

FORMAL OPINION NO 2005-61

Conflicts of Interest, Current Clients: Malpractice, Failure to Timely File, Settlement between Lawyer and Client

Facts:

Lawyer is retained by Client to represent Client in asserting two factually and legally separate claims against two separate individuals. Lawyer timely files a complaint on one claim but fails to do so on the other claim.

Questions:

1. May Lawyer negotiate a settlement with Client for Lawyer's failure to file one of the claims on a timely basis?

2. In the absence of such a settlement, may Lawyer continue to handle the claim that was timely filed?

Conclusions:

1. Yes, qualified.

2. Yes, qualified.

Discussion:

Oregon RPC 1.8(h) provides in part:

(h) A lawyer shall not:

(1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement;

(2) settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in connection therewith. . . .

Lawyer may ethically effect a settlement with Client if Lawyer first advises Client “in writing” that independent representation for Client is desirable in connection with any proposed settlement. *Cf. In re Smith*, 9 DB Rptr 79 (1995) (lawyer violated *former* DR 6-102(A) by requiring clients to sign agreement that included language purporting to limit liability of lawyer with respect to clients’ use of documents prepared or reviewed and approved by lawyer).

Oregon RPC 1.7 provides, in pertinent part:

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a current conflict of interest. A current conflict of interest exists if:

....

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client, a former client or a third person or by a personal interest of the lawyer; . . .

....

(b) Notwithstanding the existence of a current conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not obligate the lawyer to contend for something on behalf of one client that the lawyer has a duty to oppose on behalf of another client;

(4) each affected client gives informed consent,¹ confirmed in writing.

¹ Oregon RPC 1.0(g) provides:

“Informed consent” denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct. When informed consent is required by these Rules to be confirmed in

Depending on the facts and circumstances, the pendency or potential pendency of a malpractice claim by Client against Lawyer could trigger the requirements of Oregon RPC 1.7(a)(2). *Compare In re Knappenberger*, 337 Or 15, 90 P3d 614 (2004),² with *In re Lawrence*, 332 Or 502, 31 P3d 1078 (2001).³ If Oregon RPC 1.7(a)(2) applies, Lawyer may not represent Client on the claim that was timely filed unless Lawyer obtains Client's informed consent, confirmed in writing.

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writing or to be given in a writing signed by the client, the lawyer shall give and the writing shall reflect a recommendation that the client seek independent legal advice to determine if consent should be given.

² The court in *In re Knappenberger*, 337 Or at 28, stated:

Many errors by a lawyer may involve a low risk of harm to the client or low risk of ultimate liability for the lawyer, thereby vitiating the danger that the lawyer's own interests will endanger his or her exercise of professional judgment on behalf of the client. Even if the risk of some harm to the client is high, the actual effect of that harm may be minimal, or, if an error does occur, it may be remedied with little or no harm to the client. In those circumstances, it is possible for a lawyer to continue to exercise his or her professional judgment on behalf of the client without placing the quality of representation at risk.

³ In *In re Lawrence*, 332 Or at 506, the trial court entered a default judgment against the accused lawyer's client after the lawyer failed to file a timely response. The lawyer advised the client he had a viable legal malpractice claim against him, but continued to represent the client in other matters without making a full written disclosure, and importantly, the lawyer obtained a written release from his client, which provided that the lawyer would continue to handle other matters for the client for no fee in exchange for his client giving up any malpractice claim against the lawyer.

COMMENT: For additional information on this general topic and related subjects, see *The Ethical Oregon Lawyer* § 9.2-1 to § 9.2-1(c) (personal-interest conflicts), § 9.3 (limiting or settling malpractice claims) (OSB Legal Pubs 2015); *Restatement (Third) of the Law Governing Lawyers* § 54 (2000) (supplemented periodically); ABA Model RPC 1.7; and ABA Model RPC 1.8(h). *Cf. In re Brown*, 277 Or 121, 559 P2d 884, corrected on denial of reh'g, 277 Or 731, 561 P2d 1030 (1977); OSB Formal Ethics Op No 2005-32.

