**2.6: Attorney’s Fees**

**Attorney’s Fees**

*If you’ve got the money, I’ve got the time. We’ll go honky tonkin’ and we'll have a time … But if you run short of money, I’ll run short of time. ‘Cause you with no more money, honey, I’ve no more time.*[[1]](#footnote-0)

Attorneys can only charge a reasonable fee for their services. But the reasonableness of an attorney’s fee depends on the circumstances. Main Street lawyers and Wall Street lawyers can and do charge very different fees for their services. And contingent fees necessarily reflect the risk of failure.

In theory, state bar associations are supposed to ensure that attorneys charge reasonable fees. But in practice, they are reluctant to question attorney’s fee agreements. In fact, contract law may protect clients from excessive fees more effectively than the rules of professional responsibility.

| [**Model Rule 1.5: Fees**](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_5_fees/) |
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| 1. A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. 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. 2. The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client. 3. A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in a writing signed by the client and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated. The agreement must clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination. 4. A lawyer shall not enter into an arrangement for, charge, or collect:    1. any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof; or    2. a contingent fee for representing a defendant in a criminal case. 5. A division of a fee between lawyers who are not in the same firm may be made only if:    1. the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation;    2. the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and    3. the total fee is reasonable. |

| **Restatement (Third) of the Law Governing Lawyers § 34: Reasonable and Lawful Fees** |
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| A lawyer may not charge a fee larger than is reasonable in the circumstances or that is prohibited by law. |

| **Restatement (Third) of the Law Governing Lawyers § 35: Contingent-Fee Arrangements** |
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| 1. A lawyer may contract with a client for a fee the size or payment of which is contingent on the outcome of a matter, unless the contract violates § 34 or another provision of this Restatement or the size or payment of the fee is:    1. contingent on success in prosecuting or defending a criminal proceeding; or    2. contingent on a specified result in a divorce proceeding or a proceeding concerning custody of a child. 2. Unless the contract construed in the circumstances indicates otherwise, when a lawyer has contracted for a contingent fee, the lawyer is entitled to receive the specified fee only when and to the extent the client receives payment. |

| [***Matter of Cooperman*, 633 N.E.2d 1069 (N.Y. 1994)**](https://scholar.google.com/scholar_case?case=16099057859542160905) |
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| **Summary:** The Grievance Committee initiated a disciplinary proceeding against Cooperman for 15 violations of professional misconduct. Cooperman uses three separate agreements: the first is a written fee agreement to represent an individual in a criminal matter (a $15,000 minimum fee). The second is a written agreement in connection with a probate proceeding (a $5,000 minimum fee to act as counsel). The final agreement also involved a criminal matter (a $10,000 minimum fee). The court found that an attorney using special non-refundable retainer fee agreements in advance of service and irrespective of whether any professional services are actually rendered violated the Code of Professional Responsibility because the agreements were a per se violation of New York public policy. |

The issue in this appeal is whether the appellant attorney violated the Code of Professional Responsibility by repeatedly using special nonrefundable retainer fee agreements with his clients. Essentially, such arrangements are marked by the payment of a nonrefundable fee for specific services, in advance and irrespective of whether any professional services are actually rendered. The local Grievance Committee twice warned the lawyer that he should not use these agreements. After a third complaint and completion of prescribed grievance proceedings, the Appellate Division suspended the lawyer from practice for two years. It held that the particular agreements were per se violative of public policy. We affirm the order of the Appellate Division.

I.

In 1990, the petitioner, Grievance Committee for the Tenth Judicial District, initiated a disciplinary proceeding charging attorney Cooperman with 15 specifications of professional misconduct. They relate to his use of three special nonrefundable retainer fee agreements.

The first five charges derive from a written fee agreement to represent an individual in a criminal matter. It states: “My minimum fee for appearing for you in this matter is Fifteen Thousand ($15,000.00) Dollars. This fee is not refundable for any reason whatsoever once I file a notice of appearance on your behalf.” One month after the agreement, the lawyer was discharged by the client and refused to refund any portion of the fee. The client filed a formal complaint which the Grievance Committee forwarded to Cooperman for a response. Cooperman had already received a Letter of Caution not to use nonrefundable retainer agreements, and while this new complaint was pending, Cooperman was issued a second Letter of Caution admonishing him not to accept the kind of fee arrangement at issue here. He rejected the admonition, claiming the fee was nonrefundable.

Charges 6 through 10 refer to a written retainer agreement in connection with a probate proceeding. It states in pertinent part: “For the MINIMAL FEE and NON-REFUNDABLE amount of Five Thousand ($5,000.00) Dollars, I will act as your counsel.” The agreement further provided: “This is the minimum fee no matter how much or how little work I do in this investigatory stage and will remain the minimum fee and not refundable even if you decide prior to my completion of the investigation that you wish to discontinue the use of my services for any reason whatsoever.” The client discharged Cooperman, who refused to provide the client with an itemized bill of services rendered or refund any portion of the fee, citing the unconditional nonrefundable fee agreement.

The last five charges relate to a fee agreement involving another criminal matter. It provides: “The MINIMUM FEE for Mr. Cooperman's representation to any extent whatsoever is Ten Thousand ($10,000.00) Dollars. The above amount is the MINIMUM FEE and will remain the minimum fee no matter how few court appearances are made. The minimum fee will remain the same even if Mr. Cooperman is discharged.” Two days after execution of the fee agreement, the client discharged Cooperman and demanded a refund. As with the other clients, he demurred.

Cooperman’s persistent refusals to refund any portion of the fees sparked at least three separate client complaints to the Grievance Committee. In each case, Cooperman answered the complaint but refused the Grievance Committee’s suggestion for fee arbitration. Thereafter, the Grievance Committee sought authorization from the Appellate Division, Second Department, to initiate formal disciplinary proceedings against Cooperman. It tendered an array of arguments that these retainer agreements are unethical because, first, they violate the lawyer’s obligation to “refund promptly any part of a fee paid in advance that has not been earned.” Further, the agreements create “an impermissible chilling effect upon the client’s inherent right upon public policy grounds to discharge the attorney at any time with or without cause.” The petition also alleged that the fees charged by Cooperman were excessive, and that he wrongfully refused to refund unearned fees. Finally, it notes that denominating the fee payment as nonrefundable constitutes misrepresentation.

After an extensive hearing, the Referee made findings supporting violations on all 15 charges. On appropriate motion, the Appellate Division confirmed the Referee’s report with respect to charges 2 through 5, 7 through 10, and 12 through 15. The Court disaffirmed the report as to charges 1, 6 and 11, which alleged that the retainer agreements constituted deceit and misrepresentation. In sustaining the remaining charges, the Court held that these retainer agreements were unethical and unconscionable and “violative of an attorney’s obligations under the Code of Professional Responsibility to refund unearned fees upon his or her discharge.” The Court also concluded that Cooperman’s fees were excessive. The Court suspended him from the practice of law for a period of two years but did not order restitution.

II.

Whether special nonrefundable retainer fee agreements are against public policy is a question we left open in *Jacobson v. Sassower*, a fee dispute case. We agree with the Appellate Division in this disciplinary matter that special nonrefundable retainer fee agreements clash with public policy and transgress provisions of the Code of Professional Responsibility, essentially because these fee agreements compromise the client’s absolute right to terminate the unique fiduciary attorney-client relationship.

The particular analysis begins with a reflection on the nature of the attorney-client relationship. Sir Francis Bacon observed, “the greatest trust between people is the trust of giving counsel.” This unique fiduciary reliance, stemming from people hiring attorneys to exercise professional judgment on a client’s behalf — “giving counsel” — is imbued with ultimate trust and confidence. The attorney’s obligations, therefore, transcend those prevailing in the commercial marketplace. The duty to deal fairly, honestly and with undivided loyalty superimposes onto the attorney-client relationship a set of special and unique duties, including maintaining confidentiality, avoiding conflicts of interest, operating competently, safeguarding client property and honoring the client’s interests over the lawyer’s. To the public and clients, few features could be more paramount than the fee — the costs of legal services. The Code of Professional Responsibility reflects this central ingredient by specifically mandating, without exception, that an attorney “shall not enter into an agreement for, charge, or collect an illegal or excessive fee,” and upon withdrawal from employment “shall refund promptly any part of a fee paid in advance that has not been earned.” Accordingly, attorney-client fee agreements are a matter of special concern to the courts and are enforceable and affected by lofty principles different from those applicable to commonplace commercial contracts.

Because the attorney-client relationship is recognized as so special and so sensitive in our society, its effectiveness, actually and perceptually, may be irreparably impaired by conduct which undermines the confidence of the particular client or the public in general. In recognition of this indispensable desideratum and as a precaution against the corrosive potentiality from failing to foster trust, public policy recognizes a client's right to terminate the attorney-client relationship at any time with or without cause. This principle was effectively enunciated in *Martin v. Camp*: “The contract under which an attorney is employed by a client has peculiar and distinctive features thus notwithstanding the fact that the employment of an attorney by a client is governed by the contract which the parties make the client with or without cause may terminate the contract at any time.”

The unqualified right to terminate the attorney-client relationship at any time has been assiduously protected by the courts. An attorney, however, is not left without recourse for unfair terminations lacking cause. If a client exercises the right to discharge an attorney after some services are performed but prior to the completion of the services for which the fee was agreed upon, the discharged attorney is entitled to recover compensation from the client measured by the fair and reasonable value of the completed services. We have recognized that permitting a discharged attorney “to recover the reasonable value of services rendered in quantum meruit, a principle inherently designed to prevent unjust enrichment, strikes the delicate balance between the need to deter clients from taking undue advantage of attorneys, on the one hand, and the public policy favoring the right of a client to terminate the attorney-client relationship without inhibition on the other.”

Correspondingly and by cogent logic and extension of the governing precepts, we hold that the 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. The established prerogative which, by operation of law and policy, is deemed not a breach of contract is thus weakened. Instead of becoming responsible for fair value of actual services rendered, the firing client would lose the entire “nonrefundable” fee, no matter what legal services, if any, were rendered. This would be a shameful, not honorable, professional denouement. Cooperman even acknowledges that the essential purpose of the nonrefundable retainer was to prevent clients from firing the lawyer, a purpose which, as demonstrated, directly contravenes the Code and this State’s settled public policy in this regard.

Nevertheless, Cooperman contends that special nonrefundable retainer fee agreements should not be treated as per se violations unless they are pegged to a “clearly excessive” fee. The argument is unavailing because the reasonableness of a particular nonrefundable fee cannot rescue an agreement that impedes the client’s absolute right to walk away from the attorney. The termination right and the right not to be charged excessive fees are not interdependent in this analysis and context. Cooperman’s claim, in any event, reflects a misconception of the nature of the legal profession by turning on its head the axiom that the legal profession “is a learned profession, not a mere money-getting trade.”

DR 2-110 (A) and (B) of the Code of Professional Responsibility add further instruction to our analysis and disposition:

Withdrawal from Employment

(A) In general.

(3) A lawyer who withdraws from employment shall refund promptly any part of a fee paid in advance that has not been earned.

(B) Mandatory withdrawal. A lawyer representing a client before a tribunal, with its permission if required by its rules, shall withdraw from employment, and a lawyer representing a client in other matters shall withdraw from employment, if:

(4) The lawyer is discharged by the client.

We believe that if an attorney is prohibited from keeping any part of a prepaid fee that has not been earned because of discharge by the client, it is reasonable to conclude also that an attorney may not negotiate and keep fees such as those at issue here. In each of Cooperman’s retainer agreements, the Appellate Division found that the lawyer transgressed professional ethical norms. The fee arrangements expressed an absoluteness which deprived his clients of entitlement to any refund and, thus, conflicted with DR 2-110(A)(3).

Since we decide the precise issue in this case in a disciplinary context only, we imply no views with respect to the wider array of factors by which attorneys and clients may have fee dispute controversies resolved. Traditional criteria, including the factor of the actual amount of services rendered, will continue to govern those situations. Thus, while the special nonrefundable retainer agreement will be unenforceable and may subject an attorney to professional discipline, quantum meruit payment for services actually rendered will still be available and appropriate.

Notably, too, the record in this case contradicts Cooperman’s claim that he acted in “good faith.” He urges us to conclude that he “complied with the limited legal precedents at the time.” The conduct of attorneys is not measured by how close to the edge of thin ice they skate. The measure of an attorney’s conduct is not how much clarity can be squeezed out of the strict letter of the law, but how much honor can be poured into the generous spirit of lawyer-client relationships. The “punctilio of an honor the most sensitive” must be the prevailing standard. Therefore, the review is not the reasonableness of the individual attorney’s belief, but, rather, whether a “reasonable attorney, familiar with the Code and its ethical strictures, would have notice of what conduct is proscribed.” Cooperman’s level of knowledge, the admonitions to him and the course of conduct he audaciously chose do not measure up to this necessarily high professional template. He even acknowledged at his disciplinary hearing that he knew that “there were problems with the nonrefundability of retainers.” Cooperman’s case, therefore, constitutes a daring test of ethical principles, not good faith. He failed the test, and those charged with enforcing transcendent professional values, especially the Appellate Divisions, ought to be sustained in their efforts.

Our holding today makes the conduct of trading in special nonrefundable retainer fee agreements subject to appropriate professional discipline. Moreover, we intend no effect or disturbance with respect to other types of appropriate and ethical fee agreements. 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 discipline.

The Court is also mindful of the arguments of some of the amici curiae concerned about sweeping sequelae from this case in the form of disciplinary complaints or investigations that may seek to unearth or examine into past conduct and to declare all sorts of unobjectionable, settled fee arrangements unethical. We are confident that the Appellate Divisions, in the highest tradition of their regulatory and adjudicatory roles, will exercise their unique disciplinary responsibility with prudence, so as not to overbroadly brand past individualized attorney fee arrangements as unethical, and will, instead, fairly assess the varieties of these practices, if presented, on an individualized basis. Therefore, we decline to render our ruling prospectively, as requested.

| **CHECK YOUR KNOWLEDGE:** |
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| 1. Was the problem with Cooperman’s fees that they were non-refundable, too high, or both? What if Cooperman had charged a non-refundable fee of $1000 or $100? What if Cooperman required a $10,000 refundable retainer and a $5000 engagement fee, paid at the end of representation? |
| 1. What are “minimum fee arrangements and general retainers that provide for fees”? How are they different from Cooperman’s non-refundable retainer fees? |
| 1. Should attorneys be able to charge a flat fee for a service? What if the flat fee is the average fee for that service? What if it is less than the average fee? |

| [***In the Matter of Fordham*, 423 Mass. 481 (Mass. 1996)**](https://scholar.google.com/scholar_case?case=2318422468347742673) |
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| **Summary:** Bar counsel alleges that Fordham charged a clearly excessive fee for defending Clark against a OUI and other charges. Hearing committee concluded that Fordham’s fee was not substantially in excess of a reasonable fee and recommended against bar discipline. The Massachusetts Supreme Court reversed, holding that Fordham’s fee was clearly excessive, given the nature of the representation, and issued a public reprimand. |

This is an appeal from the Board of Bar Overseers’ dismissal of a petition for discipline filed by bar counsel against attorney Laurence S. Fordham. On March 11, 1992, bar counsel served Fordham with a petition for discipline alleging that Fordham had charged a clearly excessive fee for defending Timothy Clark in the District Court against a charge that he operated a motor vehicle while under the influence of intoxicating liquor (OUI) and against other related charges. Fordham moved that the board dismiss the petition and the board chair recommended that that be done. Bar counsel appealed from the chair's decision to the full board, and the board referred the matter to a hearing committee.

After five days of hearings, and with “serious reservations,” the hearing committee concluded that Fordham's fee was not substantially in excess of a reasonable fee and that, therefore, the committee recommended against bar discipline. Bar counsel appealed from that determination to the board. By a vote of six to five, with one abstention, the board accepted the recommendation of the hearing committee and dismissed the petition for discipline. Bar counsel then filed in the Supreme Judicial Court for Suffolk County a claim of appeal from the board's action.

Fordham moved in the county court for a dismissal of bar counsel’s appeal. A single justice denied Fordham's motion and reported the case to the full court. We conclude that the single justice correctly denied Fordham’s motion to dismiss bar counsel’s appeal. We conclude, also, that the board erred in dismissing bar counsel's petition for discipline. We direct a judgment ordering public censure be entered in the county court.

We summarize the hearing committee’s findings. On March 4, 1989, the Acton police department arrested Timothy, then twenty-one years old, and charged him with OUI, operating a motor vehicle after suspension, speeding, and operating an unregistered motor vehicle. At the time of the arrest, the police discovered a partially full quart of vodka in the vehicle. After failing a field sobriety test, Timothy was taken to the Acton police station where he submitted to two breathalyzer tests which registered .10 and .12 respectively.

Subsequent to Timothy’s arraignment, he and his father, Laurence Clark consulted with three lawyers, who offered to represent Timothy for fees between $3,000 and $10,000. Shortly after the arrest, Clark went to Fordham’s home to service an alarm system which he had installed several years before. While there, Clark discussed Timothy’s arrest with Fordham’s wife who invited Clark to discuss the case with Fordham. Fordham then met with Clark and Timothy.

At this meeting, Timothy described the incidents leading to his arrest and the charges against him. Fordham, whom the hearing committee described as a “very experienced senior trial attorney with impressive credentials,” told Clark and Timothy that he had never represented a client in a driving while under the influence case or in any criminal matter, and he had never tried a case in the District Court. The hearing committee found that “Fordham explained that although he lacked experience in this area, he was a knowledgeable and hard-working attorney and that he believed he could competently represent Timothy. Fordham described himself as ‘efficient and economic in the use of his time.’”

“Towards the end of the meeting, Fordham told the Clarks that he worked on a time charge basis and that he billed monthly. In other words, Fordham would calculate the amount of hours he and others in the firm worked on a matter each month and multiply it by the respective hourly rates. He also told the Clarks that he would engage others in his firm to prepare the case. Clark had indicated that he would pay Timothy’s legal fees.” After the meeting, Clark hired Fordham to represent Timothy.

According to the hearing committee’s findings, Fordham filed four pretrial motions on Timothy's behalf, two of which were allowed. One motion, entitled “Motion in Limine to Suppress Results of Breathalyzer Tests,” was based on the theory that, although two breathalyzer tests were exactly .02 apart, they were not “within” .02 of one another as the regulations require. The hearing committee characterized the motion and its rationale as “a creative, if not novel, approach to suppression of breathalyzer results.” Although the original trial date was June 20, 1989, the trial, which was before a judge without jury, was held on October 10 and October 19, 1989. The judge found Timothy not guilty of driving while under the influence.

Fordham sent the following bills to Clark:

1. April 19, 1989, $3,250 for services rendered in March, 1989.
2. May 15, 1989, $9,850 for services rendered in April, 1989.
3. June 19, 1989, $3,950 for services rendered in May, 1989.
4. July 13, 1989, $13,300 for services rendered in June, 1989.
5. October 13, 1989, $35,022.25 revised bill for services rendered from March 19 to June 30, 1989.
6. November 7, 1989, $15,000 for services rendered from July 1, 1989 to October 19, 1989."

The bills totaled $50,022.25, reflecting 227 hours of billed time, 153 hours of which were expended by Fordham and seventy-four of which were his associates’ time. Clark did not pay the first two bills when they became due and expressed to Fordham his concern about their amount. Clark paid Fordham $10,000 on June 20, 1989. At that time, Fordham assured Clark that most of the work had been completed “other than taking the case to trial.” Clark did not make any subsequent payments. Fordham requested Clark to sign a promissory note evidencing his debt to Fordham and, on October 7, 1989, Clark did so. In the October 13, 1989, bill, Fordham added a charge of $5,000 as a “retroactive increase” in fees. On November 7, 1989, after the case was completed, Fordham sent Clark a bill for $15,000.

Bar counsel and Fordham have stipulated that all the work billed by Fordham was actually done and that Fordham and his associates spent the time they claim to have spent. They also have stipulated that Fordham acted conscientiously, diligently, and in good faith in representing Timothy and in his billing in this case.

The board dismissed bar counsel’s petition for discipline against Fordham because it determined, relying in large part on the findings and recommendations of the hearing committee, that Fordham’s fee was not clearly excessive. Pursuant to S.J.C. Rule 3:07, DR 2-106(B), “a fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence, experienced in the area of the law involved, would be left with a definite and firm conviction that the fee is substantially in excess of a reasonable fee.” The rule proceeds to list eight factors to be considered in ascertaining the reasonableness of the fee:

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.
8. Whether the fee is fixed or contingent.

In concluding that Fordham did not charge a clearly excessive fee, the board adopted, with limited exception, the hearing committee’s report. The board’s and the hearing committee’s reasons for dismissing the petition are as follows: Bar counsel and Fordham stipulated that Fordham acted conscientiously, diligently, and in good faith in his representation of the client and his billing on the case. Although Fordham lacked experience in criminal law, he is a “seasoned and well-respected civil lawyer.” The more than 200 hours spent preparing the OUI case were necessary, “in part to educate Fordham in the relevant substantive law and court procedures,” because he had never tried an OUI case or appeared in the District Court. The board noted that “although none of the experts who testified at the disciplinary hearing had ever heard of a fee in excess of $15,000 for a first-offense OUI case, the hearing committee found that Clark had entered into the transaction with open eyes after interviewing other lawyers with more experience in such matters.” The board also thought significant that Clark “later acquiesced, despite mild expressions of concern, in Fordham’s billing practices.” Moreover, the Clarks specifically instructed Fordham that they would not consider a guilty plea by Timothy. Rather they were interested only in pursuing the case to trial. Finally, Timothy obtained the result he sought: an acquittal.

Bar counsel contends that the board's decision to dismiss the petition for discipline is erroneous on three grounds: First, “the hearing committee and the Board committed error by analyzing only three of the factors set out in DR 2-106 (B) (1)-(8), and their findings with regard to these criteria do not support their conclusion that the fee in this case was not clearly excessive”; second, the board “misinterpreted DR 2-106’s prohibition against charging a clearly excessive fee by reading into the rule a ‘safe harbor’ provision”; and third, “by allowing client acquiescence as a complete defense.”

In reviewing the hearing committee’s and the board’s analysis of the various factors, as appearing in DR 2-106 (B), which are to be considered for a determination as to whether a fee is clearly excessive, we are mindful that, although not binding on this court, the findings and recommendations of the board are entitled to great weight. We are empowered, however, to review the board’s findings and reach our own conclusion. In the instant case we are persuaded that the hearing committee’s and the board's determinations that a clearly excessive fee was not charged are not warranted.

The first factor listed in DR 2-106(B) requires examining “the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.” Although the hearing committee determined that Fordham “spent a large number of hours on the matter, in essence learning from scratch what others already know,” it “did not credit Bar Counsel’s argument that Fordham violated DR 2-106 by spending too many hours.” The hearing committee reasoned that even if the number of hours Fordham “spent were wholly out of proportion” to the number of hours that a lawyer with experience in the trying of OUI cases would require, the committee was not required to conclude that the fee based on time spent was “clearly excessive.” It was enough, the hearing committee concluded, that Clark instructed Fordham to pursue the case to trial, Fordham did so zealously and, as stipulated, Fordham spent the hours he billed in good faith and diligence. We disagree.

Four witnesses testified before the hearing committee as experts on OUI cases. One of the experts, testifying on behalf of bar counsel, opined that “the amount of time spent in this case is clearly excessive.” He testified that there were no unusual circumstances in the OUI charge against Timothy and that it was a “standard operating under the influence case.” The witness did agree that Fordham’s argument for suppression of the breathalyzer test results, which was successful, was novel and would have justified additional time and labor. He also acknowledged that the acquittal was a good result; even with the suppression of the breathalyzer tests, he testified, the chances of an acquittal would have been “not likely at a bench trial.” The witness estimated that it would have been necessary, for thorough preparation of the case including the novel breathalyzer suppression argument, to have billed twenty to thirty hours for preparation, not including trial time.

A second expert, testifying on behalf of bar counsel, expressed his belief that the issues presented in this case were not particularly difficult, nor novel, and that “the degree of skill required to defend a case such as this was not that high.” He did recognize, however, that the theory that Fordham utilized to suppress the breathalyzer tests was impressive and one of which he had previously never heard. Nonetheless, the witness concluded that “clearly there is no way that he could justify these kind of hours to do this kind of work.” He estimated that an OUI case involving these types of issues would require sixteen hours of trial preparation and approximately fifteen hours of trial time. He testified that he had once spent ninety hours in connection with an OUI charge against a client that had resulted in a plea. The witness explained, however, that that case had involved a second offense OUI and that it was a case of first impression, in 1987, concerning new breathalyzer equipment and comparative breathalyzer tests.

An expert called by Fordham testified that the facts of Timothy’s case presented a challenge and that without the suppression of the breathalyzer test results it would have been “an almost impossible situation in terms of prevailing on the trier of fact.” He further stated that, based on the particulars in Timothy's case, he believed that Fordham’s hours were not excessive and, in fact, he, the witness, would have spent a comparable amount of time. The witness later admitted, however, that within the past five years, the OUI cases which he had brought to trial required no more than a total of forty billed hours, which encompassed all preparation and court appearances. He explained that, although he had not charged more than forty hours to prepare an OUI case, in comparison to Fordham's more than 200 expended hours, Fordham nonetheless had spent a reasonable number of hours on the case in light of the continuance and the subsequent need to reprepare, as well as the “very ingenious” breathalyzer suppression argument, and the Clarks’ insistence on trial. In addition, the witness testified that, although the field sobriety test, breathalyzer tests, and the presence of a half-empty liquor bottle in the car placed Fordham at a serious disadvantage in being able to prevail on the OUI charge, those circumstances were not unusual and in fact agreed that they were “normal circumstances.”

The fourth expert witness, called by Fordham, testified that she believed the case was “extremely tough” and that the breathalyzer suppression theory was novel. She testified that, although the time and labor consumed on the case was more than usual in defending an OUI charge, the hours were not excessive. They were not excessive, she explained, because the case was particularly difficult due to the “stakes and the evidence.” She conceded, however, that legal issues in defending OUI charges are “pretty standard” and that the issues presented in this case were not unusual. Furthermore, the witness testified that challenging the breathalyzer test due to the .02 discrepancy was not unusual, but the theory on which Fordham proceeded was novel. Finally, she stated that she thought she may have known of one person who might have spent close to one hundred hours on a difficult OUI case; she was not sure; but she had never heard of a fee in excess of $10,000 for a bench trial.

In considering whether a fee is “clearly excessive,” the first factor to be considered pursuant to that rule is “the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.” That standard is similar to the familiar standard of reasonableness traditionally applied in civil fee disputes. Based on the testimony of the four experts, the number of hours devoted to Timothy’s OUI case by Fordham and his associates was substantially in excess of the hours that a prudent experienced lawyer would have spent. According to the evidence, the number of hours spent was several times the amount of time any of the witnesses had ever spent on a similar case. We are not unmindful of the novel and successful motion to suppress the breathalyzer test results, but that effort cannot justify a $50,000 fee in a type of case in which the usual fee is less than one-third of that amount.

The board determined that “because Fordham had never tried an OUI case or appeared in the district court, Fordham spent over 200 hours preparing the case, in part to educate himself in the relevant substantive law and court procedures.” Fordham's inexperience in criminal defense work and OUI cases in particular cannot justify the extraordinarily high fee. It cannot be that an inexperienced lawyer is entitled to charge three or four times as much as an experienced lawyer for the same service. A client “should not be expected to pay for the education of a lawyer when he spends excessive amounts of time on tasks which, with reasonable experience, become matters of routine.” “While the licensing of a lawyer is evidence that he has met the standards then prevailing for admission to the bar, a lawyer generally should not accept employment in any area of the law in which he is not qualified. However, he may accept such employment if in good faith he expects to become qualified through study and investigation, as long as such preparation would not result in unreasonable delay or expense to his client.” Although the ethical considerations set forth in the ABA Code of Professional Responsibility and Canons of Judicial Ethics are not binding, they nonetheless serve as a guiding principle.

The third factor to be considered in ascertaining the reasonableness of a fee is its comparability to “the fee customarily charged in the locality for similar legal services.” The hearing committee made no finding as to the comparability of Fordham’s fee with the fees customarily charged in the locality for similar services. However, one of bar counsel’s expert witnesses testified that he had never heard of a fee in excess of $15,000 to defend a first OUI charge, and the customary flat fee in an OUI case, including trial, “runs from $1,000 to $7,500.” Bar counsel’s other expert testified that he had never heard of a fee in excess of $10,000 for a bench trial. In his view, the customary charge for a case similar to Timothy’s would vary between $1,500 and $5,000. One of Fordham’s experts testified that she considered a $40,000 or $50,000 fee for defending an OUI charge “unusual and certainly higher by far than any I've ever seen before.” The witness had never charged a fee of more than $3,500 for representing a client at a bench trial to defend a first offense OUI charge. She further testified that she believed an “average OUI in the bench session is two thousand dollars and sometimes less.” Finally, that witness testified that she had “heard a rumor” that one attorney charged $10,000 for a bench trial involving an OUI charge; this fee represented the highest fee of which she was aware. The other expert witness called by Fordham testified that he had heard of a $35,000 fee for defending OUI charges, but he had never charged more than $12,000 (less than twenty-five per cent of Fordham’s fee).

Although finding that Fordham’s fee was “much higher than the fee charged by many attorneys with more experience litigating driving under the influence cases,” the hearing committee nevertheless determined that the fee charged by Fordham was not clearly excessive because Clark “went into the relationship with Fordham with open eyes,” Fordham’s fee fell within a “safe harbor,” and Clark acquiesced in Fordham's fee by not strenuously objecting to his bills. The board accepted the hearing committee's analysis apart from the committee’s reliance on the “safe harbor” rule.

The finding that Clark had entered into the fee agreement “with open eyes” was based on the finding that Clark hired Fordham after being fully apprised that he lacked any type of experience in defending an OUI charge and after interviewing other lawyers who were experts in defending OUI charges. Furthermore, the hearing committee and the board relied on testimony which revealed that the fee arrangement had been fully disclosed to Clark including the fact that Fordham “would have to become familiar with the law in that area.” It is also significant, however, that the hearing committee found that “despite Fordham’s disclaimers concerning his experience, Clark did not appear to have understood in any real sense the implications of choosing Fordham to represent Timothy. Fordham did not give Clark any estimate of the total expected fee or the number of $200 hours that would be required.” The express finding of the hearing committee that Clark “did not appear to have understood in any real sense the implications of choosing Fordham to represent Timothy” directly militates against the finding that Clark entered into the agreement “with open eyes.”

That brings us to the hearing committee's finding that Fordham’s fee fell within a “safe harbor.” The hearing committee reasoned that as long as an agreement existed between a client and an attorney to bill a reasonable rate multiplied by the number of hours actually worked, the attorney’s fee was within a “safe harbor” and thus protected from a challenge that the fee was clearly excessive. The board, however, in reviewing the hearing committee’s decision, correctly rejected the notion “that a lawyer may always escape discipline with billings based on accurate time charges for work honestly performed.”

The “safe harbor” formula would not be an appropriate rationale in this case because the amount of time Fordham spent to educate himself and represent Timothy was clearly excessive despite his good faith and diligence. Disciplinary Rule 2-106(B)’s mandate that “a fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence, experienced in the area of the law involved, would be left with a definite and firm conviction that the fee is substantially in excess of a reasonable fee,” creates explicitly an objective standard by which attorneys’ fees are to be judged. We are not persuaded by Fordham’s argument that “unless it can be shown that the ‘excessive’ work for which the attorney has charged goes beyond mere matters of professional judgment and can be proven, either directly or by reasonable inference, to have involved dishonesty, bad faith or overreaching of the client, no case for discipline has been established.” Disciplinary Rule 2-106 plainly does not require an inquiry into whether the clearly excessive fee was charged to the client under fraudulent circumstances, and we shall not write such a meaning into the disciplinary rule.

Finally, bar counsel challenges the hearing committee’s finding that “if Clark objected to the numbers of hours being spent by Fordham, he could have spoken up with some force when he began receiving bills.” Bar counsel notes, and we agree, that “the test as stated in the DR 2-106(A) is whether the fee ‘charged’ is clearly excessive, not whether the fee is accepted as valid or acquiesced in by the client.” Therefore, we conclude that the hearing committee and the board erred in not concluding that Fordham’s fee was clearly excessive.

Fordham argues that our imposition of discipline would offend his right to due process. A disciplinary sanction constitutes “a punishment or penalty” levied against the respondent, and therefore the respondent is entitled to procedural due process. Fordham contends that the bar and, therefore, he, have not been given fair notice through prior decisions of this court or the express language of DR 2-106 that discipline may be imposed for billing excessive hours that were nonetheless spent diligently and in good faith. It is true, as Fordham asserts, that there is a dearth of case law in the Commonwealth meting out discipline for an attorney’s billing of a clearly excessive fee. There is, however, as we have noted above, case law which specifically addresses what constitutes an unreasonable attorney’s fee employing virtually the identical factors contained within DR 2-106. More importantly, the general prohibition that “a lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee,” is followed by eight specific, and clearly expressed, factors, to be evaluated by the standard of “a lawyer of ordinary prudence,” in determining the propriety of the fee. In addition, nothing contained within the disciplinary rule nor within any pertinent case law indicates in any manner that a clearly excessive fee does not warrant discipline whenever the time spent during the representation was spent in good faith. The fact that this court has not previously had occasion to discipline an attorney in the circumstances of this case does not suggest that the imposition of discipline in this case offends due process. We reject Fordham's due process argument.

In charging a clearly excessive fee, Fordham departed substantially from the obligation of professional responsibility that he owed to his client. The ABA Model Standards for Imposing Lawyer Sanctions § 7.3 endorses a public reprimand as the appropriate sanction for charging a clearly excessive fee. We deem such a sanction appropriate in this case. Accordingly, a judgment is to be entered in the county court imposing a public censure. The record in this case is to be unimpounded.

| **CHECK YOUR KNOWLEDGE** |
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| 1. Was the problem with Fordham’s fee the rate he charged, the number of hours he billed, or both? |
| 1. Why do other attorneys litigating similar cases bill so much less? Is it because cases of this kind should take less work or because their clients cannot spend any additional money? |
| 1. What if Fordham’s acquittal rate were substantially higher than other attorneys in the same practice area? Should he be able to charge a higher rate? How much higher? |
| 1. What if Fordham estimated a fee of $50,000 in advance, and billed only for work actually completed? |

**Contingent Fees**

*You never give me your money, you only give me your funny paper, and in the middle of negotiations, you break down.*[[2]](#footnote-1)

Typically, attorneys charge an hourly fee for their services, often billed in some fraction of an hour. But some attorneys charge a fixed fee for their services. Historically, the most prestigious law firms charged a fixed fee for their services, often refusing to provide an itemized list of the services they had provided. Today, detailed billing is the norm, with the exception of attorneys providing retail representation in routine matters, and appointed counsel for indigent defendants.

However, in some circumstances, attorneys and their clients will form a contingent fee agreement, under which both parties agree that the attorney is entitled to a certain percentage of any recovery, often 33%. Contingent fee agreements are typically associated with personal injury actions, where the plaintiff often has a strong claim, but lacks the financial resources to pursue litigation. Under a contingent fee agreement, the attorney can fund the litigation, in exchange for a chance of a much larger recovery.

But contingent fee agreements can also make sense when a client wants to control an attorney’s incentives. Under an hourly billing agreement, the attorney has an incentive to bill as many hours as possible, even as the additional work produces diminishing returns to the client. And under a fixed fee billing agreement, the attorney has an incentive to do as little work as possible. But under a contingent fee agreement, the attorney simply has an incentive to win.

Under [Model Rule 1.5(c)](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_5_fees/), contingency fee agreements cannot be unreasonable and must be in writing. In addition, contingent fees are prohibited in criminal law and family law actions. Attorneys cannot form a contingent fee agreement to be paid only if a criminal defendant is acquitted or receives some other favorable outcome. And attorneys typically cannot form a contingent fee agreement to receive compensation from the resolution of a domestic dispute.

| [***Culpepper & Carroll, PLLC v. Cole*, 929 So. 2d 1224 (La. 2006)**](https://scholar.google.com/scholar_case?case=3631948001140777811) |
| --- |
| **Summary:** Cole retained attorney Culpepper for a will contest. Cole requested one-third contingent fee and Culpepper agreed. Culpepper received a settlement offer and Cole refused to settle. Cole terminated representation when Culpepper refused to file suit as a forced heir. Cole recovered nothing challenging the will by himself. Culpepper wanted $6,950 plus legal interest as attorney’s fees. Cole argued Culpepper did this on contingency basis, and that Culpepper quit the case. Court found that a contingent fee contract exists, but found that Culpepper is not entitled to recover attorney’s fees because Cole did not obtain any recovery. |

Connie Daniel Cole seeks review of a judgment of the court of appeal affirming an award of attorney’s fees to his former counsel. For the reasons that follow, we reverse the judgment of the court of appeal.

FACTS AND PROCEDURAL HISTORY

Connie Daniel Cole retained attorney Bobby Culpepper of the law firm of Culpepper & Carroll, PLLC to represent him in a contest of his mother’s will. Mr. Cole requested that the firm handle the matter on a one-third contingent fee basis, and Mr. Culpepper agreed to do so. On September 20, 2000, Mr. Culpepper sent Mr. Cole a letter in which he confirmed that he would accept the representation on a contingent fee basis of one-third “of whatever additional property or money we can get for you.”

After negotiation between Mr. Culpepper and counsel for the estate of Mr. Cole's mother, Mr. Cole was offered property worth $21,600.03 over and above what he would have received under the terms of the decedent’s will. Mr. Culpepper thought the compromise was reasonable and recommended to Mr. Cole that he accept the offer. However, Mr. Cole refused to settle his claim for that amount, believing he was entitled to a larger share of his mother’s succession as a forced heir. When Mr. Culpepper refused to file suit in the matter, Mr. Cole terminated his representation. Mr. Cole then proceeded in proper person to challenge his mother’s will, but he was unsuccessful and recovered nothing.

On April 12, 2004, Mr. Culpepper filed a “Petition on Open Account” on behalf of the Culpepper law firm. The suit was filed in Ruston City Court against Mr. Cole, seeking the sum of $6,950.01, plus legal interest, together with 25% on the principal and interest as additional attorney's fees. Attached to the petition were Mr. Culpepper’s invoice for attorney's fees and a demand letter to Mr. Cole seeking the payment of “the entire balance of $6,950.01 that you owe Culpepper & Carroll, PLLC.”

Mr. Cole, appearing in proper person, answered the law firm’s petition and denied that he owed any money. Mr. Cole explained in his answer that “Mr. Culpepper did this on a contingency fee basis,” that Mr. Culpepper “quit the case,” and that Mr. Cole paid court costs but Mr. Culpepper “would not go to court.”

Following a trial on the merits, at which both parties testified, the city court rendered judgment in favor of the law firm, awarding the sum of $6,950.01, plus legal interest from the date of judicial demand until paid, together with 25% on the principal and interest as additional attorney's fees, and costs. In oral reasons for judgment, the city court judge stated that a “contingency fee was present” based on the record, including the testimony in open court and the written admission in Mr. Cole’s answer that there was a contingent fee arrangement. The court noted that “work was accomplished” by Mr. Culpepper and further noted that, according to the testimony, the settlement would have produced a better result than if the case had gone to trial on the issue of forced heirship. Thus, the court was satisfied that the law firm met its burden of proof.

Mr. Cole appealed the city court's judgment, and in a 2-1 ruling, the court of appeal amended the judgment and affirmed. The majority agreed that a valid contingent fee contract existed between Mr. Cole and Mr. Culpepper, and found that by refusing to sign the “favorable settlement” negotiated by Mr. Culpepper before he was discharged, Mr. Cole was in effect depriving Mr. Culpepper of the contingent fee he had already earned. Accordingly, the court of appeal affirmed the award to Mr. Culpepper of $6,950.01 in attorney's fees, plus legal interest. However, the court of appeal found that the money owing in this case does not derive from an open account, but rather from a contractual obligation in the form of a contingent fee agreement. Based on this reasoning, the court of appeal amended the trial court's judgment to delete the award to the law firm of 25% additional attorney's fees plus costs under the open account statute.

Judge Caraway dissented. He recognized that a contingent fee contract existed in this case, but found that because there was ultimately no recovery in the case, no fee was due to Mr. Culpepper. Judge Caraway further observed that to allow an attorney to collect a fee when the client rejects a settlement offer and later recovers nothing “ignores multiple and serious concerns embodied in the rules of professional conduct.”

Upon Mr. Cole's application, we granted certiorari to review the correctness of the court of appeal's ruling.

DISCUSSION

As a threshold matter, we note the trial court made a finding of fact that a contingent fee contract existed between Mr. Cole and Mr. Culpepper. Based on our review of the record, we find no manifest error in this determination.

Having found a contingent fee contract exists, we now turn to the question of whether Mr. Culpepper is entitled to recover any attorney's fees under this contract. Pursuant to the parties’ agreement, Mr. Culpepper is entitled to one-third “of whatever additional property or money” he obtained on behalf of Mr. Cole. It is undisputed that Mr. Cole recovered no additional property or money as a result of the litigation against his mother's estate. Because Mr. Cole obtained no recovery, it follows that Mr. Culpepper is not entitled to any contingent fee.

Nonetheless, Mr. Culpepper urges us to find that his contingency should attach to the settlement offer he obtained on behalf of his client, even though his client refused to accept that offer. According to Mr. Culpepper, he did the work for which Mr. Cole retained him, and he is therefore entitled to one-third of the amount offered in settlement, notwithstanding Mr. Cole's rejection of the settlement offer.

With the benefit of hindsight, it would have been in Mr. Cole's best interest to accept the settlement offer obtained by Mr. Culpepper. However, it is clear that the decision to accept a settlement belongs to the client alone. Therefore, regardless of the wisdom of Mr. Cole's decision, his refusal to accept the settlement was binding on Mr. Culpepper.

To allow Mr. Culpepper to recover a contingent fee under these circumstances would penalize Mr. Cole for exercising his right to reject the settlement. We find no statutory or jurisprudential support for such a proposition. Indeed, this court has rejected any interpretation of the Rules of Professional Conduct which would place restrictions on the client’s fundamental right to control the case.

In summary, we find that Mr. Culpepper did not obtain any recovery on behalf of Mr. Cole. In the absence of a recovery, it follows that Mr. Culpepper cannot collect a contingent fee for his services. Accordingly, we must reverse the judgment of the court of appeal awarding a contingent fee to Mr. Culpepper.

| **CHECK YOUR KNOWLEDGE** |
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| 1. Why wasn’t Culpepper entitled to compensation for the work he actually did for Cole? |
| 1. Could the contingent fee agreement between Cole and Culpepper have included a clause requiring Cole to obtain Culpepper’s consent before accepting or rejecting a settlement offer? |
| 1. Why did Culpepper agree to work on a contingent fee contract? Would you have approached the case under a different fee schedule? |

*It’s a bad business to be in. You don’t get thanked and you don’t get paid. It’s a hard world to be in with, and to end with, and to think about leaving behind.*[[3]](#footnote-2)

1. Lefty Frizzell, *If You've Got The Money I've Got The Time* (1950). [↑](#footnote-ref-0)
2. The Beatles, *You Never Give Me Your Money*, Abbey Road (1969). [↑](#footnote-ref-1)
3. Liz Phair, *Elvis, Be True*, Girly-Sound (1991). [↑](#footnote-ref-2)