

FORMAL OPINION NO 2005-69

Fee Agreements: Dividing Court-Awarded Fees with Nonlawyer

Facts:

Lawyer represents Plaintiff in litigation. Plaintiff's claims include attorney fee claims. When judgment is entered, the amount awarded by the court for attorney fees exceeds the amount that Lawyer is due under Lawyer's contract with Plaintiff.

Question:

Who is entitled to the difference between the amount of the attorney fee award and the amount of agreed-on compensation?

Conclusion:

Plaintiff.

Discussion:

Oregon RPC 1.5(a) prevents a lawyer from "enter[ing] into an agreement for, charg[ing] or collect[ing] an illegal or clearly excessive fee or a clearly excessive amount for expenses." A fee is "illegal or clearly excessive" if it exceeds the amount previously agreed on. *In re Kerrigan*, 271 Or 1, 530 P2d 26 (1975); *In re Sassor*, 299 Or 720, 705 P2d 736 (1985) (applying *former* DR 2-106(A)); OSB Formal Ethics Op No 2005-15. Absent a valid amendment to the substantive terms of the fee agreement, Lawyer may not receive more than the previously agreed-on fee even though a larger fee might also be reasonable under the circumstances. *Cf.* OSB Formal Ethics Op No 2005-97; *In re Skinner*, 14 DB Rptr 38 (2000).¹

¹ The result in this instance would differ if the terms of the fee agreement expressly provided that Lawyer was entitled to the greater of the fee computed thereunder or the court-awarded amount.

Subject to certain exceptions not applicable here, Oregon RPC 5.4 prohibits a lawyer from “shar[ing] legal fees with a nonlawyer.” Payment of the excess amount to Plaintiff would not violate this rule. *See In re Griffith*, 304 Or 575, 748 P2d 86 (1987), *reinstatement granted sub nom Application of Griffith*, 323 Or 99, 913 P2d 695 (1996) (primary purpose of former DR 3-102(A) is to prohibit lawyers from sharing legal fees with nonlawyers in exchange for services related to obtaining or performing legal work). *Cf. Venegas v. Mitchell*, 495 US 82, 110 S Ct 1679, 109 L Ed 2d 74 (1990) (prevailing party, not lawyer, is entitled to award of attorney fees).

Approved by Board of Governors, August 2005.

COMMENT: For additional information on this general topic and other related subjects, see *The Ethical Oregon Lawyer* § 3.2-1 (excessive or unreasonable fees), § 3.2-2 (illegal fees), § 4.2-2(d) (refunding unearned fees), § 7.2 (competence) (OSB Legal Pubs 2015); *Restatement (Third) of the Law Governing Lawyers* §§ 10(3), 18, 34, 38 (2000) (supplemented periodically); ABA Model RPC 1.5; and ABA Model RPC 5.4. *See also* Washington Advisory Op No 1570 (1994) (available at <www.wsba.org/resources-and-services/ethics/advisory-opinions>).