

## **FORMAL OPINION NO 2005-123**

### **Conflicts of Interest, Current Clients: Formation of Corporation or Partnership**

#### **Facts:**

*A, B, and C* wish to form a corporation or partnership. They ask Lawyer to represent all three of them.

#### **Question:**

May Lawyer represent the three individuals to form a corporation or partnership?

#### **Conclusion:**

See discussion.

#### **Discussion:**

This question presents a situation involving the potential for current-client conflicts under Oregon RPC 1.7:

(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:

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- (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.

For previous opinions discussing multiple-client conflicts, see, for example, OSB Formal Ethics Op No 2005-86, OSB Formal Ethics Op No 2005-77 (rev 2016), and OSB Formal Ethics Op No 2005-72. As those opinions and the authorities cited therein indicate, a lawyer may represent multiple current clients in a matter, without “informed consent”<sup>1</sup> that is “confirmed in writing,”<sup>2</sup> if no conflict under Oregon RPC 1.7 is present. If, on the other hand, such a conflict is present, it is necessary to determine whether the conflict is waivable or nonwaivable.

Pursuant to Oregon RPC 1.0(h), a lawyer is charged with knowledge of facts that the lawyer knew, or by the exercise of reasonable care should have known, that pertain to the existence of a conflict. *Cf. In re*

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<sup>1</sup> Oregon RPC 1.0(f) provides:

“Information relating to the representation of a client” denotes both information protected by the attorney-client privilege under applicable law, and other information gained in a current or former professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

<sup>2</sup> Oregon RPC 1.0(b) provides:

“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.

*Harrington*, 301 Or 18, 718 P2d 725 (1986); *In re Johnson*, 300 Or 52, 707 P2d 573 (1985). In addition, the nature of a conflict situation—and the lawyer's resulting duties—can change over time. If, for example, a situation in which a waivable conflict is present turns into one in which a nonwaivable conflict is present, the lawyer must withdraw. If a situation in which no conflict was present turns into one in which a waivable conflict is present, a lawyer may continue only with consent based on full disclosure. *See, e.g.*, *In re Johnson*, 300 Or at 60.

Absent further facts, it is not possible to state whether, or what type of, a conflict is present here. If, after the required inquiry, it reasonably appears to Lawyer that the interests of A, B, and C are consistent and there is no material divergence of opinion or interests between them, no current-client conflict would be present. 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 Samuels & Weiner*, 296 Or 224, 674 P2d 1166 (1983). If the interests of A, B, and C are fundamentally antagonistic, it could well be that a nonwaivable conflict would be present. Cf. ABA Model RPC 1.7 cmt [28]; *In re Phelps*, 306 Or 508, 760 P2d 1331 (1988).<sup>3</sup> In circumstances falling in between these two extremes, a waivable conflict could be present.

**Approved by Board of Governors, August 2005.**

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<sup>3</sup> The opinion in *In re Phelps*, which involved a partnership dissolution, does not stand for the proposition that any level of disagreement between would-be partners or incorporators necessarily gives rise to a nonwaivable conflict. There is a difference between persons who wish to come together to do business together and who, therefore, have a substantial common interest (in addition to potential differences) and persons who are seeking to go their separate ways and who thus lack such a continuing common interest.

COMMENT: For additional information on this general topic and other related subjects, see *The Ethical Oregon Lawyer* § 10.2-2(e)(3) (multiple partners or incorporators) (OSB Legal Pubs 2015); *Restatement (Third) of the Law Governing Lawyers* §§ 121, 130 (2000) (supplemented periodically); and ABA Model RPC 1.7.

