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Re: Ethics Opinion on Retainers and Refund of Unearned Fees

Dear Mr. Scaring

Please accept this letter in response to your request for an ethics opinion. This opinion is based upon my experience practicing exclusively in the area of professional ethics for almost thirty years. As counsel to the Grievance Committee for the Tenth Judicial District for thirteen years, I routinely evaluated all aspects of the misconduct of attorneys and prosecuted those matters before the Grievance Committee and the Appellate Division, Second Department. Since then I have engaged in the private practice of law, dedicated exclusively to defending lawyers, judges and law students from charges of misconduct; counseling lawyers and law firms on the proper management of law firms and the ethical practice of law; admission matters; and, opining upon matters of professional ethics.

I have testified as an expert on professional ethics a number of times. I am on retainer to several law firms and I am regularly retained by other firms to evaluate proposed actions to ensure that their actions are legal, in accord with the Rules of Professional Conduct, and otherwise professionally appropriate under both ethical and practice standards. I regularly lecture before various bar associations, practice groups, law firms, law schools, and other groups on such topics as: avoiding grievances; attorney

professional conduct; risk management; standards of civility; escrow account management and ethics; motion practice and discovery; trial techniques; impaired lawyers; and the impact of ethical and fiduciary obligations in all areas of the practice of law. There are over one hundred (100) reported decisions in the State of New York in which I represented one of the parties, all pertaining to ethics and the related practice of law. I have also handled hundreds of cases which involved private discipline.

FACTS AS PRESENTED:

You have advised that your client and prior counsel entered into a retainer agreement, bearing the typed in date of January 24, 2017. That date was crossed out with "Feb 1st" was handwritten over the crossed out date. Your client paid prior counsel a fee of $200,000 by check dated February 1, 2017.That agreement was superseded by a revised retainer, dated February 3, 2017. That agreement provides in relevant part:

> In connection with out representation, we agree to defend you in the pending matter and our services include, but not limited to, investigation, arraignment, all court appearances, discovery, motion practices, hearings and trial. This Agreement does not include handling any appeals on your behalf.
>
> We have agreed to charge you a fixed fee, not based on billable time, for all services stated heretofore before trial, in the amount of $200,000, payable at the outset of this engagement. In the event that this matter is not resolved prior to trial, the parties will arrive at an additional fixed trial fee.
>
> You have been advised that the fixed fee for pre-trial servises [sic] has been set based on the time required, the degree of complexity of the case, the urgency of the matter, the necessity to decline other work, and to devote substantial amount of time and resources to properly defend your case and the degree of expertise and experience in handling a case of this nature. You are fully aware that the ***pre-trial fee of $200,000 is fully earned upon receipt of payment, regardless of the amount of hours incurred and either the case is dismissed or resulted in a plea*** (emphasis added).

Thereafter, Attorney #1 provided limited legal services to the client; specifically, he appeared at the arraignment and at a few conferences with the prosecution. Recently, client retained new counsel to substitute for Attorney #1. Attorney #2 has communicated with Attorney #1 seeking a refund for his client. Prior counsel has not responded to these communications. For purposes of this opinion, it is assumed that the entire retainer has not been earned and that a refund is due the client.

QUESTIONS PRESENTED:

Question I: Must Attorney #1 specifically account for his earned legal fee?

Question II: Must Attorney #1 provide a refund or may he rely upon the language of the revised retainer as to when the total fee is earned and refuse to refund any unearned portion of the legal fee?

ANSWERS:

Question I: Attorney #1 must respond to Attorney #2, as the legal representative of the client, and must provide an accounting as to the current state of the legal fee.

Question II: Attorney #1 must refund all unearned portions of the fee to client notwithstanding the clause granting himself a windfall where the services are terminated prior to completion of the contemplated work as set forth in the retainer. New York law prohibits any form of non-refundable legal fee retainer; whether expressly so stated or whether effectively resultant from the language. Retainer clauses that expressly state that an advanced legal fee is non-refundable or that create non-refundability by effect are both unethical and unenforceable.

REASONING:

The Attorney Client Fiduciary Relationship

The relationship between a lawyer and clientis a fiduciary relationship. "An attorney stands in a fiduciary relation to the client" (*GraubardMollenDannett& Horowitz v Moskovitz*, 86 NY2d 112, 118 [1995]). As a fiduciary, an attorney "is charged with a high degree of undivided loyalty to his [or her] client" (*Matter of Kelly v Greason*, 23 NY2d 368, 375 [1968]). Attorney client fee agreements possess a special status representing lofty principles that serve to distinguish them from the rules applicable to commercial contracts and they are a matter of special concern to the courts. (see, *Matter of Schanzer*, 7 A.D.2d 275, affd. 8 N.Y.2d 972; *Martin v. Camp*, 219 N.Y. 170).

Duty to Account and Refund

Regarding the accounting and refund requested by Attorney #2 on behalf of Client, Attorney #1 must respond to the request; must account for the fee earned; and, must make a refund of any un-earned legal fee. In this regard, Rule of Professional Conduct ("RPC") 1.15 states, in pertinent part:

> *(a) Prohibition Against Commingling and Misappropriation of Client Funds or Property.*
>
> ***A lawyer in possession of any funds or other property belonging to another person**, where such possession is incident to his or her practice of law, **is a fiduciary**, and must not misappropriate such funds or property or commingle such funds or property with his or her own.*
>
> * * *
>
> *(c) Notification of Receipt of Property; Safekeeping; Rendering Accounts; Paymentor Delivery of Property.*
> *A lawyer shall:*
>
> * * *
>
> *(3) maintain complete records of all funds, securities, and other properties of a client or third person coming into the possession of the*

> *lawyer **and render appropriate accounts to the client or third person regarding them**; and*
> *(4) **promptly pay or deliver to the client or third person as requested by the client** or third person the funds, securities, or other properties in the possession of the lawyer that the client or third person is entitled to receive (emphasis added).*

Rule 1.16, which deals with withdrawal from representation by counsel, states in pertinent part:

> *(e) Even when withdrawal is otherwise permitted or required, **upon termination of representation**, a lawyer shall take steps, to the extent reasonably practicable, to avoid foreseeable prejudice to the rights of the client, including giving reasonable notice to the client, allowing time for employment of other counsel, delivering to the client all papers and property to which the client is entitled, **promptly refunding any part of a fee paid in advance that has not been earned** and complying with applicable laws and rules (emphasis added).*

The plain language of the Rules expressly confirms the duty owed by a lawyer to a current or former client to account to that current or former client regarding the amount of fee earned. As Attorney #2 made the request for an accounting and a refund in his role as counsel to the client, Attorney #1 has an absolute obligation to account to Attorney #2 with regard to the status of work done and fee earned regarding the client.

Non-Refundable Retainer

In my opinion, the retainer of February 3, 2017 can be considered to be a non-refundable retainer. The language:

> We have agreed to charge you a fixed fee, not based on billable time, for all services stated heretofore before trial, in the amount of $200,000, payable at the outset of this engagement. * * *
>
> * * * You are fully aware that the pretrial fee of $200,000 is fully earned upon receipt of payment, regardless of the amount of hours incurred and either the case is dismissed or resulted in a plea. [sic]

purports to create a circumstance whereby the attorney can keep the case fee contemplated for complete representation up to the point of trial; even where he takes little or no action on behalf of the client; a result the law will not support.

Overall, the language of this retainer is imprecise. While it is unclear whether or not Attorney #1 intended to draft an expressly non-refundable retainer, it is my opinion that the language he used (and the language absent from the agreement) created non-refundability. Specifically, the final sentence quoted above provides that the entire fee is earned upon receipt regardless of the amount of hours incurred or the result achieved.

The seminal case on the stricture against non-refundability in a retainer is *Matter of Cooperman*, 611 NYS2d 465 (1994). Judge Bellacosa wrote for the Court of Appeals: "We agree with the Appellate Division in this disciplinary matter that special nonrefundable retainer fee agreements clash with public policy and transgress provisions of the Code of Professional Responsibility (see, DR 2-110[A][3]; [B][4]; 2-106[A])[1], essentially because these fee agreements compromise the client's absolute right to terminate the unique fiduciary attorney-client relationship." Id at 467

In reviewing the language of the retainer, it is highly likely that the Client, or any other average reader, would assume that in the case of Attorney #1 being discharged prior to the completion of the retainer the client would not be entitled to return of any portion of the $200,000 paid. This is exactly the reason that the court in *Cooperman* reached its decision expressly forbidding the use of non-refundable retainers.

This conclusion, that the effect of the language as a whole would lead a reasonable person to believe that the entire fee is forfeit if the client severs the attorney-client relationship, is reinforced by the conspicuous absence of fairly standard retainer language. It is appropriate to provide in a retainer agreement for the refund of unearned fees in the case of termination of the relationship prior to completion of the legal task for which the lawyer was employed.[2]

Rule of professional Conduct ("RPC") 1.5 specifically addresses the use of a non-refundable fee. It provides, in relevant part:

> ***(d) A lawyer shall not enter into an arrangement for, charge or collect:***
> * * *

[1]Now RPC 1.16 (e) & (b)(3), and 1.5 (a), respectively.
[2] 22 NYCRR Part 1215, requires retainers to include an "explanation" of the attorney's fees to be charged, expenses and billing practices; and advise the client of the right to arbitrate. While the explanation is required, as the underlying case is a criminal case the arbitration notice is not required.

> *(4) **a nonrefundable retainer fee**. A lawyer may enter into a retainer agreement with a client containing a reasonable minimum fee clause, **if** it defines in plain language and sets forth the circumstances under which such fee may be incurred and how it will be calculated; or. . . (emphasis added).*

CONCLUSION

There is no question that the attorney client relationship is a special, fiduciary relationship that transcends normal contract law. The courts will not allow an Attorney to take advantage of a client or otherwise violate the trust of a client; regardless of any agreement entered into.

Over the past 20 years the Board of Judges has refined and improved the rules under which attorneys may practice in New York State. The Code of Professional Responsibility was refined multiple times, and eventually replaced in 2016 with the Rules of Professional Conduct. Some of the changes made specifically sharpened the rules regarding the exact issues presented herein. The Rules of Professional Conduct specifically state:

An Attorney is a fiduciary;

An Attorney has a duty to account as to legal fees;

An Attorney has a duty to promptly refund any unearned fees upon discharge;

An Attorney cannot charge an excessive legal fee; and,

An Attorney cannot charge a non-refundable fee (either expressly or by effect)

It is my considered opinion, based upon the above, that Attorney #1 is in violation of the Rules of Professional Conduct by his use of a retainer that in effect is non-refundable and for his charging an excessive legal fee for the work performed. He has additionally violated the Rules by his failure and/or refusal to account as to the earned and unearned portions of the fee and by his failure to promptly refund the unearned portion; which is likely considerable.

Based upon the above noted violations; Attorney #1 has deprived his former client of use of the substantial monies likely due to him for a significant period of time, has impeded him in his efforts to pay new counsel and has thereby acted in violation of his

general fiduciary obligations to his client. He has contravened multiple Rules of Professional Conduct and the contravention is ongoing.

If you have any questions or need further explanation, please do not hesitate to contact me.

Very truly yours,

Chris McDonough Esq.
Special Counsel to
Foley Griffin LLP