

FORMAL OPINION NO 2005-104

Information Relating to the Representation of a Client: Self-Defense Exception

Facts:

Lawyer previously represented Client A. Client A has refused to pay Lawyer's bill and has asserted as a defense to payment that Lawyer committed malpractice. Lawyer believes that Lawyer did not commit malpractice and that the difficulties that arose in the course of handling the matter were of Client A's own making.

Lawyer previously represented Client B in an unrelated matter. Opposing Party, who was on the opposite side of the transaction that Lawyer handled for Client B, has filed a complaint with the Bar concerning Lawyer's handling of that matter. Lawyer believes that the complaint is not well-founded.

Question:

May Lawyer reveal information relating to the representation of a client under these circumstances?

Conclusion:

Yes.

Discussion:

Oregon RPC 1.6 provides, in pertinent part:

(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:

....

(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. . . .

The Rules of Professional Conduct of which Oregon RPC 1.6 is part are established pursuant to ORS 9.490. ORS 9.460(3) provides that a lawyer shall “[m]aintain the confidences and secrets of the attorney’s clients consistent with the rules of professional conduct.”¹ Oregon RPC 1.6(b)(4) permits a lawyer to reveal information relating to the representation of a client if doing so is reasonably necessary to the lawyer’s self-defense, for example, to justify or explain the lawyer’s conduct. Lawyer therefore may reveal information relating to the representation of Client A or Client B to the extent reasonably necessary to rebut their allegations.

Approved by Board of Governors, August 2005.

¹ The use of the term *confidences and secrets* followed the language of former DR 4-101. The phrase *information relating to the representation of a client* is defined in Oregon RPC 1.0(f) to be equivalent to what was formerly known as *confidences and secrets*.

COMMENT: For additional information relating to this general topic and other related subjects, see *The Ethical Oregon Lawyer* § 6.2-1 to § 6.2-4 (elements of duty of confidentiality), § 6.3-7 (limits on duty of confidentiality in malpractice actions) (OSB Legal Pubs 2015); *Restatement (Third) of the Law Governing Lawyers* §§ 59–60, 64–65, 68–72, 77, 80, 83 (2000) (supplemented periodically); and ABA Model RPC 1.6. See also Washington Advisory Op No 1102 (1987); and Washington Advisory Op No 1112 (1987). (Washington advisory opinions are available at <www.wsba.org/resources-and-services/ethics/advisory-opinions>.)