

FORMAL OPINION NO. 2005-124

Fee Agreements: Excessive Fees, Contingent Fees, PIP Benefits

Facts:

Lawyer represents plaintiffs in personal injury litigation. Lawyer would like to use a written contingent fee agreement, prepared in accordance with ORS 20.340, which provides for a contingent fee based both on the disputed or contested portion of any recovery and on the recovery of personal injury protection (PIP) benefits.

Question:

May Lawyer use a contingent fee agreement that is based in part on recovery of PIP benefits?

Conclusion:

Yes, qualified.

Discussion:

Oregon RPC 1.5(a) provides:

(a) A lawyer shall not enter into an agreement for, charge or collect an illegal or clearly excessive fee or a clearly excessive amount for expenses.

See also Oregon RPC 1.5(c), which prohibits contingent fees in certain domestic relations matters and in criminal matters, and Oregon RPC 1.8(i)(2), which permits a lawyer to “contract with a client for a reasonable contingent fee in a civil case.” As stated in OSB Formal Ethics Op Nos 2005-97 and 2005-54, we construe the *clearly excessive* requirements of Oregon RPC 1.5(a) and the *reasonableness* requirement of Oregon RPC 1.8(i)(2) to be coextensive.

If a fee agreement is ambiguous, it must be construed against the lawyer. *Cf.* OSB Formal Ethics Op No 2005-15.

In OSB Formal Ethics Op No 2005-98, we described a situation in which Lawyer was hired by an insurer to represent a number of insureds at a flat fee per case. We noted that the fact that Lawyer might receive extremely high compensation for cases that could be quickly resolved did not make the fee agreement excessive or unreasonable as long as the overall fee agreement between Lawyer and the insurer was not excessive

or unreasonable. A similar standard applies here. In other words, it is necessary to determine whether Lawyer's entire fee for handling a particular matter for a client (i.e., both PIP and non-PIP portions) is excessive or unreasonable.

Consider, for example, a personal injury plaintiff who stands to recover up to \$100,000 in contested personal injury damages and \$5,000 in clear-cut PIP benefits. Assume further that, as is normally the case, recovery of the PIP benefits is simply a matter of filling out a form and does not present any contested issues. If a flat fee of \$1,667 "up front" plus one-third of any recovery in the overall litigation would not be clearly excessive or unreasonable, there is no reason that a lawyer should not equally be able to agree with the client that the lawyer will collect one-third of any PIP or non-PIP sums collected by or on the client's behalf. If the mathematics are the same, the form of the fee agreement should not be controlling.

If, on the other hand, the only claim at issue was an uncontested \$5,000 claim for PIP benefits and there was no separate non-PIP personal injury claim, it should be clear that a more than nominal contingent fee would be clearly excessive.

Approved by Board of Governors, August 2005.

COMMENT: For additional information on this general topic and other related subjects, *see* THE ETHICAL OREGON LAWYER ch 3 (Oregon CLE 2003); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§34-35 (2003); and ABA Model Rule 1.5.