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## Lawyers, Clients, and Money

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# LAWYERS, CLIENTS, AND MONEY

*Professor John M. A. DiPippa\**

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## I. INTRODUCTION

The foundation of every lawyer-client relationship is trust.<sup>1</sup> Whether trust is necessary for an efficient legal system or whether it flows from the moral autonomy of the individual client, lawyers and lawyer codes enshrine it as the foundation of legal ethics.<sup>2</sup> Nowhere is this trust more important and more abused than when lawyers handle their clients' money.<sup>3</sup>

Lawyers may be entrusted with their client's funds or funds destined for third parties. Opposing parties may deposit settlement checks with lawyers for disbursement or lawyers may ask for a fee advance before beginning work on a case. In all of these instances, lawyers are acting in a fiduciary capacity. As such, lawyers must adhere to special standards of prudence, honesty, and loyalty. This article addresses the special rules that apply when lawyers handle other people's money.<sup>4</sup> After an historical overview,<sup>5</sup> this article explores the four fiduciary duties codified in *Arkansas Rules of Professional Conduct* Rule 1.15.<sup>6</sup> The four fiduciary duties are: (1) segregating client money;<sup>7</sup> (2) notifying the client of the receipt of money or property;<sup>8</sup> (3) delivering money or property to the client;<sup>9</sup> and (4)

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1. Philip F. Dowey, *Attorneys' Trust Accounts: The Bar's Role in the Preservation of Client Property*, 49 OHIO ST. L.J. 275, 292 (1988). "The greatest trust between man and man is the trust of giving counsel. For in other confidences, men commit the parts of life; their lands, their goods, their children, their credit, some particular affair; but to such as they make their counselors, they commit the whole: by how much the whole they are obligated to all faith and integrity." *Id.* (quoting FRANCIS BACON, *Of Counsel*, in THE WORKS OF LORD BACON 277 (1846)).

2. *State ex. rel Okla. Bar Ass'n v. Raskin*, 642 P.2d 262, 267 (Okla. 1982). Trust placed in a lawyer results from the special professional status the lawyer occupies as a licensed practitioner. *Id.* Public confidence in the practitioner is essential to the proper functioning of the profession. *Id.*

3. *In re Wilson*, 409 A.2d 1153, 1154-55 (N.J. 1979) (determining that clients' willingness to entrust their funds to relative strangers results from centuries of honesty and faithfulness exhibited by members of the legal profession).

4. A lawyer must also safeguard other property. *Kaleidoscope, Inc. v. Powell, Goldstein, Fraiser & Murphy (In re Kaleidoscope, Inc.)*, 15 B.R. 232, 239 (Bankr. N.D. Ga. 1981), *rev'd on other grounds*, 25 B.R. 729 (N.D. Ga. 1982); *People v. Scudder*, 590 P.2d 493, 494 (Colo. 1979) (safeguarding lost wills and records); *Florida Bar v. Carlton*, 366 So. 2d 406, 408 (Fla. 1978) (failing to maintain insurance policies in a safe place); *Attorney Grievance Comm'n v. Pollock*, 425 A.2d 1352, 1353 (Md. 1981) (misplacing real estate deeds and recording checks for seven months). To safeguard client documents, lawyers can maintain safety deposit boxes or files in his office. CHARLES WOLFRAM, *MODERN LEGAL ETHICS* 180 (Practitioner's ed. 1986).

5. See *infra* notes 16-36.

6. See *infra* pp. 11-13.

7. See *infra* notes 53-63.

8. See *infra* notes 494-98.

9. See *infra* notes 499-506.

accounting to the client for the use of the money or property.<sup>10</sup> This article focuses on the issue of properly segregating client money. It will discuss the necessity of placing advance fees in the client trust account and withdrawing amounts as earned.<sup>11</sup> It will also analyze the leading national<sup>12</sup> and Arkansas<sup>13</sup> cases on the ethics of charging nonrefundable fees. Finally, this article will discuss the newly promulgated requirement that lawyers maintain an interest-bearing trust account for nominal amounts of client money held for short periods of time.<sup>14</sup> Any interest from this account must be paid to the Interest on Lawyers' Trust Accounts (IOLTA) Foundation.<sup>15</sup>

## II. HISTORICAL OVERVIEW

The American legal profession has always espoused lofty ideals for lawyers who handle other people's money. Courts have required lawyers to live up to high fiduciary standards.<sup>16</sup> At the same time, the courts claimed an enforcement role. For example, in *Stockton v. Ford*,<sup>17</sup> the United States Supreme Court provided:

There are few of the business relations of life involving a higher trust and confidence than that of attorney and client, or, generally speaking, one more honorably and faithfully discharged; few more anxiously guarded by the law, or governed by sterner principles of morality and justice; and it is the duty of the court to administer them in a corresponding spirit.<sup>18</sup>

Similarly, one of the earliest ethics codes described a virtuous lawyer in these words: "[T]ell me a man is dishonest and I will answer that he is no lawyer. He cannot be because he is careless and reckless of justice; the law is not in his heart, is not the standard and rule of his conduct."<sup>19</sup>

The first publication to set out rules for the legal profession may have been by David Hoffman, a Baltimore practitioner, as part of a course in

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10. See *infra* notes 526-31.

11. See *infra* notes 64-65.

12. See *infra* notes 92-127.

13. See *infra* notes 128-201.

14. See *infra* notes 467-79.

15. ARKANSAS RULES OF PROFESSIONAL CONDUCT Rule 1.15(e) (1993) [hereinafter ARPC].

16. A full discussion of the development of disciplinary systems is beyond the scope of this article. For an excellent survey of this history, see Mary M. Devlin, *The Development of Lawyer Disciplinary Procedures in the United States*, 7 GEO. J. LEGAL ETHICS 911 (1994).

17. *Stockton v. Ford*, 52 U.S. (11 How.) 232 (1850).

18. *Id.* at 247.

19. *Montgomery County Bar Ass'n v. Hecht*, 317 A.2d 597, 602 (Penn. 1974) (quoting D. Webster, Speech to the Charleston Bar, (May 10, 1847)).

legal study.<sup>20</sup> One of Hoffman's fifty resolutions stated: "I will retain no client's funds beyond the period in which I can, with safety and ease, put him in possession of them."<sup>21</sup> Another resolution condemned commingling: "I will on no occasion blend with my own, my client's money: if kept distinctly as his it will be less liable to be considered as my own."<sup>22</sup> Hoffman also insisted that honorable lawyers would return any unearned fee without waiting for the client to inquire about them:

Having received a retainer for contemplated services, which circumstances have prevented me from rendering, I shall hold myself bound to refund the same, as having been paid to me on a consideration which has failed; and, as such, subject to repetition, on every principle of law, and of good morals,— and this shall be repaid not merely at the instance of my client, but *ex mero motu*.<sup>23</sup>

Pennsylvania Judge George Sharswood, whose ethical prescriptions greatly influenced the first American Bar Association's ("ABA") ethical code, wrote that "mutual trust, confidence, and goodwill" are the essence of the lawyer-client relationship.<sup>24</sup> "Money or other trust property coming into the possession of an lawyer should be promptly reported, and never commingled with his private property or used by him, except with the client's knowledge or consent."<sup>25</sup>

Later the American Bar Association would say that a lawyer should refrain from any action whereby for his personal benefit or gain he abuses or takes advantage of the confidence reposed in him by his client. Money of the client or collected for the client or other trust property coming into

20. DAVID HOFFMAN, A COURSE OF LEGAL STUDY (2d ed. 1836). For a discussion of Hoffman's work, see THOMAS SHAFFER, AMERICAN LEGAL ETHICS: TEXT, READINGS, AND DISCUSSION TOPICS 59-166 (1985).

21. HOFFMAN, *supra* note 20, at 762.

22. HOFFMAN, *supra* note 20, at 762.

23. HOFFMAN, *supra* note 20, at 763. In the next resolution, Hoffman advises lawyers to return client's papers when the case is finished even though doing so may be "sometimes troublesome, and inopportune, or too urgently made. . . ." HOFFMAN, *supra* note 20, at 763.

24. GEORGE SHARSWOOD, AN ESSAY ON PROFESSIONAL ETHICS 85 n.1 (5th ed. 1896).

25. SHARSWOOD, *supra* note 24. Alabama adopted most of Sharswood's prescriptions into the nation's first official code of ethics for lawyers, ALA. CODE OF ETHICS, 118 Ala. xxiii (1899). The code was first adopted by the Alabama Bar Association in 1887. The first ABA code, ABA CANONS OF PROFESSIONAL ETHICS, was approved in 1908. ABA CANONS OF PROFESSIONAL ETHICS (1908). Relying on the Alabama code extensively, Canon 11, which deals with client funds, is almost identical to Sharswood's statement cited in the text.

the possession of the lawyer should be reported and accounted for promptly.<sup>26</sup>

Reality, however, has often failed to match the bar's rhetoric. Some sources indicate that unethical behavior is rampant, at least in some types of practice.<sup>27</sup> More recently, Professor Lisa Lerman<sup>28</sup> found a pattern of deceptive conduct in: (1) client billing; (2) the type and degree of a lawyer's expertise; (3) the value of a lawyer's services; and (4) the difficulty of the lawyer's work for the client.<sup>29</sup> Nearly all of the lawyers in Professor Lerman's survey reported some deception in their billing practices.<sup>30</sup> In the same volume as the Lerman survey, Frederick Miller<sup>31</sup> catalogues a parade of lawyer horrors involving the misappropriation of, and in some cases theft of, client money.<sup>32</sup> In 1988, twenty-two percent of all disbarments related to problems handling client money.<sup>33</sup>

Even when lawyers are not disbarred for financial misconduct, these violations often result in other severe sanctions.<sup>34</sup> Certainly theft of a client's money will result in the most severe penalty.<sup>35</sup> Lawyers who inadvertently or unintentionally commit violations often receive sanctions designed to serve an educational or deterrent function.<sup>36</sup> Thus, the more a lawyer knows about these rules and the procedures to ensure compliance with them, the easier it will be for that lawyer to avoid problems.

26. ABA CANONS OF LEGAL ETHICS Canon 11 (1937).

27. WOLFRAM, *supra* note 4, at 79-80 (citing WOOD, PROFESSIONAL ETHICS AMONG CRIMINAL LAWYERS IN SOCIAL PROBLEMS 70 (1959)).

28. Lerman is Professor of Law at The Catholic University of America, The Columbus School of Law.

29. Lisa Lerman, *Lying to Clients*, 138 U. PA. L. REV. 659, 665 (1990).

30. *Id.* at 705.

31. Miller is the executive director and counsel for Client's Security Fund of the State of New York and a member of the American Bar Association's Standing Committee on Lawyer's Responsibility for Law Client Protection.

32. Frederick Miller, *If You Can't Trust Your Lawyer . . . ?*, 138 U. PA. L. REV. 785, 786 (1990). Miller recounts the story of a lawyer who induced a client to deposit her life savings into his trust account and then promptly stole the entire \$106,000. *Id.* All the lawyer's reimbursement checks bounced. *Id.* When his practice finally collapsed, claims from other defrauded clients totaled over \$5,000,000. *Id.* at 788.

33. *Id.* at 786 n.2. Miller notes that the second largest category of disbarments is general neglect. *Id.* See Emily Couric, *What Goes Wrong?*, 72 A.B.A. J. 65 (1986) (indicating that 14% of all disbarments and 8% of all suspensions involve mishandling of client funds). Between 1948 and 1984, more than half of the disbarments in New Jersey were for mishandling or misappropriating client money. WOLFRAM, *supra* note 4, at 177 n.2.

34. WOLFRAM, *supra* note 4, at 177 n.2.

35. David E. Johnson & Lucinda Long, *Thou Shalt Not Steal*, 36 RUTGERS L. 454, 456 (1984).

36. *In re Brooks*, 494 N.W.2d 876, 877 (Minn. 1993) (requiring a lawyer during his two-year probation period to maintain accurate business records and demonstrate compliance to the disciplinary committee).

### III. THE BASIC RULES

A lawyer must treat the property of a client with special care and meet the highest standards of accountability.<sup>37</sup> Even if the professional rules of ethics did not exist, a lawyer would still be required to act as a fiduciary toward the client.<sup>38</sup> *Black's Law Dictionary* defines a fiduciary as a "person on whom the duties of good faith, trust, special confidence, and candor toward another are imposed."<sup>39</sup> The lawyer's duty regarding client funds generally arises from agency law principles regarding agents in possession of property of the principal.<sup>40</sup> Thus, a lawyer who receives money or property for safekeeping acts as a fiduciary in regard to the money or property.<sup>41</sup>

The law imposes the following duties on all fiduciaries: (1) segregation of funds and property; (2) notification of receipt of funds or property; (3) prompt delivery of funds or property; and (4) prompt and accurate accounting for funds or property.<sup>42</sup>

#### A. Arkansas Rules of Professional Conduct Rule 1.15

These fiduciary duties are codified in *Arkansas Rules of Professional Conduct* Rule 1.15.<sup>43</sup> The text of the rule reads as follows:

(a) All lawyers shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property.

(1) Funds of a client shall be deposited and maintained in one or more identifiable trust accounts in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person. The lawyer or law firm may not deposit

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37. *E.g.*, *Bar Ass'n v. Marshall*, 307 A.2d 677, 681 (Md. 1973); *In re Grubb*, 663 P.2d 1346 (Wash. 1983).

38. *In re Deschane*, 527 P.2d 683, 684-85 (Wash. 1974). See HENRY DRINKER, *LEGAL ETHICS* 89-96 (1953); WOLFRAM, *supra* note 4, at 146.

39. *BLACK'S LAW DICTIONARY* 625 (6th ed. 1990).

40. See *RESTATEMENT (SECOND) OF AGENCY* §§ 381-82 (1957).

41. See *LAW MANUAL ON PROF. CONDUCT (ABA/BNA 45:101)*.

42. See *generally* GEOFFREY C. HAZARD & W. WILLIAM HODES, *THE LAW OF LAWYERING: A HANDBOOK OF THE MODEL RULES OF PROFESSIONAL CONDUCT*, § 1.15:102 (2d ed. 1991).

43. *In re Arkansas IOLTA Found., Inc.*, 885 S.W.2d 846 (Ark. 1994). The court originally promulgated the rules at *In re Arkansas Bar Ass'n*, 289 Ark. 595, 702 S.W.2d 326 (1985). These rules were based almost entirely on the ABA's *MODEL RULES OF PROFESSIONAL RESPONSIBILITY* which were approved by the ABA House of Delegates in 1983. *MODEL RULES OF PROFESSIONAL CONDUCT* (1983) [hereinafter *MRPC*].

funds belonging to the lawyer or law firm in any account designated as the trust account, other than the amount necessary to cover bank charges, or comply with the minimum balance required for the waiver of bank charges.

(2) Other property shall be identified as such and appropriately safeguarded.

(3) Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation.

(b) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this Rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

(c) When in the course of representation a lawyer is in possession of property in which both the lawyer and another person claim interests, the property shall be kept separate by the lawyer until there is an accounting and severance of their interest. If a dispute arises concerning their respective interests, the portion in dispute shall be kept separate by the lawyer until the dispute is resolved.

(d) (1) Each trust account referred to in (a) above shall be an interest-bearing trust account in a bank, savings bank, trust company, savings and loan association, savings association, credit union, or federally regulated investment company, and the institution shall be insured by an agency of the federal government.

(2) A lawyer who receives client funds which in the judgment of the lawyer are nominal in amount, or are expected to be held for such a short period of time that it is not practical to earn and account for income on individual deposits, shall create and maintain an interest-bearing account for such funds. The account shall be maintained in compliance with the following requirements:

(A) The trust account shall be maintained in compliance with sections (a), (b) and

(c) of this rule and the funds shall be subject to withdrawal upon request and without delay;

(B) No earnings from the account shall be made available to the lawyer or law firm; and,

(C) The interest accruing on this account, net of reasonable check and deposit processing charges which shall only include items deposited charge, monthly maintenance fee, per item check charge, and per deposit charge, shall be paid to the Arkansas IOLTA Foundation, Inc. All other fees and transaction costs shall be paid by the lawyer or law firm.

(3) All client funds shall be deposited in the account specified in section (d)(2) unless they are deposited in a separate interest-bearing account for a specific and individual matter for a particular client. There shall be a separate account opened for each such particular matter. Interest so earned must be held in trust as property of each client in the same manner as is provided in (a) and (b) of this rule.

(4) The interest paid on the account shall not be less than, nor the fees and charges assessed greater than, the rate paid or fees and charges assessed, to any non-lawyer customers on accounts of the same class within the same institution.

(5) The decision whether to use an account specified in section (d)(2) or an account specified in section (d)(3) is within the discretion of the lawyer. In making this determination, consideration should be given to the following:

(A) The amount of interest which the funds would earn during the period they are expected to be deposited; and,

(B) The cost of establishing and administering the account, including the most of the lawyer's or law firm's services.

(e) All lawyers who maintain accounts provided for in this Rule, must convert their client trust account(s) to interest-bearing account(s) with the interest to be paid to the Arkansas IOLTA Foundation, Inc., no later than six months from the date of the order adopting this Rule, unless the account

falls within subsection (d)(3). All lawyers shall certify annually that they, their law firm or professional corporation is in compliance with all sections and subsections of this Rule.

(f) A lawyer shall certify, in connection with the annual renewal of the lawyer's license, that the lawyer is complying with all provisions of this rule. Certification shall be made on the following form in a manner designated by the Clerk of the Supreme Court.

(g) A lawyer or a law firm may be exempt from the requirements of this rule if the Arkansas IOLTA Foundation's Board of Directors, on its own motion, has exempted the lawyer or law firm from participation in the Program for a period of no more than two years when service charges on the lawyer's or law firm's trust account equal or exceed any interest generated.<sup>44</sup>

Rule 1.15 is a significant departure from the old code of professional conduct.<sup>45</sup> The old model code required lawyers to keep client funds in a bank within the state of the lawyer's residence.<sup>46</sup> Rule 1.15 does not specify that funds be kept in a bank and allows the funds to be deposited out-of-state with the client's permission.<sup>47</sup> In addition, whereas the old model code only applied to *client* funds, not to funds for costs or expenses, Rule 1.15 requires all property of clients *and third persons* to be deposited.<sup>48</sup> Moreover, Rule 1.15 does not make an exception for advances for costs or expenses and applies all the fiduciary rules to both client and third party property and funds.<sup>49</sup>

The most significant innovation is the creation of a comprehensive IOLTA program.<sup>50</sup> Arkansas lawyers are now required to convert all of their trust accounts into interest-bearing accounts in which either the client or the IOLTA foundation will receive the interest payments.<sup>51</sup> In Arkansas, lawyers must certify compliance with this rule when paying their annual Arkansas Supreme Court license renewal fee.<sup>52</sup>

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44. ARPC, *supra* note 15, Rule 1.15. See *In re Arkansas IOLTA Found., Inc.*, 885 S.W.2d at 846.

45. ARPC, *supra* note 15, Rule 1.15; MODEL CODE OF PROFESSIONAL RESPONSIBILITY Rule 1.15 (1980) [hereinafter MCPR].

46. MCPR, *supra* note 45.

47. ARPC, *supra* note 15, Rule 1.15.

48. ARPC, *supra* note 15, Rule 1.15; MCPR, *supra* note 45.

49. ARPC, *supra* note 15, Rule 1.15(e).

50. ARPC, *supra* note 15, Rule 1.15(e).

51. For a discussion of the new IOLTA rules, see *infra* notes 472-82.

52. ARPC, *supra* note 15, Rule 1.15(e).

## IV. THE FIDUCIARY RULES APPLIED

## A. Segregation

A lawyer has a duty to keep client funds and property separate from the lawyer's own funds and property.<sup>53</sup> Courts and disciplinary boards have required a wide range of funds to be deposited in trust accounts.<sup>54</sup> The purpose of the segregation requirement is to protect both the lawyer and the client. By segregating client money, the lawyer avoids both the appearance of impropriety and the temptation to use client money for the lawyer's own purposes. Moreover, segregation eliminates the possibility that the lawyer will inadvertently use the client's funds.<sup>55</sup> The lawyer must adhere to the same standard of care as any bank or other financial institution acting in a fiduciary capacity.<sup>56</sup>

The proper way to segregate client funds is through the maintenance of separate accounts that are clearly identified on behalf of the client.<sup>57</sup> Client money must be held in an account. The client may not waive the separate

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53. *Weems v. Supreme Court Comm. on Professional Conduct*, 257 Ark. 673, 685, 523 S.W.2d 900, 907 (1975); *Attorney Grievance Comm. v. Engerman*, 424 A.2d 362, 368 (Ind. 1981); *In re Burr*, 228 S.E.2d 678 (S.C. 1976).

54. *In re Rogers*, 409 P.2d 45, 46 (Ariz. 1965) (holding that judgment awards must be deposited until delivered to the client); *In re Hartman*, 401 N.Y.S.2d 547, 548 (N.Y. App. Div. 1978) (determining that proceeds of a settlement must be deposited in client trust accounts); *Oklahoma Bar Ass'n v. Burger*, 401 P.2d 524, 525 (Okla. 1965) (providing that proceeds from the sale of a client's real or personal property must be deposited in the client trust account); *Oklahoma Bar Ass'n v. Dugger*, 385 P.2d 486 (Okla. 1963) (disciplining a lawyer for failure to account to a client for money received from the sale of a farm deeded to the lawyer as part of his attorney fee); *In re Burr*, 228 S.E.2d 678, 680 (S.C. 1976) (requiring that proceeds from the liquidation of a client's business must be deposited in a client trust account).

55. See James W. McElhaney, *Staying Out of Jail*, 79 A.B.A. J. 98 (1993). "It's not your money. It's not just a technical accounting problem. Your client's money is not your money, and you've got to keep it separate from your own. It's easy enough to do. All of your client's money goes in the special trust account. Then no matter how tight your personal cash flow gets, you never borrow a penny from that trust account. It doesn't matter how valid your emergency is or how quickly you are going to return it. It's not your money." *Id.*

56. HAZARD & HODES, *supra* note 42, at 455.

57. *E.g.*, *State v. Johnson*, 627 P.2d 748, 749 (Colo. 1981). The same principles have been applied when a lawyer holds funds belonging to third parties. *E.g.*, *In re Draper*, 317 A.2d 106 (Del. 1974).

If a lawyer's practice does not involve the receipt of client funds, then no trust account needs to be created. *In re Arkansas IOLTA Found.*, 885 S.W.2d 846 (Ark. 1994), Petition at 4 (Appendix). Arkansas also exempts those lawyers who do not practice in Arkansas, receive clients' funds in Arkansas, or receive funds from Arkansas clients. *Id.* Full-time judges, military lawyers, and government lawyers who do not handle client funds are also exempt. *Id.* See also ABA Comm. on Ethics, Informal Op. 621 (1962).

trust account requirement.<sup>58</sup> There must be an express agreement for the lawyer to invest the funds, and any unauthorized investment may lead to discipline.<sup>59</sup> This also applies to money paid to the lawyer by a prospective client with whom a lawyer-client relationship has not yet been established.<sup>60</sup> Neither practical difficulties nor the nature of the practice warrants noncompliance with this requirement.<sup>61</sup>

Arkansas's new rule requires that lawyers maintain an interest-bearing trust account for client funds even if they are nominal in amount and are expected to be held for only a short period of time. The new rule clarifies what was always implicit: that a lawyer may have a duty to deposit client funds in several trust accounts. For example, large amounts which will be held for a considerable time should be deposited in their own interest-bearing accounts with the interest accruing for the benefit of the client.<sup>62</sup> However, lawyers must be prudent. Although the federal deposit insurance limits apply to each individual with funds deposited in the client trust account, a lawyer should ascertain if any individual client's funds exceed the federal deposit insurance limit. If so, the lawyer should consult with the client to determine how to proceed.<sup>63</sup>

### 1. Fees and Retainers

Most jurisdictions require advance fees to be deposited in trust accounts and to be withdrawn as the fees are earned.<sup>64</sup> The plain language of Rule

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58. ABA Comm. on Ethics, Informal Op. 621 (1962). See also *Archer v. State*, 548 S.W.2d 71 (Tex. Civ. App. 1977).

59. E.g., *Cogdill v. First Dist. Comm.*, 269 S.E.2d 391, 392 (Va. 1980) (prohibiting loans to third persons from trust account funds).

60. See Mich. Ethics Op. RI-58 (1990).

61. Mich. Ethics Op. RI-93 (1991) (holding that the Legal Aid Society is not exempt from Rule 1.15 of the MODEL RULES OF PROFESSIONAL CONDUCT in spite of the unique and practical problems associated with the practice of poverty law).

62. RESTATEMENT (SECOND) OF AGENCY § 70 (1958); ARPC, *supra* note 15; Roy Conn III, Comment, *Attorney Misappropriation of Client Funds*, 27 HOW. L. J. 1597, 1608 (1984). For examples, see ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 250 (2d ed. 1992). See also Frederick Miller, *Know Your Rights: The Lawyer's Edition*, 67 N.Y. ST. B.J. 71 (1995).

63. Connecticut Bar Comm. on Professional Ethics, Ops. 92-8, 91-2 (1992 & 1991). The client may consent to exceed the limits and take the risk of loss. On the other hand, the lawyer may open separate accounts in several financial institutions, none of which may exceed the insurance maximum.

64. *Accord*, Tenn. Ethics Op. 92-F-128(a) (1992); Utah Ethics Op. 118 (1992); Or. Ethics Op. 1991-88 (1991). See *In re Lochow*, 469 N.W.2d 91 (Minn. 1991) (determining that advance payments for future services must be placed into trust accounts). See generally HAZARD & HODES, *supra* note 42; Lester Brickman, *The Advance Fee Payment Dilemma: Should Payments be Deposited to the Client Trust Account or to the General Office Account*, 10 CARDOZO L. REV. 647, 650 n.29 (1989) (favoring the deposit of all advance fees in the

1.15 of the *Arkansas Rules of Professional Conduct* suggests that all advance fees must be placed in the client trust account. In addition, the rules impose a duty on a lawyer to “refund[ ] any advance payment of fee that has not been earned.”<sup>65</sup> Together, these rules imply a duty to segregate advance fees until earned.

The problem is often deciding when a fee is earned so that the lawyer may properly place it in the office business account. For example, many lawyers ask for nonrefundable retainers. The correct place to deposit a “retainer” fee depends on the sense in which the word is used and the intent of the lawyer and the client.

#### a. The Three Definitions of “Retainers”

The traditional, true, or general retainer fee is paid to secure availability of the lawyer for a given period of time.<sup>66</sup> This type of retainer fee is considered to be earned when it is received and must be deposited in the general office account.<sup>67</sup> The lawyer agrees to be available when needed to represent the particular client in the future. The retainer fee allows the lawyer to decline other cases in order to be available when called by the retainer client.<sup>68</sup>

Lawyers sometimes use the word “retainer” to refer to any advance payment of fees for services that the lawyer will perform in the future. The majority rule is that such “retainers” must be deposited in the client trust account.<sup>69</sup>

Lawyers sometimes use the word “retainer” to refer to “nonrefundable” advance fees. In this instance, the lawyer designates the advance fee as a retainer and, ipso facto, declares it to be nonrefundable. Nevertheless, there

client trust fund). *But see In re Stanton*, 492 N.E.2d 1056 (Ind. 1986) (holding that although the lawyer failed to maintain complete records of client funds, the lawyer could not be charged with this violation because it was not asserted in the complaint).

65. ARPC, *supra* note 15, Rule 1.16(d). For a discussion of the tax consequences of holding advance fees see Richard C. Montgomery, *Ethical and Legal Issues in Law Firm Accounting*, 64 PA. B.A. Q. 39 (1993) (stating that advance fees deposited in trust accounts are treated as loans and not subject to income tax until earned, but advance fees placed in business accounts are treated as income from the time of receipt).

66. *See, e.g.*, CALIFORNIA RULES OF PROFESSIONAL CONDUCT Rule 3-700(D)(2) (1989); Va. Ethics Op. 1178 (1993). *See generally* 1 STUART SPEISER, ATTORNEY’S FEES §§ 1:4, 1:8 (1973) (denoting retainers as both general and special).

67. *Baranowski v. State Bar*, 593 P.2d 613, 618 (Cal. 1979).

68. The general or true retainer also ensures the lawyer of a minimum cash flow, aids in personnel planning, and keeps a line of communication open to a potentially important client. WOLFRAM, *supra* note 4, at 506 n.6.

69. HAZARD & HODES, *supra* note 42. *See generally* Brickman, *supra* note 64.

is considerable disagreement about the propriety of such nonrefundable fees.<sup>70</sup> In any event, an advance fee or retainer must be reasonable.<sup>71</sup>

Academic commentators have criticized nonrefundable retainers as unethical and unenforceable. Professors Lester Brickman and Lawrence Cunningham<sup>72</sup> have written a series of influential articles in which they argue that nonrefundable fees are unethical because they violate established legal and fiduciary principles.<sup>73</sup> They advance a trust-based theory of the lawyer-client relationship.<sup>74</sup> According to Brickman and Cunningham,

[lawyers] are fiduciaries because the client's retention of an attorney to exercise professional judgment on his behalf necessarily requires the client to repose trust and confidence in the attorney. When he exercises that professional judgment, the lawyer must advance the client's interests as the client would define them if fully informed. Acting primarily, if not exclusively, in a client's interest requires undivided loyalty and zealous devotion. To fulfill these fiduciary duties, lawyers must inspire their clients' trust and confidence.<sup>75</sup>

Under this view, the fiduciary nature of the lawyer-client relationship is paramount. Once a client loses faith in the lawyer, the client has an unqualified right to discharge the lawyer and hire another.<sup>76</sup> The discharge will not be a breach of contract because public policy implies a discharge right as a provision of every lawyer-client contract.<sup>77</sup> Nonrefundable fees

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70. Compare *In re Cooperman*, 591 N.Y.S.2d 855 (N.Y. App. Div. 1993) (nonrefundable fees are unethical per se) and Wis. State Bar Formal Op. e-86-9 (1986) (nonrefundable fees belong to the attorney when paid).

71. ARPC, *supra* note 15, Rule 1.5.

72. Lester Brickman and Lawrence Cunningham are law professors at the Benjamin N. Cardozo School of Law, Yeshiva University, New York City. They have written extensively on many legal issues including several law review articles on nonrefundable retainers. Brickman and Cunningham also filed an amicus curiae brief in the *Cooperman* case. Their writings have provided much of the legal and intellectual framework for judicial opinions regarding the ethical validity of nonrefundable retainers.

73. Lester Brickman & Lawrence Cunningham, *Nonrefundable Retainers Revisited*, 72 N.C. L. REV. 1, 3 (1993) [hereinafter Brickman & Cunningham 1993]; Lester Brickman & Lawrence Cunningham, *Nonrefundable Retainers: Impermissible Under Fiduciary, Statutory, and Contract Law*, 57 FORDHAM L. REV. 149 (1988) [hereinafter Brickman & Cunningham 1988]. *But see* Steven Lubet, *The Rush to Remedies: Some Conceptual Questions About Nonrefundable Retainers*, 73 N.C. L. REV. 271 (1994). Although Brickman and Cunningham advance both ethical and contract-based reasons for their position, this article will focus only on the ethical questions.

74. Brickman & Cunningham 1988, *supra* note 73, at 153-157.

75. Brickman & Cunningham 1988, *supra* note 73, at 154-155.

76. Brickman & Cunningham 1988, *supra* note 73, at 155.

77. Brickman & Cunningham 1988, *supra* note 73, at 155-156. *See* *Martin v. Camp*, 114 N.E. 46, 48 (N.Y. 1916). It is uncertain how vital the *Martin* doctrine is in Arkansas. *See* ARK. CODE ANN. § 16-22-304 (Michie 1987), which codifies the minority rule that

effectively clog the exercise of this right by imposing a financial penalty on the client who discharges the lawyer.<sup>78</sup> Thus, nonrefundable fees are inconsistent with the fiduciary nature of the lawyer client relationship.

Brickman and Cunningham reject arguments in favor of nonrefundable fees. First, some proponents of nonrefundable fees argue that nonrefundable fees pay for the lawyer's assurance of availability in a particular matter.<sup>79</sup> Note that this kind of availability is different from the availability that clients are entitled to when they enter into general or true retainers with their lawyers. With a general retainer, lawyers are available for some specified period of time for services that may or may not be needed. By accepting the general retainer, the lawyer agrees to represent the client whenever the client calls "even if the need for specific services arises at a time of great inconvenience to the lawyer."<sup>80</sup> The client gets something for her money--the lawyer's commitment to perform unspecified legal services if necessary at some unspecified time in the future.<sup>81</sup> At the same time, the lawyer is compensated for any expenses or lost income involved in being "available." However, most lawyers who accept advance fees "rarely turn down work opportunities because their plates are already full" or "idly await the moment when their general retainer client demands services."<sup>82</sup> Instead, they either add the new work on top of the old work or, as in the larger firms, add more associates.<sup>83</sup> Thus, with general retainers, the client gets nothing in addition to the specified legal services already needed. Nonrefundable fees should be allowed only when the fee is truly to secure availability or can be justified by actual additional costs or lost opportunities.<sup>84</sup>

Second, some lawyers contend that agreeing to represent a client precludes a lawyer from representing other parties involved in the matter, even if the lawyer is discharged by the client. Accordingly, lawyers should be compensated for this "opportunity loss."<sup>85</sup> General retainers do not invariably lead to conflicts of interest that preclude the lawyer from taking on other potential clients.<sup>86</sup> Even when conflicts do arise, the public need

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discharged attorneys may assert a lien based on the contract and are not limited to a quantum meruit recovery. For a discussion of this question, see *infra* notes 510-21.

78. Brickman & Cunningham 1993, *supra* note 73, at 7.

79. Brickman & Cunningham 1993, *supra* note 73, at 22-23 (citing Stephen Gillers, *All Non-Refundable Fee Agreements are Not Created Equal*, N.Y. L.J., Feb. 3, 1993, at 2).

80. Brickman & Cunningham 1993, *supra* note 73, at 23.

81. Brickman & Cunningham 1993, *supra* note 73, at 23.

82. Brickman & Cunningham 1988, *supra* note 73, at 158.

83. Brickman & Cunningham 1988, *supra* note 73, at 159.

84. Brickman & Cunningham 1993, *supra* note 73, at 24-25.

85. Brickman & Cunningham 1988, *supra* note 73, at 158-59.

86. Brickman & Cunningham 1988, *supra* note 73, at 159. This may be more accurate

for protection outweighs the lawyer's need for financial security.<sup>87</sup> Non-refundable fees create a conflict of interest between the lawyer and the client that undermines the constitutional guarantee of effective assistance of counsel.<sup>88</sup> Moreover, the line between proper representation and criminal liability gets blurred when a lawyer accepts a nonrefundable fee from a criminal enterprise conducting illegal activities.<sup>89</sup>

Finally, others argue that retainers are almost never exclusively either general or special. Instead, they are a mixture of payment for availability and payment for specified services. It is difficult to put a separate price on the lawyer's availability as opposed to his services. Any exceptions to a general ban on nonrefundable fees would only encourage lawyers to mischaracterize their fees to qualify under the exception. Lawyers would

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in metropolitan areas where the pool of potential clients is larger than in small towns and rural areas. For example, because of the small number of lawyers in rural areas, the likelihood of a conflict increases. See DONALD D. LANDON, *COUNTRY LAWYERS: THE IMPACT OF CONTEXT ON PROFESSIONAL PRACTICE* 11 (1990). Moreover, conflicts have a greater financial impact because of the smaller pool of potential clients. Country lawyers have more individual clients than city lawyers, but these cases tend to generate less remuneration than the organizational clients of city lawyers. *Id.* at 25. The statement in the text may also be inaccurate in highly technical or specialized subject areas where there are relatively few lawyers who handle most of the cases. Brickman & Cunningham 1988, *supra* note 73, at 158 n.50.

87. Brickman & Cunningham 1993, *supra* note 73, at 31-32.

88. Brickman & Cunningham 1993, *supra* note 73, at 32. Criminal defense counsel must represent their clients on appeal until relieved by the court or new counsel. *Jones v. State*, 318 Ark. 44, 883 S.W.2d 452 (1994); *Young v. State*, 318 Ark. 235, 236, 884 S.W.2d 591, 592 (1994); and *Atkins v. State*, 308 Ark. 675, 677, 827 S.W.2d 636, 637 (1992). ARKANSAS RULES OF CRIMINAL PROCEDURE Rule 36.26 reads as follows:

**RULE 36.26 TRIAL COUNSEL'S DUTIES WITH REGARD TO APPEAL**

Trial counsel, whether retained or court appointed, shall continue to represent a convicted defendant throughout any appeal to the Arkansas Supreme Court, unless permitted by the trial court or the Arkansas Supreme Court to withdraw in the interest of justice or for other sufficient cause.

ARKANSAS RULES OF CRIMINAL PROCEDURE Rule 36.26.

Sometimes this means that the lawyer will continue to work on a case even though the client can not compensate him. Some lawyers argue that nonrefundable retainers in criminal cases should be allowed to offset the losses lawyers incur in these situations. Nevertheless, nonrefundable retainers cannot be justified. The essence of this argument is that lawyers should be allowed to overcharge some clients in criminal cases to make up for other, less lucrative cases. Although this is the policy behind contingent fees, such fees have never been allowed in criminal cases because of the severe consequences of the case to the defendant. In addition, lawyers cannot charge excessive or unreasonable fees to any client. It would pervert the fiduciary nature of the lawyer-client relationship to allow lawyers to sustain their income at the expense of their clients. *Cf.* Brickman & Cunningham 1993, *supra* note 73, at 36.

89. Brickman & Cunningham 1993, *supra* note 73, at 33. See generally Eugene R. Gaetke & Sarah N. Welling, *Money Laundering and Lawyers*, 43 SYRACUSE L. REV. 1165 (1992).

“characterize their fee arrangements in whatever way is necessary to enable them to keep the advance fee. . . .”<sup>90</sup> The exception would thus swallow the rule.<sup>91</sup>

### b. The *Cooperman* Case

*In re Cooperman*<sup>92</sup> was the first judicial decision to invalidate a non-refundable retainer on the ground that it was unethical.<sup>93</sup> Cooperman was a lawyer charged with fifteen violations centering around his use of nonrefundable retainer agreements.<sup>94</sup> The grievance committee had previously disciplined him on two occasions for using nonrefundable retainer agreements.<sup>95</sup> Nevertheless, Cooperman continued to use the same nonrefundable fee agreements which led to his discipline.<sup>96</sup> Three specific fee agreements were at issue.<sup>97</sup> In the first case, Cooperman agreed to represent a client in a criminal case and charged a nonrefundable \$10,000 retainer.<sup>98</sup> After Cooperman made one court appearance in which he unsuccessfully tried to withdraw the client’s previous guilty plea, he was discharged by the client.<sup>99</sup> Of course, Cooperman claimed the entire \$10,000 and the client filed a complaint with the appropriate disciplinary committee.<sup>100</sup> The other two incidents followed a similar pattern.<sup>101</sup>

The New York Supreme Court held that the use of a nonrefundable fee retainer violated the lawyer’s obligation to refund unearned fees upon discharge.<sup>102</sup> The court distinguished minimum fee agreements as predictions of the amount the client can expect to pay from those agreements in which the lawyer is paid based on quantum meruit if he is discharged.<sup>103</sup>

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90. Brickman & Cunningham 1993, *supra* note 73, at 26.

91. Brickman & Cunningham 1993, *supra* note 73, at 26-27.

92. *In re Cooperman*, 591 N.Y.S.2d 855 (N.Y. App. Div. 1993).

93. *Cf. Federal Savs. & Loan Ins. Corp. v. Angell, Holmes, & Lea*, 838 F.2d 395 (9th Cir. 1988) (stating that the law firm was not entitled to retain an advance fee deposit after being discharged even though the fees were denominated as “earned upon payment”). Although a few courts had considered nonrefundable fees prior to the *Cooperman* decision, their analysis was superficial and their conclusions ambiguous. For a collection of these cases see Brickman & Cunningham 1988, *supra* note 73, at 150.

94. *Cooperman*, 591 N.Y.S.2d at 856.

95. *Id.* at 859.

96. *Id.*

97. *Id.*

98. *Id.* at 857.

99. *Id.* at 858.

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

Although a New York ethics opinion<sup>104</sup> previously approved a “minimum fee agreement” as a sub-species of a nonrefundable fee agreement, the *Cooperman* court refused to “blur the valid distinction” between the two.<sup>105</sup> The court was unequivocal:

Since an attorney’s fee is never truly nonrefundable until it is earned, the use of this term, which by definition allows an attorney to keep an advance payment irrespective of whether the services contemplated are rendered, is misleading, interferes with a client’s right to discharge an attorney, and attempts to limit an attorney’s duty to refund promptly, upon discharge, all those fees not yet earned.<sup>106</sup>

The New York Court of Appeals recently affirmed the *Cooperman* ruling.<sup>107</sup> The court held that the use of nonrefundable fee retainers violated public policy by compromising the client’s right to discharge the lawyer at any time.<sup>108</sup> The court noted that the fiduciary nature of the lawyer-client relationship imposed a number of “special and unique duties,” including maintaining confidentiality, avoiding conflicts of interest, operating competently, safeguarding client property, and honoring the clients’ interests over the lawyer’s interests.<sup>109</sup> This meant that fee agreements are governed by principles that are different from ones that apply to “commonplace commercial contracts.”<sup>110</sup> Thus, the client’s “unqualified right to terminate” the lawyer-client relationship assumed prominence.<sup>111</sup> Although the discharged lawyer must refund any unearned portion of a fee, the lawyer may still recover in quantum meruit for the services actually performed.<sup>112</sup> Nonrefundable retainers “diminish the core of the fiduciary relationship” by chilling the client’s discharge right.<sup>113</sup> By penalizing the client’s exercise of the discharge right, the client is coerced to remain in a fiduciary relation-

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104. N.Y. Bar Ass’n Op. 599 (1989).

105. *Id.*

106. *Cooperman*, 591 N.Y.S.2d at 857.

107. *In re Cooperman*, 633 N.E.2d 1069, 1073 (N.Y. 1994).

108. *Id.* at 1072. *See generally* *Martin v. Camp*, 114 N.E. 46 (N.Y. 1916) (holding that the lawyer-client contract has unique features and, therefore, the client may terminate the contract with or without cause). The court used the “special retainer” to refer to a fee arrangement where the client pays in advance for services to be rendered in the future. *Cooperman*, 633 N.E.2d at 1074. The court used the phrase “general retainer” to refer to what this article calls “true” retainers -- payments for availability to render potential but unspecified services in the future. *Id.*

109. *Cooperman*, 633 N.E.2d at 1071. *See* *Brickman & Cunningham* 1993, *supra* note 61, at 6.

110. *Cooperman*, 633 N.E.2d at 1072.

111. *Id.*

112. *Id.*

113. *Id.*

ship, something the court referred to as an "utter anomaly."<sup>114</sup> The court condemned nonrefundable retainers: "This would be a shameful, not honorable, professional denouement."<sup>115</sup>

The New York Court of Appeals also rejected Cooperman's invitation to evaluate nonrefundable fees under a "reasonableness" or "clearly excessive" standard, determining that the client's right to discharge a lawyer and the right not to be charged excessive fees are separate and distinct aspects of the lawyer client relationship.<sup>116</sup> Moreover, any attempt to charge a nonfundable fee conflicts with the rules that require a lawyer to return all unearned fees.<sup>117</sup> Thus, in addition to violating the client's discharge right, nonrefundable fees deprive the client of his right to a refund of any unearned fees.<sup>118</sup>

The court noted that the opinion dealt only with the return of fees advanced by the client but not earned by the lawyer.<sup>119</sup> Other fee arrangements that do not burden the client's discharge right nor deprive the client of the return of unearned fees will still be proper.<sup>120</sup> These include "minimum fee arrangements and general retainers, not laden with the nonrefundability impediment irrespective of any services."<sup>121</sup>

The *Cooperman* decisions represent a victory for Professors Brickman and Cunningham. These two cases adopt their position that the client's right to discharge a lawyer takes precedence over the lawyer's economic interests. As such, Brickman and Cunningham indicate that the central feature of fee regulation is the protection of the client which flows naturally from the fiduciary nature of the lawyer-client relationship. However, nonrefundable fees undermine the specific lawyer-client relationship as well as the public's trust in the legal system. "Because the attorney-client relationship is recognized as so special and so sensitive in our society, its effectiveness, actually and perceptually, may be irreparably impaired by conduct which undermines the confidence of the particular client or the public in

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114. *Id.* at 1073.

115. *Id.*

116. *Id.* New York bases its ethical requirements on the ABA's MODEL CODE OF PROFESSIONAL RESPONSIBILITY. However, the Disciplinary Rules and the ABA's MODEL CODE OF PROFESSIONAL CONDUCT are identical with regard to fee agreements, notwithstanding the differences in terminology.

117. *Id.* See, e.g., *Matthew v. State Bar*, 781 P.2d 952, 953 (Cal. 1989).

118. *Cooperman*, 633 N.E.2d at 1073.

119. *Id.*

120. *Id.*

121. *Id.* In New York, "minimum fees" are forecasts of the least amount the client can expect to spend if the lawyer performs the specified services. N.Y. Ethics Op. 599, 1989 WL 252368 at \*1 (N.Y. Bar Ass'n Comm. Professional Ethics March 16, 1989).

general.”<sup>122</sup> Professor Brickman candidly stated, “Look, everybody in society would love to get paid in advance and get to keep the money, even if they don’t do any work. Lawyers would be the only ones who would get to do that, if the [*Cooperman*] court had decided it was ethical.”<sup>123</sup>

The *Cooperman* decisions do not involve “true retainers,” where the client pays for the lawyer’s future availability.<sup>124</sup> Brickman and Cunningham have proposed a rule that, among other things, creates a rebuttable presumption that any advance fees are refundable.<sup>125</sup> According to the rule, the lawyer would bear the burden to show that any advance fee

122. *Cooperman*, 633 N.E.2d at 1072.

123. Brickman & Cunningham 1993, *supra* note 73, at 17 n.65.

124. *Cooperman*, 633 N.E.2d at 1072.

125. The text of the proposed rule is:

*Nonrefundable Retainers Prohibited; Advance Fees Deposited to Client Trust Account.*

When a client (or any other person on behalf of a client) pays a lawyer or law firm any sum of money or delivers any other property as payment in advance for specified services to be rendered in a specified matter, no such money or property shall be or become the property of the lawyer or law firm until such time, if any, as it shall have been earned through the rendering of such services. All such money and property shall be deposited by the lawyer or law firm promptly upon receipt into a separate trust account mandated in this jurisdiction for the receipt of client property, and shall be withdrawn only when such portions of it shall have been earned through the rendering of such services. The lawyer or law firm shall promptly refund any unearned money or property to the client upon the conclusion of the representation. Any effort, by contract or otherwise, to contravene this Rule shall be null, void, and unenforceable, and lawyers or law firms involved in making any such effort shall have violated this Rule.

Brickman & Cunningham 1988, *supra* note 73, at 17 n.65.

This rule addresses fees paid by or on behalf of a client to a lawyer or law firm in advance for legal services, and its purpose is to protect the client’s discharge right. See *Martin v. Camp*, 114 N.E. 46 (N.Y. 1916). This rule prohibits any attempt by a lawyer or law firm to retain any such advance fee payment if the services are not rendered, whether because of discharge, withdrawal, or otherwise, and whether dominated as a nonrefundable fee, a minimum fee, a general retainer, or otherwise. See *In re Cooperman*, 591 N.Y.S.2d 855 (N.Y. App. Div. 1993).

The phrase “specified services to be provided in a specified matter” denotes a “special retainer” agreement. Special retainer agreements are to be distinguished from “general retainer” agreements. General retainer agreements are narrowly tailored agreements providing exclusively for a lawyer or law firm to be available to render services over a specified period of time. See *Greenbert v. Jerome H. Remick & Co.*, 129 N.E. 211 (N.Y. 1920). Special retainer agreements provide for the performance of specific legal services for a fee, which may be fixed, contingent, a percentage, or computed on an hourly basis. Because the distinction between general retainer agreements and special retainer agreements is sometimes difficult to draw and in order to protect the interests of clients, all retainer agreements are rebuttably presumed to be special retainer agreements and covered by this rule. Brickman & Cunningham 1988, *supra* note 73, at 39-40.

For a critique of the Brickman and Cunningham position, see Lubet, *supra* note 73, at 271.

is a general or true retainer.<sup>126</sup> Thus, an increasing number of courts have adopted Brickman's and Cunningham's conclusion that nonrefundable fees violate the rules of ethics or violate contract principles.<sup>127</sup>

c. Nonrefundable Fees in Arkansas: The *Arens* Case

The Arkansas Supreme Court followed similar reasoning in a case involving a nonrefundable fee. In *Arens v. Committee on Professional Conduct*,<sup>128</sup> the supreme court sanctioned two lawyers who did not refund the unearned portion of a "nonrefundable" fee.

The clients, facing the foreclosure of their farm within weeks, sought the services of Lawyer Arens.<sup>129</sup> Although the clients already had a lawyer in Kansas, the clients wanted Arens because of his reputation for handling agricultural loan cases.<sup>130</sup> The clients believed that the Arens firm would attempt to restructure their debt and then pursue lender liability actions.<sup>131</sup> The clients paid the lawyer a \$60,000 "retainer" to handle the case and the contract denominated the fee as "nonrefundable." The clients also agreed to pay an additional forty percent contingency fee.<sup>132</sup>

The lawyers obtained a temporary restraining order to stay the foreclosure sale, but the order was never made permanent.<sup>133</sup> The Arens firm spent very little time on these matters.<sup>134</sup> Thereafter, the clients lost their land in the foreclosure sale. The clients then began to have difficulty contacting Arens, and the case was assigned to another lawyer in the firm.<sup>135</sup>

126. Brickman & Cunningham 1993, *supra* note 73, at 39.

127. *AFLAC v. Williams*, 444 S.E.2d 314, 317 (Ga. 1994); *Cohen v Radio-Elects. Officers Union*, 645 A.2d 1248, 1250 (N.J. Sup. Ct. App. Div. 1994); *In re Cooperman*, 633 N.E.2d 1069, 1073 (N.Y. 1994); *Brandes v. Zingmond*, 573 N.Y.S.2d 579, 580 (N.Y. 1991).

128. *Arens v. Committee on Professional Conduct*, 307 Ark. 308, 820 S.W.2d 263 (1991).

129. *Id.* at 309, 820 S.W.2d at 263.

130. *Id.*

131. *Id.* at 310, 820 S.W.2d at 264. The court opinion notes that the contract of employment recited that the clients hired Arens to "represent us [them] in a lawsuit (if necessary) with the Farm Credit System to enforce our [their] rights under the Agricultural Credit Act of 1987 and to obtain damages caused by the Farm Credit System." *Id.*

132. *Id.* at 310, 820 S.W.2d at 264. The agreement stated:

It is our understanding that if any recovery is made over and above debt restructure or reduction, that our expenses, including the above retainer, and your firm's out-of-pocket expenses will be paid. Only thereafter will any net recovery be shared on a sixty percent (60%) to us and forty percent (40%) to your firm basis.

*Id.*

133. *Id.* at 311, 820 S.W.2d at 264.

134. *Id.* at 311, 820 S.W.2d at 264-65.

135. *Id.*

Eight months after they were hired, the Arens firm filed a lender liability action on behalf of the clients in federal district court.<sup>136</sup> This action, which included several state claims submitted under the pendent jurisdiction of the federal court, was dismissed for failure to state a claim upon which relief could be granted.<sup>137</sup>

Six months later, the clients met with Arens and two other lawyers.<sup>138</sup> The clients decided not to appeal the district court ruling but to wait to see if Congress amended the statute in order to provide a private right of action.<sup>139</sup> When the statute was not amended, the clients decided to file an action within three months in state court based on the state claims.<sup>140</sup> The clients received assurances that the law firm's principals would be involved in this litigation.<sup>141</sup> One of the principals of the law firm, Alexander, stated that little additional work needed to be done because the state claims had previously been included in the dismissed federal case.<sup>142</sup>

Once again, the clients had trouble contacting their lawyers.<sup>143</sup> The clients called several times, but never received a return call.<sup>144</sup> Eleven months after the state action was to be filed, the client sent a letter to Alexander requesting a meeting to discuss the progress of the case.<sup>145</sup> Again, the clients did not receive a reply.<sup>146</sup> Finally, almost thirteen months after the state court complaint should have been filed and almost twenty-seven months after hiring the law firm, the clients went to Lawyer Arens' office to confront him about the lack of action in the case.<sup>147</sup> During this meeting, Arens had difficulty finding the clients' case file.<sup>148</sup> Arens claimed that another lawyer named Lindzey had the file and "[h]e hasn't done a thing on it, and I'm going to fire that man."<sup>149</sup> The clients stated that they no longer had confidence in the lawyers.<sup>150</sup> Arens replied that "[y]ou don't have any money coming, and if you think you do have any money coming,

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136. *Id.*

137. *Id.* at 311-12, 820 S.W.2d at 265.

138. *Id.* at 312, 820 S.W.2d at 265.

139. *Id.* The clients understood that the Arens firm had contacts in Washington who would amend the statute in their favor. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.* at 313, 820 S.W.2d at 265.

you're going to have to hassle me for it."<sup>151</sup> Subsequently, the clients informed a secretary in the firm that they wanted an accounting and their case files.<sup>152</sup> Thereafter, the clients sent a letter to the firm requesting the same.<sup>153</sup>

Approximately one month later, the Arens' firm sent the clients a letter.<sup>154</sup> In the letter, they promised to provide an accounting and enclosed a copy of a complaint that was to be filed in state court.<sup>155</sup> The complaint was almost a replication of the complaint filed in federal court.<sup>156</sup> The caption had been changed but the references to federal law remained.<sup>157</sup> Once again, the clients wrote to the law firm requesting an accounting and the return of the case files.<sup>158</sup> Two months after the law firm's letter, they filed an ethics complaint.<sup>159</sup> Five weeks later, the law firm provided an accounting which indicated that twelve different lawyers worked a total of 1,133.25 hours on the case.<sup>160</sup> The accounting indicated that one lawyer worked 200 hours on the federal court complaint and an additional 300 to 400 hours on the state complaint.<sup>161</sup>

The Arkansas Supreme Court held that the fee was unreasonable under Rule 1.5 of the *Model Rules of Professional Conduct*.<sup>162</sup> The court noted that the amount of the fee is only one factor in determining its reasonableness.<sup>163</sup> Initially, the \$60,000 fee was not unreasonable in relation to the amount in controversy, the nature of the litigation, and the seriousness of the consequences to the clients.<sup>164</sup> Because the firm did not perform the promised services, the court upheld the committee's finding that the fees were not commensurate with the circumstances.<sup>165</sup> The court noted:

If a lawyer charges a reasonable retainer and is retained for the purpose of providing specified services, but never performs those

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151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.* at 313, 820 S.W.2d at 266.

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.* at 314, 820 S.W.2d at 266.

159. *Id.*

160. *Id.* The firm admitted that they did not keep regular work records. *Id.* They only kept sufficient documentation to track how the firm was allocating its resources. *Id.*

161. *Id.* It should be noted that the supreme court opinion places quotation marks around the word accounting, thus indicating the court's skepticism about its accuracy.

162. *Id.*

163. *Id.* at 314-15, 820 S.W.2d at 266.

164. *Id.* at 314, 820 S.W.2d at 266.

165. *Id.*

services, the fee charged would become unreasonable. Just as a lawyer cannot bill a client for work never performed in the past, a lawyer cannot bill a client for work he will never perform in the future.<sup>166</sup>

In addition, the court affirmed the committee's finding that by failing to surrender the clients' papers and property, the lawyer failed to take steps to protect the clients' interest upon termination of the representation.<sup>167</sup> The Arkansas Supreme Court did not go as far as *Cooperman*, which held that nonrefundable fees are per se unethical.<sup>168</sup> The *Cooperman* decision was based on the unqualified right of the client to discharge the lawyer.<sup>169</sup> This right would be significantly encumbered if the client could not recover an advance fee paid but not earned.<sup>170</sup> Nonetheless, the *Arens* decision does not rest on these concerns.<sup>171</sup> Instead, the *Arens* court focused on the reasonableness of the fee.<sup>172</sup> Here the amount of the fee was reasonable at the beginning of the case, but became unreasonable when the law firm refused to return the unearned fees to the clients following their discharge.

In *Arens*, the court found that the amount of the fee became unreasonable in light of the work performed (or, perhaps more accurately, not performed). This reasoning is consistent with several recent decisions from other jurisdictions.<sup>173</sup> Even though these courts did not find nonrefundable fees unethical per se, they made strong statements against nonrefundable fees.<sup>174</sup> If a fee becomes unreasonable in light of the work promised but never performed, then few fees will ever be truly nonrefundable.<sup>175</sup> Like the proposed *Restatement of the Law Governing Lawyers*, there seems to be an implicit presumption that an advance payment is not a "true retainer." In

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166. *Id.* at 311, 820 S.W.2d at 264.

167. *Id.* at 315, 820 S.W.2d at 264. The *Arens* firm may also have violated Rules 1.3 (pertaining to diligence of a lawyer) and 1.4 (regarding communications with client) of the ARKANSAS RULES OF PROFESSIONAL CONDUCT. ARPC, *supra* note 15, Rules 1.3 & 1.4.

168. *In re Cooperman*, 591 N.Y.S.2d 855, 856 (N.Y. Div. 1993).

169. *Id.*

170. *Id.*

171. *Arens v. Committee on Professional Conduct*, 307 Ark. 308, 310, 820 S.W.2d 263, 264 (1991).

172. *Id.*

173. *In re Gastineau*, 857 P.2d 136 (Or. 1993) (holding a nonrefundable fee unreasonable when a lawyer failed to do the promised work). See Or. Ethics Op. 136 (1994); LAWYERS' MAN. ON PROF. CONDUCT (ABA/BNA) 249 (1993) (providing that a fee agreement should specify what portion of the fee is nonrefundable, that a lawyer may not default in performance, and under what circumstances a portion of the "nonrefundable" fee may be refunded); *Cf. Bain v. Weiffenbach*, 590 So. 2d 544 (Fla. Dist. Ct. App. 1991) (holding that nonrefundable fees must be judged by standards of reasonableness and not by reference to nonrefundability alone).

174. *Arens*, 307 Ark. at 311, 820 S.W.2d at 264.

175. *Brickman & Cunningham* 1988, *supra* note 73, at 190.

such cases, the lawyer will bear the burden of showing that the client agreed to a true retainer arrangement and that the amount of the retainer is reasonable.<sup>176</sup> Thus, the lawyer must show that the work performed was sufficient to justify the amount of the advance fee.

Arguably, the *Arens* decision accomplishes the same result as *Cooperman*. The *Arens* court clearly stated that lawyers cannot charge for services they do not perform.<sup>177</sup> The court indicated that the lawyer has an obligation to return at least the unearned portion of the fee if the lawyer is discharged before the case is completed.<sup>178</sup> There is no room for semantics: the lawyer must earn the fee charged.

In a reply to Professors Brickman and Cunningham, Professor Steven Lubet advances a position similar to that reached in *Arens*.<sup>179</sup> Lubet suggests that although nonrefundable fees are suspect to abuse, a blanket prohibition of them goes too far.<sup>180</sup> Brickman's and Cunningham's paradigm case involves the overreaching lawyer and the vulnerable, unsophisticated client. Such a scenario undermines client autonomy.<sup>181</sup> Many clients may be capable of negotiating a fair and reasonable nonrefundable fee arrangement.<sup>182</sup> Lubet points out:

Brickman and Cunningham give little weight to the possibility that a nonrefundable retainer might be the product of rational negotiation between attorney and client. Likewise, the *Cooperman* court declared nonrefundable retainers flatly unethical thereby placing them beyond the pale of legitimate agreement. They may be right. Perhaps nonrefundable retainers are so unconscionable that no sane client would ever consent to one. That position, however, cannot be made convincing without taking greater account of client autonomy, acumen, and intelligence.<sup>183</sup>

Finally, Lubet argues that the right to discharge a lawyer is never completely unfettered.<sup>184</sup> Whenever a client has invested significant funds in a case, there will be some degree of economic pressure on the client not

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176. For a discussion of the factors establishing a true retainer, see *supra* text accompanying note 225.

177. *Arens*, 307 Ark. at 311, 820 S.W.2d at 264.

178. *Id.*

179. Lubet, *supra* note 73, at 284.

180. Lubet, *supra* note 73, at 284.

181. Lubet, *supra* note 73, at 274.

182. Lubet, *supra* note 73, at 274.

183. Lubet, *supra* note 73, at 275. Lubet raises the issue of client autonomy again in critiquing the non-waivability of Brickman's and Cunningham's absolute prohibition. Lubet, *supra* note 73, at 277-78.

184. Lubet, *supra* note 73, at 284.

to terminate the lawyer who has conducted the work.<sup>185</sup> Thus, the client's right to discharge a lawyer should not be expanded into a blanket ban on nonrefundable fees until the economics of representation are understood.<sup>186</sup> In the end, Lubet suggests that the existing principles against excessive fees and the requirement to return unearned fees may be sufficient to discipline and deter lawyers who use nonrefundable fees to "gouge, cheat, or otherwise exploit their clients."<sup>187</sup>

The *Arens*<sup>188</sup> case provides support for Professor Lubet's position. The clients were sophisticated and understood the nature of the lender liability litigation.<sup>189</sup> They negotiated the fee agreement and monitored Arens' progress on the case.<sup>190</sup> When the clients lost faith in Arens, the clients fired him, hired new counsel, and filed an ethics complaint.<sup>191</sup> Ultimately, the prohibition against excessive fees and the requirement that unearned fees be returned provided the basis for Arens' discipline.<sup>192</sup> Nevertheless, it is unfortunate that the Arkansas Supreme Court did not take this opportunity to declare nonrefundable fees unethical per se.

Using the reasonableness or clearly excessive standard does not adequately protect the client's interests and allows lawyers to engage in what amounts to misrepresentation. First, nonrefundable fees are ubiquitous in family cases, criminal defense, and bankruptcies.<sup>193</sup> In each of these areas, clients may be more vulnerable and less sophisticated than in other areas of the law.<sup>194</sup> These clients need the lawyer to be a true fiduciary--someone who will not abuse their trust even if the lawyer could deceive the client. Nevertheless, *Arens* allows lawyers to denominate their fees as non-refundable. Clients, who probably have not read the advance sheets of the Arkansas Reports, will be unaware that "nonrefundable" fees are really

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185. Lubet, *supra* note 73, at 284. *But see* Maher v. Roe, 432 U.S. 464, 481-82 (1977) (holding that a right is not impinged upon merely because that right is made more costly as long as it can be freely exercised).

186. Lubet, *supra* note 73, at 284.

187. Lubet, *supra* note 73, at 274.

188. *Arens v. Committee on Professional Conduct*, 307 Ark. 308, 820 S.W.2d 263 (1991).

189. *Id.* at 309, 820 S.W.2d 263.

190. *Id.* at 312-13, 820 S.W.2d at 265.

191. *Id.*

192. *Id.* at 314, 820 S.W.2d at 266.

193. Lester Brickman & Jonathan Klein, *The Use of Advance Fee Attorney Retainer Agreements in Bankruptcy: Another Special Law for Lawyers?*, 43 S.C. L. REV. 1037, 1068 (1992).

194. Brickman & Cunningham 1993, *supra* note 73, at 12 (providing that clients are vulnerable because of their impaired emotional and financial ability to investigate the prices of different lawyers).

refundable because the lawyer must give back any unearned portion.<sup>195</sup> If a lawyer abuses this trust and fails to return the correct portion of the advance fee, clients may not complain or may be deterred by the lawyer's false explanation that the fee is nonrefundable. In the end, only those clients sophisticated enough to complain to the appropriate disciplinary committee may receive their proper refund. Moreover, complaining to the disciplinary committee may not result in the return of the client's money. Although the committee may condition reinstatement upon the return of unearned fees, it has little authority to monitor whether the lawyer refunds the money to the client. Unlike a court judgment, the committee's order cannot be used as a basis to seize the offending lawyer's property. Even if the order provides a basis for the client to recover money from the client security fund, the amounts may not cover the client's loss. This was true in the *Arens* case because the amount of the fee far exceeded the recovery ceiling. Although a blanket prohibition does not guarantee repayment, it more strongly deters dishonest lawyers from taking such fees and more effectively prevents honest lawyers from inadvertently spending an advance fee. In the former case, the dishonest lawyer will have a difficult time disguising the nature of the fee, while in the latter case the lawyer will always have money remaining in the client trust account to reimburse clients.

Using the reasonableness standard also fails to provide guidance to lawyers who receive advance fees. First, the *Arens* case did not involve a "true" retainer. Presumably, a true retainer complies with Rules 15 and 1.5 of the *Arkansas Rules of Professional Conduct* to the extent that it can be considered earned when received.<sup>196</sup> The true retainer pays for the availability of the lawyer and is earned when received, but this is not quite as simple as it seems.<sup>197</sup> It is unclear what a reasonable price might be for a lawyer's availability. It should not be the same as the total fee because the total fee includes both availability and specific services. Moreover, the fee should have some connection to the costs the lawyer incurs for being available. That line, however, is indistinct.<sup>198</sup>

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195. Brickman, *supra* note 64, at 654-75.

196. ARPC, *supra* note 15, Rules 1.5 & 1.15.

197. ARPC, *supra* note 15, Rules 1.5 & 1.15.

198. For a catalogue of factors to be considered in assessing the reasonableness of general retainers, see Mich. Ethics Op. R-10 (1990) (assessing the following factors: the complexity of the case; the likelihood of preclusion from the lawyer's other work; whether the agreement is in writing; the intelligence, maturity, and sophistication of the client; and whether or not the lawyer actually incurs some expenses). For a list of the factors that go into an assessment of minimum fees, see N.Y. Ethics Op. 1991-3, 1991 WL 639877 \*3 (N.Y. Bar Ass'n Comm. on Professional & Judicial Ethics, May 16, 1991).

Using the reasonableness standard also provides no guidance to the lawyer regarding where the advance fee should be deposited. If the fee is not the lawyer's until earned, the fee must be deposited in the client trust account.<sup>199</sup> But there is a logical inconsistency in claiming that a fee reasonable in its inception becomes unreasonable when the lawyer will not refund a portion of it. Most problems with trust accounts arise in situations where the lawyer cannot avoid the temptation to borrow client money. Thus, lawyers feeling financial pressure, suffering from substance abuse, or simply acting sloppily in maintaining their business records often convert client funds. Telling these lawyers that they may now deposit "nonrefundable" fees in their accounts only increases the chance that the money will not be available when a client demands the return of an unearned fee. The lawyer may then have to borrow other clients' funds to meet his current obligations. Eventually, the spiral leads to conversion without hope of reimbursement and then to disbarment. One commentator described the process in this way:

So there you are. The money is in your general account, yet you haven't done the work. You are likely to spend the money before you ever do the work. It is just like using credit cards to live beyond your means. Soon you have spent much more than you can ever pay--or at least comfortably pay. Using non-refundable fees can tempt you to take on clients for the wrong reasons. For example, accepting the case means that you will have immediate cash. This opportunity to pay your overhead or yourself is likely to color your decision to accept new clients, even though you are already unable to meet obligations to other clients. Soon you have spent the money from the new client, without doing the work, and you accept more fees from another client because you again are in need of cash. Your motivation to do work at all wanes, because you don't have to do the work first in order to get paid. There you are sliding down the slippery slope toward ethics and legal malpractice complaints, including charges that your fees were excessive and complaints that you failed to represent your client properly. Why tempt fate? Instead, reduce your exposure to claims by requiring a retainer fee up front, without making it non-refundable. This arrangement lets you hold the client's money in trust until you do the work. In this way you gain all the advantages of the non-refundable fee, with none of the dangers.<sup>200</sup>

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199. Some jurisdictions have held that advance fees may be deposited in the lawyer's business account but the lawyer still has an obligation to return any unearned portion of the fee upon discharge. This suggestion invites problems for the lawyer and the bar.

200. Barbara S. Fishleder, *Why Tempt Fate?*, 54 OR. ST. B. BULL. 33 (May 1994).

In sum, the reasonableness of a fee is always an issue. That is, all fees, no matter what they are called, must be commensurate to the service provided. Analyzing the nonrefundable fee under this general standard adds nothing in the way of client protection or lawyer guidance. Because the *Arens*<sup>201</sup> decision makes almost all fees subject to refund upon discharge, lawyers would be well advised not to read *Arens* as an invitation to use "reasonable" nonrefundable fees.

#### d. State Ethics Opinions

The most comprehensive ethical opinion on the issue came in Michigan Ethics Opinion RI-69. Lawyers were advised that according to the *Model Rules of Professional Conduct* Rule 1.15, a lawyer's property has to be segregated from the property connected with the representation of the client or third person.<sup>202</sup> The lawyer has to place all funds the client paid to the lawyer, or firm, other than advances for costs or expenses, in an interest-bearing trust account maintained in the state in which the law office is situated.<sup>203</sup> No funds belonging to the lawyer or firm are to be deposited in that account.<sup>204</sup> Additionally, the lawyer is responsible for maintaining complete records of those account funds and of other property kept by the lawyer, and the record must be preserved for a period of five years after termination of the representation.<sup>205</sup>

A lawyer can charge a flat or fixed fee for services rendered to a client, and nonrefundable fees can also be flat or fixed under the proper circumstances.<sup>206</sup> Unearned retainer fees have to be deposited in the firm's client trust account.<sup>207</sup> Under the *Model Rules of Professional Conduct* Rule 1.15(a) advances for costs or expenses are exempt from deposit in the trust account. However, deposits of unearned lawyer fees are not exempt because a lawyer cannot withdraw "anticipated fees."<sup>208</sup> The lawyer has to explain to the client that the retainer is considered a deposit, inform the client that

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201. *Arens*, 307 Ark. at 308, 820 S.W.2d at 263.

202. Mich. Ethics Op. RI-69, 1991 WL 519888, at \*1 (Mich. Standing Comm. on Professional & Judicial Ethics Feb. 14, 1991) (quoting MRPC, *supra* note 45, Rule 1.15(a)).

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.* (citing Mich. Ethics Op. RI-10 (1989); Mich. Ethics Op. RI-50 (1990)).

207. *Id.* (citing Mich. Ethics Op. RI-7 (1989)).

208. *Id.*

withdrawals will be made for fees, and advise the client that no withdrawals will be for more than the amount of the bill.<sup>209</sup>

A nonrefundable retainer can be deposited directly into the firm's operating account.<sup>210</sup> If any portion of the retainer is unearned because it is paid in advance for future legal services based on an hourly, flat, or percentage basis, it is not a nonrefundable retainer.<sup>211</sup> The committee recognized that semantics play a part in determining how funds are handled.<sup>212</sup> If the money is labeled as "nonrefundable," then it does not have to be deposited in a trust account.<sup>213</sup> This is because nonrefundable retainers are nonrefundable and are earned at the time of receipt.<sup>214</sup> However, the retainer has to be proportional to its intended purpose; it cannot be excessive in relation to the purpose for the retainer.<sup>215</sup> "Flat or fixed fee" funds that are charged in advance with no agreement between the client and the lawyer as to refundability because they are for future services are unearned and have to be placed in the client trust account.<sup>216</sup> Therefore, these funds must remain in the client trust account until the lawyer performs the services to which the client is entitled.<sup>217</sup>

If the lawyer is paid on an hourly basis and has a retainer, the lawyer can withdraw the fee from the trust account as the agreed services are performed.<sup>218</sup> *Model Rules of Professional Conduct* Rule 1.5 imposes certain requirements relating to client communications and client consent for fees.<sup>219</sup> A lawyer and client are not prohibited from agreeing that a portion of the fixed fee will be deemed "earned" by the lawyer.<sup>220</sup> Thus, the lawyer would be entitled to withdraw that particular portion of the fee at certain times or for certain events.<sup>221</sup> Both parties can agree on designating when the fees are to be earned or what events constitute fees being earned, such as the completion of certain tasks or any other basis to which the parties mutually agree.<sup>222</sup> However, a lawyer cannot enter into an agreement for,

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209. *Id.*

210. *Id.* at \*2.

211. *Id.*

212. *Id.*

213. *Id.*

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.* Filing a plea might constitute earning a portion of the fee. *Id.*

charge, or collect an illegal or clearly excessive fee.<sup>223</sup> The fee is excessive when "a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee."<sup>224</sup>

The Michigan opinion noted that in the *Model Rules of Professional Conduct* Rule 1.5(a), there are factors to consider in determining if a fee is reasonable: the time and labor required, the novelty and difficulty of the questions involved, and the skill needed to perform the legal services properly; the likelihood, if apparent to the client, that the lawyer will be precluded from accepting any other employment if that particular employment is accepted; the fee is similar to the fee customarily charged for similar services in the locality; the amount involved and results obtained; the time limitations imposed by the client or by the circumstances; the nature and length of the professional relationship with the client; the experience, reputation, and ability of the lawyer or lawyers performing the services; and whether the fee is fixed or contingent.<sup>225</sup> If the lawyer does not regularly represent the client, the rate of the fee must be communicated to the client, preferably in writing, before or within a reasonable time after representation commences.<sup>226</sup>

Even with a fixed fee, if the representation is interrupted before all the services have been rendered, the client is entitled to a partial refund of the advanced fee.<sup>227</sup> If the contract does not state when the lawyer has "earned" portions of the fixed advance fee, the *Model Rules of Professional Conduct* Rule 1.5(a) will be applicable in determining what amount the client will be refunded.<sup>228</sup> The Michigan opinion also noted that when the contract states the terms agreed to by the lawyer and client regarding performance of services under a fixed fee agreement, it assists the lawyer in determining when fees are "earned" and provides a basis for calculating any refund the client may be entitled to if the representation is interrupted.<sup>229</sup> If the contract does not state which portions of the fixed or flat fee are earned, the lawyer is required to complete all contracted services before being able to withdraw any amount of an advanced flat or fixed fee from the client trust account for the lawyer's personal use.<sup>230</sup>

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223. *Id.*

224. *Id.* (citing MRPC, *supra* note 43, Rule 1.5(a)).

225. *Id.* at \*3. See MRPC, *supra* note 43, DR 2-106 (1980).

226. *Id.*

227. *Id.*

228. *Id.*

229. *Id.*

230. *Id.*

## e. Other Significant Cases

The issue in *Wright v. Arnold*<sup>231</sup> was whether a nonrefundable retainer fee based on an hourly rate for legal services could be retained regardless of whether the lawyer rendered the contemplated services. The court only dealt with the nonrefundable retainer fee in an hourly contract and specifically stated that it did not address the issue regarding a contingency fee contract or a fixed-rate contract.<sup>232</sup>

In *Wright*, the client hired the lawyer to collect back child support payments.<sup>233</sup> The client signed a document agreeing to pay a \$4000 nonrefundable retainer for whatever services were rendered.<sup>234</sup> The client also agreed to pay \$100 per hour for in-office time and \$125 for in-court time.<sup>235</sup> The client claimed she did not know that the retainer was nonrefundable because she did not read the contract before signing it.<sup>236</sup> Within thirteen days after signing the contract, the client fired the lawyer.<sup>237</sup>

The court held that a nonrefundable retainer fee puts impermissible restraints on the client's right to discharge the lawyer.<sup>238</sup> The relationship involves trust, reliance, and confidence, and when any part of the relationship is destroyed, the client has the absolute right to discharge the lawyer.<sup>239</sup> The court stated that the *Oklahoma Code of Professional Conduct* provided that when a lawyer is terminated, the lawyer has to refund any advance fee payment that has not been earned.<sup>240</sup> A contract between the lawyer and client for a certain fee would not be upheld or enforced when the fee is so excessive that it shows the lawyer is trying to take advantage of the client.<sup>241</sup>

The lawyer argued that he had to rearrange his schedule and set aside other previously scheduled work, that the fee covered actual hours spent and expenses incurred, and that he had to forego other potential employment.<sup>242</sup> The court said that these factors are only relevant to the issue of whether the fee was reasonable based upon the services rendered, but these factors were not relevant to the issue of whether the nonrefundable retainer was

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231. *Wright v. Arnold*, 877 P.2d 616 (Okla. Ct. App. 1994).

232. *Id.* at 619.

233. *Id.* at 617.

234. *Id.*

235. *Id.*

236. *Id.*

237. *Id.* at 618.

238. *Id.*

239. *Id.*

240. *Id.* (quoting *White v. American Law Book Co.*, 233 P. 426, 427 (Okla. 1924)).

241. *Id.*

242. *Id.* at 619.

enforceable.<sup>243</sup> The court determined that the client is liable to the lawyer under a theory of quantum meruit for the reasonable value of services performed and remanded the case to the trial court to determine the reasonable value of the lawyer's services.<sup>244</sup>

California recently dealt with nonrefundable fees in *In re Fonte*.<sup>245</sup> Lawyer Fonte argued that he did not have to account for the fee advanced in a case because it was a retainer and was earned upon receipt.<sup>246</sup> He further asserted that Disciplinary Rule 4-100(B)(3) did not contain the word "fees," and therefore, fees are not included in the rule's accounting requirement.<sup>247</sup> Thus, he argued that the rule only applies to funds received from the client and placed in a trust account or property received from the client or a third party for the client.<sup>248</sup> The court disagreed and stated that the rule requires a lawyer to maintain records and account for "all funds, securities, and other properties of a client coming into the possession of the lawyer or law firm."<sup>249</sup> The court also stated that a true retainer fee is a fee paid solely to guarantee the availability of the lawyer for a period of time and it is earned upon receipt, regardless of whether the lawyer actually performs any services for the client.<sup>250</sup> The court further provided that the clients were paying for more than availability because there was no indication that Fonte made any particular provision to allot time specifically to the client's claims or that he turned away other business to handle their matter.<sup>251</sup> In looking at contested fees, the court stated that a lawyer is not permitted to set fees unilaterally and if a client contests the fees charged, the lawyer has to place the disputed funds in a trust account until the dispute is resolved.<sup>252</sup> The court held that Fonte was not only obligated to maintain adequate records of fees drawn against the \$5000 retainer and any subsequent payments for services, but also to provide the clients with an appropriate accounting.<sup>253</sup>

The Oregon Supreme Court recently held that failing to return an unearned fee caused the fee to be excessive even though the fees may have been reasonable at the inception of the representation.<sup>254</sup> In a disciplinary

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243. *Id.*

244. *Id.*

245. *In re Fonte*, 1994 WL 92387 \*1 (Cal. Bar Ct. March 16, 1994).

246. *Id.* at \*2.

247. *Id.*

248. *Id.*

249. *Id.* at \*3.

250. *Id.* at \*2 (citing *Baranski v. State Bar*, 24 Cal. 3d 153, 164 n.4 (1979)).

251. *Id.* at \*3.

252. *Id.*

253. *Id.* at \*4.

254. *In re Gastineau*, 857 P.2d 136, 139 (Or. 1993).

proceeding, Lawyer Gastineau was charged with collecting excessive fees, incompetent or neglectful representation, failing to carry out contract employment, and failing to respond in a timely manner to the state bar's request for information regarding the complaints lodged against him.<sup>255</sup>

Five clients complained that Gastineau entered into a "nonrefundable" fee contract with them between August 1988 and September 1989, but the lawyer failed to complete any services under the contracts.<sup>256</sup> In determining if these nonrefundable fee contracts were reasonable, the court considered several factors similar to those provided in Michigan Ethics Opinion RI-69.<sup>257</sup> The court in *Gastineau* also adopted the reasonable person standard stating that if a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee, then the fee is excessive.<sup>258</sup>

In *Gastineau*, the defendant used a contract form that required advance payment of a fixed-fee amount in return for the lawyer's promise to perform a particular professional task.<sup>259</sup> The court noted that the task involved was generally stated and handwritten into the printed form contract.<sup>260</sup> The fee was clearly described as nonrefundable and the terms of the contract only allowed the lawyer the option to terminate the contract for lack of payment by the client.<sup>261</sup> The court also noted that the lawyer's contract was inconsistent in some areas regarding payment of the retainer. For example, one part of the agreement stated that the fee had to be paid in full before there was representation, but another part of the agreement stated that the retainer would be applied to the fees and costs earned by the lawyer.<sup>262</sup> The court concluded that the lawyer and the clients agreed that the stated fee was for the lawyer's efforts, and not for any "hoped-for" results.<sup>263</sup>

In dealing with the issue of excessive fees, the lawyer argued that there was no violation because the fees were reasonable at the time he and the client entered into the initial agreement.<sup>264</sup> The court determined that the lawyer violated Disciplinary Rule 2-106(A) when he entered into the agreement, collected the nonrefundable fee, and failed to perform according

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255. *Id.* at 137.

256. *Id.*

257. *Id.* Mich. Ethics Op. RI-69, 1991 WL 519888 \*1 (Mich. Standing Comm. on Professional & Judicial Ethics Feb. 14, 1991). For a list of these factors, see text accompanying note 225.

258. *Gastineau*, 857 P.2d at 137. See Mich. Ethics Op. RI-69 at \*1.

259. *Gastineau*, 857 P.2d at 137.

260. *Id.*

261. *Id.*

262. *Id.*

263. *Id.* at 139.

264. *Id.*

to the agreement.<sup>265</sup> Disciplinary Rule 2-106(A) also provides that a lawyer cannot enter into an agreement for, collect, or charge an illegal or excessive fee.<sup>266</sup> Because the lawyer failed to perform according to the contract, his fees were excessive.<sup>267</sup> The court noted that this decision related to flat fee agreements only and did not necessarily apply to contingent fee agreements.<sup>268</sup>

In *In re Cain*, Lawyer Cain represented clients in a quiet title action.<sup>269</sup> The clients retained Cain's firm to clear title to trust property of a long-term lease with an option to purchase.<sup>270</sup> The clients were unsophisticated in real estate matters, but Cain knew that the nine acres in dispute was quite valuable when he accepted representation of the clients.<sup>271</sup> Cain and the clients entered into a written retainer agreement which provided that the clients would pay a nonrefundable retainer fee of \$5000 to his firm, plus a contingency fee of 10% of the gross value of the clients' entire nine-acre property.<sup>272</sup> However, the agreement did not specify the time at which the property would be valued to calculate the contingency, nor did the agreement clarify whether costs and expenses would be deducted from the recovery before or after the 10% gross value calculation was made.<sup>273</sup> Cain's clients lost the quiet title action. Cain explained the court's ruling to his client and advised them of their options.<sup>274</sup> They requested that Cain appeal the ruling and agreed, in writing, to increase the contingent fee to 20% of the gross value of the property for the appeal.<sup>275</sup>

Cain filed the appeal, but while the appeal was pending, Cain negotiated with the lessees on his clients' behalf and also negotiated with outside prospective buyers for the property.<sup>276</sup> The clients agreed to sell the property to an outside buyer in October 1979. The lessees stipulated to a dismissal of the appeal with prejudice and entered into a mutual cancellation of the lease.<sup>277</sup> In May 1981, the clients paid Cain and his firm in full for the legal services.<sup>278</sup>

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265. *Id.* at 140.

266. *Id.* at 139.

267. *Id.* at 140.

268. *Id.* at 139.

269. *In re Cain*, 852 P.2d 407, 410 (Ariz. 1993).

270. *Id.* at 408.

271. *Id.*

272. *Id.*

273. *Id.*

274. *Id.*

275. *Id.*

276. *Id.* at 409.

277. *Id.*

278. *Id.* A few months later, Cain borrowed \$150,000 from the clients for a two year

The committee applied the ABA's Standards for Imposing Lawyer Sanctions in determining the appropriate sanction for Cain. The committee that initially heard the complaint found that Cain violated Disciplinary Rule 2-106(B) for charging excessive fees. The committee looked to the ABA's standards, which reprimand lawyers who violate a professional duty by charging excessive fees.<sup>279</sup> The committee found that Cain's retainer agreement created a conflict of interest in violation of Disciplinary Rule 5-101 because it failed to specify clearly the nature of the contingency.<sup>280</sup> The committee also found that Cain violated Disciplinary Rule 5-104 when he borrowed funds from the clients and sold a promissory note to them without advising them to seek independent counsel.<sup>281</sup> The committee applied the ABA's standard which suspends a lawyer who knows of a conflict of interest but fails to disclose the conflict to his client.<sup>282</sup> Cain's agreement was ambiguous and a conflict of interest resulted.<sup>283</sup> In addition, he failed

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period with interest payable at the rate of 17% per annum. Later that day, he borrowed \$50,000 under the same terms. However, the \$150,000 was an unsecured loan for nearly two years and the \$50,000 loan was never secured. *Id.* Although he did not advise the clients to seek independent counsel in order to determine the feasibility of lending him the funds, he did repay both loans in full. *Id.* Nevertheless, Cain's conduct exhibited dishonesty, fraud, deceit, and misrepresentation when he failed to secure the loan from his clients in direct violation of DR 5-104 (1980). *Id.* at 410. In September 1981, Cain agreed not to charge the clients additional attorney's fees in partial consideration for the loans the clients had made to him. *Id.* at 409. At that time, there were no outstanding attorney's fees. *Id.*

In November 1981, Cain sold the clients a \$29,000 promissory note for \$21,000, but he failed to mention that he had purchased the note for \$17,000. *Id.* Again, he did not advise the clients to seek independent counsel regarding this transaction. *Id.* In February 1983, the clients and their new attorney requested that Cain repurchase the note for \$21,000. *Id.* The clients kept the interest paid on the note to that date. *Id.* In December 1981 and January 1982, Cain made two loans to the clients totalling \$4350. *Id.* Cain repaid himself from the clients' trust fund for more than what he was entitled to, and he claimed the overpayment was the result of a bookkeeping error. *Id.*

In April 1982, Cain converted \$5000 of the clients' trust funds for his own use and possession without permission or authority to do so. *Id.* He claimed the funds were for delinquent lawyer's fees, but the check stub indicated it was for an advance and retainer for attorney's fees. *Id.* The stub also noted that it was a loan to him. *Id.* Cain maintained inadequate records of the clients' funds and failed to keep the clients' funds segregated from his funds; he inaccurately kept records of the hours spent on the clients' work; he did not inform the clients of their account balances; and he never sent statements or notice to the clients of funds disbursed or received by the trust. *Id.*

In February 1989, Cain voluntarily placed himself on inactive status and has not practiced law since that time. *Id.* at 409-10.

279. *Id.* at 410.

280. *Id.* (citing MCPR, *supra* note 45, DR 5-101 (1980)).

281. *Id.* (citing MRPC, *supra* note 43, DR 5-101 (1980)).

282. *Id.*

283. *Id.*

to advise his clients to seek independent counsel regarding the transactions between him and his clients.<sup>284</sup>

Additionally, the committee found that Cain violated Disciplinary Rule 9-102(A) and (B) as well as Disciplinary Rule 6-1-1(A)(3) because he failed to keep his funds and his clients' funds separate and he failed to maintain adequate records.<sup>285</sup> The committee looked to Standard 4.41 which provides for disbarment where the lawyer fails to perform services for the client, or where there are patterns of neglect causing serious or potentially serious injury to the client.<sup>286</sup> The committee found that the nonexistent record-keeping and the commingling of funds could potentially cause serious injury to the clients.<sup>287</sup> The committee also stated that Standard 4.41 is applicable where the lawyer knowingly converts client property, as Cain did when he knowingly overpaid himself \$5000 from the clients' account without their permission.<sup>288</sup>

The committee then turned to aggravating and mitigating factors in the case. The aggravating factors included dishonesty, a pattern of misconduct, multiple offenses, refusal to acknowledge the wrongful nature of the conduct, and the vulnerability of the clients. For mitigation, the committee looked to Cain's record of no prior disciplinary measures, Cain's cooperative attitude toward the proceedings, and the remorse exhibited by Cain for his conduct.<sup>289</sup>

The committee recognized that sanctions should be consistent with the most serious instance of misconduct involving multiple violations; nevertheless, the committee made exceptions under the circumstances.<sup>290</sup> There was substantial delay in processing the case, which resulted in prejudice to Cain. Although the committee made it clear that delays will often occur and future respondents should not presume that "credit" will be given for time lapses, the delay in this case happened throughout the disciplinary process and none of the delays were attributable to Cain.<sup>291</sup>

Because Cain had terminated his practice in 1989 and there were unique delays in the proceedings, the court recommended a two-year suspension for Cain.<sup>292</sup> Nonetheless, it is interesting to note that the

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284. *Id.*

285. *Id.* See DR 9-102(A)-(B) (1980); DR 6-101(A)(3) (1980).

286. *Cain*, 852 P.2d at 411. See ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS Standard 4.41 (1991).

287. *Cain*, 852 P.2d at 411.

288. *Id.*

289. *Id.*

290. *Id.*

291. *Id.* at 412.

292. *Id.*

committee did not think it was fair to impose a four-year suspension. If this sanction had been imposed, Cain could not reapply for admission to the bar until 1996, seven years after terminating his practice.<sup>293</sup> The committee stated that the *Rules of Professional Conduct* do not contemplate a suspension or disbarment that lasts more than five years. Based on these facts, the committee determined that a seven-year suspension would be an unfair sanction.<sup>294</sup>

In *Stegall v. Mississippi Bar*, Mississippi disbarred a lawyer for repeatedly keeping unearned fees.<sup>295</sup> Lawyer Stegall's violations included neglect of cases, failure to reasonably inform clients of the progression of their cases, failure to return clients' property and render accounting of clients' funds, and misrepresentation of the services to be provided in exchange for quoted fees.<sup>296</sup>

The facts are basically the same in both the cases against Stegall. He represented prison inmates who were seeking to file a motion for post-conviction relief.<sup>297</sup> Stegall advised the inmates that the fees for representation and filing the motion were \$5000.<sup>298</sup> He spoke with family members of the inmates who agreed to pay the fees in two installments.<sup>299</sup> Stegall, however, never explained that the first \$2500 was nonrefundable.<sup>300</sup> Furthermore, Stegall never clarified the time frame of "before he did the case" or "prior to hearing" for payment of the remaining \$2500 to ensure commencement of representation.<sup>301</sup>

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293. *Id.*

294. *Id.*

295. *Stegall v. Mississippi Bar*, 618 So. 2d 1291, 1296 (Miss. 1993).

296. *Id.* at 1294.

297. *Id.* at 1292-93.

298. *Id.*

299. *Id.*

300. *Id.*

301. *Id.* at 1292-93. One inmate, Roger Harveston, sent Stegall a letter requesting representation. *Id.* The deadline for filing his motion was August 20, 1989. *Id.* at 1292. Because there was no clarification of exactly when Harveston's family would pay the rest of the retainer fee, they expected to pay on the day of trial. *Id.* His family testified that if the fee had to be paid before filing, it would have been paid because they borrowed the whole \$5000 and could have paid immediately. *Id.* As the deadline approached, Harveston's father repeatedly attempted to contact Stegall. *Id.* Harveston also tried to contact him to request a status report on his case and eventually a refund of the money and a return of his case materials. *Id.* Stegall no longer responded to either of them. *Id.* Stegall alleged that he was still waiting on the funds from Harveston's family to file the motion and that a refund was not part of the agreement. *Id.* at 1292. Stegall also admitted that Harveston's materials were returned over a year after they were requested, and he attributed it to an office error. *Id.* On August 8, 1989, Harveston began to draft his own motion from memory and filed it *pro se* on August 15, 1989. *Id.*

In the case of Jerry Fairman, another inmate who sought Stegall's representation,

Stegall testified that he called the fees retainers and that the retainers were "payable before hearing" because the fees became nonrefundable in the event that the final installment was not paid.<sup>302</sup> Stegall conceded that he interpreted the fee agreements to mean that, in cases where the second payment was not made, he could keep the initial payment without performing any services.<sup>303</sup>

In determining the severity of the sanctions to be imposed, the court considered five factors: (1) the nature of the misconduct; (2) the need to deter similar misconduct; (3) the preservation of dignity and reputation of the legal profession; (4) the protection of the public; and (5) the sanctions imposed in similar cases.<sup>304</sup> The court noted that its decision was to be based in part on the three-fold purpose of punishment such as: the obvious intent to punish the wrongdoer appropriately for the offense; utility in deterrence of further violations by the offender and the general community; and reinforcing confidence of the general public in the ability of society to govern itself.<sup>305</sup>

The court recognized that the ultimate sanction imposed depended on the aggravating and mitigating circumstances. As aggravating factors, the court considered prior disciplinary offenses, dishonesty, patterns of misconduct, multiple offenses, refusal to acknowledge the wrongful nature of the conduct, and substantial experience in the practice of law.<sup>306</sup> The court acknowledged that Stegall had a history of complaints against him, two of which resulted in private reprimands.<sup>307</sup> In the first situation, Stegall was found to have neglected a matter after receiving a fee from his client. In the other matter, Stegall failed to return the clients' papers and promptly refund any unearned fees paid in advance when his employment was terminated.<sup>308</sup> The mitigating factors were Stegall's virtuous reputation among his peers, his cooperation during the proceedings, and his service in the United States Army.<sup>309</sup> The court held that disbarment was proper,

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virtually the same situation occurred. On January 20, 1989, Stegall agreed to file his motion and stated his retainer fee would be \$5000. *Id.* On April 7, 1989, Stegall received \$2500 from Fairman's mother. *Id.* Beginning in August 1989, Fairman and his family began to write and telephone Stegall for status reports regarding his case. *Id.* In November, Fairman's mother wrote Stegall stating that seven months had passed without a status report. *Id.* She requested a refund and a return of her son's case materials if no work was to be done. *Id.*

302. *Id.* at 1293.

303. *Id.*

304. *Id.* at 1294.

305. *Id.* at 1294-95.

306. *Id.* at 1295.

307. *Id.*

308. *Id.*

309. *Id.* at 1296.

because Stegall failed to learn from his four prior reprimands and admonitions and continued to deal with his clients in a manner that left them uninformed, frustrated, and justifiably dissatisfied with the lack of representation.<sup>310</sup>

An Ohio lawyer received an indefinite suspension for charging excessive fees and engaging in deceptive conduct.<sup>311</sup> This case involved consolidated complaints against the lawyer for disciplinary infractions brought by the bar and a complaint from clients who the lawyer represented in employment discrimination cases.<sup>312</sup> In the first situation, the lawyer quoted clients an hourly fee of \$150 or alternatively, a "nonrefundable retainer" of \$12,000, plus a contingency fee of 40% of any recovery.<sup>313</sup> The clients tendered \$6000, a portion of the retainer fee and agreed to pay the remainder in installments including a \$100 consultation fee.<sup>314</sup>

Within a few months, the lawyer advised his clients that they had no case and should settle for six months severance pay.<sup>315</sup> The clients stated that the lawyer also agreed to forgo any contingency fee and the balance owed on the retainer fee.<sup>316</sup> In October 1990, the clients took his advice and settled.<sup>317</sup> The clients and their employer agreed that the clients could keep the disability payments received through October, and the employer agreed to give her both a neutral employment reference and a lump sum settlement of \$5,945.23 representing two and one-half months of severance pay.<sup>318</sup> At the settlement, the clients expected the employer to give them a check for the settlement amount, payable to them.<sup>319</sup> However, the lawyer had privately requested the employer to add his name to the check.<sup>320</sup> He then falsely suggested to the clients that the check amount was incorrect and that he would send them their money within a few days.<sup>321</sup> After the settlement, the clients fired the lawyer.<sup>322</sup>

The lawyer deposited the check in his IOLTA trust account, without the clients' authorization or endorsement, and later transferred the funds to his

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310. *Id.*

311. *Cuyahoga County Bar Ass'n v. Okocha*, 632 N.E.2d 1284, 1286 (Ohio 1994), *cert. denied*, 115 S.Ct 751 (1995).

312. *Id.* at 1285.

313. *Id.*

314. *Id.*

315. *Id.*

316. *Id.*

317. *Id.*

318. *Id.*

319. *Id.*

320. *Id.*

321. *Id.*

322. *Id.*

personal account.<sup>323</sup> The lawyer then billed the clients for \$2,487.71, the balance of the \$6000 retainer, plus 40% of the settlement, minus the \$5,945.23 he had received in the settlement.<sup>324</sup> When the clients refused to pay this amount, the lawyer sued and the clients cross-claimed. A jury awarded the clients \$5,945.23 in compensatory damages and \$50,000 in punitive damages.<sup>325</sup>

In the hearing for disciplinary charges before the bar, the panel found that the lawyer had falsely informed the bar that the employer requested his name be added to the check.<sup>326</sup> Furthermore, the panel found that the lawyer gave false testimony regarding the fee agreement and his removal of the settlement from the IOLTA account.<sup>327</sup>

In the second situation, the lawyer consulted with a client regarding wrongful termination of employment.<sup>328</sup> On September 10, 1990, the client signed an agreement promising to pay a nonrefundable retainer fee of \$12,000 and an additional contingency fee of 40% of any recovered sums.<sup>329</sup> A week later, the client notified the lawyer that she no longer wanted him to represent her.<sup>330</sup> The client received a bill for \$16,469.79, which consisted of the \$2000 retainer, \$2320 for an associate's services, and \$2100 for the lawyer's services and expenses.<sup>331</sup> The lawyer also failed to return the client's documents after he was fired.<sup>332</sup>

The panel determined that the lawyer had violated Disciplinary Rule 2-106(A) by charging excessive fees in both instances.<sup>333</sup> As a result of his violations, the lawyer was suspended indefinitely from the practice of law in Ohio.<sup>334</sup>

The Advisory Committee of the New Jersey Bar stated that non-refundable retainers are not per se unethical, but are always subject to the overriding precept that any fee arrangement must be reasonable and fair to

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323. *Id.*

324. *Id.*

325. *Id.*

326. *Id.*

327. *Id.*

328. *Id.*

329. *Id.*

330. *Id.* at 1285-86.

331. *Id.* at 1286.

332. *Id.*

333. *Id.* The panel also found that the lawyer violated DR 1-102(A)(4) and DR 9-102. *Id.* These rules govern conduct that involves dishonesty, fraud, deceit or misrepresentation, and preserving the identity of a client's funds and property, respectively. *Id.* The lawyer violated these rules when he withdrew the client's funds from his escrow account without the client's consent after he had been discharged and when he knowingly made misrepresentations to the bar about the clients. *Id.*

334. *Id.*

the client.<sup>335</sup> It also stated that the applicable *Model Rules of Professional Conduct* do not deal explicitly with the subject of nonrefundable retainer fees, but there are eight factors to be considered in determining if a fee is reasonable.<sup>336</sup> One factor that inferentially supports the view that a retainer may be fully earned is “the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.”<sup>337</sup> Therefore, the fee is nonrefundable when the lawyer is able to provide the anticipated representation, whether or not the lawyer actually provides the services.<sup>338</sup> Nonetheless, the committee provides that it did not directly consider the question of nonrefundable retainer fees.<sup>339</sup>

The Committee stated that the *Model Rules of Professional Conduct* Rule 1.16(d) deals with termination of representation and mandates the refund of any advance fee payment that has not been earned.<sup>340</sup> However, the rule does not address the question of whether a fee may be considered earned upon receipt or under what circumstances a fee may be considered “earned” upon receipt.<sup>341</sup> Thus, the rule, by its terms, does not preclude nonrefundable retainers.<sup>342</sup> In New Jersey, courts have not held that a general retainer fee must be deposited in a trust account or that Disciplinary Rule 9-102(A) clearly requires that a general retainer fee be deposited.<sup>343</sup> New Jersey follows the rule that a general retainer fee does not have to be deposited in a lawyer’s trust account, absent an explicit understanding that the retainer be separately maintained.<sup>344</sup> Further, the New Jersey Committee on the *Model Rules of Professional Conduct* stated that “[r]equiring [the] deposit of such funds in a trust account would not prevent lawyers from failing to perform work that they have undertaken” and that “such a requirement would interfere significantly with the variety of retainer fee arrangements that have served the interests of both lawyers and their clients.”<sup>345</sup> The New Jersey Supreme Court adopted the committee’s view which does not require a retainer fee to be deposited in the lawyer’s trust

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335. N.J. Ethics Op. 644, 1990 WL 441610, at \*1 (N.J. Advisory Comm. on Professional Ethics Oct. 11, 1990).

336. *Id.* For a list of these factors, see *supra* text accompanying note 165.

337. N.J. Ethics Op. 644, at \*1.

338. *Id.*

339. *Id.*

340. *Id.*

341. *Id.*

342. *Id.*

343. *Id.* at \*2.

344. *Id.*

345. *Id.*

account.<sup>346</sup> The court also adopted a written communication requirement.<sup>347</sup> Thus, if a lawyer does not regularly represent a client, *Model Rules of Professional Conduct* Rule 1.5(b) requires a written communication from the lawyer to the clients explaining the basis or rate of the fee.<sup>348</sup> However, the court did not adopt the committee's suggestion that the disposition of advance payments should be included in such written communications.<sup>349</sup>

The committee stated that because of the "explicit rejection" of the trust fund approach by both the court and its committee, it can be concluded that, in New Jersey, the disposition of retainer fees may properly be left to an agreement between the parties.<sup>350</sup> Therefore, the committee held that it is not unethical for a lawyer to charge a nonrefundable retainer, provided that the fee arrangement is fair and reasonable under the circumstances.<sup>351</sup> The committee, however, did find that an initially reasonable nonrefundable retainer arrangement could become unreasonable because of subsequent unforeseen circumstances.<sup>352</sup> Any unused portion of a retainer, including nonrefundable retainers, should be returned if it would be unconscionable for the lawyer to keep the retainer.<sup>353</sup>

In *AFLAC v. Williams*,<sup>354</sup> the Georgia Supreme Court discussed whether a client must pay legal fees to a lawyer under a long-term retainer contract and whether a damages clause was a liquidated damages provision or a penalty. In *Williams*, the chief executive officer ("CEO") of AFLAC and the lawyer entered into a seven-year agreement in 1987 for legal services on an "as needed basis."<sup>355</sup> The contract contained an automatic renewal clause in 1995 for an additional five years, unless the contract was terminated.<sup>356</sup> If the company ended the contract, even for good cause, it agreed to pay fifty percent of the amount due under the remaining terms, plus the renewal of the agreement.<sup>357</sup> After AFLAC's founder died in 1990, the new CEO terminated the lawyer's services.<sup>358</sup>

The court held that a lawyer cannot recover damages under a penalty clause when a client exercises the legal right to terminate the lawyer's

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346. *Id.*

347. *Id.*

348. *Id.*

349. *Id.*

350. *Id.*

351. *Id.*

352. *Id.*

353. *Id.*

354. *AFLAC v. Williams*, 444 S.E.2d 314 (Ga. 1994).

355. *Id.* at 315-16.

356. *Id.* at 316.

357. *Id.*

358. *Id.*

retainer contract.<sup>359</sup> The court stated that a lawyer-client relationship is a unique relationship founded on elements of trust and confidence by the client and of undivided loyalty and devotion by the lawyer.<sup>360</sup> If this relationship was forced into the conventional status of a commercial contract, the special fiduciary relationship would be destroyed.<sup>361</sup> Because of this fiduciary relationship, the client has the absolute right to terminate the relationship at any given time, even without cause.<sup>362</sup> This right is not viewed as a breach of contract, but rather as an exercise of the client's right.<sup>363</sup> Therefore, if the client was required to pay damages for terminating the relationship, that right would essentially be abrogated.<sup>364</sup>

In reviewing the language of the agreement in the *Williams* case, the court analyzed the damages clause under contract law and found that it was unenforceable.<sup>365</sup> To enforce a provision as liquidated damages, three factors must exist: (1) the injury must be difficult to estimate accurately; (2) the parties must intend to provide damages instead of a penalty; and (3) the sum must be a reasonable estimate of the probable loss.<sup>366</sup> The court determined that the provision was essentially a penalty used to force AFLAC to continue the relationship, even if there was good cause to terminate the relationship.<sup>367</sup> The court also held that the damages were unreasonably high, notwithstanding the lawyer's duty to mitigate his damages.<sup>368</sup> Further, the court noted that the decision only dealt with contracts of lawyers in private practice and did not address the employment relationship between employers and full-time or in-house counsel.<sup>369</sup>

*Cohen v. Radio-Electronics Officers Union*<sup>370</sup> discussed whether a renewable one-year agreement for legal services between a lawyer and his client is governed by general contract principles or principles modified by

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359. *Id.*

360. *Id.* (quoting *Demov, Morris, Levin & Shein v. Glantz*, 53 N.Y.2d 553, 556 (N.Y. App. Div. 1981)).

361. *Id.*

362. *Id.* (quoting *White v. Aiken*, 28 S.E.2d 263, 265 (Ga. 1943)).

363. *Id.* (citing *Dorsey v. Edge*, 43 S.E.2d 425, 428 (Ga. Ct. App. 1947)).

364. *Id.*

365. *Id.* at 317.

366. *Id.* (citing *Southeastern Land Fund, Inc. v. Real Estate World, Inc.*, 227 S.E.2d 340, 344 (1976)).

367. *Id.*

368. *Id.*

369. *Id.* at 315 n.1.

370. *Cohen v. Radio-Elects. Officers Union*, 645 A.2d 1248 (N.J. Super. Ct. App. Div. 1994). ROU is a labor organization that represents radio officers who are responsible for the communications and electronics aboard ocean-going vessels. *Id.* at 1251. ROU and employers contribute funds to various affiliated plans and trusts to provide medical, vacation, and other benefits to its union members. *Id.*

ethical considerations and standards applicable to the practice of law. In 1985 Thomas Harper, the secretary-treasurer of Radio-Electronics Officers Union ("ROU"), sought legal services from Lawyer Cohen, who was a partner with Marchi, Jaffe, Cohen, Crystal, Rosner & Katz ("Marchi firm").<sup>371</sup> Cohen and ROU entered into an agreement for legal services for a one-year term which was automatically renewable unless there was a written termination notice given during June of the year preceding the termination date.<sup>372</sup> On January 4, 1986, the Marchi firm and ROU entered into a contract in which ROU was to pay \$150 per hour for legal services.<sup>373</sup> In 1987, Cohen decided to leave the firm and move to Arizona to accept an adjunct associate professorship with the University of Arizona School of Law.<sup>374</sup> If he decided to pursue a full-time position, he had to notify the law school in June of the year in which he sought full-time employment.<sup>375</sup> The facts are disputed as to how ROU became a client of Cohen's, but the parties entered into an agreement effective January 1, 1988, whereby Cohen would be general counsel for ROU after he relocated to Arizona.<sup>376</sup> The parties agreed to an annual compensation of \$100,000 for 1000 hours of service.<sup>377</sup> ROU also agreed that Cohen would be designated co-counsel for all applicable ROU plans and trusts.<sup>378</sup> Any compensation received by Cohen from those plans or trusts would entitle ROU to additional hours of free service at the rate of one hour per \$100 of compensation from the plans or trusts.<sup>379</sup> The agreement also permitted Cohen to charge \$150 per hour for any time in excess of 1000 hours, excluding the additional time attributable to compensation from the plans or trusts.<sup>380</sup> Additionally, Cohen had to be available for telephone consultation during ROU's regular business hours within twenty-four hours of the phone call.<sup>381</sup> If the call was an emergency, Cohen had to be available within three hours by phone.<sup>382</sup> If Cohen was unavailable for good cause, he had to provide appropriate substitute coverage at his own cost.<sup>383</sup>

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371. *Id.*

372. *Id.* at 1250.

373. *Id.*

374. *Id.*

375. *Id.*

376. *Id.*

377. *Id.*

378. *Id.*

379. *Id.*

380. *Id.*

381. *Id.* at 1251-52.

382. *Id.* at 1252.

383. *Id.*

In January 1988, Cohen submitted invoices for legal services rendered.<sup>384</sup> An ROU auditor found that Cohen should have reimbursed ROU for \$8079 it had already paid the Marchi firm for legal services.<sup>385</sup> On December 10, 1989, Harper advised Cohen that the plan's trustees had decided to replace him as co-counsel.<sup>386</sup> On December 28, 1989, Harper notified Cohen that effective January 1, 1990, he was terminated as general counsel.<sup>387</sup> At that point, ROU had fully paid for legal services rendered through December 31, 1989, but refused to pay him an additional \$100,000 for 1990.<sup>388</sup>

The trial court construed the agreement under general contract principles, stating that ROU had to provide advance notice to terminate the agreement.<sup>389</sup> The court found the notice fair and reasonable, because Cohen had to be available to ROU at any time, and he had to give notice to the University of Arizona that he was interested in joining its faculty by June of each year.<sup>390</sup> The court found that the clause of the agreement giving ROU a one hour credit for each \$100 received by Cohen from the trusts or plans was illegal and a breach of duty by both parties when the provision was included in the retainer agreement.<sup>391</sup> However, the other compensation provisions were determined to be severable and enforceable.<sup>392</sup> The trial court also found that ROU did not discharge Cohen for cause and that Cohen had a duty to mitigate damages.<sup>393</sup>

The appellate court stated that transactions between a lawyer and client are subject to close scrutiny by the court and the burden of establishing fairness and equity of the transaction rests upon the lawyer.<sup>394</sup> The court also acknowledged that a lawyer should refrain from engaging in a business transaction with a client who has not obtained independent legal advice.<sup>395</sup> Additionally, the court determined that the fees were unreasonable.<sup>396</sup> In

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384. *Id.*

385. *Id.*

386. *Id.*

387. *Id.*

388. *Id.*

389. *Id.*

390. *Id.*

391. *Id.*

392. *Id.*

393. *Id.* at 1253.

394. *Id.* (citing *In re Gallop*, 426 A.2d 509, 511 (N.J. 1981); *In re Nichols*, 469 A.2d 494, 497 (N.J. 1984)).

395. *Id.* (citing *In re Gravel*, 125 A.2d 696 (N.J. 1956)).

396. *Id.*

determining if the fees were unreasonable, the court looked at the same factors provided in Michigan Ethics Opinion RI-69.<sup>397</sup>

The court then stated that a nonrefundable retainer agreement affects the willingness and ability of the client to terminate the services of the lawyer at any time, no matter how long employment was agreed upon.<sup>398</sup> Because the client has a right to terminate her lawyer, the court stated that the lawyer is entitled to quantum meruit when there was no cause for termination.<sup>399</sup> The court held that the agreement was void according to the *New Jersey Rules of Professional Conduct* which states that a lawyer cannot enter into an agreement for, charge, or collect an illegal or excessive fee, and when discharged, has to promptly refund any fee paid in advance that was not earned.<sup>400</sup> The court also stated that because the agreement between the lawyer and client is special, it is not to be treated like a regular contract and the lawyer cannot sue for breach of contract if the client prematurely terminates the agreement.<sup>401</sup> The client's right to terminate at will is implied in law from the special relationship between the lawyer and client.<sup>402</sup>

The court did recognize that other jurisdictions have followed the traditional view of treating an agreement between a lawyer and client as an ordinary contract, and applied general contract law.<sup>403</sup> The factors supporting the traditional view are: (1) contracting for the full value of the services as determined by the parties as well as offering the most logical measure of damages; (2) charging the full fee prohibits a client from profiting from his own breach of contract; and (3) ameliorating the difficult task of valuing a lawyer's partially completed work.<sup>404</sup>

The court held that the agreement was analogous to a nonrefundable retainer that infringed upon the right of the client to terminate the lawyer-client relationship at will.<sup>405</sup> As a result, the agreement was unreasonable and unenforceable because it was against public policy.<sup>406</sup> Moreover, the agreement burdened the client with an unwanted lawyer and made the client pay fees for legal services that the lawyer failed to render.<sup>407</sup>

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397. *Id.* For a list of these factors, see *supra* text accompanying note 225.

398. *Cohen*, 645 A.2d at 1254.

399. *Id.* (citing *In re Poliv*, 338 A.2d 888, 889 (Pa. Super. Ct. 1975)).

400. *Id.* at 1255 (citing DR 2-106(A) (1980)).

401. *Id.* at 1256 (citing *Martin v. Camp*, 114 N.E. 46, 48 (N.Y. 1916)).

402. *Id.*

403. *Id.* at 1257.

404. *Id.* (citing *Rosenberg v. Levin*, 409 So. 2d 1016, 1019-20 (Fla. 1982)).

405. *Id.* at 1250.

406. *Id.*

407. *Id.* In a concurring opinion, Judge Baime stated that a lawyer's duty to mitigate damages from a breach by the client does not sufficiently protect the client from what is in essence, a contractual penalty. *Id.* at 1260 (Baime, J., concurring).

*Brandes v. Zingmond*<sup>408</sup> discussed whether a nonrefundable matrimonial agreement was valid and enforceable. In *Brandes*, the client agreed to pay a minimum nonrefundable fee of \$15,000 to assure the availability of her

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In the dissenting opinion, Judge Villanueva did not think the bargained-for terms of the agreement were unreasonable or unethical. *Id.* at 1261 (Villanueva, J., concurring and dissenting). Judge Villanueva differentiated between special retainers, general retainers and nonrefundable retainers and based his dissenting opinion on the differences. *Id.* at 1261. A special retainer is an agreement between the lawyer and client in which the client agrees to pay a specified fee in exchange for specified services. *Id.* In a general retainer, the client agrees to pay a fixed sum in consideration for the lawyer's continual availability to perform at a specified price during the specified period for any necessary legal services. *Id.* It is separate from fees incurred for rendered services because the client is paying for availability. *Id.* The dissent went on to state that the agreement was really an option contract (that was a general retainer) because the client had the right to direct the lawyer to render services at any time during the specified period. The dissent also recognized that the parties could create a hybrid general-special retainer by agreeing that part or all of the general retainer fee be applied to the bill for services actually rendered. *Id.* Judge Villanueva stated that a nonrefundable retainer allows the lawyer to keep an advance payment whether or not services were rendered. *Id.* A nonrefundable retainer is a type of special retainer because it arises only in conjunction with rendering specified services for a specified fee. *Id.*

The dissent recognized that there are sacrifices made by the lawyer who is committed to general retainers, such as reallocation of time so they can be available at any time to the exclusion of other clients and forgoing potential income because they cannot be hired by conflicting interests. *Id.* The dissent stated that Cohen made those sacrifices; the agreement was actually more like an employment contract because Cohen was obligated to furnish legal services and remain available to furnish those services on short notice. *Id.* at 1262. The dissent provided that contracts for contingency fees or particularized services entitled the lawyer to quantum meruit for services performed. *Id.* at 1263. However, lawyers and clients should not be precluded from freely entering into fair and reasonable contracts, where the client carefully considered and freely agreed to the contract with full knowledge of the situation. *Id.* Bona fide, reasonable retainer agreements for a fixed term based on mutual considerations should be enforceable. *Id.* Judge Villanueva reasoned that in not doing so, clients and lawyers would not be inclined to make agreements for reduced compensation in return for assurance of availability for a fixed period of time. *Id.* at 1266. The dissent also placed great weight on Cohen's expert witness who stated that in looking at the circumstances, the agreement appeared to be fair, Cohen was a highly specialized and experienced attorney, ROU was an international union that essentially engaged in the business of negotiating contracts for its members, and Cohen's price was below market value. *Id.* at 1266-67. It was reasonable to include a long notice period as well as an automatic renewal. *Id.* at 1266. Judge Villanueva stated that the agreement met the requirements of the MODEL RULES OF PROFESSIONAL CONDUCT for a reasonable fee and that the agreement should be enforced. *Id.* The dissent further stated that ROU did not believe the agreement was unfair and took advantage of the agreement during the two-year period in which it enjoyed Cohen's reduced hourly rate. *Id.* The agreement was not unconscionable until ROU wrongfully terminated it. *Id.* at 1267. ROU was aware that Cohen planned his professional life based on the contract and renewal notice and Cohen relied on the agreement to his detriment. *Id.* Nevertheless, ROU did not raise the mitigating issue and Cohen did not have an opportunity to rebut it. *Id.* at 1269. This was done by the trial court and the dissent said that there should not have been any mitigation of damages. *Id.* at 1269.

408. *Brandes v. Zingmond*, 573 N.Y.S.2d 579 (N.Y. App. Div. 1991).

lawyer.<sup>409</sup> There was also a clause that stated that in signing the agreement, the client acknowledged that she received a copy and that she read and understood the agreement before signing.<sup>410</sup> The lawyer represented the client in divorce proceedings.<sup>411</sup> However, the client reconciled with her husband and then discharged her lawyer after he had spent five hours on the case.<sup>412</sup> The court held that the agreement was unenforceable and that the lawyer had a duty to promptly refund any unearned fee paid in advance.<sup>413</sup>

The court relied on the *Model Code of Professional Responsibility* which stated that the specified minimum cannot be excessive under the circumstances, that nonrefundability must be expressly conditioned on the absence of lawyer default, and the agreement must be written in clear unambiguous language fully known and understood by the client.<sup>414</sup> The court held that the agreement failed to specifically state that nonrefundability was conditioned on the absence of lawyer fault and under what conditions the client was eligible for a refund.<sup>415</sup> The court held that the fee was "grossly excessive and shocking to the Court's conscience."<sup>416</sup> In determining that the fee was reasonable, the court considered the same factors provided in Michigan Ethics Opinion RI-69.<sup>417</sup>

The court found that the fee provision was really a liquidated damages provision, which is only enforceable if the amount set is reasonably proportional to the probable loss and if actual loss would be difficult to calculate or precisely estimate.<sup>418</sup> In contrast, the court stated that a penalty is an amount disproportionate to the real damage that is used to secure performance by compulsion.<sup>419</sup> As a result, a promisor would be compelled to continue performance based on fear of economic devastation and the promisee would reap a windfall compared to the actual loss in the event of a default.<sup>420</sup>

The court noted factors to consider in determining if the clause is a penalty, such as the level of sophistication of the parties and whether either party is a member of the bar or is represented by able counsel during the

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409. *Id.* at 580.

410. *Id.*

411. *Id.*

412. *Id.*

413. *Id.* at 582.

414. *Id.* (citing New York Bar Ass'n Op. 599 (1980)).

415. *Id.*

416. *Id.*

417. *Id.* For a list of these factors see *supra* text accompanying note 225.

418. *Id.* at 582.

419. *Id.*

420. *Id.*

negotiation and execution of the agreement.<sup>421</sup> The court found no evidence that the client had a certain level of sophistication or that she was knowledgeable of the subject matter of the agreement during her divorce proceedings.<sup>422</sup> The lawyer, however, was a highly sophisticated and well-known matrimonial lawyer.<sup>423</sup> The court further provided that because the lawyer-client relationship is so special, many principles found in the relationship would not survive ordinary contract law.<sup>424</sup> As a result, agreements made in this unique relationship are not always enforceable in the same manner as ordinary commercial contracts.<sup>425</sup> The court also stated that because there are wider social implications involved in the matrimonial field, the court's traditional authority to regulate fee agreements between the lawyer and client is broader.<sup>426</sup> The liquidated damages provision in the agreement existed to circumscribe the client's right to terminate counsel.<sup>427</sup> Therefore, upholding such an agreement would be against social policy and foster an atmosphere adverse to reconciliation.<sup>428</sup>

The lawyer argued that he was precluded from spending time and energy on behalf of other potential clients, but the agreement stated that an unspecified and unlimited number of associates and paralegals could handle the client's divorce matter.<sup>429</sup> The court provided the lawyer an opportunity to produce a list of those clients that were denied services as a result of time expended on this case, but the lawyer failed to provide the list.<sup>430</sup>

The court further held that nonrefundable retainer agreements violate the concept of mitigation of damages.<sup>431</sup> However, because the client has the unfettered right to discharge the lawyer, it follows that the client cannot be held liable for damages in a breach of contract.<sup>432</sup> The court determined that even if the client was held to damages, the lawyer was required to mitigate damages which he failed to demonstrate.<sup>433</sup> The court found that the agreement was not a good faith estimate of damages, but a way to

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421. *Id.* (citing *Boyle v. Petrie Stores Corp.*, 518 N.Y.S.2d 854, 861 (N.Y. App. Div. 1987)).

422. *Id.* at 582-83.

423. *Id.*

424. *Id.* at 583 (quoting *In re Dunn*, 205 N.Y. 398, 402 (N.Y. 1912)).

425. *Id.* at 582 (quoting *Cohen v. Ryan*, 311 N.Y.S.2d 644, 645 (N.Y. App. Div. 1970)).

426. *Id.* at 583.

427. *Id.*

428. *Id.*

429. *Id.*

430. *Id.* at 584.

431. *Id.*

432. *Id.* (quoting *Jacobson v. Sassower*, 474 N.Y.S.2d 167, 168 (N.Y. App. Div.) *aff'd*, 489 N.E.2d 1283 (N.Y.) *aff'd*, 483 N.Y.S.2d 711 (N.Y. App. Div. 1983)).

433. *Id.*

ensure absolute payment of the lawyer's fees.<sup>434</sup> The lawyer also argued that the client consented to the agreement and understood the terms of his employment.<sup>435</sup> The court held that consent alone does not demonstrate the client's awareness and complete understanding of legal rights and obligations.<sup>436</sup> Because of the client's emotional state resulting from the pending divorce, she could not have comprehended the meaning of the agreement.<sup>437</sup> The agreement was unenforceable and the lawyer was entitled to only quantum meruit if there was no legal cause for discharge.<sup>438</sup> The court acknowledged that in determining the value of the legal services, the court would consider "the nature and extent of the services, the actual time spent, the necessity therefor, the nature of the issues involved, the professional standing of counsel and the results achieved."<sup>439</sup> The court determined that the discharge occurred because the client reconciled with her husband.<sup>440</sup> Thus, the court held that quantum meruit was the proper remedy.<sup>441</sup>

The *Williams, Cohen, and Brandes* courts<sup>442</sup> held that the fiduciary nature of the lawyer-client relationship causes fee arrangements to rise above the standards of ordinary commercial contract. There were three underlying themes regarding nonrefundable retainers through these recent cases: (1) the nature of the lawyer-client relationship is such that it cannot be lumped into the conventional status of a commercial contract; (2) public policy dictates that the client has an unfettered right to discharge the lawyer and be refunded any money that was not earned by the lawyer; and (3) because of the client's unfettered right to terminate, the lawyer can recover the reasonable value of any services rendered under a theory of quantum meruit if there was termination without legal cause.

Other courts have found nonrefundable fees excessive and unreasonable.<sup>443</sup> Although not finding that nonrefundable contracts are per se

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434. *Id.*

435. *Id.* See *Scheenck v. Hill, Lent & Troescher*, 530 N.Y.S.2d 486, 487 (N.Y. Supp. 1988).

436. *Id.*

437. *Id.*

438. *Id.*

439. *Id.* (quoting *Jordan v. Freeman*, 336 N.Y.S.2d 671 (N.Y. App. Div. 1972)). See *Sand v. Lammers*, 540 N.Y.S.2d 876, 877 (N.Y. App. Div. 1989).

440. *Id.*

441. *Id.* See *Teichver v. W & J Holsteins*, 489 N.Y.S.2d 36, 38 (N.Y. App. Div. 1985); *Theroux v. Theroux*, 536 N.Y.S.2d 151, 152 (N.Y. App. Div. 1988); *Ventola v. Ventola*, 491 N.Y.S.2d 736, 737 (N.Y. App. Div. 1985).

442. *AFLAC v. Williams*, 444 S.E.2d 314 (Ga. 1994); *Cohen v. Radio-Elects. Officers Union*, 645 A.2d 1248, 1255 (N.J. Super. Ct. Div. 1994); *Brandes v. Zingmond*, 573 N.Y.S.2d 579 (N.Y. App. Div. 1991).

443. See *In re Cain*, 852 P.2d 407, 409 (Ariz. 1993); *Arens v. Committee on Professional Conduct*, 307 Ark. 308, 311, 820 S.W.2d 263, 264 (1991); *In re Fonte*, 1994 WL 92387 \*3

unethical or unreasonable, these courts have nevertheless required that lawyers refund any unearned portion of a so-called nonrefundable fee.<sup>444</sup> In these situations, very few fees will ever be nonrefundable.

f. Proposed Restatement on the Law of Lawyering

The proposed restatement of the law of lawyering<sup>445</sup> also requires that lawyers refund any unearned portion of a nonrefundable fee. The proposed restatement discusses this issue in connection with excessive fees and in connection with lawyer-client fee contracts. A comment to the restatement approves "true retainers," that is, "a fee paid to ensure that a lawyer will be available for the client if required," but also states that "a lawyer's fee may not be unreasonably large."<sup>446</sup> This is qualified by the statement that such true retainers are not excessive fees if the retainer "is a reasonable prediction of the income the lawyer sacrifices by accepting" the retainer.<sup>447</sup> For example, the retainer may compensate the lawyer for turning away other clients, or for hiring new associates to handle the client's expected business.<sup>448</sup> Moreover, the comment distinguishes a "lump sum fee" and an advance fee from retainers.<sup>449</sup>

Section 50(c) of the *Restatement of the Law Governing Lawyers* states that "[w]hen a lawyer requests and receives a fee payment that is not for services already rendered, that payment is a deposit to be credited against whatever fee the lawyer may be entitled to collect."<sup>450</sup> A comment to the *Restatement of the Law Governing Lawyers* presumes that any fee payment that is not for services already rendered is presumed to be a deposit against future services.<sup>451</sup> Thus, the burden is on the lawyer to show that the client

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(Cal. Bar. Ct. Mar. 16, 1994); *Stegall v. Mississippi Bar*, 618 So. 2d 1291 (Miss. 1993); *Cuyahoga County Bar Ass'n v. Okocha*, 632 N.E.2d 1284, 1286 (Ohio 1994), *cert. denied*, 115 S. Ct. 751 (1995); *In re Gastineau*, 857 P.2d 136, 137 (Or. 1993).

444. *Cain*, 852 P.2d at 409; *Arens*, 307 Ark. at 308, 820 S.W.2d at 264; *Fonte*, 1994 WL 92387, at \*3; *Stegall*, 618 So. 2d at 1291; *Okocha*, 632 N.E.2d at 1286; *Gastineau*, 857 P.2d at 137.

445. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 50 (1991) [hereinafter RESTATEMENT].

446. *Id.* at § 46 cmt. e.

447. *Id.*

448. *Id.*

449. *Id.* at § 46 cmt. e.

450. *Id.* at § 46 cmt. e.

451. *Id.* at comment g (citing *Jersey Land & Dev. Co., v. United States*, 342 F. Supp. 48 (D. N.J. 1972) (determining that an advance payment is presumed to be a deposit, not a retainer)).

*consented* to some other arrangement, either a true retainer or payment in full.<sup>452</sup>

The true retainer requires that the payment be a reasonable prediction of future expenses or lost opportunities.<sup>453</sup> The comment states that "most clients who pay a fee without receiving an explanation assume that they are paying for services, not readiness."<sup>454</sup> Finally, even true retainers or advance fees may not be kept if the fee is unreasonable or if the lawyer withdraws prematurely or is properly discharged.<sup>455</sup>

#### g. Structuring Fee Arrangements

Given the complexity of the advance fee rules, it is important that fee arrangements be structured carefully. Rule 1.5(b) of the *Arkansas Rules of Professional Conduct* requires early communication of the fee arrangement when the lawyer has not regularly represented the client.<sup>456</sup> The rule suggests but does not require that the fee arrangement be in writing to avoid a misunderstanding.<sup>457</sup>

A "true" retainer agreement should state the amount of the retainer, whether or not the retainer amount has been paid, and the length of time that the retainer assures the lawyer's availability.<sup>458</sup> In addition, all fee arrangements should identify the client and the lawyer in charge; the objectives of the representation; the services to be rendered; the duration of the lawyer-client relationship; any time constraints imposed by either the lawyer or the client; how court costs and other expenses will be handled; how the client will be apprised of the progress of the case; how payments and disbursements will be handled; and how the lawyer will handle trust

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452. *Id.*

453. *Id.*

454. *Id.*

455. *Id.*

456. ARPC, *supra* note 15, Rule 1.5(b).

457. ARPC, *supra* note 15, Rule 1.5(b) and accompanying comment. See *In re Biggs*, 864 P.2d 1310, 1316 (Or. 1994) (determining that without a written agreement concerning the nature of the fee paid, advance fees would be considered client property).

458. CAROL M. LANGFORD & MOLLY MUNGER, *Ethical Issues in Connection With Fee Agreements*, at 9 (PLI Litig. & Admin. Practice Course Handbook Series No. H-4-519 1994). See Mich. Ethics Op. RI-10 (1989).

funds.<sup>459</sup> The majority of this information can be included in a brochure that is given to each prospective client.<sup>460</sup>

## 2. Funds for a Specific Purpose

Funds given to a lawyer for a specific purpose must be used for that purpose.<sup>461</sup> Like advances for fees and costs, they must also be segregated from the lawyer's property and funds. Absent an agreement with and consent by the client, a lawyer must return any unused portion of such funds with a full accounting.<sup>462</sup> Some examples of these funds include estate proceeds,<sup>463</sup> escrow funds,<sup>464</sup> funds for payment of client's taxes,<sup>465</sup> and funds for settlement purposes.<sup>466</sup>

## 3. Interest-Bearing Accounts

Lawyers may deposit client funds in interest-bearing accounts but any interest belongs to the client, absent an agreement to the contrary.<sup>467</sup> IOLTA accounts are the exception to this rule.<sup>468</sup> Forty-one states have some form of IOLTA account.<sup>469</sup>

459. DEMETRIOS DIMITRIOU, *How to Write Client Fee Agreements*, (PLI Comm. Law and Practice Course Handbook Series No. A4-4255 1989); Marcia L. Proctor, "Smart" Fee Agreements, 72 MICH. B. J. 1304 (December 1993). For examples of provision to be included in fee agreements, see EDWARD L. WINER, *Get Started on the Right Foot*, 560 (PLI Comm. Law and Practice Course Handbook Series No. A4-4321 1990).

460. NEIL T. SHAYNE, *Law Office Brochures*, (PLI Comm. Law & Practice Course Handbook Series No. A4-4150 1986). Assume you were going to build a home and when you met with the builder you were asked for a large nonrefundable payment, even before the job was started. If you are like most people, it would leave you feeling uncomfortable and maybe even a little suspicious. It would seem unfair. You would need and want a lot of communication from that professional so that you could be sure that your job was getting proper attention from the person who "took your money."

Clients who pay nonrefundable fees feel much the same way. Unfortunately, the nature of the fee (as described above) makes it easy to communicate infrequently with your client. Communication takes place only when the attorney feels it is necessary. This approach frequently leads to legal malpractice claims and ethics complaints because the lawyer is not communicating satisfactorily from the client's perspective.

461. *In re James*, 452 A.2d 163, 166 (D.C. 1982).

462. *Finch v. State Bar*, 621 P.2d 253, 256 (Cal. 1981).

463. *In re Thomas*, 659 P.2d 960, 961 (Or. 1983).

464. *In re Kramer*, 442 N.E.2d 171, 172 (Ill. 1982).

465. *Oklahoma Bar Ass'n v. Raskin*, 642 P.2d 262, 264 (Okla. 1982).

466. *In re Martinez*, 431 N.E.2d 490, 493 (Ind. 1982).

467. ABA Comm. on Ethics & Prof. Responsibility, Formal Op. 348 (1982). See generally LAWYER'S MAN. ON PROF. CONDUCT (ABA/BNA) 201.

468. HAZARD & HODES, supra note 42.

469. HAZARD & HODES, supra note 42.

Arkansas approved a voluntary plan in 1984.<sup>470</sup> However, on October 17, 1994, the Arkansas Supreme Court approved a "comprehensive," i.e., mandatory, IOLTA plan.<sup>471</sup> The court approved an amendment to Rule 1.15 of the *Arkansas Rules of Professional Conduct* requiring lawyers to deposit in an interest-bearing account, funds "which in the judgment of the lawyer are nominal in amount, or are expected to be held for such a short period of time that it is not practical to earn and account for income on individual deposits."<sup>472</sup>

These accounts must be maintained in compliance with the general fiduciary provisions codified in Rule 1.15 of the *Arkansas Rules of Professional Conduct*. None of the earnings from these funds will be available to the law firm, and the funds must be available for withdrawal "upon request and without delay."<sup>473</sup> The interest which accrues on these accounts minus "reasonable check and deposit processing charges . . . shall be paid to the Arkansas IOLTA Foundation, Inc."<sup>474</sup>

The new rule requires that all client funds be deposited in an interest-bearing trust account "unless they are deposited in a separate interest-bearing account for a specific and individual matter for a particular client."<sup>475</sup> There must be one account for each particular matter and any interest from these accounts must be held in trust for the individual client.<sup>476</sup> The decision to

470. *In re Interest on Lawyers' Trust Account*, 283 Ark. 252, 261, 675 S.W.2d 355, 358 (1984).

471. *In re Arkansas IOLTA Foundation, Inc.*, 885 S.W.2d 846, 848-49 (1994).

472. *Id.* at 848.

473. *Id.*

474. *Id.* The permissible processing charges are an items deposited charge, a monthly maintenance fee, a per item check charge, and a per deposit charge. *Id.* Any additional charges are the lawyer's responsibility. *Id.*

475. *Id.* at 848-49. Lawyers exempt from this requirement include: lawyers who do not receive any client funds in their practice; lawyers who do not practice law in Arkansas or receive funds from Arkansas clients; and full-time judges, government lawyers, military lawyers who do not handle client funds. *Id.* In addition, the IOLTA Foundation Board may exempt lawyers or law firms for up to two years if the service charges on their trust accounts equal or exceed any interest generated. *Id.*

There is some confusion regarding converting trust accounts to interest-bearing accounts. The text of the rule indicates that the conversion must be done no later than "six months from the date of the order adopting the rule." ARPC, *supra* note 15, Rule 1.15(e). The per curiam opinion that accompanied the rule states that the "effective date of the revised rule is January 1, 1995." *In re Arkansas IOLTA Foundation, Inc.*, 885 S.W.2d at 848. Apparently, the provisions of the rule went into effect on January 1, 1995, but the final date for the conversion of existing trust accounts was March 17, 1995. Any new accounts created after January 1, 1995, or any funds received after January 1, 1995, presumably must be deposited in the interest-bearing trust account.

476. *In re Arkansas IOLTA Foundation, Inc.*, 885 S.W.2d at 848. Lawyers required to maintain trust accounts must annually certify their compliance with the rule on the form that accompanied the per curiam opinion. *Id.*

use either the pooled funds account or the individual client trust account rests within the discretion of the lawyer. To make this decision, the lawyer should consider “[t]he amount of interest which the funds would earn during the period they are expected to be deposited; and . . . [t]he cost of establishing and administering the account, including the cost of the lawyer’s or law firm’s services.”<sup>477</sup>

The court considered comments from a number of people regarding this new rule. The most significant objection questioned the propriety of amending the rules of professional ethics instead of amending the IOLTA rules. Sixteen other jurisdictions have already amended the equivalent rule on client property to establish a comprehensive IOLTA program.<sup>478</sup> In addition, the court was confident that all the administrative monitoring of the accounts could be done by the IOLTA staff and would not involve the committee on professional conduct. The IOLTA board assured the court that lawyers would be referred to the committee on professional conduct only if they deliberately failed to comply with the provisions of the new rule.<sup>479</sup>

#### 4. *The Client Security Fund*

Arkansas has a client security fund designed to reimburse clients for their losses.<sup>480</sup> A court appointed committee may consider claims for “reimbursement of losses from defalcations . . . caused by the dishonest conduct” of a lawyer. The lawyer must have “been disbarred or suspended from the practice of law, or voluntarily resigned from the practice of law, in order for the committee to consider claims for reimbursement of losses caused by the dishonest conduct of a member of the bar.”<sup>481</sup>

“Dishonest conduct” is defined to include “wrongful acts committed by a lawyer against a client or person or organization to whom the lawyer owes a fiduciary duty in the manner of defalcation or embezzlement of money, or the wrongful taking or conversion of money, property, or other things of value.”<sup>482</sup> The committee will only consider claims that have been referred to it by the Committee on Professional Conduct and will not pay more than

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477. *Id.*

478. *Id.* at 847.

479. *Id.* Both mandatory and voluntary IOLTA programs have survived constitutional challenges. See *Washington Legal Found. v. Massachusetts Bar Found.*, 993 F.2d 962, 971 (1st Cir. 1993); *Carroll v. State Bar*, 213 Cal. Repr. 305, 313 (Cal. Ct. App. 1985); *Cone v. State Bar*, 819 F.2d 1002, 1007 (11th Cir. 1987) *cert. denied*, 484 U.S. 917 (1987).

480. *In re Client Security Fund*, 254 Ark. 1075, 493 S.W.2d 422 (1973).

481. *Id.*

482. RULES OF PROCEDURE OF THE ARKANSAS CLIENTS’ SECURITY FUND I (5).

\$40,000 for any claim.<sup>483</sup> The fund is subrogated by any recovery made by the claimant, her personal representative, and her estate and assigns against the lawyer.<sup>484</sup> Participation in the fund is mandatory in that a portion of each lawyer's license fee is used for the fund.<sup>485</sup>

## B. Record Keeping

The Arkansas rules follow the *Model Rules of Professional Conduct* and provide that "[c]omplete records [of trust accounts] shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation."<sup>486</sup> Arkansas has not adopted any rules or guidelines concerning the kinds of records which lawyers must keep, but in February 1993, the ABA adopted a model recordkeeping rule as official ABA policy. The rule is intended to emphasize Rule 1.15's requirement to keep "complete records." It requires lawyers to maintain: receipt and disbursement journals, a ledger book, monthly balance sheets, copies of all client statements, copies of all bills, copies of all payments on behalf of clients, all canceled checks, stubs, bank statements, and copies of quarterly reconciliations.

Rule 5-1.1(b) of the *Rules Regulating the Florida Bar*<sup>487</sup> requires lawyers to maintain the following records: "checkbooks, canceled checks, check stubs, vouchers, ledgers and journals, closing statements, accountings or other statements of disbursement rendered to clients or other parties with regard to trust funds, or similar equivalent records clearly and expressly reflecting the date, amount, source, and reason for all receipts, withdrawals deliveries, and disbursements of the funds or property of the client."

Some states have gone beyond the *Model Rules of Professional Conduct* to require the following: annual certification or verification of their compliance with the recordkeeping requirements,<sup>488</sup> random verification or

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483. *Id.*

484. *Id.* at I (4)(c).

485. *Id.* Consider the *Arens* case. The attorneys in that case were not disbarred or suspended. Rather, they received letters of caution. Because of that sanction, the clients could not seek reimbursement from the client security fund if the attorneys were unable to return the excess fee. In the absence of the attorneys' cooperation, the clients' only remedy is to sue the attorney for the amount of the unearned fee. Section 16-22-307 of the ARK. CODE ANN. provides for a summary action whenever an attorney "receive[s] money for his client" and refuses or fails to pay the money on demand. ARK. CODE ANN. § 16-22-307 (Michie 1989). However, none of the cases construing the statute concerned the recovery of unearned attorney's fees.

486. LAWS. MAN. ON PROF. CONDUCT (ABA/BNA)1004-06 (1993).

487. RULES REGULATING THE FLORIDA BAR Rule 5-1.1(b) (1986).

488. *See, e.g.*, Ariz. Sup. Ct. R. 43(b); Ark. Sup. Ct. R.P.C. 1.15(f); New Hamp. Sup. Ct. R. 50-A (1993); New Jersey Ct. R. 1:20-1(c) (1995).

audits of trust accounts,<sup>489</sup> or automatic notification to the disciplinary authority of overdrafts.<sup>490</sup>

Some examples of violations include the failure to maintain any records which allow the lawyer to know what amount in the trust accounts belonged to particular clients;<sup>491</sup> failure to maintain cash receipts and disbursements journal, monthly reconciliations, checkbook or bank statement balances, or canceled checks;<sup>492</sup> and failure to supervise properly the office staff in charge of recordkeeping.<sup>493</sup>

### 1. Notification

Rule 1.15 of the *Model Rules of Professional Conduct* provides that “[u]pon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person.”<sup>494</sup> A lawyer must promptly notify a client of the receipt of client properties.<sup>495</sup> Failure to promptly notify a client may itself be grounds for discipline.<sup>496</sup> A lawyer was suspended for two years for failing to notify a client of the receipt of child support checks and applying the funds toward the client’s outstanding balance.<sup>497</sup> In another case, a lawyer was suspended for failure to notify a client of the receipt of judgment proceeds.<sup>498</sup>

### C. Delivery

Rule 1.15(b) of the *Model Rules of Professional Conduct* provides that “[e]xcept as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive.”<sup>499</sup> A lawyer must promptly disburse funds to which the

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489. See, e.g., Iowa Sup. Ct. R. 121.4(a) (1995); New Jersey Sup. Ct. R. 1:21-6 (1995); Wash. Sup. Ct. R. Law. Disc. 13.1(a) (1995).

490. See, e.g., Haw. Sup. Ct. R. 11 (1995); Minn. Sup. Ct. R.P.C. 1.15(j) (1995); Nev. Sup. Ct. B.R. 78.5(2) (1993).

491. North Carolina State Bar v. Sheffield, 326 S.E.2d 320, 326 (N.C. Ct. App. 1985).

492. *In re Heffern*, 351 N.W.2d 13, 14 (Minn. 1984).

493. *In re Williams*, 711 S.W.2d 518, 521 (Mo. 1986).

494. ARPC, *supra* note 15, Rule 1.15(b).

495. *In re Davis*, 628 P.2d 38, 39 (Ariz. 1981).

496. See Debra T. Landis, Annotation, *Attorney’s Failure to Report Promptly Receipt of Money or Property Belonging to Client as Ground for Disciplinary Action*, 91 A.L.R.3d 975 (1979).

497. Statewide Grievance Comm. v. Presnick, 577 A.2d 1054, 1056 (Conn. 1990).

498. Louisiana State Bar Ass’n v. Longnecker, 538 So. 2d 156, 160 (La. 1988).

499. ARPC, *supra* note 15, Rule 1.15(b).

client is entitled.<sup>500</sup> However, there is little agreement on the meaning of the term "promptly."<sup>501</sup>

All deliveries must also be proper. A lawyer may not write a check on an account with insufficient funds<sup>502</sup> or make payments to a client in excess of the amount the client had on deposit.<sup>503</sup> Sometimes a lawyer has a duty *not* to deliver funds to a client. When a third party has some legal or equitable claim that qualifies for special protection and of which the lawyer is aware, the lawyer should not deliver funds to the client.<sup>504</sup> In addition, a lawyer should not deliver funds to a client when the lawyer is not authorized to deliver the funds.<sup>505</sup> In all other cases, the lawyer must abide by the client's instructions.<sup>506</sup>

### 1. *Disputes with Clients*

A lawyer should withdraw funds from client trust accounts only when the lawyer and the client have clearly agreed that: (1) the lawyer has a right to withdraw the funds for that purpose; (2) the amount proposed to be withdrawn is the correct amount; and (3) the time for withdrawal is appropriate.<sup>507</sup>

When a dispute arises, Rule 1.15(c) of the *Arkansas Rules of Professional Conduct* requires that the portion of the funds in dispute be held "in trust" while the lawyer suggests means for resolution of the dispute.<sup>508</sup> The undisputed amount should be "promptly distributed."<sup>509</sup>

These rules neither approve nor disapprove of a lawyer's liens but do contemplate their existence. Rule 1.8(j)(1) of the *Arkansas Rules of Professional Conduct* prohibits a lawyer from acquiring a proprietary interest

500. *In re Zagoria*, 285 S.E.2d 733 (Ga. 1982).

501. *Compare* *Doyle v. State Bar*, 648 P.2d 942, 944 (Cal. 1982) (disciplining a lawyer for failure to deliver a client's trust fund for ten months) *and* *Jackson v. State Bar*, 591 P.2d 47, 48 (Cal. 1979) (disciplining lawyer for refusing to account to the heirs of an estate for five years).

502. *The Florida Bar v. Brennan*, 411 So. 2d 176, 177 (Fla. 1982).

503. *The Florida Bar v. Rogowski*, 399 So. 2d 1390 (Fla. 1981).

504. *See In re Cassidy*, 432 N.E.2d 274, 275 (Ill. 1982) (holding that a lawyer should not deliver funds to a client when a lien exists on the funds); *Bonanza Motors, Inc. v. Webb*, 657 P.2d 1102, 1104 (Idaho 1983) (providing that a lawyer should not disperse funds to a client when a client assigns the funds to a third party).

505. *See* *Office of Disciplinary Counsel v. Smith*, 617 P.2d 80, 83 (Haw. 1980) (determining that a lawyer should not disburse funds to an heir without court approval when acting as the executor); *In re Power*, 451 A.2d 666, 667 (N.J. 1982) (holding that a lawyer should not disburse escrow funds to a clerk without verifying the opposing parties approval).

506. HAZARD & HODES, *supra* note 42, at 1.15:303.

507. *See* WOLFRAM, *supra* note 4, at 182.

508. ARPC, *supra* note 15, Rule 1.15(c).

509. ARPC, *supra* note 15, Rule 1.15(c).

in a cause of action but makes an exception for "a lien granted by law to secure the lawyer's fee or expense." There were two kinds of liens recognized by the common law: (1) a "retaining lien [which] applies to a client's property in the lawyer's possession" and (2) a "charging lien [which] applies to a judgment or settlement the client recovers through the lawyer's efforts." Whether asserting the retaining lien violates the lawyer's contemporary duties to the client is an open question.<sup>510</sup>

Arkansas has codified only a version of the charging lien.<sup>511</sup> Sections 16-22-302 and 16-22-303 of the Arkansas Code make it clear that Arkansas follows the minority rule by allowing discharged lawyers to assert a lien based on the agreement with the client and by not restricting the lawyer to a quantum meruit recovery.<sup>512</sup> The lien attaches to the client's cause of action or counterclaim, and any settlement, etc., in the client's favor in any person's possession.<sup>513</sup> By its terms, the statute does not seem to cover funds on deposit with the lawyer. Absent a separate fund on which to make a claim, a lawyer cannot use the statutory lawyer's lien to recover fees.

Claiming a retaining lien would also be problematical. In *Henry, Walden & Davis v. Goodman*<sup>514</sup> the Arkansas Supreme Court held that the lawyer's lien statute then in effect did not require a contract-based recovery. The Arkansas Supreme Court has interpreted *Goodman* to stand for the proposition that the only common law remedy available to a lawyer suing on a contingent fee contract is quantum meruit.<sup>515</sup> The court indicated that it might be willing to reconsider its analysis in *Goodman* but, because none of the parties had requested such a reconsideration, it was unwilling to do so.<sup>516</sup>

The Arkansas Supreme Court limited the application of the above statute to situations where the lawyer has been discharged without cause.<sup>517</sup> The client discharged his lawyers after he became disenchanted with their work on his case.<sup>518</sup> He hired new lawyers and eventually received a settlement of his claim. His former lawyers sought payment for the time expended on the case according to the contract.<sup>519</sup> The Arkansas Supreme

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510. See Thomas G. Fischer, Annotation, *Attorney's Assertion of Retaining Lien as Violation of Ethical Code or Rules Governing Professional Conduct*, 69 A.L.R. 4th 846 (1989).

511. ARK. CODE ANN. § 16-22-304(a)(1) (Michie Supp. 1991).

512. *Lockley v. Easley*, 302 Ark. 13, 16, 786 S.W.2d 573, 575 (1990).

513. ARK. CODE ANN. § 16-22-304(a)(1).

514. *Henry, Walden & Davis v. Goodman*, 294 Ark. 25, 741 S.W.2d 233 (1987).

515. *Lancaster v. Fitzhugh*, 310 Ark. 590, 592, 839 S.W.2d 192, 193 (1992).

516. *Id.* at 591, 839 S.W.2d at 193-94.

517. *Crockett & Brown v. Courson*, 312 Ark. 363, 365, 849 S.W.2d 938, 940 (1993).

518. *Id.* at 365, 849 S.W.2d at 939.

519. *Id.*

Court found that the lawyers were discharged with cause; nevertheless, the court upheld the contract-based award.<sup>520</sup> Justice Dudley issued a vigorous dissent in which he argued that a lawyer who is discharged for cause is entitled only to a fee in proportion to the amount that the lawyer's actions benefitted the client.<sup>521</sup>

## 2. *Duties Upon Termination of Representation*

Rule 1.16(d) of the *Arkansas Rules of Professional Conduct* requires the lawyer to protect the client's interests by, among other things, "surrendering papers and property to which the client is entitled and refunding any advance fee payment that has not been earned."<sup>522</sup> The majority rule is that upon termination of the representation a lawyer may not withdraw funds from the client trust account.<sup>523</sup> The client must agree on the right of the lawyer to make any withdrawal, the amount to be withdrawn, and the time of the withdrawal.<sup>524</sup> The lawyer must also return the client's property and papers.<sup>525</sup>

## 3. *Accounting*

Rule 1.15(b) of the *Arkansas Rules of Professional Conduct* states that "upon request by the client or third person, [a lawyer] shall promptly render a full accounting regarding [a client or third party's property or funds]."<sup>526</sup> A lawyer who notified his client of the fact of a settlement but who never gave an accurate report of the amount received was subject to discipline.<sup>527</sup>

520. *Id.* at 367, 849 S.W.2d at 940.

521. *Id.* at 372, 849 S.W.2d at 943 (citing ARK. CODE ANN. § 16-22-303 (Michie Supp. 1991)). See RESTATEMENT, *supra* note 445, § 52 (holding that a lawyer forfeits his right to compensation if the lawyer unreasonably withdraws or is discharged for reasonable cause). Cf. *Haskins Law Firm v. American Nat'l Property & Casualty Co.*, 304 Ark. 684, 804 S.W.2d 714 (1991) (entering into a contract with the client's new lawyer for a specific amount, the law firm bargained away its statutory right to rely on the original contract with the client).

522. *Id.*

523. See, e.g., *Florida Bar v. Bratton*, 413 So. 2d 754 (Fla. 1982); *In re Sawyer*, 656 P.2d 503, 504 (Wash. 1983).

524. See, e.g., *Bar Ass'n v. Carruth*, 319 A.2d 532, 535 (Md. 1974); *In re Rabb*, 374 A.2d 461, 463 (N.J. 1977).

525. *Arens v. Committee on Professional Conduct*, 307 Ark. 308, 315, 820 S.W.2d 263, 266-67 (1991). It is interesting to note that there is no mention in the record of where the \$60,000 fee was deposited. If the fee had been deposited in the lawyer's general office account, it would have been grounds for disciplinary action. See ARPC, *supra* note 15, Rule 1.15.

526. ARPC, *supra* note 15, Rule 1.15(b).

527. *McCray v. State Bar*, 696 P.2d 83, 90 (Cal. 1985).

Refusing to render a full accounting unless paid in advance for the time necessary to complete the accounting is also a violation.<sup>528</sup>

Rule 1.5(c) of the *Arkansas Rules of Professional Conduct* provides for a specific accounting in cases involving contingent fees.<sup>529</sup> As an initial matter, the fee agreement must be in writing and state the percentages that will accrue to the lawyer and whether any expenses are to be deducted before the calculation of the contingent fee.<sup>530</sup> When the case is completed, the lawyer must provide the client a written statement detailing the outcome of the matter and, if successful, the amount to be remitted to the client and how that amount was determined.<sup>531</sup>

## V. CONCLUSION

Because lawyers are fiduciaries for their clients, they must act with care when handling their client's money. The duties to segregate client funds and to return unearned fees implies a prohibition on nonrefundable fees. The new IOLTA rules now require lawyers to deposit nominal funds in interest-bearing accounts. Although most lawyers comply with these requirements, some do not. Even still, most lawyers who fail to comply are not dishonest. They are often overworked, careless, or uninformed. David Hoffman wrote that lawyers must be careful in their adherence to their minor duties because "culpable ambition, false pride, the love of lucre, and even dishonesty, sometimes make silent, insidious, and almost imperceptible inroads."<sup>532</sup> Hoffman realized that lawyers need something more practical than moral exhortation. His fiftieth and final resolution is the nineteenth century equivalent of continuing legal education: "I will read the foregoing forty-nine resolutions, twice every year, during my professional life."<sup>533</sup>

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528. *In re Hetzel*, 346 N.W.2d 782, 783 (Wis. 1984) (refusing to render an accounting of the client's funds constituted professional misconduct).

529. ARPC, *supra* note 15, Rule 1.5(c).

530. ARPC, *supra* note 15.

531. ARPC, *supra* note 15.

532. HOFFMAN, *supra* note 20, at 744-45.

533. HOFFMAN, *supra* note 20, at 775.

