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Douglas R. Richmond, *Understanding Retainers & Flat Fees,* 34 J. LEGAL PROF. 113 (2009) **(attached)**

Alec Rothrock, *The Forgotten Flat Fee: Whose Money is It & Where should It be Deposited?,* 1 FLA. COASTAL L.J. 293 (1999)

UNDERSTANDING RETAINERS AND FLAT FEES

*Douglas R. Richmond**

I. INTRODUCTION

The law generally recognizes lawyers' entitlement to reasonable fees for their services, as well as their right to recover such fees if clients unjustifiably balk at paying. For example, lawyers who do not have written fee agreements with clients, or who are discharged by clients without cause, may nonetheless be entitled to compensation in quantum meruit.[1] Clients' non-payment of fees generally justifies lawyers' withdrawal from representations, so long as the lawyers have satisfied any applicable ethics obligations.[2] Lawyers are allowed to charge clients reasonable interest on overdue fees if they specify that obligation in their engagement letters or fee agreements.[3] As a rule, lawyers may accept credit cards to pay fees.[4]

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1. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§ 39 - 40 (2000).

2. *See, e.g.,* Brandon v. Blech, 560 F.3d 536, 537-39 (6th Cir. 2009) (noting that firm gave client ample warning of its intent to withdraw and the withdrawal did not prejudice the client); Int'l Floor Crafts, Inc. v. Adams, 529 F. Supp. 2d 174, 176 (D. Mass. 2007) (finding that client's failure to pay fees constituted good case for withdrawal); MODEL RULES OF PROF'L CONDUCT R. 1.16(b)(5)-(6) (2008).

3. *See, e.g.,* Gold, Weems, Bruser, Sues & Rundell v. Granger, 947 So. 2d 835, 843-44 (La. Ct. App. 2006) (permitting lawyer to charge maximum interest rate allowed under Louisiana law);

Lawyers are permitted to assign their rights to collect unpaid fees to third parties even if affected clients might raise malpractice as a defense to payment.[5] In certain circumstances, a law firm may be able to enforce a liquidated damages provision in an engagement agreement.[6]

For years, lawyers seeking to secure payment have requested retainers from clients. Clients wishing to guarantee a favored lawyer's availability to assist them in anticipated transactions or expected litigation have long agreed to pay general retainers as a means of locking up their representation. For clients, fixed fees or flat fees are a reasonable alternative to hourly billing in some matters because of the resulting certainty in pricing legal services. Flat fees are especially common in criminal and matrimonial cases, simple transactional and trust and estate matters, and consumer bankruptcies. Yet, despite their long-standing and widespread use, many lawyers overlook or misunderstand the professional responsibility implications of the various types of retainers and they pay scant attention to those aspects of flat fees. This unfortunate lack of awareness is evidenced by the number of reported cases that retainers and flat fee agreements continuously spawn, and still more lawyer disciplinary matters involving these compensation forms that are resolved out of public sight. In summary, retainers and flat fees pose recurring professional responsibility challenges for unwary lawyers.

There are two categories of retainers: "general" and "special."[7] Special retainers are further divided into two subcategories: "security retainers" and "advance fee retainers" or "advance payment retainers."[8] Only general retainers are "retainers" in the genuine sense of the word;[9] special retainers are in fact fee advances.[10]

General retainers are sometimes called "true" or "classic" retainers.[11] General retainers are also referred to as "engagement fees" or "availability fees."[12] A general retainer ensures a lawyer's availability during a

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Schindler v. Nilsen, 770 A.2d 638, 642 (Me. 2001) (recognizing that interest rate of 1.5 % per month was reasonable and intended to encourage clients to pay bills on time).

4. *See, e.g.,* D.C. Bar, Legal Ethics Comm., Op. 348 (2009), http://www.dcbar.org/for_lawyers/ethics/legal_ethics/opinions/opinion348.cfm (specifying conditions under which lawyers may accept credit cards for fees).

5. Burnison v. Johnston, 764 N.W.2d 96, 101 (Neb. 2009).

6. *Compare* McQueen, Rains & Tresch, LLP v. Citgo Petroleum Corp., 195 P.3d 35, 45 (Okla. 2008) (upholding liquidated damages provision in flat fee agreement with a sophisticated client), *with* AFLAC, Inc. v. Williams, 444 S.E.2d 314, 316-17 (Ga. 1994) (rejecting liquidated damages provision).

7. Ryan v. Butera, Beusang, Cohen & Brennan, 193 F.3d 210, 216 (3d Cir. 1999).

8. *Id.*

9. *Id.*

10. *Id.*

11. Dowling v. Chi. Options Assocs., Inc., 875 N.E.2d 1012, 1018 (Ill. 2007).

12. Attorney Grievance Comm'n of Md. v. Kreamer, 946 A.2d 500, 508 n.16 (Md. 2008).

given period of time, or for a specified case or matter.[13] A lawyer may also earn a general retainer by agreeing to place the client's work atop the lawyer's list of priorities.[14] A client may pay a general retainer to bind a lawyer or law firm to represent it while simultaneously foreclosing the lawyer or law firm from representing an adversary or competitor.[15] In all these ways, a general retainer immediately benefits a client.[16] A general retainer does not embody a lawyer's entire compensation, however. If the lawyer's services are actually needed in the specified matter or at the agreed time, the lawyer will charge the client for those efforts in addition to the general retainer.[17]

To illustrate, assume that Company *A* and Company *B* are competitors. Company *A* aspires to acquire Company *B* in 2010 in what will likely be a difficult transaction. Lawyer *C* is the preeminent mergers and acquisitions lawyer in the city where *A* and *B* are headquartered and is known for his immense skill as a transactional lawyer. Company *A* recognizes that if it does not promptly engage Lawyer *C* in connection with its intended acquisition of Company *B*, either Company *B* or another interested party may, or that Lawyer *C* will otherwise be occupied with work for regular clients. Therefore, to secure Lawyer *C*'s representation in the anticipated transaction, Company *A* pays him a general retainer of $350,000. If Company *A* pursues the deal in 2010, Lawyer *C* will represent it and bill hourly for work on the project in addition to the general retainer. If Company *A* opts not to pursue the transaction, Lawyer *C* still keeps the $350,000, which was fully earned by agreeing to represent Company *A* in the matter.

In attempting to explain or understand general retainers, lawyers should not characterize or conceive them as either fee advances or as prepayment for future legal services because they are neither. General retainers are paid as consideration for a lawyer's employment, rather than for services rendered.[18] They are a form of option contract.[19] A general retainer retains its status as such even if the retainer agreement excludes certain tasks or types of legal work from the representation.[20]

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13. *Ryan*, 193 F.3d at 216; *Dowling,* 875 N.E.2d at 1018; *McQueen, Rains & Tresch, LLP,* 195 P.3d at 40 n.8.
14. *In re* Sather, 3 P.3d 403, 410 (Colo. 2000).
15. *Id.*
16. *See* State *ex rel.* Special Counsel for Discipline of the Neb. Sup. Ct. v. Fellman, 678 N.W.2d 491, 496 (Neb. 2004) (observing that general retainers immediately benefit clients).
17. Barron v. Countryman, 432 F.3d 590, 595 (5th Cir. 2005) (general, or classic retainers, are payment for employment, not actual services rendered).
18. *Id.*
19. Iowa Sup. Ct. Attorney Disciplinary Bd. v. Piazza, 756 N.W.2d 690, 696 (Iowa 2008).
20. Goldston v. Bandwidth Tech. Corp., 859 N.Y.S.2d 651, 657 (N.Y. App. Div. 2008).

A general retainer is deemed to be earned when paid, and it immediately becomes the lawyer's property,[21] regardless of whether the lawyer ever provides any services to the client.[22] The client loses any interest in the funds comprising a general retainer upon remittance.[23] This transfer of ownership is of great practical consequence. In short, because the lawyer earns the retainer funds upon payment, they are immediately available for use. The lawyer is not required to hold the funds in a trust account until they are earned. Indeed, the lawyer generally cannot deposit the funds into a trust account without risking professional discipline for commingling.

As a practical matter, general retainers are rare. Few lawyers enjoy the reputation or stature, or have the specialized practice, that allow them to charge general retainers. The types of representations that justify or require general retainers are also scarce. Courts hearing fee related controversies are therefore properly skeptical of general retainer claims.[24]

Special retainers are far more common than general retainers.[25] As already noted, special retainers are further divided into two subcategories: security retainers and advance fee retainers or advance payment retainers.[26] When clients and lawyers think of retainers, security retainers typically come to mind. A security retainer is intended to secure the client's payment of fees for future services that the lawyer is expected to perform.[27] The client paying a security retainer is simply advancing the law-

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21. There are two policy reasons for treating a general retainer as being earned on receipt and correspondingly denying the client the right to a refund if the client discharges the lawyer without cause. As explained above, the first is that the lawyer is being paid for availability, rather than for services. The second is that:

> [U]nder a general retainer an attorney commits himself to being available to a client over an extended period of time. . . . That advance commitment without limitation may be far more disruptive to the lawyer's practice than a special retainer, which is confined to service on a specified matter. Because the general retainer involves far greater uncertainty about the extent of the client's future demands on his time, the attorney may not be able to commit a significant portion of his time to other clients and may therefore have to accept substantial restrictions on the balance of his practice. . . . That added burden may justify greater protection for the attorney in such a circumstance if he is terminated without cause.

Kelly v. MD Buyline, Inc., 2 F. Supp. 2d 420, 446 (S.D.N.Y. 1998) (footnote omitted).

22. *In re* Equip. Servs., Inc., 290 F.3d 739, 746 (4th Cir. 2002); *Dowling,* 875 N.E.2d at 1018; *Piazza,* 756 N.W.2d at 696 (quoting Iowa Sup. Ct. Bd. of Prof'l Ethics & Conduct v. Apland, 577 N.W.2d 50, 54 (Iowa 1998)).

23. *Barron,* 432 F.3d at 595; *In re* King, 392 B.R. 62, 70 (Bankr. S.D.N.Y. 2008).

24. Joseph M. Perillo, *The Law of Lawyer's Contracts is Different*, 67 FORDHAM L. REV. 443, 450 (1998) (discussing trend away from enforcing general retainer agreements).

25. *Ryan*, 193 F.3d at 214 n. 7.

26. *Id.* at 216 n. 11.

27. *Dowling,* 875 N.E.2d at 1018.

yer fees for future services.[28] Indeed, security retainers are best thought of as fee advances.[29]

In a typical scenario, the lawyer who collects a security retainer draws it down pursuant to an agreed hourly rate as the lawyer earns the fees by performing legal services for the client.[30] Alternatively, the lawyer may consider retained funds to be earned when all services to which the retainer relates are completed.[31] Either way, retained funds remain the client's property until the lawyer applies them to charges for services that are actually performed.[32] Lawyers must, therefore, deposit security retainers in their trust accounts and keep the funds there until they are earned.[33] A lawyer must refund any unearned funds to the client upon discharge or at the completion of the engagement.[34]

So-called "evergreen retainers" are a type of security retainer.[35] Evergreen retainers come in two forms. As traditionally formulated, they differ from standard security retainers in the timing of their application to the lawyer's fees.[36] With a standard security retainer, the lawyer begins billing against the retainer at the outset of the representation.[37] An evergreen retainer, on the other hand, contemplates that the client will pay regularly and that the lawyer will not tap the retainer for payment until the final bill is due, or, in the case of a bankruptcy representation, until the court approves the final fee application.[38] Because the retainer is intact and those funds are unused until the representation concludes, the retainer is said to be "evergreen." An evergreen retainer is designed to minimize a lawyer's risk of nonpayment if the client's financial condition deteriorates over the course of the representation, or should the client for some other reason decline or be unable to pay the lawyer's fees as they come due.[39]

Alternatively, a lawyer may bill time against a security retainer and require that the client continually replenish it so that the lawyer always has

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28. Iowa Sup. Ct. Bd. of Prof'l Ethics & Conduct v. Frerichs, 671 N.W.2d 470, 476 (Iowa 2003).
29. *Ryan*, 193 F.3d at 216 (quoting *In re* Gray's Run Tech., Inc., 217 B.R. 48 (Bankr. M.D. Pa. 1997)).
30. *Id.* at 217.
31. *Id.* at 216.
32. *Barron,* 432 F.3d at 595-96; *In re King,* 392 B.R. at 70.
33. *Frerichs,* 671 N.W.2d at 476; *In re* Scimeca, 962 P.2d 1080, 1091-92 (Kan. 1998); Cluck v. Comm'n for Lawyer Discipline, 214 S.W.3d 736, 740 (Tex. App. 2007); Marcus, Santoro & Kozak, P.C. v. Wu, 652 S.E.2d 777, 781 (Va. 2007).
34. *Dowling,* 875 N.E.2d at 1018; *Frerichs,* 671 N.W.2d at 476.
35. *In re* Pan Am. Hosp. Corp., 312 B.R. 706, 709 (Bankr. S.D. Fla. 2004).
36. *Id.*
37. *Id.*
38. *In re Pan Am. Hosp. Corp.*, 312 B.R. at 709; *In re* Insilco Techs., Inc., 291 B.R. 628, 632 (Bankr. D. Del. 2003).
39. *In re Pan Am. Hosp. Corp.*, 312 B.R. at 711.

the full retainer as a hedge against nonpayment.[40] In this way the retainer is also considered evergreen, as the following example illustrates: Lawyer charges Client a $25,000 security retainer. Lawyer bills $10,000 in Month One and withdraws that amount from the law firm's trust account as fees earned. Lawyer then sends Client a $10,000 invoice to restore the retainer to $25,000. In Month Two, Lawyer bills $9,000, lowering the retainer to $16,000. Lawyer then sends Client an invoice for $9,000 to restore the retainer. So the arrangement goes until the representation concludes. At the time of final billing, Lawyer applies the retainer toward the amount due, either exhausting the retainer—and perhaps requiring further payment from Client—or keeping only that portion of the retainer that has been earned in the final billing cycle and refunding the rest to Client.

The second type of special retainer is the advance fee retainer, also known as an advance payment retainer.[41] An advance payment retainer is a present payment to a lawyer as compensation for the provision of specified legal services in the future.[42] A standard advance payment retainer is intended to compensate the lawyer for all work to be done on a matter, regardless of the time required or the complexity of the assignment.[43] It may also be used to compensate a lawyer for all work to be done on one aspect of a representation or a discrete component of a larger matter; again, regardless of the time required or complexity posed.[44] Advance payment retainers are better known as fixed fees or flat fees—the latter description probably being more common.[45]

A lawyer earns a flat fee by performing the services for which the fee was charged.[46] A flat fee is not a success fee.[47] A lawyer may earn a reasonable flat fee even if the representation is not as advantageous or beneficial as the client would have hoped,[48] as where, for example, the lawyer loses the case for which the fee was paid through no fault of her own.

Flat fees should never be confused with general retainers.[49] Again, a flat fee is a fee fully paid in advance for legal services to be rendered in the future.[50] A standard flat fee is intended to be the maximum fee

40. *Id.* at 709.
41. *Ryan*, 193 F.3d at 216 n.11.
42. *Barron*, 432 F.3d at 596; *Dowling,* 875 N.E.2d at 1018.
43. *Ryan*, 193 F.3d at 216 n. 11 (citing *In re* The Renfrew Ctr. of Fla., Inc., 195 B.R. 335, 338-389 (Bankr. E.D. Pa. 1996)).
44. *Id.* at 216.
45. Va. State Bar, Standing Comm. on Legal Ethics, LE Op. No. 1606, at 10 (1994) ("A fixed fee is an advanced legal fee") *available at* http://www.vsb.org/profguides/FAQ_leos/LEO1606.html.
46. *Id.*
47. *Id.* (contrasting "flat fees" with "contingency fees").
48. Conn. Eth. Op. 00-12, 2000 WL 1370793, at *3 (Conn. Bar Ass'n June 19, 2000).
49. *See* Va. State Bar, Standing Comm. on Legal Ethics, LEO 1606, at 3 (1994) (stating that the terms "advanced legal fees" and "retainers" are not synonymous).
50. *Id.*

charged to the client for the matter agreed upon.[51] The lawyer must perform the associated legal services to earn the flat fee.[52] In contrast, a general retainer is not a payment for legal services, nor is it a fee advance.[53] A client pays a general retainer simply to employ or engage the lawyer—the lawyer earns a general retainer even if the services are never needed.[54] If the lawyer's services are required, the lawyer will charge for them in addition to the general retainer already collected.[55]

A few courts have extended the term advance payment retainer beyond its intended meaning. According to these courts, an advance payment retainer contemplates that the client will pay in advance for some or all of the services that the lawyer is expected to perform, but more in the nature of a minimum fee rather than a flat fee.[56] This type of advance payment retainer supposedly differs from a security retainer in that ownership of the funds passes to the lawyer at the time of payment in exchange for the lawyer's commitment to provide legal services.[57] This is because the advance payment retainer is intended to represent an *advance payment* for future legal services rather than *security* against non-payment for those services.[58] This category of advance payment retainer originated outside the legal profession.[59] It is most commonly employed by lawyers representing clients in creditor-debtor matters. Indeed, advance payment retainers of this type are principally a creature of bankruptcy law where lawyers hope that by earning their fees upon receipt they can except them from the property of the bankruptcy estate and avoid the fee application process imposed by the bankruptcy code.[60]

The term advance payment retainer used in this fashion is sophistry. These are either flat fees or security retainers, and perhaps non-refundable security retainers at that.[61] If they are non-refundable security retainers,

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51. *Id.*
52. *Id.* at 10.
53. BLACK'S LAW DICTIONARY 1430 (9th ed. 2009).
54. *In re* Prod. Assocs., Ltd., 264 B.R. 180, 185 (Bankr. N.D. Ill. 2001).
55. *Ryan*, 193 F.3d at 216. (citing *In re* Gray's Run Tech., Inc., 217 B.R. 48 (Bankr. M.D. Pa. 1997)).
56. *In re* McDonald Bros. Constr., Inc., 114 B.R. 989, 1000 (Bankr. N.D. Ill. 1990).
57. *In re* Mortakis, 405 B.R. 293, 298-99 (Bankr. N.D. Ill. 2009); S.E.C. v. Butler, No. 2:00cv1827, 2005 WL 5905114, at *4 (Bankr. W.D. Pa. Dec. 29, 2005) (quoting *In re* Pannebaker Custom Cabinet Corp., 198 B.R. 453, 459 (Bankr. M.D. Pa. 1996)); *In re McDonald Bros.,* 114 B.R. at 1000.
58. *In re* Gray's Run Techs., Inc., 217 B.R. 48, 54 (Bankr. M.D. Pa. 1997).
59. *In re McDonald Bros.,* 114 B.R. at 1000.
60. *See In re* Armstrong, 234 B.R. 899, 903 (Bankr. E.D. Ark. 1999) (explaining different effects of pre-petition payments of advance payment retainers and security retainers).
61. *See In re* Datesman, No. 98-30369DWS, 1999 WL 608856, at **4-7 (Bankr. E.D. Pa. Aug. 9, 1999) (concluding that an advance payment retainer was a security retainer); *In re* Doors & More, Inc., 127 B.R. 1001, 1002 n.2 (Bankr. E.D. Mich. 1991) (finding no difference between advance payment retainers and security retainers under Michigan law).

courts rightly condemn them.[62] If they are flat fees, on the other hand, courts should so describe them. It is pointless to distinguish this category of advance payment retainers from security retainers on the basis that the former are fee advances while the latter are security against non-payment of fees because these are opposite sides of the same coin. No amount of rationalization by courts or self-interested reasoning by lawyers can distinguish such payments on an advance-versus-security basis. Security retainers are unquestionably fee advances, no matter their claimed purpose, and advance payment retainers are obviously intended to secure lawyers' payment in matters in which compensation cannot otherwise be assured.[63] To repeat, an advance payment retainer that is earned upon receipt can be only one of two things: a flat fee or a security retainer that is earned upon receipt.[64] An advance payment retainer that is really a security retainer earned upon receipt might be deposited in a lawyer's general account rather than a trust account, but it must be refundable to the client if the lawyer does not perform the services to which the retainer relates. Courts and lawyers should immediately do away with the misleading advance payment retainer terminology.

Understanding the professional responsibility aspects and implications of retainers and flat fees requires basic knowledge of applicable ethics rules. Part II of this article surveys key rules that courts and disciplinary authorities invoke when regulating lawyers' conduct in relation to retainers and flat fees. Part III analyzes the controversy over lawyers' attempts to charge non-refundable retainers. Non-refundable retainers are disfavored because they chill clients' right to discharge their lawyers. Moreover, because any fee may be reduced or ordered to be refunded if it is found to be unreasonable, describing a retainer or flat fee as non-refundable is misleading. Part IV examines the two most common problems in flat fee representations: (a) determining how or when such fees are earned and the associated trust account considerations; and (b) establishing reasonableness. Recognizing the confusion that accompanies the various types of retainers and the manner in which they are described, Part V examines recent efforts in Illinois to clarify lawyers' obligations concerning retainers. Finally, Part VI offers lawyers some recommendations for minimizing professional risk when charging retainers and flat fees.

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62. *See, e.g., In re Gray's Run,* 217 B.R. at 56 (striking down an advance payment retainer on the basis that it was a non-refundable special retainer and was therefore unethical).

63. *See In re* Datesman, No. 98-30369DWS, 1999 WL 608856 at *5 (Bankr. E.D. Pa. Aug. 9, 1999) (describing a security retainer as an advance fee intended to secure a lawyer's payment).

64. *See, e.g., Id.* (concluding that an advance payment retainer was a security retainer); *In re Gray's Run*, 217 B.R. at 54-55 (concluding that an advance payment retainer is a fee earned before legal services are performed).

II. APPLICABLE ETHICS RULES

Lawyers' and clients' rights relating to retainer agreements are a matter of contract law and, like any fee agreement, are subject to ethics rules.[65] Accordingly, any analysis of the professional responsibility aspects and implications of retainers and flat fees begins with the Model Rules of Professional Conduct.[66] While several rules potentially apply to lawyers' compensation arrangements depending on the facts, only Model Rule 1.5 focuses on fees. Rule 1.5(a) provides that "[a] lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses."[67] Before the 2002 amendments to the Model Rules, the Rule provided simply that "[a] lawyer's fee shall be reasonable."[68] The current language, which elaborates on lawyers' obligations with respect to reasonable fees, makes clear that lawyers cannot manipulate expense charges to their benefit or their clients' detriment, and generally affords a more precise basis for disciplining lawyers who overcharge their clients.[69]

Model Rule 1.5(a) lists eight factors to consider when weighing the reasonableness of a lawyer's fee:

> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
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> (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
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> (3) the fee customarily charged in the locality for similar legal services;
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> (4) the amount involved and the results obtained;
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> (5) the time limitations imposed by the client or by the circumstances;
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> (6) the nature and length of the professional relationship with the client;

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65. *In re* E-Z Serve Convenience Stores, Inc., 299 B.R. 126, 130 (Bankr. M.D.N.C. 2003).
66. MODEL RULES OF PROF'L CONDUCT (2008).
67. MODEL RULES OF PROF'L CONDUCT R. 1.5(a) (2008).
68. MODEL RULES OF PROF'L CONDUCT R. 1.5(a) (2001).
69. RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, LEGAL ETHICS: THE LAWYER'S DESKBOOK ON PROFESSIONAL RESPONSIBILITY § 1.5–1(a), at 144 (2007-08).

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.[70]

No single factor controls the reasonableness of a fee.[71] Not all factors are relevant in all cases.[72] The weight assigned to any given factor depends on the facts of the case.[73] Moreover, the Rule 1.5(a) factors are not exclusive.[74] Courts and disciplinary authorities may consider other factors in appropriate cases. The most obvious factor likely to be considered is the perceived quality of the lawyer's services, perhaps measured by the results obtained.

In analyzing the reasonableness of legal fees, courts and disciplinary authorities should consider the engagement as a whole.[75] A logical starting point is the parties' engagement letter or fee agreement. Courts regularly scrutinize engagement or retention agreements for signs of overreaching by lawyers.[76] A key element in evaluating the reasonableness of a fee is whether the lawyer disclosed to the client the "'material elements of the fee agreement and of the lawyer's billing practices.'"[77] Lawyers who have multiple clients in matters must provide appropriate disclosures and explanations to each of them.[78] Courts typically construe fee agreements from the perspective of a reasonable person in the client's circumstances,[79] and resolve any questions against the drafting lawyers.[80] This is

70. MODEL RULES OF PROF'L CONDUCT R. 1.5(a) (2001).

71. Rodriguez v. Ancona, 868 A.2d 807, 814 (Conn. App. Ct. 2005); Heng v. Rotech Med. Corp., 720 N.W.2d 54, 65 (N.D. 2006).

72. Twp. of W. Orange v. 769 Assocs., LLC, 969 A.2d 1080, 1088 (N.J. 2009).

73. McCabe v. Arcidy, 635 A.2d 446, 452 (N.H. 1993); *In re* Malone, 886 A.2d 181, 185 (N.J. Super. Ct. App. Div. 2005).

74. Nunn Law Office v. Rosenthal, 905 N.E.2d 513, 520 (Ind. Ct. App. 2009); Diamond Point Plaza Ltd. P'ship v. Wells Fargo Bank, N.A., 929 A.2d 932, 955 (Md. 2007); *Twp. of W. Orange,* 969 A.2d at 1088.

75. *See* Weatherford v. Price, 532 S.E.2d 310, 315 (S.C. Ct. App. 2000); Alexander v. Inman, 903 S.W.2d 686, 695 (Tenn. Ct. App. 1995); Lawyer Disciplinary Bd. v. Morton, 569 S.E.2d 412, 417 (W. Va. 2002).

76. *See, e.g., Weatherford*, 532 S.E.2d at 314-315 (expressing the importance of analyzing the engagement agreement for signs that the lawyers' fees are unreasonable); *Alexander*, 903 S.W.2d at 702-703 (holding that the jury should have been instructed to scrutinize the engagement agreement to determine whether the lawyer's fees were reasonable); *Lawyer Disciplinary Bd.*, 569 S.E.2d at 415 (stressing the importance of closely scrutinizing the entire engagement agreement when deciding on the issue of overreaching).

77. *In re* Disciplinary Proceedings Against Egger, 98 P.3d 477, 484 (Wash. 2004) (quoting a Washington disciplinary rule).

78. *See, e.g.,* Cunningham v. Ky. Bar Ass'n, 266 S.W. 3d 808, 810 (Ky. 2008) (holding that a lawyer has a duty to explain the fee agreement to each of multiple clients); Gallion v. Ky. Bar Ass'n, 266 S.W.3d 802, 804 (Ky. 2008) (holding that a lawyer has a duty to explain the fee agreement to each of multiple clients).

79. Cohen v. Radio-Elec. Officers Union, 679 A.2d 1188, 1196 (N.J. 1996).

logical given lawyers' superior knowledge regarding legal fees even as compared to sophisticated clients, and their ability and position as drafters to avoid or cure potential ambiguities in fee agreements.

A fee agreement that appears reasonable at the outset of a representation may become unreasonable in light of subsequent events or circumstances concerning its performance and enforcement.[81] Regardless, the burden of establishing the reasonableness of a fee rests with the lawyer.[82] While there are a few situations in which a fee is certain to be declared unreasonable, as where the lawyer performed no services,[83] or the services that were provided were valueless or nearly so,[84] there is generally no precise measure of reasonableness.[85]

Model Rule 1.5(b) also applies to lawyers' billing practices. It obligates them to inform new or irregular clients regarding their billing practices, and to inform regular clients of changes to their billing practices from prior representations.[86] Insofar as retainers are concerned, the rule requires lawyers to explain to clients how their retainers will be applied to their fees.[87] Model Rule 1.5(b) provides:

> The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when

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80. Vargas v. Schweitzer-Ramras, 878 So. 2d 415, 417 (Fla. Dist. Ct. App. 2004); Shalom Toy, Inc. v. Each and Every One of the Members of the N.Y. Prop. Ins. Underwriting Ass'n, 658 N.Y.S.2d 1, 3 (N.Y. App. Div. 1997).

81. *Ryan*, 193 F.3d at 215 (quoting McKenzie Constr., Inc. v. Maynard, 758 F.2d 97, 101 (3d Cir. 1985)).

82. *Gold, Weems, Buser, Sues & Rundell*, 947 So. 2d at 842; *In re* Dawson, 8 P.3d 856, 860 (N.M. 2000); Bass v. Rose, 609 S.E.2d 848, 853 (W. Va. 2004).

83. *In re* Cleaver-Bascombe, 892 A.2d 396, 403 (D.C. 2006); Howes v. Ky. Bar Ass'n, 214 S.W.3d 319, 320 (Ky. 2007); Attorney Grievance Comm'n of Md. v. Lawson, 933 A.2d 842, 868 (Md. 2007); *In re* Grochowski, 701 A.2d 1013, 1015 (R.I. 1997).

84. *See, e.g.,* People v. Woodford, 81 P.3d 370, 375 (Colo. 2003) (finding Rule 1.5(a) violation where lawyer's work "was not in accord with his client's objectives, was, in virtually every respect, incompetent, and was completely lacking in value of any kind to the client"); Attorney Grievance Comm'n of Md. v. Muhammad, 912 A.2d 588, 596 (Md. 2006) (finding fee unreasonable because lawyer did not render services of any value); *In re* Disciplinary Action Against McCray, 755 N.W.2d 835, 841-42 (N.D. 2008) (finding that inundating credit reporting agencies with form letters was not "meaningful legal work"); Columbus Bar Ass'n v. Farmer, 855 N.E.2d 462, 469 (Ohio 2006) (stating that a fee is necessarily unreasonable "whenever a lawyer obtains payment from a client but provides no service or other benefit in return"); State *ex rel.* Okla. Bar Ass'n v. Sheridan, 84 P.3d 710, 717 (Okla. 2003) (finding Rule 1.5 violation where clients received no benefit from any work lawyer may have done).

85. *In re* R.C. Sander Tech. Sys., Inc., 21 B.R. 40, 43 (Bankr. D.N.H. 1982); *In re* Pajarito Am. Indian Art, Inc., 11 B.R. 807, 809 (Bankr. D. Ariz. 1981); Jacobowitz v. Double Seven Corp., 378 F.2d 405, 408 (Ariz. Ct. App. 1967); Young v. N. Terminals, Inc., 315 A.2d 469, 471-72 (Vt. 1974).

86. MODEL RULES OF PROF'L CONDUCT R. 1.5(b) (2008).

87. *In re* Freeman, 835 N.E.2d 494, 498 (Ind. 2005).

> the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.[88]

The Model Rule 1.5(b) requirements attach regardless of whether the lawyer and client have a written engagement agreement.[89] Indeed, Model Rule 1.5(b) does not require lawyers to communicate the bases or rates of their fees or expenses in writing; while the rule expresses a preference for a writing, oral communications will suffice.[90] That said, some states have adopted modified versions of Rule 1.5(b), and therefore may require a writing. For example, New York's new Rule 1.5(b) provides that lawyers must commit the basis or rate of their fees and expenses to writing "where required by statute or court rule."[91] As all New York lawyers should know, New York judiciary statutes mandate engagement letters.[92] The Washington version of Rule 1.5(b) requires lawyers to commit the basis or rate of their fees and expenses to writing in any matter in which a client so requests.[93]

Retainers and fixed fees clearly implicate Model Rule 1.15. Rule 1.15(a) mandates that a lawyer "hold property of clients or third persons that is in the lawyer's possession in connection with a representation separate from the lawyer's own property."[94] More specifically, Rule 1.15(c) provides that a lawyer "shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses are incurred."[95] A lawyer "earns" fees for purposes of the rule "only by conferring a benefit on or performing a legal service for the client."[96] A lawyer cannot earn a fee simply by declaring it non-refundable.[97] If a lawyer and client dispute whether fees held in a trust account have been earned, a lawyer must remit any undisputed funds that have not been earned.[98] Lawyers need not surrender funds that they reasonably believe represent earned fees, although they may not withhold funds as a means of achieving negotiating leverage.[99]

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88. MODEL RULES OF PROF'L CONDUCT R. 1.5(b) (2008).
89. *Alexander*, 903 S.W.2d at 694.
90. *See, e.g.,* Taylor v. Dalle, No. E2006-00634-COA-R3-CV, 2007 WL 494993, at *3 (Tenn. Ct. App. Feb. 16, 2007) (noting also that lawyer's hourly rate was reflected on bills).
91. N.Y. RULES OF PROF'L CONDUCT R. 1.5(b) (2009).
92. N.Y. COMP. CODES R. & REGS. tit. 22, § 1215 (2008).
93. WASH. RULES OF PROF'L CONDUCT R. 1.5(b) (2006).
94. MODEL RULES OF PROF'L CONDUCT R. 1.15(a) (2008).
95. MODEL RULES OF PROF'L CONDUCT R. 1.15(c) (2008).
96. *In re Sather*, 3 P.3d at 410.
97. Cluck v. Comm'n for Lawyer Discipline, 214 S.W.3d 736, 740 (Tex. App. 2007).
98. MODEL RULES OF PROF'L CONDUCT R. 1.15 cmt. 3 (2008).
99. MODEL RULES OF PROF'L CONDUCT R. 1.15(c) cmt. 3 (2008).

Requiring lawyers to segregate clients' funds by depositing them in a trust account serves three important purposes. First, this regime protects clients' funds from lawyers' creditors.[100] Second, commingling funds exposes clients to a risk of loss in the event of a lawyer's death or disability.[101] Third, preventing commingling reduces the likelihood of lawyers' conversion or misappropriation of client funds.[102]

Model Rule 1.16(d), which governs lawyers' duties when terminating representations, also comes into play when retainers and fixed fees are involved.[103] The Rule states that "[u]pon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as . . . refunding any advance payment of fee or expense that has not been earned or incurred."[104] As with Rule 1.15(c), a lawyer must confer a benefit or perform a legal service for the client to treat a fee as earned.[105]

Rule 1.16(d) imposes an affirmative obligation on lawyers to refund unearned portions of retainers or expense advances without clients making such requests. Lawyers may violate the Rule by unreasonably delaying refunds, as well as by refusing them.[106] Again, as with Rule 1.15(c), lawyers cannot escape their Rule 1.16(d) duty simply by labeling fees as earned upon receipt or declaring them non-refundable.[107] A lawyer who refuses to refund unearned fees or expense advances imposes an unreasonable charge and, therefore, violates Rules 1.5(a) and 1.16(d).[108]

Finally, courts have the inherent power to determine the reasonableness of attorneys' fees and to refuse to enforce unreasonable fee agreements.[109] In the same vein, clients cannot consent to unreasonable fees.[110] Lawyers cannot charge unreasonable fees even if they are able to attract clients who are willing to pay whatever their fee agreements require.[111]

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100. *Dowling*, 875 N.E.2d at 1021.
101. *Id.*
102. *Id.* (observing that commingling is often a precursor to conversion by lawyers).
103. *See, e.g.,* Ky. Bar Ass'n v. Emerson, 276 S.W.3d 823, 824-25 (Ky. 2009) (disciplining lawyer for violating Rule 1.16(d) by failing to refund unearned portions of flat fees upon termination of representations).
104. MODEL RULES OF PROF'L CONDUCT R. 1.16(d) (2008).
105. *In re Sather*, 3 P.3d at 410.
106. *Attorney Grievance Comm'n of Md.*, 933 A.2d at 865; *see, e.g., In re* Lewis, 1 So. 3d 444, 450 (La. 2009) (finding that Rule 1.16(d) was violated where attorney failed to promptly refund unearned fees).
107. *In re Sather,* 3 P.3d at 412-13.
108. *See, e.g., In re* Whitehead, 861 N.E.2d 702, 702 (Ind. 2007) (reprimanding lawyer who refused to refund unearned portion of flat fee for violating Rules 1.5(a) and 1.16(d)).
109. Maynard Steel Casting Co. v. Sheedy, 746 N.W.2d 816, 818 (Wis. Ct. App. 2008) (quoting Herro, McAndrews & Porter, S.C. v. Gerhardt, 214 N.W.2d 401, 402 (Wis. 1974), *overruled on other grounds by* Standard Theatres, Inc. v. DOT, 349 N.W.2d 661 (Wis. 1984)).
110. *In re* Sinnot, 845 A.2d 373, 379 (Vt. 2004).
111. *In re Sinnott*, 845 A.2d at 379.

Aside from ethics rules, lawyers' fiduciary duties prevent them from charging clients unreasonable fees.[112]

III. THE CONTROVERSY OVER NON-REFUNDABLE RETAINERS

Of all the potential disputes that may be attributed in some way to retainers, none are as frequent or pitched as those resulting from lawyers' attempt to charge non-refundable retainers. Courts and disciplinary authorities intensely dislike non-refundable retainers because they chill clients' right to discharge their lawyers.[113] *In re Cooperman*[114] is the leading case against non-refundable retainers.

New York lawyer Edward Cooperman utilized three forms of engagement agreements that provided for non-refundable retainers. The first agreement, which Cooperman used when representing clients in criminal matters, stated: "'My minimum fee for appearing for you in this matter is Fifteen Thousand ($15,000.00) Dollars. This fee is not refundable for any reason whatsoever once I file a notice of appearance on your behalf.'"[115] The second agreement, which he used in probate matters, stated: "'For the MINIMAL FEE and NON-REFUNDABLE amount of Five Thousand ($5,000.00) Dollars, I will act as your counsel . . . . This is the minimum fee no matter how much or how little work I do . . . and will remain the minimum fee and not refundable even if you decide . . . to discontinue the use of my services for any reason whatsoever.'"[116] The third agreement, which Cooperman also employed in criminal matters, provided: "The MINIMUM FEE for Mr. Cooperman's representation . . . to any extent whatsoever is Ten Thousand ($10,000.00) Dollars . . . . [This] amount is the MINIMUM FEE and will remain the minimum fee no matter how few court appearances are made. . . . The minimum fee will remain the same even if Mr. Cooperman is discharged.'"[117] Disciplinary authorities moved against Cooperman when he refused to refund fees to clients who discharged him.[118] An appellate court eventually suspended Cooperman from

112. Cripe v. Leiter, 703 N.E.2d 100, 107 (Ill. 1998).

113. *See, e.g., In re* Cooperman, 633 N.E.2d 1069, 1071 (N.Y. 1994) (observing that non-refundable retainer agreements clash with public policy and transgress rules of professional conduct because they "compromise the client's absolute right to terminate the unique fiduciary attorney-client relationship"); Wright v. Arnold, 877 P.2d 616, 618 (Okla. Civ. App. 1994) (criticizing non-refundable retainers in hourly engagements as an "impermissible restraint on the right of a client to freely discharge her attorney"); *see also* ROTUNDA & DZIENKOWSKI, *supra* note 69, § 1.5–1(e), at 151 ("Although a non-refundable retainer does not prevent the client from firing the lawyer, it certainly makes the exercising that right more costly.").

114. 633 N.E.2d 1069 (N.Y. 1994).

115. *In re Cooperman*, 633 N.E.2d at 1070 (quoting Cooperman's engagement agreement).

116. *Id.* (quoting Cooperman's engagement agreement).

117. *Id.* (quoting Cooperman's engagement agreement).

118. *Id.* at 1071.

practice for two years.[119] Cooperman then appealed to the Court of Appeals, New York's highest court.

The *In re Cooperman* court began its analysis by recounting the unique fiduciary nature of the attorney-client relationship, noting that lawyers' status as fiduciaries creates obligations that transcend those in the commercial marketplace, and observing that the cost of legal services is of paramount concern to the public and clients.[120] Furthermore, because the attorney-client relationship is especially sensitive, public policy recognizes a client's right to sever an attorney-client relationship at any time, with or without cause.[121] Courts assiduously protect clients' right to discharge their lawyers, subject to lawyers' right to compensation in quantum meruit if clients discharge them unfairly.[122] Accordingly, and by logical extension of these principles, special non-refundable retainers violate public policy because they impair clients' right to terminate their lawyers.[123] As the court explained:

> Special nonrefundable retainer fee agreements diminish the core of the fiduciary relationship by substantially altering and economically chilling the client's unbridled prerogative to walk away from the lawyer. To answer that the client can technically still terminate misses the reality of the economic coercion that pervades such matters. If special nonrefundable retainers are allowed to flourish, clients would be relegated to hostage status in an unwanted fiduciary relationship—an utter anomaly. Such circumstance would impose a penalty on a client for daring to invoke a hollow right to discharge. The established prerogative which, by operation of law and policy, is deemed not a breach of contract is thus weakened. . . . Instead of becoming responsible for fair value of actual services rendered, the firing client would lose the entire "nonrefundable" fee, no matter what legal services, if any, were rendered. This would be a shameful, not honorable, professional denouement.[124]

Cooperman countered that non-refundable retainers should not be held to violate ethics rules unless they result in clearly excessive fees.[125] The court found this argument unavailing because the reasonableness of a non-refundable fee cannot rescue an agreement that restricts a client's right to

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119. *Id.*
120. *In re Cooperman*, 633 N.E.2d at 1071.
121. *Id.* at 1072.
122. *Id.*
123. *Id.*
124. *Id.* at 1072-73 (citations omitted).
125. *In re Cooperman*, 633 N.E.2d at 1073.

discharge a lawyer.[126] A client's rights to discharge a lawyer and to be charged only reasonable fees are not interdependent.[127]

The *In re Cooperman* court affirmed the lower appellate court's decision suspending Cooperman from practice for two years.[128] In doing so, however, the court attempted to limit the reach of its holding: "Minimum fee arrangements and general retainers that provide for fees, not laden with the nonrefundability impediment irrespective of any services," the court explained, would remain valid and would not alone expose lawyers to professional discipline.[129] The court's qualification may be understood to permit lawyers to treat general retainers as non-refundable because general retainers are paid to employ or engage lawyers and do not require performance of any services.

It is plausible to read *In re Cooperman* as prohibiting only (1) non-refundable security retainers and (2) non-refundable flat fees, as evidenced by the court's repeated reference in the opinion to "special" non-refundable retainers and by the court's qualification of its holding quoted immediately above. In other words, *In re Cooperman* should not be interpreted to mean that either general retainers or refundable flat fees are unethical. Indeed, New York courts—both federal and state—have since agreed that *In re Cooperman* did not abolish general retainers.[130] At least two federal courts applying New York law have approved of flat fee agreements that did not purport to restrict their refundability in the event the client discharged the law firm before the fee was fully earned.[131]

Unfortunately, this is not the only plausible reading of *In re Cooperman*. Consider again the court's qualification of its holding with respect to acceptable retainers, which states in its entirety: "Minimum fee arrangements and general retainers that provide for fees, not laden with the nonrefundability impediment irrespective of any services, will continue to be valid and not subject in and of themselves to professional discipline."[132] This sentence arguably suggests that the court blessed only refundable security retainers and refundable general retainers and paid no heed whatsoever to flat fees. Had the court meant to permit lawyers to treat general

126. *Id.*
127. *Id.*
128. *Id.* at 1074.
129. *Id.*
130. *See, e.g.,* Cabrera v. DeGuerin, No. 96-CV-4411 (ILG), 1999 WL 438473, at *5 (E.D.N.Y. May 18, 1999) (quoting Wong v. Michael Kennedy P.C., 853 F. Supp. 73, 79-80 (E.D.N.Y. 1994)); Kelly v. MD Buyline, Inc., 2 F. Supp. 2d 420, 444-51 (S.D.N.Y. 1998); Goldston v. Bandwidth Tech. Corp., 859 N.Y.S.2d 651, 657 (N.Y. App. Div. 2008); Atkins & O'Brien L.L.P. v. ISS Int'l Serv. Sys., Inc., 678 N.Y.S.2d 596, 599 (N.Y. App. Div. 1998).
131. Levisohn, Lerner, Berger & Langsam v. Med. Taping Sys., Inc., 20 F. Supp. 2d 645, 650-51 (S.D.N.Y. 1998); Gala Enters., Inc. v. Hewlett Packard Co., 970 F. Supp. 212, 219 (S.D.N.Y. 1997).
132. *In re Cooperman,* 633 N.E.2d at 1074.

retainers as non-refundable, it would have changed the word order in the sentence to state: "Minimum fee arrangements not laden with the non-refundability impediment irrespective of any services and general retainers will continue to be valid, and not subject in and of themselves to professional discipline." The conclusion that the court never meant to address flat fees flows logically from its reference only to minimum fees and general retainers. Of course, a flat fee is a *maximum* fee for the corresponding assignment, not a minimum fee. Read in context, the court's reference to a minimum fee necessarily connotes a security retainer.

The most logical reading of *In re Cooperman* is that the court intended to (1) prohibit non-refundable security retainers; and (2) permit lawyers to treat general retainers as earned upon receipt, but not to describe them to clients as non-refundable. After all, because a court may require any fee—including one earned upon receipt—to be disgorged or refunded if it is ultimately determined to be unreasonable, describing a general retainer as non-refundable is misleading.[133]

Practically speaking, lawyers should be able to treat general retainers as non-refundable so long as the amounts charged are reasonable.[134] Such treatment is consistent with the purposes of general retainers and trust accounting practices, and reflects the reality that general retainers are not fee advances, but are instead fully earned when paid.[135] In contrast, security retainers are refundable until they are earned and lawyers should take care not to describe them otherwise.[136]

Notwithstanding the majority rule that reasonable general retainers are properly considered non-refundable, at least two courts have seemingly

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133. *In re Sather*, 3 P.3d at 413; Alaska Bar Ass'n, Ethics Op. 2009-01 (2009).

134. *See Ryan*, 193 F.3d at 216. (interpreting Pennsylvania law); *In re* Hirschfeld, 960 P.2d 640, 643 (Ariz. 1998) (observing that general retainers are not improper because they are non-refundable, but they must be reasonable); *In re Sather,* 3 P.3d at 412 (outlining requirements for a general retainer to be earned upon receipt); *In re* Thonert, 682 N.E.2d 522, 524 (Ind. 1997) (recognizing that general retainers may be non-refundable); *In re Scimeca*, 962 P.2d at 1091 (distinguishing general retainers from other retainers); *In re* Disciplinary Action Against Lochow, 469 N.W.2d 91, 98 (Minn. 1991) (requiring that general retainers be written and approved by clients); *In re* Ward, 691 N.W.2d 689, 695 (Wis. 2005) (citing Wis. Ethics Op. E-93-4); Ky. Bar Ass'n, Ethics Comm., Op. 380 (1995); *see also In re* Disciplinary Proceeding Against DeRuiz, 99 P.3d 881, 889 (Wash. 2009) (suggesting that a non-refundable general retainer might be ethically permissible, but making that suggestion in reliance on a Washington State Bar Association ethics opinion that was later withdrawn).

135. *See Frerichs*, 671 N.W.2d at 475-76 (distinguishing general retainers from special retainers).

136. *Dowling*, 875 N.E.2d at 1022; *In re* Kendall, 804 N.E.2d 1152, 1160 (Ind. 2004); Iowa Sup. Ct. Bd. of Ethics & Prof'l Conduct v. Apland, 577 N.W.2d 50, 57 (Iowa 1998); *In re Scimeca,* 962 P.2d at 1091-92; *In re Dawson*, 8 P.3d at 859-60; Rimberg & Assocs., P.C. v. Jamaica Chamber of Commerce, Inc., 837 N.Y.S.2d 259, 260 (N.Y. App. Div. 2007) (referring to a "nonrefundable minimum retainer fee"); Columbus Bar Ass'n v. Klos, 692 N.E.2d 565, 567-68 (Ohio 1998); Wright v. Arnold, 877 P.2d 616, 618-19 (Okla. Civ. App. 1994); Alaska Bar Ass'n, Ethics Op. No. 2009-1 (2009); *see, e.g.,* State *ex rel.* Moore v. Scroggie, 704 P.2d 364, 370 (Idaho Ct. App. 1985) (explaining that client would have right to contest the services provided by counsel and to seek a refund of any unearned portion of the security retainer).

held to the contrary.[137] In *Nash v. Studdard,*[138] a Georgia court declared that "[a] nonrefundable fee contract is invalid . . . and a lawyer has an obligation to return the unearned portion of any retainer fee after being fired by a client."[139] But *Nash* involved a flat fee agreement, not a general retainer.[140] Furthermore, the *Nash* court's reference to lawyers' obligation to refund the unearned portion of any retainer suggests that the court did not mean to ban general retainers, which, again, are entirely earned upon receipt.

The Alabama Supreme Court recently declared in *Alabama State Bar v. Hallett*[141] that non-refundable retainers are "forbidden in Alabama" and further announced that it was "well settled that nonrefundable retainers are prohibited."[142] Yet, *Hallett* involved a flat fee agreement or a hybrid thereof—the challenged fee agreement certainly was not a general retainer.[143] Moreover, the case that the *Hallett* court cited to support the proposition that non-refundable retainers are forbidden in Alabama,[144] *Taylor v. Alabama State Bar,*[145] involved a lawyer who refused to refund a flat fee within four days of its payment despite the fact that he apparently did no work on the underlying matter.[146] Thus, despite *Hallett*'s denouncement of non-refundable retainers, it does not appear that the Alabama Supreme Court has yet had the opportunity to seriously consider the propriety of general retainers.

On the other hand, a recent Michigan Supreme Court decision, *Grievance Administrator v. Cooper,*[147] arguably blesses non-refundable security retainers. In *Cooper,* the lawyer's fee agreement provided for a $4000 minimum fee calculated in accordance with the lawyer's hourly rate and that of her legal assistant. The agreement stated that no portion of the minimum fee was refundable under any circumstances.[148] The agreement further provided that in the event the lawyer's and legal assistant's time exceeded the minimum fee, the client would be obligated to pay those

137. *In re Dawson,* 8 P.3d 856 (N.M. 2000), is sometimes offered as an example of a case prohibiting non-refundable general retainers, but it does not stand for that proposition. *In re Dawson* involved a flat fee, and the court noted only that New Mexico ethics rules "do not permit lawyers to charge nonrefundable unearned fees." *Id.* at 859. Under New Mexico law, lawyers must hold the unearned portion of any advance fee in trust until it is earned. *Id.* Of course, general retainers are earned upon their receipt, and they are not advance fees.

138. 670 S.E.2d 508, 514 (Ga. Ct. App. 2008).

139. *Nash*, 670 S.E.2d at 514.

140. *See id.* at 515 (describing the lawyer's characterization of the agreement).

141. Nos. 1071419 and 1071486, 2009 WL 962508 (Ala. Apr. 10, 2009).

142. *Hallett*, 2009 WL 962508 at *8.

143. *Id.* at **1-2 (quoting the fee agreement); *id.* at *8 (quoting the lawyer, who testified that he charged a flat fee).

144. *Id.* at *8 (quoting Taylor v. Ala. State Bar, 587 So. 2d 1205 (Ala. 1991)).

145. 587 So. 2d 1205 (Ala. 1991).

146. *Id.* at 1205.

147. 757 N.W.2d 867 (Mich. 2008).

148. *In re Cooper*, 757 N.W.2d at 867-68 (Kelly, J., concurring) (quoting the fee agreement).

hourly rates for the remainder of the representation.[149] In a very short opinion devoid of reasoning, the *Cooper* court determined:

> [T]he agreement clearly and unambiguously provided that the [lawyer] was retained to represent the client and that the minimum fee was incurred upon execution of the agreement, regardless of whether the representation was terminated by the client before the billings at the stated hourly rate exceeded the minimum. So understood, neither the agreement nor the [lawyer's] retention of the minimum fee after the client terminated the representation violated existing MRPC 1.5(a), MRPC 1.15(b) or MRPC 1.16(d).[150]

Cooper is a difficult case to understand because the decision is so cursory. Courts and lawyers generally understand that a "minimum fee" refers to some sort of advance fee—most likely a security retainer.[151] If that is the situation here, then it is possible that non-refundable security retainers oddly pass professional responsibility muster in Michigan. At the same time, the fee agreement in *Cooper* could be interpreted as a flat fee with an escape clause should the representation turn out to be more difficult than originally anticipated.[152] That would make the decision more understandable because many states hold that lawyers may consensually treat flat fees as earned upon receipt and thus not required to be held in trust.[153] It is also possible that the retainer might be characterized as an advance payment retainer of the type previously disparaged in Part I of this article.[154] If so, then the *Cooper* retainer is vulnerable to all the same criticisms and the court's embrace of it is equally infirm. Regardless, given the brevity and opacity of the opinion, no one should put much stock in *Cooper*.

IV. FLAT FEES

Flat fee controversies generally fall into two categories perhaps best framed as questions. First, must flat fees be deposited in a lawyer's trust account or can they be earned upon receipt and, conjunctively, considered non-refundable? Second, are particular flat fees reasonable under Rule 1.5(a)?

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149. *Id.* at 868 (quoting the fee agreement).
150. *Id.* at 867 (majority opinion).
151. *See, e.g., In re Scimeca*, 962 P.2d at 109 ("Designating the advance fee as a minimum fee contemplates that it must be earned by future services to the client.").
152. *See In re Cooper,* 757 N.W.2d at 868 (quoting the fee agreement).
153. *In re Kendall*, 804 N.E.2d at 1157 (branding this approach to flat fees the majority rule).
154. *See supra* notes 29-35 and accompanying text.

A. Earning and Refunding Flat Fees

A flat fee is an advance fee payment intended to compensate a lawyer for all work to be done on a matter or a discrete aspect thereof, regardless of the time required or the complexity of the assignment.[155] It is said to be the majority rule that lawyers may, with client consent—typically confirmed in writing—treat flat fees as earned upon receipt and therefore not entrusted.[156] A substantial minority of jurisdictions, however, hold that because flat fees are merely advance fee payments, they must be held in trust until earned through the lawyer's performance of the agreed services.[157] Lawyers cannot earn a flat fee simply by labeling it non-refundable,[158] nor will branding a flat fee non-refundable afford a defense to professional discipline if a lawyer refuses to refund an unearned portion of it.[159] Minority jurisdictions generally do, however, recognize that lawyers may establish in a flat fee agreement "'reasonable milestones when their interest in portions of the fee becomes fixed,'" such that they can then withdraw corresponding sums from their trust accounts.[160]

Courts' apparent apprehension concerning flat fees stems from the disturbingly common scenario in which a lawyer charges a flat fee, does little or none of the work for which the fee was paid, and then refuses to refund any portion of the fee when the client protests or terminates the engagement.[161] Ostensibly encouraging this conduct by allowing lawyers to treat flat fees as non-refundable is undesirable. Among other things, it arguably enables lawyers to breach their duties of competence and diligence; potentially discourages lawyers from honoring their ethical and fiduciary duties to communicate; facilitates the possible conversion and misappropriation of clients' funds by lawyers; potentially forces clients into need-

155. *See, e.g., In re Kendall*, 804 NE.2d at 1157 (quoting Alec Rothrock, *The Forgotten Flat Fee: Whose Money Is It and Where Should It Be Deposited?*, 1 FLA. COASTAL L.J. 293, 299 (1999))

156. *See, e.g., In re* Connelly, 55 P.3d 756, 761-62 (Ariz. 2002); *Dowling*, 875 N.E.2d at 1021-22 (Ill. 2007); *In re Kendall,* 804 N.E.2d at 1157; *In re Cooper,* 757 N.W.2d at 867-68; *In re* Conduct of Balocca, 151 P.3d 154, 160 (Or. 2007); Alaska Bar Ass'n, Ethics Op. No. 87-1 (1987); N.C. State Bar Ass'n, Formal Ethics Op. 97-4 (1998).

157. *See, e.g., In re Sather*, 3 P.3d at 411-12; *In re* Mance, 980 A.2d 1196, 1203 (D.C. 2009); *In re* Stewart, 953 A.2d 1034, 1035 (D.C. 2008); *Piazza*, 756 N.W.2d at 697-98; *In re Scimeca,* 962 P.2d at 1091-92; *Attorney Grievance Comm'n of Md.*, 933 A.2d at 867; *In re* Yalkut, 176 P.3d 1119, 1126 (N.M. 2008); Cuyahoga County Bar Ass'n v. Cook, 901 N.E.2d 225, 227 (Ohio 2009); Marcus, Santoro & Kozak, P.C. v. Wu, 652 S.E.2d 777, 781 (Va. 2007); Sup. Ct. of Tenn., Bd. of Prof'l Responsibility, Formal Eth. Op. 92-F-128, at 2 (1992).

158. *In re Sather,* 3 P.3d at 412; *Cluck*, 214 S.W.3d at 740 (quoting Tex. Comm. on Prof'l Ethics, Op. 431 (1986)).

159. State *ex rel.* Counsel for Discipline of the Neb. Sup. Ct. v. Wintroub, 765 N.W.2d 482, 492-93 (Neb. 2009).

160. *See, e.g., Piazza,* 756 N.W.2d at 698 (quoting Rothrock, *supra* note 155, at 355).

161. *See, e.g., Wintroub,* 765 N.W.2d at 492-93 (involving non-refundable flat fee); *In re* Disciplinary Proceedings Against Ryan, 766 N.W.2d 186, 188-89 (Wis. 2009) (disciplining lawyer who did not explain services to be performed in exchange for flat fee, performed next to no legal services, and failed to refund unearned portion of flat fee when requested).

less disputes at times when they may be especially vulnerable; and affords lawyers extortionate negotiating leverage with respect to fees and expenses or other aspects of a representation when clients insist on enforcing their rights. Furthermore, requiring lawyers to deposit flat fees in their trust accounts makes it easier for clients to prove their claims in the unfortunate event of a dispute and protects clients' funds from lawyers' creditors. Finally, permitting non-refundable flat fees impairs clients' right to discharge their lawyers.[162]

Legitimate though these arguments may be, they are not insurmountable. A client who pays a flat fee and receives nothing in return enjoys several forms of recourse, the principal remedy being an action against the lawyer for breach of contract.[163] A flat fee for which little or no work is done is by definition unreasonable,[164] thus providing the client with a basis for initiating professional disciplinary action against the lawyer.[165] Moreover, and unfortunately from a practical perspective, lawyers who are inclined to cheat clients by doing no work for which they charged a flat fee and then refusing to refund the fee in whole or part are unlikely to adhere to trust account rules, thus diminishing the rationale for requiring lawyers to hold flat fees in trust until they are earned by performance. As for the argument that non-refundable flat fees chill clients' right to discharge their lawyers, that is undoubtedly so. But the same can be said of general retainers, and it is true that a client's right to discharge a lawyer must sometimes be balanced against other considerations. In many engagements, such as consumer bankruptcies and felony criminal cases, a flat fee represents lawyers' only realistic chance of being fully compensated for their services,[166] and a reasonable flat fee often benefits the client by fixing the cost of legal services. In some cases, a flat fee may be a

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162. *Frerichs*, 671 N.W.2d at 476.

163. *See, e.g.*, Rothrock, *supra* note 155, at 346 ("The consideration of that fee advance is the lawyers' promise to perform the agreed-upon legal services. The failure to perform that promise gives rise to an action for breach of contract.").

164. *Attorney Grievance Comm'n of Md.*, 933 A.2d 842, 868 (Md. 2007); *Farmer*, 855 N.E.2d at 469; *In re* Conduct of Gastineau, 857 P.2d 136, 140 (Or. 1993); *In re Disciplinary Proceeding Against DeRuiz*, 99 P.3d at 889-90.

165. *See, e.g.,* State *ex rel.* Counsel for Discipline of the Neb. Sup. Ct. v. Wintroub, 765 N.W.2d 482, 492-93 (Neb. 2009); *In re Conduct of Gastineau*, 857 P.2d at 140.

166. In consumer bankruptcies, for example, a flat fee paid pre-petition is generally not property of the bankruptcy estate. *See Barron*, 432 F.3d at 594-96. Security retainers, on the other hand, are property of the bankruptcy estate and are thus subject to control by the bankruptcy court and trustee. *See In re* King, 392 B.R. 62, 70 (Bankr. S.D.N.Y. 2008). If lawyers' fees are property of the bankruptcy estate or otherwise subject to bankruptcy court control, lawyers must apply to the bankruptcy court for payment. If they are not, then they are generally subject only to a disclosure requirement. In criminal matters, defendants who lose often see no need to pay their lawyers, or contend that they owe nothing because their counsel provided ineffective assistance. Naturally, criminal defendants who are incarcerated are unable to earn incomes from which to pay fees.

client's only means of hiring qualified counsel.[167] It is therefore reasonable to conclude that a client's unfettered right to discharge a lawyer might occasionally have to yield to other considerations.

Some courts have tried to find a middle ground,[168] as in *Cincinnati Bar Ass'n v. Witt,*[169] in which the court observed that a flat fee "in a criminal case may be deposited directly into the attorney's operating account, but provisions must be made for refunding all or part of the fee in the event of a discharge or withdrawal so that the attorney's fee is not excessive."[170] The *Witt* scheme makes little sense, however, because it effectively enables commingling and it deprives the client of the protections that attend the deposit and maintenance of funds in a trust account. Furthermore, it is cleaner to require lawyers to hold flat fees in their trust accounts until they are earned, and to allow them to agree with clients on representational benchmarks which, when met, allow the lawyers to withdraw predetermined sums as having been earned. Finally, the *Witt* approach is superfluous, because lawyers always face the prospect of disgorging or reducing fees to avoid allegations that their fees are excessive or unreasonable, or as a remedy if such allegations are proven.[171]

B. The Reasonableness of Flat Fees

Lawyers' fees must always be reasonable. Flat fees are no exception. Reasonableness in this context, as elsewhere, is generally measured by the factors in Model Rule 1.5(a) and state analogs.[172] Other considerations may influence the analysis, but the Rule 1.5(a) factors typically predominate. A flat fee agreement that is perfectly drafted is no guarantee that the fee itself is reasonable.[173] Again, a flat fee is necessarily unreasonable if a lawyer performs no services or confers no benefit in exchange for it.[174]

The reasonable value of a lawyer's services upon discharge or in the event of a dispute is not necessarily formulaic and may be gauged at least in part by the quality of the lawyer's effort. Most of the time, the reasonableness of a flat fee is measured by comparing it with the time the lawyer

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167. *See In re Connelly*, 55 P.3d at 762 (explaining that flat fees are often necessary when the client has limited resources and requires the certainty of a pre-set fee).

168. *See, e.g., In re* Craig, 265 B.R. 624, 630 (Bankr. M.D. Fla. 2001) (characterizing earned-on-receipt retainers "as a lesser, or at least as a less supervised, trust arrangement").

169. 816 N.E.2d 1036 (Ohio 2004).

170. *Witt,* 816 N.E.2d at 1038.

171. *In re Craig,* 265 B.R. at 629; *In re* Sather, 3 P.3d 403, 413 (Colo. 2000).

172. *See In re Dawson*, 8 P.3d at 860 (referring to equivalent New Mexico ethics rule in a flat fee case).

173. *In re* Namee, Lochner, Titus & Williams, P.C. (Killeen), 700 N.Y.S.2d 525, 527 n.1 (N.Y. App. Div. 1999).

174. *Attorney Grievance Comm'n of Md.*, 933 A.2d at 868; *Farmer*, 855 N.E.2d at 469; *In re Conduct of Gastineau*, 857 P.2d 136, 140 (Or. 1993).

spent on the matter multiplied by the lawyer's hourly rate.[175] It can be difficult to measure reasonableness when a flat fee is at least partially earned and a client seeks a refund, however, because many lawyers who charge flat fees do not keep contemporaneous time records. Furthermore, because of the balancing of risk between a client and a lawyer in a flat fee representation, a flat fee may be larger than a fee that would be produced by hourly billing and still be reasonable.[176] As an Arizona court explained:

> A non-refundable flat fee reflects "a negotiated element of risk sharing between attorney and client" whereby the "attorney takes the risk that she will do more work than planned, without additional compensation; and the client, in return, agrees that the attorney will earn the agreed-upon amount, even if that amount would exceed the attorney's usual hourly rate" because "the client often has limited resources and therefore requires the certainty of a pre-set fee."[177]

If a client disputes the reasonableness of a flat fee, a lawyer should expect disciplinary authorities or a court to scrutinize all aspects of the representation.[178] This includes the amount of time the lawyer spent on the matter, the necessity of tasks undertaken, the strategies and tactics selected, the quality of the lawyer's work, and so on.[179] Lawyers who have not maintained contemporaneous time records or who cannot otherwise accurately account for their activities should rightly expect to be at a disadvantage when attempting to justify their fees.

V. THE ILLINOIS EXPERIENCE

Some states attempt to guide lawyers in regard to retainers and flat fees through specific rules of professional conduct or comments to such rules.[180] Illinois is the latest state to do so by way of its new Rule 1.15(c), effective January 1, 2010, which provides:

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175. *In re Connelly*, 55 P.3d at 762.
176. *Id.*
177. *Id.* (quoting State Bar of Ariz. Comm. on Prof'l Conduct, Op. 99-02, at 7 (1999)).
178. *Id.* at 759.
179. *See, e.g., In re Ward*, 691 N.W.2d at 694-95 (discussing the quality of the lawyer's work in several respects, including competence and efficiency).
180. *See, e.g.,* N.C. RULES OF PROF'L CONDUCT R. 1.15 cmt. 11 (2009) (discussing retainers and related accounting); S.C. RULES OF PROF'L CONDUCT R. 1.15(c) (2009) ("A lawyer shall deposit into a client trust account unearned legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred.").

> A lawyer shall deposit in a client trust account funds received to secure payment of legal fees and expenses, to be withdrawn by the lawyer only as fees are earned and expenses incurred. Funds received as a fixed fee, a general retainer, or an advance payment retainer shall be deposited in the lawyer's general account or other account belonging to the lawyer. An advance payment retainer may be used only when necessary to accomplish some purpose for the client that cannot be accomplished by using a security retainer. An agreement for an advance payment retainer shall be in a writing signed by the client that uses the term "advance payment retainer" to describe the retainer, and states the following:
>
> (1) the special purpose for the advance payment retainer and an explanation why it is advantageous to the client;
>
> (2) that the retainer will not be held in a client trust account, that it will become the property of the lawyer upon payment, and that it will be deposited in the lawyer's general account;
>
> (3) the manner in which the retainer will be applied for services rendered and expenses incurred;
>
> (4) that any portion of the retainer that is not earned or required for expenses will be refunded to the client;
>
> (5) that the client has the option to employ a security retainer, provided, however, that if the lawyer is unwilling to represent the client without receiving an advance payment retainer, the agreement must so state and provide the lawyer's reasons for that condition.[181]

An "advance payment retainer" as used in new Illinois Rule 1.15(c) is a present payment to a lawyer in exchange for a commitment by the lawyer to provide future legal services that becomes the lawyer's property immediately upon payment.[182] Under the new rule, lawyers are required to refund to clients unearned portions of advance payment retainers.[183] In the Illinois scheme, flat fees and advance payment retainers are not synonyms for a single form or type of fee agreement. An advance payment retainer is principally distinguished from a flat fee by its refundability,

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181. ILL. RULES OF PROF'L CONDUCT R. 1.15(c) (effective Jan. 1, 2010), *available at* http://www. state.il.us/court/SupremeCourt/Rules/Art_VIII/ArtVIII_NEW.htm.
182. *Id.* cmt. 3C.
183. *Id.*

since in Illinois lawyers may treat flat fees as non-refundable so long as the amounts charged are reasonable.[184]

Illinois enacted its new Rule 1.15(c) in response to the decision in *Dowling v. Chicago Options Associates, Inc.,*[185] in which the Illinois Supreme Court recognized advance payment retainers for the first time.[186] The *Dowling* court did so in the context of a law firm's attempt to charge a traditional evergreen retainer in a case in which it was assisting a client in his efforts to shield his assets from creditors.[187] In recognizing advance payment retainers, including flat fees,[188] the court was persuaded by two Northern District of Illinois bankruptcy cases permitting lawyers to charge advance payment retainers that were earned on receipt.[189] The *Dowling* court recognized the utility of advance payment retainers in cases where, as in the one at hand, "the client wishes to hire counsel to represent him or her against judgment creditors. Paying the lawyer a security retainer means the funds remain the property of the client and may therefore be subject to the claims of the client's creditors."[190] As a result of its funds being jeopardized by creditors, it could prove difficult for the client to hire counsel.[191] Similarly, the court reasoned that advance payment retainers may be appropriate in criminal cases in which a defendant's assets are subject to forfeiture.[192]

The problems with the Illinois approach, whether attributable to the *Dowling* court or the drafters of new Rule 1.15(c), are manifold. First, in recognizing advance payment retainers, the *Dowling* court seemed to uncritically accept the bankruptcy cases and an Illinois ethics opinion permitting them, and the drafters of Rule 1.15(c) followed suit. In fact, the bankruptcy case on which the *Dowling* court principally relied has been criticized by subsequent courts, and those criticisms pre-dated the *Dowling* decision.[193] Some courts had rejected the advance payment retainer concept well before *Dowling* was decided.[194] The other supportive authority the Illinois Supreme Court considered was arguably dubious.[195] To be

184. *Id.*
185. 875 N.E.2d 1012 (Ill. 2007).
186. ILL. RULES OF PROF'L CONDUCT R. 1.15 cmt. 3B (effective Jan. 1, 2010) (noting the *Dowling* court's initial recognition of advance payment retainers).
187. *Dowling,* 875 N.E.2d at 1015-16.
188. *Id.* at 1019 (mentioning flat fees).
189. *Id.* at 1018-20.
190. *Id.* at 1022.
191. *Id.*
192. *Dowling*, 875 N.E.2d at 1022.
193. *See, e.g., In re* Sheridan, 215 B.R. 144, 145-46 (Bankr. N.D. Ill. 1996) (discussing *In re* McDonald Bros. Constr., Inc., 114 B.R. 989 (Bankr. N.D. Ill. 1990)).
194. *See, e.g., In re* Gray's Run Techs., Inc., 217 B.R. 48, 52-56 (Bankr. M.D. Pa. 1997).
195. *See In re Sheridan,* 215 B.R. at 146 (discussing that authority, which included both case law and Illinois ethics opinions, in connection with the holding in *In re* McDonald Bros. Constr., Inc., 114 B.R. 989 (Bankr. N.D. Ill. 1990)).

sure, the court attached a number of client-protective conditions to advance payment retainers, and it deserves credit for doing so. New Illinois Rule 1.15(c) adopts those conditions. Still, no one should be confident that the Illinois approach to advance payment retainers is correct.

Second, recognizing a new form or type of retainer was unnecessary and needlessly confusing. Flat fees already cure clients' perceived difficulties in retaining counsel in cases in which fees not earned by lawyers upon receipt might be clawed back by creditors, bankruptcy courts or trustees, or government agencies.[196] If the concern is that negotiated flat fees may not adequately compensate lawyers in some cases, the answer is simple: lawyers require no protection against their own negotiating ineptitude or unwise business judgments. The fact that some lawyers may decline engagements where the prospective clients cannot afford suitable flat fees does not mean that those people or organizations will be denied counsel, but only that they will have to look elsewhere for representation.

Third, unless advance payment retainers are flat fees, they are in fact and effect security retainers. Because flat fees ensure clients' ability to hire lawyers in cases where monies paid as fees are otherwise subject to claims by third parties, creating a new super security retainer called an advance payment retainer needlessly impairs the rights of clients' legitimate creditors. In criminal cases, it may diminish the possibility that the client will be able to make restitution if ordered to do so as part of a sentence. The fact that flat fees may produce these same ills does not justify the recognition of a new hybrid retainer that does the same.

Fourth, making advance payment retainers refundable necessarily transforms them into security retainers even if they were not appropriately classified before. Of course, that transformation unfortunately exposes them to clients' creditors. The only way around that is sleight of hand—making advance payment retainers not a unique form of earned-on-receipt retainer vis-à-vis third parties, but rather a security retainer that need not be held in trust with respect to clients. Courts and drafters of ethics rules ought not engage in sleight of hand because doing so threatens to lessen public confidence in the legal profession and system.

Fifth, requiring lawyers to hold security retainers in their trust accounts benefits clients in several ways,[197] and those benefits are lost under the Illinois approach to advance payment retainers. Most importantly, by allowing lawyers to deposit advance payment retainers in their general accounts instead of their trust accounts, the Illinois approach exposes clients to the risk of their lawyers' insolvency. This is a material consideration. Many solo lawyers and small law firms struggle financially, and

196. *See, e.g.*, *In re* Gray's Run Techs., Inc., 217 B.R. at 53.
197. *Dowling*, 875 N.E.2d at 1021-22.

severe recessions, such as the current one, potentially affect even large and seemingly prosperous firms.

VI. RECOMMENDATIONS FOR LAWYERS

There are many representations in which lawyers are wise to charge retainers or flat fees, and others in which clients wish to ensure a lawyer's availability by way of a general retainer or achieve certainty as to the cost of the representation by paying a flat fee. If representations sour, lawyers cannot avoid disciplinary or judicial scrutiny of their retainers on the basis that they are private contractual relationships because it is clear that "a fee agreement between lawyer and client is more than a mere business arrangement."[198] Lawyers' duties to their clients transcend contractual obligations that might be acceptable or common in commercial markets.[199] For lawyers, then, the principal challenge lies in structuring their engagements in ways that pass muster under state ethics rules.

First, lawyers should never attempt to charge a retainer or flat fee without a written fee agreement with the client. Unsurprisingly, a lawyer's recollection and a client's recollection of the type and terms of their retainer or flat fee are likely to vary in the event of a subsequent disagreement, or the lawyer's discharge or withdrawal. A written fee agreement further allows a lawyer to readily demonstrate that she met her Rule 1.5(b) obligation to communicate to a client the basis or rate of the fee for which the client would be responsible.[200] A written fee agreement is an essential component of a lawyer's general duty of communication.[201] Written fee agreements generally promote understanding and lessen the possibility of confusion or disagreement. In addition, if the lawyer contends that the retainer funds were to be earned upon receipt, courts generally hold the view that "an oral agreement does not provide a sufficient basis for a lawyer to treat a client's funds as if they were his or her own."[202] Fortunately, most lawyers understand the need for written engagement agreements and freely employ them.

Second, lawyers must carefully draft retainer and flat fee agreements. They must clearly and specifically describe all types of retainers.[203] Absent clear contrary language, a court will probably presume that a retainer

198. *In re Hirschfeld*, 960 P.2d at 643.
199. *In re Cooperman*, 633 N.E.2d at 1071-72.
200. *See, e.g.,* Ky. Bar Ass'n v. Thornton, 279 S.W.3d 516, 518 (Ky. 2009) (finding that lawyer violated Rule 1.5(b) with respect to a retainer where the lawyer could not produce a copy of a written fee agreement with the affected client and did not argue that one existed).
201. MODEL RULES OF PROF'L CONDUCT R. 1.4(a)(3) & (b) (2008).
202. *In re* Fadeley, 153 P.3d 682, 685 (Or. 2007).
203. *Dowling*, 875 N.E.2d at 1022.

is a security retainer.[204] In reality, general retainers are quite rare and few lawyers enjoy the professional reputation, or have the specialized practice, which allows them to charge general retainers.[205] Accordingly, a general retainer must be plainly described, and the lawyer must clearly inform the client both that the general retainer will be earned upon receipt and what that means.[206]

Consistent with the requirement that a lawyer charging a general retainer must plainly describe the arrangement, the lawyer's engagement letter or agreement should clearly state that the general retainer is not intended to pay for future services,[207] but is instead intended to ensure the lawyer's availability.[208] The lawyer's engagement letter or agreement should also describe the time period the general retainer is intended to cover or the priority it is intended to establish; clearly state the basis or rate on which the lawyer will be compensated in addition to the general retainer; and explain the general retainer's benefits to the client.[209] As for the amount charged as a general retainer, there is authority for the proposition that the retainer "should bear a reasonable relationship to the income the lawyer sacrifices by accepting it."[210] That is not the only possible pricing measure, however, and it seems clear that lawyers may establish general retainer amounts by applying the Model Rule 1.5(a) factors and other relevant considerations to the circumstances of the representation.

In regard to security retainers, lawyers must explain up front that the funds advanced are the clients' property until they are applied to pay for services and that they will therefore be held in a trust account.[211] They must inform clients that any unearned portion of a security retainer will be refunded upon completion of the representation, termination of the engagement, or at any other time as they agree.[212] Lawyers further need to state how their hourly rates will be applied against security retainers.[213] Indeed, unless they have regularly represented a client on the same basis,

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204. *See, e.g., In re* Old Summit Mfg., LLC, 323 B.R. 154, 162 (Bankr. M.D. Pa. 2004) (quoting *In re* Pannebaker Custom Cabinet Corp., 198 B.R. 453, 459 (Bankr. M.D. Pa. 1996)); *In re Sather*, 3 P.3d at 410-11 (presuming a special retainer "unless the fee agreement expressly states that a fee is an engagement retainer and explains how the fee is earned upon receipt"); *Dowling,* 875 N.E.2d at 1022-23 (protecting clients' interests this way); *Frerichs*, 671 N.W.2d at 476 (noting presumption in favor of special retainers).

205. *See In re Sather*, 3 P.3d at 410-411.

206. *Id.*

207. Okla. Bar Ass'n, Ethics Op. No. 317, at 2 (2002) [hereinafter Okla. Eth. Op. No. 317].

208. LAWRENCE J. FOX & SUSAN R. MARTYN, RED FLAGS: A LAWYER'S HANDBOOK ON LEGAL ETHICS § 2.10(b), at 54 (2005).

209. *Id.* at 54.

210. Okla. Eth. Op. No. 317, *supra* note 207, at 2.

211. *Dowling,* 875 N.E.2d at 1022.

212. *Id.*

213. *In re Freeman*, 835 N.E.2d at 498.

failing to explain the operation of a security retainer violates Rule 1.5(b).[214]

Although it should be obvious, lawyers charging retainers of any sort must understand them in order to explain them to clients. Unfortunately, experience teaches that this advice is much easier to offer than absorb, even where excellent lawyers and law firms are involved. Consider this language from a respected law firm's engagement letter in a bankruptcy matter purporting to charge the client a general retainer:

> The Company will provide to the Firm, a "classic retainer" in the amount of US $500,000.00 as defined in *In re Production Associates,* 264 B.R. 180, 184[-]85 (Bankr. N.D. Ill. 2001), and *In re McDonald Bros. Construction, Inc.,* 114 B.R. 989, 997[-]99 (Bankr. N.D. Ill. 1990). As such, the classic retainer is earned by the Firm upon receipt. The initial amount of the classic retainer was set to approximate our estimate of fees and expenses expected to be accrued and unpaid by the Company between payment cycles. The Firm's estimated fees and expenses may change . . . in which case the Firm will consult with the Company and the parties will agree in good faith to adjust the classic retainer. Further, the Company agrees to replenish the classic retainer upon receiving invoices from the Firm so that the classic retainer amount remains at or above the Firm's estimated fees and expenses expected to be accrued and unpaid by the Company between payment cycles.[215]

This letter does not remotely describe a classic retainer, i.e., a general retainer. This is clear because the retainer is not being charged to ensure the firm's availability; rather, the firm is charging the retainer as a hedge against the subsequent non-payment of its fees and expenses. In fact, the letter describes an evergreen security retainer, as evidenced by the requirement that the client replenish the retainer so that it always exceeds the law firm's estimated fees and expenses expected to be accrued between billing cycles. The reference to the retainer being earned upon receipt suggests that the firm means to charge a non-refundable evergreen security retainer. The fact that the bankruptcy cases mentioned in the engagement letter recognize general retainers[216] does not imply that this arrangement qualifies as one. Calling an evergreen retainer something else changes neither its character nor its financial effect.

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214. *See In re Freeman*, 835 N.E.2d at 498.

215. The very fine lawyer who wrote this letter shall remain anonymous as a professional courtesy. A copy of the letter is on file with the author.

216. *In re* Prod. Assocs., Ltd., 264 B.R. 180, 184-85 (Bankr. N.D. Ill. 2001) (describing general retainers as "classic retainers" and explaining their operation); *In re McDonald Bros. Constr., Inc.*, 114 B.R. at 997-99.

It is perhaps possible that the lawyer who drafted this engagement letter meant to request an advance payment retainer rather than a general retainer, inasmuch as the bankruptcy cases cited in the letter mention advance payment retainers.[217] It is also possible that the firm meant to charge an advance payment retainer/evergreen retainer hybrid. The advance payment retainer approach, including a hybrid, makes some sense given (1) the firm's treatment of the retainer as earned upon receipt; and (2) the fact that this is a bankruptcy representation. The problem with that rationale is that the bankruptcy cases cited also discussed general retainers. The lawyer who prepared the engagement letter repeatedly used the term classic retainer, which is a synonym for general retainer. The terms advance payment retainer and classic retainer refer to notably different financial arrangements designed to accomplish different purposes.

Third, with respect to flat fees, lawyers must make clear what activities or tasks the fee covers. A flat fee agreement must clearly state that it is in fact a flat fee that is being charged and not a security retainer. If the jurisdiction permits lawyers to treat flat fees as earned upon receipt and therefore deposit such fees in their operating accounts rather than their trust accounts, lawyers must explain those points. If, on the other hand, a lawyer intends to deposit a flat fee in her trust account and withdraw portions of it as she achieves particular benchmarks or milestones in the representation, that process must be clearly stated in the fee agreement.[218]

Fourth, lawyers should never describe any retainer or flat fee as "non-refundable," even if it is to be earned upon receipt. Because any fee may be reduced or ordered to be refunded if it is unreasonable, branding any retainer or flat fee non-refundable is misleading.[219] Describing a retainer or flat fee as non-refundable potentially violates Model Rule 1.5(a), which requires that all fees be reasonable;[220] Model Rule 1.15(d), which controls lawyers' duty to return to clients any funds to which they are entitled and to account for such funds when requested to do so;[221] Model Rule 1.16(d), which governs lawyers' duties upon termination of a representation;[222] Model Rule 8.4(c), which prohibits "dishonesty, fraud, deceit, or misrepresentation;"[223] and even Model Rule 8.4(d), which forbids conduct that is "prejudicial to the administration of justice."[224] Thus, if lawyers intend to

217. *In re Prod. Assocs., Ltd.,* 264 B.R. at 186-87 (discussing *In re McDonald Bros.,* 114 B.R. at 1000-03); *In re McDonald Bros.,* 114 B.R. at 1000.
218. *Dowling*, 875 N.E.2d at 1022.
219. *In re Sather*, 3 P.3d at 413; Alaska Bar Ass'n, Ethics Op. 2009-1 (2009).
220. *In re* Stephens, 851 N.E.2d 1256, 1258 (Ind. 2006); *In re Kendall*, 804 N.E.2d at 1160.
221. MODEL RULES OF PROF'L CONDUCT R. 1.15(d) (2008).
222. *In re Sather,* 3 P.3d at 413.
223. MODEL RULES OF PROF'L CONDUCT R. 8.4(c) (2008).
224. MODEL RULES OF PROF'L CONDUCT R. 8.4(d) (2008).

treat retainers or flat fees as being earned upon receipt, they should content themselves with "earned upon receipt" terminology.

Fifth, lawyers should keep contemporaneous time records and document expenses even when charging flat fees. Lawyers always bear the burden of demonstrating the reasonableness of their fees, regardless of the compensation structure, which can be a difficult chore absent contemporaneous time records and careful accounting.

Sixth, lawyers must deposit general retainers in their operating accounts, not their trust accounts. Because general retainers are earned upon receipt the funds are immediately lawyers' property, and as a matter of professional responsibility, cannot be placed in their trust accounts. The only exception to this rule is for situations in which lawyers need to deposit specific amounts of their own funds in client trust accounts to pay bank service charges.[225] Furthermore, in the event of a dispute over the characterization of the retained funds, depositing the funds in the lawyer's trust account would be at least some evidence to a court or disciplinary authorities that the funds were paid not as a general retainer, but rather as a security retainer.

Seventh, lawyers must be careful when it comes to treating flat fees as earned upon receipt. They should never do so without first ascertaining the law in their jurisdiction. If a jurisdiction permits lawyers to treat flat fees as earned upon receipt and they do so, they must deposit any flat fees in their operating accounts rather than their trust accounts in order to avoid commingling charges. Because flat fees are always potentially refundable, however, lawyers must recognize the possibility that they may be called upon to repay all or some portion of a flat fee that they considered earned upon receipt. As a general proposition, and especially in the absence of clear guidance in a particular jurisdiction, the safest course for lawyers is to hold flat fees in their trust accounts until they are earned by performing agreed legal services. Of course, lawyers who go this route may not describe their flat fees as being earned upon receipt. Lawyers may mitigate any inconvenience or burden associated with this admittedly conservative approach by agreeing with clients on certain performance benchmarks or mileposts for treating portions of flat fees as becoming earned during the course of a representation.[226]

Finally, lawyers who charge general retainers must recognize that the party paying a general retainer becomes a client as soon as the lawyer accepts the representation. The client is then a current client of the lawyer for conflict of interest purposes until the engagement for which the general retainer was paid is completed or terminated, or the time or contingency

225. MODEL RULES OF PROF'L CONDUCT R. 1.15(b) (2008).
226. *Piazza*, 756 N.W.2d 690, 698 (Iowa 2008) (Rothrock, *supra* note 155, at 355).

the general retainer was intended to cover expires.[227] The fact that the time, matter, proceeding, or transaction for which the lawyer is retained is distant or speculative does not prevent the immediate formation of an attorney-client relationship.

VII. CONCLUSION

There are essentially two types of retainers: general and special. General retainers are also called true or classic retainers, or engagement fees. A general retainer is not a fee advance; rather, it typically secures a lawyer's availability during a given period of time or for a specified case or matter. A general retainer confers an immediate benefit on a client and is fully earned by the lawyer when paid. General retainers are rare. Special retainers are divided into two subcategories: security retainers and advance payment retainers. A security retainer is intended to secure the client's payment for future services that the lawyer is expected to perform. The client is simply advancing the lawyer fees for the future services. Evergreen retainers are a form of security retainer. Advance payment retainers are best known as flat fees. A flat fee is a present payment to a lawyer as compensation for the provision of specified legal services in the future. A flat fee is intended to compensate the lawyer for all work to be done on the related matter or an aspect thereof, regardless of the time required or the complexity of the assignment. Like a security retainer, a flat fee is a fee advance.

Retainers and flat fees pose several serious professional responsibility challenges for lawyers. The most common source of controversy appears to be lawyers' attempts to charge non-refundable retainers. In the flat fee context, disputes over reasonableness and trust account issues predominate. Regardless, it is important for lawyers to understand the types of retainers that may be charged, associated restraints, and potential contractual impediments and solutions. Only if they do will they be able to responsibly achieve the financial certainty or security they desire in many representations.

For courts and lawyers alike, a substantial part of the confusion over retainers and flat fees is attributable to inconsistent and awkward terminology. In fact, only general retainers are truly *retainers*; security retainers and flat fees are *advances*. Unfortunately, the term retainer is so ingrained in the language of the law that widespread re-definition or re-characterization of the various lawyer-client financial arrangements that the term is intended to describe probably cannot be achieved.

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227. *See generally* MODEL RULES OF PROF'L CONDUCT R. 1.7 (2008) (governing current client conflicts of interest).

LEADING/RECENT APPELLATE CASES

Federal: *E.g., Barron v. Countryman,* 432 F.3d 590 (5th Cir. 2005); *Ryan v. Butera, Beusang, Cohen & Brennan,* 193 F.3d 210, 216 (3d Cir. 1999)

Alabama: *Alabama State Bar v. Hallett,* 26 So. 3d 1127 (Ala. 2009); *Taylor v. Alabama State Bar,* 587 So. 2d 1205 (Ala. 1991)

Colorado: *In re Sather,* 3 P.3d 403 (Colo. 2000)

D.C.: *In re Mance,* 980 A.2d 1196 (D.C. 2009)

Georgia: *Nash v. Studdard,* 670 S.E.2d 508 (Ga. 2008)

Illinois: *Dowling v. Chicago Options Associates, Inc.,* 875 N.E.2d 1012 (Ill. 2007)

Indiana: *In re O'Farrell,* No. 29S00-0902-DI-76, 2011 Ind. LEXIS 72 (Ind. Feb. 11, 2011) **(attached);** *In re Kendall,* 804 N.E.2d 1152 (Ind. 2004)

Iowa: *Iowa Supreme Ct. Att'y Disciplinary Board v. Piazza,* 756 N.W.2d 690 (Iowa 2008); *Iowa Supreme Ct. Bd. of Prof'l Ethics & Conduct v. Frerichs,* 671 N.W.2d 470, 477 (Iowa 2003); *Iowa Supreme Ct. Board of Prof'l Ethics & Conduct v. Apland,* 577 N.W.2d 50 (Iowa 1998)

Kansas: *In re Scimeca,* 962 P.2d 1080 (Kan. 1998)

Maryland: *Attorney Grievance Comm'n of Md. v. Lawson,* 933 A.2d 842 (Md. App. 2007)

Michigan: *Grievance Administrator v. Cooper,* 757 N.W.2d 867 (Mich. 2008) **(attached)**

Nebraska: *State ex rel. Counsel for Discipline of the Neb. Sup. Ct. v. Wintroub,* 765 N.W.2d 482 (Neb. 2009)

New Mexico: *In re Yalkut,* 176 P.3d 1119 (N.M. 2008)

New York: *Meyer, Suozzi, English & Klein PC v. Vista Maro LLC,* No. 11455/10 (N.Y. Sup. Ct., Nassau Cty. Jan. 12, 2011) **(attached)**; *In re Cooperman,* 633 N.E. 2d 1069 (N.Y. 1994)

Ohio: *Cuyahoga County Bar Ass'n v. Cook,* 901 N.E.2d 225 (Ohio 2009); *Columbus Bar Ass'n v. Halliburton-Cohen,* 832 N.E.2d 42 (Ohio 2005); *Cincinnati Bar Assoc. v. Witt,* 816 N.E.2d 1036 (Ohio 2004)

Oklahoma: *McQueen, Rains & Tresch, LLP v. Citgo Premium Corp.,* 195 P.3d 35 (Okla. 2008); *Wright v. Arnold,* 877 P.2d 616 (Okla. Civ. App. 1994)

Texas: *Cluck v. Commission for Lawyer Discipline,* 214 S.W.3d 736 (Tex. App. 2007)

Virginia: *Marcus, Santoro & Kozak, P.C. v. Wu*, 652 S.E.2d 777 (Va. 2007); *Virginia State Bar v. Goggin*, 530 S.E.2d 415 (Va. 2000)

Washington: *In re Disciplinary Proceeding Against DeRuiz*, 99 P.3d 881 (Wash. 2004)

Wisconsin: *In re Ryan*, 766 N.W.2d 186 (Wisc. 2009)

GRIEVANCE ADMINISTRATOR, ATTORNEY GRIEVANCE COMMISSION, STATE OF MICHIGAN, Petitioner-Appellee, v PATRICIA COOPER, Respondent-Appellant.
SC: 135053
SUPREME COURT OF MICHIGAN
482 Mich. 1079*; *757 N.W.2d 867*; *2008 Mich. LEXIS 2505
December 12, 2008, Decided

OPINION

[*1079] [**867] On November 13, 2008, the Court heard oral argument on the application for leave to appeal the September 17, 2007 opinion and order of the Attorney Discipline Board. On order of the Court, the application is again considered. *MCR 7.302(G)(1)*. In lieu of granting leave to appeal, we REVERSE the opinion and order of the Attorney Discipline Board and REINSTATE the August 1, 2006 order of dismissal of the Attorney Discipline Board Hearing Panel No. 106. The Attorney Discipline Board erred in holding that the July 29, 2002 fee agreement was ambiguous as to whether the $ 4,000 minimum fee was nonrefundable. As written, the agreement clearly and unambiguously provided that the respondent was retained to represent the client and that the minimum fee was incurred upon execution of the agreement, regardless of whether the representation was terminated by the client before the billings at the stated hourly rate exceeded the minimum. So understood, neither the agreement nor the respondent's retention of the minimum fee after the client terminated the representation violated existing *MRPC 1.5(a)*, MPRC 1.15(b) or *MRPC 1.16(d)*.

CONCUR BY: KELLY

CONCUR

KELLY, J. (*concurring*).

I [***2] concur in the Court's order reversing the opinion and order of the Attorney Discipline Board and reinstating the order of dismissal of the Attorney Discipline Board Hearing Panel No. 106. I write separately in the interest of curtailing future misunderstandings regarding attorney-client fee agreements similar to the one that occurred in this case.

The following is the relevant part of the fee agreement:

> 1. Client agrees to pay Attorney a MINIMUM FEE OF $ 4,000.00 which shall be payable as follows:
>
> [**868] Retainer $ 4,000.00
>
> Balance $ -0-
>
> * * *
>
> This MIMIMUM FEE shall entitle Client to a combined amount of Attorney and Legal Assistant time computed in accordance with the hourly rate set forth in Paragraph 3 below.
>
> 2. Client understands that NO portion of the MINIMUM FEE referred to above is REFUNDABLE, to the client, under any circumstances.
>
> 3. Hourly rate: Attorney $ 195.00
>
> Assistant $
>
> 4. In the event the combined Attorney and Legal Assistant time shall exceed the MINIMUM FEE, Client agrees to pay for such time at the rates set forth in Paragraph 3 above.

I agree that this agreement is unambiguous because it clearly states that the $ 4,000 minimum fee is nonrefundable.

[*1080] However, counsel might be aided [***3] in knowing that the Attorney Grievance Commission believes that fewer grievances would be filed if a different fee agreement were substituted for the agreement used in this case. The commission recommends that the agreement explicitly designate the fee the attorney charges for being hired and state that the fee is nonrefundable under any circumstances. As the commission recommends, counsel may wish to designate the number of hours the attorney will work without additional charge, and specify an hourly rate to be charged thereafter.

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU - PART 3

Present: HON. UTE WOLFF LALLY
Justice

MEYER, SUOZZI, ENGLISH & KLEIN, P.C.,

Plaintiff,

-against-

VISTA MARO, LLC,

Defendants.

Motion Sequence #1

Submitted November 19, 2010

INDEX NO: 11455/10

The following papers were read on this motion for summary judgment:

Notice of Motion and Affs.....1-3
Affs in Opposition.....4&5
Affs in Reply.....6&7
Memoranda of Law.....8-9a

This motion by the plaintiff Meyer, Suozzi, English & Klein, P.C., for an order pursuant to CPLR 3212 granting summary judgment in its favor and directing the entry of a judgment against defendant the amount of $152,050.44 plus interest thereon as provided by law is denied.

In this action, the plaintiff Meyer, Suozzi, English & Klein, P.C. seeks to recover

damages representing legal fees allegedly due and owing from the defendant Vista Maro, LLC to Meyer, Suozzi, English & Klein, P.C. in the amount of $152,050.44.

"On a motion for summary judgment pursuant to CPLR 3212, the proponent must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." (*Sheppard-Mobley v King*, 10 AD3d 70, 74, aff'd. as mod., 4 NY3d 627, citing *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324; *Winegrad v New York Univ. Med. Ctr*., 64 NY2d 851, 853). "Failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers." (*Sheppard-Mobley v King*, *supra*, at p. 74; *Alvarez v Prospect Hosp*., *supra*; *Winegrad v New York Univ. Med. Ctr*., *supra*). Once the movant's burden is met, the burden shifts to the opposing party to establish the existence of a material issue of fact. (*Alvarez v Prospect Hosp*., *supra*, at p. 324). The evidence presented by the opponents of summary judgment must be accepted as true and they must be given the benefit of every reasonable inference. (*Demishick v Community Housing Management Corp*., 34 AD3d 518, 521, citing *Secof v Greens Condominium*, 158 AD2d 591).

It is not disputed that the defendant Vista Maro retained Meyer, Suozzi, English & Klein, P.C. on July 28, 2008 in writing to represent it in two actions, *Q. International Courier, Inc. v Vista Maro, LLC et al.*, (Index No. 07-700042 Supreme Court Queens County) and *Vista Maro, LLC v Q. International Courier, Inc*., *et al.*, (Index No. 08-10311 Supreme Court Queens County). The Retainer Agreement provided:

> "Upon Vista Maro's request, the agreed upon fee for Meyer, Suozzi, English & Klein, P.C.'s legal services for this representation will be **unconditional and absolute** flat amount of Three Hundred Thousand ($300,000) Dollars. It is understood and agreed that based upon contingencies of

> the Litigation and other risk factors, **Meyer, Suozzi, English & Klein, P.C. is entitled to the entire amount of this fee regardless of the outcome of the Litigation or the timing of its resolution"** (emphasis added).

The Retainer Agreement called for a payment of three installments of $100,000. The first payment was due simultaneously with the execution of the Retainer Agreement; the second installment was due on or before November 15, 2008; and, the third and final installment was due on January 15, 2009. The Retainer Agreement further provided that the "installment payment schedule solely addresses the *timing* of payment and shall not effect Vista Maro's obligation to pay the entire fee and that "any unpaid amount of the fee shall be paid no later than the resolution of the Litigation or at Meyer, Suozzi, English & Klein, P.C.'s written request." More importantly, the Agreement provided that "Vista Maro shall have the right to change counsel at any time; provided, however, that Meyer, Suozzi, English & Klein, P.C. shall be entitled to the entire $300,000 fee regardless of any change of counsel." Vista Maro also agreed to be responsible for costs and disbursements.

In support of its motion, Meyer, Suozzi, English & Klein, P.C. alleges and Vista Maro does not dispute that the two actions in which Meyer, Suozzi, English & Klein, P.C. represented Vista Maro were settled and discontinued via stipulation of the parties in April, 2009. Meyer, Suozzi, English & Klein, P.C. further alleges and again, Vista Maro does not dispute that only $150,000 of Meyer, Suozzi, English & Klein, P.C's unconditional $300,000 legal fee and only $193.54 of the $2,243.98 costs and disbursements have been paid, leaving an unpaid balance of $152,050.44.

In support of its motion, Meyer, Suozzi, English & Klein, P.C. has submitted eight invoices which were sent to Vista Maro, LLC between July 9, 2009 and June 21, 2010, which were never paid or objected to.

"While, in the law generally, equivocal contracts will be construed against the drafters, courts as a matter of public policy give particular scrutiny to fee arrangements between attorneys and clients, casting the burden on attorneys who have drafted the retainer agreements to show that the contracts are fair, reasonable and fully known and understood by their clients." (*Shaw v Manufacturers Hanover Trust Co.*, 68 NY2d 173, 176, citing *Jacobsen v Sassower*, 66 NY2d 991, 993; *Gair v Peck*, 6 NY2d 97, 106, cert den., 361 US 374; 1 Speiser, Attorneys' Fees §§ 2:3, 2:9). Thus, "[t]he law requires that an agreement between the client and the attorney be construed most favorably to the client." (*Bizar & Martin v U.S. Ice Cream Corp.*, 228 AD2d 588, 589, citing Shaw v *Manufacturers Hanover Trust Co.*, *supra*, at p. 176; *Jacobson v Sassower*, *supra*, at p. 993; *Greenberg v Bar Steel Constr. Corp*., 22 NY2d 210, 213).

A client retains the unfettered right to terminate his attorney at any time with or without cause. (*Matter of Cooperman*, 83 NY2d 465, 472; *Martin v Camp*, 219 NY170). In fact, when a client discharges an attorney after some services are performed but prior to the completion of the services for which the fee was agreed upon, the discharged attorney is entitled to recover [only] the reasonable value of services rendered in quantum meruit. (*Atkins & O'Brien, LLP v ISS Intern. Service System, Inc*., 252 AD2d 446, citing *Matter of Cooperman*, *supra*, at p. 473, citing *Lai Ling Cheng v Modansky Leasing Co. Inc*., 73 NY2d 454; *Teichner by Teichner v W & J Holsteins, Inc*., 64 NY2d 977; *Matter of Montgomery's Estate*, 272 NY 323). "Special non-refundable

retainer agreements clash with public policy and transgress provisions of the Code of Professional Responsibility (see, DR 2-110 [A] [3]; [B] [4]; 2-106[A]), essentially because these fee agreements compromise the client's absolute right to terminate the unique fiduciary attorney-client relationship." (*Matter of Cooperman*, *supra*, at p. 471). Special non-refundable retainer agreements "impose a penalty on a client for daring to invoke a hollow right to discharge." (*Id*., at p. 474). "Instead of becoming responsible for fair value of actual services rendered, the firing client would lose the entire 'nonrefundable' fee, no matter what legal services, if any, were rendered." (*Id*.) The Court of Appeals held that "this would be a shameful, not honorable, professional denouement." (*Id*.).

Nevertheless, in (*Id*., at p. 476), the Court of Appeals specifically stated that it "intend[ed] no effect or disturbance with respect to other types of appropriate and ethical fee arrangements. Minimum fee arrangements and general retainers that provide for fees, not laden with the nonrefundability impediment irrespective of any services will continue to be valid . . . ." The Court of Appeals concluded that "while the special nonrefundable retainer agreement will be unenforceable . . . quantum meruit payment for services actually rendered will still be available and appropriate." (*Id.*, at p. 475). Concomitantly, "[u]nder New York law, a client has an affirmative cause of action for rescission of an invalid retainer agreement and restitution or recoupment of legal fees paid in excess of the reasonable amount due to the attorney for services actually rendered." (*Levisohn, Lerner, Berger & Langsam v Medical Taping Systems, Inc*., 20 F. Supp. 2d 645, 650 (S.D.N.Y. 1998), citing *V.W. v J.B.*, 165 Misc2d 767 (Supreme Court New York County (1995) *reversed on other grounds*, 219 AD2d 77).

A nonrefundable retainer is defined as "a fee paid by a client in advance of services and denominated by the lawyer as nonrefundable, irrespective of whether the client discontinues the representation or whether the lawyer does any work." (*Nonrefundable Retainers Revisited*, 72 N.C.L. Rev. at 3).

The Retainer Agreement that Meyer, Suozzi, English & Klein, P.C. seeks to recover on is a non-refundable retainer agreement and as such, is unenforceable. [See *Matter of Cooperman*, *supra*; *Wong v Michael Kennedy, P.C.*, 853 F.Supp. 73 (E.D.N.Y. 1994) (agreement invalid because it expressly said fee was nonrefundble); *cf*. *Gala Enterprises*, *Inc. v Hewlett Packard Co.*, 970 F.Supp. 212 (S.D.N.Y. 1997) (agreement not a nonrefundable special retainer because it made no express reference to refundability of fee]. That the agreement does not specifically state that the fee is "nonrefundable" is irrelevant. The Retainer Agreement requires full payment of the $300,000 fee regardless of whether any work is done and whether its services are terminated. It clearly constitutes a nonrefundable retainer agreement. That Meyer, Suozzi, English & Klein, P.C. completed the services contracted for does not legalize the agreement, either: Meyer, Suozzi, English & Klein, P.C. is entitled to recover only in quantum meruit.

Therefore, Meyer, Suozzi, English & Klein, P.C.'s motion must be denied.

Dated: January 12, 2011

_____

UTE WOLFF LALLY, J.S.C.

TO: Meyer, Suozzi, English & Klein, PC
Attorneys for Plaintiff
990 Stewart Avenue, Suite 300
Garden City, NY 11530

June Diamant, Esq.
Attorney for Defendant
229 Linwood Avenue
Cedarhurst, NY 11516

meyer,suozzi-vistamaro,#1/sumjudg

IN THE MATTER OF: HEATHER MCCLURE O'FARRELL, Respondent.

No. 29S00-0902-DI-76

SUPREME COURT OF INDIANA

2011 Ind. LEXIS 72

February 11, 2011, Decided
February 11, 2011, Filed

PRIOR HISTORY: [*1]

Attorney Discipline Action Hearing Officer Kevin Barton, J.

COUNSEL: ATTORNEY FOR THE RESPONDENT: Alfred E. McClure, Lafayette, Indiana.

ATTORNEYS FOR THE INDIANA SUPREME COURT DISCIPLINARY COMMISSION: G. Michael Witte, Executive Secretary, Dennis K. McKinney, Staff Attorney, Indianapolis, Indiana.

JUDGES: Dickson, Sullivan, and David, JJ., concur. Shepard, C.J., with whom Rucker, J., joins, dissenting only as to the sanction.

OPINION

Per Curiam.

This matter is before the Court on the report of the hearing officer appointed by this Court to hear evidence on the Indiana Supreme Court Disciplinary Commission's "Verified Complaint for Disciplinary Action," and on the post-hearing briefing by the parties. The Respondent's 1995 admission to this state's bar subjects her to this Court's disciplinary jurisdiction. See *IND. CONST. art. 7, § 4*.

We find that Respondent, Heather McClure O'Farrell, engaged in attorney misconduct by making agreements for and charging unreasonable fees in violation of *Indiana Professional Conduct Rule 1.5(a)*. For this misconduct, we find that Respondent should receive a public reprimand.

Background

Respondent practices law as an attorney of McClure & O'Farrell, P.C. ("the Law Office"). The Law [*2] Office uses an "Hourly Fee Contract" or a "Flat Fee Contract" in most cases when it represents a party in a family law matter. [1] Both types of contract contain a provision for a nonrefundable "engagement fee." The Commission alleges Respondent improperly charged two clients nonrefundable engagement fees and did not refund unearned fees after the representations ended. The case was submitted to the hearing officer on the parties' stipulation of facts in lieu of an evidentiary hearing.

> 1 We note that Respondent is represented in this action by another member of the Law Firm, who states that Respondent did not draft the contracts at issue.

Count 1. On November 20, 2006, "Client 1" hired the Law Office to prepare and file for dissolution of her marriage, to represent her in the preliminary hearing in that case, and to obtain a protective order against Client 1's husband. The Law Office charged Client 1 a $3,000 engagement fee for the cases, plus $131 for filing fees, which Client 1 paid by credit card. Client 1 signed the Law Office's Flat Fee Contract, which contained the following provisions:

> "[The] engagement fee is non-refundable and shall be deemed earned upon commencement of Attorney's [*3] work on the case[.]"
>
> "Attorneys agree to credit any engagement fee received from Client toward the flat fee . . . . Said engagement fee shall be due and owing at the time of execution of this contract. Client agrees to make no demand for a refund or return of any part of the engagement fee owed or paid."
>
> "In the event that the Client-Attorney relationship terminates prior to the completion of Attorneys' representation as described . . . above, Client and Attorneys agree Attorneys shall, at the Attorneys' sole discretion, be entitled to keep the engagement fee paid[.]"

Respondent filed a petition for dissolution of Client 1's marriage ("the Divorce Case") and a petition for a

protective order ("the PO Case"). An Ex Parte Order for Protection was entered on November 22, 2006. On or about November 23, 2006, Client 1 asked her credit card company to chargeback her payment of $3,131 to the Law Office, which was done. The Law Office challenged the chargeback, and the credit card company eventually restored the payment of $3,131 to the Law Office.

On November 28, 2006, Respondent filed motions to withdraw as Client 1's attorney in the Divorce Case and in the PO Case. Both cases eventually were [*4] dismissed. The Law Office refused to refund any part of the $3,000 Client 1 had paid, saying that the fee was earned upon receipt pursuant to the Flat Fee Contract.

Count 2. "Client 2" hired the Law Office to represent her regarding her ex-husband's petition for rule to show cause and petition to modify child support. Client 2 agreed to pay an "engagement fee" of $1,500 and signed the Law Office's Hourly Fee Contract, which contained the following provisions:

> "[The] engagement fee is non-refundable and shall be deemed earned upon commencement of Attorney's work on the case[.]"
>
> "Attorneys agree to credit any engagement fee received from Client to Client's account at Attorneys' prevailing rate as it is established from time to time. Said engagement fee shall be due and owing at the time of execution of this contract. Client agrees to make no demand for a refund or return of any part of the engagement fee owed or paid."

Client 2 paid the $1,500-engagement fee, and later she paid an additional $3,000 under the terms of the Hourly Fee Contract. The Law Office then offered to complete the representation for an additional flat fee of $5,000. Client 2 accepted the offer and paid $5,000 to the [*5] Law Office. The Law Office intended the $5,000 flat fee to be non-refundable and deemed earned upon commencement of the representation. It further intended that the $5,000 flat fee would pay for the remainder of the representation. The Law Office prepared a written Flat Fee Contract for Client 2's representation. Although Client 2 never signed it, she confirmed in a letter to Respondent her understanding that the $9,500 she had paid was payment in full for the representation. Both parties thus agreed that Client 2's $5,000 payment would constitute payment in full for the balance of the representation.

After paying the Law Firm $5,000, Client 2 told Respondent that her ex-husband had molested their daughter. Respondent advised Client 2 that she could not sign a petition containing such allegations without further investigation and proof. Without further consulting with Respondent, Client 2 reported the molestation allegations to the police, which expanded and complicated the scope of the representation. Due to Client 2's unwillingness to pay any additional fee, Respondent and the Law Office ended their representation of Client 2 and withdrew as her attorney. The Law Office refused to [*6] refund any part of the fee paid by Client 2, saying that all fees were earned upon receipt and nonrefundable.

The Commission charged Respondent with violating *Indiana Professional Conduct Rule 1.5(a)*, which prohibits making an agreement for, charging, or collecting an unreasonable fee, and *Rule 1.16(d)*, which prohibits failure to refund an unearned fee promptly. [2]

> 2 The Commission also alleged that Respondent violated *Rule 1.2(a)* by failure to abide by a client's decisions concerning the objectives of the representation. The hearing officer concluded Respondent did not violate this rule, and the Commission does not challenge this conclusion.

Discussion

Types of fee arrangements. There are a variety of terms used to describe the types of fee arrangements between attorneys and clients. In this opinion, the following terms will be used for three common types of attorney fees: (1) a "flat fee" is a fixed charge for a particular representation, often paid in full at the beginning of the representation; (2) an "advance fee" is a payment made at the beginning of a representation against which charges for the representation are credited as they accrue, usually on an hourly basis; [3] and (3) a "general [*7] retainer" is payment for an attorney's availability, which is earned in full when paid before any work is done. [4]

> 3 This is sometimes referred to as a "special retainer" or a "security retainer."
> 4 This is sometimes referred to as an "engagement retainer."

Regardless of the term used to describe a client's initial payment, its type is determined by its purpose, i.e., what it is intended to purchase. When the purpose is to serve as an advance payment to the lawyer of fees the lawyer will earn in the future by doing work for the client, that payment is either a flat fee or advance fee. On the other hand, when the purpose is simply to pay for the lawyer's *availability* to provide legal services as needed during a period of time, as opposed to payment for work not yet done, the fee is a general retainer. A general re-

tainer acts as an option on the lawyer's future services, often on a priority basis, and precludes the lawyer from undertaking representations that might conflict with representing the client. In some cases, the lawyer may need to turn down unrelated employment to ensure availability if the client calls for immediate assistance. Because this fee is not intended to pay for work, but [*8] merely for the lawyer's availability, it is earned on payment and the attorney is entitled to the money even if no services are actually performed for the client, so long as the lawyer provides the bargained-for availability. [5] *See Iowa Supreme Ct. Bd. of Prof'l Ethics & Conduct v. Frerichs, 671 N.W.2d 470, 475-76 (Iowa 2003)*; *cf. Jennings v. Backmeyer, 569 N.E.2d 689 (Ind. Ct. App. 1991)* (attorney who charged "nonrefundable" fee to represent client against potential criminal charge was entitled to only reasonable value of services rendered before client's death).

> 5 As one commentator has noted, describing even a justified general retainer as non-refundable is somewhat misleading "because a court may require any fee--including one earned upon receipt--to be disgorged or refunded if it is ultimately determined to be unreasonable . . . ." Douglas R. Richmond, *Understanding Retainers and Flat Fees, 34 J. Legal Prof. 113, 129 (2009).*

Nonrefundability considerations. In addressing an attorney's use of "special nonrefundable retainer fee agreements" calling for nonrefundable minimum fees, the New York Court of Appeals opined:

> [T]he use of a special nonrefundable retainer fee agreement clashes [*9] with public policy because it inappropriately compromises the right to sever the fiduciary services relationship with the lawyer. Special nonrefundable retainer fee agreements diminish the core of the fiduciary relationship by substantially altering and economically chilling the client's unbridled prerogative to walk away from the lawyer. To answer that the client can technically still terminate misses the reality of the economic coercion that pervades such matters. If special nonrefundable retainers are allowed to flourish, clients would be relegated to hostage status in an unwanted fiduciary relationship--an utter anomaly. Such circumstance would impose a penalty on a client for daring to invoke a hollow right to discharge.

Matter of Cooperman, 83 N.Y.2d 465, 633 N.E.2d 1069, 1072-73, 611 N.Y.S.2d 465 (N.Y. 1994). In a similar vein, we have held: "A corollary of the client's right to discharge a lawyer is that a contract between the client and the lawyer that unduly impairs that right is invalid." *Galanis v. Lyons & Truitt, 715 N.E.2d 858, 861 (Ind. 1999)*.

This Court addressed the nonrefundability of fees in *Matter of Kendall, 804 N.E.2d 1152 (Ind. 2004)*, in which:

> The respondent required certain clients to pre-pay [*10] him a portion of his fees before he performed any legal services. These arrangements were set forth in contracts between the respondent and these clients that provided for the advance fee payments and specified that the advance fee payments were "nonrefundable." Notwithstanding this nonrefundability provision in the contracts, it was the respondent's intention and practice to refund any unearned portion of the advance fee payments.

Id. at 1153. We held that an advance fee cannot be nonrefundable and the assertion in a fee agreement that an advance fee is nonrefundable violates the requirement that a lawyer's fee be reasonable. *See id. at 1160*. We continued:

> Where the advance payment is in the nature of **a flat fee**, however, or for a partial payment of a flat fee, it is not only reasonable but also advisable that the agreement expressly reflect the fact that such flat fee is not refundable **except for failure to perform the agreed legal services. If the legal services covered by a flat fee are not provided as agreed, an attorney must refund any unearned fees**.

Id. (emphasis added).

In an earlier case, *Matter of Thonert, 682 N.E.2d 522 (Ind. 1997)*, this Court held that the respondent's demand [*11] for a nonrefundable $4,500 fee irrespective of any termination of the respondent's employment was an unreasonable fee. We expanded:

> We do not hold that unrefundable retainers are per se unenforceable. There are many circumstances where, for example, preclusion of other representations or

> guaranteed priority of access to an attorney's advice may justify such an arrangement. **But here there is no evidence of, for example, any value received by the client or detriment incurred by the attorney in return for the nonrefundable provision, other than relatively routine legal services**. Of course, the client is free to terminate the representation at any time.

Id. at 524 (emphasis added). In Kendall, we then advised: "Where a [general] retainer is thus justified, a lawyer would be well advised to explicitly include the basis for such non-refundability in the attorney-client agreement." *804 N.E.2d at 1160*.

The nature of Respondent's engagement fees. To determine the propriety of the nonrefundable "engagement fees" Respondent charged Clients 1 and 2, we must determine the nature of the fees. The Law Firm's fee agreements state that the engagement fee is "non-refundable and shall be deemed earned upon [*12] commencement of Attorney's work on the case." Stipulation of Facts, Exhibits A and B. However, "an attorney cannot treat a fee as 'earned' simply by labeling the fee 'earned on receipt' or referring to the fee as an 'engagement retainer.'" *Matter of Sather, 3 P.3d 403, 412 (Colo. 2000)*. "[I]t is the actual nature of the attorney-client relationship, not the label used, that will be determinative." *Kendall, 804 N.E.2d at 1160*. We therefore turn to the circumstances of Respondent's representations to determine the nature of the fees she charged, which turns on what those fees were intended to purchase.

Respondent contends her engagement fee is paid by a client to induce the Law Firm to take a case and thus is earned on receipt. The Law Firm's fee agreements, however, also provide that the engagement fee would be credited against either Respondent's hourly fee or her flat fee. Thus, if Respondent completed the work called for in the contracts, the entire engagement fee would have been used to purchase the services Respondent rendered. This is evidence that the engagement fees were intended to buy the legal services she agreed to perform rather than simply her availability at the outset.

Although [*13] not required by the rules, we suggested in Kendall that a fee agreement for a general retainer explicitly include the basis for nonrefundability. In this case, the contracts do not indicate any particular circumstances that would justify charging Clients 1 and 2 general retainers. Moreover, we note that the nonrefundability language at issue is contained in the Law Office's form contracts it uses for most family law clients regardless of whether their particular circumstances support charging a general retainer. A contract provision for a nonrefundable general retainer, with or without a recitation of supporting circumstances, cannot be inserted as boilerplate language in all of a firm's fee agreements. Routine inclusion of such a provision in all fee agreements regardless of the circumstances would be misleading; and regardless of what the contract says, the basis for charging a nonrefundable general retainer in a particular case must be supported by the actual circumstances of that case.

Respondent contends that nonrefundability of the fees she charged Clients 1 and 2 is justified because representing these clients precluded the Law Firm from representing the opposing parties and [*14] required time that the firm otherwise could have devoted to other representations. This, however, would be true any time an attorney is engaged by a client. Representing one client necessarily precludes the lawyer's employment by the client's opponent. Time spent on one case is always time that cannot be spent on others. "A lawyer who agrees to perform legal services also necessarily agrees to be available to perform those services. Thus, this type of availability is unrelated to the type of availability of a general retainer and is insufficient to justify a nonrefundable minimum fee." *Frerichs, 671 N.W.2d at 477* (citation omitted).

In her briefs, Respondent describes circumstances she contends justified charging Clients 1 and 2 nonrefundable fees. For example, she contends that seeking a protective order for Client 1 required immediate attention just before a Thanksgiving holiday, which burdened the firms' attorneys and staff, and that Client 1 had a history of bringing actions against her husband and then dismissing them. Those alleged circumstances, however, are not included in the parties' stipulated facts, which describe only fairly routine legal services provided in family law [*15] cases, and we therefore will not address whether these alleged circumstances would justify a nonrefundable general retainer.

In determining the nature of the engagement fees, we finally note that the Law Firm's contract with Client 1 was entitled a Flat Fee Contract and stated explicitly that Client 1 would be billed a "flat fee," which was equal in amount to the engagement fee, for the representation described in the contract. Although Client 2 first signed a contract calling for an hourly fee, the parties later modified it to provide for payment of a fixed additional amount to complete the representation. This, coupled with the absence of evidence justifying general retainers, leads us to conclude that the fees at issue are flat fees for work to be performed. [6]

> 6 Because Client 2's contract initially called for an hourly rate fee, Count 2 alleged a violation of *Rule 1.5(a)* by charging a nonrefundable hourly fee. The hearing officer made no conclusion regarding this charge, and neither party raised this charge in their briefs to this Court. This opinion, therefore, addresses only the charges relating to flat fees.

Respondent's making agreements for and charging nonrefundable flat fees. [*16] In addressing flat fees in Kendall, we said it is both reasonable and advisable that a fee agreement expressly reflect that a flat fee is not refundable "except for failure to perform the agreed legal services." *804 N.E.2d at 1160*. However, rather than advise clients of this exception, the Law Firm's Flat Fee Contracts told clients that the fee was nonrefundable "even if the Client-Attorney relationship terminates prior to the completion of Attorneys' representation." The presence of this contract provision, even if unenforceable, could chill the right of a client to terminate Respondent's services, believing the Law Firm would be entitled to keep the entire flat fee regardless of how much or how little work was done and the client would have to pay another attorney to finish the task. We conclude that Respondent violated *Rule 1.5(a)* by including an improper nonrefundability provision in her flat fee agreements.

The fee agreements not only *stated* that the flat fees were nonrefundable under any circumstances, but Respondent also *treated* them as such. We therefore conclude that Respondent also violated *Rule 1.5(a)* by charging and collecting flat fees that were nonrefundable regardless [*17] of the circumstances, even if Respondent failed to perform the agreed legal services. *See Kendall, 804 N.E.2d at 1160*.

Notwithstanding Kendall, Respondent argues that Indiana law should allow parties to contract for nonrefundable flat and advance fees, citing authorities from other jurisdictions. She points particularly to *Grievance Adm'r, Attorney Grievance Comm'n v. Cooper, 482 Mich. 1079, 757 N.W.2d 867 (Mich. 2008)*, a brief per curiam order (with one concurring opinion) finding no problem with an attorney's contract for a $4,000 minimum fee that was nonrefundable regardless of whether the representation was terminated by the client before the billings at the stated hourly rate exceeded the minimum. Cooper is not without its detractors. For example:

> Cooper is a difficult case to understand because the decision is so cursory. Courts and lawyers generally understand that a "minimum fee" refers to some sort of advance fee--most likely a security retainer. If that is the situation here, then it is possible that non-refundable security retainers oddly pass professional responsibility muster in Michigan. . . . [G]iven the brevity and opacity of the opinion, no one should put much stock in Cooper.

Douglas [*18] R. Richmond, *Understanding Retainers and Flat Fees, 34 J. Legal Prof. 113, 131 (2009)* (underscore added; footnote omitted). We agree with the Commission that Indiana appears to be in the majority on this issue, *see, e.g., Matter of Sather, 3 P.3d 403 (Colo. 2000)*; *Matter of Cooperman, 83 N.Y.2d 465, 633 N.E.2d 1069, 611 N.Y.S.2d 465 (N.Y. 1994)*, that this is the better position, and that it should not be changed.

The Court is mindful of the legitimate concern of attorneys that they will go through the initial steps of opening a case and beginning work for a new client, only to have that client discharge them and demand a refund of the entire initial payment as unearned. The solution, however, is not allowing attorneys to charge flat or advance fees upfront that are wholly nonrefundable regardless of the amount of services rendered. As an alternative, a fee agreement could designate a reasonable part of the initial payment that would be deemed earned by the attorney for opening the case and beginning the representation. If a general retainer for availability is justified and additional charges for actual services are contemplated, the contract could include a statement of the amount of the general retainer and the circumstances [*19] supporting it along with a provision setting forth how the fees for actual services will be calculated and collected. [7] Even without such contract provisions, "[i]t is well settled that, where the complete performance of an attorney's services has been rendered impossible, or otherwise prevented, by the client, the attorney may, as a rule, recover on a quantum meruit for the services rendered by him [or her]." *French v. Cunningham, 149 Ind. 632, 49 N.E. 797, 798 (1898)*.

> 7 Of course, regardless of how a particular contract is drafted, the fee charged must be reasonable. *See Prof. Cond. R. 1.5(a)*.

Respondent's failure to refund any part of the flat fees collected from Clients 1 and 2. "If the legal services covered by a flat fee are not provided as agreed, an attorney must refund any unearned fees." *Kendall, 804 N.E.2d at 1160*. Thus, Respondent was obligated under *Rule 1.16(d)* to refund to Clients 1 and 2 any unearned portion of the flat fees they paid her. The question is how to determine how much of each flat fee was unearned.

The Commission makes no contention that Respondent did not work diligently and professionally in her representation of Client 1 and Client 2. The Commission makes [*20] no contention that Respondent's fee, if

charged at her hourly rate, would not have exceeded the flat fee each client paid. The Commission argues, however, that if a flat fee representation is not completed, by definition some amount of the flat fee necessarily must be unearned and returned to the client.

With the limited record in this case, we are not prepared to hold that some amount of a flat fee must be returned in all cases in which the attorney-client relationship ends before the work contracted for is completed. Perhaps the entire flat fee could be deemed earned if the client deals unfairly with the attorney or refuses to cooperate with the attorney, and then either fires the attorney or makes continuation of the representation ethically impossible after the attorney expends considerable time and effort on the case. Respondent asserts circumstances like these existed with both Clients 1 and 2. Because this case was submitted to the hearing officer on the parties' limited stipulations, we find the evidence is insufficient to make a definitive determination of how much, if anything, Respondent should have refunded to Clients 1 and 2. The Court therefore concludes that the Commission [*21] failed to meet its burden of proving by clear and convincing evidence that Respondent violated *Rule 1.16(d)* in the circumstances stipulated for Clients 1 and 2. *See Admis. Disc. R. 23, sec. 14(i)*.

Discipline. The parties stipulated that Law Firm's contracts were drafted with the intent that they comply with Kendall. While not making a recommendation regarding discipline, the hearing officer noted that the Commission suggested the appropriate sanction is between a public reprimand and a short suspension with automatic reinstatement. Attorneys with misconduct similar to Respondent's have received public reprimands. *See, e.g., Matter of Stephens, 867 N.E.2d 148, 156-57 (Ind. 2007)*; *Matter of Whitehead, 861 N.E.2d 702 (Ind. 2007)*; *Kendall, 804 N.E.2d at 1161*; *cf. Thonert, 682 N.E.2d at 526* (30-day suspension with automatic reinstatement for similar misconduct plus knowingly making false statement to the Commission). Although the unrelenting denial by Respondent (through her law firm, which has vigorously represented her) of any misconduct in the face of strong precedent to the contrary might counsel in favor of a greater penalty, we note the mitigating factors of Respondent's lack of prior [*22] disciplinary history and her cooperation with the Commission. We conclude, on balance, that Respondent should receive a public reprimand.

Conclusion

The Court concludes that in charging nonrefundable flat fees, Respondent violated *Indiana Professional Conduct Rule 1.5(a)* by making agreements for and charging unreasonable fees. For Respondent's professional misconduct, the Court imposes a public reprimand.

The costs of this proceeding are assessed against Respondent. The hearing officer appointed in this case is discharged.

The Clerk of this Court is directed to give notice of this opinion to the hearing officer, to the parties or their respective attorneys, and to all other entities entitled to notice under *Admission and Discipline Rule 23(3)(d)*. The Clerk is further directed to post this opinion to the Court's website, and Thomson Reuters is directed to publish a copy of this opinion in the bound volumes of this Court's decisions.

Dickson, Sullivan, and David, JJ., concur.

Shepard, C.J., with whom Rucker, J., joins, dissenting only as to the sanction. Respondent's lawyer indicates in very strong language that she is unrepentant. We conclude that a period of suspension without automatic [*23] reinstatement is necessary for the protection of clients.

STATE ETHICS OPINIONS

Alabama: Ethics Op. 1993-21

Alaska: Ethics Op. 2009-1

Arizona: Ethics Op. 10-03 (http://www.myazbar.org/Ethics/opinionview.cfm?id=708); 99-02

D.C.: Ethics Op. 355 (2010) (http://www.dcbar.org/for_lawyers/ethics/legal_ethics/opinions/opinion355.cfm)

Kentucky: Ethics. Op. KBA E-380 (1995)

Michigan: Ethics Op. No. RI-10 (1989)

Missouri: Formal Op. 128 (2010) (http://www.mobar.org/formal/formal-128.doc)

Montana: Ethics Op. 080711

Nevada: Formal Op. No. 15 (1993)

New Hampshire: NHBA Ethics Comm., *Practical Suggestions for Flat Fees or Minimum Fees in Criminal Cases* (Jan. 17, 2008) (http://www.nhbar.org/uploads/pdf/PEA011708flatfee.pdf)

Oklahoma: Ethics Op. No. 317 (2002)

Oregon: Formal Op. No. 2005-151

Tennessee: Formal Ethics Op. Nos. 92-F-128; 92-F-128(a); 92-F-128(b)

Texas: Ethics. Op. 431 (1986)

Utah: Ethics Op. No. 136 (1993)

Virginia: Ethics Op. 1606 (1994)

Washington: Informal Ethics Op. 2197 (2009) (http://mcle.mywsba.org/IO/print.aspx?ID=1645)

RULES AND COMMENTS

Arizona

ER 1.5. Fees

(d) A lawyer shall not enter into an arrangement for, charge, or collect:

(3) a fee denominated as "earned upon receipt," "nonrefundable" or in similar terms unless the client is simultaneously advised in writing that the client may nevertheless discharge the lawyer at any time and in that event may be entitled to a refund of all or part of the fee based upon the value of the representation pursuant to paragraph (a).

Comment

Disclosure of Refund Rights for Certain Prepaid Fees

[7] Advance fee payments are of at least four types. The "true" or "classic" retainer is a fee paid in advance merely to insure the lawyer's availability to represent the client and to preclude the lawyer from taking adverse representation. What is often called a retainer but is in fact merely an advance fee deposit involves a security deposit to insure the payment of fees when they are subsequently earned, either on a flat fee or hourly fee basis. A flat fee is a fee of a set amount for performance of agreed work, which may or may not be paid in advance but is not deemed earned until the work is performed. A nonrefundable fee or an earned upon receipt fee is a flat fee paid in advance that is deemed earned upon payment regardless of the amount of future work performed. The agreement as to when a fee is earned affects whether it must be placed in the attorney's trust account, see ER 1.15, and may have significance under other laws such as tax and bankruptcy. But the reasonableness requirement and application of the factors in paragraph (a) may mean that a client is entitled to a refund of an advance fee payment even though it has been denominated "nonrefundable," "earned upon receipt" or in similar terms that imply the client would never become entitled to a refund. So that a client is not misled by the use of such terms, paragraph (d)(3) requires certain minimum disclosures that must be included in the written fee agreement. This does not mean the client will always be entitled to a refund upon early termination of the representation (e.g., factor (a)(2) might justify the entire fee), nor does it determine how any refund should be calculated (e.g., hours worked times a reasonable hourly rate, quantum meruit, percentage of the work completed, etc.), but merely requires that the client be advised of the possibility of the entitlement to a refund based upon application of the factors set forth in paragraph (a). In order to be able to demonstrate the reasonableness of the fee in the event of early termination of the representation, it would be advisable for lawyers to maintain contemporaneous time records for all representations undertaken on any flat fee basis.

Colorado

Rule 1.5 Fees

(f) Fees are not earned until the lawyer confers a benefit on the client or performs a legal service for the client. Advances of unearned fees are the property of the client and shall be deposited in the lawyer’s trust account pursuant to Rule 1.15(f)(1) until earned. If advances of unearned fees

are in the form of property other than funds, then the lawyer shall hold such property separate from the lawyer's own property pursuant to Rule 1.15(a).

(g) Nonrefundable fees and nonrefundable retainers are prohibited. Any agreement that purports to restrict a client's right to terminate the representation, or that unreasonably restricts a client's right to obtain a refund of unearned or unreasonable fees, is prohibited.

Comment

Advances of Unearned Fees and Engagement Retainer Fees

[10] The analysis of when a lawyer may treat advances of unearned fees as property of the lawyer must begin with the principle that the lawyer must hold in trust all fees paid by the client until there is a basis on which to conclude that the lawyer has earned the fee; otherwise the funds must remain in the lawyer's trust account because they are not the lawyer's property.

[11] To make a determination of when an advance fee is earned, the written statement of the basis or rate of the fee, when required by Rule 1.5(b), should include a description of the benefit or service that justifies the lawyer's earning the fee, the amount of the advance unearned fee, as well as a statement describing when the fee is earned. Whether a lawyer has conferred a sufficient benefit to earn a portion of the advance fee will depend on the circumstances of the particular case. The circumstances under which a fee is earned should be evaluated under an objective standard of reasonableness. Rule 1.5(a).

Rule 1.5(f) Does Not Prohibit Lump-sum Fees or Flat Fees

[12] Advances of unearned fees, including "lump-sum" fees and "flat fees," are those funds the client pays for specified legal services that the lawyer has agreed to perform in the future. Pursuant to Rule 1.15, the lawyer must deposit an advance of unearned fees in the lawyer's trust account. The funds may be earned only as the lawyer performs specified legal services or confers benefits on the client as provided for in the written statement of the basis of the fee, if a written statement is required by Rule 1.5(b). See also Restatement (Third) of the Law Governing Lawyers §§ 34, 38 (1998). Rule 1.5(f) does not prevent a lawyer from entering into these types of arrangements.

[13] For example, the lawyer and client may agree that portions of the advance of unearned fees are deemed earned at the lawyer's hourly rate and become the lawyer's property as and when the lawyer provides legal services.

[14] Alternatively, the lawyer and client may agree to an advance lump-sum or flat fee that will be earned in whole or in part based upon the lawyer's completion of specific tasks or the occurrence of specific events, regardless of the precise amount of the lawyer's time involved. For instance, in a criminal defense matter, a lawyer and client may agree that the lawyer earns portions of the advance lump-sum or flat fee upon the lawyer's entry of appearance, initial advisement, review of discovery, preliminary hearing, pretrial conference, disposition hearing, motions hearing, trial, and sentencing. Similarly, in a trusts and estates matter, a lawyer and

client may agree that the lawyer earns portions of the lump-sum or flat fee upon client consultation, legal research, completing the initial draft of testamentary documents, further client consultation, and completing the final documents.

[15] The portions of the advance lump sum or flat fee earned as each such event occurs need not be in equal amounts. However, the fees attributed to each event should reflect a reasonable estimate of the proportionate value of the legal services the lawyer provides in completing each designated event to the anticipated legal services to be provided on the entire matter. See Rule 1.5(a); Feiger, Collison & Killmer v. Jones, 926 P.2d 1244, 1252-53 (Colo. 1996) (client's sophistication is relevant factor).

[16] "[A]n 'engagement retainer fee' is a fee paid, apart from any other compensation, to ensure that a lawyer will be available for the client if required. An engagement retainer must be distinguished from a lump-sum fee constituting the entire payment for a lawyer's service in a matter and from an advance payment from which fees will be subtracted (see § 38, Comment g). A fee is an engagement retainer only if the lawyer is to be additionally compensated for actual work, if any, performed." Restatement (Third) of the Law Governing Lawyers § 34 Comment e. An engagement retainer fee agreement must comply with Rule 1.5(a), (b), and (g), and should expressly include the amount of the engagement retainer fee, describe the service or benefit that justifies the lawyer's earning the engagement retainer fee, and state that the engagement retainer fee is earned upon receipt. As defined above, an engagement retainer fee will be earned upon receipt because the lawyer provides an immediate benefit to the client, such as forgoing other business opportunities by making the lawyer's services available for a given period of time to the exclusion of other clients or potential clients, or by giving priority to the client's work over other matters.

[17] Because an engagement retainer fee is earned at the time it is received, it must not be commingled with client property. However, it may be subject to refund to the client in the event of changed circumstances.

[18] It is unethical for a lawyer to fail to return unearned fees, to charge an excessive fee, or to characterize any lawyer's fee as nonrefundable. Lawyer's fees are always subject to refund if either excessive or unearned. If all or some portion of a lawyer's fee becomes subject to refund, then the amount to be refunded should be paid directly to the client if there is no further legal work to be performed or if the lawyer's employment is terminated. In the alternative, if there is an ongoing client-lawyer relationship and there is further work to be done, it may be deposited in the lawyer's trust account, to be withdrawn from the trust account as it is earned.

Connecticut

Rule 1.15. Safekeeping Property

(d) Absent a written agreement with the client otherwise, a lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred.

Delaware

Rule 1.5. Fees

(f) A lawyer may require the client to pay some or all of the fee in advance of the lawyer undertaking the representation, provided that:

(1) The lawyer shall provide the client with a written statement that the fee is refundable if it is not earned,

(2) The written statement shall state the basis under which the fees shall be considered to have been earned, whether in whole or in part, and

(3) All unearned fees shall be retained in the lawyer's trust account, with statement of the fees earned provided to the client at the time such funds are withdrawn from the trust account.

Comment

[9] *Advance fees.* -- A lawyer may require that a client pay a fee in advance of completing the work for the representation. All fees paid in advance are refundable until earned. Until such time as that fee is earned, that fee must be held in the attorney's trust account. An attorney who accepts an advance fee must provide the client with a written statement that the fee is refundable if not earned and how the fee will be considered earned. When the fee is earned and the money is withdrawn from the attorney's trust account, the client must be notified and a statement provided.

[10] Some smaller fees--such as those less than $2500.00--may be considered earned in whole upon some identified event, such as upon commencement of the attorney's work on that matter or the attorney's appearance on the record. However, a fee considered to be "earned upon commencement of the attorney's work on the matter" is not the same as a fee "earned upon receipt." The former requires that the attorney actually begin work whereas the latter is dependent only upon payment by the client. In a criminal defense matter, for example, a smaller fee--such as a fee under $2500.00—may be considered earned upon entry of the attorney's appearance on the record or at the initial consultation at which substantive, confidential information has been communicated which would preclude the attorney from representation of another potential client (e.g. a co-defendant). Nevertheless, all fees must be reasonable such that even a smaller fee might be refundable, in whole or in part, if it is not reasonable under the circumstances.

[11] As a general rule, larger advance fees--such as those over $2500.00--will not be considered earned upon one specific event. Therefore, the attorney must identify the manner in which the fee will be considered earned and make the appropriate disclosures to the client at the outset of the representation. The written statement must include a reasonable method of determining fees earned at a given time in the representation. One method might be calculation of fees based upon an agreed upon hourly rate. If an hourly rate is not utilized, the attorney is required to identify certain events which will trigger earned fees. For example, in a criminal defense matter, an attorney might identify events such as entry of appearance, arraignment, certain motions, case

review, and trial as the events which might trigger certain specified earned fees and deduction of those fees from the attorney trust account. Likewise, in a domestic matter, an attorney might identify such events as entry of appearance, drafting petition, attendance at mediation conference, commissioner's hearing, pre-trial conference, and judge's hearing as triggering events for purposes of earning fees. It might be reasonable for an attorney to provide that a certain percentage of this fee will be considered earned on a monthly basis, for any work performed in that month, or upon the completion of an identified portion of the work. Nevertheless, all fees must be reasonable such that even a fee considered earned in full per the written statement provided to the client might be refundable, in whole or in part, if it is not reasonable under the circumstances.

[12] In contrast to the general rule, a larger advance fee may, under certain circumstances, be earned upon one specific event. For example, this fee or a large portion thereof could become earned upon an attorney's initial consultation with a client in a bankruptcy matter at which substantive, confidential information has been communicated which would preclude the attorney from representation of another potential client (e.g. the client's creditors). In this context, the attorney must provide a clear written statement that the fee, or a portion thereof, is earned at time of consultation as compensation for this lost opportunity. Likewise, a criminal defense attorney might outline in the written agreement that the entire fee becomes earned upon conclusion of the matter--in the case of negotiation and acceptance of a plea agreement prior to trial. Both of these examples are tempered, however, by the reasonableness requirement set forth above.

[13] It is not acceptable for an attorney to hold earned fees in the attorney trust account. See Rule 1.15(a). This is commingling. Once fees are earned, those fees must be withdrawn from the attorney trust account. Typically, it is acceptable to draw down earned fees from an attorney trust account on a monthly or some other reasonable periodic basis. Similarly, monthly/periodic statements are considered an acceptable method of notifying one's clients that earned fees have been withdrawn from a trust account. For those attorneys earning fees on a percentage basis, wherein the fee would be considered earned upon the completion of an identified portion of the work, a statement to that effect upon completion of that work would satisfy this requirement.

Rule 1.15. Safekeeping property

Comment

[7] Some of the essential financial recordkeeping issues for Delaware lawyers under this Rule include the following:

. . .

(b) Deposits of legal fees. Unearned legal fees are the property of the client until earned, and therefore must be deposited into the lawyer's fiduciary account. Legal fees must be withdrawn from the fiduciary account and transferred to the operating or business account promptly upon being earned, to avoid improper commingling. The monthly listing of client and third party funds in the fiduciary account should therefore be carefully reviewed in order to determine whether any earned legal fees remain in the account.

Florida

RULE 4-1.5 FEES AND COSTS FOR LEGAL SERVICES

Comment

Terms of payment

A lawyer may require advance payment of a fee but is obliged to return any unearned portion. See rule 4-1.16(d). A lawyer is not, however, required to return retainers that, pursuant to an agreement with a client, are not refundable. . . .

RULE 5-1.1 TRUST ACCOUNTS

Comment

Money or other property entrusted to a lawyer for a specific purpose, including advances for fees, costs, and expenses, is held in trust and must be applied only to that purpose. Money and other property of clients coming into the hands of a lawyer are not subject to counterclaim or setoff for attorney's fees, and a refusal to account for and deliver over such property upon demand shall be a conversion. This does not preclude the retention of money or other property upon which a lawyer has a valid lien for services or to preclude the payment of agreed fees from the proceeds of transactions or collections.

Advances for fees and costs (funds against which costs and fees are billed) are the property of the client or third party paying same on a client's behalf and are required to be maintained in trust, separate from the lawyer's property. Retainers are not funds against which future services are billed. Retainers are funds paid to guarantee the future availability of the lawyer's legal services and are earned by the lawyer upon receipt. Retainers, being funds of the lawyer, may not be placed in the client's trust account.

. . .

Hawaii

RULE 1.15. PRESERVING IDENTITY OF FUNDS AND PROPERTY OF A CLIENT OR THIRD PERSON.

(d) All funds entrusted to a lawyer shall be deposited intact into a trust account. . . . All fee retainers shall be maintained in trust until earned. All fee retainers are refundable until earned.

Illinois

RULE 1.15: SAFEKEEPING PROPERTY

(c) A lawyer shall deposit in a client trust account funds received to secure payment of legal fees and expenses, to be withdrawn by the lawyer only as fees are earned and expenses incurred. Funds received as a fixed fee, a general retainer, or an advance payment retainer shall be deposited in the lawyer's general account or other account belonging to the lawyer. An advance payment retainer may be used only when necessary to accomplish some purpose for the client that cannot be accomplished by using a security retainer. An agreement for an advance payment retainer shall be in a writing signed by the client that uses the term "advance payment retainer" to describe the retainer, and states the following:

(1) the special purpose for the advance payment retainer and an explanation why it is advantageous to the client;

(2) that the retainer will not be held in a client trust account, that it will become the property of the lawyer upon payment, and that it will be deposited in the lawyer's general account;

(3) the manner in which the retainer will be applied for services rendered and expenses incurred;

(4) that any portion of the retainer that is not earned or required for expenses will be refunded to the client;

(5) that the client has the option to employ a security retainer, provided, however, that if the lawyer is unwilling to represent the client without receiving an advance payment retainer, the agreement must so state and provide the lawyer's reasons for that condition.

Comment

[3A] Paragraph (c) relates to legal fees and expenses that have been paid in advance. The reasonableness, structure, and division of legal fees are governed by Rule 1.5 and other applicable law.

[3B] Paragraph (c) must be read in conjunction with *Dowling v. Chicago Options Associates, Inc.*, 226 Ill. 2d 277 (2007). In *Dowling*, the Court distinguished different types of retainers. It recognized advance payment retainers and approved their use in limited circumstances where the lawyer and client agree that a retainer should become the property of the lawyer upon payment. Prior to *Dowling*, the Court recognized only two types of retainers. The first, a general retainer (also described as a "true," "engagement," or "classic" retainer) is paid by a client to the lawyer in order to ensure the lawyer's availability during a specific period of time or for a specific matter. This type of retainer is earned when paid and immediately becomes property of the

lawyer, regardless of whether the lawyer ever actually performs any services for the client. The second, a "security" retainer, secures payment for future services and expense, and must be deposited in a client trust account pursuant to paragraph (a). Funds in a security retainer remain the property of the client until applied for services rendered or expenses incurred. Any unapplied funds are refunded to the client. Any written retainer agreement should clearly define the kind of retainer being paid. If the parties agree that the client will pay a security retainer, that term should be used in any written agreement, which should also provide that the funds remain the property of the client until applied for services rendered or expenses incurred and that the funds will be deposited in a client trust account. If the parties' intent is not evident, an agreement for a retainer will be construed as providing for a security retainer.

[3C] An advance payment retainer is a present payment to the lawyer in exchange for the commitment to provide legal services in the future. Ownership of this retainer passes to the lawyer immediately upon payment; and the retainer may not be deposited into a client trust account because a lawyer may not commingle property of a client with the lawyer's own property. However, any portion of an advance payment retainer that is not earned must be refunded to the client. An advance payment retainer should be used sparingly, only when necessary to accomplish a purpose for the client that cannot be accomplished by using a security retainer. An advance payment retainer agreement must be in a written agreement signed by the client that contains the elements listed in paragraph (c). An advance payment retainer is distinguished from a fixed fee (also described as a "flat" or "lump-sum" fee), where the lawyer agrees to provide a specific service (*e.g.*, defense of a criminal charge, a real estate closing, or preparation of a will or trust) for a fixed amount. Unlike an advance payment retainer, a fixed fee is generally not subject to the obligation to refund any portion to the client, although a fixed fee is subject, like all fees, to the requirement of Rule 1.5(a) that a lawyer may not charge or collect an unreasonable fee.

[3D] The guiding principle in the choice of the type of retainer is protection of the client's interests.

Kentucky

SCR 3.130(1.5) Fees

(f) A fee may be designated as a non-refundable retainer. A non-refundable retainer fee agreement shall be in a writing signed by the client evidencing the client's informed consent, and shall state the dollar amount of the retainer, its application to the scope of the representation and the time frame in which the agreement will exist.

Comment

Advance Fee Arrangements

(10) If a lawyer collects an advance deposit on a fee or for expenses, or a flat fee for services to be performed, the lawyer must deposit the funds in the lawyer's trust account until the fee is earned or the expense incurred, at which time the funds shall be promptly distributed. In the event the full amount that is held is not ultimately earned, or due to other factors, such as

termination of the attorney-client relationship, is not reasonable, the funds must be returned to the client as provided in Rule 1.16(d).

Non-refundable Retainers

(11) A lawyer may designate a fee arrangement as a non-refundable retainer and upon receipt deposit such funds in the lawyer's operating account. The amount of a non-refundable retainer fee must be reasonable in amount and comply with Rule 1.5.

SCR 3.130(1.15) Safekeeping property

(e) Except for non refundable fees as provided in 1.5(f), a lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred.

Comment

(5) Paragraph (e) requires that when a lawyer has collected an advance deposit on a fee or for expenses or a flat fee for services not yet completed, the funds must be deposited in the trust account until earned, at which time they should be promptly distributed to the lawyer. The foregoing shall not apply to nonrefundable fees. At the termination of the client-lawyer relationship the lawyer must return any amount held that was not earned or was an unreasonable fee, as provided by Rules 1.5 and 1.16(d).

Louisiana

RULE 1.5. FEES

(f) Payment of fees in advance of services shall be subject to the following rules:

(1) When the client pays the lawyer a fee to retain the lawyer’s general availability to the client and the fee is not related to a particular representation, the funds become the property of the lawyer when paid and may be placed in the lawyer’s operating account.

(2) When the client pays the lawyer all or part of a fixed fee or of a minimum fee for particular representation with services to be rendered in the future, the funds become the property of the lawyer when paid, subject to the provisions of Rule 1.5(f)(5). Such funds need not be placed in the lawyer’s trust account, but may be placed in the lawyer’s operating account.

(3) When the client pays the lawyer an advance deposit against fees which are to accrue in the future on an hourly or other agreed basis, the funds remain the property of the client and must be placed in the lawyer’s trust account. The lawyer may transfer these funds as fees are earned from the trust account to the operating account, without further authorization from the client for each transfer, but must render a periodic accounting for these funds as is reasonable under the circumstances.

(4) When the client pays the lawyer an advance deposit to be used for costs and expenses, the funds remain the property of the client and must be placed in the lawyer's trust account. The lawyer may expend these funds as costs and expenses accrue, without further authorization from the client for each expenditure, but must render a periodic accounting for these funds as is reasonable under the circumstances.

(5) When the client pays the lawyer a fixed fee, a minimum fee or a fee drawn from an advanced deposit, and a fee dispute arises between the lawyer and the client, either during the course of the representation or at the termination of the representation, the lawyer shall immediately refund to the client the unearned portion of such fee, if any. If the lawyer and the client disagree on the unearned portion of such fee, the lawyer shall immediately refund to the client the amount, if any, that they agree has not been earned, and the lawyer shall deposit into a trust account an amount representing the portion reasonably in dispute. The lawyer shall hold such disputed funds in trust until the dispute is resolved, but the lawyer shall not do so to coerce the client into accepting the lawyer's contentions. As to any fee dispute, the lawyer should suggest a means for prompt resolution such as mediation or arbitration, including arbitration with the Louisiana State Bar Association Fee Dispute Program.

RULE 1.15. SAFEKEEPING PROPERTY

(c) A lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred. The lawyer shall deposit legal fees and expenses into the client trust account consistent with Rule 1.5(f).

Maine

RULE 1.15 SAFEKEEPING PROPERTY, CLIENT TRUST ACCOUNTS, INTEREST ON TRUST ACCOUNTS

(b) (1) A lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred. . . .

. . .

(7) For purposes of this rule, the following definitions apply:

(iii) "Retainer" means a fee paid to an attorney for professional services that is earned upon the attorney's engagement. A retainer payment is the property of the attorney when received. "Retainer" does not include a payment by a client as an advance payment that will be credited toward fees for professional services as the attorney earns the fees.

Maryland

Rule 1.15 Safekeeping Property

(c) Unless the client gives informed consent, confirmed in writing, to a different arrangement, a lawyer shall deposit legal fees and expenses that have been paid in advance into a client trust account and may withdraw those funds for the lawyer's own benefit only as fees are earned or expenses incurred.

Comment

[3] Paragraph (c) of Rule 1.15 permits advances against unearned fees and unincurred costs to be treated as either the property of the client or the property of the lawyer. Unless the client gives informed consent, confirmed in writing, to a different arrangement, the Rule's default position is that such advances be treated as the property of the client, subject to the restrictions provided in paragraph (a). In any case, at the termination of an engagement, advances against fees that have not been incurred must be returned to the client as provided in Rule 1.16(d).

Minnesota

[Effective July 1, 2011]

RULE 1.5: FEES

(b) . . . Except as provided below, fee payments received by a lawyer before legal services have been rendered are presumed to be unearned and shall be held in a trust account pursuant to Rule 1.15.

> (1) A lawyer may charge a flat fee for specified legal services, which constitutes complete payment for those services and may be paid in whole or in part in advance of the lawyer providing the services. If agreed to in advance in a written fee agreement signed by the client, a flat fee shall be considered to be the lawyer's property upon payment of the fee, subject to refund as described in Rule 1.5(b)(3). Such a written fee agreement shall notify the client:
>
> > (i) of the nature and scope of the services to be provided;
> >
> > (ii) of the total amount of the fee and the terms of payment;
> >
> > (iii) that the fee will not be held in a trust account until earned;
> >
> > (iv) that the client has the right to terminate the client-lawyer relationship; and

(v) that the client will be entitled to a refund of all or a portion of the fee if the agreed-upon legal services are not provided.

(2) A lawyer may charge a fee to ensure the lawyer's availability to the client during a specified period or on a specified matter in addition to and apart from any compensation for legal services performed. Such an availability fee shall be reasonable in amount and communicated in a writing signed by the client. The writing shall clearly state that the fee is for availability only and that fees for legal services will be charged separately. An availability fee may be considered to be the lawyer's property upon payment of the fee, subject to refund in whole or in part should the lawyer not be available as promised.

(3) Fee agreements may not describe any fee as nonrefundable or earned upon receipt but may describe the advance fee payment as the lawyer's property subject to refund. Whenever a client has paid a flat fee or an availability fee pursuant to Rule 1.5(b)(1) or (2) and the lawyer-client relationship is terminated before the fee is fully earned, the lawyer shall refund to the client the unearned portion of the fee. If a client disputes the amount of the fee that has been earned, the lawyer shall take reasonable and prompt action to resolve the dispute.

RULE 1.15: SAFEKEEPING PROPERTY

(c) A lawyer shall:

. . .

(5) except as specified in Rule 1.5(b)(1) and (2), deposit all fees received in advance of the legal services being performed into a trust account and withdraw the fees as earned.

New Hampshire

Rule 1.15. Safekeeping Property

New Hampshire Comment

Rule 1.15 (d) provides that funds may only be withdrawn from a trust account when fees are "earned" or expenses are "incurred." This new rule, while implicitly recognizing that so-called flat fees and minimum fees are both permissible, raises questions about when such fees have been "earned" for purposes of transfer from a trust account to an attorney's business or operating account (or perhaps directly into a personal account). Rule 1.5's requirement that any fee must be reasonable is the overarching principle governing all fee issues.[1] Because this requirement may necessitate the return of some portion of a flat or minimum fee when the lawyer cannot complete representation because of conflict or other early termination of the attorney/client relationship. such fees should be considered "earned" only when work of comparable value has been

performed. Fees that may be required to be returned under Rule 1.5 must be retained in the lawyer's trust account. Lawyers should deposit all flat fees or minimum fees into their trust accounts to be periodically withdrawn only upon a determination that the value of services provided is in reasonable proportion to the percentage of the total fee withdrawn. Good practice suggests that the lawyer and client enter into a written agreement in advance of payment of the fee setting reasonable mileposts for withdrawal. For example, in a criminal case the lawyer might withdraw a certain amount upon initial assessment of the case, further funds for pre-trial practice, and the remainder upon completion of the trial or a negotiated plea.

The question of non-refundable, earned upon receipt retainers was addressed in Doherty's Case, 142 N.H. 446 (1997) in the context of bankruptcy court proceedings. In that case, the bankruptcy court had found that in a bankruptcy proceeding there was no such thing as a non-refundable, earned upon receipt retainer and a lawyer's failure to segregate a client's retainer into a separate client trust account violated Rule 1.15(a)(1). The attorney admitted to this violation and the Supreme Court affirmed the referee's ruling that the attorney had violated Rule 1.15(a)-(c).

Footnote 1: Rule 1.5 does not permit a retainer for services that is absolutely non-refundable because such a fee agreement is inconsistent with the Rule's requirement that a fee must always be reasonable. However, the use of a general retainer, sometimes referred to as a "classic retainer" or an "engagement retainer," continues to be recognized as permissible by most commentators. This retainer reflects an agreement between attorney and 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, at an agreed upon price, legal services of a specified or general type that arise during a specified time period. Because this retainer is given in exchange for availability and not for the rendition of legal services, it is deemed to be earned when paid.

New York

RULE 1.5: FEES AND DIVISION OF FEES

(d) A lawyer shall not enter into an arrangement for, charge or collect:

(4) a nonrefundable retainer fee; provided that a lawyer may enter into a retainer agreement with a client containing a reasonable minimum fee clause if it defines in plain language and sets forth the circumstances under which such fee may be incurred and how it will be calculated; . . .

Comment

Terms of Payment

[4] A lawyer may require advance payment of a fee, but is obliged to return any unearned portion. *See* Rule 1.16(e). A lawyer may charge a minimum fee, if that fee is not excessive, and if the wording of the minimum fee clause of the retainer agreement meets the requirements of paragraph (d)(4).

North Carolina

Rule 1.5 Fees

Comment

Terms of Payment

[4] A lawyer may require advance payment of a fee, but is obliged to return any unearned portion. *See* Rule 1.16(d). This does not apply when the advance payment is a true retainer to reserve services rather than an advance to secure the payment of fees yet to be earned.

Rule 1.15 Safekeeping Property

Comment

Prepaid Legal Fees

[11] Whether a fee that is prepaid by the client should be placed in the trust account depends upon the fee arrangement with the client. A retainer fee in its truest sense is a payment by the client for the reservation of the exclusive services of the lawyer, which is not used to pay for the legal services provided by the lawyer and, by agreement of the parties, is nonrefundable upon discharge of the lawyer. It is a payment to which the lawyer is immediately entitled and, therefore, should not be placed in the trust account. A "retainer," which is actually a deposit by the client of an advance payment of a fee to be billed on an hourly or some other basis, is not a payment to which the lawyer is immediately entitled. This is really a security deposit and should be placed in the trust account. As the lawyer earns the fee or bills against the deposit, the funds should be withdrawn from the account. Rule 1.16(d) requires the refund to the client of any part of a fee that is not earned by the lawyer at the time that the representation is terminated.

Ohio

RULE 1.5: FEES AND EXPENSES

(d) A lawyer shall not enter into an arrangement for, charge, or collect any of the following:

> (3) a fee denominated as “earned upon receipt,” “nonrefundable,” or in any similar terms, unless the client is simultaneously advised in *writing* that if the lawyer does not complete the representation for any reason, the client may be entitled to a refund of all or part of the fee based upon the value of the representation pursuant to division (a) of this rule.

Comment

Retainer

[6A] Advance fee payments are of at least four types. The "true" or "classic" retainer is a fee paid in advance solely to ensure the lawyer's availability to represent the client and precludes the lawyer from taking adverse representation. What is often called a retainer is in fact an advance payment to ensure that fees are paid when they are subsequently earned, on either a flat fee or hourly fee basis. A flat fee is a fee of a set amount for performance of agreed work, which may or may not be paid in advance but is not deemed earned until the work is performed. An earned upon receipt fee is a flat fee paid in advance that is deemed earned upon payment regardless of the amount of future work performed. When a fee is earned affects whether it must be placed in the attorney's trust account, see Rule 1.15, and may have significance under other laws such as tax and bankruptcy. The reasonableness requirement and the application of the factors in division (a) may mean that a client is entitled to a refund of an advance fee payment even though it has been denominated "nonrefundable," "earned upon receipt," or in similar terms that imply the client would never receive a refund. So that a client is not misled by the use of such terms, division (d)(3) requires certain minimum disclosures that must be included in the written fee agreement. This does not mean the client will always be entitled to a refund upon early termination of the representation [*e.g.*, factor (a)(2) might justify the entire fee], nor does it determine how any refund should be calculated (e.g., hours worked times a reasonable hourly rate, quantum meruit, percentage of the work completed, etc.), but merely requires that the client be advised of the possibility of a refund based upon application of the factors set forth in division (a). In order to be able to demonstrate the reasonableness of the fee in the event of early termination of the representation, it is advisable that lawyers maintain contemporaneous time records for any representation undertaken on a flat fee basis.

Pennsylvania

Rule 1.15 Safekeeping Property

(e) . . .A lawyer shall deposit into a Trust Account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred, unless the client gives informed consent, confirmed in writing, to the handling of fees and expenses in a different manner. At all times while a lawyer holds funds of a client or third person in connection with a client-lawyer relationship, the lawyer shall also maintain another account that is not used to hold such funds.

South Carolina

RULE 1.5: FEES

Comment

Terms of Payment

[4] A lawyer may require advance payment of a fee, but is obliged to return any unearned portion. Note further, however, that in certain circumstances in which a legitimate interest is served, the client and lawyer may enter into an arrangement under which there is a nonrefundable retainer fee. This nonrefundable retainer fee may be retained if it is reasonable under the factors listed in Rule 1.5. The lawyer may deposit the nonrefundable fee immediately into the law firm's operating account. However, if, at the end of the representation, it would be unreasonable for the lawyer to retain the entire fee, the lawyer must then refund that portion of the fee that is unreasonable. See Rule 1.16(d). . . .

RULE 1.15: SAFEKEEPING PROPERTY

(c) A lawyer shall deposit into a client trust account unearned legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred.

Tennessee

RULE 1.5: FEES

(f) A fee that is nonrefundable in whole or in part shall be agreed to in a writing, signed by the client, that explains the intent of the parties as to the nature and amount of the nonrefundable fee.

Comment

Terms of Payment

[4] A lawyer may require advance payment of a fee, but is obliged to return any unearned portion. *See* RPC 1.16(d). The obligation to return any portion of a fee does not apply, however, if the lawyer charges a reasonable nonrefundable fee.

[4a] A nonrefundable fee is one that is paid in advance and earned by the lawyer when paid. Nonrefundable fees, like any other fees, are subject to the reasonableness standard of paragraph (a)of this Rule. In determining whether a particular nonrefundable fee is reasonable, or whether it is reasonable to charge a nonrefundable fee at all, a lawyer must consider the factors that are relevant to the circumstances. Recognized examples of appropriate nonrefundable fees include a nonrefundable retainer paid to compensate the lawyer for being available to represent the client in one or more matters or where the client agrees to pay to the lawyer at the outset of the representation a reasonable fixed fee for the representation. Such fees are earned fees so long as the lawyer remains available to provide the services called for by the retainer or for which the fixed fee was charged. RPC 1.5(f) requires a writing signed by the client to make certain that lawyers take special care to assure that clients understand the implications of agreeing to pay a nonrefundable fee.

RULE 1.15: SAFEKEEPING PROPERY AND FUNDS

(c) A lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred.

Comment

[10] Whether a fee that is prepaid by a client should be placed in the client trust account depends on when the fee is earned by the lawyer. An advance payment of funds upon which the lawyer may draw for payment of the lawyer's fee when it is earned or for reimbursement of the lawyer for expenses when they are incurred must be placed in the client trust account. When the lawyer earns the fee, the funds shall be promptly withdrawn from the client trust account, and timely notice of the withdrawal of funds should be provided to the client. RPC 1.16(d) requires the refund to the client of any part of a fee that is not earned by the lawyer at the time that the representation is terminated. See RPC 1.5, Comment [4] for a discussion of two situations in which an advance payment from a client is properly treated as an earned fee and therefore cannot be placed in the lawyer's client trust account.

Vermont

RULE 1.15. SAFEKEEPING PROPERTY

(c) A lawyer shall deposit legal fees and expenses that have been paid in advance into an account in which funds are held that are in the lawyer's possession as a result of a representation in a lawyer-client relationship. Such funds are to be withdrawn by the lawyer only as fees are earned or expenses incurred.

Reporter's Notes–2009 Amendment

Note that new Rule 1.15(c) requires deposit in a lawyer's trust account of any fees or expenses paid in advance, no matter how designated, if the funds are to be applied as compensation for services subsequently rendered or reimbursement for expenses subsequently incurred. The rule does not require deposit in the trust account of a "pure" retainer, a flat fee paid to assure the lawyer's availability and not for performing services. If services are also to be performed, an additional agreement at a specified rate for those services is required, and any advance payment under that agreement must be deposited in the trust account. Either form of agreement is, of course, subject to the overriding requirement of Rule 1.5(a) that fees must be reasonable.

Washington

RPC RULE 1.5: FEES

(f) Fees and expenses paid in advance of performance of services shall comply with Rule 1.15A, subject to the following exceptions:

(1) A lawyer may charge a retainer, which is a fee that a client pays to a lawyer to be available to the client during a specified period or on a specified matter, in addition to and apart from any compensation for legal services performed. A retainer must be agreed to in a writing signed by the client. Unless otherwise agreed, a retainer is the lawyer's property on receipt and shall not be placed in the lawyer's trust account.

(2) A lawyer may charge a flat fee for specified legal services, which constitutes complete payment for those services and is paid in whole or in part in advance of the lawyer providing the services. If agreed to in advance in a writing signed by the client, a flat fee is the lawyer's property on receipt, in which case the fee shall not be deposited into a trust account under Rule 1.15A. The written fee agreement shall, in a manner that can easily be understood by the client, include the following: (i) the scope of the services to be provided; (ii) the total amount of the fee and the terms of payment; (iii) that the fee is the lawyer's property immediately on receipt and will not be placed into a trust account; (iv) that the fee agreement does not alter the client's right to terminate the client-lawyer relationship; and (v) that the client may be entitled to a refund of a portion of the fee if the agreed-upon legal services have not been completed. A statement in substantially the following form satisfies this requirement:

> [Lawyer/law firm] agrees to provide, for a flat fee of $_____, the following services: _____. The flat fee shall be paid as follows: _____. Upon [lawyer's/law firm's] receipt of all or any portion of the flat fee, the funds are the property of [lawyer/law firm] and will not be placed in a trust account. The fact that you have paid your fee in advance does not affect your right to terminate the client-lawyer relationship. In the event our relationship is terminated before the agreed-upon legal services have been completed, you may or may not have a right to a refund of a portion of the fee.

(3) In the event of a dispute relating to a fee under paragraph (f)(1) or (f)(2) of this Rule, the lawyer shall take reasonable and prompt action to resolve the dispute.

Comment

Additional Washington Comments

Reasonableness of Fee and Expenses

[10] Every fee agreed to, charged, or collected, including a fee that is a lawyer's property on receipt under paragraph (f)(1) or (f)(2), is subject to Rule 1.5(a) and may not be unreasonable.

. . .

Payment of Fees in Advance of Services

[12] In the absence of a written agreement between the lawyer and the client to the contrary that complies with paragraph (f)(1) or (f)(2), all advance payments are presumed to be deposits against future services or costs and must, until the fee is earned or the cost incurred, be held in a trust account pursuant to Rule 1.15A. See Rule 1.15A(c)(2). This fee structure is known as an "advance fee deposit." Such a fee may only be withdrawn when earned. See Rule 1.15A(h)(3). For example, when an advance fee deposit is placed in trust, a lawyer may withdraw amounts based on the actual hours worked. In the case of a flat fee that constitutes an advance fee deposit because it does not meet the requirements of paragraph (f)(2), the lawyer and client may mutually agree, preferably in writing, on a reasonable basis for determining when portions of the fee have been earned, such as specific "milestones" reached during the representation or specified time intervals that reasonably reflect the actual performance of the legal services.

[13] Paragraphs (f)(1) and (f)(2) provide exceptions to the general rule that fees received in advance must be placed in trust. Paragraph (f)(1) describes a fee structure sometimes known as an "availability retainer," "engagement retainer," "true retainer," "general retainer," or "classic retainer." Under these rules, this arrangement is called a "retainer." A retainer secures availability alone, i.e., it presumes that the lawyer is to be additionally compensated for any actual work performed. Therefore, a payment purportedly made to secure a lawyer's availability, but that will be applied to the client's account as the lawyer renders services, is not a retainer under paragraph (f)(1). A written retainer agreement should clearly specify the time period or purpose of the lawyer's availability, that the client will be separately charged for any services provided, and that the lawyer will treat the payment as the lawyer's property immediately on receipt and will not deposit the fee into a trust account.

[14] Paragraph (f)(2) describes a "flat fee," sometimes also known as a "fixed fee." A flat fee constitutes complete payment for specified legal services, and does not vary with the amount of time or effort expended by the lawyer to perform or complete the specified services. If the requirements of paragraph (f)(2) are not met, a flat fee received in advance must be deposited initially in the lawyer's trust account. See Washington Comment [12].

[15] If a lawyer and a client agree to a retainer under paragraph (f)(1) or a flat fee under paragraph (f)(2) and the lawyer complies with the applicable requirements, including obtaining agreement in a writing signed by the client, the fee is considered the lawyer's property on receipt and must not be deposited into a trust account containing client or third-party funds. See Rule 1.15A(c) (lawyer must hold property of clients separate from lawyer's own property). For definitions of the terms "writing" and "signed," see Rule 1.0(n).

[16] In fee arrangements involving more than one type of fee, the requirements of paragraphs (f)(1) and (f)(2) apply only to the parts of the arrangement that are retainers or flat fees. For example, a client might agree to make an advance payment to a lawyer, a portion of which is a flat fee for specified legal services with the remainder to be applied on an hourly basis as services are rendered. The latter portion is an advance fee deposit that must be placed in trust under Rule 1.15A(c)(2). If the requirements of paragraph (f)(2) are met regarding the flat fee portion, those funds are the lawyer's property on receipt and must not be kept in a trust account. If the payment is in one check or negotiable instrument, it must be deposited intact in the trust account, and the flat fee portion belonging to the lawyer must be withdrawn at the earliest

reasonable time. See Rule 1.15A(h)(1)(ii) & (h)(4). See also Comment [10] to Rule 1.15A (explaining prohibition on split deposits). Although a signed writing is required under paragraphs (f)(1) and (f)(2) only for the retainer or flat fee portion of the fee (and only if the lawyer and client agree that the fee will be the lawyer's property on receipt), the lawyer should consider putting the entire arrangement in writing to facilitate communication with the client and prevent future misunderstanding. See Washington Comment [11].

RULE 1.15A: SAFEGUARDING PROPERTY

(c) A lawyer must hold property of clients and third persons separate from the lawyer's own property.

. . .

(2) Except as provided in Rule 1.5(f), and subject to the requirements of paragraph (h) of this Rule, a lawyer shall deposit into a trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred.

Comment

[8] If a lawyer accepts payment of an advanced fee deposit by credit card, the payment must be deposited directly into the trust account. It cannot be deposited into a general account and then transferred to the trust account. Similarly, credit card payments of earned fees, of retainers meeting the requirements of Rule 1.5(f)(1), and of flat fees meeting the requirements of Rule 1.5(f)(2) cannot be deposited into the trust account and then transferred to another account.

Wisconsin

SCR 20:1.0 Terminology.

(ag) "Advanced fee" denotes an amount paid to a lawyer in contemplation of future services, which will be earned at an agreed−upon basis, whether hourly, flat, or another basis. Any amount paid to a lawyer in contemplation of future services whether on an hourly, flat or other basis, is an advanced fee regardless of whether that fee is characterized as an "advanced fee," "minimum fee," "nonrefundable fee," or any other characterization. Advanced fees are subject to the requirements of SCR 20:1.5, SCR 20:1.15(b)(4) or (4m), SCR 20:1.15(e)(4)h., SCR 20:1.15(g), and SCR 20:1.16(d).

(dm) "Flat fee" denotes a fixed amount paid to a lawyer for specific, agreed−upon services, or for a fixed, agreed−upon stage in a representation, regardless of the time required of the lawyer to perform the service or reach the agreed−upon stage in the representation. A flat fee, sometimes referred to as "unit billing," is not an advance against the lawyer's hourly rate and may not be billed against at an hourly rate. Flat fees become the property of the lawyer upon receipt and are subject to the requirements of SCR 20:1.5, SCR 20:1.15(b)(4) or (4m), SCR 20:1.15(e)(4)h., SCR 20:1.15(g), and SCR 20:1.16(d).

(mm) “Retainer” denotes an amount paid specifically and solely to secure the availability of a lawyer to perform services on behalf of a client, whether designated a “retainer,” “general retainer,” “engagement retainer,” “reservation fee,” “availability fee,” or any other characterization. This amount does not constitute payment for any specific legal services, whether past, present, or future and may not be billed against for fees or costs at any point. A retainer becomes the property of the lawyer upon receipt, but is subject to the requirements of SCR 20:1.5 and SCR 20:1.16(d).

Wisconsin Comment. The definition of flat fee specifies that flat fees “become the property of the lawyer upon receipt.” Notwithstanding, the lawyer must either deposit the advanced flat fee in trust until earned, or comply with the alternative in SCR 20:1.15(b)(4m), alternative protection for advanced fees. In addition, as specified in the definition, flat fees are subject to the requirements of all rules to which advanced fees are subject.

SCR 20:1.5 Fees.

(b)(1) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate as in the past. If it is reasonably foreseeable that the total cost of representation to the client, including attorney’s fees, will be $1000 or less, the communication may be oral or in writing. Any changes in the basis or rate of the fee or expenses shall also be communicated in writing to the client.

(2) If the total cost of representation to the client, including attorney’s fees, is more than $1000, the purpose and effect of any retainer or advance fee that is paid to the lawyer shall be communicated in writing.
Wisconsin Committee Comment: Paragraph (b) differs from the Model Rule in requiring that fee and expense information usually must be communicated to the client in writing, unless the total cost of representation will be $1000 or less. In instances when a lawyer has regularly represented a client, any changes in the basis or rate of the fee or expenses may be communicated in writing to the client by a proper reference on the periodic billing statement provided to the client within a reasonable time after the basis or rate of the fee or expenses has been changed. The communication to the client through the billing statement should clearly indicate that a change in the basis or rate of the fee or expenses has occurred along with an indication of the new basis or rate of the fee or expenses. A lawyer should advise the client at the time of commencement of representation of the likelihood of a periodic change in the basis or rate of the fee or expenses that will be charged to the client
.
In addition, paragraph (b) differs from the Model Rule in requiring that the purpose and effect of any retainer or advance fee paid to the lawyer shall be communicated in writing and that a lawyer shall promptly respond to a client’s request for information concerning fees and expenses. The lawyer should inform the client of the purpose and effect of any retainer or advance fee. Specifically, the lawyer should identify whether any portion, and if so what portion, of the fee is a retainer. A retainer is a fee that a lawyer charges the client not for specific services to be performed but to ensure the lawyer’s availability whenever the client may need legal services.

These fees become the property of the lawyer when received and may not be deposited into the lawyer's trust account. In addition, they are subject to SCR 20:1.15 and SCR 20:1.16. Retainers are to be distinguished from an "advanced fee" which is paid for future services and earned only as services are performed. Advanced fees are subject to SCR 20:1.5, SCR 20:1.15, and SCR 20:1.16. See also State Bar of Wis. Comm. on Prof'l Ethics, Formal Op. E−93−4 (1993).

SCR 20:1.15 Safekeeping property; trust accounts and fiduciary accounts.

(b) SEGREGATION OF TRUST PROPERTY.

(4) *Unearned fees and cost advances.* Except as provided in par. (4m), unearned fees and advanced payments of fees shall be held in trust until earned by the lawyer, and withdrawn pursuant to sub. (g). Funds advanced by a client or 3rd party for payment of costs shall be held in trust until the costs are incurred.

(4m) *Alternative protection for advanced fees.* A lawyer who accepts advanced payments of fees may deposit the funds in the lawyer's business account, provided that a court of competent jurisdiction must ultimately approve the lawyer's fee, or that the lawyer complies with each of the following requirements:

a. Upon accepting any advanced payment of fees pursuant to this subsection, the lawyer shall deliver to the client a notice in writing containing all of the following information:

1. the amount of the advanced payment;
2. the basis or rate of the lawyer's fee;
3. any expenses for which the client will be responsible;
4. that the lawyer has an obligation to refund any unearned advanced fee, along with an accounting, at the termination of the representation;
5. that the lawyer is required to submit any dispute about a requested refund of advanced fees to binding arbitration within 30 days of receiving a request for such a refund; and
6. the ability of the client to file a claim with the Wisconsin lawyers' fund for client protection if the lawyer fails to provide a refund of unearned advanced fees.

b. Upon termination of the representation, the lawyer shall deliver to the client in writing all of the following:

1. a final accounting**,** or an accounting from the date of the lawyer's most recent statement to the end of the representation, regarding the client's advanced fee payment with a refund of any unearned advanced fees;
2. notice that, if the client disputes the amount of the fee and wants that dispute to be submitted to binding arbitration, the client must provide written notice of the dispute to the lawyer within 30 days of the mailing of the accounting; and
3. notice that, if the lawyer is unable to resolve the dispute to the satisfaction of the client within 30 days after receiving notice of the dispute from the client, the lawyer shall submit the dispute to binding arbitration.

c. Upon timely receipt of written notice of a dispute from the client, the lawyer shall attempt to resolve that dispute with the client, and if the dispute is not resolved, the lawyer shall submit the dispute to binding arbitration with the State Bar Fee Arbitration Program or a similar local bar association program within 30 days of the lawyer's receipt of the written notice of dispute from the client.

d. Upon receipt of an arbitration award requiring the lawyer to make a payment to the client, the lawyer shall pay the arbitration award within 30 days, unless the client fails to agree to be bound by the award of the arbitrator.

Comment

SCR 20:1.15(b)(4) Advances for fees and costs. Lawyers often receive funds from 3rd parties from which the lawyer's fee will be paid. If there is risk that the client may divert the funds without paying the fee, the lawyer is not required to remit the portion from which the fee is to be paid. However, a lawyer may not hold funds to coerce a client into accepting the lawyer's contention. The disputed portion of the funds should be kept in trust, and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration. The undisputed portion of the funds shall be promptly distributed.

Lawyers also receive cost advances from clients or 3rd parties. Since January 1, 1987, the supreme court has required cost advances to be held in trust. Prior to that date, the applicable trust account rule SCR 20.50(1), specifically excluded such advances from the funds that the supreme court required lawyers to hold in trust accounts. However, by order, dated March 21, 1986, the supreme court amended SCR 20.50(1) as follows:

> All funds of clients paid to a lawyer or law firm~~, other than advances for costs and expenses,~~ shall be deposited in one or more identifiable ~~bank~~ trust accounts as provided in sub. (3) maintained in the state in which the law office is situated and no funds belonging to the lawyer or law firm may be deposited in such an account except as follows ....

This requirement is specifically addressed in SCR 20:1.15(b)(4).

SCR 20:1.15(b)(4m) Alternative protection for advanced fees. This section allows lawyers to deposit advanced fees into the lawyer's business account, as an alternative to SCR 20:1.15(b)(4). The lawyer's fee remains subject to the requirement of reasonableness (SCR 20:1.5) as well as the requirement that unearned fees be refunded upon termination of the representation [SCR 20:1.16(d)]. A lawyer must comply either with SCR 20:1.15(b)(4), or with SCR 20:1.15(b)(4m), and a lawyer's failure to do so shall be professional misconduct and grounds for discipline.

The writing required by SCR 20:1.15(b)(4m) a. must contain language informing the client that the lawyer is obligated to refund any unearned advanced fee at the end of the representation, that the lawyer will submit any dispute regarding a refund to binding arbitration, such as the programs run by the State Bar of Wisconsin and Milwaukee Bar Association, within 30 days of receiving a request for refund, and that the lawyer is obligated to comply with an arbitration

award within 30 days of the award. The client is not obligated to arbitrate the fee dispute and may elect another forum in which to resolve the dispute. The writing must also inform the client of the opportunity to file a claim in the event an unearned advanced fee is not refunded, and should provide the address of the Wisconsin lawyers' fund for client protection.

If the client's fees have been paid by one other than the client, then the lawyer's responsibilities are governed by SCR 20:1.8(f). If there is a dispute as to the ownership of any refund of unearned advanced fees paid by one other than the client, the unearned fees should be treated as trust property pursuant to SCR 20:1.15(d)(3).

This alternative applies only to advanced fees for legal services. Cost advances must be deposited into the lawyer's trust account.

Advanced fees deposited into the lawyer's business account pursuant to this subsection may be paid by credit card, debit card, or an electronic transfer of funds. A cost advance cannot be paid by credit card, debit card, or an electronic transfer of funds under this section. Such payments are subject to SCR 20:1.15(b)(1) or SCR 20:1.15(e)(4)h.

PROPOSED RULES

Proposed California Rules (approved by the California Bar Association Board of Governors, July & September 2010)

Rule 1.5: Fees for Legal Services

Comment

Payment of Fees in Advance of Services

[7] Every fee agreed to, charged, or collected is subject to paragraph (a) and may not be unconscionable.

[8] A true retainer, which is sometimes known as a "general retainer," or "classic retainer," secures availability alone, that is, it presumes that the lawyer is to be additionally compensated for any actual work performed. Therefore, a payment purportedly made to secure a lawyer's availability, but that will be applied to the client's account as the lawyer renders services, is not a true retainer. Concerning the lawyer's obligations with respect to the deposit of a true retainer in a trust account, see Rule 1.15, Comments [8] and [9].

[9] When a lawyer-client relationship terminates, the lawyer must refund the unearned portion of a fee. See Rule 1.16(e)(2). To the extent a fee is unconscionable, it never can be considered to have been earned. In the event of a dispute relating to a fee, the lawyer must comply with Rule 1.15(d)(2).

Rule 1.15: Handling Funds and Property of Clients and Other Persons

(a) Duty to deposit entrusted funds in trust account. A lawyer shall deposit all funds that the lawyer receives or holds for the benefit of a client or other person in connection with the performance of a legal service or representation by the lawyer, including an advance for costs and expenses, in one or more trust accounts in accordance with this Rule.

(d) Advances for fees; deposit and accounting. A lawyer may, but is not required to, deposit an advance for fees in a trust account. Regardless of whether the lawyer has deposited an advance for fees in a trust account:

> (1) subject to Business and Professions Code section 6068(e), the lawyer must account to the client or other person who advanced the fees; and
>
> (2) if a client or other person disputes a lawyer's entitlement to a fee, any disputed portion of an advance for fees not yet fixed must be deposited in a trust account.

Comment

Application of Rule

Paragraph (a) – Application to true retainer fees

[8] Because a true retainer fee, as described in Rule 1.5, Comment [8], is earned on receipt and so is not held for the benefit of the client, a lawyer may not deposit it in a client trust account. *Baranowski v. State Bar* (1979) 24 Cal.3d 153, 164 [154 Cal.Rptr. 752].

[9] If any part of a true retainer fee is paid for or applied to fees for the performance of legal services, the entire amount loses its character as a true retainer fee and is converted to an advance for fees. *Baranowski v. State Bar* (1979) 24 Cal.3d 153, 164, fn.4 [154 Cal.Rptr. 752]; *In the Matter of Fonte* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 752, 757. When this occurs, the lawyer must comply with paragraphs (d) and (k)(4) with respect to the entire fee. See also Comment [10].

Paragraph (d) – Advances for fees; accounting for advances for fees

[10] Although a lawyer has no duty to deposit an advance for fees in a trust account, the lawyer still has a duty under paragraph (d)(1) to account for all funds received as an advance for fees. In preparing an accounting as required under paragraph (d), a lawyer may follow the standards set forth in Business and Professions Code section 6148(b). *In the Matter of Fonte* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 752, 756–758.

Proposed Hawaii Rule

RULE 1.15: SAFEKEEPING PROPERTY.

(c) A lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred. All fees paid in advance are refundable until earned, and fees earned and expenses incurred shall be promptly withdrawn from the client trust account. All disbursements from the client trust account must identify the payee, none can be made to cash, and checks must be used for all disbursements from the client trust account except those that are made by electronic bank transfer.

SHOW ME THE MONEY: RETAINERS & FEE ADVANCES REVISITED

37th National Conference on Professional Responsibility

Memphis, Tennessee

June 4, 2011

PANELISTS

- Art Lachman, Seattle, WA
- Don Campbell, Southfield, MI
- Doug Richmond, Chicago, IL

COMMON GROUND [HOPEFULLY]

- All fees must meet the Rule 1.5 reasonableness requirement
- Flat fees are permitted if they meet the Rule 1.5 reasonableness requirement
- Any type of fee (including advanced) must be "refunded" to the client (or "disgorged" from the lawyer) to the extent:
  - it is "unreasonable"; or
  - it is "unearned" upon termination of the representation (under Rule 1.16(d))
- "True" retainers (for availability only) need not be deposited in trust

A NOTE ON “RETAINERS”

- “Over the years, attorneys have used the term ‘retainer’ in so many conflicting senses that it should be banished from the legal vocabulary.”
  - Black’s Law Dictionary 1342 (8th ed. 2004), *quoting* Mortimer Schwartz & Richard Wydick, Problems in Legal Ethics 100, 101 (2d ed. 1988)

TERMINOLOGY FOR TODAY [HOPEFULLY]

- "Retainer" (aka true, general, classic, engagement retainer)
  - for availability **ONLY**
- "Advance fee"
  - A fee received in advance of services being performed; can be flat or hourly
- "Flat fee" (or "fixed fee")
  - A fixed charge for legal services that constitutes complete payment for those services & does not vary with the amount of time or effort expended by the lawyer to complete them

WASHINGTON DEVELOPMENTS

- Prior law:
  - Client funds must be deposited into a trust account under Wash. RPC 1.15A(c)
  - Prepaid fees are generally considered “client funds” (must be placed in trust account)
  - WSBA Formal Ethics Op. 186 (1990) : if the lawyer labels the prepaid flat fee as “nonrefundable” or “earned upon receipt,” the funds are considered the lawyer’s property upon receipt & are deposited in the lawyer’s operating account

WASHINGTON DEVELOPMENTS

- Several liability & disciplinary cases involved lawyers failing to refund the unearned portion of prepaid flat fees using “nonrefundable” or “earned upon receipt” labels
- WSBA withdrew Formal Ethics Op. 186 (December 2005)
- The Washington Supreme Court adopted amendments to RPC 1.5 and RPC 1.15A effective in November 2008 to deal specifically with retainers, advance fees, & prepaid flat fees

WASHINGTON DEVELOPMENTS: NEW RPCs

- General Rule (new RPC 1.15A(c)(2)):
  - Advance fees must go into trust account
- Limited Exceptions (new RPC 1.5(f)):
  - Retainers (defined to be for availability only)
  - Prepaid flat fees (with detailed written disclosures)
- The Washington Supreme Court rejected a proposal to ban the use of the terms "nonrefundable," "earned upon receipt," and "minimum" to describe fees
- The Court also rejected a proposed refund/put-back requirement for fee disputes in the advance flat fee context

RECENT ETHICS OPINIONS

- Washington: availability retainer label, "pro bono credit" for specified hours, violates revised RPCs
- Missouri: all advance fees to trust (label irrelevant)
- Arizona: "nonrefundable"/"earned upon receipt" label controls, with disclosures in Ariz. RPC 1.5(d)(3); "minimum fee" contemplating additional hourly charges OK (use label; don't call it a "flat fee")
- D.C.: generally, all advance fees to trust; exception for flat fees, with client's informed consent (label irrelevant); lawyer & client can agree how flat fees deposited in trust are earned; absent agreement, burden on lawyer to show funds have been earned

SUMMARY/TRENDS

- An increasing number of states now require all advance fees to be deposited into trust; e.g.,
  - By rule in CO, DE, HI, VT, maybe ME
  - By ethics opinion or case law in IA, KS, MO, VA
- Advance fees described as “nonrefundable” subject to a refund requirement if unreasonable
  - E.g., ethics opinions/court decisions in AK, AL, GA, IN, NE, NV, NY, TX
  - Likely true everywhere (even Michigan?)
  - AK, NY ban “nonrefundable” terminology altogether

SUMMARY/TRENDS

- Several states permit flat fees to avoid trust account requirement (with conditions; label not dispositive)
  - By rule in LA, WA; new rule in MN (eff. 7/1/11)
  - By case law/ethics opinion in DC, MT
- A few states have adopted MR 1.15(c) (all advance fees must be deposited into trust), with a general exception for written agreements with client otherwise
  - CT, MD, PA
  - Proposed CA rule clarifies that fee advances need not be deposited in trust

SUMMARY/TRENDS

- In several states, agreements with client about where the money goes are generally honored:
  - By rule in OH, SC, WI (subject to conditions, including disclosure & informed consent)
- In several states, “nonrefundable” or “earned upon receipt” language controls
  - For any fee (apparently): KY, MI
  - For any fee (with disclosures): AZ
  - For flat fees: new rule in TN; case law/ethics opinion in OK, OR

Ode to a Fee Earned
by Donald D. Campbell[♦]

I have been asked by Art Lachman to write "something" in advance of the discussion on nonrefundable fees at the ABA Center's 37th National Conference on Professional Responsibility in Memphis. This short article seeks to expand on two concepts that I debated with Doug Richmond at the Association of Professional Responsibility Lawyers conference in San Francisco last August.

Specifically, I will address the danger posed by the blurring of the lines between civil law and disciplinary rules concerning the interpretation of attorney fee contracts. Civil-law principles that are inconsistent with grievance procedure and even antithetical to the rules that govern the attorney-disciplinary system have begun to creep into discipline matters.

Specifically, I invite you to consider two instances where this phenomenon of misapplication of civil law in the disciplinary context has appeared. First is the creep of "contra preferentum" into RPC 1.5(a) fee issues, and second is the idea, incorrectly applied to the disciplinary context, that the "burden of establishing the fee rests with the lawyer." See Douglas R. Richmond, *Understanding Retainers & Flat Fees,* 34 J. LEGAL PROF. 113, 123 (2009).

As a backdrop for both these scenarios, I will use a case I tried successfully (shameless plug) resulting in an order from the Michigan Supreme Court dismissing all disciplinary charges against my client, *Grievance Administrator v Cooper*, 482 Mich 1079 (2008).

The *Cooper* Case. In July 2002, attorney Patricia Cooper charged and collected a $4000 minimum fee under a written retainer agreement in a divorce matter. Her client was a well-educated employee of a statewide energy company. The client's husband was an attorney who practiced primarily domestic relations law in his family's law firm. A month later the parties were reconciled. The former client requested a refund. Ms. Cooper voluntarily reduced her fee to $2,614.25 and returned $1,385.75 to the former client, while noting that the minimum fee was not refundable under the contract. The former client then requested Ms. Cooper refund an additional $1,385.75.

Ms. Cooper contacted the State Bar of Michigan ethics hotline. Acting on its advice, she reviewed the factors set forth in Michigan's RPC 1.5(a) along with the leading ethics opinions on the subject and concluded her fee of $2,614.25 was both reasonable and earned. Nearly a year later, she received a grievance filed by the former client. In 2006, the Grievance Administrator filed a formal complaint charging Ms. Cooper with violating Michigan's RPC 1.5(a), the rule against charging a clearly excessive fee, and Michigan's RPC 1.15(b), the rule requiring prompt delivery of funds of another, and Michigan's RPC 1.16(d), the rule requiring refund of advanced fee not earned.

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A hearing panel of the Michigan Attorney Discipline Board found the fee to be reasonable and that there was no ethical duty to refund any of it. All charges were dismissed. The Grievance Commission filed a petition for review. On review, the Discipline Board, the intermediate appellate disciplinary tribunal, affirmed the hearing panel's Order in part and vacated it in part. The Board affirmed the hearing panel's ruling that the fee was reasonable under MRPC 1.5(a). The Board concluded, however, that the fee agreement was ambiguous. Applying the rule of *contra proferentem,* the Board found that Ms. Cooper's interpretation of the contract terms violated Michigan's RPC 1.15(b) and Michigan's RPC 1.16(d). Ultimately, the Supreme Court vacated the Board's Order and dismissed the entire complaint finding the fee agreement was unambiguous. But the Board's treatment of ambiguity and its use of contra preferentum shows the dangers of the unthinking application of well-established civil law to the disciplinary context.

The nature of the fee charged by Ms. Cooper is highlighted in the agreement: "Client agrees to pay Attorney a MINIMUM FEE of $4,000" and "Client understands that NO portion of the MINIMUM FEE referred to above is REFUNDABLE, to the client, under any circumstances." That notwithstanding, when the parties reconciled, the former client requested a refund.

The hearing panel unanimously found that the fee agreement "clearly" provided that the fee was not refundable:

> The fee agreement clearly spells out using capital letters the fact that a "MINIMUM FEE" of $4,000.00 would be charged as a retainer. Paragraph (2) clearly states that "client understands that NO portion of the MINIMUM FEE referred to above is REFUNDABLE, to the client, under any circumstances. The fee agreement was signed by the complainant.

Despite the clarity of the contract language, and contrary to the hearing panel's findings, the Board found the contract language to be ambiguous:

> The fee agreement plainly provided: "This MINIMUM FEE shall entitle Client to a combined amount of Attorney and Legal Assistant time computed in accordance with the hourly rate set forth in paragraph 3," and paragraph 3 of the agreement set forth an hourly rate of $195. While it is true that the agreement also stated that "NO portion of the MINIMUM FEE referred to above is REFUNDABLE to the client under any circumstances," this provision must be read together with the portion of the agreement that explains what the client receives for the "minimum fee," in this case a certain number of hours devoted to legal services. Additionally, paragraph 11 essentially incorporates a term the law requires in any event: "The Client is entitled to terminate this agreement subject to its contractual liability to the law firm for services rendered."

> *To the extent the agreement is ambiguous, it must be construed in favor of the client.* Thus, under the terms of the fee agreement drafted by respondent, complainant was entitled to a refund. [Emphasis supplied.]

Ambiguity a uniquely civil concept. The United States Supreme Court has listed the "right to make and enforce contracts" among "those fundamental rights which are the essence of civil freedom." *United States v Stanley*, 109 US 3, 22; 3 S Ct 18; 27 L Ed 835 (1883). Generally, courts respect the freedom of individuals freely to arrange their affairs via contract by upholding the fundamental tenet of our jurisprudence that unambiguous contracts are not open to judicial construction and must be *enforced as written* unless a contractual provision would violate law or public policy.

In particular, Michigan has recognized that a refusal to enforce a contract is contrary to the standard of justice the parties have set for themselves in a number of cases dating back to 1875. Consequently, when parties have freely established their mutual rights and obligations through the formation of unambiguous contracts, the law in most states requires a court to enforce the terms and conditions contained in such contracts, if the contract is not contrary to public policy. When contracts are formed, the parties to the contract are the lawmakers in that realm and deference must be shown to their judgments and to their language just as it is with other lawmakers.

Given these fundamental principles of contract interpretation, most courts are reluctant to find ambiguity. A contract is ambiguous only when its provisions are capable of conflicting interpretations. A term is ambiguous only when it is equally susceptible to more than a single meaning, not merely when reasonable minds can disagree regarding the meaning. Accordingly, only if two provisions of the same contract irreconcilably conflict with each other will the language of the contract be ambiguous.

In Michigan, a tribunal cannot simply ignore portions of a contract in order to declare an ambiguity. Instead, contracts must be "'construed so as to give effect to every word or phrase as far as practicable.'" *Klapp v United Ins. Group Agency, Inc*, 468 Mich. 459, 467 (2003) citing *Hunter v Pearl Assurance Co, Ltd*, 292 Mich. 543, 545 (1940), quoting *Mondou v Lincoln Mut Cas Co*, 283 Mich. 353, 358-359 (1938). Tribunals must give effect to every word, phrase, and clause in a contract and avoid an interpretation that would render any part of the contract surplusage or nugatory. *Klapp*, *supra* at 468.

As noted already, Ms. Cooper was exonerated by the Michigan Supreme Court with a ruling that her contract was unambiguous and permitted her conduct. But let's assume that her fee contract could be considered ambiguous; the plain fact is that a finding of ambiguity must preclude a finding of an ethical violation. Where ambiguity truly exists, there can be no proper basis for finding a violation of the ethics rules.

Where a written contract is ambiguous, a factual question is presented as to the meaning of its provisions, requiring a factual determination as to the intent of the parties in entering the contract. So, the fact finder must interpret the contract's terms, in light of the apparent purpose of the contract as a whole, the rules of contract construction, and extrinsic evidence of intent and meaning. See, 11 Williston, Contracts (4th ed), § 30:7, pp 87-91.

The rule of *contra proferentem* states that when interpreting a contract whose language is ambiguous a fact finder may also consider that ambiguities are to be construed against the drafter of the contract. But this rule is only to be applied if all conventional means of contract interpretation, including the consideration of relevant extrinsic evidence, have left the fact finder unable to determine what the parties intended their contract to mean. Accordingly, if the extrinsic evidence indicates that the parties intended their contract to have a particular meaning, this is the meaning that should be given to the contract, regardless of whether this meaning is in accord with the drafter's or the nondrafter's view of the contract.

In other words, if a contract is ambiguous regarding whether a term means "a" or "b," but relevant extrinsic evidence leads the jury to conclude that the parties intended the term to mean "b," then the term should be interpreted to mean "b," even though construing the document in the nondrafter's favor pursuant to an application of the rule of *contra proferentem* would produce an interpretation of the term as "a."

If, however, the language of a contract is ambiguous, and the jury remains unable to determine what the parties intended after considering all relevant extrinsic evidence, then the jury should only find in favor of the nondrafter of the contract under the rule of *contra proferentem*. The rule of *contra proferentem* should be viewed essentially as a "tie-breaker," to be used only after all conventional means of contract interpretation, including the consideration of relevant extrinsic evidence, have been applied and found wanting.

This view of the rule of construing against the drafter of the contract is in accordance with the 2 Restatement Contracts, 2d, § 206, p 105:

> In choosing among the reasonable meanings of a promise or agreement or a term thereof, that meaning is generally preferred which operates against the party who supplies the words or from whom a writing otherwise proceeds.

The comments following this rule state that "in cases of doubt, therefore, so long as other factors are not decisive, there is substantial reason for preferring the meaning of the other party. . . ." *Id.* "The rule is 'the last one to be resorted to, and never to be applied except when other rules of interpretation fail.'" *Id.*, Reporter's Note, p 106, citation omitted. [*Id.* at 471-472.}

Construing a contract against a drafter is a "rule of last resort." For example, 5 Corbin, Contracts (rev ed, 1998), § 24.27, pp 297-300, provides:

> The "*contra proferentem*" rule has been described as being applicable only as a last resort, when other techniques of interpretation and construction have not resolved the question of which of two or more possible reasonable meanings the court should choose. One court wrote that it is "a tie breaker when there is no other sound basis for choosing one contract interpretation, over another." … Another federal court expressed a similar reservation concerning use of the rule: "This rule of construction

> should not be enlarged to [clarify] perfunctorily . . . an ambiguous meaning; the trier of fact should still consider the drafting party's evidence." The "*contra proferentem*" rule thus yields to other techniques of interpretation, including the attempt to give a valid, legal, and reasonable meaning to as many of the contract terms as possible. [Citations omitted.]

In addition, Williston, *supra*, § 32:12, pp 480-482, provides:

> The rule of *contra proferentem* is generally said to be a rule of last resort and is applied only where other secondary rules of interpretation have failed to elucidate the contract's meaning. … Finally, the rule does not justify a court in adopting an interpretation contrary to that asserted by the drafter, simply because of his or her status as the drafter. Rather, it is only when consistent with the rules of contract interpretation, the meaning proposed by the nondrafter (or an altogether different meaning determined by the court) is reasonable -- when there is a true ambiguity and the court must choose between two or more reasonable meanings -- that the rule of contra proferentem is properly invoked.

The rule of *contra proferentem* is a rule of last resort because the primary goal in the construction or interpretation of any contract is to honor the intent of the parties. Obviously, the rule of *contra proferentem* does not aid in determining the parties' intent. For this reason, the comments after the restatement refer to the rule of *contra proferentem*, not as a “rule of interpretation”, but rather as, "a rule of legal effect." 2 Restatement, *supra* at 105. This significant point is often missed by even the best and brightest in our profession. For example, Professors Rotunda and Dzienkowski's Professional Responsibility, A Student's Guide, 2010-2011, mistakenly asserts, “An old rule of interpretation states that doubtful agreements are to be construed against the drafter. See p. 164. The good professors cite, of course, a civil case for this proposition – *Beatty v NP Corp.*, 31 Mass App Ct 606, 612 (1991).

The label of “rule of legal effect” is actually correct because its purpose is not to render more accurate or more perfect a fact finder’s understanding of the meaning of the contract. Instead, the rule exists merely to ascertain the winner and the loser in connection with a contract whose meaning has eluded the fact finder despite all efforts to apply conventional rules of interpretation, as stated in Corbin, *supra*, p 306:

> The rule is not actually one of interpretation, because its application does not assist in determining the meaning that the two parties gave to the words, or even the meaning that a reasonable person would have assigned to the language used. It is chiefly a rule of policy, generally favoring the underdog. It directs the court to choose between two or more possible reasonable meanings on the basis of their

> legal operation, i.e., whether they favor the drafter or the other party.

In applying the rule of *contra proferentem* a disciplinary body necessarily concedes that it is not giving effect to the intentions of the party, but merely employing a rule of legal effect to pick a winner and a loser. While the rule of *contra proferentem* can have a narrow purpose in resolving certain civil contract disputes, it has no proper place in determining the outcome of ethics charges. It is antithetical to the purposes of attorney discipline that a finding of misconduct should result when an attorney's interpretation of a contract is found not only to be made in good faith but also affirmed as reasonable in fact as it was in this matter. To say it another way, it is wrong to discipline an attorney for simply losing a legitimate fee dispute. In *Cooper*, the Michigan Attorney Discipline Board would have imposed a sanction upon Ms. Cooper for simply defending her interpretation of a contract, an interpretation the Board conceded was no less valid than the former client's.

Burden of establishing a reasonable fee. Now for my second concern, the need to respect and understand that the civil burden in a fee dispute is not the burden of an attorney facing discipline charges. In all jurisdictions the burden of proving a disciplinary charge falls upon the disciplinary agency bringing a charge under RPC 1.5(a) for charging or seeking to collect an unreasonable fee. While many jurisdictions require proof that is clear and convincing before sanctions against a lawyer can be imposed, some jurisdictions, like Michigan, have the preponderance standard for violations of 1.5(a).

As noted above, Doug Richmond has written that the "burden of establishing the fee rests with the lawyer." Richmond, *Understanding Retainers & Flat Fees*, 34 J. LEGAL PROF. 113, 123 (2009). He cites for this proposition 3 cases, "*Gold, Weems, Buser, Sues & Rundell*, 947 So. 2d at 842; *In re Dawson*, 8 P.3d 856, 860 (N.M. 2000); *Bass v. Rose*, 609 S.E.2d 848, 853 (W. Va. 2004)."

As you may have surmised, *Gold* and *Bass* are both civil cases. The former involves a claim by a lawyer for payment of a fee, while the latter involves a lawyer defending a contingency fee against an attack from a former client. *Dawson* is a disciplinary case. A closer look at these matters in the order presented is warranted.

In *Gold*, the action was by a law firm to recover its fees. The court, relying on Louisiana precedent, held that "[t]he one who asserts a fact bears the burden of proving that fact; therefore, the burden of proving the reasonableness of the fees charged is on the attorney claiming fees are owed. *Succession of Herrle*, 517 So.2d 386 (La.App. 5 Cir.1987), *writ denied*, 519 So.2d 129 (La.1988)." *Gold* at p. 842.

In *Dawson*, the court was presented with a consent discipline. So the court was essentially considering only the issue of sanction, because the findings presented were not in dispute. In the course of its discussion, the court said that it is "the lawyer's burden to prove the value of the legal services rendered." And cited, *Calderon v. Navarette*, 111 N.M. 1, 3, 800 P.2d 1058, 1060 (1990) and *Van Orman v. Nelson*, 78 N.M. 11, 23, 427 P.2d 896, 908 (1967). Both *Calderon* and *Van Orman* are civil cases where an attorney sought to claim and collect a fee. The court shows no awareness of the fact that it has adopted as a statement of disciplinary law a civil rule that completely defies the principle

that the burden of establishing a disciplinary charge rests with the ethics prosecutor. Given that the matter was a joint petition for imposition of a consent discipline, the court's dicta was of no consequence to Dawson, but could ultimately be of great consequence to other members of the bar.

Bass provides an excellent opportunity to explore the creeping effect of inapplicable civil law into the disciplinary context. Bass, the former client, sought to force Rose, his former attorney, to disgorge fees already received. The court actually found that Rose's fees were reasonable under the contingency fee agreement at issue. Still, it took time to admonish Rose's cavalier attitude toward hourly record keeping in a contingent fee matter:

> It may be that many lawyers who do work under a contingent fee contract do not keep time records. It should be obvious from this case that keeping good time records would be the more prudent course. The burden of proof is always upon the attorney to show the reasonableness of the fees charged. Syl. Pt. 2, *Committee on Legal Ethics of West Virginia State Bar v. Tatterson,* 177 W.Va. 356, 352 S.E.2d 107 (1986).

In an unexpected twist, a civil case cited a disciplinary matter for the proposition that the burden of proof is on the lawyer to show that a fee is reasonable. Significantly, in *Tatterson,* the court was careful to explain that in West Virginia proof of misconduct must be shown by the ethics prosecutor:

> At the outset this Court holds that the Committee has met its burden of proving the charges against the respondent by the full, preponderating and clear evidence. We have consistently required this type of proof in disciplinary proceedings against attorneys. [citation omitted]

This is entirely consistent with the ABA's Model Rules for Lawyer Disciplinary Enforcement, promulgated by the Center for Professional Responsibility Standing Committee on Professional Discipline, Rule 18 provides, which in its relevant part, state: "Burden of Proof. The burden of proof in proceedings seeking discipline or transfer to disability inactive status is on disciplinary counsel."

The *Tatterson* court carefully and quite convincingly goes through the various factors in RPC 1.5(a)(1)-(8) and shows how in each instance the proofs demonstrated that the attorney's conduct was not in compliance with the rule. But later in the opinion, the court inexplicably says that the "burden of proof is on the attorney":

> The burden of proof is upon the attorney to show the reasonableness and fairness of the contract for the attorney's fee. *See In re Kennedy,* 472 A.2d 1317, 1322, 1330-31 (Del.), *cert. denied,* 467 U.S. 1205, 104 S.Ct. 2388, 81 L.Ed.2d 346 (1984); *Florida Bar v. Moriber,* 314 So.2d 145, 149 (Fla.1975); *Harmon v. Pugh,* 38 N.C.App.

> 438, 444, 248 S.E.2d 421, 424-25 (1978), *petition for discretionary review denied*, 296 N.C. 584, 254 S.E.2d 33 (1979); *In re Stafford*, 36 Wash.2d 108, 113, 119, 216 P.2d 746, 748, 752 (1950) (en banc); C. Wolfram, *Modern Legal Ethics* § 9.3.1 at 520 (1986).

Kennedy and *Moriber* involved attorney-disciplinary prosecutions under DR 2.106(A), which is substantially the same as RPC 1.5(a)(1)-(8). Neither court held that the burden on the attorney, instead each reviewed the findings of fact from the original proceeding and confirmed the findings that the evidence submitted favored weighing these factors against the respondents. See *Kennedy* at 1330-31 and *Moriber* at 148. Neither court employed a presumption or burden against the respondents. *Harmon* is a civil case where an attorney made a claim for his fee. Not surprisingly, the court does conclude that an attorney making such a claim bears the burden of showing the fee was reasonable. *Stafford* is a 1950 discipline case where the rule is not identified but the relevant charge was, "(5) A charge of $2000 was exorbitant and unconscionable. No legal problems were involved. Only a search for the proper party." See *Stafford* at 113. No mention of the burden of proof is made in the opinion.

The alleged support cited by the *Tatterson* court is underwhelming. A review of these decisions lends no support for the proposition that in a discipline matter "the burden of proof is upon the attorney to show a fee is reasonable." The reality is that any such transference of the civil-law doctrine concerning burdens for establishing a claim for fees is directly contrary to the quasi-criminal nature and the fact that each of these jurisdictions, like West Virginia and Michigan (and I suspect even 21st Century Washington State), requires its ethics prosecutors to carry the burden of proving the charges against a respondent by either preponderating or convincing evidence.

Doug Richmond was correct to say that courts have held that the burden of proof for establishing reasonableness falls upon the attorney. This is neither proper nor, as far as I have been able to determine, actually true yet in a disciplinary matter. Through dicta, at least, the stage is set for an unwitting court to mistakenly misapply the civil burden in disciplinary context. Scholars should address the contradiction between the civil burden in bringing a claim for fees with the disciplinary rules concerning the prosecutor's burden of proof in quasi-criminal disciplinary proceedings.