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 believes 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

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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.
Formal Opinion No 2005-72

(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.