

FORMAL OPINION NO. 2005-1

Withdrawal from Litigation: Unpaid Fees

Facts:

Lawyer agrees to represent Client in litigation on an hourly basis. After the litigation has begun and Lawyer has appeared on Client's behalf, Lawyer becomes concerned that Client is falling behind in making the agreed payments to Lawyer.

Question:

May Lawyer refuse to proceed with the litigation unless and until Client makes up all past-due payments?

Conclusion:

No, qualified.

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 1.3 provides:

A lawyer shall not neglect a legal matter entrusted to the lawyer.

In other words, Lawyer must act competently and diligently for as long as Lawyer is Client's lawyer.

Oregon RPC 1.16 provides, in pertinent part:

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

(1) withdrawal can be accomplished without material adverse effect on the interests of the client;

...

(5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

(6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(7) other good cause for withdrawal exists.

The right to withdraw, however, is subject to the limitations set forth in Oregon RPC 1.16(c) and (d):

(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.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. . . .

In the present circumstances, Lawyer may, if consistent with applicable law, seek leave of the court to withdraw pursuant to Oregon RPC 1.16(c). *Cf.* ORS 9.380; UTCR 3.140; LR 83-11. Lawyer must provide Client with reasonable notice pursuant to Oregon RPC 1.16(b)(5) and take the steps required to avoid prejudice to Client pursuant to Oregon RPC 1.16(d). *Cf. In re Martin*, 328 Or 177, 970 P2d 638 (1998); *In re William F. Thomsen*, 262 Or 496, 499 P2d 815 (1972); *State v. Schmick*, 62 Or App 227, 660 P2d 693 (1983).

If the court refuses to permit Lawyer to withdraw, Lawyer must continue with the matter and provide competent representation, notwithstanding nonpayment. Oregon RPC 1.1, 1.16(c); *In re Lathen*, 294 Or 157, 654 P2d 1110 (1982).

Approved by Board of Governors, August 2005.

COMMENT: For additional information on this general topic and other related topics, see THE ETHICAL OREGON LAWYER §§4.4–4.5, 4.15 (Oregon CLE 2003); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§31–32 comment h(i), comment k (2003); and ABA Model Rules 1.1, 1.16. *See also* Washington Informal Ethics Op Nos 1169, 1721, 1751 (unpublished).