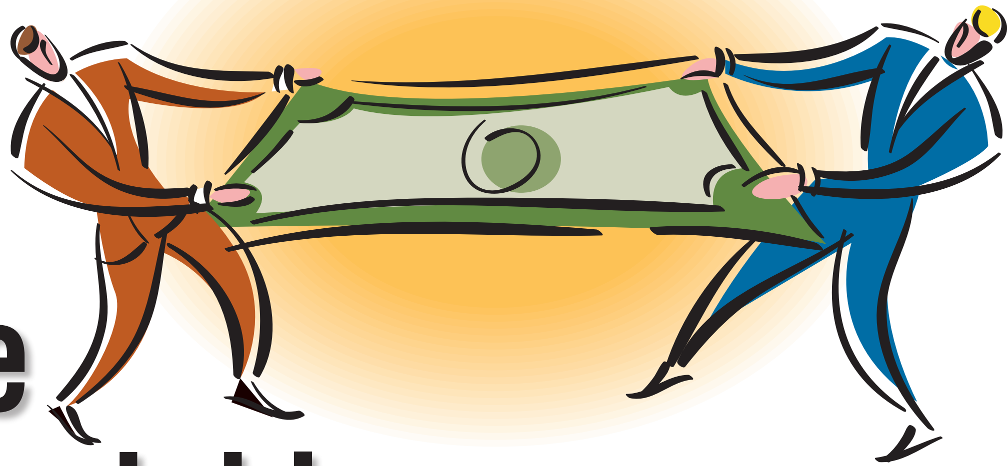
Is Your Non-Refundable Retainer More Refundable Than You Thought?



By Daniel D. Horowitz, III*

You have been thinking about charging clients a non-refundable retainer and decide to start implementing this policy on January 1st of this year. In the past, you merely charged by the hour and billed your clients on a monthly basis. In an effort to properly document the transaction and accommodate your new clients, you write into your new contract that your services will first be billed at $250 per hour against the non-refundable retainer, and then monthly thereafter. Not long after you implement this new billing practice, a woman walks into your office asking you to represent her in a divorce. You sit down with her, go over the contract, and she hires you, simultaneously handing you a check for $10,000 as a non-refundable retainer. "Isn't this great!" you think to yourself. Knowing the money is non-refundable, you deposit her check into your trust account and immediately move it to your operating account.

After working on her case for two weeks, you receive a message from your new client stating she no longer wants a divorce and is in love again. However, you have already filed the petition, served her deadbeat husband, and drafted written discovery, all totaling about 10 billable hours of work. You timely call the new client back, and she demands that you refund what is left of the $10,000 retainer. You quickly respond by telling her that the $10,000 was a non-refundable retainer and you will not be giving it back. Angry, she hangs up the phone and you hear nothing from her again; that is, until you receive a complaint from the State Bar of Texas.

So what can lawyers do to make sure this doesn't happen to them? Check your contracts!

You are thinking to yourself: "Why is this happening?" "There's no way I'm giving this money back." THINK AGAIN! In *Cluck v. Commission for Lawyer Discipline*, this is exactly what happened. *214 S.W.3d 736* (Tex. App.—Austin 2007, no pet. h.). According to the Austin Court of Appeals, not only will you likely be forced to return the remaining portion of the retainer, but you have likely committed professional misconduct and will inevitably be reprimanded for it.

In *Cluck*, Tracy D. Cluck is an attorney who practices in Austin, Texas. In June of 2001, he was contacted by Patricia Smith to represent her in a divorce case. Cluck had Smith sign a contract which stated "[i]n consideration of the legal services rendered on my behalf in the above matter, I agree to pay Tracy D. Cluck a non-refundable retainer in the amount of $15,000..." The contract contained an additional handwritten modification stating "[l]awyer fees are to be billed at $150 per hour, first against the non-refundable fee and then monthly thereafter. Additional non-refundable retainers as requested." At some point, Smith paid an additional $5,000 "non-refundable fee" for a total of $20,000.

On August 22, 2002, Smith terminated Cluck as her attorney claiming she was dissatisfied with the Cluck's progress and his lack of responsiveness to her phone calls. Two weeks later, Smith picked up her file from Cluck. On October 10, 2002, Smith wrote a letter to Cluck asking for a detailed accounting and a refund of the $20,000, less reasonable attorney's fees and expenses. Cluck responded saying she was not entitled to a refund because the payments were non-refundable retainers according to the contract. Soon thereafter, Smith filed a complaint with the State Bar of Texas alleging, among other things, that Cluck failed to hold funds belonging in whole or in part to a client in a trust account.

At the trial court level, both the Commission and Cluck filed motions for summary judgments. The trial court denied Cluck's motion but granted the Commission's motion for summary judgment. The trial court found that Cluck violated the disciplinary rules and committed professional misconduct. As a result, Cluck was given a twenty-four month fully probated suspension from the practice of law and was ordered to pay court costs and $15,000 in restitution to Smith.

On appeal, the Austin court found that Cluck violated Rule 1.14(a) by failing to hold the $20,000 paid by Smith in a trust account. *See Tex. Disciplinary R. Prof'l Conduct 1.14(a) ("A lawyer shall hold funds ... belonging in whole or in part to clients ... in a separate account, designated as a 'trust' or 'escrow' account ...").*

You may be asking yourself, "what about the language in Cluck's contract that clearly stated the money paid was a non-refundable retainer?" According to the court of appeals, the money paid by Smith was not a non-refundable retainer, but merely an advance fee. As a lawyer, this is a distinction you must not forget!

The court explained a true retainer "is not a payment for services, it is an advance fee to secure a lawyer's services, and remunerate him for loss of the opportunity to accept other employment." *Citing* Tex. Comm. on Prof'l Ethics, Op. 431, 49 Tex. B.J. 1084 (1986). The court further explained that "[i]f the lawyer can substantiate that other employment will probably be lost by obligating himself to represent the client, then the retainer fee should be deemed earned at the moment it is received." *Id.* On the other hand, if a fee is not paid to compensate the lawyer for lost opportunities and not to secure the lawyer's availability, then it is merely a prepayment for services and is not a true retainer. "A fee is not earned simply because it is designated as non-refundable. If the true retainer is not excessive, it will be deemed earned at the time it is received, and may be deposited in the attorney's account." *Id.*

As evidence that the original $15,000 was not a true retainer, the court of appeals closely scrutinized the additional $5,000 paid by Smith. The court stated if the first $15,000 was a payment to secure Cluck's availability, then he should not have charged another "retainer" to resume work on the case. At the time of the second payment, Cluck was already "retained" to represent Smith.

So what can lawyers do to make sure this doesn't happen to them? CHECK YOUR CONTRACTS! It appears that both the trial court and the appellate court decided this case based on the contract between the two parties. Cluck's contract had no language stating that the first $15,000 payment compensated Cluck for his availability or lost opportunities. In fact, it stated just the opposite. According to the courts, the handwritten changes to contract, which stated that Cluck's hourly rate will be billed against the $15,000, make this payment an "advance fee" and not a true "non-refundable retainer."

Because the money paid by Smith was an advance fee rather than a retainer, Cluck committed disciplinary misconduct by immediately transferring the money from his trust account to his personal account. When a lawyer receives money from a client that constitutes a prepayment of a fee, that money belongs to the client until the services are rendered and must be deposited into the attorney's trust account. It is not until after the attorney advises the client that the service has been rendered, the fee earned, and in the absence of a dispute may the lawyer withdraw the fund from the trust account.

So what can you do to protect yourself? REVIEW AND/OR REVISE YOUR CONTRACT! As for your current clients, in the absence of clear language which identifies the money paid up front as compensation for your availability and lost opportunities, your best bet is to keep the funds in your trust account until professional services have been rendered equal to the amount of the payment. Also, be very wary when you accept additional retainers from your clients, because if you are not careful, you may be committing professional misconduct and not even know it!

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