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Get It in Writing: Fixed Fees "Earned Upon Receipt"

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Ten years ago this Fall, the Oregon State Bar proposed and the Oregon Supreme Court adopted a specific set of rules—RPCs 1.5(c) and 1.15-1(c)—governing fixed fees paid in advance and deemed "earned upon receipt." RPC 1.5(c) permits them subject to very specific written disclosures. RPC 1.15-1(c), in turn, exempts them from being deposited into trust—provided the lawyer complied with RPC 1.5(c). Neither rule limits the practice area where this fee model can be used. It is most commonly used, however, where the costs of a particular set of tasks is predictable, overhead throughout the representation is constant and the underlying dynamic favors a single "up front" payment.

When the OSB Board of Governors proposed this set of rules in advance of the 2010 House of Delegates meeting, it noted that the Oregon Supreme Court had long made clear that this fee structure was only permitted when done in writing and that clients were entitled to at least a partial refund if all of the work contemplated was not performed. Nonetheless, the Board observed: "Notwithstanding the clear language in the cases . . ., the foregoing principles are elusive to many practitioners." The Board reasoned that, in essence, "hard-wiring" these elements into the RPCs would hopefully make the requirements both more accessible and easier to follow.

The 2010 amendments have likely achieved those goals for many lawyers. Nonetheless, OSB disciplinary statistics suggest that—at least for some—the principles involved remain "elusive." In this column, we'll first revisit the rules and then survey the consequences of failing to comply with what are now "black letter" requirements.

The Rules

RPC 1.5(c) sets out the basic standards for fixed fees that are paid in advance and are considered "earned upon receipt":

> "A lawyer shall not enter into an arrangement for, charge or collect:
>
> . . .
>
> "(3) a fee denominated as 'earned on receipt,' 'nonrefundable' or in similar terms unless it is pursuant to a written agreement signed by the client which explains that:
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> "(i) the funds will not be deposited into the lawyer trust account, and
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> "(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) then exempts such fees from being deposited into trust:

> "(c) A lawyer shall deposit into a lawyer 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, unless the fee is denominated as 'earned on receipt,' 'nonrefundable' or similar terms and complies with Rule 1.5(c)(3)."

Oregon State Bar Formal Opinion 2005-151, which was revised in 2011 to reflect these amendments and which is available on the OSB web site, discusses both the "mechanics" of using this model and the need to refund any fees collected but not earned if the work involved is not completed as agreed. The OSB Fee Agreement Compendium, which was updated in 2018 and which is also available in the members section of the OSB web site, includes a model fee agreement complying with these rules.

Failing to Comply

There are two central consequences of failing to follow these rules: lawyer discipline and a fee arrangement that is likely unenforceable—leaving the lawyer with at most a *quantum meruit* remedy measured by what was actually accomplished.

On the former, several decisions this past year in the OSB Disciplinary Reporter series, which is also available on the OSB web site, included instances where the lawyers involved had used written fee agreements—but they did not contain the language required by RPC 1.5(c) (*see, e.g., In re Bottoms*, No. 19-03 (Mar. 1, 2019); *In re Ramirez*, No. 18-181 (Jan. 11, 2019)). The very clarity of the rule doesn't leave much room for a defense of "substantial compliance."

Failure to meet the requirements of RPC 1.5(c) means that the lawyers involved also likely failed to comply with RPC 1.15-1(c) by depositing the advance payments into their general business accounts rather than into trust (*see, e.g., In re Naranjo*, No. 18-193 (Mar. 13, 2019); *In re Olsen*, No. 18-131 (Apr. 3, 2019)). If the lawyer collects such a fee, does not complete the work covered and fails to return at least the unearned portion, then the lawyer is also at risk of being charged with attempting to collect a "clearly excessive" fee in violation of RPC 1.5(a) (*see, e.g., In re Heydenrych*, No. 18-168 (June 26, 2019)). Although the discipline imposed in any given case turns on its individual facts, handling client funds is a particularly sensitive area in the regulatory realm.

On the latter, fee agreements that fail to comply with mandatory requirements are at risk of being found unenforceable. In *Bechler v. Macaluso*, No. CV 08-3059-CL, 2010 WL 2034635 (D Or May 14, 2010) (unpublished), for example, a contingent fee agreement that failed to comply with the disclosures required by ORS 20.340 was held unenforceable—leaving the lawyer with only a *quantum meruit* remedy. By analogy, a fee agreement that does not comply with the disclosures required by RPC 1.5(c) is equally at risk of being found unenforceable.

ABOUT THE AUTHOR

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