

ATTORNEYS' FEES IN DOMESTIC RELATIONS CASES

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WRITTEN RETAINER AGREEMENT

A written retainer agreement is a virtual necessity in creating a successful attorney-client relationship. Describing the method used in calculating the client's legal fees, reduces the possibility of a subsequent misunderstanding. This agreement should be executed prior to the attorney becoming engaged to handle the case.

Many fee disputes could be avoided if the attorney is careful to communicate to the client in detail the nature of the services involved, as well as an explanation of the fees and other expenses that may be incurred. The fee may be a flat fee or a fee determined by various factors, typically including time and results accomplished. A definition of the other "costs" is especially important since the client may not realize that filing fees, deposition fees and expert witness fees are paid for by the attorney and must be reimbursed. Clarification of these terms at the outset will avoid further problems.

Many agreements provide for a retainer or advance payment of fees. The Arizona Rules of Professional Conduct provide that an attorney "may require an advance payment of a fee, but is obliged to return any unearned portion of the advance at the end of the relationship."

It is important that the client understand the fees the firm may charge. In the agreement it is also crucial to clarify which portion of the retainer is refundable and that portion which is non-refundable is considered earned in full upon its payment. Remember that the attorney's fees must be reasonable.

But what if the retainer is non-refundable? A recent New York case has held that despite a non-refundable retainer provision, the "client was entitled to a

refund from the attorney of the amount by which the advance payment pursuant to the retainer exceeded the reasonable value of the legal services rendered, prior to the client's discharge of the attorney."

The court further states:

"We view unenforceable any contractual provision which constrains a client from exercising his right to freely discharge his attorney. A retainer provision which requires a client to pay for legal services in advance, and which permits the attorney to retain the advance, irrespective of whether the services contemplated are rendered, necessarily has a chilling effect upon a client's right to freely discharge his attorney. Indeed, the larger the amount of the so-called "non-refundable" retainer, the more securely is the client held hostage to that payment.

Moreover, a "non-refundable" retainer may be viewed as a mechanism for liquidating damages for discharging an attorney at the amount by which the payment made on account exceeds the actual value of legal services rendered."

The dissenting opinion cites an Ohio case to the contrary. In considering the validity of such agreements, that court stated:

"The word "retainer" may contain different connotations depending on the agreement,....A retainer may be given to bind the attorney from representing another, to prevent him from taking a fee from the adverse party or for accepting the case.

The next issue is the fairness of the contract. While cases directly on point do not abound, it is the general rule, referred to in many text authorities, that, prior to employment and the formation of the fiduciary relationship, compensation for services may be fixed by contract; and in the

absence of fraud or overreaching, the contract will be enforced without the attorney showing it is fair and reasonable."

There is no Arizona case specifically addressing non-refundable retainers.

NECESSITY OF THE "REASONABLE FEE"

Arizona courts will not enforce attorney's fees, if they are found to be unreasonable. In determining the lawyers fee, Rule 1.5(a), of the Arizona Rules of Professional Conduct, requires that the following factors be considered to ensure that the total fee is reasonable. The factors include:

- "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."

These factors may also be included in the fee agreement for clarification.

CONTINGENT FEES IN THE DOMESTIC RELATIONS CASE

Contingent fee contracts in the area of domestic relations are generally not permissible. Rule 1.5(d)(1) of the Arizona Model Rules prohibits an attorney from entering into an agreement for, charge, or collect any fee in a domestic relations

matter, the payment or amount of which is contingent upon the securing of a divorce, or upon the amount of alimony, support or the amount of the property settlement. Courts generally view them as promotive of divorce and therefore contrary to public policy. This is premised on the idea that society has an interest in maintaining the family unit, or where differences have arisen, in affecting a reconciliation. It is therefore a violation of the ethics of the profession and an attorney is subject to discipline for using such a contract in a domestic relations case.

Ethical consideration 2-20 of the ABA Code of Professional Responsibility expressed that contingent fee arrangements are rarely justified in domestic relations cases due to the "human relationships involved and the unique character of the proceedings."

Actions of debt, such as those for past due alimony or child support payments, do not fall under this limitation. A contingent fee contract made under these circumstances does not involve vitiating considerations contrary to public policy or constitute an agreement "promotive of divorce." Such an agreement does not bring about the "alienation of husband and wife by offering a stranger a premium to advise dissolution of the marriage ties." The reasons for condemning a contingent fee contract in a divorce action do not exist in an action of debt.

Where contingent fees are appropriate, the Arizona Model Rule 1.5(c) requires that contingent fee agreements be in writing. It further requires that the agreement include the method by which the fee is to be determined, including the percentage(s) that shall accrue to the attorney in the event of settlement, trial or appeal, other expenses to be deducted, as well as whether these expenses will be deducted before or after the contingent fee is calculated. The Rule further provides that at the conclusion of the matter, the attorney must provide the client

with a written statement stating the outcome of the matter, and if there is a recovery, showing the remittance to the client and the method of its determination.

An attorney under a contingent fee contract who is discharged prior to fulfillment of the contract is entitled to remuneration for the reasonable value of his services.

WHEN ATTORNEY'S FEES SHOULD BE AWARDED

A.R.S. 25-324 states in part:

"The court from time to time, after considering the financial resources of both parties, may order a party to pay a reasonable amount to the other party for costs and expenses of maintaining or defending any proceeding under this chapter...."

This statute provides for a discretionary award of a reasonable amount for costs and expenses based upon the financial resources of the parties. The primary focus of the statute is on the relative ability of the parties to pay costs incurred in the proceedings and to insure the poorer party a remedy. If a party is found to be financially able to pay for his or her own attorney's fees, the statutory prerequisite has not been met. Consequently, their spouse will not be required to pay for their attorney's fees.

The statute was not designed to punish the litigants, and does not require the party requesting attorney's fees to have prevailed in the litigation. Under A.R.S. 25-324, the sole consideration for the awarding of attorney's fees is the "financial resources" of the parties.

ATTORNEY LIENS

Where permitted by local law, an attorney may acquire a lien to secure the attorney's fees or expenses. Rule 1.8(J)(1), Arizona Model Rules of Professional Responsibility, DR5-103 (A)(1) ABA Code of Professional Responsibility. Two

types of attorney's liens that have been recognized in American jurisdictions are "charging" and "retaining" liens. Arizona case law has addressed both.

"Charging" liens are non-possessory but give the attorney the right to have any fund or recovery in the case applied to the payment of his or her fees. Arizona courts have held that such a lien arises only when it appears that the parties looked to the fund itself for the payment of the attorney's fees. This is inapplicable to divorce cases.

The "retaining" lien like the "charging" lien, is a device for securing the payment of fees earned and the sums advanced by the attorney. A "retaining" lien is similar to a mechanics lien. An attorney has a possessory interest in the papers and other chattels of his client, which come into the attorney's possession in his or her professional capacity, Rule 1.8(J)(1) of Arizona Model Rules of Professional Responsibility. If the attorney loses possession, he loses the lien.

It is proper for the lien to apply to the attorney's "work product", such as his or her staff's research, notes and other internal memoranda concerning the case. The attorney's "work product" is clearly his property and remains as such until the debt has been satisfied. It is improper for the lien to attach to a document for a purpose inconsistent with the fixing of a lien upon it. For example, "if a client brings some book, document or other chattel to his lawyer for use as an exhibit at an impending trial, the client's purpose is inconsistent with the fixing of a lien upon the document."

A retaining lien does not apply to property given to the attorney for safekeeping. Furthermore, a court may order the attorney to produce the material for inspection where the interest of judicial administration so requires.

Case law holds that the lien is "defeated or lost when the attorney unjustifiably terminates his relationship with the client or when the attorney is justifiably discharged by the client." Where the discharge is not for cause or

where the withdrawal is not wrongful and does not prejudice the client, the attorney may retain the papers.

In summary, the law recognizes that the lien attaches only where the possessory right is consistent with the public policy, with the attorney's obligations to the client, as well as those to the court.

It is recommended, for propriety's sake, that a compromise or other arrangement to secure payment is reached, which would avoid the assertion of the attorney's lien rights. Such an arrangement is obviously preferable to a lawsuit

FILING SUIT AGAINST CLIENT FOR ATTORNEY'S FEES

Attorneys and their clients are encouraged to negotiate and agree upon compromises concerning fee disputes. Ethical consideration 2-23 of the ABA Code of Professional Responsibility advises attorneys to be zealous in avoiding disputes with clients about legal fees. The code further recommends that the attorney try to resolve the dispute amicably and not sue to collect, except "to prevent fraud or gross imposition by the client."

ABA Formal Opinion 250 (1943) upholds this practice, but without fervor. The committee suggests that suits to collect fees be avoided, since "ours is a learned profession, not a mere money getting trade." Comment 5, to Rule 1.5 of the Arizona Rules, urges attorneys to use arbitration or mediation services if they are available. The arbitration procedure will not end litigation between attorneys and clients involved in fee disputes, but it may provide both parties with a more economical way to settle such disputes.

WITHDRAWAL FOR NON-PAYMENT

If a client fails to remit the required attorney's fees or expenses, the attorney may seek to withdraw from the case. Rule 1.16(b)(4) of the Arizona Rules of Professional Conduct provides for permissive withdrawal if the client "fails to substantially fulfill an obligation to the lawyer regarding the lawyer's services and

has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled." Comment 8 of the Rule, further states that "a lawyer may withdraw if the client refuses to abide by the terms of an agreement relating to the presentation, such as an agreement concerning fees or court costs." Section (c) of Rule 1.16, provides an exception to this Rule. It states that "when ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation."

An attorney may file a motion requesting the right to withdraw under the Arizona Superior Court Rules. Rule 12(c) of the Arizona Superior Court, Uniform Rules of Practice states:

(c) Withdrawal and substitution. No attorney shall be permitted to withdraw, or be substituted, as attorney of record in any pending action except by order of court, supported by written application setting forth the reasons therefore together with the name and residence of the client, as follows:

(1) Where such application bears the written approval of the client, it shall be accompanied by a proposed written order and may be presented to the court ex parte. The withdrawing attorney shall give prompt notice of the entry of such order together with the name and residence of the client, to all other parties or their attorneys;

(2) Where such application does not bear the written approval of the client, it shall be made by motion and shall be served upon the client and all other parties or their attorneys;

(3) No attorney shall be permitted to withdraw as attorney of record after an action has been set for trial, unless there shall be endorsed upon the application thereof either the signature of an attorney stating that he is advised of the trial date and will be prepared for trial, or the signature of the client stating that he is

advised of the trial date and has made suitable arrangements to be prepared for trial.

Every attorney who files an answer in a case owes a duty to the court to either appear, to withdraw as an attorney, or to advise both the court and counsel that he will not appear and that judgment may be taken in his absence.

CONCLUSION

A written retainer agreement helps to avoid future disagreements between the attorney and the client. This agreement should be executed prior to the attorney becoming engaged to handle the case. It is crucial that the terms of the agreement are defined and explained to the client in detail. These suggestions will not only reduce the likelihood that a fee dispute will develop, but the attorney will be in a proper position to substantiate the fee.