

FORMAL OPINION NO. 2005-19
Dishonesty, Misrepresentation, and
Representation Within the Bounds of the Law:
Seeking Duplicate Damages

Facts:

Lawyer represents Client, who was injured in two separate automobile accidents. From Lawyer's investigation of the case, it is not clear which accident caused which injuries.

Questions:

1. May Lawyer include the same items of damages in both complaints?
2. If one of the cases settles and Client recovers some of the damages items claimed in the other case, may Lawyer nonetheless go ahead and endeavor to collect those same items of damages from the opponent in the other case?

Conclusions:

1. Yes.
2. No, qualified.

Discussion:

Oregon RPC 8.4(a)(3) makes it professional misconduct for a lawyer to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation that reflects adversely on the lawyer's fitness to practice law." *Cf. In re Hawkins*, 305 Or 319, 751 P2d 780 (1988); *In re Howard*, 304 Or 193, 743 P2d 719 (1987); *In re Boothe*, 303 Or 643, 740 P2d 785 (1987). Oregon RPC 3.1 is much the same effect:

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 3.3(a) is also relevant:

A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel;

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false;

(4) conceal or fail to disclose to a tribunal that which the lawyer is required by law to reveal; or

(5) engage in other illegal conduct or conduct contrary to these Rules.

See, e.g., In re Eadie, 333 Or 42, 36 P3d 468 (2001); *In re Hawkins, supra*; *In re Hockett*, 303 Or 150, 734 P2d 877 (1987).

On the facts as given, it appears that there is no reason why Lawyer cannot seek the same items of damages from two different defendants at the outset because it is not clear which defendant caused the damage. Once a particular item of damages has been paid for by one defendant, however, it would be improper for Lawyer to seek payment a second time if the recovery would clearly be duplicative (as, for example, in the case of seeking double payment of the same medical bill). *See In re Popick*, 3 DB Rptr 21 (1989).

On the other hand, a lawyer is permitted to seek additional recovery if a nonfrivolous argument can be made that double recovery would not result (as, for example, in the case of a lawyer who recovers a sum of

money for the plaintiff's loss of consortium in the first case and who seeks recovery of an additional sum of money for loss of consortium on the ground that the second accident caused additional injuries).

Approved by Board of Governors, August 2005.

COMMENT: For additional information on this general topic and related subjects, see THE ETHICAL OREGON LAWYER §§7.16–7.18, 7.25–7.35 (Oregon CLE 2002); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§94, 110–111 (2003); and ABA Model Rules 3.1, 3.3(a).