

FORMAL OPINION NO 2005-111

**Conflicts of Interest, Current Clients:
Representing Bankruptcy Client Who Owes
Lawyer Substantial Fees**

Facts:

Client owes Lawyer substantial fees arising from prior representation that has been completed. Client seeks Lawyer's advice regarding bankruptcy.

Questions:

1. May Lawyer advise Client regarding bankruptcy?
2. Assuming bankruptcy law would permit the representation, may Lawyer represent Client in the bankruptcy proceeding?
3. May Lawyer condition representation of Client in the bankruptcy proceeding on prepayment of prior fees, if such prepayment is permitted under bankruptcy law?

Conclusions:

1. Yes, qualified.
2. Yes, qualified.
3. Yes.

Discussion:

Oregon RPC 1.7 provides, 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 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.

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. . . . 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.

The fact that bankruptcy proceedings will likely result in the discharge of the fees that Client owes to Lawyer raises the possibility of a personal-interest conflict between Lawyer and Client under Oregon RPC 1.7(a)(2). Lawyer's advice to Client about potential bankruptcy proceedings and Lawyer's representation of Client in such proceedings may be materially limited by Lawyer's own economic interest in being paid rather than having the fees discharged. *Cf. In re Stauffer*, 327 Or 44, 956 P2d 967 (1998). In that situation, Oregon RPC 1.7(b) would permit Lawyer to advise Client regarding bankruptcy relief only if Client provides informed consent that is confirmed in writing.¹

The proposed bankruptcy representation is not prohibited by Oregon RPC 1.8(i), which provides:

A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

- (1) acquire a lien authorized by law to secure the lawyer's fee or expenses; and
- (2) contract with a client for a reasonable contingent fee in a civil case.

If Lawyer's claim for fees is considered to be a lien on the bankruptcy assets, then Oregon RPC 1.8(i) by its terms allows the representation. If, on the other hand, Lawyer's claim is not a lien, Lawyer has no proprietary interest and Oregon RPC 1.8(i) does not apply.²

No Oregon Rule of Professional Conduct requires Lawyer to represent Client on new matters while prior fees are owing. Lawyer may demand that the prior fees be paid before undertaking bankruptcy representation, assuming such demand is not prohibited by bankruptcy

¹ We do not construe the questions asked herein to involve Oregon RPC 3.7, the lawyer witness rule. *Cf. OSB Formal Ethics Op No 2005-8.*

² Lawyer may not acquire a lien on Client's property to secure payment for actual or anticipated fees or expenses with the intention of assisting Client to defraud creditors. *See In re Taylor*, 319 Or 595, 878 P2d 1103 (1994).

Formal Opinion No 2005-111

law. *Cf.* OSB Formal Ethics Op No 2005-97 (mid-matter fee adjustments).

Approved by Board of Governors, August 2005.

COMMENT: For additional information on this general topic and other related subjects, see *The Ethical Oregon Lawyer* § 3.5-1(a) (payment of attorney fees — voluntary assignment of assets), § 3.5-4 (fee disputes), § 3.5-7(a) (acquisition of interest in litigation), § 9.2 to § 9.2-1(b) (personal-interest conflicts), § 9.6 (informed consent) (OSB Legal Pubs 2015); *Restatement (Third) of the Law Governing Lawyers* §§ 36, 41, 121–122, 125 (2000) (supplemented periodically); ABA Model RPC 1.0(b), (e); ABA Model RPC 1.7; and ABA Model RPC 1.8(i). *See also* Washington Advisory Op No 2016 (2003) (available at <www.wsba.org/resources-and-services/ethics/advisory-opinions>).