

FORMAL OPINION NO 2021-197
Payment to Lawyer from Estate Assets

Facts:

Lawyer represents Personal Representative in connection with the administration of a decedent's probate estate.

Questions:

1. May Lawyer receive a fee from probate or estate funds before obtaining a court order authorizing the payments?
2. May Lawyer receive a fee from personal funds of Personal Representative before obtaining a court order authorizing the payments?
3. Would the answers be any different if Lawyer is Personal Representative?

Conclusions:

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

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.” 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) (This case was decided based on former DR 7-102(A)(7) prior to the adoption of the Oregon Rules of Professional Conduct.)

Legal fees and personal representative fees must be approved by order of the court before they can be paid from estate funds. ORS 116.183. A lawyer who accepts attorney fees from estate assets without obtaining prior court approval engages in unethical conduct by collecting an illegal fee. “[A]ny such attorney fee that is collected without approval is unlawful and, hence, an ‘illegal’ fee.” *In re Altstatt*, 321 Or 324, 333, 897 P2d 1164 (1995), *cert dismissed*, 517 US 1129 (1996).

However, ORS 116.183 does not prohibit a lawyer from being paid from the personal representative’s own funds. In fact, the statute clearly contemplates that Personal Representative will typically expend his or her own funds on attorney fees and subsequently apply for reimbursement from the estate. “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 appraisers, attorneys and other qualified persons employed by the personal representative.” ORS 116.183(1). Furthermore, “[a] personal representative who defends or prosecutes any proceeding in good faith and with just cause, whether successful or not, is entitled to receive from the estate necessary expenses and disbursements, including reasonable attorney fees, in the proceeding.” ORS 116.183(3).

Lawyer therefore does not charge or collect an illegal fee in a probate case if Lawyer receives payment from Personal Representative’s own funds.

When Lawyer is serving as Personal Representative, the same analysis applies, and Lawyer may not receive compensation from estate assets prior to the issuance of a court order approving the payment.

Interim fees may be paid to either Lawyer or Personal Representative from estate funds upon issuance by a court of an order authorizing payment of interim fees. “A partial award of such expenses, including fees, may be allowed prior to settlement of the final account upon petition, showing that the final account reasonably cannot be filed at that time, and upon notice as directed by the court.” ORS 116.183(1).

NOTE: This opinion is not intended to address more restrictive local court rules or standing orders regarding the approval of

attorney fees in probate cases, and attorneys are advised to review any such rules or orders before accepting payment from a personal representative.

Approved by Board of Governors, February 2021.

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), § 3.2-3 (fees requiring court approval) (OSB Legal Pubs 2015); *Restatement (Third) of the Law Governing Lawyers* § 34 (2000); and ABA Model RPC 1.5.