Non-Refundable Fees?

Back in 1984, Mel Hirshman wrote in this column about non-refundable retainers, engagement fees and limitations on the ability of counsel to set a fee. In light of problems with fee agreements that appear to be endemic, it's time to revisit at least one of the topics.

As you might imagine, with 2000 or so complaints a year, our staff reviews a great many fee agreements. The words "non-refundable" or "earned upon receipt" appear all too often in those fee agreements. A fee for the purpose of ensuring the attorney's availability to the client, usually for a specified period of time, and preventing the attorney from representing adverse interests, is an engagement fee and is, indeed, earned upon receipt (and should not be placed in trust). Fees for work to be done in the future, on the other hand, cannot be non-refundable and cannot be earned until the client realizes a benefit. Such fees are the property of the client until they are earned. As such, those "unearned" fees must be held in trust unless the attorney has complied with the requirements of Rule 1.15 (c) of the Maryland Rules of Professional Conduct. That Rule sets out the "default" position that unearned fees belong in trust, absent informed consent, confirmed in writing, to a different arrangement. Rule 1.16 (d) *requires* unearned fees to be returned to the client at the conclusion of the representation. An attorney who states that her advanced fee is non-refundable is therefore misleading her client. An attorney who calls an advance fee payment an "engagement fee" to skirt the Rule's requirements likewise faces ethical difficulties.

The Colorado Supreme Court stated that a fee agreement that suggests that advance fees are "non-refundable" undermines the client's understanding of her rights and may discourage a client from seeking refunds to which the client may be entitled. In addition to misinforming a client, a "non-refundable" fees may discourage the client from discharging her lawyer for fear the client will not be able to recover advance fees for which the lawyer has yet to perform any work. For those reasons, the Colorado Supreme Court prohibited attorneys from entering into non-refundable fee agreements. *In re Sather*, 3 P.3rd 403, 413 (2000) The Court recognized limited exceptions to this rule similar to that found in our Rule 1.15 (c).

Although the Maryland Court of Appeals has not specifically enjoined the use of the phrase "non-refundable" when applied to advanced fee payments, inferences that can be drawn from several cases lead to the conclusion that if faced with the question directly, it likely would follow Colorado's reasoning. In a recent case, the Court rejected the contention of an attorney that he had not violated Rule 1.15 because he had earned the fee upon receipt as it was "non-refundable." The fee was determined to be an advanced flat

fee payment, required to be held in escrow and refunded to the client if not earned. The Court found that the attorney had not earned the fee and his withdrawal from the case made the fee unreasonable. Despite the non-refundable language in the retainer, the Court found that the parties in that case contemplated that it would be refundable if the representation ended prematurely. *Atty. Griev. Comm'n v. Lawson*, 401 Md. 536, 578, 933 A. 2d 842, 867 (2007)

I suggest that it is clear in Maryland that, at the very least, the ethical requirement to return unearned advanced fees trumps contract language characterizing the fee as non-refundable. Public policy would appear to demand no less.