

A CLIENT'S RIGHT TO REFUND OF AN ADVANCE PAYMENT

There are two basic types of retainers as the term is used in connection with providing legal services. A special retainer is a payment in advance by the client to cover any future legal services that the lawyer is to provide¹ and, as will be discussed, is refundable in some circumstances. A true or general retainer is an advance payment by the client to the attorney for the attorney's availability to render services for a fixed period of time. It is earned when paid and is, therefore, not refundable.²

In the absence of any explanation of what terms such as retainer and advance fee payment mean, a client who signs a retainer agreement may be totally unaware of the type of fee for which he has bargained. As a federal district court in New Jersey has pointed out, the word "retainer" does not have a consistent definition that a client would understand.³ It has been used to include both general and special retainers. In New Jersey, for example, courts have traditionally held that a retainer secures the availability of the attorney; it is not payment for future services, unless the parties agree to the contrary.⁴ In more recent cases from other jurisdictions, however, this view is not shared.⁵ A Massachusetts ethics opinion has defined "retainer" as a payment for future services.⁶ L'Estrange and Turner have used this particular definition

1. *Jacobsen v. Sassower*, 113 Misc.2d 279, 452 N.Y.S.2d 981, 984 (N.Y. Civ. Ct. 1982), *aff'd*, 122 Misc. 2d 863, 474 N.Y.S.2d 167 (N.Y. App. Term 1983), *aff'd on other grounds*, 107 A.D.2d 603, 483 N.Y.S.2d 711 (N.Y. App. Div. 1985); I. SPEISER, ATTORNEY'S FEES § 1.8 (1973); L'Estrange & Turner, *Fee Agreements*, 27 PRAC. LAW. 11, 23 (1981).

2. *Jacobsen*, 113 Misc. 2d at ____, 452 N.Y.S.2d at 984; I. SPEISER, *supra* n.1, § 1.4; L'Estrange & Turner, *supra* n.1 at 23.

3. *Jersey Land & Dev. Corp. v. United States*, 342 F. Supp. 48, 53 (D.N.J. 1972).

4. *Conover v. West Jersey Mortgage Co.*, 96 N.J. Eq. 441, 126 A. 855 (N.J. Ch. 1924); *In re Stern*, 92 N.J. 611, ____, 458 A.2d 1279, 1281, 1283 (1983). *But cf.*, *In re Stern*, 92 N.J. 611, ____, 458 A.2d 1279, 1281, 1283 (1983) ("While the term retainer once had a definite meaning, today's definition is not so clear.").

5. *See In re Stern*, 92 N.J. at ____, 458 A.2d at 1283.

6. Massachusetts Bar Assoc. Ethical Op. No. 78-11, 63 MASS. L. REV. 231 (1978); *see also* ABA Comm. on Ethics and Professional Responsibility, Informal

in their article, *Fee Agreements*, where they defined an "advance payment" by the client as a payment for a particular service.⁷ The California Supreme Court has even gone so far as to make a distinction between a "retainer fee" which is for the attorney's availability and "an advance fee payment" which it defined as a payment for future legal services.⁸

In general, an ambiguous retainer agreement will be interpreted using basic contract law principles where the intent of the parties will govern.⁹ In construing the agreement it is also important to fully consider such things as the conditions under which the agreement was made, whether there was an hourly fee, whether the fee was to be credited against the advance and whether a time period was specified.¹⁰ For example, a New York Civil Court has defined an agreement to be a special retainer where the agreement between the parties did not specify a time period and the hourly fee was to be credited to the advance.¹¹

Another important consideration is the relative experience of attorney and client in contract matters. It is generally assumed that the attorney has superior knowledge in such matters. Consequently, courts will usually construe ambiguous retainer agreements against the attorney.¹² Where, however, the court finds that the client has both experience and knowledge with regard to contracts, the ambiguity will not necessarily be resolved in favor of the client.¹³ The interpretation of an ambiguous retainer agreement can be difficult. Nonetheless, it is very important to both the attorney and the client as the type of agreement will determine whether

Op. 998 (1967).

7. L'Estrange & Turner, *supra* note 1 at 23.

8. Baranowski v. State Bar, 24 Cal. 3d 153, ____, n.4 593 P.2d 613, 618 n.4 (1979).

9. Genessee Merchant Bank & Trust Co. v. Sefa, 23 Mich. App. 423, ____, 178 N.W.2d 826, 828 (1970); I. SPEISER, *supra* note 1, § 1.10.

10. See *Jersey Land & Dev. Corp.*, 342 F. Supp. at 51-53; Reich & Klar v. Sadofsky, 78 A.D.2d 517, ____, 432 N.Y.S.2d 591, 592 (N.Y. App. Div. 1980); Handelman v. Olen, 11 A.D.2d 987, ____, 206 N.Y.S.2d 249, 251 (N.Y. App. Div. 1960).

11. *Jacobsen*, 113 Misc. 2d at ____, 452 N.Y.S.2d at 984.

12. *Jersey Land & Dev. Corp.*, 342 F. Supp. at 54; Roberts v. Veterans Co-op Housing Ass'n, 88 A.2d 324, 327 (D.C. 1952).

13. *Jacobsen*, 113 Misc. 2d at ____, 483 N.Y.S.2d at 713 (Kupperman, J., dissenting).

the client's advance payment is refundable.¹⁴

The general rule with regard to a client's right to a refund of an advance payment seems to be that any unearned amount of the advance is refundable upon the termination or withdrawal of the attorney.¹⁵ The obligation of the attorney to refund does not depend upon who terminates the relationship, as an attorney who is discharged by the client should also withdraw himself and refund any unearned fee.¹⁶

The ABA *Model Code of Professional Conduct* provides that an attorney who withdraws should refund any advance fee not yet earned.¹⁷ It has been held, however, the client's right to a refund depends upon the circumstances of the withdrawal; if the attorney has a valid and justifiable cause for withdrawal, he may not be required to refund fees he has collected in advance.¹⁸ In *Genrow v. Flynn*,¹⁹ the Supreme Court of Michigan held that conduct by the client that tended to degrade or humiliate the attorney was a sufficient cause for withdrawal and where there is just cause, the attorney has not breached his duty to perform by withdrawal. Accordingly, the court held that where there was a contract for a certain fee and the attorney withdrew for a justifiable cause, the attorney could recover the whole contract amount, denying the client any type of refund.²⁰

In a New Jersey Supreme Court case, the court reasoned that when an attorney has a justifiable cause for withdrawal the attorney should be able to recover the reasonable value for his services; otherwise the client would be unjustly enriched.²¹ It is interesting

14. L'Estrange & Turner, *supra* note 1 at 23.

15. *Jacobsen*, 113 Misc. 2d at ____, n.3, 452 N.Y.S.2d at 984, n.3; L'Estrange & Turner, *supra* note 1 at 23; *see generally* I. SPEISER, *supra* note 1, §§ 1.4, 1.8.

16. *Jacobsen*, 1123 Misc. 2d at ____, 452 N.Y.S.2d at 984; MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-110(A)(3) (1980) (hereinafter MODEL CODE).

17. MODEL CODE DR 2-110(B).

18. *Halbert v. Gibbs*, 16 A.D. 126, ____, 45 N.Y.S. 113, 115 (N.Y. App. Div. 1897).

19. 166 Mich. 564, 131 N.W. 1115 (1911).

20. *Id.* at 565.

21. *Stein v. Shaw*, 6 N.J. 525, 79 A.2d 310 (1951). *But see*, *Fletcher v. Krise*, 120 F.2d 809, 810 (The court held that an attorney who could not see litigation through to completion because he was disbarred was not entitled to a fee); *cert. denied* 314 U.S. 608, 86 L. Ed. 489, 62 S. Ct. 85 (1941) *Kimmie v. Terminal R.R. Ass'n of St. Louis*, 344 Mo. 412, ____, 126 S.W.2d 1197, 1201 (1939) (holding that an attorney suspended for misconduct could not recover for his services).

to note that the attorney's justifiable cause for withdrawal here was that he was disbarred. Several courts have suggested that the client's right to a refund may depend upon the circumstances of the attorney's discharge.²²

It is generally agreed that a client has a right to discharge the attorney at any time with or without a justifiable cause.²³ However, there is disagreement as to what type of recovery or other possible remedies, if any, are available to the attorney which affect his right to compensation and ultimately the right of the client to a refund in the advance fee situation. Some courts have denied the attorney any right to compensation when the client discharges him for reasonable cause.²⁴ Other courts have emphasized the fact that a client has the right to arbitrarily discharge an attorney, but the client is still liable to compensate for any services rendered up to that time whether or not the reason for discharge is justifiable.²⁵ The comment to Rule 1.16 of the ABA *Model Rules of Professional Conduct* states that a client is subject to payment for any services rendered by the attorney before any discharge.

Because the ideas of with or without cause are so indefinite, the client's right to a refund is dependent upon the individual case and the particular circumstances surrounding the withdrawal or discharge. However, the measure of the recovery by the client has been said to be independent of how much was actually paid in advance.²⁶

As there is no guarantee that the attorney will be entitled to the whole advance payment, the client has a justifiable interest in the maintenance of those funds.²⁷ According to the ABA *Model*

22. *Halbert*, 16 A.D. at ____, 45 N.Y.S. at 115; SPEISER, *supra* note 1, § 4.10.

23. *Echlin v. Superior Court of San Mateo Co.*, 13 Cal. 2d 369, ____, 90 P.2d 63, 65, (1939); *Halbert*, 16 A.D. at ____, 45 N.Y.S. at 115-116; SPEISER, *supra* note 1, §§ 1.14, 4.26; MODEL RULES OF PROFESSIONAL CONDUCT, Rule 1.16 comment (1980) [hereinafter MODEL RULES].

24. *Echlin*, 13 Cal. 2d at ____, 90 P.2d at 65; *Goodkin v. Walkowsky*, 132 Fla. 63, 180 So. 538, 540 (1938).

25. *White v. Aiken*, 197 Ga. 29, 28 S.E.2d 263, 267 (1944); *Halbert*, 16 A.D. at ____, 45 N.Y.S. at 115-116; *see also* MODEL CODE, *supra* note 23, Rule 1.16 comment.

26. *Jackson v. Baltimore*, 202 Misc. 209, 115 N.Y.S.2d 17, 18 (N.Y. App. Term 1952).

27. Texas State Bar Comm. on Professional Ethics Op. 391, 41 Tx. B.J. 322, 323 (1978) (interpreting DR 9-102); MODEL CODE, DR 9-102(B); ABA Comm. on Ethics and Professional Responsibility, Informal Op. 12749 (1975).

Code, all funds, except for advances for costs and expenses, should be deposited into a separate and identifiable account.²⁸ The attorney should maintain complete records and render an accounting to the client so that any unearned portion of the fee will be protected and available for the client to recover.²⁹ It has even been stated that an attorney cannot use an advance fee received for one matter for another matter, even if for the same client, without the client's permission.³⁰ This method of maintaining identifiable accounts serves to protect the attorney as well as the client.³¹ It has also been suggested that the attorney deposit the client's funds into an interest-bearing account where the interest is credited to the client.³² The funds of the client may be withdrawn from the separate account when earned but not if there is a dispute regarding those funds.³³ When the client is entitled to a refund, it is important that the attorney act promptly in his duty to refund³⁴ and failure to do so has resulted in disciplinary measures being imposed.³⁵

The idea of a true or general retainer, one which is a nonrefundable advance payment, was discussed recently by a New York Court in *Jacobson v. Sassoner*.³⁶ This case appears to be the only case in which a court concerns itself with the validity of the payment of a nonrefundable advance. In *Jacobson*, the attorney and client executed an agreement relating to the fees of the attorney. The agreement required a nonrefundable retainer of \$2500 that was to be credited against the attorney's hourly charges. There was no time period specified, as the length and nature of the services were uncertain at the time of the agreement. Before the attorney could complete the legal services requested, the client discharged the attorney.³⁷ The court discussed whether the client

28. MODEL CODE, DR 9-102(A).

29. *In re Gavel*, 22 N.J. 248, —, 125 A.2d 696, 794 (1956); 41 Tx. N.J. at 325.

30. *In re Schwartz*, 493 A.2d 1248, 1254 (N.J. 1985).

31. *In re White*, 24 N.J. 448, 132 A.2d 777, 778 (1957).

32. L'Estrange & Turner, *supra* note 1 at 23.

33. MODEL CODE, DR 9-102(A)(2).

34. *In re Gavel*, 125 A.2d at 704; MODEL CODE, DR 9-102(B)(4).

35. See, e.g., *In re Stern*, 458 A.2d at 1279; *In re Jahnke*, 58 N.J. 557, 558, 279 A.2d 659 (1971); *In re Gavel*, 125 A.2d at 696.

36. 113 Misc.2d 279, —, 452 N.Y.S.2d 981, 982 (N.Y. Civ. Ct. 1982), *aff'd*, 122 Misc.2d 863, 474 N.Y.S.2d 167 (N.Y. App. Term 1983) *aff'd on other grounds*, 107 A.D.2d 603, 483 N.Y.S.2d 711 (N.Y. App. Div. 1985).

37. *Jacobson*, 452 N.Y.S.2d at 983; see also *Jacobson v. Sassoner*, 122

could recover any unearned portion of the nonrefundable fee. The Court reasoned that a nonrefundable retainer was an attempt by the attorney to avoid any recovery by the client upon discharge which would, in effect, penalize the client when he was merely exercising his right to discharge the attorney.³⁸ It was, therefore, against public policy to enforce a nonrefundable fee clause in a retainer agreement.³⁹ The attorney, in defense of the clause, argued that this type of fee agreement was necessary in order to prevent clients from systematically hiring and discharging attorneys in order to deprive adversary parties of the attorney of their choice and to assure the client's commitment to his cause.⁴⁰ On appeal, the arguments apparently convinced the Appellate Division of the Supreme Court, which, with very little discussion, held that a nonrefundable clause is not invalid per se. Instead, the Court left the determination of whether such clauses were unenforceable to a case by case review of the facts and circumstances showing either unconscionability or the chilling effect on the client's right to discharge his attorney. Under this division, whether or not a client would be entitled to a refund, regardless of whether the attorney withdraws or is discharged, would be left to individual facts, including the intent of the parties and whether the unrefunded fee was in proportion to the value of the attorney's services.

In conclusion, the courts are faced with a number of conflicts in determining the client's right to a refund when he has paid in advance and his attorney withdraws or is discharged before completing the client's work. Generally, a client is entitled to a refund of any unearned portion of the advance payment. Exceptions may arise, however, from the individual circumstances that prevent the attorney from completing the legal services for the client. In order

Misc.2d 863, 474 N.Y.S.2d 167 (N.Y. App. Term 1983) (on appeal from the small claims court, the Supreme Court, Appellate Term, affirmed, finding such agreements unenforceable due to the chilling effect on the client's right to freely discharge his attorney. The court compared this clause to liquidated damages provisions constituting an unacceptable imposition of damages on the client for discharging his attorney.).

38. *Id.* at _____, 452 N.Y.S.2d at 985.

39. *Id.* at _____, 452 N.Y.S.2d at 983.

40. *Jacobson v. Sassower*, 107 A.D.2d 603, _____, 483 N.Y.S.2d 711, 712 (N.Y. App. Div. 1985), *aff'g*, 122 Misc.2d 863, 474 N.Y.S.2d 167 (N.Y. App. Term 1983) (mem. opinion affirmed based on the ambiguity of the contract, thus upholding the refund to the client).

to ensure that he is not required to refund the client's money upon withdrawal or discharge, an attorney may define an advance payment as "nonrefundable." However, this will not prevent the court from inquiring into the fairness of the transaction, and if the agreement is found to be unconscionable, will not prevent the court from ordering that the client's money be refunded. The attorney should, in all situations, explain fully both to the client and in the written agreement, any terms that would otherwise be ambiguous or cause problems in the interpretation of the agreement. Such practice would help both parties and the court in determining the type of agreement and ultimately whether the client has a right to a refund of an advance payment.

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