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) (refund 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).