OREGON STATE BAR
Board of Governors Agenda

Meeting Date: April 18, 2025
From: Legal Ethics Committee
Re: RPC 1.5 and RPC 1.15-1

Action Recommended

Recommend that the following amendments to RPC 1.5 and RPC 1.15-1 be submitted to the House of Delegates for its 2025 meeting.

Background

In June of 2022, the Client Security Fund (CSF) requested that the LEC review the current rules regarding fees earned on receipt within the Oregon RPCs. The CSF noted that approximately 25 percent of all claims paid out by the CSF arose from the failure to refund unearned flat fees. These fees are generally denoted, by the current RPC 1.5(c) as "non-refundable" or "earned on receipt."

The LEC reviewed this request, and also invited public comment on the recommendations originally proposed by the CSF. Public comment expressed substantial concern about some of the recommendations that the CSF proposed. After reviewing the rules, and discussing the proposals with practitioners, the LEC chose to proceed with a more tailored approach.

In June of 2023, the LEC recommended the adoption of these amendments by the Board. The Board requested that the LEC review the amendments, in consideration of the disclosures that would be required under the amendment, as well as case law surrounding "earned on receipt."

In November 2023, the LEC requested the Board recommend changes to RPC 1.5 and 1.15 to remove reference to "refundable fees" and "earned on receipt" for discussion at the 2024 House of Delegates. The LEC indicated that it had reviewed prior case law and noted that the ABA Model Rules and ABA Formal Op. 505 strongly disfavor the language.[1] Additionally, the LEC recommended disclosures be provided on a form agreement. The Board approved this language in 2023.

[1] Quoting *In re Long*, 368 Or. 452, 455-56, 474-75 (2021), ABA Formal Op. 505 notes that this language creates unnecessary risks for the client (ABA Formal Op. 505 at 7 n. 24). ABA Formal Op. 505 perceives this type of langauge as simply "sidestepping" an attorney's ethical obligation to safeguard client funds (ABA Formal Op. 505 at 5).

As the final agenda for the 2024 House of Delegates was drafted for review and approval by the Board, several public comments from practitioners raised concerns that the proposed amendments to RPCs 1.5 and 1.15-1 could become highly contentious on the floor. The Board sent the amendment back for review by the LEC, with recommendations to consider the comments they received regarding the amendments.

The LEC assembled a small group of four Legal Ethics Committee members and a practitioner that utilized prepaid fees. The small group included a former member of the Client Security Fund Committee and immigration attorney, a practitioner that used prepaid fees in their prior criminal practice, a professional responsibility attorney, and a practitioner who utilized prepaid fees in a transactional practice.

Options

1. Recommend that the following amendments to RPC 1.5 and RPC 1.15-1 be submitted to the House of Delegates for its 2025 meeting.

2. Amend the recommendation.

3. Refer back to the LEC for further study.

Discussion

After multiple discussions, the small group agreed that the following language would be easier for practitioners to utilize in their practice and effectively revise the RPCs to remove "nonrefundable fee" langauge that had been criticized within *In re Long* and ABA Formal Op. 505.

RULE 1.5 FEES.

* * *

(c) 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: (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.~~

(4) a fee described as a "prepaid fee" or similar terms, unless it is pursuant to a written agreement signed by the client which explains that

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(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) the fee will not be deposited into a lawyer trust account;
(iv) the client may terminate the services of the attorney at any time for any reason or no reason; and
(v) 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.

RULE 1.15-1 SAFEKEEPING PROPERTY.

* * *

(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)**(4)**~~(3)~~.

The revised rule language substantially simplifies the original November 2023 proposal (see Exhibit 1). After receiving feedback about the disclosure form's placement in the Rules of Licensure, the LEC removed the form and instead incorporated key disclosure elements directly into the rule. The LEC opted to integrate the salient parts of the disclosure agreement into the rule itself and substantially edit the language to simplify the rule. The broader language assists members in crafting a fee agreement that will be understandable to the client and will not be substantial burdensome.

Subsection (i) requires that the fee agreement place in writing the scope of the representation. Subsection (ii) requires the fee agreement state the total amount of the fee charged to the client along with the terms of payment. The combination of these two provisions will require attorneys to capture the scope of their representation, including the services that are included in the prepaid fee. For many providers with unbundled legal services, this provision allows the client to understand what services are included with the prepaid fee.

Subsection (iii) informs the client that the prepaid fee will not be held in a lawyer trust account. Several small group members debated whether to provide clients the option to hold the prepaid fee in a lawyer trust account. However, the concern was that a client's request to hold funds in trust may force a practitioner, who does not utilize a trust account, to incur the burden and cost of operating a trust account for a single client. The LEC opted to move forward with this language.

Subsection (iv) and (v) notify the client that the client may terminate the representation at any time. It also provides the client with notice that a refund may be available. This provision, along with removing the "nonrefundable" or "earned on receipt" language, informs the client that they can terminate their attorney's services and seek a partial refund if services are not completed or satisfactory.

Staff also forwarded the approved LEC changes to some of the members who provided public comments on the rule last year. One commenter, John Grant, noted that he was amenable to this version of the Rule (Exhibit 2). Mr. Grant noted some technical drafting suggestions, which were incorporated into the rule.

The LEC also recommends that if the rule is adopted by the House of Delegates, the implementation date be delayed allowing for continued education on the rule. Staff would make such a request when presenting the rule for adoption before the Oregon Supreme Court.

Attachements:

Exhibit 1 – LEC Memorandum from Nov. 2023 BOG
Exhibit 2 – Email from John Grant

OREGON STATE BAR
Board of Governors Agenda

Meeting Date: November 18, 2023
From: Legal Ethics Committee
Re: Amending RPC 1.5 and 1.15-1

Action Recommended

The Legal Ethics Committee (LEC) recommends that the Board of Governors submit the following amendments to the Rules of Professional Conduct 1.5 and 1.15-1 attached as Exhibit 1 to the House of Delegates and recommend adoption in 2024.

Background

In June of 2022, the Client Security Fund (CSF) requested that the LEC review the current fee earned on receipt rules within the Oregon RPCs. Of note, the CSF noted that approximately 25 percent of all claims paid out by the CSF arose from the failure to refund unearned flat fees. These fees are generally denoted, by the current RPC 1.5(c) as "non-refundable" or "earned on receipt."

The LEC undertook a review of this request, and also invited public comment on the recommendations originally proposed by the CSF. Public comment indicated that there was substantial concern about some of the recommendations that the CSF proposed. After reviewing the rules, and discussing the proposals with practitioners, the LEC opted to move forward with a more tailored approach. The proposed amendment prohibits the use of "nonrefundable" or "earned on receipt" and instead opts for the use of "flat fee," "prepaid fixed fee," or "prepaid flat fee."

In June of 2023, the LEC recommended the adoption of this amendments by the Board. The Board requested that the LEC review the amendments, in consideration of the disclosures that would be required under the amendment, as well as case law surrounding "earned on receipt."

The LEC discussed the issues involved with the case law, and resubmits the amendment without change. The LEC has changed the recommended disclosures that should be adopted by the Board.

Options

1. The BOG may approve of the LEC's proposed amendments, conditionally approve of the Conspicuous Disclosures, and submit the proposed amendments to the HOD.

2. The BOG may amend the LEC's proposed amendments or amend the Conspicuous Disclosures, and submit the amended proposed amendments to the HOD.

3. The BOG may decline to submit the LEC's proposed amendments, and/or submit it back to the LEC with instructions for further review.

Discussion

A. "Earned on Receipt"

After the June 2023 meeting, the LEC reviewed the case law surrounding "earned on receipt" as It has progressed over the years. The LEC studied a number of cases that has used the terminology "earned on receipt," and "nonrefundable." The original provision under RPC 1.5 was adopted with reference to the Oregon Supreme Court noting the holdings in in *In re Balocca*, 342 Or. 279 (2007 and *In re Fadeley*, 342 Ore. 403 (2007). Oregon Supreme Court case law notes that a lawyer may place funds in their operating account if "if the client has agreed, in writing, that all legal fees paid are deemed earned by the lawyer upon receipt." *In re Balocca*, 342 Ore. 279 (2007), citing its first pronouncement of the rule in *In re Hedges*, 313 Ore. 618 (1992).

The Oregon Supreme Court has, in recent years, moved away from using the terminology "nonrefundable fees." It last used the term substantively in 2012, in *In re Obert*, 352 Or. 231 (2012).[1] The Court, in recent years, have used "earned on receipt" to reference fixed fees (*see In re Long*, 368 Or. 452, 456 (2021)).

The LEC considered the option of retaining "earned on receipt" in its discussion on this issue. While case law provided guidance on the inclusion of the term, the LEC's concern was that "earned on receipt" like "non-refundable" is still completely misleading to the public. The LEC noted that requiring "earned on receipt" or "non-refundable" is contradictory to the provisions of RPC 1.5 which allows for any fee that is not earned to be refundable.[2] Changing the terminology to fixed fee or flat fee allows practitioners to continue to utilize the model to provide legal services, but removes the language that misleads clients.

In support of this provision, the LEC also noted that ABA Formal Opinion 505 came out this year. ABA Formal Opinion 505 echoes several states that have banned referring to fees as "earned on receipt" or "nonrefundable." It notes

[1] The Court does use the term in a citation in *In re Bertoni*, 363 Or. 614 (2018), but does not refer to such fixed fees as non-refundable.

[2] The Oregon Supreme Court explains this somewhat inapposite position by that there are two separate lines of analysis with different burdens. The first line is (1) whether the lawyer properly entered into a flat-fee agreement and the second line is (2) whether the lawyer properly earned their flat fee. *In re Bertoni,* 363 Or. at 614 n. 5.

> Some lawyers use labels like "nonrefundable retainer," "nonrefundable fee," or "earned on receipt" in the body or title of a fee agreement. These are not actual types of fees. And use of these descriptors does not, in and of itself, make a fee arrangement a general retainer. In fact, these terms are most often used in an attempt to make an advance fee nonrefundable. The Model Rules of Professional Conduct 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." This approach does not withstand even superficial scrutiny.

The LEC agreed with the analysis of the ABA Formal Opinion, that the usage of the terms non-refundable or "earned on receipt" only seek to dissuade the consumer from seeking a refund of fees that have not been earned by the attorney. ABA Formal Opinion 505 goes further than the recommendation of the LEC, also requiring that funds in a flat fee agreement be required to be deposited into trust until earned by the lawyer. While the Client Security Fund recommended this option to the LEC, the LEC noted that public comment was not in favor of this recommendation.

For these reasons, the LEC is recommending the same language referred to the Board in June 2023.

B. Disclosures

The LEC reviewed the disclosure required and noted the concerns that the Board had about creating too long of a required disclosure list. They have distilled the disclosures to the essential provisions that would provide robust and simple disclosure to their client about how the prepaid fee would work, that the client could terminate the attorney, and that the client could be entitled to a refund. The required disclosures would be approximately 1 page long. A copy of the disclosures are attached as Exhibit 2.

Staff would recommend conditionally adopting them to be placed into the Rules of Licensure if the House of Delegates adopts these changes. Conditionally adopting these changes would allow for Delegates to understand what the disclosures would look like prior to the House of Delegates.

Exhibits

Exhibit 1 – LEC Recommended Amendments to RPC 1.5 and 1.15-1
Exhibit 2 – LEC Recommended Conspicuous Disclosure
Exhibit 3 – Letter from Mike Purcell – Current Member of the LEC and former Member of the Client Security Fund Committee
Exhibit 4 – ABA Formal Ethics Op. 505 (2023)
Exhibit 5 – LEC Memorandum to the Board of Governors June 2023

RULE 1.5 FEES.

(c) 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: (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.~~

(4) a fee described as a "prepaid fee," "prepaid fixed fee," "prepaid flat fee," or similar terms unless it is pursuant to a written agreement signed by the client which includes the conspicuous disclosures for prepaid fees as adopted by the Oregon State Bar, prior to the acceptance of any prepaid fee from the client.

RULE 1.15-1 SAFEKEEPING PROPERTY.

(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)**(4)**~~(3)~~.

PREPAID FEE DISCLOSURE[1]

1. What you'll pay us. You (the client) agree to pay us (the lawyer/law firm) a Prepaid Fee (subject to refund) of $[amount].

2. What we will do. In return for the Prepaid Fee, we'll do: [Describe legal services to be performed for the Prepaid Fee].

3. Additional legal fees. You [will/won't] have to pay legal fees in addition to the Prepaid Fee. [Describe circumstances, if any, under which the client will owe legal fees in addition to the Prepaid Fee, and the rate or amount at which those fees will be charged.]

4. Expenses. You [will/won't] have to pay costs and expenses in addition to the Prepaid Fee. [Describe costs and expenses, if any, for which client will be responsible in addition to the Prepaid Fee].

5. Trust account option. You can require us to keep the Prepaid Fee in a trust account. It stays your money until we earn it by work on your case. Otherwise when we get the Prepaid Fee, it's our money (subject to refund). We won't put it in a trust account.

6. You can fire us. You can fire us at any time for any reason or for no reason.

7. Refund of unearned fees. If for any reason we don't finish the Prepaid Fee work, then we haven't earned all of the Prepaid Fee. You're entitled to a prompt refund of the unearned part of the fee.

8. Refund calculation. We'll calculate the amount of any refund as follows: [state method of calculating refund].

9. Fee Dispute Resolution. The Oregon State Bar Association has a Fee Dispute Resolution program. It's an informal way to resolve fee or refund disputes.

Unless bar rules require us to, you can only use the Fee Dispute Resolution Program if we agree to it. We [agree/don't agree] to use the program.

10. Client Security Fund. If we don't refund unearned fees, then you may be able to file a claim with the Oregon State Bar Client Security Fund.

11. Other remedies. You may have other legal remedies available if we don't refund unearned fees.

1 July 10, 2023 iteration.

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November 1, 2023

Board of Governors
Oregon State Bar
Tigard, Oregon

RE: **PROPOSED AMENDMENTS TO RPCs 1.5(c) and 1.15-1.**

Dear Board of Governors:

This proposed reform would enable informed choice by clients as to the handling of advance fees. Misleading terms now present in RPC 1.5(c)(3) would be abolished, and the present mandatory disclosure would be improved.

I. REMOVAL OF MISLEADING TERMS.

Except for the rare "true retainer"[1], saying a fee is "nonrefundable" is widely condemned.[2] In 2017, PLF warned that "[e]ven with the required explanation that the fee is refundable under certain circumstances, it is still conceivable that the expression may be misleading to clients."[3] "Earned on receipt" is no better.[4]

Minnesota bans the terms "non-refundable" and "earned on receipt" and instead approves "advance fee payment as the lawyer's property subject to refund."[5]

North Carolina bans "nonrefundable" as having "as a chilling effect on the client's right to terminate the representation at anytime" but permits lawyers to use the term "prepaid flat fee." Wisconsin bans the term "non-refundable."[6]

II. THIS REFORM IMPROVES ACCESS TO JUSTICE.

From 2018 to 2020, CSF paid $29,126.50 in claims to eight (8) of former attorney Andrew Long.

- Long deliberately used "Earned on Receipt" agreements to immediately use funds and not have to put them in a trust Account.

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1 "A true retainer or retaining fee is a fee given to secure the lawyer's future services or, in other words, to preclude the lawyer from agreeing to represent another party to existing or potential litigation or other work." OSB, THE ETHICAL OREGON LAWYER, §3.4-7 (2015 rev)

2 ABA FORMAL OP. 505, "FEES PAID IN ADVANCE FOR CONTEMPLATED SERVICES" (May 3, 2023), at 10, notes 28 and 29.

3 PLF Blog, "Considerations when Charging Flat Fees" (Feb 10, 2017).

4 ABA Formal Op. 505, at 5: The MRPC "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.' This approach does not withstand even superficial scrutiny."

5 Minnesota RPC 1.5(b)(3).

6 North Carolina Formal Ethics Op. 2000-5; Rev. Wisc. Ethics Op. E-93-4 (amended Mar 23, 2015).

- He'd pay refunds with money collected from other clients and use one client's the money to fund other clients' cases.
- Long chose "earned on receipt" fees in lieu of borrowing money or finding other funding to start up his practice
- To dodge his ex-wife's lawyers looking for his funds, Long converted the fees into cash and keep them in a safe in his office.[7]

In the *Long* matter, the Supreme Court stated:

> Although respondent's handling of those advance fees did not itself violate a Rule of Professional Conduct, it nevertheless left respondent's clients vulnerable. "Earned on receipt" fee agreements shift the risk of loss to the client.
>
> * * * If the lawyer has already spent the advance fees and has no other financial resources upon which to draw, then the lawyer may be unable to provide the client with the required refund.
>
> * * * [T]he losses to clients are often much greater. * * * Respondent's misconduct caused extensive injuries, which were not merely financial. Many of respondent's clients had limited financial means and needed their advance fees returned before they could afford to hire new attorneys. When respondent failed to return those advance fees, some clients simply went without legal representation.[8]

III. PROPOSED IMPROVEMENTS TO CLIENT PROTECTION.

A. Plain disclosure of basic terms.

The OSB Fee Agreement Compendium states "it is critical to define precisely what is—and what is not—included in the fixed fee involved" and warns that inaccurate billings can lead to violations of RPC 1.5(a), excessive fees, and 8.4(a)(3), misrepresentation.[9]

Disclosure of just what is covered by the advance fee has proven important for client protection.[10]

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7 CSF report, claim 2018-08 (E.A. Long), at 1.

8 ***In re Long***, 368 Or. 452, 456 (2021)

9 OSB Fee Agreement Compendium, section 11.2

10 ***In re Fowler***, 30 DB Rptr 190 (2016) Flat fee for criminal defense, not deposited into trust account. No written fee agreement, later dispute as to whether terms of representation included trial; lawyer disciplined for among other things, failure to respond directly to the client's request for a partial refund); See also ***In re Carl***, 34 DB Rptr 149, 153 (2020) (additional trial fee charged without mandatory disclosures that would have allowed fee to be deposited into the lawyer's general account); ***In re Celuch***, 35 DB Rptr 28, 29 (2021); ***In re Oh***, 23 DB Rptr 25 (2009) (one part of fee was properly disclosed as "earned on receipt" under pre-2010 rules; second part was not).

B. Plain disclosure of expenses.

Oregon lawyers have charged expenses not incurred and not made a timely refund.[11] This has too often occurred where a fee agreement stated that the fee was "earned on receipt,"[12] likely because "[u]nsophisticated clients may have little idea of the types of additional charges that are customarily incurred and billed."[13]

Wisconsin requires written disclosure of "any expenses for which client will be responsible" as one of several conditions for deposit of advance fees into the lawyer's general account.[14] Oregon should have a similar disclosure requirement if lawyers are to be allowed to bypass the trust account.

C. Right to have funds placed in trust.

Allowing placement of advance fees into the general account puts the client at risk of loss of the fee, either because the lawyer has spent it[15], a third party has levied on the account, or the lawyer has been suspended from practice.[16]

California requires disclosure of the client's right "to require that the flat fee be deposited in an identified trust account until the fee is earned."[17] The District of Columbia has a similar requirement.[18]

Clients have the same rights in Oregon. They deserve the same disclosure. Bar history from not so long ago shows the need for this.

In the early 2000s, incompetent lawyer Jason McBride energetically sought out immigrant clients from whom he collected a large amount of advance fees:

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11 See e.g. ***In re Keeler***,31 DB Rptr 285 (2017)(no refund of unused expense advance not placed in trust); ***In re Eckrem (I)***, 23 DB Rptr 84 (2009)(same); ***In re Dixon***, 24 DB Rptr 1 (2010) (same); See also CSF Annual Claims Report for 2016, OSB Bulletin Feb-Mar 2017 ((**Milstein**), OSB (client paid lawyer $2,000 to hire "team of experts" which never materialized, and for which there was no refund).

12 ***In re Dixon***, 24 DB Rptr 1 (2010).

13 OSB Fee Agreement Compendium (2018 ed.), § 2.10.

14 Wisconsin SCR 20:1.5(g)(1)(c).

15 See e.g. ***In re Hunt***, 31 DB Rptr 73 (2017)(lawyer charged $500 for an expungement, did not do the work, could not refund the fee because lawyer did not have enough money to do so.)

16 S. Weedin, "Attorney Fees: An Ethical Primer", *Missouri Bar Bulletin*, (Sept. 2005), at 26; Alaska Bar Assoc., Ethics Op. 2012-2, Deposit of Advanced Fee Retainers in Client Trust Account, at 3; ***In re Jordan***, 26 DB Rptr 191 (2012) (knowing his suspension from practice was imminent, lawyer accepted advance fees and deposited them into his general account, later pressed client for additional fees just before his suspension took effect, with no realistic possibility of completing the work before the suspension took effect; unearned fees not refunded); ***In re Hayes***, 24 DB Rptr 157 (2010) (same).

17 California RPC 1.15(b)(1)(i).

18 ***In Re Mance***, 980 A.2d 1196, 1207 (DC App 2009) "Where there is no discussion regarding the fee arrangement besides merely stating the overall fee, and no mention of the escrow account option, a client cannot be said to have a sufficient basis to give informed consent to waive the requirements of a rule designed to protect the client's interests.")

> In most instances, McBride completely ignored the majority of his clients' calls, emails, and letters, and failed to provide them with information necessary for them to be able to make informed decisions about the representation. This is astounding given the obvious and understandable desperation felt by these extremely vulnerable clients and repeatedly expressed in their correspondence and messages to McBride.
>
> [I]n some matters where there is no fee agreement and where McBride has acknowledged the need to return money to the client, he has admitted that he does not have the funds to be able to do so. **The funds should be available had they been properly deposited and maintained in trust**.[19] (emphasis added).

D. Basic description of trust account.

The proposal also requires a brief explanation of what a trust account is. This is necessary for the trust account disclosure to have value to clients who most likely will have little or no understanding as to its importance to them.[20]

This is consistent with California where the supreme court has announced that the bar association would "launch a public education campaign to raise awareness of clients' rights with respect to client trust accounts opened on their behalf."[21]

E. Right to terminate lawyer's services without cause.

Present RPC 1.5(c)(3) tells clients they may fire their lawyer, but not that they may do so without cause, which is a near absolute right.[22] Lacking this awareness, and fearing loss of the fee paid, clients may well delay or not exercise this right, even where the lawyer has, for example, engaged in a long pattern of inadequate communication.[23]

F. Unconditional right to return of unearned fees.

The present rule specifies only the client's termination as a basis for a refund of unearned fees, when lawyer's duty to return unearned fees is unconditional.[24]

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19 Aff. ADC Amber Bevaqua-Lynott (Feb 7, 2012), p3, ¶8, (Jason C. McBride discip. proceedings SPRB 12-23/29.

20 See ***In re Mance***, 980 A.2d 1196, 1207(D.C. 2009) (client testified that he had only a "faint idea" what a trust account was.)

21 Supreme Court of California, "California Supreme Court Approves Client Trust Account Protection Program" (news release) (Oct 25, 2022) available at https://supreme.courts.ca.gov/news-and-events/california-supreme-court-approves-client-trust-account-protection-program

22 ***Diamond v. Hogan Lovells US LLP***, 950 F.3d 1200(Mem) (9th Cir. 2020)(internal quotes omitted).

23 See e.g. ***In re Bertoni***, 363 Or 614 (2018) (client was also vulnerable due to lack of English proficiency and being a prisoner; discipline avoided only due bar's clear and convincing proof requirement.)

24 ***In re Thomas***, 294 Or 505, 526 (1983).

By contrast, California requires the lawyer to make disclosure "that the client is entitled to a refund [of unearned fees it] the representation is terminated or the services for which the fee has been paid are not completed."[25]

Wisconsin similarly requires disclosure of "[t]he lawyer's obligation to refund any unearned advanced fee, along with an accounting, at the termination of the representation."[26]

G. Disclosure of refund calculation method.

In Oregon, a trial panel has faulted a lawyer for failure to "provide [client] with any basis for which [client] could reasonably determine what he owed the [lawyer] and what refund, if any, was due him."[27] Another trial panel found that by failing to furnish an accounting, the lawyer prevented the client from knowing what amount should have been refunded as unearned fees.[28]

Alaska, Montana, and Arizona require disclosure of the refund calculation method.[29] In particular, Arizona RPC 1.5(d)(3), which is nearly identical to Oregon RPC 1.5(c)(3), requires further that the disclosure state that the refund will be "based upon the value of the representation[.]" (emphasis added).

Lawyers would have flexibility in crafting the refund calculation, but whatever the formula used, the result would still have to be reasonable under RPC 1.5(a).[30]

H. Disclosure of availability of OSB Fee Dispute Resolution.

Too many clients have had to sue their lawyers to receive a refund of unearned fees, and even then lawsuits have not always been successful.[31] Refunds of unearned fees (if there is a refund) are often long delayed.[32] From 2001 to 2021,

25 California RPC 1.15(b)(1)(ii).

26 Wisconsin SCR 20:1.5(g)(1)d.

27 ***In re Jagger***, 25 DB Rptr 113, 122 (2011).

28 ***In re Houston***, 29 DB Rptr 238, 245 (2015).

29 Alaska Ethics Op. 2012-2, at 1; Montana Ethics Op. 80711; Arizona RPC 1.5(d)(3).

30 See e.g. ***In re Balocca***, 342 Or 279 (2007) (lawyer subject to discipline for charging an unreasonable fee where the lawyer delayed a refund claiming that he should have been credited with $300 for an initial interview when the overall fee for the entire case was $550.)

31 See ***In re Lounsbury***, 24 DB Rptr 53 (2010) (flat fee of $5,000, no refund of unearned fees. After unsuccessful attempt to use OSB fee arbitration, client and recovered a small amount); ***In re Long***, 368 Or. 452 (2021) (client forced to sue, recovered unearned fees through small claims mediation); ***In re Heydenrych***, 33 DB Rptr 239 (2019) (flat fee, no refund of lawyer of unearned fees. Fee agreement stated disputes to be resolved by OSB fee arbitration, but lawyer refused to participate). ***In re Cross***, ___ DB Rptr ___ (2022) (Client forced to sue for unearned fees, lawyer never paid the $10,000 judgment for unearned fees, client only obtained recompense through a CSF award many years later)

32 See e.g. ***In re Ditton***, 16 DB Rptr 69 (2002) (16 mo delay); ***In re Moe***, 16 DB Rptr 139 (2002) (10 mo); ***In re Wilson***, 18 DB Rptr 285 (2004) (27 mo); ***In re Balocca***, 342 Or 279 (2007) (12 mo); ***In re Fadeley***, 342 Or 403 (2007) (36 mo); ***In re Babcock***, 21 DB Rptr 240 (2007) (6 mo).

the average refund delay was 16 months.[33] Often lawyers won't refund anything until after a CSF claim or bar complaint is filed.[34]

The bar's 2018-2020 Diversity Action Plan ("DAP") calls on the bar to "engage in outreach to marginalized communities regarding the availability and purpose of the bar's public protection programs."[35] DAP defines "public protection programs" to include both the Fee Dispute Resolution program and the Client Security Fund.[36]

Given this history, it's reasonable to require lawyers to tell clients if there will be a speedy way for them to to get back unearned fees. The Fee Resolution Dispute Program would be a good option for clients. It easily accessed and sessions are conducted by Zoom. They should know if it will be available.

Nothing in the proposal would require lawyers to participate in Fee Dispute Resolution unless they are already required to, such as in cases received through the Client Referral Service or the Modest Means Program.[37]

I. Disclosure of Client Security Fund availability.

The proposal would require disclosure of CSF as a possible remedy if unearned fees are not returned. Wisconsin has a similar requirement[38]

From 2001 through 2021, CSF paid 522 claims.[39] The largest single category (336 claims) was failure to refund unearned fees.

The average unearned fee claim paid, usually long after the loss of the funds, was $3,423.75. For many clients, that would be a year or more of savings.[40] As the court in *In re Long* observed, such a loss can readily impede access to justice.

As mentioned, OSB DAP 2018-2020 calls on the bar to engage in outreach as to public protection programs, which DAP defines to include CSF.[41] OSB has taken

33 M.Purcell. Memorandum, (8/29/22), in LEC Box Project 22-05 (disciplinary cases spreadsheet).

34 See e.g. ***In re Burns***, 27 DB Rptr 279 (2013); ***In re Ettinger (II)***, 30 DB Rptr 173 (2016); ***In re Ditton***, 16 DB Rptr 69 (2002); ***In re Feest***, 18 DB Rptr 87 (2004); ***In re Wilson***, 18 DB Rptr 285 (2004); ***In re Johnson***, 20 DB Rptr 206 (2006); ***In re Rose***, 20 DB Rptr 237 (2006).

35 OSB 2018-2020 DIVERSITY ACTION PLAN, at 11.

36 OSB 2018-2020 DIVERSITY ACTION PLAN, at 37.

37 OSB Modest Means Program Policies and Procedures, Rule 8.8 (5/2018); LRS policy, ¶ 2(e) (8/2021).

38 Wisconsin SCR 20:1.5(g)(1)(f) (lawyer must disclose "[t]he ability of the client to file a claim with the Wisconsin [CSF] if the lawyer fails to provide a refund of unearned advanced fees.")

39 M.Purcell, "Supporting evidence for proposed RPC reforms" (Memo Aug 29, 2022) Exhibit 18-1, at 164. (Available in LEC dropbox).

40 The U.S. Census Bureau reports that Oregon median household income was $70,084 for the years 2017-2021. https://www.census.gov/quickfacts/fact/table/OR/INC110221. The personal savings rate varies but for August 2023 it was 3.9%. https://www.bea.gov/data/income-saving/personal-saving-rate. This would yield annual savings of $2,733 per Oregon household.

41 OSB 2018-2020 DIVERSITY ACTION PLAN, at 11 and 37.

some steps to improve access to CSF, such as making claim forms available on the OSB website in languages other than English.[42]

More can and should be done. Of the 522 CSF claims paid 2001-2021, over 20% (106 claims) were based on immigration matters.[43] Many disciplinary cases have found immigrants and persons with limited English proficiency to be particular vulnerable clients.[44]

Faster recovery of unearned fees is needed so clients can hopefully hire a new lawyer. There have been cases where the simple filing of a CSF claim triggers return of unearned fees even where the lawyer had long delayed the refund.[45]

The filing of a CSF claim is also of value to the bar, as claims have been referred from the CSF committed to DCO which led to disciplinary action.[46]

J. Possible additional remedies.

Fee arbitration and a potential CSF award are not the client's only options. The disclosure should not be read as limiting the client's available remedies.

IV. PARTICULARLY VULNERABLE CLIENTS NEED PROTECTION.

From 2001 through 2022, approximately 250 clients were affected by fee-related misconduct[47] of their lawyers.[48] Some of categories were persons in finan-

42 https://www.osbar.org/csf. In addition to English, as of October 2023, CSF claim forms are available in Russian, Simplified Chinese, Somali, Spanish and Vietnamese.

43 M.Purcell, "Supporting evidence for proposed RPC reforms" (Memo Aug 29, 2022) Exhibit 18-1, CSF Claims statistics 2001-2021, at 164. (Available in LEC dropbox).

44 See e.g. ***In re Guthrie***, 13 DB Rptr 175, 179 (1999) (clients were "indigent, did not speak English, were not familiar with the American system of justice, and had had significant disruptions to their families."); ***In re Cullen***, 21 DB Rptr 272, 278 (2007) ("At least one of the Accused's clients was a vulnerable victim in that she was unable to speak English, and had to rely on a translator to interpret for her").; ***In re Gonzalez***, 25 DB Rptr 88, 94 (2011)(similar). li

45 ***In re Burns***, 27 DB Rptr 279 (2013); ***In re Ettinger (II)***, 30 DB Rptr 173 (2016) (five year delay in return of fees; refund made only after CSF claim filed); ***In re Enright***, 31 DB Rptr 34 (2017) (flat fee plus costs for a bankruptcy case; no work of value done; refund only made two years later after a CSF claim was filed); ***In re Slythe***, 21 DB Rptr 137 (2022) (lawyer suspended when accepted fee; only made refund 14 months later when a CSF claim was filed); ***In re Chancellor***, 36 DB Rptr 93 (2022) (settlement funds only distributed after 31 delay when client filed a CSF claim).

46 See e.g. ***In re Giles***, 33 DB Rptr 251 (2019); ***In re Logsdon (II)***, 33 DB Rptr 295 (2019); ***In re Johnson***, 33 DB Rptr 370 (2019).

47 RPC 1.5(a), illegal or clearly excessive fee, or clearly excessive amount for expenses; RPC 1.5(c)(3), accepting "earned on receipt" fees absent compliance; RPC 1.15-1(a), failure to segregate client's property; RPC 1.15-1(d), failure to promptly return client property, and on request, furnish accounting; RPC 1.16(a), failure to promptly refund unearned fees to client upon termination of representation. RPC 1.16(d), failure to refund unearned fees or return client property upon termination.

48 M.Purcell, Memo to LEC "Survey of Particularly Vulnerable Clients" (Exhibit 25: Spreadsheet) (Jan 17, 2023), available in MS Box for LEC Project 22-05. ("LEC Memo Jan 17, 2023").

cial distress, prisoners, the disabled, immigrants, and the elderly.[49]

These persons are in special need of trust account protection, and if they are to waive that protection, they must first receive full disclosure in plain language of what they are giving up.

V. PREVIOUS REFORM EFFORTS HAVE FAILED.

A. Required disclosures from 1994 to 2010.

In 1994, the Oregon Supreme Court by decision held that

> 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). [emphasis added].[50]

There was at least one lawyer was disciplined where the fee was described as "non-refundable" without also saying it was "earned on receipt."[51]

B. Rewrite of RPC 1.5(c)(3) and 1.15-1(1)(a) in 2010.

Adopted effective December 2010, RPC 1.5(c)(3) changed prior case law, which had required that the fee be stated to be non-refundable AND earned on receipt to be described either as nonrefundable OR earned on receipt. RPC 1.5(c)(3) also added disclosure requirements that had not been previously required by the supreme court.

Some lawyers kept using "earned on receipt and nonrefundable" fee agreements even after the December 2010 changes which required additional disclosure, and were disciplined as a result.[52]

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49 Financial distress:***: In re Andersen***, 18 DB Rptr 172 (2004); ***In re Balocca***, 342 Or 279 ((2007); ***In re Hayes***, 24 DB Rptr 157 (2010); prisoners (many cases) see for example ***In re Bertoni***, 363 Or 614, 643 (2018); the disabled: ***In re Hammond***, 22 DB Rptr 168 (2008); immigrants: ***In re Jordan***, 26 DB Rptr 191 (2012); ***In re Faulhaber***, 31 DB Rptr 52 (2017); ***In re Roller*** (II), 31 DB Rptr 304 (2017); ***In re Molligan***, 35 DB Rptr 73 (2021); the elderly: ***In re Keeler***, 31 DB Rptr 285 (2017).

50 ***In re Biggs***, 318 Or. 281, 294 (Or. 1994), citing ***In re Hedges***, 313 Or. 618, 623-24 (1992).

51 ***In re Lounsbury***, 24 DB Rptr 53 (2010) (although written agreement designated a $5,000 fee as non refundable, the agreement did not further specify that the fee was "earned upon receipt.").

52 ***In re Bertoni (II)***, 28 DB Rptr 196, 201 (2014) ("The agreement failed to explain that the funds paid to Bertoni would not be deposited into his lawyer trust account, that [Client] could discharge Bertoni at any time, and that if she discharged Bertoni that she may be entitled to a refund of all or part of the fee if the services for which the fee was paid were not completed."); See also, on similar facts: ***In re Williamson***, 31 DB Rptr 173 (2017); ***In re Naranjo***, 33 DB Rptr 89 (2019); ***In re Olsen***, 33 DB Rptr 109 (2019) (same); ***In re Heydenrych***, 33 DB Rptr 239, 243 (2019); ***In re Carl***, 34 DB Rptr 149, 153 (2020); ***In re Tschudy***, 36 DB Rptr 183 (2022) (fee agreement provided for "a one-time flat fee of

C. Failure to study reform of "earned on receipt fees."

The McBride claims, mentioned above, contributed materially to the complete exhaustion of the Client Security Fund for the first time in its history. In response, the CSF Committee formed a task group to make recommendations to the OSB Board of Governors.

One those recommendations was that LEC study the whether "earned on receipt" fees should be repealed. At its meeting in September 2013, the Board unanimously adopted this recommendation.

There is no evidence that the Legal Ethics Committee ever studied the issue. The Board minutes through 2019 show no evidence that any report from LEC was ever returned to the Board.[53]

D. Current RPC 1.5(c)(3) has failed to protect clients.

Even where their agreements apparently complied with RPC 1.5(c)(3) there have been at least two cases where lawyers delayed in making a substantial refund.[54] There also have been many recent cases where the lawyer delayed a refund of unearned fees until after a bar complaint was filed.[55]

CSF claims paid statistics show no improvement after RPC 1.5(c)(3) was enacted in December 2010. In the ten years from 2001 through 2011, CSF paid 135 claims at an average of $3,007.34 each. In the next ten years, 2012 through 2021, CSF paid 201 claims at an average of $3,703.43 each.[56]

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$750" and denominated the fee as "fully earned upon receipt;" agreement did not state that clients may be entitled to a refund of all or part of the fee if the services for which the fee was paid was not completed.").

53 The LEC annual reports from 2013 to 2019 contain no evidence LEC ever studied the possible repeal of earned on receipt fees. BoG minutes for the same years appear not to contain any report back from LEC.

54 ***In re O'Rourke***, 32 DB Rptr 36 (2018) (Client's grandmother paid the lawyer a flat fee of $9,880 to seek early release of her grandson from custody. The lawyer did not complete the representation, and made no refund of any amount of unearned fees; as part of the stipulation for discipline, the lawyer agreed to refund $4,940; bar dismissed its allegation of a violation of RPC 1.5(c)(3); ***In re Kmetic (II)***, 33 DB Rptr 518 (2019) (Flat fee for defense of vehicular manslaughter case, representation terminated early and client demanded return of the entire $47,500 fee; over a year after bar complaint filed, the lawyer refunded $15,000; charges of violation of RPC 1.5(c)(3) were dismissed.)

55 Among others, see ***In re Hafez Daraee***, 32 DB Rptr 252 (2018); ***In re Hunt***, 31 DB Rptr 73 (2017); ***In re Collins,*** 31 DB Rptr 167 (2017); ***In re Keeler***, 31 DB Rptr 285 (2017); ***In re Heydenrych***, 33 DB Rptr 239 (2019)

56 M.Purcell, "Supporting evidence for proposed RPC reforms" (Memo Aug 29, 2022) Exhibit 18-1, CSF Claims statistics 2001-2021, at 164. (Available in LEC dropbox).

VI. CHANGING DEMOGRAPHICS REQUIRE A RESPONSE BY THE BAR.

In 1990, 4.9% of Oregon's population was foreign-born.[57] By 2000, this was 8.5% and by 2021, it was 9.7%. Among the foreign-born, 42.9% have Limited English Proficiency ("LEP").[58]

OSB has found that "Spanish speakers found that deficits in language access are an additional barrier to getting a fair shot in the legal system" and "one of the main concerns of these participants was the attorney's actions, the lack of accountability that exists[.]"[59]

OSB's 2018-2020 Diversity Action Plan ("DAP") calls on the bar to "[d]evelop public legal information materials that are accessible to all Oregonians."[60] DAP implementation would "[d]etermine the readability/grade level of existing content, and set a target standard (e.g.,"Plain English" 8th grade reading level).

The Flesch-Kincaid ("FK") readability test generates grade level and a readability score, with a high score indicating better.[61] The proposed disclosure tests out well at FK grade level 5.43 with a high readability score of 71.73.

Often at the fee agreement phase an LEP client will be helped by a non-professional interpreter. Plain language disclosure will ease the task of interpretation.

VII. OTHER JURISDICTIONS.

Twenty-three (23) jurisdictions require all advance fees be placed in trust.[62] ABA Formal Opinion 505 (May 3, 2023) presents the case for mandatory trust deposits.

Twenty-eight (28) jurisdictions permit advance fees to be placed in an operating account on various conditions.[63] At least ten (10) of these jurisdictions have greater client protections than does Oregon.[64]

The proposal would adopt only disclosure requirements from other jurisdictions, Substantive measures, such as limitations on the amount of advance fees not deposited into trust[65], are <u>not</u> being sought.

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57 https://www.migrationpolicy.org/data/state-profiles/state/demographics/OR
58 https://www.migrationpolicy.org/data/state-profiles/state/language/OR
59 Oregon State Bar, *Licensed Paraprofessional Program: Research Report* (Jan 2022), at 41.
60 OSB Diversity Action Plan 2018-20, at 25.
61 https://www.online-utility.org/english/readability_test_and_improve.jsp
62 AL, CO, DE, HA, ID, IA, KS, MA, MO (if > $2,000), NE, NH, NJ, NM, NY, OK, RI, SD, TX, UT, VA, WV, and WY.
63 AK, AZ, CA, CT, DC, IN, KY, LA, ME, MD, MN, MS, MT, NC, ND, OH, OR, PA, SC, TN, VT, WA, and WI.
64 Greater client protection than Oregon: AK, CA, CT, DC, LA, MN, MT, NC, ND, WI.
65 See Connecticut Informal Op. (Jun 19, 2000) ("the retainer must not be so large as to likely chill the client's right to terminate the attorney-client relationship if the client becomes dissatisfied with the attorney's services.")

VII. CONCLUSION.

Lawyers are already required under RPC 1.5(c)(3) to give specific written disclosure, otherwise advance fees must be placed into trust. Those disclosures are inadequate for the reasons stated above.

The proposal is a well-justified and long-needed reform attempts to address the present inadequacies in disclosure. No lawyer will be required to give disclosure who is not already required to do so.

This proposal is a client-centered reform, as it should be. There is little if any more burden placed on the lawyer. The value to clients is great, as the evidence well establishes. I urge the Board to approve the LEC proposal.

Very truly yours

Michael T. Purcell

AMERICAN BAR ASSOCIATION
STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 505 **May 3, 2023**

Fees Paid in Advance for Contemplated Services

Under the Model Rules of Professional Conduct, a fee paid to a lawyer in advance for services to be rendered in the future must be placed in a client trust account and may be withdrawn only as earned by the performance of the contemplated services. This protects client funds and promotes client access to legal services in the event the representation terminates before all contemplated services have been rendered. All fees must be reasonable, and unearned fees must be returned to the client. Therefore, it is not accurate to label a fee "nonrefundable" before it actually has been earned, and labels do not dictate whether a fee has been earned.

This opinion examines a lawyer's obligations under the ABA Model Rules of Professional Conduct with respect to fees paid in advance for legal work to be performed by the lawyer in the future.[1] In particular, this opinion seeks to clarify the proper handling and disposition of fees paid in advance for legal work to be performed in the future, including where the lawyer must deposit and maintain the funds and when the lawyer may treat them as earned. The opinion also explains when a lawyer must refund all or a portion of fees paid in advance and discusses whether such a payment may be, or can even be labeled, "nonrefundable." The answers are derived from the application of several Model Rules, including: 1.5(a), 1.5(b), 1.15(a), 1.15(c), 1.15(d), and 1.16(d).

Fees for services may be paid after completion of the services, of course. However, for certain matters, many lawyers request or require that funds in a certain amount be paid to the lawyer at the outset of the representation to secure payment for the lawyer's later work. Under the Model Rules such fees must be placed in a Rule 1.15-compliant trust account, to be disbursed to the lawyer only after the fee has been earned. This is to protect the client from the risk that the lawyer may not be able to refund the prepaid fee in the event the representation terminates before the contemplated work is completed. The Model Rules protect the lawyer from the risk of nonpayment by allowing advance fees to be received and protect the client by requiring that the funds are kept safe and separate from the funds of the lawyer or firm.

I. Terminology

As a preliminary matter, it is useful to define terms commonly used to label certain client-lawyer fee arrangements: advances, retainers, flat or fixed fees, and "nonrefundable" or "earned-on-receipt" fees.

[1] This opinion is based on the American Bar Association Model Rules of Professional Conduct as amended by the ABA House of Delegates through August 2022. The laws, court rules, regulations, rules of professional conduct, and opinions promulgated in individual jurisdictions are controlling. This is especially noteworthy for this opinion as jurisdictions have adopted substantially different rules relating to the management of client property including fees paid in advance for legal work to be performed in the future.

A. Advances v. Retainers

Fees paid by a client to a lawyer in advance for legal work to be performed by the lawyer in the future are sometimes referred to as an "advance fee," an "advanced fee," an "advance fee payment," an "advance fee deposit," a "fee advance," or simply an "advance." Advances are also sometimes called "special retainers," "security retainers," or simply "prepaid fees." To be consistent and clear, this opinion will use the term "advance" when discussing fees paid to the lawyer for legal work to be performed in the future.

When a client pays an advance to a lawyer, the lawyer takes possession – but not ownership – of the funds to secure payment for the services the lawyer will render to the client in the future.

This opinion will also refer to the term "retainer" fee. Neither the term "retainer" nor "retainer fee" is found in the Model Rules of Professional Conduct. Regrettably, many lawyers use the term loosely to mean any sum of money paid to the lawyer at or near the commencement of representation.[2] Whereas an advance is a deposit of money with the lawyer to pay for services to be rendered in the future, there is another type of payment that is not for services. Rather, "[t]he purpose of [a retainer] is to assure the client that the lawyer will be contractually on call to handle the client's legal matters."[3] This type of agreement and payment is variously referred to as a "general retainer," "classic retainer," "true retainer," "availability retainer," or an "engagement retainer."[4] Because all of these terms mean the same thing, this opinion will use the term "general retainer" to refer to this arrangement.[5] A general retainer is paid – and deemed earned – upon the promise of availability to represent a client, whether or not services are actually needed or requested by the client.[6] Thus, a general retainer has been conceptualized as a form of an option

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[2] There is widespread agreement that the word "retainer" has been used so inconsistently that is has practically lost all definable meaning. BLACK'S LAW DICTIONARY (11th ed. 2019) ("Over the years, lawyers have used the term 'retainer' in so many conflicting senses that it should be banished from the legal vocabulary.") (quoting Mortimer D. Schwartz & Richard C. Wydick, PROBLEMS IN LEGAL ETHICS 100, 101 (2d ed. 1988)).

[3] CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 506 (West 1986).

[4] Some jurisdictions have commendably sought to define terms and draw distinctions in their court rules. *See* Ariz. Rules of Prof'l Conduct R. 1.5 cmt. [7] (*"*The 'true' or 'classic' retainer is a fee paid . . . merely to insure the lawyer's availability to represent the client and to preclude the lawyer from taking adverse representation. What is often called a retainer but is in fact merely an advance fee deposit involves a security deposit to insure the payment of fees when they are subsequently earned, either on a flat fee or hourly fee basis. A flat fee is a fee of a set amount for performance of agreed work, which may or may not be paid in advance but is not deemed earned until the work is performed. . . ."). *See also* Fla. State Bar R. 4-1.5(e)(2) (defining "retainer," "flat fee," and "advance fee") and Iowa R. Civ. P. 45.8-10 (defining "general retainer," "special retainer, and "flat fee").

[5] It is sometimes said that retainers come in two varieties: "general retainers" and "special retainers." A special retainer is simply an advance going by another, unfortunately misleading, name. *See* Lester Brickman & Lawrence A. Cunningham, *Nonrefundable Retainers Revisited*, 72 N.C. L. REV. 1, 5-6 (1993) ("A special retainer is an agreement between lawyer and client in which the client agrees to pay the lawyer a specified fee in exchange for specified services to be rendered. The fee may be calculated on an hourly, percentage or other basis and may be payable either in advance or as billed.") (footnotes omitted). The Committee is of the opinion that a special retainer is the same thing as an "advance." To be consistent and clear, this opinion will use the term "advance" when referring to such arrangements, although some of the cited sources and authorities may use the term "special retainer."

[6] "Because the general retainer is not a payment for the performance of services, but rather is compensation for the lawyer's promise of availability, the fee is earned by the lawyer at the time the retainer is paid and thus should not be deposited into a client trust account. The general retainer is not an advance deposit against future legal services, which instead would be separately calculated and charged should the lawyer actually be called upon by the client to

contract.[7] In other words, hourly time is not billed against a general retainer and a general retainer is not a flat fee for a specific amount of the lawyer's time – it is solely to reserve the lawyer's availability. An important result of these related features is that the money paid by the client in connection with a general retainer should not be placed in a trust account since it is considered earned upon the commencement of the contract.[8]

Some authorities treat the term "general retainer" or "true retainer," etc., as synonymous with "nonrefundable." This is not correct. A general retainer may, by custom, be considered earned when paid, but this does not mean that it is forever exempt from scrutiny under the Rules. It may be determined to be an unreasonable fee, or even unearned if the lawyer does not make himself or herself available. For example, if a company retains a lawyer to handle a hostile takeover bid should one arise and the lawyer does not, in fact, accept the engagement, then the fee, which may have been paid many months earlier and treated as the lawyer's own property, may be determined to be unreasonable and/or unearned and therefore the subject of an order requiring it to be returned, refunded, or repaid to the client. Other circumstances requiring refund might include the death, disability, suspension, or disbarment of the lawyer. Like all fees, a general retainer must be reasonable under the circumstances.[9]

General retainers "are quite rare,"[10] and have "largely disappeared from the modern practice of law."[11] However, attempts to cast what is actually an advance payment of fees for services to be performed later as a general retainer are very much present today. Given the rarity and unusual nature of a general retainer, and the fact that very few clients would actually need or benefit from one, the nature of the fee and lawyer's obligations and client's benefits under such an agreement must be explained clearly and in detail, including the fact that fees for legal services performed will be charged in addition to the general retainer,[12] and use of the term should be restricted to its traditional definition.

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perform the legal services in the future." Gregory C. Sisk, *Duties to Effectively Represent the Client*, § 4-4.4(b) (A Retainer for Lawyer Availability), *in* LEGAL ETHICS, PROFESSIONAL RESPONSIBILITY, AND THE LEGAL PROFESSION (West 2016).

[7] Lester Brickman, *The Advance Payment Dilemma: Should Payments be Deposited to the Client Trust Account or to the General Office Account*, 10 CARDOZO L REV. 647, 649 n.13 (1989). *See also In re* O'Farrell, 942 N.E.2d 799, 803 (Ind. 2011).

[8] This opinion does not attempt to exhaustively discuss general retainers. Though they can and do have legitimate uses, for years they have been criticized, disfavored, and narrowly construed based on contract law, public policy, and contemporary ethics principles. *See, e.g.*, Charles J. McClain, Jr., *The Strange Concept of the Legal Retaining Fee*, 8 J. LEGAL PROF. 123 (1983) (common law of retainers "rests on rather shaky conceptual foundations" full of "inconsistencies and contradictions" and "contributing yet another irritant to the already strained relations between the legal profession and the public at large"); Pamela S. Kunen, *No Leg to Stand on: The General Retainer Exception to the Ban on Nonrefundable Retainers Must Fall*, 17 CARDOZO L. REV. 719 (1996) (discussing "historical and descriptive misconceptions" and arguing that, in many instances, such retainers generate the fiduciary obligations attending other lawyer-client fee agreements); and Joseph M. Perillo, *The Law of Lawyers' Contracts Is Different*, 67 FORDHAM L. REV. 443, 449-453 (1998).

[9] MODEL RULES OF PROF'L CONDUCT R. 1.5(a); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 34 (2001) [hereinafter RESTATEMENT].

[10] Douglas R. Richmond, *Understanding Retainers and Flat Fees*, 34 J. LEGAL PROF. 113, 116 (2009). *See also In re* O'Farrell, 942 N.E.2d at 804 n.5.

[11] Provanzano v. Nat'l Auto Credit, Inc., 10 F. Supp. 2d 44, 51 (D. Mass. 1998).

[12] MODEL RULES OF PROF'L CONDUCT R. 1.5(b); RESTATEMENT, *supra* note 9, § 38.

This opinion focuses on advance fees paid by individual clients, usually for a single legal matter (or related matters) that will not recur on a regular basis. Examples include a divorce, defense of criminal charges, and discharge from employment or other civil matters not handled on a contingent fee basis. However, some clients may need legal services of a certain type on a repeat basis and may contract for such services. For example, the client and lawyer may enter into a renewable one-year agreement providing for a monthly payment to handle any or all collections arising out of one or more of the client's businesses. Some lawyers and clients may use the term "retainer" or "general retainer" to refer to such an arrangement. Such arrangements may be perfectly appropriate although they may not meet the definition of a general retainer even if "availability" is said to be a part of the arrangement. Perhaps the arrangement may best be understood as a fixed fee agreement, except that instead of handling one matter for a set fee no matter what services end up being required, the lawyer is handling several matters (subject to whatever limitations the parties place on the number, type, geography, etc., of the matters).[13]

B. Flat or Fixed Fees

Some lawyers prefer to charge their clients a flat or fixed fee for discrete legal services they provide. Examples include closing the purchase of a single-family home, incorporating a small business, drafting a will, or providing a defined, limited-scope service, such as drafting a motion. A flat fee is one that "embraces all work to be done, whether it be relatively simple and of short duration, or complex and protracted."[14]

If a flat or fixed fee is paid by the client in advance of the lawyer performing the legal work, the fees are an advance. Use of the term "flat fee" or "fixed fee" does not transform the arrangement into a fee that is "earned when paid." "Flat" or "fixed" does not even mean that the fee must be paid at the commencement of the representation, although most lawyers who do not have an existing relationship with a client may want to ensure payment and may, therefore, ask for the fee to be paid in advance before committing to the representation. If they do, as will be emphasized below, then that fee must be placed in a Rule 1.15-compliant trust account, to be disbursed to the lawyer only after the fee has been earned.

Several courts and ethics opinions endorse the option of dividing the representation into segments such that certain portions of a flat fee advance are considered earned before completion

[13] As we have noted, courts scrutinize purported general retainers to ensure that the lawyer is not attempting to circumvent the ethics rules requiring refund of unearned fees upon termination of the representation. The same is true with what are sometimes called "hybrid" fees or retainers. Such a fee is "a putative general retainer that is denominated as both for availability and for services," and it is likely to be considered by courts to be "fully refundable to the extent not earned by services rendered." Lester Brickman & Lawrence A. Cunningham, *Nonrefundable Retainers: A Response to Critics of the Absolute Ban*, 64 U. CIN. L. REV. 11, 22 (1995). *See also* N.Y. City Bar Formal Op. 2015-2 (Nonrefundable Monthly Fee in a Retainer Agreement) (2015), *citing* Agusta & Ross v. Trancamp Contracting Corp., 193 Misc.2d 781, 785-86 (N.Y. Civ. Ct. 2002) for the proposition that "enforcement of a hybrid retainer 'should be subject to close scrutiny, governed by a rebuttable presumption that any moneys retained by counsel are for services, rather than availability.'"

[14] ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1389 (1977).

of all the contemplated work.[15] Some jurisdictions have codified this approach in their rules.[16] Thus, if agreed to, the lawyer may remove such earned portions of a flat fee advance from trust prior to the completion of the full scope of the legal services to be performed as certain "milestones" or stages of the representation are reached or completed. This approach allows the lawyer to be paid in part before the end of the representation and provides some assistance in determining the refund amount in case of early termination. Of course, "extreme 'front-loading' of payment milestones in the context of the anticipated length and complexity of the representation" may not be reasonable.[17]

C. So Called "Nonrefundable" and "Earned Upon Receipt" Fees

Some lawyers use labels like "nonrefundable retainer," "nonrefundable fee," or "earned on receipt" in the body or title of a fee agreement. These are not actual types of fees. And use of these descriptors does not, in and of itself, make a fee arrangement a general retainer. In fact, these terms are most often used in an attempt to make an advance fee nonrefundable.

The Model Rules of Professional Conduct 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." This approach does not withstand even superficial scrutiny. A lawyer may not charge an unreasonable fee. See Model Rule 1.5(a) ("A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses."). Comment [4] to Rule 1.5 provides this additional guidance: "A lawyer may require advance payment of a fee, but is obliged to return any unearned portion. See Rule 1.16(d)." See also, Model Rule 1.15(c) and others discussed in connection with Hypothetical 1 below. Therefore, under the Model Rules, an advance fee paid by a client to a lawyer for legal services to be provided in the future cannot be nonrefundable. Any unearned portion must be returned to the client. Labeling a fee paid in advance for work to be done in the future as "earned upon receipt" or "nonrefundable" does not make it so.[18]

Hypothetical scenarios illustrating these concepts and applying the Model Rules are discussed in Section IV below.

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[15] *See, e.g.*, New Hampshire Bar Assoc. Ethics Committee Practical Ethics Article, *Practical Suggestions for Flat Fees or Minimum Fees in Criminal Cases* (Jan. 17, 2008). *See also In re* Mance, 980 A.2d 1196, 1202, 1204-1205 (D.C. 2009), *citing* Alec Rothrock, *The Forgotten Flat Fee; Whose Money is it and Where Should it be Deposited?*, 1 FLA. COSTAL L.J. 293, 323 (1999) for the proposition that some opinions "allow the lawyer to withdraw fees according to milestones 'based upon passage of time, the completion of certain tasks, or any other basis mutually agreed upon between the lawyer and client.'"

[16] *See, e.g.*, Colo. Rules of Prof'l Conduct R. 1.5(h) (defining a flat fee, explaining proper handling, setting forth required contents of the agreement, and appending an authorized form agreement).

[17] *In re* Mance, *supra* note 15.

[18] *See, e.g., In re* O'Farrell, 942 N.E.2d 799, 803 (Ind. 2011) ("Regardless of the term used to describe a client's initial payment, its type is determined by its purpose, i.e., what it is intended to purchase."); Mo. Sup. Ct. Advisory Comm. Formal Op. 128 (Amended 2018) (labels not conclusive); *In re* Wintroub, 277 Neb. 787, 801; 765 N.W.2d 482 (2009) (citing cases from several jurisdictions for the proposition that "a lawyer may not retain an unearned fee, even if the fee agreement clearly provides that the fee is nonrefundable"); Iowa Sup. Ct. Att'y Disciplinary Bd. v. Turner, 918 N.W.2d 130, 147 (Iowa 2018) (simply labeling payment of advance fees as "nonrefundable" does not relieve attorney from obligation to deposit them into trust accounts).

II. Model Rule of Professional Conduct 1.15: The Anti-commingling Rule and the Need to Protect Client Funds, Including Advances

Rules of professional conduct exist for the protection of the public. That purpose is well served when the rules are designed and enforced to prevent concrete financial harm to clients. The anti-commingling principle, embodied in Rule 1.15, is a longstanding and effective component in the client protection arsenal. This is why, since their inception in 1908, the American Bar Association's model codes and rules of ethics have prohibited lawyers from commingling their property (including funds) with the property of clients and third parties.[19]

Under the general anti-commingling rule, Model Rule 1.15(a), client property, which includes unearned fees paid in advance, must be held in an account separate from the lawyer's own property.[20] In 2002, Model Rule 1.15 was amended to address specifically the issue of advance fees in a new paragraph (c): "A lawyer shall deposit into a client 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." Therefore, advances must be placed into a lawyer's trust account until those fees are earned.

The Commission on Evaluation of the Rules of Professional Conduct ("Ethics 2000 Commission"), which recommended the addition of this paragraph, did so in response to reports "that the single largest class of claims made to client protection funds is for the taking of unearned fees."[21] Accordingly, paragraph (c) "provides needed practical guidance to lawyers on how to handle advance deposits of fees and expenses."[22] Stated simply, under the Model Rules advance fees must be placed in a Rule 1.15-compliant trust account, to be disbursed to the lawyer only after the fee has been earned.

Some jurisdictions have authorized lawyers to treat advances as the lawyer's property upon payment, so long as the client signs a fee agreement designating the sum as "nonrefundable" or

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[19] *See* ABA CANONS OF PROFESSIONAL ETHICS, Canon 11 (1908); ABA MODEL CODE OF PROF'L RESPONSIBILITY, DR 9-102 (1969); ABA MODEL RULES OF PROF'L CONDUCT R. 1.15 (1983, revised 2002). One treatise explains the nature and breadth of this key obligation:

> One of the core fiduciary duties of a lawyer is to safeguard the property that the lawyer receives from the client or from other sources but that belongs to the client or third persons. Property received from a client may include funds to be applied to a transaction, a payment in satisfaction of a judgment or settlement, an advance deposit against lawyer's fees, valuable documents to be analyzed, or property of evidentiary value. Under Rule 1.15(a) of the Model Rules of Professional Conduct, "[a] lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property." The lawyer therefore must keep the property in a secure location and segregate those assets from the lawyer's own property. Gregory C. Sisk, Duties to Effectively Represent the Client, § 4-5.6 (The Duty to Safeguard Client Funds and Property), in Legal Ethics, Professional Responsibility, and the Legal Profession (West Academic Publishing, 2016).

[20] *In re* Kendall, 804 N.E.2d 1152, 1161 (Ind. 2004). Also, Rule 1.15(a)'s predecessor was applied to advance fees. Iowa Sup. Ct. Bd. of Prof'l Ethics & Conduct v. Frerichs, 671 N.W.2d 470, 477 (Iowa 2003) (failure to place advance fee in a trust account violated DR 9-102(A)).

[21] A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, 1982–2005 342 (ABA 2006).

[22] *Id.*

"earned on receipt" or some other variation on this theme.[23] This approach departs from the safekeeping policy of the Model Rules described herein and creates unnecessary risks for the client.[24]

III. Model Rule of Professional Conduct 1.16: Declining or Terminating Representation

Model Rule 1.16(d) requires that, upon termination of representation, a lawyer shall refund "any advance payment of fee or expense that has not been earned or incurred." This Rule, and Rule

[23] *See, e.g.*, Or. Rules of Prof'l Conduct R. 1.5(c)(3). That jurisdiction's version of Rule 1.15(c) contains an exception to the anti-commingling rule for advance fees when "the fee is denominated as 'earned on receipt,' 'nonrefundable' or similar terms and complies with Rule 1.5(c)(3)." Or. Rules of Prof'l Conduct R. 1.15-1(c). A considerable minority of U.S. jurisdictions have authorized this variant approach to advances by rule, ethics opinion, or judicial decree. *See, e.g.*, State Bar of Ariz. Op. 99-02 (1999) (non-refundable, earned-upon-receipt fee is ethical if reasonable under Rule 1.5 and client is fully informed about and expressly agrees to such a fee, preferably in writing; such a fee does not go into a lawyer's trust account); Fla. Rules of Prof'l Conduct R. 4-1.5(e)(2)(B) and Comment (nonrefundable flat fee is the property of the lawyer and should not be held in trust); Wash. State Rules of Prof'l Conduct R. 1.5(f)(2) (if agreed to in advance in a writing signed by the client, a flat fee is the lawyer's property on receipt and shall not be deposited into a trust account); and N.Y. St. Bar. Assn. Comm. Prof'l Ethics Op. 816 (2007) (reaffirming 1985 opinion concluding that "fees paid to a lawyer in advance of services rendered are not necessarily client funds and need not be deposited in client trust account"). Such jurisdictions typically provide, via rule or otherwise, that advance fees must be refunded if unreasonable or work remains to be done even if language to the contrary is used and the funds have been taken by the lawyer pursuant to a rule and/or agreement.

[24] See *In re* Long, 368 Or. 452, 455–56, 474-75, 491 P.3d 783, 788–89, 798-99 (2021), cert. denied 142 S. Ct. 2685 (2022), in which the court candidly discussed the rule and its fallout:

> Respondent's limited financial resources also led to his extensive use of fee agreements that allowed him to access advance fees before completing the promised services. . . . The [Oregon] Rules of Professional Conduct allow for alternative fee agreements, under which advance fees become the lawyer's property at the time the fees are received—that is, before the lawyer has performed the promised services. RPC 1.5(c)(3). In those instances, the advance fees are not placed in the lawyer's trust account and are sometimes referred to as "earned on receipt." Fees may be "earned on receipt" only pursuant to a written fee agreement disclosing that "the funds will not be deposited into the lawyer trust account" and that "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." *Id.* [¶] According to respondent, because he frequently had pressing personal and business costs, he would not have been able to operate his legal practice if he could access a client's fees only after he completed the promised services. . . . [¶] Although respondent's handling of those advance fees did not itself violate a Rule of Professional Conduct, it nevertheless left respondent's clients vulnerable. "Earned on receipt" fee agreements shift the risk of loss to the client. If the client relationship ends before the lawyer has performed the services needed to keep the advance fees, then the lawyer is required to return the fees for the uncompleted work. If the lawyer has already spent the advance fees and has no other financial resources upon which to draw, then the lawyer may be unable to provide the client with the required refund. [¶] That is what happened to many of respondent's clients. . . . [¶] Respondent's misconduct caused extensive injuries, which were not merely financial. Many of respondent's clients had limited financial means and needed their advance fees returned before they could afford to hire new lawyers. When respondent failed to return those advance fees, some clients simply went without legal representation.

1.15, work in tandem to achieve the regulatory objective of protection of the public from financial harm caused by inattentive or unscrupulous lawyers.[25]

Advances are unearned because they are payment today for work to be performed in the future. They were unearned upon receipt and remain unearned until the work is performed. The Model Rules mandate that advances belong to the client, must be preserved until they are actually earned, and must be refunded if the representation terminates before the fees are earned.

As a practical matter it may be somewhat more difficult to determine what has been earned and what is unearned when a representation ends before completion of the contemplated services when the client pays a flat or fixed fee instead of an hourly rate. However, courts routinely apportion the services completed and sum earned when a representation terminates before a lawyer has completed all of the contemplated work.[26]

IV. Hypothetical Scenarios Involving Client Payments at the Commencement of a Specific Representation.

Hypothetical 1 ("Nonrefundable Retainer")

A lawyer is consulted by a client seeking to terminate her marriage. The lawyer informs the client that the lawyer requires a $6,000 "retainer" to cover the filing of a divorce complaint, preparing a motion to enjoin the transfer of assets and a possible motion for a protective order, attending hearings relative to those motions, and any negotiations or related work until the lawyer expends 20 hours. The client was also informed that additional "retainers" may be required to complete the matter, and that the retainers will be credited toward payment for the lawyer's services at the reasonable rate of $300 per hour. The lawyer's fee agreement states, in pertinent part:

> Client agrees to pay Lawyer a nonrefundable retainer fee of $6,000. Client understands that no portion of this fee shall be refunded or returned to Client for any reason.
>
> Client further agrees that should Lawyer expend more than 20 hours on Client's matter, Client shall pay additional retainers as requested by Lawyer which shall be

[25] Nothing tarnishes the profession's reputation like a lawyer who takes an advance fee for legal services to be performed in the future, does not complete the work contemplated by the fee arrangement, and does not refund the money, perhaps because he or she cannot. Once the money has been spent by the lawyer, it may never be recovered by the client (or by the client protection fund which may have reimbursed the client). Even if a civil judgment or disciplinary order of restitution is entered it may do little good if the lawyer is impecunious, judgment-proof, or bankrupt. Discipline in that case may offer a measure of public protection through deterrence, but it does not recompense the client. That client's access to justice may also be impeded. The client may be unable to pay another advance fee and may, therefore, be unrepresented if legal aid or pro bono assistance is unavailable. Model Rules 1.15 and 1.16 exist to protect a client from these consequences.

[26] *See, e.g.*, *In re* O'Farrell, 942 N.E.2d 799, 808 (Ind. 2011) (quantum meruit available upon client termination of flat fee agreement). *Cf.* Plunkett & Cooney, PC v. Capitol Bancorp Ltd, 212 Mich. App. 325, 331; 536 N.W.2d 886 (1995) (discharged lawyer with fixed-fee agreement entitled to compensation for services rendered calculated by percentage of services required under contract, unless lawyer and client have agreed to other terms for valuing work completed).

applied to Lawyer's billing for this matter at a rate of $300 per hour and to any costs or expenses incurred in the representation.

Three weeks after signing the agreement and paying the $6,000, Client notified Lawyer that she wanted to reconcile with her husband and asked for an itemization of Lawyer's time and expenses and a refund of any unearned fees. Lawyer had filed the complaint, but it had not been served. Lawyer had also prepared but had not filed a motion to enjoin the transfer of certain assets. Lawyer had spent 5.5 hours on the file and $150 to file the complaint, but responded to the Client that no refund was due because the $6,000 was a nonrefundable fee.

Question: Does Lawyer owe Client a refund for any of the $6,000 paid to Lawyer and are any rule violations established by this scenario?

Answer: Yes, Lawyer owes Client a refund. First, the $6,000 paid by Client to the Lawyer are fees paid in advance not a general retainer. Under this agreement, Lawyer is rendering legal services at the rate of $300 per hour. This is true from the outset as is established by simply reading the portion of the agreement quoted above and performing some simple math. The $6,000 entitles Client to 20 hours of Lawyer's work on the matter.

Second, lawyer was required to have placed the $6,000 of advanced fees into the Lawyer's client trust account. Model Rule 1.15(c) provides that: "A lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by Lawyer only as fees are earned or expenses incurred." The so-called nonrefundable fee here is an advance payment of fees that may only be withdrawn from the client trust account as earned by Lawyer. The facts of this hypothetical are silent as to whether Lawyer placed the $6,000 in the trust, operating, or personal account and as to whether it was spent in whole or in part. Lawyers may be disciplined for treating advance fees as their own property before the fees are earned, i.e., before the contemplated legal services are rendered.[27] Commingling and perhaps misappropriation may have occurred here if Lawyer deposited the $6,000 into an account other than a client trust account and spent it.

In this scenario, assuming that the legal work performed was appropriate and useful, Lawyer has earned $1,650.00 in legal fees. Lawyer also spent $150 for the expense of filing the complaint. Failure to return the balance of $4,200 is a violation of Model Rule 1.16(d) (upon termination of representation, a lawyer shall refund any advance payment of fee or expense that has not been earned or incurred). Comment [4] to Rule 1.16(d) explains the fundamental legal principle underlying this requirement: "A client has a right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services." Lawyer's failure to provide an accounting for the fees paid in advance also constitutes a violation of Rule 1.15(d).

[27] "A lawyer misappropriates client funds in violation of DR 1–102(A)(3), (4), (5), and (6)DR 1–102(A)(3), (4), (5), and (6) when special retainers and flat fees paid in advance are treated as money belonging to the lawyer and not maintained in a trust account until the fee has been earned." Iowa Sup. Ct. Bd. of Pro. Ethics & Conduct v. Frerichs, 671 N.W.2d 470, 475 (Iowa 2003). *See also In re* Fazande, 290 So. 3d 178, 185 (La. 2020) (lawyer violated Rule 1.15(c) by failing to deposit into his client trust account advance fees and costs).

Model Rule 1.5(a) provides: "A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses." Comment [4] to Rule 1.5 states: "A lawyer may require advance payment of a fee, but is obliged to return any unearned portion. See Rule 1.16(d)." Thus, keeping the balance ($4,200) violates Rule 1.5(a) on these facts. Because Rule 1.5 precludes a lawyer from agreeing to an unreasonable fee, it is also violated by the Lawyer's inclusion of the following provision in the fee agreement: "Client agrees to pay Lawyer a nonrefundable fee of $6,000. Client understands that no portion of this fee shall be refunded or returned to Client for any reason."[28]

Finally, because a lawyer may, in fact, be required to refund an advance payment of fees in various situations, characterizing such an advance as "nonrefundable" may also amount to a violation of Rule 1.4 (communication) and Rule 8.4(c) (misrepresentation) as the mischaracterization of the funds may have a chilling effect on a client seeking a refund of unearned fees upon termination of the representation.[29]

Lawyer and the fee agreement use the words "retainer" and "fee" interchangeably. In this hypothetical it appears that the word "retainer" is used incorrectly to refer to the advance payment of legal fees at the initiation of a matter, or, really, at any time during the representation as is suggested by the agreement's provision that additional "retainers" may be required.

Hypothetical 2 (Purported General Retainer)

The facts are the same as in Hypothetical 1, except that the lawyer's standard fee agreement states, in pertinent part:

> Client agrees to pay Lawyer a non-refundable engagement fee of $6,000 which shall be deemed earned upon receipt by Lawyer. This engagement fee is for the purpose of retaining Lawyer and assuring the availability of Lawyer in this matter. Client understands that no portion of the engagement fee shall be refunded or returned to Client for any reason.
>
> Client further agrees that should Lawyer expend more than 20 hours, Client shall pay upon request an additional retainer in an amount determined by Lawyer which shall be applied to Lawyer's billing for this matter at a rate of $300 per hour and to any costs or expenses incurred in the representation.

[28] *In re* Kendall, 804 N.E.2d 1152, 1160 (Ind. 2004) ("We hold that the assertion in a lawyer fee agreement that such advance payment is nonrefundable violates the requirement of Prof. Cond. R. 1.5(a) that a lawyer's fee 'shall be reasonable.'"). *See also* N.Y. City Bar Ass'n Formal Opinion 1991-3 (in light of reasonableness requirement, duty to refund unearned fees, and client's "essentially absolute" right to discharge counsel, "a lawyer may not properly denominate or characterize a fee as 'nonrefundable' or otherwise use words that could reasonably be expected to convey to the client the understanding that a fee paid before the services are performed will not be subject to refund or adjustment under any possible circumstance").

[29] *See, e.g.*, *In re* Sather, 3 P.3d 403, 415 (Colo. 2000) (knowing use of misleading language, i.e., describing flat advance fee as "nonrefundable," violated Colo. RPC 8.4(c)) and Ala. State Bar Op. RO-93-21 (1993) ("Any indication by the lawyer that the fee is non-refundable is inaccurate and inherently misleading and would violate Rule 1.4(b) Communication; Rule 1.5(b) Fees; and Rule 8.4(c) Misrepresentation."). *See also* Mo. Sup. Ct. Advisory Comm. Formal Op. 128 (Amended 2018) (in various situations "the description of the fee as 'nonrefundable' is misleading").

Again, the facts are the same: Lawyer spent 5.5 hours and a filing fee for the complaint, and Client reconciles and seeks a refund. Lawyer declines to refund any portion of the fee, claiming it is nonrefundable.

Question: Does Lawyer owe Client a refund for any of the $6,000 paid to Lawyer and are any rule violations established by this scenario?

Answer: Yes. The answer and analysis for Hypothetical 1 apply here as well. The only difference ("retainer" and "engagement fee" language) makes no difference at all. The fee arrangement still has the same basic structure and, for the reasons discussed above, the $6,000 is clearly an advance payment for the future performance of legal services, not an actual "retainer" because the lawyer contemplates billing time against the advance.[30] Accordingly, the $6,000 must be held in trust until earned and any unearned portion properly refunded to the client.

Under the Model Rules, there are no magic words that a lawyer can use to change what is actually an advance payment for fees into a general retainer: "an attorney cannot treat a fee as 'earned' simply by labeling the fee 'earned on receipt' or referring to the fee as an 'engagement retainer.'"[31] Notwithstanding the use of the terms "engagement fee," "retainer," and "availability," the fee in Hypothetical 2 is still not a general retainer fee and is, therefore, not deemed earned on receipt. The purpose of the fee dictates its character and treatment irrespective of labels or terminology used.

Courts examine the transaction and agreement very carefully to ensure that the purported general retainer is not an attempt to charge and retain unearned advance fees.[32] Accordingly, a lawyer claiming to have a general retainer must be prepared to demonstrate a valuable benefit to the client and/or an actual detriment to the lawyer.[33] It is easy to recite that the lawyer is prioritizing the client's work, turning away other work, keeping up on the relevant law, etc. However, it must be shown that such things were not only actually done, but that they were necessary for the representation and not part of the lawyer's basic responsibilities.[34]

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[30] *Cf. In re* Lais, No. 91-O-08572, 1998 WL 391171, at *14-15 (Cal. Bar Ct. July 10, 1998) (characterization as "'fixed, non-refundable retaining fee' paid 'for the purpose of assuring the availability of [respondent] in this matter'" was "not determinative" and the fee was not a "true" (general) retainer, but actually payment for the first 10 hours of lawyer's services).

[31] *In re* Sather, 3 P.3d 403, 412 (Colo. 2000). *See also* note 18, *supra*.

[32] Richmond, *supra* note 10, at 116: "As a practical matter, general retainers are rare. . .. The types of representations that justify or require general retainers are also scarce. Courts hearing fee related controversies are therefore properly skeptical of general retainer claims." *See also* RESTATEMENT, *supra* note 9, § 34 ("Engagement-retainer fees agreed to by clients not so experienced should be more closely scrutinized to ensure that they are no greater than is reasonable and that the engagement-retainer fee is not being used to evade the rules requiring a lawyer to return unearned fees.")

[33] Att'y Grievance Comm'n of Maryland v. Stinson, 428 Md. 147, 183-185, 50 A.3d 1222, 1244-1245 (2012) (purported engagement fee for "willingness and availability" to represent client not a true general retainer where no benefit to client or detriment to lawyer established and lawyer "produced no useable work").

[34] *See Stinson*, 50 A.3d at 1243 (benefits offered to the client in exchange for the nonrefundable fee were "nothing more than the ethical obligation imposed on all lawyers when they agree to provide legal services to a client. . . . A lawyer who agrees to perform legal services also necessarily agrees to be available to perform those services."), *citing* Lester Brickman & Lawrence A. Cunningham, *Nonrefundable Retainers Revisited*, 72 N.C. L. REV. 1, 24 (1993), and Iowa Sup. Ct. Bd. of Pro. Ethics & Conduct v. Frerichs, 671 N.W.2d 470, 477 (Iowa 2003).

Hypothetical 3 (Flat Fee)

A client seeks to hire a lawyer for representation in a criminal matter. The fee agreement provides: "Client shall pay Lawyer the sum of $15,000 for representation in the matter of State v Client, and that no part of the flat fee shall be refunded for any reason. Client understands that the flat fee is the agreed upon amount due Lawyer regardless of the time expended on the matter or how it is resolved." Client signed the agreement and paid the full $15,000. Lawyer deposited the $15,000 into his firm's operating account. Lawyer reviewed the police report, left a message for the prosecutor and law enforcement officer, appeared on behalf of the defendant at the arraignment, and filed an appearance with the court. A few weeks after the arraignment, Client discharged Lawyer and requested an accounting and partial refund. Lawyer refused, stating that the flat fee was earned when it was paid.

As we noted above, flat fees paid in advance of performing the work are subject to Rule 1.15(c) and the other rules set forth in the analyses in Hypotheticals 1 and 2. In other words, the foregoing rules regarding safekeeping, refundability, and reasonableness apply.

Flat fees are not general retainers and must not be treated as such. That the price set for the representation is not based on hours worked but is instead based on the completion of certain described services does not mean that the fee must be considered earned on receipt or nonrefundable when there is work yet to be done. Of course, if the flat fee is paid *after* the work is completed, the funds are earned and are not deposited into the trust account.

V. Conclusion

The Model Rules protect a client's right to terminate the fiduciary relationship with a lawyer and have the money to which the client is entitled available to obtain successor counsel if desired. Rule 1.15 requires that fees paid in advance must be held in a trust account until the services for which the fees will be paid are actually rendered, thereby allocating various risks to lawyer and client. The lawyer does not have to bear the risk of nonpayment after the work is completed; Rule 1.15 provides a process for withdrawal of earned fees and even for disputes, should they arise. And the client does not have to bear the risk that the funds will be spent, attached by the lawyer's creditors, or otherwise dissipated before the legal work is performed due to a lawyer's unwillingness or inability to do so.

Other ethics opinions and resources discuss good billing practices and fee agreement drafting tips. However, we offer the following suggestions in relation to the matters addressed in this opinion. Use plain language. Thus, instead of "retainer" say "advance" and explain that it is a "deposit for fees."[35] Explain that the sum deposited will be applied to the balance owed for work on the matter, and how and when this will happen. For example, the fee agreement could provide

[35] GEOFFREY C. HAZARD, JR., PETER R. JARVIS, TRISHA THOMPSON & W. WILLIAM HODES, THE LAW OF LAWYERING §9.07 (4th ed. 2022-2 Supp. 2014). Of course, the applicable Rules of Professional Conduct must be consulted, and it may be prudent or required to use certain terms. However, accurately translating legal terms of art is not only helpful to the client but also assists with interpretation and enforcement. So, if the term "advance" or "special retainer" is used in the applicable rules, the lawyer will want to use it in the fee agreement. However, consider also adding an explanation that it is functionally a deposit to cover fees for work in the future.

that on a monthly basis the client will be invoiced for the time expended by the lawyer and state when the sum reflected in the invoice will be withdrawn from the trust account. When the arrangement is for hourly billing, explain that if the deposit exceeds the final billing any balance will be remitted to the client. If the advance fee is fixed and the representation may continue for some time or involve several stages, consider dividing the representation into reasonable segments and providing for withdrawal of a reasonable portion of the deposited fee as the representation progresses and the fee becomes partially earned.[36] Finally, it may be wise to recognize the reality that many relationships do not last and include a provision explaining what will happen if the representation is terminated before the matter is completed.[37]

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[36] *See supra* notes 15 & 16.

[37] Again, see Colo. R. Prof'l Conduct R. 1.5(h) and accompanying flat fee form providing helpful language for dividing a representation into increments and explaining a method of calculating the fees the lawyer has earned should the representation terminate prior to completion of the tasks or events specified in the agreement.

OREGON STATE BAR
Board of Governors Agenda

Meeting Date: June 23, 2023
From: Legal Ethics Committee
Re: Proposed Amendments to RPC 1.5(c) and 1.15-1(c)

Action Recommended

The Legal Ethics Committee (LEC) recommends the Board of Governors (BOG) approve the following amendments to RPC 1.5(c) and 1.15-1(c) and submit the amendment to the House of Delegates (HOD) in October 2023, and conditionally approve the following Conspicuous Disclosures attached as Exhibit 1, to be adopted if the HOD approves the proposed amendments.

RULE 1.5 FEES.

(c) 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: (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.~~

(4) a fee described as a "prepaid fee," "prepaid fixed fee," "prepaid flat fee," or similar terms unless it is pursuant to a written agreement signed by the client which includes the conspicuous disclosures for prepaid fees as adopted by the Oregon State Bar, prior to the acceptance of any prepaid fee from the client.

RULE 1.15-1 SAFEKEEPING PROPERTY.

(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)**(4)**~~(3)~~.

Background

In June of 2022, the Client Security Fund (CSF) requested that the LEC review the current fee earned on receipt rules within the Oregon RPCs (Exhibit 2). Of note, the CSF noted that approximately 25 percent of all claims paid out by the CSF arose from the failure to refund unearned flat fees. These fees are generally denoted, by the current RPC 1.5(c) as "non-refundable" or "earned on receipt."

The LEC undertook a review of this request, and also invited public comment on the recommendations originally proposed by the CSF. Public comment indicated that there was substantial concern about some of the recommendations that the CSF proposed. After reviewing the rules, and discussing the proposals with practitioners, the LEC opted to move forward with a more tailored approach. The proposed amendment prohibits the use of "nonrefundable" or "earned on receipt" and instead opts for the use of "flat fee," "prepaid fixed fee," or "prepaid flat fee." Additionally, the proposed amendment provides additional that an attorney must provide additional "Conspicuous Disclosures."

Options

1. The BOG may approve of the LEC's proposed amendment, conditionally approve of the Conspicuous Disclosures, and submit the proposed amendments to the HOD.

2. The BOG may amend the LEC's proposed amendments or amend the Conspicuous Disclosures, and submit the amended proposed amendments to the HOD.

3. The BOG may decline to submit the LEC's proposed amendments, and submit it back to the LEC for further review.

Discussion

The LEC proposes to amend RPC 1.5 to remove "non-refundable" and "earned on receipt" from flat fee agreements as both are misnomers. No fee is "non-refundable" as all fees must be reasonable and not clearly excessive (*see* RPC 1.5(a) and 1.5(b)) (See Formal Op. 2005-151 at 4 ("[a]ccordingly, even a fee designated as "nonrefundable" is subject to refund if the specified services are not performed.")). The proposed amendment in RPC 1.15-1 also removes the langauge non-refundable and earned on receipt. In its place, the LEC proposed the terminology "prepaid fee," "prepaid fixed fee," and "prepaid flat fee."

Additionally, the proposed amendments require a set of "Conspicuous Disclosures," much like the requirements under the current RPC 1.5(c)(i) and (c)(ii). The Conspicuous Disclosures are not included in the RPCs, but instead are a separate document that is approved by the BOG, and may be modified by the BOG. The proposed Conspicuous Disclosure, attached as Exhibit 1, includes the following disclosures to prospective clients for attorneys utilizing a flat fee:

1. A description of the prepaid fee (noted as subject to refund), with a description of the legal services to be performed. Additional information would be provided about services which may require additional fees or expenses.
2. Option for client to place prepaid fee into a trust account instead of the operating account.

3. Notice of right to terminate services of the attorney.
4. Notice of the right to a refund of unearned fees, as well as a statement about how refunds are calculated.
5. Notice of the Fee Dispute Resolution program and whether the attorney would agree or not agree to use the Fee Dispute Resolution program.
6. Notice of the Client Security Fund and other remedies.

The LEC, in deciding to move forward with this proposal, weighed the proposals presented by the CSF with the concerns of immigration attorneys and criminal law attorneys, who had substantial concerns about the initial proposals promoted by the CSF. The Conspicuous Disclosures strikes a balance, providing additional information to the client about the representation, while not placing an onerous burden on practitioners.

Attachments

1. Exhibit 1 – Memorandum to LEC with Conspicuous Disclosures
2. Exhibit 2 – Letter to LEC from CSF

OREGON STATE BAR
Legal Ethics Committee Agenda

Meeting Date: May 19, 2023
From: Ankur Doshi, General Counsel
Re: Project 22-05 – Client Security Fund and RPC 1.5

The working group reviewed a number of comments from the prior LEC meeting, and propose the following language as a potential update. The language changes "earned on receipt" and "nonrefundable" description of fees within the RPCs to the more accurate "prepaid fee," "prepaid fixed fee," and "flat fee." It also further allows for the bar to adopt conspicuous disclosures that must be amended to any fee agreement with a prepaid fix fees. The group also attached a draft disclosure, which would need to be adopted by the Board of Governors.

RULE 1.5 FEES.

(c) 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: (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.~~

(4) a fee described as a "prepaid fee," "prepaid fixed fee," "prepaid flat fee," or similar terms unless it is pursuant to a written agreement signed by the client which includes the conspicuous disclosures for prepaid fees as adopted by the Oregon State Bar, prior to the acceptance of any prepaid fee from the client.

RULE 1.15-1 SAFEKEEPING PROPERTY.

(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)**(4)**~~(3)~~.

Oregon State Bar Conspicuous Disclosures for Prepaid Fees

Note: Conspicuous Disclosures should be provided to the client in a conspicuous location on the fee agreement in a legible font of at least 12 point in size.

P R E P A I D F E E D I S C L O S U R E

1. **What you will pay us.** You (the client) are agreeing to pay us (the lawyer/law firm) a Prepaid Fee (subject to refund) of $[amount].

2. **What we will do.** In return for the Prepaid Fee, we will do the following legal services for you: [Describe legal services to be performed for the Prepaid Fee].

3. **Additional legal fees.** You [will/will not] be responsible to pay legal fees in addition to the Prepaid Fee. [Describe circumstances, if any, under which the client will owe legal fees in addition to the Prepaid Fee, and the rate or amount at which those fees will be charged.]

4. **Expenses.** You [will/will not] be responsible to pay costs and expenses in addition to the Prepaid Fee, consisting of the following [Describe costs and expenses, if any, for which client will be responsible in addition to the Prepaid Fee].

5. **Trust account option.** You have the right to require that the Prepaid Fee be deposited into a trust account which we maintain for our clients. If you use this right, the Prepaid Fee will remain your money until we earn it by working on your case and we tell you in writing what work we have done and how much of the Prepaid Fee we will be taking out to pay ourselves.

6. **If trust account option not selected.** If you do not select the trust account option, then when you pay us the Prepaid Fee, we will treat it as our money. We

will not deposit the Prepaid Fee into a trust account.

7. **You can fire us.** You have the right to terminate our services at any time for any reason or for no reason.

8. **Right to refund of unearned fees.** If for any reason we don't finish the legal services we agreed to do for the Prepaid Fee, then we have not earned the full Prepaid Fee. You are entitled to a prompt refund of the part of the Prepaid Fee that we did not earn.

9. **How we calculate refunds.** We will calculate the amount of any refund as follows: [state method of calculating refund].

10. **Fee Dispute Resolution.** The Oregon State Bar Association has a Fee Dispute Resolution program, which is an informal way to resolve fee or refund disputes with your lawyer if a dispute should arise.

    If your case came to us through the Oregon State Bar Lawyer Referral Service, or the bar's Modest Means Program, then we are required to participate in the Fee Dispute Resolution program if you choose to use it.

    Otherwise, you can only use the Fee Dispute Resolution program if we agree to it. We [agree/do not agree] to use the Fee Dispute Resolution program.

    For details go to: https://www.osbar.org/feedisputeresolution.

11. **Client Security Fund.** If you believe that we have not refunded the correct amount of unearned fees to you, then you also have the right to file a claim for reimbursement with the Oregon State Bar Client Security Fund. For details go to: https://www.osbar.org/csf.

12. **Other remedies.** You may have other legal remedies available if we don't provide you with a refund of unearned Prepaid Fees in the correct amount.

Oregon State Bar

June 15, 2022

Via email only at awilkinson@droregon.org

Alison F. Wilkinson
Disability Rights Oregon
511 SW 10th Ave., Ste. 200
Portland, OR 97205

Re: OSB Client Security Fund referral to OSB Legal Ethics Committee

Dear Ms. Wilkinson,

On May 14, 2022, the Client Security Fund voted to send this request that the Legal Ethics Committee review RPC 1.5 regarding the rules involving fees earned on receipt or "flat fees." The Client Security Fund recently reviewed RPC 1.5 in the context of claims, and believes that the rules can be adjusted to provide additional protection to clients.

Please find enclosed a letter drafted by Committee member Michael Purcell. The Client Security Fund requests that the Legal Ethics Committee review the following recommendations, as detailed in Mr. Purcell's letter:

1.A. Flat-fees to require partial payment benchmarks.

1.B. All advance fee payments must go into the trust account.

1.C. Disclosure to Clients as to Surety Bond Status.

1.D. No post-representation "trusts" with lawyer at trustee.

Thank you for considering these recommendations.

Sincerely,

Melissa May
Oregon State Bar Client Security Fund Chairperson
Email: mmay@duffykekel.com

Enclosures
cc: Ankur Doshi, OSB General Counsel
Courtney Dippel, OSB CSF Bar Liaison

MICHAEL T. PURCELL
ATTORNEY AT LAW
P.O. BOX 14209
PORTLAND, OREGON 97293
503-241-8203
MPURCELL.LAW@GMAIL.COM

January 28, 2022

Client Security Fund Committee
Oregon State Bar
P.O. Box 231935
Tigard, OR
97281-1935

RE: Recommendations for client protection against lawyer dishonesty.

Dear Committee Members and Staff:

I submit for your consideration the following recommendations to be made to the OSB Board of Governors.

I. SUMMARY OF RECOMMENDATIONS.

A. Flat-fees to require partial payment benchmarks.

Oregon Rule of Professional Responsibility 1.5 should require that "flat fees" require a written agreement that establishes benchmarks for determining when the fee shall considered to have been earned by the lawyer.

This proposal is based on Colorado RPC 1.5(h). "Flat fees" should be defined in ORPC 1.0. This is **not** intended to require or encourage lawyers to bill by the hour.

B. All advance fee payments must go into the trust account.

All advance payments of fees must be deposited into trust. Current ORPC 1.5(c)(3) should be repealed, but only prospectively because of reliance on the old rule.

C. Disclosure to clients as to surety bond status.

Oregon RPC 1.4 should be amended to require that lawyers disclose to clients whether funds entrusted to the lawyer are protected by a surety bond.

D. No post-representation "trusts" with lawyer as trustee.

It should be a conflict of interest for a lawyer who receives the proceeds of a settlement or collection of funds from a third party to act as trustee over those funds absent court supervision.

E. Improve bar role to deter VA and SSA benefits theft by lawyers.

The bar should take what action it can to prevent or at least deter lawyer payees of VA and SSA benefits from stealing those benefits.

F. Better model agreements.

All flat-fee model agreements should be revised to have benchmarks, and strike ORPC 1.5(c)(3) language. There should be a model immigration law fee agreement.

G. Community outreach.

OSB needs a regular outreach problem for communities of persons most vulnerable to malfeasant lawyers, including CLE credit for volunteer lawyers.

II. IDENTIFICATION OF PROBLEM AREAS BY CLAIMS EXPERIENCE.

The following is a summary of the annual reports of CSF claims paid for the years 2001 through 2020 as published in the Oregon State Bar Bulletin.[1]

A. CLIENT VULNERABILITY A COMMON FACTOR.

Client vulnerability is the most common factor among all claims paid. Victim classes include immigrants, disabled persons, juveniles, persons facing eviction, persons in residential treatment, young sexual abuse victims, and the elderly.

B. REVIEW OF ANNUAL REPORTS OF CLAIMS PAID.

CSF paid $4,575,677.12 spread across 516 claims and 233 lawyers.[2] The average paid per claim was $8,867.59. The average paid per lawyer was $19,638.00.

I assigned each claim to one of four categories: (1) conversion of settlement proceeds; (2) failure to refund unearned flat fees; (3) other unearned fees, and (4) other defalcations not readily discernible as the previous three. Here is a summary:

CSF Claims Paid 2001-2021 (Summary by claim type)					
Claim basis	Settlement conv	Flat fees	Other fees	Other claim basis	Total all claims
Total paid	$2,680,682.10	$1,150,379.97	$280,692.98	$463,922.07	$4,575,677.12
Avg per claim	$23,514.76	$3,486.00	$8,019.80	$12,538.43	$8,867.59
Avg per lawyer	$89,356.07	$8,101.27	$9,054.61	$15,464.07	$19,638.00

1 I relied on the CSF committee minutes for claims paid in 2021. I was not able to find the 2004 annual report in the Bar Bulletin.

2 There is a slight overcount of lawyers due to a few having had claims paid out in more than one year.

C. CLAIM DETAILS.

1. Conversion of settlement proceeds.

Fifty-nine percent (59%) of total amount of all claims paid was based on the lawyer's conversion of settlement proceeds. CSF paid out $2,680,682.10 for 114 claims arising from the conduct of thirty (30) lawyers. The average amount paid on a claim paid was $23,514.76. The average paid per lawyer was $89,356.07.

There were multiple instances of client losses well in excess of the CSF cap. Over $2,000,000 was paid on account of just two lawyers. (Deveny and Gruetter).

2. Failure to refund unearned flat-fees.

Twenty-five percent (25%) of the total value of all claims paid was based on a lawyer's failure to refund the unearned portion of flat fee fees.

CSF paid out $1,150,379.97 for 330 claims arising from the conduct of 142 lawyers related to flat fees. The average paid per claim was $3,486.00. The average paid per lawyer was $8,101.27. One claim (Connall) exceeded the $50,000 cap.

3. Failure to return other unearned fees.

CSF paid out $280,692.98 for various other forms of unearned fees, such as failure to refund overpayments. There were thirty-five (35) such claims, based on the misconduct of thirty-one (31) lawyers. The average paid per claim was $8,019.80, and the average paid per lawyer was $9,054.61. No claim exceeded the $50,000 cap.

4. Other misconduct generating claims.

Lawyers engaged in a wide variety of other dishonesty, resulting in $463,922.07 total of CSF claims paid. For the 37 claims, the average paid was $12,538.43, involving 30 lawyers, for an average of $15,464.07 per lawyer. Two claims well exceeded the $50,000 cap, particularly Dickerson ($320,000).

III. PROPOSALS FOR REFORM.

A. BENCHMARKS FOR PARTIAL PAYMENT OF FLAT FEES.

Using Colorado RPC 1.5(h) as a model, Oregon should define "flat-fee" in ORPC 1.0 and then amend ORPC 1.4 to require written disclosure as follows:

> (i) A description of the services the lawyer agrees to perform;
>
> (ii) The amount to be paid to the lawyer and the timing of payment for the services to be performed;

> (iii) If any portion of the flat fee is to be earned by the lawyer before conclusion of the representation, the amount to be earned upon the completion of specified tasks or the occurrence of specified events; and
>
> (iv) The amount or the method of calculating the fees the lawyer earns, if any, should the representation terminate before completion of the specified tasks or the occurrence of specified events.

B. REQUIRE ALL ADVANCE FEES BE DEPOSITED INTO TRUST.

Paragraph 1.5(c)(3), permitting certain advance fees to go into the general account, was adopted December 1, 2010. Since then, CSF has paid $764,820.78 for 214 claims for failure to refund unearned flat fees, based on 80[1] lawyers. Almost all of these fees seem to have been deposited into the general account. This must end.

C. REQUIRE DISCLOSURE OF SURETY BOND COVERAGE.

A surety company can evaluate the lawyer's credit worthiness, assets, and income in a way that a client never could. Mandatory deposit of fund into trust provides some protection, as does third party settlement notification, but we can do more.

1. CSF process no substitute for bond disclosure.

With most lawyers who generate CSF claims being judgment-proof, there is no effective legal remedy available to victims.

CSF is intended to be the last resort, but too often it is the only resort, and even then it is only a fund of grace, subject to caps. The real damage often well exceeds the cap. Clients should be able to protect themselves long before the matter reaches CSF.

2. Setting the amount of the bond.

Oregon law requires that surety bonds be posted for many occupations and businesses. In many cases, the amount of the bond is dependent on the amount of business, and hence the risk to the public, engaged by the regulated business.

For example, degree granting institutions must post a bond "equal to or less than the rolling annual average of prepaid tuition held by the school at any time[.]"[2] The same considerations apply to lawyers.

The bond amount should be the higher of (a) the highest amount of funds held in trust during the previous 12 months or (b) funds reasonably likely to be held in trust for the particular client, or (c) $20,000.

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1 This is a slight overcount; some lawyers had claims in more than one year.
2 ORS 348.613.

The $20,000 minimum bond is based on CSF claims history showng the average of paid per lawyer was $19,638.00.

3. Importance of diclosure to allow an informed choice.

Under the proposed reform, lawyers would not even be required to purchase a bond, just disclose to clients whether they have one.

This is analogous to states that don't require lawyers to have malpractice insurance, but do require disclosure if they don't. Alaska and Washington, for example, require a certain level of insurance, otherwise the lawyer is considered uninsured.

South Dakota even requires that disclosure as to lack of malpractice insurance be made on the lawyer's letterhead and in every written communication with the client.[1] Oregon may not need to go that far, but there still should be disclosure.

4. Minimal effect on private practice of law,

I expect that for a lawyer with good credit, a $20,000 surety bond should cost about $110 per year, and a $100,000 bond would be about $550.

These costs are optional. Lawyers could avoid them entirely by simply giving the required "no-bond" disclosure to the client, or by not receiving client funds in trust.

Some lawyers might have a fall-off in business if required to give the no-bond disclosure. This is as it should be. Clients deserve a fully informed choice as to which lawyer they select to hold their entrusted funds.

D. DEFINE POST-REPRESENTATION "TRUSTS" AS CONFLICTS.

There's no reason for a lawyer to hold funds after the representation. A third party can do this just as well. Where the lawyer already has access to the funds, the danger for abuse is particularly high, and the loss to the client can be enormous.

For example, in Deveny/Furches, the lawyer obtained possession of a worker's compensation settlement of over $1,200,000, then set up a so-called trust, and used it to steal most of the settlement.

E. IMPROVE PROTECTION FOR VA AND SSA BENEFICIARIES.

There have been at least Oregon lawyers who stole substantial amounts of VA or SSD benefits. (Miller, 2005, $38,375; Deveny, 2021, $17,300[2]). These losses went undetected for year. Bond disclosure is all the more required here.

1 South Dakota RPC 1.4(c).

2 The Deveny theft of VA/SSD benefits only emerged as part of a much larger conversion of funds, and was not a specific claim submitted to CSF.

The VA has done a number of studies and there does appear to a role for states to play in protecting VA receipients. The bar should work with the state DVA and if necessary the legislature to improve client protection in these cases.

F. IMPROVE MODEL FEE AGREEMENTS.

The bar association's fee agreement compendium does not have a model agreement form for immigration, and that should be added.

G. IMPROVE COMMUNITY OUTREACH AND EDUCATION.

The bar association should do more to reach out to vulnerable communities and support organizations to inform them of measures they can take to protect themselves.

Very truly yours,

Michael T. Purcell

encl: Proposed changes to ORPC
Summary of CSF claims 2001-2021
Selected bond requirements from Oregon statutes
Draft model flat-fee agreement for OSB fee agreement compendium
Colorado RPC 1.5(h) (flat-fees and benchmarks)
Colorado Lawyer article explaining CRPC 1.5 (h)
Alaska RPC 1.4 (mandatory malpractice insurance disclosure)
ABA summary of mandatory malpractice insurance disclosure RPC (2015)

Outlook

Re: RPC 1.5 and 1.15 drafts

From John Grant <john@agileattorney.com>
Date Tue 3/25/2025 2:16 PM
To Ankur Doshi <adoshi@osbar.org>; MacDaniel Reynolds <dan@reynoldsdefensefirm.com>

Hi Ankur:

Looping back on this:

Aside from my drafting suggestions, I think this is a vastly improved revision to RPC 1.5 regarding fixed fees as compared to the changes proposed last fall. I especially appreciate the simplified disclosure language; lawyers could easily use it verbatim in their fee agreements, but it leaves flexibility for individual wording choices. I also applaud the committee for removing the option to use terms like "nonrefundable" in favor of "pre-paid—" the latter more closely aligns to the purpose of the rules.

Thank you to the BOG, to the LEC, and to you and your team for taking our concerns about the earlier proposal seriously. I think the end result is a much better rule.

—John

On Mon, Mar 17, 2025 at 11:35 AM John Grant <john@agileattorney.com> wrote:

> Thanks Ankur:
>
> At first blush this looks much better to me. Let me huddle with the TCLC folks before I give a final answer, but I'll try to do that this week and get back to you.
>
> In the meantime, there are a few drafting oddities that the LEC may want to resolve:
>
> - In 1.5(c)(3) the last part says "or **in** similar terms" (bold mine); but in 1.5(c)(4) it just says "or similar terms." I think it makes more sense without the "in."
> - In 1.5(c)(4), the first three list items — (i) through (iii) — start with "the...", but (iv) and (v) start with "that the...". I think the cleanest drafting option would be to move the "that" to the end of the main part of sub (4), so that it reads "pursuant to a written agreement signed by the client which explains **that**", and then eliminate the "that" from the list items.
> - In the main part of 1.4(c)(4), I feel like it would read more clearly with a comma after "or similar terms (before "unless"). So it would read "a fee described as a "prepaid fee" or similar terms, unless it is pursuant to..."
>
> Thanks for your work on this and for keeping me in the loop. I'll circle back with you later this week on the effect of the language.

—John

On Mon, Mar 17, 2025 at 8:46 AM Ankur Doshi <adoshi@osbar.org> wrote:

> Hi John and Dan,
>
> The LEC discussed your comments, as well as the comments for several practitioners in regard to this language. They are moving forward with a simplified version of the rule noted below. If you have any comments you would like to add as I submit these to the Board of Governors, please provide them to me by March 28. I'll include them to the Board as well.
>
> The LEC also recommended a lengthy phase in time. While not in the rule itself, it would likely be recommended for the court for a later effective date than usual to allow for continued education of the Rule prior to implementation.
>
> If the Board move these amendments forward, we will likely have another article in August to provide additional time for comment and consideration prior to the House of Delegates in October.
>
> Thank you,
>
> Ankur
>
> ---
>
> **RULE 1.5 FEES.**
>
> * * *
>
> (c) 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: (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.~~
>
> **(4) a fee described as a "prepaid fee" or similar terms unless it is pursuant to a written agreement signed by the client which 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) 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.**
>
> **RULE 1.15-1 SAFEKEEPING PROPERTY.**
>
> * * *
>
> (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)**(4)**~~(3)~~.

Ankur Doshi

General Counsel

503-431-6312

adoshi@osbar.org

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