

A professional legal corporation is retained by a client concerning an ongoing investigation which may lead to the client's indictment. The client signs a retainer agreement with the law firm and pays a substantial retainer upon engaging the firm. The retainer agreement provides that the client will not be billed until the firm has spent the necessary hours in excess of those covered under the original retainer amount. In addition, you have stated that the law firm's policy or agreement among the lawyers is that the fee generated by the case would be distributed by way of salary to all lawyers in the firm; not just those lawyers responsible for the case.

You have stated that, subsequent to undertaking the criminal representation in question, certain members withdraw from the firm and, at the client's request, the attorneys who withdrew from the firm were asked to continue the representation of the client. Just prior to the break-up of the firm, the hours expended by the attorneys amounted to approximately half of the retainer amount.

You wish to know whether, under the facts as you have stated them in the inquiry, there is any ethical restriction or proscription against the non-withdrawing firm members, who are not currently representing the client, enforcing the agreement to distribute all fees generated by the case among all members of the firm and not just among those working on the case.

The appropriate and controlling disciplinary rules relative to your inquiry are DR:2-105(D), DR:2-108(D) and DR:9-102(B)(4). Disciplinary Rule 2-105(D) is responsive to those instances in which the employment of additional counsel is contemplated or necessary. The Rule permits a division of fees between lawyers who are not of the same firm only if the client consents to the employment of additional counsel; both attorneys expressly assume responsibility to the client; and the client consents to the terms of the division of fees after full disclosure. Disciplinary Rule 2-108(D) provides in part that upon termination of the representation of a client, a lawyer shall take reasonable steps for the continued protection of a client's interests, including, in pertinent part, refunding any advance payment of fee that has not been earned. Similarly, DR:9-102(B)(4) states that a lawyer must promptly pay or deliver to the client or another as requested by the client the funds, securities, or other properties in the possession of the lawyer which such person is entitled to receive.

The Committee directs your attention to LE Op. 1178 in which the Committee made the distinction between an "advanced legal fee" and a "retainer." The Committee stated that the terms were not synonymous and that fees paid in advance for services on a specific matter, which are entrusted to the lawyer, are deemed the property of the client except for that which may be considered the property of the lawyer pursuant to DR:9-102(A)(2) and DR:9-102(D). However, a "retainer" or periodic payment made to an attorney to ensure his availability to the client is rightfully deemed the property of the lawyer or the law firm as consideration for the lawyer's unavailability to potential adversary parties. The Committee has previously opined that it is the duty of an attorney to refund so much of a retainer fee as has not been earned by performance of the services for which the attorney was retained. (See LE Op. 646, LE Op. 510, LE Op. 988 and *Heinzman v. Fine, Fine, Legum and Fine*, 217 Va. 958 (1977).) In addition, LE Op. 681 states in part that an attorney who is paid a substantial portion of an agreed fee in a criminal matter and whose

services are terminated prior to the conclusion of the case must, upon demand by the client, provide an accounting of fees received and expended, which fees claimed must be reasonable. (See DR:9-102, DR:2-105(A) and (B))

The Committee believes that, because of the splitting of the firm and upon the client requesting the continued legal representation by the withdrawing partners, the employment by the original firm under the retainer agreement would have been terminated. The Committee opines therefore that under DR:2-108(D) and DR:9-102(B)(4), provided that none of the members of the remaining firm are still representing the client, any portion of the retainer or advanced fee payment that had not been earned by the firm as compensation for legal services to the client must be returned to the client. Therefore, attempting to enforce the agreement with regard to the unearned fees in the possession of the original firm would be improper. Any sharing of fees between the non-withdrawing members of the firm and the attorneys representing the client in the criminal matter is permissible only if the requirements under DR:2-105(D) have been met.

Committee Opinion  
July 24, 1990