

FORMAL OPINION NO 2005-46

Conflicts of Interests, Current Clients: “Who Is the Client,” Group Legal-Assistance Plans

Facts:

Law Firm provides legal services to employees of Corporation pursuant to a lawful, prepaid legal-services plan. Pursuant to ORS 750.595(4), the plan provides that in the event of a conflict between employees of Corporation who are covered by the plan, Law Firm will represent one of the employees and will arrange for separate counsel at another firm to represent the other employee at no additional expense to the employee.

A dispute subsequently arises between Employee A and Employee B. Employee A approaches Law Firm first and Law Firm agrees to represent Employee A. When Law Firm subsequently offers to arrange for separate counsel for Employee B, Employee B objects to Law Firm’s representation of Employee A on the ground that as a member of the prepaid legal-services plan, Employee B is a client of Law Firm and that a conflict of interest, which Employee B will not waive, therefore exists.

Question:

May Law Firm represent Employee A notwithstanding Employee B’s objection?

Conclusion:

Yes.

Discussion:

The only question here is whether Employee B, as a potential beneficiary of the prepaid legal-services plan, is *per se* a current client of

Law Firm. If Employee *B* were a client of Law Firm, Oregon RPC 1.7¹ would prohibit Law Firm from opposing Employee *B* in this dispute without, at a minimum, Employee *B*'s consent. *See* Oregon RPC 1.0(g);²

¹ 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.

² Oregon RPC 1.0(g) provides:

"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.

OSB Formal Ethics Op No 2005-27; OSB Formal Ethics Op No 2005-30 (rev 2016).³

The modern trend is to find the existence of a lawyer-client relationship whenever a person or entity that consults a lawyer reasonably believes that the person or entity is entitled to look to the lawyer for advice. *See, e.g., In re Weidner*, 310 Or 757, 801 P2d 828 (1990); *In re Mettler*, 305 Or 12, 18–20, 748 P2d 1010 (1988); *In re O’Byrne*, 298 Or 535, 544–45, 694 P2d 955 (1985); *In re Robertson*, 290 Or 639, 648, 624 P2d 603 (1981); OEC 503(1)(a) (client is someone “who is rendered . . . legal services . . . or who consults a lawyer with a view to obtaining professional legal services”); OSB Formal Ethics Op No 2005-27. Under the facts as provided, Employee *B* does not qualify as a client of Law Firm under this test.

Approved by Board of Governors, August 2005.

³ If Employee *B* were also a client, and if Law Firm simultaneously represented both Employee *A* and Employee *B* on opposite sides of the same matter, a conflict of interest would exist. If Law Firm represented Employee *A* in the matter at issue and Employee *B* on other, unrelated matters, a conflict of interest would exist only if the lawyer was obligated “to contend for something on behalf of [Employee *A*] that the lawyer has a duty to oppose on behalf of [Employee *B*]. Oregon RPC 1.7(b)(3).

COMMENT: For additional information on this general topic and related subjects, see *The Ethical Oregon Lawyer* § 2.6-5 (prepaid legal-services plans), § 10.2-2 to § 10.2-2(c) (conflicts between current clients), § 13.2-1(d) (group legal plans) (OSB Legal Pubs 2015); *Restatement (Third) of the Law Governing Lawyers* § 10 cmt f (2000) (supplemented periodically); and ABA Model RPC 1.7. *See also* Wayne F. Foster, Annotation, *Prepaid Legal Services Plans*, 93 ALR3d 199 (1979) (supplemented periodically).

