

## FORMAL OPINION NO 2005-151

[REVISED 2011]

### Fee Agreements:

#### Fixed Fees

#### Facts:

Lawyer wishes to use fixed-fee agreements for certain types of services that Lawyer will perform for clients. Lawyer intends to obtain most or all of the fixed fee in advance of performing any services for the client.

#### Questions:

1. May Lawyer enter into fixed-fee agreements with clients?
2. May Lawyer deposit prepaid fixed fees in Lawyer's general account?
3. May Lawyer keep all of the prepaid fixed fee even if the representation ends before all of the work is performed by Lawyer?
4. May Lawyer charge more than the fee fixed by the agreement when the matter unexpectedly involves more work than usual for the particular matter?

#### Conclusions:

1. Yes, qualified.
2. No, qualified.
3. No, qualified.
4. No, qualified.

#### Discussion:

For purposes of this opinion, the term *fixed-fee agreement* includes any fee agreement in which the lawyer's charge for specified services is a fixed dollar amount, regardless of when the lawyer is paid or how much work the lawyer must do and regardless of the name applied by the

lawyer to the agreement—e.g., “flat fee,” “nonrefundable retainer,” “pre-paid legal fee,” etc.

1. *Propriety of Fixed-Fee Agreements.*

Oregon RPC 1.5(a) and (b) provide:

(a) 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.

(b) A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. Factors to be considered as guides in determining the reasonableness of a fee include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

The Oregon Rules of Professional Conduct do not prohibit fixed-fee agreements. In addition, case law establishes that fixed-fee agreements are permitted as long as they are not excessive or unreasonable. *In re Hedges*, 313 Or 618, 623–24, 836 P2d 119 (1992) (“[W]here a [nonrefundable fixed-fee] arrangement is used ‘the designation of the fee as nonrefundable must be made by a clear and specific written agreement

between client and lawyer.”); *In re Biggs*, 318 Or 281, 293, 864 P2d 1310 (1994). The mere fact that a fixed fee may result in a fee in excess of a reasonable hourly rate does not in itself make the fee unethical. *In re Gastineau*, 317 Or 545, 552, 857 P2d 136 (1993). On the other hand, “[t]he disjunctive use of the word ‘collect’ means that the excessiveness of the fee may be determined after the services have been rendered, as well as at the time the employment began.” *In re Gastineau*, 317 Or at 550–51; OSB Formal Ethics Op No 2005-15; OSB Formal Ethics Op No 2005-69; OSB Formal Ethics Op No 2005-97; *In re Sassor*, 299 Or 720, 705 P2d 736 (1985).

2. *May Prepaid Fixed Fees Be Deposited into the Lawyer’s General Account?*

Oregon RPC 1.5(c) provides, in part:

A lawyer shall not enter into an arrangement for, charge or collect:

. . . .

(3) a fee denominated as “earned on receipt,” “non-refundable” or in similar terms 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.

Oregon RPC 1.15-1(a) provides, in pertinent part:

(a) A lawyer shall hold property of clients or third persons that is in a lawyer’s possession separate from the lawyer’s own property. Funds, including advances for costs and expenses and escrow and other funds held for another, shall be kept in a separate “Lawyer Trust Account” maintained in the jurisdiction where the lawyer’s office is situated. Each lawyer trust account shall be an interest bearing account in a financial institution selected by the lawyer or law firm in the exercise of reasonable care. . . .

Oregon RPC 1.15-1(c) provides:

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).

Ordinarily, fees are earned as work is performed. *See* OSB Formal Ethics Op No 2005-149. Without a clear written agreement between a lawyer and a client that fees paid in advance are earned on receipt, such funds must be considered client property and are, therefore, afforded the protections imposed by Oregon RPC 1.15-1. *In re Biggs*, 318 Or at 293 (discussing *former* DR 9-101). If there is a written agreement with the client that complies with the requirements of Oregon RPC 1.5(c)(3), the funds belong to the lawyer and may not be put in the lawyer’s client trust account. If no such agreement exists, the funds must be placed into the trust account and can only be withdrawn as earned. *See, e.g., In re Hedges*, 313 Or at 623–24; OSB Formal Ethics Op No 2005-149.

3. *Early Termination by Client and the “Nonrefundable Fee.”*

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.” Moreover, Oregon RPC 1.5(c)(3)(ii) requires the lawyer to inform the client in the written fee agreement that the client 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.

Accordingly, even a fee designated as “nonrefundable” is subject to refund if the specified services are not performed. Thus, designation of a prepaid fixed fee as “nonrefundable” may be misleading, if not false, in violation of Oregon RPC 8.4(a)(3) (prohibiting conduct involving “dishonesty, fraud, deceit or misrepresentation that reflects adversely on the lawyer’s fitness to practice law”). Whether, or to what extent, a bad-

faith termination by a client near the end of a matter requires a refund of fees paid in advance is a question beyond the scope of this opinion.

4. *Charges in Excess of Fixed-Fee Agreement.*

A lawyer may not charge more than the agreed-on fee, and any fee charged in excess of the agreed-on fee is excessive as a matter of law. It follows that unless either (a) the fee agreement itself allows for changes over time<sup>1</sup> or (b) the fee agreement is permissibly modified pursuant to OSB Formal Ethics Op No 2005-97, the agreed-on fixed amount is all that the lawyer may collect.

**Approved by Board of Governors, June 2011.**

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<sup>1</sup> For example, a fixed-fee agreement might provide a fixed fee for each stage of a project rather than a fixed fee for the whole. Similarly, agreements that allow periodic adjustments to hourly fees or costs are also permissible unless illegal or otherwise unreasonable.

COMMENT: For additional information on this general topic and other related subjects, see *The Ethical Oregon Lawyer* § 3.2-1 (excessive or unreasonable fees), § 3.4-2 (description of services to be rendered), § 3.4-7 (retainer), § 12.3-6(a) (client retainers in trust account) (OSB Legal Pubs 2015); *Fee Agreement Compendium* ch 11 (updated 4/2011, available only in BarBooks™ online library); *Restatement (Third) Of The Law Governing Lawyers* §§ 34, 38 (2000) (supplemented periodically); and ABA Model RPC 1.5.

