

FORMAL OPINION NO 2005-28

Conflicts of Interest, Current and Former Clients: Representing Both Sides in Adoption

Facts:

Lawyer previously represented Client. After the representation concluded, Client told Lawyer that she was going to have a baby whom Client wished to have adopted. Client informs Lawyer that a couple (“Adopting Parents”) interested in adopting the baby will call Lawyer to seek legal assistance.

Questions:

1. May Lawyer represent both Client and Adopting Parents in the adoption proceeding?
2. May Lawyer represent only Adopting Parents in the adoption proceeding?

Conclusions:

1. No.
2. Yes, qualified.

Discussion:

Oregon RPC 1.7 provides, in 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:

(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.

A lawyer generally cannot represent “both sides” of a transaction or matter in which the parties’ interests are necessarily opposed, such as lender and borrower, buyer and seller, and the like, because the lawyer will be obligated to contend for something on behalf of one client that the lawyer has a duty to oppose for the other client. *Cf. In re Wittemyer*, 328 Or 448, 980 P2d 148 (1999); *In re McKee*, 316 Or 114, 849 P2d 509 (1993), *reinstatement granted sub nom In re Reinstatement of McKee*, 333 Or 209, 37 P3d 987 (2002); *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 Harrington*, 301 Or 18, 718 P2d 725 (1986). Consent of the clients does not make such a joint representation permissible. Oregon RPC 1.7(b)(3). Although it might appear that the interests of Client and Adopting Parents are aligned, simultaneous representation of both is not allowed because they necessarily have opposing positions on subjects such as rights in and to the child and reimbursement of hospital or medical expenses.

Whether Lawyer could represent Adopting Parents and not former Client depends on the nature of Lawyer’s former work for Client. Oregon RPC 1.9 provides:

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless each affected client gives informed consent, confirmed in writing.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client:

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter; unless each affected client gives informed consent, confirmed in writing.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

Under the facts presented, the adoption of Client's baby by Adopting Parents would not be a matter substantially related to the work that Lawyer did for Client because it does not involve the matters that Lawyer previously handled for Client. Nor do the facts assert that Lawyer would have acquired any confidential information while representing Client that could be used to her disadvantage in the adoption. Accordingly, there would be no conflict under Oregon RPC 1.9 and Lawyer could represent Adopting Parents without any special disclosure to, or consent from, Client or Adopting Parents. *Cf. In re Brandsness*, 299 Or 420, 702 P2d 1098 (1985); OSB Formal Ethics Op No 2005-11; OSB Formal Ethics Op No 2005-17.

On the other hand, if the facts were such that Lawyer's representation of Adopting Parents was substantially related to Lawyer's prior

representation of Client or that Lawyer had information relating to the representation of Client that could be used to her disadvantage in the adoption, Lawyer could proceed to represent Adopting Parents only if both (former) Client and Adopting Parents give their informed consent, confirmed in writing. Oregon RPC 1.0(g) provides:

“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.

See In re Sawyer, 331 Or 240, 13 P3d 112 (2000).

Approved by Board of Governors, August 2005.

COMMENT: For additional information on this general topic and other related subjects, see Peter R. Jarvis, Mark J. Fucile & Bradley F. Tellam, *Waiving Discipline Away: The Effective Use of Disclosure and Consent Letters*, 62 OSB Bulletin 69 (June 2002); *The Ethical Oregon Lawyer* § 10.2 to § 10.2-3 (multiple-client conflicts rules) (OSB Legal Pubs 2015); *Restatement (Third) of the Law Governing Lawyers* §§ 121–124, 128–133 (2000) (supplemented periodically); ABA Model RPC 1.7; and ABA Model RPC 1.9.