

Nonrefundable Attorney's Fees? Not in Missouri, New Opinion States

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The Missouri Advisory Committee has issued Formal Opinion 128, which clarifies that Missouri's ethics rules prohibit lawyers from charging "nonrefundable" fees.

The bottom line: Missouri does not have "nonrefundable" fees. Regardless of whether a representation is complete and the "terminology used to describe the fee, if the ultimate fee is unreasonable, taking into consideration the eight factors listed under Rule 4-1.5(a), the unreasonable portion must be refunded."

Having established this bottom line, Formal Opinion 128 tackles some of the challenging issues left concerning fixed fees, advance fees, and the like.

The Opinion examines two types of matters where "fixed" or "nonrefundable" fees are frequently used. It explains that in some circumstances, in particular domestic relations matters, it may be appropriate for a lawyer to charge a reasonable "intake fee" to reflect that the lawyer will be foregoing the ability to represent other parties in the matter when the lawyer commences representing the client. This fee would be earned upon commencement, and thus would not be accurately described as "nonrefundable" — rather, it would be earned at commencement.

In contrast, Formal Opinion 128 explains, a criminal matter that did not involve such conflict issues likely would not be suitable for an "intake fee." Thus, if the lawyer was terminated or withdrew shortly after commencing a representation, some of the fee would likely need to be refunded.

Formal Opinion 128 also challenges two long-held principles regarding fees. First, the Opinion rejects that a flat fee is “earned upon receipt for trust account purposes.” Formal Opinion 128 instead advises that, under the present version of Missouri Rule 4-1.15(f), “all flat fees must be deposited into a lawyer trust account and promptly removed when actually earned, similar to prompt removal of earned hourly fees.”

Finally, Formal Opinion 128 discourages the use of “retainer,” noting that the term “has taken on many meanings which are inconsistent with one another and which are confusing to clients.” Instead, the Opinion advises lawyers to use “use plain language that clients are likely to clearly understand.”

A copy of Formal Opinion 128 is available here: <http://www.mo-legal-ethics.org/modules.php?name=News&action=view&id=64&PHPSESSID=f96c1be7f56dc7617efd7c2555ce6517>

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