



ILLINOIS STATE
BAR ASSOCIATION

ISBA Advisory Opinion on Professional Conduct

ISBA Advisory Opinions on Professional Conduct are prepared as an educational service to members of the ISBA. While the Opinions express the ISBA interpretation of the Illinois Rules of Professional Conduct and other relevant materials in response to a specific hypothesized fact situation, they do not have the weight of law and should not be relied upon as a substitute for individual legal advice.

This Opinion was **AFFIRMED** by the Board of Governors in January 2010. Please see the 2010 Illinois Rule of Professional Conduct 1.5. This opinion was affirmed based on its general consistency with the 2010 Rules, although the specific standards referenced in it may be different from the 2010 Rules. Readers are encouraged to review and consider other applicable Rules and Comments, as well as any applicable case law or disciplinary decisions.

Opinion Number 722
April 30, 1981

Topic: Fees for Legal Services

Digest: A law firm may use an employment agreement which calls for a noncancellable and nonrefundable retainer, as long as the fee is not excessive.

Ref: Rules 2-106(a) and (b);
ISBA Opinions 432 & 703;
ABA Informal Opinions 1389, 998, and 553; and
In re Kutner, 78 Ill. 2d 157, 399 N.E.2d 963 (1979)

QUESTION

A law firm specializing in family law and dissolution of marriage proposes to have clients sign an employment agreement which calls for a non-cancellable and non-refundable retainer. The agreement would be fully explained before it is signed and a copy given to the client.

The law firm asks whether such an agreement is permitted. If so, and assuming that a lawyer from the firm has only had an initial interview with the client, the law firm asks what obligation it would have if the client telephones the following day and states that he does not wish to proceed or has engaged other counsel.

OPINION

The Committee is of the opinion that a law firm may use an employment agreement which calls for a non-cancellable and non-refundable retainer as long as the fee is not excessive under Rules 2-106(a) and (b) of the Illinois Code of Professional Responsibility, and no statute is violated.

Retainers are a recognized means for a lawyer to obtain advance payment of a fee. A lawyer may set in advance of the performance of his work a lump sum as his fee or require payment of his fee in advance. ABA Informal Opinion 593. In response to the first inquiry, it is not professionally improper for the law firm to use the proposed employment agreement. In ISBA Opinion 432, this Committee held that it is proper for a lawyer to make a contract for professional services which provides that a substantial retainer deposit with the lawyer may be retained no matter how much work the lawyer does in the case, provided the agreement is in compliance with DR 2-106 (now Rule 2-106). See also ISBA Opinion 703, where this Committee discussed retainers.

In response to the second inquiry, it is a long-standing general policy of this Committee not to pass on the reasonableness of specific fees. The law firm should examine Rule 2-106 carefully. Rule 2-106(a) provides that a lawyer shall not enter into an agreement for, charge, or collect an excessive fee. Rule 2-106(b) (which is essentially identical to former DR 2-106(b)) further provides that "a fee is excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee." Rule 2-106(b) then sets forth eight factors which are to be considered as guides in determining the reasonableness of a fee.

In deciding its obligation, the law firm might also be guided by several opinions. In ISBA Opinion 432 (discussed above), we also stated that a lawyer was not entitled to retain funds advanced by a client for time never spent by the law firm, even though the law firm might stand ready to perform. The opinion then said that the lawyer could deduct, from the amount refunded to the client, payment at the agreed hourly rate for services performed to the date of termination, apparently on a quantum meruit basis. See also ABA Informal Opinions 998 and 1389, and In re Kutner, 78 Ill.2d 157, 399 N.E.2d 963 (1979).

* * *