

FORMAL OPINION NO. 2005-33
Conflicts of Interest, Current Clients:
Withdrawal When Client Not Found

Facts:

Lawyer, who has represented Defendant in litigation that results in a judgment against Defendant, is directed by Defendant to file an appeal and does so. Defendant then posts a bond. Subsequently, and while the appeal is still pending, Defendant leaves the country. At that time, Defendant is indebted to Lawyer for past-due fees and expenses. Notwithstanding Lawyer's endeavors to locate Defendant, Lawyer is unable to do so.

Questions:

1. May Lawyer refuse to continue with the appeal unless and until Defendant is heard from?
2. May Lawyer settle the case if the plaintiff proposes terms that Lawyer believes to be favorable to Defendant?

Conclusions:

1. No, qualified.
2. No, qualified.

Discussion:

Oregon RPC 1.1 requires a lawyer to provide "competent representation to a client," and Oregon RPC 1.3 provides that a lawyer "shall not neglect a legal matter" entrusted to the lawyer. *See* Oregon RPC 1.2(a) ("a lawyer shall abide by a client's decisions concerning the objectives of representation and . . . shall consult with the client as to the means by which they are to be pursued").

Pursuant to Oregon RPC 1.16(b), 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 to 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.

Oregon RPC 1.16(c) and (d) also must be taken into consideration:

(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.

It follows that unless Lawyer properly seeks *and* obtains leave to withdraw pursuant to Oregon RPC 1.16, Lawyer must continue to handle the appeal. *Cf. In re Lathen*, 294 Or 157, 654 P2d 1110 (1982); *State v. Balfour*, 311 Or 434, 814 P2d 1069 (1991). Although reasonable grounds for Lawyer to seek leave to withdraw under Oregon RPC 1.16(b) appear to exist, Lawyer must still give notice to or obtain consent from the court in which the appeal is pending, as may be required, pursuant to Oregon RPC 1.16(c) before Lawyer can withdraw. *Cf. OSB Formal Ethics Op No 2005-1*.

The second question must be considered in light of the fact that Lawyer is Defendant's agent and owes Defendant a fiduciary duty. *Cf. OSB Formal Ethics Op No 2005-26*. As that opinion indicates, Lawyer may not settle Defendant's case unless Lawyer has been given authority to do so.

Approved by Board of Governors, August 2005.

COMMENT: For more information on this general topic and related subjects, see ORS 9.380–9.390; THE ETHICAL OREGON LAWYER §§4.2–4.8, 5.13–5.18 (Oregon CLE 2003); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§31–33 (2003); and ABA Model Rule 1.16.