STATE OF MAINE
SUPREME JUDICIAL COURT
AMENDMENTS TO
THE MAINE RULES OF PROFESSIONAL CONDUCT

2014 Me. Rules 04

Effective: September 1, 2014

All of the Justices concurring therein, the following amendments to the Maine Rules of Professional Conduct are adopted to be effective on the date indicated above. The specific amendments are stated below. To aid in understanding of the amendments, an Advisory Note appears after the text of each amendment. The Advisory Note states the reason for recommending the amendment, but the Advisory Note is not part of the amendment adopted by the Court.

1. Rule 1.0 of the Maine Rules of Professional Conduct is amended to add subdivisions (o) and (p) as follows:

RULE 1.0 DEFINITIONS AND TERMINOLOGY

As used in these Rules, the following terms shall have the following meanings:

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(o) "Advance," "advance payment of fees," or "retainer" means a payment by a client in anticipation of the future rendition of services that is not earned until such services are rendered and that is to be credited toward the fees earned when such future services are rendered.

(p) "Nonrefundable fee" means a fee paid to an attorney and earned by the attorney before professional services are rendered. Such a nonrefundable fee may be in exchange for retaining the attorney's availability alone or may be in exchange also for the right to receive specified services in the future for no additional fee, or for a stated fee.

Advisory Committee's Note – June 2014

Definitions have been added for "advance," "advance payment of fees," and "retainer" at Rule 1.0(o); and "nonrefundable fee" at Rule 1.0(p).

A stylistic change has been made in the use of the term "retainer." Historically, the Rules and Ethics Opinions interpreting the Rules have used the term "retainer" to mean a fee that is earned on receipt, in contrast to an advance, which is not earned until future services are rendered. That usage was peculiar to the Rules. It did not conform to usage by lay people and even by many lawyers, who use the term "retainer" to refer to an advance that will be credited against future bills for services. In order to comport with common usage, the term "retainer" is now included in the definition of "advance," to be synonymous with that term.

This stylistic change is not meant to change the substantive principle that unearned fees (whether called "advances" or "retainers") must be kept in a lawyer's trust account before they are earned. It also is not meant to do away with the concept that was formerly referred to as a "retainer," namely a fee that is earned on receipt before services are rendered and not to be refunded. The previous definition of "retainer," which appeared in Rule 1.15(b)(7)(iii), has been removed from that Rule, and the concept it expressed is now captured in the newly defined term "nonrefundable fee."

The definition of "nonrefundable fee" clarifies that such fees, earned on receipt, are not limited to so-called "availability retainers." Rather, a fee may be earned on receipt, even though the parties expect the lawyer to render future services, even at no additional charge. So long as the fee is reasonable, such an agreed-upon fee is not refundable, even though the future services are not rendered (for example, because they end up not needed or because the client terminates the representation). The Committee intends this broader definition to displace the narrower concept of a "general retainer" or "availability retainer" expressed in Ethics Opinion No. 206 (Dec. 12, 2012) of the Professional Ethics Commission.

A lawyer's acceptance of a nonrefundable fee is subject to requirements set forth in Rule 1.5(h). The requirement that all advances be placed in a trust account is set forth in Rule 1.15(b). Rule 1.16(d) requires a lawyer to return the unearned portion of an "advance payment of fees" on termination of representation, and does not require the return of a "nonrefundable fee."

2. Rule 1.5 of the Maine Rules of Professional Conduct is amended as follows:

RULE 1.5 FEES

(a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. A fee or charge for expenses is unreasonable when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee or expense is in excess of a reasonable fee or expense. The factors to be considered in determining the reasonableness of a fee include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood~~, if apparent to the client,~~ that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the range of fees customarily charged in the locality for similar legal services;

(4) the responsibility assumed, the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the 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;

(8) whether the fee is fixed or contingent;

(9) whether the client has given informed consent as to the fee arrangement; ~~and~~

(10) whether the fee agreement is in writing; and

(11) any other risks allocated by the fee agreement or potential benefits of the fee agreement, judged as of the time the fee agreement was made.

(b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in a writing signed by the client and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated. The agreement must clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination. A general form of Contingent Fee Agreement is attached to the comments to this rule.

(d) A lawyer shall not enter into an arrangement for, charge, or collect:

(1) ~~any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof~~ a contingent fee in any initial action for divorce, annulment, judicial separation, paternity or parentage, parental rights and responsibilities, emancipation, grandparent visitation, guardianship, or child support, or in any post-judgment proceeding to modify, alter, or amend an order arising from these actions; or

(2) a contingent fee for representing a defendant in a criminal case; or

(3) any fee to administer an estate in probate, the amount of which is based on a percentage of the value of the estate.

(e) A lawyer shall not divide a fee for legal services with another lawyer who is not a partner in or associate of the lawyer's law firm or office unless:

(1) after full disclosure, the client consents to the employment of the other lawyer and to the terms for the division of the fees, confirmed in writing; and

(2) the total fee of the lawyers does not exceed reasonable compensation for all legal services they rendered to the client.

(f) A lawyer may accept payment by credit card for legal services previously rendered, or for an advance payment of fees or nonrefundable fee otherwise permitted by these rules.

(g) A lawyer practicing in this State shall submit, upon the request of the client, the resolution of any fee dispute in accordance with ~~Rule 9 [of the Maine Bar Rules]~~ the Supreme Judicial Court's rules governing fee arbitration.

(h) A lawyer may enter into an agreement for a client to pay a nonrefundable fee that is earned before any legal services are rendered. The amount of such an earned fee must be reasonable, like any fee, in light of all relevant circumstances. A lawyer cannot accept a nonrefundable fee, or characterize a fee as nonrefundable, unless the lawyer complies with the following conditions:

(1) The lawyer confirms to the client in writing before or within a reasonable time after commencing representation (a) that the funds will not be refundable and (b) the scope of availability and/or services the client is entitled to receive in exchange for the nonrefundable fee;

(2) A lawyer shall not solicit or make any agreement with a client that prospectively waives the client's right to challenge the reasonableness of a nonrefundable fee, except that a lawyer can enter into an agreement with a client that resolves an existing dispute over the reasonableness of a nonrefundable fee, if the client is separately represented or if the lawyer advises the client in writing of the desirability of seeking independent counsel and the client is given a reasonable opportunity to seek such independent counsel.

(3) Where it accurately reflects the terms of the parties' agreement, and where such an arrangement is reasonable under all of the relevant circumstances and otherwise complies with this Rule, a fee agreement may describe a fee as "nonrefundable," "earned on receipt," a "guaranteed minimum," or other similar description indicating that the funds will be deemed earned regardless whether the client terminates the representation.

(i) A nonrefundable fee that complies with the requirements of (h)(1)-(2) above constitutes property of the lawyer that should not be commingled with client funds in the lawyer's trust account. Any funds received in advance of rendering services that do not meet the requirements of (h)(1)-(3) constitute an advance that must be deposited in the lawyer's trust account in accordance with Rule 1.15(b)(1) until such funds are earned by rendering services.

(j) For definitions of "advance," "retainer," and "nonrefundable fee" as used in this Rule, see the definitions in Rule 1.0.

Advisory Committee's Note – June 2014

Paragraph (a) has been amended to make clarifying changes regarding the considerations that bear on the reasonableness of a fee.

In paragraph (a)(2), the requirement that the preclusion of a lawyer's employment be apparent to the client has been removed. A lawyer's reasonable perception of the risk of loss of other employment is relevant to the reasonableness of the fee, whether or not the client is aware of potentially conflicting engagements.

Paragraph (a)(3) has been amended to clarify that in any particular locality, a range of fees, rather than a single precise fee, can very well be charged for a particular service, and that range, rather than any one particular fee, is relevant to determining the zone of reasonableness of fees in any particular case.

Paragraph (a)(11) is new. It highlights the fact that, as with many commercial contracts, parties to a fee agreement enter the agreement in order to allocate various risks and in the expectation of, or pursuit of, certain potential benefits. Parties make those agreements lacking perfect foresight. The reasonableness of the agreement is to be judged by the reasonableness at the time of contracting, in light of the parties' desire to allocate risks and pursue benefits, not in hindsight. An agreement entered into by parties reasonably seeking certainty despite (or even because of) their lack of perfect foresight should be respected, even if one party might regret it in hindsight or, if the party had had perfect foresight, might not have entered it.

Paragraph (d)(1) is amended to update the current rule prohibiting fees that are contingent upon securing a divorce or contingent upon the amount of alimony, support, or property settlement in lieu thereof. The amendment expands the Rule to include all family matter actions in which a contingent fee arrangement is not appropriate. Neither the existing Rule, nor the amendment prohibits a contingent fee arrangement in a family matter enforcement proceeding.

Paragraph (f) has been amended to clarify that a lawyer can accept an advance paid by credit card or other means that requires initial deposit into the lawyer's operating account, so long as the lawyer complies with the requirements set forth in newly amended Rule 1.15(b)(1). See the Advisory Committee's Note June – 2014 to Rule 1.15 for discussion of this issue.

Paragraph (g) has been amended to change the reference to "Bar Rule 9" in light of coming revisions to the organization and content of the Bar Rules. No substantive change is intended.

Paragraph (h) is new. It clarifies the conditions that apply to a lawyer's acceptance of a nonrefundable fee.

Paragraph (h)(1) provides that nonrefundable fees are permissible, subject to the requirement of reasonableness that applies to all fees. The paragraph requires certain safeguards to ensure the client's informed consent to the nonrefundability of a fee. Although the safeguards in paragraph (h)(1) are required, they will not

guarantee a finding of informed consent in every case and are not exclusive of the factors that otherwise bear on the existence of informed consent. See Rule 1.0(e). When fees are paid prior to the rendition of services and in the expectation that such future services will be rendered, the Committee believes that a client's default expectation will be that the payment is an advance rather than a nonrefundable fee. In order to avoid client confusion, paragraph (h)(1) requires clear disclosure to the client that the fee is nonrefundable and a description of the scope of future services that the client is entitled to receive.

The Committee intends that Opinion No. 206 (Dec. 12, 2012) of the Professional Ethics Commission shall not apply to nonrefundable fees that lawyers accept in compliance with this new paragraph. The amendment differs from the law as stated in Opinion No. 206 in two important ways: (1) it permits nonrefundable fees for more than a lawyer's mere "availability," and allows such fees even though the parties fully expect the lawyer to render specified future services; (2) it requires (where Opinion No. 206 forbids) description of the fee as nonrefundable, in order to ensure the client's informed consent thereto.

A lawyer who accepts payment before services are rendered cannot treat such payment as a nonrefundable fee, unless the lawyer complies with the disclosure requirements of paragraph (h)(1). Without the client's informed consent to nonrefundability in accordance with this paragraph, the lawyer must treat the funds as an advance to be credited against future bills for services and must keep such funds in a trust account, in accordance with Rule 1.15, until future services are rendered, and must refund the unearned portion of any such funds upon termination of representation, in accordance with Rule 1.16(d). If conditions (h)(1) and (h)(2) are met, nonrefundable fees cannot be deposited in the lawyer's trust account as those nonrefundable fees are not the property of a client.

Paragraph (h)(2) prohibits a lawyer from securing a client's advance waiver of the right to challenge the reasonableness of a fee. A client's written agreement to a fee is a factor under paragraph (a) in the determination of its reasonableness. A lawyer should not press further and request or require the client to waive the client's right to have the reasonableness of a nonrefundable fee determined in accordance with law.

3. Rule 1.15 of the Maine Rules of Professional Conduct is amended as follows:

RULE 1.15 SAFEKEEPING PROPERTY, CLIENT TRUST ACCOUNTS, INTEREST ON TRUST ACCOUNTS

(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property.

(b) (1) A lawyer shall deposit into a client trust account ~~legal~~ any advance payment of fees or retainer and any expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred, except that an advance or retainer may be placed temporarily in a non-trust account, where necessary to effectuate payment by the client's chosen means (e.g., by credit card), so long as such funds are transferred promptly, and no later than two business days following receipt, into a client trust account. A lawyer shall not accept any advance payment or retainer into a non-trust account if the lawyer has any reason to suspect that the funds will not be successfully transferred into the client trust account within two business days of receipt. All such funds shall be deposited in one or more identifiable accounts maintained in the state in which the law office is situated at a financial institution authorized to do business in such state. No funds belonging to the lawyer or law firm shall be deposited therein except as follows:

(i) Funds reasonably sufficient to pay institutional service charges may be deposited therein; and

(ii) Funds belonging in part to a client and in part presently or potentially to a lawyer or law firm must be deposited therein, but the portion belonging to the lawyer or law firm may be withdrawn when due unless the right of the lawyer or law firm to receive the funds is disputed by the client; in that event the disputed portion shall not be withdrawn until the dispute is finally resolved.

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(7) For purposes of this rule, the following definitions apply:

(i) "Interest or dividends in excess of costs" means the net of interest or dividends earned on a particular amount of one client's funds over the administrative costs allocable to that amount. In estimating the gross amount of interest or dividends to be earned, the lawyer or law firm shall consider the principal amount involved; available interest or dividend rates; and the time the funds are likely to be held, taking into account the likelihood of delay in any relevant proceeding or transaction.

(ii) "Administrative costs" means that portion of the following costs properly allocable to a particular amount of one client's funds paid to a lawyer or law firm:

(A) Financial institutional service charges for opening, maintaining, or closing an account, or accounting for the deposit and withdrawal of funds and payment of interest or dividends.

(B) Reasonable charges of the lawyer or law firm for opening, maintaining or closing an account; accounting for the deposit and withdrawal of funds and payment of interest or dividends; and obtaining information and preparing or forwarding any returns or reports that may be required by a revenue taxing agency as to the interest or dividends earned on a client's funds.

~~(iii) "Retainer" means a fee paid to an attorney for professional services that is earned upon the attorney's engagement. A retainer payment is the property of the attorney when received. "Retainer" does not include a payment by a client as an advance payment that will be credited toward fees for professional services as the attorney earns the fees.~~

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Advisory Committee's Note – June 2014

Rule 1.15(b) has been amended to clarify that a lawyer can accept an advance paid by credit card or other means that requires initial deposit into the lawyer's operating account, so long as: (a) the lawyer promptly places the advanced funds into the trust account, and (b) the lawyer has no reason to believe that the funds will be meaningfully exposed to the lawyer's creditors while in the operating account or that there is any practical risk that the funds will not be successfully transferred promptly into the trust account. The Committee intends that Opinion No. 173 (Mar. 7, 2000) of the Professional Ethics Commission shall not apply to credit card payments accepted in compliance with this amendment. The Committee believes that the benefit to clients and lawyers of being able to choose payment by credit card or other means that might require temporary deposit into a lawyer's operating account warrants the slight risk that such deposit entails, since those risks can be mitigated with the controls the rule provides: the exposure in the operating account must be very short-lived, and such deposit is prohibited if the lawyer is aware of any meaningful risk to such funds from deposit into the operating account.

The Committee intends to maintain a bright line separating earned fees from unearned fees (which must be deposited into a trust account). The Committee intends the concept of a fee that is "earned, subject to refund," as described in Opinion No. 206 (Dec. 12, 2012) of the Professional Ethics Commission, to have no place in the rules. A fee that is subject to future refund if the client decides to terminate the representation or not to make use of anticipated future services is an advance, not a nonrefundable fee, and must be placed in a trust account, even though the parties think it highly likely that the future services will in fact be rendered. If the parties intend for the lawyer to treat funds as the lawyer's own before services are rendered, the lawyer must make an agreement for a nonrefundable fee that complies with Rule 1.5(h).

4. These amendments shall be effective on September 1, 2014.

Dated: June 19, 2014

FOR THE COURT[1]

LEIGH I. SAUFLEY
Chief Justice
DONALD G. ALEXANDER
WARREN M. SILVER
ANDREW M. MEAD
ELLEN A. GORMAN
JOSEPH M. JABAR
Associate Justices

[1] This Rule Amendment Order was approved after conference of the Court, all Justices concurring therein.