

FORMAL OPINION NO 2005-91

Conflicts of Interest, Current Clients: Lawyer as Officer, Director, or Shareholder of Corporate Client, Vicarious Disqualification

Facts:

Lawyer works for Firm that has Corporation as one of its clients. Corporation asks Lawyer to become one of its officers or directors.

Questions:

1. May Lawyer become an officer, director, or shareholder of Corporation notwithstanding Firm's representation of Corporation?
2. Does the answer depend on whether Lawyer, or others at Firm, actually perform the legal work for Corporation?

Conclusions:

1. Yes, qualified.
2. No.

Discussion:

As an officer or director, if not also as a shareholder, Lawyer would owe Corporation a fiduciary duty. *See, e.g., Zidell v. Zidell, Inc.*, 277 Or 413, 418, 560 P2d 1086 (1977). Similarly, lawyers owe their clients a fiduciary duty. *See, e.g., OSB Formal Ethics Op No 2005-26*. In most circumstances, the two sets of duties or interests coincide.

If Lawyer is directly involved in Firm's representation of Corporation, however, there may be circumstances in which Lawyer's responsibilities or interests as officer, director, or shareholder and Lawyer's obligations as counsel for the Corporation may diverge. *Cf. In re Griffith*, 304 Or 575, 748 P2d 86 (1987), *reinstatement granted sub nom Application of Griffith*, 323 Or 99, 913 P2d 695 (1996); *In re Brown*, 326 Or 582, 956 P2d 188 (1998); *In re Henderson*, 10 DB Rptr 51 (1996). This would be true if, for example, Corporation's board were deciding

whether or under what conditions to continue to employ Firm. It could also be true if Lawyer or Firm were representing Corporation and its officers, directors, or shareholders in a third party's claim for damages.

If the circumstances are such that there is a significant risk that Lawyer's representation of Corporation will be materially limited by Lawyer's interests as an officer, director, or shareholder, Lawyer may not act as counsel with respect to the matter giving rise to the conflict unless Corporation consents after full disclosure pursuant to Oregon RPC 1.7(a)(2) and (b)¹ and Oregon RPC 1.0(b) and (g).² On the other hand, if

¹ Oregon RPC 1.7(a)(2) and (b) provide, in pertinent part:

(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:

....

(2) there is a significant risk that the representation of one or more clients will be materially limited 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.

² Oregon RPC 1.0(b) and (g) provide, in pertinent part:

(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

the only divergence of interest is caused by Corporation's consideration of its relationship with Lawyer or Firm (and no legal advice is involved), there would be no conflict under Oregon RPC 1.7. However, principles of corporate fiduciary duty may require Lawyer's recusal from a corporate decision in which Lawyer has a direct or indirect financial interest.

Under Oregon RPC 1.10(a),³ when one lawyer within a firm has a current-client conflict, that conflict of interest is imputed to the other members of the firm. Within Oregon RPC 1.10(a) is an exception to that imputed disqualification for situations when the conflict is due to a personal interest—e.g., a political view—of the lawyer that will not affect the representation of the client by other members of the firm. Here, the conflict is because Lawyer's financial interest as officer, director, or shareholder conflicts with Lawyer's fiduciary duty to Corporation, and therefore the exception does not apply. It makes no difference whether

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.

³ Oregon RPC 1.10(a) provides:

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless the prohibition is based on a personal interest of the prohibited lawyer or on Rule 1.7(a)(3) and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.

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Lawyer who is going to be the officer, director, or shareholder is or is not the lawyer who does the legal work for Corporation.

Approved by Board of Governors, August 2005.

COMMENT: For additional information on this general topic and other related subjects, see *The Ethical Oregon Lawyer* § 9.1 to § 9.2-1(c) (personal-interest conflicts), § 9.6 (informed consent), § 20.1 to § 20.2-2 (disclosure and consent) (OSB Legal Pubs 2015); *Restatement (Third) of the Law Governing Lawyers* §§ 121–123, 125 (2000) (supplemented periodically); ABA Model RPC 1.0(b), (e); and ABA Model RPC 1.7(a)(2), (b). *See also* Washington Advisory Op No 1743 (1997) (available at <www.wsba.org/resources-and-services/ethics/advisory-opinions>).