

FORMAL OPINION NO 2005-140

Lawyer Self-Interest Conflict: Sexual Relations with Client

Facts:

Client hires Lawyer to handle a matter on Client's behalf.

Questions:

1. May Lawyer begin sexual relations with Client during the representation of Client?
2. May Lawyer represent Client if Lawyer had a consensual sexual relationship with Client before the representation commenced?

Conclusions:

1. No.
2. No, qualified.

Discussion:

Oregon RPC 1.8(j) provides:

(j) A lawyer shall not have sexual relations with a current client of the lawyer unless a consensual sexual relationship existed between them before the client-lawyer relationship commenced; or have sexual relations with a representative of a current client of the lawyer if the sexual relations would, or would likely, damage or prejudice the client in the representation. For purposes of this rule:

(1) "sexual relations" means sexual intercourse or any touching of the sexual or other intimate parts of a person or causing such person to touch the sexual or other intimate parts of the lawyer for the purpose of arousing or gratifying the sexual desire of either party; and

(2) "lawyer" means any lawyer who assists in the representation of the client, but does not include other firm members who provide no such assistance.

Accordingly, Lawyer is prohibited from having sexual relations with Client with whom Lawyer does not have a preexisting consensual sexual relationship. Even if there is a preexisting consensual sexual relationship so that there is no violation of Oregon RPC 1.8(j), continuing the sexual relationship during the representation requires consideration of Oregon RPC 1.7, which 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; [and]

....

(4) each affected client gives informed consent, confirmed in writing.

See also Oregon RPC 1.0(b) and (g) for the definitions of *confirmed in writing* and *informed consent*.

Depending on the facts, the existence of an ongoing sexual relationship between Lawyer and Client could present a substantial risk that Lawyer's representation of Client will be materially limited within the meaning of Oregon RPC 1.7(a)(2). Such a conflict may be waived only if the requirements of Oregon RPC 1.7(b) are met. *Cf. In re Carey*, 307 Or 315, 767 P2d 438 (1989); *In re Adams*, 293 Or 727, 652 P2d 787 (1982); *In re Robeson*, 293 Or 610, 652 P2d 336 (1982). For example, clients who are or should be known by a lawyer to be incapable of

giving meaningful consent cannot give informed consent under Oregon RPC 1.7(b).

Approved by Board of Governors, August 2005.

COMMENT: This opinion replaces OSB Formal Ethics Op No 2005-99. For additional information on this general topic and other related subjects, see *The Ethical Oregon Lawyer* § 9.7 (sexual relations with clients) (OSB Legal Pubs 2015); *Restatement (Third) of the Law Governing Lawyers* § 125 (2000) (supplemented periodically); and ABA Model RPC 1.8(j).

