

FORMAL OPINION NO 2005-92

**Competent and Diligent Representation:
Assisting Client in Breach of Contract**

Facts:

Client asks Lawyer to assist Client in breaching a contract that Client has with another party or in minimizing damages likely to flow from that breach.

Question:

May Lawyer do so?

Conclusion:

Yes, qualified.

Discussion:

Oregon RPC 1.2 provides, in pertinent part:

(a) Subject to paragraphs (b) and (c), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

....

(c) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is illegal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

Oregon RPC 4.4(a) provides, in pertinent part:

(a) In representing a client . . . , a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, harass or burden a third person

Oregon RPC 8.4(a) provides, in pertinent part:

(a) It is professional misconduct for a lawyer to:

. . . .

(3) engage in conduct involving dishonesty, fraud, deceit or misrepresentation that reflects adversely on the lawyer's fitness to practice law;¹

Lawyer cannot help Client defraud others. *Cf. In re Hawkins*, 305 Or 319, 751 P2d 780 (1988); *In re Hockett*, 303 Or 150, 734 P2d 877 (1987); *In re Brown*, 255 Or 628, 469 P2d 763 (1970). Lawyer also cannot assist Client in behavior designed simply to harass or burden a third person. Oregon RPC 4.4(a). *See, e.g., In re White*, 311 Or 573, 815 P2d 1257 (1991); *In re Gooding*, 254 Or 38, 456 P2d 998 (1969). As long as Lawyer refrains from such wrongful conduct and does not assist Client in such wrongful conduct, Lawyer may assist Client to breach the contract and to minimize the liability that may flow from the breach.

Approved by Board of Governors, August 2005.

¹ Furthermore, Oregon RPC 1.16(a) requires withdrawal if the representation will result in violation of the rules of professional conduct and Oregon RPC 1.16(b)(3) permits withdrawal if the client has used the lawyer's services to perpetrate a crime or fraud.

COMMENT: For additional information on this general topic and other related subjects, see *The Ethical Oregon Lawyer* § 4.3 to § 4.3-1 (mandatory withdrawal), § 4.4 to § 4.4-2 (permissive withdrawal), § 7.5-1 (abiding by client's decision), § 7.5-2 (assisting in illegal or fraudulent conduct), § 8.11 (conduct prejudicial to the administration of justice) (OSB Legal Pubs 2015); *Restatement (Third) of the Law Governing Lawyers* §§ 8, 16, 23, 94, 106 (2000) (supplemented periodically); ABA Model RPC 1.0(e); ABA Model RPC 1.2; ABA Model RPC 1.16; ABA Model RPC 4.4; and ABA Model RPC 8.4.