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Board of Professional Conduct Issues New Guidance on Flat Fee Agreements

The terms and parameters of fee agreements have historically raised ethical issues for attorneys, and flat fee agreements are no exception. Under the former Ohio Code of Professional Responsibility, the Board of Professional Conduct for the Ohio Supreme Court addressed some of these issues in Advisory Opinion 96-4. However, with the adoption of the Ohio Rules of Professional Conduct in February 2007, which contain significant changes with respect to the handling of client funds, many questions resurfaced.

In the first advisory opinion addressing flat fee agreements under the Ohio Rules of Professional Conduct, the Board withdrew Opinion 96-4 and issued Advisory Opinion 2016-1, entitled “Flat Fee Agreements Paid in Advance of Representation,” on February 12, 2016.

There are two major differences between Opinions 2016-1 and 96-4. First, the scope of Opinion 2016-1 is much broader, applying to flat fee agreements in all matters, not just criminal cases. Second, Opinion 2016 provides that flat fees paid in advance of representation must be placed in a client trust account, i.e. an IOLTA account, until earned. This is a departure from the Board’s guidance under DR 9-102(A), which precluded a lawyer from placing client advances into a client trust account. The following summarizes the Board’s Opinion.

Permissibility of Flat Fee Agreements

Flat fee agreements are generally permissible so long as they comply with Prof. Cond. R. 1.5. Prof. Cond. R. 1.5 provides that a fee must not be “illegal or clearly excessive[,]” and sets forth several non-exclusive factors to be considered in determining the reasonableness of the fee, such as “the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly”

and “the fee customarily charged in the locality for similar legal services.” Prof. Cond. R. 1.5(a).

Flat fee agreements must also comply with Prof. Cond. R. 1.8(e), which provides that non-indigent clients must remain liable for court costs and expenses of litigation. Additionally, flat fee agreements cannot limit an attorney’s duties of competent and diligent representation under Prof. Cond. R. 1.1 and 1.3.

Handling of Flat Fees

Under Prof. Cond. R. 1.15(a) and 1.15(c), an attorney is required to maintain client funds separate from the attorney’s property in an IOLTA account, and must similarly place any legal fees and expenses paid in advances by the client into a trust account. Therefore, flat fees must generally be held in an attorney’s IOLTA account until earned.

However, flat fees deemed “earned upon receipt[,]” i.e. earned regardless of the amount of future work performed, are considered to be an attorney’s property. Such fees cannot be placed into an IOLTA account, and should instead be deposited into an attorney’s operating account. Unfortunately, the Board did not address the circumstances under which “earned upon receipt” designations are appropriate and the ethical problems that may arise should the client be entitled to a refund of such fees.

Refund of Flat Fees

Irrespective of any “nonrefundable” or “earned upon receipt” designation, flat fees cannot be deemed nonrefundable. According to Prof. Cond. R. 1.5(d)(3), an attorney is obligated to return any unearned portion of the fee if the attorney does not complete the representation for any reason. Similarly, under Prof. Cond. R. 1.16(e), an attorney that withdraws from representation must “refund promptly any part of a fee paid in advance that has not been earned, except when withdrawal is pursuant to Rule 1.17.”

The fact that flat fees must be considered “refundable” does not mean that a client is entitled to a refund. A client *may* be entitled to a refund in the event that the representation is not completed depending upon the application of the reasonableness factors set forth in Prof. Cond. R. 1.5(a). Comment [6A] to Prof. Cond. R. 1.5.

Practical Considerations

In short, when utilizing a flat fee arrangement, it is important to remember the following:

- Legal fees must be reasonable;
- Legal fees and advances on litigation expenses must be deposited and held in an IOLTA account until earned;
- A designated “earned upon receipt” fee cannot be deposited in an IOLTA account;
- There is no such thing as a nonrefundable flat fee. If any portion of the flat fee is not earned, it must be returned to the client;
- For any fee denominated as “earned upon receipt,” a client must be advised in writing it may be entitled to a refund of any unearned portion of the flat fee if the representation is not completed;
- Clients must remain responsible for litigation expenses; and
- Flat fee agreements cannot limit an attorney’s duties to provide competent and diligent representation.

Moreover, to support any decision as to whether a refund is warranted or the amount of a refund, it is wise to maintain contemporaneous time records for any flat fee matter and include language in the fee agreement delineating the calculation for determining whether a refund is warranted. *See* Comments to Prof. Cond. R. 1.5.

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