

FORMAL OPINION NO 2005-119
Conflicts of Interest, Current Clients:
Fiduciaries

Facts:

Plaintiff sues Widow and the estate of Widow's late husband in a personal-injury tort action. Widow is the duly appointed personal representative of her late husband's estate. Lawyer *A* has been asked to represent Widow in this litigation, both as an individual and in her capacity as personal representative. The potential liability of Widow and of the estate to Plaintiff could be different, and there are beneficiaries of the estate in addition to Widow whose economic interests may differ from those of Widow.

Employee sues Employer, who is also a trustee of a retirement trust. Employee asserts that Employer has violated the rights of Employee as a beneficiary of the trust. Lawyer *B*, who generally advises Employer with respect to the trust and who advised Employer with respect to the handling of Employee's claim, is asked to represent Employer in the litigation.

Questions:

1. May Lawyer *A* represent Widow both as an individual and in her capacity as personal representative?
2. If, during the course of their professional relationship, Widow informs Lawyer *A* that she has in the past breached the fiduciary duties that she owes to the estate, may Lawyer *A* inform the beneficiaries of the estate of the breaches?
3. If Widow informs Lawyer *A* that she intends to breach such duties in the future, may Lawyer *A* inform the beneficiaries?
4. May Lawyer *B* represent Employer in the trust litigation brought by Employee *B*, in light of the fact that Employee is a beneficiary of the trust?

Conclusions:

1. Yes, but see discussion.
2. No, qualified.
3. Yes, qualified.
4. Yes.

Discussion:

1. *The Estate Questions.*

As we observed in OSB Formal Ethics Op No 2005-62, a lawyer for a personal representative represents the personal representative and not the estate or the beneficiaries. It follows that when Lawyer A represents Widow as an individual and Widow in her capacity as personal representative, Lawyer A has only one client. Alternatively stated, the fact that Widow may have multiple interests as an individual and as a fiduciary does not mean that Lawyer A has more than one client, even if Widow's personal interests may conflict with her obligations as a fiduciary. Representing one person who acts in several different capacities is not the same as representing several different people. Consequently, the current-client conflict rules in Oregon RPC 1.7¹ do not apply

¹ 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.

to Lawyer A’s situation. *Cf. In re Harrington*, 301 Or 18, 27, 718 P2d 725 (1986).

The absence of any lawyer-client relationship with the estate or the beneficiaries does not permit Lawyer A to assist Widow in any conduct that would be illegal or fraudulent or otherwise in violation of any rule of professional conduct. *See, e.g.*, Oregon RPC 1.2(c) (prohibiting lawyer from counseling or assisting a client “in conduct that the lawyer knows is illegal or fraudulent”); Oregon RPC 3.1 (prohibiting lawyer from taking any action on behalf of client that has no basis in law or fact); Oregon RPC 8.4(a)(3) (prohibiting lawyer from engaging in “conduct involving dishonesty, fraud, deceit or misrepresentation that reflects adversely on the lawyer’s fitness to practice law”).²

(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 A further clarification also may be appropriate. If Lawyer A undertook to represent the beneficiaries and not just the personal representative (as, for example, by giving the beneficiaries individual legal advice about the estate or advising the beneficiaries on other matters), a current-client conflict could exist under Oregon RPC 1.7 because Lawyer A would then have more than one client. *Cf. The Florida Bar v. Brigman*, 307 So 2d 161, *supplemented*, 322 So 2d 556 (Fla 1975); *Richardson v. State Bar of Cal.*, 19 Cal 2d 707, 122 P2d 889 (1942). *But see Kidney Ass’n of Oregon, Inc. v. Ferguson*, 315 Or 135, 843 P2d 442 (1992) (theoretical potential for multiple current-client conflict is not automatically a conflict because the two clients—the personal representative of the estate and its sole beneficiary—shared interest in maximizing distribution). See also OSB Formal Ethics Op No 2005-85 and OSB Formal Ethics Op No 2005-46 regarding the “who is the client” question.

As noted above, Lawyer A may not assist Widow in improper conduct. This does not mean, however, that Lawyer A is free to reveal information relating to the representation of Widow any more than lawyers for other clients may. Oregon RPC 1.6 provides, in pertinent part:

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to disclose the intention of the lawyer's client to commit a crime and the information necessary to prevent the crime;

(2) to prevent reasonably certain death or substantial bodily harm;

(3) to secure legal advice about the lawyer's compliance with these Rules;

(4) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

(5) to comply with other law, court order, or as permitted by these Rules. . . .

On the facts given above, Widow's communication to Lawyer about her past wrongs was made in the course of her representation by Lawyer A and thus constitutes information relating to the representation that is protected by Oregon RPC 1.6. It follows that unless one of the exceptions to Oregon RPC 1.6 applies, Lawyer A must not reveal Widow's past wrongs. Lawyer A may, however, discuss with Widow the legal consequences of her misconduct and counsel her about appropriate corrective measures. Oregon RPC 1.2(c). Lawyer cannot assist Widow in withholding or misrepresenting information she must disclose to the

probate court. Oregon RPC 1.2(b); Oregon RPC 3.3(a)–(b). In fact, Lawyer would be obligated to seek leave to withdraw if not withdrawing would cause Lawyer to become directly involved in wrongdoing. *See, e.g.*, Oregon RPC 1.16(a).³ *Cf.* OSB Formal Ethics Op No 2005-53. In withdrawing, however, Lawyer cannot disclose Widow’s past wrong or other information protected by Oregon RPC 1.6.

The result would be somewhat different if Widow’s statements were not simply communications about past wrongs, but also communications of an intention to commit a future crime. *See, e.g.*, Oregon RPC 1.6(b)(1); OEC 503(4)(a). Lawyer could then ethically disclose the intention of Widow to commit the crime and the information necessary to prevent it. *Cf. State v. Phelps*, 24 Or App 329, 545 P2d 901 (1976). *See also United States v. Zolin*, 905 F2d 1344, 91-1 US Tax Cas P 50147 (9th Cir 1990); *State v. Ray*, 36 Or App 367, 584 P2d 362 (1978); *State ex rel. N. Pac. Lumber Co. v. Unis*, 282 Or 457, 579 P2d 1291 (1978). As an ethics matter, however, disclosure in this case would be permissive rather than mandatory. OSB Formal Ethics Op No 2005-34.

2. *The Trust Question.*

As discussed above in connection with representation of a personal representative, the lawyer for a trustee represents the trustee and not the trust or its beneficiaries. If the rule were otherwise, it would in effect be impossible for a trustee to obtain legal advice independent of the beneficiaries. Although there is some limited case law to the contrary from other jurisdictions,⁴ we do not believe that these cases are either well-reasoned or consistent with the Oregon approach to representation of fiduciaries. *Cf.* Oregon RPC 1.13(a) (“[a] lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents”).

³ With regard to further handling of the matter if the court refuses to allow withdrawal, see OSB Formal Ethics Op No 2005-34.

⁴ *Cf. Hechenberger v. W. Elec. Co., Inc.*, 570 F Supp 820, 823 (ED Mo 1983), *aff’d*, 742 F2d 453 (8th Cir 1984); *Helt v. Metro. Dist. Comm’n*, 113 FRD 7, 9 (D Conn 1986); *Washington-Baltimore Newspaper Guild, Local 35 v. Washington Star Co.*, 543 F Supp 906, 909 (DDC 1982).

Here, too, the fact that Lawyer *B* does not represent the trust beneficiaries does not permit Lawyer *B* to assist Employer in any wrongdoing. *Cf. Whitfield v. Tomasso*, 682 F Supp 1287 (EDNY 1988). Similarly, if the corporate employer and fiduciary were not the same or if Lawyer *B* also represented the beneficiaries as clients, a conflict of interest under Oregon RPC 1.7 could conceivably exist. *Cf. Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am. v. Allis-Chalmers Corp.*, 447 F Supp 766, 770–71 (ED Wis 1978) (declining, on facts before court, to find conflict in simultaneous representation of employer and trustee, who were separate entities).

Approved by Board of Governors, August 2005.

COMMENT: For additional information on this general topic and other related subjects, see *The Ethical Oregon Lawyer* § 4.1 to § 4.3-1 (withdrawal), § 4.4 (permissive withdrawal), § 4.4-2 (client's conduct), § 6.1 to § 6.2-4 (elements of duty of confidentiality), § 6.3-5 (disclosures of criminal intent), § 7.5-2 (assisting in illegal or fraudulent conduct), § 10.1 to § 10.2 (multiple-client conflicts rules), § 10.2-2 to § 10.2-2(d) (current-client conflicts), § 10.2-2(e)(6) (trust and estate conflicts), § 10.2-3 (issue conflicts) (OSB Legal Pubs 2015); *Restatement (Third) of the Law Governing Lawyers* §§ 32–33, 121, 128, 130 (2000) (supplemented periodically); ABA Model RPC 1.2(d); ABA Model RPC 1.6–1.7; ABA Model RPC 1.16; and ABA Model RPC 8.4(c). *See also* Washington Advisory Op No 1226 (1988); and Washington Advisory Op No 1849 (1998). (Washington advisory opinions are available at <www.wsba.org/resources-and-services/ethics/advisory-opinions>.)