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“Nonrefundable” Reminder: They Can Be Refundable

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The Oregon Supreme Court has long held that even “nonrefundable” flat fees can, in fact, be refundable if the work involved was not performed completely. Similarly, the Oregon State Bar has long made that same point in its primary ethics opinion on the subject. In late 2010, the fee rule—RPC 1.5—was amended to make this even more specific. At the time, the Board of Governors noted that, notwithstanding the injunctions from both the Supreme Court and the Bar, “the foregoing principles are elusive to many practitioners.” That point was aptly illustrated last year when the Supreme Court disciplined a lawyer for failing to return a “nonrefundable” fee after performing comparatively little work on a matter. In this column, we’ll look at both the authority authorizing the use of flat fees paid in advance and the circumstances under which they are refundable.

Flat Fees Paid in Advance

OSB Formal Ethics Opinion 2005-151 emphasizes (at 548) that “[t]he Oregon RPCs do not prohibit fixed fee agreements.” In fact, they are common in many practice areas ranging from criminal defense to estate planning. Flat fees can either be paid in advance or paid in arrears when the work is completed. If they are paid in advance, then like any other advance they must normally be

deposited into the lawyer's trust account until the work or agreed milestones are completed.

If, however, a flat fee is to be considered as "earned on receipt," then RPCs 1.5(c)(3) and 1.15-1(c) require that it be put in the lawyer's general account *provided* the client first entered into a written agreement in line with RPC 1.5(c)(3):

"[A] fee denominated as 'earned on receipt,' 'nonrefundable' or in similar terms [is not permitted] unless it is pursuant to a written agreement signed by the client which explains that:

"(i) the funds will not be deposited into the lawyer trust account, and

"(ii) the client may discharge the lawyer at any time and in that event may be entitled to a refund of all or part of the fee if the services for which the fee was paid are not completed."

If a written agreement complying with RPC 1.5(c)(3) is not in place, then Formal Ethics Opinion 2005-151 notes (at 549) that, even if the lawyer calls the fee "earned on receipt," "the funds must be placed into the trust account and can only be withdrawn as earned."

Refunding "Nonrefundable" Payments

The Supreme Court last year in *In re Obert*, 352 Or 231, 243, 282 P3d 825 (2012), both summarized the longstanding Oregon case law noted above and succinctly explained the reason even "nonrefundable" fees must be refunded (in whole or in part) when the work involved is not completed:

"RPC 1.5(a) provides that '[a] lawyer shall not enter into an agreement for, charge or collect an illegal or clearly excessive fee or a

clearly excessive amount for expenses.’ Importantly, the fee must not be ‘clearly excessive’ at both the time the client and the attorney enter into an agreement and at the time that the attorney charges and *collects* the fee . . . Thus, a fee could be reasonable at the time the parties enter into the agreement but ‘clearly excessive’ when the attorney collects that fee. . . .

“This court has held that a lawyer violates RPC 1.5(a) when the lawyer ‘collects a nonrefundable fee, does not perform or complete the professional representation for which the fee was paid, but fails promptly to remit the unearned portion of the fee.’” (Citations omitted; emphasis in original.)

The question of what portion—if any—of the fee that the lawyer is entitled to keep turns under both the Supreme Court’s decisional law and Formal Ethics opinion 2005-151 on the degree to which the particular tasks covered by the flat fee agreement have been “substantially completed.”

ABOUT THE AUTHOR

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