

**State of Michigan
In the Supreme Court**

Appeal from the Attorney Discipline Board

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

Petitioner/Appellee,

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

v

Patricia M. Cooper, P-37389,

Respondent/Appellant.

**PETITIONER/APPELLEE'S SUPPLEMENTAL BRIEF IN OPPOSITION 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

TABLE OF CONTENTS

	<u>Page</u>
Index of Authorities.....	ii
Statement of Questions Involved.....	iii
Counter-Statement of Facts.....	1

Arguments

I. The Attorney Discipline Board did not err in holding that the Respondent’s fee agreement was ambiguous as to whether the \$4,000 minimum fee was refundable.....	2
II. Both the Fee agreement, and Respondent’s partial retention of the minimum fee after the client terminated the relationship, violate MRPC 1.5(a), MRPC 1.15(b) or 1.16(d).....	4
III. The Attorney Discipline Board did not err in finding the Respondent guilty of violating the Rules of Professional Conduct and/or in declining to make the ruling prospective only	8
 Conclusion.....	 12

INDEX OF AUTHORITIES

Cases

Page

Grievance Administrator v Boffman, ADB Case No. 03-135-GA(2005)... 3, 9, 11
Grievance Administrator v Cooper, ADB Case No. 06-36-GA, Bd opinion..... 15
In Re Sather, 3 P 3rd, 403, 410 (2000)..... 9

Court Rules and Others

MRPC 1.5(a)..... 4, 8, 11, 12
MRPC 1.15(b)..... 4, 12
MRPC 1.15(b)(3)..... 6
MRPC 1.16(d)..... 4, 12
Formal Ethics Opinion R-7..... 8, 9
Informal Ethics Opinion RI-10..... 3, 8, 9, 10, 11
Informal Ethics Opinion RI-69..... 10, 11
Informal Ethics Opinion RI-162..... 11

STATEMENT OF QUESTIONS INVOLVED

- I. **Did the Attorney Discipline Board err in holding that the Respondent's fee agreement was ambiguous as to whether the \$4,000 minimum fee was refundable?**

Petitioner/Appellee responds: NO

- II. **Did either the fee agreement, or Respondent's partial retention of the minimum fee after the client terminated the relationship, violate MRPC 1.5(a), MRPC 1.15(b) or 1.16(d)?**

Petitioner/Appellee responds: YES

- III. **Did the Attorney Discipline Board err in finding the Respondent guilty of violating the Rules of Professional Conduct and/or in declining to make the ruling prospective only, in light of:**

- a) **its acknowledgments that it "provided something less than coherent guidance," and that "it was only recently, and only in a [September 29,2005] memo to the Michigan Supreme Court that we expressed the view that there really is no such thing as a non-refundable retainer,"**
- b) **the lack of record evidence that such a memorandum was provided to the Respondent, and,**
- c) **the fact that "a lawyer of ordinary prudence," at the time the agreement was executed on July 29,2002, must have been "left with a definite and firm conviction that the fee is in excess of a reasonable fee" in order for the ADB to find a violation of MRPC 1.5(a).**

Petitioner/Appellee responds: NO

Counter-Statement of Facts

On April 4, 2006, a Formal Complaint was filed alleging that Respondent charged an excessive fee and failed to refund an unearned fee. (Appellees's Appendix, p 1b). On June 14, 2006, a hearing on this matter was held.

By order of the Panel hearing this matter, the Attorney Discipline Board issued an order on August 1, 2006 dismissing the Formal Complaint. (App., p 9b).

On August 18, 2006, the Grievance Administrator filed a conditional petition for review with the Attorney Discipline Board. On October 6, 2006, the Grievance Administrator filed a brief in support of the appeal. On October 27, 2006, Respondent filed a brief in response opposing the Grievance Administrator's appeal. Oral argument on the matter was held before the Attorney Discipline Board on December 7, 2006.

On September 7, 2007, the Attorney Discipline Board vacated the order of dismissal, finding that Respondent committed misconduct. The Board entered an order of no discipline, and further ordered Respondent to pay restitution. (App., p 11b). On October 12, 2007, Respondent filed an application for leave to appeal the order of the Attorney Discipline Board with this Court. The court has instructed the parties to address specific issues in the briefs submitted. Petitioner/Appellee addresses these issues as requested.

Argument

I.

The Attorney Discipline Board did not err in holding that the Respondent's fee agreement was ambiguous as to whether the \$4,000 minimum fee was refundable.

Respondent's fee agreement contains the following provisions:

- 1) Client agrees to pay Attorney a MINIMUM FEE OF \$4,000 which shall be payable as follows:

Retainer	<u>\$4,000</u>
Balance	<u>\$ 0</u>

This MINIMUM FEE shall entitle Client to a combined amount of Attorney and Legal Assistant time computed in accordance with the hourly rate set forth in Paragraph 3 below. (emphasis added)

- 2) Client understands that NO portion of the MINIMUM FEE referred to above is REFUNDABLE, to the client, under any circumstances.
- 3) Hourly rate: Attorney \$195.00
Assistant \$ _____

(App., p 43b).

The ambiguity Respondent created by these three paragraphs renders her fee agreement unethical and unenforceable. According to paragraph one of Respondent's fee agreement, the minimum fee entitles the client to a certain ascertainable amount of work at a certain rate of pay. But, paragraph two says the client is **not** entitled to anything for the money paid as a retainer. What, then, was the client purchasing, if anything? Was the client purchasing merely the right to have the attorney's full attention by virtue of the retainer, or was the client actually purchasing a set amount of attorney time devoted to her case? Clients are entitled to know exactly what they are purchasing.

Respondent claims she reviewed Informal Ethics Opinion RI-10 on October 24, 2002, to determine whether her fee agreement comported with ethical requirements. (App., pp 80b-81b). If Respondent had actually read the text of that opinion, she would have discovered that her fee agreement must unambiguously articulate that the lump sum retainer she requested purchased something in addition to a fixed amount of lawyer hours. (App., p 88b). In the instant case, there is no indication from the remainder of the body of Respondent's fee agreement to specify that the client was purchasing anything other than a fixed amount of lawyer hours. The ambiguity in Respondent's fee agreement serves only the Respondent's interests, in that it deters her client from terminating their agreement. Respondent's fee agreement, in essence, imposed a financial penalty upon her client if she chose to terminate the attorney-client relationship before the work that was contemplated was finished.

It is made clear by RI-10 that "The client's understanding of what the retainer is buying is crucial...if the written fee agreement is ambiguous, or if the client is unsophisticated or uneducated, the risk that the retention agreement will be misunderstood by the client, and subsequently viewed as an unconscionable exploitation of the client, must be borne by the lawyer." (App., p 90b).

The Board emphasized the importance that the client understands the agreement he/she is entering into in *Grievance Administrator v Boffman*, ADB Case No. 03-135-GA (2005). (App., p 94b). In *Boffman*, the Board held that "An ambiguous writing must be construed against the party who drafted it. This rule of construction applies when attorneys draft fee agreements." (App., p 102b). (Citations omitted).

Paragraph one of Respondent's retainer agreement states that the client was purchasing a definite amount of the attorney's time as well as her staff's time for services to be performed in the future. Paragraph two then does an about face and states that the client really was not purchasing anything at all. The ambiguity in this fee agreement could not be any more apparent.

II.

Both the fee agreement, and Respondent's partial retention of the minimum fee after the client terminated the relationship, violate MRPC 1.5(a), MRPC 1.15(b) or 1.16(d).

MRPC 1.5(a) states:

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

The fee agreement prepared by Respondent violated MRPC 1.5(a) because Respondent caused her client to enter into a contract that could result in the collection of an excessive fee. It is clear that Respondent intended to keep the entire retainer whether or not she performed any work for her client. The client, however, was led to believe that a certain amount of work was going to be performed for the fee she had paid. Respondent's client was not informed that anything was being purchased other than a set amount of Respondent's time. A client must understand the value they are receiving for the fee they paid. In this case, the value to the client purports to be the hours of work outlined in the first paragraph of the fee agreement. The fee agreement

prepared by Respondent did not provide her client with any ascertainable value other than the hours of work promised in the first paragraph.

The impropriety of entering into the fee agreement was then compounded by Respondent's attempt to "charge and collect" the unearned fee. Respondent's failure to return the portion of the fee that was not earned is the same as "charging" or "collecting" a fee. If Respondent had **not** attempted to enforce the portion of her fee agreement requiring that her client forfeit the unearned portion of the fee, this matter might never have necessitated a formal complaint. Respondent's conduct in entering into the agreement with her client could have been mitigated by modifying her agreement and returning the unearned portion of the fee to her client.

Respondent's own billing statement clearly shows that she earned only \$1228.50 of the \$4,000 paid by her client. (App., pp 111b-112b). Paragraph one of Respondent's retainer agreement called for the retainer to be billed against as fees were earned. Respondent returned exactly one-half of the unearned retainer to her client. She supposedly did this as a "courtesy", and not because she was obligated to do so by the Rules of Professional Conduct. (App., p 110b).

Respondent's conduct violated MRPC 1.5(a), in that she first entered into a contract with her client which could result in a clearly excessive fee, and then failed to refund the unearned portion of the fee upon her termination.

MRPC 1.15(b) states:

A lawyer shall:

- (1) promptly notify the client or third person when funds or property in which a client or third person has an interest is received;
- (2) preserve complete records of such account funds and other property for a period of five years after termination of the representation; and,
- (3) promptly pay out or deliver any funds or other property that the client or third person is entitled to receive, except as stated in this rule or otherwise permitted by law or by agreement with the client or third person, and, upon request by the client or third person, promptly render a full accounting regarding such property.

Respondent's conduct violated MRPC 1.15(b)(3) in that she failed to promptly deliver the funds that she had not earned to her client and failed to promptly respond to her client's request for an accounting.

Respondent admitted in her answer to the Formal Complaint that her client terminated her services and requested an accounting on or about August 19, 2002. (App., p 6b). Respondent's client testified that she called Respondent numerous times following her initial request for an accounting and refund without response from Respondent. (App., p 66b). Finally, on October 22, 2002, more than two months after the initial request, Respondent answered these repeated requests by sending her client a billing statement and a partial refund of one-half of the unearned fees. (App., p 110b).

Respondent's lack of any response at all to her former client's inquiries for two months following the termination of their relationship reveals Respondent's indifference to her former client, and her conscious refusal to address the issue of the refund due to her client.

Two days after providing her client with an accounting and partial refund, Respondent researched ethics opinions regarding her duty to her client. At this point, Respondent had been informed by her client that it was unethical for her to retain the unearned portion of the fee (App., p 113b). There is no evidence that Respondent made any efforts prior to this time to explore what, if anything, she was obligated to do. The court rules require a “prompt” response to a client’s request for an accounting. Respondent took over two months to even explore her obligations. Thereafter, she explored what she was ethically bound to do in regard to these fees, but only after being informed of her obligations by her client. Although she explored her ethical obligations, she failed to act to correct her conduct.

Respondent to this day still has not refunded the unearned portion of the fee paid by her client. Respondent’s failure to promptly provide an accounting of her fees, as well as her failure to refund the unearned portion of the fee constitute violations of MRPC 1.15(b)(3).

MRPC 1.16(d) states:

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

As stated previously, Respondent’s fee agreement guaranteed that the retainer would be billed against at Respondent’s hourly rate as work was done on the client’s matter. By virtue of this clause in her agreement, the retainer paid by the client was a

fee paid in advance for work to be performed in the future. Respondent's billing statement plainly shows she did not earn all of the fees paid by her client. Respondent was required to refund the advance payment of fees that she failed to earn.

III.

The Attorney Discipline Board did not err in finding the Respondent guilty of violating the Rules of Professional Conduct and/or in declining to make the ruling prospective only, in light of:

- a) **its acknowledgments that it “provided something less than coherent guidance,” and that “it was only recently, and only in a [September 29,2005] memo to the Michigan Supreme Court that we expressed the view that there really is no such thing as a non-refundable retainer,”**
- b) **the lack of record evidence that such a memorandum was provided to the Respondent, and,**
- c) **the fact that “a lawyer of ordinary prudence,” at the time the agreement was executed on July 29,2002, must have been “left with a definite and firm conviction that the fee is in excess of a reasonable fee” in order for the ADB to find a violation of MRPC 1.5(a).**

Although the Board said that they had provided “something less than coherent guidance” as to the issue of attorney fees, they also acknowledged that an attorney's duties in regard to fees “are hardly new”. (App., p 27b). In their opinion the Board provided a lengthy explanation of Informal Ethics Opinion RI-10 and and Formal Ethics Opinion R-7 and noted that these ethics opinions have been in existence since 1989 and 1990 respectively.

In 1990, Formal Ethics Opinion R-7 was issued due to the “lack of guidance for Michigan lawyers....concerning ethical requirements applicable to the establishment and maintenance of lawyer trust accounts for the deposit of funds belonging to clients and other persons.” (App., p 115b). In their discussion of “non-refundable retainers”, the Committee stated, “If any portion of the retainer is unearned because it is paid in advance for legal services to be performed in the future on an hourly, flat or percentage basis, the retainer has not been earned and is not a non-refundable retainer.” (App., p 121b).

As stated previously, RI-10, (which Respondent claimed to have reviewed) clearly indicates that a lump sum retainer may be earned upon receipt **if** the agreement unambiguously articulates that the fee paid by the client purchases something in addition to a fixed amount of lawyer hours. There is no mention in Respondent’s fee agreement that her client was purchasing anything other than a fixed amount of attorney hours.

In *Grievance Administrator v Boffman*, the Board discussed “general,” “true” or “classic” retainers, which are earned upon receipt and therefore can be considered “non-refundable.” (App., p 102b). *Boffman* distinguishes those types of retainers from fees paid in advance for services to be rendered in the future. The language contained in the fee agreement in *Boffman* was similar to the language used by Respondent in this matter. In *Boffman*, the Board noted that “There is no mention of securing respondent’s availability or any other benefit to the client or detriment to the lawyer which might serve to create, or be recognized as justifying, a general retainer.” (Citing *In Re Sather*, 3 P 3rd 403, 410 (2000)). (App., p 103b).

In 2005, in response to this Court's request for comment or instruction regarding possible Michigan Court Rule changes, a memo was prepared by the Board regarding the issue of fees. (App., p 123b). The memo to the court was written in reference to proposed court rule changes and not for the edification of attorneys. However, the mere fact that this memo itself was not directed to Respondent does not negate that fact that the principles upon which the memo was written were readily available to Respondent. In fact, Respondent says she reviewed RI-69 and RI-10 which were discussed in the Attorney Discipline Board's memo to the court. The Board's memo to the Court did not create new law about non-refundable retainers. It merely clarified what the court rules already required of attorneys, and made suggestions as to how these requirements can be more accurately expressed in any revisions to the court rules.

When the fee agreement in this case was entered into, Respondent should have been aware of the ambiguity which could allow her to charge and collect an excessive fee if she was discharged prematurely. A lawyer of ordinary prudence would conclude that Respondent's fee agreement was ambiguous as to its terms, provided no discernable value to the client if the hours of work were not performed and could result in an excessive fee should the attorney be discharged or the matter resolved prematurely.

Respondent not only prepared an unethical fee agreement, she executed the unethical clause in her contract by force. The fees were already in her possession. She did not sue to collect them, but merely kept what was not hers to keep, and let her client suffer the burden of trying to prove to her that her conduct was unacceptable.

The record in this case reveals that Respondent was well aware during the investigative stage of the grievance that was filed, that the issue of her fee agreement was the focus of the investigation. (App., pp 59b-60b). Respondent admits that she researched the issue before the grievance was filed. Had Respondent comprehended the case law and ethics opinions on the subject, she would have come to the conclusion that her fee agreement was ambiguous, and therefore could not be enforced, and to do so or attempt to do so would constitute misconduct.

The ethics opinions Respondent relied on clearly established that merely calling a fee non-refundable does not necessarily make it so. The “ethical focus always should be whether, under the totality of the circumstances, the fee agreement is reasonable, notwithstanding the adjectives used to label it.” (App., p 93b). Respondent said she researched RI-10, (App., p 88b), RI-69 (App., p 137b) and RI-162 (App., p 141b). Any one of these opinions would have warned Respondent that her fee agreement constituted a fee for services to be performed in the future and therefore not a non-refundable retainer. As stated previously, a fee agreement cannot be ambiguous as to what the client is purchasing. If the fee agreement is ambiguous, the agreement **must** be interpreted in favor of the client.


It is easy for an attorney to fail to act. It is another thing altogether to act responsibly, do the research that is required, understand the issues and the law, and react accordingly. In the case at hand, Respondent was advised repeatedly about concerns raised by her fee agreement. She was informed by the Attorney Grievance Commission during the investigation of the underlying grievance that her conduct in regard to her fee agreement and the partial refund she tendered was not appropriate.

Respondent's conduct violated MRPC 1.5(a) at the time the fee agreement was entered into and, more egregiously, at the time she "charged or collected" the fee after her services were terminated.

Conclusion

The fee agreement Respondent prepared and executed with her client was inappropriate in that it was ambiguous as to what the client was purchasing for the fees paid. Respondent's fee agreement did not specify that her client was purchasing anything other than Respondent's time and efforts. Respondent's conduct in entering into this agreement and then enforcing it violated misconduct under MRPC 1.5(a), 1.15(b)(3) and 1.16(d). Respondent's application for leave to appeal should therefore be denied.

Dated: September 4, 2008



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