FORMAL OPINION NO 2005-54

Fee Agreements:
Contingent to Hourly Fee When Client Rejects Settlement Offer

Facts:

Lawyer frequently represents plaintiffs in personal-injury contingent-fee litigation. Lawyer proposes to provide as a term in Lawyer's standard contingent-fee agreement that if a client rejects a settlement offer that Lawyer deems reasonable, Lawyer may, at Lawyer's option, transform the fee agreement into one that entitles Lawyer to the agreed-on percentage of the rejected settlement amount plus an hourly fee from the point of rejection forward.

Question:

If the requirements of ORS 20.340 are met, and the terms and conditions of the fee agreement are explained to and understood by Lawyer's clients, may Lawyer employ and enforce such a provision?

Conclusion:

Yes, qualified.

Discussion:

Oregon RPC 1.2(a) requires a lawyer to "abide by a client's decision whether to settle a matter." Because lawyers are agents for their clients, and not principals, it is up to the clients—and not the lawyers—to decide whether to settle a matter. *See, e.g.*, OSB Formal Ethics Op No 2005-26. *But cf. Hagans, Brown & Gibbs v. First Nat'l Bank of Anchorage*, 783 P2d 1164 (Alaska 1989) (noting very limited bad-faith exception to this general rule). Depending on the circumstances, the proposed clause could unduly interfere with the client's unfettered decision whether to settle.

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." The use of a provision in a fee

agreement such as the one outlined here could very well turn an otherwise lawful fee into a "clearly excessive fee" in violation of Oregon RPC 1.5(a) or into a fee that was not a "reasonable contingent fee" in violation of Oregon RPC 1.8(i). *Cf.* OSB Formal Ethics Op No 2005-15.[1] *See also In re Kerrigan*, 271 Or 1, 530 P2d 26 (1975). In addition, and because Oregon RPC 1.5(a) prohibits not only entering into an agreement for but also charging or collecting a clearly excessive fee, it may happen that subsequent events make it improper for a lawyer to charge or collect the full amount of an agreed-on fee that turns out to be excessive in fact even though it did not appear to be excessive at the outset. *Cf. Hayes v. Sec'y of Health & Human Servs.*, 916 F2d 351 (6th Cir 1990), *republished and clarified on reh'g*, 923 F2d 418 (1991).

We cannot say as a matter of law, however, that all uses of split contingent-fee/hourly fee agreements will necessarily violate these standards. *Cf. In re Yacob*, 318 Or 10, 860 P2d 811 (1993) (lawyer disciplined for charging client more than previously agreed-on fee).

Approved by Board of Governors, August 2005.

[1] We construe the "clearly excessive" standard under Oregon RPC 1.5(a) and the "unreasonable" standard under *former* DR 5-103(A) to be the same.

COMMENT: For additional information on this general topic and related subjects, see *The Ethical Oregon Lawyer* § 3.2-1 (excessive or unreasonable fees), § 3.2-4 (contingent-fee agreements), § 3.3-3 (amendments to fee agreement), § 4.2-2(d) (refunding unearned fees), § 12.3-6(a) (client retainers) (OSB Legal Pubs 2015); *Restatement (Third) of the Law Governing Lawyers* §§ 34–35, 37 (2000) (supplemented periodically); ABA Model RPC 1.5(a); and ABA Model RPC 1.8(i).