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"Illegal" Fees: How to Avoid Getting Pulled Over

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Most lawyers know that the "fee rule"—RPC 1.5—prohibits unreasonable fees—which in Oregon's version is phrased as "clearly excessive." Fewer lawyers recall that RPC 1.5(a) also prohibits "illegal" fees. Despite its sinister cast, the Oregon Supreme Court has long held that any fee that, by statute or the equivalent, requires prior court approval is "illegal" if the lawyer collects without the requisite permission. Although experienced practitioners in areas such as probate are aware of the statutory requirement, "illegal" fees can be a proverbial "trap for the unwary" for lawyers who don't regularly practice in an area where approvals are necessary. For example, an environmental lawyer handling a site remediation on a property in probate may not realize that the lawyer's fee may require court approval.

In this column, we'll look at three aspects of "illegal" fees. First, we'll briefly survey the history of Oregon's approach to that term. Second, we'll look at some of the areas that may trigger prior court approval of fees. Finally, we'll discuss practical steps lawyers can take to avoid having their fee become "illegal."

History

When Oregon adopted professional rules patterned on the ABA Model Code of Professional Responsibility in 1970, one of the rules was DR 2-106(A): "A lawyer shall not enter into an agreement for, charge or collect an illegal or clearly excessive fee." In 1985, the Supreme Court disciplined a lawyer in *In re Sassor*, 299 Or 570, 574, 704 P2d 506 (1985), for charging an "illegal" fee under DR 2-106(A) by failing to obtain prior approval as required by statute in a workers compensation proceeding. Although *Sassor* did not include a detailed discussion of "illegal" fees, two years later *In re Hockett*, 303 Or 150, 162, 734 P2d 877 (1987), interpreted another provision of the DRs using the term "illegal" as extending to conduct violating statutes generally—not just criminal laws. A series of decisions followed—most prominently *In re Altstatt*, 321 Or 324, 897 P2d 1164 (1995)—in which the Supreme Court wove together the requirement of court approval and failing to do so rendering a fee "illegal." As the Supreme Court put it in *Altstatt*, which involved a probate proceeding:

> "The rule to be derived from those cases is that it is impermissible to collect attorney fees from an estate in probate without prior court approval. Any such attorney fee that is collected without approval is unlawful and, hence, an 'illegal' fee." 321 Or at 333.

When Oregon moved to professional rules based on the ABA Model Rules of Professional Conduct in 2005, DR 2-106(A) was retained in the form of RPC 1.5(a) and (unlike its ABA Model Rule counterpart) continued to include the term "illegal" fees. Given that similarity, it is not surprising that both the Supreme Court and the Oregon State Bar continued to apply the new rule consistently with the old one—with *In re Lopez*, 350 Or 192, 195, 252 P3d 312 (2011), an example of the former and *In re Krueger*, 29 DB Rptr 273, 279 (Or 2015), illustrating the latter.

Application

Altstatt involved one of the primary areas requiring approval of fees by a court: probate under ORS 116.183. ORS 125.095 generally requires prior court approval of fees in conservatorship proceedings and *In re Vanagas*, 27 DB Rptr 255 (Or 2013), provides an example of discipline for an "illegal" fee in this context. While not intended as a complete list, other common areas include Social Security disability cases (*see, e.g., In re Knappenberger*, 344 Or 559, 561-65, 186 P3d 272 (2008)) and workers compensation proceedings (*see, e.g., In re Dodge*, 16 DB Rptr 278 (Or 2002)).

Oregon State Bar Formal Opinions 2005-63 and 2005-171 note that a lawyer can be paid by a personal representative out of the personal

representative's own funds as long as the personal representative, in turn, seeks court approval for any subsequent reimbursement from estate funds. At the same time, the Supreme Court in *Knappenberger* cautioned that a lawyer and client cannot avoid a statutory requirement altogether by private agreement.

The *Krueger* case noted earlier demonstrates the risk for lawyers who don't handle a probate themselves but whose fees are subject to approval by the probate court. The lawyer in *Krueger* was handling a wrongful death claim for a personal representative and failed to obtain the probate court's approval before collecting his fee in the wrongful death case. He was disciplined for an "illegal" fee.

Lessening Risk

The Supreme Court in *Altstatt* and *In re Weidner*, 320 Or 336, 341, 883 P2d 1293 (1994), emphasized that "ignorance" is not a defense. It is imperative, therefore, that lawyers practicing in an area requiring court approval of fees understand and adhere to that requirement. The Supreme Court offered pungent advice in *Weidner*: "[T]he accused had practiced law for almost two decades. We do not credit his claim of ignorance. The pertinent statutes are plain an easy to find."

Lawyers hired by fiduciaries, in turn, for their expertise in other areas such as our opening example also need to acquaint themselves with any applicable approval requirements.

The risk in this context is not simply regulatory. In *Krueger*, the probate court disallowed the lawyer's contingent fee claim and awarded substantially less using a quantum meruit standard.

ABOUT THE AUTHOR

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