

## **FORMAL OPINION NO 2005-41**

### **Competence and Diligence: Client with Diminished Capacity**

#### **Facts:**

For many years, Lawyer has represented Client on business matters. Recently, however, Lawyer has begun to observe extraordinary behavior by Client that appears to be out of character with Client's former behavior and contrary to Client's own best interests. Based on these observations, Lawyer becomes reasonably concerned that Client is no longer capable of handling Client's own affairs. When Lawyer discusses these concerns with Client, however, Client tells Lawyer to mind Lawyer's own business.

#### **Question:**

Notwithstanding Client's directions, may Lawyer take steps to protect what Lawyer believes to be Client's best interests?

#### **Conclusion:**

Yes, qualified.

#### **Discussion:**

As a general proposition, lawyers owe their clients a duty of competent and diligent representation as well as a duty to preserve information relating to the representation. See, for example, Oregon RPC 1.1, Oregon RPC 1.3, and Oregon RPC 1.6, discussed in OSB Formal Ethics Op No 2005-18 and OSB Formal Ethics Op No 2005-17. Although these duties are nearly absolute, Oregon RPC 1.14 provides an exception:

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

A lawyer in such a situation must reasonably believe that there is a need for protective action and then may take only such action as is reasonably necessary under the circumstances. If, for example, Lawyer expects that Client's questionable behavior can be addressed by Lawyer raising the issue with Client's spouse or child, a more extreme course of action, such as seeking the appointment of a guardian, would be inappropriate.

**Approved by Board of Governors, August 2005.**

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COMMENT: For additional information on this general topic and related subjects, see *The Ethical Oregon Lawyer* chapter 18 (representing clients with diminished capacity and disability) (OSB Legal Pubs 2015); *Restatement (Third) of the Law Governing Lawyers* §§ 16–24 (2000) (supplemented periodically); and ABA Model RPC 1.14.

See also OSB Formal Ethics Op No 2005-159, which states that (1) a lawyer representing a mentally ill parent in a dependency or termination-of-parental-rights case should seek the lawful objectives of the client and not substitute the lawyer's own interest, and (2) a lawyer may seek appointment of a guardian to speak for the client, or may take other protective action for the client as limited by the disciplinary rule, if the client cannot act in his or her own interests.