

State of Michigan  
In the Supreme Court

Grievance Administrator,  
Attorney Grievance Commission,  
State of Michigan,

Petitioner/Appellee,

Supreme Court No. 135053  
ADB Case No. 06-36-GA

v

Patricia A. Cooper, P-37389,

Respondent/Appellant.

---

135053

PETITIONER/APPELLEE'S BRIEF IN RESPONSE TO  
RESPONDENT/APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

ROBERT L. AGACINSKI, P-10065  
Grievance Administrator

RUTHANN STEVENS, P-39042  
Senior Associate Counsel  
Attorney Grievance Commission  
Suite 256, Marquette Building  
243 West Congress  
Detroit, Michigan 48226  
(313) 961-6585

**FILED**

NOV 5 2007

CORBIN R. DAVIS  
CLERK  
MICHIGAN SUPREME COURT

**Table of Contents**

	<u><b>Page</b></u>
Index of Authorities.....	ii
Counter-Question Presented For Review.....	iii
Statement of Facts and Proceedings.....	2
Argument.....	3
Did the Attorney Discipline Board abuse their discretion in deciding that Respondent's fee agreement constituted a fee paid in advance for services to be rendered, and therefore refundable as to the unearned portion?	
Conclusion.....	7

**Index of Authorities**

<b><u>Cases</u></b>	<b><u>Pages</u></b>
<i>Grievance Administrator v August</i> 438 Mich 296 (ADB 1991).....	1
<i>Grievance Administrator v Harry R. Boffman</i> 03-135-GA (ADB 2005).....	5
<i>Grievance Administrator v Wilbourne Kelly</i> 96-162-GA (ADB 1997).....	3
<i>Grievance Administrator v James T. Macauley</i> 04-153-GA (ADB 2004).....	3
<i>Grievance Administrator v Otis Underwood</i> 99-58-GA (ADB 2001).....	1
<i>Grievance Administrator v Diane Xagoraris</i> 92-123-GA (ADB 1993).....	3

**Court Rules and Others**

MRPC 1.5(a).....	4, 5, 6
------------------	---------

**Counter-Question Presented For Review**

- I. **Did the Attorney Discipline Board abuse their discretion in deciding that Respondent's fee agreement constituted a fee paid in advance for services to be rendered, and therefore refundable as to the unearned portion:**

Petitioner/Appellee answers "no".

Respondent/Appellant answers "yes".

**State of Michigan**  
**Attorney Discipline Board**

**Grievance Administrator,  
Attorney Grievance Commission,  
State of Michigan,**

Petitioner/Appellee

**ADB Case No. 06-36-GA  
Supreme Court No. 135053**

**v**

**Patricia M. Cooper, P-37389,**

Respondent/Appellant

---

**Standard of Review**

On review, the findings of the Hearing Panel and the Attorney Discipline Board are to be reviewed for proper evidentiary support on the whole record. In cases where there is no challenge to the factual findings of the hearing panel, but rather to the panel's ultimate determination, the Board possesses a measure of discretion with regard to its ultimate decision. *Grievance Administrator v August*, 438 Mich 296, 304 (1991).

## Statement of Facts and Proceedings

The facts in this matter are relatively undisputed. On July 29, 2002, Respondent was retained by Kaisra Sheikh in regard to a possible divorce. (R's Ans. to F.C. ¶ 4). Respondent charged and collected a fee of \$4,000 on that date. (Id). Ms. Sheikh executed a contract with Respondent which contained the provision that "NO portion of the MINIMUM FEE referred to above is REFUNDABLE to the client under any circumstances." (Id). The fee agreement further stated that the minimum fee entitled the client to an amount of attorney time computed at an hourly rate. (P's Ex. 2).

On or about August 19, 2002, Ms. Sheikh advised Ms. Cooper that she and her husband had reconciled. (6/14/06 Tr. p 79). On that date, Ms. Sheikh requested that Respondent provide a statement of services and a refund of any unearned fees. (R's Ans. to F.C. ¶ 8). On or about October 22, 2002, Respondent provided Ms. Sheikh with a billing statement indicating that she had earned \$1,228.50 of the fee paid. (P's Ex. 3). Respondent provided Ms. Sheikh with a partial refund of \$1,385.75, which sum represented half of the unearned portion of the fee. (R's Ex. B).

On April 4, 2006, a one-count Formal Complaint was issued. The Formal Complaint alleged that Respondent charged a clearly excessive fee for the work performed on her client's matter and failed to refund an unearned fee.

The hearing on misconduct was held on June 14, 2006. Evidence was presented and testimony was taken from Respondent and Ms. Sheikh. At the conclusion of the hearing, the matter was taken under advisement by the Hearing Panel. On August 1, 2006, the Hearing Panel's Order of Dismissal was entered by the Attorney Discipline Board.

On August 18, 2006, Petitioner/Appellee filed a Petition for Review with the Attorney Discipline Board. The Hearing on Petitioner's appeal was held on December 7, 2006. On September 17, 2007, the Board issued their opinion and order vacating the dismissal of the matter and finding that Respondent had committed misconduct. Due to the circumstances presented in the case, the Board determined that an order of no discipline was warranted. Respondent was ordered to pay restitution to her client in the amount of the unearned fee.

### Argument

**The Attorney Discipline Board abused their discretion in deciding that Respondent's fee agreement constituted a fee paid in advance for services to be rendered, and therefore refundable as to the unearned portion.**

It has been said that there is nothing new under the sun. The requirement that an attorney return unearned fees at the conclusion of a representation is not a novel concept in the disciplinary system. (See *Grievance Administrator v Diane Xagoraris*, ADB Case No. 92-123-GA, 1993, *Grievance Administrator v Wilbourne Kelly*, ADB Case No. 96-162-GA, 1997, *Grievance Administrator v James T. Macauley*, ADB Case No. 04-153-GA, 2004). However, the issue of what constitutes a "non-refundable retainer agreement" has been the subject of recent disciplinary decisions in Michigan. To that end, the Board's decision in this case provides a well-reasoned and thorough explanation of the case law, Michigan Rules of Professional Conduct and ethics opinions which preceded this case. The Board's decision is clear as to what constitutes

a true general retainer and what constitutes a fee paid in advance. The Board's definition of these concepts was simply stated:

"It is now clear that fees paid in advance for services to be performed in the future are refundable if unearned. And use of the term "nonrefundable" in fee agreements providing that a sum paid will be earned by the rendering of legal services does not convert such a deposit (advance fee) into a general retainer." (9/17/07 Order, p 29).

Two cases which were extensively argued by Petitioner and Respondent were discussed by the Board in their opinion. The first case, *Grievance Administrator v Otis A. Underwood*, ADB Case No. 99-58-GA, was issued July 26, 2001. In *Underwood*, the Board determined that the issue of Respondent's non-refundable retainer need not be decided, as the fee charged and collected by the Respondent was earned by the work he performed. However, the Board discussed the issue of the term "non-refundable retainer" in their opinion, stating:

"...the term "non-refundable retainer" is misleading. For *all* fees – hourly, fixed, contingent, and even those denominated as "non-refundable" – are subject to MRPC 1.5(a)'s standards". (Emphasis in original *Underwood*, p 5).

MRPC 1.5(a) requires that all fees be reasonable under the circumstances. In *Underwood*, the Board discussed the "reasonableness" requirement of MRPC 1.5 by citing Geoffrey C. Hazard, Jr. and W. William Hodes, *The Law of Lawyering* (3<sup>rd</sup> ed), §8.5, p 8.3:

"...an initial (minimum) fee of \$5,000 for routine services would almost certainly be found to be unreasonable by most courts and disciplinary authorities if the lawyer did little legal work and refused to refund part of the money." (*Underwood*, p 5).

In the case at hand, Respondent charged a \$4,000 “minimum” fee for what the Board determined was not a complex matter as was alleged by Respondent. (9/17/07 Order, p 19). The Board stated that “we must observe that, as a matter of law, this representation does not begin to approach the level of complexity” required to establish Respondent’s claim that the unearned fee was not subject to refund. (9/17/07 Order, p 9). The issue of non-refundable retainers was also discussed in *Grievance Administrator v Harry R. Boffman*, ADB Case No. 03-135-GA, 2005. Although Boffman was likewise not decided on the issue of nonrefundability, but instead on where client funds should be held, there was discussion about the definition of a “general” retainer as opposed to fees paid in advance for services to be rendered. Attorney Boffman’s retainer agreement stated that the fee paid by his client would entitle the client to 50 hours of attorney time. (*Boffman*, p 2). The Board found that this language clearly indicated that the fee paid by the client was for services to be rendered, and would therefore be subject to refund if such services were not, in fact, rendered. (*Boffman* p 10).

Respondent’s fee agreement indicated that the fee paid by her client entitled the client to “a combined attorney and legal assistant time computed in accordance with the hourly rate set forth in Paragraph 3 below.” (P’s Ex. 2). The Board held that the language employed by Respondent in her contract entitled her client to a “certain amount of hours devoted to legal services,” and was therefore a fee paid in advance for services to be rendered. (9/17/07 Order, p 6).

The Board also extensively explained the impact of Informal Ethics Opinion RI-10 in conjunction with MRPC 1.5(a). This discussion was included due to Respondent’s

“reliance” on it when determining whether a refund was due her client. (9/17/07 Order, p 17). In deciding this issue, the Board exhaustively discussed how RI-10 applied to this matter, and why the facts elicited at the hearing on this matter did not substantiate Respondent’s claim that RI-10 supported her position. Respondent relied on four factors derived from MRPC 1.5(a) to justify her position that her minimum fee agreement entitled her to keep the unearned portion of the fee she charged her client.

Those factors, simply stated, are:

- 1) the complexity of the matter;
- 2) the likelihood that accepting the case would preclude other employment;
- 3) time limitations imposed by the client; and,
- 4) experience and reputation of the attorney.

The Board found that these factors were not substantiated by the evidence. (9/17/07 Order, p 26). The divorce matter was not complex (9/17/07 Order, p 19), there was no evidence to establish that Respondent’s involvement in this matter would preclude her retention in other matters (9/17/07 Order, p 22) and no “other factors” were evident from the record which would substantiate Respondent’s claim (9/17/07 Order, p 23). The Board concluded that “these ethics opinions arguably should have apprised Respondent that her client was entitled to a refund.” (9/17/07 Order, p 28).

The decision issued by the Attorney Discipline Board is well-reasoned and articulate. The Board found that Respondent should have been able to discern from the Ethics opinions she cited that the fee she charged was subject to refund if all the services contracted for were not provided. The Board reasoned that, based on the circumstances, an order of no discipline was warranted in this case. There is no compelling reason for this court to grant leave to appeal in this case.

**Conclusion**

Wherefore, Petitioner/Appellee respectfully requests that this Honorable Court deny Respondent/Appellant's application for leave to appeal.

Dated: November 2, 2007

  
Ruthann Stevens, P39042  
Senior Associate Counsel  
Attorney Grievance Commission  
243 West Congress, Suite 256  
Detroit, MI 48226  
(313) 961-6585