Indiana Court Decisions Related to Fee Agreements

942 N.E.2d 799 (2011)

In the Matter of Heather McClure O'FARRELL, Respondent.

No. 29S00-0902-DI-76.

Supreme Court of Indiana.

February 11, 2011.

801*801 Alfred E. McClure, Lafayette, IN, Attorney for Respondent.

G. Michael Witte, Executive Secretary, Dennis K. McKinney, Staff Attorney, Indianapolis, IN, Attorneys for **Indiana** Supreme Court Disciplinary Commission.

Attorney Discipline Action

PER CURIAM.

This matter is before the Court on the report of the hearing officer appointed by this Court to hear evidence on the **Indiana** Supreme Court Disciplinary Commission's "Verified Complaint for Disciplinary Action," and on the post-hearing briefing by the parties. The Respondent's 1995 admission to this state's bar subjects her to this Court's disciplinary jurisdiction. *See* IND. CONST. art. 7, § 4.

We find that Respondent, Heather McClure **O'Farrell**, engaged in attorney misconduct by making agreements for and charging unreasonable fees in violation of **Indiana** Professional Conduct Rule 1.5(a). For this misconduct, we find that Respondent should receive a public reprimand.

Background

Respondent practices law as an attorney of McClure & **O'Farrell**, P.C. ("the Law Office"). The Law Office uses an "Hourly Fee Contract" or a "Flat Fee Contract" in most cases when it represents a party in a family law matter.[1] Both types of contract 802*802 contain a provision for a nonrefundable "engagement fee." The Commission alleges Respondent improperly charged two clients nonrefundable engagement fees and did not refund unearned fees after the representations ended. The case was submitted to the hearing officer on the parties' stipulation of facts in lieu of an evidentiary hearing.

Count 1. On November 20, 2006, "Client 1" hired the Law Office to prepare and file for dissolution of her marriage, to represent her in the preliminary hearing in that case, and to obtain a protective order against Client 1's husband. The Law Office charged Client 1 a $3,000 engagement fee for the cases, plus $131 for filing fees, which Client 1 paid by credit card. Client 1 signed the Law Office's Flat Fee Contract, which contained the following provisions:

"[The] engagement fee is non-refundable and shall be deemed earned upon commencement of Attorney's work on the case[.]"

"Attorneys agree to credit any engagement fee received from Client toward the flat fee.... Said engagement fee shall be due and owing at the time of execution of this contract. Client agrees to make no demand for a refund or return of any part of the engagement fee owed or paid."

"In the event that the Client-Attorney relationship terminates prior to the completion of Attorneys' representation as described ... above, Client and Attorneys agree Attorneys shall, at the Attorneys' sole discretion, be entitled to keep the engagement fee paid[.]"

Respondent filed a petition for dissolution of Client 1's marriage ("the Divorce Case") and a petition for a protective order ("the PO Case"). An Ex Parte Order for Protection was entered on November 22, 2006. On or about November 23, 2006, Client 1 asked her credit card company to chargeback her payment of $3,131 to the Law Office, which was done. The Law Office challenged the chargeback, and the credit card company eventually restored the payment of $3,131 to the Law Office.

On November 28, 2006, Respondent filed motions to withdraw as Client 1's attorney in the Divorce Case and in the PO Case. Both cases eventually were dismissed. The Law Office refused to refund any part of the $3,000 Client 1 had paid, saying that the fee was earned upon receipt pursuant to the Flat Fee Contract.

Count 2. "Client 2" hired the Law Office to represent her regarding her ex-husband's petition for rule to show cause and petition to modify child support. Client 2 agreed to pay an "engagement fee" of $1,500 and signed the Law Office's Hourly Fee Contract, which contained the following provisions:

"[The] engagement fee is non-refundable and shall be deemed earned upon commencement of Attorney's work on the case[.]"

"Attorneys agree to credit any engagement fee received from Client to Client's account at Attorneys' prevailing rate as it is established from time to time. Said engagement fee shall be due and owing at the time of execution of this contract. Client agrees to make no demand for a refund or return of any part of the engagement fee owed or paid."

Client 2 paid the $1,500-engagement fee, and later she paid an additional $3,000 under the terms of the Hourly Fee Contract. The Law Office then offered to complete the representation for an additional flat fee of $5,000. Client 2 accepted 803*803 the offer and paid $5,000 to the Law Office. The Law Office intended the $5,000 flat fee to be non-refundable and deemed earned upon commencement of the representation. It further intended that the $5,000 flat fee would pay for the remainder of the representation. The Law Office prepared a written Flat Fee Contract for Client 2's representation. Although Client 2 never signed it, she confirmed in a letter to Respondent her understanding that the $9,500 she had paid was payment in full for the representation. Both parties thus agreed that Client 2's $5,000 payment would constitute payment in full for the balance of the representation.

After paying the Law Firm $5,000, Client 2 told Respondent that her ex-husband had molested their daughter. Respondent advised Client 2 that she could not sign a petition containing such allegations without further investigation and proof. Without further consulting with Respondent, Client 2 reported the molestation allegations to the police, which expanded and complicated the scope of the representation. Due to Client 2's unwillingness to pay any additional fee, Respondent and the Law Office ended their representation of Client 2 and withdrew as her attorney. The Law Office refused to refund any part of the fee paid by Client 2, saying that all fees were earned upon receipt and nonrefundable.

The Commission charged Respondent with violating **Indiana** Professional Conduct Rule 1.5(a), which prohibits making an agreement for, charging, or collecting an unreasonable fee, and Rule 1.16(d), which prohibits failure to refund an unearned fee promptly.[2]

Discussion

Types of fee arrangements. There are a variety of terms used to describe the types of fee arrangements between attorneys and clients. In this opinion, the following terms will be used for three common types of attorney fees: (1) a "flat fee" is a fixed charge for a particular representation, often paid in full at the beginning of the representation; (2) an "advance fee" is a payment made at the beginning of a representation against which charges for the representation are credited as they accrue, usually on an hourly basis;[3] and (3) a "general retainer" is payment for an attorney's availability, which is earned in full when paid before any work is done.[4]

Regardless of the term used to describe a client's initial payment, its type is determined by its purpose, i.e., what it is intended to purchase. When the purpose is to serve as an advance payment to the lawyer of fees the lawyer will earn in the future by doing work for the client, that payment is either a flat fee or advance fee. On the other hand, when the purpose is simply to pay for the lawyer's *availability* to provide legal services as needed during a period of time, as opposed to payment for work not yet done, the fee is a general retainer. A general retainer acts as an option on the lawyer's future services, often on a priority basis, and precludes the lawyer from undertaking representations that might conflict with representing the client. In some cases, the lawyer may need to turn down unrelated employment 804*804 to ensure availability if the client calls for immediate assistance. Because this fee is not intended to pay for work, but merely for the lawyer's availability, it is earned on payment and the attorney is entitled to the money even if no services are actually performed for the client, so long as the lawyer provides the bargained-for availability.[5] *See* *Iowa Supreme Ct. Bd. of Professional Ethics & Conduct v. Frerichs*, 671 N.W.2d 470, 475-76 (Iowa 2003); *cf.* *Jennings v. Backmeyer*, 569 N.E.2d 689 (Ind.Ct.App.1991) (attorney who charged "nonrefundable" fee to represent client against potential criminal charge was entitled to only reasonable value of services rendered before client's death).

Nonrefundability considerations. In addressing an attorney's use of "special nonrefundable retainer fee agreements" calling for nonrefundable minimum fees, the New York Court of Appeals opined:

[T]he use of a special nonrefundable retainer fee agreement clashes with public policy because it inappropriately compromises the right to sever the fiduciary services relationship with the

lawyer. Special nonrefundable retainer fee agreements diminish the core of the fiduciary relationship by substantially altering and economically chilling the client's unbridled prerogative to walk away from the lawyer. To answer that the client can technically still terminate misses the reality of the economic coercion that pervades such matters. If special nonrefundable retainers are allowed to flourish, clients would be relegated to hostage status in an unwanted fiduciary relationship—an utter anomaly. Such circumstance would impose a penalty on a client for daring to invoke a hollow right to discharge.

Matter of Cooperman, 83 N.Y.2d 465, 611 N.Y.S.2d 465, 633 N.E.2d 1069, 1072-73 (1994). In a similar vein, we have held: "A corollary of the client's right to discharge a lawyer is that a contract between the client and the lawyer that unduly impairs that right is invalid." *Galanis v. Lyons & Truitt*, 715 N.E.2d 858, 861 (Ind. 1999).

This Court addressed the nonrefundability of fees in *Matter of Kendall*, 804 N.E.2d 1152 (Ind.2004), in which:

The respondent required certain clients to pre-pay him a portion of his fees before he performed any legal services. These arrangements were set forth in contracts between the respondent and these clients that provided for the advance fee payments and specified that the advance fee payments were "nonrefundable." Notwithstanding this nonrefundability provision in the contracts, it was the respondent's intention and practice to refund any unearned portion of the advance fee payments.

Id. at 1153. We held that an advance fee cannot be nonrefundable and the assertion in a fee agreement that an advance fee is nonrefundable violates the requirement that a lawyer's fee be reasonable. *See id.* at 1160. We continued:

Where the advance payment is in the nature of a flat fee, however, or for a partial payment of a flat fee, it is not only reasonable but also advisable that the agreement expressly reflect the fact that such flat fee is not refundable except for failure to perform the agreed legal services. If the legal services 805*805 covered by a flat fee are not provided as agreed, an attorney must refund any unearned fees.

Id. (emphasis added).

In an earlier case, *Matter of Thonert*, 682 N.E.2d 522 (Ind.1997), this Court held that the respondent's demand for a nonrefundable $4,500 fee irrespective of any termination of the respondent's employment was an unreasonable fee. We expanded:

We do not hold that unrefundable retainers are per se unenforceable. There are many circumstances where, for example, preclusion of other representations or guaranteed priority of access to an attorney's advice may justify such an arrangement. But here there is no evidence of, for example, any value received by the client or detriment incurred by the attorney in return for the nonrefundable provision, other than relatively routine legal services. Of course, the client is free to terminate the representation at any time. *Id.* at 524 (emphasis added). In *Kendall*, we then advised: "Where a [general] retainer is thus justified, a lawyer would be well advised to

explicitly include the basis for such non-refundability in the attorney-client agreement." 804 N.E.2d at 1160.

The nature of Respondent's engagement fees. To determine the propriety of the nonrefundable "engagement fees" Respondent charged Clients 1 and 2, we must determine the nature of the fees. The Law Firm's fee agreements state that the engagement fee is "non-refundable and shall be deemed earned upon commencement of Attorney's work on the case." Stipulation of Facts, Exhibits A and B. However, "an attorney cannot treat a fee as `earned' simply by labeling the fee `earned on receipt' or referring to the fee as an `engagement retainer.'" *Matter of Sather*, 3 P.3d 403, 412 (Colo.2000). "[I]t is the actual nature of the attorney-client relationship, not the label used, that will be determinative." *Kendall*, 804 N.E.2d at 1160. We therefore turn to the circumstances of Respondent's representations to determine the nature of the fees she charged, which turns on what those fees were intended to purchase.

Respondent contends her engagement fee is paid by a client to induce the Law Firm to take a case and thus is earned on receipt. The Law Firm's fee agreements, however, also provide that the engagement fee would be credited against either Respondent's hourly fee or her flat fee. Thus, if Respondent completed the work called for in the contracts, the entire engagement fee would have been used to purchase the services Respondent rendered. This is evidence that the engagement fees were intended to buy the legal services she agreed to perform rather than simply her availability at the outset.

Although not required by the rules, we suggested in *Kendall* that a fee agreement for a general retainer explicitly include the basis for nonrefundability. In this case, the contracts do not indicate any particular circumstances that would justify charging Clients 1 and 2 general retainers. Moreover, we note that the nonrefundability language at issue is contained in the Law Office's form contracts it uses for most family law clients regardless of whether their particular circumstances support charging a general retainer. A contract provision for a nonrefundable general retainer, with or without a recitation of supporting circumstances, cannot be inserted as boilerplate language in all of a firm's fee agreements. Routine inclusion of such a provision in all fee agreements regardless of the circumstances would be misleading; and regardless of what the contract says, the basis for charging a nonrefundable general retainer in a particular case must 806*806 be supported by the actual circumstances of that case.

Respondent contends that nonrefundability of the fees she charged Clients 1 and 2 is justified because representing these clients precluded the Law Firm from representing the opposing parties and required time that the firm otherwise could have devoted to other representations. This, however, would be true any time an attorney is engaged by a client. Representing one client necessarily precludes the lawyer's employment by the client's opponent. Time spent on one case is always time that cannot be spent on others. "A lawyer who agrees to perform legal services also necessarily agrees to be available to perform those services. Thus, this type of availability is unrelated to the type of availability of a general retainer and is insufficient to justify a nonrefundable minimum fee." *Frerichs*, 671 N.W.2d at 477 (citation omitted).

In her briefs, Respondent describes circumstances she contends justified charging Clients 1 and 2 nonrefundable fees. For example, she contends that seeking a protective order for Client 1

required immediate attention just before a Thanksgiving holiday, which burdened the firms' attorneys and staff, and that Client 1 had a history of bringing actions against her husband and then dismissing them. Those alleged circumstances, however, are not included in the parties' stipulated facts, which describe only fairly routine legal services provided in family law cases, and we therefore will not address whether these alleged circumstances would justify a nonrefundable general retainer.

In determining the nature of the engagement fees, we finally note that the Law Firm's contract with Client 1 was entitled a Flat Fee Contract and stated explicitly that Client 1 would be billed a "flat fee," which was equal in amount to the engagement fee, for the representation described in the contract. Although Client 2 first signed a contract calling for an hourly fee, the parties later modified it to provide for payment of a fixed additional amount to complete the representation. This, coupled with the absence of evidence justifying general retainers, leads us to conclude that the fees at issue are flat fees for work to be performed.[6]

Respondent's making agreements for and charging nonrefundable flat fees. In addressing flat fees in *Kendall*, we said it is both reasonable and advisable that a fee agreement expressly reflect that a flat fee is not refundable "except for failure to perform the agreed legal services." 804 N.E.2d at 1160. However, rather than advise clients of this exception, the Law Firm's Flat Fee Contracts told clients that the fee was nonrefundable "even if the Client-Attorney relationship terminates prior to the completion of Attorneys' representation." The presence of this contract provision, even if unenforceable, could chill the right of a client to terminate Respondent's services, believing the Law Firm would be entitled to keep the entire flat fee regardless of how much or how little work was done and the client would have to pay another attorney to finish the task. We conclude that Respondent violated Rule 1.5(a) by including an improper nonrefundability provision in her flat fee agreements.

807*807 The fee agreements not only *stated* that the flat fees were nonrefundable under any circumstances, but Respondent also *treated* them as such. We therefore conclude that Respondent also violated Rule 1.5(a) by charging and collecting flat fees that were nonrefundable regardless of the circumstances, even if Respondent failed to perform the agreed legal services. *See Kendall*, 804 N.E.2d at 1160.

Notwithstanding *Kendall*, Respondent argues that **Indiana** law should allow parties to contract for nonrefundable flat and advance fees, citing authorities from other jurisdictions. She points particularly to *Grievance Adm'r, Attorney Grievance Comm'n v. Cooper*, 757 N.W.2d 867 (Mich. 2008), a brief per curiam order (with one concurring opinion) finding no problem with an attorney's contract for a $4,000 minimum fee that was nonrefundable regardless of whether the representation was terminated by the client before the billings at the stated hourly rate exceeded the minimum. *Cooper* is not without its detractors. For example:

Cooper is a difficult case to understand because the decision is so cursory. Courts and lawyers generally understand that a "minimum fee" refers to some sort of advance fee—most likely a security retainer. If that is the situation here, then it is possible that non-refundable security retainers oddly pass professional responsibility muster in Michigan.... [G]iven the brevity and opacity of the opinion, no one should put much stock in *Cooper*.

Douglas R. Richmond, *Understanding Retainers and Flat Fees*, 34 J. Legal Prof. 113, 131 (2009) (underscore added; footnote omitted). We agree with the Commission that **Indiana** appears to be in the majority on this issue, *see, e.g.*, *Matter of Sather*, 3 P.3d 403 (Colo.2000); *Matter of Cooperman*, 83 N.Y.2d 465, 611 N.Y.S.2d 465, 633 N.E.2d 1069 (1994), that this is the better position, and that it should not be changed.

The Court is mindful of the legitimate concern of attorneys that they will go through the initial steps of opening a case and beginning work for a new client, only to have that client discharge them and demand a refund of the entire initial payment as unearned. The solution, however, is not allowing attorneys to charge flat or advance fees upfront that are wholly nonrefundable regardless of the amount of services rendered. As an alternative, a fee agreement could designate a reasonable part of the initial payment that would be deemed earned by the attorney for opening the case and beginning the representation. If a general retainer for availability is justified and additional charges for actual services are contemplated, the contract could include a statement of the amount of the general retainer and the circumstances supporting it along with a provision setting forth how the fees for actual services will be calculated and collected.[7] Even without such contract provisions, "[i]t is well settled that, where the complete performance of an attorney's services has been rendered impossible, or otherwise prevented, by the client, the attorney may, as a rule, recover on a quantum meruit for the services rendered by him [or her]." *French v. Cunningham*, 149 Ind. 632, 49 N.E. 797, 798 (1898).

Respondent's failure to refund any part of the flat fees collected from Clients 1 and 2. "If the legal services covered by a flat fee are not provided as 808*808 agreed, an attorney must refund any unearned fees." *Kendall*, 804 N.E.2d at 1160. Thus, Respondent was obligated under Rule 1.16(d) to refund to Clients 1 and 2 any unearned portion of the flat fees they paid her. The question is how to determine how much of each flat fee was unearned.

The Commission makes no contention that Respondent did not work diligently and professionally in her representation of Client 1 and Client 2. The Commission makes no contention that Respondent's fee, if charged at her hourly rate, would not have exceeded the flat fee each client paid. The Commission argues, however, that if a flat fee representation is not completed, by definition some amount of the flat fee necessarily must be unearned and returned to the client.

With the limited record in this case, we are not prepared to hold that some amount of a flat fee must be returned in all cases in which the attorney-client relationship ends before the work contracted for is completed. Perhaps the entire flat fee could be deemed earned if the client deals unfairly with the attorney or refuses to cooperate with the attorney, and then either fires the attorney or makes continuation of the representation ethically impossible after the attorney expends considerable time and effort on the case. Respondent asserts circumstances like these existed with both Clients 1 and 2. Because this case was submitted to the hearing officer on the parties' limited stipulations, we find the evidence is insufficient to make a definitive determination of how much, if anything, Respondent should have refunded to Clients 1 and 2. The Court therefore concludes that the Commission failed to meet its burden of proving by clear and convincing evidence that Respondent violated Rule 1.16(d) in the circumstances stipulated for Clients 1 and 2. *See* Admis. Disc. R. 23, sec. 14(i).

Discipline. The parties stipulated that Law Firm's contracts were drafted with the intent that they comply with *Kendall.* While not making a recommendation regarding discipline, the hearing officer noted that the Commission suggested the appropriate sanction is between a public reprimand and a short suspension with automatic reinstatement. Attorneys with misconduct similar to Respondent's have received public reprimands. *See, e.g.*, *Matter of Stephens*, 867 N.E.2d 148, 156-57 (Ind.2007); *Matter of Whitehead*, 861 N.E.2d 702 (Ind.2007); *Kendall*, 804 N.E.2d at 1161; *cf. Thonert*, 682 N.E.2d at 526 (30-day suspension with automatic reinstatement for similar misconduct plus knowingly making false statement to the Commission). Although the unrelenting denial by Respondent (through her law firm, which has vigorously represented her) of any misconduct in the face of strong precedent to the contrary might counsel in favor of a greater penalty, we note the mitigating factors of Respondent's lack of prior disciplinary history and her cooperation with the Commission. We conclude, on balance, that Respondent should receive a public reprimand.

Conclusion

The Court concludes that in charging nonrefundable flat fees, Respondent violated **Indiana** Professional Conduct Rule 1.5(a) by making agreements for and charging unreasonable fees. For Respondent's professional misconduct, the Court imposes a public reprimand.

The costs of this proceeding are assessed against Respondent. The hearing officer appointed in this case is discharged.

The Clerk of this Court is directed to give notice of this opinion to the hearing officer, to the parties or their respective 809*809 attorneys, and to all other entities entitled to notice under Admission and Discipline Rule 23(3)(d). The Clerk is further directed to post this opinion to the Court's website, and Thomson Reuters is directed to publish a copy of this opinion in the bound volumes of this Court's decisions.

DICKSON, SULLIVAN, and DAVID, JJ., concur.

SHEPARD, C.J., with whom RUCKER, J., joins, dissenting only as to the sanction.

Respondent's lawyer indicates in very strong language that she is unrepentant. We conclude that a period of suspension without automatic reinstatement is necessary for the protection of clients.

[1] We note that Respondent is represented in this action by another member of the Law Firm, who states that Respondent did not draft the contracts at issue.

[2] The Commission also alleged that Respondent violated Rule 1.2(a) by failure to abide by a client's decisions concerning the objectives of the representation. The hearing officer concluded Respondent did not violate this rule, and the Commission does not challenge this conclusion.

[3] This is sometimes referred to as a "special retainer" or a "security retainer."

[4] This is sometimes referred to as an "engagement retainer."

[5] As one commentator has noted, describing even a justified general retainer as non-refundable is somewhat misleading "because a court may require any fee—including one earned upon receipt—to be disgorged or refunded if it is ultimately determined to be unreasonable...." Douglas R. Richmond, *Understanding Retainers and Flat Fees*, 34 J. Legal Prof. 113, 129 (2009).

[6] Because Client 2's contract initially called for an hourly rate fee, Count 2 alleged a violation of Rule 1.5(a) by charging a nonrefundable hourly fee. The hearing officer made no conclusion regarding this charge, and neither party raised this charge in their briefs to this Court. This opinion, therefore, addresses only the charges relating to flat fees.

[7] Of course, regardless of how a particular contract is drafted, the fee charged must be reasonable. *See* Prof. Cond. R. 1.5(a).

953 N.E.2d 1060 (2011)

In the Matter of Everett E. POWELL, II, Respondent.

No. 49S00-0910-DI-426.

Supreme Court of Indiana.

September 29, 2011.

1061*1061 Pro se, Attorney for the Respondent.

G. Michael Witte, Executive Secretary, Angie L. Ordway, Staff Attorney, Indianapolis, IN, Attorneys for the Indiana Supreme Court Disciplinary Commission.

Attorney Discipline Action

PER CURIAM.

We find that Respondent, Everett E. Powell, II, engaged in attorney misconduct by collecting a clearly unreasonable and exploitive fee from a vulnerable client in violation of Indiana Professional Conduct Rule 1.5(a). For this misconduct, we find that Respondent should be suspended from the practice of law in this state for at least 120 days without automatic reinstatement.

This matter is before the Court on the report of the hearing officer appointed by this Court to hear evidence on the Indiana Supreme Court Disciplinary Commission's "Verified Complaint for Disciplinary Action," 1062*1062 and on the post-hearing briefing by the parties. Respondent's 2004 admission to this state's bar subjects him to this Court's disciplinary jurisdiction. *See* IND. CONST. art. 7, § 4.

Background

Prior to Respondent's representation of T.G., another attorney, Mark E. Ross ("Ross"), had represented T.G. in obtaining a settlement of a personal injury action. T.G. had a history of drug and alcohol abuse, and she was in an apparently abusive and controlling relationship with J.S., the father of her six children. In August 2004, Ross created, with T.G.'s consent, a "special needs trust" to hold $42,500 from the settlement to preserve T.G.'s eligibility for public assistance and to prevent rapid depletion by T.G. and those who may not be acting in her best interests, including J.S. Ross agreed to become the trustee because he was unable to find any other qualified individual or institution to serve.

T.G. soon began demanding access to the trust money, pressured, Ross believed, by J.S. and his mother. Ross sent a series of letters to T.G. reminding her of the purposes of the special needs trust, expressing willingness to surrender his position to a qualified successor trustee, saying that he was, in fact, very close to resigning as trustee (in which case, he told her a court would

appoint a successor), and suggesting she contact some smaller banks to see if any would be willing to take over as trustee.

On October 27, 2004, T.G. (accompanied by J.S.) consulted Respondent about getting access to the funds in the trust. During this consultation, Respondent reviewed documents provided by T.G., which showed the amount of money placed in the trust and indicated Ross's willingness to step aside as trustee. Because T.G. did not have funds to pay a fee upfront, Respondent suggested that he could take the case on a contingent basis. On the same day, the parties entered into an agreement under which Respondent would "provide legal services concerning removal of Mark E. Ross as trustee of your Special Needs Trust" for a fee of "1/3 of whatever was in the trust." The agreement also stated:

• T.G. and her family have sought legal representation for some time and no attorney is willing to take on this case.

• T.G. had been given the option of paying for Respondent's services on an hourly basis.

• The agreement could result in a substantial fee for Respondent for little work.

• The parties agreed that the one-third fee was reasonable under the circumstances.

• J.S. attested to all the statements and signed as a witness.

The following day, October 28, 2004, Respondent faxed a letter to Ross telling him of T.G.'s dissatisfaction and asking him to dissolve the trust. Ross sent a return fax saying that he was glad T.G. had consulted an attorney and that he had offered to have the trust pay for one or two hours for legal work. Ross told Respondent of the reasons the trust was created and expressed concern that the assets would be quickly depleted if T.G. got unfettered access to them. On the same day, Respondent and Ross reached an agreement by phone that Respondent would take over as successor trustee.

Respondent prepared a short "Resignation and Replacement of Trustee" document, which T.G., Respondent, and Ross signed on October 29. Having became the successor trustee at this point, Respondent executed documents terminating the trust, in accordance with T.G.'s wishes. Ross gave Respondent the checkbook for the 1063*1063 trust account, which was at Fifth Third Bank, along with a check for $3,917.40, written on Ross's attorney trust account, which Ross was holding for payment of outstanding medical bills.

Still on October 29, Respondent and T.G. went to the downtown branch of Fifth Third Bank and showed employees there the trust termination documents. They refused to allow Respondent to sign anything allowing T.G. to withdraw any money from the trust account. Respondent and T.G. then went to another branch of Fifth Third Bank. Without showing the employees there the trust termination documents, he executed a signature card for the trust account in his purported capacity as trustee. He deposited the $3,917.40 check into the trust account, although it was not part of the trust assets.

Later on October 29, Respondent prepared an accounting of funds to be distributed from the trust, showing $14,815.55 as his fee, $200 to be held for any tax and accounting fees, and $29,429.62 for T.G. The beginning balance was off by $500 and it included the $3,917.40 that

was intended for payment of outstanding medical bills.[1] Respondent and T.G. went to yet another branch of Fifth Third Bank that was open late. In his purported capacity as trustee, he also wrote a check to a different bank for $29,429.62 with the notation "Opening Account for [T.G.]." On October 30, 2004, he wrote a check on the trust account to his firm for $14,815.55.

After these two checks cleared, the balance of the trust account was $667.44. Respondent provided no tax and accounting services and did nothing to secure the funds remaining in the account, which were completely depleted by bank fees by September 2008.

The hearing officer rejected any justification for a one-third contingent fee Respondent collected for his services and calculated that a reasonable fee for Respondent's services was $3,000, based on 15 hours of work at $200 per hour.

Discussion

Collection of an unreasonable fee. The Commission charged Respondent with violating Indiana Professional Conduct Rule 1.5(a), which prohibits making an agreement for, charging, or collecting an unreasonable fee.[2]

Even if a fee agreement is reasonable under the circumstances at the time entered into, subsequent developments may render collection of the fee unreasonable. In *Matter of Gerard*, 634 N.E.2d 51 (Ind.1994), an elderly, hospitalized woman (Randolph) retained the respondent to prepare a will and help recover certificates of deposit she believed were lost or stolen. The fee agreement stated that the respondent was to receive "as a retainer an amount equal to one-third of all assets recovered." *Id.* at 52. He charged $250 for preparing a will, and during the following month, he located 23 certificates of deposit, all safely deposited under the client's name, with a value of over $450,000. He retained a fee of nearly $160,000. The respondent's actions were largely administrative and required no specific legal skill. He claimed he spent 160 hours in this effort. After the client died, her estate filed suit against him to recover the allegedly excessive fee. The respondent then renegotiated his fee and 1064*1064 retained just $28,000 for his services (for 160 hours at his customary rate of $175.00 per hour).

[T]he Hearing Officer found no evidence Respondent knew collection of Randolph's assets would be a simple, uncontested matter until after Randolph signed the contingency fee agreement. However, a more important fact is that Respondent did not renegotiate his fee after realizing his client's entitlement to the certificates was not seriously in doubt, but instead nonetheless accepted the inflated contingency fee. . . .

. . . Respondent's acts in securing the inflated fee represent greedy overreaching. His proper course of action would have been to renegotiate his fee after it became apparent that collection of Randolph's assets was a simple, uncontested matter. His failure to immediately do so indicates a conscious attempt to secure an excessive fee, which imparts added culpability to Respondent's acts.

Id. at 53-54 (emphasis added).

In the current case, Respondent may have reasonably believed at the outset that removing Ross as trustee would be contested (despite documentation indicating Ross was willing to step aside in favor of a qualified successor). He may have even reasonably questioned the amount of money in the trust upon which his fee would be calculated and collected (despite documentation that $42,500 had been deposited in it just a few months earlier). But within two or three days, Ross agreed to resign as trustee in favor of Respondent, and Respondent had assumed control over the trust, knew the balance in the trust account, had gained access to those funds, and had cut himself a check for his fee. At this point, he knew the case did not involve any complex issues, prolonged time commitment, risk of no recovery, or even any opposition.

Respondent argues that his fee can be justified by the "red flags" raised by a client who was complaining about her former attorney, because such a client might turn around and give him the same treatment. Also, Ross had warned Respondent that if he dissolved the trust and the assets were quickly dissipated, T.G. would likely have a legal action against him for breach of trust. Even if "red flags" that a client may be difficult to deal with could justify a higher fee than would be reasonable otherwise, we reject any suggestion that an attorney's concern that he may be committing legal malpractice in representing a client justifies charging the client a higher fee.

We do not suggest that a contingent fee must be reduced every time a case turns out to be easier or more lucrative than contemplated by the parties at the outset. But collection of a fee under the original agreement is unreasonable when it gives the attorney an unconscionable windfall under the totality of the circumstances. On the evidence before us in this case, we conclude that Respondent violated the Indiana Professional Conduct Rule 1.5(a) by collecting an fee that was clearly excessive and unreasonable under the totality of the circumstances.

Discipline. "Our analysis of proper sanction entails consideration of the nature of the misconduct, the duty violated by the respondent, any resulting or potential harm, the respondent's state of mind, our duty to preserve the integrity of the profession, the risk to the public should we allow the respondent to continue in law practice, and matters in extenuation, mitigation, and aggravation." *Matter of McCarthy*, 668 N.E.2d 256, 258 (Ind.1996).

We agree with the hearing officer's finding of the following facts in aggravation: 1065*1065 (1) Respondent is not remorseful; (2) he lacks insight into his misconduct; (3) he made disingenuous, contradictory, unsupported, and evasive assertions during the proceedings; (4) he did not cooperate fully with the Commission's investigation; (5) he was on notice that his client was vulnerable and took an indifferent attitude; (6) he made misrepresentations to Ross (that he intended to act as trustee when he intended to terminate the trust) and to Fifth Third Bank (that he was acting as trustee when he had already terminated the trust); and (7) he has not made restitution. We find the following facts in mitigation: (1) Respondent has no disciplinary history; and (2) at the time of the misconduct, he was newly admitted to the bar.

Disciplinary cases involving fee violations may result in a sanction no more severe than a public reprimand, even when the respondent vigorously denies wrongdoing. *See, e.g.*, *Matter of O'Farrell*, 942 N.E.2d 799 (Ind.2011); *Matter of Lauter*, 933 N.E.2d 1258 (Ind.2010). Suspension, however, is warranted when the misconduct involves clearly exploitive overreaching. In *Matter of Hefron*, 771 N.E.2d 1157 (Ind.2002), the respondent was retained by

a client to recover assets belonging to a probate estate for an hourly fee. The respondent did little on the case, but after the client worked extensively to find assets that were easily recoverable, he insisted that the client agree to a contingent fee. He obtained court approval of over $76,000 in fees and sought additional fees of over $25,000. The probate court eventually reduced his fee to $40,000. The Court imposed a six-month suspension with automatic reinstatement. In *Matter of Thayer*, 745 N.E.2d 207 (Ind.2001), the respondent agreed to prosecute a claim for a contingent fee of 40 percent. On the day of settlement, the respondent presented new fee agreement to the client providing that he would receive 50 percent of settlement. The client felt she had no choice and signed the new agreement to obtain her portion of the settlement proceeds. For this and other misconduct, the Court imposed a 30-day suspension without automatic reinstatement.

Exploitive overreaching in misconduct involving fees is even more culpable when the client is particularly vulnerable. In *Matter of Gerard*, discussed above, the Court imposed a suspension of one year without automatic reinstatement for collecting an unreasonable fee from an elderly, hospitalized woman. In the current case, Respondent was on notice from the outset of the circumstances that prompted T.G. herself to agree a special needs trust just two months earlier—her history of drug and alcohol abuse, her apparently abusive and controlling relationship with J.S., the need to preserve her eligibility for public assistance, and the danger of rapid depletion if she had unfettered access to the funds. Respondent not only dissolved the special needs trust that was meant to protect her assets from dissipation, but he actually began the dissipation by retaining an unreasonable fee from those assets.

In light of Respondent's collection of an unreasonable fee from a vulnerable client, his lack of insight into his misconduct, and the other aggravating circumstances described above, we conclude that Respondent should be suspended for 120 days without automatic reinstatement.

Conclusion

The Court concludes that Respondent violated the Indiana Professional Conduct Rule 1.5(a) by collecting a clearly unreasonable and exploitive fee from a vulnerable client.

For Respondent's professional misconduct, the Court suspends Respondent from the practice of law in this state for a 1066*1066 period of not less than 120 days, without automatic reinstatement, beginning November 11, 2011. Respondent shall not undertake any new legal matters between service of this order and the effective date of the suspension, and Respondent shall fulfill all the duties of a suspended attorney under Admission and Discipline Rule 23(26). At the conclusion of the minimum period of suspension, Respondent may petition this Court for reinstatement to the practice of law in this state, provided Respondent pays the costs of this proceeding, fulfills the duties of a suspended attorney, and satisfies the requirements for reinstatement of Admission and Discipline Rule 23(4). Reinstatement is discretionary and requires clear and convincing evidence of the attorney's remorse, rehabilitation, and fitness to practice law. See Admis. Disc. R. 23(4)(b).

The costs of this proceeding are assessed against Respondent. The hearing officer appointed in this case is discharged.

The Clerk of this Court is directed to give notice of this opinion to the hearing officer, to the parties or their respective attorneys, and to all other entities entitled to notice under Admission and Discipline Rule 23(3)(d). The Clerk is further directed to post this opinion to the Court's website, and Thomson Reuters is directed to publish a copy of this opinion in the bound volumes of this Court's decisions.

All Justices concur.

[1] It does not appear that these funds were ever applied to the medicals bills for which they were intended.

[2] Even if the evidence eventually adduced arguably may have supported charges that Respondent violated other Professional Conduct Rules, the only charge against Respondent is violation of Rule 1.5(a).

EDWIN BLINN, JR., Appellant-Plaintiff,
v.
ROBERT HAMMERLE and HAMMERLE & CLEARY, formerly known as HAMMERLE ALLEN & CLEARY, also formerly known as HAMMERLE & ALLEN, Attorneys at Law, Appellees-Defendants.

No. 49A02-1006-CT-634.

Court of Appeals of Indiana.

April 4, 2011.

SCOTT A. WEATHERS, TRAVIS W. MONTGOMERY, The Weathers Law Office, P.C., Indianapolis, Indiana, ATTORNEYS FOR APPELLANT.

DAVID J. HENSEL, Pence Hensel LLC, Indianapolis, Indiana, ATTORNEY FOR APPELLEES.

NOT FOR PUBLICATION

MEMORANDUM DECISION

ROBB, Chief Judge

Case Summary and Issues

Following Edwin Blinn's guilty plea and sentencing in federal court to money laundering charges, Blinn sued his criminal defense attorney, Robert Hammerle, for malpractice and unjust enrichment. The trial court granted Hammerle's motion for summary judgment on all claims. Blinn now appeals, raising four issues for our review, which we consolidate and restate as three: 1) whether Blinn filed his complaint within the statute of limitations, 2) whether Hammerle committed malpractice, and 3) whether Hammerle was unjustly enriched. We conclude that Blinn did not file his complaint within the applicable statute of limitations, and even if he did, we also conclude that Hammerle did not commit malpractice and Hammerle was not unjustly enriched. Therefore, the trial court's judgment is affirmed.

Facts and Procedural History

Blinn retained Hammerle to defend him in federal court against money laundering charges. Hammerle wrote Blinn a letter, dated May 26, 2005, memorializing their original fee contract:

[T]he flat fee/retainer of $35,000.00 that is due and owing will be my entire fee barring out of pocket expenses should this trial last no more than five (5) calendar days. However, I will bill hourly for every day that said trial lasts beyond the five (5) [sic] calendar days.

Appellant's Appendix at 125.

After continuing to represent Blinn for nearly eight months, Hammerle sent Blinn another letter, dated January 20, 2006, proposing modification of the fee agreement because Blinn's case was more demanding than anticipated. Apparently Blinn rejected Hammerle's January 20 proposal, but eventually agreed to a modified agreement.[1] Blinn states the oral agreement was that he would "pay a flat fee for trial work done after the first five (5) days of trial in lieu of the hourly rate for such work contemplated by the original agreement," and he and Hammerle "agreed upon the additional sum of $20,000," which Blinn paid. Id. at 9.

Hammerle ultimately negotiated and Blinn entered a plea agreement, so there was no trial. Blinn pleaded guilty to one count, which carried a maximum sentence of twenty years in prison and a fine of up to $500,000. Under the agreement, Blinn would be sentenced to between twelve and twenty months in prison and the district court would "consult and take into account" the federal sentencing guidelines. Id. at 66. The agreement did not explicitly address the length or conditions of any supervised release Blinn might be required to serve, but the sentencing judge asked him, "Do you understand also that you'd be subject to up to, I believe it's three years of supervised release after any prison sentence?" Id. at 92. Blinn replied, "Yes, sir." Id. The federal district court sentenced Blinn to sixteen months in prison followed by twelve months of home detention.

The plea agreement provided "Blinn also expressly waives his right to contest or seek review of the sentence on appeal on any ground . . . ." Id. at 67. Blinn appealed his sentence, specifically challenging the twelve months of home detention. The Seventh Circuit Court of Appeals dismissed his appeal following a partial discussion of the merits. Blinn v. United States, 490 F.3d 586, 588 (7th Cir. 2007), reh'g denied, reh'g en banc denied. Shortly after the Seventh Circuit issued this opinion, Blinn wrote a letter dated June 28, 2007 to the Indiana Attorney General, alleging Hammerle violated ethical rules for not returning Blinn's payment in 2006, and for not objecting to Blinn's home detention. Hammerle testified in a deposition that he considered August 27, 2007, when the Seventh Circuit denied rehearing, to be the last day of his representing Blinn.

On August 26, 2009, Blinn filed his complaint against Hammerle in state court for malpractice and unjust enrichment, arguing Hammerle: 1) provided ineffective assistance in Blinn's sentencing, and 2) was not entitled to keep the $20,000 Blinn paid him in 2006. The trial court granted Hammerle's motion for summary judgment on all claims. Blinn now appeals. Additional facts will be supplied as appropriate.

Discussion and Decision

I. Standard of Review

On appeal of a summary judgment order we are bound by the same standard as the trial court, and we consider only those materials which the parties designated at the summary judgment stage. Estate of Pflanz v. Davis, 678 N.E.2d 1148, 1151 (Ind. Ct. App. 1997). Summary judgment is appropriate if the "designated evidentiary matter shows that there is no genuine issue

as to any material fact and that the moving party is entitled to a judgment as a matter of law." Ind. Trial Rule 56(C). The moving party bears the burden of showing no genuine issue of material fact in reliance upon specifically designated evidence. Pflanz, 678 N.E.2d at 1150. If the moving party satisfies its burden, the burden shifts to the non-movant to set forth specifically designated evidence showing there is a genuine issue for trial. Id. A genuine issue of material fact exists where facts concerning an issue which would dispose of the litigation are in dispute, or where undisputed facts are capable of supporting conflicting inferences on such an issue. Briggs v. Finley, 631 N.E.2d 959, 963 (Ind. Ct. App. 1994), trans. denied. Even if the facts are undisputed, summary judgment is inappropriate where the record reveals an incorrect application of the law to the facts. Gen. Accident Ins. Co. of Am. v. Hughes, 706 N.E.2d 208, 210 (Ind. Ct. App. 1999), trans. denied.

We liberally construe all designated evidentiary material in the light most favorable to the non-moving party to determine whether there is a genuine issue of material fact for trial. Dunifon v. Iovino, 665 N.E.2d 51, 55 (Ind. Ct. App. 1996), trans. denied. We may affirm a trial court's grant of summary judgment upon any theory supported by the designated materials. Sims v. Barnes, 689 N.E.2d 734, 735 (Ind. Ct. App. 1997), trans. denied. Additionally, we "may determine in the context of summary judgment a mixed question of law and fact." Ebbinghouse v. Firstfleet, Inc., 693 N.E.2d 644, 647 n.2 (Ind. Ct. App. 1998), trans. denied.

II. Statute of Limitations

Hammerle argues that Blinn did not file his complaint within the applicable statute of limitations, which the parties agree is two years. See Morgan v. Benner, 712 N.E.2d 500, 503 (Ind. Ct. App. 1999), trans. denied. In evaluating this argument, we refer to the following three facts from the designated evidence: 1) Blinn displayed his awareness of Hammerle's possible misconduct in his June 28, 2007 letter to the Indiana Attorney General; 2) Hammerle admitted he ceased to represent Blinn on August 27, 2007; and 3) Blinn filed his complaint on August 26, 2009. Even given these facts, Hammerle and Blinn disagree over when the two-year statute of limitations began to run, and therefore whether it expired before Blinn filed suit.

In particular, Hammerle argues the "discovery rule" applies, and accordingly that the statute began to run, at the latest, on June 28, 2007, when Blinn wrote a letter to the Indiana Attorney General regarding Hammerle's alleged misconduct. Blinn argues the "continuous representation doctrine" applies, and accordingly that the statute began to run on August 27, 2007, the date Hammerle ceased to represent Blinn.

Hammerle bases his argument on Morgan, which states:

legal malpractice actions are subject to the "discovery rule," which provides that the statute of limitations does not begin to run until such time as the plaintiff knows, or in the exercise of ordinary diligence could have discovered, that he had sustained an injury as the result of the tortious act of another. For a cause of action to accrue, it is not necessary that the full extent of damage be known or even ascertainable, but only that some ascertainable damage has occurred.

712 N.E.2d at 503 (citations omitted).

Blinn bases his argument on Biomet, Inc. v. Barnes & Thornburg, 791 N.E.2d 760 (Ind. Ct. App. 2003), trans. denied, which explains that "[u]nder the continuous representation doctrine, the statute of limitations does not commence until the end of an attorney's representation of a client in the same matter in which the alleged malpractice occurred." Id. at 765. In Biomet, we adopted the continuous representation doctrine for numerous policy reasons as a narrow exception to the discovery rule traditionally followed in legal malpractice actions. Id. at 765-77. In Biomet, we noted several reasons for applying the narrow exception: avoiding disruption of the attorney-client relationship, allowing attorneys to remedy mistakes before being sued, and not forcing clients to second-guess their attorney's handling of their case. Id. at 766. This doctrine also allows a client to be confident in their attorney's ability to correct errors, or for the client to terminate the relationship and file suit within two years of termination. Id. Finally, the doctrine prevents an attorney from defeating a malpractice action by continuing representation until the statute of limitations under the discovery rule has expired. Id. at 766-67.

These rationales support application of the continuous representation doctrine in Indiana and other jurisdictions, and application to the accounting profession in Indiana as well. See Bambi's Roofing, Inc. v. Moriarty, 859 N.E.2d 347, 357-58 (Ind. Ct. App. 2006). However, here, we find that the rationales supporting our adoption and application of the continuous representation doctrine are absent.

Our application of the continuous representation doctrine is beneficial to the extent that it does not require clients or encourage attorneys to act in ways that might interfere with their relationship or prejudice clients in their ongoing legal matters or a malpractice action. The very existence of the doctrine minimizes incentives for attorneys to act in ways that might otherwise prejudice these clients. However, the doctrine is of negligible utility where its application would not advance the concerns explained in Biomet, and of no utility where the client has already acted — perhaps unaware of the continuous representation doctrine.

Here, Blinn wrote to the Indiana Attorney General complaining of Hammerle's conduct, explaining the fee dispute for Hammerle not returning money to Blinn and Blinn's suspicion of Hammerle's malpractice by not objecting to Blinn's home detention. This letter was likely to disrupt the attorney-client relationship, and demonstrated Blinn was already second-guessing Hammerle's handling of his case. All the while, Hammerle was dutifully seeking rehearing of the Seventh Circuit decision. Hammerle ended the representation less than two months later, so he was clearly not attempting to defeat a malpractice action by extending representation to run out the statute of limitations.

Therefore, we decline to apply the continuous representation exception and instead follow the default discovery rule for accrual of the statute of limitations. The facts in this case are particularly appropriate for application of the discovery rule, which is "designed to encourage the prompt presentation of claims and to assure fairness to defendants." Silvers v. Brodeur, 682 N.E.2d 811, 817 (Ind. Ct. App. 1997), trans. denied. The discovery rule is also sympathetic to plaintiffs by "toll[ing] the running of the statute of limitations until a party either knows, or should have known, about his injury." Id. Here, the designated evidence clearly shows that Blinn knew of his "injury" — the purportedly improper sentence — in June 2007 and even lucidly expressed his view that it was malpractice in his letter dated June 28, 2007. Therefore, we

consider this to be the date of accrual of Blinn's claim, and his two-year statute of limitations expired before he filed his complaint on August 26, 2009. Further, our decision here is not unprecedented, as we have applied the discovery rule to legal malpractice claims in at least one other post-Biomet decision. See Godby v. Whitehead, 837 N.E.2d 146, 150-51 (Ind. Ct. App. 2005) ("[A] criminal defendant is required to file his malpractice action within two years of discovering the malpractice.") (quoting Silvers, 837 N.E.2d at 818), trans. denied. However, because we decide this issue on a narrow exception, we continue to address the merits as well.

III. Legal Malpractice

Blinn's malpractice claim is premised on the allegation that Hammerle should have objected when the federal district court imposed twelve months of home detention in addition to a sixteen-month prison term. Hammerle's failure to object, Blinn asserts, resulted in a "sentence inconsistent with [Blinn's] binding plea agreement," Appellant's Br. at 17 (all capitalization omitted), because it imposed "continued punishment" beyond that specified in the plea agreement. Id. at 10. He also argues Hammerle's error prevented the Seventh Circuit from deciding his appeal on the merits. We disagree, and for the following reasons affirm summary judgment on his malpractice claim.

The Seventh Circuit explained the facts underlying Blinn's malpractice claim:

[A] [federal] grand jury returned a superseding indictment charging [Blinn] with conspiring to launder monetary proceeds (Count Four) and laundering the monetary proceeds of the unlawful distribution of marijuana (Count Five). Blinn negotiated a plea agreement with the government . . . and pleaded guilty to Count Four of the indictment; Count Five was dismissed. The agreement called for a sentence of twelve to twenty months' imprisonment, which was well below the statutory maximum of twenty years, but it was silent as to any term of supervised release. The district court accepted the plea and was bound by the sentencing recommendation contained in the plea agreement.

Blinn was ultimately sentenced to sixteen months' imprisonment, ordered to pay a fine of $40,000, and placed on supervised release for three years. In addition to these terms, the district court ordered, as a condition of the supervised release, that Blinn be confined to his home with electronic monitoring for twelve months, except for purposes of employment and other activities approved by Blinn's probation officer. Blinn did not object to the stated terms of his sentence before it was imposed or move to withdraw his plea agreement.

He now appeals, arguing that his sentence of sixteen months' imprisonment to be followed by twelve months of home confinement violates the terms of his plea agreement by exceeding the high end of the sentencing range set forth in his plea agreement by four months. In making this argument, Blinn directs us to section 5F1.2 of the United States Sentencing Guidelines, which advises that home detention may be imposed as a condition of probation or supervised release, "but only as a substitute for imprisonment." This provision, Blinn contends, prevents the district court from ordering him to a period of home detention that, when combined with his actual term of imprisonment, exceeds the maximum sentence of twenty months' imprisonment provided for in his plea agreement. . . .

Blinn, 490 F.3d at 587 (footnote and citations omitted). Under the sentencing guidelines then in effect, district courts were advised to impose a period of supervised release to follow a defendant's term of imprisonment greater than one year. Id. at 587 n.1.

The Seventh Circuit explained that the legal authorities Blinn cited in support of his argument were non-binding as from other federal circuits and also significantly distinguishable on the facts. Continuing, the court declined to determine whether his sentence violates the terms of his plea agreement because a provision of his plea agreement included a valid waiver of his right to appeal. However, the court did discuss what has become a central issue in Blinn's malpractice claim — whether Blinn received the benefit of his bargained-for plea agreement.

[T]he terms of the plea agreement and the transcript of the proceedings show that Blinn received exactly what he bargained for — a term of imprisonment not to exceed twenty months. The agreement plainly states, "should the Court accept this plea agreement, Blinn will be sentenced to a sentence within the range of 12 to 20 months' imprisonment on Count Four . . . ." During the plea colloquy, Blinn also confirmed his understanding that if the district court accepted the plea agreement, it was committed "to giving [Blinn] a sentence that is at least 12 months in prison, but no more than 20 months in prison[.]" At Blinn's sentencing hearing, this range of imprisonment was repeated multiple times by the judge and the government's attorney before Blinn's sentence was finally imposed.

It is apparent from the above discussion that the parties bound by the plea agreement — Blinn, the government, and the district court . . . — were all in agreement that Blinn, in exchange for pleading guilty to Count Four, would serve a sentence between twelve and twenty months in prison. In addition, there was no question that the sentencing judge would set the terms of Blinn's supervised release. Because the plea agreement made no recommendation as to this aspect of Blinn's sentence, during the plea colloquy, the sentencing judge sought and received Blinn's acknowledgment that it was within the judge's discretion to decide the length and conditions of the supervised release. In addition, as we noted earlier, though given the opportunity, Blinn made no objections to the district court's conditions of his supervised release before it was imposed. Therefore, Blinn's argument that he was somehow deprived of the benefit of his bargain provides no basis for us to make an exception to his appellate waiver and consider the merits of his case.

Id. at 588-89 (citations omitted).

Although the Seventh Circuit did not explicitly address whether Blinn's sentence violates the terms of his plea agreement, it did state that he received exactly what he bargained for — "a sentence between twelve and twenty months in prison." Id. at 589.

We adopt the reasoning of the Seventh Circuit and find Blinn's sentence did not violate the terms of the plea agreement or the terms of the controlling sentencing statute. Thus, we do not find Hammerle committed malpractice by failing to object because such an objection would not have been successful. See Sanchez v. State, 675 N.E.2d 306, 310 (Ind. 1996) ("To succeed on a claim that counsel was ineffective for failure to make an objection, the [client] must demonstrate that if such objection had been made, the court would have had no choice but to sustain it."). Blinn has not demonstrated Hammerle's failure to object to the period of home detention was malpractice,[2] and therefore, summary judgment for Hammerle was proper.

IV. Unjust Enrichment

A. Analytical Framework

A claim for unjust enrichment is a legal fiction courts conceived to permit recovery where the circumstances are such that "under the law of natural and immutable justice there should be a recovery . . . ." Zoeller v. E. Chicago Second Century, Inc., 904 N.E.2d 213, 220 (Ind. 2009) (citation omitted). Courts thereby impose obligations "without regard to the assent of the parties bound, to permit a contractual remedy where no contract exists in fact but where justice nevertheless warrants a recovery under the circumstances as though there had been a promise." City of Indianapolis v. Twin Lakes Enters., Inc., 568 N.E.2d 1073, 1078 (Ind. Ct. App. 1991), trans. denied. "To prevail on a claim of unjust enrichment, a claimant must establish that a measurable benefit has been conferred on the defendant under such circumstances that the defendant's retention of the benefit without payment would be unjust." Second Century, 904 N.E.2d at 220. Essentially, unjust enrichment is the remedy for breach of a constructive contract, implied in law. See id.; Twin Lakes Enters., 568 N.E.2d at 1078.

However, "[w]hen the rights of parties are controlled by an express contract, recovery cannot be based on a theory implied in law." Keystone Carbon Co. v. Black, 599 N.E.2d 213, 216 (Ind. Ct. App. 1992), trans. denied. Indeed, "[a]s a general rule, there can be no constructive contract where there is an express contract between the parties in reference to the same subject matter." Twin Lakes Enters., 568 N.E.2d at 1079; accord Keystone Carbon, 599 N.E.2d at 216.

B. Modified Agreement

Blinn's unjust enrichment claim is based upon Hammerle's retention of $20,000 that Blinn paid pursuant to the parties' modified agreement. The original contract between Blinn and Hammerle states in relevant part, "the flat fee/retainer of $35,000.00 . . . will be [Hammerle's] entire fee . . . should this trial last no more than five (5) calendar days. However, [Hammerle] will bill hourly for every day that said trial lasts beyond the five (5) [sic] calendar days." Appellant's App. at 125. It is undisputed that under the terms of the original fee contract, Hammerle would retain Blinn's payment of $35,000 in the event of no trial. See Appellant's Br. at 4-5 (noting Blinn and Hammerle's agreement with this interpretation).

Hammerle argues that in late January or early February of 2006 Blinn agreed to modify the original contract such that he would pay Hammerle an additional $20,000 (for a total of $55,000) for representation through the entire trial regardless of length, or to completion of the matter in the event of no trial.

Blinn first responds that he did not agree to modify the original contract at all. In particular, Blinn asserts on appeal he "did not consider the advance to be a modification of the original fee agreement, although Blinn's Complaint mistakenly says otherwise." Appellant's Br. at 4. On review of summary judgment, we consider the designated evidence to determine if there is a genuine issue of material fact and the movant is entitled to judgment as a matter of law. T.R. 56(C). Here, Hammerle properly designated Blinn's complaint as evidence for summary

judgment at the trial court. Accordingly, although generally parties may liberally amend pleadings in compliance with Indiana Trial Rule 15, a party cannot amend the complaint as part of an appeal. In any event, Blinn's assertion that his $20,000 payment was not made pursuant to modification of the original contract is contrary to his strenuous contention that the parties modified the original contract but now disagree over the terms of the modified agreement.

Blinn next argues that the parties' modified agreement refers only to any work Hammerle would have billed hourly after the first five calendar days of trial, and did not modify an undisputed provision in the original contract that Hammerle would retain $35,000 in the event of no trial.

However, the context surrounding Blinn's eventual acquiescence to modify the original contract reveals what was really going on. Looking to the context — evident in the designated record — expands our view of the dispute and allows us to apply the law where the "facts and circumstances have been sufficiently developed." Waterfield Mortg. Co., Inc. v. O'Connor, 172 Ind. App. 673, 677, 361 N.E.2d 924, 926 (1977).

Nearly eight months after the parties finalized the original contract, Hammerle wrote to Blinn in a letter dated January 20, 2006:

Quite frankly, in thirty years of practice, it has been exceedingly rare for me to revisit the issue of fees once a case has begun. . . .

However, the simple fact is that the demands of your case far, far exceed that anticipated when I agreed to get involved. In any event, if I am going to do this right, which I intend on accomplishing, here is what needs to be done from a financial standpoint[.]

Id. at 127.

Hammerle's letter then proposes expanding to "full-time" the roles and responsibilities of another attorney and a paralegal who had been assisting Hammerle with Blinn's case, and specifies their rates of pay. Id. Hammerle's letter continues:

As to me, I have quite frankly used up the retainer that you have paid me as of today's date. However, I will continue to work on this matter personally through the end of this month without billing further. However, as of February 1, 2006, I propose billing at the rate of $250.00 an hour for all out-of-Court work and $300.00 an hour for in-Court trial work.

. . . [T]he fact is that I am going to have to literally put nearly everything else aside in order to properly defend you in trial . . . . ***

Id. (emphasis added).

This letter reveals that the reason for modifying the original contract was that Hammerle had already used up the entire $35,000 Blinn paid him earlier, and the $35,000 was not a "flat fee" for work to completion or up to a certain point (i.e., five days of trial), but a "retainer" to be billed against hourly. See id. at 125 (referring to the "flat fee/retainer of $35,000.00"). This background makes clear that the original contract called for Hammerle to bill hourly up to and including the first five days of trial. In other words, the $35,000 was merely an estimate that the

parties apparently agreed was likely to cover anything before and including the first five days of trial.[3] Hammerle's January 20, 2006 letter shows this was his understanding of the original contract. Id. Blinn's eventual acquiescence to modify the original contract makes clear that this was his understanding as well, despite his appellate argument to the contrary and the "entire fee barring out of pocket expenses" language in the original contract. Id. at 125.

Further, if Blinn understood the original contract as stating that $35,000 was full compensation under all circumstances except for a trial exceeding five days, then he would not have modified the contract pursuant to Hammerle's letter stating he "used up" the funds and — implicitly but clearly — that he had been billing hourly against Blinn's account. Id. at 127. If Blinn understood the original contract to mean that Hammerle was not entitled to additional compensation until after five days of trial, then Blinn would not have acquiesced to pay Hammerle more before trial began — "to go to trial." Addendum to Appellant's Brief at 5. During a deposition, Blinn stated: "I had an agreement for a flat fee of $35,000. Mr. Hammerle asked me for an additional sum of money. I gave him [$]20[,000]. He said he needed it to go to trial." Id. (emphasis added).

The designated evidence includes two different calculations by Blinn as reasons for his agreement to modify the original contract. The first is included in a verified complaint for disciplinary action against Hammerle filed by the Acting Executive Secretary of the Disciplinary Commission of the Indiana Supreme Court:

Blinn . . . "did the math" and realized that, if [Hammerle] began billing him as of February 1st and spent every day on his case for the next 6 weeks [before trial was scheduled to begin], Blinn, conceivably, could end up owing [Hammerle] a huge sum (above the $35,000 already paid) that could be substantially in excess of $20,000.

Appellant's App. at 20.

This description of Blinn's calculation is consistent with the other designated evidence that indicates the parties intended for Hammerle to bill hourly in the original contract even before trial began, that the parties did not intend for $35,000 to be a flat fee for full payment of all work until the end of five days of trial, and that under the original contract Blinn could end up owing Hammerle more than $35,000 prior to and even in the event of no trial.

Blinn argues he made a slightly different strategic calculation: Blinn evaluated the likelihood that he would end up paying an extremely high amount if Hammerle billed at his hourly rate for a trial lasting two or three weeks or longer,[4] and therefore chose to modify the original contract by paying a limited additional sum of $20,000 for work after the first five days of trial to limit his additional expenses. This is unlikely because as mentioned above, Hammerle had been billing hourly all along and was already in need of additional payments by the time Blinn agreed to modification. As a result, Blinn was aware that this additional sum was partially compensation for work from late January and early February, and partially a flat fee to cover all future work on this case.

Blinn also argues the modified agreement was "subject to a condition precedent, namely the occurrence of a trial lasting beyond five calendar days." Appellant's Br. at 15. A condition

precedent "must be performed before the agreement of the parties shall become a binding contract, or it may be a condition which must be fulfilled before the duty to perform an existing contract arises." Blakley v. Currence, 172 Ind. App. 668, 670, 361 N.E.2d 921, 922 (1977). Again, the context of the parties' modified agreement makes clear that the parties did not intend to create a condition precedent. Their original contract provided for Blinn's payment of $35,000, to be billed against hourly, although the parties estimated that amount would take them through the first five days of a trial. The parties' modified agreement provided for Blinn's payment of an additional $20,000 —$55,000 total — for Hammerle's representation to the completion of a trial regardless of length or in the event of no trial. The modified agreement limited and fixed Blinn's expenses and Hammerle's compensation, and was not contingent on satisfaction of a condition precedent.

At bottom, we have examined the designated evidence in the light most favorable to Blinn, the non-moving party, and have concluded there is no genuine issue of material fact precluding judgment as a matter of law in favor of Hammerle. See Dunifon, 665 N.E.2d at 55. We cannot and have not reweighed the evidence. Rather, we have culled through the evidence designated by both parties and now affirm summary judgment on a theory supported by the designated materials. Sims, 689 N.E.2d at 735. In sum, the context in which the parties modified the original contract spells out precisely what the parties intended in both the original contract and modified agreement. Hammerle had been billing hourly all along, and when he told Blinn the initial $35,000 was used up and expected trial to last multiple weeks, Blinn agreed to modify the fee agreement to limit and fix his expenses. Hammerle did not breach a constructive contract, implied in law, and thus Blinn is not entitled to a claim for unjust enrichment.

C. Express Contract Referring to the Same Subject Matter

We also find compelling an alternative route to the same conclusion that Hammerle was not unjustly enriched. Again, we begin with an undisputed understanding of part of the original contract: Hammerle would keep Blinn's payment of $35,000 even in the event of no trial. Because this understanding is undisputed, it constitutes an "express contract between the parties in reference to the same subject matter," Twin Lakes Enters., 568 N.E.2d at 1079, as that in dispute — whether Hammerle would keep Blinn's payment of $35,000 even in the event of no trial. If, as Blinn argues, the modified agreement did not affect this undisputed portion of the original contract, then this portion of the original contract would remain in effect.

Accordingly, even if we were to accept Blinn's argument that this portion of the original contract was not modified, there still remains an express contract referring to the same subject matter, thereby precluding his claim for unjust enrichment. See id.; Town of New Ross v. Ferretti, 815 N.E.2d 162, 168 (Ind. Ct. App. 2004). Therefore, under this theory, it is immaterial whether the modified agreement addressed the subject matter of the unjust enrichment claim, because the original contract indisputably did, thereby precluding Blinn's claim of unjust enrichment.

In sum, even if the original contract dictated what Hammerle was due in the event of no trial and the modified agreement did not affect the original contract in this regard, the original contract's undisputed guidance on this subject matter precludes Blinn's claim for unjust enrichment.

Conclusion

Blinn did not file his complaint within the applicable statute of limitations, and his claims are therefore time-barred. Further, addressing the merits, the trial court did not err in granting summary judgment against Blinn on his malpractice claim because Blinn has not demonstrated Hammerle's failure to object to the period of home detention was malpractice. Neither did the trial court err in granting summary judgment against Blinn on his unjust enrichment claim. For the above reasons, summary judgment in favor of Hammerle is affirmed.

Affirmed.

VAIDIK, J., concurs.

MAY, J., dissents with opinion.

MAY, Judge, dissenting

I agree with the majority's analyses of the limitations and malpractice issues. However, I believe there is a genuine issue of material fact as to whether Hammerle was, under the terms of the parties' original and modified fee agreements, unjustly enriched when he retained the additional $20,000 even though there was no trial. I must therefore respectfully dissent.

The majority might well be correct, and a trier of fact might reasonably find, that "the context surrounding Blinn's eventual acquiescence to modify the original contract reveals what was really going on." (Slip op. at 14.) It might also be correct in its characterizations of, among other things, what Hammerle's letter seeking a modification "implicitly but clearly" stated regarding whether Hammerle had been billing hourly all along, (*id.* at 16), the various ways Blinn might have "understood the original contract," (*id.*), or how the "context" of the modified agreement "makes clear" the parties did not intend a condition precedent, (*id.* at 18).

But while the majority finds it "apparent" that the parties considered the original $35,000 "merely an estimate that the parties apparently agreed" was likely to cover Hammerle's work through the first five days of trial, (*id.* at 15), it is equally apparent to me that no designated evidence compels that characterization such that all genuine issues of material fact about the parties' intentions in signing the original contract have been resolved.

The majority relies on context, implicit statements, and speculation as to the parties' "understanding." I believe we must, in determining whether Blinn was paying a "flat fee" or a "retainer" against which Hammerle would bill, instead rely on the explicit statements in the agreements that were favorable to Blinn as the non-movant. For that reason, summary judgment is inappropriate on the unjust enrichment claim.

Summary judgment is permitted when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Ind. Trial Rule 56(C). There is such a genuine issue if the trial court is required to resolve disputed facts, but summary judgment is likewise inappropriate if *conflicting inferences* arise from the facts. *Lawson v. Howmet*

Aluminum Corp., 449 N.E.2d 1172, 1175 (Ind. Ct. App. 1983). To preclude summary judgment, the conflicting inferences must be decisive to the action or to a relevant secondary issue. *Id.*

Here, they are. Those conflicting inferences are highlighted by the conclusions the majority draws from "context," (slip op. at 14), "background," (*id.* at 15), a statement made "implicitly" in Hammerle's letter, and the "understanding" the majority attributes to the parties. (*Id.* at 16.) As disputes about the evidence or inferences to be drawn therefrom are to be resolved in favor of the non-movant, here Blinn, T.R. 56, summary judgment on the unjust enrichment issue was error.

The evidence on which we should rely — the explicit language most favorable to Blinn — requires reversal of summary judgment. The majority finds, from "context — evident in the designated record," (slip op. at 14), that the initial $35,000 was "not a `flat fee' for work to completion . . . but a `retainer' to be billed against hourly." (*Id.* at 15.) It then notes the explicit language in the letter Hammerle wrote Blinn to memorialize the original agreement, where Hammerle referred to "the flat fee/retainer of $35,000." (App. at 125.) On review of summary judgment, I do not believe we may, as the majority appears to do, read the phrase "flat fee" out of the designated evidence, especially when our standard of review requires us to view the evidence and inferences therefrom in the light most favorable to Blinn.

Nor is it apparent the parties could have any "understanding" of what a "flat fee/retainer" agreement is, as those terms are incompatible. In *In re Kendall*, 804 N.E.2d 1152, 1154 (Ind. 2004), our Indiana Supreme Court undertook to "distinguish between the advance fees charged by the respondent here (that were to be earned in the future at an agreed rate) and advance fees that are agreed to cover specific legal services regardless of length or complexity (fixed or `flat' fees)." The Court noted one description of the term "flat fee" as embracing "all work to be done, whether it be relatively simple and of short duration, or complex and protracted." *Id.* (quoting Alec Rothrock, *The Forgotten Flat Fee: Whose Money Is It And Where Should It Be Deposited*? 1 Fla. Coastal L.J. 293, 299 (1999)). "As distinguished from a partial initial payment to be applied to fees for future legal services[*i.e.*, a "retainer" like that to which the majority finds Hammerle and Blinn agreed], a flat fee is a fixed fee that an attorney charges for all legal services in a particular matter, or for a particular discrete component of legal services." *Id.* at 1157.

The $35,000 in the original agreement before us could not have represented *both* a "flat fee" and a "retainer," and which type of agreement it was should be decided by the trier of fact at a trial, not by this court on review of a summary judgment.

Nor can I agree with the majority that an unjust enrichment claim is unavailable to Blinn because the parties had an express contract. Express terms in a valid contract preclude "the substitution of and the implication by law of terms *regarding the subject matter covered by the express terms of the contract.*" *Zoeller v. East Chicago Second Century, Inc.*, 904 N.E.2d 213, 221 (Ind. 2009) (emphasis added), *cert. denied, reh'g denied.* Therefore, when the rights of parties are controlled by an express contract, recovery cannot be based on a theory implied in law. *Id.*

Assuming *arguendo* that the parties' agreement regarding the additional $20,000 amounted to a valid contract in the form of a modified fee agreement,[5] I believe there is a genuine issue of

material fact as to whether any terms of such contract expressly addressed the subject matter of Blinn's unjust enrichment claim, *i.e.*, whether the parties contemplated Hammerle would retain the additional $20,000 even if there was no trial.

In *Brown v. Mid-Am. Waste Sys., Inc.*, 924 F. Supp. 92, 94 (S.D. Ind. 1996), Brown, a landfill operator, agreed in 1988 to sell his shares to Mid-American. Mid-American paid Brown about $750,000, but the purchase agreement provided an additional $4.5 million would be payable to Brown if a then-pending permit application to expand the waste disposal area at the landfill was approved by the Indiana Department of Environmental Management ("IDEM"). If IDEM did not approve the Expansion Application by October 1, 1991, no additional purchase price was due. IDEM delayed issuance of the permit until 1993.

Brown alleged Mid-American was unjustly enriched by its beneficial use of the newly-permitted expansion area of the landfill, but Mid-American argued the Purchase Agreement precluded the implication of a contract under an unjust enrichment theory: "[B]ecause the rights and obligations of the parties are controlled by the express terms of a valid contract, defendant maintains that plaintiff cannot base his recovery upon a contract implied in law." *Id.* at 94.

The Southern District of Indiana agreed with Mid-American. It summarized Indiana law on that question:

Under Indiana law, the terms quasi-contract, contract implied-in-law, constructive contract and *quantum meruit* are used almost interchangeably as "legal fictions, created by courts of law, to provide a remedy which prevents unjust enrichment and thereby promotes justice and equity." *City of Indianapolis v. Twin Lakes Enterprises, Inc.*, 568 N.E.2d 1073, 1078 (Ind. App. 1991). Each doctrine allows courts to impose obligations "without regard to the assent of the parties bound, to permit a contractual remedy where no contract exists in fact but where justice nevertheless warrants a recovery under the circumstances as though there had been a promise." *Id.; see also Wright v. Pennamped*, 657 N.E.2d 1223, 1229 (Ind. App. 1995).

Courts, however, "do not sit to improve the bargains that parties freely negotiate." *Wood v. Mid-Valley Inc.*, 942 F.2d 425, 428 (7th Cir. 1991). The existence of express terms in a valid contract thus precludes the substitution of implied terms regarding matters covered by the contract's express terms. *Keystone Carbon Co. v. Black*, 599 N.E.2d 213, 216 (Ind. App. 1992). In short, "there can be no constructive contract where there is an express contract between the parties in reference to the same subject matter." *Twin Lakes*, 568 N.E.2d at 1083.

Id. at 94.

In *Brown*, the agreement explicitly

allocate[d] the risks surrounding IDEM's acceptance of (or delay in accepting) the Expansion Application. Thus, because there is an express and valid contract already covering the subject matter upon which plaintiff bases his unjust enrichment claim, there is no need for the Court to imply a contract or invent contractual terms.

Id. at 94-95.

In the case before us, by contrast, no express term in the amended fee agreement indicates whether the $20,000 would belong to Hammerle if Blinn's trial was less than six days. I acknowledge the majority's characterization of the original $35,000 as "merely an estimate" the parties expected to cover anything through the first five days of trial. (Slip op. at 15). But I would not at the same time disregard the explicit language of Hammerle's letter memorializing the parties' original agreement that the original $35,000 "*will be my entire fee*. . . should this trial last no more than [five days]." (App. at 125) (emphasis added). The amended agreement provided Hammerle would represent Blinn throughout trial, regardless of its length, for a flat fee of $20,000. But no trial ever happened.

This ambiguity further demonstrates why there is a genuine issue of fact as to whether Hammerle was unjustly enriched by retaining the money Blinn paid pursuant to the amended agreement. The amended agreement is silent as to when it takes effect. If the facts are viewed in the light most favorable to Hammerle and the original agreement was, as the majority holds, a retainer, then the amended agreement would have taken effect when the parties entered into it. If the facts are viewed in the light most favorable to Blinn, the non-moving party on summary judgment, then the original agreement means what it explicitly says: the $35,000 was the "entire fee" Blinn owed for representation through the first five days of trial. (App. at 125.) If that is the case, the amended agreement would not take effect until day six of trial. As there never was a day six of trial, Hammerle would be unjustly enriched if he retained the additional $20,000.

I therefore cannot agree with the majority that "the original contract indisputably" addressed "the subject matter of the unjust enrichment claim," (slip op. at 20). An agreement that $35,000 will be the entire fee for representation cannot "indisputably" address an agreement that $20,000 would be added to the cost of representation contingent on a circumstance that never arose. There is a genuine issue of material fact as to whether the modified agreement to pay Hammerle a flat fee of $20,000 to "take the matter to the conclusion of trial without further billing," (App. at 42), could have "controlled" the "rights and obligations of the parties," *Brown*, 924 F. Supp. at 94, when the original agreement explicitly set forth the "entire fee" for representation and when the trial explicitly contemplated in both agreements never took place.

Thus, based on the designated evidence, when viewed in the light most favorable to Blinn as the non-movant, I believe there is a genuine issue of material fact as to whether Hammerle was unjustly enriched when he retained the $20,000. Summary judgment on that issue was improper, and I must respectfully dissent.

[1] Blinn now asserts he "did not consider the advance to be a modification of the original fee agreement, although Blinn's Complaint mistakenly says otherwise." Appellant's Brief at 4.

[2] Even if Hammerle's failure to object at sentencing resulted in improper time on home detention, Hammerle cannot be liable for malpractice unless Blinn can demonstrate he would have obtained a more favorable result absent the malpractice. See Clary v. Lite Mach. Corp., 850 N.E.2d 423, 430 (Ind. Ct. App. 2006) ("In the malpractice action, then, it was [the client]'s burden to prove, among other things, that but for [the attorney]'s failure to research and argue the issue of mitigation of damages before and/or during the . . . trial, [the client] would have received a greater damages award."). Blinn has not asserted that an objection would have worked to his advantage.

Blinn assumes, without reference to authority, that an objection by Hammerle would have resulted in the sentence Blinn now asserts would have been proper. But it seems just as likely that, had Hammerle objected at sentencing, the

district court would have thrown out the plea agreement because the parties did not have a meeting of the minds regarding the sentence. Blinn would then be facing a potential twenty-year sentence.

Further, Blinn cannot demonstrate he was harmed by Hammerle's failure to object unless Blinn effectively asserts he would have been willing to withdraw his plea and proceed to trial. See United States v. Elkins, 176 F.3d 1016, 1022 (7th Cir. 1999) (where maximum possible sentence was thirty years and defendant received twenty-four months of imprisonment followed by five years of supervised release, defendant could not demonstrate he was harmed by court's failure to mention supervised release prior to accepting defendant's plea, "particularly since Elkins nowhere claims that he would have pled differently had the court discussed supervised release"). However, Blinn has neither asserted nor demonstrated he was willing to withdraw his plea.

[3] The record also indicates that prior to the May 26, 2005 letter memorializing the original contract, Hammerle proposed the following fee arrangement:

A retainer/flat fee in the amount of $35,000.00. I will bill against that non-refundable fee my attached hourly rate along with those of any of my Associates and Paralegal who we will need to get the job done properly.

Regardless, the stated retainer/flat fee will be all that will be owed absent total expended hours exceeding that amount. . . .

***

Appellant's App. at 123.

Notably, Hammerle's proposed phrasing regarding billing at his hourly rate was not included in the later-memorialized original contract. While we recognize this distinction, the original contract that followed this early proposal does not clearly express that Hammerle was not to bill hourly. Similarly, the equivalent phraseology — "retainer/flat fee" and "flat fee/retainer" — of Hammerle's first proposal and the May 26, 2005 original contract does not expressly state that Hammerle was not to bill hourly. Further, this distinction is of little consequence because the communication between Hammerle and Blinn in 2006 makes clear that both understood Hammerle to be billing hourly against Blinn's account.

[4] Hammerle and Blinn's federal prosecutor at some point considered a trial of two to three weeks to be "a certainty." Appellant's App. at 27.

[5] This modification appears to have been an oral agreement. Hammerle asserts it did not need to be put in writing because it was "more advantageous to the client." (Br. of Appellees at 30.) In his complaint, Blinn says he "agreed to a modified fee arrangement," (App. at 9), that he "did agree to pay a flat fee for trial work done *after* the first five (5) days of trial in lieu of the hourly rate for such work contemplated by the original agreement," *id.*, and he and Hammerle "agreed upon the additional sum of $20,000." (*Id.*)

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MyShingle Blog Posts on Fee Agreements

What If Your Retainer Agreement Could Look Like This?

in Client Service, Dealing With Clients, Retainer Agreements

Credit Card Agreement

After reading this post at the Public Citizens Law & Policy Blog (H/T Legal Blogwatch) about simplicity guru Alan Siegel's efforts to cleanse the gobbledygook from consumer agreements, my first thought was that if Siegel succeeds, then Minneapolis, Minnesota solo lawyer and bloggerGraham Martinwill have to find another topic to replace his Fine Print Friday feature, which parses and analyzes the fine print in consumer services agreements. But my second thought was why can't we lawyers design our retainer letters for consumers just as Siegel has done in his example?

To be fair, many lawyers' retainers letters are fairly uncomplicated – really too much so, if you look at some of the bar-sanctioned agreements at Soloformania. Others, like this one are more complex, though the terms are still relatively understandable. But none of these retainer agreements (my own included, and I will post some of those shortly) are particularly attractive: they look like something from a lawyer (which of course, they are!)

But what if we lawyers could take some time and design a retainer agreement like that designed by Siegel? Seems to me that consumers would find it more inviting, and less intimidating and as such, we could get off on the right foot in our relationship.

At the same time, would a simple document undercut our authority? Might consumers regard our services as less serious because our retainer letter didn't come on fancy letter-head, with the formality of legalese? Or is this entire subject irrelevant anyway, because, as Enricho Schaefer has said, formal retainer agreements are outdated. Please share your thoughts below.

Beware the Mis-named Non-Refundable Retainer

in Dealing With Clients, Ethics & Malpractice Issues, Retainer Agreements

UPDATE – In December 2008, the Michigan Supreme Court reversed this decision and held that the non-refundable retainer passed ethical muster because the agreement was unambiguous. See here .
Thank goodness for lawyers who are willing to risk a disciplinary sanction to retain $2500 of money that any objective observer would recognize as unearned and undeserved. After all, if we didn't have lawyers like this, we wouldn't have the benefit of this well written and researched decision by the Michigan Attorney Grievance Board that describes the difference between an ordinary retainer fee (which represents advance payment for services to be rendered) and a non-refundable retainer fee (which is typically allowed only where a fee agreement states specifically that the retainer is intended to compensate the attorney for availability, not for service to be rendered) (hat tip to Legal Profession Blog for the link.

The Michigan case involved attorney Patricia Cooper, who collected a $4000 non-refundable retainer from a client to handle her divorce. After two weeks, the client changed her mind about going forward with the divorce and asked to Cooper to stop work, provide an itemized bill and return an unearned balance. Cooper sent an itemized bill showing that she performed $1228 worth of work and agreed to return $1385 "out of the goodness of her heart." She refused, however, to return the balance, citing the non-refundable nature of the retainer agreement.

The client filed a grievance seeking a refund. The Michigan Board agreed. The Board explained that Cooper's designation of a retainer as "non-refundable" was irrelevant because the retainer was intended to secure advance payment for services to be rendered in the future. Because Cooper did not render the services contemplated, she was bound to refund the unearned amount. Citing cases from a variety of jurisdictions, the Michigan Board cautioned that a non-refundable retainer could be used only in situations such as to secure a lawyers availabilty and that the purpose of the non-refundable retainer must be explained to clients.

For those who have wondered about non-refundable retainers, the Michigan Board clarifies that they're generally a "don't" except in narrow situations. And the Board also makes clear that if you're not sure of whether a retainer is non-refundable or not, then GIVE THE UNEARNED MONEY BACK!!

Greatest American Lawyer's Rejoinder to the Well Drafted Retainer

in Client Relations, Retainer Agreements

In a response to my earlier post, The Well Drafted Retainer, my blogging colleague Enricho Schaefer ponders whether the traditional retainer is outdated. Schafer argues that the complexity of retainer agreements complicates relationships with clients rather than facilitating them. Schaefer explains that his firm memorializes the attorney-client agreement with an email listing the tasks to be performed and the flat fee, which clients can pay via Pay Pal and thus commence the relationship.

To my mind, what paves the way for Schaefer's type of retainer agreement isn't so much the electronic nature of the transaction, as he suggests. After all, in an internet age, even a "paper agreement" can be scanned and signed or acknolwedged by email. Instead, what really enables Schaefer's agreement is the flat fee and the way that it liberates lawyers from the attendant protections required when they bill by the hour. When lawyers charge a flat fee, they merely need to state what work they will perform and (if they choose to be overly cautious) what tasks are not covered. Clients do not care how many hours each task will take or what each task involves because they have already agreed to a sum certain and understand that the lawyer will perform all work needed to complete the task. In short, they pay an end product, not hours billed.

By contrast, in the example that I gave in my post regarding a family law matter, the attorney intended to bill by the hour. And in fact, most lawyers still do bill by the hour. Thus, to prevent "sticker shock" at the end of a matter, lawyers must use the retainer agreement to educate the client regarding the tasks involved and the possible outcome. Where a flat fee is assessed and agreed to, particularly where a sophisticated client is involved and the cost is reasonable (or a refund is available as in Schaefer's case), this extra verbiage is superfluous.

Of course, even if you plan to adopt an alternative billing strategy, as Schaefer points out, some jurisdictions require certain "magic language" in contingency fee agreements or so-callsed non-refundable retainer agreements. Absent this language, a court might void the retainer and a lawyer might jeopardize a fee.

In addition, while I like the simplicity of Schaefer's agreement – and indeed, use a similar format for my flat fee appellate matters — in more complex cases even where I charge a flat fee, I like to educate my clients about what to expect by preparing a road map or strategy plan. Sometimes, if it's a short discussion, I may include the road map in the body of the retainer; for more complex cases, I will include it as an appendix or attachment. Again, the road map tempers client expectations and prevents complaints about "why is this taking so long" down the line.

So getting back to Schaefer's original question about whether the traditional retainer agreement is outdated, I'd agree – at least where the agreement involves the outdated/old fashioned practice of billing by the hour. Indeed, perhaps that's the best side-benefit of flat fee billing: the ability to toss the cumbersome retainer letter by the wayside.

The Retainer Letter As a Walk Down Memory Lane

in Client Relations, Ethics & Malpractice Issues, Setting and Collecting Fees

I may not be a contract aficionado like Ken Adams, but I love a good retainer agreement. Though clean, crisp language and brevity makes me swoon as much as any other lawyer, my affinity for retainer agreements reaches far deeper than the surface: quite simply, I'm a sucker for the stories behind the the whereas clauses.

The search terms "retainer agreement" and "form" draw more traffic to this site than nearly any other. And while I gladly accomodate these inquiries, a retainer agreement, done right, is far more than just a form or a template: it's a living, breathing, ever-evolving document that reflects our personal history as lawyers.

Just as paging through a photo album triggers old memories, so too does a skim through a retainer letter. Spend a little time with some old-time lawyers and ask them to go through their retainer agreements with you and you'll see what I mean:

> *Ah, yes – that's the withdrawal clause that I added after that nice little old lady who promised that she was good for the money wouldn't pay me and I couldn't get out of the case.*
>
> *Mmm, I remember that. I came up with the provision that gives people a discount if they pay in full upfront after I was nearly evicted after I couldn't make rent for the third month in a row– even though I had $10k in outstanding accounts.*
>
> *Gosh, I don't recall exactly where that section on conflicts waiver came in – I must have lifted it from the agreement that we used when I was at biglaw.*
>
> *Ugh, that's the provision that I had to add to comply with the D.C. Bar's Legal Ethics Opinion 355 on flat fees after that annoying decision in In Re Mance that prohibits treatment of flat fees as earned on receipt.*

We call it the "practice" of law because in many ways, law is a craft that we never perfect. Yet over time, we improve and ripen with experience; becoming a little wiser, a little savvier and also, sadly, a little more jaded. Our retainer agreements document our transformation, reminding us of just how far we've come and — each time they fall short and necessitate another change — of how far we still have to go.

Nowit's your turn: share some of the clauses that you include in your retainer agreement in the comments below— and more importantly, the stories behind them.

The Well Drafted Retainer Agreement – A Sample and A Challenge

in Client Relations, Retainer Agreements

As I've written in Solo by Choice and discussed at my blog, a well drafted, ethically compliant retainer agreement is a lawyer's *most* important tool in guarding against grievances, setting client expectations and generally, helping to create a profitable pratice. Without a retainer, some bars won't even let you collect your fee. And if your agreement doesn't comply with bar rules, you may find yourself hit with a serious grievance. Finally, a retainer is the first document that a client receives from your office – and a professional, well thought out and thorough retainer can be a selling point for your practice.

Because of its importance, retainer letter is one of the first documents that you should create for your office. You should constantly review and modify it to incorporate new ideas as you move forward. At the same time, there are no shortcuts: because law practices and bar rules are so divergent, it's impossible to create a standard, one size fits all retainer. At Soloformania, I list some letters that may offer a starting point or include language that you want to put into your retainer agreement, but you'll still have to do most of the modifications yourself.

How can a retainer letter help you keep a fee? Because the agreement (if you choose) sets out what you'll do in a case, you can readily defend your fee by simply pointing to a list of tasks in the retainer that you said might be necessary. For family law attorneys, Michael Sherman of Law for Profit.com has a great Sample Retainer (at the end of the materials) that you can modify for your jurisdiction. Notice that the retainer educates the client by giving a roadmap of the proceeding, establishes an expectation that the matter may potentially be protracted, makes clear the terms of payment, sets forth grounds for withdrawal and contains a sunset provision on the effectiveness of the agreement. Yes, there's even more that you can include in a Retainer (or a supplemental Office Policies Guide) such as policies for use of email, document retention, data security, time for returning phone calls, resolving billing disputes, Client Bill of Rights or even green office practices. But Sherman's retainer covers many bases for a family law practice.

Don't wait for your first client to walk through the door to draft a retainer agreement. Get started now with this important building block for your law firm.

What NOT to Put In A Retainer Agreement

in Ethics & Malpractice Issues, Mistakes/What NOT To Do, Retainer Agreements

As we at MyShingle have said many times, a retainer agreement is one of the most important tools that we lawyers have to protect ourselves from unscrupulous or troublesome clients. It should be obvious though that lawyers can't use the retainer agreement to protect themselves by cutting off their clients' rights to file a grievance. And yet, as reported in Legal Ethics Panel Votes to Disbar Richard Lee, Rob Perez, Star Bulletin (2/25/05), that's what a Hawaii attorney did in at least 160 of his retainer agreements – and then tried to justify his action by claiming that the bar's prohibition of this practice constituted unjustified intervention in fee practices, tantamount to price fixing.

According to the article, attorney Richard Lee (also a former state judge), included a standard provision in retainer agreements that required clients to pay Lee $2000 if the disciplinary committee became involved in a fee dispute before an attempt was made to resolve the dispute via arbitration. The bar believed that the purpose of the provision was to intimidate clients from filing an ethics action against Lee. Apparently, Lee kept the provision in his retainer agreements for at least a year after the bar ordered it removed.

It's hard to imagine how an attorney could believe that a provision in a retainer agreement cutting off clients' rights to file an ethics complaint would ever withstand scrutiny. And it's even harder still to imagine that an attorney would keep the provision in after receiving warning from the bar. But Lee apparently tried to *defend* his retainer agreement, saying (according to the article), that the bar's interference in fee disputes is unwarranted and amounts to price fixing.

There's so much wrong with Lee's retainer agreement that I hardly know where to begin. The agreement attempts to extract an unreasonable $2000 fee, punishes clientsfor exercising legal rights and places the attorney's interest over that of the individual client as well as the public at large, which is entitled to learn about a lawyer's unethical actions through the grievance process. The only lesson here is that if you think Lee's retainer agreement is appropriate, then you should probably leave the legal profession now, while you can do so voluntarily – because with judgment like that, it's only a matter of time before you'll be ordered to go.