speaking of ethics

By Saul Jay Singer

An E-*Mance*-ipation Proclamation

Mick Wiggins

Larry Lawyer, a solo practitioner who represents primarily criminal defendants in drug cases, learned through hard experience that once his clients were convicted or plead out, they suddenly lacked funds to pay his outstanding fee or conveniently forgot their payment obligation. He also discovered that it was difficult to collect a fee from incarcerated clients with no assets. As such, he decided to represent clients strictly on a flat-fee basis and to represent only those clients who could come up with the flat fee up front. Money in hand, he would immediately deposit these fees into his operating account. "In truth," Larry says, "handling my fees in this matter is the only way I can maintain my practice, given the nature of my clientele and the cash-flow issues inherent in financing my practice."[1]

Across town at Big Firm, Attila Attorney, an in-demand, scorched-earth civil litigator, demands a $50,000 down payment from the client for each new matter. In accordance with Rule 1.5(b), he carefully specifies in his retainer agreements that, once the representation commences, the minimum fee will be $25,000. In fact, in the ultimate exercise of caution, he has his clients deliver two separate checks, each for $25,000; as he carefully explains, "I will deposit the first check into Firm's trust account, where it will be maintained and protected until earned, but the second check will be deposited into Firm's operating account as funds fully earned immediately upon receipt." Attila argues that no one forces his clients to accept his terms; if they don't like it, he says, there are plenty of other lawyers in the District of Columbia who would be only too happy to take their case—"although," he smugly notes, "none of 'em are as good as I am."

Connie Counselor has come up with a creative billing technique for her trusts and estates practice: she charges her clients $750 per hour for the first five hours but only $200 per hour thereafter. She, too, is very careful to detail this arrangement in her retainer agreements. "In my three decades of practice," she says, "not a single client has ever complained about this arrangement, even though a material portion of my cases has involved providing fewer than five hours of estate counseling."

Peter Partner has found a gold mine: He enters into an arrangement with a large group of Firm clients whereby each client pays him an "engagement retainer," an annual fee to ensure his availability to represent the client as—and, more important to Peter, *if* —the need for such representation arises. As it turns out, he is rarely called upon to actually provide any legal services to these clients and, in the few instances when his services are actually needed, he still charges them his usual and customary fee while pocketing the annual engagement retainer previously paid.

What do you do if, like Larry, Attila, and Connie, you arrive at your office one fine day only to discover that your standard fee-handling and management practices—the ones that you had carefully and faithfully followed for years—were found to be unethical by both the D.C. Court of Appeals and the D.C. Legal Ethics Committee? That is precisely the dilemma faced recently by many D.C. lawyers.

In *In re Mance*, 980 A.2d 1196 (D.C. 2009), attorney Mance argued that he had earned a flat fee upon receipt because the fee did not constitute a client advance but, rather, was simply the agreed-upon fee irrespective of the quantity of legal work actually required. However, the Court of Appeals disagreed, holding that a flat fee is an advance of unearned fees and that, absent informed consent from the client to act in some contrary manner,[2] the lawyer must deposit all flat fees and advance fees into the lawyer's trust account. The court ruled that these funds may not be transferred to the lawyer's operating account, or otherwise drawn upon, until either: (1) the client gives informed consent to such withdrawal; or (2) the portion of the fee to be withdrawn has been earned.

In so ruling, the court took a strong position against "front-loading," emphasizing the severe adverse impact on the absolute right of the client to the counsel of his or her choice, including specifically the client's right to terminate his or her lawyer at any time and for any reason. A lawyer who pockets a flat fee (or an advance) may force the client to stick with a lawyer he or she does not want or trust because, having paid the lawyer to complete the case, the client lacks the financial resources to retain new counsel to complete the representation.

As such, Larry's flat fees are not earned upon receipt and, contrary to the usual and customary practice of the criminal defense bar, he must deposit them into his trust account, unless the client otherwise gives informed consent. Attila's arrangement is also unethical because the $25,000 he pockets at the outset of the representation is a "front-load" and a limitation on the client's ability to retain alternative counsel. Moreover, his argument that the client is free to accept or reject his terms also fails because his fee is *per se* unreasonable under Rule 1.5(a).[3] Similarly, Connie's fee scheme is arguably a clever front-load, an unethical disincentive to clients discharging her midrepresentation, and an unreasonable hourly fee under Rule 1.5.

In contrast, the *Mance* court specifically held that Peter's "engagement retainers" are permitted and deemed earned upon receipt;[4] in fact, the court held that Peter's deposit of these funds into his trust account would violate the D.C. rule against commingling funds. As such, Peter's handling of these engagement fees is proper.

But can this possibly mean that a lawyer is entitled to no portion of the flat fee until the representation is completed, or that a lawyer cannot transfer any portion of a client advance to the lawyer's operating account until the advance has been fully earned? If a flat-fee client dismisses a lawyer midrepresentation, to what portion of the flat fee is the lawyer entitled? And, assuming that the lawyer

has earned at least a portion of the flat fee or advance, does maintaining the entire fee in the trust account until completion of the representation constitute commingling? These questions were essentially unresolved by the *Mance* court, which, while noting that waiting until the conclusion of a representation to gain access to any portion of a flat fee could impose financial hardship on attorneys, nonetheless failed to address in detail *how* and *under what circumstances* an attorney is deemed to earn portions of the fee.

The Legal Ethics Committee answers these questions in Legal Ethics Opinion 355. Relying upon the court's approval of a lawyer's use of "milestones" based upon "the passage of time, the completion of certain tasks, or any other basis mutually agreed upon between the lawyer and the client" to earn portions of flat fees and advances, the committee recommends that lawyers use their retainer agreements to describe in detail when and which portion or percent of the advance or flat fee has been earned.[5] The committee suggested several acceptable milestones such as certain events (completion of discovery or hearings); completion of specific tasks (witness interviews, filing of motions, completion of specified document drafts); or the application of a reasonable hourly rate to the lawyer's efforts.

This list is by no means intended to be exclusive, and other reasonable milestones that do not unethically front-load the client's fee can pass *Mance*-scrutiny. However, the client's agreement in this regard will not be outcome-determinative because such agreements must bear a reasonable relationship to the anticipated course of the representation.

The committee further determined that, even absent an agreement between the lawyer and client regarding withdrawal of a portion of the client's flat fee or advance, there is no *per se* prohibition against the lawyer transferring some portion of the flat fee or advance to an operating account before the representation has been completed, provided that: (1) the transferred portion reasonably reflects the services provided by the lawyer to date when measured against the entirety of the flat fee or advance, and (2) the lawyer advises the client of the withdrawal and affords the client the opportunity to contest it. A lawyer should proceed very carefully in this regard, and the lawyer bears the burden to prove that the amount withdrawn has been fully earned.

As reflected by calls to the Legal Ethics Helpline, "*Mance* madness" is in full swing, and the reader would be well-advised to carefully read the *Mance* opinion and to be guided by LEO 355 in structuring fee-handling and management practices.

Legal Ethics counsel Hope C. Todd and Saul Jay Singer are available for telephone inquiries at 202-737-4700, ext. 3231 and 3232, respectively, or by e-mail at ethics@dcbar.org.

Notes

1 This, in fact, is precisely how the criminal defense bar has historically handled receipt of flat fees: "the understanding among lawyers with respondent's type of practice [criminal defense] has been that flat fees belong to the lawyer upon receipt." *In re Mance*, 980 A.2d 1196, 1206 (D.C. 2009).

2 As the Legal Ethics Committee discusses in Legal Ethics Opinion 355, a lawyer may, pursuant to Rule 1.15(e) [which replaces old Rule 1.15(d) effective August 1, 2010], deposit unearned funds in an operating account only if he or she obtains the client's informed consent. According to the committee, a client's consent under these circumstances is deemed "informed" only if the lawyer explains in detail, *inter alia*, that (1) that the client has the right to direct that funds be deposited and maintained in a trust account until earned; (2) the risks to the client of depositing client funds in the lawyer's operating account (e.g., in case of a judgment against the lawyer, these funds will remain unprotected); and (3) that permitting client funds to be deposited into an operating account by no means relieves the lawyer of his or her ethical duty to return unearned funds in the event the client decides to terminate the represen-

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tation—a right the client retains under all circumstances. While strongly recommending that the lawyer obtain the client's consent in writing, the committee determined that written consent is not required.

While the rule does permit it, it is rarely in the client's interests to consent to such an arrangement, and the lawyer must be very careful to ensure that the client's consent is informed. For a more complete discussion of the requirements for client consent in this instance, *see* LEO 355.

3 The Rule 1.5(a) mandate that "A lawyer's fee shall be reasonable" is not subject to client consent; i.e., a client cannot consent to an unreasonable fee.

4 One caveat: Peter must refund the engagement retainer if he prematurely withdraws or is terminated.

5 Significantly, the committee did not read *Mance* as *mandating* such a provision in retainer agreements and, as such, it determined that a lawyer may hold the entire fee in his trust account until the completion of the representation without fear of commingling.

Disciplinary Actions Taken by the District of Columbia Court of Appeals

Original Matters

IN RE KIM E. HALLMARK. Bar No. 437950. June 10, 2010. The D.C. Court of Appeals disbarred Hallmark under D.C. Code Section 11-2503(a). Hallmark was convicted of a number of crimes involving moral turpitude. Specifically, for a period of two years, Hallmark swindled a series of landlords and prospective subtenants. Hallmark caused more than $40,000 in damages to her victims, and pleaded guilty to eight misdemeanor charges—five counts of theft, two counts of fraud, and one count of contempt of court—for her crimes. Because she repeatedly defrauded others for personal gain, Hallmark committed offenses involving moral turpitude, for which disbarment is mandatory.

Reciprocal Matters

IN RE G. SCOTT CHRISTENSON. Bar No. 362377. June 3, 2010. In a reciprocal matter from California, the D.C. Court of Appeals imposed identical reciprocal discipline and disbarred Christenson.

IN RE HARVEY D. COLEMAN. Bar No. 915256. June 3, 2010. In a reciprocal matter from Virginia, the D.C. Court of Appeals suspended Coleman based upon a disability, pursuant to D.C. Bar Rule XI, section 13(e).

IN RE GARRISON S. CORBEN. Bar No. 460419. June 3, 2010. In a reciprocal matter from Massachusetts, the D.C. Court of Appeals imposed identical reciprocal discipline and suspended Corbin for one year and one day, with a fitness requirement.

IN RE ROBERT S. FISHER. Bar No. 461518. June 17, 2010. In a reciprocal matter from Colorado, the D.C. Court of Appeals imposed identical reciprocal discipline and suspended Fisher for six months, with the imposition of the suspension stayed.

IN RE JOHN L. HILL. Bar No. 439358. June 3, 2010. In a reciprocal matter from Maryland, the D.C. Court of Appeals disbarred Hill. The Maryland Court of Appeals disbarred Hill by consent.

IN RE STEPHEN M. HUNTER. Bar No. 435111. June 10, 2010. In a reciprocal matter from Rhode Island, the D.C. Court of Appeals imposed identical reciprocal discipline and suspended Hunter for one year with fitness.

IN RE SAM MATTHEWS. Bar No. 430223. June 3, 2010. In a reciprocal matter from New Jersey, the D.C. Court of Appeals disbarred Matthews. The New Jersey Supreme Court disbarred Matthews by consent.

IN RE STEVEN J. ROZAN. Bar No. 209262. June 3, 2010. In a reciprocal matter from Texas, the D.C. Court of Appeals suspended Rozan for five years, with three years stayed in favor of probationary terms imposed in Texas. In a second reciprocal matter from Texas, the Court of Appeals further suspended Rozan from the practice of law for one year. Rozan's suspensions are to run concurrently.

Interim Suspensions Issued by the District of Columbia Court of Appeals

IN RE ROBERT J. ABALOS. Bar No. 394349. June 25, 2010. Abalos was suspended on an interim basis based upon discipline imposed in Virginia.

IN RE BIRGER G. BACINO. Bar No. 455448. June 29, 2010. Bacino was suspended on an interim basis based upon his conviction of a serious crime in the Superior Court for Los Angeles County, California.

IN RE LORIN BLEECKER. Bar No. 96685. June 22, 2010. Bleecker was suspended on an interim basis based upon discipline imposed in Maryland.

IN RE WAYNE R. BRYANT. Bar No. 957480. June 25, 2010. Bryant was suspended on an interim basis based upon his conviction of a serious crime in the United States District Court for the District of New Jersey.

IN RE H. BEATTY CHADWICK. Bar No. 126466. June 22, 2010. Chadwick was suspended on an interim basis based upon discipline imposed in Pennsylvania.

IN RE DALE E. DUNCAN. Bar No. 370591. June 17, 2010. Duncan was suspended on an interim basis based upon discipline imposed in Virginia.

IN RE ROBERT L. EHRLICH. Bar No. 943985. June 25, 2010. Ehrlich was suspended on an interim basis based upon discipline imposed in California.

IN RE EDWARD D. FAGAN. Bar No. 394334. June 29, 2010. Fagan was suspended on an interim basis based upon discipline imposed in New Jersey, New York, and Pennsylvania.

IN RE GREGORY VAN JUDICE. Bar No. 474017. June 25, 2010. Judice was suspended on an interim basis based upon discipline imposed in Louisiana.

IN RE JEFFREY L. KRAIN. Bar No. 326884. June 22, 2010. Krain was suspended on an interim basis based upon discipline imposed in Pennsylvania.

IN RE MARIA T. LOPEZ. Bar No. 499285. June 1, 2010. Lopez was suspended on an interim basis based upon discipline imposed in Florida.

IN RE KEVIN C. MCDONOUGH. Bar No. 362940. June 1, 2010. McDonough was suspended on an interim basis based upon discipline imposed in Connecticut.

IN RE BRIAN M. MILLER. Bar No. 429107. June 25, 2010. Miller was suspended on an interim basis based upon discipline imposed in Virginia.

IN RE DAVID E. PARKER. Bar No. 279919. June 22, 2010. Parker was suspended on an interim basis based upon discipline imposed in New York.

IN RE PAUL B. ROYER. Bar No. 484398. On October 22, 2009, the D.C. Court of Appeals granted Royer's motion to vacate the interim order of suspension that was issued on September 29, 2009, effective October 29, 2009.

IN RE RICHARD C. SCALISE. Bar No. 125146. June 25, 2010. Scalise was suspended on an interim basis based upon discipline imposed in Virginia.

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Attorney Briefs

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practice group… **Mark D. Whitaker** has joined DLA Piper LLP as partner in the firm's corporate and finance group.

Company Changes

DLA Piper LLP has established an office in Istanbul, Turkey, which will provide advice on international and foreign law… Brian L. Lerner, formerly a partner at Hogan & Hartson LLP (now Hogan Lovells) has opened **Ward Kim Vaughan & Lerner LLP** in Fort Lauderdale, Florida, focusing on arbitration (both domestic and international), commercial litigation, and employment law. He also has been named Lawyer of the Month by Lawyers to the Rescue in recognition of his commitment to pro bono work.

Author! Author!

Theodore A. Gebhard and **James F. Mongoven** have written the article "Prohibiting Fraud and Deception in Wholesale Petroleum Markets: The New Federal Trade Commission Market Manipulation Rule," which appears in the spring 2010 issue of the *Energy Law Journal*. The authors are both senior attorneys with the U.S. Federal Trade Commission and members of the rulemaking task force… **Eric Kracov**, a partner on Kilpatrick Stockton LLP's financial institutions team, coauthored a new chapter on "Executive Compensation" in the multivolume treatise *Successful Partnering Between Inside and Outside Counsel*. The treatise is a joint project of West and the Association of Corporate Counsel… **David P. Fidler** and **Sarah J. Hughes** coauthored *Responding to National Security Letters: A Practitioner's Guide*, published by the American Bar Association... **Randall D. Eliason**, professorial lecturer in law at American University Washington College of Law and The George Washington University Law School, has published "Surgery With a Meat Axe: Using Honest Services Fraud to Prosecute Federal Corruption," which appears in the fall 2009 issue of the *Journal of Criminal Law & Criminology* at Northwestern University Law School… **Hale E. Sheppard**, who was promoted to full equity shareholder in the Atlanta office of Chamberlain, Hrdlicka, White, Williams & Martin, has published the following articles: "No Returns, No Problem: Tax Court Rules in Case of First Impression That IRS Must Consider 'Economic Hardship' in Pre-Levy Collection Due Process Cases" and "Two More Blows to Foreign Account Holders: Tax Court Lacks FBAR Jurisdiction and Bankruptcy Offers No Relief From FBAR Penalties," which appear in the *Journal of Tax Practice & Procedure*… **Clarence D. Long IV** and **Samuel Wolff** have coauthored "Post-SOX Trends in Delisting and Deregistration," which was published in the winter 2010 issue of the *Richmond Journal of Global Law and Business*... **Mark Vlasic**, a senior fellow at Georgetown University's Institute for Law, Science & Global Security and a partner at Ward & Ward PLLC, has published "The Long Arm of Justice," an op-ed for *The Huffington Post*… **Pieter M. O'Leary**, an associate attorney at Carlin Law Group, APC, has written "When Clean Kids Take Dirty Pictures: The Sexting Phenomenon and Its Impact on American Teenagers, the Criminal Justice System, and Parental Responsibility" for the winter 2009 issue of the *Children's Legal Rights Journal*, published by the Loyola University Chicago School of Law… **Roseann B. Termini**, a food and drug professor and attorney, has written "Dining Out: Legal Issues for Restaurants and Their Customers' Food Safety Issues" and "FDA Enforcement: It Is Not a Walk in the Park: 16th Annual Health Law Institute," both of which were published by the Pennsylvania Bar Institute.

D.C. Bar members in good standing are welcome to submit announcements for this column. When making a submission, please include name, position, organization, and address. E-mail submissions to D.C. Bar staff writer Thai Phi Le at tle@dcbar.org.

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Disciplinary Actions Taken by Other Jurisdictions

In accordance with D.C. Bar Rule XI, § 11(c), the D.C. Court of Appeals has ordered public notice of the following nonsuspensory and nonprobationary disciplinary sanctions imposed on D.C. attorneys by other jurisdictions. To obtain copies of these decisions, visit www.dcbar.org/discipline and search by individual names.

IN RE STEPHEN A. BAMBERGER. Bar No. 339952. On May 3, 2010, the Virginia State Bar reprimanded Bamberger.

IN RE HOUSTON PUTNAM LOWRY. Bar No. 387075. On May 28, 2010, the Statewide Grievance Committee of Connecticut reprimanded Lowry.

IN RE R. CALVERT STEUART. Bar No. 238261. On June 22, 2009, the Attorney Grievance Commission of Maryland reprimanded Steuart.

Informal Admonitions Issued by the Office of Bar Counsel

IN RE SAMUEL JAY LEVINE. Bar No. 166306. June 14, 2010. Bar Counsel issued Levine an informal admonition for failing to promptly forward a former client's file to successor counsel in an immigration matter. Rules 1.8(i) and 1.16(d).

IN RE NATHAN I. SILVER II. Bar No. 944314. June 9, 2010. Bar Counsel issued Silver an informal admonition for misconduct while representing a client in a criminal matter. Namely, failure to provide competent representation; to serve a client with skill and care commensurate with that generally afforded to clients by other lawyers in similar matters; to abide by a client's decisions concerning the objectives of representation, and to consult with the client as to the means by which they are to be pursued; to represent a client zealously and diligently within the bounds of the law; to keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information; and in connection with a termination of representation, to take timely steps to the extent reasonably practicable to protect a client's interests, such as surrendering papers and property to which the client is entitled. Rules 1.1(a), 1.1(b), 1.2(a), 1.3(a), 1.4(a), 1.4(b), and 1.16(d).

The Office of Bar Counsel compiled the foregoing summaries of disciplinary actions. Informal Admonitions issued by Bar Counsel and Reports and Recommendations issued by the Board on Professional Responsibility are posted on the D.C. Bar Web site at www.dcbar.org/discipline. Most board recommendations as to discipline are not final until considered by the court. Court opinions are printed in the Atlantic Reporter *and also are available online for decisions issued since August 1998. To obtain a copy of a recent slip opinion, visit www.dcappeals.gov/dccourts/appeals/opinions_mojs.jsp.*