VIRGINIA:

BEFORE THE FIRST DISTRICT SUBCOMMITTEE
OF THE VIRGINIA STATE BAR

IN THE MATTER OF
DON LEONARD SCOTT, JR. VSB Docket No. 22-010-126153

SUBCOMMITTEE DETERMINATION
(PUBLIC REPRIMAND WITHOUT TERMS)

On March 16, 2023, a meeting was held in this matter before a duly convened First District Subcommittee consisting of Ann W. Templeman, Lay Member; Nancy G. Parr, Esq.; and Jeannette M. Dodson-O'Connell, Esq., Chair. During the meeting, the Subcommittee voted to approve an Agreed Disposition for a Public Reprimand without Terms pursuant to Part 6, § IV, ¶ 13-15.B.4 of the Rules of the Supreme Court of Virginia. The Agreed Disposition was entered into by the Virginia State Bar, by Seth T. Shelley, Esq., Assistant Bar Counsel; Don Leonard Scott, Jr., Esq., Respondent; and Jon M. Babineau, Esq., and Kevin Edward Martingayle, Esq., counsel for Respondent.

WHEREFORE, the First District Subcommittee of the Virginia State Bar hereby serves upon Respondent the following Public Reprimand without Terms:

I. FINDINGS OF FACT

1. Respondent was admitted to the Virginia State Bar ("VSB") in June 2015. At all relevant times, Respondent was a member of the VSB.

2. In September 2020, Respondent was retained by Paul Voskanyan ("Complainant"). On September 15, 2020, Chris Bond ("Bond"), a friend of Voskanyan, paid an advanced legal fee of $5,000. Respondent presented a fee agreement to Bond that characterized the fee as a "non-refundable and earned upon receipt retainer."[1]

[1] Virginia Legal Ethics Opinion 1606 states that non-refundable fees and earned upon receipt advanced legal fees are per se unreasonable and thus a violation of RPC 1.5(a). *See* Virginia State Bar Standing Comm. on Legal Ethics, Legal Ethics Op. 1606 (1994) (Compendium Opinion, Va. Sup Ct. Approved (2016)) (attached as Exhibit 1). A "retainer seeks to guarantee the client's right to secure the attorney's employment for representation of his interests in a

3. In late 2020 and early 2021, Bond met with Respondent three more times at Respondent's office and paid an additional $5,000 at each visit.

4. During the representation, Respondent did not deposit the funds received from Bond into a trust account and did not maintain disbursement journals or client ledgers. When interviewed, Respondent acknowledged he was not in compliance with RPC 1.15.

5. Respondent was previously a solo practitioner during the representation of Complainant. However, Respondent currently is a partner at the firm of Breit Biniazan and asserts that he has staff and "substantial office management support" to handle the financial accounting involved in client representation.

II. NATURE OF MISCONDUCT

Such conduct by Respondent constitutes misconduct in violation of the following provisions of the Rules of Professional Conduct:

RULE 1.5 Fees

(a) A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
(3) the fee customarily charged in the locality for similar legal services;
(4) the amount involved and the results obtained;
(5) the time limitations imposed by the client or by the circumstances;
(6) the nature and length of the professional relationship with the client;
(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
(8) whether the fee is fixed or contingent.

RULE 1.15 Safekeeping Property

(a) Depositing Funds.

(1) All funds received or held by a lawyer or law firm on behalf of a client or a third party, or held by a lawyer as a fiduciary, other than reimbursement of advances for costs and expenses shall be deposited in one or more identifiable trust accounts; all other property held on behalf of a client should be placed in a safe deposit box or other place of safekeeping as soon as practicable.

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matter which may arise in the future" and is earned upon receipt. *Id*. Respondent was unaware of the distinction between an advanced legal fee and a retainer.

(2) For lawyers or law firms located in Virginia, a lawyer trust account shall be maintained only at a financial institution approved by the Virginia State Bar, unless otherwise expressly directed in writing by the client for whom the funds are being held.

* * *

(c) Record-Keeping Requirements. A lawyer shall, at a minimum, maintain the following books and records demonstrating compliance with this Rule:

(1) Receipts and disbursements journals for each trust account. These journals shall include, at a minimum: identification of the client or matter; date and amount of the transaction; name of the payor or payee; manner in which the funds were received, disbursed, or transferred; and current balance. A checkbook or transaction register may be used in lieu of separate receipts and disbursements journals as long as the above information is included.

(2) A client ledger with a separate record for each client, other person, or entity from whom money has been received in trust. Each entry shall include, at a minimum: identification of the client or matter; date and amount of the transaction; name of the payor or payee; source of funds received or purpose of the disbursement; and current balance.

* * *

(4) All records subject to this Rule shall be preserved for at least five calendar years after termination of the representation or fiduciary responsibility.

III. PUBLIC REPRIMAND WITHOUT TERMS

Accordingly, having approved the Agreed Disposition, it is the decision of the Subcommittee to impose a Public Reprimand Without Terms and Don Leonard Scott, Jr., Esq., is hereby so reprimanded.

Pursuant to Part 6, § IV, ¶ 13-9.E of the Rules of the Supreme Court of Virginia, the Clerk of the Disciplinary System shall assess costs.

FIRST DISTRICT SUBCOMMITTEE
OF THE VIRGINIA STATE BAR

By: _____
Jeannette M. Dodson-O'Connell, Esq.
Subcommittee Chair

CERTIFICATE OF MAILING

I certify that on March 20, 2023, a true and complete copy of the Subcommittee Determination (Public Reprimand Without Terms) was sent by certified mail to Don Leonard Scott, Jr., Respondent, at Breit & Biniazin, 355 Crawford St., Suite 704, Portsmouth, VA 23704, his last address of record with the Virginia State Bar, and by email to don@bbtrial.com; and by first-class mail, postage prepaid, to Kevin E. Martingayle, counsel for Respondent, at Bischoff Martingayle PC, 3704 Pacific Ave Ste 300, Virginia Beach, VA 23451, and by email to martingayle@bischoffmartingayle.com; and by first-class mail, postage prepaid, to Jon M. Babineau, co-counsel for Respondent, at Fraim & Fiorella, PC, 150 Boush St., Suite 601, Norfolk, VA 23510, and by email to jon@babineaulaw.com.

Seth T. Shelley
Assistant Bar Counsel

Supreme Court Approved
November 2, 2016
Committee Opinion
November 22, 1994

LEGAL ETHICS OPINION 1606 FEES (COMPENDIUM OPINION).

Inquiry: Because a number of existing opinions pertaining to fee arrangements are sometimes inconsistent or incomplete in the description and definition of those arrangements, this Committee has chosen to review existing opinions and issue a compendium opinion discussing the propriety of fee arrangements. Some of the issues the Committee has decided to consider include the various types of fee arrangements, when the fee is the property of the client and when it can be considered the property of the attorney, and when and under what circumstances a client is entitled to a return of fees paid to an attorney. Specifically, the Committee has chosen to address the following types of legal fees:

Retainers

Advanced Legal Fees

Non-refundable Legal Fees ("Non-refundable Retainers" or "Minimum Fees")

Fixed Fees

Contingent Fees

Applicable Disciplinary Rules: The appropriate and controlling disciplinary rules relevant to the questions raised are:

DR:2-105(A) which requires that a lawyer's fees be reasonable and adequately explained to the client.

DR:2-105(B) which requires that upon request a lawyer shall furnish to the client the basis or rate of the lawyer's fee.

DR:2-105(C) which permits (with exceptions) a fee contingent on the outcome of a matter for which the service is rendered.

DR:2-108(A)(3) which requires a lawyer to withdraw from representing a client if the lawyer is discharged by the client.

DR:2-108(D) which requires that upon termination of representation a lawyer shall refund any advance payment of fees that has not been earned.

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DR:9-102(A)(2) which permits the lawyer to deposit into the trust account funds which belong in part to the client and in part presently or potentially to the lawyer. The portion

> belonging to the lawyer must be withdrawn when earned unless the right to receive it is disputed by the client.
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> DR:9-102(B)(4) requiring a lawyer to promptly pay or deliver to the client or another all funds in the possession of the lawyer which the client is entitled to receive.

Prior Legal Ethics and Court Opinions: The following opinions and court cases have dealt with the issue of legal fees:

> Legal Ethics Opinions: LE Op. 189, LE Op. 214, LE Op. 510, LE Op. 528, LE Op. 568, LE Op. 646, LE Op. 681, LE Op. 1062, LE Op. 1246, LE Op. 1322, LE Op. 1370,
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> Case Law: *AFLAC, Inc. v. Williams*, 1994 Ga. LEXIS 466 (Ga. 1994); *County of Campbell v. Howard*, 133 Va. 19 (1922); *In the Matter of Edward M. Cooperman*, 83 N.Y.2d 465, 633 N.E.2d 1069, 611 N.Y.S.2d 465 (N.Y. 1994); *Heinzman v. Fine, Fine, Legum and Fine*, 217 Va. 958 (1977); *Mullins v. Richlands National Bank*, 241 Va. 447 (1991); *Tazwell Oil Co. v. United Virginia Bank*, 243 Va. 94 (1992); *Wong v. Kennedy*, 1994 U.S. Dist. LEXIS 6875 (E.D. N.Y 1994); *Wood v. Carwile*, 231 Va. 320 (1986).

Opinion: 1. Fees in General. An analysis of legal fees begins with the proposition that contracts for legal services are not construed as are other commercial contracts. Citing with approval *Drippner v. Mutz*, 205 Minn. 497, 287 N.W. 19 (1939) the Virginia Supreme Court has noted:

> It is a misconception to attempt to force an agreement between an attorney and his client into the conventional modes of commercial contracts. While such a contract may have similar attributes, the agreement is, essentially, in a classification peculiar to itself. Such an agreement is permeated with the paramount relationship of attorney and client which necessarily affects the rights and duties of each. *Heinzman v. Fine, Fine, Legum and Fine*, 217 Va. 958, 962 (1977).

The Disciplinary Rules set certain restrictions on all legal fees that cannot be avoided by the employment contract. Regardless of the agreed terms, the designation of the fee in the employment contract cannot alter the true nature of the fee and will not be dispositive in determining whether there is a violation of the Disciplinary Rules. Neither will the terminology used to describe the fee determine whether the fee has been earned by the lawyer or into which type of account the fee must be placed. LE Op. 510. A lawyer cannot by contract alter the nature or the ownership of fees received, nor can he legitimize a fee that is otherwise prohibited by the Disciplinary Rules.

DR:2-105 directs that a lawyer's fees be adequately explained to the client, and that the basis of the fee be furnished to the client. EC:2-21 suggests that there be a clear agreement as to the basis of the fee as soon as feasible after a lawyer has been employed. It also encourages the use of written contracts of employment as the preferred means of complying with the requirement of DR:2-105. A lawyer must, upon request, furnish to his client an itemized breakdown of legal fees, costs and related expenses paid by that client. LE Op. 214.

All fees must be reasonable. DR:2-105(A). In determining the reasonableness of the fee, one may take into account the lawyer's experience, ability and reputation, the nature of the

employment, the responsibility and effort involved and the results obtained. EC:2-20. It is also proper to consider such circumstances as the time consumed, the effort expended, the nature of the services rendered, and other attending circumstances. *Tazwell Oil Co. v. United Virginia Bank*, 243 Va. 94 (1992); *Mullins v. Richlands National Bank*, 241 Va. 447 (1991).

The Committee has previously opined that the fact that a fee is stated and agreed to in a contract is not dispositive of whether it is reasonable under the Code of Professional Responsibility. LE Op. 528. It is also important to note that because of the unique nature of the legal contract, a determination of the reasonableness of the fee is not necessarily limited to the circumstances which existed at the time of the agreement. The occurrence of unusual or extraordinary events not contemplated by the parties at the outset of the representation may effect the ultimate reasonableness of the agreed upon fee.

A client retains the absolute right to discharge the lawyer at any time for any reason or without reason. Disciplinary Rule 2-110 imposes no restriction or condition on the client's right to discharge his lawyer. Even when the discharge constitutes a breach of the employment contract, the lawyer is entitled only to that portion of the fee that has been actually earned prior to the termination. LE Op. 681. When the attorney is discharged prior to the completion of the representation he may only recover the reasonable value of the services which he has rendered. He cannot recover for damages for the breach of the contract, and, in instances where the fee is contingent upon the outcome of the matter, the attorney may not recover the full agreed upon fee. He is entitled only to a recovery in *quantum meruit* for services actually rendered. *Heinzman, supra*. The *quantum meruit* determination must look to the reasonable value of the services rendered, not to the benefit received by the client. *Wood v. Carwile*, 231 Va. 320 (1986); *County of Campbell v. Howard*, 133 Va. 19 (1922).

Finally, if the lawyer is discharged by the client, he must refund to the client all advanced legal fees which have not been earned. DR:2-108(D).

2. Retainers. This Committee has on several occasions addressed the unique features of a retainer. The Committee is mindful, however, that the term is probably misused more often than not (a fault for which the Committee must accept some responsibility), to describe any type of advanced legal fees. As the Committee opined previously in LE Op. 1322, a retainer (or advance periodic payment) is a payment by a client to an attorney to insure the attorney's availability for future legal services and/or as consideration for his unavailability to a potential adverse party in the future. A retainer is not a pre-payment for legal services to be rendered in the future, and is thus distinguished from advanced legal fees. A retainer seeks to guarantee the client's right to secure the attorney's employment for representation of his interests in a matter which may arise in the future. This Committee has previously opined, and continues to believe that a retainer is not violative of the Disciplinary Rules. LE Op. 1178.

The Committee is further of the opinion that because retainers are paid to secure the availability of an attorney in the future, and not as payment for future legal services, retainers are earned when paid and become the property of the attorney upon receipt. Such fees are deemed earned by the lawyer at the time of payment in consideration for the lawyer's availability to the client and unavailability to potential adverse parties. LE Op. 1178. Because retainer fees are the property of the lawyer when paid, they may not be deposited into the attorney's trust account. DR:9-102(A).

The Committee recognizes that it is common practice for lawyers to accept fees described as retainers to secure the lawyer's future availability and agree to credit those fees against legal services to be provided in the future. The Committee is of the opinion that while such an arrangement is not improper, if the employment agreement provides for fees, regardless of their designation, to be applied against future services to be rendered by the attorney, the fee is not a retainer, but rather an advanced legal fee and must be handled as discussed below. LE Op. 510.

LE Op. 1178, LE Op. 1322 and LE Op. 1370 properly define and distinguish the terms "retainer" and "advanced legal fees". As noted previously, however, various other opinions have used the term "retainer" in a generic sense which often is inconsistent with its true meaning. Accordingly, to the extent, and only to the extent, that previous opinions, including LE Op. 186-A, LE Op. 558, LE Op. 646, LE Op. 681, LE Op. 1081, LE Op. 1117, LE Op. 1238, LE Op. 1246 and LE Op. 1318, have used the word "retainer" to describe a fee arrangement that is inconsistent with this opinion, they are overruled. *See generally*, L. Brickman and L. Cunningham, Nonrefundable Retainers Revisited, 72 NCL Rev. 1, 3-5 (1993).

3. Advanced Legal Fees. Fees paid in advance for particular legal services not yet performed are advanced legal fees regardless of the terminology used in the employment contract. Advanced legal fees are not violative of the Disciplinary Rules as long as they are properly deposited and identified as belonging to the client until earned. The Committee has consistently opined that the element of payment for future legal services differentiates advanced legal fees from a retainer. LE Op. 1322, LE Op. 1178. The two terms are not synonymous.

Because advanced legal fees do not belong to the lawyer until the services are rendered, it is the opinion of the Committee that they must be deposited in an identifiable account (trust account) and remain the property of the client until they are earned by the attorney. The Committee notes that in some situations, the employment contract may provide that a portion of an advanced legal fee is considered to be earned at the time it is paid. In this case the earned portion becomes the property of the lawyer and may not be deposited in the lawyer's trust account.

Upon termination of the representation it is the duty of the attorney to refund any portion of an advanced legal fee which has not been earned. In addition, all fees charged against the account must be reasonable and must be adequately explained to the client. DR:2-105(A).

4. Non-refundable Legal Fees. The Committee has previously opined and continues to be of the opinion that any fee arrangement involving advanced legal fees and providing for a non-refundable or minimum fee violates the Disciplinary Rules and is thus improper. LE Op. 1322 and LE Op. 1370. If the fee is an advance payment for legal services, as described above, it continues to be the property of the client. The fee must be deposited in a trust account and may only be paid over to the lawyer when and if it is earned. An advanced legal fee cannot, by employment contract or otherwise, be termed non-refundable without violating the Disciplinary Rules. See LE Op. 510, LE Op. 1246 and LE Op. 1322. And, as noted above, using the term "retainer" to describe what is, in reality, an advanced legal fee does not change the true nature of the fee, nor does it allow the fee to be considered non-refundable. *See Wong v. Kennedy*, 1994 U.S. Dist. LEXIS 6875 (E.D. N.Y 1994).

The Committee believes that the concept of a non-refundable or minimum fee paid in advance for specific legal services is violative of the Disciplinary Rules for the following reasons:

A. A non-refundable fee compromises the client's unqualified right to terminate the attorney client relationship and is violative of DR:2-108(A)(3). *See also In the Matter of Edward M. Cooperman*, 83 N.Y.2d 465, 633 N.E.2d 1069, 611 N.Y.S.2d 465 (N.Y. 1994). The client's absolute right to discharge a lawyer contained in DR:2-108(A)(3) would be of little value if the client must risk paying for services not rendered. Such a situation could force the client to continue the services of an attorney in whose integrity, judgment or capacity the client had lost confidence.

B. If the client discharges the lawyer prior to the fee being earned, the retention of a non-refundable fee would violate the attorney's responsibility to refund to a client any advanced fee that had not been earned. DR:2-108(D).

C. A fee that is not earned is per se an unreasonable fee. Thus the retention of an unearned non-refundable fee would result in the lawyer collecting an unreasonable fee in violation of DR:2-105(A).

5. Fixed Fee. The term fixed fee is used to designate a sum certain charged by a lawyer to complete a specific legal task. Because this type of fee arrangement provides the client with a degree of certainty as to the cost of legal services, it is to be encouraged.

A fixed fee is an advanced legal fee. It remains the property of the client until it is actually earned and must be deposited in the attorney's trust account. If the representation is ended by the client, even if such termination is without cause and constitutes a breach of the contract, the client is entitled to a refund of that portion of the fee that has not been earned by the lawyer at the time of the termination. LE Op. 681. In such circumstances, what portion of the fee has been earned requires a *quantum meruit* determination of the value of the lawyer's services in accordance with *Heinzman* and *County of Campbell v. Howard*, 133 Va. 19 (1922).

6. Contingency Fees. The Committee notes that DR:2-105(C) permits fees that are contingent on the outcome of a matter for which the service is rendered, except in criminal cases or other matters in which such a fee is prohibited by law. Contingent fees are generally ethically permissible in any legal matter that generates a *res* from which the fee can be paid, unless otherwise prohibited. One purpose of a contingent fee arrangement is to encourage a lawyer to accept a case which carries inherent risks of nonpayment of legal fees. This Committee has previously opined, and continues to believe that ministerial matters that carry no such risk, such as recovering funds that could be obtained by the client without the services of the lawyer, are not matters in which a contingent fee arrangement is proper, nor do they create the type of *res* from which a contingency fee may be paid. It would, therefore be improper for a lawyer to receive a contingent fee to recover medical compensation payments which an insurance carrier is contractually obligated to pay to the client. LE Op. 1461

The Council of the Virginia State Bar has opined that, except in extremely rare situations, it is ethically improper for an attorney to enter into a contingent fee arrangement in family law and domestic relations cases. LE Op. 189. “Because of the human relationships involved and the unique character of the proceedings, contingent fee arrangements in domestic relations cases are rarely justified.” EC:2-22. Thus it would be improper for an attorney to enter into a contingent fee agreement to represent a divorced spouse in a claim against her husband's military retirement pay.

LE Op. 568. It would similarly be improper to enter into a fee agreement where the attorney's fee would consist of a percentage of a lump sum property settlement. LE Op. 423.

This Committee has opined that only where the following four factors exist may a contingent fee agreement be employed in a domestic relations matter:

1. There has been the passage of a sufficient length of time so as to preclude the continued existence of any meaningful human relationship which might be undermined by litigation handled on a contingent fee basis;

2. The client is not able to pay reasonable attorney's fees charged on an hourly or fixed basis;

3. Any attorney's fees awarded by the court will be credited against the contingent fee; and

4. The contingent fee charged would be fair and reasonable under all the circumstances. LE Op. 189, LE Op. 405, LE Op. 423, LE Op. 588, LE Op. 667, LE Op. 850 and LE Op. 1062.

Contingency fee arrangements must state the method by which the fee is determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, expenses to be deducted from the recovery, and whether expenses are to be deducted before or after the contingent fee is calculated. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a closing statement showing the fee and the method of its determination.

Supreme Court Approved
November 2, 2016
Committee Opinion
November 22, 1994

Legal Ethics Committee Notes. – Rule 1.5(d)(1) and Comment [3a] codify the circumstances in which lawyers may handle family law matters on a contingent fee basis.

Rule 1.5(e) permits fee sharing between lawyers in different firms provided the client consents and the fee is reasonable. The referring attorney may charge a fee for referring a case to another lawyer without further participation in the client’s matter.

VIRGINIA:

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DON LEONARD SCOTT, JR. VSB Docket No. 22-010-126153

AGREED DISPOSITION
PUBLIC REPRIMAND WITHOUT TERMS

Pursuant to the Rules of the Supreme Court of Virginia, Part 6, § IV, ¶ 13-15.B.4, the Virginia State Bar, by Seth T. Shelley, Assistant Bar Counsel; Don Leonard Scott, Jr., Respondent; and Jon M. Babineau, Esq., and Kevin E. Martingayle, Esq., Counsel for Respondent, hereby enter into the following Agreed Disposition arising out of the referenced matter.

I. STIPULATIONS OF FACT

1. Respondent was admitted to the Virginia State Bar ("VSB") in June 2015. At all relevant times, Respondent was a member of the VSB.

STS, edit with consent of Respondent's counsel

2. In September 2020, Respondent was retained by Paul Voskanyan ("Complainant"). On September 15, 2022, Chris Bond ("Bond"), a friend of Voskanyan, paid an advanced legal fee of $5,000. Respondent presented a fee agreement to Bond that characterized the fee as a "non-refundable and earned upon receipt retainer."[1]

3. In late 2020 and early 2021, Bond met with Respondent three more times at Respondent's office and paid an additional $5,000 at each visit.

4. During the representation, Respondent did not deposit the funds received from Bond into a trust account and did not maintain disbursement journals or client ledgers. When interviewed, Respondent acknowledged he was not in compliance with RPC 1.15.

[1] Virginia Legal Ethics Opinion 1606 states that non-refundable fees and earned upon receipt advanced legal fees are per se unreasonable and thus a violation of RPC 1.5(a). *See* Virginia State Bar Standing Comm. on Legal Ethics, Legal Ethics Op. 1606 (1994) (Compendium Opinion, Va. Sup Ct. Approved (2016)) (attached as Exhibit 1). A "retainer seeks to guarantee the client's right to secure the attorney's employment for representation of his interests in a matter which may arise in the future" and is earned upon receipt. *Id.* Respondent was unaware of the distinction between an advanced legal fee and a retainer.

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(c) Record-Keeping Requirements. A lawyer shall, at a minimum, maintain the following books and records demonstrating compliance with this Rule:

(1) Receipts and disbursements journals for each trust account. These journals shall include, at a minimum: identification of the client or matter; date and amount of the transaction; name of the payor or payee; manner in which the funds were received, disbursed, or transferred; and current balance. A checkbook or transaction register may

be used in lieu of separate receipts and disbursements journals as long as the above information is included.

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* * *

(4) All records subject to this Rule shall be preserved for at least five calendar years after termination of the representation or fiduciary responsibility.

III. PROPOSED DISPOSITION

Accordingly, Assistant Bar Counsel and Respondent tender to a subcommittee of the First District Committee for its approval the Agreed Disposition of a Public Reprimand without Terms as representing an appropriate sanction if these matters were to be heard through an evidentiary hearing by the First District Committee.

If the Agreed Disposition is approved, the Clerk of the Disciplinary System shall assess costs.

Pursuant to Part 6, § IV, ¶ 13-30.B of the Rules of the Supreme Court of Virginia, Respondent's prior disciplinary record shall be furnished to the subcommittee considering this Agreed Disposition.

THE VIRGINIA STATE BAR

Seth T. Shelley
Assistant Bar Counsel

Don Leonard Scott, Jr., Esquire
Respondent

Jon M. Babineau, Esquire
Counsel for Respondent

Kevin Martingayle, Esquire
Counsel for Respondent

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> Legal Ethics Opinions: LE Op. 189, LE Op. 214, LE Op. 510, LE Op. 528, LE Op. 568, LE Op. 646, LE Op. 681, LE Op. 1062, LE Op. 1246, LE Op. 1322, LE Op. 1370,
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> Case Law: *AFLAC, Inc. v. Williams*, 1994 Ga. LEXIS 466 (Ga. 1994); *County of Campbell v. Howard*, 133 Va. 19 (1922); *In the Matter of Edward M. Cooperman*, 83 N.Y.2d 465, 633 N.E.2d 1069, 611 N.Y.S.2d 465 (N.Y. 1994); *Heinzman v. Fine, Fine, Legum and Fine*, 217 Va. 958 (1977); *Mullins v. Richlands National Bank*, 241 Va. 447 (1991); *Tazwell Oil Co. v. United Virginia Bank*, 243 Va. 94 (1992); *Wong v. Kennedy*, 1994 U.S. Dist. LEXIS 6875 (E.D. N.Y 1994); *Wood v. Carwile*, 231 Va. 320 (1986).

Opinion: 1. Fees in General. An analysis of legal fees begins with the proposition that contracts for legal services are not construed as are other commercial contracts. Citing with approval *Drippner v. Mutz*, 205 Minn. 497, 287 N.W. 19 (1939) the Virginia Supreme Court has noted:

> It is a misconception to attempt to force an agreement between an attorney and his client into the conventional modes of commercial contracts. While such a contract may have similar attributes, the agreement is, essentially, in a classification peculiar to itself. Such an agreement is permeated with the paramount relationship of attorney and client which necessarily affects the rights and duties of each. *Heinzman v. Fine, Fine, Legum and Fine*, 217 Va. 958, 962 (1977).

The Disciplinary Rules set certain restrictions on all legal fees that cannot be avoided by the employment contract. Regardless of the agreed terms, the designation of the fee in the employment contract cannot alter the true nature of the fee and will not be dispositive in determining whether there is a violation of the Disciplinary Rules. Neither will the terminology used to describe the fee determine whether the fee has been earned by the lawyer or into which type of account the fee must be placed. LE Op. 510. A lawyer cannot by contract alter the nature or the ownership of fees received, nor can he legitimize a fee that is otherwise prohibited by the Disciplinary Rules.

DR:2-105 directs that a lawyer's fees be adequately explained to the client, and that the basis of the fee be furnished to the client. EC:2-21 suggests that there be a clear agreement as to the basis of the fee as soon as feasible after a lawyer has been employed. It also encourages the use of written contracts of employment as the preferred means of complying with the requirement of DR:2-105. A lawyer must, upon request, furnish to his client an itemized breakdown of legal fees, costs and related expenses paid by that client. LE Op. 214.

All fees must be reasonable. DR:2-105(A). In determining the reasonableness of the fee, one may take into account the lawyer's experience, ability and reputation, the nature of the

employment, the responsibility and effort involved and the results obtained. EC:2-20. It is also proper to consider such circumstances as the time consumed, the effort expended, the nature of the services rendered, and other attending circumstances. *Tazwell Oil Co. v. United Virginia Bank*, 243 Va. 94 (1992); *Mullins v. Richlands National Bank*, 241 Va. 447 (1991).

The Committee has previously opined that the fact that a fee is stated and agreed to in a contract is not dispositive of whether it is reasonable under the Code of Professional Responsibility. LE Op. 528. It is also important to note that because of the unique nature of the legal contract, a determination of the reasonableness of the fee is not necessarily limited to the circumstances which existed at the time of the agreement. The occurrence of unusual or extraordinary events not contemplated by the parties at the outset of the representation may effect the ultimate reasonableness of the agreed upon fee.

A client retains the absolute right to discharge the lawyer at any time for any reason or without reason. Disciplinary Rule 2-110 imposes no restriction or condition on the client's right to discharge his lawyer. Even when the discharge constitutes a breach of the employment contract, the lawyer is entitled only to that portion of the fee that has been actually earned prior to the termination. LE Op. 681. When the attorney is discharged prior to the completion of the representation he may only recover the reasonable value of the services which he has rendered. He cannot recover for damages for the breach of the contract, and, in instances where the fee is contingent upon the outcome of the matter, the attorney may not recover the full agreed upon fee. He is entitled only to a recovery in *quantum meruit* for services actually rendered. *Heinzman, supra*. The *quantum meruit* determination must look to the reasonable value of the services rendered, not to the benefit received by the client. *Wood v. Carwile*, 231 Va. 320 (1986); *County of Campbell v. Howard*, 133 Va. 19 (1922).

Finally, if the lawyer is discharged by the client, he must refund to the client all advanced legal fees which have not been earned. DR:2-108(D).

2. Retainers. This Committee has on several occasions addressed the unique features of a retainer. The Committee is mindful, however, that the term is probably misused more often than not (a fault for which the Committee must accept some responsibility), to describe any type of advanced legal fees. As the Committee opined previously in LE Op. 1322, a retainer (or advance periodic payment) is a payment by a client to an attorney to insure the attorney's availability for future legal services and/or as consideration for his unavailability to a potential adverse party in the future. A retainer is not a pre-payment for legal services to be rendered in the future, and is thus distinguished from advanced legal fees. A retainer seeks to guarantee the client's right to secure the attorney's employment for representation of his interests in a matter which may arise in the future. This Committee has previously opined, and continues to believe that a retainer is not violative of the Disciplinary Rules. LE Op. 1178.

The Committee is further of the opinion that because retainers are paid to secure the availability of an attorney in the future, and not as payment for future legal services, retainers are earned when paid and become the property of the attorney upon receipt. Such fees are deemed earned by the lawyer at the time of payment in consideration for the lawyer's availability to the client and unavailability to potential adverse parties. LE Op. 1178. Because retainer fees are the property of the lawyer when paid, they may not be deposited into the attorney's trust account. DR:9-102(A).

The Committee recognizes that it is common practice for lawyers to accept fees described as retainers to secure the lawyer's future availability and agree to credit those fees against legal services to be provided in the future. The Committee is of the opinion that while such an arrangement is not improper, if the employment agreement provides for fees, regardless of their designation, to be applied against future services to be rendered by the attorney, the fee is not a retainer, but rather an advanced legal fee and must be handled as discussed below. LE Op. 510.

LE Op. 1178, LE Op. 1322 and LE Op. 1370 properly define and distinguish the terms "retainer" and "advanced legal fees". As noted previously, however, various other opinions have used the term "retainer" in a generic sense which often is inconsistent with its true meaning. Accordingly, to the extent, and only to the extent, that previous opinions, including LE Op. 186-A, LE Op. 558, LE Op. 646, LE Op. 681, LE Op. 1081, LE Op. 1117, LE Op. 1238, LE Op. 1246 and LE Op. 1318, have used the word "retainer" to describe a fee arrangement that is inconsistent with this opinion, they are overruled. *See generally*, L. Brickman and L. Cunningham, Nonrefundable Retainers Revisited, 72 NCL Rev. 1, 3-5 (1993).

3. Advanced Legal Fees. Fees paid in advance for particular legal services not yet performed are advanced legal fees regardless of the terminology used in the employment contract. Advanced legal fees are not violative of the Disciplinary Rules as long as they are properly deposited and identified as belonging to the client until earned. The Committee has consistently opined that the element of payment for future legal services differentiates advanced legal fees from a retainer. LE Op. 1322, LE Op. 1178. The two terms are not synonymous.

Because advanced legal fees do not belong to the lawyer until the services are rendered, it is the opinion of the Committee that they must be deposited in an identifiable account (trust account) and remain the property of the client until they are earned by the attorney. The Committee notes that in some situations, the employment contract may provide that a portion of an advanced legal fee is considered to be earned at the time it is paid. In this case the earned portion becomes the property of the lawyer and may not be deposited in the lawyer's trust account.

Upon termination of the representation it is the duty of the attorney to refund any portion of an advanced legal fee which has not been earned. In addition, all fees charged against the account must be reasonable and must be adequately explained to the client. DR:2-105(A).

4. Non-refundable Legal Fees. The Committee has previously opined and continues to be of the opinion that any fee arrangement involving advanced legal fees and providing for a non-refundable or minimum fee violates the Disciplinary Rules and is thus improper. LE Op. 1322 and LE Op. 1370. If the fee is an advance payment for legal services, as described above, it continues to be the property of the client. The fee must be deposited in a trust account and may only be paid over to the lawyer when and if it is earned. An advanced legal fee cannot, by employment contract or otherwise, be termed non-refundable without violating the Disciplinary Rules. See LE Op. 510, LE Op. 1246 and LE Op. 1322. And, as noted above, using the term "retainer" to describe what is, in reality, an advanced legal fee does not change the true nature of the fee, nor does it allow the fee to be considered non-refundable. *See Wong v. Kennedy*, 1994 U.S. Dist. LEXIS 6875 (E.D. N.Y 1994).

The Committee believes that the concept of a non-refundable or minimum fee paid in advance for specific legal services is violative of the Disciplinary Rules for the following reasons:

A. A non-refundable fee compromises the client's unqualified right to terminate the attorney client relationship and is violative of DR:2-108(A)(3). *See also In the Matter of Edward M. Cooperman*, 83 N.Y.2d 465, 633 N.E.2d 1069, 611 N.Y.S.2d 465 (N.Y. 1994). The client's absolute right to discharge a lawyer contained in DR:2-108(A)(3) would be of little value if the client must risk paying for services not rendered. Such a situation could force the client to continue the services of an attorney in whose integrity, judgment or capacity the client had lost confidence.

B. If the client discharges the lawyer prior to the fee being earned, the retention of a non-refundable fee would violate the attorney's responsibility to refund to a client any advanced fee that had not been earned. DR:2-108(D).

C. A fee that is not earned is per se an unreasonable fee. Thus the retention of an unearned non-refundable fee would result in the lawyer collecting an unreasonable fee in violation of DR:2-105(A).

5. Fixed Fee. The term fixed fee is used to designate a sum certain charged by a lawyer to complete a specific legal task. Because this type of fee arrangement provides the client with a degree of certainty as to the cost of legal services, it is to be encouraged.

A fixed fee is an advanced legal fee. It remains the property of the client until it is actually earned and must be deposited in the attorney's trust account. If the representation is ended by the client, even if such termination is without cause and constitutes a breach of the contract, the client is entitled to a refund of that portion of the fee that has not been earned by the lawyer at the time of the termination. LE Op. 681. In such circumstances, what portion of the fee has been earned requires a *quantum meruit* determination of the value of the lawyer's services in accordance with *Heinzman* and *County of Campbell v. Howard*, 133 Va. 19 (1922).

6. Contingency Fees. The Committee notes that DR:2-105(C) permits fees that are contingent on the outcome of a matter for which the service is rendered, except in criminal cases or other matters in which such a fee is prohibited by law. Contingent fees are generally ethically permissible in any legal matter that generates a *res* from which the fee can be paid, unless otherwise prohibited. One purpose of a contingent fee arrangement is to encourage a lawyer to accept a case which carries inherent risks of nonpayment of legal fees. This Committee has previously opined, and continues to believe that ministerial matters that carry no such risk, such as recovering funds that could be obtained by the client without the services of the lawyer, are not matters in which a contingent fee arrangement is proper, nor do they create the type of *res* from which a contingency fee may be paid. It would, therefore be improper for a lawyer to receive a contingent fee to recover medical compensation payments which an insurance carrier is contractually obligated to pay to the client. LE Op. 1461

The Council of the Virginia State Bar has opined that, except in extremely rare situations, it is ethically improper for an attorney to enter into a contingent fee arrangement in family law and domestic relations cases. LE Op. 189. “Because of the human relationships involved and the unique character of the proceedings, contingent fee arrangements in domestic relations cases are rarely justified.” EC:2-22. Thus it would be improper for an attorney to enter into a contingent fee agreement to represent a divorced spouse in a claim against her husband's military retirement pay.

LE Op. 568. It would similarly be improper to enter into a fee agreement where the attorney's fee would consist of a percentage of a lump sum property settlement. LE Op. 423.

This Committee has opined that only where the following four factors exist may a contingent fee agreement be employed in a domestic relations matter:

1. There has been the passage of a sufficient length of time so as to preclude the continued existence of any meaningful human relationship which might be undermined by litigation handled on a contingent fee basis;

2. The client is not able to pay reasonable attorney's fees charged on an hourly or fixed basis;

3. Any attorney's fees awarded by the court will be credited against the contingent fee; and

4. The contingent fee charged would be fair and reasonable under all the circumstances. LE Op. 189, LE Op. 405, LE Op. 423, LE Op. 588, LE Op. 667, LE Op. 850 and LE Op. 1062.

Contingency fee arrangements must state the method by which the fee is determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, expenses to be deducted from the recovery, and whether expenses are to be deducted before or after the contingent fee is calculated. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a closing statement showing the fee and the method of its determination.

Supreme Court Approved
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Legal Ethics Committee Notes. – Rule 1.5(d)(1) and Comment [3a] codify the circumstances in which lawyers may handle family law matters on a contingent fee basis.

Rule 1.5(e) permits fee sharing between lawyers in different firms provided the client consents and the fee is reasonable. The referring attorney may charge a fee for referring a case to another lawyer without further participation in the client’s matter.