

FORMAL OPINION NO 2005-82

Conflicts of Interest, Current Clients: Representing Multiple Criminal Defendants

Facts:

Lawyer is asked to represent multiple defendants in a criminal matter.

Question:

May Lawyer ethically do so?

Conclusion:

No, qualified.

Discussion:

This opinion raises questions involving potential conflicts of interest between multiple current clients of a lawyer. *Cf.* OSB Formal Ethics Op No 2005-77 (rev 2016); OSB Formal Ethics Op No 2005-72; OSB Formal Ethics Op No 2005-46; OSB Formal Ethics Op No 2005-40; OSB Formal Ethics Op No 2005-28. 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.

Oregon RPC 1.0(b) and (g) provide:

(b) “Confirmed in writing,” when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. . . . If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.

. . . .

(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.

In many, if not most, cases of joint representation of criminal defendants, a lawyer would effectively be obligated to contend for something on behalf of one client that the lawyer would be obligated to oppose on behalf of another client. This would be true if, for example, either client might be offered or might wish to propose a “deal” with the district attorney under which that client would receive a lesser sentence in exchange for testimony against the other client. This would also be true if there were material inconsistencies between the factual or legal

positions of the two clients. Simultaneous representation under either circumstance is barred by Oregon RPC 1.7(b)(3).

In the few cases in which neither Oregon RPC 1.7(a)(2) nor Oregon RPC 1.7(b)(3) is implicated, the lawyer could proceed without the clients' consent. This would be true if, for example, the two defendants were spouses whose positions and interests were the same. *Compare In re Shannon*, 297 Or 168, 681 P2d 794 (1984) (civil case—joint representation allowed), with *In re O'Neal*, 297 Or 258, 683 P2d 1352 (1984), and *In re Porter*, 283 Or 517, 584 P2d 744 (1978), modified by *In re Johnson*, 300 Or 52, 707 P2d 573 (1985). See also *United States v. Rewald*, 889 F2d 836, 856–59 (9th Cir 1989), amended, 902 F2d 18 (9th Cir 1990); *In re Jeffery*, 321 Or 360, 898 P2d 752 (1995); *In re Wyllie*, 331 Or 606, 19 P3d 338 (2001).

Approved by Board of Governors, August 2005.

COMMENT: For additional information on this general topic and other related subjects, see *The Ethical Oregon Lawyer* § 4.3 (mandatory withdrawal), § 4.3-1 (withdrawal to avoid rule violation), § 4.4 (permissive withdrawal), § 9.6 (informed consent), § 10.2 (multiple-client conflicts rules), § 10.2-2 (conflicts between current clients), § 10.2-2(a) (Oregon's waivable and nonwaivable current-client-conflicts model), § 10.2-2(b) (nonwaivable conflicts), § 10.2-2(c) (waivable conflicts), § 10.2-2(e)(2) (multiple plaintiffs or defendants), § 10.3-1 (vicarious application of the conflicts rules), § 16.4-14(a) (conflicts and liability exposure), § 20.2-1 to § 20.2-2 (*informed consent* and *written confirmation* defined), § 20.3-1 to § 20.3-11 (specific items to address in conflicts-waiver letters) (OSB Legal Pubs 2015); *Restatement (Third) of the Law Governing Lawyers* §§ 121–123, 129–130 (2000) (supplemented periodically); ABA Model RPC 1.0(b) and (e); and ABA Model RPC 1.7.

