# FORMAL OPINION NO 2005-122

## Conflicts of Interest, Current Clients:
## Multiple Government Clients, Future Conflict Waivers

**Facts:**

Lawyer is engaged in a general private practice. Lawyer also acts as a special prosecutor in certain misdemeanor cases in the Circuit Court for County in which City is located. In those cases, Lawyer represents the State of Oregon, but is paid by City. In Lawyer's work as a special prosecutor, Lawyer sometimes must coordinate efforts with the County district attorney's office.

Lawyer also has private clients who, from time to time, may be adverse to the State, to City, or to County in civil matters that are unrelated to Lawyer's misdemeanor prosecutions. Lawyer's representation of these private clients does not, for example, put Lawyer in a position to use any confidential client information of the State against the State. Similarly, Lawyer's work as a special prosecutor does not put Lawyer in a position to use confidential client information of Lawyer's private clients against those clients.

**Questions:**

1.     May Lawyer represent a private client adversely to the State or to a department or agency of the state?

2.     May Lawyer represent a private client adversely to City or County or to a department or agency of City or County?

3.     May Lawyer obtain a blanket waiver of future conflicts from the State that will permit Lawyer to represent Lawyer's private client and against the State and its departments or agencies?

**Conclusions:**

1.     Yes.

2.      Yes.

3.      Yes, qualified.

## Discussion:

When Lawyer appears on behalf of the State as a special prosecutor, the State is Lawyer's client. *Cf.* ORS 8.680; ORS 8.726; ORS 8.760. This is true even though one of the principal purposes of the prosecutions may be to cause misdemeanants to make restitution to private parties injured by the underlying wrongful conduct and even though Lawyer is paid by City and may at times coordinate efforts with the County district attorney's office. *Cf.* Oregon RPC 1.8(f); Oregon RPC 5.4(c);[1] *Gibson v. Johnson*, 35 Or App 493, 582 P2d 452 (1978); OSB Formal Ethics Op No 2005-85; OSB Formal Ethics Op No 2005-46.

Within the context of the governmental entity, the client will sometimes be a specific agency, will sometimes be a branch of government, and will sometimes be an entire governmental level (e.g., city, county, or state)[2] as a whole. ABA Model RPC 1.13 cmt [9] ("Although

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[1]     Oregon RPC 1.8(f) provides:

> (f)      A lawyer shall not accept compensation for representing a client from one other than the client unless:
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> (1)      the client gives informed consent;
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> (2)      there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
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> (3)      information related to the representation of a client is protected as required by Rule 1.6.

Oregon RPC 5.4(c) provides:

> (c)      A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

[2]     Representation of a state does not constitute representation of political subdivisions of the state, and vice versa. Among other things, political subdivisions of a state, such as its cities and counties, are independent bodies and are not subject to

in some circumstances the client may be a specific agency, it may also be a branch of government, such as the executive branch, or the government as a whole."). In essence, it is up to the lawyer and the government "client" to define who or what is to be considered the client, much as the process works in private-side representations of for-profit entities. *See also* Oregon RPC 1.7(c).

It is also necessary to address what it means to represent a client adversely to a state or to a department or agency of a state. Clearly, representation of a client in litigation against a state or against a state department or agency would qualify, as would negotiations on the opposite side of a state or state agency or department. *Cf.* OSB Formal Ethics Op No 2005-86; OSB Formal Ethics Op No 2005-40. On the other hand, we do not believe that merely giving a private client advice about structuring a transaction to minimize state taxes would constitute a representation adverse to the state. *Cf.* Oregon RPC 1.7. Similarly, appearing on behalf of a private party before a state agency which may adjudicate a matter between that private party and a third party would not, by itself, constitute representation adverse to a state.

Under the facts described above, it appears that any conflict that would result from Lawyer's simultaneous representation of the State of Oregon in criminal misdemeanor matters and private parties on unrelated civil matters could be waived. *Cf.* Oregon RPC 1.7.[3] If a

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the direction and control of the executive branch of state government. *Cf.* ORS 203.010–203.030; ORS 203.720; ORS 221.410(1).

[3]     Oregon RPC 1.7 provides:

> (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)     the representation of one client will be directly adverse to another client;

> (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

nonwaivable conflict were present, Lawyer could not proceed even with informed consent, confirmed in writing. *Cf.* Oregon RPC 1.7; *In re Phelps*, 306 Or 508, 760 P2d 1331 (1988); *In re Thies*, 305 Or 104, 750 P2d 490 (1988).

Lawyer's representation of private clients against the State or its departments or agencies would give rise only to waivable conflicts under Oregon RPC 1.7(a)(1) and (b). This is because, although the interests of the private clients and the State may be "directly adverse," Lawyer would not be obligated to contend for something for one of the clients that Lawyer has a duty to oppose for the other. *Cf.* Oregon RPC 1.7(b)(3). In waivable conflict situations, a lawyer may proceed if the affected clients provide informed consent, confirmed in writing as

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      (3)    the lawyer is related to another lawyer, as parent, child, sibling, spouse or domestic partner, in a matter adverse to a person whom the lawyer knows is represented by the other lawyer in the same matter.

      (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.

defined in Oregon RPC 1.0(b) and (g).[4] *See, e.g.*, OSB Formal Ethics Op No 2005-77 (rev 2016); OSB Formal Ethics Op No 2005-40.

Because City and County are not Lawyer's clients solely because of Lawyer's duties as a special prosecutor, representation of private parties adverse to City, County, or a department or agency of City or County would not give rise to any conflicts problems under Oregon RPC 1.7. Whether, or under what circumstances, the representation of private parties adverse to City or County could ever give rise to a problem due to a personal-interest conflict of Lawyer requiring Lawyer to obtain informed consent, confirmed in writing, pursuant to Oregon RPC 1.7 is a question that these facts do not require us to consider.

Nothing in Oregon RPC 1.7 prohibits a blanket or advance waiver from the State or from a nongovernment client as long as Lawyer adequately explains the material risks and available alternatives. *See, e.g.*, ABA Formal Ethics Op No 05-436. Lawyer must be sensitive, however, to situations that were not contemplated in the original disclosure or that constitute nonwaivable conflicts. In the former situation, Lawyer would need to obtain the informed consent of each affected client as to the new

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[4]   Oregon RPC 1.0(b) and (g) provide:

> (b)   "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.

> . . . .

> (g)   "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.

conflict. In the latter situation, Lawyer would have to decline representation in the new matter that gives rise to the conflict. Oregon RPC 1.16(a)(1).

**Approved by Board of Governors, August 2005.**

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COMMENT: For additional information on this general topic and other related subjects, see *The Ethical Oregon Lawyer* § 3.5-3 (payment of fees by nonclients), § 9.6 (informed consent), § 10.2 to § 10.2-2(d) (multiple-client conflicts rules), § 10.2-3 (issue conflicts), § 11.4-1 (client identification for a government lawyer), § 11.4-5 (duties applicable to government lawyers), § 11.5-2 (confidentiality issues for government lawyers) (OSB Legal Pubs 2015); *Restatement (Third) of the Law Governing Lawyers* §§ 121–122, 125, 128–130, 132 (2000) (supplemented periodically); ABA Model RPC 1.0(b), (e); ABA Model RPC 1.7; ABA Model RPC 1.8(f); and ABA Model RPC 5.4(c).