May 2024

THE CLIENT PROTECTION WEBB*

A Publication of the
National Client Protection Organization

**The Client Protection Webb is published in memory of Gilbert A. Webb, Esq., who served as Assistant Client Protection Counsel for the American Bar Association's Center for Professional Responsibility. Mr. Webb was dedicated to protecting the welfare of clients victimized by their attorneys and served as an editor of the ABA's first client protection newsletter.*

Submissions to the Webb are always welcome. Please send them to the editor, Mike McCormick at Michael.McCormick@judiciary.state.nj.us.

On the Road Again

By
Michael T. McCormick, Esq.

ABA Forum & NCPO Workshop Registrations Open

The ABA Standing Committee on Public Protection in the Provision of Legal Services (PPPLS Committee) invites you to attend its 39th National Client Protection Forum.

The 2024 Forum will be held at the Grand Hyatt Denver in Denver, CO, May 31-June 1, 2024.

The Forum offers cutting edge educational programming and networking opportunities for Client Protection Fund administrators, directors, board members, trustees, staff, and others from the Client Protection community. Don't miss the opportunity to be a part of the conversation, share ideas, and innovate with colleagues from across the United States and Canada. Registration information and further details can be found on the Forum registration page. Note that "early bird" registration discounts end on April 30, 2024.

The ABA has reserved a block of rooms at the Grand Hyatt Denver for Forum attendees. Room reservations can be made via the ABA room-block link or by calling (303) 295-1234. If making your reservation over the phone, please mention the ABA Forum to ensure you receive the correct rate. Rooms are limited and must be booked by Tuesday, May 7, 2024 to ensure the ABA rate.

Please contact Annie Kuhlman annie.kulman@americanbar.org or Stephanie Custard stephanie.custard@americanbar.org with any Forum related questions. We look forward to seeing you in Denver!

Plans are also well underway for NCPO's annual workshop, which will be held in Virginia Beach on September 19 and 20, 2024. Many funds appear to be experiencing an increase in filed claims. The workshop agenda is designed to help us meet the challenges of more claims, litigation and funding concerns with the same (or less) resources. Here are some of the panel topics planned for this year's workshop:

- Bankruptcy Law and emerging trends in collections;
- Marketing your fund;
- P2P Platforms – How they work and their claims implications;
- Lawyers Handling Other People's Money
- NCPO's annual meeting, dinner and presentation of the Isaac Hecht Award

Register for the NCPO workshop here: https://www.ncpo.org/2024-ncpo-workshop. Discounted room reservations have been arranged at the workshop venue, the Hilton Garden Inn on the beach. Book your room at https://www.hilton.com/en/attend-my-event/orfbogi-ncpo-b81a2007-44c0-4eed-95fa-54004409ad68/. Both conferences will offer CLE credits to attendees accepted in their respective jurisdictions. There will also be plenty of opportunities for great networking in unique & exciting cities.

NCPO wants your fund to be able to attend the annual workshop. It's an invaluable experience amongst colleagues committed to client protection. We recognize that some funds may not have the resources to attend, but we don't want that to stand in your way. NCPO will help cover up to $1,000 in traveling expenses to the Virginia Beach workshop through its Workshop Assistance Program.

Apply at https://www.ncpo.org/_files/ugd/289ac3_d4d27149550f43fbae05a62613dbffa0.pdf so that we can see you in Virginia Beach!

WE NEED YOU!

NCPO Kicks Off Annual Membership Drive

It's that time of year again – By now you've received an email from Trinity Braun-Arana, NCPO's membership chair and Director of the Iowa Clients' Security Commission, asking you to renew your NCPO membership for 2024-25. NCPO offers members the support needed to strengthen funds and their ability to serve client victims. Workshops, this newsletter, grants, rule changes, loss prevention legislation, trustee and staff training, case management systems, form and precedent libraries – they're all ways NCPO can help. Most of all, members support one another with generations of experience and the great guidance they can offer each other as a result.

Individual membership is just $25 and your entire fund can join for only $200. If you haven't yet received your renewal email, please let Trinity know at Trinity.Braun-Arana@iowacourts.gov. You can also visit www.ncpo.org/membership to become a member – You'll be glad you did!

Nominations Open for 2024 Isaac Hecht Award

The Hecht Award is granted annually to recognize an individual, law client protection fund, or other professional organization that has demonstrated excellence in the field of law client protection.

The Isaac Hecht award honors the memory of one of NCPO's co-founders, who practiced law in Maryland for 64 years before his death in 2003 at the age of 89. Mr. Hecht served as Treasurer of Maryland's Fund since its creation in 1967. He was committed to the belief that the trust of law clients is the essential linchpin in every lawyer-client relationship, and that the reimbursement of innocent victims of lawyer dishonesty represents the legal profession at its best.

Mr. Hecht was especially focused on the financial foundations of client protection funds, the initiatives of fund leaders, and their receptivity to techniques to deter and detect dishonest conduct in the practice of law.

To nominate a future Hecht award recipient, visit https://www.ncpo.org/nomination or contact Mike McCormick at Michael.mccormick@njcourts.gov.

Rhode Island Returns

RHODE ISLAND Bar Association 1898

Welcome back to the Rhode Island Client Reimbursement Fund and its Executive Director Kathleen Bridge -- https://ribar.com/for-the-public/client-reimbursement-fund/.

The Rhode Island Fund has re-joined NCPO after a few years, thanks to an invitation from NCPO's regional vice president, Linda Bauer, who is also the Executive Director of the Massachusetts Clients' Security Board. The Rhode Island and Massachusetts funds are working through problems created by a respondent admitted in both jurisdictions.

The wrinkle of multijurisdictional claims comes up from time to time, perhaps most recently in the matter of Michael Kwasnik, a member of both the Pennsylvania and New Jersey bars, who stole $13 million from his clients. How to collaborate with a neighboring fund will undoubtedly be a discussion topic at both the ABA Forum and NCPO Workshop this year.

Is it time for a Federal Fund?

By Michael T. McCormick, Esq.
NCPO President

After 248 years, still they come – by the millions from far corners of the globe in search of the freedom and prosperity our nation promises. The vicissitudes of the system these immigrants encounter when they enter our country is clearly beyond the scope of both this article and the mission of NCPO. There are, however, client protection consequences to the arduous process through which we currently integrate the wayward into our society. Once here, many become law clients who spend years waiting for multiple petitions, hearings and proceedings. Their knowledge of both the process and the language is likely limited. They are vulnerable, and perhaps desperate.

With increasing frequency, some of our funds are facing claims that have originated in immigration cases gone wrong. There is no indication that the incidence of dishonesty in the immigration bar is any greater than it is in the general population of attorneys – about one-half of one percent. There is, however, a troubling jurisdictional gap in client protection fund coverage that has come to light through these claims: The immigration bar is national – Once admitted to one state's bar, a practitioner can be admitted to practice immigration law in any state, even those in which he or she is not also admitted to the state bar.

By contrast, funds almost universally require admission to their state's bar as a jurisdictional prerequisite to making an award. Thus, when a California attorney, for example, absconds with a retainer in an immigration matter in New Jersey, the New Jersey Fund cannot return that unearned retainer, since the attorney is not also admitted to the New Jersey Bar. Most funds also require that the dishonest conduct arise from the practice of law in their jurisdiction, so in this example, it is also unlikely that the California Fund could step in to set matters to right, since the dishonest conduct occurred 3,000 miles beyond its borders.

Victimized clients struggling with immigration cases probably will not grasp these nuances of client protection fund jurisdiction. Their priority is the recovery of a retainer (or other monies) they may need to pay successor counsel and continue to build their new lives in the U.S. Expanding individual fund jurisdictions to bridge the federal immigration bar gap opens a pandora's box of issues into which no one wants to wade. Perhaps the solution is a "Federal Fund" designed to cover just such instances of attorney theft that fall outside the ability of most state funds to address.

We've reached out to the American Immigration Lawyers Association to begin a conversation on possible ways to address this latest wrinkle in client protection. We also welcome your thoughts on the issue. In the end, effective client protection means being able to redress those few wrongs of our errant colleagues wherever they occur in whatever area of the law. A "Federal Fund" may help us to bridge the gap for those new to our shores whose first experiences in the practice of law are the exception instead of the ideal.

Funds in Action

Ohio Fund Awards over $266,000

The Ohio Board of Commissioners of the Lawyers' Fund for Client Protection recently reimbursed $266,758.17 to 17 victims of attorney theft by five respondents. Claim awards arose from unearned retainers as well as an investment matter and one deceased attorney's failure to disburse $100,000 to a client prior to his death.

Ohio has more than 45,000 attorneys engaged in the active practice of law. Less than one percent (1%) of those attorneys is involved in claims reimbursed by the fund.

New York Fund's Annual Report Details $6.1 Million in 2023 Awards

The New York Lawyers' Fund for Client Protection last year paid out $6.1 million in reimbursements to law clients, according to the organization's 2023 annual report.The principal source of revenue for the Fund is a $30 per year contribution from the attorney registration fee paid by more than 353,000 lawyers in the state. The Fund does not receive any taxpayer money. The Fund also receives revenue from attorney restitution payments, judicial sanctions, and donations.

Last year, 249 claims were filed with the Fund and 72 awards were approved for law clients. Since the Fund was created in 1982, the Fund has awarded more than $258 million. During that period, the Fund has rejected $783.6 million in claims. There is a $400,000 limit on reimbursement awards from the Fund.
The 72 approved awards last year is a decrease from 2022, when 133 awards were paid totaling $9.8 million.

The 2023 awards were the result of 23 suspended, disbarred, or deceased lawyers. Of those 23, 11 appeared for the first time in 2023. Examples of the losses covered by the Fund include theft of real estate escrow funds, estate and trust assets, litigation settlement money, money embezzled from clients in investment transactions, and unearned fees accepted by a lawyer who falsely promised to provide legal services.

During the entire history of the Fund, the most common loss reimbursed has been the theft of real property escrow funds. Since 1982, almost 40% of all money reimbursed has involved realty escrow funds. Last year, $3.9 million of the total $6.1 million total paid out involved the theft of real property escrow funds.

Of the 21,301 claims filed with the fund since 1982, 11,903 were deemed ineligible for failure to provide satisfactory evidence of a loss. Over the years, 30 claimants who were denied reimbursement, and three former lawyers, filed lawsuits against the Fund. Of those, 28 were dismissed and five were pending at the end of 2023.

NCPO Asks Chief Justices to Revisit Standards

At NCPO's 2023 Annual Meeting in Des Moines, Iowa last September the membership adopted an addition to the "Standards for Evaluating Lawyers' Funds for Client Protection." The new Standard 1.5 urges fund trustees to use fund resources "effectively, prudently and appropriately" to make victims whole. This may include spending money not only on claim reimbursement but on loss prevention and subrogation efforts as well.

In 2013 the US Conference of Chief Justices endorsed the Standards and called upon its members to implement them through Court Rule amendments. Now NCPO has again reached out to the Conference to ask that it reaffirm its commitment to effective client protection, particularly with respect to the newly adopted Standard 1.5. NCPO's letter to Conference President Anna Blackburne-Rigsby, Chief Justice of the D.C. Circuit, is reprinted below.

The full text of the Standards is available HERE.

We would also be happy to send you hard copies of the Standards in booklet form for distribution to your staff, trustees, bar and court.

Contact Mike McCormick at Michael.mccormick@njcourts.gov.

National Client Protection Organization

www.ncpo.org

April 17, 2024

Hon. Anna Blackburne-Rigsby, C.J.D.C.Cir
President, Conference of Chief Justices
National Center for State Courts
300 Newport Avenue
Williamsburg, Virginia 23185-4147

Dear Chief Judge Blackburne-Rigsby:

Since 1998 the National Client Protection Organization (NCPO) has supported the work of client protection funds across the U.S. and Canada. In June 2006, NCPO adopted "Standards for Evaluating Lawyers' Funds for Client Protection." These Standards have guided our efforts to develop and sustain strong and stable funds with adequate funding that are accessible and responsive to the needs of client victims. We are most grateful for the support of the Conference of Chief Justices, which on July 31, 2013 formally endorsed the Standards, encouraging their adoption by individual jurisdictions and the amendment of existing client protection rules "in accordance with the NCPO standards" (*copy attached*).

We are writing because, as funds have continued to work towards realization of the Standards, it became apparent that a substantive addition was warranted. On September 19, 2023, NCPO's membership adopted Section 1.5(2), which recognizes the need to advocate for and utilize fund resources "effectively, prudently and appropriately" to pay meritorious claims in full as well as to foster loss prevention mechanisms and pursue subrogation efforts. A complete copy of the Standards, including the newly adopted section at page 15, is attached.

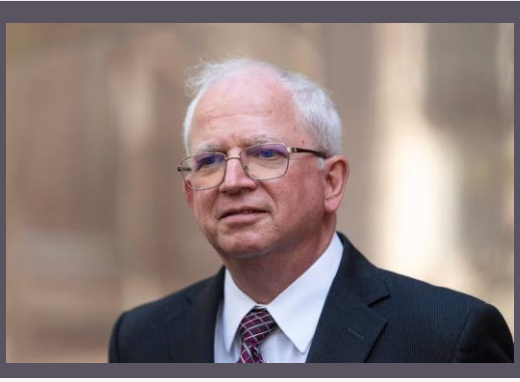
The new provision clarifies the nature and extent of the discretion vested in Fund Trustees, often (and preferably) by the jurisdiction's highest court. Thus, we thought it particularly appropriate to bring to your attention, with a request that the Conference of Chief Justices renew its endorsement of the Standards. In enhancing client protection funds, they remain important in the profession's ongoing efforts to protect law clients and honor the public's trust in our system of justice.

Please do not hesitate to contact me if we can provide any additional information or in any way assist the Conference in its consideration.

Respectfully,

Michael T. McCormick
President

Encl.
Via regular mail and email to ccj@ncsc.dni.us



California Fund Receives Restitution from Trump Lawyer

When a California judge ordered that one of Donald Trump's lawyers be disbarred, she also said the attorney had to pay $10,000 to the California Client Security Fund as restitution for his conduct. To NCPO's knowledge this is a case of first impression: An attorney paying restitution to a fund even though no claims have been paid on his behalf.

John Eastman faces disbarment in California over his role in developing a legal strategy to help President Donald Trump stay in power after his 2020 election loss. State Bar Court of California Judge Yvette Roland issued the recommendation in a 128-page ruling, ordering that Eastman's law license be put on "involuntary inactive" status. The California Supreme Court will issue a final ruling on the matter, which Eastman can appeal. Along with the recommendation for disbarment, Roland recommended that Eastman be ordered to pay $10,000 in monetary sanctions to the State Bar of California Client Security Fund.

"The court rejects Eastman's contention that this disciplinary proceeding and Eastman's resultant discipline is motivated by his political views or his representation of President Trump or President Trump's Campaign," Roland's ruling said. "Rather, Eastman's wrongdoing constitutes exceptionally serious ethical violations warranting severe professional discipline."

Eastman's attorney, Randy Miller, said in a statement that his client "maintains that his handling of the legal issues he was asked to assess after the November 2020 election was based on reliable legal precedent, prior presidential elections, research of constitutional text, and extensive scholarly material." "The process undertaken by Dr. Eastman in 2020 is the same process taken by lawyers every day and everywhere — indeed, that is the essence of what lawyers do. They are ethically bound to be zealous advocates for their clients — a duty Dr. Eastman holds inviolate. To the extent today's decision curtails that principle, we are confident the Review Court will swiftly provide a remedy," Miller added.

Once More On Fee Claims – But This Time With Help ABA Ethics Opinion 505 and Our Peskiest Claims

By Ken Bossong
Director (ret.) NJ Lawyers' Fund for Client Protection

For as long as there have been client protection funds, there have been difficult claims. Two kinds recur constantly: investment-type claims and unearned fees. The latter difficult claims are generally the more numerous of the two, and tend to be discussed whenever we gather. The June ABA Forum in New Orleans and the September NCPO Workshop in Des Moines were no exceptions, and unearned fee claims will undoubtedly come up in future "town hall" sessions.

For coping with them, help has arrived with Formal Opinion 505 of the ABA Standing Committee on Ethics and Professional Responsibility ["505"], issued May 5, 2023. As well reasoned as it is well written, 505 assists on several fronts. In quoting extensively from the Opinion, I'll leave out their citations to case law and other authority. Obviously, I encourage reading the Opinion. All **bolding** is my emphasis added.

Quick Review

In order to succeed, a Fund claim generally must demonstrate (a) an attorney-client or fiduciary relationship between claimant and respondent; (b) dishonest conduct (or the equivalent) by the respondent; (c) resulting in a demonstrable loss to claimant. The burden of proof, whether explicitly stated or *de facto*, tends to be on the claimant by a preponderance of the evidence.

The good news with unearned fee claims is that – unlike investment-type claims – element (a) is seldom much of a problem. Unfortunately, however, (b) and (c) can be devilishly difficult.

Why So Difficult?

Several kinds of problems arise in fee claims: terminology; inherent conceptual difficulty; emotional baggage with the finding of dishonest conduct; proof problems in discerning the loss; and, in the mash-up of these factors, a certain fuzzy thinking this one class of claims seems to engender.

Terminology

Let's start with a confession: I've been part of the problem. For decades, I have sloppily referred to this entire class of claims as "unearned retainers". (As usual, one can't arrive at good answers without getting the questions right.)

If it has accomplished nothing else, 505 has provided a real service by taking on the terminology squarely and at the outset. We'll be wise to use the suggested language, if for no other reason than ensuring we're discussing the same things.

Advances vs. Retainers

Noting the confusion caused by a vast array of terms used in referring to fees paid at the outset of legal representation, "this opinion will use the term 'advance' when discussing fees paid to the lawyer for legal work to be performed in the future."

Good; **advances** they are.

Next, 505 points out that "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."

Ouch. [Sulking] What's the difference? Actually, they're entirely different:

"Whereas an advance is a deposit of money with the lawyer to pay for services to be rendered in the future"… a retainer "is to assure the client that the lawyer will be contractually on call to handle the client's legal matters." Actually, I remember knowing that and calling them "availability retainers", which is one of many names 505 lists as meaning the same thing. The opinion settles on using "**general retainer**".

The client, seeing an important issue or matter coming, pays the lawyer to take the call right away regardless of what else is on the lawyer's plate when the issue pops. The payment is not for the services per se, but for immediate *availability* to render services.

Why does any of this matter? Because – unlike an advance – it can actually make sense in certain instances to say, at least in retrospect, that a general retainer was earned upon receipt.

Flat or Fixed Fees

The next area of confusion is fees that are fixed for completion of a representation's task; it'll cost the client the stated flat amount to, say, defend traffic tickets no matter how long it takes at court that night (or to write a will, or to obtain a divorce, or to…)

Note that it's not "Flat or Fixed Fees *versus* Advances"; rather, the terms address two different aspects of a legal fee. Flat fees paid before services are rendered are advances. Flat fees, while fixed at the outset, need not be paid then; some are paid in segments, and still others upon conclusion. The point of fixing the fee is to shift the risk of a matter becoming difficult or protracted, by aligning the fee to the task accomplished rather than the hours expended.

The key takeaway: "Use of the term 'flat fee' or 'fixed fee' does not transform the arrangement into a fee that is 'earned when paid'." Indeed, it can't. Why not? Because of the law governing the ethics of legal fees.

First Principles

As would be expected , the Model Rules of Professional Conduct (MRCP) provide the fundamental principles, two in particular:
(1) "A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses." MRCP 1.5 (a); and
(2) As Comment 4 to Rule 1.5 points out, "A lawyer may require advance payment of a fee, but is obliged to return any unearned portion." MRCP 1.16(d).

So, a lawyer MUST charge only reasonable fees, and return any advance fees not earned. These aren't exactly controversial propositions for an honorable profession; they flow directly from and with other universally recognized duties of lawyers to clients – fidelity, diligence, competence, communication, confidentiality, etc.

Opinion 505 includes another as a bedrock principle: the requirement under MRPC 1.15(c) to place advance fees in a trust account and draw against them only as earned. This seems a kind of black-letter ethics law that operates on a different level; more on this point below.

A Quick Note on Reasonableness

Requiring a fee to be "reasonable" may seem as vague as it inarguable. MRCP 1.5(a) anticipates the problem, acknowledging that a number of factors need to be considered.

Without attempting to be exhaustive, the Rule names eight factors to include: (1) the novelty and difficulty of the matter, and the time, labor, and skill required; (2) the extent this matter keeps the lawyer from handling others; (3) the fee customarily charged; (4) the amount involved and result obtained; (5) any special time limitations; (6) the underlying A/C relationship; (7) the lawyer's experience, reputation, ability; and (8) contingent or fixed fee.

On MRPC 1.16(d)

The thing for client protection professionals to note about the clear, obvious ethical duty to return that which is not earned is how often, and inexplicably, it seems to be ignored in discussions of difficult fee claims.

The Impact of Those First Principles

If there is one over-arching theme to 505, it is this: Don't be misled – the two basic principles, not the labels used on fees, determine what is ethically permissible with respect to legal fees.

Thus, calling advances "retainers", flat fees "general retainers", or any fees "nonrefundable", "earned upon receipt", etc., does not make it so, as a matter of law. Let's dig into some specifics explored in the Opinion.

Those General Retainers

First, few if any Fund claims will be generated by general retainers: "General retainers 'are quite rare,' and have 'largely disappeared from the modern practice of law.' However, attempts to cast what is actually an advance…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, and use of the term should be restricted to its traditional definition."

Second, even if a fee were a general retainer, "Like all fees, a general retainer must be reasonable under the circumstances." Getting to the real issues here: "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."

This last is an interesting and telling point. Even general retainers can *only* be said to have been earned on receipt *in retrospect* – if either (a) no matter materialized for the lawyer to handle, or (b) the lawyer *actually was* available when asked. A lawyer neglecting a client on a matter for which a retainer was accepted must return the retainer under Rule 1.16.

Those Flat Fees

The Opinion similarly applies the Rules to flat fee hypotheticals:

"As we noted above, flat fees paid in advance of performing the work are subject to… the foregoing rules regarding safekeeping, refundability, and reasonableness…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."

The Main Culprit: "Nonrefundable"

The short version: forget about "nonrefundable". Opinion 505's language is worth noting:

"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."

The bottom line is that, "**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."

A Side Note

The Opinion goes further on the mislabeling of a fee as nonrefundable possibly being an ethics violation in itself: "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."

On Depositing Advances Into Trust Accounts Under MRPC 1.15(c)

Thus far, we've side-stepped 505's emphasis on Rule 1.15(c) – and they *do* emphasize it:

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On Depositing Advances Into Trust Accounts Under MRPC 1.15(c)

Thus far, we've side-stepped 505's emphasis on Rule 1.15(c) – and they *do* emphasize it:

"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. 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 thing is, they added paragraph (c) for us in the field:

"The Commission on Evaluation of the Rules of Professional Conduct ('Ethics 2000Commission'), 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.' Accordingly, paragraph (c) 'provides needed practical guidance to lawyers on how to handle advance deposits of fees and expenses.' 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."

In jurisdictions that have enacted (c), the finding of "dishonest conduct" in these claims can seem or feel more straightforward. An advance fee (or portion of same) not earned should be sitting in the lawyer's trust account awaiting disbursement to client. Its absence denotes, perhaps constitutes, dishonest conduct.

What about jurisdictions that have not adopted 1.15(c)? It should make little difference in deciding Fund claims.

Here's Why

Anywhere lawyers are the ultimate fiduciaries, which is everywhere, they must charge only reasonable fees, and return that which is not earned. Any jurisdiction that doesn't have Rules 1.5(a) and 1.16(d) has some serious explaining to do.

Rule 1.15(c) is different. It requires a *specific mechanism* to ensure the safekeeping, refundability, and reasonableness of legal fees, but it does not *create* those universally recognized duties. The argument that placing advances into trust is the better practice and that requiring it is good public policy is persuasive to me, but apparently not universally held.

Am I being naïve in assuming that jurisdictions without 1.15(c) are saying "We are not going to require you to safeguard your clients' interests this exact way" rather than "We don't care whether you safeguard your clients' interests"? I certainly hope not.

The duty is the same: Make sure you are always in a position to return that which you have not earned. Everyone knows – certainly anyone who has ever been scammed knows – it's dishonest not to return that which you have not earned.

A Special Hypothetical: Earned On Receipt?

Once, years ago, in a conversation with a large grouping of ABA entities discussing these issues, someone made the following argument:

"Look, not to brag, but I am a well-known expert in my field [domestic law]. My reputation in the field has been earned by 25 years of hard work, zealous but ethical representation, and great results for my clients. I charge $20,000 to open a file and it IS earned upon receipt. Here's why – and it happens all the time. Someone comes to me with their ex being completely unreasonable about everything. When the ex's lawyer says nothing is negotiable, they come to me. Within hours of my filing an appearance, all of a sudden everything (money, visitation) is negotiable. Offers of asset sharing, alimony, and child support double or triple (or demands are cut in half). If I settle that case on terms very favorable to my client, that fee is earned – regardless of the hours spent."

Treating this as a hypothetical claim, I have a few thoughts:

1) When was the last time you had a claim that presented these facts?

2) If you ever did have such a claim, it would

probably be no more than a non-compensable fee dispute. This is not because the fee was "earned on receipt", however, but because it was arguably "reasonable" under all the factors to be considered in MRPC 1.5(a), especially the skill required (1), the result obtained (4), and the lawyer's experience, reputation, ability (7).
3) This is not the kind of fee claim that bedevils Funds. Change the facts a bit: When our hero gets in the case, the adversary says "Oh, Mr. Tough Guy is in the case? Our demands are now double." Respondent files a worthless pleading and disappears. That seems a bit more familiar.

There is another fact pattern we can't skip; no discussion of the topic is complete without it.

"It's Not Dishonest To Die!"

The situation where a lawyer takes a fee and passes away without performing services presents special challenges. Especially when a lawyer dies suddenly or without numerous pending ethics claims, the concern about finding "dishonest conduct" is expressed: "Surely it's not dishonest to die."

No, it's not. But it's not exculpatory, either. The dying is neutral with respect to the required finding of dishonest conduct. We'll never know whether the deceased respondent would have performed the promised services. Death *is* relevant in precluding any further earning of the fee. (So is disbarment, permanent disability, or disappearance.)

Unbeknownst to the client who had entrusted both fee money and a matter of real importance to respondent, the latter used that unearned fee at some point, without taking measures to protect the client's interests. In knowingly placing the client in such peril, respondent was no less dishonest than one who "borrows" from the trust account. In any claim other than unearned fees, we spend not a moment worrying about respondent's state of mind, wants, or needs. Yet in each case, the Fund has claims from equally innocent claimants with money missing.

Conclusion

Rule 10(C)(1) of the ABA Model Rules on Lawyers' Funds For Client Protection now provides:

As used in these Rules, "dishonest conduct" means wrongful acts committed by a lawyer in the nature of theft or embezzlement of money or the wrongful taking or conversion of money, property or other things of value, including but not limited to: (1) Failure to refund unearned fees received in advance as required by [Rule 1.16 of the ABA *Model Rules for Professional Conduct*]…

For Client Protection Funds having no such further elucidation of "dishonest conduct" in their rules, Opinion 505 may not make fee claims easy to resolve. It does help tremendously, though, in clearing away some of the clutter that has made them even harder than they need to be.

Under the Model Rules, it points out, there are no magic words that a lawyer can use to change what is actually an advance payment for fees into something nonrefundable. The purpose of the fee dictates its character and treatment irrespective of labels or terminology used.

Likewise, Funds should avoid any temptation to decide claims by label. We can do better than rejecting all claims involving fees as "fee disputes". Without remembering the exact numbers from a call in the 1980s, I'll never forget a claimant inquiring about our rejection on that basis. He had paid, say, $5000, calling any work by the disbarred respondent worthless. Respondent argued he had earned about $1500. "How can it be a fee dispute if there's no dispute as to the $3500?" he asked. The Trustees agreed; an award in that amount replaced rejection at the next meeting.

There can always be proof problems; when as to payment of the fee, they can preclude an award. Discerning an appropriate compensable loss can be tricky, too. If the Fund can get to the finding of dishonest conduct, though, there should be a way within the Trustees' discretion to arrive at a just award. The amount it took or will take to obtain the representation paid for but not provided can help.

It usually comes back to whether or not we can make the finding of dishonest conduct. It's my sense that we suffer from lack of a satisfactory standard. It reminds me of the biggest problem with investment-type claims: the finding of the requisite attorney-client relationship. For that, the standard of the "But-For Test" has proven to be quite helpful. Let's take a stab at this.

The Paid/Not Earned/Not Returned Test

Is there a legal fee that was proven to have been (a) paid; (b) clearly not earned; and (c) not returned? If so, a finding of dishonest conduct is appropriate, notwithstanding the respondent's state of mind or how the Fund has jurisdiction – whether by virtue of the respondent's suspension, disbarment, disappearance, disability, death, or other circumstance.

Notes: A "legal fee" can be an entire advance paid, or a sensibly identified portion thereof. "Clearly" not earned is intended to cut out legitimate fee disputes. Concern for proof of the respondent's *mens rea* is explicitly left out, as it is for any other Fund claim. Obviously, the covers only the one element of a successful claim.

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