Opinion No. 2005-4

SYNOPSIS

An attorney may charge a flat fee or a minimum fee, so long as the basis for the fee is understood by the client and the fee is reasonable when measured by Rule 1.5(a). Any advance payment remains the property of the client until earned and must be deposited in the attorney's trust account. If, however, the client knowingly agrees the fee is "earned upon receipt," it becomes the property of the lawyer and cannot go into the trust account. Otherwise, depending on the agreement terms, the attorney may draw against this advance with periodic billings as the matter progresses or delay payment until the end of the matter. If, prior to completion, the attorney withdraws or is discharged, the attorney must refund any unearned portion of the advance payment. Depending on the circumstances, a refund may be required notwithstanding an earlier agreement that the fee was "earned upon receipt." Upon completion, the attorney is entitled to retain the flat fee or minimum fee, unless, under all circumstances, this would be unreasonable considering all Rule 1.5 factors.

Facts

The attorney focuses his practice in the area of criminal law. He asks a number of hypothetical questions about minimum and flat fees. The questions assume advance payment by the client. Essentially, he asks four questions:

(1) May a lawyer charge a minimum fee for a discrete piece of legal work, subject to a higher fee if the time required to perform the work exceeds that upon which the minimum fee is calculated or if a higher fee is otherwise justified under Rule 1.5(a)?

(2) May a lawyer charge a flat fee for a discrete piece of legal work?

(3) If the attorney receives payment of the minimum fee or the flat fee in advance, must the fee go into the attorney's trust account or may the attorney take the fee into the attorney's general account?

(4) If the attorney receives payment of the minimum fee or the flat fee in advance, is the client entitled to a refund if the matter is resolved in less time than that upon which the minimum or flat fee was based?

Applicable Rules of Professional Conduct

Rule 1.5 Fees: (a) A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

(b) When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation.

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Rule 1.15 Safekeeping Property

(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property**….** (emphasis added).

….

(c) A lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred. (emphasis added). [***Proposal from A.B.A. Model Rule 1.15(c)-not yet acted on by the Vermont Supreme Court***]

Rule 1.16 Declining or Terminating Representation:

….

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

Analysis

The questions focus on the propriety of a minimum fee or a flat fee, and, with its inquiry about possible refund, presupposes advanced payment by the client. Courts, ethics boards, legal scholars and practitioners have caused incredible confusion in discussions of advance payments to lawyers with varied and sometimes inconsistent use of terms such as “retainer,” “general

retainer," "true retainer, "classic retainer," "engagement retainer," "special retainer," "minimum fee," "flat fee," "fixed fee," and "lump-sum fee." These terms are sometimes further modified with the adjective "non-refundable." Before we can analyze the relevant issues, we need to agree on some basic terminology. Leaving aside for the moment, the question of "non-refundable payments," there are really two categories of advance payments to lawyers.

(1) General retainer

The first, often referred to as "retainer," "general retainer," or "engagement retainer," is an up-front charge made by an attorney, not for specific services, but to ensure the lawyer's availability whenever the client needs legal services. *In re Sinnott*, PRB Decision No. 43 (2003); ABA/BNA Lawyers' Manual on Professional Conduct, 41:202; RESTATEMENT (THIRD) THE LAW GOVERNING LAWYERS, § 34, *comment (e)* (2000); Brinkman & Cunningham, *Nonrefundable Retainers Revisited*, 72 N.C.L. REV. 1, 5-6 (1993). We do not dwell on aspects of a "general retainer" since this is not the subject inquired about. Suffice it to say for the purposes of this opinion, a fee to reserve the lawyer's availability is a "general retainer," "only if the lawyer is to be additionally compensated for actual work, if any" and "if it bears a reasonable relationship to the income the lawyer sacrifices or expense the lawyer incurs by accepting it, including such costs as turning away other client (for reasons of time or due to conflicts of interest), hiring new associates so as to be able to take the client's matter, keeping up with the relevant field, and the like." RESTATEMENT (THIRD) THE LAW GOVERNING LAWYERS, § 34, *comment (e)* (2000

(2) Advance payment given in anticipation of future work

Other than payment made to ensure the attorney's availability, an advance payment to a lawyer is presumed to be a deposit to secure payment of fees and expenses to be incurred by the lawyer in the future. RESTATEMENT (THIRD) THE LAW GOVERNING LAWYERS, § 38, *comment (g)* (2000). Such payments, whether designated an "advance," "deposit," "retainer," "minimum fee," "lump-sum fee," "fixed fee," or otherwise, are the property of the client until earned by the lawyer. *See, e.g.,* Oregon Formal Opinion No. 2005-151. Let us now examine the rights of the client and the lawyer, and the related obligations of the lawyer, with respect to these advance payments.

a. When is a fee earned? The threshold question is, of course, what has the client agreed to? If, for example, the contract is to bill monthly based on an hourly rate, the client has agreed the fee is earned at the end of each month, when the bill is submitted for work done during the previous period. *Vermont Advisory Ethics Opinion* 2002-04; *Vermont Advisory Ethics Opinion* 1998-05. When is a "minimum fee," "lump-sum fee," "flat fee," or similar fee earned? In those cases where the parties agree the fee is earned upon completion of the project, the answer is easy. The tougher question, in those instances when the agreement provides the fee is "earned upon receipt," "in advance," or the like, is whether that agreement is proper given that services are yet to be rendered?

"The overarching guideline that governs attorneys' fees, no matter what the context or method of billing, is that an attorney's fee must not be unreasonable or excessive." ABA/BNA Lawyers' Manual on Professional Conduct. 41:309. While not expressly holding that a fixed fee may be earned upon receipt, the Vermont Supreme Court has recently hinted that it generally approves

of fixed or flat fees for all-inclusive representation.[1] *In re Sinnott*, 2004 VT 16, n. 2, 176 Vt. 596, 845 A.2d 373. It did so, however, in a case where it disallowed a contract in which the client had agreed a fee would be deemed earned under specific circumstances (i.e. if the client did not complete her promise to make specified payments for legal and administrative fees and payments towards an account for settlement of the client's debt to creditors). *Id*. at ¶ 5. In *Sinnott*, the Court concluded "the work performed was of no value to the client," *Id*. at ¶ 13, and none of the firm's efforts "did anything to advance the goals of the representation." *Id*. In response to the attorney's claim that his fee was justified based on a valid contract, the Court pointed to Rule 1.5 and emphasized that "lawyers, unlike some other professionals, cannot charge unreasonable fees even if they are able to find clients who will pay whatever a lawyer's contract demands." *Id*. at ¶ 16. This underscores the point that a fee may be earned when the parties agree it is, but that agreement by itself is not enough. Even where there is agreement that a fee is earned at a given point, that agreement must be reasonable and a client can look beyond the agreement to be sure value has been rendered under Rule 1.5.

This approach appears consistent with opinions from other jurisdictions.[2] *In re Kendall*, 804 N.E.2d 1152, 1157 (2004) ("The majority of jurisdictions[3] have held that flat fees may, with the consent of the client, be considered to be earned upon receipt and therefore not required to be placed in a trust account"); *Stalls v. Pounders*, 2005 W.L. 181687, p. 5 (Tenn. Ct. App. 2005) (approving non-refundable "retainer fee" if client understands and agrees and if the fee is just and reasonable under the factors of Rule 1.5); *In re Biggs*, 318 Or. 281, 293, 864 P. 2d 1310, 1316 (1994) (Without a clear, written agreement between a lawyer and a client that fees paid in

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[1] While the Court's reference did not expressly refer to fees paid in advance, the context of the case involved advance payments and the Court's comments appear to lend favor generally to "fixed or flat fees for all-inclusive representation" which are paid in advance.

[2] New Hampshire, by Supreme Court rule, provides that "earned when paid" retainers may be placed in the lawyer's general account and should not be placed in the attorney's trust account. *See* New Hampshire Supreme Court 50(2)(C) and *New Hampshire Formal Opinion* # 1990/91-10.

[3] Not all jurisdictions agree that advance payments for future services are properly "earned upon receipt." An example is *Iowa Supreme Court Board of Professional Ethics and Conduct v. Frerichs*, 671 N.W.2d 470 (Iowa, 2003). The court reasoned that even with a fixed or flat fee, "it is still possible the retainer, or a portion of the retainer, would need to be refunded to the client in the event the attorney-client relationship is terminated before the services are rendered." Id. at 476. While that is true, the jurisdictions that uphold "earned upon receipt" agreements also recognize that Rules 1.5 and 1.16(d) require refunds under appropriate circumstances. These jurisdictions treat the attorney's promise of future services as valid consideration for immediate access to the agreed-upon fee. *Board of (Ohio) Commissioners of Grievances and Discipline Opinion 96-4*, (1996); At the same time, these jurisdictions recognize there may be circumstances where the services rendered will be less than expected, requiring a refund. Id. For additional *contra* authority, *see, In re Sather*, 3 P.3d 403 (Colo. 2000) ("[W]e hold that an attorney earns fees by conferring a benefit on or performing a legal service for the client. Thus, under Colo. RPC 1.15 an attorney cannot treat advance fees as property of the attorney and must segregate all advance fees by placing them into a trust account until such time as the fees are earned."). Like the *Freichs* court, the *Sather* court emphasizes that "[a]ttorney fees are always subject to refund if they are excessive or unearned." *Id*. at 413. Although it does "not address the exact contours of such an arrangement," the Colorado court "recognize[s] that narrow exceptions to this rule may exist" "[i]n the limited circumstances in which an attorney earns fees before performing any legal services (i.e., engagement retainers) or where an attorney and client agree that the attorney can treat advance fees as the attorney's property before the attorney earns the fees by supplying a benefit or performing a service." *Id*. at 414. It is hard to understand how a lawyer would confer a benefit on the client by agreeing to be available to the client (i.e. general or engagement retainer) but would not confer a comparable benefit when the lawyer not only agrees to be available but also agrees that the advance fee will cover the entire service (flat fee).

advance constitute a non-refundable retainer earned upon receipt, such funds must be considered client property); *In re Sousa*, 323 Or. 137, 143, 915 P. 2d 408, 412 (1996) (A lawyer violates the rule against collecting an excessive fee if the lawyer collects a nonrefundable fee, does not perform or complete the professional representation for which the fee is paid and fails to remit the unearned portion of the fee); *Barron v. Countryman*, 432 F.3d 590, 596-97 (5th Cir. 2005) (In bankruptcy proceeding, lawyer charged "non-refundable" $400 advance deposit for pre-petition work, describing it as earned upon receipt; although lawyer's characterization was not controlling, court upheld the fee as "earned upon receipt," noting the work was done as promised and there was no issue of unreasonableness. Since the fee became the lawyer's upon receipt, he did not have to put it into a trust account); *Board of (Ohio) Commissioners of Grievances and Discipline Opinion 96-4*, (1996) (Flat fee, paid in advance for representation in a criminal matter does not have to be placed in trust account); *See also*, RESTATEMENT (THIRD) THE LAW GOVERNING LAWYERS, § 38, *comment (g)* (2000) ("A client and lawyer might also agree that an advance payment is neither a deposit nor an engagement retainer, but a lump-sum fee constituting complete payment for the lawyer's services.").[4] Even *In re Cooperman*, 84 N.Y.2d 465, 633 N.E.2d 1069, 611 N.Y.S.2d 465 (1994), the New York Court of Appeals case that invalidated non-refundable retainers because they necessarily compromised the client's "absolute right" to terminate the attorney-client relationship, commented that "we intend no effect or disturbance with respect to other types of appropriate and ethical fee agreements ... [cite omitted]. Minimum fee arrangements and general retainers that provide for fees, not laden with the nonrefundability impediment irrespective of any services, will continue to be valid and not subject in and of themselves to professional complaint. 84 N.Y.2d at 476, 633 N.E.2d at 1074, 611 N.Y.S.2d at 470.

In an earlier opinion, *Vermont Advisory Ethics Opinion* 1997-07, the Committee opined that "fixed fee" or "flat fee" funds "may not be accessed by the lawyer until the fee has been earned." The Committee concluded "[t]he attorney can access only that portion of the retainer which compensates the attorney for services previously rendered" and "[f]unds prepaid by a client for future legal services must be placed in a client's trust and cannot be co-mingled with the attorney's business funds." Although this opinion involved an analysis of DR-102, that rule did not change materially when replaced by Rule 1.15. Both rules require an attorney to hold client funds in a trust account, separate from the lawyer's funds. Implicit in this earlier opinion is the rule, discussed above, that an attorney is not entitled to these funds until they are earned. What is not discussed in *Vermont Advisory Ethics Opinion* 1997-07 is whether there are circumstances under which a client may properly agree that a fee is earned in advance, thereby entitling the lawyer to the fee before the services are rendered. The authorities cited above, all of which postdate *Vermont Advisory Ethics Opinion* 1997-07, have caused us to reconsider that opinion. Recognizing that the touchstone for whether a fee is earned (be it before or after the rendering of services) is the knowing agreement of the client and the reasonableness of the circumstances, we

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[4] This comment relates to RESTATEMENT (THIRD) THE LAW GOVERNING LAWYERS, § 38(c) (2000), which provides: "Unless a contract construed in the circumstances indicates otherwise: .... when a lawyer requests and receives a fee payment that is not for services already rendered, that payment is to be credited against whatever fee the lawyer is entitled to collect." (emphasis added). *See also*, RESTATEMENT (THIRD) THE LAW GOVERNING LAWYERS, § 44, *comment (f)* (2000) ("[I]f a payment to a lawyer is a flat fee paid in advance rather than a deposit out of which fees will be paid as they become due, the payment belongs to the lawyer (see § 38, Comment g).").

believe there are circumstances where lawyer and client may properly agree that a fee is earned upon receipt notwithstanding the services are yet to be rendered.

If, after considering Rule 1.5(b), one concludes the client understood[5] an advance payment to be a fixed fee or a minimum fee earned upon receipt and if, after reviewing the criteria of Rule 1.5(a), one concludes the fee is reasonable for the service to be provided, there is no principled reason not to honor that contract. If the fee is earned upon receipt, it is the property of the lawyer and cannot properly be co-mingled with client funds in the trust account and we hereby revise *Vermont Advisory Ethics Opinion* 1997-07 in that respect.

In the absence of clear language from the Vermont Supreme Court to the contrary, we believe a fairly negotiated fee agreement, understood by the client and objectively reasonable under all the circumstances, will allow a flat fee or minimum fee to be earned when paid, prior to the provision of services. In some instances, this may be a lump-sum payment for the entire project, paid in advance. In other instances, it may be lump-sum payments that will be made on a monthly or other periodic basis. In yet other circumstances, it may be a minimum fee paid in advance, beyond which an additional fee may be earned pursuant to the agreement. In the absence of express agreement by the client that the fee is earned in advance, the fee is not earned until after performance of service by the lawyer. This conclusion regarding fees "earned upon receipt" does not mean there will never be circumstances requiring refund. See discussion in subsections (c) and (d) below.

It is interesting to note that proposed Vermont Rule of Professional Conduct 1.15(c) specifies that "[a] lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred." (emphasis added). We do not believe this language, if adopted by the Vermont Supreme Court, would necessarily answer the question.[6] In the final analysis, that language only begs the question, discussed herein, about when a fee paid in advance of services is earned.[7]

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[5] We emphasize the burden will be on the lawyer, if the arrangement is challenged, to show the client understood the fee was to be earned upon receipt. The Professional Responsibility Section strongly urges a lawyer entering into such an agreement to reduce it to writing. In doing so, the lawyer must walk a fine line, on the one hand assuring the client understands the fee is earned upon receipt and, on the other hand, not overstating its nonrefundable character. As indicated in paragraphs 2(c) and 2(d) of this opinion, there may be circumstances where Rules 1.5 and/or 1.16(d) require a refund and it would be misleading to have a fee agreement that provides to the contrary.

[6] Proposed Rule 1.15(c) is based on the Report of the Ethics 2000 Commission, the first comprehensive revision of the Model Rules of Professional Conduct, adopted by the ABA in February, 2002. We have located no case decision or ethics opinion addressing this issue under the new amendment and have based our opinion on pre-amendment discussions about whether a fee may be "earned upon receipt." According to the June 6, 2001 Conference Report of the 27th National Conference on Professional Responsibility (see ABA/BNA Lawyers' Manual on Professional Conduct), revised Rule 1.15(c) was one of several last minute changes to the recommendations submitted to the House of Delegates in August, 2001. The reporter's note explains that "[t]he Commission is responding to reports that the single largest class of claims made to client protection funds is for the taking of unearned fees." This explanation appears to have little relation to fees that a client has expressly agreed would be "earned upon receipt."

[7] *See,* Rothrock, *The Forgotten Flat Fee: Whose Money Is It and Where Should It Be Deposited?,* 1 Florida Coastal Law Journal 293, 329 (1999) (Referring to similar language in Rule 1.15 of Delaware and Colorado, Mr. Rothrock observes that "[t]he Delaware and Colorado rules beg the question of when advance fee payments are

It must be observed, however, that jurisdictions differ on this issue.[8] Ultimately, the answer to the question "when is the fee earned?" should rest on an analysis of what interests need to be protected. Neither side of this issue dispute the essentials. A lawyer's fee must be reasonable. Rule 1.5(a). A lawyer must be sure the client understands the fee arrangement. Rule 1.5(b). A client has a right to discharge a lawyer at any time, with or without cause. Rule 1.16, *comment*. If, at the conclusion of a lawyer's service it appears that a fee, which seemed reasonable when agreed upon, has become excessive, the attorney may not stand upon the contract but must reduce the fee. *In the matter of Hirschfeld*, 192 Ariz. 40, 960 P.2d 640, ¶16 (1998). If these are the ground rules, may a lawyer and client agree that a fee may be "earned upon receipt" or are there still important values that can only be protected by requiring the fee to go into a trust account and be drawn upon only after services have been provided?

The risks of allowing an advance fee to be earned upon receipt are (1) the lawyer may not provide the promised services[9] and (2) in retrospect, the fee may be unreasonably high.[10] Under these circumstances, Rule 1.16(d) clearly requires a refund and a problem occurs in those instances the lawyer is unwilling or unable to provide the refund. Do these risks rise to the level that require an arbitrary rule outlawing good faith fee agreements entered into between client and counsel? We think not. In our opinion, an agreement between lawyer and client that a flat fee or a minimum fee, paid in advance, is earned upon receipt complies with the Rules of Professional Conduct if it is otherwise reasonable. Counsel are encouraged to reduce agreements to writing and are cautioned not to use language that will mislead the client into believing there are no circumstances under which a refund can be required. Counsel are reminded that a final assessment of a fee's reasonableness must be made on completion of the matter and if, in retrospect, changed circumstances make the fee unreasonable, it must be adjusted. This latter comment, however, is as applicable to a flat fee paid on completion as it is to a flat fee paid in advance.

b. Must an advance payment be placed in a trust account? Rule 1.15 requires that "[a] lawyer shall hold property of clients … in a lawyer's possession in connection with a representation separate from the lawyer's own property**…."** The rule continues, requiring that client funds be kept in the attorney's trust account. The essential question is whether a client payment remains the client's property or has become the lawyer's. The answer to this question turns on the issue discussed above, about when the fee is earned. If the fee has been earned in advance, by virtue of a reasonable agreement with the client, the payment is the lawyer's property and may not be placed in the trust account. If the fee has not yet been earned, it must be placed in the trust account until earned.

c. What if the lawyer/client relationship terminates prior to completion of the project? "A client has a right to discharge a lawyer at any time, with or without cause, subject to liability

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considered 'unearned,' such that they must be entrusted.") The language of the proposed rule does not expressly prohibit withdrawal of fees before services are provided.

[8] See discussion in footnote 3 *supra*.

[9] The lawyer may withdraw or be fired. The lawyer may die, become ill, move or lose his license to practice. The lawyer be irresponsible and never do the work, or may render substandard service.

[10] For a whole host of unforeseen reasons, the matter may take substantially less work than contemplated. An adverse witness may die or become unavailable unrelated to counsel's efforts. The applicable law may be changed (by court decision or legislation), also unrelated to counsel's efforts. The client could die.

for payment for the lawyer's services." Rule 1.16, C*omment*; *See* RESTATEMENT (THIRD) THE LAW GOVERNING LAWYERS, § 32 (1). Under certain circumstances, a lawyer must withdraw as counsel; under other circumstances, the lawyer may withdraw. *Id.* § 32(2) & (3). "Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as … refunding any advance payment of fee that has not been earned…." Rule 1.16(d). For examples of how the refund might work in various circumstances, see Comment and Illustrations with RESTATEMENT (THIRD) THE LAW GOVERNING LAWYERS, § 40. Although the Vermont Supreme Court has not ruled on the subject, it is clear that any advance payment of fee, even if designated a "minimum fee" or "flat fee," is subject to refund of any unearned portion if the representation is terminated prior to the completion of the project. *See* Rule 1.5 (fee must be reasonable) and Rule 1.16(d) (attorney must refund unearned advance payments). In determining what portion of the fee has been earned, one would look beyond the initial agreement that the fee is earned upon receipt[11] and assess all Rule 1.5 factors with respect to the services actually delivered.

d. <u>What if the work takes less time than the advance payment contemplated, as measure by the estimated hours and the hourly rate</u>? Whether an advance payment is a true deposit to be applied toward future work or is agreed by the lawyer and client to be a "minimum fee" or a "fixed fee," Rule 1.5 still requires the ultimate fee to be reasonable. Rule 1.5, of course, is not limited merely to the mathematical product of hours times rate. Assessments of Rule 1.5 factors will always be subjective. For instance, one could imagine the successful defense of a criminal case where charges are dropped because a key prosecution witness is unavailable to testify. If the unavailability follows a successful motion *in limine*, the value of the lawyer's pre-trial effort might compensate for the hours saved by the absence of a trial. On the other hand, if the witness was unavailable because of, say, an automobile accident, it would be unjust to allow the lawyer the same credit under a Rule 1.5 analysis. For similar examples see Illustration to Comment c of RESTATEMENT (THIRD) THE LAW GOVERNING LAWYERS, § 34. If reduced hours are the result of factors reasonably contemplated by the parties (e.g. the possibility of a successful pre-trial motion or a successful plea bargain), it is likely the full fee will be deemed reasonable. See Comment c to RESTATEMENT (THIRD) THE LAW GOVERNING LAWYERS, § 34. If they are the result of fortuity, the full fee would almost certainly be excessive. *Id.* Consequently, there can be no hard-and-fast rule as to whether a refund will be required where fewer hours than anticipated are actually required. Ultimately, the test will be one of reasonableness under Rule 1.5(a), within the expectations communicated to the client under Rule 1.5(b) when the fee was originally agreed to.

<u>Caveat</u>: There is not uniformity among the authorities as to whether an advance payment of fees or expenses may be deemed "earned," and immediately taken into an attorney's income, by virtue of an agreement between the lawyer and client that such payments are "earned upon receipt." Three member of the Professional Responsibility Section take the position that the agreement for hiring an attorney may not make such payments "earned" before the services are provided or expenses incurred, even if Model Rule 1.15(c) is not adopted. These members emphasize this position is consistent with dictionary definitions of "earn" and with our Opinion 1997-07. They

[11] A material condition of the agreement would have been an expectation of certain agreed legal services. If the lawyer has been discharged or has withdrawn before full services are delivered, the basis for the original agreement will have changed and the reasonable amount of the fee for services rendered will need to be reexamined.

also stress this position encourages an attorney to pursue the client's matters diligently and protects the availability of funds for a refund to the client if the advance payments turn out to be excessive in the end under Rule 1.5(a). And contrary to footnote 7, they believe that the language of Model Rule 1.15(c), if adopted in Vermont, does expressly prohibit taking into an attorney's income any fees paid in advance for which the services have not yet been provided.