

FORMAL OPINION NO 2005-21

Frivolous Litigation: Affirmative Defenses

Facts:

Client asks Lawyer to sue Defendant. Lawyer knows that Defendant has a valid affirmative defense to Client's claim but does not know whether Defendant will discover and assert that defense.

Question:

May Lawyer file a complaint against Defendant notwithstanding Lawyer's knowledge of the valid affirmative defense?

Conclusion:

Yes, qualified.

Discussion:

This question involves consideration of Oregon RPC 3.1:

[A] lawyer shall not knowingly bring or defend a proceeding, assert a position therein, delay a trial or take other action on behalf of a client, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law, except that a lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration may, nevertheless so defend the proceeding as to require that every element of the case be established.

This rule must be read in concert with Oregon RPC 3.3(a), which states that a lawyer shall not knowingly

- (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
- (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel;

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false;

(4) conceal or fail to disclose to a tribunal that which the lawyer is required by law to reveal; or

(5) engage in other illegal conduct or conduct contrary to these Rules.

As long as Lawyer has a “basis in law and fact . . . that is not frivolous,” within the meaning of Oregon RPC 3.1, there is no reason why Lawyer cannot proceed. *Frivolous* is defined as “without factual basis or well-grounded legal argument.” *Cantua v. Creager*, 169 Or App 81, 98, 7 P3d 693 (2000) (citing *Davis v. Armenakis*, 151 Or App 66, 74, 948 P2d 327 (1997), *rev den*, 327 Or 83 (1998), *rev den*, 328 Or 194 (1998)). Lawyer does not represent Defendant, and it is up to Defendant or Defendant's own counsel to look after Defendant's interests and to discover and assert any available defenses.

Approved by Board of Governors, August 2005.

COMMENT: For additional information on this general topic and related subjects, see *The Ethical Oregon Lawyer* § 8.3 (meritorious claims and contentions), § 8.4-1 to § 8.4-4 (candor toward the tribunal) (OSB Legal Pubs 2015); *Restatement (Third) of the Law Governing Lawyers* §§ 94, 110–111 (2000) (supplemented periodically); and ABA Model RPC 3.3(a).