

STATE BAR OF SOUTH DAKOTA

ETHICS OPINION 2000-5

October 20, 2000

- **RULES: 1.5, 1.16; 1.8(f)**
- **SUBJECT: Non-Refundable Retainer Agreements; Third Party Guarantor of Fees**
- **SUMMARY: Retainer agreements for a specific service or case must allow for a refund of any unearned fees upon the discharge of the attorney.
A third party guarantor of fees is permissible so long as the client gives informed consent, the lawyer's judgment is not interfered with and client confidences are protected.**

FACTS

South Dakota Lawyer has asked whether a non-refundable retainer or fee agreement is permissible for a specific work product or case. In addition, the lawyer inquired as to the use of a third party guarantor on a fee agreement.

DISCUSSION

NON-REFUNDABLE RETAINERS

Rule 1.5(a) requires that all fees be reasonable and lists eight factors to be considered in making a determination of reasonableness. All fees agreements should be in writing. Rule 1.5(b). Rule 1.16(d) provides for a client's right to discharge a lawyer and provides that upon discharge the client is entitled to a refund of "any advanced payment of fee that has not been earned."

A fee agreement that would not, under any circumstances, allow for a refund or review of any fee that had not been earned would be in violation of the above rules. "Many ethics committees and, increasingly courts, have found it necessary to point out that lawyers cannot lock in a guaranteed non-refundable fee for services that is fully earned upon receipt regardless of the brevity of the representation or the circumstances that unfold" ABA/BNA Lawyer's Manual on Professional Conduct 41:114. *See e.g.* Arizona Ethics Opinion 99-02 ("even if fee agreement characterizes the fee as nonrefundable and the funds have not been held in trust, the lawyer may be ethically required to refund some portion of the fee."); West Virginia Ethics Opinion 99-03 ("An agreement for a specific work product, however, may not include a nonrefundable retainer."); Massachusetts Ethics Opinion 95-2(DR) ("A lawyer may not enter into a fee agreement with a client that provides for the payment of a non-refundable retainer, a non-refundable retainer paid in advance for particular services or a particular case. This type of fee agreement impedes the client's absolute right to discharge the lawyer."). *In re Cooperman*, 591 NYS2d 855 (NY 1993)(DR); *Wong v. Michael Kennedy, P.C.*, 853 FSupp 83 (EDNY 1994)(DR).

No opinion is expressed as to a "general retainer" arrangement in which a client pays a lawyer solely to ensure the lawyer's availability.

THIRD PARTY GUARANTORS

Rule 1.8(f) addresses the situations in which a lawyer can look to persons other than the client for fees. Rule 1.8(f) provides:

A lawyer shall not accept compensation for representing a client from one other than the client unless:

- (1) the client consents after consultation;
- (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
- (3) information relating to representation of a client is protected as required by Rule 1.6.

Based upon the rule, nothing would appear to prohibit the use of a third party guarantor so long as the client gives informed consent, the lawyer's judgment is not interfered with and client confidences are protected.

*Susan Brunick Simons, Chair
Ethics Committee*