

FORMAL OPINION NO 2005-158

[REVISED 2015]

Conflicts of Interest, Current Clients: Representing Driver and Passengers in Personal-Injury/Property-Damage Claims

Facts:

Lawyer is asked to represent both the driver and the passengers of the same motor vehicle in personal-injury and property-damage claims for negligence against the adverse driver.

Questions:

1. May Lawyer represent both the driver and the passengers if there is a question concerning the liability of the driver for any injury suffered by the passengers?

2. May Lawyer represent both the driver and the passengers if the passengers merely make claims against the driver's insurance for personal injury protection (PIP) benefits?

3. May Lawyer represent both the driver and the passengers if the aggregate available assets, including insurance, of the adverse driver are insufficient to cover all claims?

Conclusions:

1. No, qualified.
2. Yes.
3. No, qualified.

Discussion:

This opinion deals only with multiple current-client conflicts of interest in the specific context of a driver and passengers who are in the same motor vehicle that collides with another motor vehicle and have suffered personal injuries or property damage as a result of that collision. Other multiple current-client conflicts-of-interest problems are dealt with in various other opinions. *See* OSB Formal Ethics Op No 2005-27 (repre-

senting trade association and member); OSB Formal Ethics Op No 2005-30 (rev 2016) (representing insurer and insured); OSB Formal Ethics Op No 2005-46 (group legal assistance plans); OSB Formal Ethics Op No 2005-82 (representing multiple defendants in a criminal matter); OSB Formal Ethics Op No 2005-86 (representing husband and wife in bankruptcy, wills, and dissolution).

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

(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.

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. See paragraph (g) for the definition of “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.

Additionally, Oregon RPC 1.8(g) provides:

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregate agreement as to guilty or nolo contendere pleas, unless each client gives informed consent, in a writing signed by the client. The lawyer’s disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

The analysis for determining the existence of conflicts between multiple current clients requires the following steps:

- (1) Determine who is or will be, and who is not and will not be, a client.
- (2) Determine whether there is direct adversity or other conflict within the meaning of Oregon RPC 1.7(a).
- (3) Determine whether any such conflict can or cannot be waived pursuant to Oregon RPC 1.7(b).
- (4) Obtain any required waivers by informed consent and do not represent parties as to whom a nonwaivable conflict exists.
- (5) Monitor the waivable conflicts of interest during the representation to determine whether additional disclosure or subsequent withdrawal is required.

Conflicts between multiple plaintiffs in motor vehicle cases can arise over both liability and damages issues.

1. *Simultaneous Representation When the Plaintiff Driver's Liability Is an Issue.*

If the driver has no liability for the injury of the passengers, there is no conflict that would limit or prohibit simultaneous representation of both the driver and the passengers. However, contributory fault is often asserted by the adverse driver or may be discovered during the course of the representation. This defense may create a nonwaivable conflict of interest that prohibits the simultaneous representation. If the nonwaivable conflict is discovered after the representation has commenced, it will require Lawyer to stop representing both the driver and the passengers unless either the driver or the passengers agree to become former clients and consent to Lawyer's continued representation of the other. *See* Oregon RPC 1.9; OSB Formal Ethics Op No 2005-11; OSB Formal Ethics Op No 2005-17.

The mere fact that the defendant has alleged contributory fault by the driver does not necessarily create a nonwaivable conflict. The passengers may disagree with the adverse driver's factual contentions or, if the driver and the passengers are closely related, the passengers may not wish to pursue intrafamily claims. Assuming that these decisions not to pursue claims are made voluntarily and without influence arising from Lawyer's obligations to the driver, a nonwaivable conflict does not exist.

Nevertheless, and even in the limited situations in which the passengers do not wish to pursue a claim against the driver, the defendant's contributory fault claim may have a significant effect on the passengers' recovery. Although this possibility might not create a nonwaivable or even waivable conflict between the driver and the passengers, Lawyer should still consider the matter and, if appropriate, review it with the prospective clients and obtain any necessary consent.

2. *Simultaneous Representation and PIP Claims.*

There is no conflict of interest in this situation because personal injury protection (PIP) benefits are based on a per capita and not on an aggregate limit and are not based on the fault of the driver. ORS 742.520;

ORS 742.524. Lawyer may proceed to represent passengers in a claim against the driver's insurance carrier for PIP benefits.

3. *Simultaneous Representation When Resources Are Insufficient to Cover All Claims.*

There is no conflict of interest if Lawyer knows that the aggregate resources available to the driver and the passengers are adequate to cover all possible claims.¹ If, however, an aggregate settlement is offered, the special requirements of Oregon RPC 1.8(g), quoted above, must be met.²

If, over time, the client damages escalate and the aggregate resources become inadequate to cover all damages for all clients insofar as they can reasonably be estimated or assessed,³ Lawyer can continue

¹ Oregon RPC 1.0(h) provides:

“Knowingly,” “known,” or “knows” denotes actual knowledge of the fact in question, except that for purposes of determining a lawyer’s knowledge of the existence of a conflict of interest, all facts which the lawyer knew, or by the exercise of reasonable care should have known, will be attributed to the lawyer. A person’s knowledge may be inferred from circumstances.

² In *In re Gatti*, 356 Or 32, 333 P3d 994 (2014), the Oregon Supreme Court adopted the following American Law Institute definition of *aggregate settlement*, as that term is used in Oregon RPC 1.8(g):

Definition of a Non-Class Aggregate Settlement

(a) A non-class aggregate settlement is a settlement of the claims of two or more individual claimants in which the resolution of the claims is interdependent.

(b) The resolution of claims in a non-class aggregate settlement is interdependent if:

(1) the defendant’s acceptance of the settlement is contingent upon the acceptance by a number or specified percentage of claimants; or

(2) the value of each claim is not based solely on individual case-by-case facts and negotiations.

Gatti, 356 Or at 48 (quoting from *Principals of Law of Aggregate Litigation* § 3.16).

³ A lawyer is not required, for example, to value the cases on an unreasonably and unrealistically high basis.

the representation only if all clients consent after full disclosure to limit Lawyer's representation to collecting all possible resources from the adverse party or parties.⁴ This consent should be obtained no later than the time at which it is learned that the aggregate of defense resources is inadequate. The clients may agree, however, to accomplish any subsequent division of resources through mediation or arbitration. Lawyer can assist in establishing the mediation or arbitration process and in providing information to all affected clients but cannot actively represent one current client against another current client.

Approved by Board of Governors, April 2015.

⁴ See the discussion in *The Ethical Oregon Lawyer* § 10.1 (multiple-client conflicts), § 10.2-2(c) (waivable conflicts between current clients) (OSB Legal Pubs 2015).

COMMENT: For additional information on this general topic and other related subjects, see *The Ethical Oregon Lawyer* § 3.2-4 (contingent-fee agreements), § 3.4-1 (parties to fee agreement), § 10.2-2(b) (nonwaivable conflicts between current clients), § 10.2-2(e)(2) (multiple plaintiffs and multiple defendants); *Restatement (Third) of the Law Governing Lawyers* §§ 121, 128 (2000) (supplemented periodically); and ABA Model RPC 1.7–1.8.