

FORMAL OPINION NO 2005-97

Fee Agreements: Modifications of Fee Agreement and Interest Charges

Facts:

Lawyer would like to charge clients 18 percent interest on accounts that are 30 days or more past due.¹

Questions:

1. May Lawyer charge 18 percent annual interest if a client expressly agrees to it as part of the fee agreement?
2. What interest rate may Lawyer charge in the absence of an interest rate agreement?
3. If no agreement concerning a charge of 18 percent is reached, may Lawyer amend the fee agreement to include an 18 percent per annum charge by stating on a bill sent to the client that, in the future, the client must begin to pay 18 percent per annum if payment is not received within 30 days?

Conclusions:

1. Yes, qualified.
2. Nine percent, pursuant to ORS 82.010(1)(a).
3. No.

Discussion:

1. *Eighteen Percent Per Year Is Not Excessive Per Se.*

Oregon RPC 1.5(a) provides that “[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 1.8(i)(2),

¹ We assume that the manner in which Lawyer would charge interest does not violate Regulation Z or other similar credit laws or requirements. See *Consumer Law in Oregon* ch 7 (OSB Legal Pubs 2013).

which permits a lawyer to “contract with a client for a reasonable contingent fee in a civil case” subject to certain limitations. We held in OSB Formal Ethics Op No 2005-54 that the “clearly excessive” standard in Oregon RPC 1.5(a) and the “reasonable contingent fee” standard in Oregon RPC 1.8(i)(2) are the same. See also ORS 20.340, which places certain limitations on personal-injury or wrongful-death contingent-fee agreements. Apart from such limitations, however, the content of a fee agreement is up to the lawyer and the client to decide under general principles of substantive contract law.

An 18 percent interest charge on past-due amounts would not be clearly excessive if the charge is within the range of interest normally charged for credit transactions. In Oregon, as in many other states, clients may now pay for legal services with credit cards. *See* OSB Formal Ethics Op No 2005-172. A substantial portion of the public also uses credit cards for other purposes. Because many credit cards provide for interest charges of 18 percent or more, we do not believe that an 18 percent charge would be clearly excessive or unreasonable unless the fee agreement taken as a whole could be said to be clearly excessive or unreasonable.

2. Only Nine Percent May Be Charged If No Enforceable Agreement Is Reached.

If no enforceable agreement is reached between Lawyer and Client regarding payment of interest on past-due amounts at a greater rate, Lawyer would be limited to interest at nine percent pursuant to ORS 82.010(1)(a). *See In re Schroeder*, 15 DB Rptr 212 (2001). *Cf. United Farm Agency v. McFarland*, 243 Or 124, 133–34, 411 P2d 1017 (1966).

3. A Statement on the Monthly Bill Would Not Support an 18 Percent Charge.

In OSB Formal Ethics Op No 2005-69 and OSB Formal Ethics Op No 2005-15, we noted that a lawyer may not charge or collect more than the agreed-on fee. *See also In re Yacob*, 318 Or 10, 860 P2d 811 (1993). *Cf. Comm. on Legal Ethics of W. Virginia State Bar v. Tatterson*, 173 W

Va 613, 319 SE2d 381 (1984) (lawyer has burden to establish terms of fee agreement in the event of dispute). Because fee agreements can, in principle, be modified to make them more favorable to the lawyer (such as by including greater interest), it is necessary to consider whether the mere addition of a statement on a bill that 18 percent interest will be charged in the future constitutes a valid and enforceable modification.

A modification of a fee agreement in the lawyer's favor requires client consent based on an explanation of the reason for the change and its effect on the client. *See In re Skinner*, 14 DB Rptr 38 (2000). In addition, the modification must be objectively fair. *See, e.g., Ward v. Richards & Rossano, Inc., P.S.*, 51 Wash App 423, 428–29, 754 P2d 120 (1988); *Durr v. Beatty*, 142 Ill App 3d 443, 491 NE2d 902, 907–08 (1986); *Sabin v. Terrall*, 186 Or 238, 250, 206 P2d 100 (1949); *Jacobson v. Sassower*, 66 NY2d 991, 489 NE2d 1283 (1985). *See also Cord v. Smith*, 338 F2d 516, 524–25 (9th Cir 1964) (discussing fiduciary obligations of lawyers in conflict-of-interest context). The mere addition of a statement on a client's bill to the effect that 18 percent interest will be charged does not meet these standards and thus could not justify a charge of 18 percent interest rather than nine percent interest. Moreover, this is true even if, as a matter of general substantive contract law, the addition of such a statement would be sufficient to modify a contract not involving a lawyer.²

² It is not clear that such a practice would necessarily create a binding contractual amendment in a transaction not involving a lawyer. *Cf. Empire Bldg. Supply, Inc. v. EKO Investments, Inc.*, 40 Or App 739, 746, 596 P2d 593 (1979). If the addition of a reference on a bill to 18 percent interest would not create a contractual obligation to pay 18 percent as a matter of general substantive contract law, Lawyer could not ethically charge 18 percent for this reason as well.

Approved by Board of Governors, August 2005.

COMMENT: For additional information on this general topic and other related subjects, see *The Ethical Oregon Lawyer* § 3.1 to § 3.2-2 (attorney fees and limitations), § 3.2-4 (contingent-fee agreements), § 3.3-1 to § 3.3-6 (overview of fee agreements), § 3.4-10 (finance charges), § 3.4-13 (amendments to fee agreements), § 3.5-7(a) (acquisition of interest in litigation) (OSB Legal Pubs 2015); *Restatement (Third) of the Law Governing Lawyers* §§ 18, 34 (2000) (supplemented periodically); ABA Model RPC 1.5(a); and ABA Model RPC 1.8(i)(2). *See also* Washington Advisory Op No 1960 (2001) (available at <www.wsba.org/resources-and-services/ethics/advisory-opinions>).