

Billing Pitfalls and Pratfalls: Avoiding the Ethical Issues that Snag Attorneys
 December 3, 2008, teleseminar sponsored by the ABA FLS

Moderated by: Mark Chinn, Jackson, MS
 Panelists: Lori Nelson, Salt Lake City, UT and
 Chaim Steinberger, New York, NY

TABLE OF CONTENTS
 Chaim Steinberger

BILLING.	<u>-1-</u>
<i>How to make 40% more money - A very interesting statistic.</i>	<u>-1-</u>
Technique No. 1: Always be Client-Centric:	<u>-1-</u>
<i>competence</i>	<u>-4-</u>
<i>concern, integrity and honesty</i>	<u>-4-</u>
Best Practices Tip: Obtain an up-front advance.	<u>-4-</u>
Technique No. 2: Ensure that the client is <u>never</u> surprised:	<u>-4-</u>
Technique No. 3: Allow the client to see and feel the effort you put into the case:...	<u>-5-</u>
What “effort” means to the client is how hard they believe you are working for them--not the amount of time you are spending.....	<u>-5-</u>
Technique No. 4: Bill timely and completely:	<u>-5-</u>
Technique No. 5: Make your billing entries come alive and display your exertions:...	<u>-5-</u>
Technique No. 6: Project integrity, ethics & competence in everything you do.....	<u>-6-</u>
Technique No. 8: Copy the client on all documents.....	<u>-6-</u>
Technique No. 9: Give the client your undivided attention during all meetings.	<u>-7-</u>
Technique No. 10: View each billing question or complaint as an opportunity to strengthen the attorney-client relationship.....	<u>-7-</u>
Technique No. 11: Never, ever, <u>ever</u> , let the client get out too far ahead of his payments	<u>-8-</u>
Problem Avoidance Technique: If multiple lawyers are required, introduce them to the client and explain why they are needed and how multiple lawyers will benefit the client.....	<u>-9-</u>
FEES.	<u>-11-</u>
What fee may a lawyer charge.....	<u>-11-</u>
Model Rules of Professional Conduct 1.5.....	<u>-11-</u>
The basis of the fee must be communicated.	<u>-13-</u>
Arrangements that have resulted in sanctions to the attorney.	<u>-13-</u>
Clearly unethical charges.....	<u>-13-</u>
Deceptive billing practices.....	<u>-13-</u>
“Unreasonable” fees.....	<u>-14-</u>
Services left unperformed.	<u>-14-</u>

Fees for doing very little.	-15-
Unnecessary travel.	-17-
Learning an area of law.	-20-
Too many lawyers.	-22-
Charging lawyer's rates for non-lawyer's work.	-23-
What if client agrees.	-25-
Client & Firm [Overhead?] Expenses.	-26-
Electronic research.	-28-
Advance Payments vs. General Retainers.	-30-
Discharge or Withdrawal.	-35-
Withdrawal for non-payment of fees.	-35-
May the lawyer retain the client's file(s) to ensure payment of his fee?.	-37-
States that permit the attorney a retaining lien:	-37-
Florida.	-38-
New York.	-38-
States that although technically permit the attorney a retaining lien, discourage or restrict it:	-38-
District of Columbia.	-38-
Florida.	-38-
Maryland.	-38-
Massachusetts.	-38-
Minnesota.	-38-
Mississippi.	-38-
Montana.	-38-
Oklahoma.	-38-
South Carolina.	-38-
South Dakota.	-39-
Tennessee.	-39-
Texas	-39-
Utah.	-39-
West Virginia.	-39-
States that flatly prohibit an attorney to assert a retaining lien against the case file:	-39-
California.	-39-
Louisiana.	-39-
Virginia.	-39-
Common Law Charging Lien.	-39-
Lawyer Trust Accounts.	-40-
Commingling of funds.	-40-
Recordkeeping.	-40-

Delegation of responsibilities.	-42-
Strict liability offenses.	-42-
Distribution of property held in trust.	-42-
Atty-client dispute.	-43-
Client & Client's creditor, or Attorney & Client's creditor, dispute.	-43-
Interest earned on client IOLTA funds.	-43-
For More Information see.	-43-

TABLE OF AUTHORITIES

RULES:

Model Rules of Professional Conduct 1.1..... [-20-](#)

Model Rules of Professional Conduct 1.5..... [-11-](#)

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Connecticut Bar Association Committee on Professional Ethics, Informal Op. 03-08, 2003 WL 23663018 (9/22/2003). [-28-](#)

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CASES:

Alsfelder, Cincinnati Bar Association vs., 816 N.E.2d 218 (Ohio 2004). [-24-](#)

BD v. DeBuono, 177 F.Supp.2d 201, 209 (S.D.N.Y.2001). [-29-](#)

Bjornen v. State Farm Fire and Cas. Co., 81 Hawaii 105, 912 P.2d 602, 604-06 (1996). . . . [-29-](#)

Braskey, Attorney Grievance Commission of Maryland v., 836 A.2d 605 (Md., 2003). [-25-](#)

Braunberger v. Interstate Eng'r, Inc., 2000 ND 45, ¶ 20, 607 N.W.2d 904. [-29-](#)

Bushman v. State Bar, 11 Cal.3d 558, 113 Cal.Rptr. 904, 522 P.2d 312, 314 (1974). [-18-](#)

Calahan, In re, 930 So.2d 916 (La. 2006). [-15-](#)

Carr v. Fort Morgan School District, 4 F.Supp.2d 998 (D. Colo. 1998). [-22-](#)

Comstock, In re, 664 N.E.2d 1165 (Ind. 1996). [-17-](#)

<i>Cooper, Matter of</i> , 219 NY 255 (1943).....	-38-
<i>Crosby v. Bowater Inc. Retirement Plan</i> , 262 F.Supp.2d 804, 817 (W.D.Mich.2003).....	-28-
<i>Dorothy, In re</i> , 605 NW2D 493 (S.D. 2000).....	-17-
<i>Gibson v. Burns</i> , 505 So.2d 66, 69 (La. App. 1987).	-18-
<i>Glesner, In re</i> , 606 N.W.2d 173 (Wis. 2000).	-14-
<i>Green, In re</i> , 11 P.3d 1078 (Colo. 2000)	-23-
<i>Guida, Attorney Grievance Cmm'n of Md. v.</i> , 891 A.2d 1085 (Md. 2006).....	-14-
<i>Halliburton-Cohen, Columbus Bar Assoc. vs.</i> , 832 N.E.2d 42 (Ohio, 2005).	-33-
<i>Haroco, Inc. v. American Nat'l Bank and Trust Co. of Chicago</i> , 38 F.3d 1429, 1440-41 (7th Cir.1994).	-28-
<i>Heavener v. Meyers</i> , 158 F.Supp.2d 1278 (E.D. Okl. 2001).....	-21-
<i>Heng v. Rotech Med. Corp.</i> , 720 N.W.2d 54 (N.D., 2006).	-28-
<i>Hensley v. Eckerhart</i> , 461 U.S. 424, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983).	-23-
<i>Hess, Att'y Griev. Cmm'n of Md. v.</i> , 722 A.2d 905 (Md. 1999).....	-13-
<i>Lane, Iowa Supreme Court Board of Professional Ethics & Conduct v.</i> , 642 N.W.2d 296 (Iowa 2002).	-14-
<i>Lerner v. Seigel</i> , 22 AD2d 816.	-38-
<i>McCord v. New York</i> , NYLJ 10/1/2008 at 26 col. 1 (Court of Claims).....	-37-
<i>Merritt Meridian Constr. Corp., United States v.</i> , 95 F.3d 153, 172 (2nd Cir.1996).	-28-
Model Rule of Professional Conduct 1.15.....	-31- , -40-
Model Rule of Professional Conduct 8.4.....	-31-
<i>Montgomery v. Aetna Plywood, Inc.</i> , 231 F.3d 399, 409 (7th Cir.2000).....	-28-
<i>Montpetit, In re</i> , 528 NW2d 243 (Minn., 1995).	-42-

<i>Poseidon Pools of America, Inc., In re</i> , 180 B.R. 718 (Bankr. E.D.N.Y., 1995).	-21-
<i>Ramos v. Lamm</i> , 713 F.2d at 546, 557 (10 th Cir., 1983).	-23-
<i>Ryan v. Butera, Beausang, Cohen & Brennan</i> , 193 F.3d 210 (3 rd Cir., 1999)..	-30- , -33-
<i>Sather, Matter of</i> , 3 P.3d 403 (Colorado, 2000) (<i>en banc</i>).. . . .	-30- , -41-
<i>Schneider, Kleinick, Weitz, Damashek & Shoot v. New York City</i> , 302 AD2d 183, 754 NYS2d 220 (App. Div., 1 st Dept., 2002)..	-35- , -39- , -43-
<i>Sinnott, In re</i> , 845 A.2d 373 (Vt. 2004)..	-25-
<i>Spicer v. Chicago Board Options Exchange, Inc.</i> , 844 F.Supp. 1226 (N.D. Ill., 1993).	-27-
<i>Standley v. Chilhowee R-IV Sch. Distr.</i> , 5 F.3d 319, 325 (8th Cir.1993).	-28-
<i>Struthers, Matter of</i> , 179 Ariz. 216, 877 P.2d 789 (1994)..	-18-
<i>Uren v. Dakota Dust-Tex, Inc.</i> , 2002 ND 81, ¶ 34, 643 N.W.2d 678.	-29-
<i>Zimmerman, Committee on Professional Ethics and Conduct of the Iowa State Bar v.</i> , 465 N.W.2d 288 (Iowa, 1991)	-23-

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By Chaim Steinberger¹

BILLING²

Each one of the attorneys' bills will either strengthen the attorney's relationship with the client or weaken it. Moreover, it generally serves as the source for all of the attorney's revenues. It should, therefore, be viewed seriously, and with an eye towards customer service, strengthening the attorney-client relationship, and obtaining more client referrals.

How to make 40% more money - A very interesting statistic:

Disciplined timekeepers make 40% more money than non-timekeepers.

Technique No. 1: Always be Client-Centric:

The touchstone approach that should be taken is to be *client-centric*, and view every single thing the attorney does or presents, from the client's point of view. It is not enough if the attorney knows that the client is receiving value for their money. It is the client who has to realize it, for the client to be satisfied with the attorney's services. If the client feels the bill is unjustified, he will resent the attorney and not consider the attorney for future services. Moreover, he may contest the bill, refuse to pay it, or, in extreme circumstances, even file an ethics complaint.

It is, therefore, imperative that attorneys create bills that demonstrate the attorney's value to the client. A client who understands the bill and feels it is justified, will likely pay it. Attorneys must, therefore, understand what clients want and expect from them.

¹ **Chaim Steinberger** is the principal of CHAIM STEINBERGER, P.C., in New York, NY, and serves on the Attorney-Client Fee Dispute Arbitration Panel of the Brooklyn Bar Association. He can be reached through his website, www.theNewYorkDivorceLawyer.com.

² Many of the ideas in this section are based on the suggestions contained in J. Harris Morgan & Jay G. Foonberg's book, *How to Draft Bills Client Rush to Pay* (2d ed., 2003, ABA LPM section).

In 1960, Prentice-Hall conducted a study of users of legal services (Prentice-Hall Missouri Motivational Study of 1960) and questioned them about what was important to them. Incredibly, the clients' answers barely matched up with attorneys' perceptions of what they, the clients, wanted.

Typically, attorneys believe that clients want, in the following order:

1. Efficiency;
2. Fair fee;
3. Competence;
4. Concern;

Clients, however, have an entirely different set of priorities. According to the Missouri study, what clients want are, in order of importance to them:

1. Concern;
2. Honesty and ethics;
3. Competence; and only then,
4. Efficiency;

To clients, then, efficiency and price is not as important to them, indeed come in only at a distant fourth place, after basic concern for them and their issues, honesty and integrity, and the attorney's competence.

Placing cost/price in fourth place was no mere oversight. When asked directly what they thought should be the most important element in the fees set by their attorneys, 47% of the clients responded that it should be the degree of effort exerted by the attorney.³

That same study split the clients into two groups, depending on whether they said they would hire the same lawyer again or not. They then asked the groups why they would, or would not, in the second group, hire that lawyer. Their answers were, again, surprising.

Not a single person said they would not rehire the attorney because the attorney charged too much or lost the case. Instead, the reasons given were:

- ✓ "Well, I certainly couldn't stand his impersonal attitude. He was so busy that I was just a file number and he didn't even know my name or who I was. When I would ask if he had heard anything, he would look at me like he wondered who I was and what he should have heard."

³ In the study, 47% said it should be the attorneys' effort; 18% said it should be the complexity and importance of the case; 15% said it should be the client's ability to pay; and 6% said it should be the results achieved by the lawyer.

- ✓ "She was so bored and indifferent."
- ✓ "He always had so many papers on his desk he didn't have time to fool with my \$1 million case. He was certainly rude and brusque. He didn't have time to get up and usher me out and usher me in. He listened to everybody on the telephone and talked about people's business on the telephone, which horrified me."
- ✓ "She had a superior attitude and never told me anything because, of course, I am too stupid. I was a layperson and she was a smart lawyer. I don't know the English language. I couldn't understand about rules of law. I was a stupid idiot. I wouldn't hire her again because she had a superior arrogant, attitude and failed to keep me informed. I never knew what was going on."
- ✓ He never tells us whether he won or lost."

Conversely, those that said they would rehire the same attorney, did not cite price or a successful result as the reason for their loyalty to their lawyer. Instead, their responses included the following:

- ✓ "I would employ her again because of her friendliness."
- ✓ "I like the way he came out in the waiting room and took my hand and said, 'John, I'm so glad to see you. Won't you please come in?'"
- ✓ "I like the prompt, businesslike manner."
- ✓ "I like the way she talked about what the fee was going to be, as if it had some importance to both of us, at the very beginning of the employment."
- ✓ "I like the way he billed me every month for reimbursements that he had."
- ✓ "I like the way she itemized the bill so I knew what I was paying for."
- ✓ "I loved his courtesy--the way he kept the telephone turned off when I was discussing a matter with him and how he would protect my confidences."
- ✓ "I like the way he was not condescending."
- ✓ "She even sent me trial briefs and let me know that I could understand some of these instruments just as well as she could, and she discussed the case fully, and kept me informed. I knew exactly what was going on all the time."

The lessons to be learned from this is that, contrary to the opinion held by many attorneys, clients are less swayed by cost than they are by the degree of approachability, care, concern, and professionalism demonstrated by the attorney to the client.

From the outset of the relationship, the attorney should, consistent with the findings of the Missouri Study, show the client care and concern. Focus your entire attention on the client whenever the client is in your office or presence.

Demonstrate a high level of integrity and trustworthiness in everything you do, whether it is with the client, with opposing counsel, or with others (such as staff members). Giving a proposed client an honest assessment of the case, is one way to display such integrity. Display professionalism as well as integrity by raising the issue and discussing your billing structure at the first meeting before the client ever asks.⁴ Explain to the client what systems you have in place to ensure the accuracy of the bills.

Display your **competence** by using, as appropriate, professional terminology, relevant caselaw, other cases you have handled and their outcomes, or discussing some of the problems in this case and how you might handle them.

Demonstrate **concern, integrity and honesty** by referring the case to another competent lawyer, if you lack the competence to handle the matter.

Best Practices Tip: Obtain an up-front advance on legal fees in an amount estimated to equal two months of legal fees (one month at a minimum). As Abraham Lincoln is quoted as saying, “In this manner, the lawyer will know that he has a client and the client will know that he has a lawyer.” It is better to identify up front, a client unable or unwilling to pay the attorney's fee.

Technique No. 2: Ensure that the client is never surprised:

Carefully estimate the time and work the matter will take. Then double it. Provide the client with this amount as an estimate of costs. It is better to estimate high and then come in below.

The client's **expectations** about the fee is much more important than the actual amount of the fee. Thus, a large part of client relations should be about *managing expectations*.

If, despite the doubling, you see that the costs are overrunning the estimate, advise

⁴ Many clients are afraid to ask the issue. They, therefore, hope that the attorney will do so. Indeed, 80% of the participants in the Missouri study preferred that lawyers discuss fees in the first interview. Unfortunately, 36% of us do not do so. Clients overwhelmingly (88%) did not want to be the ones initiating the discussions about fees.

the client of the fact and why that is happening. Research has shown that if a lawyer corrects an estimate before it becomes a fact, the ultimate fee is perceived as fair by the client, even if it is above the original estimate. The client will not feel surprised and, therefore, will not feel deceived.

Technique No. 3: Allow the client to see and feel the effort you put into the case:

Most clients do not equate effort with time spent. Rather they define it as “service rendered.” What “effort” means to the client is how hard they believe you are working for them-- not the amount of time you are spending.

Think about how to structure your bills so that the clients perceive your efforts on their behalf. Do not highlight the number of hours, or even the total amount of the bill. Instead, the bill should highlight the effort you put in, and a personal note, demonstrating your concern, for your client.

Technique No. 4: Bill timely and completely:

Based on a study by Joe Roehl of Albuquerque, New Mexico, the best time to present a client with a bill for services is within 72 hours after the service has been rendered. The later you bill after that, the more precipitously your chances for collection is reduced. Remember, *the value of services diminish rapidly after they are rendered.*

Timely bills also demonstrates a businesslike attitude and, therefore, is a major factor in clients' decision to rehire the attorney. Studies show that *firms that bill more frequently, obtain more referrals* from clients.

If you have put in a lot of work in a short period of time, consider sending bills every week or even every day. It prevents the client from being surprised and if there is going to be a problem, it is better to know about it up front.

Be sure to include everything done on the client's behalf on the bill, even if there is no charge associated with it. This demonstrates to the client the efforts exerted and, if there is no charge, allows the client to further appreciate it.

Technique No. 5: Make your billing entries come alive and display your exertions:

Use a plethora of active verbs, instead of boring passive recitations. Use present tense verbs instead of past tense.

Lace the bill with action verbs like: file, mail, copy, outline, depose, contact, confer, secure, determine, conclude, improve, reject, propose, suggest, calculate, examine, compare, search, research, draft, prepare, construct, close,

engage, demand, compile, revise, update and redact. Each telephone call is, in actuality, a telephone “conference” and deserves that dignity. You might reserve certain verbs for specific staff functions like *draft* for lawyers and *prepare* for secretaries. Avoid using the word “brief,” because it might sound like something the lawyer should have learned in law school and for which the client should not be paying for.

Billing entries should demonstrate what you did, and what the value to the client was. For example, instead of an entry that states, “Tel. call to opposing counsel;” an entry might read,

Telephone conference with opposing counsel - advise counsel that client is not obligated to pay more than \$1,500/month in child support and that wife's alimony was about to terminate.

Instead of “legal research,” value to the client would be better demonstrated by an entry like:

Researched relevant caselaw, found *Jones* case that stands for the proposition that father need not pay child support for a child that is working full time.

These entries remind the client of the effort exerted by the attorney, and the value they received.

By including all of the work done on the client's behalf, the bill reads like a story providing the client with a narrative history of the client's case. It has a beginning, middle and end. (If you fail to include some developments in your bill, then the story will have gaps.)

Technique No. 6: Project integrity, ethics & competence in everything you do:

Show prepayments as deposits into your escrow account.

Explicitly show withdrawals from the escrow account when drawn down, and the balance remaining in the escrow account.

Return to the client any remaining sums, even if it is only a negligible amount, if the client is entitled to a refund. It establishes the attorney's trustworthiness.

Technique No. 7: Personalize each bill:

Add a personal statement to the bill, such as, “Thank you for your confidence. We are grateful for the opportunity to defend you in the lawsuit your ex-wife brought.”

Technique No. 8: Copy the client on all documents:

Include the notation “For your information - no response necessary” or “For your review and comment,” as necessary. This keeps the clients informed of all the efforts you are exerting on their behalf.

Technique No. 9: Give the client your undivided attention during all meetings:

Turn off your telephone, cell phone, blackberry, and email program, and personally usher your client in and out. As displayed by the responses to the Missouri Study, this creates more value in the client's mind, then reducing your bill or getting more work done.

Technique No. 10: View each billing question or complaint as an opportunity to strengthen the attorney-client relationship:

Although it may be difficult, it is imperative that an attorney not become defensive, angry or confrontational when a client questions a bill. The attorney should view the question or complaint as a request for clarification, and an opportunity to strengthen the attorney-client relationship.

Stay calm. Tell the client you will review the problem and get back to him/her when you have obtained the underlying information.

You need to be careful how you handle the issue. If you immediately reduce the bill, the client may feel that you have been caught trying to pad your fee and can become suspicious of every following bill, destroying your relationship.

Ask the client when would be a good time to call back on the issue.

Then, after familiarizing yourself with the facts and calling the client back, first try to understand the client's point of view. Repeat the client's claims without agreeing to them, just to show the client you understand what the client is saying. This goes a long way in dissipating a client's dissatisfaction. You might say, for example, “Let me see if I understand you correctly. You are saying that although we put in 25 hours on the motion, because the judge denied it, we should not be paid for it. Is that right? Am I understanding you correctly?” Allow the client to clarify his position if you didn't get it quite right.

After you understand the client's claim, try to relate the work done to the specific issue it was relevant to, and show the benefit the client received from it. It is not enough to simply say, “We put in the time, so you have to pay for it.” The client may think you are incompetent and spent unnecessary time on the matter. Instead be *client-centric* and point out how the client benefitted from the work done.

If you determine that there is an error, be frank and apologize for it.

If you cannot reach an agreement with the client, you can ask the client to pay the undisputed amount as you continue to discuss and consider the amount in dispute.

If after discussions, you cannot get the client to consent to the legitimacy of the bill, you can tell the client that “We feel the work was necessary but understand that you are upset. We will make an adjustment of \$X to demonstrate that we value you as a client . . . “

The worst thing you can do is to ignore the issue and hope it goes away. This will likely just enrage the client and, possibly, result in a grievance complaint.

Technique No. 11: Never, ever, ever, let the client get out too far ahead of his payments:

You have worked hard for a client. You are well on your way. The client has paid a substantial sum but, lately, the payments have been coming in later and later, in smaller and smaller amounts (compared to the charges). We have all been there. The temptation is great to just keep carrying the charges, maybe raise the issue delicately or somewhat hesitantly, but to continue working for the client for whom you expect to accomplish great things. Moreover, if you drop the case now, all your hard work has been for naught or, even worse, someone else will claim the glory.

The problem is that the greater the amount of money the client owes you, the greater the incentive the client has to find some reason to challenge your fees or, even worse, file an ethics complaint or grievance against you, to get out of paying your fee.

Additionally, if you lose the case, the client will not feel you are justified in your fee.

Even if you win the case, *the value of services diminish rapidly immediately after the service is performed.*

Knowing that you are not being paid for the work you continue to invest in the case, raises the temptation to turn your attention to paying work and to neglect this case. This makes you even more susceptible to an ethics complaint.

Finally, because you are owed so much money, you have now become a guarantor of the client's action. The client can lean back and stop carrying the normal-workload that clients shoulder, because he knows that you will have to make up the slack. You can't afford to lose. That further increases your frustration and the temptation to further neglect this case.

Moreover, this now becomes “your” case. Instead of being the dispassionate advocate who is advocating for a client, you are now a party in interest, fearful that a loss would result in a significant loss of revenue to you personally. You are less able to think

dispassionately about the issues, choices and their ramifications, and to make cool, level-headed, analysis and recommendations to your client. You have now allowed yourself to be converted from an attorney to a litigant. Do not let this happen to you!

When a bill is not paid in a timely manner, immediately begin collection efforts. You should develop and institute a collection procedure that will kick in automatically when bills are not paid. The sooner you are made aware of a problem, the better off you are. An even greater benefit is that the clients will respect your professionalism and understand that you are running a business as well as providing them an important service.

Problem Avoidance Technique: If multiple lawyers are required, introduce them to the client and explain why they are needed and how multiple lawyers will benefit the client

There seems to be a high correlation between multiple lawyers in a case and mismanaged cases. Clients often become angry believing the lawyers are padding the bills. This is particularly true if the attorney's name appears only once, or once every several months. Moreover, clients do not want to pay for another attorneys relearning the case merely because it is more convenient for the firm.

If multiple lawyers are needed explain why. Perhaps it is because:

1. A large amount of information must be accumulated or synthesized in a short period of time;
2. There is so much work, that it is in client's best interest to have it compartmentalized and have lawyers with specific skills utilized in certain parts thereof;
3. The case is so complex that it is in client's interest to bring in specialist;
4. So simple that it is in the client's interest to use a lawyer with a lower billing rate;
5. It effects so many areas of the client company's operations that a review is necessary to ensure that the positions taken in this suite do not prejudice the client in any antitrust, intellectual property, employment areas, or in the client's policies & procedures;

Try to have lawyers meet the client before their names appear on bills.

List the learning curve on the bill with a “no charge” entry . It demonstrates integrity and forces the firm to be more efficient.

FEES:

What fee may a lawyer charge?

Model Rules of Professional Conduct 1.5 prohibits an attorney from (i) making an agreement for; (ii) charging; or (iii) collecting (a) an unreasonable fee; or (b) an unreasonable amount for expenses.⁵

⁵ Model Rules of Professional Conduct 1.5 provides that:

Fees

(a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:

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

(b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in a writing signed by the client and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated. The agreement must clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a

The rule explicitly lists eight (8) factors among those that are to be considered when determining whether a fee is reasonable, but does not foreclose the possibility of considering other factors.⁶ The eight factors explicitly listed are:

1. Time and labor required, novelty & difficulty of issues, skill required;
2. Likelihood that would preclude other employment;
3. Fee customarily charged for similar services;
4. Amount involved and results obtained;
5. Time limitations under which operating;
6. Nature and length of the relationship;
7. Experience, reputation & ability of the lawyer;
8. Whether the fee is fixed or contingent;

MRPC 1.5(a)(1)-(8).

recovery, showing the remittance to the client and the method of its determination.

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

(1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof; or

(2) a contingent fee for representing a defendant in a criminal case.

(e) A division of a fee between lawyers who are not in the same firm may be made only if:

(1) the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation;

(2) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and

(3) the total fee is reasonable.

MRPC 1.5.

⁶ MRPC 1.5 cmt. 1.

Whether a fee is reasonable or not is primarily a factual issue that is determined by all of the circumstances surrounding the making of the agreement. Decisions that have evaluated the reasonableness of a fee have also looked at these additional factors:

- the responsibility incurred by the attorney;
 - the importance of the matter;
 - the amount of money involved in the matter;
 - the intricacies of facts involved;
 - counsel's diligence;
 - the court's own knowledge;
 - client's sophistication and experience in business matters; and
 - whether the client received “reasonable and fair disclosure.”
-

The basis of the fee **must** be communicated:

Model Rule 1.5(b) requires the lawyer to tell the client what the basis of the fee will be, “preferably in writing.” MRPC 1.5(b). It also requires the attorney to advise the client when there is a change in the basis or rate of the fee or expenses. *Id.*

Arrangements that have resulted in sanctions to the attorney:

Clearly unethical charges:

● Deceptive billing practices:

Sanctioned: Attorney who inflated bills by 15% to offset 15% “prompt payment discount” (which client did not earn), is sanctioned.; *Att’y Griev. Cmm’n of Md. v. Hess*, 722 A.2d 905 (Md. 1999);

Human Story: “Impossible” client of major Baltimore law firm, who called attorney at home six nights a week; spent hours on the telephone with the attorney during the attorney's honeymoon; and who did not pay his bills, sometimes delaying payment for as long as 13 months; but had billings of \$400,000-\$900,000/year, then demanded a 15% discount lying that such a discount was offered to him by another firm. The attorney granted 15% discount conditioned on prompt payment (which never

happened) and then inflated the bills to recapture the discount amount.

Court states that inflating bills destroys the public confidence in the integrity of the profession and warrants disbarment but, because here it was merely the offset of the prompt-payment discount, the penalty was reduced to a 3 year suspension.

Side note: The attorney was forced to resign his position in the firm, and the firm had to pay \$475,000 to clean this up.

The scheme came to light when the client, in one of the underlying representations, sought to recover his attorneys' fees and costs from his adversary. The adversary requested and reviewed the law firm's billings and discovered the machinations.

Sanctioned: attorney who agreed to write down client's bill by \$7,000, then tacked on \$1,500 on each of two following bills to recover the lost fees. *In re Glesner*, 606 N.W.2d 173 (Wis. 2000);

Sanctioned: lawyer whose brief was plagiarized (without attribution) from a treatise and, after winning the Americans with Disabilities claim, sought an award of attorneys' fees for, among other fees, 80 hours at \$200/hour. Despite the court's questioning, the attorney failed to identify the source of the material. Court holds that attorney's action was an attempt to deceive the court, goes to his integrity, and undermines the public confidence in the legal system warranting a six month suspension from the practice of law. *Iowa Sup. Court Bd. of Prof's Ethics & Conduct v. Lane*, 642 N.W.2d 296 (Iowa 2002);

“Unreasonable” fees:

- Services left unperformed:

Sanctioned: Even a fee that is reasonable if the services are performed, can become unreasonable and the basis for sanctions when the attorney fails to perform the agreed upon work. In *Attorney Grievance Cmm'n of Md. v. Guida*, 891 A.2d 1085 (Md. 2006) the attorney took a \$735 fee to allow the new husband to adopt the wife's two children. “[A]lthough \$735.00 as a fee for a relatively straightforward adoption may not be unreasonable on its face, in the context of Guida's failure to perform the services to any meaningful degree . . . the fee became unreasonable.”

Background: Attorney, in practice for over 30 years and a former Assistant United States Attorney, received signed retainer in July, 2002, advance legal fee in August, 2003, to permit the new husband to adopt the wife's two children. By May, 2003,

attorney had not filed the adoption proceeding but, when the client called to inquire, said it was being held up by the Court and that he would contact the court to check on the progress.

In December, 2002, attorney gave the clients a nonexistent “Judgment of Adoption *Pendente Lite*” on which the attorney forged a judge's signature.

In July, 2003, after receiving no responses from the attorney, the clients filed a grievance. Two days later the attorney refunded their \$735 and apologized, attributing his failures on his physical and psychological problems.

During the disciplinary proceedings, the attorney established that before and during the events at issue, he was suffering from major depression, exacerbated by the death of his father and the cultural pressure on him, the eldest son, to take over the care of his family. He gained 100 pounds, and required surgery to correct debilitating back pain.

Held: Although the major depression and debilitating pain might mitigate some acts, his intentional dishonesty in preparing a fraudulent order mandated disbarment.

Question: In this case, the client signed retainer agreement, but client did not provide fee until following month.

Potential Pitfall: Is the client a client or not? What duties does the attorney owe the client? Can the attorney neglect the matter if no advance fee is provided?

- Fees for doing very little:

Disbarred: *In re Calahan*, 930 So.2d 916 (La. 2006)(Note, although this case is typically cited for the proposition that it is unreasonable to charge \$12,500 or 40% of recovery, for writing one-page demand letter to recover excessive legal fees from a prior attorney, in actuality the case revolved around a claim by the attorney that he had an oral contingency fee contract which was denied by the client, and then the lawyer's attempt to justify his fee by “conjuring up” time sheets to support his contingency fee);

Count: Client hires attorney to obtain return of excessive fee from prior attorney. Attorney proposes a contingency fee of 40%-50%, but client refuses. Attorney says, “We'll work it out later.” Sends letter to prior attorney, receives return of \$30,000, and retains \$12,500 as his fee.

- Attorney first claims that it was “a negotiated fee agreed to” by the client;

- Next he claimed that it was reasonable in light of “the unusual nature of the case,” his “unique experience in the area,” the degree of risk, the “unexpectedly high and beneficial results,” and that he had to decline other representation to take and investigate this case. He admitted that he kept no time sheets.
- In the client's civil suit for the return of the fee, the attorney claimed that they had an oral contingent fee contract.
- At trial, attorney introduced a reconstruction of his 81 hours of time that consisted of 24 hours of legal research, 28 hours of travel, 10 hours of review of court records, 10 hours of conversations with the client, 2 hours for going to the bank to deposit the settlement check and to prepare a settlement statement, 2 hours to draft the demand letter, 2 hours of settlement discussion with opposing counsel and 1 with the client, and 2 hours to review the settlement documents and discuss them with the client.

The client testified that the attorney first told him he would charge him \$100-\$150/hour to write a demand letter, but later demanded the client sign a contingent fee agreement which the client refused.

In addition to being charged with charging an unreasonable fee, the attorney was also charged with a violation of the ethical rules by failing to report the misconduct of the prior attorney.

Count-II

A different client retained the attorney to obtain a divorce. When asked whether she was physically abused by her husband she said no.

Nevertheless, the attorney prepared a petition for divorce in which he alleged that she was harassed and physically abused by her husband and that she feared him. The petition purported to contain the woman's signature, and was notarized by the attorney.

When the woman found out and confronted the attorney about these allegations, the attorney told her that it was “standard wording in a [petition for] a restraining order.” He also denied knowledge about who signed the petition saying, “I have no idea who signed that.”

The woman filed a complaint against the attorney. The attorney responded that the woman was “an emotionally disturbed woman who has suffered considerable mental abuse from her husband.”

In a later response, the attorney averred that “To the best of my knowledge [the client] authorized her signature on the affidavit.”

When requested for further clarification, the attorney admitted that he signed the

woman's name to the affidavit, notarized it, and filed it in the court record. "I would not have filed the affidavit unless she specifically authorized it."

At the hearing, the woman denied authorizing the attorney to sign on her behalf. The attorney denied that it was deceitful to forge the woman's name on the affidavit saying, "I happen to know that others do it, and I don't pass any judgment on it. I think it's a matter of convenience to the client and to the court system."

Disposition: Attorney is disbarred.

- Unnecessary travel:

Attorney is retained to defend both a criminal and civil action, and receives \$7,500 retainer, with the understanding that he would bill \$100/hour against it.

Attorney makes two phone calls, totaling 0.4 hours, and determines that no criminal charges will be preferred. Does not advise client for about a month.

Attorney is later in California. Although there is a law library minutes away from where he is, he charges for 6 hours driving time (at his full rate) to do 5 or 6 hours of research. He does this three times, even after client discharges him.

Attorney then claims that the entire \$7,500 is a nonrefundable retainer for the defense of the criminal action. He further claims client owes him another \$6,500 for his work on the civil action.

At the disciplinary proceedings, attorney agrees that he needs to refund \$1,200.

Attorney and Disciplinary Commission agree that attorney should be suspended for 30 days and Court approves that resolution. *In re Comstock*, 664 N.E.2d 1165 (Ind. 1996);

Difficult

Decision: *In re Dorothy*, 605 NW2D 493 (S.D. 2000);

Former Assistant Attorney General for the State of South Dakota and Deputy State's Attorney, is brought up on disciplinary charges for billing a client \$62,650.72 for a divorce and custody case in which "there was nothing unusual or novel in the pleadings or research in th[e] case."

The court states that it "is not attempting to draw a bright line on what constitutes

an unreasonable attorney's fee” nor does it try to “establish[] a fee schedule.” The court recognizes that “the issue of whether an attorney has charged an unreasonable fee is a difficult one, because '[f]ew, if any, areas of attorney discipline are as subject to differing interpretations as the matter of what constitutes an excessive attorney's fee.’” (Citations omitted.) However, the court continues, it must “protect[] the public from lawyer misconduct.”

The Disciplinary Board of the State Bar argued that the attorney “engaged in discovery and trial tactics which served only to complicate and extend the proceedings which resulted in unreasonable fees and costs for his client.”

The court struggles with the definition of an unreasonable fee. It cites other jurisdictions and their articulations, such as:

“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.”

Model Code of Professional Responsibility, DR 2-106(B). Louisiana's courts interpret an “clearly excessive” fee to mean a fee that is

so grossly out of proportion with the fees charged for similar services by other attorneys in the locale as to constitute an unquestionable abuse of the attorney's professional responsibilities to the public.

Gibson v. Burns, 505 So.2d 66, 69 (La. App. 1987). The court also cites an Arizona decision that held:

[A] fee agreement between lawyer and client is not an ordinary business contract. Although the lawyer is certainly free to consider his own interests, the primary concerns are those of the client. Fees must be reasonably proportional to the services rendered and to the situation presented.

Matter of Struthers, 179 Ariz. 216, 877 P.2d 789 (1994) (internal quotations and citation omitted). In California, the court finds:

The test is whether the fee is so exorbitant and wholly is disproportionate to the services performed as to shock the conscience.

Bushman v. State Bar, 11 Cal.3d 558, 113 Cal.Rptr. 904, 522 P.2d 312, 314

(1974) (internal quotations and citations omitted).

The trial court that disallowed the attorney's fee, found nothing unusual or novel in the case. The court found that “under all the circumstances, the fee charged . . . was so exorbitant and wholly disproportionate to the services rendered . . . as to shock the conscience.” The attorney asserted that the case was “quite involved,” but the trial court found that he was “unable to articulate any complex issues which required extensive research or specialized skills.”

Burden of Proof:

The court went on to say that “when a fee is challenged as excessive, the attorney claiming the fee is required to produce competent evidence to demonstrate the value of his services. The attorney has the burden of proving his fee is justified and reasonable.” (Citations and quotations omitted.)

The attorney pointed out that the client had given him “10 books of materials . . . [m]any [of which] were large 3-ring binders” that he needed to review. The psychologist reported that this case was “one of the most time-consuming and involved custody evaluations” the evaluator was involved in, with “extremely complex” dynamics.”

Nevertheless, the trial judge found that the attorney's representation “increased the duration of th[e] case and [its] cost.” For example, the attorney submitted a 68-page prehearing memorandum four days prior to trial, which cost the clients “several thousands of dollars and was of little or no value.”

Another example cited by the trial judge was when the clients, traveling to meet with the attorney, ran out of gas. The attorney offered and then drove out and gave them gas, but he billed them \$100/hour to do so.

The court also noted that the other parent's attorney charged only \$16,309.40, and the grandparents' only \$19,869.04, in comparison to this attorney's claim for fees of \$45,100.35. The court recognized that “it may take more time to prepare a case by the moving party than [by] a nonmoving party,” but added that when the client want to withdraw from the action the attorney warned her that she had a great case, would get her attorney's fees back from the other side and, if she withdrew, it would cost her the other side's attorneys' fees and lost past and future child support.

The court ultimately finds that after “extensive review of the voluminous records” the attorney charged

an unreasonable fee in violation of Rule 1.5. In so holding we do not attempt to set a bright line rule based on the amounts involved here or for that matter, any specific amount. There may well be custody cases which justify fees of this nature or more depending on the facts and the application of the factors cited herein. However, this Court has long ago taken the position that it will not sit idly by while clients are financially abused by officers of the bar.

Disposition: Attorney is publicly censured.

Perhaps the concurring opinion explains the motivations of the Court, one of which points out that the attorney, Charles Dorothy, represented himself throughout the proceedings, and the other:

“SABERS, Justice (concurring).

“I concur because Dorothy's conduct, his lack of remorse and his insistence that he did nothing wrong clearly justifies public censure under our cases. In fact, his conduct brought him dangerously close to suspension.

“Dorothy's conduct demonstrates an ability to place a spin on the “facts” which may be brilliant legal gymnastics. However, the same conduct also shows a lack of professional judgment for such a seasoned lawyer. At times, it shows he was not smart enough to know when to quit. Obviously, he should have quit long before he started his criticism of the circuit court Judges.”

- Learning an area of law:

Lawyers must provide “competent representation,” RPC 1.1,⁷ and, therefore, cannot charge for time necessitated by their own inexperience.

⁷ Model Rules of Professional Conduct 1.1 provides:

Competence

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

MRPC 1.1.

Court reduces fee request where (i) counsel claims to have spent 19 hours before consenting to the dismissal of a state from the Federal excessive-force action which, the court notes, was a “slam-dunk” issue; (ii) claimed 555 hours of attorney and paralegal time in a relatively simple case; and (iii) has 49 entries for “discussion” with co-counsel that the court characterizes as “duplicative work which is not compensable and will not be condoned by the court. It is a prime example of fee-padding and excessive billing” in this “factually limited excessive force case, with well-established legal standards” that does not “require[] joint effort.” Having made the decision to use two attorneys, the court noted, “counsel are not free to charge twice for essentially the same work.” *Heavener v. Meyers*, 158 F.Supp.2d 1278 (E.D. Okl. 2001)

Other holdings in this decision:

- Cannot charge attorney rates for the time before an attorney is admitted to the bar;
- Cannot charge legal-assistant rates for secretarial functions;

In re Poseidon Pools of Am., Inc., 180 B.R. 718 (Bankr. E.D.N.Y. 1995) (counsel fee application significantly reduced for, among many other categories of criticisms of the fee application and billing entries, “given the numerous times . . . that Applicant requests fees for revising various documents, Applicant fails to negate the obvious possibility that such a plethora of revisions was necessitated by a level of competency less than that reflected by the Applicant's billing rates.”);

It is 100+ page decision, the court catalogs the elements that need to be included in a fee application to the court, which provides us good guidance on what we attorneys might wish to include in any action to collect fees or any fee-dispute proceeding:

“[A] proper fee application must list:

- 1) each activity separately;
- 2) the day on which it was performed;
- 3) the person who performed the work;
- 4) description of the work performed or subject matter of the work;
- and
- 5) time spent on the work.”

Id., (quoting *In re J.F. Wagner's Sons Co.*, 135 B.R. at 267)

“[T]he application should [also] explain the outcome of the aforementioned activities and justify their necessity. Ideally, the fee application's times sheets should permit the Court as much as reasonably possible to identify the legal problems involved,

the difficulty of the problems, how the problem was resolved and what results were achieved for the [client].

“Where documentation of services is too vague or nonspecific to permit meaningful review, a court may not award compensation for such services.”

. . . .

“[W]ith respect to telephone calls, the time entries must at a minimum describe the purpose and length thereof and the parties involved. A time sheet entry of 'telephone call' or even 'telephone call with Mrs. X' is insufficient.

. . . .

“Finally, an applicant should not 'lump' several services or tasks into one time sheet entry because it is then difficult if not impossible for a court to determine the reasonableness of the time spent on each of the individual services or tasks provided.” *Id.* (Internal quotations and citations omitted.)

The court then, in a decision that is longer than a hundred pages, disallows entire groups of entries for inadequate information, for services that did not need to be done by attorneys,

- Too many lawyers

Carr v. Fort Morgan School District, 4 F.Supp.2d 998 (D. Colo. 1998) - prevailing party in an Americans with Disabilities Act failure to hire claim, seeks attorney's fees. Court notes that the attorneys unnecessarily “engaged in constant collaboration, discussion and review of work of one by the other” even on what appeared to be “mundane matters.” “If the attorneys possess the skill required to charge the rates they are charging for their legal services . . . such constant collaboration, review, preparation and consultation is not necessary.” The court, therefore, reduced the attorneys' times by 15% across the board for the “excessive time spent.”

Court also criticizes entries such as “trial preparation” as inadequate.

Court denies a 30% lodestar-enhancement because, although plaintiff's counsel “were always prepared and performed excellent legal work, achieving very favorable results for their client,” the case “did not present novel or complex issues” that required “unusual or special expertise,” and, therefore, did not justify an enhancement.

“Exceptional success” sometimes justifies an enhancement, *Hensley v. Eckerhart*, 461 U.S. 424 (1983), sometimes characterized as a “**genius bonus**.” *Ramos v. Lamm*, 713 F.2d at 546, 557 (10th Cir., 1983). The court declines to award a genius bonus in this case because the “genius factor diminishes and eventually disappears as the number of hours expended increases” or where many lawyers are involved.

- Charging lawyer's rates for non-lawyer's work

In re Green, 11 P.3d 1078 (Colo. 2000) - “[C]harging an attorney's hourly rate for clerical services that are generally performed by a non-lawyer, and thus for which an attorney's professional skill and knowledge add no value to the service, is unreasonable as a matter of law.”

The court also cites a 6.0 hour charge for receiving and reviewing a 12 page court decision and faxing it to the client:

The determination of what fees are reasonable involves more than simply multiplying the number of hours spent on a given case times a specific rate. An attorney must use judgment and discretion in rendering a bill. This includes recognizing the limits of one's won capacity and one's own inefficiencies. There is no reason or excuse for charging a client . . . for one's own inefficiencies.

Id. (citation omitted).

[Note: lawyer here, Green, charged a total of \$101,991.45 for the trial and appeal of a \$7,500 mechanic's lien. Because the underlying contractor's agreement provided that the losing party would pay the prevailing one's attorneys' fees, Green submitted a fee application. He later, however, accused the judge of being a racist and asked the court, several times, to recuse itself. The Colorado Supreme Court, however, held that the First Amendment prevented Green from being disciplined for his letters to chambers.]

Committee on Professional Ethics and Conduct of the Iowa State Bar v. Zimmerman, 465 N.W.2d 288 (Iowa 1991)

Attorney had wife appointed as conservator, while he did legal work.
First year he presented bill for wife based on wife's hours spent.
Second year he presented conservator's bill based on percentage of assets, though wife did not do all of the duties of a conservator and was uncomfortable in her

role.

In addition, however, attorney billed, on a per hour basis, for the work he did that, ordinarily, would have been done by the conservator. In addition, he billed at his hourly rate, for the work done by his secretary. A sharp judge ordered a hearing, at which time attorney presented “revised” bills.

Attorney now claims that it was all an honest mistake.

The Committee on Professional Ethics and Conduct charges that he was trying to fleece his client and was prevented only by the alert judge.

Disposition: Attorney suspended for six months.

- Cannot charge for being a friend:

Cincinnati Bar Association vs. Alsfelder, 816 N.E.2d 218 (Ohio 2004)

Single woman with no children, “lower-than-average capacity for coping with day-to-day activities,” and emotionally and intellectually vulnerable, who is the beneficiary of \$2M trust, retains attorney to find a way to outwit the terms of the trust and permit her to direct the distribution of the trust proceeds after her death and to disinherit her cousins. Attorney first charges her \$10,000; He then converts their agreement to a fixed fee of \$12,500-\$20,000/year for several years;

During the three years attorney was engaged, he earns \$60,00 in legal fees even though client received \$75,000/year from the trust. Attorney provided only a limited amount of legal work, though he did spend about 4 hours/week with her, giving her personal and friendly advice and talking with her “about anything and everything in her life nearly anytime she wanted, day or night” including relationships, vehicles, food and restaurants. (Internal quotations omitted.)

The Bar Association accused the attorney of taking advantage of a vulnerable client.

The attorney claims that he was providing good friendship and service, and serving as the “deep rudder” she seemed to need.

Held:

[A]n attorney may not serve in a self-appointed role as a paraclete, comforter, helper, or hand holder, under the guise of legal services and at a lawyer's compensation rate.

* * *

[W]e accept the descriptions of respondent's practice as following in the 'old-fashioned' traditions of dedication and caring for his clients. With respect to this one client, however, respondent lost his perspective and tried to be more . . . than he could or should be for her. He attempted to charge for his counsel in the manner that a therapist might, overlooking that an attorney, unless a qualified therapist, may no more engage in that profession than a therapist may practice law without a license.

Id. (Citations and quotations omitted.)

Disposition: One year suspension, stayed if he returns \$30,000 to her.

What if client agrees?

- No matter what the client has agreed to/an unreasonable fee subjects the lawyer to disciplinary proceedings.

Attorney Grievance Commission of Maryland v. Braskey, 836 A.2d 605 (Md., 2003) (lawyer settles personal injury claim for \$25,000 and takes his 25% share and holds the remaining pending resolution of Blue Cross-Blue Shield's subrogation claim; when he does not hear back, he and client agrees to “split” the remaining \$18,000. Held: Even if client agreed to split the money with the attorney, “the agreement was unenforceable and amounts to 'fee gouging.'” If Blue Cross did not assert its subrogation lien, “the money belonged to the client, to whom respondent was obliged to disburse the funds.”

Disposition: Attorney disbarred (additional factors were the misstatements about the funds the attorney made, and his withdrawals from the trust account of disputed funds);

In re Sinnott, 845 A.2d 373 (Vt. 2004)

Client with \$18,000 debt to American Express, enrolls in attorney's debt reduction program and agrees that attorney will withdraw \$300 from her account. When, after four months, nothing significant has been done she terminates her enrollment. Attorney claims a \$500/month administrative fee.

The court holds that a reasonable fee is determined by considering “whether the attorney is providing services of value to the client for which the attorney is entitled to be paid or whether . . . the lawyer is charging the client for doing nothing.” By this reasoning, the

\$500/month administrative fee was “unreasonable.”

The attorney then, however, claimed that the fee was justified because it was based on a valid contract with the client. “[L]awyers, unlike some other service professionals,” the court held, “cannot charge unreasonable fees even if they are able to find clients who will pay whatever a lawyer's contract demands.”

but see

Paul, Weiss, Rifkind, Wharton & Garrison v. Koons, 780 N.Y.S.2d 710 (Sup.Ct., New York County, 2004) - wealthy artist Jeffrey Koons retains Paul Weiss to represent him in a nasty custody battle against his wife, Ilona Staller, an Italian citizen. Koons directed Paul Weiss to “leave no stone unturned” and to work “full-speed-ahead” on every front, including contacting ambassadors and the United States Assistant Secretary of State, as the child was abducted to Italy. The battle raged in the courts of the United States as well as Italy. Paul Weiss bills almost \$4M of which almost \$2M is still owed, and Koons asks the court to set the fee aside as unreasonable as a matter of law.

The court recognizes that Koons mounted “an extravagant effort . . . through a top-notch law firm to control and dictate the terms of the dispute with defendant's former wife. Such extravagance is costly” The court noted that there was no allegation that the attorneys charged an inappropriate hourly rate or utilized their time inefficiently. “This Court [therefore,] will not police the conduct of wealthy litigants who choose to share their wealth with counsel through extravagant litigation.”

Client & Firm [Overhead?] Expenses:

Expenses charged to a client must also abide the MRPC's “reasonableness” requirement. MRPC 1.5 cmt. [1]. According to the comment, there are two ways an expense can be passed along to the client. The lawyer may either (1) pass along the **actual**, reasonable costs incurred by the lawyer; or (2) charge the client a reasonable amount to which the client has already agreed.

Paragraph (a) [of MRPC 1.5] also requires that expenses for which the client will be charged must be reasonable. A lawyer may seek reimbursement for the cost of services performed in-house, such as copying, or for other expenses incurred in-house, such as telephone charges, either by charging a reasonable amount to which the client has agreed in advance or by charging an amount that reasonably reflects the cost incurred by the lawyer.

MRPC 1.5 cmt[1].

Without the express agreement of the client, a lawyer must limit the bills for disbursements and in-house activities—such as photocopying— to the lawyer's actual cost:

In the absence of an agreement to the contrary, it is impermissible for a lawyer to create an additional source of profit for the law firm beyond that which is contained in the provision of professional services themselves. The lawyer's stock in trade is the sale of legal services, not photocopy paper, tuna fish sandwiches, computer time or messenger services.

ABA Formal Ethics Op 93-379 (1993).

Spicer v. Chicago Board Options Exchange, Inc., 844 F.Supp. 1226 (N.D. Ill., 1993)
Class counsel settles case arising from Black Monday stock market crash for \$10M fund.
Seeks a total of 59% of fund for fees, costs and administrative expenses.

Court holds that (i) size of recovery necessarily limits the attorneys' fees that can be awarded; (ii) partners billing was excessive in relation to that of associates and they should have delegated more; (iii) significant duplication and conferencing should not be compensated; Court awards \$2.9M in fees, or 29% of fund;

Court allows documented long distance call costs but denies a proposed 20% markup on the calls and charges for cell phones (as a convenience, not necessary, item), and allows only .10 out of the requested .20 charge for in-house copies.

The court disallows the following charges as “general overhead” and not properly billable to the client:

- a. charges for sending faxes (long-distance charges are already approved and, if local, are part of “common office expenditures” and not chargeable);
- b. messengers to deliver documents;
- c. a \$36,000 charge for offices that were occupied by plaintiff's experts;
- d. \$33,763.10 for hardware and software;
- e. clerical salaries or overtime;
- f. meals while on overtime;

- g. the purchase of general purpose (computer or other reference) books;
- h. Westlaw monthly subscriber charges;
- i. Letter of credit fees;
- j. tolls, parking and cabs to the library, deliveries, home after working late, or into the office on Saturday;
- k. plane fare for three, when a train could have been taken for 1/5 the cost, and only a few hours more (only train fare allowed); and
- l. \$576 for special ventilation in the days after the Great Chicago Flood (also part of general overhead);

Connecticut Bar Association Committee on Professional Ethics, Informal Op. 03-08, 2003 WL 23663018 (9/22/2003) - a personal injury attorney who historically has her own paralegals obtain medical records, may not pass along the cost by having an outside firm obtain those records.

- Electronic research:

Heng v. Rotech Med. Corp., 720 N.W.2d 54 (N.D., 2006) - plaintiff sues employer for retaliatory discharge for finding out that it was a violation to have service technicians assemble oxygen systems. Awarded \$35,195 in damages and \$220,762 in attorneys' fees.

Trial court disallowed fees for those claims that were dismissed, and for the “second chair” counsel;

On appeal, North Dakota Supreme Court disallows fees for attendance at mediation (although there is a split in authority on this issue, here because the mediation agreement provided each party will bear its own costs);

Court further disallows fees for electronic research:

Some courts have ruled that electronic research fees may be separately recovered as costs. See, e.g., [Crosby v. Bowater Inc. Retirement Plan](#), 262 F.Supp.2d 804, 817 (W.D.Mich.2003). Most courts, however, have ruled that computer-aided research, like any other form of legal research, is a component of attorney fees and cannot be independently taxed as an item of costs. See, e.g., [Montgomery v. Aetna Plywood, Inc.](#), 231 F.3d 399, 409 (7th Cir.2000); [United States v. Merritt Meridian Constr. Corp.](#), 95 F.3d 153, 172 (2nd Cir.1996); [Haroco, Inc. v. American Nat'l Bank and Trust Co. of Chicago](#), 38 F.3d 1429, 1440-41 (7th Cir.1994); [Standley v. Chilhowee R-IV Sch. Distr.](#),

[5 F.3d 319, 325 \(8th Cir.1993\)](#); [BD v. DeBuono, 177 F.Supp.2d 201, 209 \(S.D.N.Y.2001\)](#); [Bjornen v. State Farm Fire and Cas. Co., 81 Hawai'i 105, 912 P.2d 602, 604-06 \(1996\)](#). In [Uren v. Dakota Dust-Tex, Inc., 2002 ND 81, ¶ 34, 643 N.W.2d 678](#), this Court held that attorney travel expenses for discovery are not recoverable as costs but “are part of the attorney's fees and expenses which are normally reimbursed by the client.” See also [Braunberger v. Interstate Eng'r, Inc., 2000 ND 45, ¶ 20, 607 N.W.2d 904](#) (abuse of discretion to award attorney hotel and meal expenses as costs). Under the reasoning of *Uren*, *Braunberger*, and the majority of courts that have specifically addressed the question, we conclude that electronic legal research fees are a component of attorney fees and cannot be separately taxed as costs. We conclude the district court erred in awarding Heng electronic research fees as part of her costs.

Pennsylvania Bar Association Committee on Legal Ethics & Prof. Resp., Informal Op. 2006-30 (2006) -

Generally, the flat monthly fee for computer assisted legal research (“CALR”) could be considered more akin to general overhead expenses like rent, base secretarial salaries, local telephone and utilities, that are part of a “properly equipped office,” reflected in the lawyer's hourly billing rates, and should not be passed along to the client.

Lawyer who wants to *pro rate* the monthly fee to all of the clients for whom the service has been used in each month, resulting in widely different fees for different months even though the service was used for the client in the same amount, needs to explain clearly the basis of the charge to the clients so that the client realizes that his charges are not related only to the use on his own behalf, and obtain informed consent

According to J. Harris Morgan & Jay G. Foonberg, in their book *How to Draft Bills Client Rush to Pay* (2d ed., 2003, ABA LPM section), attorneys should create “profit centers” out of the resources they have in their offices. They suggest that each attorney should:

- Establish a billing rate for each staff person that results in billing three times their salary plus fringe benefits using the following calculations:
 - Smaller law firms are open for business only 1,948 hours/year;
 - Vacations, sick leaves, funerals and other personal leaves reduced chargeable hours by at least 160 hours (or one month lost);
 - Reduce by 25% fudge factor, leaves 1,335 hours-worked/year or 28 hours/week;

- Using the above, determine the costs to the firm;

- Generally, double the raw cost of the following:
 - calls to the firm;
 - copy charges, double the .07-.10 = .10-.25

electronic research (passed through or marked up?)
facsimile (calculate the raw cost & double it);
forms library
divide the cost by its estimated use, and double the raw cost;

- ❑ Be mindful of the ethical considerations, disclose the fact that the firm is “marking up” these items to result in independent profit to the firm and obtain the client's consent;

Advance Payments vs. General Retainers

[Useful definitions, because of the confusing terms:

General retainer - to secure the attorney's availability as, if, and when needed; no specific services are required to earn; funds belong immediately to the attorney;

Special or **Specific retainer** - where the funds are provided to pay for specific or special services; funds are not earned until the services provided; funds belong to client and must be segregated until earned;

Further subdivided into:

Security retainers - to secure payment of fees for future services; funds applied normally only after the submission and approval of an application for compensation;

Advance fee retainers - attorney receives payment in advance and depletes the prepaid fund as services are rendered. Ownership of the funds passes to the attorney at the time of the billing.

Ryan v. Butera, Beausang, Cohen & Brennan, 193 F.3d 210 n. 11 & text (3rd Cir., 1999)
(discussed in detail *infra*.)

Matter of Sather, 3 P.3d 403 (Colorado, 2000) (*en banc*)

Attorney entered into a “Minimum fee contract,” also characterized as a “minimum fee,” “non-refundable fee” and “flat fee” of \$20,000 plus costs, to represent a client in a civil suit against the State Patrol, “regardless of the number of hours attorneys devote to [his] matter.” Although the contract acknowledged the client's right to discharge the attorney, it provided that no funds would be refunded:

IN ALL EVENTS, NO REFUND SHALL BE MADE OF ANY

PORTION OF THE MINIMUM FEE PAID, REGARDLESS OF THE AMOUNT OF TIME EXPENDED BY THE FIRM.

The client has been advised that this is an agreed flat fee contract. The client acknowledges that the minimum flat fee is the agreed upon amount of \$20,000 **regardless of the time or effort involved or the result obtained.**

(Emphasis in original retainer contract.) The attorney testified that although the contractual language said that the retainer was non-refundable, he knew that the fees were subject to refund and he “never treated the fees as non-refundable.”

Attorney believed that the “*flat fee*” was earned upon receipt and used it as his own.

Held: Attorney violated ethical rules by:

- spending, and failing to put into trust account, the \$20,000 he received as a “non-refundable” advance fee thereby treating them as his own;⁸
- labeling the fee as “non-refundable” even though he knew it was subject to refund;⁹
- failing to promptly return the unearned portion of the \$20,000;¹⁰

“[A]n attorney earns fees by conferring a benefit on or performing a legal service for the client. Thus . . . an attorney cannot treat advance fees as property of the attorney and must segregate all advance fees by placing them into a trust account until such time as the fees are earned. An attorney cannot label advance fees 'non-refundable' because it misleads the client and risks impermissibly burdening the client's right to discharge his attorney.” (*Citations and footnotes omitted.*)

The court then drew distinction between the three types of possible arrangements: (a) the “general” or “engagement retainers;” (b) the “advance fees,” or “special retainers;” and (c) the “lump sum fees”:

⁸ This is a violation of MRPC 1.15(a) that requires the lawyer to “hold property of the client . . . separate from the lawyer's own.” MRPC 1.15(a).

⁹ This violates MRPC 8.4(c) that prohibits attorneys from “engag[ing] in conduct involving dishonesty, fraud, deceit or misrepresentation.” MRPC 8.4(c).

¹⁰ A violation of MRPC 1.16(d) that requires a lawyer, upon termination, to “refund[] any advance payment of fee or expense that has not been earned or incurred.” MRPC 1.16(d).

Some forms of advance fees or retainers appropriately compensate an attorney when the fee is paid because the attorney makes commitments to the client that benefit the client immediately. Such an arrangement is termed a “general retainer” or “engagement retainer,” and these retainers typically compensate an attorney for agreeing to take a case, which requires the attorney to commit his time to the client's case and causes the attorney to forego other potential employment opportunities as a result of time commitments or conflicts. . . . 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. Or the client may pay an engagement retainer merely to prevent the attorney from being available to represent an opposing party. . . . In all of these instances, the attorney is providing some benefit to the client in exchange for the engagement retainer fee.

In contrast to engagement retainers, a client may advance funds—often referred to as “advance fees,” “special retainers,” “lump sum fees,” or “flat fees”—to pay for specified legal services to be performed by the attorney and to cover future costs. . . . We note that unless the fee agreement expressly states that a fee is an engagement retainer and explains how the fee is earned upon receipt, we will presume that any advance fee is a deposit from which an attorney will be paid for specified legal services. . . .

. . . [S]ome forms of advance fees, e.g., “lump sums” or “flat fees,” benefit the client by establishing before representation the maximum amount of fees that the client must pay. . . . In these instances, the client knows how much the total cost for legal fees will be in advance, permitting the client to budget based on a fixed sum rather than face potentially escalating hourly fees that may exceed the client's ability to pay. . . . So long as the fees are reasonable, such arrangements do not violate ethical rules governing attorney fees. . . .

Advance fees benefit the attorney because the attorney can secure payment for future legal services, eliminating the risk of non-payment after the attorney does the work. . . . Often, attorneys collect a certain amount from the client in advance of any work and deduct from that amount according to the hours worked or mutually agreed-upon “milestones” reached during representation (e.g., investigation, pretrial work and motions, negotiations, filings, handling a company's initial public offering, etc.). . . . Attorneys often deduct costs from advance payments as they incur the costs, similar to the manner in which they deduct their fees as they are earned. Advance fees represent an alternative method of obtaining legal assistance that accommodates legitimate needs of both clients and attorneys, and by this opinion we do not intend to discourage these fee arrangements provided the fee agreements comply with the ethical principles discussed in this case.

In the case of both advance fees and engagement retainers, the attorney performs a service or provides a benefit to the client in exchange for the fee. We recognize that we have not previously explained the ethical principle that determines when an attorney may treat funds paid as engagement retainers or advance fees as property of the attorney. Because this principle is a crucial element of the attorney-client relationship, we make our interpretation of the underlying ethical principle explicit: **an attorney earns a fee only when the attorney provides a benefit or service to the client.** Under [Colo. RPC 1.15\(a\) and \(f\)](#), all client funds—including engagement retainers, advance fees, flat fees, lump sum fees, etc.—must be held in trust until there is a basis on which to conclude that the attorney “earned” the fee; otherwise, the funds must remain in the client's trust account because they are not the attorney's property.

(Citations and footnotes omitted, emphasis added.) In addition, the Court place another burden on an attorney claiming an “earned upon receipt” fee, requiring the attorney to describe in writing to the client “the nature of the benefit being provided” to the client:

With respect to fees mutually agreed to be “earned on receipt,” an attorney must describe in writing the nature of the benefit being provided to a specific client in order to claim some portion or all of an engagement retainer as earned when paid. . . . That is, an attorney cannot treat a fee as “earned” simply by labeling the fee “earned on receipt” or referring to the fee as an “engagement retainer.” . . . Rather, the attorney must explain in detail the nature of the benefit being conferred on the client, whether it is the attorney's guarantee of availability, prioritization of the client's work, or some other appropriate consideration.

(Citations omitted.)

Columbus Bar Assoc. vs. Halliburton-Cohen, 832 N.E.2d 42 (Ohio, 2005)

Attorney's retainer agreement provided:

My hourly rate is \$250.00 an hour.

The initial retainer for the matter is \$3,500.

Upon retention, a fee of \$100.00 is assessed to the client for opening the file and \$1,500 is assessed to the client “for the lost opportunity cost to the attorney for her immediate and permanent inability to represent any other party in the case.”

The Board of Commissioners on Grievances and Discipline found that once the client consulted with the attorney, the attorney “was ethically foreclosed from any other representation in the case.” Moreover, the client's spouse already had an attorney. The Board, therefore, found that the attorney “had no employment opportunity to lose” for which to charge the \$1,500 fee. The Ohio Supreme Court agreed holding that this fee was, therefore, an “excessive fee.”

Disposition: Attorney suspended for 6 months, stayed if the money is refunded.

but see

Ryan v. Butera, Beausang, Cohen & Brennan, 193 F.3d 210 (3rd Cir., 1999) - client, an asbestos company, was forced into involuntary bankruptcy staying all litigation against it but anticipated that, when the stay was lifted, there would be a plethora of litigation. In an attempt to secure counsel, the client offered several prominent law firms a fixed fee contract that provided for quarterly as well as per-day at trial payments, and a “one-time, non-refundable payment of \$1 million.” This proposal was presented on a “take it or leave it” basis. It further provided that the client can discharge the attorney on 90 days

written notice, but that all fees paid will be non-refundable. The client used this strategy to “attract counsel with 'specific capability' as well as to overcome its history of nonpayment of legal fees.”

Predictably, ten weeks later, client discharges attorney and sues for the return of the \$1M fee. Client now argues that in retrospect the fee was unreasonable and inequitable.

Held: Client had spent \$1M to buy an “opportunity” to use attorney's services at a capped costs, akin to an “options contract.” Although it may be less than the fully-realized opportunity, it is worth something.

Nor was the client's right to terminate the lawyer “chilled” by this high retainer, since the client did not, in fact, hesitate to terminate the attorney.

Connecticut Bar Association Informal Op. 00-12 (2000)

“Lawyers in Connecticut should approach the concept of 'nonrefundability' of retainers . . . with considerable caution. The concept of 'nonrefundability' is as *slippery as a watermelon seed.*” (Emphasis added.)

Oregon State Bar Assoc. Board of Governors Formal Op. 2005-151 (2005) - Fixed fee Agreements

1. A lawyer may enter into a “fixed fee” agreement so long as it is not excessive or unreasonable;
2. A fixed fee may be deposited into the attorney's general account only if the written agreement provides that it is earned on receipt. Otherwise it is earned when the services are provided and the funds must be kept in trust until then;
3. If the attorney is terminated early, he may not generally retain the full fixed fee. Thus designation of the fee as “nonrefundable” may be misleading if not false and violate the prohibition against dishonesty and fraud, *see, e.g.*, MRPC 8.4(c).
4. The attorney may not charge more than the fixed fee, unless the agreement provides for additional fees for additional work (or for additional stages of the project) or the parties agree to additional fees.

Discharge or Withdrawal:

Upon discharge, or withdrawal for cause, an attorney has a number of remedies available for the payment of the attorney's fees. The attorney may bring a contract action under the retainer agreement, and, in many jurisdictions, impose a common law charging lien against any proceeds, a common law or statutory retaining lien against documents and other items in his possession, or maintain a suit for payment in *quantum meruit*. *Schneider, Kleinick, Weitz, Damashek & Shoot v. New York City*, 302 AD2d 183, 754 NYS2d 220 (App. Div., 1st Dept., 2002). An attorney who withdraws without cause may, however, forfeit all or part of his previously earned fee.

- **Withdrawal for non-payment of fees:**

Once representation is commenced, there is ordinarily an implied obligation to continue such representation through completion. Nevertheless, Rule 1.16 of the Model Rules of Professional Conduct permits an attorney to withdraw from representing a client if the client “fails substantially to fulfill an obligation to the lawyer . . . and has been given reasonable warning” or if “the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client.” MRPC 1.16(b)(5) & (6).¹¹

¹¹ Rule 1.16 provides that:

RULE 1.16 DECLINING OR TERMINATING REPRESENTATION

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

- (1) the representation will result in violation of the Rules of Professional Conduct or other law;
- (2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or
- (3) the lawyer is discharged.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client, or if:

- (1) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;
- (2) the client has used the lawyer's services to perpetrate a crime or fraud;
- (3) the client insists upon pursuing an objective that the lawyer considers repugnant or imprudent;
- (4) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

Fidelity National Title Insurance Co. of N.Y. vs. Intercounty National title Insurance Co., 310 F.3d 537 (7th Cir., 2002) - Court reverses, as an abuse of discretion, trial judge's denial of counsel's motion to withdraw. Attorneys should not be forced to continue to provide free legal service to a client who owes substantial sums of money and is not paying. "Litigants have no right to free legal aid in civil suits" and *pro bono* "is at any event voluntary rather than compulsory."

Hammond v. T.J. Little & Co., Inc., 809 F.Supp. 156 (D. Mass., 1992)

Client's inability to pay, continuing for an extended period of time, justified withdrawal by counsel.

Breakdown of the attorney-client relationship is further reason to permit withdrawal.

A client who "behaves in a way that creates extra work [for the attorney] for which the client knows there is a substantial risk the attorney will never be compensated" is not acting in accordance with the "obligation of good faith and . . . due regard" for the attorney's rights.

but see

Klein v. Klein, 800 NYS2d 348, 2005 WL 89006; 2005 N.Y. Slip Op. 50018 (Supreme Court, Nassau County, 2005)(*unreported decision*) - Unemployed wife, whose husband earns \$53,300, hires attorney and gives him a \$10,000 retainer payment. She later pays him another \$7,500 but still owes another \$19,000. Counsel moves for leave of court to withdraw.

Court denies counsel's application. The client's failure to pay was not deliberate. She has no income, owns no assets and the attorney's withdrawal will prejudice her by delaying

(5) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(6) other good cause for withdrawal exists.

(c) When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall take reasonable steps to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled, and refunding any advance payment of fee that has not been earned. The lawyer may retain papers relating to the client to the extent permitted by law.

MRPC 1.16.

the trial and leaving her without the financial means to retain new counsel.

This Court has entertained numerous applications in matrimonial actions wherein counsel seek to be relieved after the client, who has paid substantial fees, is no longer able to fund unanticipated costly litigation expenses. . . .

It was incumbent upon moving counsel in this case, and the Court submits, is the obligation of all matrimonial attorneys, prior to entering into a retainer agreement with a client, to make an assessment of the fees that will likely be incurred, and the income and assets of the parties that will be available to satisfy said fees. . . .

When it appears likely . . . that the prospective client's . . . income and assets may not be adequate to secure payment of counsel's customary fee, counsel should either decline the case . . . or undertake to represent the client through disposition of the action . . .

. . . . Once a retainer fee is accepted, an attorney is duty bound to diligently and zealously represent his or her client to the conclusion of the matter unless it becomes clear that the attorney client relationship has been irreparably impaired for some reason other than a fee dispute . . .

and

McCord v. New York, NYLJ 10/1/2008 at 26 col. 1 (Court of Claims)

Attorney who agreed to take case on contingency with client “reimbursing” attorney for expenses, must see case through trial and advance the expenses and only, after trial, collect the expenses from the client.

WSF, Inc. v. Carter, 803 So.2d 445 (La. App. 2 Cir., 2001) - trial court properly permitted attorney to withdraw for “irreconcilable differences” when learning of client's criminal background.

May the lawyer retain the client's file(s) to ensure payment of his fee?

States that permit the attorney a retaining lien:

Florida, *Foreman v. Behr*, 866 So.2d 705 (Fla. App. 2003), *but see* Florida Ethics Op. 88-11, *infra*;

New York, *Matter of Cooper*, 219 NY 255 (1943); *Lerner v. Seigel*, 22 AD2d 816;

States that although technically permit the attorney a retaining lien, discourage or restrict it:

District of Columbia Ethics Op. 250 (“It seems clear . . . that retaining liens on client files are now strongly disfavored in the District of Columbia, . . . that a lawyer should assert a retaining lien on work product relating to a former client only where the exception is clearly applicable and where the lawyer's financial interests 'clearly outweigh the adversely affected interests of his former client.'”)

Florida Ethics Op. 88-11 (Reconsideration 1993)(“An attorney's right to assert a lien may be limited, however, by the ethical obligation to avoid foreseeable prejudice to the client's interests.”); *but see Foreman v. Behr*, 866 so.2d 705 (Fla. App. 2003);

Maryland Ethics Op. 85-40;

Massachusetts Rules of Professional Conduct 1.16(e)(7) (“a lawyer may not refuse, on grounds of nonpayment, to make available materials in the client's file when retention would prejudice the client unfairly.”)

Minnesota Ethics Op. 13 (1989) (“All items for which the lawyer had advanced costs and expenses regardless of whether the client has reimbursed the lawyer for the costs and expenses including depositions A lawyer may withhold documents *not constituting client files, papers and property* until the outstanding fee is paid unless the client's interests will be substantially prejudiced without the documents.” (emphasis added))

Mississippi Ethics Op. 144 (1988);

Montana Ethics Op. 860115 & 880218 (“[I]t is prudent to refrain from this course of action Retention of client files when they have been requested is seldom justified.”)

Oklahoma Ethics Op. 295 (1979);

South Carolina Ethics Op. 93-30 & 02-11;

South Dakota Ethics Op. 95-16;

Tennessee Rules of Professional Conduct 1.16(d) (“ . . . promptly surrendering any other work product . . . provided, however, that the lawyer may retain such work product to the extent permitted by other law but only if the retention of the work product will not have a materially adverse affect on the client with respect to the subject matter of the representation.”)

Texas Rules of Professional Conduct 1.15(d) (“The lawyer may retain papers relating to the client to the extent permitted by other law only if such retention will not prejudice the client in the subject matter of the representation.”) & Ethics Op. 411 (1984) (“An attorney refusing to relinquish possession of a client's file on the basis of a common-law retaining lien does so at personal risk.”)

Utah Ethics Op. 91 (1989);

West Virginia Ethics Op. 92-02 (requires giving the client all papers regardless of outstanding fees, and permits a lien only against the narrowly defined “work product”)

States that flatly prohibit an attorney to assert a retaining lien against the case file:

California Rules of Professional Conduct 3-700(D) (“A member whose employment has terminated shall: (1) . . . promptly release to the client . . . all the client papers and property . . . whether the client has paid for them or not.”)

Louisiana Rules of Professional Conduct 1.16(d) (“Upon termination of representation . . . the lawyer shall promptly release to the client . . . the entire file relating to the matter. The lawyer . . . shall not condition release over issues relating to the expense of copying the file or for any other reason.”)

Virginia's Rules of Professional Conduct 1.16(e) (“All original . . . or official documents . . . shall be returned . . . to the client . . . whether or not the client has paid the fees and costs owed the lawyer.”)

Common Law Charging Lien:

Many jurisdictions grant the attorney a charging lien on any funds that were generated by the attorney's efforts. *See, e.g.,* New York Judiciary Law § 475; *Schneider, Kleinick, Weitz, Damashek & Shoot v. New York City*, 302 AD2d 183, 754 NYS2d 220 (App. Div., 1st Dept., 2002);

but see

Shipman v. New York City Support Collection Unit, 183 Misc.2d 478, 703 NYS2d 389 (Supreme Court, Bronx County, 2000) - public policy prevents attorney from enforcing charging lien against child support award;

Lawyer Trust Accounts:

Commingling of funds prohibited:

Model Rule of Professional Conduct 1.15 requires attorneys to maintain client funds segregated from their own. MRPC 1.15(a).¹² The lawyer may, however, deposit some nominal amounts to cover bank service charges that accrue on the account. MRPC 1.15(b).

Recordkeeping:

¹² Rule 1.16 of the Model Rules of Professional Conduct provides that:

Client-Lawyer Relationship

Rule 1.15 Safekeeping Property

(a) 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. Funds shall be kept in a separate account maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person. 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.

(b) A lawyer may deposit the lawyer's own funds in a client trust account for the sole purpose of paying bank service charges on that account, but only in an amount necessary for that purpose.

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

(d) 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.

(e) When in the course of representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.

MRPC 1.16.

The rule further requires the attorney to retain all records relating to such account funds and client property for a specified period of time. *Id.* [Check your local jurisdiction for the span of time attorneys in your jurisdiction are required to maintain records of property held by the attorney.]

Segregation of client's funds serves several important purposes:

1. Protects the client's property from the attorney's creditors;
2. Prevents misuse by the attorney.
3. Protects the client's right to discharge the attorney;

Matter of Sather, 3 P.3d 403 (Colorado, 2000) (*en banc*)

The lawyer must “promptly deliver” to the client or other person entitled to receive the funds or property, MRPC 1.15(d), and “may not hold funds to coerce a client into accepting the lawyer's contention[s regarding payment to the lawyer],” MRPC 1.15 cmt. [3].

Matter of Sather, 3 P.3d 403 (Colorado, 2000) (*en banc*)

Attorney entered into a \$20,000 “non-refundable fee” contract. The attorney believed that the “*flat fee*” was earned upon receipt and used it as his own.

Held: Attorney violated ethical rules by:

- spending, and failing to put into trust account, the \$20,000 he received as a “non-refundable” advance fee thereby treating them as his own;¹³
- labeling the fee as “non-refundable” even though he knew it was subject to refund;¹⁴
- failing to promptly return the unearned portion of the \$20,000;¹⁵

¹³ This is a violation of MRPC 1.15(a) that requires the lawyer to “hold property of the client . . . separate from the lawyer's own.” MRPC 1.15(a).

¹⁴ This violates MRPC 8.4(c) that prohibits attorneys from “engag[ing] in onduct involving dishonesty, fraud, deceit or misrepresentation.” MRPC 8.4(c).

¹⁵ A violation of MRPC 1.16(d) that requires a lawyer, upon termination, to “refund[] any advance payment of fee or expense that hs not been earned or incurred.” MRPC 1.16(d).

(See more detailed discussion, *infra*.)

but see, New York State Bar Association Committee on Professional Ethics Op. 570 (1981); *ratified by* New York State Bar Association Committee on Professional Ethics Op. 816 (2007)

Advance payments of legal fees need not be considered client funds and need not be deposited in a client trust account.

Therefore, if the lawyer treats advance payments of fees as the lawyer's own, then depositing those fees in a trust account would constitute impermissible mingling.

The opinion recognizes that it is “contrary to the majority of opinions” issued by other ethics committees, but cites, as consistent authority D.C. 113 (1982), 110 Daily Washington L. Rptr. 2772 (1982) *digested in Lawyers' Man. Prof. Cond.* 801:2306 (ABA/BNA) (1984); Fla. 76-27 (1976), Fla. Bar Comm. on Prof. Ethics, *Selected Opinions* 88 (1977), *indexed in Maru's Digest* No. 10867 (Sup. 1980); Md. 83-62 (1983), *digested in Lawyers' Man. Prof. Cond.* 801:43330 (ABA/BNA) (1984).

Delegation of responsibilities?

May delegate, but ultimately the attorney remains responsible for the actions of the attorney's employees.

Strict liability offenses; lack of intent is irrelevant:

In re Montpetit, 528 NW2d 243 (Minn., 1995) - Attorney who delegated trust-account bookkeeping to secretary and then had an overdraft, although the referee found that (i) attorney did not have actual knowledge that the books were improperly maintained; (ii) did not intend to submit false certifications that he maintained proper books and records; (iii) conduct was negligent, not intentional; and (iv) no client complained or was ever hurt, nevertheless charged with:

- permitting trust account shortages;
- use of trust funds for personal purposes;
- commingling; and
- falsely certifying that his trust account records were properly maintained.

Held: Suspended for 6 months.

Distribution of property held in trust:

Gen'l rule: Distribute undisputed portion, retain disputed portion and, if no agreement is reached, deposit it with the court for resolution. MRPC 1.15(e).

Atty-client dispute:

Cannot withdraw fees that are disputed. This is an objective test, not subjective, that is, no matter how much the attorney believes to be legally entitled to the funds, he may not withdraw them if the client disputes it. Moreover, the client's "dispute" need not be genuine, serious or even *bona fide*. *Attorney Grievance Commission of Maryland vs. Braskey*, 378 Md. 425, 836 A.2d 605 (2003).

Client & Client's creditor, or Attorney & Client's creditor, dispute:

Schneider, Kleinick, Weitz, Damashek & Shoot v. New York City, 302 AD2d 183, 754 NYS2d 220 (App. Div., 1st Dept., 2002) - Plaintiff's lawyer replaced by other firm. Lawyer sends letter to defendant's counsel advising them of charging lien against any recovery plaintiff may receive.

Later when case is settled, defendants pay plaintiff directly without protecting the lawyer.

Held: Defendants must make second restitution to the lawyer for the amount of their charging lien.

Interest earned on client IOLTA funds:

If the account bears interest, the attorney may not retain it but must remit it to the client.

Practice Tip: Add a line in the retainer that if a separate IOLTA account is set up (to enable earning interest on significant sums) the client will reimburse firm for the bookkeeping necessary for it.

For More Information see:

J. Harris Morgan & Jay G. Foonberg, *How to Draft Bills Clients Rush to Pay* (2nd ed., 2003, ABA Law Practice Management section)

Mark A. Chinn, *How to Build and Manage a Family Law Practice* (ABA 2006)

Annotated Model Rules of Professional Conduct (6th ed., ABA 2006)

Mark A. Robertson & James A. Calloway, *Winning Alternatives to the Billable Hour: Strategies that Work* (3rd ed., ABA LPM, 2008)

Michael E. Gerber, *The E Myth Revisited: Why Most Small Businesses Don't Work and What to Do About It* (3rd ed., 1995)

Marcus Buckingham & Curt Coffman, *First Break All the Rules: What the World's Greatest Managers Do Differently* (1999, Simon & Schuster)