REL: 04/10/09

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2008-2009

1071419

Alabama State Bar

v.

Lawrence Johnson Hallett, Jr.

1071486

Lawrence Johnson Hallett, Jr.

v.

Alabama State Bar

Appeals from the Board of Disciplinary Appeals of the Alabama State Bar (No. 07-05)

1071419; 1071486

WOODALL, Justice.

The Alabama State Bar ("the Bar") and Lawrence Johnson Hallett, Jr., a member of the Bar, appeal and cross-appeal, respectively, from a decision of the Board of Disciplinary Appeals of the Alabama State Bar ("the Board"), which reversed in part an order of a panel of the Disciplinary Board of the Alabama State Bar (the panel"); the panel had disciplined Hallett after finding that he had violated Rules 1.5(a), 1.5(e), 1.8(a), and 8.4(g), Ala. R. Prof. Cond. We reverse and remand.

I. Factual and Procedural Background

This disciplinary action arose out of an action commenced in December 1999 by Carol J. Earheart to dissolve her marriage to Joel Earheart. On March 23, 2000, Mrs. Earheart engaged J. Daniel Morrow to represent her in that action. The marital estate included real property valued in excess of $1 million and three ongoing businesses valued at $5-6 million. Mrs. Earheart was the chief financial officer of those companies. The divorce action also involved issues regarding the custody of the couple's two minor children.

The divorce action was set for trial on September 27, 2000. On September 5, 2000, Morrow introduced Mrs. Earheart

to Hallett. At that meeting, they discussed whether Hallett should represent Mrs. Earheart. On September 14, 2000, before Mrs. Earheart agreed to hire Hallett, Morrow and Hallett agreed in writing that Hallett would pay Morrow 25% of the fee he earned in representing Mrs. Earheart.

Four days later, on September 18, 2000, Mrs. Earheart signed a "Retainer Agreement and Promissory Note" ("the retainer agreement"). The retainer agreement provided, in pertinent part:

> "1. I, CAROLYN [sic] EARHEART, do hereby hire and retain the services of LAWRENCE J. HALLETT, JR., Attorney at Law. I do further affirm that I have read, understand and do affix my signature to this instrument evidencing the fact that I owe to the same LAWRENCE J. HALLETT, JR., One Hundred Thousand Dollars and no/100 Dollars ($100,000) attorney fees plus any and all costs advanced, court costs, paralegal fees or any other costs incurred in this matter as evidenced by invoices rendered during and a final invoice rendered upon completion of this matter. All such sums are considered a part of this agreement and Promissory Note which represents fees and costs incurred. It is further agreed and understood that any and all costs advanced or incurred, court costs, paralegal fees or any other costs incurred in this matter are in addition to the Attorney Fees and are due and payable upon rendering of Invoice for said costs, fees and advances. I further acknowledge that LAWRENCE J. HALLETT, JR..[sic]

"2. The parties hereby acknowledge that they have this day paid the sum of $___0___ as a retainer against current and future invoices and I owe and Promise to Pay the balance shown on each and every invoice submitted to me upon rendering an invoice for any and all costs advanced or incurred, court costs, paralegal fees or any other costs incurred in this matter in addition to professional legal services rendered. PAYMENTS TO BE PAID AT THE FIRST OF EACH MONTH, LATE AFTER THE 15TH OF EACH MONTH.

"3. I acknowledge that the full amount is due and owing immediately and I agree and understand that if I am unable to pay the full amount I shall be responsible for interest of 1⅓% per month on the unpaid balance plus the costs incurred for additional amounts due including the costs of collection and reasonable attorney's fees.

"4. I further understand that if I fail to comply with this agreement and do not have the balance paid by my court date that, LAWRENCE J. HALLETT, JR. can withdraw from the case or seek other legal remedies. This debt will be turned over to a collection agent to collect the balance and all costs associated therewith will be my responsibility including all costs for the collection including attorney's fees.

"5. I have read and understand this instrument in its entirety and I fully understand and agree to its terms and conditions."

That same day, Mrs. Earheart also signed a "promissory note," which stated, in pertinent part:

"For value received, the undersigned Carol Jean Earheart ('the Client') ... promises to pay to the order of Lawrence J. Hallett, Jr. ('the Attorney'), ... the sum of $100,000.00 with interest from

September 15, 2000, on the unpaid principal at the rate of 12.00% per annum.

"Unpaid principal after the Due Date[1] shown below shall accrue interest at a rate of 18.00%.

"The unpaid principal and accrued interest shall be payable on demand.

"If any installment is not paid when due, the remaining unpaid balance and accrued interest shall become due immediately at the option of the Attorney.

"The Client reserves the right to prepay this Note (in whole or in part) prior to the due date with no prepayment penalty.

"If any payment obligation under this Note is not paid when due, the Client promises to pay all costs of collection, including reasonable attorney fees, whether or not a lawsuit is commenced as part of the collection process.

"This Note is secured by Any and All Real Estate or Personal Property in which Carol Jean Earheart has an interest in or receives an interest to as a result of any court action [in] which she is a party, dated September 15, 2000. The Attorney is not required to rely on the above security for the payment of this Note in the case of default, but may proceed directly against the Client.

"If any of the following events of default occur, this Note and any other obligations of the Client to the Attorney, shall become due immediately, without demand or notice:

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[1]Although this appears to be a defined term in the promissory note, the "Due Date" is not specified.

> "1. the failure of the Client to pay the principal and any accrued interest in full on or before the Due Date;
>
> "2. The death of the Client(s) or Attorney(s);
>
> "3. the filing of bankruptcy proceedings involving the Client as a Debtor;
>
> "4. the application for appointment of a receiver for the Client;
>
> "5. the making of a general assignment for the benefit of the Client's creditors;
>
> "6. the insolvency of the Client; or
>
> "7. the misrepresentation by the Client to the Attorney for the purpose of obtaining or extending credit.
>
> "In addition, the Client shall be in default if there is a sale, transfer, assignment, or any other disposition or any assets pledged as security for the payment of this Note, or if there is a default in any security agreement which secures this Note."

(Emphasis added.)

These documents (hereinafter referred to collectively as "the fee-agreement documents") were not drafted by Hallett. Instead, they were prepared by Dwight Bowman, who was employed by Hallett as a paralegal. Mrs. Earheart's testimony regarding the fee-agreement documents varied widely. She testified (1) that she did not sign the fee-agreement documents, (2) that she did sign the fee-agreement documents, (3) that she lied

under oath when she said she signed the fee-agreement documents, and (4) that she does not remember signing the fee-agreement documents. Her own handwriting expert opined that the signatures on the fee-agreement documents were hers. For the purposes of this appeal, we assume that she signed the fee-agreement documents.

At Hallett's instance, the trial was postponed until October 13, 2000. Bowman allegedly spent 2-3 hours a day, 3 or 4 days a week with Mrs. Earheart, in preparing for the trial.

The trial began on Friday, October 13, and concluded at midday on Tuesday, October 17. Hallett appeared for Mrs. Earheart at trial. Issues at trial included allegations that both parties had engaged in domestic violence; that Mr. Earheart was guilty of adultery; that Mrs. Earheart had embezzled money from the family businesses; and that Mrs. Earheart had written worthless checks to a gambling casino in Mississippi for which criminal charges were pending against her.

A judgment of divorce was subsequently entered awarding Mrs. Earheart (1) custody of the children, (2) two parcels of real property, and (3) 25% of the value of Mr. Earheart's

retirement account. Regarding that real property, the judgment stated:

> "[Mr. Earheart] is to transfer to [Mrs. Earheart] all of his right, title and interest in and to said property within thirty (30) days. ... In the event [he] fails, refuses or neglects to convey said property, ... then the Circuit Clerk of this Court is authorized ... to execute said conveyance in [Mr. Earheart's] behalf upon submission by counsel of the deed to the Circuit Clerk."

Mr. Earheart was awarded 100% interest in the family businesses, as well as visitation rights with the children. Further, he was ordered to pay child support of $1,500 per month. The court "reserve[d] the issue of alimony" and awarded "a judgment against [Mr. Earheart] in the amount of $5,000 as additional spousal support to be applied towards a reasonable attorney's fee."

On December 7, 2000, Hallett moved to alter, amend, or vacate the judgment. In that motion, he sought, among other things, an award of alimony. He also sought a "judgment against [Mr. Earheart] in the Amount of $50,000.00 towards a reasonable attorney fee for such a complex divorce and custody matter," plus an "amount of $585.00 representing expense in

production of documents."[2] (Emphasis added.) The trial court denied the motion as to those requests.[3] Mr. Earheart paid $5,000 into court as ordered "to be applied towards a reasonable attorney's fee." Hallett received $2,100 of that fee, but did not credit it to Mrs. Earheart's account.[4]

After the judgment of divorce had been entered, Mrs. Earheart visited Hallett at his office to discuss the status of her case. The essence of the alleged conversation is revealed in the following colloquy before the panel:

> "Q. [By counsel for the Bar:] What did he say to you about the divorce and the decision?
>
> "A. [By Mrs. Earheart:] He told me that he had made me a millionaire and that what else did I want. And he was really harsh speaking with me. And I said: 'Well, what are my options here?' And he said: 'Well, you can appeal it.' And I was dissatisfied with the divorce.
>
> "...."

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[2]The panel construed this language as "a prayer for an award of $50,000 as a reasonable fee." Hallett does not challenge this characterization of his request.

[3]Mrs. Earheart appealed the divorce judgment, but neither Morrow nor Hallett represented her on that appeal.

[4]The remainder of the $5,000 was paid to Hallett's successor, who represented Mrs. Earheart in her appeal from the judgment of divorce.

"Q. Did you ... were you happy with the outcome of the divorce?

"A. No.

"....

"Q. What did you tell him?

"A. Well, I told him that I was going to be destitute very shortly after the divorce was rendered. And --

"Q. What did you mean by that?

"A. Well, I was unemployed. I had got no alimony, fifteen hundred dollars a month child support for two children, a house note of four thousand two dollars a month, [and] a vehicle note for seven fifty-six a month. So I was going to be shortly in trouble. And Mr. Hallett stated that I needed to sell my assets.

"Q. And had you planned on doing that?

"A. No."

(Emphasis added.)

Mrs. Earheart did, indeed, sell one of the parcels of real estate she was awarded in the divorce judgment. It was Hallett's role in that transaction that triggered this action by the Bar.

The sale on the property was set to close on January 12, 2001. Surety Land Title, Inc. ("Surety"), was serving as the closing agent. As of January 11, however, Mr. Earheart had

not executed a deed to the property as the trial court had ordered. On that date, Shirley Harley, an employee of Surety, contacted Hallett and requested a circuit clerk's deed in order to prepare the necessary closing documents, because, according to Harley's affidavit testimony, she had been told that Hallett was holding such a deed. Hallett sent Harley a copy of a circuit clerk's deed, along with a copy of the as-yet-unrecorded promissory note, with notice that he was relying on the promissory note as security for $110,942.78 in attorney fees and interest for his representation of Mrs. Earheart. Harley informed Mrs. Earheart's real-estate agent that the sale could not close without resolution of the attorney-fee claim.

That same day, January 11, 2001, Hallett prepared a billing statement; the total of the statement was $110,942.78. The billing statement included $4,000 in interest computed at 12% beginning September 15, 2000. It also included $6,942.78 in "research costs with Westlaw; copying costs; deposition costs; discovery costs; [and] postage costs."

Mrs. Earheart first learned of Hallett's claim to the proceeds on the day of closing on the sale of the property

when she received a copy of the United States Department of Housing and Urban Development Settlement Statement showing that the $110,942.78 was to be deducted as "settlement charges." She telephoned Hallett from the closing and protested the fees. When she and her real-estate agent suggested placing the proceeds in an escrow account pending resolution of the dispute, they were told that Surety had already remitted funds in the amount of $110,942.78 to Hallett. Hallett split the fee with Morrow pursuant to their agreement.[5]

On January 17, 2001, Mrs. Earheart wrote a letter to Hallett terminating his representation. In that letter, she also demanded a "complete itemized list" (emphasis in original) of Hallett's time attributable to his representation of her, as well as a "complete list and itemization" of attendant expenses. On January 21, 2001, Hallett sent Mrs. Earheart an invoice, which, according to Hallett, was prepared by Bowman (hereinafter "the Bowman invoice"). The Bowman invoice totaled $130,235.53, which included the principal amount of $100,000, plus $4,000 interest on the promissory

[5]Morrow eventually surrendered his license to practice law and is currently on disability/inactive status.

note from September 15, 2000, through January 15, 2001, at a rate of 12%. After crediting Mrs. Earheart for $110,942.78, the invoice showed $19,292.75 as an outstanding debt. The total number of hours reflected on the invoice as having been spent on the matter was approximately 311.

Subsequently, Mrs. Earheart sued Hallett in the Mobile Circuit Court. Those claims have been dismissed and are not at issue in this case. Hallett developed colon cancer and was hospitalized for treatment. While Hallett was incapacitated from the cancer, Bowman allegedly opened a large number of credit accounts in Hallett's name, resulting in a loss to Hallett of approximately $200,000, and Hallett filed for bankruptcy protection.

Mrs. Earheart filed an adversary complaint against Hallett in the United States Bankruptcy Court for the Southern District of Alabama. Her complaint included counts of conversion and misrepresentation, alleging that the debt resulting from Hallett's misconduct was nondischargeable in bankruptcy. For example, according to the bankruptcy court's "order on complaint" entered on November 9, 2006, "[c]ounts one and two of [Mrs.] Earheart's complaint allege that Hallett

converted approximately $111,000 in proceeds from the sale of [her] home, and the deed and real property itself by failing to deliver the clerk's deed to [Mrs.] Earheart." The complaint also alleged that Hallett had misrepresented to Mrs. Earheart "the terms of his employment." The bankruptcy court concluded that the evidence before it did "not support a finding of conversion." It deemed evidence of misrepresentation to be "conflicting and unreliable" and, consequently, held that "[Mrs.] Earheart [had] failed to prove that Hallett misrepresented the terms of his employment and the $100,000 fee." The bankruptcy court, therefore, entered a judgment in favor of Hallett on Mrs. Earheart's adversary complaint.

Mrs. Earheart filed a complaint against Hallett with the Bar, and on January 27, 2005, pursuant to Ala. R. Disc. P. 12(e)(1), the Bar filed a petition for disciplinary action with the disciplinary clerk of the Bar, alleging that Hallett had violated a number of the Alabama Rules of Professional Conduct in connection with his representation of Mrs. Earheart, including (1) Rule 1.1 ("Competence"), (2) Rule 1.3 ("Diligence"), (3) Rule 1.5 ("Fees"), (4) Rule 1.7(b)

("Conflict of Interest: General Rule"), (5) Rule 1.8(a) ("Conflict of Interest: Prohibited Transactions"), and (6) Rule 8.4(g) ("Misconduct"). Hallett filed his answer on March 4, 2005, denying the substantive allegations.

On July 25, 2007, following a hearing on the charges, the panel entered its judgment. After setting forth extensive findings of fact, the panel held that Hallett had violated Rule 1.5(a) and (e), Rule 1.8(a), and Rule 8.4(g). A majority of the panel found Hallett not guilty of violating Rule 1.1 or Rule 1.3. The panel suspended Hallett from the practice of law for 90 days. It further suspended Hallett for an additional 18 months, but made the additional suspension conditional on Hallett's failure to make restitution in the amount of $40,000. Full restitution of the $40,000 at any time during the 18-month period would void the order imposing the conditional suspension. Hallett appealed.

The Board affirmed the panel's decision in part and reversed it in part. It affirmed the panel's holding as to the violation of Rule 8.4(g). However, it held that the panel's findings that Hallett had violated Rule 1.5(a) and (e) and Rule 1.8(a) were clearly erroneous. The Board also vacated the discipline imposed by the panel and ordered,

instead, a public reprimand with general publication. The Bar appealed (case no. 1071419), and Hallett cross-appealed (case no. 1071486).

II. Discussion

"When proceedings before the Board of Disciplinary Appeals are conducted, the Board of Disciplinary Appeals shall affirm the decision [of the panel] unless it determines that, based on the record as a whole, the findings of fact are clearly erroneous ...." Ala. R. Disc. P. 5.1(d) (emphasis added).[6] When the panel's findings are based on oral testimony, the "Board of Appeals, and this Court, are to accord the [panel's] findings the benefit of the ore tenus presumption." Tipler v. Alabama State Bar, 866 So. 2d 1126, 1137 (Ala. 2003). "'"A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."'" Id. (quoting Anderson v. City of Bessemer City, N.C., 470 U.S. 564, 573

[6]On September 12, 2008, this Court issued an order rescinding Rule 5.1, Ala. R. Disc. P., effective October 6, 2008. In that same order, it adopted Rule 12.1, which provides, in pertinent part, that "[t]he Board of Disciplinary Appeals shall remain in effect ... for the limited purpose of disposing of pending matters."

(1985), quoting in turn United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948)).

A. Case No. 1071419

The Bar contends that the Board merely "reweighed the evidence and reached its own conclusions, substituting its judgment for that of the [panel]" and that the Board thus "violated the standard of review." The Bar's brief, at 36. "[W]hether the Board of Appeals properly applied the 'clearly erroneous' standard of review to the [panel's] findings of fact is a question of law," which we review de novo. Tipler, 866 So. 2d at 1137.

The panel concluded that Hallett had violated two provisions of Rule 1.5, namely, subsections (a) and (e). Those subsections provide:

> "(a) A lawyer shall not enter into an agreement for, or charge, or collect a clearly excessive fee. In determining whether a fee is excessive the factors to be considered are 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;

"(8) Whether the fee is fixed or contingent; and

"(9) Whether there is a written fee agreement signed by the client.

"....

"(e) A division of fee between lawyers who are not in the same firm, including a division of fees with a referring lawyer, may be made only if:

"(1) Either (a) the division is in proportion to the services performed by each lawyer, or (b) by written agreement with the client, each lawyer assumes joint responsibility for the representation, or (c) in a contingency fee case, the division is between the referring or forwarding lawyer and the receiving lawyer;

> "(2) The client is advised of and does not object to the participation of all the lawyers involved;
>
> "(3) The client is advised that a division of fee will occur; and
>
> "(4) The total fee is not clearly excessive."

The panel found that the fee Hallett charged Mrs. Earheart was clearly excessive in violation of Rule 1.5(a) and that it involved the improper "division of [a] fee between lawyers who are not in the same firm," as prohibited by Rule 1.5(e).

1. Violation of Rule 1.5.

Regarding Rule 1.5(a), the panel stated:

> "The Panel, having heard the testimony of respondent as to the Bowman invoice ... and having examined it, finds that many of the entries contained in it are clearly fraudulent, and even where not clearly a fraud, are excessive and show evidence of having been manufactured after the fact, and after a dispute had arisen ... as part of which the client demanded an invoice."

(Emphasis added.) The panel discussed several exemplary entries:

> "[T]here is an entry for October 18, 2000, for eight hours, allegedly for Mr. Bowman's attendance in court assisting [Hallett]. However, the trial had been concluded by mid-day on October 17, and this identical entry and charge appears for October 13 (10 hours), October 16 (10 hours), and October 17 (8 hours), the latter for a half-day of court; October

> 17 further includes 4.25 hours of 'preparation' for an already-concluded hearing. October 16 includes time asking for information as to whether the judge had signed the divorce, before the trial was concluded. Fifteen hours were recorded to review one set of handwritten notes prepared by [Mrs. Earheart] as an outline. On October 12 (the day before trial), fourteen subpoenas were recorded as being prepared, at one billable hour each. Few of those were served, and even fewer were called as witnesses. Except for Mrs. Earheart's children, none appear to have even been interviewed. One and one-half hours are charged for recording the Promissory Note/lien against [Mrs. Earheart's] property."

(Emphasis added.)

The panel also noted that the Bowman invoice sought payment for "$8,198.03 for largely unspecified and undocumented expenses." In fact, that entry states only "total reimbursable expenses," without any explanation or specification of what these expenses included. Moreover, there are two entries for December 12, 2000, totaling $4,831.08, which are entirely blank except for the date and the amount. The panel also pointed out that Hallett's explanation for the $6,942.78 expense on the January 11, 2001, billing statement, namely, "research costs with Westlaw; copying costs; deposition costs; discovery costs; [and]

postage costs," did not identify any deposition, discovery event, or Westlaw research.

Hallett does not attempt to refute these findings. He offers, for example, no explanation for the seemingly fraudulent and manufactured invoice entries noted by the panel. Indeed, in testimony before the panel, he asserted that he did not keep contemporaneous records of his time, because he regarded the $100,000 fee as a "flat fee," the total amount of which was earned upon the execution of the retainer agreement. Hallett's position on that issue was evidenced in the following colloquy:

> "Q. [By counsel for the Bar:] You didn't keep up with your hours or the time that you devoted to this case, did you?
>
> "A. [By Hallett:] I have a fairly good idea, but I didn't keep a record of it.
>
> "Q. No contemporaneous written order [sic] at all?
>
> "A. It was a flat fee.
>
> "Q. But my question was: 'Did you keep a record of your time and expenses in this case?'
>
> "A. I wouldn't keep a record of time on a flat fee.
>
> "Q. Because you didn't intend to account to Ms. Earheart for any time that you expended on her behalf, did you?

"A. It was a flat fee.

"Q. You didn't intend to account for any time that you spent in this case to Ms. Earheart, did you?

"....

"A. No. I didn't intend to keep time because it was a flat fee, and I didn't have to.

"Q. Are you not aware that you have an obligation to account to your clients for your time and expenses in any case?

"A. I have a flat fee arrangement. She is a grown, intelligent woman, relatively sophisticated. She had a lawyer. Why would I keep time on a flat fee case?

"....

"Q. You are not aware that you should keep time records?

"A. I am not aware that I should keep records on a flat fee case .... That is correct.

"Q. So, it is your position that once you had Ms. Earheart sign that retainer agreement and sign that promissory note that your $100,000 plus interest was earned?

"A. That's correct."

(Emphasis added.)

In that connection, however, the panel observed: "Even a flat or fixed fee ... must be returnable to the extent of any un-earned portion. [Hallett] testified that he regarded the

entire fee as being fully earned upon execution of the contract, and that no part of it was refundable or subject to cancellation." (Emphasis added.) The panel's observation is correct. The Bar argues, and we agree, that Hallett's contention is tantamount to defending charging a non-refundable retainer, which is forbidden in Alabama. It is well settled that nonrefundable retainers are prohibited. See Taylor v. Alabama State Bar, 587 So. 2d 1205 (Ala. 1991); Rule 1.16(d), Ala. R. Prof. Cond. ("Upon termination of representation, a lawyer shall ... refund[] any advance payment of fee that has not been earned."); J. Anthony McLain, Opinions of General Counsel, "Lawyers' Trust Account Obligations with Regard to Retainers and Set Fees," 70 Ala. Law. 65, 66 (January 2009) ("all retainers and fees are refundable to the extent that they have not yet been earned").

The panel's findings were also informed by the factors listed in Rule 1.5(a)(1)-(9), most particularly, the factors listed in subsections (4) ("[t]he amount involved and the results obtained") and (7) ("[t]he experience, reputation, and ability of the lawyer or lawyers performing the services"). The panel stated:

> "The results of the divorce proceedings were problematic for Mrs. Earheart, resulting in an order granting her two pieces of real estate with an aggregate net value of approximately $600,000 (of which Mrs. Earheart already had been a half-owner before the divorce), 25% of Mr. Earheart's retirement account (the value of which was never established, but which was later liquidated by settlement for approximately $25,000), child support as set by the domestic relations guidelines, and primary custody of the children. That order reserved a determination of alimony, but none was ever awarded, and ordered the husband to pay $5,000 toward his wife's attorney fees. ..."

(Emphasis in original; footnotes omitted.)

Moreover, there is no explanation why, if $50,000 -- the figure Hallett sought in his postjudgment motion -- was a reasonable attorney fee, a fee of twice that amount is not excessive. Neither is there any explanation as to why Mrs. Earheart was not given a credit for the money Hallett received from Mr. Earheart or why Hallett began computing interest on the principal on September 15, 2000, that is, three days before the retainer agreement was signed. Based on the record as a whole, the panel's finding that the fee charged by Hallett was excessive is not clearly erroneous.

The panel also found that Hallett's payment of $25,000 of the fee to Morrow violated 1.5(e), which limits the circumstances under which fees may be divided. Rule 1.5(e)(4)

provides, in part, that "[a] division of fee between lawyers who are not in the same firm, including a division of fees with a referring lawyer, may be made only if ... the total fee is not clearly excessive." Because we conclude that the panel's finding that the fee was excessive is not clearly erroneous, it follows that a finding that Rule 1.5(e) has been violated is, likewise, not clearly erroneous. We, therefore, pretermit any discussion of any of the other requirements of Rule 1.5(e).

2. Violation of Rule 1.8(a)

The panel also held that Hallett had violated Rule 1.8(a), Ala. R. Prof. Cond., which provides:

> "A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to a client unless:
>
> > "(1) The transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner that can be reasonably understood by the client;
> >
> > "(2) The client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and
> >
> > "(3) The client consents in writing thereto."

(Emphasis added.)

As a preliminary matter, it must be noted that the three subdivisions are stated in the conjunctive. In other words, a lawyer may not "knowingly acquire an ownership, possessory, security, or other pecuniary interest" in the client's property unless all the conditions set forth in all three subdivisions are satisfied.

It is undisputed that the promissory note purported to give Hallett a security interest in Mrs. Earheart's property, and, for the purposes of this opinion, we are regarding her signature on the promissory note as genuine. The Board held, however, that the Bar "failed to establish that there was anything about the fee agreement that was not fair and reasonable to the client." (Emphasis added.) The Bar contends that this holding fails to "employ the proper standard of review." The Bar's brief, at 61. We agree.

The panel found that the conditions of Rule 1.8(a)(1) were not met. In addition to the excessiveness and, therefore, the unreasonableness of the fee, the panel regarded the language of the fee-agreement documents as "inconsistent" and "almost incomprehensible." Indeed, a cursory review of

the fee-agreement documents reveals a number of ambiguities or irregularities potentially harmful to Mrs. Earheart.

First, the full amount of the fee, plus interest, was arguably due on demand at any time at Hallett's option. This is so, because, according to the promissory note, "[t]he unpaid principal and accrued interest [was to be] payable on demand." Elsewhere, the promissory note provided for the acceleration of the balance, with interest, upon any default of any installment payment "at the option of [Hallett]." This construction is bolstered by Hallett's testimony that he regarded the entire principal amount and interest to be due and payable as of September 18, 2000, when Mrs. Earheart signed the fee-agreement documents. Second, although the promissory note references a "Due Date [as] shown below," no due date actually appears in either of the fee-agreement documents. Third, the amount of interest is indeterminable. The rate was 12% per year according to the promissory note, 16% per year according to the retainer agreement, and 18% per year if not paid by an undefined due date. Finally, the retainer agreement is incomplete on its face. Paragraph one

concludes with the following incomplete sentence: "I further acknowledge that LAWRENCE J. HALLETT, JR.."

These aspects of the fee-agreement documents fully support the panel's finding that the transaction was neither "fair and reasonable to the client [nor] fully disclosed and transmitted ... in a manner that [could] be reasonably understood by the client." Thus, the panel's finding that Hallett was guilty of violating Rule 1.8(a) was not clearly erroneous.[7]

B. Case No. 1071486

The Board upheld the panel's finding that Hallett was guilty of violating Rule 8.4(g), and Hallett cross-appeals as to the punishment the Board imposed for that violation. Rule 8.4(g) provides: "It is professional misconduct for a lawyer to ... [e]ngage in any ... conduct that adversely reflects on his fitness to practice law." Hallett does not challenge the Board's affirmance of the panel's determination that he violated Rule 8.4(g). In other words, for the purposes of

[7]In its appeal, the Bar also challenges the Board's modification of the discipline imposed by the panel. The Bar requests that in reversing the Board's order, we should order that the discipline imposed by the panel be reinstated. Our discussion of that contention is consolidated with our discussion of Hallett's cross-appeal.

these proceedings, Hallett concedes that he engaged in "conduct that adversely reflects on his fitness to practice law." In his words: "As the sole reason for Hallett's cross-appeal, this Court should modify the discipline imposed by the Board as its penalty for violation of 8.4(g)." Hallett's brief, at 17. In fact, both parties challenge the Board's modification of the panel's discipline.

The panel suspended Hallett from the practice of law for 90 days and imposed an additional suspension of 18 months, to be voided if Hallett paid restitution of $40,000. The Board modified the discipline imposed by the panel, ordering a public reprimand with general publication.

> "When proceedings before the Board of Disciplinary Appeals are conducted, the Board of Disciplinary Appeals shall affirm the decision under review unless it determines ... that the form or extent of discipline imposed, when considered under the Alabama Standards for Imposing Lawyer Discipline, (1) bears no relation to the conduct, (2) is manifestly excessive or insufficient in relation to the needs and protection of the public, the profession, or the administration of justice, or (3) is arbitrary and capricious. No error shall be predicated on any ground not presented to the Disciplinary Board or the Disciplinary Commission."

Rule 5.1(d), Ala. R. Disc. P. (emphasis added).[8] Thus, the question before this Court is whether the discipline imposed by the panel bore "no relation to the conduct," was "manifestly excessive," or was "arbitrary or capricious."

"Arbitrary and capricious action has been defined as willful and unreasoning action, without consideration and in disregard of facts and circumstances. Where there is room for two opinions, action is not arbitrary and capricious even though one may believe an erroneous conclusion has been reached." Heinmiller v. Department of Health, 127 Wash. 2d 595, 609, 903 P.2d 433, 440 (1995). A "'decision is arbitrary when it is not done according to reason and judgment, but depending on the will alone. An action is capricious if done without reason, in a whimsical manner, implying either a lack of understanding of or disregard for the surrounding facts and settled controlling principles.'" Mississippi Dep't of Human Servs. v. McNeel, 869 So. 2d 1013, 1018 (Miss. 2004) (quoting Miss. State Dep't of Health v. Natchez, 743 So. 2d 973, 977 (Miss. 1999)). Thus, so long as the discipline imposed bears a rational relationship to the lawyer's conduct, is not

[8]See note 6, supra.

manifestly excessive, and is authorized for such conduct by the applicable disciplinary rules, it is not arbitrary and capricious.

In vacating the $40,000 restitution[9] ordered by the panel, the Board reasoned: "[S]ince the fee was not shown to be clearly excessive, there was no basis to order Hallett to return any portion of his fee; indeed, to do so in light of the bankruptcy order discharging him from any debt to Ms. Earheart might very well be problematic." (Emphasis added.) According to the Bar, this reasoning is flawed for two reasons. First, it contends, and we agree, that the excessiveness of the fee was sufficiently established to withstand appellate review.

As to the relevance of the bankruptcy order, the Bar contends that Hallett did not assert the bankruptcy order as a defense in the proceedings before the panel and, therefore, that any error was not preserved. See Rule 5.1(d) ("No error shall be predicated on any ground not presented to the [panel]"). We agree.

[9]Restitution is a disciplinary device expressly authorized by Rule 8(i)(1), Ala. R. Disc. P.

Rule 3(b), Ala. R. Disc. P., provides: "Except as otherwise provided in these rules, the Alabama Rules of Civil Procedure and the Alabama Rules of Appellate Procedure shall apply." "Rule 8(c), Ala. R. Civ. P., governing affirmative defenses, requires that a party 'set forth affirmatively ... discharge in bankruptcy ....' Subject to exceptions not shown to be here applicable, the affirmative defense of a bankruptcy discharge is waived if not affirmatively pleaded in accordance with Rule 8(c)." Systrends, Inc. v. Group 8760, LLC, 959 So. 2d 1052, 1064 (Ala. 2006). The affirmative defense of a discharge in bankruptcy was not raised in Hallett's answer and therefore has been waived. Thus, the potential effect of the order of the bankruptcy court formed no part of a proper rationale for vacating the panel's disciplinary order.

In discussing the excessiveness of the fee, the panel stated:

> "[T]he total fee (exclusive of undocumented expenses) charged for the thirty days of employment through trial (and the small activity thereafter) totaled over $117,000, coupled with more than $13,000 of expenses, only approximately $2,920 of which were itemized. Mr. Hallett testified that his customary hourly charge would have been at most $200.00 per hour, so that, even crediting the testimony as to more than three hundred hours in

> thirty days, a resulting fee would have been at most $75,000."

(Emphasis added; footnote omitted.)

Reducing the attorney fee in the retainer ($100,000) by the amount the panel ordered in restitution ($40,000) yields $60,000, the precise amount the panel found attributable to 300 hours in 30 days of employment at $200 per hour. Thus, the restitution bears a direct relation to the conduct and is not manifestly excessive.

Regarding the suspension ordered by the panel, suspension from the practice of law is "generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed to the profession and causes injury or potential injury to a client, the public, or the legal system." Standard 7.2, Alabama Standards for Imposing Lawyer Discipline. Standard 7.2 is expressly applicable in cases such as this one involving "clearly excessive or improper fees." Standard 7.0, Alabama Standards for Imposing Lawyer Discipline ("Violations of Duties Owed to the Profession"). Suspension is also appropriate under Standard 4.3 ("Failure to Avoid Conflicts of Interest") "when a lawyer knows of a conflict of interest and does not fully disclose to a client

the possible effect of that conflict and causes injury or potential injury to a client." Standard 4.32.

In addition, Standard 9.0, Alabama Standards for Imposing Lawyer Discipline, sets forth specific "aggravating and mitigating circumstances [that] may be considered" in imposing discipline "[a]fter misconduct has been established." The aggravating factors include:

> "(a) prior disciplinary offenses;
>
> "(b) dishonest or selfish motive;
>
> "(c) a pattern of misconduct;
>
> "(d) multiple offenses;
>
> "(e) bad faith obstruction of the disciplinary proceedings by intentionally failing to comply with rules or orders of the disciplinary agency;
>
> "(f) submission of false evidence, false statements, or other deceptive practices during the disciplinary process;
>
> "(g) refusal to acknowledge wrongful nature of conduct;
>
> "(h) vulnerability of victim;
>
> "(i) substantial experience in the practice of law;
>
> "(j) indifference to making restitution."

Standard 9.22, Alabama Standards for Imposing Lawyer Discipline. The mitigating factors include:

"(a) absence of a prior disciplinary record;

"(b) absence of a dishonest or selfish motive;

"(c) personal or emotional problems;

"(d) timely good faith effort to make restitution or to rectify consequences of misconduct;

"(e) full and free disclosure to disciplinary board or cooperative attitude toward proceedings;

"(f) inexperience in the practice of law;

"(g) character or reputation;

"(h) physical or mental disability or impairment;

"(i) delay in disciplinary proceedings;

"(j) interim rehabilitation;

"(k) imposition of other penalties or discipline;

"(l) remorse;

"(m) remoteness of prior offenses."

Standard 9.32.

The panel found six aggravating factors to be applicable, namely, those set forth in Standard 9.22(d), (f), (g), (h), (i), and (j). These findings were not clearly erroneous. There was clear -- or unchallenged -- evidence of violation of multiple sections of the Alabama Rules of Professional

Conduct, namely, Rule 1.5(a) and (e), Rule 1.8(a), and Rule 8.4(g). See Standard 9.22(d). In a number of instances, the panel disbelieved Hallett's exculpatory testimony, see Standard 9.22(f), and those findings by the panel are subject to the presumptions attendant the ore tenus rule. Tipler, supra.

To be sure, the panel also found two notable mitigating factors, namely, those set forth in Standard 9.32(a) (Hallett had no "prior disciplinary record") and Standard 9.32(g) (Hallett enjoyed a good reputation). However, in weighing all the factors, it cannot be said that the panel disciplined Hallett in a "form or extent" that "(1) bears no relation to the conduct, (2) is manifestly excessive ..., or (3) is arbitrary and capricious." Rule 5.1(d). Thus, the Board erred in vacating and modifying the discipline imposed by the panel.

III. Conclusion

In summary, the Board violated the standard of review insofar as both guilt and discipline are concerned. Consequently, the Board's judgment is reversed, and the cause is remanded for the Board to affirm the panel's judgment.

1071419; 1071486

1071419 -- REVERSED AND REMANDED.
1071486 -- REVERSED AND REMANDED.

Cobb, C.J., and Lyons, Stuart, Smith, Bolin, Parker, and Shaw, JJ., concur.

Murdock, J., concurs in the result in part and dissents in part.

MURDOCK, Justice (concurring in the result in part and dissenting in part).

A. Reinstating the Panel's Findings of Violations

Although I believe we should reinstate the panel's findings as to what rules Hallett violated, I do not agree with all the reasoning used by the panel or by the main opinion to reach this result.

First, I am concerned that a statement in the panel's decision could be construed as endorsing a "reasonableness" standard for the evaluation of allegedly excessive attorney fees. Second, I am concerned about the conflation of the concept of "clearly excessive fees" and the separate and different concept of "unearned fees," a concept that relates to the prohibition of "nonrefundable retainers." These concerns go to the risk of improper outcomes in future cases, even if not in this case. Moreover, they ultimately implicate the right of a lawyer and his or her client to contract, particularly as to fixed or "flat" fee arrangements.

1. "Reasonableness" v. "clear excessiveness" of fees

In a statement partially quoted in the main opinion, the panel stated as follows: "Even a flat or fixed fee must be reasonable, and must be returnable to the extent of any

un-earned portion." I see no rule in the Alabama Rules of Professional Conduct requiring that fees to which two private parties voluntarily agree be "reasonable." Wisely, in my view, the drafters of our Rules of Professional Conduct did not see fit to attempt to involve the Alabama Bar Association in policing the "reasonableness" of fees charged by lawyers. What the drafters did choose to prohibit is what the rules refer to as "clearly excessive fees."

Rule 1.5(a) is the rule the drafters wrote to prohibit a "clearly excessive fee." It contains a plain prohibition of such a fee and a list of factors to be considered by the Bar in determining what is and what is not a "clearly excessive fee." Insofar as the amount of Hallett's fee is concerned, Rule 1.5(a) is the rule Hallett was charged with violating. I agree that he violated this rule.

2. Conflation of the concepts of "clearly excessive fees," "unearned fees," and "nonrefundable retainers"

"Clearly excessive fees" and "nonrefundable retainers" are two separate and different concepts. They are governed by two different rules. Hallett was charged with violating only one of these rules, and not the other. Despite how he attempted to defend his actions at the hearing before the

panel, when all was said and done, the fact is that Hallett violated only one of these rules.

The main opinion appears to accept the injection of the concepts of "unearned fees" and "nonrefundable retainers" into what I submit should be a discussion limited to the issue whether the amount of Hallett's fee was "clearly excessive" under the criteria prescribed by Rule 1.5(a). The above-referenced partial quotation from the panel opinion and the ensuing analysis of the main opinion read as follows:

> "[T]he Panel observed: 'Even a flat or fixed fee ... must be returnable to the extent of any unearned portion. [Hallett] testified that he regarded the entire fee as being fully earned upon execution of the contract, and that no part of it was refundable or subject to cancellation.' The panel's observation is correct. The Bar argues, and we agree, that Hallett's contention is tantamount to defending charging a nonrefundable retainer, which is forbidden in Alabama. It is well settled that nonrefundable retainers are prohibited. See Taylor v. Alabama State Bar, 587 So. 2d 1205 (Ala. 1991); Rule 1.16(d), Ala. R. Prof. Cond. ('Upon termination of representation, a lawyer shall ... refund[] any advance payment of fee that has not been earned.'); J. Anthony McLain, Opinions of General Counsel, 'Lawyers' Trust Account Obligations with Regard to Retainers and Set Fees,' 70 Ala. Law. 65, 66 (January 2009) ('all retainers and fees are refundable to the extent that they have not yet been earned')."

___ So. 3d at ___ (emphasis omitted).

"Unearned fees" and "nonrefundable retainers" are the subject of Rule 1.16(d). Hallett was not charged with violating this rule. Ultimately, he did not violate it. Rule 1.16(d) provides: "Upon termination of representation, a lawyer shall ... refund[] any advance payment of fee that has not been earned." Thus, Hallett was incorrect in testifying that the fee in question was earned as soon as Mrs. Earheart executed the retainer agreement. As a factual matter, however, the fee in question was earned. It may have been (as discussed below) a "clearly excessive fee" in relation to the quantity and quality of work and the results achieved, thus running afoul of Rule 1.5(a), but it was a fee that was "earned" in the sense contemplated by Rule 1.16(d).

Specifically, the contract into which Hallett and Mrs. Earheart voluntarily entered provided that, in return for representing Mrs. Earheart through the trial-court proceedings to a final judgment, Hallett would receive a fixed, or "flat," fee of $100,000. Hallett represented Mrs. Earheart through the trial-court proceedings to a final judgment. As contemplated by the authorities cited by the main opinion, at no time was Hallett discharged or replaced by another attorney; nor did he, for any other reason, fail to complete

the representation of Mrs. Earheart through trial and a final judgment. He may not have done it well, but unlike attorneys in cases such as Taylor v. Alabama State Bar, 587 So. 2d 1205 (Ala. 1991), cited in the main opinion, Hallett completed the representation for which he was hired. See 587 So. 2d at 1206 (explaining that there was no evidence indicating that an attorney had earned any of his fixed fee between the time it was given to him and the time he was asked to withdraw from the case). See also J. Anthony McLain, Opinions of General Counsel, "Lawyers' Trust Account Obligations with Regard to Retainers and Set Fees," 70 Ala. Law. 65 (January 2009).[10]

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[10]This citation is to an opinion of the general counsel of the Alabama State Bar published in The Alabama Lawyer in which the general counsel explains that

> "the overriding principle of [Formal Opinion] RO 1992-17 and [Formal Opinion] RO 1993-21 is that a non-refundable fee would impinge on the right of the client to change lawyers at any time. Allowing an attorney to keep a fee, regardless of whether any service has been performed for the client, would certainly restrict the ability of a client to terminate the attorney and seek new counsel. In reaching this conclusion, the Commission also made clear that the rule applied to all arrangements where fees are paid in advance of legal services being rendered. As such, all retainers and fees are refundable to the extent that they have not yet been earned."

70 Ala. Law. at 65-66.

Again, Hallett was charged with violating Rule 1.5(a). The conduct prohibited by Rule 1.5(a) and the criteria for determining whether a lawyer engaged in that conduct are clearly set out in that rule itself. Hallett clearly violated that rule. I see no need to go outside the criteria provided by Rule 1.5(a), and especially no need to inject into the discussion the different concepts of "nonrefundable retainers" and "unearned fees" found in Rule 1.16(d) in order to decide if the panel's decision that Hallett violated Rule 1.5(a) is sustainable. As stated at the outset, in conflating these concepts we run the risk of achieving incorrect results in future cases and, even more problematically, of impinging on the right of private parties to enter into contracts governing the exchange of legal services for agreed-upon fees.[11]

[11]As noted in Part A.1 above, this conflation is articulated with reference to a "reasonable fee" standard rather than simply the "clearly excessive" standard prescribed in Rule 1.5(a). To that extent, I also am concerned that it could put us on a "slope" toward the use of the non-rule-based concept of the "reasonableness" of a fee as a measure for what will be deemed "unearned" and therefore what "must be returnable."

B. The Amount of the Penalty

1. Was the penalty imposed by the panel too much?

Part II.B of the main opinion, titled "Case No. 1071486," is devoted to the issue whether the discipline imposed by the panel for the four rules violations found by the panel was too much. That issue, however, has not been presented by Hallett to this Court.

Of the four rules violations found by the panel, the Board upheld only one of them. As the opening sentence of Part II.B states, "The Board upheld the panel's finding that Hallett was guilty of violating Rule 8.4(g), and Hallett cross-appeals as to the punishment the Board imposed for that violation." ___ So. 3d at ___. In other words, the Bar filed an appeal, case no. 1071419, challenging the Board's decision that Hallett had committed only one rule violation, instead of the four rules violations found by the panel. Hallett, as the appellee in that case, defends the Board's decision that he committed only one rule violation. In addition, Hallett has filed a cross-appeal, case no. 1071486, in which he challenges as excessive the discipline imposed by the Board for that single rule violation.

Hallett has provided this Court with no argument by way of a conditional cross-appeal[12] or otherwise to the effect that, if he loses in the appeal, and this Court reverses the Board's decision and reinstates the panel's decision, including its conviction and punishment of Hallett for four rules violations rather than only one, the discipline imposed in the panel's decision for those four violations should be reduced. Again, Hallett makes an argument relating only to what he considers to be the unreasonableness of the discipline imposed by the Board for the single violation of Rule 8.4(g). He makes no argument challenging the degree of the punishment

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[12]See, e.g., Parsons v. Aaron, 849 So. 2d 932, 935 (Ala. 2002) (explaining that the appellee had "filed a conditional cross-appeal, seeking reinstatement of the full punitive-damages award in the event the [appellant's] appeals were not dismissed as untimely"); First Props., L.L.C. v. Bennett, 959 So. 2d 653, 657 (Ala. Civ. App. 2006) ("Because we have concluded that the judgment is due to be reversed as a result of the appeal, the condition specified in the [appellee's] conditional cross-appeal has occurred, and that cross-appeal is ripe for review."); Bess v. Waffle House, Inc., 824 So. 2d 783, 787 (Ala. Civ. App. 2001) ("Waffle House filed a cross-appeal, in which it did not challenge any portion of the trial court's judgment. Instead, Waffle House sought review of the trial court's exclusion of the deposition testimony of a psychologist, Dr. Robert Barth, in the event that this court reversed the trial court's judgment. Such a cross-appeal is known as a conditional cross-appeal and is considered to be moot in the event that the trial court's judgment is affirmed.").

ordered by the panel in the event that he is to be punished for all four violations found by the panel. His argument presumes that the only violation for which a punishment is needed is his violation of Rule 8.4(g), a presumption that is not valid in light of this Court's decision today in the Bar's appeal.

Thus, Hallett has provided this Court with no basis for disturbing the discipline imposed by the panel now that we are reinstating the panel's finding of four rules violations and now that a discipline is needed for those four violations rather than only the one upheld by the Board. Logically, there is no need for this Court to even take up this issue unless we would be willing to do so on the basis of an argument that we would craft for Hallett and authorities that we would provide on his behalf. See Dykes v. Lane Trucking, Inc., 652 So. 2d 248, 251 (Ala. 1994) (holding that it is not the function of this Court to do a party's legal research or to make and address legal arguments for a party). I therefore do not find warranted the discussion in the main opinion as to whether the punishment imposed by the panel was too much, unless there is a sufficient need for us to take up that issue ex mero motu. I see no such need.

2. Was the punishment imposed by the panel not enough?

I do, however, see a need to take up ex mero motu the different issue whether the discipline imposed by the panel was not enough.

The panel found as follows:

> "Mr. Hallett testified ... that he essentially devoted his entire professional time to this single matter from September 18 through October 17. However, the testimony of Brandon Lee, a former secretary in [Hallett's] office, was to the effect that the day-to-day business of other matters continued to be handled by [Hallett] as had been customary, that Bowman worked on the Earheart files (obtained from opposing counsel) only for the week before trial, not for the month from September 18 to October 17, and that Bowman was also conducting other business (for which time was recorded and billed); she testified that Mr. Hallett maintained his usual schedule, approximately 9-5, including court appearances in other matters.
>
> "It is clear that no discovery depositions were initiated or taken by [Hallett],[5] no witnesses were interviewed, and no accounting expert engaged. Except for the amendment adding the civil tort claim and the motion to disqualify, no pleadings were filed. On the day before trial, some 14 subpoenas were issued, only a few of which were served, and, except for witnesses on whom no subpoena was necessary (e.g., Mrs. Earheart's children), none of those witnesses testified, including the alleged paramour of Mr. Earheart. Mr. Hallett sought to explain the failure to call or interview the alleged paramour first on the basis that his opposing counsel had 'hidden' the witness (which was hotly denied by such counsel), then on the basis that she lived behind a gated entrance, and service of process would

have been impossible; the latter excuse also proved to be inaccurate.

> "[5]The deposition of Mr. Hallett's client was 'taken by opposing counsel,' but Mr. Hallett did not attend, nor did he engage in preparing his client for her deposition.

"The panel, having heard the testimony of [Hallett] as to the Bowman invoice and having examined it, finds that many of the entries contained in it are clearly fraudulent, and even where not clearly a fraud, are excessive and show evidence of having been manufactured after the fact, and after a dispute had arisen between [Hallett] and Mrs. Earheart, as part of which the client demanded an invoice.[6] The invoice sought payment of $11,094.72 for Mr. Bowman's services, and an additional $8198.03 for largely unspecified and undocumented expenses. On January 11, 2001, [Hallett] also sent a separate invoice for a $100,000 fee, $4,000 in interest from September 15, 2000, and $6,942.78 for expenses. Those expenses were only (collectively) identified as: 'Research costs with Westlaw; copying costs; deposition costs; discovery costs; postage costs;' [sic]. There was no identification of the depositions (other than the single deposition taken by opposing counsel, there were none), discovery events (none were identified), or Westlaw research (none was identified). The January 11 invoice expressly did not include the 'paralegal fees' which were to be 'billed seperately [sic] per retainer agreement...'

> "[6]A few examples suffice: there is an entry for October 18, 2000, for eight hours, allegedly for Mr. Bowman's attendance in court assisting [Hallett]. However, the trial had been concluded by midday on October 17, and this identical entry and charge appears for October 13 (10 hours), October 16 (10 hours) and October 17 (8 hours), the latter for a half-day of

> court; October 17 further includes 4.25 hours of 'preparation' for an already-concluded hearing. October 16 includes time asking for information as to whether the judge had signed the divorce, before the trial was concluded. Fifteen hours were recorded to review one set of handwritten notes prepared by [Mrs. Earheart] as an outline. On October 12 (the day before trial), fourteen subpoenas were recorded as being prepared, at one billable hour each. Few of those were served, and even fewer were called as witnesses. Except for Mrs. Earheart's children, none appear to have even been interviewed. One and one-half hours are charged for recording the Promissory Note/lien against Mr. Hallett's client's property."

(Emphasis added; citations to the record omitted.)

Regarding the relationship of the fee charged by Hallett to the amount of work he actually put into preparing for trial, the panel states:

> "As set out in the background facts, the total fee (exclusive of undocumented expenses) charged for the thirty days of employment through trial (and the small activity thereafter) totaled over $117,000, coupled with more than $13,000 of expenses, only approximately $2,920.00 of which was itemized. Mr. Hallett testified that his customary hourly charge would have been at most $200.00 per hour, so that, even crediting the testimony as to more than three hundred hours in thirty days, a resulting fee would have been at most $75,000. ... The factors under Rule 1.5(a)(1)-(9) were, for the most part not addressed by [Hallett] in support of the fee charged.
>
> "....

> "The credible evidence does not support a finding of 300-400 hours of work devoted to this single matter in one month, nor anything approaching such a figure. The issues in the divorce, while unpleasant and contentious, were in no way unique or unprecedented; nor is the evidence of preclusion of other employment persuasive. The billing by Mr. Hallett's office for the paralegal time of Mr. Bowman is transparently false and overstated. The failure to even credit Mrs. Earheart with the $2100 portion of the $5000 awarded by the Court and paid by Mr. Earheart was not explained or justified; nor was the accrual of a high interest charge, from a date prior to the contract, on a fee which plainly could not possibly have been paid on demand, as its terms provide, justified."

(Emphasis added; footnotes omitted.)

Despite the fact that Mr. Earheart had a net worth of millions of dollars and made over $500,000 per year, the panel found the results achieved for Mrs. Earheart to be "problematic":

> "The results of the divorce proceedings were problematic for Mrs. Earheart, resulting in an order granting her two pieces of real estate with an aggregate net value of approximately $600,000 (of which Mrs. Earheart already had been a half-owner before the divorce), 25% of Mr. Earheart's retirement account (the value of which was never established, but which was later liquidated by settlement for approximately $25,000), child support as set by the domestic relations guidelines,[7] and primary custody of the children. That order reserved a determination of alimony, but none was ever awarded, and ordered the husband to pay $5,000 toward his wife's attorney's fees.

> "[7]The evidence was without dispute that Mr. Earheart's earnings far exceeded the guideline cap, but no application for an award exceeding the guidelines was made."

Finally, the panel adds: "[T]he Panel is satisfied that [Hallett] has not been fully candid and truthful in his testimony or in his characterization of the events and documents before the Panel."

The main opinion describes the fact that, some time after the trial in the divorce proceeding, Mrs. Earheart was forced for economic reasons to sell one of the parcels of land she had been awarded in the divorce and how Hallett extracted $110,942.78 from the closing proceeds. That sale came after a meeting between Hallett and Mrs. Earheart as described in the following colloquy:

> "Q. [By counsel for the Bar:] What did he say to you about the divorce and the decision?
>
> "A. [By Mrs. Earheart:] He told me that he had made me a millionaire[13] and that what else did I want. And he was really harsh speaking with me. And I said: 'Well, what are my options here?' And he said: 'Well, you can appeal it.' And I was dissatisfied with the divorce.
>
> "....

[13]The panel's findings obviously conflict with Hallett's assertion that he made Mrs. Earheart a millionaire.

> "Q. What did you tell him?
>
> "A. Well, I told him that I was going to be destitute very shortly after the divorce was rendered. And --
>
> "Q. What did you mean by that?
>
> "A. Well, I was unemployed. I had got no alimony, fifteen hundred dollars a month child support for two children, a house note of four thousand two dollars a month, [and] a vehicle note for seven fifty-six a month. So I was going to be shortly in trouble. And Mr. Hallett stated that I needed to sell my assets.
>
> "Q. And had you planned on doing that?
>
> "A. No."

(Emphasis added.)

Hallett's conduct in this case is the type of conduct that diminishes the reputation of the legal profession. Further, the $60,000 fee that remains after the panel-ordered restitution of $40,000 would correlate to Hallett's working on Mrs. Earheart's case for 10 hours a day every day, including weekends, for 30 straight days at a rate of $200 per hour.[14] It is clear that Hallett did not work anywhere near this much

[14]Even if 25% of this amount is allocated to Morrow, Hallett would still be paid at the rate of $150 per hour for a theoretical 300 hours, plus the $11,000 in at least partially fraudulent expenses extracted by Hallett from Mrs. Earheart at her real-estate closing.

on Mrs. Earheart's case. In addition, Hallett has received the additional $11,000 in at least partially fraudulent charges he caused to be added to the "HUD" closing statement as a precondition to Mrs. Earheart's being able to close the above-described property sale.

Based on this Court's inherent authority to oversee the administration of the judicial system and the discipline of lawyers admitted to practice before the Alabama courts, see Ex parte Case, 925 So. 2d 956, 962-63 (Ala. 2005) ("This Court has the inherent authority to admit lawyers to the practice of law, ... to inquire into matters of any disciplinary proceeding, and to take any action it sees fit in disciplinary matters."), and because the restitution ordered by the panel is "manifestly ... insufficient in relation to the needs and protection of the public, the profession, or the administration of justice," see Rule 5.1(d), Ala. R. Disc. P.,[15] I would remand this case to the panel for the entry of an order increasing the amount of restitution to be paid by Hallett to Mrs. Earheart up to, but not exceeding, an amount

[15]Rule 5.1, Ala. R. Disc. P., establishing the Board of Disciplinary Appeals and governing its operation, was rescinded by an order of this Court effective October 6, 2008.

that would leave Hallett with sufficient funds to fairly compensate Morrow for his efforts in representing Mrs. Earheart before Hallett assumed that responsibility and compensating Hallett for reasonable out-of-pocket expenses he actually incurred.

C. Conclusion

Based on the foregoing, I concur in the result reached by the main opinion insofar as it reinstates the panel's decision finding that Hallett committed four violations of the Alabama Rules of Professional Conduct. I dissent insofar as the main opinion reinstates the punishment imposed by that decision.