

FORMAL OPINION NO 2005-27

**Conflicts of Interest, Current Clients:
Representation of Trade Association and Its Members**

Facts:

Lawyer is retained by Trade Association to represent its interests. While the representation of Trade Association is continuing, Lawyer is asked to represent one Trade Association member against another Trade Association member in a matter unrelated to the work that Lawyer is doing for Trade Association. The member whom Lawyer is asked to oppose is not and has not been an individual client of Lawyer.

Question:

May Lawyer represent one Trade Association member against another on matters unrelated to the Lawyer's work for Trade Association?

Conclusion:

Yes.

Discussion:

Given the facts as presented above, Lawyer's client in connection with Lawyer's work for Trade Association is the association itself and not its individual members. Oregon RPC 1.13 provides, in pertinent part:

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

....

(f) In dealing with an organization's . . . constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

(g) A lawyer representing an organization may also represent any of its . . . constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent may only be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

See, e.g., In re Kinsey, 294 Or 544, 556 n 4, 660 P2d 660 (1983);¹ *In re Mettler*, 305 Or 12, 17–19, 748 P2d 1010 (1988); *In re Brownstein*, 288 Or 83, 602 P2d 655 (1979); *In re Banks*, 283 Or 459, 584 P2d 284 (1978); OEC 503(1)(a) (“‘Client’ means a person, public officer, corporation, association or other organization or entity, either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from the lawyer.”).

Although the *Banks* and *Brownstein* decisions indicate that the “entity theory” of representation does not apply to corporations or partnerships in which all of the shares or partnership interests are controlled by a single person or family or in which there is no distinct minority interest, that is not the case here. In addition, there does not seem to be any indication here that Lawyer has led the individual Trade Association members to believe that they are Lawyer’s clients. *Cf. In re Weidner*, 310 Or 757, 801 P2d 828 (1990); *In re Mettler*, 305 Or 12; *In re Robertson*, 290 Or 639, 648, 624 P2d 603 (1981).

¹ The court in *Kinsey*, 294 Or at 556 n 4, cited Ethical Canon 5-18 with approval: “A lawyer employed or retained by a corporation or similar entity owes his allegiance to the entity and not to a stockholder, director, officer, employee, representative, or other person connected with the entity.”

Under these facts, Trade Association's interests are not adversely implicated in Lawyer's representation of one Trade Association member against the other, because there is no significant risk that representing the Trade Association member will materially limit Lawyer's responsibilities to the Trade Association; and because the Trade Association member whom Lawyer seeks to oppose is not and has not been a client of Lawyer, a current conflict of interest is not present within the meaning of Oregon RPC 1.7.² There is no reason Lawyer cannot proceed.

² 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; . . .

. . . .

(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.

Approved by Board of Governors, August 2005.

COMMENT: For additional information on this general topic and other related subjects, see *The Ethical Oregon Lawyer* § 5.3-1 to § 5.3-2 (corporations, partnerships, and trade associations as clients), § 10.2 (multiple-client conflicts rules), § 10.2-2 to § 10.2-2(a) (conflicts between current clients), § 11.2 (institutional client duties) (OSB Legal Pubs 2015); *Restatement (Third) of the Law Governing Lawyers* §§ 14 cmt f, 121 cmt d, 131 (2000) (supplemented periodically); and ABA Model RPC 1.7.

See also OSB Formal Ethics Op No 2005-85 (who is the client in corporations and partnerships); OSB Formal Ethics Op No 2005-67 (discussing same with regard to county representation); OSB Formal Ethics Op No 2005-46 (discussing same in group legal assistance plans).