

FORMAL OPINION NO 2005-40
Conflicts of Interest, Current Clients:
Representing Debtor and
One or More Creditors in Bankruptcy

Facts:

Lawyer is asked to represent Individual *A* in bankruptcy. Individual *A* owes money to Secured Creditor *B* and Unsecured Creditor *C*, both of whom are also clients of Lawyer.

Questions:

1. May Lawyer simultaneously represent Individual *A*, Secured Creditor *B*, and Unsecured Creditor *C* in the bankruptcy proceedings?
2. May Lawyer represent only Individual *A* in the bankruptcy proceedings?
3. Assume that Lawyer had never represented and is not asked to represent Individual *A*. Could Lawyer represent both Secured Creditor *B* and Unsecured Creditor *C* in Individual *A*'s bankruptcy?

Conclusions:

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

Discussion:

The critical sections that must be considered are Oregon RPC 1.7(a) and (b). Oregon RPC 1.7(a) provides:

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.

Oregon RPC 1.7(b) provides:

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 and the lawyer has a duty to oppose on behalf of another client; and

(4) each affected client gives informed consent, confirmed in writing.

For the definition of *informed consent*, see Oregon RPC 1.0(g):

“Informed Consent” denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation and 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.

Simultaneous representation of Individual A and Individual A's creditors in the bankruptcy would constitute a nonwaivable current-client conflict under Oregon RPC 1.7(a) and (b), which cannot be cured even with disclosure and consent from all concerned. *See* OSB Formal Ethics Op No 2005-37; OSB Formal Ethics Op No 2005-28. *See also In re Claussen*, 322 Or 466, 909 P2d 862 (1996); *In re Griffith*, 304 Or 575,

615–17, 748 P2d 86 (1987), *reinstatement granted sub nom Application of Griffith*, 323 Or 99, 913 P2d 695 (1996); *In re Harrington*, 301 Or 18, 30–31, 718 P2d 725 (1986). On the other hand, as long as Lawyer has the informed consent of Individual A, Secured Creditor B, and Unsecured Creditor C, Lawyer may represent Individual A in the bankruptcy while continuing to represent Secured Creditor B and Unsecured Creditor C on other unrelated matters. *Cf. In re Vaile*, 300 Or 91, 707 P2d 52 (1985).

The propriety of Lawyer’s simultaneous representation of Secured Creditor B and Unsecured Creditor C is not subject to a clear-cut answer on the facts presented. If, for example, the priority of Secured Creditor B is undisputed and Secured Creditor B has no interest in challenging the debt ostensibly owed to Unsecured Creditor C, no conflict appears to exist because the interests of the creditors would not be directly adverse and it is not likely that Lawyer’s representation of either creditor would be materially limited by Lawyer’s obligations to the other creditor. *See In re Griffith*, 304 Or at 595. On the other hand, if the interests of Secured Creditor B and Unsecured Creditor C are in fact adverse because they dispute each other’s priority or right to payment, simultaneous representation of both of them would involve a current conflict that cannot be waived by informed consent. However, Lawyer could represent just one of the two creditors in this matter if both creditors give their informed consent as provided in Oregon RPC 1.7(b).

Approved by Board of Governors, August 2005.

COMMENT: For additional information on this general topic and other related subjects, see *The Ethical Oregon Lawyer* § 10.2 (multiple-client conflicts rules), § 10.2-2 to § 10.2-2(d) (conflicts between current clients), § 10.2-2(e)(4) (multiple creditors), § 10.2-2(e)(6) (estate and trust conflicts) (OSB Legal Pubs 2015); *Restatement (Third) of the Law Governing Lawyers* §§ 121–124, 128–133 (2000) (supplemented periodically); and ABA Model RPC 1.7.

