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PROFESSIONAL CONDUCT

Exit Strategies: Can You Take the Client and the Retainer?

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Special to the Legal

In these difficult times, partnerships are breaking up, firms are dissolving and more and more laterals are seeking greener pastures. These events often create ethical dilemmas concerning client and fee retention. Recently, we pondered the question of how a minimum fee gets apportioned when the lawyer who brought the client and the fee to the firm decides to leave, and the client leaves with the lawyer.

Here's the hypothetical that sparked our interest: Client retains a law firm through Lawyer A and signs a retainer agreement providing for the payment of a nonrefundable retainer representing a minimum fee. The agreement provides that fees will be charged against the retainer but is silent on the question of what happens to the retainer in the event of discharge by the client. Lawyer A later leaves the firm, and client decides to go with Lawyer A. Is it permissible for the firm to keep the remaining balance of the retainer or must they refund it by permitting the unused retainer to be transferred with the client's file?

First, Rule of Professional Conduct 1.5(b) tells us: "When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, in writing, before or within a reasonable time after commencing the representation." Therefore, whether you are getting a retainer or not, get your fee agreements in writing. (If you don't have them in writing yet, send them out.) Having said that, there are several kinds of retainers that we've encountered in our practice.

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First, there is the classic security retainer, which an attorney holds to secure future payment of fees. In this case, the client pays his bills during the course of the representation, and the security retainer is applied to the final bill; any fees not earned at the end of the engagement must be returned.

Another type of retainer is a general retainer, paid to ensure that the attorney will be available to the client during a certain period of time. Since it is the availability of the attorney, and not necessarily his or her services, which are being acquired, this money is earned in full even if the attorney does no work during the given time period. (See *Ryan v. Butera Beausang Cohen & Brennan*.)

The third type of retainer is a flat fee retainer. This is an agreement up front that the work will cost a certain amount and that neither the attorney nor the client will be able to complain about the amount of the fee, no matter how extensive the work required turns out to be. This fee is also "non-refundable" and can, with a caveat, be placed into an operating account immediately. The caveat is that there is a risk that some portion of the fee may have to be disgorged if the client and attorney part ways before the work is completed.

The fourth type is an advance fee retainer. With these retainers, the agreement will state that fees for work done are deducted from the retainer. One subset of the advance fee retainer is the nonrefundable minimum fee retainer, which provides that a certain minimum amount is not refundable. This is true whether the work is simply completed faster than expected, or whether the lawyer is discharged by the client before completion of the case.

In general, the Pennsylvania Rules of Professional Conduct do not contain any specific prohibition against nonrefundable minimum fee retainers. Pennsylvania Bar Association Formal Opinion 95-100 says that nonrefundable retainers are permissible if reasonable and not "clearly excessive." The opinion also says: "[I]t may be that if an attorney is discharged at an early stage of representation, it would be

unreasonable for the attorney to retain the entire fee which has been paid." Another opinion, Pennsylvania Bar Association Formal Opinion 93-201 (1994), also suggests that, at least in some cases, retaining funds that were not earned would amount to charging a clearly excessive fee. After reviewing the question put before them, where an attorney was discharged prior to completing the engagement, the committee concluded: "[I]n view of the fact that, as you concede, your services in the matter had not yet been completed, I believe that there is a significant risk that a reviewing authority would conclude that your retention of the full Retainer would result in the charging of a 'clearly excessive' fee." These opinions suggest that one factor to consider in deciding whether keeping a minimum fee retainer would be excessive is whether the services requested were in fact finished or whether the work was halted prior to completion.

Pennsylvania Rule of Professional Conduct 1.16(d) is also germane to our hypothetical. The rule states: "Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect client's interests, such as … refunding any advance payment of fee or expense that has not been earned or incurred." The rule does not answer the question of exactly when a fee has been earned. It does, however, suggest that retaining fees after termination is significantly different than retaining "unearned" fees after the completion of a representation. The difference arises because retention of a nonrefundable minimum fee can impermissibly interfere with a client's right to terminate representation. Comment Four to Pennsylvania Rule of Professional Conduct 1.16 states: "A client has a right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services." Furthermore, Pennsylvania Bar Association Formal Opinion 95–100 states that the "amount retained as a nonrefundable retainer should not be so great as to interfere with the client's ability to discharge counsel and retain successor counsel."

We think the Disciplinary Board and the Office of Disciplinary Counsel would probably support a client's efforts to disgorge unearned fees and most attorneys would probably not resist the board on that issue. However, in weighing the rights of the respective parties, if the fee agreement is clear, and the client is a sophisticated business person, we'd feel comfortable advocating that the fee agreement is a contract that should be honored, as it would be in any other context.

In New Jersey, the rule on fees is stated slightly differently. Rather than prohibiting excessive fees, New Jersey Rule of Professional Conduct 1.5 requires that a "lawyer's fee shall be reasonable." In 1990, the New Jersey State Bar Association created an Ad Hoc Committee on Nonrefundable Retainers. That year both the Ad Hoc Committee, and the Supreme Court Advisory Committee on Professional Ethics, concluded that nonrefundable retainers are not unethical per se "but are subject always to the overriding precept that any fee arrangement must be reasonable and fair to the client." The New Jersey Supreme Court later adopted rules in 1999 that entirely prohibited the use of nonrefundable retainers for matrimonial matters.

So what's the answer to our hypothetical? The answer is that nonrefundable, minimum fee retainers are generally permissible, but should not interfere with the right of the client to have his fee follow the attorney to another firm. Any dispute over the entitlement to that fee should be settled between the lawyers, without creating risk to or further burdening the client.

We also advise our clients who are moving on professionally to keep the big picture in mind. Positive relationships and solid reputations are always our most important assets, and even more so in these difficult times. Consider how your former client and your former colleague will feel about you as you both move forward. Make sure the short-term impact on your bank account is worth the long-term effect on your future.

Litigation associate Renada Rutmanis assisted with the research and drafting of this article. •