Don't Impair Your Client's Right to Fire You

Our ethics rules provide that clients have an absolute right to fire us (politely known as "terminating the representation"), with or without cause.[1] This may sometimes lead to situations that can unfairly threaten a lawyer's ability to be paid for any obvious benefits conferred upon the former client prior to termination. Over the years, lawyers have attempted, through their fee agreements, to avoid such occasions—albeit with mixed results, as demonstrated below.

The usual case involving the enforceability of agreements concerning unpaid fees at the time the lawyer–client relationship ends is when the lawyer is working on a contingent fee basis.[2] Most of these cases turn on whether the lawyer, in attempting to protect himself from being stiffed, also may have included terms that have the effect of discouraging, impairing, "chilling" or penalizing the client from taking advantage of the client's absolute right to terminate before the contingency (recovery) has occurred. Because the test is an objective one, form in these instances can sometimes be just as important as substance.

Let's start with an Arizona ethics opinion.[3] Although the rules and their comments have been amended several times since the opinion was published in 1994, the precepts upon which it was based still apply for our purposes. There, the inquiring lawyer had a Personal Injury Employment Agreement that provided, in pertinent part:

> Under the law, the client has the power, but not necessarily the contract right, to discharge their attorney at any time. It is the intent of the parties herein that the client's right to discharge [the lawyer] be limited, to the extent possible by law, to situations where there is good cause for his dismissal.

Ethics Opinions and the Rules of Professional Conduct are available at https://azbar.org/for-lawyers/ethics/

Citing ER 1.16 and its Comment [4], the opinion reiterates the rule that the client has a right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services, and cannot be circumvented by denominating the fee agreement as an "employment" contract, inferring that the client has hired the lawyer as an "employee" and limiting the occasions for termination of the "employment." The opinion states that such a provision would "likely discourage or deter a client" from discharging the lawyer and that the implied threat of a breach of contract action would act as an additional deterrent. The opinion concludes that the lawyer's attempt to limit the client's right to terminate their relationship was unethical because it would likely interfere with the client's right to have counsel of her choice.

A 1994 case from Georgia shows that the rule also may apply to non-contingent fee matters.[4] In that case, the lawyer had been retained by an insurance company under a seven-year agreement whereby the lawyer was to provide legal advice to the company on an "as needed" non-exclusive basis and was to be paid a monthly retainer for doing so. The lawyer was entitled to additional compensation on assigned projects that required an "extraordinary" amount of time and effort. The agreement further provided for automatic renewal of the representation for an additional five years unless terminated in the meantime and, more important, provided that if the company ended the representation, even for good cause, it agreed that it would pay the lawyer "as damages an amount equal to 50 percent of the sums due under the remaining terms, plus renewal of this agreement."

There was a change in the management after four years into the agreement, and the company attempted to terminate it through a declaratory judgment action challenging the validity of the damage provision. The lawyer counterclaimed, seeking more than $1 million in damages for breach of contract. After inconsistent rulings in the lower courts, the case finally found its way to the Georgia Supreme Court.

After discussing the fiduciary nature of the lawyer–client relationship and how it was manifested in the public policy requiring that a client must be free to end the relationship for any reason, the court found that the contested provision amounted to a "penalty" that "eviscerated" the client's absolute right to terminate the representation and refused to enforce it.

The bottom line here is that there are mistakes you can make in how you word your engagement letter that can leave you empty-handed in the event your client terminates the representation before it is completed as originally contemplated and in which you have provided a benefit that rightfully should be compensated. When in doubt, you might start by looking at the sample fee agreements found at the link to Practice 2.0 (Free Confidential Practice Management Help) on the State Bar website and its collection of practice forms.

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endnotes

1. ER 1.16 (Declining or Terminating Representation) at Comment [4], Arizona Rules of Professional Conduct, Rule 42, Ariz.R.S.Ct. *See also State Farm Mut. Ins. Co. v. St. Joseph's Hosp.*, 489 P.2d 837, 841 (Ariz. 1971).
2. Cases are collected in ABA/BNA Law. Man. of Prof. Conduct at ¶31:1007, and in Annotated Model Rules of Professional Conduct (ABA Center for Professional Responsibility, 9th ed. 2019) at 286.
3. Ariz. Ethics Op. 94-02 (Retainer Agreement; Representation; Fees and Files) (March 1994) and the cases cited therein.
4. *AFLAC Inc. v. Williams*, 444 S.E.2d 314 (Ga.1994).