

## Lawyer Ordered To Return Unearned Part of Retainer

BY LAZAR EMANUEL

Lawyer Ramirez consulted Lawyer Aidala in connection with a criminal indictment against him for filing false visa applications with the Immigration Service. When the two first met, Lawyer Aidala asked for a fee of \$100,000, not including trial, of which \$75,000 was paid in advance. Aidala asked Ramirez to sign a "Fee Agreement," but Ramirez did not sign it. A few days after their first meeting, Ramirez informed Aidala that he did not wish to retain him. Ramirez confirmed this by a fax in which he asked Aidala to return the \$75,000, less a fee for the time spent by Aidala on the matter.

Aidala refused to return any portion of the \$75,000, contending that it represented a "fixed fee for my availability" and constituted a general retainer. Ramirez sued to recover the money advanced and for sanctions. On a motion by Ramirez for summary judgment, Judge Shafer ordered the appointment of a Special Referee to determine the value of Aidala's services and directed Aidala to refund the \$75,000, less the value of his services as determined by the referee. *Ramirez v. Aidala*, Sup.Ct., NY Cty. (September 2002).

The court found that special non-refundable retainer agreements are void against public policy because they inhibit the client from asserting his right to terminate the lawyer/client relationship at any time with or without cause. The lawyer's remedy when he is discharged after performing only some of the services contemplated by the engagement is to recover the reasonable value of his services in quantum meruit.

The facts here do not fall within either of the two exceptions to this general rule:

- (1) Lawyer Aidala did not change his position in accepting the retainer or incur any expense; and (2) the engagement did not constitute a general retainer, which contemplates the performance of legal services for a fixed period "in relation to matters that may arise" over the period. Instead, the facts establish only a special retainer for a particular task and a particular case.

Special retainer agreements may not provide for non-refundable fees. A provision in a retainer agreement insisting on a non-refundable fee may result in disciplinary proceedings against the lawyer (citing *Matter of Corcoran*, 243 AD2d 86 (1st Dept. 1998)). Lawyer Aidala has not demonstrated that he was retained for any reason other than Ramirez' defense against the indictment.