Legal Ethics & Malpractice Reporter

Vol. 4, No. 5

MAY 31, 2023

EDITED BY

Dr. Michael Hoeflich
Professor, The University of Kansas School of Law

PUBLISHED BY

Joseph Hollander & Craft LLC
Lawyers and Counselors

Contents

FEATURE ARTICLE

ABA Formal Opinion 505: Advanced Fee Arrangements

On May 3, 2023, the ABA issued Formal Opinion 505, "Fees Paid in Advance for Contemplated Services." Many lawyers require clients, especially new clients, to pay money in advance as a means of ensuring that the client will pay bills as they come due. These advanced payments go by many names, and the ethics of their use are often not clear to lawyers taking them. Opinion 505 brings a greater degree of clarity to this area of billing practice.

The Opinion starts out by explaining the lack of clarity in the practices and nomenclature of advanced payments. It goes on to lay down a clear rule:

> When a client pays an advance to a lawyer, the lawyer takes possession – but not ownership – of the funds to secure payment for the services the lawyer will render to the client in the future.

Then, it takes care to distinguish "true retainers" from advanced fee payments:

> This opinion will also refer to the term "retainer" fee. Neither the term "retainer" nor "retainer fee" is found in the Model Rules of Professional Conduct. Regrettably, many lawyers use the term loosely to mean any sum of money paid to the lawyer at or near the commencement of representation. *Whereas an advance is a deposit of money with the lawyer to pay for services to be rendered in the future, there is another type of payment that is not for services. Rather, "[t]he purpose of [a retainer] is to assure the client that the lawyer will be contractually on call to handle the client's legal matters*." This type of agreement and payment is variously referred to as a "general retainer," "classic retainer," "true retainer," "availability retainer," or an "engagement retainer." Because all of these terms mean the same thing, this opinion will use the term "general retainer" to refer to this arrangement. A general retainer is paid – and deemed earned – upon the promise of availability to represent a client, whether or not services are actually needed or requested by the client. Thus, a general retainer has been conceptualized as a form of an option contract. In other words, hourly time is not billed against a general retainer and a general retainer is not a flat fee for a specific amount of the lawyer's time – it is solely to reserve the lawyer's availability. An important result of these related features is that the money paid by the client

> in connection with a general retainer should not be placed in a trust account since it is considered earned upon the commencement of the contract.
>
> (emphasis added)

These paragraphs lay out a basic framework for understanding advanced fee payments. Most advanced payments will be refundable and, therefore, not earned by a lawyer until the work is actually done. General retainers, which are rare, are paid to the lawyer and become the lawyer's property as soon as they are paid—because they are payments for a lawyer's promise of future availability to the client for a specific period.

The Opinion also addresses several specific ethical pitfalls in taking an advanced fee. First is how the Rules impact advanced fee payments in the context of a flat fee agreement:

> If a flat or fixed fee is paid by the client in advance of the lawyer performing the legal work, the fees are an advance. Use of the term "flat fee" or "fixed fee" does not transform the arrangement into a fee that is "earned when paid." "Flat" or "fixed" does not even mean that the fee must be paid at the commencement of the representation, although most lawyers who do not have an existing relationship with a client may want to ensure payment and may, therefore, ask for the fee to be paid in advance before committing to the representation. If they do, as will be emphasized below, then that fee must be placed in a Rule 1.15-compliant trust account, to be disbursed to the lawyer only after the fee has been earned.

Second, the Opinion addresses the idea of non-refundability:

> The Model Rules of Professional Conduct do not allow a lawyer to sidestep the ethical obligation to safeguard client funds with an act of legerdemain: characterizing an advance as "nonrefundable" and/or "earned upon receipt." This approach does not withstand even superficial scrutiny. A lawyer may not charge an unreasonable fee. See Model Rule 1.5(a) ("A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses."). Comment [4] to Rule 1.5 provides this additional guidance: "A lawyer may require advance payment of a fee, but is obliged to return any unearned portion. See Rule 1.16(d)." See also, Model Rule 1.15(c) and others discussed in connection with Hypothetical 1 below. Therefore, under the Model Rules, an advance

> fee paid by a client to a lawyer for legal services to be provided in the future cannot be nonrefundable. Any unearned portion must be returned to the client. Labeling a fee paid in advance for work to be done in the future as "earned upon receipt" or "nonrefundable" does not make it so.
>
> …
>
> Some jurisdictions have authorized lawyers to treat advances as the lawyer's property upon payment, so long as the client signs a fee agreement designating the sum as "nonrefundable" or "earned on receipt" or some other variation on this theme. This approach departs from the safekeeping policy of the Model Rules described herein and creates unnecessary risks for the client.

The Opinion provides three hypothetical scenarios to clarify how the Rules apply to advanced payments and distinguish between advanced payments and true general retainers. Each hypothetical is worth a study for the interplay of Rules 1.15, 1.16, 1.5, 1.4, and 8.4 and why "the purpose of fee dictates its character and treatment irrespective of labels or terminology used."

Advanced payments can be an extremely useful tool for lawyers. They can provide additional security that money will be available to pay a client's bills. They can also provide a lawyer with much needed funds early in a representation. However, a lawyer who structures an advanced fee improperly may face charges that he has violated a multitude of rules.

ABA Formal Opinion 505 provides a useful guide to navigating this minefield. Of course, it is also critical for lawyers to recognize that this opinion is based on the Model Rules; and so it is necessary to consult local variations of the Rules as they have been adopted and interpreted in each jurisdiction.

AUTHORITY

The Kansas Code of Judicial Conduct

Last month's feature article discussed the problem of the appearance of improper activities by members of the United States Supreme Court. Controversy over the need for imposing ethical rules upon the justices of the Supreme Court continues as Chief Justice Roberts and other justices work to improve the public image of the Court. This month, we can do what physicists refer to as a "thought experiment." Let us imagine that the justices of the United States Supreme Court were subject to the Kansas Code of Judicial Conduct. Kansas Supreme Court Rule 601B contains the Canons and Rules governing Kansas judges' professional conduct. The Preamble reads:

> [1] An independent, fair and impartial judiciary is indispensable to our system of justice. Our legal system is based upon the principle that an independent, impartial, and competent judiciary, composed of men and women of integrity, will interpret and apply the law that governs our society. Thus, the judiciary plays a central role in preserving the principles of justice and the rule of law. Inherent in all the Rules contained in this Code are the precepts that judges, individually and collectively, must respect and honor the judicial office as a public trust and strive to maintain and enhance confidence in the legal system.
>
> [2] Judges should maintain the dignity of judicial office at all times, and avoid both impropriety and the appearance of impropriety in their professional and personal lives. They should aspire at all times to conduct that ensures the greatest possible public confidence in their independence, impartiality, integrity, and competence.
>
> [3] The Kansas Code of Judicial Conduct establishes standards for the ethical conduct of judges and judicial candidates. It is not intended as an exhaustive guide for the conduct of judges and judicial candidates, who are governed in their judicial and personal conduct by general ethical standards as well as by the Code. The Code is intended, however, to provide guidance and assist judges in maintaining the highest standards of judicial and personal conduct, and to provide a basis for regulating their conduct through disciplinary procedures.

The preamble not only explains the underlying reasons as to why we have a Code of Judicial Conduct; it gives insight into the spirit of the Code—a spirit which should

be embraced by every judge in the State.

> The Code contains four canons of conduct:
>
> Canon 1 - A Judge Shall Uphold and Promote the Independence, Integrity, and Impartiality of the Judiciary, and Shall Avoid Impropriety and the Appearance of Impropriety.
>
> Canon 2 - A Judge Shall Perform the Duties of Judicial Office Impartially, Competently, and Diligently.
>
> Canon 3 - A Judge Shall Conduct the Judge's Personal and Extrajudicial Activities to Minimize the Risk of Conflict with the Obligations of Judicial Office.
>
> Canon 4 - A Judge or Candidate for Judicial Office Shall Not Engage in Political or Campaign Activity That Is Inconsistent with the Independence, Integrity, or Impartiality of the Judiciary.

Each of these four canons is interpreted and supplemented by authoritative rules that deal with specific situations a Kansas judge may face.

The Kansas rule that would be most relevant to the problems plaguing the Supreme Court—questionable disclosure practices, relationships between judges and wealthy individuals, etc.—would fall most directly under Canon 1's "appearance of impropriety" regulation on judicial behavior. Although commentators have often criticized this standard, it remains the rule in Kansas and many states. Rule 1.2 reads:

> **Promoting Confidence in the Judiciary**
>
> A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.
>
> **COMMENT**
>
> [1] Public confidence in the judiciary is eroded by improper conduct and conduct that creates the appearance of impropriety. This principle applies to both the professional and personal conduct of a judge.
>
> [2] A judge should expect to be the subject of public scrutiny that might be viewed as burdensome if applied to other citizens and must accept the restrictions imposed by the Code.

> [3] Conduct that compromises or appears to compromise the independence, integrity, and impartiality of a judge undermines public confidence in the judiciary. Because it is not practicable to list all such conduct, the Rule is necessarily cast in general terms.
>
> [4] Judges should participate in activities that support ethical conduct among judges and lawyers, professionalism within the judiciary and the legal profession, and access to justice for all.
>
> [5] Actual improprieties include violations of law, court rules, or provisions of this Code. The test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge violated this Code or engaged in other conduct that reflects adversely on the judge's honesty, impartiality, temperament, or fitness to serve as a judge.
>
> [6] A judge may initiate and participate in community outreach activities for the purpose of promoting public understanding of and confidence in the administration of justice. In conducting such activities, the judge must act in a manner consistent with this Code.

Comments 3 and 5 are particularly relevant to the behavior making headlines in recent months. If we were to apply these standards to the justices' behavior, how would they fare? Have any of them acted in a manner that "would create in reasonable minds a perception that the judge violated this Code or engaged in other conduct that reflects adversely on the judge's honesty, impartiality, temperament, or fitness to serve as a judge"?

Some of the alleged activities might well run afoul of the standards set forth in Kansas Rule 1.2 as interpreted in Comments 3 and 5 to that Rule. That is, a "reasonable person" might well believe (assuming the veracity of the reports) that one or more of the justices has acted in a manner that reflects adversely on his or her impartiality, temperament, or fitness to serve as a member of the highest court in the land.

This raises a crucial issue for every citizen. Should the most powerful and visible judges in the United States be subject to ethical rules less stringent than those by which other judges are constrained? Will the public continue to have confidence in a court whose rulings profoundly shape American society and culture when the members of this court have fewer ethical responsibilities than local judges with far less power?

Much of the debate about the Supreme Court has focused on its uniqueness. In many respects, it is. But the Court is still a court, and the justices are still judges.

And many people would be shocked at the lack of formal ethical obligations imposed on U.S. Supreme Court justices compared to judges presiding over courts in their own states. Avoiding the appearance of impropriety, alone, provides a compelling basis for the U.S. Supreme Court act to adopt more stringent formal ethical rules and not wait for others to do so legislatively.

ETHICS & MALPRACTICE RESEARCH TIP

New Articles from *The Current Index of Legal Periodicals*

1. David Rapallo, House Rules: Congress and the Attorney-Client Privilege, 100 Wash. U. L. Rev. 455 (2022).

   > Attorney-client privilege must be of constant concern to every practicing lawyer.

2. Douglas R. Richmond, Lawyers' Right of Professional Self-Defense and Its Limits, 74 S.C. L. Rev. 303 (2022).

   > Doug Richmond is one of the nation's leading experts on lawyer ethics, malpractice, and liability. Every article he writes, including the present one, is worthwhile reading.

A BLAST FROM THE PAST

"A Lawyer should be a Scholar, but, Sirs, when you are called upon to be wise, the main Intention is that you may be wise to do good."

—Cotton Mather (1710), quoted in Julius Henry Cohen, *The Law: Business or Profession?* (1924).

josephhollander.com