

**ETHICS OPINION NUMBER 250
OF THE MISSISSIPPI BAR
RENDERED JUNE 25, 2002**

FEES: Non-refundable retainers are prohibited to the extent the fee is not reasonable.

The Ethics Committee of The Mississippi Bar has been asked to render an opinion on the following question:

Does Rule 1.5 of the Mississippi Rules of Professional Conduct or any other rule of professional conduct or statute prohibit the use of "nonrefundable retainers" in Mississippi?

Rule 1.5(a) of the Mississippi Rules of Professional Conduct provides that "[a] lawyer's fee shall be reasonable." Furthermore, attorneys may require advance payment of a fee but are obligated to return any unearned portion thereof. Comment, M.R.P.C. Rule 1.5. The Rules of Professional Conduct do not make any distinction between a retainer and a fee paid in advance nor is there any definition in the rules for the term "retainer" and the term "fee".

Historically, the term "retainer", when used to describe payments to a lawyer, had nothing to do with compensation for services. Rather, a retainer was a sum of money paid to a lawyer to secure his availability to a client over a given period of time regardless of whether the lawyer actually performs any service for the client. See Black's Law Dictionary Revised 5th Edition (1979). Referred to as a "general retainer", the fee is earned when paid since the lawyer is entitled to the money regardless of whether he actually performs any services for the client. E.g., *In Re: Viscount Furniture Corp.*, 133 B.R. 360, 364 (N.D. Miss 1991). The general retainer is paid for availability only and is not applied against the attorney's hourly rate; instead, there is an additional bill for services actually rendered. By its nature, a general retainer is "non-refundable".

Over time, a second class of "special retainer" arrangements has come into existence. In the typical "special retainer" arrangement, the client pays, in advance, for some or all of the services the attorney is expected to perform on the client's behalf. Such an arrangement is permitted in Mississippi. Comment, M.R.P.C. Rule 1.5. In the usual situation, the advance fee payment is applied against the attorney's hourly fee and the attorney spends down the advance payment as services are performed. Under Rule 1.16(d) of the Mississippi Rules of Professional Conduct and Opinion No. 219, an attorney must refund any advance fee payment that has not been earned.

The potential ethical dilemma arises when an attorney enters into a "special retainer" arrangement whereby an advance fee payment is required, some and/or all of which is categorized as a "non-refundable retainer". An analysis of M.R.P.C. Rule 1.5(a) does not per se prohibit "non-refundable retainers" provided the retainer is reasonable. However, should a client discharge the lawyer or the lawyer withdraws from representation, M.R.P.C. Rule 1.16(d) requires an attorney to refund "any advance payment that has not been earned" which would include any "unreasonable portion" of a "non-refundable retainer". As advised in Opinion No. 219, the fee arrangement should be in writing and the written agreement should contain a provision which specifically states what part of the initial fee is non-refundable.