STATE OF MICHIGAN

Attorney Discipline Board

Grievance Administrator,

Petitioner/Appellant,

v

Harry R. Boffman, III, P- 55052,

Respondent/Appellee,

Case No. 03-135-GA

Decided: September 28, 2005

Appearances:

H. Lloyd Nearing (before hearing panel); Robert E. Edick (on review), for the Attorney Grievance Commission.
Kenneth H. Mogill, for the respondent.

BOARD OPINION

This review proceeding arises out of the handling of $5,000 paid to respondent pursuant to a written retainer agreement with his client. The agreement provided for a "retained service amount" of 50 hours, i.e., that respondent was obligated to perform 50 hours of legal service before billing further. Services rendered after the "initial retainer ha[d] been exhausted," were to be billed at $100 per hour. The client became dissatisfied with respondent's representation and, about three months after signing the retainer agreement, discharged respondent and demanded his money back. Respondent calculated the time he spent on the matter and offered to return a portion of the retainer. The client was not satisfied and filed suit and the grievance leading to the formal complaint in this matter.

The formal complaint alleged various rule violations. Following a hearing, the panel concluded that the $5,000 paid to respondent constituted a general retainer and dismissed the complaint. The Grievance Administrator has petitioned for review alleging only that the panel erred in dismissing the commingling charge, i.e., the violation of MRPC 1.15. We conclude that the panel

erred in characterizing the sum paid to respondent as a general retainer and, accordingly, that respondent violated MRPC 1.15.

It could be argued that the duties imposed under the rules as applied to the facts in this matter should come as no surprise to a Michigan practitioner – the law being more settled than many propositions upon which liability in civil, criminal and disciplinary forums is imposed. However, we do acknowledge a prior contrary decision of this Board and the fact that many respected and thoughtful practitioners have divergent views as to the proper way to handle money paid to, or deposited with, a lawyer at the inception of a representation. Accordingly, we make our ruling in this case prospective. Further, inasmuch as the hearing panel has urged this Board or our Supreme Court to clarify the appropriate use of retainer fees, and a different but somewhat related question is pending before the Court in the form of proposed amendments to MRPC 1.5 and 1.15, we will join the panel's request for clarification in future cases and will consider forwarding a memorandum to the Court discussing various issues pertaining to retainers and/or fees paid in advance.

I. Facts & Procedural Background.

The complainant in this case is respondent's client, Jaswant Kalsi. Mr. Kalsi retained respondent because he believed the FBI was tapping his phones and following him. He and respondent, Mr. Boffman, signed a Retainer Agreement with the following terms set forth in the numbered paragraphs below:

> ¶2. Client promises to pay Attorney a retainer of $5,000 Dollars upon the execution of this agreement.
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> ¶3. Client understands that he/she will be billed for legal services in the event that attorney performs services in excess of the retained service amount.
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> ¶4. The retained service amount shall be 50 Hours; that is, Attorney shall be obligated to perform 50 Hours legal service [sic] to client before billing the client for additional services.
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> ¶5. Client agrees to pay Attorney at a rate of One Hundred ($100) Dollars per hour for legal services rendered after the initial retainer has been exhausted.

Mr. Kalsi paid $5,000 to Mr. Boffman in cash ($4,000) and by check ($1,000). Mr. Boffman had no trust account; the check was deposited in a checking account held jointly with his wife and at least a portion of the cash was not deposited in any account.

Mr. Kalsi testified that on October 17, 2000, he met with Mr. Boffman for about an hour to discuss Mr. Kalsi's concern that the FBI was tapping his phones and following him. Mr. Kalsi testified that he had about 30 phone calls with respondent, and had a meeting earlier in January related to alleged harassment of his daughter at her workplace. He met with respondent on January 17th or 18th, 2001 and concluded that respondent had "not done anything." Mr. Kalsi then asked respondent to "stop my case and refund my money." This was reiterated in a January 29th letter. Respondent offered to return $2,600 which sum was based on "the time respondent invested in [Mr. Kalsi's] matters." Complainant sued respondent in district court for the amount of the retainer and obtained a default judgment against respondent which judgment was satisfied.

The formal complaint charged respondent with neglect, misappropriation, failure to refund unearned fees and commingling. The hearing panel dismissed the complaint in its entirety. With respect to the neglect charges, the panel stated: "We are troubled by the Grievance Administrator bringing an allegation of professional misconduct for neglect where there was no apparent factual support for the allegation." (HP Report, p 3.) As to the "separate claims against Boffman for the alleged failure to refund unearned fees to Kalsi, failure to separate client property, and for misappropriating client funds," the panel concluded that "the three claims rest on the same premise," i.e., that the $5,000 retainer was client property and not a "general retainer." (HP Report, p 4.)

The panel summarized the Administrator's argument regarding the commingling charge as follows:

> The Grievance Administrator claims that Boffman violated MRPC 1.15(a) because Boffman did not deposit the retainer--which the Grievance Administrator asserts is client property--into an Interest on Lawyer's Trust Account (IOLTA) or other client trust account. As noted above, Boffman did not have a separate business account at the time and deposited at least some of the retainer into a personal checking account he owned jointly with his wife. According to the Grievance Administrator, Boffman's failure to deposit the retainer is a violation of MPRC 1.15(a) because Boffman did not separate his client's property from his own. [HP Report, p 4.]

In the course of its analysis, the hearing panel stated, among other things:

> Clearly, a more explicit retainer agreement could have avoided this issue. Nevertheless, after reviewing the exhibits in conjunction with the testimony, we find that the $5000 mentioned in the retainer agreement was a general retainer rather than an advance from which hourly based fees would be drawn.
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> * * *
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> [W]e disagree with the Grievance Administrator's assertion that a retainer fee is client property that must be deposited into an IOLTA account. Where, as here, the client and the attorney agree to payment of a set amount of money in advance for an agreed upon amount of work (in this case, any amount up to 50 hours), we conclude that the retainer is not "the property of clients" or "client funds" subject to the IOLTA and trust rules in MRPC 1.15.
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> [W]e believe it follows from the Board's reasoning in [Grievance Administrator v Cohen, 91-159-RP (ADB 1992), and Grievance Administrator v Underwood, 99-58-GA (ADB 2001)] that the retainer received by Boffman in this case was not client property subject to the IOLTA or trust requirements of MRPC 1.5. See also New York Ethics Opinion 570(1985) (analyzing analogous NY Code of Professional Responsibility provision and explaining textual and practical reasons for this conclusion).
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> * * *
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> Given our conclusion that the $5000 retainer was not client property, the Grievance Administrator's remaining claims are easily resolved. By definition, there were no unearned fees and Boffman must prevail on this claim. See Underwood Opinion at 5-6 (general retainer fees are "earned when paid"; quoting commentators that recognize validity of general retainers).[8] Further, there cannot be a misappropriation where no client property is involved. See Grievance Administrator v Conway, ADB #97-156-GA (1998) (defining misappropriation in part as an unauthorized use of client funds). Accordingly, we also dismiss these claims.

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[8] Even if we are incorrect in our legal reasoning, this claim must be dismissed. We have found that Boffman contacted Kalsi to pick up a check in his office within a week or so after Kalsi terminated the representation and demanded that the retainer be refunded. Thus, even if a portion of the retainer was unearned as the Grievance Administrator asserts, we would hold that Boffman's efforts to contact Kalsi and his leaving a check for him to pick up constituted a prompt refund.

II. Issue on Review.

The Grievance Administrator petitions for review of only the hearing panel's dismissal of those parts of the formal complaint alleging commingling in violation of MRPC 1.15. The duty not to commingle lawyer or firm funds with client funds stems from MRPC 1.15(a) which provides:

> *A lawyer 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.* ***All funds of the client*** *paid to a lawyer or law firm,* ***other than advances for costs and expenses****, shall be deposited in an interest-bearing account in one or more identifiable banks, savings and loan associations, or credit unions maintained in the state in which the law office is situated, and no funds belonging to the lawyer or the law firm shall be deposited therein except as provided in this rule.* Other property shall be identified as such and appropriately safeguarded. 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. [MRPC 1.15(a); emphasis added.]

The parties, and the panel below, have framed the dispositive issue as whether the retainer at issue was a "general retainer," as the panel concluded, or an advance payment of fees. The parties agree, as a legal proposition, that "an advance payment of fees, which remains the property of the client until earned, must be kept in a client trust account until earned." Respondent's Brief, p 13 n 6. See also Administrator's Brief, pp 12-13.

III. The Hearing Panel's Legal Conclusions & Disposition of the Case.

A. The Panel's Conclusion That the $5,000 was a General Retainer.

In its thoughtful and detailed report, the hearing panel reasoned that the "retainer" paid to Mr. Boffman was a general retainer. The report, states, in part:

> Our initial inquiry is whether the retainer agreement required Boffman to refund any portion of the retainer fee if he did less than 50 hours of work for Kalsi. The agreement itself is not explicit on this issue. It does state that Boffman was "obligated to perform 50 Hours [sic] legal service to client before billing the client for additional services." From this language, one might interpret the agreement to provide that Boffman was entitled to keep the $5000 for

any work up to 50 hours (subject to the limitations imposed by ethical rules). [6]

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[6] Of course, a general retainer is still subject to other ethics requirements, including that it not be clearly excessive. MRPC 1.5. The Grievance Administrator does not assert--and we express no opinion on whether--the retainer amount was excessive.

On the other hand, Boffman's conduct towards Kalsi, as well as some of his arguments to this panel, leads to the opposite conclusion. After Kalsi demanded a refund, Boffman did not tell Kalsi that he had no right to have any portion of the $5000 refunded. Instead, Boffman offered a refund based on the number of hours he worked to that point. This arguably suggests that Boffman thought he was working on an hourly rate basis. In addition, before this panel Boffman does not contest the Grievance Administrator's unearned fee claim by arguing that Kalsi was not entitled to any refund (which would be the logical argument if Boffman was entitled to keep the full $5000 even if he worked less than 50 hours). Instead, Boffman argues that his efforts to leave a check for Kalsi demonstrate that he promptly tried to return any unearned fee (thus suggesting there was an unearned fee).

To resolve the question of what the parties' intentions were with respect to the $5000, we turn to the hearing testimony of Boffman and Kalsi. Boffman testified that he understood that Kalsi intended the $5000 to belong to Boffman and did not need to be held in trust. (Tr. at 71.) Boffman also believed the $5000 belonged to him, and testified that Kalsi understood that Boffman was going to treat the $5000 as belonging to him and did not object. (Tr. at 73.) See also Tr. at 179-83 (Boffman testimony that the $5000 was a retainer and not an advance for hourly-based billing).

Significantly, Kalsi's testimony is consistent with Boffman's testimony on this crucial point:

> Q: …[W]hen you paid [Boffman] that money, that's his money and then you wanted him to do the work for you; right?
>
> A: Yes. (Tr, p 151.)

Clearly, a more explicit retainer agreement could have avoided this issue. Nevertheless, after reviewing the exhibits in conjunction with the testimony, we find that the $5000 mentioned in the retainer agreement was a general retainer rather than an advance

> from which hourly based fees would be drawn. We believe that Boffman's offer to refund to Kalsi a portion of the retainer was an effort to respond to Kalsi's dissatisfaction with the results of Boffman's work and an (ultimately unsuccessful) effort to avoid litigation. Further, we conclude that Boffman's argument in his brief regarding the return of an unearned fee was made to address this issue in the event we agreed with the Grievance Administrator's view that the $5000 was client property. [HP Report 11/4/04, pp 5-6.]

B. Did the Panel Correctly Conclude that the Fee Paid Was a General Retainer?

At the outset, we will state our agreement with the parties' formulation of the issue and the legal principles implicit therein. "A general (or "true") retainer is a fee . . . paid solely for availability and therefore do[es] not involve an advance fee but a fee that is fully earned when paid.'"[1] A frequently cited treatise also frames the issue under the subheading "Retainer or Advance?":

> The retainer fee must be distinguished from an advance payment of costs and fees a client makes for specific legal services and accompanying expenses. Advances, which unfortunately are often included under the generic rubric of "retainers," remain the property of the client until the lawyer performs the services, or incurs the expenses, for which the payments were made. Most jurisdictions require advance fees to be deposited into trust accounts and to be withdrawn as the fees are earned. [*ABA/BNA Lawyers' Manual on Professional Conduct*, 41: 2002 - 2003; citations omitted.]

As we have noted, respondent concedes that this is the state of the law, but argues that it does not dictate the result "because the money at issue in this case was a general retainer and *not* an advance payment of fees." The Administrator disagrees and argues that the $5,000 paid to respondent was an advance of fees and not a "nonrefundable retainer"or, to use the panel's language, a "general retainer." Although some lawyers who use the unfortunate term "nonrefundable retainer"[2] may mean something other than a general (i.e., "true" or "classic") retainer, there is no

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[1] District of Columbia Bar Opinion No. 264 (1996). See also, New York Ethics Opinion 570 (1985), p 1 n1.

[2] We disapproved of the phrase "nonrefundable retainer" in Grievance Administrator v Otis M. Underwood, 99-58-GA (ADB 2001) because lawyers have a duty to return unearned fees. Lawyers also have a duty not to charge or collect clearly excessive fees. Therefore, it is inaccurate to label a fee "nonrefundable." As this Board noted in Underwood, some courts have held that use of the term is itself misconduct because it is (continued...)

question here that the parties are focused on whether the $5,000 was paid as a "general retainer" or as fees paid in advance.

The Administrator relies heavily on the express terms of the fee contract which we have quoted above, and which required respondent to provide 50 hours of legal services.

Respondent argues, as he did below, that the retainer agreement was "unclear" because although it used the word "retainer," it did not specify what type. The panel, relying in part on the client's testimony, found that the fee belonged to respondent upon payment. The testimony relied on by the panel consists of the following answer to the following compound question:

> Q: …[W]hen you paid [Boffman] that money, that's his money and then you wanted him to do the work for you; right?
>
> A: Yes. (Tr, p 151.)

The Administrator contends that the admission of the parol evidence was improper. In essence, the Administrator argues that there was no ambiguity in the fee contract, and, even were there one, it must be resolved against the attorney-drafter. The Administrator's brief states:

> The agreement does not use the word "nonrefundable" or any similar word, or language to the effect that the retainer shall be considered fully earned upon receipt. There is nothing within the four corners of the fee agreement to even suggest that Complainant was purchasing anything other than a fixed amount of hours from Respondent. [Administrator's brief on review, p 7.]

Our "first inquiry is what the words of the contract say, not what the parties say about it." Eagle Industries Inc v Thompson, 900 P2d 475 (Ore 1995).

We agree with Administrator that,

> A lawyer's silence about whether a retainer is nonrefundable [or a general retainer, or otherwise not an advance payment of fees] does not create an ambiguity, it triggers a presumption. "A fee payment that does not cover services already rendered and that is not otherwise identified is presumed to be a deposit against future services." Restatement Third, The Law Governing Lawyers § 38(c), Comment, p 282. [Administrator's brief on review, pp 11-12.]

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[2] (...continued)
false and deceptive.

An omission or a mistake is not an ambiguity. Michigan Chandelier Co v Morse, 297 Mich 41, 48; 297 NW 64 (1941). As our court stated in Michigan Chandelier:

> "Whatever may be the inaccuracy of expression or the inaptness of the words used in an instrument in a legal view, if the intention of the parties can be clearly discovered, the court will give effect to it and construe the words accordingly . . . . The law presumes that the parties understood the import of their contract and that they had the intention which its terms manifest. It is not within the function of the judiciary to look outside of the instrument to get at the intention of the parties and then carry out that intention regardless of whether the instrument contains language sufficient to express it; but their sole duty is to find out what was meant by the language of the instrument."

An ambiguous writing must be construed against the party who drafted it.[3] This rule of construction applies when attorneys draft fee agreements.[4]

We do not find that the fee agreement is ambiguous with respect to the issue before us, i.e., whether the retainer was an advance payment of fees or a general retainer. A general retainer (or "classic retainer" or "true retainer") is simply payment for the attorney's availability to the client and unavailability to other clients. See, e.g. New York Ethics Opinion 570 (1985), p 1 n1. It is not payment for the legal work. As the Restatement explains, referring to a general retainer as an "engagement retainer":

> An engagement retainer must be distinguished from a lump sum fee constituting the entire payment for a lawyer's service in a matter and from an advance payment from which fees will be subtracted (see § 38, Comment g). A fee is an engagement retainer only if the lawyer is to be additionally compensated for actual work, if any, performed. [1 *Restatement of The Law Governing Lawyers, 3d*, § 34, comment e, p 251.]

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[3] See, e.g., Michigan Chandelier Co v Morse, 297 Mich 41, 48; 297 NW 64 (1941) ("If it can be said that it is susceptible of two constructions by reason of doubt or uncertainty, the [contract] is to be construed most strictly against the [party] in whose behalf it was prepared."); Stroud v Glover, 120 Mich App 258; 327 NW2d 462 (1982).

[4] Wolfram, Modern Legal Ethics (1986), § 9.2, p 503 ("Courts quite uniformly resolve ambiguities in a fee contract against the lawyer, who has almost invariably drafted it."); Gabriz v Wechter, unpublished opinion per curiam of the Court of Appeals, decided 12/5/97 (Docket No. 189880; 1997 Mich App Lexis 1882) (retainer agreement's provisions regarding scope of representation construed against attorney-drafter)

Again, nothing in the retainer agreement indicated that the client was paying for anything but 50 hours of respondent's time.

Even assuming an ambiguity exists, and that it should not be held against the drafter, we do not find that Mr. Kalsi's testimony establishes that the fee is a general retainer. If we are to look outside the contract, when we consider this testimony in light of other evidence, it only becomes clearer that we are dealing with fees paid in advance and not a general retainer. Respondent also testified that he believed the money was his, based on the fact that he had told Mr. Kalsi that he could not guarantee a particular result. (Tr, p73.) This does not establish a general retainer. We also note also the testimony of respondent that he "accounted for [his] time," and offered a refund "for whatever portion [Kalsi] might have been entitled to as a result of the fact that [respondent] had only spent 90 to 120 days . . . with [Mr. Kalsi as his] client." (Tr, p 90.) And, we note the October 11, 2002 letter of respondent stating that the "retainer . . . was only partially expended." (Petitioner's Ex 6.)

The record, the law, and most important, the express language of the fee agreement in this case, simply do not establish that the retainer here is anything other than an advance payment of the fees respondent would earn by performing work on the client's matter. There is no mention of securing respondent's availability or any other benefit to the client or detriment to the lawyer which might serve to create, or be recognized as justifying, a general retainer.[5]

C. Did the Panel Reach the Right Result?

Respondent argues that three Board decisions support his position: Grievance Administrator v James M. Cohen, 91-159-RP (ADB 1992); Grievance Administrator v Mark T. Light, 98-198-GA (2001); and, Grievance Administrator v Otis M. Underwood, 99-58-GA (ADB 2001).

Light was charged and tried as a failure to communicate the basis of the fee. Light alleged that the fee was nonrefundable, and the panel concluded that he did not establish this and failed to correct his clients' (mis)understanding as to the nature of the fee arrangement in violation of MRPC 1.4. The fact that the panel and the Board did not reach the issues presented here, probably because there were no allegations of commingling, does not give much guidance in this case.

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[5] See, e.g., In Re Sather, 3 P 3d 403, 410 (2000).

Underwood involved a contract for a "minimum fee of $1,000.00, which includes the non-refundable case origination fee and services rendered until judgment enters, without regard to the amount of time or quantity of legal services provided." This "minimum" fee (or hybrid retainer) is different than a "pure" retainer (to compensate the attorney for availability only but not for work) which the respondent claims he has here. The Board did not pass on the propriety of such fees in general. The Board simply held that the attorney's retention of the $1,000 fee in that case was reasonable in light of all of the circumstances including the amount and the work Underwood put in on the matter. However, we, like every court or agency faced with the question, held that *all* fees are subject to scrutiny for excessiveness under MRPC 1.5 and that unearned fees must be refunded, MRPC 1.16(d). Indeed, the very fact that we reviewed the fee vindicates the well-established rule that one cannot insulate a fee from scrutiny under the rules of professional conduct by using certain terminology.

However, in Cohen, a 1992 opinion, we did state that:

> The Board is not prepared *at this time* to adopt the argument put forward by the Grievance Administrator that MRPC [1.15] in conjunction with Informal Ethics Opinion RI-10 requires that all retainer fees be placed in a client trust account until such fees have been earned or that deposit of a retainer fee into an attorney's general business account constitutes an improper commingling of funds. [Emphasis added.]

The opinion contains few facts about the fee, other than that it was "a retainer fee of $11,500 to represent" a client and that respondent believed it had been partially earned.

Since Cohen, this Board and hearing panels have imposed discipline for failure to segregate unearned fees from the lawyer's own funds. See, e.g., Grievance Administrator v Ronald P. Derocher, 99-98-GA (ADB 2000) (respondent disciplined for, among other things, failing to deposit $250 in unearned fees into a client trust account); Grievance Administrator v John Dughie, 02-116-GA (ADB Order 2003) (failure to place $1,500 retainer in a trust account); Grievance Administrator v J. Michael Hill, 96-236-GA (ADB Order 1998) (failure to place an unearned retainer fee, "not properly designated as a non-refundable retainer," in a segregated trust account and refusing to

refund the unused portion of the fee)[6]; Grievance Administrator v Richard J. Corriveau, 01-111-GA (HP Consent 2001) (failure to deposit $5,000 advance payment of fee into an interest bearing account in which no funds belonging to respondent or his firm were being held); Grievance Administrator v James E. Bliss, 99-141-GA (HP Consent 2000) (failure to deposit two retainer fees in trust and commingling same); and Grievance Administrator v David A. Gordon, 94-197-GA (HP Consent 1995) (respondent failed to deposit $750 unearned fee into trust account and depositing into his personal account thereby commingling funds with his own).

These decisions are consistent with the conclusion of Michigan Formal Ethics Opinion R-7 (1990). In that opinion, the topic of retainers is discussed based on the following hypothetical situation: "An agreement is reached and the client gives the lawyer a retainer to begin work." R-7 sets forth its analysis:

> Since the retainer is for work not yet performed, the retainer is unearned and must be deposited in the firm's client trust account. MRPC 1.15(a) specifically exempts advances of costs and expenses from deposit in the trust account, but does not exempt the deposit of unearned attorney fees. If the Supreme Court had intended fee advances to be exempt from deposit, the Court would have so specified. A lawyer may not withdraw "anticipated fees." The lawyer must explain to the client that the retainer is considered a deposit, inform the client that withdrawals will be made for fees, and may not withdraw more than has been billed, Grievance Administrator v Sauer, ADB 9-89, 12/8/89.

Respondent also argues that the reasoning in New York Ethics Opinion 570 (1985) supports an interpretation of the Michigan rules under which "fees paid to an attorney prior to work being done need not be considered client funds until the work is done and, therefore, need not be deposited into an attorney's IOLTA or client trust account." New York is in a minority of jurisdictions allowing unearned fees to be commingled with lawyer funds.[7]

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[6] Hill should not be read to stand for the proposition that merely "designating" a fee "nonrefundable" determines the lawyer's right to access the funds immediately or keep them under all circumstances. Indeed, as we have stated above, the Board has disapproved of the use of the word "nonrefundable" with respect to fees because of its capacity to mislead client and lawyer.

[7] Also, that ethics opinion involves an advance payment of fees. Respondent argues that he had a general retainer (but his agreement does not meet the definition in note 1 of the New York opinion).

Moreover, the New York opinion makes the following concession: "We recognize that our conclusion is contrary to the majority of opinions by other ethics committees that have addressed this issue, which would require that advance payments of legal fees be deposited in a client trust account and retained there until earned." That was in 1985. Since then, ethics opinions, discipline decisions, and court rules on this subject have multiplied. In fact, as we note below, the American Bar Association's Model Rules of Professional Conduct were amended in 2002 to expressly require this. The trend is unmistakably in favor of segregating unearned fees.

Finally, the logic of New York opinion 570 is simply not persuasive. The opinion asserts that lawyers require fees in advance "so that they will not be subject to a client's refusal to pay for legal services after they are rendered." The opinion argues that if unearned fees were required to be placed in trust this purpose could be easily defeated because fees disputed by a client would have to remain in trust until the dispute is resolved. Respondent and the opinion contend that this is unreasonable. But that is precisely what our rules require.[8] Indeed it is a basic part of being a fiduciary. And, having the funds available in trust is a great advantage, even if one must wait until a dispute is resolved to access them. This position is far preferable to having to sue on the account, conduct post-judgment collection proceedings, and run the risk that the client will be uncollectible.

The New York Ethics Opinion concedes that fees placed in a lawyer's account must be returned to the extent that they are unearned. Thus, fees which can only logically be considered to be the client's until earned are allowed to be commingled with lawyer funds in New York. This does serious violence to the policy which led to the anti-commingling rule. As the California Supreme Court said over 40 years ago:

> "[Commingling] is committed when a client's money is intermingled with that of his attorney and its separate identity lost so that it may be used for the attorney's personal expenses or subjected to claims of his creditors. . . . " The rule against commingling 'was adopted to provide against the probability in some cases, the possibility in many

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[8] See MRPC 1.15(c), which provides:

> (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 interests. If a dispute arises concerning their respective interests, the portion in dispute shall be kept separate by the lawyer until the dispute is resolved.

> cases, and the danger in all cases that such commingling will result in the loss of clients' money. . . .'" [Black v State Bar of California, 57 Cal 2d 219; 368 P2d 118 (1962).]

The concerns which led to MRPC 1.15 and its predecessors are not speculative. In a recent Indiana case, In Re Kendall, 804 NE2d 1152 (Ind, 2004), the attorney charged retainers he called "nonrefundable" and put them in his operating account. His practice was to refund any unearned portions, however. But, he filed bankruptcy, and the IRS placed a lien on his assets, including the account with the retainers.

Citing reports that "the single largest class of claims made to client protection funds is for the taking of unearned fees,"[9] the ABA recently codified the majority interpretation of Model Rule 1.15 by adding a new paragraph (c), which states:

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

As we have noted, even under the anti-commingling rules in existence prior to the addition of this paragraph, most states have concluded that unearned fees belong to the client, not the lawyer. And, the logic of the New York ethics opinion is unpersuasive, and represents a diminishing minority position.

However, we do recognize that our decisions subsequent to Cohen may not have been viewed as prominently and clearly departing from Cohen, and that, accordingly, some practitioners may not be aware of the steady evolution of the law on this point in Michigan and elsewhere. Only Derocher resulted in an opinion by the Board, and all three Board decisions involved other misconduct, specifically, failure to return unearned fees.

The Grievance Administrator has offered a sound analysis in this case and has ably and accurately argued that the $5,000 was required to be placed in a trust account. However, recognizing that the issue has not been settled well or for long, and the likelihood that a significant segment of the bar may be unaware of the applicable requirements, the Administrator acknowledged that prospective application of the holding on this issue may be in the interests of justice. *Cf.* Grievance Administrator v Gerald F. Doherty, No. DP 153/84 (ADB 1986). Discipline decisions

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[9] Reporter's Explanation of Changes proposed by the ABA Commission on the Evaluation of the Model Rules of Professional Conduct, Model Rule 1.15.

in other states have been given prospective application when the law regarding proper handling of retainers is unclear.[10]

IV. Conclusion.

We conclude that the $5,000 paid to respondent in this matter was clearly a portion of the fee, paid in advance (commonly called a "retainer"), for specific legal services to be rendered. It was not a general retainer (also known as a "true" or "classic" retainer or an "engagement fee"). The failure to place fees paid in advance in a trust account is a violation of MRPC 1.15(a). However, because we have concluded that prospective application of our holding is appropriate in this rare instance, we do not vacate the panel's order of dismissal and do not remand for a hearing on discipline. We wish to emphasize that we do so because the handling of fees paid in advance, for some reason, presents an almost unique situation involving not merely confusion, but lack of awareness and divergence of opinion with respect to the applicable ethical constraints.

This case will be seen to be more clear cut than many "retainer fee" cases. The agreement plainly provided that the money paid by the client was for specific legal services to be rendered. Thus, as we have held above, the funds were required to be held in trust until earned. And yet, we understand that the result in this case may come as a surprise to many honorable lawyers. We

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[10] See, e.g., In Re Sather, 3 P 3d 403, 405-406, 412 n 11 (2000) (declining to discipline for violation of RPC 1.15 "[a]lthough our holding today is consistent with our earlier cases and the majority of jurisdictions in the country," and making holding prospective because court was "aware that many attorneys believe that they are adhering to the rules . . . when they treat . . . advance fees as their own property"). Indeed, the Sather court referred the issue to the Colorado Bar Association for assistance with rulemaking to give attorneys an opportunity to comment and "comport their practices to these ethical constraints." 3 P3d at 414.

Compare, Iowa Sup Ct Bd of Prof Ethics & Conduct v Apland, 577 NW2d 50, 57 (Iowa 1998) (considering lack of clarity in formulating discipline):

> Because Apland took the fee before it was earned, he misappropriated the client's funds in violation of DR 1-102(A)(3), (4), (5), and (6). See Iowa Supreme Ct. Bd. of Prof'l Ethics & Conduct v. Gottschalk, 553 N.W.2d 322, 323-24 (Iowa 1996). The misappropriation, however, was not intentional given the uncertainty at the time about whether such fees were subject to trust account requirements.

But see, In Re Cooperman, 83 NY2d 465, 476; 633 NE2d 1069; 611 NYS2d 465 (1994) (disputing respondent's claims that he acted in good faith and "complied with the limited legal precedents at the time," and declining request to render ruling prospectively because respondent's steadfast refusal to refund any sums under his particular agreements despite previous admonitions and his knowledge that "there were problems with the nonrefundability of retainers" constituted "a daring test of ethical principals, not good faith").

therefore agree with the hearing panel that guidance to the bar is needed, and we will submit a memorandum to our Supreme Court joining the panel's request for clarification of the duties of a lawyer with respect to retainers and/or advance fees, and discussing various options for addressing that request.

Board members Theodore J. St. Antoine, William P. Hampton, George H. Lennon, and Lori McAllister concur in this decision.

Statement of George H. Lennon, specially concurring:

I concur because the result is in accordance with our previous decisions, and the great weight of authority. However, I believe ti would be beneficial for questions related to the proper handling of advance fees and retainers to be considered in a non-disciplinary forum in order to, first, achieve public protection without penalizing reasonable practices of the bar and, second, give lawyers ample notice of their obligations.

Board member Rev. Ira Combs, Jr. dissents and would remand for the imposition of discipline.

Board Members Marie E. Martell, Ronald L. Steffens, Billy Ben Baumann, M.D,. and Hon. Richard F. Suhrheinrich did not participate in this decision.