

The Supreme Court of Ohio

BOARD OF PROFESSIONAL CONDUCT

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OPINION 2016-1

Issued February 12, 2016

Withdraws Advisory Opinion 96-4

Flat Fee Agreements Paid In Advance Of Representation

SYLLABUS: It is proper for a lawyer to enter a flat fee agreement requiring a client¹ to pay a fixed amount in advance of representation. The flat fee agreement must comport with the Ohio Rules of Professional Conduct. Under Prof.Cond.R. 1.15(c), a lawyer is required to deposit flat fees and expenses paid in advance for representation into an IOLTA account, unless designated as “earned upon receipt” or similarly, and only may withdraw the fees as they are earned or the expenses as they are incurred. This is a change from former DR 9-102(A). Even if a flat fee paid in advance of representation is deemed “earned upon receipt,” “nonrefundable,” or similarly, Prof.Cond.R. 1.5 requires a lawyer to return any unearned portion of the fee if the lawyer does not complete the representation for any reason. Additionally, the Rules also require that a flat fee must not be excessive under Prof.Cond.R. 1.5(a); that a lawyer shall not provide financial assistance to a client, aside from advances of court costs and expenses of litigation under Prof.Cond.R. 1.8(e); and a lawyer is required to provide competent and diligent representation to each client under Prof.Cond.R. 1.1 and 1.3.

OPINION: This opinion addresses a flat fee agreement requiring a client to pay a fixed amount in advance of representation. It does not address payment of a retainer to an

¹ The Board acknowledges that the Adv. Op. 96-4 addressed this issue in the context of criminal matters; however, the Board has elected to consider the issue in other contexts.

attorney to secure availability of the lawyer's services over a period of time without regard to a specific matter.

QUESTION:

Is it proper for a lawyer to enter a flat fee² agreement requiring a criminal defendant to pay a fixed amount in advance of representation in a criminal matter?

Fee agreements must comply with Rule 1.5 of the Ohio Rules of Professional Conduct. Prof.Cond.R. 1.5(a) is the cardinal rule governing fee agreements and provides that a lawyer shall not "make an agreement for, charge, or collect an *illegal* or clearly excessive fee." Several factors should be considered in order to determine if a fee is reasonable:

- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) the fee customarily charged in the locality for similar legal services;
- (4) the amount involved and the results obtained;
- (5) the time limitation imposed by the client or by the circumstances;
- (6) the nature and length of the professional relationship with the client;
- (7) the experience, reputation, and ability of the lawyer or lawyers performing the services;
- (8) whether the fee is fixed or contingent.

Prof.Cond.R. 1.5(a)(1)-(8). These factors are not exclusive. Prof.Cond.R. 1.5, Cmt. [1]. Additionally, fixed fees are expressly recognized as a type of legal fee in Prof.Cond.R. 1.5(a)(8).

² As used in this Opinion, the terms "fixed fee" and "flat fee" are afforded the same meaning and are used interchangeably. The Board acknowledges that there are other types of fixed fees, such as a fixed hourly rate. A fixed fee may not necessarily be a "flat fee."

A lawyer is not permitted to enter into an arrangement for, charge, or collect a contingent fee for representing a defendant in a criminal case. Prof.Cond.R. 1.5(d)(2). As a result, fixed fee agreements are required in criminal representations.

A flat fee is a type of fixed fee. Fixed fees or flat fees are considered an alternative to hourly billing in different types of matters because they provide the client a degree of certainty about the cost of the legal services. Douglas R. Richmond, Understanding Retainers & Flat Fees, 34 J. LEGAL PROF. 113 (2009). 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.” Prof.Cond.R. 1.5, Cmt. [6A]. Flat fees are based on factors independent of the actual number of hours involved in a representation. A lawyer earns a flat fee by performing the services for which the fee was charged, and that fee is the maximum amount that will be charged for the services to be performed. Douglas R. Richmond, *Understanding Retainers & Flat Fees*, 34 J. LEGAL PROF. 113 (2009).

Criminal matters do present uncertainty with regard to the amount of time that may be expended, since the matters may be resolved through dismissal, plea agreement, or trial. Time is one factor to consider when determining the reasonableness of a fee under Prof.Cond.R. 1.5(a). However, the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (2003) unequivocally disapprove of flat fees in death penalty cases because the client’s interests are pitted against the lawyer’s interest in doing no “more than what is minimally necessary to qualify for the flat payment.” ABA Standards of Criminal Justice: *Providing Defense Services, Commentary to Standard 5-2.4* (3d ed. 1993).

This Board has addressed the use of flat fees in the context of a flat fee agreement between a law firm and an insurer/third party administrator of group health benefit plans. In Opinion 95-2 (1995), the Board advised that the propriety of a flat fee agreement is based upon a variety of factors. A fixed flat fee is subject to the restriction in former DR 2-106(A) [now Prof.Cond.R. 1.5(a)] that it not be excessive. A fixed flat fee cannot circumvent the requirement of DR 5-103(B) [now Prof.Cond.R. 1.8(e)] that clients must remain liable for expenses of litigation. Additionally, a fixed flat fee agreement must not limit an attorney’s duties of competent and diligent representation to each client under Prof.Cond.R. 1.1 and 1.3.

When the payment of a flat fee is made in advance of representation, there are additional ethical considerations, such as when a flat fee is required to be placed into the lawyer’s client trust account, and what, if any, portion of the fee is refundable. See, Prof.Cond.R. 1.5(d)(3), Cmt. [6A].

When a flat fee is earned affects whether or not it must be placed in the lawyer's trust account. Prof.Cond.R. 1.5, Cmt. [6A]. Prof.Cond.R. 1.15(a)³ requires a lawyer to keep the property of clients separate from the lawyer's own property. Client and third-person funds paid to a lawyer or a law firm must be maintained in an insured, interest bearing account, designated as "client trust account," "IOLTA account," or with another identifiable fiduciary title, and in a financial institution in the state where the lawyer's office is located. Prof.Cond.R. 1.15(a). Additionally, under Prof.Cond.R. 1.15(c), lawyers are required to place legal fees and advances on litigation expenses paid by the client into a trust account, unlike DR 9-102(A), which precluded a lawyer from placing client advances into a trust account.

An "earned upon receipt" fee is a flat fee paid in advance that is deemed earned upon payment regardless of the amount of future work performed. Prof.Cond.R. 1.5, Cmt. [6A]. When a fee is denoted as "earned upon receipt," those fees are considered the lawyer's funds, and not the client's funds. As a result, those fees should not be placed in the lawyer's IOLTA account, as it is impermissible to commingle a lawyer's own funds with those of a client.

A lawyer who receives a flat fee paid in advance for representation in a legal matter is obligated to return any unearned portion of the fee.⁴ Prof.Cond.R. 1.5(d)(3), 1.16(e). Even if a fee is designated as "earned upon receipt," "nonrefundable," or similarly, Prof.Cond.R. 1.5 requires a lawyer to refund any unearned portion of a fee paid in advance if the representation is not completed for any reason. Additionally, Prof.Cond.R. 1.16(e) states that "[a] lawyer who withdraws from employment shall 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 Board withdraws Opinion 96-4, which analyzed former DR 9-102(A), and concludes that Prof.Cond.R. 1.15 requires flat fees paid in advance for representation must be placed in a client trust account. A flat fee for representation in a matter may not be placed into the attorney's business or operating account, unless it is designated as "earned upon receipt" or similarly and the client is advised in writing that if the lawyer does not complete the representation for any reason, the client may be entitled to a refund. Prof.Cond.R. 1.5(d)(3).

³ Prof.Cond.R. 1.15 includes provisions that are not contained in former DR 9-102.

⁴ See also, *Columbus Bar Assn. v. Farmer*, 111 Ohio St.3d 137, 143-44, 2006-Ohio-5342, ¶ 31, 855 N.E.2d 462, 469 (citations omitted) (A lawyer has a duty to account for and return any unearned fees).

CONCLUSION:

It is proper for a lawyer to enter a flat fee agreement requiring a client to pay a fixed amount in advance of representation. The flat fee agreement must comport with the Ohio Rules of Professional Conduct. Under Prof.Cond.R. 1.15(c), a lawyer is required to deposit flat fees and expenses paid in advance for representation into an IOLTA account, unless designated as “earned upon receipt” or similarly, and may withdraw the fee only as it is earned or the expense as it is incurred. If a lawyer designates a fee “earned upon receipt,” “nonrefundable,” or similarly, the client must be advised in writing that the client may be entitled to a refund under Prof.Cond.R. 1.16(e) for any part of an unearned flat fee paid in advance of representation. Under Prof.Cond.R. 1.5(a), the flat fee must not be excessive. Under Prof.Cond.R. 1.8(e), the lawyer shall not provide financial assistance to a client, aside from advances in court costs and litigation expenses. Under Prof.Cond.R. 1.1 and 1.3, the flat fee agreement must not interfere with an attorney’s duties to provide competent and diligent representation to each client.

Advisory Opinions of the Board of Professional Conduct are informal, nonbinding opinions in response to prospective or hypothetical questions regarding the application of the Supreme Court Rules for the Government of the Bar of Ohio, the Supreme Court Rules for the Government of the Judiciary, the Rules of Professional Conduct, the Code of Judicial Conduct, and the Attorney’s Oath of Office.