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Prepaid Fees:
New Take on an Old Subject

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Late last year, the Oregon Supreme Court on the recommendation of the Oregon State Bar revisited a topic that Oregon lawyers have wrestled with for over thirty years: fees that are paid in advance of the services rendered that a lawyer wishes to treat as the lawyer's property immediately. Effective January 1, Oregon RPC 1.5(c)(3) was amended to specifically prohibit the terms "earned upon receipt" and "nonrefundable" fee. A new companion provision—RPC 1.5(c)(4)—was added to recast the idea involved into a "prepaid" fee with very stringent requirements.

In this column, we'll briefly survey the history of how we got to this new formulation, the mechanics of the new rule, and the potential consequences of violating it.

Before we do, however, two qualifiers are in order.

First, the recent amendments are likely not the last word in this area. OSB Formal Opinion 2005-151 addresses fixed fees of various types—including those that use the now-prohibited terms. Look for that opinion to be updated.

Second, ABA Model Rule 1.5 does not contain a similar provision, and states vary in their approach to this area. ABA Formal Opinion 505 (2023) notes (at 5) that the Model Rules "do not allow a lawyer to sidestep the ethical

obligation to safeguard client funds with an act of legerdemain . . . characterizing an advance as 'nonrefundable' and/or 'earned upon receipt.'" Lawyers practicing beyond Oregon, therefore, need to carefully review the rule in the jurisdiction in which services are being provided if they are attempting to claim ownership of a fee paid in advance of the services.

A Little History

It has long been the general rule in Oregon that funds paid in advance of services are treated as remaining client property until the services contemplated are rendered. Former Oregon Disciplinary Rule 9-101, for example, required funds paid in advance to be deposited into trust and current Oregon RPC 1.15-1 continues that requirement.

In a pair of disciplinary cases from the early 1990s, however, the lawyers involved contended that they were exempt from depositing funds paid before services into trust because they supposedly had agreements with the clients concerned permitting them to treat the payments as "nonrefundable." In both instances (*In re Hedges*, 313 Or. 618 (1992) and *In re Biggs*, 318 Or. 281 (1994)), the lawyers couldn't prove the agreements they claimed and were disciplined. At the same time, the Supreme Court left the door open to this approach through client agreement—with *Biggs* noting (at 293): "Without a clear

written agreement between a lawyer and a client that fees paid in advance constitute a non-refundable retainer earned on receipt, such funds must be considered client property and are, therefore, afforded the protections imposed by DR 9-101(A)."

In 2010, the OSB proposed and the Supreme Court adopted then-RPC 1.5(c) (and a corresponding amendment to RPC 1.15-1) that codified the ability of Oregon lawyers to denominate fees as "earned upon receipt" or "nonrefundable" under very narrow circumstances consistent with Oregon case law. At the time, the OSB House of Delegates materials accompanying the proposed amendments noted that although the Supreme Court had articulated clear standards in the case law, "the foregoing principles are elusive to many practitioners."

Despite this change, problems remained. The OSB Client Security Fund approached the OSB Legal Ethics Committee in 2022 about revisiting the rule as roughly 25 percent of CSF claims involved the failure to refund unearned fixed fees. After a lengthy period of study and outreach, the LEC developed the proposal that eventually became the revised version of RPC 1.5(c)(3), new RPC 1.5(c)(4), and a corresponding amendment to RPC 1.15-1.

Prepaid Fee

As noted, RPC 1.5(c)(3) now prohibits the terms "earned upon receipt" and "nonrefundable" fee.

New RPC 1.5(c)(4) allows a "prepaid" fee to be considered the lawyer's property immediately if it follows a written agreement signed by the client that explains:

> (i) the nature of the fee arrangement and the scope of the services to be provided;
> (ii) the total amount of the fee and the terms of payment;
> (iii) that the fee will not be deposited into a lawyer trust account;
> (iv) that the client may terminate the services of the attorney at any time for any reason or no reason; and
> (v) that the client may be entitled to a refund of all or part of a fee if the services for which the fee was paid are not completed and how any such refund would be calculated.

Consequences

Despite the 2010 amendments, the Oregon State Bar's *Rules of Professional Conduct Annotated* continued to reflect many cases involving lawyers disciplined for failing to meet the codified requirements for fees paid in advance that were intended to be the lawyer's property immediately. If history is a guide, lawyers who fail to meet the rigorous requirements under new RPC 1.5(c)(4) will be at risk of regulatory discipline. Further, the very clarity of the new rule doesn't leave much room for a defense of "substantial compliance."

Beyond discipline, fee agreements that fail to comply with mandatory requirements are at risk of being found unenforceable. In *Bechler v. Macaluso*, 2010 WL 2034635 (D. Or. May 14, 2010) (unpublished), for example, a contingent fee that failed to comply with ORS 20.340 was held unenforceable.

ABOUT THE AUTHOR

Mark J. Fucile of Fucile & Reising LLP advises lawyers, law firms, and corporate and governmental legal departments throughout the Northwest on professional ethics and risk management. Mark has chaired both the WSBA Committee on Professional Ethics and its predecessor, the WSBA Rules of Professional Conduct Committee. Mark has served on the Oregon State Bar Legal Ethics Committee and is a member of the Idaho State Bar Section on Professionalism & Ethics. Mark writes the Ethics Focus column for the Multnomah (Portland) Bar's *Multnomah Lawyer*, the Ethics & the Law column for the WSBA *Bar News* and is a regular contributor on legal ethics to the WSBA *NWSidebar* blog. Mark is the editor-in-chief and a contributing author for the WSBA *Legal Ethics Deskbook* and a principal editor and contributing author for the OSB *Ethical Oregon Lawyer* and the WSBA *Law of Lawyering in Washington*. Before co-founding Fucile & Reising LLP in 2005, Mark was a partner and in-house ethics counsel for a large Northwest regional firm. He also taught legal ethics for over a decade as an adjunct at the University of Oregon School of Law. Mark is admitted in Oregon, Washington, Idaho, Alaska and the District of Columbia. He is a graduate of the UCLA School of Law. Mark's telephone and email are 503.860.2163 and Mark@frllp.com.