Rule 1.18 Duties to Prospective Client

(a) A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

(b) Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client.

(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

(d) Representation is permissible if both the affected client and the prospective client have given informed consent, confirmed in writing, or:

(1) the disqualified lawyer is timely screened from any participation in the matter; and

(2) written notice is promptly given to the prospective client.

Legal Practice Tips

How to Fire a Client:
Do's and Don'ts When Ending Representation

By Beverly Michaelis

Do you have a file in your office that you just can't stand to look at? (Hint: It's often related to the client you don't like.) Has it been languishing on the corner of your desk or pushed out-of-sight on your credenza? Is a deadline approaching, but you just can't seem to get started? These unwanted files are a major cause of ethics complaints and legal malpractice claims. And most lawyers have at least one. To free yourself from this potentially dangerous situation, gather your courage, take a stand, and fire your problem clients. The first step is to identify the clients and cases you should let go.

Whom Should I Fire?

Some lawyers can easily identify their "dog" files. Others may find this task more difficult. Whether or not you think you know your "dog" files, it never hurts to stop and thoughtfully evaluate your caseload three or four times a year. Try to make it a regular, quarterly practice. When you do, ask yourself if any of these situations sound familiar:

The Client Who Owes You Money

Whether the client never had the money to pay your fees to begin with, or somewhere along the way the account just became delinquent, involuntary pro bono cases are a bad idea. When you continue working for a client who is not paying your bill, you are sending the message that you are not worth the fee you charge. This practice not only emboldens the non-paying client to continue not paying you, but also can be demoralizing and financially damaging to you, your family and your staff. Instead, establish specific billing and accounts receivable practices, spell them out clearly in your fee agreement, and enforce the rules. These situations rarely get better, and the longer you stay on the case, the harder it will be for you to withdraw.

The "Difficult" Client

Also known as the client you hate working for. You know who they are: The client who tracks down your home phone number and calls you on the weekend for non-emergency matters. The client who makes a habit of dropping by your office unexpectedly. The client who complains about every bill and pushes the limit by paying late or at the last possible moment to avoid late fees. The client who won't listen to your advice and fails to cooperate in keeping appointments, providing documents or answering questions. The client who wants to be your co-counsel. The client who is rude to you or your staff. Letting this client go will lift your spirits and instantly lower your stress level. Keeping this client may lead to an ethics complaint or a legal malpractice claim, since this file is generally the last to be worked on, if it receives any attention at all. Learn to spot (and fire) this type of client early in the case. Better yet – avoid representing this client in the first place.

The Case Better Left to Someone Else

Even when you get along famously with your client, and finances are not an issue, some matters simply aren't worth keeping (or taking on). If your favorite client has talked you into helping him or her with a matter that is outside your area of expertise, heed the red flag.

Many a legal malpractice claim can be traced back to a lawyer's initial bad judgment in accepting a case that should have been declined. When friends, family and long-time clients apply pressure, many lawyers succumb to the hero syndrome, believing they can save the day. Resist this temptation. You wouldn't suggest that a loved one see a dermatologist for chest pains. The practice of law is no different. Act in your client's best interests and match him or her with the right professional. This advice holds doubly true in the case of friends or family, where the combination of inexperience plus lack of objectivity and client control can spell ethics or malpractice trouble. You can never go wrong by directing your potential client to the right practitioner. As the friend, family member or long-time lawyer, you can then assume a more fitting role: remain associated with the matter – if appropriate and helpful – or lend moral support. But leave the primary representation to the capable, disinterested colleague who is best suited to handle it.

How Do I Fire My Client?

Oregon Rule of Professional Conduct (ORPC) 1.16(b) specifically permits a lawyer to withdraw from representation if:

Withdrawal can be accomplished without material adverse effect on the interests of the client. ORPC 1.16(b)(1).

The client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement. ORPC 1.16(b)(4).

The client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled. ORPC 1.16(b)(5).

The representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client. ORPC 1.16(b)(6).

Other good cause exists. ORPC 1.16(b)(7).

Any one of these grounds, in addition to others listed in ORPC 1.16(b), is sufficient. To withdraw from representing the non-paying client, the difficult client, or the case better left to another practitioner, follow the steps set out in ORPC 1.16(c) and (d):

Give reasonable notice to the client.

Allow time for employment of other counsel.

Surrender papers and property to which the client is entitled.

Refund any advance payment of fees or expenses that have not been earned or incurred.

Comply with applicable law requiring notice to or permission of a tribunal to withdraw.

Take other appropriate action necessary to protect the client's interests.

Lawyers who inappropriately seek to enforce attorney fee liens over client files, withhold file contents or charge clients for file copies risk an ethics complaint or a legal malpractice claim. (See "*Difficult Paradigm: Are Lien Rights Absolute?*" and "*Client Files Revisited: More Light on a Topic That Won't Go Away*," by Helen Hierschbiel, OSB assistant general counsel, published in the *OSB Bulletin*, May 2006 and January 2006, respectively.)

In addition, you should:

Advise the client of (or confirm) the reason for termination in writing. Avoid commenting on the merits of the case. Since you are terminating representation before conclusion of the matter, advise the client *generally* that time limitations may or do apply, and stress the need to hire another lawyer immediately.

Keep a copy of any documents returned to the client and preserve your file for at least 10 years.

Cooperate fully with the client's new legal counsel, if any. Provide that person with a complete copy of the file, and make sure a substitution of counsel is timely filed with the court by the client's new legal counsel.

Reviewing your caseload three or four times a year will help you identify and promptly withdraw from problem cases. Then take the wisdom you've gained and apply it the next time you are screening a new client or matter. If unpaid fees are a perennial problem in your practice, follow the suggestions below to keep on top of overdue accounts. And above all, keep up these practices. Your vigilance is the key to successfully avoiding or withdrawing from the "dog" files.

Other Practical Tips

Keep an Eye on Your Accounts

Do not allow outstanding fees to accumulate. If you are not paid as agreed, call the client as soon as possible and discuss the situation. You may find that the client has new financial circumstances and that you are willing to renegotiate the terms of the client's account. Or you may find that you need to address issues related to your attorney-client relationship. For example, the client may be dissatisfied with an aspect of your representation. Speaking with the client helps you to decipher and address the real issues behind the client's non-payment. Once you understand the situation, you can decide whether you want to continue or withdraw from the representation. Do not discontinue providing essential legal services due to non-payment unless you have properly withdrawn from the case.

Streamline the Process with Form Letters

Creating form letters to have on hand when you want to withdraw from a case will make the process much simpler. For the prospective client who did not sign and return your fee agreement, pay your retainer or respond as requested, your letter might say something like this:

> Dear Client:
>
> Since I have not heard from you for the past (*30, 45, or other number of your choosing*) days, I assume you do not wish to retain me further or to proceed with this matter. For that reason, I am now closing my file and will take no further action in the matter.
>
> You (*are*) (*may be*) facing some time deadlines. If you decide to proceed, you should contact another attorney immediately. If you fail to do so, your legal matter may be barred by a time limit.
>
> *Very truly yours,*
> *Sam Lawyer*

If your client owes you outstanding fees and costs, download and use the PLF form letter, "Disengagement Letter 3 – Unpaid Fees," available on the PLF website at www.osbplf.org. While at the website, consider downloading the eight other nonengagement and disengagement letters for your forms file.

For the client or case you should never have taken, your letter might say:

> Dear Client:
>
> The purpose of this letter is to confirm, based on our conversation of (date), that (firm name) will not continue to represent you in (describe matter) because (give reason for declining if possible and appropriate to state it). OR: The purpose of this letter is to confirm, based on our conversation of (date), that (firm name) will not continue to represent you in (describe matter). We feel that your interests would be better served by retaining another lawyer to assist you in this matter.
>
> You should be aware that any action in your case must be filed within the applicable statute of limitations. I strongly recommend that you consult with another lawyer concerning your rights in this matter. Our decision should not be taken as a statement of the merits of your case.
>
> *Very truly yours,*
> *Samantha Attorney*

To Sue or Not to Sue

As a general rule, avoid suing clients for fees. Make an effort to determine the root of the client's dissatisfaction. It is natural to be defensive about your work on a case, but try to put your emotional investment in the matter aside

while attempting to resolve a fee dispute. Really listen to the client's side of the argument. If appropriate, offer to arbitrate the fee dispute through the OSB Fee Arbitration Program, or consider other alternative dispute resolution methods.

Before suing a client for fees, consider the following:

Do you stand to gain or lose a substantial amount of money?

Was a good result obtained in the underlying case?

Has an uninvolved, experienced lawyer reviewed the file for possible malpractice?

Does the client have any grounds to credibly dispute the debt or any part of it?

Have you offered to arbitrate or compromise?

Will a judgment be collectible if obtained?

Will a lawsuit result in bad publicity reflecting negatively on you or your law firm?

Exercise extreme caution in deciding to sue to collect a fee. Many legal malpractice suits result from counterclaims to a lawyer's action to recover fees. Frequently, your effort to sue for fees is rewarded only with further aggravation, wasted time, wasted money and poor client relations. A straightforward discussion of fees, financial arrangements and billing procedures at the beginning of the attorney-client relationship will reassure clients, reduce the possibility of fee disputes and eliminate the need for collection litigation.

Perhaps Abraham Lincoln said it best: "It is more important to know what cases not to take than it is to know the law."

ABOUT THE AUTHOR

The author is a lawyer and practice management adviser with the Professional Liability Fund.

ENGAGEMENT LETTER
(Sample – Modify as appropriate)

Re: [*Subject*]

Dear [*Name*]:

The purpose of this letter is to confirm, based on our conversation of [*date*], that [*firm name*] will represent you in [*describe matter*]. We will provide the following services: [*list services to be provided*].

Attached for your use is information on our billing and reporting procedures. Our fee is [*dollar amount*] per hour for services performed by lawyers of this firm and [*dollar amount*] per hour for services performed by our nonlawyer staff. You will also be billed for expenses and costs incurred on your behalf.

Our expectations of you are: [*list any expectations concerning payment of bills, responses to requests for information, etc.*].

This firm has not been engaged to provide the following services: [*list services that are outside the scope of the representation*].

I estimate that fees and expenses in this case will be [*provide a realistic, worst-case estimate of fees and expenses*]. Please keep in mind that this is only an estimate and that, depending on the time required and the complexity of the action, actual fees and expenses may exceed this estimate. You will be billed for actual fees and expenses.

It is very difficult to accurately predict how long it will take to conclude your case. Generally, these cases take [*provide a realistic, worst-case estimate of time to be spent on the case*]. This is only an estimate, and the actual time required to conclude this matter may be greater than expected.

I have enclosed a copy of the initial interview form. If any of the information on this form is incorrect, please notify [*primary contact*] immediately. If you have any questions about this information, please call [*primary contact*].

My goal is to provide you with conscientious, competent, and diligent legal services. However, I cannot achieve this goal without your cooperation. This includes keeping appointments, appearing for depositions, producing documents, attending scheduled court appearances, and making payments as required. It is also important that you promptly notify me of any change of address or telephone number so I will always be able to reach you. In addition, I may suggest that we consult with another attorney about issues in your case. Before I do this, I will discuss the issue with you and ask you to decide whether you want to retain the attorney as a consulting attorney on the case.

I also want to protect your interests in the event of my unexpected death, disability, impairment, or incapacity. To accomplish this, I have arranged with another attorney to assist with closing my practice in the event of my death, disability, impairment, or incapacity. In such event, my office staff or the assisting attorney will contact you and provide you with information about how to proceed.

I will send you pleadings, documents, correspondence, and other information throughout the case. These copies will be your file copies. I will also keep the information in a file in my office. The file in my office will be my file. Please bring your file to all our meetings so that we both have all the necessary information available to us. When I have completed all the legal work necessary for your case, I will close my file and return original documents to you. I will then store the file for approximately 10 years. I will destroy the file after that period of time.

I have included a copy of this letter for you to review, sign, and return to me. If any of the information in the letter is not consistent with your understanding of our agreement, please contact me before signing the letter. Otherwise, please sign the enclosed copy and return it to me.

On behalf of the firm, we appreciate the opportunity to represent you in this matter. If you have any questions, please feel free to call.

Very truly yours,

[Attorney]
[Firm]

I have read this letter and consent to it.

_____ _____

[Client] *[Date]*

Enclosures

[NOTE: This is a sample form only. Use of this letter will help to establish clear expectations and avoid misunderstandings between you and your client. It will not, however, provide absolute protection against a malpractice action.]

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NONENGAGEMENT LETTER
NOT MONITORING CHANGES
(Sample – Modify as appropriate)
(May be sent by certified mail, return receipt requested)

Re: [*Subject*]

Dear [*Name*]:

This letter is to confirm that this firm will not represent you in the [*subject*] matter. Please note that because we are not currently representing you on any matter, we will not be able to monitor changes in the law or your circumstances that may affect the strength of your case.

Important time limits [*could be*] [*are*] involved. We have not researched these time limits and we are unable to advise you on the applicable time limits. We urge you to contact another lawyer immediately if you wish to have this advice. If you do not proceed promptly, your legal matter may be barred by a time limit.

If you wish to have a lawyer represent you and you do not have another lawyer in mind, we suggest you call the Oregon State Bar Lawyer Referral Service (LRS) at 503-684-3763 or 1-800-452-7636. You may also request an online referral by visiting the LRS Web site at http://www.osbar.org/public/ris/ris.html. The LRS maintains a list of lawyers who may be able to handle your case.

Thank you for contacting our law firm. [*Optional:* We hope we can serve you in the future.]

Very truly yours,

[Attorney]
[Firm]

[*NOTE: This is a sample form only. Use of this letter will help to establish clear expectations and avoid misunderstandings between you and your client. It will not, however, provide absolute protection against a malpractice action.*]

DISENGAGEMENT LETTER
UNPAID FEES
(Sample – Modify as appropriate)

Re: [*Subject*]

Dear [*Name*]:

During the past [*time*], it has been our pleasure to serve you as counsel in [*subject-matter title*]. In the course of this representation, you have paid us [*dollar amount already paid*] in legal fees and expenses. Unfortunately, contrary to our engagement agreement, you have not paid our statements in a timely manner for the past [*time period*].

At this time, the outstanding and overdue fees and expenses total approximately [*dollar amount currently owing*]. Our firm desires to continue our relationship, but does not have the ability to finance your case. Moreover, you expressly agreed that the hourly fees and expenses in this matter would be kept current.

We have continued to represent you for the past [*time*], even though each month the outstanding fees and expenses increased. We did so because we value our relationship with you and would like to continue representing you.

At this point, in our opinion, the trial court will permit us to withdraw from your case. There is still sufficient time for you to retain another lawyer without jeopardizing your case or adversely affecting the court's calendar. However, if we wait several more months, one of these conditions for withdrawal may not exist.

Your new lawyer may wish to discuss this case with us, which would be to your advantage, considering the work we have already done. We are willing to consult with your new lawyer as long as you make arrangements to pay us for our time and expense. In addition, you must agree to a plan to reduce your unpaid bill for fees and expenses for work done in the past [month, etc.]. We are willing to share this work with your new lawyer to the extent we are legally obligated to do so in the absence of full payment of our fees and expenses.

I enclose our petition to withdraw from the case, which we intend to file within [*number of days]* days from the date of this letter. If instead you wish us to continue representing you, we would need your account to be brought current before we could resume any work on your behalf. Please contact me to make the necessary arrangements. I look forward to hearing from you and I hope we can continue representing you.

Very truly yours,

[Attorney]
[Firm]

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

[NOTE: This is a sample form only. Use of this letter will help to establish clear expectations and avoid misunderstandings between you and your client. It will not, however, provide absolute protection against a malpractice action.]

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Defined Terms (see Rule 1.0):

"Fraudulent"
"Informed consent"
"Knows"
"Matter"
"Reasonable"

Comparison to Oregon Code

This rule has no real counterpart in the Oregon Code. Subsection (a) is similar to DR 7-101(A) and (B), but expresses more clearly that lawyers must defer to the client's decisions about the objectives of the representation and whether to settle a matter. Subsection (b) is a clarification of the lawyer's right to limit the scope of a representation. Subsection (c) is similar to DR 7-102(A)(7), but recognizes that counseling a client about the meaning of a law or the consequences of proposed illegal or fraudulent conduct is not the same as assisting the client in such conduct. Paragraph (d) had no counterpart in the Oregon Code.

Comparison to ABA Model Rule

ABA Model Rule 1.2(b) states that a lawyer's representation of a client "does not constitute an endorsement of the client's political, economic, social or moral views or activities." It was omitted because it is not a rule of discipline, but rather a statement intended to encourage lawyers to represent unpopular clients. Also, MR 1.2(c) refers to "criminal" rather than "illegal" conduct.

RULE 1.3 DILIGENCE

A lawyer shall not neglect a legal matter entrusted to the lawyer.

Adopted 01/01/05

Defined Terms (see Rule 1.0)

"Matter"

Comparison to Oregon Code

This rule is identical to DR 6-101(B).

Comparison to ABA Model Rule

The ABA Mode Rule requires a lawyer to "act with reasonable diligence and promptness in representing a client."

RULE 1.4 COMMUNICATION

(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.
Adopted 01/01/05

Defined Terms (see Rule 1.0):

"Knows"
"Reasonable"
"Reasonably"

Comparison to Oregon Code

This rule has no counterpart in the Oregon Code, although the duty to communicate with a client may be inferred from other rules and from the law of agency.

Comparison to ABA Model Rule

This is the former ABA Model Rule. ABA MR 1.4 as amended in 2002 incorporates provisions previously found in MR 1.2; it also specifically identifies five aspects of the duty to communicate.

RULE 1.5 FEES

(a) 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.

(b) A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. Factors to be considered as guides in determining the reasonableness of a fee include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

(c) A lawyer shall not enter into an arrangement for, charge or collect:

(1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of spousal or child support or a property settlement;

(2) a contingent fee for representing a defendant in a criminal case; or

(3) a fee denominated as "earned on receipt," "nonrefundable" or in similar terms unless it is pursuant to a written agreement signed by the client which explains that:

(i) the funds will not be deposited into the lawyer trust account, and

(ii) the client may discharge the lawyer at any time and in that event may be entitled to a refund of all or part of the fee if the services for which the fee was paid are not completed.

(d) A division of a fee between lawyers who are not in the same firm may be made only if:

(1) the client gives informed consent to the fact that there will be a division of fees, and

(2) the total fee of the lawyers for all legal services they rendered the client is not clearly excessive.

(e) Paragraph (d) does not prohibit payments to a former firm member pursuant to a separation or retirement agreement, or payments to a selling lawyer for the sale of a law practice pursuant to Rule 1.17.

Adopted 01/01/05

Amended 12/01/10: Paragraph(c)(3) added.

Defined Terms (see Rule 1.0):

"Firm"
"Informed Consent"
"Matter"
"Reasonable"

Comparison to Oregon Code

Paragraphs (a), (b) and (c)(1) and (2) are taken directly from DR 2-106, except that paragraph (a) is amended to include the Model Rule prohibition against charging a "clearly excessive amount for expenses." Paragraph (c)(3) had no counterpart in the Code. Paragraph (d) retains the substantive obligations of DR 2-107(A) but is rewritten to accommodate the new concepts of "informed consent" and "clearly excessive." Paragraph (e) is essentially identical to DR 2-107(B).

Comparison to ABA Model Rule

ABA Model Rule 1.5(b) requires that the scope of the representation and the basis or rate of the fees or expenses for which the client will be responsible be communicated to the client before or within a reasonable time after the representation commences, "preferably in writing." Model Rule 1.5(c) sets forth specific requirements for a contingent fee agreement, including an explanation of how the fee will be determined and the expenses for which the client will be responsible. It also requires a written statement showing distribution of all funds recovered. Paragraph (c)(3) has no counterpart in the Model Rule. Model Rule 1.5(e) permits a division of fees between lawyers only if it is proportional to the services performed by each lawyer or if the lawyers assume joint responsibility for the representation.

RULE 1.6 CONFIDENTIALITY OF INFORMATION

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to disclose the intention of the lawyer's client to commit a crime and the information necessary to prevent the crime;

(2) to prevent reasonably certain death or substantial bodily harm;

(3) to secure legal advice about the lawyer's compliance with these Rules;

(4) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

(5) to comply with other law, court order, or as permitted by these Rules; or

(6) in connection with the sale of a law practice under Rule 1.17 or to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm. In those circumstances, a lawyer may disclose with respect to each affected client the client's identity, the identities of any adverse parties, the nature and extent of the legal services involved, and fee and payment information, but only if the information revealed would not compromise the attorney-client privilege or otherwise prejudice any of the clients. The lawyer or lawyers receiving the information shall

RULE 1.14 CLIENT WITH DIMINISHED CAPACITY

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

Adopted 01/01/05

Defined Terms (see Rule 1.0):

"Believes"
"Information relating to the representation of a client"
"Reasonably"
"Reasonably believes"
"Substantial"

Comparison to Oregon Code

Paragraph (b) is similar to DR 7-101(C), but offers more guidance as to the circumstances when a lawyer can take protective action in regard to a client. Paragraph (a) and (c) have no counterparts in the Oregon Code, but provide helpful guidance for lawyers representing clients with diminished capacity.

Comparison to ABA Model Rule

This is the ABA Model Rule.

RULE 1.15-1 SAFEKEEPING PROPERTY

(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession separate from the lawyer's own property. Funds, including advances for costs and expenses and escrow and other funds held for another, shall be kept in a separate "Lawyer Trust Account" maintained in the jurisdiction where the lawyer's office is situated. Each lawyer trust account shall be an interest bearing account in a financial institution selected by the lawyer or law firm in the exercise of reasonable care. Lawyer trust accounts shall conform to the rules in the jurisdictions in which the accounts are maintained. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation.

(b) A lawyer may deposit the lawyer's own funds in a lawyer trust account for the sole purposes of paying bank service charges or meeting minimum balance requirements on that account, but only in amounts necessary for those purposes.

(c) A lawyer shall deposit into a lawyer trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred, unless the fee is denominated as "earned on receipt," "nonrefundable" or similar terms and complies with Rule 1.5(c)(3).

(d) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

(e) When in the course of representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.

Adopted 01/01/05

Amended 11/30/05: Paragraph (a) amended to eliminate permission to have trust account "elsewhere with the consent of the client" and to require accounts to conform to jurisdiction in which located. Paragraph (b) amended to allow deposit of lawyer funds to meet minimum balance requirements.

Amended 12/01/10: Paragraph (c) amended to create an exception for fees "earned on receipt" within the meaning of Rule 1.5(c)(3).

Defined Terms (see Rule 1.0):

"Law firm"
"Reasonable"

Comparison to Oregon Code

to "net interest" that can be earned on funds held in trust. Additional changes were made to conform the rule to banking practice and to clarify the requirement for annual certification.

Comparison to ABA Model Rule

The Model Rule has no equivalent provisions regarding IOLTA and the trust account overdraft notification programs. In most jurisdictions those are stand-alone Supreme Court orders.

RULE 1.16 DECLINING OR TERMINATING REPRESENTATION

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of the Rules of Professional Conduct or other law;

(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or

(3) the lawyer is discharged.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

(1) withdrawal can be accomplished without material adverse effect on the interests of the client;

(2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;

(3) the client has used the lawyer's services to perpetrate a crime or fraud;

(4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;

(5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

(6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(7) other good cause for withdrawal exists.

(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers, personal property and money of the client to the extent permitted by other law.

Adopted 01/01/05

Defined Terms (see Rule 1.0):

"Believes"
"Fraud"
"Fraudulent"
"Reasonable"
"Reasonably"
"Reasonably believes"
"Substantial"
"Tribunal"

Comparison to Oregon Code

This rule is essentially the same as DR 2-110, except that it specifically applies to declining a representation as well as withdrawing from representation. Paragraph (a) parallels the circumstances in which DR 2-110(B) mandates withdrawal, and also includes when the client is acting "merely for the purpose of harassing or maliciously injuring" another person, which is prohibited in DR 2-109(A)(1) and DR 7-102(A)(1).

Paragraph (b) is similar to DR 2-110(C) regarding permissive withdrawal. It allows withdrawal for any reason if it can be accomplished without "material adverse effect" on the client. Withdrawal is also allowed if the lawyer considers the client's conduct repugnant or if the lawyer fundamentally disagrees with it.

Paragraph (c) is like DR 2-110(A)(1) in requiring compliance with applicable law requiring notice or permission from the tribunal; it also clarifies the lawyer's obligations if permission is denied.

Paragraph (d) incorporates DR 2-110(A)(2) and (3). The final sentence has no counterpart in the Oregon Code; it recognizes the right of a lawyer to retain client papers and other property to the extent permitted by other law. The "other law" includes statutory lien rights as well as court decisions determining lawyer ownership of certain papers created during a representation. A lawyer's right under other law to retain papers and other property remains subject to other obligations, such as the lawyer's

general fiduciary duty to avoid prejudicing a former client, which might supersede the right to claim a lien.

Comparison with ABA Model Rule

This is essentially identical to the Model Rule except that MR 1.16(d) refers on to the retention of the client's "papers." The additional language in the Oregon rule was taken from ORS 86.460.

RULE 1.17 SALE OF LAW PRACTICE

(a) A lawyer or law firm may sell or purchase all or part of a law practice, including goodwill, in accordance with this rule.

(b) The selling lawyer, or the selling lawyer's legal representative, in the case of a deceased or disabled lawyer, shall provide written notice of the proposed sale to each current client whose legal work is subject to transfer, by certified mail, return receipt requested, to the client's last known address. The notice shall include the following information:

(1) that a sale is proposed;

(2) the identity of the purchasing lawyer or law firm, including the office address(es), and a brief description of the size and nature of the purchasing lawyer's or law firm's practice;

(3) that the client may object to the transfer of its legal work, may take possession of any client files and property, and may retain counsel other than the purchasing lawyer or law firm;

(4) that the client's legal work will be transferred to the purchasing lawyer or law firm, who will then take over the representation and act on the client's behalf, if the client does not object to the transfer within forty-five (45) days after the date the notice was mailed; and

(5) whether the selling lawyer will withdraw from the representation not less than forty-five (45) days after the date the notice was mailed, whether or not the client consents to the transfer of its legal work.

(c) The notice may describe the purchasing lawyer or law firm's qualifications, including the selling lawyer's opinion of the purchasing lawyer or law firm's suitability and competence to assume representation of the client, but only if the selling lawyer has made a reasonable effort to arrive at an informed opinion.

(d) If certified mail is not effective to give the client notice, the selling lawyer shall take such steps as may be reasonable under the circumstances to give the client actual notice of the proposed sale and the other information required in subsection (b).

(e) A client's consent to the transfer of its legal work to the purchasing lawyer or law firm will be presumed if no objection is received within forty-five (45) days after the date the notice was mailed.

(f) If substitution of counsel is required by the rules of a tribunal in which a matter is pending, the selling lawyer shall assure that substitution of counsel is made.

(g) The fees charged clients shall not be increased by reason of the sale except upon agreement of the client.

(h) The sale of a law practice may be conditioned on the selling lawyer's ceasing to engage in the private practice of law or some particular area of practice for a reasonable period within the geographic area in which the practice has been conducted.

Adopted 01/01/05

Defined Terms (see Rule 1.0):

"Known"
"Law firm"
"Matter"
"Reasonable"
"Tribunal"
"Written"

Comparison to Oregon Code

This rule continues DR 2-111which, when adopted in 1995, was derived in large part from Model Rule 1.17.

Comparison to ABA Model Rule

The Model Rule requires sale of the entire practice or practice area, and also requires that the selling lawyer cease to engage in the private practice of law, or the area of practice sold, within a certain geographic area. The Model Rule gives the client 90 days to object before it will be presumed the client has consented to the transfer of the client's files. The Model Rule requires notice to all clients, not only current clients, but does not require that it be sent by certified mail. The Model Rule does not address the selling lawyer's right to give an opinion of the purchasing lawyer's qualifications. The Model Rule does not allow for client consent to an increase in the fees to be charged as a result of the sale.

RULE 1.18 DUTIES TO PROSPECTIVE CLIENT

(a) A person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

(b) Even when no client-lawyer relationship ensues, a lawyer who has learned information from a prospective client shall not use or reveal that information, except as Rule 1.9 would permit with respect to information of a former client.

(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

(d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:

(1) both the affected client and the prospective client have given informed consent, confirmed in writing, or:

(2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and

(i) the disqualified lawyer is timely screened from any participation in the matter; and

(ii) written notice is promptly given to the prospective client

Adopted 01/01/05

Amended 12/11/09: Paragraph (d) amended to conform to ABA Model Rule 1.18 except for prohibition against disqualified lawyer being apportioned a part of the fee.

Amended 01/01/14: Paragraphs (a) and (b) amended slightly to conform to changes in the Model Rule.

Defined Terms (see Rule 1.0):

"Confirmed in writing"
"Informed consent"
"Firm"
"Knowingly"
"Matter"
"Screened"
"Substantial"
"Written"

Comparison to Oregon Code

This rule has no counterpart in the Oregon Code. It is consistent with the rule of lawyer-client privilege that defines a client to include a person "who consults a lawyer with a view to obtaining professional legal services." OEC 503(1)(a). The rule also codifies a significant body of case law and other authority that has interpreted the duty of confidentiality to apply to prospective clients.

Comparison to ABA Model Rule

This is identical to the ABA Model Rule, except it doesn't prohibit the screened lawyer from sharing in the fee.

COUNSELOR

RULE 2.1 ADVISOR

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.

Adopted 01/01/05

Comparison to Oregon Code

This rule has no counterpart in the Oregon Code, although it codifies the concept of exercising independent judgment that is fundamental to the role of the lawyer and which is mentioned specifically in DRs 2-103, 5-101, 5-104, 5-108 and 7-101.

Comparison to ABA Model Rule

This is the ABA Model Rule.

RULE 2.2 [RESERVED]

RULE 2.3 EVALUATION FOR USE BY THIRD PERSONS

(a) A lawyer may provide an evaluation of a matter affecting a client for the use of someone other than the client if the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer's relationship with the client.

(b) When the lawyer knows or reasonably should know that the evaluation is likely to affect the client's interests materially and adversely, the lawyer shall not provide the evaluation unless the client gives informed consent.

(c) Except as disclosure is authorized in connection with a report of an evaluation, information relating to the evaluation is otherwise protected by Rule 1.6.

Adopted 01/01/05

Defined Terms (see Rule 1.0):

"Believes"
"Informed consent"
"Knows"
"Matter"
"Reasonably believes"
"Reasonably should know"

FORMAL OPINION NO 2011-185

Withdrawal from Litigation: Client Confidences

Facts:

During litigation, Lawyer and Client have a dispute concerning the representation. Lawyer and Client cannot resolve the dispute and Lawyer files a motion to withdraw in which Lawyer wishes to state one of the following:

1. My client will not listen to my advice;
2. My client will not cooperate with me;
3. My client has not paid my bills in a timely fashion; or
4. My client has been untimely and uncooperative in making discovery responses during the course of this matter.

Question:

May Lawyer choose unilaterally to provide the court any of the client information noted above in the motion to withdraw?

Conclusion:

No, qualified.

Discussion:

Oregon RPC 1.0(f) provides:

> "Information relating to the representation of a client" denotes both information protected by the attorney-client privilege under applicable law, and other information gained in a current or former professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

Oregon RPC 1.6(a) provides:

> A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the

> disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

Oregon RPC 1.6(b) provides, in part:

> A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
>
> . . . .
>
> (4) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;
>
> (5) to comply with other law, court order, or as permitted by these Rules.

Lawyer's obligation not to reveal information relating to the representation of a client continues even when moving to withdraw from representing Client. *See* Oregon RPC 1.6(a). To the extent the withdrawal is based on "information relating to the representation of a client," the Lawyer may not reveal the basis for the withdrawal to the court unless disclosure is permitted by one of the narrow exceptions in Oregon RPC 1.6(b).[1]

Depending upon the specific factual circumstances involved, the four statements noted above seem likely to constitute information relating to the representation of a client because the information "would be embarrassing or would be likely to be detrimental to the client." *See also The Ethical Oregon Lawyer* § 4.2-1 (OSB Legal Pubs 2015) (providing that an event "such as nonpayment of fees, may have confidential aspects

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[1] This opinion does not address the situation that would occur when a client terminates a lawyer's services. Pursuant to Oregon RPC 1.16(a)(3), a lawyer is required to withdraw from the representation of a client if "the lawyer is discharged." Under those circumstances, it would be appropriate to inform the court that the lawyer's motion is being brought pursuant to Oregon RPC 1.16(a)(3).

to it, and therefore may constitute information protected by Oregon RPC 1.6").[2]

For example, a client's inability or refusal to pay may prejudice the client's ability to resolve the dispute with an opposing party. Likewise, a party's unwillingness to cooperate with discovery may lead the plaintiff to file additional pleadings or seek sanctions. Consequently, Lawyer cannot unilaterally and voluntarily decide to make this information public unless an exception to Oregon RPC 1.6 can be found.

Neither a disagreement between Lawyer and Client about how the client's matter should be handled nor the client's failure to pay fees when due constitute a "controversy between the lawyer and the client" within the meaning of Oregon RPC 1.6(b)(4). While there may be others, the two most obvious examples of such a controversy are fee disputes and legal-malpractice claims. A client's dissatisfaction with the lawyer's performance may ultimately ripen into a controversy, but at the point of withdrawal, such a controversy is inchoate at best. In a fee dispute or malpractice claim, fairness dictates that the lawyer be on equal footing with the client regarding the facts. Such is not the case under the facts presented here.

Suppose, however, that the court inquires regarding the basis for the withdrawal or orders disclosure of such information.[3] Comment 3 to ABA Model RPC 1.16 offers guidance and provides, in part:

> The court may request an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would con-

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[2] This opinion assumes that the dispute between Lawyer and Client does not concern whether Lawyer should take action in violation of the Oregon Rules of Professional Conduct. For an analysis of such a situation, see OSB Formal Ethics Op No 2005-34, which notes that if a client will not rectify perjury, "the lawyer's only option is to withdraw, or seek leave to withdraw, from the matter without disclosing the client's wrongdoing." *See also In re A.*, 276 Or 225, 554 P2d 479 (1976).

[3] See, for example, Oregon RPC 1.16(c), which provides that a lawyer wishing to withdraw must "comply with applicable law requiring notice to or permission of a tribunal when terminating a representation." *See also* UTCR 3.140 (discussing resignation of attorneys); LR 83-11 (discussing withdrawal from a case).

> stitute such an explanation. The lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient.[4]

If the court orders disclosure, Lawyer may reveal information relating to the representation of Client under Oregon RPC 1.6(b)(5) but may only do so to the extent "reasonably necessary" to comply with the court order. Lawyer should therefore take steps to limit unnecessary disclosure of confidential information by, for example, offering to submit such information under seal (or outside the presence of the opposing party) so as to avoid prejudice or injury to the client.

Approved by Board of Governors, August 2011.

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[4] Similarly, *The Ethical Oregon Lawyer* provides that

> [i]n most instances, it should be sufficient to state on the record or in public pleadings that the situation is one in which withdrawal is appropriate and to offer to submit additional information under seal or in chambers (and outside the presence of the opposing party) if the court orders the lawyer to do so."

The Ethical Oregon Lawyer § 4.2-1.

COMMENT: For additional information on this general topic and other related subjects, see *The Ethical Oregon Lawyer* chapter 4 (withdrawal), § 6.2-2 (information relating to the representation of a client), § 6.2-3 (difference between duty of confidentiality and lawyer-client privilege); and *Restatement (Third) of the Law Governing Lawyers* §§ 32, 59–60 (2000) (supplemented periodically).

FORMAL OPINION NO 2005-1

Withdrawal from Litigation: Unpaid Fees

Facts:

Lawyer agrees to represent Client in litigation on an hourly basis. After the litigation has begun and Lawyer has appeared on Client's behalf, Lawyer becomes concerned that Client is falling behind in making the agreed payments to Lawyer.

Question:

May Lawyer refuse to proceed with the litigation unless and until Client makes up all past-due payments?

Conclusion:

No, qualified.

Discussion:

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 1.3 provides:

> A lawyer shall not neglect a legal matter entrusted to the lawyer.

In other words, Lawyer must act competently and diligently for as long as Lawyer is Client's lawyer.

Oregon RPC 1.16 provides, in pertinent part:

> (b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

> (1) withdrawal can be accomplished without material adverse effect on the interests of the client;
>
> . . . .
>
> (5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;
>
> (6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or
>
> (7) other good cause for withdrawal exists.

The right to withdraw, however, is subject to the limitations set forth in Oregon RPC 1.16(c) and (d):

> (c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.
>
> (d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. . . .

In the present circumstances, Lawyer may, if consistent with applicable law, seek leave of the court to withdraw pursuant to Oregon RPC 1.16(c). *Cf.* ORS 9.380; UTCR 3.140; LR 83-11. Lawyer must provide Client with reasonable notice pursuant to Oregon RPC 1.16(b)(5) and take the steps required to avoid prejudice to Client pursuant to Oregon RPC 1.16(d). *Cf. In re Martin*, 328 Or 177, 970 P2d 638 (1998); *In re Thomsen*, 262 Or 496, 499 P2d 815 (1972); *State v. Schmick*, 62 Or App 227, 660 P2d 693, *rev den*, 295 Or 122 (1983).

If the court refuses to permit Lawyer to withdraw, Lawyer must continue with the matter and provide competent representation, notwithstanding nonpayment. Oregon RPC 1.1; Oregon RPC 1.16(c); *In re Lathen*, 294 Or 157, 654 P2d 1110 (1982).

Approved by Board of Governors, August 2005.

COMMENT: For additional information on this general topic and other related topics, see *The Ethical Oregon Lawyer* § 4.2-2 to § 4.2-2(a) (withdrawal: protecting the client), § 4.4-3 (client's failure to fulfill obligations to lawyer) (OSB Legal Pubs 2015); *Restatement (Third) of the Law Governing Lawyers* §§ 31 cmt c, 32 cmts h(i), k (2000) (supplemented periodically); ABA Model RPC 1.1; ABA Model RPC 1.16. *See also* Washington Advisory Op No 1169 (1988); Washington Advisory Op No 1721 (1997); and Washington Advisory Op No 1751 (1997) (Washington advisory opinions are available at <www.wsba.org/resources-and-services/ethics/advisory-opinions>).

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Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

EUGENE DIVISION

GLENN WILSON,

Plaintiff,

v.

OREGON YOUTH AUTHORITY,
An Agency of the STATE OF OREGON,

Defendant.

Civil No. 6:13-cv-1538-AA

MOTION TO WITHDRAW

Pursuant to L.R. 83.11, Attorneys Jaime B. Goldberg and Elizabeth Lemoine hereby request permission of the Court to withdraw as counsel for Plaintiff. Counsel and Plaintiff have developed fundamental disagreements that ethically allow and require Counsel to withdraw from this case. The Plaintiff's counsel has conferred with counsel for the Defendant and the Defendant's counsel does not oppose this motion.

Dated this 1st day of December, 2015

CODE 3 LAW, LLP

/s/ Jaime B. Goldberg
Jaime B. Goldberg
OSB No. 842339

LEMOINE LEGAL, PC

/s/ Elizabeth Lemoine
Elizabeth Lemoine
OSB No. 040811

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR JACKSON COUNTY

JOHNATHON W. LAVIGNE, Plaintiff, vs. PACIFICORP, a domestic business corporation; TREES, INC., a foreign business corporation; STATE OF OREGON, OREGON DEPARTMENT OF TRANSPORTATION; JOSEPHINE COUNTY; FRED A. O'DELL; ROBIN O'DELL; RODNEY W. BARTH; and JULIE A. BARTH, Defendants.	Case No: 15CV17044 **NOTICE OF MOTION AND MOTION TO WITHDRAW AS ATTORNEYS OF RECORD**

To the Court, Plaintiff, Johnathon W. Lavigne, and defendants by and through their attorneys of record.

PLEASE TAKE NOTICE that Black, Chapman, Webber & Stevens, attorneys of record for plaintiff, Johnathon W. Lavigne, apply to the court for an order authorizing it to withdraw as attorneys of record regarding the above matter, based on the Affidavit of Thomas N. Petersen, filed herewith, and upon such other and further information as may be adduced at a hearing, to the extent required by the court, in this matter.

Dated this 17th day of December, 2015.

BLACK, CHAPMAN, WEBBER & STEVENS

/s/Thomas N. Petetsen
Thomas N. Petersen, OSB # 974645
Attorney for Plaintiff

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IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR JACKSON COUNTY

JOHNATHON W. LAVIGNE, Plaintiff, vs. PACIFICORP, a domestic business corporation; TREES, INC., a foreign business corporation; STATE OF OREGON, OREGON DEPARTMENT OF TRANSPORTATION; JOSEPHINE COUNTY; FRED A. O'DELL; ROBIN O'DELL; RODNEY W. BARTH; and JULIE A. BARTH, Defendants.	Case No: 15CV17044 **AFFIDAVIT OF THOMAS N. PETERSEN IN SUPPORT OF MOTION TO WITHDRAW AS ATTORNEYS OF RECORD**

STATE OF OREGON)
) ss.
COUNTY OF JACKSON)

I, Thomas N. Petersen, having been duly sworn do depose and say as follows:

1. I am a partner at the law offices of Black, Chapman, Webber & Stevens. Frederick H. Lundblade, who initiated this lawsuit, has withdrawn as a partner in our firm. Mr. Lundblade represented Mr. Lavigne in the above-captioned matter. When Mr. Lundblade left the firm an election letter was mailed to Mr. Lavigne asking him whether he intended to keep Mr. Lundblade as his attorney or go with Black, Chapman, Webber & Stevens. A copy of that letter dated November 9, 2015 is attached as Exhibit 1.

2. My review of the file indicates that, during this time, our firm has had difficulty maintaining contact with Mr. Lavigne who does not stay in touch or respond to

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both oral and written requests to contact and assist his attorneys in the claim process.

3. For example, a letter was sent to Mr. Lavigne by Mr. Lundblade on March 11, 2015, regarding the importance of communicating with our office (Exhibit 2). Another letter was sent dated November 3, 2015, with respect to contacting our office to go over the Requests for Production (Exhibit 3). After receiving no response to the November 3, 2015, letter, another letter was sent on November 30, 2015, asking Mr. Lavigne to contact our office and as of today's date we have had no response from Mr. Lavigne (Exhibit 4).

4. I have given plaintiff first class and certified return receipt notice of the motion. I have also given written notice to Mr. Lundblade and defense counsel that this motion will be filed and am providing them with copies of the motion, this affidavit, and the proposed order.

5. The basis for the motion is that the client appears to have abandoned the claim, is not cooperating with Black, Chapman, Webber & Stevens, and has placed the movants in an unattenable position by his failures to cooperate and assist counsel. Movants seek this relief under Rules of Professional Conduct.

Dated this 17 day of December, 2015.

Thomas N. Petersen, OSB 974645

SUBSCRIBED AND SWORN to before me this 17 day of December, 2015.

OFFICIAL STAMP
KELLI BARTLETT
NOTARY PUBLIC-OREGON
COMMISSION NO. 923476
MY COMMISSION EXPIRES JANUARY 01, 2018

Notary Public of Oregon

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FORMAL OPINION NO 2005-90

Client Property: Attorney Liens

Facts:

Lawyer *A* represents Client *A* in litigation. Lawyer *B* represents Client *B* in litigation.

Lawyer *A* is fired by Client *A* shortly before trial and is granted leave to withdraw as counsel of record. Lawyer *B* seeks leave to withdraw for nonpayment of fees, and leave is granted. Both Client *A* and Client *B* hire other counsel to protect their interests, and their respective cases continue.

Both Lawyer *A* and Lawyer *B* are owed substantial fees by their clients and both have in their possession documents and information of critical importance to their clients' cases, which the clients cannot practicably duplicate or replace.

Questions:

1. May Lawyer *A* retain client documents or information until all past-due fees are paid?

2. May Lawyer *B* retain client documents or information until all past-due fees are paid?

Conclusions:

1. Yes, qualified.

2. Yes, qualified.

Discussion:

Oregon RPC 1.16(a)(3) requires a lawyer to withdraw if the lawyer "is discharged." Oregon RPC 1.16(b)(5) permits the lawyer to withdraw if

> the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled.

See also OSB Formal Ethics Op No 2005-1.

In either case, the terms and conditions of withdrawal are governed by Oregon RPC 1.16(c) and (d):

> (c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.
>
> (d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client' interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers, personal property and money of the client to the extent permitted by other law.

See, e.g., *In re Biggs*, 318 Or 281, 864 P2d 1310 (1994) (lawyer ceased practicing law without taking steps necessary to avoid prejudice to existing clients); *In re Devers*, 317 Or 261, 855 P2d 617 (1993) (lawyer disciplined for failing to deliver to client all papers to which client was entitled); *In re McKnight*, 9 DB Rptr 17 (1995) (lawyer disciplined for failure to refund unearned portion of retainer promptly on withdrawal from employment); *In re Passannante*, 16 DB Rptr 310 (2002) (lawyer who ceased working on client's legal matter without notice to client and without returning file to client effectively withdrew in violation of *former* DR 2-110(A)(2)); *In re Covert*, 16 DB Rptr 87 (2002) (lawyer violated *former* DR 7-110 by withdrawing from bankruptcy representation without obtaining bankruptcy court's permission).

On the facts as presented, the requirements of Oregon RPC 1.16(c) have been met, and the portion of Oregon RPC 1.16(d) relating to refunding any unearned advance payments does not apply. Thus, it is only necessary to consider the application of the remaining portion of Oregon RPC 1.16(d) relating to return of client documents or property. *See also* Oregon RPC 1.15-1(d).[1]

ORS 87.430 creates an attorney's possessory lien on client papers and property, and ORS 87.435 and ORS 87.440 provide a procedure by which a client may file a surety bond and obtain discharge of the lien.[2] If the lien is otherwise valid and if the client has sufficient resources to pay the lawyer what is due but chooses neither to make payment nor to file a bond, the lawyer may lawfully withhold the client's materials. If, however, the client does not have sufficient resources to pay the lawyer in full and if surrender of the materials is necessary to avoid foreseeable prejudice to the client, the attorney lien must yield to the fiduciary duty that the lawyer owes to the client on payment of whatever amount the client can afford to pay. *Compare* Thomas G. Fischer, Annotation, *Attorney's Assertion of Retaining Lien as Violation of Ethical Code or Rules Governing Professional Conduct*, 69 ALR4th 974 (1989) (supple-

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[1] Oregon RPC 1.15-1(d) provides in pertinent part:

> (d) . . . Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client . . . any funds or other property that the client . . . is entitled to receive and, upon request by the client . . . , shall promptly render a full accounting regarding such property.

[2] See also ORS 87.445 to 87.490, regarding liens on actions and judgments. With respect to the difference between "retaining" and "charging" liens, see *Lee v. Lee*, 5 Or App 74, 482 P2d 745 (1971). We do not believe that the existence of ORS 9.360 and ORS 9.370, which provide a procedure in which clients can obtain a court ruling requiring the return of their papers or property, compels the conclusion that it necessarily is ethical for lawyers to retain client papers or property until a court so orders. *Cf. In re Arbuckle*, 308 Or 135, 139, 775 P2d 832 (1989) (disciplining lawyer who had not "attempted to justify his failure to return the property by any claim of privilege or right"). Among other things, there will be clients whose very lack of resources or abilities will render this remedy unavailable.

mented periodically), and sources cited; Washington Advisory Op No 181 (1987) (available at <www.wsba.org/resources-and-services/ethics/advisory-opinions>).

Approved by Board of Governors, August 2005.

COMMENT: For additional information on this general topic and other related subjects, see *The Ethical Oregon Lawyer* § 3.4-11 (addressing withdrawal or discharge in fee agreement), § 3.5-1(a) to § 3.5-1(b) (security for payment of fees), § 3.5-6(c) (payments upon discharge or withdrawal), § 4.1 to § 4-2-2(d) (withdrawal), § 4.3 (mandatory withdrawal), § 4.3-3 (discharge by the client), § 4.4 to § 4.4-3 (permissive withdrawal), § 12.3-7(b) (payment of attorney fees from lawyer's trust account), § 12.4-1 to § 12.4-2 (client property) (OSB Legal Pubs 2015); *Restatement (Third) of the Law Governing Lawyers* §§ 17, 31–33, 40, 43–46 (2000) (supplemented periodically); and ABA Model RPC 1.15–1.16.

209 Or.App. 56
Court of Appeals of Oregon.

Jeffrey B. WIHTOL, Appellant,
v.
Christopher LYNN and Angela Lynn,
Respondents.

0402–01208; A126446.
|
Argued and Submitted Oct. 10, 2005.
|
Decided Nov. 1, 2006.

Synopsis
Background: Attorney filed action against former clients to recover an enhanced contingent fee triggered by the filing of an appeal in medical malpractice action. The Circuit Court, Multnomah County, Ann Fisher, J., granted summary judgment for former clients and attorney appealed.

Holdings: The Court of Appeals, Armstrong, P.J., held that:

[1] enhanced fee was triggered by filing an interlocutory appeal; and

[2] contingent fee clause did not violate public policy.

Reversed and remanded.

West Headnotes (8)

[1] **Appeal and Error**
Particular Orders or Rulings Reviewable in General
Appeal and Error
Rendering Final Judgment

When a trial court grants a motion for summary judgment and denies a cross-motion for summary judgment, Court of Appeals can review both rulings on appeal; it reviews the record to determine if there are genuine issues of material fact, and, if there are none, it decides which party is entitled to judgment as a matter of law.

Cases that cite this headnote

[2] **Contracts**
Ambiguity in General

In the absence of an ambiguity, the court construes the words of a contract as a matter of law.

Cases that cite this headnote

[3] **Judgment**
Ambiguity in Written Instrument
Judgment
Contract Cases in General

In a contract dispute, a party will be entitled to summary judgment only if the governing terms of the contract are unambiguous.

1 Cases that cite this headnote

[4] **Appeal and Error**
Review Where Evidence Consists of Documents

Court of Appeals reviews the construction of a contract, including whether it is ambiguous, that is, whether some material term is capable of more than one plausible interpretation, as a matter of law.

Cases that cite this headnote

[5] **Attorney and Client**

⇐Construction and Operation of Contract

In a contingency fee contract, providing for an enhanced fee if an appeal is filed, the enhanced-fee language of the contract could not plausibly be read to exclude its application to interlocutory appeals.

Cases that cite this headnote

[6] **Attorney and Client**
⇐Amount of Fee

Because a contingency fee agreement expressly allowed for either a 33 ⅓ percent fee or a 40 percent fee to apply to a "structured" settlement, it could not reasonably be read to limit the higher fee to recoveries made only after a trial or after a completed or successful appeal.

Cases that cite this headnote

[7] **Attorney and Client**
⇐Amount of Fee

A contingent fee contract with medical malpractice plaintiffs, which provided for an enhanced fee if an appeal was filed, could be plausibly read only to mean that the filing of a notice of appeal, the act that legally started the process of an appeal, triggered the enhanced fee, and the filing of a notice of appeal that was interlocutory fell within the scope of the contract's enhanced-fee clause; the enhanced fee clause did not require that plaintiff establish that the filing of the notice of appeal yielded additional economic benefit, although a settlement was reached after the filing of the appeal.

Cases that cite this headnote

[8] **Attorney and Client**
⇐Requisites and Validity of Contract

Enhanced fee clause in a contingent fee agreement, based on the filing of an interlocutory appeal, was not void as against public policy.

Cases that cite this headnote

Attorneys and Law Firms

**365 Jeffrey B. Wihtol, Portland, argued the cause for appellant pro se. On the briefs were Erin K. MacDonald and Law Offices of Jeffrey B. Wihtol.

William H. Sumerfield, Hood River, argued the cause for respondents. With him on the brief was Phillips Reynier & Sumerfield.

**366 Before ARMSTRONG, Presiding Judge, and BREWER, Chief Judge, and SCHUMAN, Judge.*

Opinion

ARMSTRONG, P.J.

*58 Plaintiff appeals a judgment in a declaratory judgment action to enforce a contract. Plaintiff seeks a declaration that the enhanced-fee clause in the contract under which plaintiff represented defendants in a medical malpractice action is enforceable. The trial court granted summary judgment to defendants and entered a declaration that the enhanced fee clause is unenforceable. We conclude that the trial court erred in granting summary judgment to defendants and in denying summary judgment to plaintiff. We therefore reverse and remand with instructions to enter summary judgment for plaintiff.

[1] When a trial court grants a motion for summary judgment and denies a cross-motion for summary judgment, we can review both rulings on appeal. *See, e.g., Martin v. City of Tigard,* 335 Or. 444, 449 n. 4, 72 P.3d 619 (2003). We review the record to determine if there are genuine issues of material fact, and, if there are none, we decide which party is entitled to judgment as a matter of law. ORCP 47 C; *Powell v. Bunn,* 185 Or.App. 334, 338, 59 P.3d 559 (2002), *rev. den.,* 336 Or. 60, 77 P.3d 635 (2003).

The parties' dispute arose from a medical malpractice action in which plaintiff represented Christopher and

Angela Lynn, defendants here, concerning the death of their son at a Hood River hospital.[1] Plaintiff took that case on a contingent-fee basis under a written fee agreement that identified the Lynns as clients, individually and as personal representatives of their son's estate. The two-page agreement provides in part:

> "1. Client hereby retains Attorney for representation of Client with regard to the wrongful death of Shane Charles Lynn on or about April 17, 2000.
>
> "2. *FEES.* In consideration of the services rendered by Attorney, it is agreed that the compensation and fees of the *59 Attorney will be the following percentage of the gross of any recovery collected for the Client by settlement, judgment or compromise:
>
> "One third (33 ⅓%) of the gross recovery before a notice of appeal is filed. In the event an appeal is filed, the percentage increases to two-fifths (40%) from 33 ⅓%.
>
> "A. Recovery is defined to mean the total economic benefit obtained by Client resulting from Attorney's efforts.
>
> "B. In the event of a structured settlement, the gross recovery amount shall be the present value (cost) of all present and future lump sum and periodic payments. Attorney may elect to receive all or a portion of his fees as periodic payments. If the Attorney makes that election, then Attorney will do so prior to any settlement, and the present value of the attorney fees * * * will not exceed the above percentages of the gross recovery."

The case involved multiple defendants and claims related to wrongful death and personal injury. Plaintiff's filing of an interlocutory notice of appeal in pursuit of some of the claims led to this fee dispute.[2] The original defendants were a hospital, an obstetrician, and a nurse midwife (the medical negligence defendants), based on plaintiff's theory that the nurse might have negligently inserted a catheter that caused fatal blood loss through the placenta during delivery. Plaintiff sought discovery of the placental tissue for the Lynns' medical expert to examine but learned that the medical negligence defendants had ordered, without the Lynns' consent, placental testing by another clinic and doctor that had destroyed some tissue. The remaining tissue did not support or preclude a showing of placental injury. Plaintiff added **367 claims against the medical negligence defendants and the testing clinic and doctor (collectively, the placental-injury claims) for intentional and negligent spoliation of material evidence and conversion of placental tissue, and a class action claim for injunctive relief to prevent future destructive testing. He told the Lynns that the new claims and the new *60 defendants could help to maximize the value of their negligence claims by undermining the defense of a lack of physical evidence of placental injury.

The placental-injury claims were novel, and the trial court dismissed them for various reasons through entry of an ORCP 67 B judgment for the defendants. Plaintiff recommended that the Lynns appeal the judgment, and he filed a notice of appeal on their behalf. The Lynns did not object to that filing, ask plaintiff not to appeal, question when appeals can occur in a civil suit, or question the effect under their fee agreement of an interlocutory appeal.

In response to plaintiff's notice of appeal, we issued an order in July 2003 to show cause why the appeal should not be dismissed "as to defendant Providence Health System Oregon" (one of the medical negligence defendants) because the judgment did not name that defendant even though it was named as a party to the appeal. Plaintiff moved to remand the case to the trial court for entry of an amended judgment. In August 2003, we determined that the trial court had intended to enter an appealable judgment that named all parties to the dismissed claims but that the judgment was defective in form, and we therefore granted leave for the trial court to enter an amended judgment. ORS 19.270(4). In response, the trial court entered an amended judgment that added the missing defendant but also removed the ORCP 67 B language. The language of the judgment, as amended, rendered the court's ruling on the placental-injury claims no longer appealable until the remaining claims were resolved. *See* ORCP 67 B (1993), *amended by* Or Laws 2003, ch 576, § 90.[3]

In September 2003, within a few weeks of the trial court's entry of the amended judgment, plaintiff and Angela Lynn participated in a mediation with the remaining parties in the action, the medical negligence defendants. Although that mediation session was not successful, settlement discussions continued. In early October 2003, the Lynns accepted a *61 $750,000 settlement offer from the medical negligence defendants: $650,000 for their child's wrongful death and $100,000 for Angela Lynn's injuries. That settlement agreement disposed of all claims against the medical negligence defendants, including the placental-injury claims.

In support of plaintiff's motion for summary judgment in this case, two attorneys who had defended the medical negligence defendants provided affidavits about the settlement value of the placental-injury claims and

plaintiff's effort to appeal the dismissal of those claims. The attorneys averred that the placental-injury claims and the additional defendants on those claims made their defense of the action more difficult because they helped explain a gap in the evidence that could have more fully supported the Lynns' theory of the case; they might create juror sympathy on the ground that the destructive testing without consent was done for the defendants' litigation advantage; and they precluded defense efforts to move venue from Multnomah County, which the defense attorneys considered to be a location favorable to medical malpractice plaintiffs. They also averred that the covenant not to sue in the settlement agreement expressly covered the placental-injury claims because the medical negligence defendants believed that the Lynns' efforts to appeal the dismissal showed their intention to continue to pursue those claims.

Plaintiff met with the Lynns to review the proposed settlement. He told them at the meeting that he expected to receive an attorney fee of 40 percent of the settlement. Although the Lynns expressed surprise at the fee, Christopher Lynn submitted a probate ****368** court petition within ten days after the meeting that sought approval of both the settlement and a 40 percent attorney fee, and Angela Lynn filed her consent in probate court to the same distribution about one week later. The probate judge signed an order approving the settlement and the 40 percent fee to plaintiff. A few days later, another attorney representing the Lynns notified plaintiff that the 40 percent fee was not acceptable to the Lynns. Plaintiff notified the probate court of the dispute and segregated the disputed fee amount in a trust account. The Lynns terminated plaintiff's services because of the fee ***62** dispute, and plaintiff initiated this action to collect a 40 percent attorney fee from the settlement recovery.

The record before us also contains compliments by the Lynns, by their attorney in this fee dispute, and by the trial court in this case about the quality of the work that plaintiff performed in the medical negligence case. The court stated in its bench ruling that plaintiff "did a very excellent job in representing the claims and finding a settlement," and added, "I don't think I could question any of his work." Christopher Lynn stated in an affidavit in this case:

> "We do not dispute Mr. Wihtol's fee agreement. We agree that we signed it, that he performed admirably under the fee agreement, and that he is entitled to collect a fee pursuant to that agreement. We simply dispute that the relevant fee is 40%. In our view Mr. Wihtol's fee should be limited to 33–⅓% because this case settled prior to going to trial."

Plaintiff moved the trial court for summary judgment or partial summary judgment on several theories, which he renews on appeal. First, he argues that the contractual fee provision unambiguously entitles him to the enhanced 40 percent fee because he filed a notice of appeal, and that the trial court erred in ruling that the fee enhancement clause is unenforceable as against public policy. In the alternative, if the fee clause is ambiguous, plaintiff claims that defendants ratified the 40 percent fee when they signed documents authorizing the probate court to distribute his fee at that rate. As a second alternative, if the enhanced fee clause is unenforceable under these circumstances as against public policy, he argues that he has a valid claim in *quantum meruit* for the reasonable value of his services, not to exceed 50 percent of the gross recovery, with the amount of defendants' liability to be determined at trial.

[2] We agree with plaintiff that there are no genuine issues of material fact in this case. Defendants applaud rather than fault plaintiff's services in the medical negligence action. They admit that the contingent-fee agreement is valid and enforceable. The defense attorneys' affidavits are undisputed evidence that plaintiff's pursuit of the placental-injury ***63** claims enhanced the settlement value of the medical negligence action. In addition, we conclude that the meaning of the parties' contract is unambiguous, as we discuss below. "In the absence of an ambiguity, the court construes the words of a contract as a matter of law." *Yogman v. Parrott,* 325 Or. 358, 361, 937 P.2d 1019 (1997) (citation and internal quotation marks omitted).

[3] [4] Defendants' argument concerning interpretation of the contract is that the phrases "before a notice of appeal is filed" and "[i]n the event an appeal is filed" should be read to exclude the filing of interlocutory appeals. In a contract dispute, a party will be entitled to summary judgment only if the governing terms of the contract are unambiguous. *Hauge v. Vanderhave,* 121 Or.App. 221, 854 P.2d 1002, *rev. den.,* 317 Or. 583, 859 P.2d 540 (1993). We review the construction of a contract, including whether it is ambiguous—that is, whether some material term is capable of more than one plausible interpretation—as a matter of law. *Yogman,* 325 Or. at 361, 937 P.2d 1019.

[5] [6] We do not agree that the enhanced-fee language of the contract can plausibly be read to exclude its

application to interlocutory appeals. The disputed section says that the parties agree that plaintiff's compensation will be 33 ⅓ percent of "the gross of any recovery collected for [defendants] by settlement, judgment or compromise" if recovery occurs before a notice of appeal is filed, and 40 percent of the same basis if recovery **369 occurs after a notice of appeal is filed. Clause 2B of the fee agreement, although itself applicable only to settlements that are "structured" to include a future payment stream, expressly sets an expectation that either percentage may apply to settlements: "In the event of a structured settlement * * * the attorney fees * * * will not exceed the above percentages of the gross recovery." Because the agreement expressly allows for either a 33 ⅓ percent fee or a 40 percent fee to apply to a "structured" settlement, it cannot reasonably be read to limit the higher fee to recoveries made only after a trial or after a completed or successful appeal. An ambiguous material term in a contract would create a triable issue of fact. *See, e.g., Mann v. Wetter,* 100 Or.App. 184, 785 P.2d 1064, *rev. den.,* 309 Or. 645, 789 P.2d 1387 (1990). However, we conclude here, where the parties agree that a notice of appeal was filed and that defendants then achieved a recovery by settlement, that *64 no ambiguity exists in the intended application of the contractual provision to those facts.

Defendants also argue that the enhanced fee provision in the parties' contract should be interpreted to require plaintiff to show that the notice of appeal that he filed produced economic benefit for defendants in the medical malpractice action. We do not agree that the fee agreement impliedly requires the filing of an appeal that results in a direct economic benefit in order for the higher fee to be triggered. "In the construction of an instrument, the office of the judge is simply to ascertain and declare what is, in terms or in substance, contained therein, not to insert what has been omitted[.]" ORS 42.230. Clause 2A of the fee agreement merely defines "recovery" to be the total economic benefit received by the client. Clause 2 provides that, "[i]n consideration of the services rendered," the attorney's compensation will be one of the two percentage rates "of the gross of *any* recovery[.]" Furthermore, when a case settles, it is rarely possible to quantify the extent to which various factors contributed to the settlement value. The contract provides that the applicable fee applies to the total recovery. The terms "recovery" and "economic benefit" as they appear in the contract do not define or modify how or when the filing of a notice of appeal triggers the enhanced fee.

[7] We conclude that the parties' contract can be plausibly read only to mean that the filing of a notice of appeal, the act that legally starts the process of an appeal, triggers the enhanced fee of 40 percent. Furthermore, the filing of a notice of appeal that is interlocutory falls within the scope of the contract's enhanced-fee clause. The applicable attorney fee may be either the lower or higher percentage of "any recovery collected * * * by settlement," depending upon whether the higher fee has been triggered by the filing of an appeal. The "recovery" that is subject to the fee is the total economic benefit that plaintiff obtained on behalf of defendants. In this case, that recovery is the monetary settlement with the medical negligence defendants that plaintiff obtained for defendants. The enhanced fee clause does not require that plaintiff establish that the filing of the notice of appeal yielded additional economic benefit. In accordance with the unambiguous terms of the contract, plaintiff filed an interlocutory appeal *65 by means of a notice of appeal that was within the scope of the enhanced fee clause and plaintiff subsequently obtained a $750,000 settlement for defendants that is subject to the 40 percent attorney fee.

We next consider whether the trial court properly granted summary judgment in favor of defendants. Defendants' position is that the filing of a notice of appeal as it occurred in this case cannot legally trigger the enhanced fee clause. Their argument boils down to the substance of Christopher Lynn's sworn statement above: the enhanced fee should not apply in a case that settled pretrial because a layperson expects the filing of an appeal to follow a trial. With greater specificity, defendants contend that a client would not reasonably expect an enhanced fee clause to apply after the filing of an interlocutory notice of appeal that proved premature, because the trial court later amended its judgment, and that arguably concerned matters tangential to the basic medical negligence claims, when the case settled rather than going to trial.

[8] Although the trial court did not precisely adopt any of defendants' arguments, it **370 ruled in defendants' favor by concluding that an enhanced fee clause based on an interlocutory appeal was against public policy because an attorney might manipulate the appellate process solely to enhance his fee. However, voiding a contract as against public policy requires a court to identify a source for the public policy on which it relies. Neither the trial court in its ruling nor defendants in their arguments on appeal have identified a public policy source that supports the trial court's conclusion. The Supreme Court has held that contingent attorney fee arrangements are void as against public policy only under narrow circumstances. *See, e.g., Hay v. Erwin,* 244 Or. 488, 490, 419 P.2d 32 (1966) (historically well settled that contingent arrangement is void in divorce proceedings because fee incentive promotes divorce and discourages reconciliation); *Fisher v. Lane,* 174 Or. 438, 445–46, 149 P.2d 562 (1944)

(contingent pay to justice of the peace for successful outcomes adversely affected judicial neutrality). Those holdings are inapplicable to an enhanced-fee clause in a contingent-fee contract that has well accepted use in tort cases. In the event that an attorney files an appeal pretextually to enhance his *66 fees, an injured client is protected against such conduct by contract law doctrines, such as the implied covenant of good faith and fair dealing, as well as by the rules of professional responsibility that apply to attorneys. *See generally U.S. National Bank v. Boge,* 311 Or. 550, 556–68, 814 P.2d 1082 (1991) (discussing obligation of good faith and citing cases). Defendants do not argue that those principles should operate as a matter of public policy to void operation of an enhanced fee clause that can be triggered by the filing of an interlocutory appeal.

Defendants also argue that we should model our decision on *Lane v. Wilkins,* 229 Cal.App.2d 315, 323, 40 Cal. Rptr. 309, 314 (1964), and distinguish what defendants call "core" claims from "non-core" claims, to determine when the filing of an appeal may be used to enhance a contingent fee. Using the subject matter or the scope of an appeal to constrain when an appeal may trigger an enhanced fee is arbitrary and is not warranted on these facts. We see no basis to create an artificial distinction that would foster uncertainty and litigation over contingent-fee clauses. Furthermore, the issue addressed in *Lane* is not presented here, because the placental-injury claims and the added defendants in this case were within the scope of the retainer clause of the fee agreement. The agreement states that defendants "retain [ ] Attorney for representation of Client with regard to the wrongful death of Shane Charles Lynn on or about April 17, 2000." As with the settlement of $100,000 for Angela Lynn's personal injuries, the placental-injury claims arose from the same transaction as the wrongful death of the Lynns' child and thus were within the scope of the retainer clause of the fee agreement. All told, the myriad possible circumstances surrounding an appeal suggest that a legal rule to define a threshold for fee enhancement that is based on an appeal would not solve any inherent problem of client expectations. We conclude that defendants are not entitled to judgment in their favor in this case.

To the contrary, we conclude that the fee agreement is enforceable according to its unambiguous terms, namely, that the filing of a notice of appeal triggered the enhanced-fee clause. Thus plaintiff, rather than defendants, is entitled to summary judgment. Because of the basis on which we decide *67 this case, we do not reach plaintiff's alternative arguments about ratification or *quantum meruit.*

Reversed and remanded with instructions to enter summary judgment for plaintiff.

All Citations

209 Or.App. 56, 146 P.3d 365

Footnotes

* Schuman, J., *vice* Richardson, S.J.

1 To avoid confusion because the Lynns are defendants in this dispute, we refer to them by proper name to recount the relevant facts of the underlying malpractice action in which they were the plaintiffs. "The defendants" in our summary of the facts refers to the medical providers who were the defendants in that original action.

2 Plaintiff filed another notice of appeal that is not at issue here because he does not base his claim for an enhanced fee on that filing.

3 In summary, the notice of appeal was defective only as to Providence Health System Oregon. In other respects, as to all the placental-injury claims against all of the other defendants, the notice of appeal was based on a judgment that was appealable when plaintiff filed the notice of appeal.

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