

Ex 1

STATE OF MICHIGAN
IN THE SUPREME COURT

ATTORNEY GRIEVANCE COMMISSION,

Petitioner/Appellee,

Docket No.

vs.

Attorney Discipline Board
Case no. 06-36-GA

PATRICIA COOPER,

Respondent/Appellant.

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**AMICUS CURIAE BRIEF
OF THE MICHIGAN CHAPTER OF THE
AMERICAN ACADEMY OF MATRIMONIAL LAWYERS**

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STATEMENT OF THE BASIS OF JURISDICTION

This matter comes before the Court pursuant to MCR 9.122, which provides as follows:

“A party aggrieved, including the person who made a request for investigation, by a final order of discipline or dismissal entered by the board on review under MCR 9.118, may apply for leave to appeal to the Supreme Court under MCR 7.302 within 28 days after the order is entered. If a motion for reconsideration is filed before the board's order takes effect, the application for leave to appeal to the Supreme Court may be filed within 28 days after the board enters its order granting or denying reconsideration.”

In the underlying matter, the Attorney Discipline Board issued an Order dated September 28, 2007, and Appellant filed her Application for Leave to Appeal within twenty eight days, on October 12, 2007.

This Amicus Curiae brief comes before the Court pursuant to MCR 7.306(D).

STATEMENT OF QUESTIONS INVOLVED

- I. It is permissible for attorneys in the state of Michigan to charge nonrefundable special retainers subject to the reasonableness requirements of MRPC 1.5.
 - A. Nonrefundable special retainers are already established and permitted in Michigan.
 - B. Nonrefundable special retainers are necessary in Michigan to assure access by litigants of counsel of their choice.
 - C. Nonrefundable special retainer agreements are valid and enforceable contracts like any other contracts.

Appellant: "Yes"

Appellee: "No"

The Michigan Chapter of the American Academy of Matrimonial Lawyers: "Yes"

STATEMENT OF FACTS

Amicus Curiae counsel concurs with the statement of facts submitted by Appellant.

LEGAL BACKGROUND

There are two principal types of attorney-client retainers: “general retainers” and “special retainers.” Within the category of “special retainers” there are three sub-types of special retainers: “traditional retainers,” “minimum fees,” and “nonrefundable retainers.” Lester Brickman & Lawrence A. Cunningham, *Nonrefundable Retainers Revisited*, 72 N.C. L. Rev. 1 (1993) (hereinafter cited as “Brickman 1993”). The specific issue before the Court only pertains to the propriety of a lawyers charging nonrefundable special retainers in Michigan. This case does not address general retainers, traditional special retainers, or minimum fee special retainers.

I. General Retainers:

As recognized by the Attorney Discipline Board, a general retainer, also known as an “availability retainer” or “classic retainer,” is an agreement between an attorney and a client in which the client agrees to pay a fixed sum to the attorney in exchange for the attorney's promise to be available to perform any legal services (which may be of any kind or of a specified kind) that arise during a specified period. Lester Brickman & Lawrence A. Cunningham, *Nonrefundable Retainers: A Response to Critics of the Absolute Ban*, 64 U. Cin. L. Rev. 11, 17 (1995) (hereinafter cited as “Brickman 1995”). The general retainer fee, which is deemed earned at the time it is paid,¹ is given in exchange for availability and not

¹ “The conclusion that a general retainer is earned when paid has historically been based on the attorney's availability to the client. The justification for that

for the rendition of legal services. *Id.* Therefore, it is a charge separate from fees incurred for services actually rendered. *Id.* General retainers are not the subject of this case or this appeal.

II. Special Retainers:

As recognized by the Attorney Discipline Board, a special retainer is an agreement between an attorney and a client in which the client agrees to pay the attorney a specified fee in exchange for specified services to be rendered. *Id.* Consistent with the foregoing definition of special retainers, there are three sub-species of special retainers: “traditional retainers”, “minimum fees”, and “nonrefundable retainers”. *Id.*

A. Traditional Retainers:

Traditional retainers represent an advance payment for fees and costs for specific legal services and accompanying expenses. Such monies are not earned in full at the time representation of the client is undertaken, but rather these monies are deposited to the lawyer’s trust account and are billed against as the matter proceeds. Traditional retainers are not the subject of this case or this appeal.

B. Minimum Fees:

Minimum fees, also known minimum engagement fees, represent a minimum amount a lawyer will undertake to represent a client in a given matter irrespective of the total number of hours actually expended during the course of representing the client. *Id.*

conclusion has been the theory that lawyers make two sacrifices at the time of signing a general retainer agreement: they reallocate their time so that they can stand ready to serve the general retainer client, to the exclusion of other clients, and they give up their right to be retained by persons whose interests conflict with the general retainer client, thus again foregoing potential income. It is in this sense that the fee is deemed ‘earned when paid.’” Brickman 1995.

A minimum fee agreement is a forecast by the attorney of the minimum amount that a client can expect to pay in order for the attorney to represent the client to completion in the contemplated matter. *In re Cooperman*, 591 N.Y.S.2d 855, 856 (App. Div. 1993) and Brickman 1995. Minimum fee agreements typically provide that a lawyer will work on an hourly or fixed fee basis to complete a particular task. For example, the agreement may provide that, although the task will likely require twenty hours of work, even if it is completed in fewer hours, the fee will still be the twenty hour fee. The agreement may also provide, however, that the fee can be more than the minimum fee if the task requires more hours or effort than contemplated. *Id.* Minimum fees are to be deposited to the lawyer's trust account and billed against until such time as the case is concluded or the hourly charges exceed the minimum fee. As recognized by numerous commentators and cases, minimum fees raise no inherent ethical objections. In such a case, the client's right to discharge the lawyer prior to completion of the service, with liability only in *quantum meruit*, is unimpaired. *Id.* If the attorney is discharged prior to completion, but after entering into a "minimum fee" agreement, he or she is entitled to payment based on the value of the services rendered to that point. Minimum fees are not the subject of this case or this appeal.

C. Nonrefundable Retainers:

Nonrefundable special retainers, which are the lone subject of this case appeal, are fees paid to a lawyer by a client in advance of services to be rendered and denominated by the lawyer as nonrefundable in the event that the client terminates the relationship. *Id.* They are "a subspecies of the special retainer and have nothing in common with the

general retainer as defined in the narrow sense set forth above.” *Id.* Such fees are deemed earned at the time that they are paid.

ARGUMENTS

- I. IT IS PERMISSIBLE FOR ATTORNEYS IN THE STATE OF MICHIGAN TO CHARGE NONREFUNDABLE SPECIAL RETAINERS SUBJECT TO THE REASONABLENESS REQUIREMENTS OF MRPC 1.5.
 - A. NONREFUNDABLE SPECIAL RETAINERS ARE ALREADY ESTABLISHED AND PERMITTED IN MICHIGAN.

Pursuant to RI-10, which was released in April of 1989, nonrefundable special retainers are permissible and ethical in Michigan subject to each agreement meeting the requirements of MRPC 1.5 relative to such fees being reasonable. RI-10.

RI-10 recognizes the propriety and ethics of nonrefundable retainers, subject to the requirements that the fee be a reasonable fee. Specifically, RI-10 holds:

"In conclusion, where a client has solicited a lawyer's representation in complex litigation, and the client signs and understands a written fee agreement requiring payment of a large up-front "nonrefundable" retainer, then discharges the lawyer for reasons not attributable to the lawyer's misfeasance after the lawyer has expended resources and declines other employment in reliance on the agreement, it is not unethical for the lawyer to keep the entire retainer even though the amount kept exceeds what would have been earned on an hourly rate basis."

RI-10 also states: "Nor are nonrefundable retainer fee agreements unethical in other cases where compensation is primarily determined on an hourly rate basis."

As recognized in RI-10, nonrefundable retainers are not by definition impermissible or unethical.

"In actuality, a reasonable fee is never improper regardless of when collected, and therefore, agreements to pay for legal services in anticipation of performance are not per se unethical. Each retainer agreement must be judged in its own factual context by the eight touchstones of reasonableness contained in MRPC 1.5.

RI-10 clearly provides: “ Each retainer agreement must be judged in its own factual context by the eight touchstones of reasonableness contained in MRPC 1.5.”

In the instant matter the Attorney Discipline Board opined, and effectively legislated, that nonrefundable special retainers are no longer permissible or ethical in Michigan. In reaching its conclusion, the Attorney Discipline Board recognized that generally there are two types of retainers: “general retainers” and “special retainers”. As it could not reconcile where nonrefundable special retainers fit in the rubric with general retainers and special retainers, it concluded that they must then be impermissible and unethical. The Attorney Discipline Board failed to recognize that nonrefundable special retainers are one of the three recognized types of special retainers.

The Attorney Discipline Board’s reliance on R-7, in an effort to circumvent the holding of RI-10, is misguided, as the issue before the Court is not whether the Appellant should have deposited her nonrefundable special retainer to her trust account, but rather whether she was permitted to enter into a nonrefundable special retainer agreement.

For almost twenty years Michigan attorneys have relied on RI-10 when entering into thousands of nonrefundable special retainer agreements. Nothing in Michigan law or practice has changed that justifies the Attorney Discipline Board’s attempt to reverse RI-10 and impose a blanket prohibition on such agreements, even if they meet the “reasonableness” requirements of MRPC 1.5.

B. NONREFUNDABLE RETAINERS ARE NECESSARY IN MICHIGAN TO ASSURE ACCESS BY LITIGANTS TO COUNSEL OF THEIR CHOICE.

The Attorney Discipline Board, by ruling that attorneys cannot charge nonrefundable special retainers, let alone bill against nonrefundable special retainers, has acted in a way that will potentially deprive many litigants of being able to hire the attorneys of their choice.

Attorneys only have the capacity to take on so much work, and the decision to take on each new client affects each attorney's ability to take on other work. Thus, when an attorney takes on a new client, it is only fair that the attorney be entitled to a concomitant commitment from the client that the attorney will be appropriately compensated for taking on that client's matter, even if discharged shortly thereafter. Without nonrefundable special retainers, many lawyers will commence charging general retainers, which only insure the attorney's availability and against which no monies for services rendered are credited; or many attorneys will simply increase their rates to insure that by allocating his/her capacity to handle a client's case, the lawyer receives a minimum fee even if discharged by the client.

Nonrefundable special retainers, against which the lawyer credits a certain amount of hourly charges or a certain quantity of services, function not only to protect the aforesaid interests of attorneys, but also function to keep the services of various lawyers who will only accept certain cases based on the assurance of a particular fee available to the prospective clients. From a client's perspective, what is wrong with giving the client some added benefit against the initial fee? The decision of the Attorney Discipline is wholly nonsensical in this regard.

C. NONREFUNDABLE RETAINER AGREEMENTS ARE VALID AND ENFORCEABLE CONTRACTS LIKE ANY OTHER CONTRACTS.

As explicitly recognized in RI-10, "A fee agreement between a lawyer and a client is a contract like any other contract." Thus, being like any other contract between private parties that are entered into voluntarily and fairly, attorney-client fee agreements should be deemed valid and enforced in the courts.

In *Wilkie v. Auto-Owners Ins. Co.*, 469 Mich. 41, 51-52, 664 N.W.2d 776 (2003), this Court stated that it is a "bedrock principle of American contract law that parties are free to contract as they see fit, and the courts are to enforce the agreement as written absent some highly unusual circumstance, such as a contract in violation of law or public policy."

"The notion, that free men and women may reach agreements regarding their affairs without government interference and that courts will enforce those agreements, is ancient and irrefutable. It draws strength from common-law roots and can be seen in our fundamental charter, the United States Constitution, where government is forbidden from impairing the contracts of citizens, art. I, § 10, cl. 1. Our own state constitutions over the years of statehood have similarly echoed this limitation on government power. It is, in short, an unmistakable and ineradicable part of the legal fabric of our society. Few have expressed the force of this venerable axiom better than the late Professor Arthur Corbin, of Yale Law School, who wrote on this topic in his definitive study of contract law, *Corbin on Contracts*, as follows:

"One does not have 'liberty of contract' unless organized society both forbears and enforces, forbears to penalize him for making his bargain and enforces it for him after it is made."

In *Wilkie*, this Court further stated

"As this Court has previously stated, 'The general rule [of contracts] is that competent persons shall have the utmost liberty of contracting and that their agreements voluntarily and fairly made shall be held valid and enforced in the courts.' *Terrien*, supra at 71, 648 N.W.2d 602, quoting *Twin City Pipe Line Co. v. Harding Glass Co.*, 283 U.S. 353, 356, 51 S.Ct. 476, 75 L.Ed. 1112 (1931). Under this legal principle, the parties are generally free to agree to whatever they like, and, in most circumstances, it is beyond the authority

of the courts to interfere with the parties' agreement. *St. Clair Intermediate School Dist. v. Intermediate Ed. Ass'n*, 458 Mich. 540, 570-572, 581 N.W.2d 707 (1998).

In *Terrien v. Zwit*, 467 Mich. 56, 648 N.W.2d 602 (2002), this Court stated "absent some specific basis for finding them unlawful, courts cannot disregard private contracts and covenants in order to advance a particular social good." See also, *Johnstone v. Detroit, G H & M R Co*, 245 Mich. 65, 73-74, 222 N.W. 325 (1928).

The decision of the Attorney Discipline Board effectively limits to private parties' – the attorney and the client -- ability to voluntarily enter into a contract, the terms of which best suit their particular purposes. Such a prohibition is directly contrary to the most fundamental principles upon which American contract law was founded.

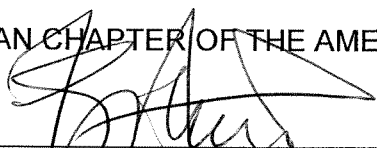
RELIEF REQUESTED

WHEREFORE, the Michigan Chapter of the American Academy of Matrimonial Lawyers respectfully requests that the decision of the Attorney Discipline Board be reversed and that the Court affirm RI-10 by holding that nonrefundable special retainers are ethical and permissible in Michigan provided that each such agreement meets the "reasonableness" requirements of MRPC 1.5.

SIGNATURES

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