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Whole Meal Deal: Fixed Fee Agreements

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Fixed fee agreements are increasingly used in a wide variety of practice areas ranging from will preparation to product liability defense. In some instances, the fixed fee is paid in advance. In others, it is paid in arrears. With either variant, however, the central feature is that the lawyer has agreed to handle a discrete task or matter for a fixed amount.

In this column, we'll look at three key questions that can arise in the fixed fee context. First, if the fixed fee is paid in advance, should it be deposited into the law firm's trust account or its general account? Second, what happens if the representation ends before the work is completed? Third, can the firm increase the fee if the matter turns out to be more difficult than anticipated?

Advance Payment

If a fixed fee is paid in advance but will only be treated as earned as the work is performed, OSB Formal Ethics Opinion 2005-151 counsels that the funds should be deposited into the firm's trust account. The funds can then be withdrawn by the firm when the work is completed or as agreed milestones are met.

By contrast, if a fixed fee paid in advance is treated as "earned on receipt," RPC 1.5(c)(3), which was added to the professional rules by amendment in

2010, allows the fee to be deposited directly into the firm's general account if very specific written disclosures are included in the fee agreement at the outset of the representation. The 2010 amendments were the result of a number of cases in which lawyers claimed that flat fees were "earned on receipt" but lacked documentation to that effect, including *In re Fadeley*, 342 Or 403, 409-10, 153 P3d 682 (2007), and *In re Balocca*, 342 Or 279, 288-89, 151 P3d 154 (2007).

Early Exit

If the representation ends (by withdrawal, disqualification or discharge) before the work is completed, the firm does not get to keep the entire fixed fee—even if it was labeled "earned on receipt." Formal Ethics Opinion 2005-151 puts it this way (at 3):

> "A lawyer who does not complete all contemplated work will generally be unable to retain the full fixed fee. This is consistent with *In re Thomas*, 294 Or 505, 526, 659 P2d 960 (1983), in which the court stated: 'It would appear that any fee that is collected for services that is not earned is clearly excessive regardless of the amount.'"

New RPC 1.5(c)(3)(ii) makes this same point. This result also reflects case law preceding the 2010 amendments, including *Fadeley* and *Balocca*, where lawyers were disciplined for failing to return unearned fixed fees.

More Difficult than Expected

Generally, a firm may not charge more than the agreed fixed fee even if the matter turns out to be more difficult than expected. Formal Ethics Opinion 2005-151 notes that fixed fee agreements, like their hourly and contingent counterparts, may be modified, but only if done in accord with the exacting ethical and contractual standards set out in Formal Ethics Opinion 2005-97 (including client consent).

If there is some degree of uncertainty about the scope of a matter, the safer course is to structure the representation so that the fixed fee component applies to the relatively "known" portion and an hourly fee component applies to the comparatively "unknown" portion. The key to making a blended arrangement work from both practical and contractual perspectives is to carefully spell out in a written agreement the specific stages to which the fixed and hourly components apply.

Summing Up

Fixed fees can offer significant benefits for lawyers and clients alike. For lawyers, fixed fees are an attractive way to market services which are relatively predictable. For clients, fixed fees offer budgetary certainty. Particularly if the fee is paid in advance, however, fixed fee agreements warrant careful documentation at the outset to avoid misunderstandings later.

ABOUT THE AUTHOR

Mark J. Fucile of Fucile & Reising LLP focuses on legal ethics, product liability defense and condemnation litigation. In his legal ethics practice, Mark handles professional responsibility, regulatory and attorney-client privilege matters and law firm related litigation for lawyers, law firms and legal departments throughout the Northwest. He is a past member of the Oregon State Bar's Legal Ethics Committee, is a past chair of the Washington State Bar Rules of Professional Conduct Committee, is a member of the Idaho State Bar Professionalism & Ethics Section and is a co-editor of the OSB's Ethical Oregon Lawyer and the WSBA's Legal Ethics Deskbook. Mark also writes the monthly Ethics Focus column for the Multnomah (Portland) Bar's Multnomah Lawyer, the quarterly Ethics & the Law column for the WSBA Bar News and is a regular contributor on risk management to the OSB Bar Bulletin, the Idaho State Bar Advocate and the Alaska Bar Rag. Mark's telephone and email are 503.224.4895 and Mark@frllp.com.