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When MIRA Liens Trump Attorney Fee Claims: A Harsh Result in Light of *Karpierz*?

*State ex rel. Nixon v. Bass*¹

I. INTRODUCTION

The Missouri Incarceration Reimbursement Act (“MIRA”) is a powerful tool which allows the State to recover incarceration costs directly from an inmate’s personal assets.² But what if the inmate’s assets include funds obtained in some fashion by the legal services of an attorney? Could a subsequent MIRA claim take priority over that attorney’s interest in being paid from the fruit of his labor? In the 2003 case of *State ex rel. Nixon v. Karpierz*, the Missouri Supreme Court sought to provide answers to these questions.³ *Karpierz* placed a limitation on the parameters of MIRA’s reach by allowing a plaintiff inmate’s attorney to take a reasonable fee for legal services performed in obtaining a judgment prior to the attachment of the MIRA claim.⁴

In the factually similar case of *State ex rel. Nixon v. Bass*, the Missouri Court of Appeals, Western District made no mention of *Karpierz*.⁵ This Note argues that in deciding *Bass*, the Missouri Court of Appeals should have discussed the *Karpierz* holding in order to provide more clear and definitive guidance for attorneys who undertake the representation of inmates. Particularly helpful would have been some direction regarding whether and when *Karpierz* might be invoked to protect from MIRA’s grasp a legal fee arising from an attorney’s active *defense* of an inmate.

1. No. WD 68662, 2008 WL 3833712 (Mo. App. W.D. Aug. 19, 2008), *transfer granted*, No. SC 89666 (Mo. Dec. 16, 2008). On March 31, 2009, the Missouri Supreme Court, sitting en banc, reversed the trial court’s grant of summary judgment in favor of the State and remanded for a hearing on the merits. *State ex rel. Nixon v. Bass*, No. SC89666, at 6 (Mo. Mar. 31, 2009) (en banc), *available at* http://www.courts.mo.gov/file/Opinion_SC89666.pdf. For a discussion of this opinion, see *infra* notes 135-39 and accompanying text.

2. MO. REV. STAT. §§ 217.825-.841 (2000).

3. 105 S.W.3d 487 (2003) (en banc).

4. *Id.* at 491.

5. 2008 WL 3833712, at *1-4.

II. FACTS AND HOLDING

On March 29, 2006, Loren Bass (“Bass”) was arrested in Cole County, Missouri for drug related offenses.⁶ At the time of the arrest, Bass was in possession of \$4421.00 in cash, which was seized by the arresting officers for forfeiture pursuant to Missouri’s Criminal Activity Forfeiture Act (“CAFA”).⁷ Shortly after being formally charged with drug possession, Bass hired the law firm of Hanrahan Trapp, P.C. (“Hanrahan”) as legal counsel and agreed to pay a \$10,000.00 legal fee.⁸ Bass paid Hanrahan \$5600.00 up front and indicated that he would pay the remaining portion by assigning his interest in the seized cash to the firm.⁹ He signed a document entitled “Authorization for the Release of Funds by Inmate,” which provided:

I, Loren Bass, hereby authorize the release of any and all of my funds currently in the possession of Cole County, Missouri (believed to be approximately \$4421.00) to the firm of Hanrahan Trapp, PC as the initial retainer for legal representation fees.¹⁰

On June 12, 2006, Bass pled guilty to a lesser criminal charge and received a three year prison sentence.¹¹ At the plea hearing, Hanrahan filed a motion for release of the seized funds and the defense’s interest was recorded

6. Appellant’s Opening Brief at 2, State *ex rel.* Nixon v. Bass, No. WD 68662, 2008 WL 3833712 (Mo. App. W.D. Aug. 19, 2008); *see also* Bass, 2008 WL 3833712, at *1.

7. Bass, 2008 WL 3833712, at *1. On April 3, 2006, the State, seeking an order of forfeiture, filed a separate civil suit for possession of the seized funds under CAFA. *Id.* The statutory provisions for CAFA are found at MO. REV. STAT. §§ 513.600-.645 (2000 & Supp. 2008).

8. Bass, 2008 WL 3833712, at *1; Appellant’s Opening Brief, *supra* note 6, at 2. “Bass was formally charged in Cole County” on March 31, 2006, and Hanrahan was retained by Bass a week later, on April 7, 2006. *Id.*

9. Appellant’s Opening Brief, *supra* note 6, at 2.

10. Bass, 2008 WL 3833712, at *2. This document was not dated, but Bass later swore by affidavit that it was executed on April 13, 2006. Appellant’s Opening Brief, *supra* note 6, at 3.

11. Bass, 2008 WL 3833712, at *1; Appellant’s Opening Brief, *supra* note 6, at 3. According to an affidavit signed by the prosecuting attorney assigned to Bass’ criminal case, there was

a negotiated testimonial agreement with Hanrahan . . . [where] the State . . . agreed to permit Bass to plead guilty to a reduced charge and to dismiss the said forfeiture action in exchange for Bass’ testimony in several other cases. The State agreed to dismiss said action knowing that Defendant Bass would use the seized funds to pay outstanding legal fees owed to Hanrahan.

Affidavit of Randall M. England ¶ 5 (Nov. 29, 2006), *in* Legal File at 98, State *ex rel.* Nixon v. Bass, No. WD 68662, 2008 WL 3833712 (Mo. App. W.D. Aug. 19, 2008).

in the criminal case docket.¹² The State dismissed its CAFA petition four days later.¹³ On the day that the CAFA action was dismissed, then-State Attorney General Jay Nixon filed a petition against Bass for incarceration reimbursement under MIRA, claiming the seized funds as compensation for Bass' prison expenses.¹⁴ Hanrahan intervened in the case, arguing that, pursuant to the signed authorization, the money was no longer Bass' property but rather belonged to the law firm.¹⁵ In support of its position, Hanrahan utilized the Missouri Supreme Court's statutory interpretation of the definition of a MIRA "asset" as announced in the case of *State ex rel. Nixon v. Karpierz*.¹⁶

Nixon subsequently filed a motion for summary judgment, pointing out that Hanrahan's position implied that the authorization signed by Bass created an assignment of Bass' full interest in the seized money.¹⁷ Nixon argued that the authorization was not a valid assignment for two reasons. First, he asserted that the document merely authorized the release of money for a

12. Appellant's Opening Brief, *supra* note 6, at 3; Docket Entry, Guilty Plea, *State v. Bass*, No. 06AC-CR00810-01 (Cole County Cir. Ct. June 12, 2006), available at <https://www.courts.mo.gov/casenet/base/welcome.do>.

13. Appellant's Opening Brief, *supra* note 6, at 3. While it is evident from the record that Hanrahan carried out Bass' criminal defense, it is not clear whether the firm actively represented Bass in the CAFA case. See Docket Entry, Parties and Attorneys, *State v. Bass*, No. 06AC-CR00810-01 (Cole County Cir. Ct. June 12, 2006), available at <https://www.courts.mo.gov/casenet/base/welcome.do> (Hanrahan on record as counsel); Docket Entry, Parties and Attorneys, *State ex rel. Tackett v. Bass*, No. 06AC-CC00252 (Cole County Cir. Ct. June 16, 2006), available at <https://www.courts.mo.gov/casenet/base/welcome.do> (no attorney on record as counsel); Affidavit of Lorne Bass ¶ 6 (June 28, 2006), in Legal File at 37, *State ex rel. Nixon v. Bass*, No. WD 68662, 2008 WL 3833712 (Mo. App. W.D. Aug. 19, 2008) ("I retained Hanrahan Trapp, P.C., to represent me in Case No. 06AC-CR00810.").

14. *Id.* at 3-4; *Bass*, 2008 WL 3833712, at *1. For the statutory provisions of MIRA, see MO. REV. STAT. §§ 217.825-.841 (2000).

15. Intervenor's Answer to Petition for Incarceration Reimbursement ¶ 14, *State ex rel. Nixon v. Bass*, No. 06AC-CC00469 (Cole County Cir. Ct. June 16, 2006), in Legal File at 48, *State ex rel. Nixon v. Bass*, No. WD 68662, 2008 WL 3833712 (Mo. App. W.D. Aug. 19, 2008). Hanrahan also claimed that the MIRA action interfered with and violated the testimonial agreement entered in the criminal case, whereby Bass agreed to testify against other defendants in exchange for a lesser plea arrangement, the State's dismissal of the CAFA case and the release of the seized funds for payment of Bass' attorney fees. *Id.* ¶¶ 15-16; see also Appellant's Opening Brief, *supra* note 6, at 3.

16. 105 S.W.3d 487, 490-91 (Mo. 2003). For the court's reasoning in *Karpierz*, see *infra* notes 46-51 and accompanying text.

17. *Bass*, 2008 WL 3833712, at *1; Appellant's Opening Brief, *supra* note 6, at 3; Suggestions in Support of Plaintiff's Motion for Summary Judgment at 4-5, *State ex rel. Nixon v. Bass*, No. 06AC-CC00469 (Cole County Cir. Ct. June 16, 2006), in Legal File at 74, *State ex rel. Nixon v. Bass*, No. WD 68662, 2008 WL 3833712 (Mo. App. W.D. Aug. 19, 2008).

specified use.¹⁸ Thus, there was no full assignment of Bass' interest to Hanrahan.¹⁹ Second, Nixon argued that, to be valid, an assignment must transfer the assignor's full interest in the property to the assignee.²⁰ Specifically, he relied on the fact that Bass signed the authorization at a time when the seized funds were the subject of the CAFA action.²¹ Thus, because the authorization was an agreement to transfer the money at a future point in time, "[t]he release did not vest any present interest in the funds."²²

The trial court granted Nixon's motion for summary judgment on June 29, 2007, and awarded the State \$4845.14 in incarceration expenses.²³ It then held that the funds seized from Bass were subject to the incarceration reimbursement judgment.²⁴ The court was silent regarding the legal effect of the authorization signed by Bass.²⁵

On July 24, 2007, Hanrahan filed its notice of appeal to the Missouri Court of Appeals, Western District.²⁶ On appeal, the primary issue raised was the same argument presented in the lower court – that the funds at issue did not belong to Bass because they were assigned to Hanrahan before the MIRA action was filed.²⁷ Nixon, in addition to the arguments presented at the summary judgment hearing, raised two new points on appeal. First, he asserted that, at the time the authorization was signed, "Hanrahan . . . had not undertaken [its] representation of Bass."²⁸ "As such . . . [the] assignment could only be considered contingent, [thus] Bass must have retained an

18. Suggestions in Support of Plaintiff's Motion for Summary Judgment, *supra* note 17, at 4-5.

19. *Id.* at 4.

20. *Id.*

21. *Id.* at 5.

22. *Id.* at 4-5. Nixon also argued that Hanrahan's assertion that the MIRA action interfered with Bass' plea agreement lacked merit, pointing to the fact that the Testimonial Agreement on file in the criminal case contained no reference to the dismissal of the CAFA case. *Id.* at 5-6.

23. Docket Entry, Judgment Entered, State *ex rel.* Nixon v. Bass, No. 06AC-CC00469 (Cole County Cir. Ct. June 16, 2006), available at <https://www.courts.mo.gov/casenet/base/welcome.do>.

24. Appellant's Opening Brief, *supra* note 6, at 9; Docket Entry, Judgment Entered, State *ex rel.* Nixon v. Bass, No. 06AC-CC00469 (Cole County Cir. Ct. June 16, 2006), available at <https://www.courts.mo.gov/casenet/base/welcome.do>.

25. Appellant's Opening Brief, *supra* note 6, at 6-7.

26. Docket Entry, Appeal Filed, State *ex rel.* Nixon v. Bass, No. 06AC-CC00469 (Cole County Cir. Ct. June 16, 2006), available at <https://www.courts.mo.gov/casenet/base/welcome.do>.

27. Appellant's Opening Brief, *supra* note 6, at 1. Again, Hanrahan relied on *Karpierz*. *Id.* at 13. The firm also relied on *Greater Kansas City Baptist & Community Hospital Ass'n, Inc. v. Businessmen's Assurance Co.*, 585 S.W.2d 118 (Mo. App. W.D. 1979). *Id.* at 17-18. For a discussion of this case, see the text accompanying *infra* note 104.

28. Respondent's Brief at 14, State *ex rel.* Nixon v. Bass, No. WD 68662, 2008 WL 3833712 (Mo. App. W.D. Aug. 19, 2008).

interest in the funds.”²⁹ Second, Nixon argued that because Bass retained an interest in the funds, the most that Hanrahan obtained through the authorization was a secured interest in the funds, over which the MIRA claim had priority.³⁰

In making its decision, the appellate court focused primarily on the use of the phrase “*initial retainer* for legal representation fees” in Hanahan’s authorization.³¹ It explained that, in the attorney-client context, such words describe funds that do not belong to the lawyer until they are earned.³² Thus, the court held, when an attorney accepts a client’s signed authorization of a release of funds held by a third party as an advance fee payment, until the fee is earned by the attorney, the client retains an interest in the funds which may either be reclaimed by the client or executed against by a priority claim such as that which arises under MIRA.³³

III. LEGAL BACKGROUND

In order to fully understand and analyze the issues in the instant case, it is necessary to examine generally the nature of a MIRA claim and its effects on attorney fees. Additionally, it is important to explore the laws in Missouri as they apply to attorney fees. Each of these topics will be discussed in turn.

29. *Id.*

30. *Id.* at 15-16.

31. *Bass*, 2008 WL 3833712, at *3 (emphasis added).

32. *Id.*

33. *Id.* In a separate opinion, a dissenting judge argued that summary judgment was improper because there was a genuine issue of material fact with respect to whether Bass’ attorney earned its fee. *Id.* at *4 (Ahuja, J., concurring in part and dissenting). The dissent recommended remanding for further development of the facts and consideration of the matter in light of the Missouri Supreme Court’s holding in *State ex rel. Nixon v. Karpierz*, 105 S.W.3d 487 (Mo. 2003) (en banc). *Id.* at *6. On December 16, 2008 the Missouri Supreme court granted Hanrahan’s request for transfer. Docket Entry, Transfer Granted, *State ex rel. Nixon v. Bass*, No. SC89666 (Mo. Dec. 16, 2008), available at <https://www.courts.mo.gov/casenet/base/welcome.do>.

In its opinion on March 31, 2009, the Missouri Supreme Court expressed its agreement with the appellate dissenting opinion, reversed the grant of summary judgment in favor of the State, and remanded the matter to the trial court for hearing on the merits. *State ex rel. Nixon v. Bass*, No. SC89666, at 4-6 (Mo. Mar. 31, 2009) (en banc), available at http://www.courts.mo.gov/file/Opinion_SC89666.pdf. For a discussion of this opinion, see *infra* notes 135-39 and accompanying text.

A. *The Missouri Incarceration Reimbursement Act*

The State's petition in the instant case was filed pursuant to the Missouri Incarceration Reimbursement Act, also known as MIRA.³⁴ Enacted in 1988, MIRA provides an avenue for recovering "the cost of caring for and maintaining prisoners in the Missouri Department of Corrections."³⁵ Under MIRA, Missouri may claim up to ninety percent of a prisoner's assets as reimbursement for the costs of incarceration.³⁶ Assets are defined as any "property, tangible or intangible, real or personal, *belonging to or due an offender*."³⁷ The act further provides that a MIRA claim is superior over almost all other obligations attached to a prisoner's assets.³⁸

An exception to MIRA's ability to reach a prisoner's assets, designed to protect attorney fees, was created by the Missouri Supreme Court in *State ex rel. Nixon v. Karpierz*.³⁹ In *Karpierz*, a Missouri prisoner was awarded a civil judgment in the amount of \$46,470.04.⁴⁰ The State then filed a MIRA suit

34. See MO. REV. STAT. §§ 217.825-.841 (2000). For the purposes of this note, the primary focus will be on the law as it is applied in Missouri.

35. *State ex rel. Nixon v. Karpierz*, 105 S.W.3d 487, 488 (Mo. 2003) (en banc).

36. MO. REV. STAT. § 217.833.1 (2000).

37. MO. REV. STAT. § 217.827(1)(a) (2000) (emphasis added).

38. MO. REV. STAT. § 217.837.4 (2000).

39. 105 S.W.3d 487. Other limitations are found in the statutory language itself. For example, MO. REV. STAT. § 217.831.3 (2000) requires the state attorney general to first prove that the claim made will result in an amount recovered of at least "ten percent of" either the "estimated [total] cost of care [or the] estimated cost of care . . . for two years, whichever is less." Cost of incarceration is calculated on a "per capita cost" basis for the time period in which the prisoner is "in a state correctional center." MO. REV. STAT. § 217.833.2. Another example is found in the section defining the word "asset," which allows exclusions for homesteads and the first \$2,500.00 of an inmate's "wages and bonuses . . . paid [to] the offender while he or she was confined to a state correctional center." MO. REV. STAT. § 217.827(1)(b). Other limitations arise from sources external to the act's provisions. For example, one significant group of exceptions to the enforcement of MIRA claims arise under the Supremacy Clause of the Constitution, which mandates federal preemption of state law. See, e.g., *Hankins v. Finnel*, 964 F.2d 853, 861 (8th Cir. 1992) ("conclud[ing] that [42 U.S.C. §] 1983 preempts the Missouri Incarceration Reimbursement Act" from executing against a federal civil rights judgment); *State ex rel. Nixon v. McClure*, 969 S.W.2d 801, 808 (Mo. App. W.D. 1998) (holding that 5 U.S.C. § 8346(a)'s prohibition of execution against federal disability payments preempted MIRA); *Bennett v. Arkansas*, 485 U.S. 395, 397 (1988) (holding that the Supremacy Clause preempted an Arkansas reimbursement act similar to MIRA, prohibiting it from attaching to funds disbursed under the Social Security Act (citing 42 U.S.C. § 407(a) (Supp. 1982))).

40. *Karpierz*, 105 S.W.3d at 488. *Karpierz* filed a civil action against the Kansas City Board of Police Commissioners claiming that the Board violated Missouri's Criminal Activity Forfeiture Act. *Id.* In granting judgment for *Karpierz* under a theory of assumpsit, the trial court determined that a state law enforcement officer violated mandatory CAFA notice requirements by unlawfully turning over seized

for incarceration expenses, seeking to attach its claim to the civil award.⁴¹ The trial court thereafter awarded to the State incarceration costs in the amount of \$36,854.43.⁴² Karpierz's attorney from the civil case appealed the MIRA award, arguing that he was entitled to his full attorney fee before the State's claim attached.⁴³ The State responded that, pursuant to Missouri Revised Statute § 217.837.4, the State's lien for expenses of incarceration had priority over other liens and, thus, the State's interest trumped the attorney's contingent fee lien on the judgment.⁴⁴

In making its decision in *Karpierz*, the Missouri Supreme Court first pointed out that, contrary to the State's argument, the issue was not one of lien priority.⁴⁵ Instead, the resolution of the matter depended upon the legislature's definition of an "asset."⁴⁶ Particularly, the court focused on the MIRA statutory provision defining an asset as "'property . . . belonging to or due an offender."⁴⁷ Using simple statutory construction techniques,⁴⁸ the court determined that, while the civil defendant was liable to Karpierz for the full award, what was actually due to the inmate was something less.⁴⁹ What "*rightfully belong[ed]* to Karpierz" for MIRA purposes was only the amount of the judgment in excess of the attorney fees and expenses.⁵⁰ This lesser amount was the asset which was subject to the State's MIRA claim.⁵¹

The court's rationale for this holding was twofold. First, the court reasoned that to hold otherwise "would give the State not only the proceeds of a judgment it could not access without the [contribution] of [a] private attorney, but also the attorney fees necessary to procure that judgment."⁵² Second, the court stated that this outcome supported public policy in that it encouraged attorneys to represent inmates.⁵³

Thus, it is apparent that the key inquiry becomes whether a particular attorney fee to be paid from an inmate's assets falls within the scope of *Karpierz's* asset exception. If *Karpierz* does apply, the MIRA lien would

funds directly to federal authorities. *Karpierz v. Easley*, 68 S.W.3d 565, 569, 571, 573-74 (Mo. App. W.D. 2002).

41. *Karpierz*, 105 S.W.3d at 488.

42. *Id.*

43. *Id.*

44. *Id.* at 489.

45. *Id.* at 490.

46. *Id.*

47. *Id.* at 489 (quoting MO. REV. STAT. § 217.827 (2000)).

48. The court "look[ed] to the plain and ordinary meaning of the word[s]," cited dictionary definitions and employed "common sense" to reach a "sound resolution." *Id.* at 490.

49. *Id.*

50. *Id.* at 490 n.12 (emphasis added to "belong[ed]").

51. *Id.* at 491.

52. *Id.* The court also acknowledged the inherent risk assumed by the attorney in agreeing to represent Karpierz in the civil action. *Id.*

53. *Id.*

only attach to any amount remaining in the “pool” of recovered funds after attorney fees and expenses have been deducted. If the scope of the *Karpierz* exception is so narrow as to make it inapplicable in a given situation, then the “traditional” rules regarding attorney fees and contracts should be utilized to determine which party’s interest prevails.⁵⁴ These traditional rules will be discussed next.

B. The “Traditional” Rules of Attorney Fees

In Missouri, attorney fees are traditionally regulated by the courts’ judgment and application of Missouri Rules of Professional Conduct and, to a lesser extent, by application of statutes and common law. In addition to exploring these traditional rules, it is important to the analysis of the instant case to explore the concepts of earned fees versus advanced fee payments and the different connotations the word “retainer” may assume in attorney fee agreements. Each of these topics will be covered in turn.

The regulation of attorneys, including their fee agreements, is generally handled by the courts, primarily through the rules of professional conduct.⁵⁵ Courts also look to statutes and the common law for guidance.⁵⁶ To gain an understanding of the regulation process, each area of the law will be addressed separately.

The Missouri Supreme Court, through its promulgation of rules of professional conduct, is the ultimate authority on the supervision and regulation of Missouri attorneys.⁵⁷ Missouri Rule of Professional Conduct 4-1.5 specifically governs attorney fees.⁵⁸ This rule requires that attorneys

54. This seems to be the path taken by the majority opinion in *Bass*. See *State ex rel. Nixon v. Bass*, No. WD 68662, 2008 WL 3833712, at *1-3 (Mo. App. W.D. Aug. 19, 2008), *transfer granted*, No. SC 89666 (Mo. Dec. 16, 2008).

55. *Clark v. Austin*, 101 S.W.2d 977, 994 (Mo. 1937) (en banc) (Ellison, C.J., concurring). “It is the inherent power [of courts] to protect their own existence and functioning as constitutional courts, which includes the right to regulate the practice of law.” *Id.*

56. MO. REV. STAT. §§ 484.010-.350 (2000 & Supp. 2008) (chapter entitled “Attorneys At Law”). For an example of a court’s reference to the common law of attorney fees, see *Orr v. Mutual Benefit Health & Accident Ass’n*, 207 S.W.2d 511, 515 (Mo. App. W.D. 1947) (describing a “common law ‘retaining lien’”).

57. See generally MO. R. PROF’L CONDUCT 4-1.1 to -9.1. See also Law Offices of Gary Green, P.C. v. Morrissey, 210 S.W.3d 421, 425 (Mo. App. S.D. 2006) (“The rules of professional conduct have the force and effect of judicial decision.” (quoting *Londoff v. Vuylsteke*, 996 S.W.2d 553, 557 (Mo. App. E.D. 1999))).

58. MO. R. PROF’L CONDUCT 4-1.5. This rule incorporated the American Bar Association’s Model Rule of Professional Conduct 1.5 in its entirety and added an additional section which requires an attorney to “conscientiously consider participating in [an] appropriate fee dispute resolution program” if “a fee dispute arises.” Compare *id.* at 4-1.5(f), with MODEL RULES OF PROF’L CONDUCT R. 1.5 (2008).

communicate the “scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible” to the client “before or within a reasonable time after commencing the representation.”⁵⁹ An exception is made when an attorney has a regular client who is charged the same rate for services.⁶⁰ The rule does not require that the communication be in writing, but recommends that it be.⁶¹

Notably absent from Rule 4-1.5 is any direct mandate controlling the amount that an attorney may charge or the manner in which the fee is implemented. Instead, the rule simply requires that the fee charged be “reasonable.”⁶² Reasonableness of a fee is determined according to a set of suggested, but not exclusive, factors.⁶³ Factors considered are the amount of time and work required during the course of the representation, the chances that taking the client’s case will keep the attorney from accepting other work, the amount normally charged for similar services in the area, the size of the fee and the results obtained, any time restrictions, the nature and length of the attorney-client association, the skill, knowledge, reputation and capability of the attorney, and the nature of the fee arrangement.⁶⁴ Another factor in the reasonableness determination is that, before the attorney may take full possession and control of the paid amount, it must be earned.⁶⁵

When regulating attorney fee agreements, Missouri courts may take into consideration, but are not required to follow, the provisions of state statutes.⁶⁶ There are only two Missouri statutes which directly address attorney fee contracts. Section 484.130 of the Revised Statutes of Missouri sets out the general requirements for a valid attorney fee agreement.⁶⁷ It provides that

59. MO. R. PROF’L CONDUCT 4-1.5(b).

60. *Id.*

61. The comment to Rule 4-1.5 is illuminating. It states:

Generally, it is desirable to furnish the client with at least a simple memorandum or copy of the lawyer’s customary fee arrangements that states the general nature of the legal services to be provided, the basis, rate or total amount of the fee and whether and to what extent the client will be responsible for any costs, expenses or disbursements in the course of the representation. A written statement concerning the terms of the engagement reduces the possibility of misunderstanding.

Id. at 4-1.5 cmt. 2.

62. *Id.* at 4-1.5(a).

63. *Id.*

64. *Id.* at 4-1.5(a)(1)-(8).

65. *See id.* at 4-1.5 cmt. 4 (“A lawyer may require advance payment of a fee, but is obliged to return any unearned portion.”).

66. Courts may choose to accept or reject legislative attempts to regulate attorneys. *See In re Conner*, 207 S.W.2d 492, 495 (Mo. 1948) (en banc) (stating “this Court, independent of any other branch of the government, has inherent power to fully regulate the admission and disbarment of its attorney officers, to accomplish all objects within its orbit, and to provide procedure by rule”).

67. MO. REV. STAT. § 484.130 (2000).

“[t]he compensation of an attorney or counselor for his services is governed by agreement, express or implied, which is not restrained by law.”⁶⁸ The remaining portion of § 484.130 codifies the common law charging lien.⁶⁹ It provides an attorney with a lien against property obtained in the case filed on behalf of the client.⁷⁰ Similarly, § 484.140 provides for contingent fee charging liens.⁷¹ As the statutes do not conflict with Rule 4-1.5, Missouri courts generally accept them.⁷²

Because the courts have “the inherent authority to regulate the practice of law,” the common law is a rich source of regulatory authority.⁷³ Given the general nature of the attorney fee provisions in the rules of professional conduct and state statutes, the courts’ “expert” knowledge is often called upon to resolve the finer points.⁷⁴ One such point addressed, perhaps inconsistently, is the use of the word “retainer” in attorney fee agreements.⁷⁵

68. *Id.*

69. *Modern Woodmen of Am. v. Cummins*, 268 S.W. 383, 384 (Mo. App. E.D. 1924); *see also* *Ross v. Am. Tel. & Tel. Commc'ns Corp.*, 836 S.W.2d 952, 954 (Mo. App. W.D. 1992) (“Section 484.130 restates the common law of Missouri giving an attorney a lien on his client’s cause of action from the commencement of that action.”); Jeffrey Berman, *Recent Developments in Missouri: Civil Practice and Procedure*, 48 UMKC L. REV. 513, 513-14 (1980) (discussing the common law charging lien).

70. MO. REV. STAT. § 484.130.

71. MO. REV. STAT. § 484.140 (2000). In addition to the codified charging liens, a second type of common law lien, known as the “retaining lien,” purports to give the attorney a general right to keep a client’s property until the client’s debt to his lawyer is satisfied, thus putting into effect a “passive” lien. *Modern Woodmen of Am.*, 268 S.W. at 384. However, this lien has not been statutorily codified and the availability of its use is questionable. *Compare* 2 MO. PRAC. § 2.15 (4th ed. 2002) (“An attorney has a ‘retaining lien’ which permits an attorney to retain a client’s property to secure any unpaid fees.” (citing *Corrigan v. Armstrong*, 824 S.W.2d 92, 97 (Mo. App. E.D. 1992); *Orr v. Mut. Benefit Health & Accident Ass’n*, 207 S.W.2d 511, 515 (Mo. App. W.D. 1947))), *with* Formal Opinion No. 115 (1979), *in* 35 J. MO. B. 340 (1979) (opinion of the Missouri Bar Advisory Committee stating that the purpose of the retaining lien is unethical and contra to the professional rules of conduct). *See also* Berman, *supra* note 69, at 513-14 (discussing common law attorney liens).

72. *See, e.g., Reed v. Garner Indus., Inc.*, 832 S.W.2d 945, 949 (Mo. App. E.D. 1992).

73. *In re Crews*, 159 S.W.3d 355, 358 (Mo. 2005) (en banc).

74. *See, e.g., Travis v. Travis*, 174 S.W.3d 67, 71 (Mo. App. W.D. 2005) (“The trial court is considered an expert on the necessity, reasonableness, and value of attorney’s fees.”); *Tobin v. Jerry*, 243 S.W.3d 437, 441 (Mo. App. E.D. 2007) (court called on to decide whether MO. R. PROF’L CONDUCT 4-1.5 required a contingent fee agreement to be a signed writing).

75. Even Black’s Law Dictionary reflects the diverse use of the word retainer. It offers four definitions:

1. A client’s authorization for a lawyer to act in a case
2. A fee that a client pays to a lawyer simply to be available when the client needs legal

Some usages of the word are fairly straightforward. For example, the act of entering into an arrangement whereby a client “engages” an attorney for legal representation is often called a “retainer.”⁷⁶ The word may also be used as a verb, where the client is said to “retain” legal counsel.⁷⁷ In other situations, courts have used the word in apparently conflicting fee contexts, which led to increased confusion.⁷⁸ For example, the same word can be used to describe seemingly different types of attorney fees, such as a general retainer, special retainer, minimum retainer, initial retainer, or non-refundable retainer.⁷⁹

In order to fully assess the issues in *State ex rel. Nixon v. Bass*, it is necessary to develop a general understanding of the overall types of fees that attorneys may charge and how the word “retainer” fits into those types. This discussion can be streamlined by categorizing fees into two basic groups: earned fees and unearned fees.

Earned fees, as the words imply, are quite simply already earned at the moment the attorney takes possession of the payment. One fee in this category is the general retainer.⁸⁰ A general retainer “is a fee for agreeing to make legal services available when needed during a specified time period.”⁸¹

help during a specified period or on a specified matter. 3. A lump-sum fee paid by the client to engage a lawyer at the outset of a matter. . . . 4. An advance payment of fees for work that the lawyer will perform in the future.

BLACK'S LAW DICTIONARY 1341-42 (8th ed. 2004); see cases cited *infra* note 78.

76. See *Agnew v. Walden*, 4 So. 672, 673 (Ala. 1888); see also Lester Brickman, *The Advance Fee Payment Dilemma: Should Payments Be Deposited to the Client Trust Account or to the General Office Account?*, 10 CARDOZO L. REV. 647, 649 (1989).

77. See *supra* note 75.

78. Compare *Dowling v. Chi. Options Assocs., Inc.* 875 N.E.2d 1012, 1018 (Ill. 2007) (describing three types of retainers: (1) the “true,” “general,” or “classic” retainer,” (an immediately earned fee to ensure a lawyer’s availability); (2) the “security retainer,” (meant only to serve as security for future attorney fees); and (3) the “advanced payment retainer” (“payment to the lawyer in exchange for the commitment to provide legal services in the future”)), with *In re Connelly*, 55 P.3d 756, 762 n.7 (Ariz. 2002) (“A non-refundable fee differs from a non-refundable retainer or advance payment. Unlike a non-refundable fee, a non-refundable retainer is ‘a fee paid, apart from any other compensation, to ensure that a lawyer will be available for the client if required’ and ‘an advance payment [is one] from which fees will be subtracted.’”), and *Iowa Supreme Court Bd. of Prof’l Ethics & Conduct v. Frerichs*, 671 N.W.2d 470, 475 (Iowa 2003) (categorizing “advance fees . . . as general retainers or special retainers”).

79. *Frerichs*, 671 N.W.2d at 476.

80. *Iowa Supreme Court Bd. of Prof’l Ethics & Conduct v. Apland*, 577 N.W.2d 50, 54 (Iowa 1998) (citing *Brickman, supra* note 76, at 649).

81. *Id.* “In form, [a general retainer] is an option contract; the fee is earned by the attorney when paid since the attorney is entitled to the money regardless of whether he actually performs any services for the client.” *Id.* Some authorities prefer to distinguish the general retainer from what they label the “special retainer,” [which]

Thus, by putting an attorney on general retainer, a client is paying to have that attorney be “on call.” The attorney earns the general retainer fee simply by agreeing to be “on call” for that client, regardless of whether any actual work is ever performed.

Unearned fees arise when the attorney accepts funds in advance of the performance of legal services; hence, this type of fee is an “*advance fee payment*.”⁸² These funds technically remain the client’s property until the attorney both earns the fee and takes possession and control of the money.⁸³ Because the funds belong to the client until they are deemed earned, they must be kept in the attorney’s trust account, and while the funds are in the trust account, the client retains ultimate control.⁸⁴ As the attorney earns the fee, the earned portion may be transferred from trust to the firm operating account.⁸⁵ At the end of representation, the attorney must refund any remaining balance of the advance fee payment to the client.⁸⁶

Fees in the advance fee payment category receive a variety of labels, creating much confusion. Many advance fee payments are correctly categorized as special retainers.⁸⁷ “A special retainer [is said to] cover[] payment of funds for a specific service,” and, to the extent that the special retainer is paid before services are rendered, is an advance fee payment.⁸⁸

A common type of special retainer is the flat fee.⁸⁹ A flat fee is an amount charged that “embraces all work to be done, whether it be relatively simple and of short duration, or complex and protracted.”⁹⁰ Because a flat fee is charged for the entirety of the legal service, it raises the question of

covers payment of funds for a specific [legal] service.” *Id.* at 55. Other fees in this category would include hourly, contingent fees and any other arrangement where attorneys receive payment after the work has been performed. Hourly fees are generally billed after the work time has been incurred and contingent fees are received upon the attorney’s attainment of a funded disposition of the client’s claim, thus both fee types are earned when received by the attorney. *See generally* 1 ROBERT L. ROSSI, ATTORNEYS’ FEES 58-61, 92-94 (2d ed. 1995) (discussing hourly and contingent fees).

82. *Apland*, 577 N.W.2d at 55 (emphasis added).

83. *Id.*

84. MO. R. PROF’L CONDUCT 4-1.15(e).

85. *Id.*; *Apland*, 577 N.W.2d at 55; *see also* Nancy L. Ripperger, *Trust Account Recordkeeping: What You Need to Know to Stay out of Trouble*, PRECEDENT, Summer 2008, at 21, 23 n.4 (stating that the Missouri Office of Chief Disciplinary Council has taken the same position).

86. MO. R. PROF’L CONDUCT 4-1.16(d).

87. *Apland*, 577 N.W.2d at 55 (citing Brickman, *supra* note 76, at 649).

88. *Id.*

89. *Id.* Flat fees are “commonplace for fairly routine and standardized legal services,” such as will preparation or representation in uncontested divorces. *Id.* (citing 41 ABA/BNA LAWYERS’ MANUAL ON PROFESSIONAL CONDUCT 306 (1993)).

90. *Id.* (quoting ABA Comm. on Ethics and Prof’l Responsibility, Informal Op. 1389 (1977)).

whether it is necessary that the payment be placed in the client trust account.⁹¹ It might be argued that, since the agreed upon fee for the entire legal service is pre-set, it is non-refundable, thus the fee may be placed directly into the attorney's operating account. The American Bar Association's response is that the ethically:

“questionable [application] of non-refundable fee advances [in the attorney-client context] has inspired some imaginative terminology designed to characterize the advance payments in a manner that eludes the issue: retainers, non-refundable retainers, fee advances, or advanced fees, prepaid fees, flat fees, and minimum fees. The basic question is[,] [w]hose money is it? If it's the client's money, in whole or in part, it is subject to trust account requirements. . . . In general, analysis turns on when the money is deemed 'earned,' for once the money is earned it is deemed the lawyer's. The majority of courts and ethics committees addressing the problem have looked beyond the terminology by which the fee is characterized, and have determined that fee advances are not earned when paid, and therefore must be deposited into the trust account.”⁹²

The Office of the Chief Disciplinary Counsel for the State of Missouri agrees with this position, which is supported by important public policy.⁹³

Three distinct policy goals may be [implicated]: (1) to preserve the client's property from the reach of the lawyer's creditors; (2) to preserve the client's property from possible misappropriation by the lawyer; and (3) to enable the client to realistically dispute a fee where the funds are already in the lawyer's possession by disallowing a self-help resolution by the lawyer and instead preserving the disputed funds intact until the dispute is resolved.⁹⁴

Furthermore, the position is in accord with the Missouri Rules of Professional Conduct 4-1.15(e) and 4-1.16(d).⁹⁵

91. *Id.*

92. *Id.* (quoting 45 ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT 109 (1993)).

93. Ripperger, *supra* note 85, at 21, 23 n.4; Brickman, *supra* note 76, at 667.

94. Brickman, *supra* note 76, at 667.

95. “A lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred.” MO. R. PROF'L CONDUCT 4-1.15(e). “Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as . . . refunding any advance payment of fee or expense that has not been earned or incurred.” *Id.* at 4-1.16(d).

This section covered MIRA claims and the corresponding law, as well as the *Karpierz* attorney fee asset exception. Also examined were the traditional rules of attorney fees, with particular attention being given to the use of the word retainer in the context of both earned fees and advanced fee payments. Next, it is appropriate to explore the instant case and then to analyze the instant court's application of the law to the facts.

IV. INSTANT DECISION

In *State ex rel. Nixon v. Bass*, Hanrahan asserted that the seized funds held by the Cole County Circuit Court were not available for execution under the MIRA claim because those funds were assigned to Hanrahan.⁹⁶ In reframing this point, the court found that the critical issue was "whether the funds held by Cole County [were] assets belonging to Bass."⁹⁷

To answer this question, the court sought to interpret Bass' authorization.⁹⁸ First, the court found the authorization was unambiguous.⁹⁹ Proceeding with the interpretation, the court set out the general rule for interpreting an unambiguous contract - that the "parties' intent [is discerned] from the four corners of the document."¹⁰⁰ Because of the "four corners" limitation, the court declined to consider extrinsic evidence of Bass' and Hanrahan's intent.¹⁰¹

Next, the court considered Hanrahan's argument that the authorization constituted a valid assignment of the funds.¹⁰² Hanrahan's primary authority was *Greater Kansas City Baptist & Community Hospital Ass'n, Inc. v. Businessman's Assurance Co.* ("BMA").¹⁰³ The *BMA* court held that an

96. No. WD 68662, 2008 WL 3833712, at *2 (Mo. App. W.D. Aug. 19, 2008), *transfer granted*, No. SC 89666 (Mo. Dec. 16, 2008). Hanrahan also argued that the trial court erred in granting summary judgment to Plaintiff-Appellee Nixon because Nixon failed to answer Hanrahan's "counterclaim." *Id.* at *1. The instant court rejected this point, determining that Hanrahan had "'mistakenly designated [an affirmative] defense as a counterclaim.'" *Id.* (quoting MO. R. CIV. P. 55.08).

97. *Id.* at *2. The majority opinion was written by the Honorable James Edward Welsh, with the Honorable Paul M. Spinden concurring and the Honorable Alok Ahuja concurring in part and dissenting in a separate opinion. *Id.* at *1, *4.

98. *Id.* at *2. For the complete language of the authorization, see *supra* text accompanying note 10.

99. *Bass*, 2008 WL 3833712, at *2. The court observed that neither the parties nor the trial court raised the question of ambiguity in the summary judgment proceedings. *Id.* Because it would be improper to raise this issue for the first time on appeal, a finding of no ambiguity was fitting. *Id.*

100. *Id.* (citing *J.H. Berra Constr. Co. v. Mo. Highway & Transp. Comm'n*, 14 S.W.3d 276, 279 (Mo. App. W.D. 2000)).

101. *Id.* Items of extrinsic evidence offered to the court included affidavits of Bass and the attorney prosecuting Bass' criminal case. *Id.*

102. *Id.* at *3.

103. 585 S.W.2d 118 (Mo. App. W.D. 1979).

assignment was valid where a patient arranged to pay an already incurred medical debt by assigning a future insurance benefit payout to the treating hospital.¹⁰⁴ The instant court also took note of the case of *Halvorson v. Commerce Trust Co.*,¹⁰⁵ cited in *BMA*, and remarked that the *Halvorson* court found that “the payment of a[n earned] real estate commission at a future time was a valid assignment.”¹⁰⁶ However, it distinguished the instant case by pointing out the authorization was not created after a balance had become due.¹⁰⁷ Instead, Bass authorized the release of funds to Hanrahan as an “initial retainer for legal representation fees.”¹⁰⁸

The court then commented that if the release stated it was to pay for already earned legal fees, *BMA* and *Halvorson* would control.¹⁰⁹ But, because the authorization was expressly designated as an *initial retainer*, which the court described as a deposit of money made by a client with his attorney for the payment of *future* legal fees (hence, an *advanced fee payment*), an irrevocable assignment was not effectuated.¹¹⁰ The court said “[a]n absolute assignment, one that divests all interest from the assignor to the assignee, [did not] exist in this case. It [was] clear that the release did not pass all of Bass’[] title or interest in the funds to Hanrahan . . . nor did it divest Bass of all right of control over the funds; therefore, no assignment occurred.”¹¹¹

The court then stated that because this advanced fee payment was maintained in Cole County at the time that Nixon filed his petition for incarceration reimbursement, the funds were still within Bass’ control and the authorization was subject to revocation.¹¹² Thus, the court concluded, the advanced fee “was still an asset belonging to Bass and subject to the reimbursement statute.”¹¹³

104. *Id.* at 119.

105. 222 S.W. 897 (Mo. App. W.D. 1920).

106. *Bass*, 2008 WL 3833712, at *3.

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.* The court further noted that even if the money had been released to Hanrahan upon the signing of the authorization, it ought to have been placed in the firm’s trust account until the fee was earned, where it “would still [have been] subject to the State’s claim.” *Id.* at *3 n.2.

113. *Id.* at *3. Next the court considered and rejected construing the writing as a conditional assignment. *Id.* (“In a ‘conditional assignment for purposes of security’ . . . title to the collateral is retained by the assignor subject to his performance of an independent obligation owed to the assignee.” (quoting *Miller v. Wells Fargo Bank Int’l Corp.*, 540 F.2d 548, 559 (2d Cir. 1976))); see also *Uni-Com Nw., Ltd. v. Argus Publ’g Co.*, 737 P.2d 304, 308 (Wash. Ct. App. 1987) (“The situation thus described is one where the debtor has the alternatives of (1) performing the condition and retaining the collateral or (2) not performing the condition and forfeiting the collateral.”). The court noted that, once again, the issue was not raised in the lower

In a separate dissenting opinion, Judge Alok Ahuja argued that summary judgment was an improper disposition of the matter because there was a genuine issue of material fact regarding whether Bass' attorney owned at least some of the seized money when the State's MIRA claim ripened.¹¹⁴ Judge Ahuja first addressed the form of the authorization, noting that while the contents were "inartful," it "was sufficient to transfer [Bass'] rights to the seized funds to his attorneys."¹¹⁵ The authorization was then compared to the subject document in *BMA* and Judge Ahuja found that the two writings were in essentially the same form.¹¹⁶ He pointed out that, like the *Bass* authorization, the document in *BMA* contained neither the word "'assign' or 'transfer,' [yet] the *BMA* court found an effective assignment, since 'the intention of all concerned [was] clear.'"¹¹⁷ Next, Judge Ahuja pointed out that in the case of *Halvorson v. Commerce Trust Co.*, a valid assignment existed under language similar to the Bass authorization.¹¹⁸ Thus, by analogy, the Bass authorization was an effective assignment.¹¹⁹

court and therefore, it would be improper to raise it on appeal. *Bass*, 2008 WL 3833712, at *3. Second, it noted that the writing did not fit the proper form for a collateral assignment "because Bass was not seeking to release the funds as collateral security for a debt." *Id.* Finally, it remarked that even had the document been deemed a conditional assignment, it would only have afforded Hanrahan a security interest in the seized funds, which would have been defeated by the State's superior priority interest in the inmate's asset. *Id.*; see *supra* note 33 and accompanying text.

114. *Bass*, 2008 WL 3833712, at *4 (Ahuja, J., concurring in part and dissenting).

115. *Id.* "No particular form of words is necessary to accomplish an assignment, so long as there appears from the circumstances an intention on the one side to assign . . . and on the other side to receive." *Id.* (quoting *Keisker v. Farmer*, 90 S.W.3d 71, 74 (Mo. 2002) (en banc)). The case relied upon by Hanrahan, *Greater Kansas City Baptist & Community Hospital Ass'n, Inc. v. Businessmen's Assurance Co.*, 585 S.W.2d 118, 119 (Mo. App. W.D. 1979), also stands for this proposition.

116. *Bass*, 2008 WL 3833712, at *4.

117. *Id.*

118. *Id.* (citing *Halvorson v. Commerce Trust Co.*, 222 S.W. 897, 897 (Mo. App. W.D. 1920)). The *Halvorson* contract read as follows: "[i]f the sale is finally concluded, you have our consent to pay over to F.B. Gillette [\$3,750] out of said sum [\$10,000], as his commission." *Id.* (quoting *Halvorson*, 222 S.W. at 897).

119. *Id.* at *4. Judge Ahuja stated:

I do not believe the wording of the Authorization here can fairly be distinguished from the language of the instruments at issue in *BMA*, or in the *Halvorson* case on which *BMA* relied. As in those cases, Bass' intent to transfer rights to specifically identified funds is clearly expressed in the writing. This transfer is plainly supported by consideration, since Bass was aware that Hanrahan . . . would not perform legal services on his behalf without his execution of the Authorization, and Hanrahan . . . in fact represented him thereafter.

Id.

However, Judge Ahuja's position that the Bass authorization was an effective assignment came with a caveat.¹²⁰ The caveat concerned the authorization's designation of the funds for Bass' payment of the *initial retainer* to Hanrahan.¹²¹ This "reference [left] open the question of whether all, or any portion, of those funds remained Bass' property, or had instead been earned by Hanrahan . . . at the time at which the State's inmate reimbursement rights attached."¹²² The dissenting opinion acknowledged the majority's description of an initial retainer and the general rule that, to the extent that an attorney has not earned his fee, "the client . . . retains an interest in the funds."¹²³ However, Judge Ahuja suggested that if the fee becomes earned, the client's interest in the fee is extinguished under this authorization.¹²⁴ He noted that approximately two months elapsed between the purported date of execution of the Bass authorization, the State's subsequent dismissal of the forfeiture claim, and Nixon's filing of the incarceration reimbursement claim.¹²⁵ During that time, Hanrahan could have conceivably completed the agreed upon legal services and did in fact take Bass, "apparently through the conclusion of the criminal proceedings."¹²⁶

Judge Ahuja then expressed concern that denying Hanrahan at least the amount of the funds equal to that which was earned violated a public policy of "assuring inmates' access to legal representation."¹²⁷ The policy is violated because attorneys would naturally be more averse to undertaking inmate representation if their earned fees could be easily swept away by a subsequent MIRA claim.¹²⁸ He pointed out that it would be consistent with the Missouri Supreme Court's holding in *State ex rel. Nixon v. Karpierz* to find that, at least to the extent that Hanrahan established that its fees were earned, the seized funds no longer "'belonged' to Bass."¹²⁹ Thus, under *Karpierz*, a court's decision regarding the ownership of an inmate's awarded or recovered asset must take into consideration any legal "fees necessary to procure" it.¹³⁰

120. *Id.* at *5.

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.* Additionally, another year passed before judgment was entered on the MIRA action. *Id.*

127. *Id.* (citing *State ex rel. Nixon v. Karpierz*, 105 S.W.3d 487, 491 (Mo. 2003) (en banc)).

128. *Id.*

129. *Id.* In the *Karpierz* court's own language, this outcome produced results that were "suitable, rightful, [and] fitting." 105 S.W.3d at 490.

130. *Bass*, 2008 WL 3833712, at *5 (quoting *Karpierz*, 105 S.W.3d at 491).

While this line of reasoning was not itself dispositive in the instant case, Judge Ahuja found it to be influential.¹³¹ Thus, he noted, the extrinsic evidence ignored by the majority, particularly the affidavits sworn by Bass and the prosecuting attorney, were relevant.¹³² Judge Ahuja pointed out that the record indicated that Hanrahan was instrumental in negotiating Bass' plea and testimonial arrangement with the State and obtaining the dismissal of the forfeiture action.¹³³ However, because of insufficiencies in the factual record, Judge Ahuja recommended remanding the case on the "triable issue [of] whether all, or at least some portion, of the seized funds belonged to Hanrahan . . . rather than Bass, at the relevant time."¹³⁴

On March 31, 2009, the Missouri Supreme Court, after hearing Hanrahan's appeal of the appellate court's affirmation of the trial court judgment, reversed the grant of summary judgment in favor of the State and remanded the case for hearing on the merits.¹³⁵ The Missouri Supreme Court found "a genuine issue of material fact that the funds at issue were not subject to incarceration reimbursement in that the funds all, or in part, had previously been assigned to Hanrahan."¹³⁶ Taking up the position set out in Judge Ahuja's dissenting opinion, the court acknowledged the ambiguity which exists in the usage of the word "retainer" generally in attorney fee

131. *Id.*

132. *Id.* Judge Ahuja noted that:

[The] Bass[] affidavit states . . . , '[b]ut for my assurances that I would pay Hanrahan . . . such fees, Hanrahan . . . would not have undertaken to represent me.' Further, Bass' affidavit states that, but for the State's agreement to dismiss the pending forfeiture action and release the funds to Hanrahan . . . 'as payment of the remainder of my legal fees,' 'I would not have entered into the said plea agreement.'

Id.; see also *supra* note 11 (quoting the prosecuting attorney's affidavit).

133. *Bass*, 2008 WL 3833712, at *5. Judge Ahuja went on to remark that:

In these circumstances – the Authorization's role as an essential condition of Bass' retention of counsel, and counsel's performance of services for Bass; counsel's participation in 'creation' of the fund through dismissal of the forfeiture action; and the State's knowledge that the funds it had agreed to release (as a material aspect of Bass' plea agreement) would be used to pay counsel – I believe the Supreme Court's holding in *Karpierz* provides further support for a determination that the seized funds were not 'property . . . belonging to' Bass, and therefore that these funds were not subject to incarceration reimbursement.

Id. (quoting *Karpierz*, 105 S.W.3d at 490).

134. *Id.* at *6 ("[O]ne can[not] resolve the issue whether [Hanrahan] had in fact earned all or part of the seized funds, as a matter of undisputed fact, on the existing summary judgment record.").

135. *State ex rel. Nixon v. Bass*, No. SC89666, at 6 (Mo. Mar. 31, 2009) (en banc), available at http://www.courts.mo.gov/file/Opinion_SC89666.pdf.

136. *Id.* at 2.

agreements.¹³⁷ It then remarked that the record in the instant case was less than clear with respect to the terms and conditions of the subject fee agreement.¹³⁸ The court remanded with instructions that:

[i]f . . . the authorization was an essential condition of Bass' retention of counsel and counsel's performance of services for Bass; counsel participated in "creation" of the funds through dismissal of the forfeiture action; and the State knew that the funds it had agreed to release (as a material aspect of Bass' plea agreement) would be used to pay counsel then, this case would be controlled by *State ex rel. Nixon v. Karpierz*.¹³⁹

In the *Bass* appellate court decision, the majority focused primarily on the traditional rules of attorney fees to determine the appropriate asset allocation under MIRA. The dissent emphasized the possibility that Hanrahan had actually earned its fee. It further recommended the consideration of the *Karpierz* exception for attorney fees to mitigate the potential harshness of flat adherence to the traditional attorney fee rules and to further public policy goals. The Missouri Supreme Court found the record on appeal insufficient to support summary judgment for the State and remanded the case for consideration in accordance with the approach suggested by the appellate dissent. The next section will set out that, although the appellate majority probably arrived at the correct outcome given the facts in this case, the dissent's analysis of the problem under the *Karpierz* exception was indeed the more technically correct approach to take.

137. *Id.* at 4-5, 5 n.2. For a discussion of Judge Ahuja's dissenting opinion, see *supra* notes 114-34 and accompanying text.

138. *Id.* at 5-6 ("There is no other reference in the record to the terms of the parties' agreement as to Hanrahan[']s . . . fees, and specifically concerning when and how those fees would be earned.")

139. *Id.* at 6 n.4.

V. COMMENT

A comparison of the facts of *State ex. rel. Nixon v. Bass* with those of *State ex. rel. Nixon v. Karpierz* indicates that the two cases share several significant similarities.¹⁴⁰ Thus, it seems logical to analyze *Bass* in light of the holding of *Karpierz*. The *Bass* majority's decision not to include *Karpierz* in its discussion was therefore surprising.¹⁴¹ Instead of utilizing *Karpierz*, the *Bass* court proceeded directly to an analysis under the "traditional" rules of attorney fees, finding that, first, Hanrahan did not earn the funds based on the authorization language and, second, that the State's incarceration reimbursement claim had priority over any lesser interest that Hanrahan might have in the funds.¹⁴²

140. First, each case arose from the State's filing of a MIRA petition. *See supra* notes 14 & 41 and accompanying text. Second, the courts in both cases focused on MIRA's definition of an "asset." *See supra* notes 46-51, 97, 112-13 and accompanying text. Third, the 'pools' of money targeted by the MIRA claims arose from cash which was seized during criminal arrests and thereafter subject to governmental forfeitures, but which were ultimately liberated through at least some attorney effort. *See supra* notes 6-7, 11-12, 40 and accompanying text. Fourth, the attorney in each case had an attorney fee agreement with the client whereby at least some portion of the legal fee would be taken out of the recovery of the seized funds. *See supra* notes 9-10, 43-44 and accompanying text. Fifth, in each case there were facts on the record that would suggest that, at the time the MIRA claim was filed, the inmate's attorney had "earned" his agreed upon fee. *See supra* notes 40, 43, 122-26 and accompanying text. And finally, the objecting attorney in each case defended his right to take his attorney fee from the created "pool" before the MIRA claim was applied. *See supra* notes 15-16, 43 and accompanying text.

141. Only the dissenting judge's opinion made reference to *Karpierz*. *Bass*, 2008 WL 3833712, at * 5 (Ahuja, J., concurring in part and dissenting). Another portion of the *Bass* opinion is also perplexing. The court suggested that, "[h]ad Bass's [sic] release said 'for payment of legal fees,'" the outcome would have been different. *Id.* at *3 (majority opinion). The implication was that, if the attorney fee was already earned and simply due at the time of execution, the authorization would have effectuated a valid transfer of Bass' interest to Hanrahan. By extension, then, the seized funds would no longer have been an asset belonging to Bass for the purposes of the MIRA claim. However, what the court overlooked in this analysis was the fact that the funds at issue were, at the relevant times, in the hands of a third party. Thus, even a valid assignment would have given Hanrahan no more than a contractually enforceable interest in the property. Against many other competing claims, this interest would perhaps have prevailed, but not necessarily against the MIRA action. This is because MIRA contains a provision which gives the State's claim priority over other encumbrances. MO. REV. STAT. § 217.837.4 (2000). Therefore, it is not entirely clear that a valid assignment of these funds would actually have made a difference in the outcome of this case.

142. *See supra* notes 110-13 and accompanying text.

However, in a MIRA claim, this “traditional” analysis, by itself, does not foreclose the opposite result. Under the application of the *Karpierz* asset exception in MIRA claims, the “asset due or belonging” issue must be resolved before any priority issue.¹⁴³ Framed in this manner, the decision in a *Bass*-type case should discuss whether the *Karpierz* asset exception was applicable or whether only the “traditional” rules of attorney fees applied. In order to explore this in a more coherent fashion, the argument in favor of the application of *Karpierz* will be set out first, followed by the argument against allowing the exception.

The strongest arguments in favor of applying the *Karpierz* asset exception to the attorney fee in *Bass* are based on the policies and rationales espoused by the Missouri Supreme Court in *Karpierz*. First, although the released funds in the instant case were not recovered in a plaintiff’s action, the record indicates that Hanrahan did in fact perform legal services for Bass. The legal services presumably had value, because, as a result of the attorney’s successful negotiations, the CAFA case was dismissed. Therefore, to the extent that services were performed, Hanrahan’s fee was earned. If the fee was earned at the time that the MIRA judgment became executable against the released CAFA funds, *Karpierz* indicates that the earned legal fee should be excluded from the State’s recovery.¹⁴⁴ Furthermore, the *Karpierz* opinion did not indicate that a contingent fee arrangement for the *defense* of a civil case was specifically excluded from its umbrella of protection.¹⁴⁵

Second, but for Hanrahan’s action, the “pool” of money at issue would not have been available to the State for a MIRA claim. Extrinsic evidence presented by Hanrahan suggested that the firm’s legal services were instrumental in the final disposition of the CAFA case.¹⁴⁶ While in this case the recovered amount was the same amount as the attorney’s claimed fee, in other cases this pool might contain overflow to which a MIRA claim could attach. Thus, the holding in *Bass* would have a chilling effect on future inmate defendant fee arrangements of this type and the State will experience lost opportunities for future MIRA recoveries.

Third, the application of *Karpierz* furthers the public policy of encouraging attorneys to represent inmates by assuring that their earned fees will not be preempted by a MIRA claim. Moreover, as a collateral matter, the very nature of a CAFA case lends support to the notion that advocating an inmate’s *defense* should qualify the attorney to raise the *Karpierz* fee exclusion because, in a sense, the traditional party roles in a CAFA case are reversed. In a CAFA case, it is the plaintiff who has possession of the asset and the defendant who is actively attempting to “recover.” Thus, a favorable recovery of assets may be attained even where the defendant has filed no

143. In fact, if the traditional attorney fee rules were applied to the case in *Karpierz* without other consideration, the State’s MIRA claim would have prevailed.

144. *State ex rel. Nixon v. Karpierz*, 105 S.W.3d 487, 491 (Mo. 2003) (en banc).

145. *See generally id.* at 488-91.

146. *See supra* notes 11-12, 133 and accompanying text.

independent cause of action. Although contingent fees are most often associated with claimants' recoveries, courts have noted that nothing in the nature of contingent fees limits their use to plaintiffs' attorneys, especially in CAFA-type claims.¹⁴⁷

However, one might argue on three different grounds that the *Karpierz* exception should not be applicable to the analysis of *Bass*. The proponent of this position would first point out that there are differences between the two cases' respective representational and fee agreements. It is arguable that the *Karpierz* asset exception was only intended to protect attorneys who represent plaintiff inmates. The fact that Missouri does not provide a statutorily codified charging lien for the *defense* of a case lends support to this argument.¹⁴⁸

Additionally, the record in *Bass* does not indicate that Hanrahan took an active role in defending the CAFA case itself, thus the firm did little to "create" the "pool" at issue here. At best, it appears that Hanrahan may have negotiated a plea and testimonial agreement in the underlying criminal case which passively caused Bass' money to be released from the CAFA action. This type of arrangement does not seem to comport with the spirit of *Karpierz*. Why should an attorney be able to actively work one case to its resolution, and then passively reap his reward from the disposition of a separate case? In this situation, it seems equitable that the attorney should recover after MIRA.

Finally, it could be argued that the type of fee agreement in *Bass* raises ethical concerns and therefore should not be condoned by the courts. Particularly alarming is the arrangement where a criminal defense attorney takes a personal interest in the outcome of a related CAFA case as security for his attorney fee in the criminal case.¹⁴⁹ While not expressly prohibited by rules of professional conduct,¹⁵⁰ the arrangement does create the appearance

147. ROSSI, *supra* note 81, at 93.

148. See MO. REV. STAT. §§ 484.130-.140 (2000) (both sections require recovery from a client's cause of action or claim, to which the charging lien attaches); *Evans v. FDIC*, 981 F.2d 978, 980 (8th Cir. 1992) ("Section 484.130 is expressly for the purpose of protecting counsel *who undertake filing a lawsuit or a counterclaim on behalf of his or her client . . .*" (emphasis added)); *Orr v. Mut. Benefit Health & Accident Ass'n.*, 207 S.W.2d 511 (Mo. App. W.D. 1947) ([S]ection [484.140] has to do only with contingent fee contracts, and authorizes such agreements, including fee percentage of the proceeds of any settlement of the *client's cause of action* before or after suit or judgment, or whether or not any action shall be commenced, and provides that if the *attorney shall serve the defendant or proposed defendant* with a notice in writing that he has such a fee contract . . ." (emphasis added)).

149. The concern arises from Missouri Rule of Professional Conduct 4-1.5(d)(2), which states: "A lawyer shall not enter into an arrangement for, charge, or collect[] a contingent fee for representing a defendant in a criminal case." MO. R. PROF'L CONDUCT 4-1.5(d)(2).

150. Missouri Rule of Professional Conduct 4-1.7(a) provides that "a lawyer shall not represent a client if the representation involves a concurrent conflict of interest."

and at least the potential that the attorney's personal interest in the recovery of the seized assets may color the counsel given to the criminal client.¹⁵¹ For these reasons, the court could choose to discourage this particular type of arrangement by allowing a subsequent MIRA action to preempt the attorney's interest in the seized assets.¹⁵²

So, given the strengths of the two positions on the applicability of *Karpierz* to the instant case, it becomes apparent that, regardless of its ultimate applicability to the facts at hand, *Karpierz* simply should have been addressed by the *Bass* court. Without that analysis, the picture is incomplete. However, the *Bass* opinion does serve one important function in that it reinforces the realities of the perhaps misused and often confused concept of

Id. at 4-1.7(a). Rule 4-1.7(a)(2) indicates that "a personal interest of the lawyer" is a concurrent conflict of interest. *Id.* at 4-1.7(a)(2). According to Comment 10 to Rule 4-1.7, the reasoning behind this rule is that, "[t]he lawyer's own interests should not be permitted to have an adverse effect on representation of a client." *Id.* at 4-1.7 cmt. 10. However, the representation may proceed if: 1) the attorney "reasonably believes" he can provide representation that is uninfluenced by his personal interest; 2) the representation is not otherwise prohibited by the law; 3) it does not involve two adverse clients of the same lawyer; and 4) "each affected client gives informed consent, confirmed in writing." *Id.* at 4-1.7(b)(1)-(4).

151. The primary concern arises from the limited avenues of recovery on the CAFA case. For a criminal defendant, there are three basic options for recovering seized funds held pursuant to a related CAFA action. First, the defendant could prevail based on a procedural error made by the government. *See State v. Sims*, 124 S.W.3d 486, 488 (Mo. App. W.D. 2003) ("Forfeitures are not favored in the law and should be enforced only when both the letter and the spirit of the law authorizing the forfeiture are followed. Thus, forfeiture statutes are strictly construed against the state" (citations omitted)). Second, if the criminal defendant wins his criminal case, he automatically wins the CAFA case. *See MO. REV. STAT. § 513.617.1* (2000) (When "criminal charges arising from the same activity giving rise to the CAFA proceeding are filed . . . no property [is] forfeited unless the [defendant] is found guilty of or pleads guilty to a felony offense substantially related to the forfeiture."). These two options raise no ethical concerns. The third option is that a settlement agreement may be reached. *MO. REV. STAT. § 513.617.3*. It is this option that poses the ethical issue because of the risk that the attorney's interest in the CAFA assets may influence the counsel given in the criminal case.

152. The recent Missouri Supreme Court opinion on the instant matter does not address the possibility of ethical concerns in a *Bass*-type fee arrangement. *See State ex rel. Nixon v. Bass*, No. SC89666 (Mo. Mar. 31, 2009) (en banc), available at http://www.courts.mo.gov/file/Opinion_SC89666.pdf. However, two parts of the Supreme Court's instructions on remand appear to leave the door open for just such a contemplation. The trial court is to determine whether "the authorization was an essential condition of Bass' retention of counsel and counsel's performance of services for Bass; [and whether] counsel participated in 'creation' of the funds through dismissal of the forfeiture action." *Id.* at 6 n.4. If the facts demonstrate the existence of an impermissible contingent fee in a criminal case, the arrangement is *per se* invalid and thus could not be enforced as either an essential condition of representation or as a conduit for the creation of additional funds.

the advanced attorney fee payment. Practicing attorneys are reminded that an attempted assignment of client assets to satisfy an advanced attorney fee payment results in, at best, a secured interest in the property, which may be defeated by claims with superior priority. The result is the same regardless of when the advanced fee becomes an earned fee. To the extent that the attorney is not in control of the asset, the interest in the asset is just that, an interest. Perhaps for some attorneys, this seems like a harsh result.

While the advanced fee payment lesson is useful, the court missed out on other, perhaps more significant, opportunities to complete the picture. In *Bass*, the court could have affirmatively explained why the *Karpierz* exception was inapplicable in a *Bass*-type fee arrangement. *Karpierz* clearly affords protection to statutorily codified contingent fee charging liens. However, its coverage should not be extended to passive interests taken in 'pools' of client funds, which serve merely to secure an attorney in a separate or unrelated case. Conversely, the *Karpierz* protection should extend to attorneys who obtain valid contingent fee charging liens which arise from the active *defense* of CAFA-type cases.

Another opportunity missed was the consideration of the potential ethical issues which may arise in a *Bass*-type fee agreement. Under the general prohibition against contingent fees in criminal cases, it is questionable whether an attorney should take a personal interest in client funds that are at least potentially dependent upon the outcome of the client's pending criminal case. The *Bass* court could have sent a warning to attorneys by explicitly refusing to apply the *Karpierz* exception to such arrangements. The rationale for this message is straightforward. First, criminal clients cannot compensate their attorneys via contingent attorney fee agreements. Second, if the *Bass* criminal fee agreement was in fact contingent, it was unethical and invalid. Third, if it was not a contingent fee agreement, then the *Karpierz* protection was inapplicable. The unprotected fee in either outcome sends a clear message to attorneys: there is inherent risk in this potentially unethical type of fee arrangement. By remaining silent, the court left this area of the law open to further ethical uncertainty.

Finally, the *Bass* opinion allowed the scope of MIRA to grow. Under the *Bass* holding, the State is now more emboldened to actively pursue even those legitimately earned attorney fees arising from the active defense of CAFA cases. In theory, the *Karpierz* asset exception should be an applicable shield for attorney fee charging liens against CAFA assets that are earned as a result of a successful CAFA defense. Unfortunately, after *Bass*, whether this protection will be afforded to defending attorneys is less than clear. Under the current state of the law, the chance exists that even an actively earned defending attorney fee charging lien could be lost to the State in a subsequent MIRA claim. This truly would be a harsh result.

VI. CONCLUSION

The *Bass* majority's failure to address *Karpierz* in its opinion makes the law less clear than before. It is possible to take the court's holding and the absence of a discussion of *Karpierz* to mean that, by implication, the exception is inapposite. However, even with that inference, the reader of the *Bass* opinion is left to wonder what particular factor in *Bass* was determinative in making *Karpierz* inapplicable and whether, in the future, defense attorneys could ever invoke the latter's fee-protective umbrella. Thus, *Bass* effectively muddies the MIRA waters and makes the limits and applicability of the *Karpierz* asset exception more confusing. Given the Missouri Supreme Court's recent reversal and remand in the matter, the lower courts now have another chance to clear up the confusion.

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