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Disciplinary Rule 2-110(A)(3): Appellate Division, Second Department, Bans Use of Nonrefundable Retainer Agreements

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The importance of the attorney's role in society has led the legal profession to self-impose the highest standards of ethical conduct.[1] To maintain these standards, New York, as well as many other states, has adopted a Code of Professional Responsibility (the "Code") to provide lawyers with ethical guidance and to establish a system of disciplinary proceedings to regulate conduct.[2] Standards regarding attorneys fees are naturally among

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[1] *See* MODEL RULES OF PROFESSIONAL CONDUCT (1992) [hereinafter MODEL RULES]. The self-governance of the legal profession, for the most part, is a result of the uniqueness of the close relationship between the profession and the processes of government and law enforcement. *Id.* pmbl. para. 9. The legal profession's relative autonomy carries with it the special responsibility to "assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar." *Id.* para. 11; *see* Robert P. Lawry, *The Central Tradition of Lawyering*, 19 HOFSTRA L. REV. 311 (1990) (articulating key elements of moral tradition of lawyering as they have evolved in course of changing social, economic, political, and moral forces); Lon L. Fuller & John D. Randall, *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A. J. 1159, 1162 (1958) (noting that role of lawyer in legal system "imposes on him a trusteeship for the integrity of those fundamental processes of government and self-government upon which the successful functioning of our society depends"). The vital role of lawyers in the preservation of society is recognized by the American Bar Association when it described a lawyer as a "representative of clients [as advisor, negotiator and mediary], an officer of the legal system and a public citizen having special responsibility for the quality of justice." *See* MODEL RULES, *supra*, pmbl.

[2] *See* N.Y.S.B.A. CODE OF PROFESSIONAL RESPONSIBILITY (McKinney 1992). "The Code . . . points the way to the aspiring [attorney] and provides standards by which to judge the transgressor." *Id.* pmbl. at 354. The Code was first promulgated by the American Bar Association in 1969 as its own code of ethics and was adopted by the New York State Bar Association in 1970 as its official code of ethics. *See* N.Y. JUD. LAW app. at 350 (McKinney 1992). In 1983 the American Bar Association adopted the Model Rules of Professional Conduct to serve as a national framework for implementation of standards of professional conduct. *See supra* note 1 and accompanying text. Governmental adoption or at least formal declaration by a court are prerequisites for the provisions of the Model Rules or the Model Code to have authority. *See* ANDREW L. KAUFMAN, PROBLEMS IN PROFESSIONAL RESPONSIBILITY 18 (3d ed. 1989). Although the Model Rules were never formally adopted by the New York State Bar Association, they served as the basis for major revisions in the 1970 Code. *See* N.Y. JUD. LAW app. at 350 (McKinney 1992). These revisions were ultimately adopted by the four judicial departments of the Appellate Division of the State Supreme Court and promulgated as joint rules of the Appellate Divisions effective September 1, 1990. *See id.* The disciplinary committees of the appellate divisions are responsible for the supervision of attorney conduct and the establishment of standards by which to review such conduct. N.Y. JUD. LAW § 90(2) (McKinney 1983); *see also New York State Bar Association: Preliminary Report of the Standing Committee on Professional Discipline*, 55

the Code's provisions.[3] The validity and fairness of nonrefundable fee agreements have been a source of continuing controversy, resulting in disagreement among bar associations as to whether they are ethical.[4] The Code's Disciplinary Rules mandate "the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action."[5] More specifically, Discipli-

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N.Y. ST. B.J., Dec. 1983, at 40-42 (outlining reasons disciplinary matters are handled by appellate divisions instead of Court of Appeals). New York State is the only jurisdiction in the country that vests exclusive responsibility for administering lawyer discipline in the intermediate appellate court rather than its court of final jurisdiction. *See* N.Y. JUD. LAW § 90(2) (McKinney 1983); *see also* Grunberg v. Feller, 132 Misc. 2d 738, 741, 505 N.Y.S.2d 515, 517 (N.Y.C. Civ. Ct. N.Y. County 1986) (holding that disciplinary committees of appellate divisions are proper forums for complaints involving attorney misconduct).

[3] *See, e.g.*, Jacobson v. Sassower, 66 N.Y.2d 991, 993, 489 N.E.2d 1283, 1284, 499 N.Y.S.2d 381, 382 (1985) (citations omitted) ("[A]s a matter of public policy, courts pay particular attention to fee arrangements between attorneys and their clients. An attorney has the burden of showing that a fee contract is fair, reasonable, and fully known and understood by the client."); Rubenstein v. Rubenstein, 137 A.D.2d 514, 514, 523 N.Y.S.2d 986, 986 (2d Dep't 1988) (fairness and reasonableness standards applied to valuation of legal fee); J.M. Heinike Assocs. v. Liberty Nat'l Bank, 142 A.D.2d 929, 930, 530 N.Y.S.2d 355, 356-57 (4th Dep't 1988) (retaining prepaid fee following withdrawal from representaion in absence of good cause is unconscionable); *see also* Lester Brickman & Lawrence A. Cunningham, *Nonrefundable Retainers: Impermissible Under Fiduciary, Statutory and Contract Law*, 57 FORDHAM L. REV. 149 (1988) (asserting that, with few exceptions, nonrefundable retainers are illegal, unethical, and contrary to attorney-client fiduciary obligation, statutes, and principles of contract law).

[4] *See* Pennsylvania Bar Ass'n Comm. Op. 85-120 (1987) (concluding that non-refundable retainer places lawyer on call so that lawyer must forego other employment, thus, constituting proper factor in compensating lawyer); Texas Bar Op. 391 (1978) (requiring lawyer to provide client with circumstances where the fee would not be returned); Maryland State Bar Ass'n Comm. on Ethics, Op. 80-21 (1986) (same); Alaska Op. 87-1 (1987) (same).

Some bar associations have reacted unfavorably to the use of the non-refundable fee agreements. *See* Cleveland Bar Ass'n Op. 84-1 (1984) (lawyer may not require nonrefundable retainer to secure availability over specified period of time without regard to specified matter); Michigan Bar Op. CI-962 (1983) (requiring return of unearned portion of retainer); Nassau County Bar Op. 85-5 (1985) (forbidding lawyer from entering into fee agreement with client that calls for nonrefundable retainer and requiring that unearned advance fee payments must be refunded to client upon discharge).

[5] N.Y.S.B.A. CODE OF PROFESSIONAL RESPONSIBILITY, Preliminary Statement at 355 (McKinney 1992). The Code sets forth the general principles and standards of professional conduct and is divided into three parts: Canons, Ethical Considerations, and Disciplinary Rules. *Id.* at 354. The Ethical Considerations, aspirational in character, represent the objectives of the profession and serve as guidance in specific situations. *Id.* at 355. The Disciplinary Rules are mandatory rules which are considered the substantive law which subjects all attorneys to disciplinary action. *See id.*; *see also In re* Hof, 102 A.D.2d 591, 596, 478 N.Y.S.2d 39, 42 (2d Dep't 1984) ("Disciplinary

nary Rule ("DR") 2-110(A)(3) provides that "a lawyer who withdraws from employment shall refund promptly any part of a fee paid in advance which has not been earned,"[6] while DR 2-106(A) prohibits an "excessive" fee.[7] Courts, however, have ambiguously interpreted this language in determining the amount owed to a lawyer who has been prematurely discharged.[8] The use of

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rules and ethical considerations set down in the Code . . . represent the acknowledged standards of the profession . . . .").

[6] N.Y.S.B.A. CODE OF PROFESSIONAL RESPONSIBILITY, DR 2-110(A)(3) (McKinney 1992).

[7] *Id.* DR 2-106(A); *see* Joel R. Brandes, P.C. v. Zingmond, 151 Misc. 2d 671, 573 N.Y.S.2d 579 (Sup. Ct. Nassau County 1991) (finding $15,000 nonrefundable fee for services in divorce action excessive when client reconciled with spouse shortly after entering into agreement); *In re* Adoption of E.W.C., 89 Misc. 2d 64, 77, 389 N.Y.S.2d 743, 752 (Sur. Ct. Nassau County 1976) (finding fee not related to lawyer's actual services clearly excessive and in violation of Code); New York State Bar Ass'n Comm. on Professional Ethics, Formal Op. 599 (1989). To the extent the court finds illegality based on the disproportion of the fee demanded with the value of the attorney's services, the DR 2-106(A) proscription against "excessive fees," as well as EC 2-17 and EC 2-18 governing reasonable fees, make it difficult to distinguish the legal issues from the ethical ones. *Id.* Ethically, no fee agreement can ever be literally "non-refundable" as the term may be understood. *Id.* Since the determination of whether a fee is "clearly excessive" involves a factual inquiry into each case, it can be argued that ethical proscription against "clearly excessive fees" is not compatible with per se rule banning all nonrefundable fee agreements. *Id.*

[8] *See, e.g.*, Jacobson v. Sassower, 122 Misc. 2d 863, 474 N.Y.S.2d 167 (Sup. Ct. App. T. 1st Dep't 1983), *aff'd*, 107 A.D.2d 603, 483 N.Y.S.2d 711 (1st Dep't), *aff'd*, 66 N.Y.2d 991, 489 N.E.2d 1283, 499 N.Y.S.2d 381 (1985).

Significant legal issues involving the fiduciary relationship that exists between an attorney and a client impact the termination of a lawyer's services. Lawyers are fiduciaries because a client retains an attorney to exercise "professional judgment" and to act primarily for the client's benefit thus requiring the client to place great trust and confidence in the lawyer. *See* ABA, MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 5-1, DR 5-105(A) (1992); CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 4.1, at 147 (1986) ("[C]lients have a right to assume that a lawyer who undertakes to listen to them and to render legal assistance can be trusted . . . ."); Charles Fried, *The Lawyer as Friend; The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060, 1075 (1976) (noting legal profession "exemplifies . . . the ideal of personal relations of trust and personal care . . . .").

As a matter of law, the client's right to discharge a lawyer is essentially absolute, and well established legal precedent dictates that a client should not be compelled to continue being represented by a lawyer in whom the client has lost confidence or trust. *See* Martin v. Camp, 219 N.Y. 170, 174, 114 N.E. 46, 48 (1916). Inherent in the fiduciary relationship between attorney and client is the right to discharge a lawyer at any time, with or without cause, subject to liability for the lawyer's services. *See In re* Dunn, 205 N.Y. 398, 402, 98 N.E. 914, 916 (1912); Petty v. Field, 97 A.D.2d 538, 539, 467 N.Y.S.2d 898, 899 (2d Dep't 1983); *see also* Hausen v. Davis, 112 Misc. 2d 992, 994-95, 448 N.Y.S.2d 87, 89 (N.Y.C. Civ. Ct. Queens County 1981) (allowing discharged attorney who had retainer to prosecute personal injury claim to recover fixed sum on quantum meruit basis).

"nonrefundable" retainers[9] raises two issues: how much of the nonrefundable fee has been "earned," and whether the lawyer is charging a fee that is "excessive" within the prohibition of DR 2-106(A). Recently, in *Matter of Cooperman*,[10] the Appellate Division, Second Department, held that nonrefundable fee agreements between attorneys and clients are unethical under all circumstances.[11]

The respondent in *Cooperman*, attorney Edward Cooperman, was charged with professional misconduct as a result of his use of nonrefundable fee agreements in connection with three separate clients.[12] One instance involved a fifteen thousand dollar fee which Cooperman stated was nonrefundable once he filed a notice of appearance on behalf of the client.[13] In a second matter,

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[9] *See* 1 STUART M. SPEISER, ATTORNEY FEES §§ 1:12-:21, at 16-25 (1973). The term general retainer is used in a variety of contexts and must be distinguished from a special retainer, which is an agreement for the performance of specific legal services for a designated fee. *See id.* A general retainer is similar to an option agreement between the attorney and the client in which the client agrees to pay a fixed sum to the attorney in exchange for the attorney's promise to be available to perform, at an agreed price, any legal services that are required during a specific period. *Id.* The attorney forms the general retainer by agreeing to be available, not by performing services. *See* MORTIMER D. SCHWARTZ & RICHARD C. WYDICK, PROBLEMS IN LEGAL ETHICS 100 (2d ed. 1988). In addition, attorneys use the term "retainer" to mean a lump sum fee paid by a client at the outset of a matter, stating that the fee is "nonrefundable." *Id.* Other times the fee agreement states that the "retainer" is to cover a specified amount of work, and if more work is needed the client will pay for it at a specified rate. *Id.* Sometimes, the agreement does not specify what is intended. *Id.* "Finally, attorneys sometimes use the term 'retainer' to mean an advance payment of fees (special retainer) for work that the lawyer will perform in the future." *Id.* The parties may limit the range of legal services to be covered by the general retainer or may create a hybrid general-special retainer by agreeing that part or all of the general retainer be applied to the bill for any services actually performed. *See* James C. Freund, *Skadden Arps in 40th Year—A Memoir of 'Flom Machine'*, N.Y. L.J., June 18, 1987, at 1, col. 3.

[10] 187 A.D.2d 56, 591 N.Y.S.2d 855 (2d Dep't 1993).

[11] *Id.* at 57, 591 N.Y.S.2d at 856.

[12] *Id.* at 57-58, 591 N.Y.S.2d at 856. The disciplinary proceeding against Mr. Cooperman was initiated by complaints filed with the Grievance Committee for the Tenth Judicial District in the Spring of 1991. *Id.* at 56. In October, the Committee brought 15 charges of professional misconduct against Cooperman in connection with three clients. *See* Shirley E. Perlman, *Panel Bans Non-refundable Lawyers' Fees*, NEWSDAY (Nassau Ed.), Jan. 29, 1993, at 33. He had ignored two letters of caution issued by the Committee in 1985 and 1987. *Id.*

The Special Referee sustained all 15 charges. *Cooperman*, 187 A.D.2d at 57-58, 591 N.Y.S.2d at 856. The Appellate Division reversed as to three charges and allowed the other 12 to stand. *Id.* at 62, 591 N.Y.S.2d at 859. As a result, Cooperman was suspended from the practice of law for two years. *Id.*

[13] *Cooperman*, 187 A.D.2d at 58, 591 N.Y.S. 2d at 856. Charges two through five related to the fees "earned" by filing a notice of appearance on the clients' behalf. *Id.* The relevant provision of Cooperman's retainer agreement stated: "My minimum fee

Cooperman refused to refund a five thousand dollar retainer even though he was discharged just forty-eight hours after being hired.[14] The clients claimed that the language in the fee agreements violated the attorney's obligation under the Code to promptly refund any unearned portion of a fee paid in advance[15] and interfered with their absolute right to discharge an attorney at any time.[16] Furthermore, they alleged that in each of the fee agreements Cooperman charged clearly excessive fees.[17] The five-

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for appearing for you in this matter is fifteen thousand ($15,000) dollars. This fee is not refundable for any reason whatsoever once I file a notice of appearance on your behalf." *Id.*

[14] *Id.* at 58, 591 N.Y.S.2d at 856-57. Charges 7 through 10 referred to an agreement which provided:

> For a MINIMUM FEE and NON-REFUNDABLE amount of Five Thousand ($5,000) Dollars, I will act as your counsel. . . . This is the minimum fee no matter how much or how little work I do in this investigatory stage . . . and will remain the minimum fee and not refundable 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.

Id.

[15] *Id.* at 59, 591 N.Y.S.2d at 857; *see* N.Y.S.B.A. CODE OF PROFESSIONAL RESPONSIBILITY, DR 2-110(A)(3) (McKinney 1992) (providing that lawyer who withdraws from employment "shall refund promptly any part of a fee paid in advance that has not been earned"). An attorney employed under a contract for a specific fee, who is discharged without cause, is relegated to recovery on quantum meruit for the services rendered prior to discharge. *See* Jacobson v. Sassower, 66 N.Y.2d 991, 993, 489 N.E.2d 1283, 1284, 499 N.Y.S.2d 381, 382 (1985); *see also* Ventola v. Ventola, 112 A.D.2d 291, 292, 491 N.Y.S.2d 736, 738 (2d Dep't 1985) (holding that even under "fixed-fee retainer" agreement, amount of attorney's compensation for services rendered prior to discharge must be determined on quantum meruit basis).

[16] *Cooperman*, 187 A.D.2d at 59, 591 N.Y.S.2d at 857; *see supra* note 8 (discussing client's right to discharge attorney). The current doctrine defining the freedom to discharge an attorney was established in Martin v. Camp. 219 N.Y. 170, 114 N.E. 46 (1916). While a client may discharge his attorney without cause at any time, the discharged attorney is ordinarily entitled to recover in quantum meruit for the fair and reasonable value of his services up to the point of discharge. *See* Jacobson v. Sassower, 66 N.Y.2d 991, 992, 489 N.E.2d 1283, 1284, 499 N.Y.S.2d 381, 382 (1983); *In re* Goldin, 104 A.D.2d 890, 891, 480 N.Y.S.2d 392, 393 (2d Dep't 1984); N.Y.S.B.A. CODE OF PROFESSIONAL RESPONSIBILITY, DR 2-106 (McKinney 1992). Other jurisdictions have similarly concluded that a discharged attorney is entitled to recover in quantum meruit. *See, e.g.*, Buckelew v. Grossbard, 461 A.2d 590, 592 (N.J. Super. Ct. Law Div. 1983), *aff'd*, 469 A.2d 518 (1983); Belli v. Shaw, 657 P.2d 315, 319 (Wash. 1983). Other courts have held that if a client proves good cause for discharge, the attorney is not entitled to recover under the contract of employment, but may recover for services rendered up to the time of discharge. *See, e.g.*, Rocha v. Ahmad, 676 S.W.2d 149, 156 (Tex. Ct. App. 1984). New York has gone even farther and held that an attorney discharged for just cause loses all right to compensation. *See* Kyle v. Kyle, 94 A.D.2d 866, 866, 463 N.Y.S.2d 584, 585 (3d Dep't 1983).

[17] *Cooperman*, 187 A.D.2d at 59, 591 N.Y.S.2d at 857; *see supra* notes 13 and 14. The Code contains basic requirements that are applicable to all fee arrangements be-

judge panel unanimously concluded that nonrefundable fee agreements are against public policy and therefore void.[18] The court explained that "[s]ince an attorney's fee is never truly nonrefundable until it is earned, the use of [the term nonrefundable] . . . is misleading, interferes with a client's right to discharge an attorney, and attempts to limit an attorney's duty to refund promptly, upon discharge, all those fees not yet earned."[19] The court cited DR 2-110(A)(3) to support its conclusion that a discharged lawyer's fee should be measured in quantum meruit.[20] Furthermore, the court found the phrase "nonrefundable fee" to be "imbued with an absoluteness which conflicts with DR 2-110(A)(3),"[21] which provides that any unearned portion of a fee must be returned.[22] Acknowledging the "peculiar and distinctive" nature of the attorney-client employment contract and its difference from ordinary employment contracts, the court found the use of nonrefundable retainer agreements to be unethical and unconscionable.[23]

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tween a lawyer and a client. *See, e.g.*, N.Y.S.B.A. CODE OF PROFESSIONAL RESPONSIBILITY, EC 2-17 (McKinney 1992) ("The determination of a proper fee requires consideration of the interests of both client and lawyer. A lawyer should not charge more than a reasonable fee . . . ."); *see also id.* DR 2-106(A) (providing that "[a] lawyer shall not enter into an agreement for, charge or collect an illegal or clearly excessive fee").

18 *Cooperman*, 187 A.D.2d at 59, 591 N.Y.S.2d at 857.

19 *Id.* at 59, 591 N.Y.S.2d at 857. "We find the use of these retainer agreements to be unethical and unconscionable in spite of the inherent right of attorneys to enter into contracts for their services." *Id.* (citing Greenberg v. Remick & Co., 230 N.Y. 70, 129 N.E. 211 (1920)). Arguably, nonrefundable retainers could be justified pursuant to section 474 of New York's Judicial Code. *See* N.Y. JUD. LAW § 474 (McKinney 1983) (attorney compensation is "governed by agreement, express or implied, which is not restrained by law . . . ."). *But see* Brickman & Cunningham, *supra* note 3, at 170 (maintaining that "[l]iteral interpretation of the statutory language . . . is inconsistent with judicial doctrine treating the attorney-client contract as an aspect of fiduciary law"). "Moreover, the adoption of the Model Code of Professional Responsibility by the Appellate Divisions of New York's court system . . . would have been precluded since several sections regulate the inception of the attorney-client relationship and the fees to be charged." *Id.* at 170-71 n.139 (citations omitted).

20 *Cooperman*, 187 A.D.2d at 59, 591 N.Y.S.2d at 857; *see supra* note 15.

21 *Cooperman*, 187 A.D.2d at 59, 591 N.Y.S.2d at 857.

22 N.Y.S.B.A. CODE OF PROFESSIONAL RESPONSIBILITY, DR 2-110 (A)(3) (McKinney 1992). The court found that a client who signed a nonrefundable fee agreement might mistakenly conclude that even the part of the fee that exceeded quantum meruit could not be returned. *See Cooperman*, 187 A.D.2d at 59, 591 N.Y.S.2d at 857. Additionally, the court decided that the language used was against public policy because it would create an "impermissible chilling effect upon the client's inherent right . . . to discharge an attorney at any time with or without cause." *Id.*

23 *Cooperman*, 187 A.D.2d at 60, 591 N.Y.S.2d at 857; *see Martin*, 219 N.Y. at 174, 114 N.E. at 48 ("The discharge of the attorney by his client does not constitute a breach of the contract, because it is a term of such contract, implied from the peculiar relationship which the contract calls into existence, that the client may terminate the

In explaining its ruling, the *Cooperman* court distinguished nonrefundable fees from "minimum fee agreements," which serve as useful forecasts of the amount a client can expect to pay for a specific lawyer's services.[24] The court praised minimum fee agreements as a means for comparing lawyers fees for similar services.[25] In setting minimum fees, a lawyer may consider several factors enumerated in DR 2-106(B), including the time and labor involved, the effect that accepting the matter may have on the lawyer's ability to enter into other employment, the results obtained, time limitations imposed, and the lawyer's experience and reputation.[26] In examining the reasonableness of Cooperman's fees, the court applied these standards and found the fees in each

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contract at any time with or without cause."); *see also* Demov, Morris, Levin & Shein v. Glantz, 53 N.Y.2d 553, 556, 428 N.E.2d 387, 389, 444 N.Y.S.2d 55, 57 (1981) (noting that "a client may at anytime, with or without cause, discharge an attorney . . . .").

[24] *Cooperman*, 187 A.D.2d at 57, 591 N.Y.S.2d at 856. The court found that there was a valid distinction to be made between nonrefundable fee agreements and minimum fee agreements. *Id.* In doing so, it declined to follow other opinions that "blur" this valid distinction. *Id.*; *see, e.g.*, N.Y.S.B.A. Comm. on Professional Ethics, Op. 599 (1989) (using terms "nonrefundable" and "minimum fees" interchangeably). The court stated that nonrefundable fee agreements, by definition, allow an attorney to keep an advance payment even if the attorney had not earned the fee. *Cooperman*, 187 A.D.2d at 57, 591 N.Y.S.2d at 856. In contrast, the minimum fee agreement is the minimum amount that a client can expect to pay a specific attorney for his representation in the matter until its completion. *Id.*

[25] *Cooperman*, 187 A.D.2d at 57, 59, N.Y.S.2d at 856.

[26] *See* N.Y.S.B.A. CODE OF PROFESSIONAL RESPONSIBILITY, DR 2-106(A) (McKinney 1992). DR 2-106(B) provides:

> A fee is 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. Factors to be considered as guides in determining the reasonableness of a fee include the following:
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> 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 or made known 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 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.
> 8. Whether the fee is fixed or contingent.

Id. DR 2-106(B). According to the New York State Bar Committee, the standard set forth in DR 2-106(B) is highly fact specific. *See* N.Y.S.B.A. Comm. on Professional Ethics, Op. 1991-1993 (1989).

case to be excessive, and thus in violation of the Code.[27] Specifically, the court noted that the agreements offered no protection for the clients if they wished to terminate the attorney's services within hours after retention, as the forfeiture of a large sum of money would result.[28]

The *Cooperman* decision represents the first occasion on which an Appellate Division in New York has employed DR 2-110(A)(3) to invalidate the use of nonrefundable fee agreements.[29] Rather than deciding the case on the narrower ground of a "clearly excessive fee[ ]," the court ruled broadly in banning the use of nonrefundable fee agreements.[30] It is submitted that the court erred in categorically prohibiting the use of nonrefundable fee agreements, instead of permitting the reasonableness of these agreements to be evaluated on a case-by-case basis, in accordance with the factors contemplated by DR 2-106(B).

It is also suggested that disqualification of an attorney or law firm is an important factor in determining the reasonableness of a nonrefundable fee. For instance, a "true general retainer" serves the purpose of obligating an attorney to be available to represent a particular client, as well as preventing that attorney from taking

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[27] *Cooperman*, 187 A.D.2d at 61, 591 N.Y.S.2d at 858-59. Based on evidence adduced at the hearing, the court sustained charges that the respondent's fees were excessive and that he wrongfully refused to refund the unearned portions of the fees. *Id.* at 61, 591 N.Y.S.2d at 859. Cooperman argued that his fee did not reflect a quantum meruit calculation according to his hourly rates, but in all the cases the fee reflected permissible factors explicitly allowed by the Code. *Id.* at 61, 591 N.Y.S.2d at 858. The court acknowledged that the factors of DR 2-106(B) were considered before reaching their conclusion. *Id.* at 61, 591 N.Y.S.2d at 859.

[28] *Id.* at 60, 591 N.Y.S.2d at 858. Cooperman admitted that he used the retainer agreements to prevent his clients from exercising their right to fire him. *Id.* at 61, 591 N.Y.S.2d at 858. Courts have concluded that some fee agreements which result in the forfeiture of large sums before prospective services are rendered impose a substantial penalty on the client. *See* Gross v. Russo, 76 Misc. 2d 441, 444, 351 N.Y.S.2d 355, 359 (Sup. Ct. Richmond County 1974) (ruling that $25,000 liquidated damage fee upon termination is unconscionable as matter of law), *rev'd*, 47 A.D.2d 655, 364 N.Y.S.2d 184 (2d Dep't 1975); *see also* Brickman & Cunningham, *supra* note 3, at 189-90 (analyzing of nonrefundable retainers on basis of traditional contract law).

[29] Stephen Gillers, *All Non-Refundable Fee Agreements are not Created Equal*, N.Y.L.J., Feb. 3, 1993, at 1, col. 1. Gillers, a New York University professor and expert on legal ethics, notes that this is the first such ruling in New York and perhaps anywhere. *Id.* He maintains that the court erred in banning all nonrefundable fee agreements. *Id.* at 2, col. 1. Gillers concludes that each case should be decided on its facts, remarking that "we must use a rule of reason, not a categorical prohibition . . . ." *Id.* at 3, col. 4.

[30] *Id.* at 1, col. 1.

a fee from a party with adverse interests.[31] In the market place, clients often retain legal experts to prevent adversaries from doing so.[32] The conflict of interest rules, DR 5-105(A) and DR 5-108, prevent attorneys and their firms from representing clients in "substantially related" matters in which that client's interests are "materially adverse" to a former client.[33] It is asserted that the court failed to consider that lawyers sell their future employability in accepting nonrefundable fee agreements. Therefore, a lawyer's fee accounts not only for the work performed on a particular case, but also for other work that the lawyer is forced to forego.

In addition, many clients, as well as attorneys, recognize the value of hiring an experienced attorney with an excellent reputation.[34] When a party has retained a prestigious lawyer, opposing

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31 *See id.* at 2, col. 2; N.Y.S.B.A. Comm. on Professional Ethics, Formal Op. 1991-1993 (1989). A "retainer" is an amount paid for reserving the availability of the lawyer, generally with respect to a particular period of time. *Id.* The retainer may also provide that the lawyer be on call to represent a specific client in connection with a particular matter, if the client decides to use the lawyer. *Id.* In the latter case, the retainer agreement may implicitly contemplate that the lawyer could not represent anyone else in connection with the event or transaction where such representation could interfere, by reason of conflict of interest, with the representation of the client who is reserving the services of the lawyer. *Id.* Where the retainer is for a specified period of time, it is generally contemplated that the lawyer will limit his or her other commitments so as to be available for the client paying the retainer. *Id.* Fees for actual legal services performed might be credited against the retainer (resembling a minimum fee) or they might be billed in addition to the retainer. *See* SPEISER, *supra* note 9, § 1:1, at 3-6 (providing that retainer is for availability and lost opportunity cost as well as services actually rendered).

32 *See* JAMES STEWART, THE PARTNERS 255 (1983); Wilson, *Managing for Success at Skadden Arps*, INT'L FIN. L. REV. 31 (1984). Skadden's typical retainer agreements provide that the firm will represent its client to prevent a hostile takeover, even if the corporate raider is also a client. *Id.* Thus, the firm cannot represent the raider-clients in takeover efforts against target-clients. *Id.*

33 N.Y.S.B.A. CODE OF PROFESSIONAL RESPONSIBILITY, DR 5-108 (McKinney 1992). Once a lawyer identifies a potential conflict of interest between two clients, he must withdraw from representing both. *Id.* In addition, the disqualification from representing adverse interests is to the firm as a whole. *See id.* DR 5-105(D). *See generally* Orrin G. Judd, *Conflicts of Interest—A Trial Judge's Notes*, 44 FORDHAM L. REV. 1097 (1976) (outlining judiciary's role in "safeguarding the client's interest in effective, independent representation").

34 *See* MARK STEVENS, POWER OF ATTORNEY: THE RISE OF THE GIANT LAW FIRMS 104 (1987) ("[C]lients [of Skaden Arps' M & A practice] pay annual retainers . . . just [as] an insurance policy making it certain that the miracle worker and his squadron of highly trained shock troops will be available at the first sign of takeover."). The author notes the power and experience of particular law firms and the effect of their reputation in the business community. *Id.* at 101-27. With respect to the merger-acquisition-takeover practice at Skadden, Arps, it may command "incredible fees" because they have the ability to do the job and the "business community believes it can do it better than anyone else." *Id.* at 103.

counsel and clients are often willing to settle a case more quickly and, in some circumstances, may even be dissuaded from initiating a lawsuit.[35] Thus, it is asserted that a nonrefundable fee can clearly be considered "earned when paid."[36]

Furthermore, the client's level of sophistication and the nature and complexity of the legal task should also be considered by the court in determining the validity of a nonrefundable retainer.[37] For instance, a major corporation with inside general counsel justifiably may not consider a large retainer fee to be unconscionable when it seeks the best possible counsel to work on a difficult case.[38] In addition, prior to determining the validity of a fee agreement, the court should look to the expectations of the party and conduct a full exploration of the facts and circumstances.[39]

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[35] *Id.* at 101-27.

[36] *See* PROPOSED CALIFORNIA RULE OF PROFESSIONAL CONDUCT 3-700(D)(2) (1987) (defining "true retainer fee" as one "paid solely for the purpose of insuring the availability of the attorney for the matter"); *see also* Pennsylvania Bar Ass'n Formal Op. 85-20 (1985) (such "retainer" belongs to the lawyer when it is paid, and it should not be put into the client trust account); Texas State Bar Op. 431 (1986) (same); Wisconsin State Bar Formal Op. E-86-9 (1986) (same).

[37] *See* N.Y.S.B.A. Comm. on Professional Ethics Op. 599; *supra* note 26. While the bar recognizes the potential for abuse of nonrefundable fee agreements involving clients of limited education and experience, the bar does not consider "retainer" agreements per se violative of professional ethics *Id.* If retention of the fee is expressly conditioned on the absence of lawyer default and the client is fully advised that the fee can be "earned" on grounds other than hours of service, the amount is not excessive. *Id.* Factors enumerated in DR 2-106(B) implicitly call for the assumption that fees are earned on other grounds. *See supra* note 30 and accompanying text.

[38] *See* Brobeck, Phleger & Harrison v. Telex Corp., 602 F.2d 866, 875 (9th Cir.) (ruling that one million dollar minimum contingent fee not unconscionable when large corporation of superior bargaining strength sought best possible outside counsel), *cert. denied*, 444 U.S. 981 (1979).

[39] *See* Cohen v. Ryan, 34 A.D.2d 789, 790, 311 N.Y.S.2d 644, 645 (2d Dep't 1970) (stating that retainer agreement will not be enforced in absence of proof that it was fully comprehended by client).

> Whether enforcement of such a retainer should be denied as unconscionable or as having a chilling effect on a client's right to freely discharge his attorney should depend on a "full exploration of all the facts and circumstances [of the particular case], including the intent of the parties and whether the fee demanded is out of proportion to the value of the attorney's services."

Jacobson, 107 A.D.2d at 603, 483 N.Y.S.2d at 712 (quoting Gross v. Russo, 47 A.D.2d 655, 655, 364 N.Y.S.2d 184, 186 (2d Dep't 1975)) (alteration in original). It is suggested that the amount of the fee determined to be "earned" should depend upon the express terms of the fee agreement, the parties' expectations at the time of signing the contract as well as the extent to which the lawyer satisfied the client's legitimate expectations, and the benefits received by the client. *See* N.Y.S.B.A. Comm. on Profes-

In an earlier case, *Jacobson v. Sassower*,[40] the New York Court of Appeals found a general retainer agreement ambiguous, and thus, upon discharge, the attorney was to be compensated on an hourly basis, rather than keeping the retainer.[41] However, the court, in dictum, concluded that, although such retainers are not to be encouraged, not all are unenforceable as a matter of law.[42] In deciding the question left open in the *Jacobson* opinion, it is submitted that the *Cooperman* court failed to distinguish certain circumstances in which the general retainer may serve valid professional and economic interests.

Consequently, in light of the widespread use of the nonrefundable general retainer throughout the New York metropolitan area,[43] the ruling of the *Cooperman* court is likely to have a large impact on the manner in which attorneys bill their clients. New York attorneys practicing in the Second Department should be aware that despite their common use, nonrefundable fee agreements will be considered invalid.

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sional Ethics Op. 599 ("The essence of the matter is clarity-clarity that will assure the client's full understanding of the fee agreement proposal.").

[40] 66 N.Y.2d 991, 489 N.E.2d 1283, 499 N.Y.S.2d 381 (1985).

[41] *Id.* at 992, 489 N.E.2d at 1284, 499 N.Y.S.2d at 382. In *Jacobson*, an attorney sought to convert a special retainer into a general retainer, and thus to preclude a refund. *See* Jacobson v. Sassower, 113 Misc. 2d 279, 281, 452 N.Y.S.2d 981, 982 (N.Y.C. Civ. Ct. N.Y. County 1982). The trial court held that the agreement failed to establish a general retainer fitting into the *Martin* exception. *Id.* at 283, 452 N.Y.S.2d at 984; *see* Martin v. Camp, 219 N.Y. 170, 176, 114 N.E. 46, 48 (1916) (stating in dictum that rule forbidding contract damages upon dismissal of attorney without cause was inapplicable to general retainers on basis of sacrifice of availability). The Appellate Division affirmed and adopted the *Gross* position, observing that the retainer's enforceability "should depend on 'full exploration of the facts and circumstances'" including the intentions of the parties. Jacobson v. Sassower, 107 A.D.2d 603, 603, 483 N.Y.S.2d 711, 712 (1st Dep't 1985).

[42] *Jacobson*, 107 A.D.2d at 603, 483 N.Y.S.2d at 712.

[43] *See Jacobson*, 113 Misc. 2d at 285, 452 N.Y.S.2d at 985; *see, e.g.*, John H. L'Estrange, Jr. & William J. Tucker, *Fee Agreements*, 27 PRAC. LAW. 11 (April 1981). STEVENS, *supra* note 34, at 101-27 (discussing NYC firm Skadden Arps' retainer fees).