STATE OF MICHIGAN

Attorney Discipline Board

Grievance Administrator,

Petitioner/Appellee,

v

Otis M. Underwood, P-21678,

Respondent/Appellant,

Case No. 99-58-GA

Decided: July 26, 2001

BOARD OPINION

Tri-County Hearing Panel #75 entered an order in this matter on September 6, 2000 reprimanding the respondent, Otis M. Underwood, Jr., and directing the payment of restitution to complainant Jody Gore in the amount of $1,000.00 plus interest. The respondent has petitioned for review on the grounds that the hearing panel erred in its conclusion that respondent's collection and retention of a nonrefundable "origination fee" was in excess of a "reasonable fee" and was in violation of Michigan Rule of Professional Conduct 1.5. We are persuaded by respondent's argument that his conduct was not prohibited by that rule. We therefore vacate the hearing panel's order and dismiss the formal complaint.

During the afternoon of Friday, March 13, 1998, complainant Jody Gore and her father, John J. Gore, met for the first time with respondent at his office in Oxford, Michigan. Ms. Gore testified that she made an appointment with respondent after seeing his advertisement which included the statement that the first consultation was free. Ms. Gore's appointment with respondent was prompted by the death, on March 11, 1998, of Ms. Gore's employer, William H. Thompson. Ms. Gore presented respondent with photocopies of two documents purportedly signed by William H. Thompson on February 22, 1998 (Exhibit A). One, a typewritten "To Whom It May Concern" letter, stated that Jody Gore and William H. Thompson had agreed that she should be paid the sum of $157,248.00 for her full-time personal care of Mr. Thompson for a period of six years. The nature of these services is spelled out in a somewhat more detailed letter of the same date. At the time of his death, William Thompson was survived by eight children and had left a purported will dated January 20, 1988 directing that his estate be divided equally among his children.

Respondent recommended that Ms. Gore seize the initiative by filing a petition for commencement of probate proceedings in Lapeer County in her capacity as creditor of the deceased. Respondent testified that he had some concerns about the viability of Ms. Gore's claim and that he was therefore unwilling to undertake the representation on a purely contingent fee basis. He therefore proposed what he described

as a "blended" contingent fee agreement to be embodied in two written agreements. The first was a "Contract for Legal Services" (Petitioner's Exhibit 1). This written agreement called for the immediate payment of $1,000.00 as a "non-refundable case origination fee." That amount was further described in the contract as 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." Another paragraph in the agreement states:

> Client agrees that the fee is based not merely on the purchase of a fixed amount of attorney time, but also on Rule 1.5 of the Michigan Rules of Professional Conduct, including:
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> i. The time and labor required, the novelty and difficulty of the questions involved, and the expertise and skill requisite to perform the legal service properly.
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> ii. The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the Law Office.
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> iii. The amount involved and results obtained.
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> iv. The time limitations imposed by the client or by the circumstances.
>
> v. The experience, reputation, and ability of the lawyer performing the legal services.

This contract was signed on March 13, 1998 by respondent, complainant Jody Gore and her father, John J. Gore, who wrote respondent a check for $1,000.00. That contract refers to an accompanying "Contingent Blend Fee Agreement" between respondent and Jody Gore calling for a fee of 25% of the total recovery from the estate of William Thompson contingent upon a recovery being achieved and an hourly fee of $100.00 if there was no successful recovery.

The record reveals a number of factual disputes between respondent and Ms. Gore. It is undisputed, however, that Ms. Gore contacted respondent's office on Monday, March 16, 1998 to instruct him to cease his efforts on her behalf and to request the return of the $1,000.00 fee and the documents which she had left with respondent on Friday. Respondent returned a number of documents to Ms. Gore on March 19, 1998 but refused to return the $1,000.00 fee, claiming that he had expended 3.7 hours in the preparation of probate documents to be filed on Monday, March 16th.

The Grievance Administrator's complaint charged, *inter alia*, that respondent violated his duty under MRPC 1.5 to refrain from charging or collecting an illegal or clearly excessive fee by entering into an improper fee agreement. In this regard, the complaint specifically charged in paragraph 9(a) that:

> [Respondent] had Ms. Gore and her father execute a "Contract for Legal Services" and pay a "$1,000.00 non-refundable case origination fee," even though Ms. Gore's legal matter was not sufficiently complex so that it would preempt respondent from other work.

> Ms. Gore was not of sufficient maturity and intelligence to understand that the fee was nonrefundable, and respondent did not set aside a block of time, turn down other cases and martial [sic] his resources in reliance on his fee agreement with Ms. Gore and her father.

The hearing panel conducted public hearings in this matter on October 18, 1999 and January 18, 2000. Complainant Jody Gore and her father John Gore reside in the state of Florida and their *de bene esse* depositions were received by the panel. In addition to the testimony of respondent, Otis Underwood, Jr., the panel received the testimony of respondent's former secretary, Bonnie Dabb, who testified that she prepared a petition for commencement of proceedings and a publication notice in the William Thompson estate at respondent's direction on Friday, March 13, 1998. Ms. Dabb testified that she spoke with Ms. Gore at approximately 8:45 a.m. on Monday, March 16th when Ms. Gore advised:

> That she was wanting to put a hold on things, that she had a settlement likely. That she had met with the heirs over the weekend or the decedent's children. [Tr 10-18-99, p 123.]

She testified that she delivered Ms. Gore's documents to her on March 19, 1998. Attorney Thomas K. Butterfield testified that he represented Harold Thompson, the personal representative of the Estate of William Thompson, and that a claim eventually submitted to the estate on behalf of Jody Gore was settled for $5,000.00. Finally, the panel received the testimony of handwriting expert Leonard Speckin who testified that he was asked to compare the photocopies of the two "To Whom It May Concern" letters purportedly signed by William Thompson on February 22, 1998 and delivered to respondent by Ms. Gore on March 13, 1998. (The original documents have apparently never been produced.) He testified that the signatures on the two documents were, as he described, "cloned signatures," that is, the signature block containing the purported signature of William Thompson and the notary signature were photocopied from a single document.

At the conclusion of the hearings, the hearing panel issued its report on misconduct which contained the following conclusions:

A. The collection and retention of a nonrefundable origination fee, which bears no relationship to legal services rendered, constitutes professional misconduct and is violative of the Michigan Rules of Professional Conduct ("MRPC") 1.5; and

B. It is the definite and firm conviction of the panel members that the nonrefundable origination fee is in excess of a reasonable fee and is in violation of MRPC 1.5(a).

C. The charges of professional misconduct set forth in Counts Two, Three and Four of the complaint have not been established by a preponderance of the evidence and those counts are therefore dismissed.

The respondent has petitioned for review on the grounds that the hearing panel's conclusions with regard to Count One were erroneous as a matter of law and/or were without proper evidentiary support

in the record.[1]

We agree with respondent that neither the Michigan Court Rules, the Rules of Professional Conduct or Michigan case law clearly prohibits the charging or retention of a "case origination" fee paid as a nonrefundable retainer to commit the attorney to represent the client and not as a fee to be earned by future services. On the contrary, the Board takes notice that the subject of nonrefundable retainer agreements has been, and continues to be, the subject of vigorous debate in this state.[2] The Board also takes notice of the extent to which Michigan practitioners may have relied upon Informal Ethics Opinion RI-10 (1989), in which the State Bar's Committee on Professional Ethics opined on the circumstances under which a lawyer who has been discharged may retain all of a lump sum paid at the inception of representation, whether or not that sum has been "earned" on an hourly rate basis.[3] Moreover, we note that even jurisdictions which have outlawed nonrefundable retainers recognize that they are "widely used" though "not immune to criticism." In Re Sather, 3 P3d 403, 413 (Colo 2000).[4]

The Grievance Administrator argues, and the hearing panel appears to have accepted, the proposition that a fee paid in advance to secure an attorney's "readiness" is, per se, an illegal or excessive fee under MRPC 1.5. However, this is at odds with overwhelming precedent recognizing the validity of certain fees, commonly called "engagement fees" or "general retainers," that are earned when paid. See, e.g., Dubin & Schwartz, *Michigan Rules of Professional Conduct and Disciplinary Procedure*, p 1-37

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[1] The respondent also argues on review that the hearing panel erred in its refusal to allow expert testimony and in its assessment of costs against respondent under MCR 9.128. In view of the Board's decision to reverse the hearing panel's findings of misconduct, those issues are not addressed. The panel's dismissal of Counts Two, Three and Four was not appealed and is not before the Board.

[2] See, for example, "The Case Against Non-Refundable Retainer Agreements," Larry Dubin; "The Case For Michigan's Treatment of Non-Refundable Retainer Agreements," Lawrence I. McKay; Michigan Bar Journal, February 1995, pages 182-186.

[3] We agree with the Grievance Administrator that the State Bar's Informal Ethics Opinions do not represent controlling authority to be followed by hearing panels or the Board. We do not agree, however, that they are entirely inapplicable or that respondent has "disingenuously" argued in favor of RI-10's applicability. In this regard, we note with interest that Informal Opinion RI-10 appears to be the source for the language employed by the Grievance Administrator in paragraph 9(a) of the formal complaint. That language, cited earlier in this opinion, is essentially identical to conditions (a), (c) and (d) in the syllabus which precedes Informal Ethics Opinion RI-10. That syllabus summarizes the conclusion that it is not unethical for a lawyer who has been discharged without cause to keep all of a lump sum paid at the inception of representation, notwithstanding that the sum had not been "earned" on an hourly basis provided that certain conditions have been met including, for example, "(c) the client is of sufficient intelligence, maturity and sophistication to understand the agreement and that the fee is non-refundable and (d) the lawyer in fact sets aside a block of time, turns down other cases and marshals law firm resources in reliance on the fee agreement."

[4] Sather held that, "an attorney earns fees by conferring a benefit on or performing a legal service for the client," and therefore that attorneys must generally segregate advance fees by placing them in a trust account until earned (the Court preserved a limited exception for fees "earned when paid"). However, Sather recognized that "a substantial number of attorneys in this state may engage in conduct that would be affected by our discussion of these issues." Sather, 3 P3d at 414. Accordingly, the Court referred the matter to the Colorado Bar Association to solicit comments and draft proposed rules implementing "the ethical principles" announced by the Court. Id.

("An engagement fee . . . merely engages the services of a particular lawyer. Once a lawyer has been engaged, a separate fee agreement must determine the services to be rendered. The engagement fee is earned if the lawyer accepts the case."); Sather, supra, at 410 (Distinguishing "engagement retainers" from advance fees, and discussing some of the benefits provided by the lawyer: "Although an attorney usually earns an engagement retainer by agreeing to take the client's case, an attorney can also earn a fee charged as an engagement retainer by placing the client's work at the top of the attorney's priority list."); Matter of Scimeca, 265 Kan 742; 962 P2d 1080, 1091 (1998).

We agree with the Court in Sather, that the term "nonrefundable retainer" is misleading. For *all* fees – hourly, fixed, contingent, and even those denominated "nonrefundable" – are subject to MRPC 1.5(a)'s standards.[5] If a fee is "clearly excessive" within the meaning of MRPC 1.5(a), it is misconduct to fail to refund the clearly excessive part of the fee when required by MRPC 1.16(d). This, however, does not mean that all nonrefundable fees are per se unethical. And, we are not prepared at this point to follow Sather and discipline lawyers who use the term "nonrefundable."

Professors Hazard and Hodes, like almost all other authorities, reject the idea that nonrefundable fees are per se unreasonable. Geoffrey C. Hazard, Jr., and W. William Hodes, 1 *The Law of Lawyering* (3d ed), §8.5, p 8.3. After discussing the continued viability of general retainers that are "earned when paid," the authors write:

> Once the amount of the fee *is* taken into account, it makes analytic sense to treat the fee as a minimum fee, and then to assess its reasonableness under ordinary standards. . . . For example, a lawyer who ordinarily charges $200 per hour might charge $1000 for the *first* hour, taking into account start-up costs, and the danger that substantive discussion might reveal unexpected complexities, including a conflict of interest that would dictate termination of the relationship. When the first hour of consultation is over, the $1,000 cannot be refunded, yet it has been earned *and* it is not excessive. On the other hand, an initial (minimum) fee of $5,000 for routine services would almost certainly be found to be unreasonable by most courts and disciplinary authorities if the lawyer did little legal work and refused to refund part of the money. [Id. Emphasis in original. Footnote omitted.]

We need not write the definitive opinion on nonrefundable fees, or on the ethics of fees and billing

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[5] Model Rule of Professional Conduct 1.5(a) reads: " A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following . . . ." Michigan's version of Rule 1.5 retained the Code of Professional Responsibility's language from DR 2-106(A) & (B):

> A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee. A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. The factors to be considered in determining the reasonableness of a fee include the following . . .

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

Board members Wallace D. Riley, Theodore J. St. Antoine, Michael R. Kramer, Grant J. Gruel, Marsha M. Madigan, and Marie E. Martell concur.

Board members Diether H. Haenicke, Ronald L. Steffens and Nancy A. Wonch did not participate.