
Revised Wisconsin Ethics Opinion E-93-4: Nonrefundable Retainers and Advanced Fees

Amended March 23, 2015

Synopsis

Lawyers may charge clients advanced fees, which SCR 20:1.0(ag) defines as an amount paid to a lawyer in contemplation of future services. SCR 20:1.0(ag) subjects advanced fees to the requirements of SCR 20:1.5 and SCR 20:1.16(d). Lawyers may also charge availability retainers to clients. SCR 20:1.5(b)(2) requires that the purpose and effect of any retainer be communicated to the client in writing when the total cost to the client of the representation is more than \$1000. SCR 20:1.0(mm) prohibits lawyers from billing against retainers for fees or costs at any time, and subjects retainers to the requirements of SCR 20:1.5 and SCR 20:1.16(d). Because both advanced fees and retainers must be earned as required by SCR 20:1.16(d), and unforeseen circumstances may prevent such fees from being earned, a lawyer may not describe such fees as “nonrefundable” in communications with clients, including fee agreements.

Introduction

In Ethics Opinion E-93-4, the State Bar’s Standing Committee on Professional Ethics (the “Committee”) addressed whether a Wisconsin lawyer could ethically deem a client’s advance payment of fees to be nonrefundable. The Opinion was issued in 1993, and in 2007, Wisconsin’s Rules of Professional Conduct for Attorneys (the “Rules”) were amended. As part of those amendments, the Rules governing lawyer’s fees were significantly changed and consequently, the Committee deemed it necessary to revisit that prior opinion.

In the previous version of this Opinion, the Committee opined that nonrefundable lawyer fees were not *per se* unethical. That opinion, however, addressed particularly the nonrefundability of “retainers,” stating as follows:

A true nonrefundable retainer is a fee that a lawyer charges the client not necessarily for specific services to be performed but, for example, to ensure the lawyer’s availability whenever the client may need legal services. These fees become the property of the lawyer when received and may not be deposited into the lawyer’s trust account. In addition, they are presumed to be nonrefundable, provided that they meet the “reasonable” standard of SCR 20:1.5. Such retainers are to be distinguished from an “advance” which generally is considered to be earned only as services are performed, and which must be deposited into the lawyer’s trust account. E-86-9. These funds do not belong to the lawyer and must be returned if not earned. SCR 20:1.16(d) expressly provides that any “advance payment of fee that has not been earned” must be returned to the client upon termination of the representation.

Thus, the Committee distinguished between “retainers,” which could be deemed nonrefundable under certain circumstances, and “advances,” which could not.

When the Rules were amended in 2007, the newly created SCR 20:1.0 was adopted. This Rule contained various definitions, two of which are of particular importance for this subject. First, SCR 20:1.0(ag) defines advanced fees and reads as follows:

“Advanced fee” denotes an amount paid to a lawyer in contemplation of future services, which will be earned at an agreed-upon basis, whether hourly, flat, or another basis. Any amount paid to a lawyer in contemplation of future services whether on an hourly, flat or other basis, is an advanced fee regardless of whether that fee is characterized as an “advanced fee,” “minimum fee,” “nonrefundable fee,” or any other characterization. Advanced fees are subject to the requirements of SCR 20:1.5, SCR 20:1.15 (b) (4) or (4m), SCR 20:1.15(e) (4) h., SCR 20:1.15 (g), and SCR 20:1.16 (d).

Second, SCR 20:1.0(mm) defines “retainer” and states:

“Retainer” denotes an amount paid specifically and solely to secure the availability of a lawyer to perform services on behalf of a client, whether designated a “retainer,” “general retainer,” “engagement retainer,” “reservation fee,” “availability fee,” or any other characterization. This amount does not constitute payment for any specific legal services, whether past, present, or future and may not be billed against for fees or costs at any point. A retainer becomes the property of the lawyer upon receipt, but is subject to the requirements of SCR 20:1.5 and SCR 20:1.16 (d).

Thus, under Wisconsin’s Rules, a “retainer” is a payment made to a lawyer for the sole purpose of securing the lawyer’s agreement to be available to perform legal services for the client should the need arise, but does not, and in fact *may* not, constitute payment for such legal services. An “advanced fee,” by contrast, is a payment, in any form, made to a lawyer now for specific legal services to be performed in the future.

To illustrate the distinction between the terms, consider the following situation: Individual believes that he is under investigation by governmental authorities and believes that the investigation may result in charges being issued. In the event such charges are issued, Individual wants to ensure that Lawyer, an experienced and well-respected litigator, is available to represent Individual, but does not wish to be represented by Lawyer in connection with the investigation. Individual pays Lawyer a retainer, which causes Lawyer to regard Individual as a client and avoid conflicts, thereby ensuring that if charges are issued, Lawyer will be able to undertake representation of Individual. Lawyer performs no legal services for Individual while the investigation is pending. When charges are issued, Lawyer charges Individual an advanced fee for the legal services that Lawyer anticipates providing in defense of Individual. Lawyer then represents Individual in connection with the charges. Note that SCR 20:1.0(mm) prohibits applying the retainer towards the amount of the advanced fees.

On the facts above, is it appropriate, given Wisconsin's current Rules of Professional Conduct to term either the availability retainer¹ or advanced fee "nonrefundable?"

Discussion

Both availability retainers and advanced fees are, by their definitions, fees and subject to the requirements of SCR 20:1.5². Moreover, both retainers and advanced fees are also, by their definitions, subject to the requirements of SCR 20:1.16(d), which provides as follows:

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.

Thus, both availability retainers and advanced fees must be earned by the lawyer or returned upon termination.

Determining whether an advanced fee is earned is relatively straightforward: the lawyer earns an advanced fee by performing the legal services for the client for which the advanced fees are intended to constitute payment. If the lawyer does not or cannot perform the legal services for which the advanced fee constitutes payment, the lawyer must refund the unearned portion of the advanced fee.

Availability retainers, however, cannot constitute payment for legal services at any time.³ Therefore, the analysis of the application of SCR 20:1.16(d) is less straightforward. Availability retainers do constitute payment, but only for the availability of the lawyer to perform services in the event they are needed rather than the actual services. Therefore, a lawyer earns a retainer by actually being available to the client as agreed upon. Considering again the example above, Lawyer first charges Individual a retainer and earns that retainer by being available to represent Individual if and when charges are issued. If, however, shortly after accepting the matter, Lawyer discovers that she has a conflict that would prevent Lawyer from representing Individual if charges are issued, the Lawyer is unable to ensure availability to Individual and must refund the retainer paid by the individual because Lawyer has not earned the retainer.

The fact that both retainers and advanced fees are subject to the requirements of SCR 20:1.16(d) means that the lawyer's ability keep either type of payment is contingent upon future events. In the case of advanced fees, the lawyer must provide legal services to earn the advanced fees, In the case of an availability retainer, the lawyer must be available to the client as agreed upon. A lawyer may be prevented from fulfilling either obligation (providing legal services or remaining available) by unforeseen changes in circumstances, such as conflicts, loss of license or death or incapacity of the lawyer.

¹ For purposes of this Opinion, the terms "availability retainer" and "retainer" are synonymous.

² "A retainer is a fee that a lawyer charges the client not for specific services to be performed but to ensure the lawyer's availability whenever the client may need legal services." Wisconsin Committee Comment to SCR 20:1.5.

³ See SCR 20:1.0(mm).

In dealing with current and prospective clients, lawyers must be truthful. This stems from the lawyer's obligation under SCR 20:8.4(c) not to engage in any conduct involving dishonesty, deceit or misrepresentation. Misrepresentation is defined by SCR 20:1.0(h) as follows:

"Misrepresentation" denotes communication of an untruth, either knowingly or with reckless disregard, whether by statement or omission, which if accepted would lead another to believe a condition exists that does not actually exist.

Lawyers are also prohibited by SCR 20:7.1(a) from engaging in misleading communications about their services.

Based on the forgoing, the Committee does not believe that it would be accurate to term either an availability retainer or advanced fee as nonrefundable. In the view of the Committee, a reasonable person would interpret the term "nonrefundable" to mean that the person would not be entitled to a refund under any circumstances. As discussed above however, circumstances may arise that would prohibit the lawyer from fulfilling the obligations necessary to earn either the retainer or advanced fee. Therefore to use the term "nonrefundable" in connection with either advanced fees or retainers is a misleading communication about the lawyer's services in violation of SCR 20:7.1(a) and thus prohibited. Depending upon circumstances, use of the term "nonrefundable" may also violate SCR 20:8.4(c).

The Committee also notes that use of the term "nonrefundable" does not affect the analysis of whether a lawyer is entitled to keep an advanced fee or availability retainer. As discussed above, in order to keep such payments, lawyers must demonstrate that they are earned, and the determination of whether such payments are earned is not affected by whether they are described as "nonrefundable" in an engagement letter. This is illustrated by Wisconsin disciplinary actions (initiated since the adoption of the new Rule), where lawyers were required to refund advanced fee payments notwithstanding that they were described by the lawyers as "nonrefundable."⁴

Lastly, the Committee notes that SCR 20:1.0(mm) states that a retainer becomes the property of the lawyer upon receipt, but that retainers are subject to the requirements of SCR 20:1.6(d). Therefore, the requirement that such fees be earned is explicit, and the fact that lawyers may have a property interest in availability retainers does not alter the analysis as to whether the use of the term "nonrefundable" is appropriate.⁵

Other Considerations

When a lawyer agrees to accept an availability retainer from a prospective client, the lawyer should bear in mind additional considerations. When a lawyer accepts such a retainer, the lawyer must treat the client as a currently represented client, even though the lawyer is not actively providing legal services at the time. From this flows all the obligations that a lawyer owes to any client, such as avoiding impermissible conflicts, as required by SCR 20:1.7, and observing the duty of confidentiality, as required

⁴ See e.g. *Public Reprimand of John Anthony Ward*, 2012-OLR-2; *Private Reprimand* 2008-05.

⁵ The fact that retainers become the property of the lawyer upon receipt does allow the lawyer to place availability retainers in the lawyer's business, rather than trust, account.

by SCR 20:1.6. The lawyer must also observe the obligations under SCR 20:1.5(b) to communicate the purpose and effect of any retainer, and such communication must be in writing if the amount of the retainer is over \$1000. Finally, retainers, like any type of lawyer fee must be reasonable, as required by SCR 20:1.5(a).