

FORMAL OPINION NO 2005-136

[REVISED 2014]

Information Relating to the Representation of a Client: Lawyer's Wrongful Termination Claim

Facts:

Lawyer is in-house counsel and general manager of Company. In the course of applying for a patent on behalf of Company, Lawyer learned that the product was not invented by Company, but was in fact invented by Company's customer. The patent application required Lawyer to swear on behalf of Company that Company was the "original and first inventor." A person who makes a misrepresentation on a patent application is subject to criminal prosecution. Lawyer refused to make the representation that Company was the original and first inventor, and was fired. Lawyer wishes to pursue a civil action for wrongful termination in which it will be necessary to disclose information about these events.

Question:

May Lawyer bring a civil action for wrongful termination if bringing the action requires disclosure of information relating to Lawyer's representation of Company?

Conclusion:

Yes, qualified.

Discussion:

Relying on the general rule that "a client may terminate the relationship between himself and his lawyer with or without cause,"¹ some courts decline to recognize the tort of wrongful discharge in the

¹ *Herbster v. N. Am. Co. for Life & Health Ins.*, 150 Ill App 3d 21, 501 NE2d 343 (1986). See generally Daniel S. Reynolds, *Wrongful Discharge of Employed Counsel*, 1 Geo J Legal Ethics 553 (1988).

case of in-house counsel. Some courts reach that conclusion, in part, because recognizing the claim would permit lawyers to disclose client confidences and secrets. *Balla v. Gambro, Inc.*, 145 Ill 2d 492, 584 NE2d 104, 109 (1991); *Eckhaus v. Alfa-Laval, Inc.*, 764 F Supp 34, 37 (SDNY 1991). There are presently no dispositive Oregon Supreme Court cases on this issue.

A discussion of whether, or under what circumstances, a former in-house counsel can state a claim for wrongful termination is a matter of substantive law, and beyond the scope of this opinion. For purposes of discussion, however, we assume that such a claim can be stated.

In asserting such a claim, Lawyer is bound by Oregon RPC 1.6, which provides:

(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 have the same responsibilities as the disclosing lawyer to preserve the information regardless of the outcome of the contemplated transaction.

(7) to comply with the terms of a diversion agreement, probation, conditional reinstatement or conditional admission pursuant to BR 2.10, BR 6.2, BR 8.7 or Rule for Admission Rule 6.15. A lawyer serving as a monitor of another lawyer on diversion, probation, conditional reinstatement or conditional admission shall have the same responsibilities as the monitored lawyer to preserve information relating to the representation of the monitored lawyer's clients, except to the extent reasonably necessary to carry out the monitoring lawyer's responsibilities under the terms of the diversion, probation, conditional reinstatement or conditional admission and in any proceeding relating thereto.

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

See also ORS 9.460(3). Lawyer is bound to protect information relating to the representation of Company even after termination of employment. OSB Formal Ethics Op No 2005-23 (rev 2014).

Because the information at issue here is protected from disclosure by Oregon RPC 1.6, Lawyer may not use it in the claim for wrongful termination unless one of the applicable exceptions is satisfied. Oregon RPC 1.6(b)(4) applies to a "claim or defense on behalf of a lawyer in a controversy between the lawyer and the client." If a legally viable and nonfrivolous claim exists, disclosure may be made. Nevertheless, there are limits on how much Lawyer may reveal and the circumstances of the revelation. The information that Lawyer seeks to disclose must be reasonably necessary to establish the claim asserted. *See* OSB Formal Ethics Op No 2005-104. Lawyer must ensure that any confidential

information is revealed in the least public manner, including insistence on an appropriate protective order. *Cf. In re Huffman*, 328 Or 567, 983 P2d 534 (1999) (lawyer disciplined for making disclosures of confidential information that were not required for lawyer to assert viable defense).

Approved by Board of Governors, April 2014.

COMMENT: For additional information on this general topic and other related subjects, see *The Ethical Oregon Lawyer* § 4.2-1 (court permission to withdraw), § 6.3-6 (client perjury) (OSB Legal Pubs 2015); *Restatement (Third) of the Law Governing Lawyers* §§ 59–60, 64–65 (2000) (supplemented periodically); and ABA Model RPC 1.6.