

FORMAL OPINION NO 2005-59

Frivolous Litigation: Joinder of Defendants

Facts:

Potential Plaintiff purchased goods from Corporation. The goods were defective, and Potential Plaintiff may have a valid cause of action against Corporation. Potential Plaintiff hires Lawyer to look after its interests in this matter.

Question:

Under what circumstances may Lawyer name Corporation's officers, employees, or shareholders as defendants, in addition to Corporation itself?

Conclusion:

See discussion.

Discussion:

Oregon RPC 3.1 provides:

[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.

Oregon RPC 4.4(a) provides:

In representing a client or the lawyer's own interests, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, harass or burden a third person, or knowingly use methods of obtaining evidence that violate the legal rights of such a person.

If, after a reasonable investigation of the matter, as required by Oregon RPC 1.1 and Oregon RPC 1.2(a),¹ Lawyer concludes that there is a reasonable, nonfrivolous basis on which to join particular officers or employees as additional defendants (because, for example, the officers and employees may be held liable in tort for their individual misrepresentations to Potential Plaintiff) or to join Corporation's shareholders (because, for example, there is reason to believe that they may be liable under a "piercing the corporate veil" theory), Lawyer may, and presumably should, do so. *Cf. In re Leuenberger*, 337 Or 183, 93 P3d 786 (2004) (no violation under *former* DR 7-102(A)(1) and *former* DR 7-102(A)(2) when lawyer had an arguable legal basis for motion and bar did not prove that he was motivated solely to harass or injure the opposing party).

If, at the other extreme, Lawyer's reasonable investigation reveals no reasonable basis on which to conclude or suspect that Corporation's officers, employees, or shareholders are or may be subject to liability on any theory, a decision to join them would violate Oregon RPC 3.1 and Oregon RPC 4.4(a). *Cf. Lawyer Disciplinary Bd. v. Neely*, 207 W Va 21, 528 SE2d 468 (1998).² See also FRCP 11 and ORCP 17 A, which prohibit frivolous pleadings, and Oregon RPC 3.4(c), which prohibits a lawyer from "knowingly disobey[ing] an obligation under the rules of a

¹ Oregon RPC 1.1 provides:

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

² See also *Seely v. Hanson*, 317 Or 476, 857 P2d 121 (1993) (appeal is "frivolous" and therefore subjects lawyer to sanctions, if every argument on appeal is one that reasonable lawyer would know is not well grounded in fact, or that reasonable lawyer would know is not warranted either by existing law or by reasonable argument for the extension, modification, or reversal of existing law); *In re White*, 311 Or 573, 815 P2d 1257 (1991) (lawyer disciplined for filing claims to harass opposing party, for filing claims in different counties when doing so was not warranted, and for knowingly advancing unwarranted claims).

tribunal, except for an open refusal based on an assertion that no valid obligation exists.”³

A more difficult question arises when Potential Plaintiff approaches Lawyer only shortly before the limitations period is about to run and it is not possible for Lawyer to conduct what would otherwise be a reasonable pre-filing investigation before a decision must be made whether to include the additional defendants. In this limited circumstance, we believe it would be ethical to join the additional defendants if, but only if, each of the following is true: (1) either the officers, employees, or shareholders will not consent to an extension of the limitations period or it would be impossible or impracticable to seek an extension from them (because, for example, there is not enough time to do so or doing so might cause them to go into hiding); (2) Lawyer acts with diligence after the filing to determine whether a viable claim against the additional defendants exists; and (3) if no such claim exists, Lawyer must promptly dismiss the additional defendants from the litigation.⁴

Approved by Board of Governors, August 2005.

³ There also may be circumstances in which Oregon RPC 8.4(a)(4), which prohibits “conduct that is prejudicial to the administration of justice,” applies to improper joinder situations. *Cf. In re Haws*, 310 Or 741, 801 P2d 818 (1990).

⁴ Even in this extremely limited circumstance, Lawyer could not file a complaint naming the additional defendants if doing so would constitute a knowing and intentional violation of FRCP 11 or ORCP 17 under the applicable case law. *Cf. Townsend v. Holman Consulting Corp.*, 914 F2d 1136, *amended and superseded*, 929 F2d 1358 (9th Cir 1990) (en banc); *Whitaker v. Bank of Newport*, 101 Or App 327, 790 P2d 1170 (1990), *aff’d*, 313 Or 450, 836 P2d 695 (1992); *Adams v. State By & Through Bargaining Unit Benefits Bd.*, 103 Or App 288, 798 P2d 244, *rev’d*, 311 Or 13 (1990).

COMMENT: For additional information on this general topic and related subjects, see *The Ethical Oregon Lawyer* § 7.5-1 (abiding by client’s decision; scope of representation), § 8.3 (meritorious claims and contentions) (OSB Legal Pubs 2015); *Restatement (Third) of the Law Governing Lawyers* §§ 105–107, 110–112 (2000) (supplemented periodically); ABA Model RPC 1.1–1.2; ABA Model RPC 3.1; ABA Model RPC 3.3–3.4; ABA Model RPC 4.1; and ABA Model RPC 4.4.

