

STATE OF MICHIGAN

Attorney Discipline Board

Grievance Administrator,

Petitioner/Appellant,

v

Patricia M. Cooper, P 37389,

Respondent/Appellee,

Case No. 06-36-GA

Decided: September 17, 2007

Appearances:

Ruthann Stevens, for the Grievance Administrator.

Patricia M. Cooper, Respondent, In Pro Per

BOARD OPINION

The formal complaint alleges that respondent charged an excessive or illegal fee,¹ failed to promptly pay funds a client is entitled to receive,² and failed to refund, upon termination of representation, “any advance payment of fee that has not been earned.”³

The fee agreement in this case provided that \$4,000 was paid to respondent for work to be performed in a divorce matter. The agreement characterized this as a “minimum fee,” stated that it entitled the client to attorney time at a certain hourly rate, and provided that no part of the minimum fee would be refundable. A few weeks after retaining the respondent, the client changed her mind about the divorce and asked for an itemization and a refund of unearned fees. After continued requests by the client, respondent eventually prepared a bill for \$1,228.50 and, “out of the goodness of her heart,” refunded \$1,385.75, thus bringing the total amount kept by respondent to \$2,614.25. The hearing panel dismissed the formal complaint.

¹ MRPC 1.5(a)

² MRPC 1.15(b)

³ MRPC 1.16(d)

We hold that the fee agreement's nonrefundability language does not negate the contract's express provision that the 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 [of the agreement]." The representation here was terminated before completion of the legal services contemplated, and under the fee agreement, MRPC 1.15(b), and MRPC 1.16(d), respondent was obligated to return the unearned portion of the "retainer," which was, in actuality, a fee paid in advance.

As we explain below, a true retainer (also known as a "general retainer") is a fee for the attorney's availability. An "advance fee" is essentially a deposit from which fees are paid after services are rendered. Courts routinely hold that the unearned portion of advance fees must be returned to the client irrespective of whether they are designated "nonrefundable."

The Grievance Administrator has acknowledged the need for clarification in this area. Accordingly, we have extensively reviewed various authorities emanating from Michigan and elsewhere on the subject of fees and so-called "nonrefundable retainers." We conclude that the failure to refund the fee here amounted to misconduct, and we will therefore vacate the panel's order of dismissal. However, for reasons discussed below, we will impose no discipline.⁴

I. Factual Background & Panel Proceedings

Respondent and complainant entered into a fee agreement dated July 29, 2002. The agreement reads, in part, as follows:

1. Client agrees to pay Attorney a MINIMUM FEE OF \$4,000 which shall be payable as follows:

Retainer	<u>\$4,000</u>
Balance	<u>\$0</u>

* * *

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 below.

⁴ *Grievance Administrator v Deutch*, 455 Mich 149, 163; 565 NW2d 369 (1997) (the rules allow entry of an order of discipline which, in fact, orders "no discipline at all").

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	<u>\$195.00</u>
	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.

* * *

11. . . . The Client is entitled to terminate this agreement subject to its contractual liability to the law firm for services rendered. [Petitioner's Exhibit 2.]

On or about August 19 or 20, 2002, complainant called respondent and informed her that she had reconciled with her husband, and asked respondent to prepare a statement and issue a refund. When the refund was not forthcoming, complainant began calling respondent until October, at which point she faxed a letter to respondent stating that it was “unethical and inappropriate for her not to return [complainant’s] phone calls,” and demanding a billing statement for the services provided and a refund of the unearned portion of her fees.

Complainant testified that respondent called her thereafter and stated that the fees were nonrefundable pursuant to the fee agreement, but that “from the goodness of my heart, I’ll give you half of the unearned fees.” On October 22, 2002, complainant picked up a check for \$1,385.75, an invoice for professional services, and a copy of the retainer agreement.

The invoice shows 6.4 hours expended for a total charge of \$1,228.50. It reflects payment of \$4,000 on July 29, 2002 and a balance of “(\$2,771.50).” Respondent spent 4 hours and 18 minutes on complainant’s matter in the first week. In the second week, respondent spent one hour and 18 minutes on the file. In the third week, respondent spoke with her client on August 20, 2002 (18 minutes) and there is no other activity shown on the invoice until October when less than half an hour was charged for phoning and reviewing a fax from the client. The reasonableness of these charges is not at issue.

On or about October 23, 2002, complainant faxed a letter to respondent requesting an additional \$1,385.75 to bring the total refund to \$2,771.50, the difference between the invoiced

amount (\$1,228.50) and the \$4,000 paid to respondent. Complainant wrote: “Your rate was \$190 [sic] per hour and you anticipated approx. 20 hours of work. Since you did NOT spend anywhere near that time on the case, the entire unearned balance is due to me.” The letter requested the “balance of the unearned portion” by October 25, 2002, and announced that if complainant did not hear from respondent by then, she “would have no choice but to submit a grievance.”

The next day, October 24, 2002, respondent called the State Bar of Michigan’s Ethics Helpline. Three Michigan Ethics Opinions were faxed by the Bar to respondent that day: RI-10 (April 6, 1989); RI-69 (February 14, 1991); and RI-162 (April 30, 1993). Respondent testified that she reviewed them and concluded that it was reasonable for her to keep the sum she retained over and above the amount she billed for her services. Respondent had no further contact with her client.

Respondent was served with the request for investigation in July of 2003. On February 1, 2005, AGC counsel wrote to respondent as follows:

Enclosed please find a copy of Informal Ethics Opinion, RI-10. Upon receipt of this letter, please make an appointment to discuss with me the criteria involved in non-refundable retainer agreements, and its application in this matter. Please be prepared to substantiate your claim to the unearned portion of this fee. [Petitioner’s Exhibit 1.]

The Grievance Administrator filed the formal complaint on April 3, 2006, and this matter was heard on June 16, 2006. Respondent testified that this case was complicated and that complainant wanted her matter to receive “top priority.” In contrast, complainant testified that she was having problems with her husband after three years of marriage and “wanted some advice.” Complainant didn't think the matter was complex. There were no children, no support issues, she held all the assets, there were no personal protection orders, nor does it appear she asked for one.⁵

Complainant testified that she did not insist on “top priority” or immediate action: “I was basically exploring my options. I wasn't even sure if I was going to file for divorce. I wanted to know if I was put in that situation what I would have to do.”

⁵ There is no record evidence to support the finding that personal protection orders were in effect. Respondent testified that she did not obtain one on complainant’s behalf because complainant was about to leave for a trip and a hearing could not be scheduled.

In its report, the panel announced:

Lawyer Cooper argues that the contract is clear on its face, that [complainant/client] was a sophisticated consumer and that the complexities of the case justified the minimum fee of \$4,000.00. The complexities argued on behalf of the respondent were that one of the parties was a lawyer, that [complainant] owned the vast majority of the property including the marital home in her own name, that the file came to her with a recent history of assaultive behavior on the part of [complainant's husband] and that PPOs were in effect. In addition and perhaps most persuasively, respondent argued that by taking this case there was a very real possibility of burning bridges with lawyers in the [husband's] firm as well as those who were professional acquaintances of [the husband]. The respondent indicated that when she took the file, she understood that this could be a source of problems relating to referrals in the future. Having carefully considered the precedent in this area, particularly *Grievance Administrator v Underwood*, Case No. 99-58-GA, decided July 26, 2001, and the *Grievance Administrator v Boffman*, Case No. 03-135-GA, decided September 28, 2005, we find that under the facts and circumstances of this particular case the fee was not excessive [within] the meaning of MRPC 1.5(a).

Clearly we are not substituting our opinion for that of a judge or jury with respect to a civil cause of action. We believe that the rationale adopted in [*Grievance Administrator*] v *Hamilton*, Case No. 97-57-GA, decided June 12, 1998, applies to the instant factual pattern in that legal and factual issues presented in a legitimate fee dispute should be the subject of a civil proceeding or an arbitration. In other words, we do not nor can we make any factual findings with respect to the civil dispute, but we do find that there was no violation of Ms. Cooper's ethical duties to her client to refund any more of the fee than she had already refunded.

II. Discussion: Should the Formal Complaint Have Been Dismissed?

The Grievance Administrator argues on review that this case involves a fee paid in advance, and not a valid general retainer. The Administrator argues that, according to the fee agreement, “the minimum fee . . . was for future services to be rendered. These services were not, in fact, rendered, and the unearned portion should have been returned.”

The respondent does not address the unearned fee argument, but instead argues that the fee was not clearly excessive (MRPC 1.5(a)), and that the panel “properly relied upon and applied prior ADB case law in dismissing this matter.”

We agree with the Administrator that dismissal was improper. The formal complaint alleged violation of MRPC 1.5(a), 1.15(b), and 1.16(d). The panel’s report, and respondent’s arguments below and on review, focus on MRPC 1.5(a). Respondent failed, upon termination of the representation, to refund an advance fee that had not been earned, and this constitutes a violation of MRPC 1.16(d) and MRPC 1.15(b).

A. MRPC 1.16(d) and MRPC 1.15(b).

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.”⁶ To the extent the agreement is ambiguous, it must be construed in favor of the client.⁷ Thus, under the terms of the fee agreement drafted by respondent, complainant was entitled to a refund.

⁶ *Plunkett & Cooney, PC v Capitol Bancorp*, 212 Mich App 325, 330 n 3; 536 NW2d 886 (1995) (“The right of the client to discharge counsel is an implied term of the contractual attorney-client relationship. MRPC 1.16(a)(3). However, the client is liable to compensate the attorney for services rendered to the date of discharge. [citations omitted].”).

⁷ See authorities cited in *Grievance Administrator v Harry R. Boffman, III*, 03-135-GA (ADB 2005), p 9; *Michigan Ethics Opinion RI-10* (“If a fee agreement is ambiguous, it should be interpreted in favor of the client.”); *Lane v Wilkins*, 229 Cal App 2d 315; 40 Cal. Rptr. 309, 315 (1964); *Elliott v Joyce*, 889 P2d 43, 46 (Colo 1994); *Hamilton v Ford Motor Co*, 205 U.S. App. D.C. 37; 636 F.2d 745; 1980 (“If there is any dispute over the terms of the Retainer Agreement, then any ambiguity must be construed against the attorneys.”); 7 Am Jur 2d Attorneys at Law § 262. See also, *C & L Enters. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 423; 121 S. Ct. 1589; 149 L. Ed. 2d 623; 2001 (noting “the common-law rule of contract interpretation that a court should construe ambiguous language against the interest of the party that drafted it.”).

Additionally, attorney-client agreements are subject to the Rules of Professional Conduct.⁸ Among these Rules is MRPC 1.16(d) which provides that, “Upon termination of representation, a lawyer shall take reasonable steps to protect a client's interests, such as . . . refunding any advance payment of fee that has not been earned.”⁹ This rule supplements and reinforces respondent’s contractual duty in this case.

While the agreement also contained language labeling the \$4,000 payment nonrefundable, the mere invocation of such a term does not convert an advance fee arrangement into a general retainer or otherwise entitle a lawyer to keep the advance fee if the representation is interrupted before contemplated legal services are rendered.¹⁰

B. MRPC 1.5(a), Michigan Informal Ethics Opinion RI-10, and the Concept of a So-Called “Non-refundable Retainer.”

As we have noted above, respondent does not address MRPC 1.16(d). Rather, her arguments rely mainly on MRPC 1.5, Board case law, and Michigan Informal Ethics Opinion RI-10.¹¹ That ethics opinion used the term “nonrefundable retainer.” This term has no fixed meaning. Some think

⁸ See, e.g., *Plunkett & Cooney, PC v Capitol Bancorp*, n 6, *supra*, and at 212 Mich App at 331 n 4.

⁹ *Id.*

¹⁰ See, e.g., *Grievance Administrator v Otis M. Underwood*, 99-58-GA (ADB 2001); *Wong v Michael Kennedy PC*, 853 F Supp 73 (ED NY, 1994) (agreement providing fees paid “shall be deemed earned and no part thereof shall be refundable” found to be advance fee: “Merely reciting the language ‘shall be deemed earned’ does not convert the Retainer Agreement into a general retainer”); *In re National Magazine Publishing Co*, 172 BR 237 (Bankr ND Ohio, 1994) (merely stating that a retainer is fully earned upon receipt and nonrefundable does not satisfy the requirements of a classic retainer); Connecticut Informal Opinion 00-12 (1992) (“designating a fee as ‘nonrefundable’ is not determinative”); DC Bar Op 264 (Feb 14, 1996) (“merely stating in a contract that the retainer fee is a general retainer or nonrefundable does not necessarily make it so”); and numerous authorities cited throughout this opinion, including those at n 27 and n 47, *infra*.

¹¹ In this case, we consider RI-10 in detail because it appears that RI-10 was central to the investigation and to the defense of the charges in the formal complaint, and because it is frequently cited as authority in this area. Ethics opinions “do not represent controlling authority to be followed by hearing panels or the Board.” *Grievance Administrator v Otis M. Underwood*, *supra*. The Bar agrees: “Opinions of the Committee do not have the force and effect of law and may not be relied upon as an absolute defense to a charge of ethical misconduct.” Rule 7B of the Rules of the State Bar of Michigan Standing Committee on Ethics, Professional and Judicial. <http://www.michbar.org/generalinfo/ethics/rules.cfm>. See also, *Evans & Luptak, PLC v Lizza*, 251 Mich App 187; 650 NW2d 364 (2002), lv den 467 Mich 935 (2002) (Although State Bar Ethics Opinions are not binding on this Court, they are instructive).

it describes or helps to describe a general retainer.¹² Too often, however, a fee agreement drawn up by a lawyer will attempt to designate fees paid in advance for specific services as nonrefundable. This is inconsistent with our Rules of Professional Conduct. To explain this, we will first discuss certain categories of fees and the law generally applicable to them.

1. Retainers versus Advance Fees.

a. General Retainers.

A general retainer is also known as a “true,” “classic,” or “availability” retainer, or as an “engagement fee.”¹³ “A true retainer fee is an amount a lawyer charges the client not for specific services but to ensure the lawyer’s availability whenever the client may need legal services.”¹⁴ Such a fee “is a charge separate from fees incurred for services actually rendered.”¹⁵ In other words: “A fee is an engagement retainer only if the lawyer is to be additionally compensated for actual work, if any, performed.”¹⁶

A “true,” “classic” or “general” retainer has historically been considered earned when paid. Thus, it is said that the “lawyer who receives a [general] retainer has earned the fee by promising to be available for future work, and the funds so received need not be put in a trust account.”¹⁷

¹² See, e.g. *In Re Doors and More, Inc.*, 127 BR 1001, 1002 n 2 (Bankr ED MI, 1991) and ABA/BNA Lawyers' Manual on Professional Conduct, 41: 2002--2003 construing RI-10 as referring to a general or classic retainer.

¹³ *Underwood*, n 10, *supra*, at 4; *Grievance Administrator v Harry R. Boffman, III*, 03-135-GA (ADB 2005), p 7.

¹⁴ *ABA/BNA Lawyers' Manual on Professional Conduct*, 41:2002.

¹⁵ A general retainer--sometimes referred to as the classic retainer--is 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 price, any legal services, which may be of any kind or of a specified kind, that arise during a specified period. The general retainer fee is given in exchange for availability and not for the rendition of legal services. Therefore, it is a charge separate from fees incurred for services actually rendered. [Brickman & Cunningham, *Nonrefundable Retainers: A Response to Critics of the Absolute Ban*, 64 U Cin L Rev 11, 19 (1995).]

¹⁶ 1 *Restatement (Third) of The Law Governing Lawyers*, § 34, comment e, p 251.

¹⁷ See, e.g. Kentucky Bar Ass'n Ethics Opinion 380 (June 1995), citing *Baranowski v State Bar*, 154 Cal Rptr 752; 593 P2d 613 (Cal 1979).

However, general retainers, like all fees, must be reasonable, and if the lawyer withdraws or is discharged prematurely the agreed upon fee might be subject to reduction.¹⁸

b. Advance Fees (also known as “Special Retainers”).

At or near the beginning of a matter, lawyers commonly receive a fee paid in advance. This is sometimes called an “advance fee,” and is essentially a deposit for legal services to be performed. The key distinction between a true or general retainer and a fee paid in advance has been summarized as follows:

The retainer fee must be distinguished from an advance payment of costs and fees a client makes for specific legal services and accompanying expenses. Advances, which unfortunately are often included under the generic rubric of “retainers,” remain the property of the client until the lawyer performs the services, or incurs the expenses, for which the payments were made.¹⁹

The fact that the term “retainer” is frequently used to describe what is really a fee paid in advance contributes to some confusion.²⁰ Also, some commentators and leading cases refer to an advance fee as a “special,” “specific” or “security” “retainer.”²¹ In this opinion, we will often refer to “special retainers” as “advance fees” or fees paid in advance.

¹⁸ 1 *Restatement (Third) of the Law Governing Lawyers*, § 38 comment g.

¹⁹ ABA/BNA *Lawyers' Manual on Professional Conduct*, 41: 2002--2003.

²⁰ See, e.g., Virginia LEO #1606 Fees (Compendium Opinion):

November 22, 1994 The Committee is mindful, however, that the term is probably misused more often than not (a fault for which the Committee must accept some responsibility), to describe any type of advanced legal fees. As the Committee opined previously in LE Op. 1322, a retainer (or advance periodic payment) is a payment by a client to an attorney to insure the attorney's availability for future legal services and/or as consideration for his unavailability to a potential adverse party in the future. A retainer is not a pre-payment for legal services to be rendered in the future, and is thus distinguished from advanced legal fees.

²¹ Some decisions, particularly in the bankruptcy area, have drawn purported distinctions between these types of retainers, and have accordingly treated them differently, but in fact they are all the same – fees paid in advance to cover specific legal services. Also, see the comment to Arizona's Rule 1.5:

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.

It may be most common for attorneys to bill against advance fees by the hour, and withdraw funds from trust accordingly.²² However, “the advance funds can also consist of a fixed or flat fee, representing the total compensation for all the work to be done in the case”²³

c. Advance Fees with a Claim of Nonrefundability.

Some fee agreements, such as the one in this case, designate prepaid fees for services to be rendered in the future as nonrefundable.²⁴ This is misconduct in some states.²⁵ As a general proposition, it appears that in most of the remaining states the language is simply often disregarded as courts and discipline agencies review a fee under the Rules of Professional Conduct, and discipline may be imposed when the attorney fails to return the unearned portion of the fee.²⁶ Use of the term “nonrefundable” does not create a general retainer, nor does it defeat application of the rules requiring refund of fees paid in advance upon termination of a representation.²⁷ Some fee

²² *Bd of Professional Ethics and Conduct v Frerichs*, 671 NW2d 470, 476 (Iowa 2003).

²³ *Id.* See also *Wong v Michael Kennedy PC*, 853 F Supp 73 (ED NY, 1994) (various amounts due at signing, before trial, and per week in the event the matter went to trial).

²⁴ In the instant case the money paid by the client is called a "retainer" and is expressly stated to be for future services. The agreement also designates the money as a "minimum fee" no portion of which is "refundable, to the client, under any circumstances." Nothing in the agreement, however, indicates that the client's \$4,000 payment is intended to cover anything other than legal services.

²⁵ See, e.g., Alabama Opinion Number: 1993-21 (Lawyer may not characterize a fee as non-refundable or use other language in a fee agreement that suggests that any fee paid before services are rendered is not subject to refund or adjustment); *In the Matter of Larry D. Sather*, 3 P3d 403 (Colo 2000) (fees may not be called "nonrefundable," but reasonable engagement retainers providing value to client may be permissible). *Bd of Professional Ethics and Conduct v. Frerichs*, 671 NW2d 470, 475-77 (Iowa 2003) (unethical for lawyer to enter into contract providing for nonrefundable fee unless it is a general retainer). See also, *In re Kendall*, 804 NE2d 1152, 1160 (Ind, 2004) ("We hold that the assertion in an attorney fee agreement that such advance payment is nonrefundable violates the requirement of Prof. Cond. R. 1.5(a) that a lawyer's fee 'shall be reasonable.'" The court so held even though it also said, "We do not hold that nonrefundable retainers are per se unenforceable.")

²⁶ See, e.g., *Matter of Hirschfeld*, 192 Ariz 40; 960 P2d 640 (1998).

²⁷ See, e.g., *Sather*, n 25, *supra*, 3 P 3d at 410:

[U]nless the fee agreement expressly states that a fee is an engagement retainer and explains how the fee is earned upon receipt, we will presume that any advance fee is a deposit from which an attorney will be paid for specified legal services.

(continued...)

agreements calling for payment for future services also contain general retainer language. For example, there may be a passing reference to availability without distinguishing how much is being paid for precisely what. A retainer purporting to be “both for availability and for services” has been called a “hybrid” and is usually treated as a special retainer or advance payment of fees.²⁸

As Michigan Formal Ethics Opinion R-7 (1990),²⁹ issued one year after RI-10 and relying upon it, explained:

If any portion of the retainer is unearned because it is paid in advance for legal services to be performed in the future on an hourly, flat or percentage basis, the retainer has not been earned and is not a non-refundable retainer, RI-10. See also, *Baranowski v State Bar*, 24 Cal3d 153, 593 P2d 613 (1979).

Unfortunately, this relatively bright line test has not been uniformly followed and many fee agreements still attempt to graft nonrefundability language onto agreements to pay “retainers” which

²⁷ (...continued)

See also, *In re Salvatore A. Scimeca*, 265 Kan 742, 760; 962 P2d 1080 (1998) (“Absent clear language that the retainer is paid solely to commit the attorney to represent the client and not as a fee to be earned by future services, it is refundable.”), and *In re DeRuiz*, 152 Wn2d 558; 99 P3d 881, 889 (2004) (“Here, the ‘retainer’ paid . . . is more accurately characterized as a flat fee for legal services in a particular matter because [the clients] hired DeRuiz to represent them in a specific matter [They] were paying for services, not for availability.”).

²⁸ See, e.g., *In re Gray's Run Technologies, Inc*, 217 BR 48 (Bankr Pa MD, 1997); *Agusta & Ross v Trancamp Contracting Corp*, 193 Misc 2d 781; 751 NYS2d 155 (2002) (“the yardstick for recovery of a general-specific hybrid agreement is quantum meruit, for the reasonable value of the services rendered by the law firm”); *In re National Magazine Publishing Co*, 172 BR 237 (Bankr ND Ohio, 1994) (consideration cannot include future services if the retainer is truly earned upon receipt; hourly charges for services as a component of agreement inconsistent with a classic retainer agreement). See also Brickman & Cunningham, *supra*, 64 U Cin L Rev 11, 22-23 (hybrid “fully refundable to the extent not earned by services rendered”); 11-60 Corbin on Contracts § 60.9[2] n 39 (Hybrid fund against which lawyer draws “is the client’s money and belongs in a trust account. An attempt to make it nonrefundable is invalid.”), citing *Gray’s Run, supra*; *Construction and Operation of Attorney's General or Classic Retainer Fee or Salary Contract Under State Law*, 102 ALR 5th 253, § 8[b]. But see *Kelly v MD Buyline, Inc*, 2 F Supp 420 (SD NY, 1998) (attorney with three-year hybrid general retainer agreement might recover contract damages less mitigation or for detrimental reliance); and *Construction and Operation of Attorney's General or Classic Retainer Fee or Salary Contract Under State Law*, 102 ALR 5th 253, § 8[a].

²⁹ Formal opinions are adopted by the State Bar Board of Commissioners, reflect the policy of the State Bar, and “deal with matters of general and substantial interest to the public, address situations which affect a significant number of members of the Bar, or reverse prior formal opinions.” Rule 8 of the Rules of the State Bar of Michigan Standing Committee on Ethics, Professional and Judicial. <http://www.michbar.org/generalinfo/ethics/rules.cfm>. Informal opinions, issued by the professional or judicial subcommittee of the Ethics Committee, are said to “generally deal with situations of limited and individual interest or application,” and bear the designation “I” for “informal.” *Id.* Thus, informal opinions receive an “RI” designation and formal opinions will have an “R” preceding the number of the opinion.

are in fact deposits of advance fees. One reason confusion may be perpetuated is the continued use of the term “nonrefundable retainer,” which we discuss further below.

2. Michigan Informal Ethics Opinion RI-10.

The factual basis underlying the request for the opinion in RI-10 is summarized by the Ethics Committee as follows:

In representing a client in complex litigation, such as a hostile tender offer or antitrust suit, a lawyer offered and the client agreed to a written fee agreement which stipulates a large nonrefundable retainer and which also sets the hourly rate at which the client will be billed for the lawyer's services. The lawyer then set aside time, declined other cases, and marshaled firm resources in preparation for the impending suit. But before hourly charges have equalled [sic] or exceeded the retainer, the client discharges the lawyer without cause and demands that the difference between the retainer and the fee calculated on the hourly basis be refunded.

The opinion’s syllabus reads as follows:

It is not unethical for a lawyer who has been discharged without cause to keep all of a lump sum paid at the inception of representation, notwithstanding that this sum is only partially "earned" on an hourly rate basis, provided that:

(a) the complexity of the case and its likelihood of preempting the lawyer from other work is apparent to the client at the outset; and

(b) the retainer agreement is in writing, clearly identifies the client's expectations in hiring the lawyer, and unambiguously articulates that the lump sum purchases something in addition to a fixed amount of lawyer hours; and

(c) the client is of sufficient intelligence, maturity, and sophistication to understand the agreement and that the fee is nonrefundable; and

(d) the lawyer in fact sets aside a block of time, turns down other cases, and marshals law firm resources in reliance on the fee agreement.

RI-10 is full of observations and subtle analysis. For example, the opinion asserts that: “The client’s understanding of what the retainer is buying is crucial.” Over time, readers may have

focused on the syllabus, treating it as a checklist for attaining a thing presumed to exist (a nonrefundable retainer) but not precisely defined by RI-10. The syllabus itself may have been vastly oversimplified by readers wanting to touch the bases. Thus, the requisites might be ticked off something like this: a writing, complexity, a client who knows what they are signing, and a colorable claim to some sort of “marshaling” of firm resources. Such an approach does not justify a so-called “nonrefundable retainer.” Indeed, it overlooks a tremendous amount of the text and substance of RI-10, the law governing retainers and advance fees (which has developed and become clearer since RI-10 was rendered), and it also begs essential questions such as:

- What is meant by “nonrefundable retainer,” generally, and by the drafters of RI-10?
- Is RI-10 talking about a true, general retainer, or did the agreement in that case simply attempt to graft nonrefundability language onto a fee paid in advance?
- In light of the Rules of Professional Conduct, is it ever accurate to say that a fee paid at the outset of representation is “nonrefundable”?

RI-10, like virtually every other ethics opinion or court decision in this area, essentially answers the last of the above questions in the negative. RI-10 recognizes that “[e]ach retainer agreement must be judged in its own factual context by the eight touchstones of reasonableness contained in MRPC 1.5.” It also cites an ethics opinion recognizing that “such fees . . . may be excessive if the lawyer withdraws or is fired.” RI-10 also states that even if “nonrefundable retainers” were customarily used (and the opinion assumed otherwise) this “would not preclude an inquiry into whether any particular retainer fee was excessive.” In addition, RI-10 opines:

If a fee agreement is ambiguous, it should be interpreted in favor of the client. Thus, if firing a lawyer is prompted by some development unforeseen by the client, but which should have been anticipated by the lawyer and mentioned in the fee agreement, the lawyer should refund the difference between the total amount paid and that earned on an hourly basis. Had the potential problem been disclosed, the client might never have hired the lawyer at all, or paid a large retainer.

Finally, with respect to the fleeting nature of nonrefundability, RI-10 asserts: “The ethical focus always should be whether, under the totality of the circumstances, the fee arrangement is reasonable, notwithstanding the adjectives used to label it.” Thus, RI-10 acknowledges that certain requirements arise by operation of law irrespective of language used in the agreement. After all of these statements, the concluding paragraph makes reference to a “large up-front ‘nonrefundable’

retainer.” The quotation marks around “nonrefundable” in this statement signal the committee’s qualified usage of the term.

This cautious reading is confirmed by RI-10’s author who later wrote that RI-10 “prohibits non-refundable retainer agreements except in the most extraordinary circumstances.”³⁰

RI-10 offers sophisticated treatment of a complex question in many respects. However, with the benefit of more recent ethics opinions, disciplinary decisions, and court rules addressing the recurring problem presented when nonrefundability language is attached to agreements calling for fees to be paid in advance, we have concluded that RI-10’s analysis must be supplemented. In particular, as we have noted, RI-10 does not take into account the very significant differences in the treatment of a general retainer and an advance fee upon payment to the lawyer. Indeed, RI-10 states:

Less attention should be paid to whether a fee is paid in advance or in arrears; the focus should be on the amount of the retainer in relation to the complexity of the case, the content of the fee agreement, and particularly, how client expectations are addressed in that fee agreement. The ethical focus always should be whether, under the totality of the circumstances, the fee arrangement is reasonable, notwithstanding the adjectives used to label it.

We can agree with parts of this passage. However, members of the Bar must be aware that a fee paid in advance is subject to significantly different treatment than either a general retainer or a fee paid for services that have been rendered. A fee paid for services rendered may be deposited into a lawyer’s own bank account. A general retainer, though potentially subject to review, may, by long established practice, also be treated as earned by the lawyer upon payment. Fees paid in advance, however, “shall be deposited in a client trust account and may be withdrawn only as fees are earned.”³¹ A fee paid in advance is defined by the very fact that it is for legal services to be rendered in the future. And once it is established that the money paid to the lawyer is for services to be performed, certain duties arise, including the duty to keep such funds separate from the lawyer’s *and*, more important for this case, the duty of “refunding any advance payment of fee that has not been earned.” R-7, citing MRPC 1.16(d).

³⁰ Lawrence I. McKay, *The Case for Michigan’s Treatment of Non-Refundable Retainer Agreements*, Michigan Bar Journal (February 1995), p 182. Mr. McKay stated in his 1995 article that he had used a “nonrefundable” retainer only once since he was admitted in 1974.

³¹ MRPC 1.15(g). See also, *Boffman, supra*.

These duties have become clearer in the years following RI-10, but they are hardly new. Formal Opinion R-7 was released in 1990, only one year after RI-10. And R-7 noted numerous inquiries from lawyers regarding the use of trust accounts which inquires “reflect[ed] a lack of information or understanding of the underlying philosophy, caselaw, and ethics decisions regarding funds and property of clients and third persons.”³² Yet, in 1991, a bankruptcy decision held: “Since the retainer is for work not yet performed, the retainer is unearned and must be deposited in the firm’s client trust account”; the court cited MRPC 1.15(a), MRPC 1.16(d), R-7 and RI-69, among other authorities which “make the point clear.”³³

A few years later, in what was to become an influential opinion, the New York Court of Appeals affirmed a lawyer’s two-year suspension for “repeatedly using special nonrefundable retainer fee agreements with his clients.” *In Re Cooperman*, 83 NY2d 465, 469; 633 NE2d 1069; 611 NYS2d 465 (1994).

In *Cooperman*, the New York Court of Appeals explained that special retainers (or advance fees) “are marked by the payment of a nonrefundable fee for specific services, in advance and irrespective of whether any professional services are actually rendered.” *Id.* One of the fee agreements at issue in *Cooperman* is quite similar to the one used by respondent here. It provided that monies paid at the beginning of the representation constituted a “minimum fee” and were “not refundable for any reason whatsoever once I file a notice of appearance on your behalf.”

³² Formal Opinion R-7 continued:

The Attorney Discipline Board opinions show there is an increase in the number, frequency, and dollar amount of trust account violations, and claims to the State Bar Client Security Fund underscore the damages clients have suffered in this area. Although several states have recordkeeping rules, mandatory trust account rules, “spot-audits,” or trust account overdraft notification rules, the Michigan Supreme Court has not promulgated similar rules.

The lack of guidance for Michigan lawyers in this area is one factor contributing to this type of professional misconduct. Therefore, the Committee provides the following guidance concerning ethical requirements applicable to the establishment and maintenance of lawyer trust accounts for the deposit of funds belonging to clients and other persons.

³³ *In Re Doors and More, Inc.*, 127 BR 1001, 1003-1004 (Bankr ED MI, 1991).

Finding that special nonrefundable retainer fee agreements violated various provisions of New York's Code of Professional Responsibility,³⁴ the *Cooperman* court emphasized a "client's absolute right to terminate the unique fiduciary attorney-client relationship."³⁵ The court held that an agreement attempting to designate as "nonrefundable" fees deposited to cover services would chill the client's right to discharge an attorney and therefore violated public policy:

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. . . . 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.³⁶

Although it declined a request to render its ruling prospectively, the Court of Appeals was sensitive to concerns about "sweeping sequelae" and took pains to point out that: "Minimum fee³⁷ 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."³⁸

In 1995, the year after *Cooperman* was decided, a pair of articles appeared in the Michigan Bar Journal presenting differing viewpoints on so called "non-refundable retainer agreements."³⁹

³⁴ DR 2-110(A)(3) (failure to return unearned fee paid in advance); DR 2-110(B)(4) (by chilling the client's right to discharge attorney under this rule); and, DR 2-106(A) (lawyer shall not charge or collect an excessive fee).

³⁵ 83 NY2d at 471.

³⁶ 83 NY2d at 473-474.

³⁷ The "minimum fee" common and acceptable to courts in New York does not claim to be nonrefundable. It is discussed *infra*.

³⁸ 83 NY2d at 476.

³⁹ Larry Dubin, *The Case Against Non-refundable Retainer Agreements*, Michigan Bar Journal (February 1995), p 182, and Lawrence I. McKay, *The Case for Michigan's Treatment of Non-Refundable Retainer* (continued...)

One criticized RI-10, and the other, written by RI-10's author, defended it. Notably, both agreed that such fees would only rarely be consistent with the MRPC, and that the *Cooperman* fee discussed above was not permitted even by RI-10.

RI-10's author further agreed that a nonrefundability clause would be “unethical under RI-10,” in the following hypothetical situation, bearing great similarity to the facts of this case:

A divorce client comes into a lawyer's office. After a discussion about his legal problems, the lawyer quotes a legal fee for services to be performed which includes a non-refundable retainer of \$5,000. The client retains the lawyer and pays the retainer.

A week later, the client calls the lawyer and informs her that the client has decided to reconcile with his wife and wants to dismiss his lawsuit. The lawyer tells her client that although she is delighted that reconciliation will be pursued, the client shouldn't expect to receive any refund of the \$5,000 retainer that had previously been paid because their retainer agreement specifically states “. . . that under no circumstances will the retainer be refunded to the client.” Is this type of retainer agreement an ethical fee? The answer is a resounding “no.”⁴⁰

“Under the bare facts presented,” the author of RI-10 wrote, “it is clear that both non-refundable fee agreements are unethical under RI-10.” He then argued that the existence of its factors could change this view, and concluded: “RI-10 places the burden on the lawyer to establish all of these factors in order to justify keeping a fee which exceeds that which would have been earned on an hourly rate basis. If the attorney fails to satisfy any of these burdens, the fee arrangement is unethical under the Michigan Rules of Professional Conduct.”⁴¹

With this background on the so called “nonrefundable retainer,” we now apply various authorities to the facts of this case; we include RI-10 in light of respondent's reliance upon it in assessing her client's refund request and in proceedings before the panel.

³⁹ (...continued)
Agreements, Id.

⁴⁰ McKay, *supra*, p 184, agreeing with Professor Dubin's hypothetical at p 182.

⁴¹ *Id.*, pp 184-185.

3. Application of RI-10 and MRPC 1.5(a).

In her brief on review, respondent relies on four factors, drawn mainly from MRPC 1.5(a), to justify “the fee charged by respondent.” The factors cited by respondent are:

- the complexity of the matter;
- the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- time limitations imposed by the client; and
- experience and reputation of the attorney.

Respondent also argued below that RI-10's factual scenario is “nearly identical to this case.”⁴²

a. Complexity.

Respondent argues that this factor justifies retention of fees beyond those she earned for services rendered to complainant. We disagree for several reasons.

RI-10's syllabus opined that a discharged lawyer could keep a “lump sum paid at the inception of representation” when, among other things, “the complexity of the case and its likelihood of preempting the lawyer from other work is apparent to the client at the outset.” We follow respondent's approach and treat separately the factors of complexity and preclusion from other representation.

The body of RI-10 must be read carefully to understand the manner in which the opinion actually employs the complexity factor:

1. Time, labor, and skill required by the difficulty of the case. In this inquiry, it is stipulated that the litigation is complex and that law firm resources were marshaled on behalf of the client prior to discharge. While the facts are not specific, it is not difficult to envision substantial firm resources redirected in favor of the client (assigning legal assistants to research the subject, preparation of witness lists, drafting a proposed complaint, scheduling depositions, etc.) without the lawyer billing more than an hour or two. Note that this factor refers merely to time and labor required, not to billable hours. *To the extent the lawyer or law firm paid for this time and labor, the retainer fee is partly justified*, even if the client dissipates the benefit of that effort by firing the lawyer. [Emphasis added.]

⁴² Tr, p 34.

We read this as simply saying that if a lawyer relies on an employment contract to “marshal firm resources” in the ways described above (which are commonly factored into lawyer billable time or otherwise charged to clients), the expense of doing so is properly chargeable to the client upon discharge. Perhaps it was somewhat less common when RI-10 was issued in 1989 for firms to bill for legal assistant time, but respondent’s agreement shows that such is a common practice now. If the fee is fixed rather than hourly, the lawyer would seem to be entitled upon discharge to the proportional value of the fixed fee for services rendered,⁴³ including those rendered by legal assistants. But, there is a gap in the logic of RI-10 to the extent that the syllabus suggests a lawyer should be entitled to keep the entire sum paid in contemplation of services simply because *some* of the services were in fact rendered. Those services enumerated in the body of the RI-10 (such as drafting a complaint or witness list) may be assigned a value.

RI-10's reliance on complexity appears to stem from MRPC 1.5(a)(1) which provides that “the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal services properly” are among the factors to be considered in determining the reasonableness of a fee. While actual complexity might have justified a large bill at the end of the representation, it certainly cannot justify a bill for services not rendered in this case. Also, as the panel’s questions below seem to suggest, the complexity of a case could be relevant in determining the amount of the advance fee the lawyer might require to be deposited with him or her because truly complex cases will usually take more time, and generally justify a higher bill. However, the potential complexity of a case that never gets going does not justify the retention of a fee paid in advance for specific services that were never performed.

Moreover, even were complexity a factor that justified the keeping of an advance fee, the divorce here is not complex. Respondent argues that the case was complex because the client was the primary breadwinner, held most of the assets, her spouse was an attorney from a family of attorneys, an order enjoining asset transfers was in place, and police reports had been filed and personal protection orders might be sought. We must observe that, as a matter of law, this representation does not begin to approach the level of complexity referenced in RI-10 which spoke of a tender offer or an antitrust case as examples. Every matter has its unique factors. These do not automatically

⁴³ See *Plunkett Cooney v Bancorp*, n 6 supra

establish “complexity,” and, as we have explained above, complexity does not justify retention of a fee for services anticipated but not performed.

Finally, there is no record support for respondent’s argument on review that both she and her client “understood this case to be a complex divorce” and that the client agreed to pay a nonrefundable sum because this matter was complex. Again, the “retainer” paid pursuant to this fee agreement was not a true retainer paid to secure a lawyer’s availability. Complexity might factor into a lawyer’s decision to charge a true retainer. Had a lawyer explained that he or she would charge a general retainer because the handling of this case will require hiring of additional staff, for example, such a retainer might be reasonable. But, it is those acts in reliance upon being retained, not the complexity (or, more accurately, potential complexity) of the matter, that justify the general retainer. In this case such factors are not present. Moreover, there is no agreement for anything other than the performance of specific contemplated legal services, and therefore the \$4,000 was a fee paid in advance.

b. The Likelihood, If Apparent to the Client, That the Acceptance of Particular Employment Will Preclude Other Employment by the Lawyer. MRPC 1.5(a)(2).

Although it has been said that “general retainers have largely disappeared from the modern practice of law,”⁴⁴ when such true retainers are used, preclusion from other employment is frequently cited as a basis for charging them. The Restatement of the Law Governing Lawyers explains when such a fee is reasonable:

An engagement-retainer fee satisfies the requirements of this Section if it bears a reasonable relationship to the income the lawyer sacrifices or expense the lawyer incurs by accepting it, including such costs as turning away other clients (for reasons of time or due to conflicts of interest), hiring new associates so as to be able to take the client’s matter, keeping up with the relevant field, and the like. When a client experienced in retaining and compensating lawyers agrees to pay an engagement-retainer fee, the fee will almost invariably be found to fall within the range of reasonableness. Engagement-retainer fees agreed to by clients not so experienced should be more closely scrutinized to ensure that they are no greater than is reasonable and that the

⁴⁴ *Provanzano v National Auto Credit, Inc*, 10 F Supp 2d 44, 51 n 13 (D Mass, 1998). See also, McKay, n 30 *supra* (author of RI-10 used “nonrefundable retainer” only once in 20 years).

engagement-retainer fee is not being used to evade the rules requiring a lawyer to return unearned fees.⁴⁵

The plain text of MRPC 1.5(a)(2) requires that likely preclusion from other employment be apparent to the client. Where a fee agreement is unclear as to what the money is paid for, it is presumed to be an advance fee.⁴⁶ Here, the agreement states that the funds will be earned by the performance of legal work at a certain hourly rate. Thus, the money paid is an advance fee and the unearned portion must be refunded irrespective of the use of terminology such as “nonrefundable” or “minimum fee” or the like.⁴⁷

At the hearing before the panel, respondent was initially called to testify by the Grievance Administrator. She was asked the following questions about the fee agreement in this case, and she gave the following answers:

Q. Is this your standard fee agreement?

A. Yes.

Q. So is it your habit to charge a minimum fee to all of your clients?

A. Yes.

Q. So even if it is a will or something very, very run-of-the-mill, you would charge them a minimum fee; is that what you're saying?

MR. CAMPBELL: I'm going to object on the grounds of relevance.

CHAIRMAN GARVEY: Well, I'm going to allow the question. She already answered that she did use it in all cases, and now she's saying - she's clarifying it. She's saying do you really mean all cases.

THE WITNESS: It's either this fee agreement or a contingency fee agreement. I only have two fee agreements of choice.

⁴⁵ 1 *Restatement (Third) of The Law Governing Lawyers*, § 34, comment e, p 251-252.

⁴⁶ See, e.g., *Boffman, supra*, at p 8, quoting 1 *Restatement of The Law Governing Lawyers*, 3d, § 38(c), comment g, p 282. See also, *In re Salvatore A. Scimeca*, 265 Kan 742, 760; 962 P2d 1080 (1998) (“Absent clear language that the retainer is paid solely to commit the attorney to represent the client and not as a fee to be earned by future services, it is refundable.”).

⁴⁷ See, e.g., *Cluck v Comm'n for Lawyer Discipline*, 214 SW 3d 736, 739-740 (Tex App, 2007) (fee agreement in divorce matter provided that attorney fees would be billed at \$150 per hour “first against the nonrefundable fee and then monthly thereafter,” and that “no part of the legal fee is to be refunded.”); *In re Steven L. Whitehead*, 861 NE2d 702 (Ind, 2007) (lawyer violated MRPC 1.5(a) and 1.16(d) by failing to refund unearned portion [\$92.50] of a “\$1,000 nonrefundable minimum fee” when client discharged attorney two months after being retained in divorce matter). See also, *Michigan Formal Ethics Opinion R-7* (“If any portion of the retainer is unearned because it is paid in advance for legal services to be performed in the future on an hourly, flat or percentage basis, the retainer has not been earned and is not a non-refundable retainer”).

CHAIRMAN GARVEY: I think the question was would you have this sort of a fee agreement with a minimum fee with a will?

THE WITNESS: Yes. [Tr, pp 59-60.]

Later, in respondent's case-in-chief, her counsel asked the following questions and she gave the following replies:

Q. In each case, do you make a determination as to whether or not a minimum fee is to be charged, and, if so, how much in that particular case?

A. Yes.

Q. And does it vary from case to case?

A. Sure does.

Q. In this case, what were some of the factors that you took into consideration in establishing this minimum fee?

A. There were several factors. Number one would be the impact this would have on my practice. I knew I was going to be, first of all, burning bridges by representing [complainant] in a case against another attorney in a county that I practice in, that I'm affiliated with their firm. I would have cases from time to time with their firm.

Q. And you knew of this firm, as you said, in practice both as opposing counsel and, at other times, just counsel say in the transaction or something?

A. That's correct because I know her husband's sister,

A. ... A lot of attorneys wouldn't take kindly to me representing her in a matter like this, especially with the abuse issues that were in this case. [Tr, pp 132-133.]

The panel's report contains the following statements:

In addition and perhaps most persuasively, respondent argued that by taking this case there was a very real possibility of burning bridges with lawyers in the [husband's] firm as well as those who were professional acquaintances of [the husband]. The respondent indicated that when she took the file, *she understood* that this could be a source of problems relating to referrals in the future. [Panel Report, p 3; emphasis added.]

The record contains no evidence to establish that respondent ever had a referral relationship with the husband's firm or would otherwise be precluded from other employment. In any event, this burned-bridges factor does not justify the retention of the fees paid in advance beyond the hourly fees contemplated in the fee agreement in this case. As we have noted, there is nothing in the agreement or in the record to indicate that the client had any inkling that she was being charged a fee because

respondent knew her husband's sister or that respondent had previously "had cases" with the firm. Had this fact been disclosed and made a part of the negotiations and agreement, the client would have had the opportunity to seek another lawyer without "bridges" to the opposing firm. If a client knowingly entered into an agreement to pay an additional sum to compensate a certain lawyer for burning bridges because the client desired to retain that particular lawyer, such an arrangement might indeed be reasonable. But there is no such agreement here.

c. Other Factors, Cases & Authorities.

Respondent also argues that her retention of the fee is justified by time limitations imposed by the client and by her experience and reputation. First, the agreement does not recite that these factors were considered by the parties as a basis for a fee above and beyond the fee for services. Additionally, the record does not establish that respondent in fact put other matters aside or otherwise assigned priority to her client's matter. *Cf. Grievance Administrator v Otis M. Underwood*, 99-58-GA (ADB 2001).

Respondent quotes a passage from a treatise referenced in our decision in *Underwood* which describes a hypothetical situation that seems quite similar to the instant case: "an initial (minimum) fee of \$5,000 for routine services would almost certainly be found to be unreasonable by most courts and disciplinary authorities if the lawyer did little work and refused to refund part of the money." In *Underwood* we concluded that the attorney's agreement for, and retention of, a "minimum fee of \$1,000.00, which includes the non-refundable case origination fee and services rendered" did not violate MRPC 1.5(a) under the circumstances there which included the amount of the fee, the work performed and the priority actually assigned to the matter in that case.

The fee agreement in *Underwood* expressly stated "Client agrees that the fee is based not merely on the purchase of a fixed amount of attorney time," but also on other factors drawn from MRPC 1.5. It is true that in *Underwood* we declined to find "all nonrefundable fees . . . per se unethical." But, we emphasized that "the term 'nonrefundable retainer' is misleading" because all fees are subject to MRPC 1.5(a) and 1.16(d) and may therefore be refundable notwithstanding language to the contrary in a fee agreement.

On the other hand, we recognize that the opinion did not explain as we do here the pitfalls of an attorney's attempt to provide that an advance fee is nonrefundable. The circumstances in *Underwood* did not require us to analyze that question. There, the attorney rendered 3.7 hours of

service between being retained on a Friday and the following Monday when the client requested a refund. Probate pleadings were drafted pursuant to a strategy that the client “seize the initiative by filing a petition for commencement of probate proceedings.” The fee agreement in *Underwood* provided that the \$1,000 “fee is based not merely on the purchase of a fixed amount of attorney time,” but also on factors including “[t]he time limitations imposed by the client and the circumstances.” This was a necessary but not sufficient condition for the lawyer’s retention of the \$1,000 fee. We also examined the reasonableness of the fee and concluded:

In light of the all of the circumstances, including the amount of the minimum or “nonrefundable” portion of the fee in this case, the work done by respondent, and the priority assigned to the client’s matter, we conclude that the \$1,000 retained by respondent was not a clearly excessive fee.

As noted above, the fee in this case resembles the hypothetical \$5,000 minimum fee disapproved of in *Underwood* much more than the \$1,000 fee upheld there. But, again, we acknowledge that *Underwood* did not precisely explain the fundamental inconsistency between a general retainer and fee paid in advance, the fact that combination of the two frustrates the attorney’s duty to communicate the basis of the fee to the client and the client’s understanding of what he or she is paying for, and, finally, the rule treating hybrid retainers as advance fees (i.e., requiring refund of the portion not earned by the provision of legal services).

We note briefly that, respondent’s use of the term “minimum fee” in her fee agreement does not affect our analysis regarding her duty to return unearned fees. Although it is possible to provide for a minimum fee that does not penalize the client financially if the representation ends before completion of the matter, it is clear that respondent is here using the term essentially as a synonym for “nonrefundable.”⁴⁸

⁴⁸ See, e.g., *Iowa Bd of Prof Ethics v Frerichs*, n 21, *supra* (“minimum fee” operated as, and equated to, nonrefundable advance fee); *In Re Scimeca*, 265 Kan 742; 962 P2d 1080, 1091 (1998) (“Designating the advance fee as a minimum fee contemplates that it must be earned by future services.”). Compare *Rosen v Rosen*, 161 Misc 2d 795; 614 NYS 2d 1018, 1023 (Sup Ct, 1994) (quoting extensively from a minimum fee agreement which did not provide for retention of unearned fees upon early termination of representation and rejecting attack on agreement under *Cooperman, supra*). See also the distinction between permissible and impermissible “minimum fees” drawn by leading commentators:

Minimum fee agreements typically provide that a lawyer will work on an hourly or fixed fee basis to complete a particular task. For example, the agreement may provide that, although the task will

(continued...)

It is also argued that the hearing panel properly relied on our decision in *Grievance Administrator v Boffman*, 03-135-GA (ADB 2005), in dismissing the formal complaint. The question in *Boffman* was whether the \$5,000 paid to respondent constituted a “general retainer” or an advance fee. The only charge of misconduct at issue on review was commingling (i.e., failure to deposit the funds in a trust account in accordance with MRPC 1.15). That is not at issue in this case. However, the following observations, made by the Board in that case, are largely applicable here:

The record, the law, and most important, the express language of the fee agreement in this case, simply do not establish that the retainer here is anything other than an advance payment of the fees respondent would earn by performing work on the client's matter. There is no mention of securing respondent's availability or any other benefit to the client or detriment to the lawyer which might serve to create, or be recognized as justifying, a general retainer. [*Boffman*, p 10.]

These observations remain apt here even though the fee agreement in *Boffman* did not contain the term “nonrefundable” or a variation thereof. Also relevant here are these comments about our decision in *Underwood*:

[W]e, like every court or agency faced with the question, held that *all* fees are subject to scrutiny for excessiveness under MRPC 1.5 and that unearned fees must be refunded, MRPC 1.16(d). Indeed, the very fact that we reviewed the fee vindicates the well-established rule that one cannot insulate a fee from scrutiny under the rules of professional conduct by using certain terminology.

⁴⁸ (...continued)

likely require twenty hours of work, even if it is completed in fewer hours, the fee will still be the twenty hour fee. The agreement may also provide, however, that the fee can be more than the minimum fee if the task requires more hours or effort than contemplated. This kind of minimum fee also raises no inherent ethical objections. In such a case, the client's right to discharge the lawyer prior to completion of the service, with liability only in quantum meruit, is unimpaired.

On the other hand, of course, any such device that does impair the client discharge right would be forbidden. Thus, for example, an arrangement nominally characterized as a "minimum fee," but that also purports to allow an attorney to keep an advance payment without regard to whether the services contracted for are rendered, is invalid because it impairs the client discharge right. In effect, it is simply a nonrefundable retainer in disguise; it contains a “nonrefundability impediment irrespective of any services.” Minimum fees of this variety are therefore unethical and unenforceable. [Lester Brickman & Lawrence A. Cunningham, *Nonrefundable Retainers: A Response to Critics of the Absolute Ban*, 64 U Cinn L Rev 11, 33 (1995).]

Finally, we consider a 2004 decision of the Court of Appeals involving a “non-refundable engagement fee.” *Lusader v Law Firm of John F. Schaefer, PLLC*, unpublished opinion per curiam of the Michigan Court of Appeals, Docket No. 249683; 2004 Mich App Lexis 3506 (Decided 12/21/2004). Respondent argued below that the panel should consider *Lusader* and the asserted lack of disciplinary consequences arising from that transaction as proof that the fee in this case was reasonable. The panel declined to do so and this ruling was correct for several reasons. We will discuss two.

First, although the terms of the agreement are only briefly summarized in that decision, it appears that the fee charged there was in fact a general retainer or “engagement fee.” As we have discussed elsewhere, the term “nonrefundable” is misleading even when used in connection with true retainers because all fees are subject to the Rules of Professional Conduct. However, the agreement in *Lusader* appears to have explained that the fee was not for work to be performed. At least, that is how we read the opinion’s statement that the client “signed a letter agreeing to a \$50,000 ‘nonrefundable engagement fee’ and additional hourly charges beyond the engagement fee.” Thus, the fee appears to have been for availability and not, as in this case, for services.

Second, as the Grievance Administrator points out, *Lusader* does not speak to whether the retention of the fee there complied with the Rules of Professional Conduct. The Court would not consider the Rules and upheld dismissal of the plaintiff’s claim precisely because the complaint alleged a violation of MPRC 1.5(a).⁴⁹

In sum, we are not persuaded by respondent’s arguments that her failure to refund to her client the sum in excess of the fees for services rendered was reasonable under MRPC 1.5(a), or approved by RI-10, or consistent with our opinions in *Underwood* and *Boffman*.

VI. Consequences for Rule Violations in this Matter.

The Grievance Administrator has asked that our opinion afford guidance on the subject of “nonrefundable retainers.” He also suggests that prospective application or an order finding misconduct but imposing no discipline may be appropriate in this case. We have considered various

⁴⁹ *Lusader, supra*, at 1, citing *Watts v Polaczyk*, 242 Mich App 600, 607 n1; 619 NW2d 714 (2000). *Lusader* does not cite cases holding that the Michigan Rules of Professional Conduct are limitations upon contractual terms. See, e.g., *Plunkett & Cooney, PC v Capitol Bancorp*, n 6, *supra*; *Evans & Luptak, PLC v Lizza*, 251 Mich App 187; 650 NW2d 364 (2002), lv den 467 Mich 935 (2002); and, *Morris & Doherty, PC v Lockwood*, 259 Mich. App. 38, 43, 672 NW2d 884 (2003).

factors in determining the appropriate consequences for the rule violations here, including respondent's attempts to comply with the Rules, the state of the law, and the degree to which it may be settled or unsettled on the questions presented here.

Respondent was furnished with three ethics opinions by the Bar: RI-10, RI-69 and RI-162.

We have analyzed Michigan Informal Ethics Opinion RI-10 in some detail, and we have applied its factors in light of the fact that it figured prominently in this case and has frequently been cited as a source of guidance with respect to "nonrefundable retainers." RI-10 does not justify keeping more than the fee for services here for several reasons discussed above, the most important of which is that the fee agreement did not unambiguously articulate that the sum paid "purchases something in addition to a fixed amount of attorney hours." However, while RI-10 may offer some guidance as to general retainers, we hasten to add that we do not believe that RI-10 validates the notion of a nonrefundable advance fee. Further, RI-10, and any other authority that uses the term "nonrefundable retainer," may continue to cause confusion and perhaps contact with the discipline system. As we have explained in our recent memorandum to the Supreme Court, the term is inaccurate and misleading to lawyer and client because even the jurisdictions purporting to uphold such fees admit that the term is misleading or at the very least not determinative of whether the lawyer will in fact be required to refund a portion of a fee under specific circumstances.⁵⁰

The syllabus of RI-69, also reviewed by respondent during the dispute with her client, states:

If a lawyer-client relationship is terminated before all services are rendered but after payment of a fixed fee, the lawyer shall refund any portion of the fee which has not been earned

The body of RI-69 explains the basis for this conclusion:

If any portion of the retainer is unearned because it is paid in advance for legal services to be performed in the future on an hourly, flat, or percentage basis, the retainer has not been earned and is not a nonrefundable retainer. [RI-69, citing RI-10 and quoting a part of Formal Opinion R-7.]

Respondent testified that she also reviewed RI-162. Though it's relevance to respondent's situation may not have been immediately apparent in light of the differing factual circumstances, it

⁵⁰ September 29, 2005 ADB Memorandum regarding clarification of lawyers' duties in handling "retainers" or fees paid in advance.

does advise that: “A lawyer has a continuing duty prior to billing the client and before collecting a fee from a client to reexamine the reasonableness of the fee in light of subsequent events in the representation.” (This advice is consistent with disciplinary caselaw.⁵¹ And, when the fee has been paid in advance, as in this case, the duty to reexamine the reasonableness of the fee in light of subsequent events in the representation remains.⁵²)

These ethics opinions arguably should have apprised respondent that her client was entitled to a refund. However, we must acknowledge that portions may unwittingly encourage analytical shortcuts. For example, RI-69 says this:

It appears that semantics play an important part in determining how funds paid to a lawyer are to be handled. If the money is classified as a "nonrefundable retainer" then it need not be placed in a trust account. The nonrefundable retainer is exactly what it says it is and is clearly earned at the time of payment. It must, however, be in an amount which is not clearly excessive for the purpose for which it is intended.

The foregoing statement is problematic for several reasons. First, as noted above, the overwhelming weight of authority, including RI-10, holds that semantics do not carry the day. Second, RI-69 itself recognizes this: the statement about the importance of semantics is qualified three sentences later when it is said that although a nonrefundable retainer is “clearly earned at the time of payment” it must only “be in an amount which is not clearly excessive.” In other words, the fee is not truly nonrefundable; it is in fact subject to refund if excessive. Third, saying that semantics trumps substance clashes with R-7's careful and correct analysis (quoted in RI-69) regarding the proper handling of fees for work yet to be performed: “[If] the retainer is for work not yet performed, the retainer is unearned and must be deposited in the firm's client trust account.”

⁵¹ See, e.g., *Maryland AGC v Korotki*, 318 Md 646; 569 A2d 1224 (1990) (“[I]f at the conclusion of a lawyer's services it appears that a fee, which seemed reasonable when agreed upon, has become excessive, the attorney may not stand upon the contract; he must reduce the fee.” [citing *Matter of Swartz*, 141 Ariz. 266, 273; 686 P.2d 1236, 1243 (1984)].”).

⁵² See *Holmes v Loveless*, 122 Wn App 470, 478 (2004); *Cotton v Kronenberg*, 111 Wn App 258, 272 (2002) (“a fee agreement that may seem fair to a client at the time that the agreement is signed must be reevaluated under the applicable rules when subsequent events alter the circumstances of the relationship”); *Arens v Committee on Professional Conduct*, 307 Ark 308; 820 SW2d 263 (1991) (“If a lawyer charges a reasonable retainer and is retained for the purpose of providing specified services, but never performs those services, the fee charged would become unreasonable.”).

In short, while these ethics opinions were each thoughtful and thorough, they also bear witness, as do our opinions, to what has been a somewhat confused and evolving area of the law.

It is now clear that fees paid in advance for services to be performed in the future are refundable if unearned.⁵³ And use of the term “nonrefundable” in a fee agreement providing that a sum paid will be earned by the rendering of legal services does not convert such a deposit (advance fee) into a general retainer.⁵⁴

The requisites or propriety of a true or “general” retainer are beyond the scope of this opinion. At a minimum, however, the lawyer must be able to prove that the client clearly understood that the fee is for availability only and that the client will be billed separately for any legal work to be performed. “The client's understanding of what the retainer is buying is crucial.”⁵⁵ One court has adopted the following approach, which we consider helpful to all parties: “unless the fee agreement expressly states that a fee is an engagement retainer and explains how the fee is earned upon receipt, we will presume that any advance fee is a deposit from which an attorney will be paid for specified legal services.”⁵⁶ We would add that just as important as the label (e.g., “general retainer” or “engagement fee”) is the clear disclosure that the fee is for something other than legal services, and the explanation of how the fee is earned. Hybrid “retainers” defeat clarity. Therefore, if a fee agreement charges one sum purporting to be both a general retainer and an advance fee (i.e., a fee for services to be rendered), then, upon early termination of the representation, the lawyer’s fee is measured by the contract rate for rendering services and the balance is to be refunded to the client.

The \$4,000 paid to respondent was clearly for legal services to be performed. As such, it is a fee paid in advance – not a general retainer – and belongs to the client until earned in accordance

⁵³ Effective October 18, 2005, MRPC 1.15(g) was amended to provide as follows: “Legal fees and expenses that have been paid in advance shall be deposited in a client trust account and may be withdrawn only as fees are earned or expenses incurred.” This effectuated a clarification and not a change in the law. See, e.g., ABA/BNA Lawyers' Manual on Professional Conduct, 41: 2002--2003 (discussing the amendment to the Model Rule of Professional Conduct identical to amended MRPC 1.15(g): “The ABA made clear when it revised Model Rule 1.15 in 2002 that advance payments of fees must be treated as the client's property until earned.”). Also, Formal Opinion R-7 (interpreting the former MRPC 1.15(a)) and Informal Opinion RI-69, as well as other authorities discussed above, show that the amendment simply restated existing law.

⁵⁴ See n 10, *supra*.

⁵⁵ RI-10. *Cf.* MRPC 1.5(a)(2) (likelihood that other employment will be precluded must be apparent to the client).

⁵⁶ *In the Matter of Larry D. Sather*, 3 P3d 403, 410 (Colo 2000).

with the fee agreement. The fact that the agreement says “NO portion of the MINIMUM FEE referred to above is REFUNDABLE, to the client, under any circumstances” does not change this. Such language does not by itself establish that a fee is earned, especially when accompanied by other language that clearly states, “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 below. Respondent owed her client a refund under the fee agreement drafted by respondent, and under the Rules of Professional Conduct. The failure to refund these unearned fees was a violation of MRPC 1.16(d) and MRPC 1.15(b).

Our survey of the development of the law from the perspective of a Michigan practitioner convinces us that our conclusions regarding misconduct are sound, but that, as the Administrator suggests, the consequences for misconduct are appropriately tempered in this case. We cannot deny that the law and ethics opinions in this area have afforded something less than coherent guidance. Indeed, it was only recently, and only in a memorandum to the Michigan Supreme Court, that we expressed the view that there really is no such thing as a nonrefundable retainer.⁵⁷

Though we find misconduct, we conclude that it is appropriate to enter an order imposing no discipline under the circumstances of this case which include an attempt to resolve the matter with a partial refund, consultation with ethics advisors, and review of ethics opinions. Respondent shall pay restitution to her client in the amount of \$1,385.75, the balance of the unearned fees.

Board Members William P. Hampton, William L. Matthews, C.P.A., Billy Ben Baumann, M.D., William J. Danhof, and Andrea L. Solak concur in this decision.

Board Members Lori McAllister, Rev. Ira Combs, Jr., George H. Lennon, and Hon. Richard F. Suhrheinrich, were absent and did not participate.

⁵⁷ September 29, 2005 ADB Memorandum regarding clarification of lawyers’ duties in handling “retainers” or fees paid in advance, p 12.