

# Ending the Attorney-Client Relationship

by John J. Brandt, Risk Manger

WE FREQUENTLY CREATE an attorney-client relationship with its attendant rights and responsibilities. But what of the termination of that relationship?

## Discharge by the Client—Rule 1:16(a)(3) Va. Rules of Professional Conduct (2007-08) (VRPC)

A client may discharge a lawyer at any time, regardless of cause of the engagement agreement, and that attorney's actual authority to represent the client ends. The relationship also ends when the client dies or when a corporate client no longer functions as a corporation.

The only condition upon the client's right to discharge is if the client matter is in court and the tribunal refuses to enter an order terminating representation or substituting new counsel. Rule 1:16(c) VRPC. Under that circumstance, the attorney must continue the representation to the best of his or her ability.

## Discharge by the Attorney

A lawyer may withdraw from representing a client so long as it can be accomplished without material adverse effect on the client's interests. Rule 1:16(b) VRPC. Specific grounds that may require termination of the relationship by the attorney include, but are not limited to:

- a client's persistent criminal and fraudulent activity;
- the use of the lawyer's services to perpetuate a crime or fraud;
- a client's actions that the attorney considers repugnant or imprudent;
- a client's failure to fulfill a substantial financial or other obligation that the attorney has previously

warned the client could lead to attorney withdrawal; or

- an irreparable breakdown of the attorney-client relationship due to the client's difficult behavior.

Of course, if the matter handled by the attorney is in suit, the attorney must seek the entry of an order permitting his withdrawal or substitution of other counsel.

Before withdrawing, the attorney should have a witnessed personal conference with the client during which the attorney clearly communicates the basis for the withdrawal.

An attorney has an obligation when he terminates the relationship to allow reasonable time to secure other counsel, to return all of the client's papers and property, and to refund all fees and costs not earned by the attorney. 1:16(d) VRPC. The attorney also must preserve the former client's confidences and not take unfair advantage of the client by abusing knowledge or trust acquired during the representation.

The attorney should memorialize termination of the attorney-client relationship with a "termination letter" that summarizes the services rendered by counsel and states the reasons for the termination. Such a letter will start the statute of limitations running for any alleged errors by the attorney.

## Attorney liens and calculating fees

An attorney may and should protect his entitlement to his fees upon the discharge by applying the attorney's lien statute, § 54.1-3932 Va. Code (1950), as amended. The question of a discharged attorney's entitlement to fees has created sometimes confusing legal and ethical opinions. *Heinzman v. Fine*, 217 Va. 958, 962-64, 234 S.E.2d 282, 285-86 (1977), holds that a contract for representation

between attorney and client does not compel the client to pay the agreed amount, even if the client discharges his attorney without cause. Rather, the court ruled that because the client always has the right to terminate his attorney under Rule 1:16(a)(3) VRPC, the attorney could not enforce a contingent fee contract. The court reversed the trial court that had enforced the contingent fee. Instead, the appellate court adopted the *quantum meruit* rule as "the most functional and equitable measure of recovery." The court did endorse the right of the attorney to protect his *quantum meruit* fee by the statutory lien process found in § 54.1-3932 Va. Code (1950), as amended. This *quantum meruit* rule should encourage all attorneys, including the plaintiff's bodily injury lawyers, to maintain careful track of their hours in the event that fee litigation ensues.

Legal Ethics Opinion 1812 (2005) addresses whether a plaintiff's attorney can enforce a clause in the standard fee agreement that values the attorney's services at a specific hourly rate if either side terminates the contract. (The opinion also addressed whether a contingency fee could be enforced and concluded that it could not, based on *Heinzman*). The opinion concludes that such an alternative fee arrangement is permissible so long as it is adequately explained to the client (Rules 1.4(b), 1.5(b) VRPC); so long as it is reasonable (Rule 1.5(a) VRPC); and so long as it does not unreasonably hamper the client's absolute right to discharge the lawyer (Rule 1:16(3) VRPC).

The opinion concludes that simply listing hourly fees in the representation agreement does not *ipso facto* create the basis for *quantum meruit* recovery. The opinion notes that *quantum meruit* is a common-law concept, but that Rule 1:5(a) VRPC includes eight factors that

may be considered in determining the reasonableness of a fee, including time and labor required, novelty and difficulty, customary fee charged, and *whether the fee is fixed or contingent.* (Emphasis added.)

Two subsequent cases, *Hughes v. Cole*, 251 Va. 3, 19-25, 465 S.E.2d 820, 829-31 (1996) and *Zelnick v. Adams*, 263 Va. 601, 612, 361 S.E.2d 711, 718 (2002), raise the real possibility that a trial court may rely on the fact that the parties had a contingent fee contract in fashioning the ultimate *quantum meruit* fee owed by the client. Although it is probably dicta, the *Zelnick* Court stated:

[N]othing should . . . preclude the trier of fact from fashioning an award [of attorney's fees] appropriate to the unique circumstances of

the case, *including a contingent award at an appropriate percentage. Id.* (Emphasis added.)

Unfortunately for the attorney, subsequent litigation barred his claim. *Zelnick v. Adams*, 269 Va. 117, 606 S.E.2d 843 (2005).

The bottom line appears to be that listing an hourly fee and a contingent fee in the representation agreement does not guarantee that they will be the basis for a *quantum meruit* recovery, but neither are they summarily excluded.

Attorneys should remember that they cannot ethically retain a client's file when they are discharged, even if the client owes costs and fees. Rule 1:16(e) VRPC; *see also* Legal Ethics Opinion 1690 (1997).

## Conclusion

Either the client or the attorney may terminate the attorney-client relationship. Careful advice to the client and good draftsmanship of the representation agreement will be extremely helpful if the agreement is terminated and legal and ethical issues develop over what *quantum meruit* fee is owed to the attorney.

*Virginia lawyers can reach John Brandt at (800) 215-2854 for a free consultation on any risk management issues.*