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Who Decides?
Fee Provisions that Penalize Client Choice

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Clients can sometimes be "difficult"—especially when cases reach the crucial stage of settlement negotiations. Occasionally, lawyers try to put additional "teeth" into their settlement recommendations by including provisions in their fee agreements that contain penalties if clients reject their advice and wish to continue forward. One of the most common in this vein is a provision that retains the lawyer's entitlement to a contingent percentage of the rejected offer while switching to an hourly fee from that point forward. Oregon ethics opinions dating back over 20 years permit this approach—with conditions that the opinion summarizes as "Yes, qualified." Due to their unique history, however, the Oregon opinions now run counter to court decisions or ethics opinions regionally. Because these provisions have never been reviewed foursquare by Oregon's appellate courts, Oregon lawyers should proceed with caution. In this column, we'll look at the history of the Oregon opinions and how Oregon became out-of-sync with other states around the Northwest.

The Oregon Opinions

The Oregon State Bar first addressed this topic comprehensively in 1991 with Formal Ethics Opinion 1991-54. This opinion, interpreting the old "DRs," focused on former DR 2-106(A) and the question of whether this blended

structure would impose a "clearly excessive" fee. The 1991 opinion concluded that as long as the blended fee structure was agreed with the client up front, it was not improper on its face.

When Oregon moved to the RPCs in 2005, the Bar updated its ethics opinions to correspond to the new rules. One of the new rules that came to us at that time was RPC 1.2(a), which requires a lawyer to "abide by a client's decision whether to settle a matter." There was no counterpart to RPC 1.2(a) in the former DRs. The updated version of the 1991 opinion—Formal Opinion 2005-54—mentions the new rule and cautions that "the proposed clause could unduly interfere with the client's unfettered decision whether to settle." But, the opinion then goes on to focus primarily on the same issue at the core of the 1991 opinion: whether the resulting blended fee would be "clearly excessive." Like its predecessor, the 2005 opinion found that as long as the blended fee structure was agreed with the client at the outset of the representation, it was not improper on its face.

One appellate decision (*In re Gastineau*, 317 Or 545, 550 n.5, 857 P2d 136 (1993)) noted Opinion 1991-54 in passing and another (*In re Groom*, 350 Or 113, 115 n.2, 249 P3d 976 (2011)) simply mentioned RPC 1.2(a). Neither decision, however, evaluates the central rationale of the opinions in light of the new rule. Meanwhile, courts and ethics opinions in other jurisdictions regionally

have concluded that such provisions improperly invade settlement decision-making that is reserved to the client under RPC 1.2(a).

Other States Around the Northwest

Washington, Alaska, Idaho and the Ninth Circuit have all recently addressed fee agreements or conduct similar to the illustration in the two Oregon ethics opinions. These more recent authorities focus on client decision-making under RPC 1.2(a) rather than the "excessive fee" issue that has been at the core of the Oregon opinions since 1991. As noted, all conclude that such provisions are improper.

Washington Advisory Opinion 191 (at 2), which was amended in 2009, is typical:

> "The proposed provision is antithetical to a lawyer's duty to 'abide by' a client's decision regarding settlement. Rather than accept a client's settlement decision without question, the provision—and thus the lawyer by extension—restricts the client's freedom to reject a settlement offer. In very real terms, the provision functions to economically coerce the client into accepting an offer that the client might otherwise perceive to be inadequate."

The Alaska Supreme Court echoed this view in *Compton v. Kittleson*, 171 P3d 172, 176 (Alaska 2007): "Because this right (under RPC 1.2(a)) is personal to the client, an attorney cannot demand relinquishment of the right as a condition of representation." Idaho (*Hurst v. IHC Health Services, Inc.*, 2012 WL 2126886, *2 (D Idaho June 12, 2012)) and the Ninth Circuit (*Nehad v. Mukasey*, 535 F3d 962, 970-72 (9th Cir 2008)) reach the same conclusion.

Although in the more fundamental context of a criminal plea agreement, the Oregon federal district court also noted recently in *United States v. Davis*, 2013 WL 796655, *5 (D Or Mar 4, 2013), that RPC 1.2(a) "comports with the Constitutional limitations on when an attorney must obtain express client consent."

Treading Warily

Ethics opinions in Oregon are advisory only under RPC 8.6. A court—especially one in the context of a fee dispute—might very well use the cautionary language on RPC 1.2(a) in the newer Oregon opinion as a jumping off point to embrace the more client-centered logic found in the recent decisions from around the region to invalidate a provision of this kind. Oregon lawyers would be well advised, therefore, to tread warily when considering provisions such as these that penalize client choice.

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