

FORMAL OPINION NO. 2005-129

Competent Representation, Information Relating to the Representation of a Client: Responsibilities on Death of a Sole Practitioner

Facts:

Lawyer is a sole practitioner with no partners, associates, or employees. Lawyer's files contain information relating to the representation of clients.

Questions:

1. Must Lawyer take steps to safeguard the interests of Lawyer's clients, and the information relating to their representations, if Lawyer dies or is disabled?
2. If Lawyer makes arrangements for a successor lawyer to disburse his or her files if Lawyer dies or becomes disabled, what steps must or may the successor lawyer undertake?

Conclusions:

1. See discussion.
2. See discussion.

Discussion:

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.

Oregon RPC 1.6(a) provides:

A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).¹

¹ Oregon RPC 1.6(b) provides:

A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to disclose the intention of the lawyer's client to commit a crime and the information necessary to prevent the crime;

(2) to prevent reasonably certain death or substantial bodily harm;

(3) to secure legal advice about the lawyer's compliance with these Rules;

(4) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

(5) to comply with other law, court order, or as permitted by these Rules; or

(6) to provide the following information in discussions preliminary to the sale of a law practice under Rule 1.17 with respect to each client potentially subject to the transfer: the client's identity; the identities of any adverse parties; the nature and extent of the legal services involved; and fee and payment information. A potential purchasing lawyer shall have the same responsibilities as the selling lawyer to preserve confidences and secrets of such clients whether or not the sale of the practice closes or the client ultimately consents to representation by the purchasing lawyer.

See also Oregon RPC 5.3:

With respect to a nonlawyer employed or retained, supervised or directed by a lawyer:

(a) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(b) except as provided by Rule 8.4(b), a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

ORS 9.705–9.755 set forth a statutory scheme pursuant to which a nonperforming lawyer’s law practice may be placed under the jurisdiction of the court and steps taken to protect the interests of the nonperforming lawyer’s clients. For a lawyer who has no partners, associates, or employees, however, there could well be a significant lapse of time after the lawyer’s death or disability during which the lawyer’s telephone would go unanswered, mail would be unopened, deadlines would not be met, and the like.

The duty of competent representation includes, at a minimum, making sure that someone will step in to avoid client prejudice in such circumstances. The person may, but need not, be a lawyer. Depending on the circumstances, it may be sufficient to instruct the person that if the lawyer dies or becomes disabled, the person should contact the presiding judge of the county circuit court so that the procedure set forth in ORS 9.705–9.755 can be commenced.² The person also should be instructed, however, about the lawyer’s duties to protect information relating to the representation of a client pursuant to Oregon RPC 1.6. *Cf.* OSB Formal Ethics Op Nos 2005-50, 2005-44, 2005-23.

A lawyer may, however, go further than this and may specifically arrange for another lawyer to come in and disburse the lawyer’s files if the lawyer dies or becomes disabled. Nothing in ORS 9.705–9.755 makes it the exclusive means of handling such circumstances. Like a court-appointed custodial lawyer, a voluntary lawyer must be mindful of the need to protect the client’s confidential information. Also like a court-appointed custodial lawyer, the voluntary lawyer must promptly inform the clients of the sole practitioner that the voluntary lawyer has possession of the client’s files and must inquire what the clients wish the voluntary lawyer to do with the files. Unlike the court-appointed custodial lawyer, however, the voluntary lawyer may offer in writing to take over the work of the lawyer’s clients, if the voluntary lawyer

² There may be circumstances, however, in which the lawyer must do more. This would be true if, for example, a client were to request that particular steps be taken. It would also be true if the lawyer learns in advance that he or she would be able to continue practicing law for only a limited additional time. In this event, the lawyer should begin the process of notifying the lawyer’s clients as soon as possible to inquire how each client wishes to have his or her files handled.

complies with Oregon RPC 7.3 on solicitation of clients.³ *Cf.* ORS 9.730; OSB Formal Ethics Op No 2005-127.

Approved by Board of Governors, August 2005.

³ The voluntary lawyer could not do so if, for example, the voluntary lawyer is not qualified to handle the work in question or if doing so would create conflict of interest problems under Oregon RPC 1.7. *Cf.* Oregon RPC 1.1; OSB Formal Ethics Op Nos 2005-119, 2005-110. With regard to the sale of a law practice, see Oregon RPC 1.17.

COMMENT: For additional information on this general topic and other related subjects, see THE ETHICAL OREGON LAWYER §§7.2–7.5 (Oregon CLE 2003); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§16, 59–60 (2003); and ABA Model Rules 1.1, 1.6.