

FORMAL OPINION NO 2005-32
Conflicts of Interest, Current Clients:
Limiting Business Relations with Client

Facts:

Lawyer *A* proposes to borrow money from Client *A*.

Lawyer *B* proposes to lease property from Client *B*.

Lawyer *C* proposes to enter into a business partnership with Client *C* and others. Lawyer *C* also proposes thereafter to handle the legal affairs of the partnership.

Question:

Is the proposed conduct ethical?

Conclusion:

Yes, qualified.

Discussion:

Oregon RPC 1.8(a) provides:

A lawyer shall not enter into a business transaction with a client, or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by client;

(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and

(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

The definition of *informed consent* is set forth in Oregon RPC 1.0(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.

Lawyers *A*, *B*, and *C* may engage in the proposed transactions if the lawyers comply with all the requirements of Oregon RPC 1.8(a).¹ *Cf. In re Luebke*, 301 Or 321, 722 P2d 1221 (1986) (lawyer and business borrowed funds from client); *In re Moore*, 299 Or 496, 703 P2d 961 (1985) (lawyer entered into business transaction with client); *In re Montgomery*, 297 Or 738, 687 P2d 157 (1984) (analyzing *former* DR 5-104(A)). *See also* ABA Model RPC 1.8 cmts [1]–[4].

If the lawyers are going to represent their clients in the transactions, Oregon RPC 1.8(a)(3) as well as Oregon RPC 1.7(a)(2)² require the lawyers to inform their clients of the risks associated with wearing the

¹ *Former* DR 5-104(A) contained a requirement that the lawyer and client have “differing interests” in the business transaction to invoke the disclosure requirements of *former* DR 10-101(B). Oregon RPC 1.8(a) by its terms applies to all business transactions between lawyers and their clients regardless of whether lawyer and client have differing interests, but applies to a lawyer’s acquiring “an ownership, possessory, security or other pecuniary interest” only when the lawyer’s interests are adverse to those of the client.

² Oregon RPC 1.7(a) 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:

....

(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.

dual hats of legal advisor and participant in the transaction, such as the risk that the lawyer will structure the transaction or give advice in such a way as to benefit his or her interest at the expense of the client. This is true whether or not the lawyers and their respective clients also happen to be friends. *In re Germundson*, 301 Or 656, 724 P2d 793 (1986).

Approved by Board of Governors, August 2005.

COMMENT: For additional information on this general topic and related subjects, see *The Ethical Oregon Lawyer* § 9.5-1 to § 9.5-1(c) (business transactions between lawyer and client) (OSB Legal Pubs 2015); and *Restatement (Third) of the Law Governing Lawyers* §§ 121, 125–126 (2000) (supplemented periodically). See also OSB Formal Ethics Op No 2005-94 (rev 2016) (lawyer who is married to real estate broker but who does no legal work for broker may represent seller in drafting listing agreement with broker only when client gives informed consent); OSB Formal Ethics Op No 2005-10 (with informed consent, lawyer may advise clients concerning transactions with business enterprises that lawyer owns).

