

FORMAL OPINION NO 2005-130

[REVISED 2018]

Conflicts of Interest, Current Clients: Plaintiff and Witness for Plaintiff

Facts:

Lawyer A filed a claim on behalf of Plaintiff for wrongful discharge, alleging mental anguish as injury. Defendant's lawyer subpoenaed Plaintiff's treating Psychotherapist for deposition as to Plaintiff's mental state following her discharge from employment.¹

At the beginning of the deposition of the treating Psychotherapist, Lawyer A declared that he represented the Psychotherapist for the purpose of the deposition. Psychotherapist confirmed that the representation was arranged that morning immediately before the deposition. In the course of the deposition, Lawyer A objects to leading questions and instructs Psychotherapist not to answer certain questions.

Defendant's lawyer convened a court hearing during the deposition on the issue of whether Psychotherapist was required to answer the questions. Lawyer A appeared as lawyer for both Plaintiff and Psychotherapist.

Question:

May Lawyer A represent Psychotherapist in the deposition while representing Plaintiff in the wrongful-termination claim?

Conclusion:

Yes, qualified.²

¹ Under OEC 504(4), the psychotherapist-patient privilege does not apply when the plaintiff puts his or her mental state in issue.

² This opinion does not address certain possible ethical violations raised by Lawyer A's conduct that are outside the limited scope of the question considered. For example, if Lawyer A contacted Psychotherapist for the purpose of obtaining professional employment, Lawyer A would be prohibited from using any means of

Discussion:

If Lawyer A represents Plaintiff with respect to the wrongful-discharge claim and Psychotherapist with respect to the deposition, both individuals will be current clients of Lawyer A. The issue, then, is whether the simultaneous representation of them creates a conflict of interest in violation of Oregon RPC 1.7:

(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

(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:

solicitation prohibited by Oregon RPC 7.3. In addition, Lawyer A's instructions to Psychotherapist not to answer certain questions may not have been permissible under the Oregon Rules of Civil Procedure. If so, such instruction may have violated Oregon RPC 3.4(a), which prohibits obstructing access to evidence, or Oregon RPC 8.4(a)(4), which prohibits conduct prejudicial to the administration of justice. In addition, if Plaintiff is paying the cost of Lawyer A's representation of Psychotherapist, Lawyer A may not accept such compensation without the consent of Psychotherapist after full disclosure pursuant to Oregon RPC 1.8(f). Last, if Lawyer A had an impermissible purpose for entering into a lawyer-client relationship with Psychotherapist, that representation might violate Oregon RPC 4.4(a).

- (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.

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.

From the limited facts given, it does not appear that Lawyer A’s simultaneous representation of Plaintiff and Psychotherapist involves a conflict of interest. The interests of the clients are not directly adverse. In fact, the interests of Plaintiff and Psychotherapist with respect to the deposition may be aligned—both may desire that matters related to the psychotherapy not be disclosed in the deposition. Even if Psychotherapist were neutral and had no interest in avoiding testifying, the differing positions of Plaintiff and Psychotherapist as to whether Psychotherapist should testify would not be directly adverse. There is also no reason to conclude, on the facts given, that Lawyer A’s representation of either will be materially limited by his responsibilities to anyone else. Therefore,

there would be no conflict under Oregon RPC 1.7 and Lawyer A is not required to have the informed consent of either client.

The mere theoretical possibility that Lawyer A might instruct Psychotherapist not to answer questions in a manner that might expose Psychotherapist to contempt charges does not create a conflict of interest. *Cf. Kidney Ass'n of Oregon, Inc. v. Ferguson*, 100 Or App 523, 786 P2d 754 (1990), *aff'd in part, rev'd in part on other grounds*, 315 Or 135, 843 P2d 442 (1992). Although Plaintiff's interest may be in preventing adverse testimony from Psychotherapist, Lawyer A may not advance that interest by instructing Psychotherapist not to answer a permissible deposition question. *See* footnote 1, *supra*. Conversely, Lawyer A's proper instruction to Psychotherapist not to answer an impermissible question would not expose Psychotherapist to a contempt charge. Moreover, if the circuit court ruled that Psychotherapist was required to testify, Lawyer A was precluded from instructing Psychotherapist not to testify.

It is possible that conflicts could develop after the joint representation begins. *Cf.* OSB Formal Ethics Op No 2005-122; OSB Formal Ethics Op No 2005-40. Suppose, for example, that Psychotherapist gives deposition testimony that is extremely detrimental to Plaintiff's case. Lawyer A might then be in a position in which the only proper course of action would be to try to impeach Psychotherapist's testimony at trial. If Psychotherapist is still a current client of Lawyer A at that time, it is reasonable to conclude that Lawyer A's representation of Psychotherapist will be materially limited by Lawyer A's responsibility to Plaintiff to impeach Psychotherapist. On the other hand, Lawyer A's representation of Plaintiff could be materially limited if Lawyer A is unwilling to impeach his other client. In either case, Oregon RPC 1.7(a)(2) would preclude Lawyer A from continuing the representation of either client

unless they each give their informed consent, confirmed in writing, as required by Oregon RPC 1.7(b).

Approved by Board of Governors, November 2018.

COMMENT: For additional information on this general topic and other related subjects, see *The Ethical Oregon Lawyer* § 10.2-2 to § 10.2-2(e)(2) (current-client conflicts) (OSB Legal Pubs 2015); *Restatement (Third) of the Law Governing Lawyers* §§ 121–122, 128 (2000); and ABA Model RPC 1.7.

