FORMAL OPINION NO 2005-171

Fee Agreements:
Interim Payment to Lawyer before Probate Completed

Facts:

Lawyer is asked to represent a person who has been designated Personal Representative in a decedent’s will. Lawyer anticipates that the final accounting will include reimbursement to Personal Representative for legal and other professional fees incurred in administering the estate.

Questions:

1. May Lawyer request and accept a retainer from Personal Representative as a condition of accepting the representation?
2. May Lawyer request and receive partial payments before completing the proceeding?
3. Would the answers be any different if Lawyer is Personal Representative?

Conclusions:

1. Yes, qualified.
2. Yes, qualified.
3. No.

Discussion:

Oregon RPC 1.5(a) provides:

A lawyer shall not enter into an agreement for, charge or collect an illegal or clearly excessive fee . . . .

Illegal conduct is not limited to criminal conduct, but includes conduct that is forbidden by statute. In re Hockett, 303 Or 150, 162, 734 P2d 877 (1987).
ORS 116.183(1) provides that a personal representative shall be allowed in the settlement of the final account all necessary expenses incurred in the care, management and settlement of the estate, including reasonable fees of attorneys employed by the personal representative. A partial award of such expenses, including fees, may be allowed prior to settlement of the final account upon petition.

A lawyer who takes attorney fees from an estate without obtaining prior court approval engages in unethical conduct by collecting an illegal fee. In re Altstatt, 321 Or 324, 333, 897 P2d 1164 (1995), cert dismissed, 517 US 1129 (1996) ("[a]ny such attorney fee that is collected without approval is unlawful and, hence, an ‘illegal’ fee").

On the other hand, nothing in ORS 116.183 prohibits a lawyer from being paid from the personal representative’s own funds. In fact, the plain language of the statute contemplates that the personal representative is entitled to reimbursement of expenses incurred in the settlement of the estate. Lawyer does thus not charge or collect an illegal fee in a probate case if Lawyer requests and receives an initial payment or interim payments from Personal Representative’s own funds. Personal Representative may then seek court approval for reimbursement from the estate assets of some or all of the money advanced for legal fees.1

A lawyer who is serving as personal representative of an estate must, however, obtain court approval before withdrawing any compensation for services from the estate, as provided in ORS 116.183.

Approved by Board of Governors, August 2005.

1 This result is particularly appropriate because a personal representative may ask a lawyer to provide services for which it is unlikely that the court would authorize payment.

COMMENT: For additional information on this general topic and other related subjects, see The Ethical Oregon Lawyer § 3.2-1 (excessive or illegal fees), § 3.2-3 (fees requiring court approval) (OSB Legal Pubs 2015); Restatement (Third) of the Law Governing Lawyers § 34 (2000) (supplemented periodically); and ABA Model RPC 1.5.