

FORMAL OPINION NO 2009-182
Conflict of Interest: Current Client's
Filing of Bar Complaint; Withdrawal

Facts:

Lawyer represents Client in a matter set for trial. One week before trial is scheduled to begin, Client files a Bar complaint, but does not discharge Lawyer. The complaint alleges Lawyer failed to interview key witnesses, and failed to return Client's phone calls to discuss trial strategy. Lawyer does not believe the witnesses identified by Client will be able to provide admissible testimony, but is willing to interview them in the time remaining before trial. Lawyer further believes that he or she has made reasonable efforts to respond to Client's inquiries and to keep Client informed.

Question:

Must Lawyer seek to withdraw from further representation once Client has filed a Bar complaint against Lawyer?

Conclusion:

No, qualified.

Discussion:

Oregon RPC 1.16 provides, in part:

(a) Except as stated in paragraph (c), a lawyer . . . shall withdraw from the representation of a client if:

(1) the representation will result in violation of the Rules of Professional Conduct or other law;

(2) ; or

(3) the lawyer is discharged.

. . . .

(c) a lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation.

When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

Because Lawyer has not been discharged, Oregon RPC 1.16(a)(3) does not require withdrawal. However, Lawyer should consider whether the filing of a Bar complaint creates a conflict of interest under Oregon RPC 1.7, such that continued representation would potentially result in a violation of the Rules. If so, withdrawal would likely be required by Oregon RPC 1.16(a)(1).¹

Oregon RPC 1.7 provides in 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:

(1)

(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; or

(3)

(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; and

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

¹ Any resignation triggered by a conflict or termination by the Client is governed by UTCR 3.140.

Under Oregon RPC 1.7(a)(2), Lawyer has a conflict of interest if there is a “significant risk” that Lawyer’s representation will be “materially limited” by a “personal interest” of Lawyer. Under the facts presented, the potentially limiting interest would presumably be Lawyer’s desire to avoid discipline by the Bar. It is also possible that Client’s filing of a Bar complaint could create such personal resentment that it would compromise Lawyer’s ability to effectively represent Client. Regardless of the specific personal interest involved, if it creates a substantial risk that Lawyer’s representation would be materially limited, Lawyer may continue the representation only with Client’s informed consent, confirmed in writing. Moreover, Lawyer may seek Client’s consent only if Lawyer reasonably believes that competent and diligent representation can be provided to Client notwithstanding the conflict. Oregon RPC 1.7(b)(1). If consent is not available or is not given, then Oregon RPC 1.16(a)(1) would require Lawyer to withdraw from further representation or if before a tribunal, seek to withdraw subject to Oregon RPC 1.16(c).

On the other hand, if there is no substantial risk that Lawyer’s representation of Client would not be materially limited, there is no conflict under Oregon RPC 1.7(a)(2) and the representation could continue without the need for the Client’s informed consent.

While it is apparent that the filing of a disciplinary complaint could raise concerns on a case-by-case basis, it does not appear to create a *per se* conflict of interest. Though the Oregon Supreme Court has not directly addressed this issue, a pending Bar complaint is in many ways analogous to a potential claim of legal malpractice, which the Court has addressed in this context. *See, e.g., In re Knappenberger*, 337 Or 15, 90 P3d 614 (2004); *In re Obert*, 336 Or 640, 89 P3d 1173 (2004). In the case of both the malpractice claim and the Bar complaint, the lawyer’s and the client’s respective interests in the outcome are clearly adverse. Thus, the cases discussing a lawyer’s obligations in the face of a potential malpractice claim are at least instructive in this context.

In *Knappenberger*, the Court considered whether the Accused violated *former* DR 5-101(A)(1)² when he continued to represent a client after having made a procedural error on appeal, and without both disclosing the error and obtaining the client’s consent to continue. *In re Knappenberger*, 337 Or at 21. The Oregon State Bar argued that the potential claim of malpractice that arose from that error reasonably might have impaired the Accused’s exercise of his professional judgment, thereby triggering the duty to obtain consent following full disclosure before continuing representation. *In re Knappenberger*, 337 Or at 27.

The Court rejected the Bar’s *per se* approach, reasoning that not every error, and thus not every potential malpractice claim, could be presumed to affect or be reasonably likely to affect the lawyer’s professional judgment in a way that implicated the rule or its requirements of disclosure and consent. *In re Knappenberger*, 337 Or at 26.³

² *Former* DR 5-101(A)(1), the predecessor to Oregon RPC 1.7(a)(2), provided in part:

(A) Except with the consent of the lawyer’s client after full disclosure,

(1) a lawyer shall not accept or continue employment if the exercise of the lawyer’s professional judgment on behalf of the lawyer’s client will be or reasonably may be affected by the lawyer’s own financial, business, property, or personal interests. . . .

“Full disclosure,” as used in this rule, also required that the disclosure and request for consent be confirmed in writing. *Former* DR 10-101(B)(2).

³ The Court in *Knappenberger*, 337 Or at 28, further noted:

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. *See In re Hopp*, 291 Or 697, 634 P2d 238 (1981) (finding no DR 5-101(A) violation when accused had incidental financial or proprietary interest

Rather, the Court held, it must be shown “by clear and convincing evidence that the lawyer’s error, and the pending or potential liability arising from that error, will or reasonably may affect the lawyer’s professional judgment. That conclusion will depend on the facts and circumstances of each case.” *In re Knappenberger*, 337 Or at 29.⁴

Although it has repeatedly rejected a *per se* approach, the Supreme Court has clearly suggested that at some point a potential malpractice claim might cause the interests of lawyer and client to diverge, thereby implicating Oregon RPC 1.7. *See In re Knappenberger*, 337 Or 15; *In re Obert*, 336 Or 640. The Court has not provided explicit guidance as to where that threshold lies. However, the discussion excerpted above indicates that the stronger the potential claim, with its correspondingly greater risk of harm to the lawyer’s own interests, the more significant risk there is that the claim will impair the lawyer’s ability to represent his or her client. Of course, a potential claim could motivate a lawyer to seek to correct an error before its harmful effects are realized, thereby further aligning lawyer’s and client’s interests. *See State v. Taylor*, 207 Or App

in outcome of litigation). It simply does not follow, then, that any error made during the course of a lawyer’s representation will or *reasonably* may affect his or her professional judgment in a way that requires consent after disclosure under DR 5-101(A).

⁴ The court has not indicated clearly whether the existence of a substantial risk of material limitation should be evaluated subjectively (by what the lawyer believes) or objectively (by what a “reasonable lawyer” would believe in the same circumstances). In *In re Knappenberger*, the accused lawyer denied having a self-interest conflict on one of the charges because he did not believe his error would make him liable to his client. In evaluating whether the Accused’s judgment might have been affected, the court noted that “the Bar does not assert that the accused’s opinion was unreasonable or that it would have been evident to a reasonable lawyer at that time that [the Accused’s client] had a viable malpractice claim.” By contrast, in *In re Schenck*, 345 Or 350, 363–64, 194 P3d 804 (2008), *modified on recons*, 345 Or 652, 202 P3d 165 (2009), the court found a self-interest conflict by comparing the way a “disinterested lawyer” would have acted in the same circumstances.

649, 665 n 6, 142 P3d 1093 (2006), *rev den*, 342 Or 299 (2007).⁵ But evidence that an attorney has recommended a course of action that would serve to conceal that error is likely to result in a finding of conflict. *See In re Knappenberger*, 337 Or at 26 (accused lawyer conceded violation of former DR 5-101(A) when he missed a filing deadline for postconviction relief, then suggested claim was weak due to matters beyond his control, such that voluntary dismissal to limit client's losses might be best course of action).

Like a malpractice claim, the filing of a Bar complaint carries with it the potential for public embarrassment, damage to a lawyer's professional reputation, and significant financial loss. However, in regard to Client's concerns with Lawyer's failure to interview certain witnesses, those risks appear to be minimal. Lawyer is aware of Client's desire to have additional witnesses contacted, but also is presumably in a far better position to assess whether those witnesses would be permitted to testify at trial. As a result, Lawyer's potential exposure to Bar sanctions is probably not great. Lawyer also is willing to address Client's concerns, and appears able to do so without delaying trial or otherwise prejudicing Client's case. Thus there is no apparent motive for Lawyer to act contrary to Client's best interest, and consequently one could reasonably conclude that there was no significant risk that Lawyer's representation will be materially limited. *See In re Obert*, 336 Or at 648 (under former DR 5-101(A), there must be some *reasonable* likelihood that lawyer's judgment will be affected before a conflict will be found). It follows that there is little risk that Lawyer would be found in violation of Oregon RPC 1.7 for failing to either withdraw or obtain Client's informed con-

⁵ This formal opinion addresses only counsel's potential obligations under the Oregon Rules of Professional Conduct when a client files a Bar complaint in the course of representation. In a criminal case involving an indigent defendant, the trial court has the further obligation of ensuring that the Accused has been appointed constitutionally adequate counsel. A court that "knows or reasonably should know from the record before it that appointed counsel may have a conflict of interest [is] obligated to inquire about the potential conflict." *Taylor*, 207 Or App at 664 (internal citations omitted).

sent, at least not in the absence of some clear indication that Lawyer acted to protect Lawyer's, and not Client's, best interests.

The client communication issue is more problematic. Oregon RPC 1.4⁶ governs Lawyer's duties to communicate and explain.⁷ Despite Lawyer's belief that Client's complaint is unfounded, the question of whether communication has been adequate is arguably more subjective than the witness issue. Lawyer is not in as good a position to predict the outcome of the disciplinary proceeding. Even on the basis of the limited facts provided, Lawyer's potential liability would appear greater. Lawyer's trial strategy has the potential to affect the outcome of Client's case in a way that the witness issue could not, and reasonable minds could differ as to whether Lawyer's efforts to communicate and explain this strategy met the requirements of Oregon RPC 1.4.

⁶ Rule 1.4, Communication:

(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

⁷ "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 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.

Oregon RPC 1.0(g).

"Confirmed in writing," when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. . . . If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.

Oregon RPC 1.0(b).

Given the Supreme Court's reluctance to assume that a lawyer's representation is or is likely to be adversely affected in such circumstances, it is unlikely that even this second allegation would necessarily trigger Oregon RPC 1.7. However, a cautious lawyer may nonetheless choose to avoid such questions by obtaining the client's informed consent, confirmed in writing.

Approved by Board of Governors, October 2009.

COMMENT: For additional information on this general topic and other related subjects, see *The Ethical Oregon Lawyer* § 4.2 (withdrawal), § 4.2-1 (court permission to withdraw), § 4.3 (mandatory withdrawal), § 4.3-1 (withdrawal to avoid a rule violation), § 4.4 to § 4.4-1 (permissive withdrawal), § 7.4 (client communication), § 9.2-1 to § 9.2-1(c) (personal-interest conflicts), § 9.6 (informed consent) (OSB Legal Pubs 2015); and *Restatement (Third) of the Law Governing Lawyers* §§ 20, 32, 122, 125 (2000) (supplemented periodically).