



**New York State Bar Association
Committee on Professional Ethics**

Opinion 1245 (11/16/2022)

Topic: Legal Fees, Minimum Fees, Nonrefundable Fees

Digest: A lawyer may charge a minimum fee to provide a defined legal service provided (a) the service is performed as agreed; (b) the engagement letter provides in plain language how the minimum fee will be calculated and the circumstances under which it will be “incurred”; and (c) the minimum fee is reasonable and not excessive and was therefore fully “earned.”

Rules: 1.5; 1.5(a); 1.5(a)(1)-(8); 1.5(d)(4); 1.16(e)

FACTS:

1. The inquirer proposes to include language in an engagement letter that will fix a “minimum fee” for drafting and finalizing a separation and severance agreement between the inquirer’s client and the client’s employer. That minimum fee equates to a fixed number of hours of the inquirer’s time at a stated hourly rate, and the client would agree to pay for any additional time required to complete the matter at that same rate. The engagement letter will also expressly advise the client that the minimum fee shall be due and owing even if the inquirer expends fewer hours than the fixed number of hours covered by the letter.

QUESTION:

2. Does the financial obligation imposed by the inquirer upon the client in the engagement letter constitute a prohibited “nonrefundable fee?”

OPINIONS:

3. Rule 1.5(d)(4) of the New York Rules of Professional Conduct (the “Rules”) sets forth a requirement of full transparency as to what the lawyer must do or accomplish in order to earn a minimum fee, as well as the ultimate reasonableness of the amount of the minimum fee, as two touchstones for ethical propriety. In pertinent part, Rule 1.5(d)(4) thus provides:

A lawyer shall not enter into an arrangement for, charge or collect

(4) a nonrefundable retainer fee; provided that a lawyer may enter into a retainer agreement with a client containing a reasonable minimum fee clauses if it defines in plain language and sets forth the circumstances under which such fee may be incurred and how it will be calculated;

4. As with all legal fees, a minimum fee, and an agreement to pay a minimum fee, is subject to Rule 1.5(a) which provides that “A lawyer shall not make an agreement for, charge, or collect

an excessive or illegal fee or expense.” See also Rule 1.5 Cmt. [4] (“A lawyer may charge a minimum fee, if that fee is not excessive, and if the wording of the minimum fee clause of the retainer agreement meets the requirements of paragraph (d)(4).”).

5. To determine whether a fee, including a minimum fee, is reasonable or excessive, Rule 1.5(a) sets forth a list of eight nonexclusive factors:

- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal services properly;
- (2) the likelihood, if apparent or made known to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) the fee customarily charged in the locality for similar legal services;
- (4) the amount involved and the results obtained;
- (5) the time limitations imposed by the client or by circumstances;
- (6) the nature and length of the professional relationship with the client;
- (7) the experience, reputation and ability of the lawyer or lawyers performing the services; and
- (8) whether the fee is fixed or contingent.

6. In N.Y. State 1202 (2020), we examined several proposed fee agreements, all involving flat or fixed fees. We concluded that “a lawyer may charge a non-excessive minimum fee . . . [but] may not charge a non-refundable fee.” N.Y. State 1202 ¶ 12. Other opinions that have discussed nonrefundable fees include N.Y. State 599 (1989) (non-excessive minimum fee agreements are permissible, but ultimately subject to the attorney’s obligation under ethics rules to return unearned fees); N.Y. City 2015-2 (nonrefundable flat monthly fees may be permitted if they are not excessive, are fully earned and do not impede a client from terminating the representation); and N.Y. City 1991-3 at II (a minimum fee can satisfy the requirement of reasonableness).

7. Here, the proposed retainer letter is not a general retainer in which a client agrees to pay an attorney an agreed sum for that lawyer to be available for an agreed period and where that agreed sum is earned upon receipt. See N.Y. State 816 ¶ 3. Rather, there is a specific legal service to be provided by the attorney which is at the heart of the engagement with the client. It is in this specific context that the reasonableness of the minimum fee under the criteria of Rule 1.5(a) must be considered. For example, was the inquirer required by the client to act expeditiously and, as a result, was she precluded for a time from providing legal services to other clients? Does the inquirer possess the requisite ability, experience and skill for negotiating and drafting employment-related documents? How many hours would such an attorney have anticipated expending on this matter in relation to the minimum number of hours that were incorporated into the engagement letter? Were there particular facts and circumstances known to the inquirer that suggested the existence of novelties or complexities that would complicate and extend the resolution of the agreement? Was the hourly rate used to calculate the minimum fee consistent with hourly rates in the legal community for the same or similar legal services? Did the inquirer obtain a good result for her client?

8. Against this background, the committee does not have sufficient facts to determine whether the inquirer’s proposed minimum fee satisfies the requirements of Rule 1.5(d)(4) and is not, therefore, a prohibited nonrefundable fee.

9. The committee also does not address what additional considerations may come into play when an attorney is discharged or withdraws, with or without cause, before completing the legal service that was the subject of the minimum fee retainer letter. These events implicate highly fact-sensitive issues of law on which the committee has no jurisdiction to opine. We note, however,

that consistent with the principle that a minimum fee must be reasonable and not excessive, Rule 1.16(e) requires a refund, upon withdrawal, of that portion of a fee that has not been earned:

Even when withdrawal is otherwise permitted or required, upon termination of representation, a lawyer shall . . . promptly refund[] any part of a fee paid in advance that has not been *earned*. . .

CONCLUSION

10. A lawyer may charge a minimum fee to provide a defined legal service provided (a) the service is performed as agreed; (b) the engagement letter provides in plain language how the minimum fee will be calculated and the circumstances under which it will be “incurred”; and (c) the minimum fee is reasonable and not excessive and was therefore fully “earned.”

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