

FORMAL OPINION NO 2005-116
Conflicts of Interest, Current Clients:
Charity and Donor

Facts:

Lawyer represents Charity on a continuing basis and is also a member of its board of directors.

Donor asks Lawyer to represent Donor in making a sizable gift to Charity. Donor also asks Lawyer to prepare Donor's will in which Charity would be a named beneficiary.

Questions:

1. May Lawyer represent both Charity and Donor in the charitable gift transaction?
2. May Lawyer represent only Donor in the charitable gift transaction?
3. May Lawyer prepare Donor's will naming Charity as a beneficiary?

Conclusions:

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

Discussion:

1. *The Charitable Gift.*

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.

See also Oregon RPC 1.0(b) and (g):

(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.

If undertaking or continuing a representation would give rise to a nonwaivable conflict of interest under Oregon RPC 1.7(a)(1) and (b)(3), Lawyer may not proceed, even with informed consent from all concerned. A nonwaivable conflict of interest will ordinarily exist when a lawyer undertakes simultaneously to represent both sides of a buyer-seller, lender-borrower, or similar transaction. *Cf. In re Claussen*, 322 Or 466, 909 P2d 862 (1996); *In re Jordan*, 300 Or 430, 712 P2d 97 (1985); *In re Renn*, 299 Or 559, 704 P2d 109 (1985); *In re Johnson*, 300 Or 52, 707 P2d 573 (1985). Because of the potential for differing interests or positions between Charity and Donor concerning the terms of the transaction, representation of both Charity and Donor in the transaction would similarly constitute a prohibited, nonwaivable conflict of interest under Oregon RPC 1.7(a)(1) and (b)(3). *See, e.g.*, OSB Formal Ethics Op No 2005-72; OSB Formal Ethics Op No 2005-40.

It appears, however, that only a waivable conflict of interest under Oregon RPC 1.7(a)(2) would be present if Lawyer represented only Donor in the charitable-gift transaction while continuing to represent Charity in other matters and to serve on its board.¹ When, as here, there is a significant risk that Lawyer's representation of Donor would be materially limited by Lawyer's obligations to Charity, the representation is permissible with the informed consent of all clients, confirmed in

¹ Care must be taken to determine what is a nonwaivable conflict of interest rather than a waivable conflict of interest. For example, a nonwaivable conflict of interest can result from a lawyer's involvement in more than one specific proceeding or transaction. In *In re Bristow*, 301 Or 194, 721 P2d 437 (1986), for example, the court found that a nonwaivable conflict existed when a lawyer sought to uphold the validity of a particular franchising system on behalf of one client in one case while simultaneously seeking to overturn the validity of the same franchising system on behalf of other clients in another case. The *Bristow* case was decided under the former Oregon Disciplinary Rules; however, the result would be the same under the Oregon Rules of Professional Conduct and the representation would not be permissible pursuant to Oregon RPC 1.7(b)(3). If Lawyer's representation of Donor in the unitrust transaction gave rise to a similar situation, a nonwaivable conflict of interest, rather than a waivable conflict of interest, would be present, and the representation would not be permissible.

writing. *Cf. In re Harris*, 304 Or 43, 741 P2d 890 (1987); *In re Baer*, 298 Or 29, 688 P2d 1324 (1984).

2. *The Will.*

Oregon RPC 1.7(a)(2) also would apply to Lawyer's efforts to draft Donor's will if Charity is to be a beneficiary. As discussed above, there is a significant risk, in that situation, that Lawyer's representation of Donor will be materially limited by Lawyer's obligations to Charity. Lawyer would therefore have to obtain informed consent, confirmed in writing pursuant to Oregon RPC 1.7(b) from both Donor and Charity before undertaking the work. *Cf. In re Harrington*, 301 Or 18, 718 P2d 725 (1986).

By contrast, however, the fact that Lawyer is counsel for Charity does not mean that Oregon RPC 1.7(a)(1) applies to the will transaction. This is because the interests of Donor and Charity are not adverse, within the meaning of Oregon RPC 1.7, at the time that the will would be drafted. *Cf. In re Johnson*, 300 Or 52.²

Approved by Board of Governors, August 2005.

² If, in order to draft the will, Lawyer needed to disclose Charity's confidential information to Donor, Lawyer would also need Charity's informed consent pursuant to Oregon RPC 1.6 and ORS 9.460(3). *Cf.* OSB Formal Ethics Op No 2005-96 (rev 2014); OSB Formal Ethics Op No 2005-81 (rev 2014); OSB Formal Ethics Op No 2005-23 (rev 2014).

COMMENT: For additional information on this general topic and other related subjects, see *The Ethical Oregon Lawyer* § 9.6 (informed consent), § 10.2 (multiple-client conflicts rules), § 10.2-2 to § 10.2-2(c) (conflicts between current clients), § 10.2-3 (issue conflicts), chapter 20 (conflicts-waiver letters) (OSB Legal Pubs 2015); *Restatement (Third) of the Law Governing Lawyers* §§ 121–122, 125, 130 (2000) (supplemented periodically); ABA Model RPC 1.0(b), (e); and ABA Model RPC 1.6–1.7. *See also* Washington Advisory Op No 943 (1985); and Washington Advisory Op No 1568 (1994). (Washington advisory opinions are available at <www.wsba.org/resources-and-services/ethics/advisory-opinions>.)