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**“Retainer”:
A Word in Need of Retiring**

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Lawyers have long and loosely used the word “retainer” when describing a wide range of financial arrangements with their clients. Black’s Law Dictionary, however, defines a “retainer” narrowly as “[a] fee that a client pays to a lawyer simply to be available when the client needs legal help during a specified period or on a specified matter.” Whatever most lawyers think when they use the word “retainer,” it is probably *not* the very rare instance described in Black’s. To add a further wrinkle to this semantic confusion, “retainer” nowhere appears in the Oregon Rules of Professional Conduct. What lawyers usually mean when they say “retainer” is either an advance fee deposit or a prepaid fixed fee. They are distinctly different concepts and neither resembles Black’s definition of a “retainer.” In this column, we’ll look at both.

Advance Fee Deposits

Advance fee deposits are used in a wide variety of practices. They can be coupled with hourly fees, fixed fees (that are paid in arrears) and even the cost-component of contingent fee agreements (when the client has agreed to remain responsible for costs advanced). They are most often collected at the outset of a representation, but—with appropriate terms in a fee agreement—can also be reserved generally or to specific mileposts in a representation such as a set

number of days before trial. Advance fee deposits can be a single fund that the lawyer draws on for payment or “replenishable” periodically as fees are billed so that the deposit becomes the equivalent of “last month’s rent.”

As the phrase implies, an advance fee deposit is a sum that a client pays in advance that will then be billed against as work on the matter progresses. Because an advance fee deposit is not the lawyer’s money until it has been earned or the costs involved incurred, advance fee deposits must be placed into trust under RPC 1.15-1(a) and (c). Under those same rules, funds on deposit may only be transferred to the lawyer’s business account as fees have been earned or costs advanced. Oregon State Bar Formal Opinions 2005-117, 145, 149 and 172 (among others) discuss the mechanics of advance fee deposits and related trust accounting in detail. They are all available on the Oregon State Bar’s web site at www.osbar.org.

Prepaid Fixed Fees

Fixed fees are common in a many practice areas where the nature of the service is predictable, such as a fixed amount for a simple will. As noted earlier, some fixed fees are paid in arrears—in other words, the fixed fee is charged after the agreed work has been performed. In other instances, however, lawyers may

charge fixed fees that are paid in advance and considered “earned on receipt.”

Criminal defense is a frequent example.

Although the Oregon Supreme Court had developed case law holding that fees denominated as “earned on receipt” could only be used when agreed in writing with the client and were refundable (at least in part) if the services were not performed, the Board of Governors in sponsoring an amendment to the RPCs in 2010 to write these concepts into the rules themselves noted that “the foregoing principles are elusive to many practitioners.” The House of Delegates concurred and the Supreme Court adopted the standards as RPC 1.5(c)(3):

“(3) a fee denominated as ‘earned on receipt,’ ‘nonrefundable’ or in similar terms [is prohibited] 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.”

RPC 1.15-1(c) was amended in the same package to mirror the trust account component in RPC 1.5(c)(3)(i).

Oregon State Bar Formal Opinion 2005-151, which was amended in 2011 to incorporate RPC 1.5(c)(3), discusses fixed fees generally and their “earned on receipt” variant in detail. Reflecting the new rule, Opinion 2005-151 emphasizes

that such treatment must be explained in writing to the client at the outset of a representation. Further, because the fee is considered “earned on receipt,” it must be deposited into the lawyer’s business account rather than the client trust account.

The Oregon Supreme Court in *In re Obert*, 352 Or 231, 282 P3d 825 (2012), relied on both its own long-standing case law and RPC 1.5(c)(3) in disciplining a lawyer who, after collecting a prepaid fixed fee, did not refund it when the matter resolved essentially without the lawyer’s involvement. The Supreme Court reasoned that when the services contemplated under a prepaid fixed fee are not performed, the fee becomes “clearly excessive” under RPC 1.5(a) because the prohibition in that rule specifically extends to the *collection* of an excessive fee. The Supreme Court also disciplined the lawyer for not having a written fee agreement with the client that spelled-out the prepaid fee.

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Page 5

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