

ADVISORY ETHICS OPINION 97-07

SYNOPSIS:

Funds prepaid by a client for future legal services must be placed in a client's trust and cannot be co-mingled with the attorney's business funds. The attorney can access only that portion of the retainer which compensates the attorney for services previously rendered or costs incurred in the course of that client's representation. An engagement letter and fee agreement signed by the client and law firm addressing these issues is strongly recommended. Disputes over whether the law firm can and should access funds held on deposit over a client's objections should be referred to the Arbitration of Fees Committee of the Vermont Bar Association or satisfactorily resolved with the client prior to accessing the funds.

FACTS:

A law firm requests advice regarding whether and under what circumstances the firm can ethically access funds prepaid by clients for future legal services not yet performed. The firm inquires whether "fixed fee" or "flat fee" funds need to be placed in trust, when funds can generally be accessed that are held in trust to pay for fees, and whether prepaid client's retainers can ever be placed directly into a business account without first going through a trust account.

DISCUSSION:

1. Disciplinary Rule 9-102 requires that all funds or property held in a lawyer's possession that relate to future representation of a client be segregated and maintained in a separate trust account into which only client funds may be placed. The Rule permits the lawyer to deposit personal funds into the client trust account to pay bank charges or to avoid service charges so long as this amount is the minimum necessary to avoid these charges and the lawyer does not use the funds for any other purpose. Co-mingling of client funds is an outright prohibition, with violations almost certain to result in disciplinary action.
2. Prepaid client funds, whether characterized as a retainer to be billed and paid on an hourly basis, or as a flat fee retainer, may not be accessed by the lawyer until the fee has been earned. The lawyer must use the funds advanced only for the purposes set forth in the fee agreement. Any unused portion must be returned. If the client disputes a lawyer's right to withdraw and access funds, the lawyer may not withdraw them until the dispute is resolved. These requirements are due to the fiduciary responsibility to which the attorney is held in possessing and accounting to the client for the client's funds. The attorney must further maintain proper books of account and records of all transactions and account to the client in a timely way.
3. The sole exception to this general principle is the prepaid fee characterized by some attorneys as a "non-refundable" retainer. Ethics committees and courts have held payments made to ensure attorney availability are earned when paid and therefore not necessarily subject to the trust account requirement. See Washington Bar Association Code of Professional Responsibility Committee Opinion 173 (1980). These decisions are not without criticism, however. Because lawyers are fiduciaries of their client, their clients may discharge them at any time for any reason. Since the non-refundable retainer imposes a penalty on the exercise of the right of a client to discharge an attorney, it is inconsistent with the right to discharge, and unfairly penalizes the client.

If an attorney arranges employment based on some form of a "non-refundable" retainer, it is strongly recommended that the retainer detail exactly what services the client is receiving for this retainer and how it should be treated in the event of the termination of legal services.

CONCLUSION:

1. All funds advanced to any attorney by a client for unearned legal services must be segregated from the lawyer's own funds and property and cannot be co-mingled.
2. This segregation rule applies to "flat fee" services that have not yet been performed by the attorney.
3. An attorney may not withdraw client's prepaid funds, no matter how these funds may be characterized, until the services have been performed and the fees have been earned.