UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

Case Number 20-20538
Honorable David M. Lawson

MATTHEW DARREL CHILDERS,

Defendant.
_____/

ORDER GRANTING IN PART MOTION TO WITHDRAW AND REFERRING THE CASE TO THE FEDERAL COMMUNITY DEFENDER FOR APPOINTMENT OF REPLACEMENT COUNSEL

This matter is before the Court on a motion by the defendant's two retained lawyers for leave to withdraw their appearances in this case. The Court has reviewed the submissions of the parties and heard oral argument on August 1, 2022. During the hearing, the government represented that it is prepared for trial and all discovery has been produced to the defense. The defendant's attorneys also indicated that they are prepared to proceed to trial on the scheduled date, but the defendant "unequivocally terminated the attorney-client relationship" "[o]n 8/26/22." ECF No. 70, PageID.514. (That allegation cannot be true, since that date has not yet come.) In court, the defendant said that he had hired his current lawyers based on their assurances that they "could do better" in negotiating a plea agreement than his previous attorney, but they had "done nothing." The defendant represented that he was unable to hire new counsel and expressed a desire for the Court to appoint a lawyer for him.

Defense counsel informed the Court that they undertook the representation for a fee paid, and the Court asked counsel to describe the fee arrangement and the work performed. The defendant's attorneys said that they had received a "flat fee" of $30,000, but because of the lack

of detail in their response, the Court directed them to file an accounting of all amounts paid and work performed during the representation to date.

On August 5, 2022, attorney Ryan Machasic filed a "response to the Court's *sua sponte* order to provide an accounting," in which he challenged the Court's authority to order an accounting and asserted that any order for return of a portion of the attorney's fee would deprive him of due process rights. Mr. Machasic lamented that he was "unable to locate any authority" for the Court's order. But he need only have looked to the Criminal Justice Act (CJA) to find it. *See* 18 U.S.C. § 3006A(f). Congress has authorized the Court to direct payment of "funds . . . available for payment from or on behalf of a person furnished representation . . . to the bar association or legal aid agency or community defender organization which provided [an] appointed attorney . . . or to the court for deposit in the Treasury as a reimbursement." *Ibid.* And the CJA authorizes the Court to conduct an "appropriate inquiry" to determine if any portion of an attorney's fee paid by a criminal defendant is unearned and therefore "available for payment." *See United States v. Pacheco-Romero*, 995 F.3d 948, 957 (11th Cir. 2021) (holding that "[t]he CJA contemplates a district court's *sua sponte* inquiry into the availability of funds," including, as in that case, where the funds constitute an unearned portion of an attorney's fee paid in advance).

Present defense counsels' predecessor in the case, attorney Robert S. Harrison, was appointed to represent the defendant under the CJA, and he has been paid fees under the CJA for his substantial work on the matter. In addition, it appears that successor counsel also will be appointed under the CJA. The costs for Mr. Harrison's work have been incurred, but the Court also has the authority to "order[] reimbursement and payment for future defense costs." *United States v. Robertson*, 980 F.3d 672, 677 (9th Cir. 2020).

On the question of unearned fees, attorney Ryan Machasic asserts that the funds paid constitute a "flat fee." Under Michigan law, fees paid by a client at the outset of representation may constitute a "general retainer," which is fully earned when paid, or an "advance fee," which must be earned before it belongs to the attorney. *In re Boffman*, No. 03-135-GA, at 8 (Mich. Atty. Discipline Bd., Sept. 28, 2005), http://data.adbmich.org/coveo/opinions/2005-09-28-03o-135.pdf#search=%22boffman%22 (explaining that "[a] general retainer (or 'classic retainer' or 'true retainer') is simply payment for the attorney's availability to the client and unavailability to other clients"). The Michigan Supreme Court has held that fixed or minimum fees are allowable and may be kept by the attorney when a written fee agreement states unambiguously that the fee is nonrefundable. *Grievance Adm'r, Att'y Grievance Comm'n v. Cooper*, 482 Mich. 1079, 757 N.W.2d 867 (2008). But it is also clear that under the ethical rules, "an attorney has an affirmative obligation to return any unearned portion of an advance payment made by the client for legal services." *Shelton & Assocs., P.C. v. Mayer*, No. 217456, 2001 WL 732397, at *4 (Mich. Ct. App. June 12, 2001). And "[i]f a lawyer and client have agreed to representation based upon a fixed fee, and the representation is interrupted before all contracted services have been rendered, the client will be entitled to a refund of some portion of the advanced fee." *Ibid.*

The fee agreement furnished by Mr. Machasic states that the fee is "earned upon receipt," with the exception of $6,000 that would not be "earned" until trial starts. But the agreement does not state clearly that the rest of the payment is nonrefundable, and in all events excessive fees are prohibited under Michigan law. Mich. R. Prof. Conduct 1.5(a) ("A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee."); *Speicher v. Columbia Twp. Bd. of Election Comm'rs*, 299 Mich. App. 86, 93, 832 N.W.2d 392, 396 (2012) (reaffirming that

Rule 1.5(a) "specifically prohibits a lawyer from entering into an agreement for an illegal or clearly excessive fee and from charging or collecting such a fee").

To determine whether the flat fee was excessive and unearned, the Court directed defense counsel to submit billing information to support the fee charged and collected. Mr. Machasic balked at that direction somewhat, stating that he did not keep billing records (as contemplated by the engagement agreement) and asserting that his response would be inhibited by the attorney-client privilege. The latter protest is not well-taken. Michigan decisions on point construe the attorney-client privilege narrowly and hold that billing records are privileged only to the extent that they may reveal the substance of confidential communications. *E.g.*, *Williams-Inner v. Liberty Mut. Ins. Co.*, No. 319217, 2015 WL 2213680, at *7 (Mich. Ct. App. May 12, 2015) (holding that "[t]hose parts of the billing records containing privileged information could be redacted. However, the remainder should have been made available to" the plaintiff challenging the reasonableness of an attorney fee award). Federal decisions are consistent in similarly holding that billing records are not privileged *per se*, and limited redactions are the appropriate measure to protect the substance of any stray confidential communications reflected in the records. *United States v. Calonge*, No. 20-523, 2022 WL 1805852, at *12 (S.D.N.Y. June 1, 2022) ("Attorney's billing records are not privileged in their entirety — only those portions that reveal such privileged information."); *Bernstein v. Mafcote, Inc.*, 43 F. Supp. 3d 109, 114 (D. Conn. 2014) ("The Second Circuit has consistently held that, absent special circumstances, client identity and fee information are not privileged.").

Even allowing for the fact that the accounting Mr. Machasic submitted is a reconstruction (since apparently no contemporaneous time records were submitted), there is a considerable lack of detail, and the time claimed raises questions. For instance, he allocates 55 hours for "client

visit," stating he is unsure of how many visits there were, but the defendant acknowledged that six visits occurred. That would break down into over nine hours per visit, which is unlikely. He states that 35 hours were spent on research, but no motions or other legal papers were filed on the docket since these attorneys took over for Mr. Harrison. He claims six hours for court appearances, but the only record of a court appearance since he came on the case (excepting his appearance seeking to withdraw) took place on May 26, 2022, and it was conducted via Zoom remote technology and lasted less than 15 minutes. To evaluate the reasonableness of the fee, the general approach used by federal courts is the lodestar method, which calls for multiplying reasonable hours expended by a reasonable hourly rate. *Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983); *Wallace v. Oakwood Healthcare, Inc.*, 954 F.3d 879, 899 (6th Cir. 2020). Defense counsel has not suggested an hourly rate. There is, therefore, no sound basis in the information submitted for the Court to render a full assessment of either the necessity of the work claimed, or the reasonableness of the fee charged.

Mr. Machasic also complains that an order requiring him to pay over fees would deprive him of due process. However, the process that is due simply calls for the Court to make an "appropriate inquiry" into the availability of funds. *Pacheco-Romero*, 995 F.3d at 957 (citing *United States v. Owen*, 963 F.3d 1040, 1053-54 (11th Cir. 2020)). And when those funds might consist of an unearned attorney's fee, that requirement is satisfied when the Court puts counsel on notice of the issue and directs him to submit an accounting. *Id.* at 958. The filing made in response to that directive makes clear that $6,000 of the $30,000 fee is unearned, but otherwise it is sketchy and leaves out an important component of the lodestar approach, which would assist in determining whether the balance of the fee — $24,000 — would be excessive if retained. Perhaps counsel would benefit from another chance at a proper submission.

Turning back to the motion to withdraw as counsel, the defendant made clear his dissatisfaction with present retained counsel, asserting that the relationship with his lawyers has deteriorated beyond the point of repair. He has asked for counsel to be appointed. He already established his indigency at the outset of the case, and the only determination to be made is whether there are other funds available to him that could defray the expense under the CJA. The Court, therefore, will permit present counsel to withdraw, subject to their continuing responsibility to the Court to furnish additional information, if they choose, on the question whether any portion of their retained fee must be paid into the Court's Registry.

Accordingly, it is **ORDERED** that the motion to withdraw by attorneys Ryan H. Machasic and Thomas Jacob Machasic (ECF No. 70) is **GRANTED** for the reasons stated here and on the record, subject the submission of additional information described above.

It is further **ORDERED** that if defense counsel wish to submit any additional information on whether any of the retained attorney's fee should be paid into the court under the CJA, they must do so **on or before August 25, 2022**.

It is further **ORDERED** that the Federal Community Defender shall appoint an attorney to represent the defendant under the Criminal Justice Act.

s/David M. Lawson
DAVID M. LAWSON
United States District Judge

Dated: August 12, 2022