STATE OF KANSAS
OFFICE OF THE DISCIPLINARY ADMINISTRATOR

GAYLE B. LARKIN
Disciplinary Administrator

MATTHEW J. VOGELSBERG
Chief Deputy Disciplinary Administrator

CRYSTALYN M. ELLIS
Director of Investigations

KATHLEEN J. SELZLER LIPPERT
ALICE L. WALKER
JULIA A. HART
AMANDA G. VOTH
KATE DUNCAN BUTLER
Deputy Disciplinary Administrators

BIOS:

Kathleen J. Selzler Lippert, JD, joined the Office of the Disciplinary Administrator in 2019 following a 30-year legal career in public service. She began her career as a prosecutor working in both Atchison County and later as an Assistant District Attorney in Shawnee County where she prosecuted felony domestic violence cases, including homicides. She then practiced administrative law for over a decade by serving in a variety of roles for the Kansas State Board of Healing Arts, including Executive Director. She is a wife and mother of three young men who are now embarking on the adventures of adulthood.

Presentation Title: Trust Accounts in Kansas: Clicking Your Heels Won't Fix Bad Decisions

Presentation Description: Every state has professional rules governing fees and safekeeping of property belonging to clients or others. While the state rules have some similarities, they are often a little or a lot different depending on the jurisdiction. This CLE is only about Kansas rules related to fees (KRPC 1.5) and safekeeping (KRPC 1.15). It is critical to know the specific rules for the jurisdiction where you practice.

Presentation Outline:
1. Why it is important.
2. Know the rules.
3. IOLTA vs. Non-IOLTA
4. Characterizing Funds.
5. Record Keeping
6. Avoiding Discipline
7. Quiz

Learning objectives – By the end of this presentation, participants will be able to:
1. Recognize how small missteps – neglect, poor communication, sloppy trust accounting – can escalate into serious disciplinary consequences.
2. Identify best practices to protect clients and your practice.
3. Recognize the red flags in your practice before the Board does.

Trust Accounts in Kansas: Clicking Your Heels Won't Fix Bad Decisions

1. Why it is important.
    a. Duty, protection (for you and client), avoid discipline.
2. Know the rules.
    a. The Kansas Supreme Court requires lawyers to certify client trust account compliance on their annual licensing registration KRPC 1.15(e).
    b. KRPC 1.5 (fees) sets forth factors to be considered in determining whether a fee is reasonable, contingent fee requirements and prohibitions, and other duties as it relates to fees.
    c. KRPC 1.15 (safekeeping) sets forth requirements for record keeping, prompt notice and delivery requirements, defines IOLTA and other trust accounts.
    d. Five caretaker duties: (1) Segregation, (2) Prompt Notification, (3) Prompt Payment or Delivery, (4) Safeguarding, and (5) Accounting. Helpful Tips.
    e. Scammer Warning.
    f. The materials include an overview of disciplinary decisions related to KRPC 1.15.
3. IOLTA vs. Non-IOLTA
    a. IOLTA: Pooled interest-bearing account, interest earnings to be paid to the Kansas Bar Foundation under the IOLTA program (Interest on Lawyer Trust Account).
    b. Non-IOLTA: Interest Bearing, Pooled Interest Bearing, or Pooled non-interest bearing.
4. Characterizing Funds.
    a. Every dollar in IOLTA or Trust account belongs to a client or third party. Commingling funds of others with lawyer's funds is prohibited.
    b. Know what funds are and where they go.
5. Record Keeping
    a. Document, document, document.
    b. Always provide receipts, deposit funds promptly, no "cashing out" or cash withdrawals, and wait for funds to clear before disbursement.
    c. Keep (1) client ledgers, (2) Check journal, (3) Monthly bank statements, (4) Receipts / disbursements, and (5) Do monthly 3-way reconciliations.
6. Avoiding Discipline
    a. Conduct that will invite discipline: commingling, conversion, sloppy records, disbursing too early, failure to reconcile, not recording in real time, using trust account as an operating account, disbursement before clearance.
7. Quiz

Materials for Trust CLE and School

Categories of Summarized Cases[1]

- Attorneys are expected to know the rules
- Misappropriation of client funds is serious
- Record keeping
- Commingling, Earned upon receipt, & Unearned fees in operating account
- Promptly deliver funds or property
- Non-refundable fees
- Flat fees
- Rounding up
- Overdraft
- Improper use of trust account
- Misappropriation of firm or partner funds

Attorneys Are Expected to Know the Rules

In re Ruther, 285 Kan. 808 (2008)

Discussed and summarized in more detail below in the "Earned Upon Receipt" section. Significantly, the Court held:

The Kansas Supreme Court has consistently held that **it is incumbent upon every attorney to know the disciplinary rules regulating the profession**, and failure to cite specific rules does not excuse misconduct. {Emphasis added]. *[See: In re Farmer, 242 Kan. 296, 300 (1987), In re Turner, 217 Kan. 574, 579 (1975), quoting State v. Alvey, 215 Kan. 460, 464 (1974), and State v. Nelson, 206 Kan. 154, 157 (1970)]*

---

[1] Rarely does a disciplinary case involve a single rule violation. Most disciplinary cases involve multiple rule violations and could be placed in several 'categories'. Thus, the category designation is representative of only one violation in the case.

Misappropriation of Client Funds Is Serious

In re Shumway, 269 Kan. 796 (2000)

The respondent was contacted regarding a potential paternity action on behalf of a father. Respondent advised the client that a paternity action could be brought prior to the birth of a child, which was contrary to Kansas law. After not responding to the client, the client filed a complaint. Respondent failed to respond to multiple requests from the disciplinary office for a written response. At the formal hearing, respondent asserted that she was not able to respond because of her severe depression and argued she could not comply with the duty to cooperate.

The Court stated that her clinical depression was serious; however, there was nothing to suggest she was physically incapacitated. She could have telephoned the disciplinary administrator or the investigator to inform the office of her situation.

In determining the appropriate sanction, the Court said, "[m]isappropriating client funds is one of the gravest offenses against the public trust a lawyer can commit. Suspension is an appropriate discipline."

The respondent violated KRPC 1.1 (competence), 1.15(d)(2)(iv) (safekeeping - promptly deliver), 1.16(d) (termination - surrender papers, property, return unearned fees), and 8.4(g) (misconduct - conduct adversely reflecting on fitness). The Court imposed a one-year suspension with conditions.

In re Buckner, 308 Kan. 427 (2018)

This case arose when respondent was retained to defend clients in a pending mortgage foreclosure action. Respondent's fee agreement provided for a $500 "monthly flat fee." The background of the case is described in more detail below in the "Flat Fee" section. The Kansas Supreme Court stated:

"Kansas disciplinary cases have consistently recognized that misappropriation of clients' funds is one of the most serious offenses an attorney can commit, and the sanction generally imposed has been disbarment."

Citing In re Veith, 252 Kan. 266, 272 (1992).

Record Keeping

In re Black, 283 Kan. 862 (2007)

Respondent, an elected county attorney, was responsible for handling diversion funds. The established process required defendants to submit two checks: one for court costs and one for the law enforcement training fund. Some defendants submitted a single check instead. Respondent cashed these checks, stored the money in his desk drawer labeled with a sticky note, and periodically distributed funds to the clerk and county treasurer. Respondent failed to obtain receipts, maintain a ledger, or reconcile funds.

The Court found a violation of KRPC 1.15(a) (safekeeping - maintain complete records and hold property separate) and imposed public censure.

In re Corrin, 286 Kan. 421 (2008)

The initial complaints related to diligence and communication. During the course of the investigation, information came to light concerning respondent's trust account practices. The investigation uncovered evidence that respondent failed to disburse funds from his client trust account to numerous clients.

Respondent was directed to provide an accounting of trust account funds and identify which funds should be disbursed to clients. Respondent was unable to identify client ownership of the funds, blamed his computer software, and asserted that his computer had "crashed." Respondent had very few records available during the trust account audit.

Eventually, respondent delivered his computer to ODA investigators, who were able to determine ownership of more than $30,000 belonging to clients. During the formal hearing, the panel issued an interim order directing respondent to distribute client funds. Respondent distributed some, but not all, of the funds and failed to fully comply with the order. The Supreme Court found that respondent's failure to comply was a knowing violation.

The respondent violated KRPC 1.15(a) (safekeeping - maintain complete records and hold property separate), 1.15(b) (safekeeping - promptly notify and deliver funds and render full accounting upon request), and 8.4(g) (misconduct - conduct adversely reflecting on fitness to practice law). The Court imposed an indefinite suspension and additional requirements.

In re Quinn, 286 Kan. 301 (2008)

This matter arose from a complaint alleging fraudulent endorsement of an insurance check, which led to an audit of respondent's trust account. The account was overdrawn and commingled with personal funds. Respondent failed to supervise her assistant, who improperly endorsed and deposited checks. Respondent had a very casual approach to trust account transactions and recordkeeping; despite being admonished in a prior disciplinary hearing to get help to ensure appropriate maintenance of her trust account.

Respondent admitted she maintained no deposit slips, ledgers, reconciliations, or transaction journals. The Court rejected respondent's argument that wrongful intent was required to establish misrepresentation.

The respondent violated KRPC 1.15(a) (safekeeping - maintain complete records and hold property separate), 5.3(b) (supervision of nonlawyer assistance), and 8.4(c) (misconduct - dishonesty, fraud, deceit, or misrepresentation). The Court imposed a one-year suspension, with a minority favoring a more severe sanction.

In re Harrington, 305 Kan. 643 (2016)

This disciplinary case involved two separate matters. In the first, respondent misused a durable power of attorney to withdraw funds from a client's account, including after the client's death, and made false statements to the probate court regarding his authority and fees. Respondent paid himself more than $30,000 for a simple estate, later refunding $10,000. His remaining fees were still unreasonable.

In a second matter, respondent paid himself more than the amount approved by the court, retained an heir's funds in trust, and ultimately converted approximately $25,000 for personal use. When ordered to remit the funds to the Kansas State Treasurer as unclaimed property, respondent obtained a personal loan to replenish the trust account. Respondent failed to maintain proper trust records and made misleading statements during the investigation.

The respondent argued his due process was violated because the ODA initially learned of the misconduct through an informal conversation with another attorney who died before the panel hearing. The respondent contended that the other attorney had an impure motive and the absence of a written formal complaint was a due process violation. Additionally, the respondent argued that his restitution negated any harm.

The Court rejected respondent's due process arguments and his claim that restitution negated harm, reiterating that "no harm, no foul" arguments are consistently repudiated in disciplinary cases. The Court stated the ODA can investigate all possible misconduct "whether called to his or her attention by complaint or otherwise." The absence of a written

complaint did not prejudice the respondent in any manner. The ODA developed the evidence through investigation and established violations through independently obtained evidence and rendered the motive of the other attorney irrelevant. The Court rejected his claim that restitution negated harm, reiterating that "no harm, no foul" arguments are consistently repudiated in disciplinary cases.

The respondent violated KRPC 1.5 (fees - reasonable), 1.8(b) (conflict special rules - prohibit use of client information to disadvantage of client), 1.15(a) (safekeeping - maintain complete records and hold property separate), 1.15(d)(2)(v) (safekeeping - produce trust account records for examination), 3.3(a)(1) (candor toward tribunal – prohibit false statement), 8.1(b) (disciplinary matters - correct misapprehension, must respond to ODA request for information), 8.4(c) (misconduct - dishonesty, fraud, deceit, or misrepresentation), and 8.4(d) (misconduct - prejudicial to administration of justice). The Court ordered disbarment.

Commingling, Earned Upon Receipt, & Unearned Fees in Operating Accounts

This section addresses fees treated as earned upon receipt when, under Kansas law, they were required to be held in trust until earned.

In re Kellogg, 274 Kan. 281 (2002)

In one matter, a client paid respondent $2,000 and terminated the representation days later. Respondent failed to deposit the unearned fees into her trust account and did not provide an accounting. In a second matter, a client paid $20,000 for representation in a criminal case. Respondent again failed to deposit unearned fees into trust and was later terminated.

Respondent kept no contemporaneous time records and directed staff to bill in fixed increments regardless of time spent, intentionally padding bills to limit refunds. A refund check issued to the client was returned for insufficient funds.

The hearing panel considered the issue of reasonable fees and cited to Davis v. Miller, 269 Kan. 732 (2000), which held, "… [f]ees which are not supported by 'meticulous, contemporaneous time records' that show the specific task being billed should not be allowed."

The respondent violated KRPC 1.5 (fees - reasonable), 1.15(a) (safekeeping - maintain complete records and hold property separate), 1.15(b) (safekeeping - promptly notify and deliver funds and render full accounting upon request), 1.15(d)(1) (safekeeping - deposit in trust/IOLA, two limited exceptions, prohibit commingling), 1.15(d)(2)(iii) (safekeeping -

maintain complete records) and 8.4(c) (misconduct - dishonesty, fraud, deceit, or misrepresentation). The Court imposed an indefinite suspension with additional requirements.

In re Ruther, 285 Kan. 808 (2008)

This disciplinary case stemmed from an audit of respondent's trust account. Respondent opened an interest-bearing account, commingled personal funds with client funds, and retained interest earned on client money. Respondent falsely certified compliance with KRPC 1.15(e) on his attorney registration form. [See also, *In re Leon*, 314 Kan. 419 (2021)].

The respondent violated KRPC 1.15(d)(1) (safekeeping - deposit in trust/IOLA, two limited exceptions, prohibit commingling), 1.15(d)(3)(iii) (safekeeping - interest earnings credited proportionately to the client or third party for the benefit of whom the funds are held or IOLTA to the Kansas Bar Foundation, Inc.), and 1.15(e) (safekeeping - certify compliance on attorney registration). The Court imposed an indefinite suspension.

The Kansas Supreme Court has consistently held that it is incumbent upon every attorney to know the disciplinary rules regulating the profession, and failure to cite specific rules does not excuse misconduct. *[See: In re Farmer, 242 Kan. 296, 300 (1987), In re Turner, 217 Kan. 574, 579 (1975), quoting State v. Alvey, 215 Kan. 460, 464 (1974), and State v. Nelson, 206 Kan. 154, 157 (1970)]*

In re Holmes, 293 Kan. 478 (2011)

This disciplinary matter arose from several client complaints involving a divorce, a simple estate, a conservatorship and guardianship, a family land dispute, and a contested conservatorship. Respondent charged unreasonable fees in the estate matter, increased fees without prior agreement, failed to provide itemized statements upon request, and filed a garnishment order against a client despite a settlement agreement.

Respondent mishandled probate matters by failing to file required inventories and delaying the establishment of a conservatorship for a minor heir. Respondent billed an estate for time spent responding to a disciplinary complaint and advanced unearned fees to himself from conservatorship funds without court approval. Respondent commingled and converted client funds for personal use.

In another matter, respondent received unearned fees, failed to deposit them into a trust account, and converted those funds for personal use. It is no defense to conversion that, later, the fees were earned.

The respondent violated KRPC 1.5 (fees - reasonable), 1.15(a) (safekeeping - maintain complete records and hold property separate) and 1.15(d) (safekeeping - deposit in trust/IOLA, two limited exceptions, prohibit commingling), and 8.4(c) (misconduct - dishonesty, fraud, deceit, or misrepresentation). The Court ordered disbarment.

In re Haitbrink, 304 Kan. 531 (2016)

Respondent represented 15 Washington residents in negotiations with mortgage companies concerning delinquent or underwater mortgages. The State of Washington charged respondent with violations of the Mortgage Broker Practices Act, and respondent agreed to pay restitution. Respondent failed to inform the Kansas Office of the Disciplinary Administrator (ODA) of the Washington charges.

Respondent's fee agreements included hold-harmless provisions that violated the requirement that clients be represented by independent counsel before entering into such agreements. Respondent treated client fees as earned upon receipt, even though the work had not yet been completed. As a result, the fees should have been deposited into a trust account rather than the operating account.

The respondent violated KRPC 1.8(h)(1) (conflict special rules - prohibit agreement to prospectively limit liability), 1.15(a) (safekeeping - maintain complete records and hold property separate), 1.16(d) (termination - surrender papers, property, return unearned fees), and 8.3(a) (duty to report misconduct by self or others). The Court imposed a public censure.

In re Hult, 307 Kan. 479 (2018)

Respondent maintained an immigration practice while licensed in Kansas and practicing federal immigration law in Iowa. Iowa rules required respondent to maintain a trust account, file annual statements, and pay fees. Respondent disclosed to Iowa authorities that he did not maintain a trust account and deposited flat fees into his operating account because he believed the fees were earned upon receipt. Iowa publicly reprimanded respondent, and the matter was referred to Kansas. Respondent failed to report the Iowa discipline to Kansas.

Kansas ODA also received multiple client complaints regarding lack of communication, diligence, and competence. In one case, respondent failed to respond to a malpractice action, resulting in a default judgment, and later failed to appear in a collection proceeding. In the subsequent garnishment action, respondent provided the bank account number where he deposited unearned client funds. Then he opened a new account and transferred all monies

from the prior account to avoid garnishment. The Court issued a temporary suspension pending the final disciplinary hearing.

During disciplinary proceedings, respondent testified that he did not understand what a trust account was, had no reliable billing or timekeeping system, lacked office management support, and did not understand basic procedural requirements. Despite accepting funds for work not yet completed, respondent continued to operate without a trust account.

The hearing panel found violations of KRPC 1.5 (fees - reasonable), 1.15(a) (safekeeping - maintain complete records and hold property separate), 1.16(d) (termination - surrender papers, property, return unearned fees), and 8.3 (duty to report misconduct by self or others). The Court imposed an indefinite suspension.

In re Leon, 314 Kan. 419 (2021)

This matter arose from multiple client complaints. Respondent maintained a trust account but routinely failed to deposit unearned fees into it, instead using client funds for personal expenses. Respondent charged nonrefundable fees, which are per se unreasonable, failed to maintain complete trust account records, and failed to provide documents to the investigator.

Respondent certified on attorney registration forms that he was familiar with and compliant with KRPC 1.15. When questioned, respondent testified he believed he was compliant merely because he had a trust account, even though he rarely used it. [See also, *In re Ruther*, 285 Kan. 808 (2008) (violation of KRPC 1.15(e) (safekeeping - certify compliance on attorney registration)].

The respondent violated KRPC 1.5 (fees - reasonable), 1.15(a) (safekeeping - maintain complete records and hold property separate), 1.15(d)(1) (safekeeping - deposit in trust/IOLA, two limited exceptions, prohibit commingling), 1.15(d)(2)(iii) (safekeeping - maintain complete records), and 1.15(d)(2)(v) (safekeeping - produce trust account records for examination). The Court imposed an indefinite suspension.

Promptly Deliver Funds or Property

These cases focus on the duty to promptly notify clients or third persons of receipt of funds or property and to promptly deliver what they are entitled to receive.

In re Jenkins, 258 Kan. 779 (1995)

Respondent represented a husband in a divorce action. Following trial, the opposing party (the ex-wife) delivered personal property to respondent for return to his client. Respondent failed to inventory, receipt, or safeguard the items and stored them in a garage at his wife's home. Respondent's client received some items but claimed that other items were not returned to him.

The hearing panel emphasized and the Supreme Court affirmed that KRPC 1.15 applies to tangible personal property as well as funds and requires attorneys to act as professional fiduciaries. KRPC 1.15, Comment [1] provides that all property which is the property of clients or third persons should be kept separate from the lawyer's business and personal property and an attorney must hold property with the care required of a professional fiduciary.

Respondent violated KRPC 1.15 (safekeeping). The Court imposed an indefinite suspension, concurrent with a prior suspension.

In re Potter, 279 Kan. 937 (2005)

Respondent accepted fees from multiple clients, performed little or no work, deposited unearned fees into his operating account, and failed to communicate. When clients requested return of fees and files, respondent failed to comply.

Respondent violated KRPC 1.15(a) (safekeeping - maintain complete records and hold property separate) and 1.15(b) (safekeeping - promptly notify and deliver funds and render full accounting upon request). The Court imposed an indefinite suspension.

In re Rathbun, 280 Kan. 672 (2005)

Respondent's divorce client gave mail addressed to the client's ex-spouse, the opposing party, to respondent. Respondent retained the mail addressed to the ex-spouse for more than two years without notifying opposing counsel or forwarding the mail. The opposing party had a clear interest in receiving the correspondence.

The Court found respondent violated KRPC 1.15(b) (safekeeping - promptly notify and deliver funds and property, and render full accounting upon request). Because the misconduct occurred before respondent was placed on probation in a prior disciplinary case, the Court extended probation by one year.

In re Dowell, 249 Kan. 83 (2011)

Respondent represented several clients in bankruptcy matters and repeatedly failed to file required documents, communicate with clients, or take necessary action. Respondent received numerous orders to show cause and failed to notify clients when he ceased practicing law.

While assisting respondent with a move, a client discovered original bankruptcy documents and personal property discarded as trash, including tax returns and credit cards. Respondent instructed the client to dispose of the materials.

The respondent violated KRPC 1.15 (safekeeping) by improperly disposing of client property. The Court imposed an indefinite suspension.

In re Biscanin, 305 Kan. 1212 (2017)

This disciplinary matter arose from a contested and complex probate case involving competing wills and intestate heir claims. After settlement, respondent's client received a significant distribution. At the client's request, respondent agreed to "hold" $10,000. Respondent did not deposit the funds into his trust account, instead placing the money in a safe in his office and later returned it to the client when it was requested.

The client later provided the funds to respondent to "hold" a second time. The client testified that respondent asked to borrow the money to invest in a bar and promised to pay interest. Respondent claimed a promissory note existed but was unable to produce it. The hearing panel found respondent's explanation not credible.

One issue before the hearing panel was whether the respondent promptly returned the funds after the client asked respondent to hold them the second time. The respondent argued he first learned of the client's demand for the funds when he received the disciplinary complaint and returned the funds to the client within approximately 6 weeks. Respondent argued this was "prompt". The disciplinary administrator argued the evidence showed the return took 8 months. Arguably, the 8-month time frame required an assessment of credibility of the client and respondent's testimony.

The Count framed the question as whether a 6-week delivery period constituted a "prompt" delivery of the client's funds. The Court found a delay of 10 months to be a violation in McPherson. [*In re McPherson*, 287 Kan. 434, 440 (2008) (10-month delay in returning retain after divorce client notified the attorney of the couple's reconciliation)]. The Supreme Court analyzed the delay and did not accept respondent's argument. The Court discussed the meaning of "prompt delivery" as required by KRPC 1.15(b) and 1.15(d)(iv) and said that "[w]hether one acts on time and without delay will often be determined by the particular circumstances of a transaction."

The Court determined the arrangement constituted a business transaction with a client and that respondent failed to comply with KRPC 1.8(a) (conflicts special rules - limits on business transactions with clients). Respondent violated KRPC 1.15(a) (safekeeping - maintain complete records and hold property separate), KRPC 1.15(b) (safekeeping - promptly notify and deliver funds and render full accounting upon request), 1.15(d)(1) (safekeeping - deposit in trust/IOLA, two limited exceptions, prohibit commingling) by failing to deposit funds into trust, and 1.15(d)(2) (safekeeping – maintain complete records and promptly deliver). The Court imposed a 2-year suspension, stayed after 6 months, and placed on supervised probation for 2 years.

In re Crow-Johnson, 319 Kan. 192 (2024)

Respondent was responsible for administering a trust while employed at a law firm. After leaving the firm for other employment, respondent retained possession of the trust matter. Respondent ceased communicating with the beneficiary, who hired new counsel.

Despite extensive efforts, successor counsel was unable to obtain the trust file. A court order directed respondent to return the file or face contempt. Respondent failed to fully comply and retained trust records and client property at her home, commingling client records with personal property. In a separate matter, respondent failed to promptly deliver client tax documents despite repeated requests.

Although many Rule 1.15 cases involve funds, the Court emphasized that the rule also applies to client papers and property. In addition to many other rule violations, Respondent violated KRPC 1.15(a) (safekeeping - maintain complete records and hold property separate) and 1.15(b) (safekeeping - promptly notify and deliver funds and render full accounting upon request). The Court ordered disbarment.

Non-Refundable Fees

These cases address advance fees labeled as non-refundable and the distinction between true retainers and fees to be earned by future services.

In re Scimeca, 265 Kan. 742 (1998)

Respondent's fee agreements designated advance payments as non-refundable minimum fees owed upon receipt. At the time payment was made, respondent had performed no services for which the client owed a fee. The Court held that absent clear language establishing a true retainer paid solely to secure the attorney's availability, advance fees remain client property until earned and must be held in trust. Respondent refused to return advance payments of unearned fees, endorsed checks so as to attempt to make an improper agreement prospectively limiting his liability.

The better view is to resolve the question based upon the agreement between the parties. If the contract or agreement between the attorney and the client clearly states that the fee advanced is paid as a nonrefundable retainer to commit the attorney to represent the client and not as a fee to be earned by future services, then it is earned by the attorney when paid and is the attorney's money. If, on the other hand, the retainer is to be earned by future services performed by the attorney, then it remains the client's money and subject to Rule 1.15.

The Court explained that if a fee is to be earned by future services, it is subject to the requirements of KRPC 1.15. Additionally, respondent billed time in minimum .25-hour increments, resulting in charges for time not actually spent on client matters, which constitutes improper billing. It is a violation to bill for time not spent on client matters.

The respondent violated KRPC 1.5(a) (fees - reasonable), 1.8(h) (conflict special rules - prohibit agreement to prospectively limit liability), 1.15(b) (safekeeping - promptly notify and deliver funds and render full accounting upon request), 1.16(d) (termination - surrender papers, property, return unearned fees), 8.2(a) (judicial officials - statement that is false), and 8.4(a) (misconduct – prohibit attempt to violate), 8.4(c) (misconduct - dishonesty, fraud, deceit, or misrepresentation), and 8.4(d) (misconduct -prejudicial to administration of justice). The Court imposed an indefinite suspension.

[See also, ABA Formal Opinion 505 (defining a 'true' retainer "…it is solely to reserve the lawyer's availability.")].

In re Angst, 275 Kan. 388 (2003)

This disciplinary case arose from a contested probate matter. The written fee agreement provided for a $2,500 retainer plus hourly billing at $95 per hour, along with costs. During the representation, the client paid a total of $4,743, and the probate court later awarded respondent $475 in fees, bringing the total amount received to $5,218.30. The client requested a refund of $1,000 and a detailed accounting.

Respondent failed to refund any unearned fees and refused to provide an accounting unless the client agreed to allow respondent to bill for the effort of preparing it. The hearing panel, citing *In re Scimeca*, [discussed above] determined that the $2,500 portion of the retainer was treated as non-refundable without the required language, rendering it unreasonable. The respondent must have earned the retainer at his hourly rate in order to retain it.

The Court held in *Scimeca* that absent clear language that unless a retainer is paid solely to secure the attorney's availability and not for future services, the fee remains refundable. Respondent violated KRPC 1.15(a) (safekeeping - maintain complete records and hold property separate), 1.15(b) (safekeeping - promptly notify and deliver funds and render full accounting upon request), and 1.16(d) (termination - surrender papers, property, return unearned fees). The Court imposed a public censure.

In re Crandall, 308 Kan. 1526 (2018)

Although this case did not involve a direct violation of KRPC 1.15, it provides extensive discussion relevant to trust-account issues and reasonable fees. The matter involved competing expert testimony regarding the reasonableness of fees under the eight factors set forth in KRPC 1.5(a).

Respondent proposed a fee agreement that included an advance non-refundable fee to be earned by future services. Respondent argued the provision was irrelevant because it was not selected by the client. The hearing panel rejected that argument, emphasizing that non-refundable fees are strictly prohibited in Kansas.

The Court also noted respondent's time records were not prepared contemporaneously, and the lack of detail undermined the credibility of the claimed fees. Further, the Court discussed the difference between a flat fee and retainer for future services.

The respondent violated KRPC 1.5(a) (fees - reasonable). The Court imposed a six-month suspension and required a reinstatement hearing.

Flat Fees

These cases address the treatment of flat fees, including when such fees are earned, the requirement to deposit them into trust until earned, and the consequences of failing to maintain adequate records or provide accountings.

In re Thurston, 304 Kan. 146 (2016)

Respondent represented a client in a criminal case for a flat fee but failed to deposit the unearned fee into a trust account. Respondent withdrew after the preliminary hearing and failed to provide an accounting upon termination.

Because respondent failed to maintain complete time records, it was difficult to determine what portion of the fee had been earned. The Court reiterated that flat fees must be deposited into trust and remain there until earned, unless the lawyer and client agree to partial withdrawals tied to completion of specified tasks.

"A lawyer may charge a flat fee to a client for a specific task to be undertaken. When the flat fee is paid to the lawyer, it must be deposited into the lawyer's trust account and the fee cannot be withdrawn until it is earned. Since a flat fee is not earned until completion of the task, the entire flat fee must remain in the lawyer's trust account until that task is completed unless the lawyer and client otherwise agree to partial withdrawals based upon the amount earned for completion of specified subtasks unless the lawyer and client otherwise agree to partial withdrawals based upon the amount earned for completion of specified subtasks." (*Thurston*, at 149).

Respondent violated KRPC 1.15(a) (safekeeping - maintain complete records and hold property separate) and 1.16(d) (termination - surrender papers, property, return unearned fees). The Court imposed a public censure.

In re Knox, 305 Kan. 628 (2016)

Respondent represented a client in multiple matters, charged a non-refundable flat fee, and failed to deposit the fee into a trust account. Respondent did not withdraw after being discharged, failed to refund unearned fees, failed to appear at a hearing, and delayed forwarding evidence to a prosecutor.

During the disciplinary hearing, respondent falsely testified regarding the client's instructions, the date of termination, and alleged the theft of his laptop. Respondent also failed to cooperate with the disciplinary investigation by failing to provide requested documents.

Respondent violated KRPC 1.5 (fees - reasonable), 1.15(a) (safekeeping - maintain complete records and hold property separate)1.15(b) (safekeeping - promptly notify and deliver funds and render full accounting upon request), 1.15(d) (safekeeping – preserve identity of funds by deposit in trust/IOLA), 1.16(a)(3) (termination – shall withdraw when discharged), 1.16(d) (termination - surrender papers, property, return unearned fees), 8.1(b) (failure to disclose fact necessary to correct a misapprehension known by respondent), 8.4(d) (misconduct - prejudicial to administration of justice). S. Ct. R. 207(b) (failure to cooperate in disciplinary investigation), and S. Ct. R. 211(b) (failure to file answer in a disciplinary proceeding). The Court imposed a one-year suspension and required a reinstatement hearing.

In re Buckner, 308 Kan. 427 (2018)

Respondent was retained to represent a client in a mortgage foreclosure action and to file a counterclaim. The fee agreement provided for a $500 "monthly flat fee" and stated respondent would maintain contemporaneous time records. Respondent did not maintain contemporaneous time records.

A dispute arose regarding settlement proceeds. Respondent failed to place the proceeds in a trust account, failed to provide a full accounting, and treated the matter inconsistently as both a flat fee and contingency fee arrangement. Respondent failed to reduce any contingency agreement to writing and did not advise the client of the right to court review.

Because a dispute existed regarding entitlement to funds, respondent was required to keep the disputed funds separate until resolution. Instead, respondent withdrew funds and deposited them into an operating account at a financial institution not approved by the ODA. Respondent admitted he was unaware of the requirement that trust accounts be maintained at approved institutions.

Additionally, respondent provided documents which purported to be billing statements at the disciplinary hearing. However, he testified that he prepared the finished draft of his time in 2017, for work performed in 2014 and 2015; the hearing panel found this to be deceptive. Further, respondent failed to cooperate with the investigation, and failed to provide a written response.

The respondent violated numerous provisions, including KRPC 1.5(d) (fees – contingent fee, deduct expenses before contingent fee is calculated, and advise the client of the right to have fee reviewed by court), and 1.5(e) (fees - all fee contracts subject to court review and approval). Additionally, he violated 1.15(a) (safekeeping - maintain complete records and hold property separate), 1.15(b) (safekeeping - promptly notify and deliver funds and render full accounting upon request), 1.15(c) (safekeeping - funds in dispute kept separate until resolved), 1.15(d)(1)(ii) (safekeeping - disputed portion kept separate until resolved), 1.15(d)(3) (safekeeping - trust accounts maintained in approved institution), and 1.15(f)

(safekeeping - approved institution must report overdraft). Further, he violated 1.16(d) (termination - surrender papers, property, return unearned fees), 8.1(b) (disciplinary matters - correct misapprehension, must respond to ODA request for information), and 8.4(c) (misconduct - dishonesty, fraud, deceit, or misrepresentation). The Court ordered disbarment.

In re Borich, 316 Kan. 257 (2022)

Respondent represented a client in a home construction defect matter. The initial fee agreement was a contingency agreement. The litigation was complex and extended for more than ten years. During the representation, the client performed substantial legal work, including drafting pleadings, to assist respondent.

Respondent amended the original contingency agreement to require a $1,000 payment and $500 monthly payments. The amendment also stated respondent would "not return any attorney's fees if we are not successful." Respondent later demanded and accepted two additional $5,000 payments. Respondent failed to deposit the monthly fees and additional payments into a trust account.

The amended agreement did not specify when the monthly payments would be earned, and respondent failed to maintain contemporaneous time records. When the client requested an accounting and return of unearned fees, respondent failed to comply. Respondent falsely told the client that an arbitration award of $3,500 had been obtained and issued a check from the trust account, depositing personal funds to cover the payment.

Respondent violated KRPC 1.5(a) (fees - reasonable) and 1.5(d) (fees – contingent fee, deduct expenses before contingent fee is calculated, and advise the client of the right to have fee reviewed by court). Additionally, he violated 1.15(a) (safekeeping - maintain complete records and hold property separate), 1.15(b) (safekeeping - promptly notify and deliver funds and render full accounting upon request), and 1.15(d) (safekeeping - deposit in trust/IOLA). Further, he violated 1.16(a) (termination - shall withdraw), and 1.16(d) (termination - surrender papers, property, return unearned fees), and 8.4(c) (misconduct - dishonesty, fraud, deceit, or misrepresentation). The Court imposed a one-year suspension with conditions and criticized respondent for minimizing responsibility and blaming the complainants.

In re Maughan, 318 Kan. 890 (2024)

Respondent represented multiple clients in a criminal matter, creating conflicts of interest. Respondent accepted a $30,000 flat fee and deposited it into his operating account, testifying that he considered the fee earned upon receipt.

The hearing panel, citing *In re Thurston*, found the fee had not been earned when deposited and that respondent commingled the flat fee with personal funds.

Respondent violated KRPC 1.15(a) (safekeeping - maintain complete records and hold property separate). The Court imposed a one-year suspension and required a reinstatement hearing.

Rounding Up

These cases address improper billing practices, including rounding up time entries and charging for time not actually expended, which can render fees unreasonable and implicate trust-account obligations.

In re Scimeca, 265 Kan. 742 (1998)

Summarized above.

In re Davis, 296 Kan. 531 (2013)

The respondent was a law firm partner responsible for administering a large trust for an elderly client. In that role, the respondent hired his wife to serve as the client's health care advocate. The trust was billed for the wife's services over several years, and her fees were repeatedly increased. Ultimately, the trust paid nearly $500,000 to the respondent's wife.

The respondent opened a separate trust account at a different bank and deposited client trust funds into that account. Those funds were then used to pay the respondent's personal taxes. The respondent also engaged in dishonest billing practices by rounding up billing entries and charging for time not actually spent on client matters. KRPC 1.15 requires attorneys to charge reasonable fees. Rounding up time constitutes billing for work not performed. Billing for work not performed is per se unreasonable.

The misconduct was discovered during a law firm audit. The respondent was not fully candid with either the law firm or the Office of the Disciplinary Administrator regarding the scope of his misconduct. The law firm ultimately reimbursed the trust more than $400,000 in excessive fees.

The respondent violated KRPC 1.5 (fees - reasonable), 1.15 (safekeeping), 8.4(b) (misconduct - criminal act), 8.4(c) (misconduct - dishonesty, fraud, deceit, or misrepresentation), and 8.4(d) (misconduct - prejudicial to administration of justice). The Court ordered disbarment.

Overdraft

These cases involve overdrafts of attorney trust accounts and the resulting disciplinary consequences, including failure to maintain required records, commingling, and conversion of client funds.

In re Craig, 272 Kan. 299 (2001)

The respondent operated a high-volume, low-cost uncontested divorce practice known as the "Divorce Clinic." The disciplinary case involved five client matters and multiple trust account violations.

The respondent maintained three successive trust accounts. The first was closed after six checks were returned for insufficient funds and had a negative balance exceeding $900 at closure. The second account had four checks returned for insufficient funds. A third trust account was then opened.

The respondent failed to maintain complete trust account records. He and his wife, who served as office manager, deposited personal funds into the trust account to avoid creditors and the IRS. The respondent testified that his practice operated on a cash basis. His wife testified that cash—including unearned fees—were kept in envelopes and used to pay filing fees.

The respondent violated KRPC 1.15(a) (safekeeping - maintain complete records and hold property separate), 1.16(d) (termination - surrender papers, property, return unearned fees), 5.3 (supervision of nonlawyer assistance), and 8.4(c) (misconduct - dishonesty, fraud, deceit, or misrepresentation). The Court imposed a one-year suspension, restitution, additional CLE requirements, and a reinstatement hearing.

In re Collins, 295 Kan. 1084 (2012)

This disciplinary matter arose from two complaints: (1) multiple overdrafts on the respondent's attorney trust account and failure to cooperate with the disciplinary investigation, and (2) failure to prepare and file tax returns for a client.

In 2010, the Office of the Disciplinary Administrator was notified that the respondent overdrew his attorney trust account on six occasions. Three of the overdrafts resulted from the respondent using the trust account to pay expenses associated with maintaining his law license, including CLE and registration fees. The ODA sent letters in June, July, and August 2010 requesting a written explanation for the overdrafts. The respondent failed to respond

and did not provide a written explanation until December 2010, approximately six months after the initial request. The respondent testified that no client funds were held in the trust account at the time and that the account contained only personal funds.

The second complaint involved the respondent's failure to prepare and file tax returns for a client. As a result, the Kansas Department of Revenue seized the client's personal property, and the client lost refunds because the returns were filed more than three years late.

The respondent argued that he did not violate KRPC 1.15 because he held no client funds in the trust account and therefore did not commingle funds. He further asserted that, absent a KRPC 1.15 violation, he had no duty to respond to the ODA and therefore did not violate KRPC 8.1(b).

The Supreme Court rejected these arguments, holding that Kansas rules generally prohibit maintaining personal funds in a trust account, subject only to limited exceptions that did not apply. The Court also emphasized that the duty to cooperate with disciplinary investigations is independent of any underlying rule violation.

The respondent violated KRPC 1.15(a) (safekeeping - maintain complete records and hold property separate) and 1.15(d)(1) (safekeeping - deposit in trust/IOLA, two limited exceptions, prohibit commingling). Additionally, he violated 8.1(b) (disciplinary matters - correct misapprehension, must respond to ODA request for information), and 8.4(g) (misconduct - conduct adversely reflecting on fitness to practice law). The Court imposed a one-year suspension with a reinstatement hearing.

Improper Use of Trust Account

In re Lund, 270 Kan. 865 (2001)

The respondent was delinquent on child support and medical expenses for his child. He deposited personal funds into the trust account to conceal them and made child support payments directly from his IOLTA account. When enforcement efforts began, he falsely represented that funds in his trust account were not subject to garnishment. While client funds are not subject to garnishment, his personal funds, concealed in the trust account, were subject to garnishment.

The respondent violated KRPC 1.15(a) (safekeeping - maintain complete records and hold property separate), 1.15(d)(1) (safekeeping - deposit in trust/IOLA, two limited exceptions, prohibit commingling), 8.4(c) (misconduct - dishonesty, fraud, deceit, or misrepresentation), 8.4(d) (misconduct - prejudicial to administration of justice), and 8.4(g) (misconduct - conduct adversely reflecting on fitness to practice law). The Court imposed a one-year suspension.

In re Rausch, 272 Kan. 309 (2001)

The respondent used his trust account as a "mere conduit" to pass investment funds to his company in connection with an investment scheme. Although no attorney-client relationship existed, the respondent served as trustee for the investors. A federal civil judgment found the respondent liable for fraud and breach of contract.

The respondent acknowledged his conduct "appears to be negligent and careless" and contended he was "duped, and did not knowingly or intentionally defraud or deceive anyone". Responded disputed that he acted "knowingly" or that conduct "seriously adversely reflects on fitness. The respondent urged the Court to impose a public censure as was done in *Kershner*. [*In re Kershner*, 250 Kan. 383 (1992) (convicted of four felony violations of Kansas Securities Act, panel recommended disbarment and the Supreme Court imposed public censure)].

The Court dismissed respondent's analysis. The Court cited to *Lucas* which imposed a two-year suspension as appropriate for an attorney who misrepresented closure of trust account and used it to deposit fees. [*In re Lucas*, 269 Kan. 785 (2000)]. The Court, citing to *In re Shumway*, 269 Kan. 796 (2000), said, "Misappropriating client funds is one of the gravest offenses against the public trust a lawyer can commit." Here, the victims were not clients, but respondent was trustee for victims, placed their funds into his IOLTA account, transferred funds to another and the money was lost.

The opinion includes an extensive discussion of the purpose of IOLTA accounts. There was also a discussion on the evidentiary effect of civil judgments in disciplinary proceedings and whether a civil judgment is deemed 'conclusive' or 'prima facie evidence' and the standard of proof applied in the underlying judgment. The opinion has a discussion of whether a criminal conviction can form the basis of both a violation of KRPC 8.4(b) (misconduct - criminal act) and (g) (misconduct - adversely reflecting on fitness to practice law).

The respondent violated KRPC 1.15(a) (safekeeping - maintain complete records and hold property separate), 4.1(b) (truthfulness in statements to others), 8.4(b) (misconduct - criminal act), 8.4(c) (misconduct - dishonesty, fraud, deceit, or misrepresentation), and 8.4(d) (misconduct - prejudicial to administration of justice). The Court imposed a two-year suspension.

In re Conwell, 275 Kan. 902 (2003)

This case involved the respondent's handling of advance due-diligence fees paid by prospective borrowers through a consulting business associated with the respondent's law partner. The consulting corporation advertised its ability to obtain financing for large projects and required prospective clients to pay a $25,000 advance due-diligence fee, which was deposited into the law firm's trust account.

Written contracts and oral representations stated that the due-diligence fee would be refunded if financing was not obtained. Shortly after deposit, however, the funds were transferred from the trust account to the consulting firm's account and then converted to personal use. None of the due-diligence fees were refunded.

The consulting firm was never registered as a loan broker with the Kansas Securities Commissioner as required by K.S.A. 50-1001 et seq. By acting as unregistered loan brokers, both the consulting business and the law firm violated Kansas law.

The respondent violated KRPC 1.15(b) (safekeeping - promptly notify and deliver funds and render full accounting upon request) and 1.15(c) (safekeeping - funds in dispute kept separate until resolved). Additionally, he violated 5.1(c)(2) (responsibilities of partners, managers, and supervisory lawyers - lawyer shall be responsible for misconduct of other lawyer in specific circumstances), and 8.4(a) (misconduct - attempt to violate). The Court imposed a two-year suspension, stayed, with two years of probation under specific conditions.

In re Mandelbaum, 304 Kan. 67 (2016)

This matter involved multiple client representations. The respondent borrowed nearly $10,000 from client funds, advanced living expenses to clients, and used trust funds to assist with a client's motorcycle purchase by temporarily using other clients' funds. The respondent also intentionally maintained personal funds in his trust account to avoid tax levies.

The respondent violated KRPC 1.8(a) (conflicts special rules - limits on business transactions with clients) and 1.8(e) (conflict special rules - limits on financial assistance to client), 1.15(a) (safekeeping - maintain complete records and hold property separate) and 1.15(d) (safekeeping - deposit in trust/IOLA, two limited exceptions, prohibit commingling). The Court imposed an indefinite suspension, stayed, with supervised probation.

In re Odo, 304 Kan. 844 (2016)

The respondent used his trust account as an operating account and commingled personal and client funds. He recommended that financially distressed personal injury clients obtain litigation loans from a corporation he controlled, charging excessive interest and imposing burdensome terms without advising clients to seek independent counsel.

The respondent later represented a medical provider who sued one of his former clients, creating additional conflicts.

The respondent violated KRPC 1.7(a)(2) (conflicts), 1.8(a) (conflicts special rules - limits on business transactions with clients) and 1.8(e) (conflict special rules - limits on financial assistance to client), 1.9(a) (duty to former client), 1.15(d) (safekeeping - deposit in trust/IOLA, two limited exceptions, prohibit commingling), and 8.4(d) (misconduct - prejudicial to administration of justice). The Court imposed a one-year suspension with a reinstatement hearing.

In re Hawkins, 310 Kan. 988 (2019)

The respondent failed to diligently represent multiple clients, including failing to file required briefs and continuing to practice after suspension. She also improperly used her attorney trust account for personal purposes.

The respondent deposited retirement funds into her trust account, paid personal credit cards and attorney fees from the account, and failed to promptly return client funds. She did not cooperate with the disciplinary investigation and failed to appear at the hearing.

The respondent violated KRPC 1.15(a) (safekeeping - maintain complete records and hold property separate), 1.15(b) (safekeeping - promptly notify and deliver funds and render full accounting upon request), 1.16(d) (termination - surrender papers, property, return unearned fees), and 8.1(b) (disciplinary matters - correct misapprehension, must respond to ODA request for information). The Court ordered disbarment.

In re Fulcher, 319 Kan. 105 (2024)

The respondent was disciplined by the Missouri Supreme Court after an audit revealed a variety of problems. The respondent had a personal injury practice. The audit revealed he provided financial assistance to a client in the amount of $500 and did not comply with KRPC 1.8(e)(1). The respondent routinely failed to keep funds belonging to clients or third parties in his trust account. He paid funds to his firm from the trust account without properly accounting that the amount was correct and represented earned fees. Respondent

failed to promptly deliver funds to clients or third parties. Additionally, he failed to notify clients or others that he had received funds on their behalf. In several cases, he did not deliver payments owed until the Missouri disciplinary office inquired about the missing payments.

The respondent violated KRPC 1.8(e) (conflict special rules - limits on financial assistance to client), 1.15(a) (safekeeping - maintain complete records and hold property separate) and 1.15(b) (safekeeping - promptly notify and deliver funds and render full accounting upon request). The Court imposed a two-year suspension, stayed, and two years' probation.

Misappropriation of Firm or Partner Funds

In re Lucas, 269 Kan. 785 (2000)

The respondent failed to close firm trust accounts as required by the agreement with the firm partners and continued to use the former firm trust accounts to conceal client revenue from other attorneys in the firm. He falsely represented that the accounts had been closed, hid bank statements, and redirected mail to conceal the accounts.

The respondent violated KRPC 1.15 (safekeeping) and 8.4(c) (misconduct - dishonesty, fraud, deceit, or misrepresentation). The Court imposed a two-year suspension.

In re Wright, 276 Kan. 357 (2003)

The respondent misappropriated funds from his elderly aunt while acting under a power of attorney and failed to pay the elderly aunt's nursing home bill for approximately three years. The nursing home notified respondent that his elderly aunt faced removal. The investigation revealed he had "borrowed" over $86,000 from his elderly aunt without authorization. Additionally, the respondent converted funds from a social club for which he served as secretary/treasurer.

The respondent violated KRPC 1.15(a) (safekeeping - maintain complete records and hold property separate). Additionally, he violated 8.4(a) (misconduct – prohibit attempt to violate rules), 8.4(c) (misconduct - dishonesty, fraud, deceit, or misrepresentation), 8.4(d) (misconduct - prejudicial to administration of justice), and 8.4(g) (misconduct - conduct adversely reflecting on fitness to practice law). The Court ordered disbarment.

In re Johnson, 276 Kan. 904 (2003)

The respondent accepted a representation, received an unearned fee, failed to deposit it into the firm's trust account, and converted it to personal use. When confronted, the respondent asked the client to characterize the payment as a loan and not disclose the misconduct.

The respondent violated KRPC 1.15(d)(1) (safekeeping - deposit in trust/IOLA, two limited exceptions, prohibit commingling), 8.4(c) (misconduct - dishonesty, fraud, deceit, or misrepresentation), and 8.4(g) (misconduct - conduct adversely reflecting on fitness to practice law). The Court imposed an indefinite suspension.

In re Christian, 281 Kan. 1203 (2006)

While employed at a law firm, the respondent repeatedly converted firm funds by accepting attorney fees from clients and failing to remit those fees to the firm. In more than seven matters, the respondent converted more than $36,000. The firm incurred substantial fees investigating the misconduct.

The respondent failed to provide settlement statements to several clients and made misrepresentations to both clients and the firm regarding fees collected.

The respondent violated KRPC 1.5(d) (fees – contingent fee, deduct expenses before contingent fee is calculated, and advise the client of the right to have fee reviewed by court), 1.15(b) (safekeeping - promptly notify and deliver funds and render full accounting upon request), 4.1 (truthfulness in statements to others), and 8.4(c) (misconduct - dishonesty, fraud, deceit, or misrepresentation). The Court ordered disbarment.

In re Purinton, 283 Kan. 880 (2007)

After termination from his firm, it was discovered that the respondent had cashed a client's fee check for personal use. The respondent initially denied wrongdoing before admitting the misconduct.

The respondent violated KRPC 1.15(a) (safekeeping - maintain complete records and hold property separate) and 8.4(c) (misconduct - dishonesty, fraud, deceit, or misrepresentation). The Court imposed an indefinite suspension.

In re Schnittker, 298 Kan. 898 (2013)

A law partner became concerned that respondent had not deposited earned fees into the firm's operating account. The respondent intentionally deposited firm funds into his personal account, constituting felony theft – albeit uncharged. The Court rejected the respondent's request for a public censure, which was based on the law partner's forgiveness, emphasizing the seriousness of the misconduct. The Court noted that respondent seemed to imply that a benevolent crime victim's wishes should somehow supersede the imposition of a sanction typically imposed and warranted for such serious flagrant misconduct.

The respondent violated KRPC 8.4(b) (misconduct - criminal act) and 8.4(c) (misconduct - dishonesty, fraud, deceit, or misrepresentation). The Court ordered disbarment.

In re Peloquin, 301 Kan. 338 (2014)

The respondent failed to properly supervise his office manager, who negotiated settlements without authorization and converted settlement funds to her personal use. The office manager took the respondent's computer when the misconduct was discovered. The respondent also failed to keep a master list of clients and failed to maintain proper trust account records.

The respondent violated KRPC 1.15 (safekeeping) and 5.3(b) (supervision of nonlawyer assistance). The Court imposed a three-month suspension and additional requirements.

73-SEP J. Kan. B.A. 6

Journal of the Kansas Bar Association
September, 2004

Item of Interest
Philip Ridenour [a1]

ATTORNEY FEES: WHERE ARE WE IN KANSAS?

If properly structured, Kansas lawyers are ethically permitted to charge clients nonrefundable, flat, minimum, and retainer fees. However, if the fee agreement contemplates future services to be performed by the lawyer, the "up front" payments do not belong to the lawyer until the services are rendered, and, upon completion of the assignment or termination of the representation, any unused portion of the fee must be refunded to the client.

"A lawyer's fee shall be reasonable." Thus begins Rule 1.5 Fees, of the Kansas Rules of Professional Conduct (KRPC), which then proceeds to enumerate eight nonexclusive factors that may be considered in determining the reasonableness of a fee.

Rule 1.5 is silent about nonrefundable, flat, minimum, or retainer fees, but the Kansas Comment to Rule 1.5 states,

> *Terms of Payment*
>
> A lawyer may require advance payment of a fee, but is obligated to return any unearned portion. See Rule 1.16(d).

Additionally, KRPC 1.16 states as follows:

> (d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable 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. ...

***7** From these two provisions it is abundantly clear that if a lawyer has been paid a fee in advance then, upon the conclusion of the representation, the lawyer must return any unused or unearned portion of the advance fee. But, what about written fee agreements? Is it permissible for a lawyer to contract with a client to receive a flat fee, nonrefundable advance fee, or a minimum fee that the lawyer may permissibly and ethically retain regardless of the amount of work or the services performed by the lawyer? The KRPC contain no specific provisions or guidelines that address these issues, but Kansas case law drawn from lawyer disciplinary cases supplies most of the answers.

Flat or Fixed Fees

The "flat" fee is also known as a "fixed" or "task-based" fee. The lawyer agrees to do a specific task in exchange for the payment by the client of a specified fee.

> **Example I**: Able Lawyer agrees, for the flat fee of $1,250, to draft the articles of incorporation for a new corporation and file them with the secretary of state, meet with the incorporators and prospective shareholders, and discuss how the corporation will operate; draft the by-laws and initial meeting minutes, which will include a banking resolution, medical reimbursement plan, and buy-sell agreement; prepare the opening balance sheet; and issue the stock.

Under the flat fee arrangement, the lawyer assumes the risk for the task consuming more time than estimated. The flat fee, like all fees, must also be reasonable under the requirements of KRPC 1.5. As long as the fee remains reasonable, then the lawyer reaps the benefit of streamlining the process and office efficiencies used in providing the service. [1]

The KRPC, following the American Bar Association's (ABA) Model Rules of Professional Conduct (MRPC), specifically approves of fixed or flat fees as one of the eight factors under KRPC 1.5 that may be considered in determining whether a fee is reasonable:

> The factors to be considered in determining the reasonableness of a fee include the following:
>
> (8) Whether the fee is fixed or contingent. [2]

In its only ethics opinion to consider flat fees, the ABA has approved fixed or flat fees in the areas of legal work on tax matters and tax litigation:

> There is nothing improper in a lawyer charging and being paid a fixed fee in advance for legal work on tax matters or litigation before the Tax Court if the client and the lawyer choose to do so and it is fully understood that the fixed fee embraces all work to be done, whether it be relatively simple and of short duration, or complex and protracted. [3]

The Kansas comment to KRPC 1.5 clearly approves flat or fixed fees:

> It is sufficient, for example, to state that the basic rate is an hourly charge or a *fixed* amount, or an estimated amount, or to identify the factors that may be taken into account in finally fixing the fee. [Emphasis added. [4]

Flat or fixed fees have been discussed on several occasions by the Kansas Supreme Court. *In re Rathbun* [5] involved two flat fees, one being a “minimum” flat fee while the other was a flat fee in a custody matter. The Court was not troubled by the flat fee as such, but found a violation of (1) KRPC 1.5 when the attorney deposited the flat fee into his operating account instead of his trust account prior to rendering the services covered by the fee and (2) KRPC 1.15 when the lawyer failed to return the portion of unearned flat “minimum” fee when his representation was terminated early. The Court has heard several other disciplinary cases in which the respondent attorney charged a “flat” fee. While the Court has found violations in the manner in which the flat fee was handled, including lack of communication regarding the fee, depositing the fee to the operating account instead of the trust account until the fee was earned, and failure to refund the unearned portion of the fee when the lawyer was discharged before completion of the services covered by the flat fee, none of the cases disapprove of the flat fee as such. [6]

Perhaps the most comprehensive analysis of flat fees is found in *In re Carson*, [7] where the attorney quoted the client a flat fee of $800 to handle a child support matter and the client signed a promissory note for that amount. The client made periodic payments totaling $360 and was billed an additional $460. While handling the child support matter, the client decided to seek a change in child custody and visitation and agreed to pay an additional fee for that work, but no fee was agreed upon. Respondent filed suit to collect an $800 fee from his client, allegedly for additional work on the support matter, but his ledger reflected no additional work was performed.

The hearing panel of the Kansas Board of Discipline of Attorneys concluded that respondent's flat fee was not in fact a flat fee but rather a fee that could be raised based solely upon respondent's judgment as to how much work was performed by the attorney. The Court found it troubling that the flat fee could be raised by respondent but declined to find a violation of ***8** KRPC 1.5, doubtlessly because respondent and his client had agreed upon additional work to be performed beyond that work agreed covered by the quoted flat fee. Nevertheless, the importance of *Carson* is its specific approval by the Court of a flat fee:

> The problem with respondent's fee setting is not that it is a flat fee, as such would obviously be within the rule. Rather, the problem is that respondent has reserved the right to set a fee higher than the flat fee whenever, in his estimation, the time spent on the case is more than usual. [8]

Despite the peculiar facts in *Carson*, neither it nor KRPC 1.5 can be read as authorizing an attorney unilaterally to increase a quoted flat fee if the attorney decided time had been spent beyond what was anticipated would be required when the fee agreement was made. Also, as discussed below, KRCP 1.16(d) requires the lawyer to return any unsecured portion of the flat fee if representation is terminated before the tasks are completed. [9]

> **Example II:** Shirley Wright is approached by a client accused of embezzlement of an employer's money. Shirley agrees to represent the client at the preliminary hearing through any trial that might result for the flat fee of $10,000 to be paid up front before representation begins. The client pays the $10,000, which Shirley properly deposits into her escrow account.

First Scenario: Client terminates Shirley's representation after the preliminary hearing; Shirley must refund to the client the unused portion of the fee, with the amount to be retained by Shirley calculated at her usual hourly rate or on some other reasonable basis as may be agreed upon with the client.

Second Scenario: The preparation for trial proves to be far more time consuming than Shirley anticipated: Shirley cannot ethically seek additional fees from the client and must perform the services agreed upon pursuant to the flat fee agreement.

Flat or fixed fees, whereby an attorney agrees to handle a matter and provide the required services, are proper in Kansas--as they seem to be in most other jurisdictions [10] --subject to the requirements that they are reasonable and, if the attorney is discharged before rendering the services contracted, the unearned portion must be refunded.

Nonrefundable Advance Payments and Retainer Fees

There is perhaps more confusion among members of the bar regarding nonrefundable advance payments or nonrefundable retainer fees than any other issue regarding fees. Much of the confusion is caused by the lack of generally acknowledged definitions. For analysis, nonrefundable advance payments and retainer fees must be separated into two categories: “engagement fees” and “minimum” or “nonrefundable retainers,” which are discussed below.

1. Engagement Retainer Fees

The Restatement of the Law Governing Lawyers (1998) (Restatement), defines an "engagement retainer fee" [11] as follows:

> As used in this Restatement, an "engagement retainer fee" is a fee paid, apart from any other compensation, to ensure that a lawyer will be available for the client if required. An engagement retainer must be distinguished from a lump sum fee constituting the entire payment for a lawyer's service in a matter and from an advance payment from which fees will be subtracted (see § 38, Comment g). A fee is an engagement retainer only if the lawyer is to be additionally compensated for actual work, if any, performed. In some jurisdictions, an engagement retainer is referred to as a "general" or "special" retainer.

Since "engagement retainer fee" is the term used by the Restatement, that term will be used here. If properly handled, engagement retainers are permissible in Kansas. [12]

Although the term "engagement retainer fee" has not been used by the Kansas courts, it seems more descriptive of the arrangement and less confusing than some of the other terms that have been used to describe it, including "general retainer," "minimum fee," or "nonrefundable retainer." A good example of the confusion that can occur in this area is *In re Jackson*. [13] While the facts in that case are not entirely free from doubt, it appears that the respondent attorney received an engagement retainer, which was not required to be placed in the lawyer's trust account and, since earned upon receipt by the lawyer, not subject to refund upon termination of the representation. The Court, however, referred to the fee as a "minimum fee." If the fee is regarded as an engagement retainer, then the case appears to have reached the correct result.

Nationally, the engagement retainer has lost favor with the courts and commentators. [14] Courts critical of the engagement retainer have noted that lawyers are not business people entitled to charge what the traffic will bear, the engagement retainer robs the client of the ability to discharge the attorney and recover unearned fees, and engagement retainers are inconsistent with the fiduciary duties incumbent on the attorney in the attorney-client privilege. [15]

***36** One of the leading cases to deal with nonrefundable retainers is *Matter of Cooperman*, [16] wherein a lawyer routinely had clients sign retainer agreements providing for minimum fee nonrefundable retainers regardless of "how much or how little work I do in this case" and "even if you decide prior to my completion of the investigation that you wish to discontinue the use of my services for any reason whatsoever." [17] The New York Court of Appeals found the retainer agreements violative of the Code of Professional Responsibility then in effect and contrary to public policy "essentially because these fee agreements compromise the client's absolute right to terminate the unique fiduciary attorney-client relationship."

Cooperman can be read broadly as prohibiting every kind of nonrefundable retainer, including the engagement retainer. However, professor Hazard [18] urges a narrow construction of *Cooperman* and suggests that engagement retainers (unfortunately referred to by Hazard as a "substantial nonrefundable fee" or a "minimum fee") ought to be permitted:

> On the facts of the case, the *Cooperman* decision seems right. The matter undertaken for the client was apparently routine, the nonrefundable retainer fee was large, and the discharge of the lawyer was effected before any significant services had been rendered. Thus, the court could easily have justified imposing discipline solely on the alternate basis that the fee was unreasonably large in light of the limited services actually provided.
>
> The suggestion in *Cooperman* that nonrefundable fees are per se unreasonable, however, seems wrong. Several situations may be imagined in which a substantial nonrefundable fee--better understood as a minimum fee-- might be justified. For example, a client might wish to prevent anyone else from retaining the lawyer in connection with a particular matter. Or a client might anticipate needing legal services in the future and wish to [e]nsure the lawyer's availability at that time, in effect "taking an option" on the lawyer's services. Under those and similar conditions, it is not unreasonable for the lawyer to be compensated for the other business opportunities thus forgone.

> Leaving aside for the moment the size of the fee, this kind of "nonrefundable" fee--often referred to as a fee that is "earned when paid"--should be considered unaffected by *Cooperman*. The client, after all, has received what was paid for, and therefore no refund should ever be due. [19]

The Kansas Supreme Court has acknowledged the continuing ethical viability of the engagement retainer, earned by the lawyer upon receipt and paid to ensure the availability of the attorney. *In re Scimeca* [20] is a well-reasoned case holding that engagement retainers are ethically permissible if properly structured.

In *Scimeca*, the disciplinary administrator alleged that respondent had charged unreasonable fees. The hearing panel found that respondent provided in his retainer agreements, "This attorney fees retainer is a minimum fee and not refundable. In other words, regardless of what happens in the above matter, this Attorney Fees Retainer is owed to Attorney." [21] Respondent stipulated before the Board of Discipline hearing panel "... that nonrefundable unearned retainers are prohibited by the Kansas Comment to Rule 1.5 and by Rule 1.16(d)." [22]

The *Scimeca* Court noted the distinction between advance funds belonging to a client and advance fees:

> An attorney who receives advance funds belonging to a client, either as a fee or expenses, must keep those funds separate and not commingle them with other funds. The key question is whether an advance payment belongs to the client or the attorney. If the funds are paid to the attorney to be used for a specific purpose, they must be used for that purpose. In such a situation, the attorney acts as a fiduciary for his or her client. Where the funds are advanced by the client for costs or expenses, they must be kept in a trust account until used for those purposes ... the status of advance fees can be more complicated. [23]

The Court then set forth the following:

> ***37** The parties stipulated before the panel that a nonrefundable unearned retainer is prohibited by MRPC 1.5. We agree. However, the Deputy Disciplinary Administrator would have this court, as a matter of public policy, require all fees advanced by a client to be refundable, regardless of how designated or agreed to by the parties. We decline to do so. The better view is to resolve the question based upon the agreement between the parties. If the contract or agreement between the attorney and the client clearly states that the fee advanced is paid as a nonrefundable retainer to commit the attorney to represent the client and not as a fee to be earned by future services, then it is earned by the attorney when paid and is the attorney's money. If, on the other hand, the retainer is to be earned by future services performed by the attorney, then it remains the client's money and subject to MRPC 1.15.
>
> Here, the agreement provides that the retainer was not refundable, was a minimum fee, and was owed to the attorney. Designating the advance fee as a minimum fee contemplates that it must be earned by future services to the client. Respondent had done nothing at that point in time for which the client "owed" him a fee. Absent clear language that the retainer is paid solely to commit the attorney to represent the client and not as a fee to be earned by future services, it is refundable. There was no such language in the agreements respondent entered into with his clients. The panel's finding that respondent's "nonrefundable" retainer was a fee advanced for services to be performed, and thus subject to the trust account requirements of MRPC 1.15, is supported by the record. [24]

Both Example III and Example IV, below, qualify under Kansas law as ethically permissible engagement retainers under the rationale of *Scimeca*. Both examples involve a client who wishes to commit the lawyer to be available to represent the client, and neither example suggests that the retainer is an advance payment for future services to be rendered by Able Lawyer.

> **Example III:** Excavating Company inadvertently cuts through a high pressure natural gas pipeline, resulting in the destruction of several neighboring structures, loss of gas service to thousands of customers for two weeks in December, and substantial cleanup and restoration costs. Shirley Wright has litigated numerous pipeline explosion cases for both plaintiffs and defendants. Excavating Company approaches Shirley Wright and offers a $100,000 engagement retainer if Shirley Wright will agree not to represent any other party in the litigation and will agree to represent Excavating Company at the hourly rate of $500 per hour if called upon to do anything further.

> **Example IV:** Farmer Jones has signed a letter of intent to purchase 500 acres of farmland and approaches Able Lawyer to represent him in final negotiations to occur in July. Able Lawyer explains that his 40th wedding anniversary is that week, that his whole family has been planning on vacationing at the beach, and that he declines the offered representation. Farmer Jones is insistent and again requests Able Lawyer to represent him in the negotiations. Able Lawyer again declines the offered representation, points out that he has no special expertise in real estate negotiations, and suggests several other area real estate lawyers whom he knows to be at least as well qualified to represent Farmer Jones. Farmer Jones again approaches. He is more insistent than before and demands that Able Lawyer represent him and tells him to "name your price." Able Lawyer responds that he will cancel all his plans and represent Farmer Jones for an up-front payment of $10,000 plus payment of his fees for whatever future services he provides at his regular hourly rate of $135 per hour. Farmer Jones agrees.

Although examples III and IV qualify as permissible engagement retainers, they are nevertheless subject to the reasonableness requirement of KRPC 1.5. On the issue of the reasonableness of an engagement retainer, the Restatement provides:

> An engagement-retainer fee satisfies the requirements of this Section if it bears a reasonable relationship to the income the lawyer sacrifices or expense the lawyer incurs by accepting it, including such costs as turning away other clients (for reasons of time or due to conflicts of interest), hiring new associates so as to be able to take the client's matter, keeping up with the relevant field, and the like. When a client experienced in retaining and compensating lawyers agrees to pay an engagement-retainer fee, the fee will almost invariably be found to fall within the range of reasonableness. Engagement-retainer fees agreed to by clients not so experienced should be more closely scrutinized to ensure that they are no greater than is reasonable and that the engagement-retainer fee is not being used to evade the rules requiring a lawyer to return unearned fees. [25]

The eight nonexclusive factors enumerated by KRPC 1.5 are presumably to be applied in determining the reasonableness of an engagement retainer. In the situation posed by Example III, the excavating accident, Shirley Wright is an acknowledged expert, and the matter can reasonably be expected to run into millions of dollars of potential damages. Factor 2 of KRPC 1.5:

> (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

***38** and factor 7:

> (7) the experience, reputation, and ability of the lawyer or lawyers performing the services;

and possibly factor 1:

> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

suggest that an engagement retainer of $100,000, paid by a knowledgeable corporate client to an expert lawyer to commit the attorney to the representation of the excavating company as opposed to any potential plaintiff or other defendant, may very well be proper and reasonable under the facts and circumstances.

Example IV raises greater questions about the reasonableness of the engagement retainer. While Farmer Jones may very well be a sophisticated businessman, he is likely not "experienced in retaining and compensating lawyers,"[26] in the words of the Restatement, and, while 500 acres of farmland may very well be worth many hundreds of thousands of dollars, Able Lawyer has acknowledged that he has no special expertise in real estate negotiations and that other lawyers are equally qualified. Perhaps the only factor arguably applicable to the facts of Example IV is factor 5: "the time limitations imposed by the client or by the circumstances."

Ultimately, one can conclude that if Farmer Jones in Example IV is insistent upon obtaining the services of Able Lawyer, has specifically been made aware that other equally competent lawyers are available, and nevertheless voluntarily decides to pay the engagement retainer to commit Able Lawyer to the representation, then the amount of the engagement retainer must be reasonable at least in the eyes of the client. Certainly all travel deposits forfeited and other out-of-pocket expenses incurred by Able Lawyer in accepting the representation should also be covered.

Both examples III and IV differ significantly from the situation in Example I where a flat fee is paid. Under an "engagement retainer" agreement, the lawyer does not agree to perform any services in exchange for the payment of the engagement retainer. The payment is paid solely to make certain that the lawyer will be available in the event the lawyer's services are required in the future and to commit the lawyer to the representation. Any future services to be performed by the lawyer will be billed as the services are rendered and will still be owed in addition to the engagement retainer. Even if no future services are performed, the full amount of the engagement retainer belongs to the lawyer immediately upon receipt, and no refund is ever due to the client. By contrast, under a "flat fee" agreement, although a lawyer is committed to the representation of the client, the lawyer also agrees to perform designated and agreed upon services in the future. If the services are not performed, the unused portion of the flat fee must be returned to the client.

2. Minimum Fees and Nonrefundable Retainers.

Under this type of fee agreement the attorney is paid an advance fee for identified legal services to be performed by the lawyer. The fee agreement provides that the attorney is entitled to retain the total amount of the advance fee upon the termination of the representation, and in the event the representation requires more time than anticipated, the client agrees to pay the additional fees. The so-called "nonrefundable retainer," like the permissible "engagement retainer," commits the lawyer to the representation but, unlike the engagement retainer, it contemplates further services will be performed by the lawyer. Under KRPC[27] and as discussed below, nonrefundable retainer arrangements are prohibited.

> **Example V:** Shirley Right agrees to represent her client in a theft case for the nonrefundable fee of $15,000, to cover the first 100 hours of work. If Shirley works 80 hours, the fee agreement provides she can retain the entire $15,000. If she works more than 100 hours, the excess hours are to be compensated at $150 per hour. This fee arrangement is unethical.

The comment to KRPC 1.5 and KRPC 1.16(d) make it clear that upon termination of representation, a lawyer is required to refund any advance payment of a fee that has not been earned. In addition, KRPC 1.15 requires a lawyer who receives an

advance payment for services to be performed in the future to deposit those advance fee payments into a separate trust fund account and not to deposit the fee in the lawyer's general operating account until the services have been performed. [28]

The Kansas Supreme Court has ruled that a nonrefundable unearned retainer is prohibited by KRPC 1.5. [29] If a fee agreement states that a retainer is a nonrefundable retainer, but the retainer is to be earned by future services, then the fee agreement violates KRPC 1.5(a). [30]

Therefore, fee agreements that state they are for a minimum fee or nonrefundable retainers violate the KRPC. If advance fees are paid for future services, any unearned portion of the fees must be refunded to the client upon termination of the representation. Advance fees paid for future services do not belong to the lawyer until earned by the performance of the services.

> ***39 Example VI:** Client approaches Able Lawyer to represent him in a real estate foreclosure action to be brought against the client. Able Lawyer agrees to represent client in the action upon payment to him by the client of a nonrefundable retainer of $10,000, to constitute a minimum fee, to include up to 50 hours of work, plus additional attorneys fees at the rate of $200 per hour if Able Lawyer spends more than 50 hours in defending the action.

Example VI, like Example V involving representation in a criminal proceeding, also is impermissible, since it contemplates futures services by Able Lawyer and in reality is merely an advance payment for future services. If Able Lawyer completes his assignment in 40 hours of work, he is required to refund to the client $2,000 of the "nonrefundable" retainer (40 hours x $200 = $8,000; therefore, $10,000 - $8,000 = $2,000 refund). And, under the rationale of *Scimeca* [31] and *Angst*, [32] by its terms the fee agreement violates the requirements of KRPC 1.5 by attempting to convert a refundable retainer into a nonrefundable retainer in violation of KRPC 1.15(d).

In Example II involving the client accused of criminal embezzlement, the payment of the $10,000 to attorney Shirley Wright, regardless whether labeled as a flat or minimum fee or nonrefundable retainer, is nothing more than the advance payment for future legal services. As such, upon termination of the services, the unused portion of the advance payment is, without exception, always refundable to the client in all circumstances.

When a lawyer enters into a fee agreement with a client and undertakes the representation, then upon the termination of the lawyers' representation by the client prior to the completion of the services to be rendered, the question arises as to what portion of the agreed upon fee should be paid to the lawyer or, in the situation where the lawyer has received an advance payment, what portion must be repaid. The Kansas Supreme Court has most recently addressed the question in *In re Harris*. [33]

In *Harris*, the attorney agreed to represent a client in a personal injury case pursuant to a written contingent fee agreement providing for payment to the attorney of 40 percent of the amount recovered. The attorney was terminated by the client for failing to communicate with the client, followed by the client's successful negotiations with the insurance company, which paid policy limits in settlement. The attorney claimed 40 percent the net recovery, or $4,000. The dispute over fees was submitted to the Johnson County Fee Dispute Committee, which rejected the attorney's claim and instead awarded him a quantum meruit fee based on the number of hours spent by the lawyer at his hourly rate. The Supreme Court approved the quantum meruit award and stated:

> The ABA/BNA Lawyers' Manual on Professional Conduct (1997) provides at p. 41:2012:
>
> "The overarching rule is that when a lawyer is discharged by the client for any reason--or withdraws for good cause-- before the completion of the representation, the lawyer loses the right to recover the compensation set forth in the fee agreement and instead becomes entitled to the reasonable value of his services to the time of discharge or withdrawal. This quantum meruit rule has gained increasing support among the courts as being consistent with the rule that a client has an absolute right to discharge his lawyer, with or without good cause, at any point in the

> representation. The client would be deterred from exercising this right if he were required to pay the full amount of the contractual fee despite having discharged his attorney."

> The ABA/BNA Lawyer's Manual further provides at p. 41:922: "Moreover, something less than a quantum meruit fee is appropriate for a lawyer who is discharged by the client for good cause, although total forfeiture is not necessarily called for." [34]

Therefore, based upon the rationale of *Harris*, (1) a lawyer discharged by the client, without cause, prior to the conclusion of the representation is entitled to quantum meruit fees, calculated ***40** at his customary hourly rate; and (2) a lawyer discharged by the client, with cause, prior to the conclusion of the representation is not entitled to a quantum meruit fee but may be entitled to something less.

The foregoing support the following general conclusions about nonrefund able retainers, minimum fee agreements, and engagement retainers in Kansas:

> **1.** An "engagement retainer" paid to commit the lawyer to take a case is earned by the lawyer at the instant of payment and belongs to the lawyer even if the lawyer renders no future services whatever other than remaining available to assume the representation, as long as the retainer agreement makes it clear that (a) it is paid to commit the attorney to represent the client, and (b) is not a fee to be earned by future services. If the fee agreement meets the requirements of an engagement retainer and is clear that it is paid to commit the lawyer to the case and is not to be earned by future service, the fee is in fact nonrefundable and upon receipt by the attorney belongs to the attorney and should not be placed in the attorney's trust account.

> **2.** A "nonrefundable retainer," or minimum fee agreement, even if it states that it is a minimum fee and nonrefundable and is owed to the attorney upon payment, is in fact refundable if it is to be earned by future services to be performed by the attorney for the client. Upon receipt, the minimum fee or "nonrefundable retainer," which contemplates future services will be rendered, must be placed in the attorney's trust account, to be earned as future services are provided to the client. The presumption is that a retainer is refundable and must be deposited to the attorney's trust account, absent clear language in the retainer agreement that the payment is paid solely to commit the attorney to represent the client and not for future services to be rendered.

Conclusion

Flat Fees: Flat fees are permissible in Kansas. If paid in advance of the services, the fee must be placed in the lawyer's trust account to be paid out to the lawyer upon completion of the services. If paid following the completion of the services, the flat fee belongs to the lawyer upon receipt.

Engagement Retainers: Engagement retainers, if properly drafted, are permissible under Kansas law. The engagement retainer is earned upon receipt by the lawyer, should not be placed in the lawyer's trust account, and, because earned upon payment, is not subject to refund.

Nonrefundable Retainers and Minimum Fees: A fee agreement whereby the client agrees to pay an advance fee that is a minimum fee or a nonrefundable retainer to cover legal services to be rendered in the future is a violation of KRPC 1.5 and 1.15(d). All advance fee payments to secure future legal services to be performed are always refundable if not fully earned upon the termination of the representation.

Discharge of Attorney Without Cause: An attorney discharged by the client without cause prior to the completion of the representation is entitled to a quantum meruit fee based on hourly rate and must refund any advance fee in excess of that amount.

Discharge of Attorney With Cause: An attorney discharged by the client with cause prior to the completion of the representation may be entitled to something less than a quantum meruit fee, but computation of the property amount of the reduced fee is uncertain, and, in the absence of any agreement with the client, cautious attorneys may wish to forego all fees and refund all advance fee payments.

Reasonableness of Fees: All attorney fees must be reasonable, raising issues about the reasonableness of engagement retainers that have not been addressed by the Kansas Supreme Court.

Footnotes

a1 ***Philip Ridenour*** *is a partner in Ridenour and Ridenour, Cimarron. He has been a member of the Kansas Board for Discipline of Attorneys since 1992. His practice consists primarily of estate planning, wills, trusts, estates, and related litigation. Ridenour's undergraduate degree (B.A. English, 1965) and law degree (J.D. 1970) are from the University of Kansas. The author wishes to thank Disciplinary Administrator Stan Hazlett, his staff, and the members of the Kansas Board for Discipline of Attorneys for the insights gained from numerous thoughtful and sometimes animated discussions, debates, and arguments on the subject of the article.*

1 *See* generally Hazard and Hodes, THE LAW OF LAWYERING § 8.15 (3rd Ed. 2004).

2 KRPC 1.5.

3 ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1389; (1977).

4 The Kansas Comment mirrors the official ABA Comment at the time the KRPC were adopted. However, as the result of the "Ethics 2000 Task Force," the ABA official comment was revised and no longer contains language referring to flat or fixed fees. *See* Annotated Model Rules of Professional Conduct Rule 1.5, cmt. [1] and [2] (5th Ed. 2003).

5 *In re Rathbun*, 275 Kan. 920, 69 P.3rd 537 (2003).

6 See *In re Wagle*, 275 Kan. 543, 66 P.3rd 884 (2003); *In re Kellogg*, 274 Kan. 281, 50 P.3rd 57 (2002); *In re Shelton*, 274 Kan. 374, 49 P.3rd 10 (2002); *In re Johnson*, 272 Kan. 284, 32 P.3rd 1132 (2001); and *In re Trickey*, 268 Kan 835, 999 P.2d 964 (2000).

7 *In re Carson*, 268 Kan 134, 991 P.2nd 896 (1999).

8 *Id*. at 141.

9 *Infra* at notes 27 through 31, on the issue of "nonrefundable" retainers.

10 *See* The Restatement of the Law Governing Lawyers: §38 cmt. g (1998) (hereinafter "Restatement"), "A client and lawyer might also agree that an advance payment is neither a deposit nor an engagement retainer, but a lump-sum fee constituting complete payment for the lawyer's services." *See* Opinion 97-7, Board of Commissioners on Grievances

and Discipline, the Supreme Court of Ohio, December 5, 1997, discussing opinions from other jurisdictions on the propriety of flat and fixed fees.

11 Restatement § 34, cmt. e.

12 *In re Scimeca*, 265 Kan 742, 962 P.2d 1080 (1998).

13 I%in re Jackson*, 254 Kan 406, 867 P.2d 278 (1994)*.

14 For a good annotation discussing the rationale of various cases from around the country, *see* Model Rules of Professional Conduct Rule 1.5, Annot. (5th Ed. 2003).

15 *Id*.

16 *In re Cooperman*, 83 NY 2d 465, 633 N.E. 2d 1069, 611 N.Y.S. 2d 465 (1964).

17 *Id.*, 83 N.Y. 2d at 470.

18 Hazard and Hodes, THE LAW OF LAWYERING §8.5 (3rd Ed. 2004).

19 *Id*.

20 *In re Scimeca*, 265 Kan. 742, 962 P.2d 1080 (1998).

21 *Id.*, 265 Kan. at 743.

22 *Id.*, 265 Kan. at 752.

23 *Id.*, 265 Kan. at 758-759 (citations omitted).

24 *Id.*, 265 Kan. at 759-760.

25 Restatement § 34, cmt. e.

26 *Id.*, second paragraph.

27 KRPC 1.5, official comment ("A lawyer may require advance payment of a fee but is obligated to return any unearned portion") and KRPC 1.16(d) ("Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interest, such as ... refunding any advance payment of fee that has not been earned.").

28 KRPC 1.15(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") and KRPC 1.15(d)(1) ("All funds of clients paid to a lawyer or law firm, including advances for costs and expenses, shall be deposited in one or more identifiable accounts ...").

29 *In re Scimeca*, 265 Kan. at 759.

30 *In re Angst*, 275 Kan 388, 389, 64 P.3d 350 (2003).

31 *In re Scimeca*, 265 Kan. at 759-760.

32 *In re Angst*, 275 Kan. at 389.

33 *In re Harris*, 261 Kan. 1063, 934 P.2d 965 (1997).

34 *Id.*, 231 Kan. at 1073.

73-SEP JKSBA 6

End of Document

AMERICAN BAR ASSOCIATION
STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 505 **May 3, 2023**

Fees Paid in Advance for Contemplated Services

Under the Model Rules of Professional Conduct, a fee paid to a lawyer in advance for services to be rendered in the future must be placed in a client trust account and may be withdrawn only as earned by the performance of the contemplated services. This protects client funds and promotes client access to legal services in the event the representation terminates before all contemplated services have been rendered. All fees must be reasonable, and unearned fees must be returned to the client. Therefore, it is not accurate to label a fee "nonrefundable" before it actually has been earned, and labels do not dictate whether a fee has been earned.

This opinion examines a lawyer's obligations under the ABA Model Rules of Professional Conduct with respect to fees paid in advance for legal work to be performed by the lawyer in the future.[1] In particular, this opinion seeks to clarify the proper handling and disposition of fees paid in advance for legal work to be performed in the future, including where the lawyer must deposit and maintain the funds and when the lawyer may treat them as earned. The opinion also explains when a lawyer must refund all or a portion of fees paid in advance and discusses whether such a payment may be, or can even be labeled, "nonrefundable." The answers are derived from the application of several Model Rules, including: 1.5(a), 1.5(b), 1.15(a), 1.15(c), 1.15(d), and 1.16(d).

Fees for services may be paid after completion of the services, of course. However, for certain matters, many lawyers request or require that funds in a certain amount be paid to the lawyer at the outset of the representation to secure payment for the lawyer's later work. Under the Model Rules such fees must be placed in a Rule 1.15-compliant trust account, to be disbursed to the lawyer only after the fee has been earned. This is to protect the client from the risk that the lawyer may not be able to refund the prepaid fee in the event the representation terminates before the contemplated work is completed. The Model Rules protect the lawyer from the risk of nonpayment by allowing advance fees to be received and protect the client by requiring that the funds are kept safe and separate from the funds of the lawyer or firm.

I. Terminology

As a preliminary matter, it is useful to define terms commonly used to label certain client-lawyer fee arrangements: advances, retainers, flat or fixed fees, and "nonrefundable" or "earned-on-receipt" fees.

[1] This opinion is based on the American Bar Association Model Rules of Professional Conduct as amended by the ABA House of Delegates through August 2022. The laws, court rules, regulations, rules of professional conduct, and opinions promulgated in individual jurisdictions are controlling. This is especially noteworthy for this opinion as jurisdictions have adopted substantially different rules relating to the management of client property including fees paid in advance for legal work to be performed in the future.

A. Advances v. Retainers

Fees paid by a client to a lawyer in advance for legal work to be performed by the lawyer in the future are sometimes referred to as an "advance fee," an "advanced fee," an "advance fee payment," an "advance fee deposit," a "fee advance," or simply an "advance." Advances are also sometimes called "special retainers," "security retainers," or simply "prepaid fees." To be consistent and clear, this opinion will use the term "advance" when discussing fees paid to the lawyer for legal work to be performed in the future.

When a client pays an advance to a lawyer, the lawyer takes possession – but not ownership – of the funds to secure payment for the services the lawyer will render to the client in the future.

This opinion will also refer to the term "retainer" fee. Neither the term "retainer" nor "retainer fee" is found in the Model Rules of Professional Conduct. Regrettably, many lawyers use the term loosely to mean any sum of money paid to the lawyer at or near the commencement of representation.[2] Whereas an advance is a deposit of money with the lawyer to pay for services to be rendered in the future, there is another type of payment that is not for services. Rather, "[t]he purpose of [a retainer] is to assure the client that the lawyer will be contractually on call to handle the client's legal matters."[3] This type of agreement and payment is variously referred to as a "general retainer," "classic retainer," "true retainer," "availability retainer," or an "engagement retainer."[4] Because all of these terms mean the same thing, this opinion will use the term "general retainer" to refer to this arrangement.[5] A general retainer is paid – and deemed earned – upon the promise of availability to represent a client, whether or not services are actually needed or requested by the client.[6] Thus, a general retainer has been conceptualized as a form of an option

---

[2] There is widespread agreement that the word "retainer" has been used so inconsistently that is has practically lost all definable meaning. BLACK'S LAW DICTIONARY (11th ed. 2019) ("Over the years, lawyers have used the term 'retainer' in so many conflicting senses that it should be banished from the legal vocabulary.") (quoting Mortimer D. Schwartz & Richard C. Wydick, PROBLEMS IN LEGAL ETHICS 100, 101 (2d ed. 1988)).

[3] CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 506 (West 1986).

[4] Some jurisdictions have commendably sought to define terms and draw distinctions in their court rules. *See* Ariz. Rules of Prof'l Conduct R. 1.5 cmt. [7] (*"*The 'true' or 'classic' retainer is a fee paid . . . merely to insure the lawyer's availability to represent the client and to preclude the lawyer from taking adverse representation. What is often called a retainer but is in fact merely an advance fee deposit involves a security deposit to insure the payment of fees when they are subsequently earned, either on a flat fee or hourly fee basis. A flat fee is a fee of a set amount for performance of agreed work, which may or may not be paid in advance but is not deemed earned until the work is performed. . . ."). *See also* Fla. State Bar R. 4-1.5(e)(2) (defining "retainer," "flat fee," and "advance fee") and Iowa R. Civ. P. 45.8-10 (defining "general retainer," "special retainer, and "flat fee").

[5] It is sometimes said that retainers come in two varieties: "general retainers" and "special retainers." A special retainer is simply an advance going by another, unfortunately misleading, name. *See* Lester Brickman & Lawrence A. Cunningham, *Nonrefundable Retainers Revisited*, 72 N.C. L. REV. 1, 5-6 (1993) ("A special retainer is an agreement between lawyer and client in which the client agrees to pay the lawyer a specified fee in exchange for specified services to be rendered. The fee may be calculated on an hourly, percentage or other basis and may be payable either in advance or as billed.") (footnotes omitted). The Committee is of the opinion that a special retainer is the same thing as an "advance." To be consistent and clear, this opinion will use the term "advance" when referring to such arrangements, although some of the cited sources and authorities may use the term "special retainer."

[6] "Because the general retainer is not a payment for the performance of services, but rather is compensation for the lawyer's promise of availability, the fee is earned by the lawyer at the time the retainer is paid and thus should not be deposited into a client trust account. The general retainer is not an advance deposit against future legal services, which instead would be separately calculated and charged should the lawyer actually be called upon by the client to

contract.[7] In other words, hourly time is not billed against a general retainer and a general retainer is not a flat fee for a specific amount of the lawyer's time – it is solely to reserve the lawyer's availability. An important result of these related features is that the money paid by the client in connection with a general retainer should not be placed in a trust account since it is considered earned upon the commencement of the contract.[8]

Some authorities treat the term "general retainer" or "true retainer," etc., as synonymous with "nonrefundable." This is not correct. A general retainer may, by custom, be considered earned when paid, but this does not mean that it is forever exempt from scrutiny under the Rules. It may be determined to be an unreasonable fee, or even unearned if the lawyer does not make himself or herself available. For example, if a company retains a lawyer to handle a hostile takeover bid should one arise and the lawyer does not, in fact, accept the engagement, then the fee, which may have been paid many months earlier and treated as the lawyer's own property, may be determined to be unreasonable and/or unearned and therefore the subject of an order requiring it to be returned, refunded, or repaid to the client. Other circumstances requiring refund might include the death, disability, suspension, or disbarment of the lawyer. Like all fees, a general retainer must be reasonable under the circumstances.[9]

General retainers "are quite rare,"[10] and have "largely disappeared from the modern practice of law."[11] However, attempts to cast what is actually an advance payment of fees for services to be performed later as a general retainer are very much present today. Given the rarity and unusual nature of a general retainer, and the fact that very few clients would actually need or benefit from one, the nature of the fee and lawyer's obligations and client's benefits under such an agreement must be explained clearly and in detail, including the fact that fees for legal services performed will be charged in addition to the general retainer,[12] and use of the term should be restricted to its traditional definition.

---

perform the legal services in the future." Gregory C. Sisk, *Duties to Effectively Represent the Client*, § 4-4.4(b) (A Retainer for Lawyer Availability), *in* LEGAL ETHICS, PROFESSIONAL RESPONSIBILITY, AND THE LEGAL PROFESSION (West 2016).

[7] Lester Brickman, *The Advance Payment Dilemma: Should Payments be Deposited to the Client Trust Account or to the General Office Account*, 10 CARDOZO L REV. 647, 649 n.13 (1989). *See also In re* O'Farrell, 942 N.E.2d 799, 803 (Ind. 2011).

[8] This opinion does not attempt to exhaustively discuss general retainers. Though they can and do have legitimate uses, for years they have been criticized, disfavored, and narrowly construed based on contract law, public policy, and contemporary ethics principles. *See, e.g.*, Charles J. McClain, Jr., *The Strange Concept of the Legal Retaining Fee*, 8 J. LEGAL PROF. 123 (1983) (common law of retainers "rests on rather shaky conceptual foundations" full of "inconsistencies and contradictions" and "contributing yet another irritant to the already strained relations between the legal profession and the public at large"); Pamela S. Kunen, *No Leg to Stand on: The General Retainer Exception to the Ban on Nonrefundable Retainers Must Fall*, 17 CARDOZO L. REV. 719 (1996) (discussing "historical and descriptive misconceptions" and arguing that, in many instances, such retainers generate the fiduciary obligations attending other lawyer-client fee agreements); and Joseph M. Perillo, *The Law of Lawyers' Contracts Is Different*, 67 FORDHAM L. REV. 443, 449-453 (1998).

[9] MODEL RULES OF PROF'L CONDUCT R. 1.5(a); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 34 (2001) [hereinafter RESTATEMENT].

[10] Douglas R. Richmond, *Understanding Retainers and Flat Fees*, 34 J. LEGAL PROF. 113, 116 (2009). *See also In re* O'Farrell, 942 N.E.2d at 804 n.5.

[11] Provanzano v. Nat'l Auto Credit, Inc., 10 F. Supp. 2d 44, 51 (D. Mass. 1998).

[12] MODEL RULES OF PROF'L CONDUCT R. 1.5(b); RESTATEMENT, *supra* note 9, § 38.

This opinion focuses on advance fees paid by individual clients, usually for a single legal matter (or related matters) that will not recur on a regular basis. Examples include a divorce, defense of criminal charges, and discharge from employment or other civil matters not handled on a contingent fee basis. However, some clients may need legal services of a certain type on a repeat basis and may contract for such services. For example, the client and lawyer may enter into a renewable one-year agreement providing for a monthly payment to handle any or all collections arising out of one or more of the client's businesses. Some lawyers and clients may use the term "retainer" or "general retainer" to refer to such an arrangement. Such arrangements may be perfectly appropriate although they may not meet the definition of a general retainer even if "availability" is said to be a part of the arrangement. Perhaps the arrangement may best be understood as a fixed fee agreement, except that instead of handling one matter for a set fee no matter what services end up being required, the lawyer is handling several matters (subject to whatever limitations the parties place on the number, type, geography, etc., of the matters).[13]

B. Flat or Fixed Fees

Some lawyers prefer to charge their clients a flat or fixed fee for discrete legal services they provide. Examples include closing the purchase of a single-family home, incorporating a small business, drafting a will, or providing a defined, limited-scope service, such as drafting a motion. A flat fee is one that "embraces all work to be done, whether it be relatively simple and of short duration, or complex and protracted."[14]

If a flat or fixed fee is paid by the client in advance of the lawyer performing the legal work, the fees are an advance. Use of the term "flat fee" or "fixed fee" does not transform the arrangement into a fee that is "earned when paid." "Flat" or "fixed" does not even mean that the fee must be paid at the commencement of the representation, although most lawyers who do not have an existing relationship with a client may want to ensure payment and may, therefore, ask for the fee to be paid in advance before committing to the representation. If they do, as will be emphasized below, then that fee must be placed in a Rule 1.15-compliant trust account, to be disbursed to the lawyer only after the fee has been earned.

Several courts and ethics opinions endorse the option of dividing the representation into segments such that certain portions of a flat fee advance are considered earned before completion

---

[13] As we have noted, courts scrutinize purported general retainers to ensure that the lawyer is not attempting to circumvent the ethics rules requiring refund of unearned fees upon termination of the representation. The same is true with what are sometimes called "hybrid" fees or retainers. Such a fee is "a putative general retainer that is denominated as both for availability and for services," and it is likely to be considered by courts to be "fully refundable to the extent not earned by services rendered." Lester Brickman & Lawrence A. Cunningham, *Nonrefundable Retainers: A Response to Critics of the Absolute Ban*, 64 U. CIN. L. REV. 11, 22 (1995). *See also* N.Y. City Bar Formal Op. 2015-2 (Nonrefundable Monthly Fee in a Retainer Agreement) (2015), *citing* Agusta & Ross v. Trancamp Contracting Corp., 193 Misc.2d 781, 785-86 (N.Y. Civ. Ct. 2002) for the proposition that "enforcement of a hybrid retainer 'should be subject to close scrutiny, governed by a rebuttable presumption that any moneys retained by counsel are for services, rather than availability.'"

[14] ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1389 (1977).

of all the contemplated work.[15] Some jurisdictions have codified this approach in their rules.[16] Thus, if agreed to, the lawyer may remove such earned portions of a flat fee advance from trust prior to the completion of the full scope of the legal services to be performed as certain "milestones" or stages of the representation are reached or completed. This approach allows the lawyer to be paid in part before the end of the representation and provides some assistance in determining the refund amount in case of early termination. Of course, "extreme 'front-loading' of payment milestones in the context of the anticipated length and complexity of the representation" may not be reasonable.[17]

C. So Called "Nonrefundable" and "Earned Upon Receipt" Fees

Some lawyers use labels like "nonrefundable retainer," "nonrefundable fee," or "earned on receipt" in the body or title of a fee agreement. These are not actual types of fees. And use of these descriptors does not, in and of itself, make a fee arrangement a general retainer. In fact, these terms are most often used in an attempt to make an advance fee nonrefundable.

The Model Rules of Professional Conduct do not allow a lawyer to sidestep the ethical obligation to safeguard client funds with an act of legerdemain: characterizing an advance as "nonrefundable" and/or "earned upon receipt." This approach does not withstand even superficial scrutiny. A lawyer may not charge an unreasonable fee. See Model Rule 1.5(a) ("A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses."). Comment [4] to Rule 1.5 provides this additional guidance: "A lawyer may require advance payment of a fee, but is obliged to return any unearned portion. See Rule 1.16(d)." See also, Model Rule 1.15(c) and others discussed in connection with Hypothetical 1 below. Therefore, under the Model Rules, an advance fee paid by a client to a lawyer for legal services to be provided in the future cannot be nonrefundable. Any unearned portion must be returned to the client. Labeling a fee paid in advance for work to be done in the future as "earned upon receipt" or "nonrefundable" does not make it so.[18]

Hypothetical scenarios illustrating these concepts and applying the Model Rules are discussed in Section IV below.

---

[15] *See, e.g.*, New Hampshire Bar Assoc. Ethics Committee Practical Ethics Article, *Practical Suggestions for Flat Fees or Minimum Fees in Criminal Cases* (Jan. 17, 2008). *See also In re* Mance, 980 A.2d 1196, 1202, 1204-1205 (D.C. 2009), *citing* Alec Rothrock, *The Forgotten Flat Fee; Whose Money is it and Where Should it be Deposited?*, 1 FLA. COSTAL L.J. 293, 323 (1999) for the proposition that some opinions "allow the lawyer to withdraw fees according to milestones 'based upon passage of time, the completion of certain tasks, or any other basis mutually agreed upon between the lawyer and client.'"

[16] *See, e.g.*, Colo. Rules of Prof'l Conduct R. 1.5(h) (defining a flat fee, explaining proper handling, setting forth required contents of the agreement, and appending an authorized form agreement).

[17] *In re* Mance, *supra* note 15.

[18] *See, e.g., In re* O'Farrell, 942 N.E.2d 799, 803 (Ind. 2011) ("Regardless of the term used to describe a client's initial payment, its type is determined by its purpose, i.e., what it is intended to purchase."); Mo. Sup. Ct. Advisory Comm. Formal Op. 128 (Amended 2018) (labels not conclusive); *In re* Wintroub, 277 Neb. 787, 801; 765 N.W.2d 482 (2009) (citing cases from several jurisdictions for the proposition that "a lawyer may not retain an unearned fee, even if the fee agreement clearly provides that the fee is nonrefundable"); Iowa Sup. Ct. Att'y Disciplinary Bd. v. Turner, 918 N.W.2d 130, 147 (Iowa 2018) (simply labeling payment of advance fees as "nonrefundable" does not relieve attorney from obligation to deposit them into trust accounts).

II. Model Rule of Professional Conduct 1.15: The Anti-commingling Rule and the Need to Protect Client Funds, Including Advances

Rules of professional conduct exist for the protection of the public. That purpose is well served when the rules are designed and enforced to prevent concrete financial harm to clients. The anti-commingling principle, embodied in Rule 1.15, is a longstanding and effective component in the client protection arsenal. This is why, since their inception in 1908, the American Bar Association's model codes and rules of ethics have prohibited lawyers from commingling their property (including funds) with the property of clients and third parties.[19]

Under the general anti-commingling rule, Model Rule 1.15(a), client property, which includes unearned fees paid in advance, must be held in an account separate from the lawyer's own property.[20] In 2002, Model Rule 1.15 was amended to address specifically the issue of advance fees in a new paragraph (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." Therefore, advances must be placed into a lawyer's trust account until those fees are earned.

The Commission on Evaluation of the Rules of Professional Conduct ("Ethics 2000 Commission"), which recommended the addition of this paragraph, did so in response to reports "that the single largest class of claims made to client protection funds is for the taking of unearned fees."[21] Accordingly, paragraph (c) "provides needed practical guidance to lawyers on how to handle advance deposits of fees and expenses."[22] Stated simply, under the Model Rules advance fees must be placed in a Rule 1.15-compliant trust account, to be disbursed to the lawyer only after the fee has been earned.

Some jurisdictions have authorized lawyers to treat advances as the lawyer's property upon payment, so long as the client signs a fee agreement designating the sum as "nonrefundable" or

---

[19] *See* ABA CANONS OF PROFESSIONAL ETHICS, Canon 11 (1908); ABA MODEL CODE OF PROF'L RESPONSIBILITY, DR 9-102 (1969); ABA MODEL RULES OF PROF'L CONDUCT R. 1.15 (1983, revised 2002). One treatise explains the nature and breadth of this key obligation:

> One of the core fiduciary duties of a lawyer is to safeguard the property that the lawyer receives from the client or from other sources but that belongs to the client or third persons. Property received from a client may include funds to be applied to a transaction, a payment in satisfaction of a judgment or settlement, an advance deposit against lawyer's fees, valuable documents to be analyzed, or property of evidentiary value. Under Rule 1.15(a) of the Model Rules of Professional Conduct, "[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." The lawyer therefore must keep the property in a secure location and segregate those assets from the lawyer's own property. Gregory C. Sisk, Duties to Effectively Represent the Client, § 4-5.6 (The Duty to Safeguard Client Funds and Property), in Legal Ethics, Professional Responsibility, and the Legal Profession (West Academic Publishing, 2016).

[20] *In re* Kendall, 804 N.E.2d 1152, 1161 (Ind. 2004). Also, Rule 1.15(a)'s predecessor was applied to advance fees. Iowa Sup. Ct. Bd. of Prof'l Ethics & Conduct v. Frerichs, 671 N.W.2d 470, 477 (Iowa 2003) (failure to place advance fee in a trust account violated DR 9-102(A)).

[21] A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, 1982–2005 342 (ABA 2006).

[22] *Id.*

"earned on receipt" or some other variation on this theme.[23] This approach departs from the safekeeping policy of the Model Rules described herein and creates unnecessary risks for the client.[24]

III. Model Rule of Professional Conduct 1.16: Declining or Terminating Representation

Model Rule 1.16(d) requires that, upon termination of representation, a lawyer shall refund "any advance payment of fee or expense that has not been earned or incurred." This Rule, and Rule

[23] *See, e.g.*, Or. Rules of Prof'l Conduct R. 1.5(c)(3). That jurisdiction's version of Rule 1.15(c) contains an exception to the anti-commingling rule for advance fees when "the fee is denominated as 'earned on receipt,' 'nonrefundable' or similar terms and complies with Rule 1.5(c)(3)." Or. Rules of Prof'l Conduct R. 1.15-1(c). A considerable minority of U.S. jurisdictions have authorized this variant approach to advances by rule, ethics opinion, or judicial decree. *See, e.g.*, State Bar of Ariz. Op. 99-02 (1999) (non-refundable, earned-upon-receipt fee is ethical if reasonable under Rule 1.5 and client is fully informed about and expressly agrees to such a fee, preferably in writing; such a fee does not go into a lawyer's trust account); Fla. Rules of Prof'l Conduct R. 4-1.5(e)(2)(B) and Comment (nonrefundable flat fee is the property of the lawyer and should not be held in trust); Wash. State Rules of Prof'l Conduct R. 1.5(f)(2) (if agreed to in advance in a writing signed by the client, a flat fee is the lawyer's property on receipt and shall not be deposited into a trust account); and N.Y. St. Bar. Assn. Comm. Prof'l Ethics Op. 816 (2007) (reaffirming 1985 opinion concluding that "fees paid to a lawyer in advance of services rendered are not necessarily client funds and need not be deposited in client trust account"). Such jurisdictions typically provide, via rule or otherwise, that advance fees must be refunded if unreasonable or work remains to be done even if language to the contrary is used and the funds have been taken by the lawyer pursuant to a rule and/or agreement.

[24] See *In re* Long, 368 Or. 452, 455–56, 474-75, 491 P.3d 783, 788–89, 798-99 (2021), cert. denied 142 S. Ct. 2685 (2022), in which the court candidly discussed the rule and its fallout:

> Respondent's limited financial resources also led to his extensive use of fee agreements that allowed him to access advance fees before completing the promised services. . . . The [Oregon] Rules of Professional Conduct allow for alternative fee agreements, under which advance fees become the lawyer's property at the time the fees are received—that is, before the lawyer has performed the promised services. RPC 1.5(c)(3). In those instances, the advance fees are not placed in the lawyer's trust account and are sometimes referred to as "earned on receipt." Fees may be "earned on receipt" only pursuant to a written fee agreement disclosing that "the funds will not be deposited into the lawyer trust account" and that "the client may discharge the lawyer at any time and in that event may be entitled to a refund of all or part of the fee if the services for which the fee was paid are not completed." *Id.* [¶] According to respondent, because he frequently had pressing personal and business costs, he would not have been able to operate his legal practice if he could access a client's fees only after he completed the promised services. . . . [¶] Although respondent's handling of those advance fees did not itself violate a Rule of Professional Conduct, it nevertheless left respondent's clients vulnerable. "Earned on receipt" fee agreements shift the risk of loss to the client. If the client relationship ends before the lawyer has performed the services needed to keep the advance fees, then the lawyer is required to return the fees for the uncompleted work. If the lawyer has already spent the advance fees and has no other financial resources upon which to draw, then the lawyer may be unable to provide the client with the required refund. [¶] That is what happened to many of respondent's clients. . . . [¶] Respondent's misconduct caused extensive injuries, which were not merely financial. Many of respondent's clients had limited financial means and needed their advance fees returned before they could afford to hire new lawyers. When respondent failed to return those advance fees, some clients simply went without legal representation.

1.15, work in tandem to achieve the regulatory objective of protection of the public from financial harm caused by inattentive or unscrupulous lawyers.[25]

Advances are unearned because they are payment today for work to be performed in the future. They were unearned upon receipt and remain unearned until the work is performed. The Model Rules mandate that advances belong to the client, must be preserved until they are actually earned, and must be refunded if the representation terminates before the fees are earned.

As a practical matter it may be somewhat more difficult to determine what has been earned and what is unearned when a representation ends before completion of the contemplated services when the client pays a flat or fixed fee instead of an hourly rate. However, courts routinely apportion the services completed and sum earned when a representation terminates before a lawyer has completed all of the contemplated work.[26]

IV. Hypothetical Scenarios Involving Client Payments at the Commencement of a Specific Representation.

Hypothetical 1 ("Nonrefundable Retainer")

A lawyer is consulted by a client seeking to terminate her marriage. The lawyer informs the client that the lawyer requires a $6,000 "retainer" to cover the filing of a divorce complaint, preparing a motion to enjoin the transfer of assets and a possible motion for a protective order, attending hearings relative to those motions, and any negotiations or related work until the lawyer expends 20 hours. The client was also informed that additional "retainers" may be required to complete the matter, and that the retainers will be credited toward payment for the lawyer's services at the reasonable rate of $300 per hour. The lawyer's fee agreement states, in pertinent part:

> Client agrees to pay Lawyer a nonrefundable retainer fee of $6,000. Client understands that no portion of this fee shall be refunded or returned to Client for any reason.
>
> Client further agrees that should Lawyer expend more than 20 hours on Client's matter, Client shall pay additional retainers as requested by Lawyer which shall be

[25] Nothing tarnishes the profession's reputation like a lawyer who takes an advance fee for legal services to be performed in the future, does not complete the work contemplated by the fee arrangement, and does not refund the money, perhaps because he or she cannot. Once the money has been spent by the lawyer, it may never be recovered by the client (or by the client protection fund which may have reimbursed the client). Even if a civil judgment or disciplinary order of restitution is entered it may do little good if the lawyer is impecunious, judgment-proof, or bankrupt. Discipline in that case may offer a measure of public protection through deterrence, but it does not recompense the client. That client's access to justice may also be impeded. The client may be unable to pay another advance fee and may, therefore, be unrepresented if legal aid or pro bono assistance is unavailable. Model Rules 1.15 and 1.16 exist to protect a client from these consequences.

[26] *See, e.g.*, *In re* O'Farrell, 942 N.E.2d 799, 808 (Ind. 2011) (quantum meruit available upon client termination of flat fee agreement). *Cf.* Plunkett & Cooney, PC v. Capitol Bancorp Ltd, 212 Mich. App. 325, 331; 536 N.W.2d 886 (1995) (discharged lawyer with fixed-fee agreement entitled to compensation for services rendered calculated by percentage of services required under contract, unless lawyer and client have agreed to other terms for valuing work completed).

applied to Lawyer's billing for this matter at a rate of $300 per hour and to any costs or expenses incurred in the representation.

Three weeks after signing the agreement and paying the $6,000, Client notified Lawyer that she wanted to reconcile with her husband and asked for an itemization of Lawyer's time and expenses and a refund of any unearned fees. Lawyer had filed the complaint, but it had not been served. Lawyer had also prepared but had not filed a motion to enjoin the transfer of certain assets. Lawyer had spent 5.5 hours on the file and $150 to file the complaint, but responded to the Client that no refund was due because the $6,000 was a nonrefundable fee.

Question: Does Lawyer owe Client a refund for any of the $6,000 paid to Lawyer and are any rule violations established by this scenario?

Answer: Yes, Lawyer owes Client a refund. First, the $6,000 paid by Client to the Lawyer are fees paid in advance not a general retainer. Under this agreement, Lawyer is rendering legal services at the rate of $300 per hour. This is true from the outset as is established by simply reading the portion of the agreement quoted above and performing some simple math. The $6,000 entitles Client to 20 hours of Lawyer's work on the matter.

Second, lawyer was required to have placed the $6,000 of advanced fees into the Lawyer's client trust account. Model Rule 1.15(c) provides that: "A lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by Lawyer only as fees are earned or expenses incurred." The so-called nonrefundable fee here is an advance payment of fees that may only be withdrawn from the client trust account as earned by Lawyer. The facts of this hypothetical are silent as to whether Lawyer placed the $6,000 in the trust, operating, or personal account and as to whether it was spent in whole or in part. Lawyers may be disciplined for treating advance fees as their own property before the fees are earned, i.e., before the contemplated legal services are rendered.[27] Commingling and perhaps misappropriation may have occurred here if Lawyer deposited the $6,000 into an account other than a client trust account and spent it.

In this scenario, assuming that the legal work performed was appropriate and useful, Lawyer has earned $1,650.00 in legal fees. Lawyer also spent $150 for the expense of filing the complaint. Failure to return the balance of $4,200 is a violation of Model Rule 1.16(d) (upon termination of representation, a lawyer shall refund any advance payment of fee or expense that has not been earned or incurred). Comment [4] to Rule 1.16(d) explains the fundamental legal principle underlying this requirement: "A client has a right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services." Lawyer's failure to provide an accounting for the fees paid in advance also constitutes a violation of Rule 1.15(d).

[27] "A lawyer misappropriates client funds in violation of DR 1–102(A)(3), (4), (5), and (6)DR 1–102(A)(3), (4), (5), and (6) when special retainers and flat fees paid in advance are treated as money belonging to the lawyer and not maintained in a trust account until the fee has been earned." Iowa Sup. Ct. Bd. of Pro. Ethics & Conduct v. Frerichs, 671 N.W.2d 470, 475 (Iowa 2003). *See also In re* Fazande, 290 So. 3d 178, 185 (La. 2020) (lawyer violated Rule 1.15(c) by failing to deposit into his client trust account advance fees and costs).

Model Rule 1.5(a) provides: "A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses." Comment [4] to Rule 1.5 states: "A lawyer may require advance payment of a fee, but is obliged to return any unearned portion. See Rule 1.16(d)." Thus, keeping the balance ($4,200) violates Rule 1.5(a) on these facts. Because Rule 1.5 precludes a lawyer from agreeing to an unreasonable fee, it is also violated by the Lawyer's inclusion of the following provision in the fee agreement: "Client agrees to pay Lawyer a nonrefundable fee of $6,000. Client understands that no portion of this fee shall be refunded or returned to Client for any reason."[28]

Finally, because a lawyer may, in fact, be required to refund an advance payment of fees in various situations, characterizing such an advance as "nonrefundable" may also amount to a violation of Rule 1.4 (communication) and Rule 8.4(c) (misrepresentation) as the mischaracterization of the funds may have a chilling effect on a client seeking a refund of unearned fees upon termination of the representation.[29]

Lawyer and the fee agreement use the words "retainer" and "fee" interchangeably. In this hypothetical it appears that the word "retainer" is used incorrectly to refer to the advance payment of legal fees at the initiation of a matter, or, really, at any time during the representation as is suggested by the agreement's provision that additional "retainers" may be required.

Hypothetical 2 (Purported General Retainer)

The facts are the same as in Hypothetical 1, except that the lawyer's standard fee agreement states, in pertinent part:

> Client agrees to pay Lawyer a non-refundable engagement fee of $6,000 which shall be deemed earned upon receipt by Lawyer. This engagement fee is for the purpose of retaining Lawyer and assuring the availability of Lawyer in this matter. Client understands that no portion of the engagement fee shall be refunded or returned to Client for any reason.
>
> Client further agrees that should Lawyer expend more than 20 hours, Client shall pay upon request an additional retainer in an amount determined by Lawyer which shall be applied to Lawyer's billing for this matter at a rate of $300 per hour and to any costs or expenses incurred in the representation.

---

[28] *In re* Kendall, 804 N.E.2d 1152, 1160 (Ind. 2004) ("We hold that the assertion in a lawyer fee agreement that such advance payment is nonrefundable violates the requirement of Prof. Cond. R. 1.5(a) that a lawyer's fee 'shall be reasonable.'"). *See also* N.Y. City Bar Ass'n Formal Opinion 1991-3 (in light of reasonableness requirement, duty to refund unearned fees, and client's "essentially absolute" right to discharge counsel, "a lawyer may not properly denominate or characterize a fee as 'nonrefundable' or otherwise use words that could reasonably be expected to convey to the client the understanding that a fee paid before the services are performed will not be subject to refund or adjustment under any possible circumstance").

[29] *See, e.g.*, *In re* Sather, 3 P.3d 403, 415 (Colo. 2000) (knowing use of misleading language, i.e., describing flat advance fee as "nonrefundable," violated Colo. RPC 8.4(c)) and Ala. State Bar Op. RO-93-21 (1993) ("Any indication by the lawyer that the fee is non-refundable is inaccurate and inherently misleading and would violate Rule 1.4(b) Communication; Rule 1.5(b) Fees; and Rule 8.4(c) Misrepresentation."). *See also* Mo. Sup. Ct. Advisory Comm. Formal Op. 128 (Amended 2018) (in various situations "the description of the fee as 'nonrefundable' is misleading").

Again, the facts are the same: Lawyer spent 5.5 hours and a filing fee for the complaint, and Client reconciles and seeks a refund. Lawyer declines to refund any portion of the fee, claiming it is nonrefundable.

Question: Does Lawyer owe Client a refund for any of the $6,000 paid to Lawyer and are any rule violations established by this scenario?

Answer: Yes. The answer and analysis for Hypothetical 1 apply here as well. The only difference ("retainer" and "engagement fee" language) makes no difference at all. The fee arrangement still has the same basic structure and, for the reasons discussed above, the $6,000 is clearly an advance payment for the future performance of legal services, not an actual "retainer" because the lawyer contemplates billing time against the advance.[30] Accordingly, the $6,000 must be held in trust until earned and any unearned portion properly refunded to the client.

Under the Model Rules, there are no magic words that a lawyer can use to change what is actually an advance payment for fees into a general retainer: "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.'"[31] Notwithstanding the use of the terms "engagement fee," "retainer," and "availability," the fee in Hypothetical 2 is still not a general retainer fee and is, therefore, not deemed earned on receipt. The purpose of the fee dictates its character and treatment irrespective of labels or terminology used.

Courts examine the transaction and agreement very carefully to ensure that the purported general retainer is not an attempt to charge and retain unearned advance fees.[32] Accordingly, a lawyer claiming to have a general retainer must be prepared to demonstrate a valuable benefit to the client and/or an actual detriment to the lawyer.[33] It is easy to recite that the lawyer is prioritizing the client's work, turning away other work, keeping up on the relevant law, etc. However, it must be shown that such things were not only actually done, but that they were necessary for the representation and not part of the lawyer's basic responsibilities.[34]

---

[30] *Cf. In re* Lais, No. 91-O-08572, 1998 WL 391171, at *14-15 (Cal. Bar Ct. July 10, 1998) (characterization as "'fixed, non-refundable retaining fee' paid 'for the purpose of assuring the availability of [respondent] in this matter'" was "not determinative" and the fee was not a "true" (general) retainer, but actually payment for the first 10 hours of lawyer's services).

[31] *In re* Sather, 3 P.3d 403, 412 (Colo. 2000). *See also* note 18, *supra*.

[32] Richmond, *supra* note 10, at 116: "As a practical matter, general retainers are rare. . .. The types of representations that justify or require general retainers are also scarce. Courts hearing fee related controversies are therefore properly skeptical of general retainer claims." *See also* RESTATEMENT, *supra* note 9, § 34 ("Engagement-retainer fees agreed to by clients not so experienced should be more closely scrutinized to ensure that they are no greater than is reasonable and that the engagement-retainer fee is not being used to evade the rules requiring a lawyer to return unearned fees.")

[33] Att'y Grievance Comm'n of Maryland v. Stinson, 428 Md. 147, 183-185, 50 A.3d 1222, 1244-1245 (2012) (purported engagement fee for "willingness and availability" to represent client not a true general retainer where no benefit to client or detriment to lawyer established and lawyer "produced no useable work").

[34] *See Stinson*, 50 A.3d at 1243 (benefits offered to the client in exchange for the nonrefundable fee were "nothing more than the ethical obligation imposed on all lawyers when they agree to provide legal services to a client. . . . A lawyer who agrees to perform legal services also necessarily agrees to be available to perform those services."), *citing* Lester Brickman & Lawrence A. Cunningham, *Nonrefundable Retainers Revisited*, 72 N.C. L. REV. 1, 24 (1993), and Iowa Sup. Ct. Bd. of Pro. Ethics & Conduct v. Frerichs, 671 N.W.2d 470, 477 (Iowa 2003).

Hypothetical 3 (Flat Fee)

A client seeks to hire a lawyer for representation in a criminal matter. The fee agreement provides: "Client shall pay Lawyer the sum of $15,000 for representation in the matter of State v Client, and that no part of the flat fee shall be refunded for any reason. Client understands that the flat fee is the agreed upon amount due Lawyer regardless of the time expended on the matter or how it is resolved." Client signed the agreement and paid the full $15,000. Lawyer deposited the $15,000 into his firm's operating account. Lawyer reviewed the police report, left a message for the prosecutor and law enforcement officer, appeared on behalf of the defendant at the arraignment, and filed an appearance with the court. A few weeks after the arraignment, Client discharged Lawyer and requested an accounting and partial refund. Lawyer refused, stating that the flat fee was earned when it was paid.

As we noted above, flat fees paid in advance of performing the work are subject to Rule 1.15(c) and the other rules set forth in the analyses in Hypotheticals 1 and 2. In other words, the foregoing rules regarding safekeeping, refundability, and reasonableness apply.

Flat fees are not general retainers and must not be treated as such. That the price set for the representation is not based on hours worked but is instead based on the completion of certain described services does not mean that the fee must be considered earned on receipt or nonrefundable when there is work yet to be done. Of course, if the flat fee is paid *after* the work is completed, the funds are earned and are not deposited into the trust account.

V. Conclusion

The Model Rules protect a client's right to terminate the fiduciary relationship with a lawyer and have the money to which the client is entitled available to obtain successor counsel if desired. Rule 1.15 requires that fees paid in advance must be held in a trust account until the services for which the fees will be paid are actually rendered, thereby allocating various risks to lawyer and client. The lawyer does not have to bear the risk of nonpayment after the work is completed; Rule 1.15 provides a process for withdrawal of earned fees and even for disputes, should they arise. And the client does not have to bear the risk that the funds will be spent, attached by the lawyer's creditors, or otherwise dissipated before the legal work is performed due to a lawyer's unwillingness or inability to do so.

Other ethics opinions and resources discuss good billing practices and fee agreement drafting tips. However, we offer the following suggestions in relation to the matters addressed in this opinion. Use plain language. Thus, instead of "retainer" say "advance" and explain that it is a "deposit for fees."[35] Explain that the sum deposited will be applied to the balance owed for work on the matter, and how and when this will happen. For example, the fee agreement could provide

[35] GEOFFREY C. HAZARD, JR., PETER R. JARVIS, TRISHA THOMPSON & W. WILLIAM HODES, THE LAW OF LAWYERING §9.07 (4th ed. 2022-2 Supp. 2014). Of course, the applicable Rules of Professional Conduct must be consulted, and it may be prudent or required to use certain terms. However, accurately translating legal terms of art is not only helpful to the client but also assists with interpretation and enforcement. So, if the term "advance" or "special retainer" is used in the applicable rules, the lawyer will want to use it in the fee agreement. However, consider also adding an explanation that it is functionally a deposit to cover fees for work in the future.

that on a monthly basis the client will be invoiced for the time expended by the lawyer and state when the sum reflected in the invoice will be withdrawn from the trust account. When the arrangement is for hourly billing, explain that if the deposit exceeds the final billing any balance will be remitted to the client. If the advance fee is fixed and the representation may continue for some time or involve several stages, consider dividing the representation into reasonable segments and providing for withdrawal of a reasonable portion of the deposited fee as the representation progresses and the fee becomes partially earned.[36] Finally, it may be wise to recognize the reality that many relationships do not last and include a provision explaining what will happen if the representation is terminated before the matter is completed.[37]

---

[36] *See supra* notes 15 & 16.

[37] Again, see Colo. R. Prof'l Conduct R. 1.5(h) and accompanying flat fee form providing helpful language for dividing a representation into increments and explaining a method of calculating the fees the lawyer has earned should the representation terminate prior to completion of the tasks or events specified in the agreement.

AMERICAN BAR ASSOCIATION
STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 512 **July 29, 2024**

Generative Artificial Intelligence Tools

To ensure clients are protected, lawyers using generative artificial intelligence tools must fully consider their applicable ethical obligations, including their duties to provide competent legal representation, to protect client information, to communicate with clients, to supervise their employees and agents, to advance only meritorious claims and contentions, to ensure candor toward the tribunal, and to charge reasonable fees.

I. Introduction

Many lawyers use artificial intelligence (AI) based technologies in their practices to improve the efficiency and quality of legal services to clients.[1] A well-known use is electronic discovery in litigation, in which lawyers use technology-assisted review to categorize vast quantities of documents as responsive or non-responsive and to segregate privileged documents. Another common use is contract analytics, which lawyers use to conduct due diligence in connection with mergers and acquisitions and large corporate transactions. In the realm of analytics, AI also can help lawyers predict how judges might rule on a legal question based on data about the judge's rulings; discover the summary judgment grant rate for every federal district judge; or evaluate how parties and lawyers may behave in current litigation based on their past conduct in similar litigation. And for basic legal research, AI may enhance lawyers' search results.

This opinion discusses a subset of AI technology that has more recently drawn the attention of the legal profession and the world at large – generative AI (GAI), which can create various types of new content, including text, images, audio, video, and software code in response to a user's prompts and questions.[2] GAI tools that produce new text are prediction tools that generate a statistically probable output when prompted. To accomplish this, these tools analyze large amounts of digital text culled from the internet or proprietary data sources. Some GAI tools are described as "self-learning," meaning they will learn from themselves as they cull more data. GAI tools may assist lawyers in tasks such as legal research, contract review, due diligence, document review, regulatory compliance, and drafting letters, contracts, briefs, and other legal documents.

---

[1] There is no single definition of artificial intelligence. At its essence, AI involves computer technology, software, and systems that perform tasks traditionally requiring human intelligence. The ability of a computer or computer-controlled robot to perform tasks commonly associated with intelligent beings is one definition. The term is frequently applied to the project of developing systems that appear to employ or replicate intellectual processes characteristic of humans, such as the ability to reason, discover meaning, generalize, or learn from past experience. BRITTANICA, https://www.britannica.com/technology/artificial-intelligence (last visited July 12, 2024).

[2] George Lawton, *What is Generative AI? Everything You Need to Know*, TECHTARGET (July 12, 2024), https://www.techtarget.com/searchenterpriseai/definition/generative-AI.

GAI tools—whether general purpose or designed specifically for the practice of law—raise important questions under the ABA Model Rules of Professional Conduct.[3] What level of competency should lawyers acquire regarding a GAI tool? How can lawyers satisfy their duty of confidentiality when using a GAI tool that requires input of information relating to a representation? When must lawyers disclose their use of a GAI tool to clients? What level of review of a GAI tool's process or output is necessary? What constitutes a reasonable fee or expense when lawyers use a GAI tool to provide legal services to clients?

At the same time, as with many new technologies, GAI tools are a moving target—indeed, a *rapidly* moving target—in the sense that their precise features and utility to law practice are quickly changing and will continue to change in ways that may be difficult or impossible to anticipate. This Opinion identifies some ethical issues involving the use of GAI tools and offers general guidance for lawyers attempting to navigate this emerging landscape.[4] It is anticipated that this Committee and state and local bar association ethics committees will likely offer updated guidance on professional conduct issues relevant to specific GAI tools as they develop.

II. Discussion

A. Competence

Model Rule 1.1 obligates lawyers to provide competent representation to clients.[5] This duty requires lawyers to exercise the "legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation," as well as to understand "the benefits and risks associated" with the technologies used to deliver legal services to clients.[6] Lawyers may ordinarily achieve the requisite level of competency by engaging in self-study, associating with another competent lawyer, or consulting with an individual who has sufficient expertise in the relevant field.[7]

To competently use a GAI tool in a client representation, lawyers need not become GAI experts. Rather, lawyers must have a reasonable understanding of the capabilities and limitations

---

[3] Many of the professional responsibility concerns that arise with GAI tools are similar to the issues that exist with other AI tools and should be considered by lawyers using such technology.

[4] This opinion is based on the ABA Model Rules of Professional Conduct as amended by the ABA House of Delegates through August 2023. The Opinion addresses several imminent ethics issues associated with the use of GAI, but additional issues may surface, including those found in Model Rule 7.1 ("Communications Concerning a Lawyer's Services"), Model Rule 1.7 ("Conflict of Interest: Current Clients"), and Model Rule 1.9 ("Duties to Former Clients"). *See, e.g.*, Fla. State Bar Ass'n, Prof'l Ethics Comm. Op. 24-1, at 7 (2024) (discussing the use of GAI chatbots under Florida Rule 4-7.13, which prohibits misleading content and unduly manipulative or intrusive advertisements); Pa. State Bar Ass'n Comm. on Legal Ethics & Prof'l Resp. & Philadelphia Bar Ass'n Prof'l Guidance Comm. Joint Formal Op. 2024-200 [hereinafter Pa. & Philadelphia Joint Formal Opinion 2024-200], at 10 (2024) ("Because the large language models used in generative AI continue to develop, some without safeguards similar to those already in use in law offices, such as ethical walls, they may run afoul of Rules 1.7 and 1.9 by using the information developed from one representation to inform another."). Accordingly, lawyers should consider all rules before using GAI tools.

[5] MODEL RULES OF PROF'L CONDUCT R. 1.1 (2023) [hereinafter MODEL RULES].

[6] MODEL RULES R. 1.1 & cmt. [8]. *See also* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 477R, at 2–3 (2017) [hereinafter ABA Formal Op. 477R] (discussing the ABA's "technology amendments" made to the Model Rules in 2012).

[7] MODEL RULES R. 1.1 cmts. [1], [2] & [4]; Cal. St. Bar, Comm. Prof'l Resp. Op. 2015-193, 2015 WL 4152025, at *2–3 (2015).

of the specific GAI technology that the lawyer might use. This means that lawyers should either acquire a reasonable understanding of the benefits and risks of the GAI tools that they employ in their practices or draw on the expertise of others who can provide guidance about the relevant GAI tool's capabilities and limitations.[8] This is not a static undertaking. Given the fast-paced evolution of GAI tools, technological competence presupposes that lawyers remain vigilant about the tools' benefits and risks.[9] Although there is no single right way to keep up with GAI developments, lawyers should consider reading about GAI tools targeted at the legal profession, attending relevant continuing legal education programs, and, as noted above, consulting others who are proficient in GAI technology.[10]

With the ability to quickly create new, seemingly human-crafted content in response to user prompts, GAI tools offer lawyers the potential to increase the efficiency and quality of their legal services to clients. Lawyers must recognize inherent risks, however.[11] One example is the risk of producing inaccurate output, which can occur in several ways. The large language models underlying GAI tools use complex algorithms to create fluent text, yet GAI tools are only as good as their data and related infrastructure. If the quality, breadth, and sources of the underlying data on which a GAI tool is trained are limited or outdated or reflect biased content, the tool might produce unreliable, incomplete, or discriminatory results. In addition, the GAI tools lack the ability to understand the meaning of the text they generate or evaluate its context.[12] Thus, they may combine otherwise accurate information in unexpected ways to yield false or inaccurate results.[13] Some GAI tools are also prone to "hallucinations," providing ostensibly plausible responses that have no basis in fact or reality.[14]

Because GAI tools are subject to mistakes, lawyers' uncritical reliance on content created by a GAI tool can result in inaccurate legal advice to clients or misleading representations to courts and third parties. Therefore, a lawyer's reliance on, or submission of, a GAI tool's output—without

---

[8] Pa. Bar Ass'n, Comm. on Legal Ethics & Prof'l Resp. Op. 2020-300, 2020 WL 2544268, at *2–3 (2020). *See also* Cal. State Bar, Standing Comm. on Prof'l Resp. & Conduct Op. 2023-208, 2023 WL 4035467, at *2 (2023) adopting a "reasonable efforts standard" and "fact-specific approach" to a lawyer's duty of technology competence, citing ABA Formal Opinion 477R, at 4).

[9] *See* New York County Lawyers Ass'n Prof'l Ethics Comm. Op. 749 (2017) (emphasizing that "[l]awyers must be responsive to technological developments as they become integrated into the practice of law"); Cal. St. Bar, Comm. Prof'l Resp. Op. 2015-193, 2015 WL 4152025, at *1 (2015) (discussing the level of competence required for lawyers to handle e-discovery issues in litigation).

[10] MODEL RULES R. 1.1 cmt. [8]; *see* Melinda J. Bentley, *The Ethical Implications of Technology in Your Law Practice: Understanding the Rules of Professional Conduct Can Prevent Potential Problems*, 76 J. MO. BAR 1 (2020) (identifying ways for lawyers to acquire technology competence skills).

[11] As further detailed in this opinion, lawyers' use of GAI raises confidentiality concerns under Model Rule 1.6 due to the risk of disclosure of, or unauthorized access to, client information. GAI also poses complex issues relating to ownership and potential infringement of intellectual property rights and even potential data security threats.

[12] *See,* W. Bradley Wendel, *The Promise and Limitations of AI in the Practice of Law,* 72 OKLA. L. REV. 21, 26 (2019) (discussing the limitations of AI based on an essential function of lawyers, making normative judgments that are impossible for AI).

[13] *See, e.g.*, Karen Weise & Cade Metz, *When A.I. Chatbots Hallucinate*, N.Y. TIMES (May 1, 2023).

[14] Ivan Moreno, *AI Practices Law 'At the Speed of Machines.' Is it Worth It?*, LAW360 (June 7, 2023); *See* Varun Magesh, Faiz Surani, Matthew Dahl, Mirac Suzgun, Christopher D. Manning, & Daniel E. Ho, *Hallucination Free? Assessing the Reliability of Leading AI Legal Research Tools*, STANFORD UNIVERSITY (June 26, 2024), *available at* https://dho.stanford.edu/wp-content/uploads/Legal_RAG_Hallucinations.pdf (study finding leading legal research companies' GAI systems "hallucinate between 17% and 33% of the time").

an appropriate degree of independent verification or review of its output—could violate the duty to provide competent representation as required by Model Rule 1.1.[15] While GAI tools may be able to significantly assist lawyers in serving clients, they cannot replace the judgment and experience necessary for lawyers to competently advise clients about their legal matters or to craft the legal documents or arguments required to carry out representations.

The appropriate amount of independent verification or review required to satisfy Rule 1.1 will necessarily depend on the GAI tool and the specific task that it performs as part of the lawyer's representation of a client. For example, if a lawyer relies on a GAI tool to review and summarize numerous, lengthy contracts, the lawyer would not necessarily have to manually review the entire set of documents to verify the results if the lawyer had previously tested the accuracy of the tool on a smaller subset of documents by manually reviewing those documents, comparing then to the summaries produced by the tool, and finding the summaries accurate. Moreover, a lawyer's use of a GAI tool designed specifically for the practice of law or to perform a discrete legal task, such as generating ideas, may require less independent verification or review, particularly where a lawyer's prior experience with the GAI tool provides a reasonable basis for relying on its results.

While GAI may be used as a springboard or foundation for legal work—for example, by generating an analysis on which a lawyer bases legal advice, or by generating a draft from which a lawyer produces a legal document—lawyers may not abdicate their responsibilities by relying solely on a GAI tool to perform tasks that call for the exercise of professional judgment. For example, lawyers may not leave it to GAI tools alone to offer legal advice to clients, negotiate clients' claims, or perform other functions that require a lawyer's personal judgment or participation.[16] Competent representation presupposes that lawyers will exercise the requisite level of skill and judgment regarding all legal work. In short, regardless of the level of review the lawyer selects, the lawyer is fully responsible for the work on behalf of the client.

Emerging technologies may provide an output that is of distinctively higher quality than current GAI tools produce, or may enable lawyers to perform work markedly faster and more economically, eventually becoming ubiquitous in legal practice and establishing conventional expectations regarding lawyers' duty of competence.[17] Over time, other new technologies have become integrated into conventional legal practice in this manner.[18] For example, "a lawyer would have difficulty providing competent legal services in today's environment without knowing how

---

[15] *See generally* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 08-451, at 1 (2008) [hereinafter ABA Formal Op. 08-451] (concluding that "[a] lawyer may outsource legal or nonlegal support services provided the lawyer remains ultimately responsible for rendering competent legal services to the client under Model Rule 1.1").

[16] *See* Fla. State Bar Ass'n, Prof'l Ethics Comm. Op. 24-1, *supra* note 4.

[17] *See, e.g.*, Sharon Bradley, *Rule 1.1 Duty of Competency and Internet Research: Benefits and Risks Associated with Relevant Technology* at 7 (2019), *available at* https://ssrn.com/abstract=3485055 ("View Model Rule 1.1 as elastic. It is expanding as legal technology solutions expand. The ever-changing shape of this rule makes clear that a lawyer cannot simply learn technology today and never again update their skills or knowledge.").

[18] *See, e.g.*, Smith v. Lewis, 530 P.2d 589, 595 (Cal. 1975) (stating that a lawyer is expected "to possess knowledge of those plain and elementary principles of law which are commonly known by well-informed attorneys, and to discover those additional rules of law which, although not commonly known, may readily be found by *standard research techniques*") (emphasis added); Hagopian v. Justice Admin. Comm'n, 18 So. 3d 625, 642 (Fla. Dist. Ct. App. 2009) (observing that lawyers have "become expected to use computer-assisted legal research to ensure that their research is complete and up-to-date, but the costs of this service can be significant").

to use email or create an electronic document."[19] Similar claims might be made about other tools such as computerized legal research or internet searches.[20] As GAI tools continue to develop and become more widely available, it is conceivable that lawyers will eventually have to use them to competently complete certain tasks for clients.[21] But even in the absence of an expectation for lawyers to use GAI tools as a matter of course,[22] lawyers should become aware of the GAI tools relevant to their work so that they can make an informed decision, as a matter of professional judgment, whether to avail themselves of these tools or to conduct their work by other means.[23] As previously noted regarding the possibility of outsourcing certain work, "[t]here is no unique blueprint for the provision of competent legal services. Different lawyers may perform the same tasks through different means, all with the necessary 'legal knowledge, skill, thoroughness and preparation.'"[24] Ultimately, any informed decision about whether to employ a GAI tool must consider the client's interests and objectives.[25]

---

[19] ABA Formal Op. 477R, *supra* note 6, at 3 (quoting ABA COMMISSION ON ETHICS 20/20 REPORT 105A (Aug. 2012)).

[20] *See, e.g.*, Bradley, *supra* note 17, at 3 ("Today no competent lawyer would rely solely upon a typewriter to draft a contract, brief, or memo. Typewriters are no longer part of 'methods and procedures' used by competent lawyers."); Lawrence Duncan MacLachlan, *Gandy Dancers on the Web: How the Internet Has Raised the Bar on Lawyers' Professional Responsibility to Research and Know the Law*, 13 GEO. J. LEGAL ETHICS 607, 608 (2000) ("The lawyer in the twenty-first century who does not effectively use the Internet for legal research may fall short of the minimal standards of professional competence and be potentially liable for malpractice"); Ellie Margolis, *Surfin' Safari—Why Competent Lawyers Should Research on the Web*, 10 YALE J.L. & TECH. 82, 110 (2007) ("While a lawyer's research methods reveal a great deal about the competence of the research, the method of research is ultimately a secondary inquiry, only engaged in when the results of that research process is judged inadequate. A lawyer who provides the court with adequate controlling authority is not going to be judged incompetent whether she found that authority in print, electronically, or by any other means."); Michael Thomas Murphy, *The Search for Clarity in an Attorney's Duty to Google*, 18 LEGAL COMM. & RHETORIC: JALWD 133, 133 (2021) ("This Duty to Google contemplates that certain readily available information on the public Internet about a legal matter is so easily accessible that it must be discovered, collected, and examined by an attorney, or else that attorney is acting unethically, committing malpractice, or both"); Michael Whiteman, *The Impact of the Internet and Other Electronic Sources on an Attorney's Duty of Competence Under the Rules of Professional Conduct*, 11 ALB. L.J. SCI. & TECH. 89, 91 (2000) ("Unless it can be shown that the use of electronic sources in legal research has become a standard technique, then lawyers who fail to use electronic sources will not be deemed unethical or negligent in his or her failure to use such tools.").

[21] *See* MODEL RULES R. 1.1 cmt. [5] (stating that "[c]ompetent handling of a particular matter includes . . . [the] use of methods and procedures meeting the standards of competent practitioners"); New York County Lawyers Ass'n Prof'l Ethics Comm. Op. 749, 2017 WL 11659554, at *3 (2017) (explaining that the duty of competence covers not only substantive knowledge in different areas of the law, but also the manner in which lawyers provide legal services to clients).

[22] The establishment of such an expectation would likely require an increased acceptance of GAI tools across the legal profession, a track record of reliable results from those platforms, the widespread availability of these technologies to lawyers from a cost or financial standpoint, and robust client demand for GAI tools as an efficiency or cost-cutting measure.

[23] Model Rule 1.5's prohibition on unreasonable fees, as well as market forces, may influence lawyers to use new technology in favor of slower or less efficient methods.

[24] ABA Formal Op. 08-451, *supra* note 15, at 2. *See also id.* ("Rule 1.1 does not require that tasks be accomplished in any special way. The rule requires only that the lawyer who is responsible to the client satisfies her obligation to render legal services competently.").

[25] MODEL RULES R. 1.2(a).

B. Confidentiality

A lawyer using GAI must be cognizant of the duty under Model Rule 1.6 to keep confidential all information relating to the representation of a client, regardless of its source, unless the client gives informed consent, disclosure is impliedly authorized to carry out the representation, or disclosure is permitted by an exception.[26] Model Rules 1.9(c) and 1.18(b) require lawyers to extend similar protections to former and prospective clients' information. Lawyers also must make "reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of the client."[27]

Generally, the nature and extent of the risk that information relating to a representation may be revealed depends on the facts. In considering whether information relating to any representation is adequately protected, lawyers must assess the likelihood of disclosure and unauthorized access, the sensitivity of the information,[28] the difficulty of implementing safeguards, and the extent to which safeguards negatively impact the lawyer's ability to represent the client.[29]

Before lawyers input information relating to the representation of a client into a GAI tool, they must evaluate the risks that the information will be disclosed to or accessed by others outside the firm. Lawyers must also evaluate the risk that the information will be disclosed to or accessed by others *inside* the firm who will not adequately protect the information from improper disclosure or use[30] because, for example, they are unaware of the source of the information and that it originated with a client of the firm. Because GAI tools now available differ in their ability to ensure that information relating to the representation is protected from impermissible disclosure and access, this risk analysis will be fact-driven and depend on the client, the matter, the task, and the GAI tool used to perform it.[31]

Self-learning GAI tools into which lawyers input information relating to the representation, by their very nature, raise the risk that information relating to one client's representation may be disclosed improperly,[32] even if the tool is used exclusively by lawyers at the same firm.[33] This can occur when information relating to one client's representation is input into the tool, then later revealed in response to prompts by lawyers working on other matters, who then share that output with other clients, file it with the court, or otherwise disclose it. In other words, the self-learning

---

[26] MODEL RULES R. 1.6; MODEL RULES R. 1.6 cmt. [3].
[27] MODEL RULES R. 1.6(c).
[28] ABA Formal Op. 477R, *supra* note 6, at 1 (A lawyer "may be required to take special security precautions to protect against the inadvertent or unauthorized disclosure of client information when … the nature of the information requires a higher degree of security.").
[29] MODEL RULES R. 1.6, cmt. [18].
[30] *See* MODEL RULES R. 1.8(b), which prohibits use of information relating to the representation of a client to the disadvantage of the client.
[31] *See* ABA Formal Op. 477R, *supra* note 6, at 4 (rejecting specific security measures to protect information relating to a client's representation and advising lawyers to adopt a fact-specific approach to data security).
[32] *See generally* State Bar of Cal. Standing Comm. on Prof'l Resp. & Conduct, PRACTICAL GUIDANCE FOR THE USE OF GENERATIVE ARTIFICIAL INTELLIGENCE IN THE PRACTICE OF LAW (2024), *available at* https://www.calbar.ca.gov/Portals/0/documents/ethics/Generative-AI-Practical-Guidance.pdf; Fla. State Bar Ass'n, Prof'l Ethics Comm. Op. 24-1, *supra* note 4.
[33] *See* Pa. & Philadelphia Joint Formal Opinion 2024-200, *supra* note 4, at 10 (noting risk that information relating to one representation may be used to inform work on another representation).

GAI tool may disclose information relating to the representation to persons outside the firm who are using the same GAI tool. Similarly, it may disclose information relating to the representation to persons in the firm (1) who either are prohibited from access to said information because of an ethical wall or (2) who could inadvertently use the information from one client to help another client, not understanding that the lawyer is revealing client confidences. Accordingly, because many of today's self-learning GAI tools are designed so that their output could lead directly or indirectly to the disclosure of information relating to the representation of a client, a client's informed consent is required prior to inputting information relating to the representation into such a GAI tool.[34]

When consent is required, it must be informed. For the consent to be informed, the client must have the lawyer's best judgment about why the GAI tool is being used, the extent of and specific information about the risk, including particulars about the kinds of client information that will be disclosed, the ways in which others might use the information against the client's interests, and a clear explanation of the GAI tool's benefits to the representation. Part of informed consent requires the lawyer to explain the extent of the risk that later users or beneficiaries of the GAI tool will have access to information relating to the representation. To obtain informed consent when using a GAI tool, merely adding general, boiler-plate provisions to engagement letters purporting to authorize the lawyer to use GAI is not sufficient.[35]

Because of the uncertainty surrounding GAI tools' ability to protect such information and the uncertainty about what happens to information both at input and output, it will be difficult to evaluate the risk that information relating to the representation will either be disclosed to or accessed by others inside the firm to whom it should not be disclosed as well as others outside the firm.[36] As a baseline, all lawyers should read and understand the Terms of Use, privacy policy, and related contractual terms and policies of any GAI tool they use to learn who has access to the information that the lawyer inputs into the tool or consult with a colleague or external expert who has read and analyzed those terms and policies.[37] Lawyers may need to consult with IT professionals or cyber security experts to fully understand these terms and policies as well as the manner in which GAI tools utilize information.

Today, there are uses of self-learning GAI tools in connection with a legal representation when client informed consent is not required because the lawyer will not be inputting information relating to the representation. As an example, if a lawyer is using the tool for idea generation in a manner that does not require inputting information relating to the representation, client informed consent would not be necessary.

---

[34] This conclusion is based on the risks and capabilities of GAI tools as of the publication of this opinion. As the technology develops, the risks may change in ways that would alter our conclusion. *See* Fla. State Bar Ass'n, Prof'l Ethics Comm. Op. 24-1, *supra* note 4, at 2; W. Va. Lawyer Disciplinary Bd. Op. 24-01 (2024), *available at* http://www.wvodc.org/pdf/AILEO24-01.pdf.

[35] *See* W. Va. Lawyer Disciplinary Bd. Op. 24-01, *supra* note 34.

[36] Magesh et al. *supra* note 14, at 23 (describing some of the GAI tools available to lawyers as "difficult for lawyers to assess when it is safe to trust them. Official documentation does not clearly illustrate what they can do for lawyers and in which areas lawyers should exercise caution.")

[37] Stephanie Pacheco, *Three Considerations for Attorneys Using Generative AI,* BLOOMBERG LAW ANALYSIS (June 16, 2023, 4:00 pm), https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-three-considerations-for-attorneys-using-generative-ai?context=search&index=7.

C. Communication

Where Model Rule 1.6 does not require disclosure and informed consent, the lawyer must separately consider whether other Model Rules, particularly Model Rule 1.4, require disclosing the use of a GAI tool in the representation.

Model Rule 1.4, which addresses lawyers' duty to communicate with their clients, builds on lawyers' legal obligations as fiduciaries, which include "the duty of an attorney to advise the client promptly whenever he has any information to give which it is important the client should receive."[38] Of particular relevance, Model Rule 1.4(a)(2) states that a lawyer shall "reasonably consult with the client about the means by which the client's objectives are to be accomplished." Additionally, Model Rule 1.4(b) obligates lawyers to explain matters "to the extent reasonably necessary to permit a client to make an informed decision regarding the representation." Comment [5] to Rule 1.4 explains, "the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation." Considering these underlying principles, questions arise regarding whether and when lawyers might be required to disclose their use of GAI tools to clients pursuant to Rule 1.4.

The facts of each case will determine whether Model Rule 1.4 requires lawyers to disclose their GAI practices to clients or obtain their informed consent to use a particular GAI tool. Depending on the circumstances, client disclosure may be unnecessary.

Of course, lawyers must disclose their GAI practices if asked by a client how they conducted their work, or whether GAI technologies were employed in doing so, or if the client expressly requires disclosure under the terms of the engagement agreement or the client's outside counsel guidelines.[39] There are also situations where Model Rule 1.4 requires lawyers to discuss their use of GAI tools unprompted by the client.[40] For example, as discussed in the previous section, clients would need to be informed in advance, and to give informed consent, if the lawyer proposes to input information relating to the representation into the GAI tool.[41] Lawyers must also consult clients when the use of a GAI tool is relevant to the basis or reasonableness of a lawyer's fee.[42]

Client consultation about the use of a GAI tool is also necessary when its output will influence a significant decision in the representation,[43] such as when a lawyer relies on GAI

---

[38] Baker v. Humphrey, 101 U.S. 494, 500 (1879).

[39] *See, e.g.*, MODEL RULES R. 1.4(a)(4) ("A lawyer shall . . . promptly comply with reasonable requests for information[.]").

[40] *See* MODEL RULES R. 1.4(a)(1) (requiring lawyers to "promptly inform the client of any decision or circumstance with respect to which the client's informed consent" is required by the rules of professional conduct).

[41] See section B for a discussion of confidentiality issues under Rule 1.6.

[42] See section F for a discussion of fee issues under Rule 1.5.

[43] Guidance may be found in ethics opinions requiring lawyers to disclose their use of temporary lawyers whose involvement is significant or otherwise material to the representation. *See, e.g.*, Va. State Bar Legal Ethics Op. 1850, 2010 WL 5545407, at *5 (2010) (acknowledging that "[t]here is little purpose to informing a client every time a lawyer outsources legal support services that are truly tangential, clerical, or administrative in nature, or even when basic legal research or writing is outsourced without any client confidences being revealed"); Cal. State Bar, Standing Comm. on Prof'l Resp. & Conduct Op. 2004-165, 2004 WL 3079030, at *2–3 (2004) (opining that a

technology to evaluate potential litigation outcomes or jury selection. A client would reasonably want to know whether, in providing advice or making important decisions about how to carry out the representation, the lawyer is exercising independent judgment or, in the alternative, is deferring to the output of a GAI tool. Or there may be situations where a client retains a lawyer based on the lawyer's particular skill and judgment, when the use of a GAI tool, without the client's knowledge, would violate the terms of the engagement agreement or the client's reasonable expectations regarding how the lawyer intends to accomplish the objectives of the representation.

It is not possible to catalogue every situation in which lawyers must inform clients about their use of GAI. Again, lawyers should consider whether the specific circumstances warrant client consultation about the use of a GAI tool, including the client's needs and expectations, the scope of the representation, and the sensitivity of the information involved. Potentially relevant considerations include the GAI tool's importance to a particular task, the significance of that task to the overall representation, how the GAI tool will process the client's information, and the extent to which knowledge of the lawyer's use of the GAI tool would affect the client's evaluation of or confidence in the lawyer's work.

Even when Rule 1.6 does not require informed consent and Rule 1.4 does not require a disclosure regarding the use of GAI, lawyers may tell clients how they employ GAI tools to assist in the delivery of legal services. Explaining this may serve the interest of effective client communication. The engagement agreement is a logical place to make such disclosures and to identify any client instructions on the use of GAI in the representation.[44]

D. Meritorious Claims and Contentions and Candor Toward the Tribunal

Lawyers using GAI in litigation have ethical responsibilities to the courts as well as to clients. Model Rules 3.1, 3.3, and 8.4(c) may be implicated by certain uses. Rule 3.1 states, in part, that "[a] lawyer shall not bring or defend a proceeding, or assert or controvert and issue therein, unless there is a basis in law or fact for doing so that is not frivolous." Rule 3.3 makes it clear that lawyers cannot knowingly make any false statement of law or fact to a tribunal or fail to correct a material false statement of law or fact previously made to a tribunal.[45] Rule 8.4(c) provides that a

---

lawyer must disclose the use of a temporary lawyer to a client where the temporary lawyer's use constitutes a "significant development" in the matter and listing relevant considerations); N.Y. State Bar Ass'n, Comm on Prof'l Ethics 715, at 7 (1999) (opining that "whether a law firm needs to disclose to the client and obtain client consent for the participation of a Contract lawyer depends upon whether client confidences will be disclosed to the lawyer, the degree of involvement of the lawyer in the matter, and the significance of the work done by the lawyer"); D.C. Bar Op. 284, at 4 (1988) (recommending client disclosure "whenever the proposed use of a temporary lawyer to perform work on the client's matter appears reasonably likely to be material to the representation or to affect the client's reasonable expectations"); Fla. State Bar Ass'n, Comm. on Prof'l Ethics Op. 88-12, 1988 WL 281590, at *2 (1988) (stating that disclosure of a temporary lawyer depends "on whether the client would likely consider the information material");.

[44] For a discussion of what client notice and informed consent under Rule 1.6 may require, see section B.

[45] MODEL RULES R. 3.3(a) reads: "A lawyer shall not knowingly: (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer; (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or (3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if

lawyer shall not engage in "conduct involving dishonesty, fraud, deceit or misrepresentation." Even an unintentional misstatement to a court can involve a misrepresentation under Rule 8.4(c). Therefore, output from a GAI tool must be carefully reviewed to ensure that the assertions made to the court are not false.

Issues that have arisen to date with lawyers' use of GAI outputs include citations to nonexistent opinions, inaccurate analysis of authority, and use of misleading arguments.[46]

Some courts have responded by requiring lawyers to disclose their use of GAI.[47] As a matter of competence, as previously discussed, lawyers should review for accuracy all GAI outputs. In judicial proceedings, duties to the tribunal likewise require lawyers, before submitting materials to a court, to review these outputs, including analysis and citations to authority, and to correct errors, including misstatements of law and fact, a failure to include controlling legal authority, and misleading arguments.

E. Supervisory Responsibilities

Model Rules 5.1 and 5.3 address the ethical duties of lawyers charged with managerial and supervisory responsibilities and set forth those lawyers' responsibilities with regard to the firm, subordinate lawyers, and nonlawyers. Managerial lawyers must create effective measures to ensure that all lawyers in the firm conform to the rules of professional conduct,[48] and supervisory lawyers must supervise subordinate lawyers and nonlawyer assistants to ensure that subordinate lawyers and nonlawyer assistants conform to the rules.[49] These responsibilities have implications for the use of GAI tools by lawyers and nonlawyers.

Managerial lawyers must establish clear policies regarding the law firm's permissible use of GAI, and supervisory lawyers must make reasonable efforts to ensure that the firm's lawyers and nonlawyers comply with their professional obligations when using GAI tools.[50] Supervisory obligations also include ensuring that subordinate lawyers and nonlawyers are trained,[51] including in the ethical and practical use of the GAI tools relevant to their work as well as on risks associated with relevant GAI use.[52] Training could include the basics of GAI technology, the capabilities and limitations of the tools, ethical issues in use of GAI and best practices for secure data handling, privacy, and confidentiality.

---

necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false."

[46] *See* DC Bar Op. 388 (2024).

[47] Lawyers should consult with the applicable court's local rules to ensure that they comply with those rules with respect to AI use. As noted in footnote 4, no one opinion could address every ethics issue presented when a lawyer uses GAI. For example, depending on the facts, issues relating to Model Rule 3.4(c) could be presented.

[48] *See* MODEL RULES R. 1.0(c) for the definition of firm.

[49] ABA Formal Op. 08-451, *supra* note 15.

[50] MODEL RULES R. 5.1.

[51] *See* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 467 (2014).

[52] *See generally*, MODEL RULES R. 1.1, cmt. [8]. One training suggestion is that all materials produced by GAI tools be marked as such when stored in any client or firm file so future users understand potential fallibility of the work.

Lawyers have additional supervisory obligations insofar as they rely on others outside the law firm to employ GAI tools in connection with the legal representation. Model Rule 5.3(b) imposes a duty on lawyers with direct supervisory authority over a nonlawyer to make "reasonable efforts to ensure that" the nonlawyer's conduct conforms with the professional obligations of the lawyer. Earlier opinions recognize that when outsourcing legal and nonlegal services to third-party providers, lawyers must ensure, for example, that the third party will do the work capably and protect the confidentiality of information relating to the representation.[53] These opinions note the importance of: reference checks and vendor credentials; understanding vendor's security policies and protocols; familiarity with vendor's hiring practices; using confidentiality agreements; understanding the vendor's conflicts check system to screen for adversity among firm clients; and the availability and accessibility of a legal forum for legal relief for violations of the vendor agreement. These concepts also apply to GAI providers and tools.

Earlier opinions regarding technological innovations and other innovations in legal practice are instructive when considering a lawyer's use of a GAI tool that requires the disclosure and storage of information relating to the representation.[54] In particular, opinions developed to address cloud computing and outsourcing of legal and nonlegal services suggest that lawyers should:

- ensure that the [GAI tool] is configured to preserve the confidentiality and security of information, that the obligation is enforceable, and that the lawyer will be notified in the event of a breach or service of process regarding production of client information;[55]
- investigate the [GAI tool's] reliability, security measures, and policies, including limitations on the [the tool's] liability;[56]
- determine whether the [GAI tool] retains information submitted by the lawyer before and after the discontinuation of services or asserts proprietary rights to the information;[57] and
- understand the risk that [GAI tool servers] are subject to their own failures and may be an attractive target of cyber-attacks.[58]

F. Fees

Model Rule 1.5, which governs lawyers' fees and expenses, applies to representations in which a lawyer charges the client for the use of GAI. Rule 1.5(a) requires a lawyer's fees and expenses to be reasonable and includes a non-exclusive list of criteria for evaluating whether a fee

---

[53] ABA Formal Op. 08-451, *supra* note 15; ABA Formal. Op. 477R, *supra* note 6.
[54] *See* ABA Formal Op. 08-451, *supra* note 15.
[55] Fla. Bar Advisory Op. 12-3 (2013).
[56] *Id.* citing Iowa State Bar Ass'n Comm. on Ethics & Practice Guidelines Op. 11-01 (2011) [hereinafter Iowa Ethics Opinion 11-01].
[57] Fla. Bar Advisory Op. 24-1, *supra* note 4; Fla. Bar Advisory Op. 12-3, *supra* note 55; Iowa Ethics Opinion 11-01, *supra* note 56.
[58] Fla. Bar Advisory Op. 12-3, *supra* note 55; *See generally* Melissa Heikkila, *Three Ways AI Chatbots are a Security Disaster*, MIT TECHNOLOGY REVIEW (Apr. 3, 2023), www.technologyreview.com/2023/04/03/1070893/three-ways-ai-chatbots-are-a-security-disaster/.

or expense is reasonable.[59] Rule 1.5(b) requires a lawyer to communicate to a client the basis on which the lawyer will charge for fees and expenses unless the client is a regularly represented client and the terms are not changing. The required information must be communicated before or within a reasonable time of commencing the representation, preferably in writing. Therefore, before charging the client for the use of the GAI tools or services, the lawyer must explain the basis for the charge, preferably in writing.

GAI tools may provide lawyers with a faster and more efficient way to render legal services to their clients, but lawyers who bill clients an hourly rate for time spent on a matter must bill for their actual time. ABA Formal Ethics Opinion 93-379 explained, "the lawyer who has agreed to bill on the basis of hours expended does not fulfill her ethical duty if she bills the client for more time than she has actually expended on the client's behalf."[60] If a lawyer uses a GAI tool to draft a pleading and expends 15 minutes to input the relevant information into the GAI program, the lawyer may charge for the 15 minutes as well as for the time the lawyer expends to review the resulting draft for accuracy and completeness. As further explained in Opinion 93-379, "If a lawyer has agreed to charge the client on [an hourly] basis and it turns out that the lawyer is particularly efficient in accomplishing a given result, it nonetheless will not be permissible to charge the client for more hours than were actually expended on the matter,"[61] because "[t]he client should only be charged a reasonable fee for the legal services performed."[62] The "goal should be solely to compensate the lawyer fully for time reasonably expended, an approach that if followed will not take advantage of the client."[63]

The factors set forth in Rule 1.5(a) also apply when evaluating the reasonableness of charges for GAI tools when the lawyer and client agree on a flat or contingent fee.[64] For example, if using a GAI tool enables a lawyer to complete tasks much more quickly than without the tool, it may be unreasonable under Rule 1.5 for the lawyer to charge the same flat fee when using the GAI tool as when not using it. "A fee charged for which little or no work was performed is an unreasonable fee."[65]

The principles set forth in ABA Formal Opinion 93-379 also apply when a lawyer charges GAI work as an expense. Rule 1.5(a) requires that disbursements, out-of-pocket expenses, or additional charges be reasonable. Formal Opinion 93-379 explained that a lawyer may charge the

---

[59] The listed considerations are (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.

[60] ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 93-379, at 6 (1993) [hereinafter ABA Formal Op. 93-379].

[61] *Id.*

[62] *Id.* at 5.

[63] *Id.*

[64] *See, e.g.*, *Williams Cos. v. Energy Transfer LP*, 2022 Del. Ch. LEXIS 207, 2022 WL 3650176 (Del. Ch. Aug. 25, 2022) (applying same principles to contingency fee).

[65] Att'y Grievance Comm'n v. Monfried, 794 A.2d 92, 103 (Md. 2002) (finding that a lawyer violated Rule 1.5 by charging a flat fee of $1,000 for which the lawyer did little or no work).

client for disbursements incurred in providing legal services to the client. For example, a lawyer typically may bill to the client the actual cost incurred in paying a court reporter to transcribe a deposition or the actual cost to travel to an out-of-town hearing.[66] Absent contrary disclosure to the client, the lawyer should not add a surcharge to the actual cost of such expenses and should pass along to the client any discounts the lawyer receives from a third-party provider.[67] At the same time, lawyers may not bill clients for general office overhead expenses including the routine costs of "maintaining a library, securing malpractice insurance, renting of office space, purchasing utilities, and the like."[68] Formal Opinion 93-379 noted, "[i]n the absence of disclosure to a client in advance of the engagement to the contrary," such overhead should be "subsumed within" the lawyer's charges for professional services.[69]

In applying the principles set out in ABA Formal Ethics Opinion 93-379 to a lawyer's use of a GAI tool, lawyers should analyze the characteristics and uses of each GAI tool, because the types, uses, and cost of GAI tools and services vary significantly. To the extent a particular tool or service functions similarly to equipping and maintaining a legal practice, a lawyer should consider its cost to be overhead and not charge the client for its cost absent a contrary disclosure to the client in advance. For example, when a lawyer uses a GAI tool embedded in or added to the lawyer's word processing software to check grammar in documents the lawyer drafts, the cost of the tool should be considered to be overhead. In contrast, when a lawyer uses a third-party provider's GAI service to review thousands of voluminous contracts for a particular client and the provider charges the lawyer for using the tool on a per-use basis, it would ordinarily be reasonable for the lawyer to bill the client as an expense for the actual out-of-pocket expense incurred for using that tool.

As acknowledged in ABA Formal Opinion 93-379, perhaps the most difficult issue is determining how to charge clients for providing in-house services that are not required to be included in general office overhead and for which the lawyer seeks reimbursement. The opinion concluded that lawyers may pass on reasonable charges for "photocopying, computer research, . . . and similar items" rather than absorbing these expenses as part of the lawyers' overhead as many lawyers would do.[70] For example, a lawyer may agree with the client in advance on the specific rate for photocopying, such as $0.15 per page. Absent an advance agreement, the lawyer "is obliged to charge the client no more than the direct cost associated with the service (i.e., the actual cost of making a copy on the photocopy machine) plus a reasonable allocation of overhead expenses directly associated with the provision of the service (e.g., the salary of the photocopy machine operator)."[71]

---

[66] ABA Formal Op. 93-379 at 7.
[67] *Id.* at 8.
[68] *Id.* at 7.
[69] *Id.*
[70] *Id.* at 8.
[71] *Id.* Opinion 93-379 also explained, "It is not appropriate for the Committee, in addressing ethical standards, to opine on the various accounting issues as to how one calculates direct cost and what may or may not be included in allocated overhead. These are questions which properly should be reserved for our colleagues in the accounting profession. Rather, it is the responsibility of the Committee to explain the principles it draws from the mandate of Model Rule 1.5's injunction that fees be reasonable. Any reasonable calculation of direct costs as well as any reasonable allocation of related overhead should pass ethical muster. On the other hand, 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." *Id.*

These same principles apply when a lawyer uses a proprietary, in-house GAI tool in rendering legal services to a client. A firm may have made a substantial investment in developing a GAI tool that is relatively unique and that enables the firm to perform certain work more quickly or effectively. The firm may agree in advance with the client about the specific rates to be charged for using a GAI tool, just as it would agree in advance on its legal fees. But not all in-house GAI tools are likely to be so special or costly to develop, and the firm may opt not to seek the client's agreement on expenses for using the technology. Absent an agreement, the firm may charge the client no more than the direct cost associated with the tool (if any) plus a reasonable allocation of expenses directly associated with providing the GAI tool, while providing appropriate disclosures to the client consistent with Formal Opinion 93-379. The lawyer must ensure that the amount charged is not duplicative of other charges to this or other clients.

Finally, on the issue of reasonable fees, in addition to the time lawyers spend using various GAI tools and services, lawyers also will expend time to gain knowledge about those tools and services. Rule 1.1 recognizes that "[c]ompetent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." Comment [8] explains that "[t]o maintain the requisite knowledge and skill [to be competent], a lawyer should keep abreast of changes in the law and its practice, *including the benefits and risks associated with relevant technology*, engaging in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject."[72] Lawyers must remember that they may not charge clients for time necessitated by their own inexperience.[73] Therefore, a lawyer may not charge a client to learn about how to use a GAI tool or service that the lawyer will regularly use for clients because lawyers must maintain competence in the tools they use, including but not limited to GAI technology. However, if a client explicitly requests that a specific GAI tool be used in furtherance of the matter and the lawyer is not knowledgeable in using that tool, it may be appropriate for the lawyer to bill the client to gain the knowledge to use the tool effectively. Before billing the client, the lawyer and the client should agree upon any new billing practices or billing terms relating to the GAI tool and, preferably, memorialize the new agreement.

III. Conclusion

Lawyers using GAI tools have a duty of competence, including maintaining relevant technological competence, which requires an understanding of the evolving nature of GAI. In

---

[72] MODEL RULES R. 1.1, cmt. [8] (emphasis added); *see also* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 498 (2021).

[73] Heavener v. Meyers, 158 F. Supp. 2d 1278 (E.D. Okla. 2001) (five hundred hours for straightforward Fourth Amendment excessive-force claim and nineteen hours for research on Eleventh Amendment defense indicated excessive billing due to counsel's inexperience); *In re* Poseidon Pools of Am., Inc., 180 B.R. 718 (Bankr. E.D.N.Y. 1995) (denying compensation for various document revisions; "we note that given the numerous times throughout the Final Application 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"); Att'y Grievance Comm'n v. Manger, 913 A.2d 1 (Md. 2006) ("While it may be appropriate to charge a client for case-specific research or familiarization with a unique issue involved in a case, general education or background research should not be charged to the client."); *In re* Hellerud, 714 N.W.2d 38 (N.D. 2006) (reduction in hours, fee refund of $5,651.24, and reprimand for lawyer unfamiliar with North Dakota probate work who charged too many hours at too high a rate for simple administration of cash estate; "it is counterintuitive to charge a higher hourly rate for knowing less about North Dakota law").

using GAI tools, lawyers also have other relevant ethical duties, such as those relating to confidentiality, communication with a client, meritorious claims and contentions, candor toward the tribunal, supervisory responsibilities regarding others in the law office using the technology and those outside the law office providing GAI services, and charging reasonable fees. With the ever-evolving use of technology by lawyers and courts, lawyers must be vigilant in complying with the Rules of Professional Conduct to ensure that lawyers are adhering to their ethical responsibilities and that clients are protected.

ABAJOURNAL

ETHICS

3 law partners suspended for failing to supervise trusted-but-embezzling office manager

BY DEBRA CASSENS WEISS (HTTPS://WWW.ABAJOURNAL.COM/AUTHORS/4/)

JUNE 3, 2019, 7:00 AM CDT

Photo by Francois Poirier/Shutterstock.com.

Three partners in a former New York law firm have received six-month suspensions for failing to properly supervise a nonlawyer office manager who embezzled more than $200,000 from client funds.

The name partners in the former Garden City law firm Karol, Hausman & Sosnik were suspended in May 29 opinions by the Appellate Division's Second Judicial Department of the New York Supreme Court (here (http://www.nycourts.gov/courts/AD2/Handdowns/2019/Decisions/D59287.pdf), here (http://www.nycourts.gov/courts/AD2/Handdowns/2019/Decisions/D59288.pdf) and here (http://www.nycourts.gov/courts/AD2/Handdowns/2019/Decisions/D59289.pdf)). The Legal Profession Blog notes the (https://lawprofessors.typepad.com/legal_profession/2019/05/an-attorneys-failure-to-supervise-a-trusted-but-thieving-non-attorney-who-had-raided-the-firms-escrow-account-was-suspended-f.html) decisions.

The law firm replenished the misappropriated funds and cooperated in the investigation, according to the court opinions. The firm had reported the problem in May 2013 after it was notified of a bounced check from its escrow account. The firm hired an accounting firm, which discovered the extent of the shortages.

The law firm learned during the review that the employee had been transferring money between escrow, operating and payroll accounts without "rhyme or reason" for a period of at least 3½ years.

The New York appeals court said in the three opinions that a review of monthly bank statements would have put the partners on notice of questionable transfers between accounts. Those transfers should have been an early warning to give the accounting records greater scrutiny.

The three partners—Louis Karol, Michael Hausman and Howard Sosnik—were suspended after a joint disciplinary hearing. The suspensions begin June 28 and continue until further court order.

Karol had testified that the office manager was a "dedicated and trusted employee." He and his partners occasionally checked transactions to make sure disbursements equaled deposits, but they didn't properly review the escrow account, the opinions said.

The partners decided not to report the employee to police. "We didn't want it to get out there that we were foolish because that would hurt us," Karol had testified. The firm did institute new bookkeeping practices, however.

Karol told the ABA Journal that the partners immediately notified ethics regulators, immediately investigated and immediately took corrective action. "We did everything right, except initially we didn't supervise," he says. "We're good lawyers and lousy businessmen."

Karol says he thinks ethics authorities understood that he and his partners were good people. "As the decision indicated, I have 33 years of unblemished record," Karol says.

Other lawyers should know "it's a bright line test," he says. If someone else touches your escrow account, "you'll get slammed; you'll get spanked."

"The cautionary tale is you can't rely on people; you have to double-check yourself," he says.

3 Attys Susp Failing to Supervise Trusted-but Embezzling Office Mgr – Quotes from the Attys:

"Karol told the ABA Journal that the partners immediately notified ethics regulators, immediately investigated and immediately took corrective action. 'We did everything right, except initially we didn't supervise,' he says. 'We're good lawyers and lousy businessmen.

"Karol says he thinks ethics authorities understood that he and his partners were good people. 'As the decision indicated, I have 33 years of unblemished record,' Karol says.

"Other lawyers should know 'it's a bright line test,' he says. If someone else touches your escrow account, 'you'll get slammed; you'll get spanked.'

"'The cautionary tale is you can't rely on people; you have to double-check yourself,' he says."

What jumps out to me is how readily apparent the embezzlement would've been had the lawyers simply looked. From the opinions:

- "While the respondent and his partners claim there were no early warning signs of the financial improprieties occurring in the escrow account, the record reveals otherwise. Indeed, the respondent testified that once they went online and looked at their accounts, they saw that, over a 3½ year period, [the employee] was transferring client funds between the Firm's escrow, operating, and payroll accounts. Although the respondent and his partners were unaware that online access had been instituted for the Firm's bank accounts, these questionable transfers were also listed on the monthly bank statements received by the Firm. It is also noted that online transfers were clearly designated as such on the bank statements. We find that had the Firm's partners provided proper oversight, including a review of the Firm's escrow account bank statements, the questionable transfers between the Firm's escrow, operating, and payroll accounts, including those transfers which were made using online access, should have served as an early warning to the respondent and his partners to undertake greater scrutiny of the escrow account transactions. The failure to detect these early warning signs is directly attributable to the respondent's and his partners' failure to provide proper oversight of the escrow account."

Kansas Cases:

In re Christian, 281 Kan. 1203 (2006)

While working at a law firm, respondent converted money belonging to the firm on numerous occasions by accepting attorney fees from clients and failing to deliver those

Committee Opinion
September 7, 2006

LEGAL ETHICS OPINION 1835

TRUST ACCOUNT – CAN A LAWYER REMIT IRREVOCABLY CREDITED FUNDS WHEN ACCOUNT HOLDS FUNDS FOR ONLY ONE CLIENT?

You have presented a hypothetical situation in which a law firm represents a number of creditors in the collection of delinquent consumer/retail accounts. The firm maintains a separate trust account for each major client, into which they deposit only those funds collected on behalf of that client from account debtors. All of these funds held in each individual account belong only to one client, but are collected from a multitude of different debtors.

Under the facts you have presented you have asked the following questions:

1. When an attorney trust account holds funds for only one client, is it necessary to remit only on irrevocably credited funds in a trust account, or may remittances be made on a more prompt basis without violating the Rules of Professional Conduct?

2. If the answer to the first question is that disbursements on uncollected funds are permissible under those circumstances, is the same conclusion reached if the retail accounts that are being collected by the client have been "securitized", leaving the client with only servicing and perhaps some residual rights under the securitization process?

Rule 1.15 governs the lawyer's duty to safeguard other's property and 1.15 (c) states that " [A] lawyer shall: … (4) promptly pay or deliver to the client ….the funds, securities, or other properties in the possession of the lawyer which such person is entitled to receive."

This committee has previously made reference in various LEOs to the term "irrevocably credited" when referring to the appropriate designation of funds available to be ethically disbursed to clients.[1] LEO 1255 clearly states this committee's continuing opinion on the correct timing of disbursement of funds.[2] As the requester correctly states, the term "irrevocably credited" has no legal definition, however, the committee continues to opine that, in spite of past terminology, the funds must be deposited into the lawyer's trust account, credited to the account, and be "cleared" funds that are available for withdrawal and disbursement with no chance of revocation or recall by the financial institution. As the requester has advised, the determination of when funds actually meet

[1] LEOs 183, 1021, 1255, 1256, 1797.

[2] While the disciplinary rule establishes an affirmative duty to pass funds to a party or the parties entitled to the funds, it implicitly prohibits payment of funds from an escrow account to the party who is *not or not yet* entitled to the funds. (emphasis added) Thus, a strict interpretation would require an attorney not to disburse upon items deposited in his trust account until the depository bank had irrevocably credited them to that account. (See LE Op. 183, LE Op. 753 and LE Op. 813) It is well established that an attorney assumes a strict fiduciary responsibility when he holds money belonging to the client. (See *Pickus v. Virginia State Bar*, 232 Va. 5 (1986)). LEO 1255

that standard is determined by federal banking regulations and is a legal issue outside the purview of this committee.[3]

Additionally, the question distinguishes those funds held in a commingled trust account from those funds held in a trust account exclusively for one client. The answer remains the same.

The answer to the second question is not required since the answer to the first question deemed such disbursements to be improper and the second question seems to involve legal concepts outside the purview of this committee.

This opinion is advisory only, based on the facts presented and not binding on any court or tribunal.

[3] The requester accurately states that the amount of time a bank is permitted to hold funds before making the funds available for withdrawal is governed by a federal statute called the Expedited Funds Availability Act, 12 U.S.C. § 4001, *et seq.* (the "EFA"). The EFA places "upper limits" on the amount of time banks are permitted to hold different categories of payment instruments before making the funds available for withdrawal.