

FORMAL OPINION NO 2005-98

Fee Agreements: Flat Fees, Diligence, and Competence

Facts:

Insurer would like to contract with Lawyer for the provision of legal services to Insureds. Insurer would like to pay Lawyer at a flat rate per case, regardless of the amount of work required. For some cases, this will mean that Lawyer earns fees at a rate that is in excess of what Lawyer would earn if the work were done on an hourly basis. In other cases, Lawyer will earn less.

Questions:

1. May Lawyer enter into such a fee agreement and collect fees thereunder?
2. What limitations, if any, does this arrangement place on Lawyer's relationship with Insureds, who are also Lawyer's clients?

Conclusions:

1. Yes.
2. See discussion.

Discussion:

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.” *Cf.* OSB Formal Ethics Op No 2005-97. In the present circumstance, there is no reason to believe that entering into or collecting fees under the proposed agreement would result in a fee that is clearly excessive. In this type of arrangement, the question is not whether Lawyer earns more than a permissible hourly rate in handling any one particular case but whether the agreement, as a whole, provides excessive compensation. *Cf.* OSB Formal Ethics Op No 2005-151 (rev 2011).

The fact that Lawyer is paid only a flat fee per case does not limit in any way Lawyer's obligations to each client under Oregon RPC 1.1, Oregon RPC 1.2, Oregon RPC 1.3, Oregon RPC 1.8(f), and Oregon RPC 5.4(c).¹ As a general proposition, Lawyer owes the same duty to "flat

¹ Oregon RPC 1.1 provides:

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Oregon RPC 1.2 provides:

(a) Subject to paragraphs (b) and (c), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

(c) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is illegal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

Oregon RPC 1.3 provides: "A lawyer shall not neglect a legal matter entrusted to the lawyer."

Oregon RPC 1.8(f) provides:

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

- (1) the client gives informed consent;
- (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and

fee” clients that Lawyer would owe to any other client. Thus, Lawyer cannot ethically assist Insurer in violating the fiduciary obligation that Insurer owes to Insureds to provide a competent defense. *Cf.* OSB Formal Ethics Op No 2005-119. If, for example, the flat fee per case rate quoted by Insurer to Lawyer were so low as to compel the conclusion that Insurer was seeking to shirk its duties to Insureds and to enlist Lawyer’s assistance in doing so, Lawyer could not ethically accept the representation.

Approved by Board of Governors, August 2005.

(3) information related to the representation of a client is protected as required by Rule 1.6.

Oregon RPC 5.4(c) provides:

(c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer’s professional judgment in rendering such legal services.

COMMENT: For additional information on this general topic and other related subjects, see *The Ethical Oregon Lawyer* § 3.2-1 to § 3.2-2 (excessive, unreasonable, or illegal fees), § 3.4-5 (amount or basis for determining attorney fees), § 3.5-3 (payment of fees by nonclients), § 4.2-2(d) (refunding unearned fees), § 5.1 (identifying the client), § 5.3-5 (insurance defense), § 7.2 to § 7.2-8 (competence), § 7.3 (diligence) (OSB Legal Pubs 2015); *Restatement (Third) of the Law Governing Lawyers* §§ 16, 21–23, 34, 50, 52 (2000) (supplemented periodically); ABA Model RPC 1.1–1.3; ABA Model RPC 1.5(a); ABA Model RPC 1.8(f); and ABA Model RPC 5.4(c). *See also* OSB Formal Ethics Op No 2005-170.

