

FORMAL OPINION NO 2005-72

Conflicts of Interest, Current Clients: Creditor of Seller vs. Buyer

Facts:

A is a creditor with a security interest in *B*'s accounts receivable. *B* has sold goods to *C* and has retained a purchase-money security interest in the goods. *A* and *C* are both clients of Lawyer.

Question:

If *B* sues *C* for default, under what circumstances may Lawyer represent *A*, *C*, or both *A* and *C*?

Conclusion:

See discussion.

Discussion:

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.

(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.

In a case such as this, it is necessary to determine whether a non-waivable conflict, a waivable conflict, or no conflict at all is present. *Cf.* OSB Formal Ethics Op No 2005-40.

More facts would be necessary to reach a definitive conclusion. For example, if Lawyer knows or reasonably believes¹ that *B* has sufficient resources to pay *A* regardless of whether *B* prevails against *C*, no conflict would exist because Lawyer’s representation of *C* would not be materially limited by Lawyer’s responsibilities to *A*. *Cf. In re Griffith*, 304 Or 575, 595, 748 P2d 86 (1987), *reinstatement granted sub nom Application of Griffith*, 323 Or 99, 913 P2d 695 (1996). On the other hand, if the extent of *B*’s resources is in doubt and there is a reasonable likelihood that *A* will be paid only if *B* prevails against *C*, a waivable conflict could be present. *Cf. In re Bristow*, 301 Or 194, 721 P2d 437

¹ Oregon RPC 1.0(h) and (l) provide:

(h) “Knowingly,” “known,” or “knows” denotes actual knowledge of the fact in question, except that for purposes of determining a lawyer’s knowledge of the existence of a conflict of interest, all facts which the lawyer knew, or by the exercise of reasonable care should have known, will be attributed to the lawyer. A person’s knowledge may be inferred from circumstances.

....

(l) “Reasonable belief” or “reasonably believes” when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.

(1986); *In re Vaile*, 300 Or 91, 707 P2d 52 (1985); OSB Formal Ethics Op No 2005-40.

If Lawyer represents *A* to collect from *B* at the same time that Lawyer is representing *C* in defending against *B*'s claim, and if it is reasonably clear that *A* may be paid in full only if *C* pays *B*, a current-client conflict of interest would be present; the conflict would exist because Lawyer would be representing one client whose interests are directly adverse to another client, as prohibited in Oregon RPC 1.7(a)(1).

Even if Lawyer represents either *A* or *C* in connection with *B* and represents the other client only on unrelated matters, a current-client conflict would exist if there is a significant risk that the representation of one client will be materially limited by Lawyer's responsibilities to another client. Oregon RPC 1.7(a)(2). *Cf. In re Bristow*, 301 Or 194; *In re Vaile*, 300 Or 91.

Approved by Board of Governors, August 2005.

COMMENT: For additional information on this general topic and other related subjects, see *The Ethical Oregon Lawyer* § 10.2 (multiple-client conflicts rules), § 10.2-2 to § 10.2-2(b) (conflicts between current clients), § 10.2-2(c) to § 10.2-2(d) (waivable conflicts), § 10.2-2(e)(4) (multiple creditors) (OSB Legal Pubs 2015); *Restatement (Third) of the Law Governing Lawyers* §§ 121–124, 128–133 (2000) (supplemented periodically); and ABA Model RPC 1.7.

