

FORMAL OPINION NO 2005-86
Conflicts of Interest, Current Clients:
Representing Husband and Wife in
Bankruptcy, Wills, Dissolution

Facts:

Husband and Wife approach Lawyer jointly and ask Lawyer to represent both of them in the matters described below.

Questions:

1. May Lawyer represent both Husband and Wife in joint bankruptcy proceedings?
2. May Lawyer represent both Husband and Wife in preparing wills for both of them?
3. May Lawyer represent both Husband and Wife in marital dissolution proceedings?

Conclusions:

1. Yes, qualified.
2. Yes, qualified.
3. No, qualified.

Discussion:

This opinion raises questions concerning potential conflicts between current clients of a lawyer. For other opinions discussing such conflicts, see OSB Formal Ethics Op No 2005-119 and OSB Formal Ethics Op No 2005-82, and sources cited therein.

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), (g), and (h) 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.

(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.

In circumstances such as these, Oregon RPC 1.7(a)(2) and Oregon RPC 1.7(b)(3) may prohibit simultaneous representation of Husband and Wife.¹

1. *Joint Bankruptcies and Wills.*

Pursuant to Oregon RPC 1.0(h), a lawyer is charged with all knowledge that a reasonable investigation of the facts would show. *Cf. In re Johnson*, 300 Or 52, 61, 707 P2d 573 (1985); *In re Harrington*, 301 Or 18, 29, 718 P2d 725 (1986). Typically, such an investigation will not lead the lawyer to conclude that a conflict exists under Oregon RPC 1.7(a) when joint bankruptcies or joint wills are contemplated, because the interests of spouses in such matters will generally be aligned.

This will not always be the case, however. For example, it could be in the interest of one of the spouses to avoid bankruptcy by asserting that all debts at issue were solely those of the other spouse. Similarly, spouses with children by prior marriages may have very different opinions concerning how their estates should be divided. *See, e.g., In re Plinski*, 16 DB Rptr 114 (2002) (husband and wife, who each had adult children from previous marriages, had interests that were adverse because value of their respective estates were substantially different, clients disagreed over distribution of assets, and wife was susceptible to pressure from husband

¹ These prohibitions are imputed to the other lawyers within the lawyer’s firm. “While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9. . . .” Oregon RPC 1.10(a). *See, e.g., In re Schmeits*, 12 DB Rptr 195 (1998) (lawyer represented buyers in land sale transaction for which law partner represented sellers); *In re Vaughan*, 12 DB Rptr 179 (1998).

on financial issues). Absent further facts, we decline to state whether, or under what circumstances, the interests of the spouses would be directly adverse or that a significant risk of materially limited representation would result in such cases.

2. *Marital Dissolutions.*

At the other end of the spectrum, parties to marital dissolution proceedings will almost always have directly adverse interests that require the lawyer to contend for something on behalf of one client that the lawyer must oppose for the other client. Such conflicts cannot be waived by clients. Oregon RPC 1.7(b). *See, e.g., 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) (lawyer disciplined for representing husband and wife as copetitioners in divorce; concurring opinion suggests that consent usually will not cure conflict of interest between copetitioners in divorce). *Cf. In re Johnson*, 300 Or at 61–62, noting that in the ordinary case, simultaneous representation of a buyer and a seller will constitute an “actual conflict” under *former* DR 5-105(A)(1) because of the inherent adversity of interests, but finding no adversity when the lawyer reasonably believed that the buyer and seller were commonly owned. *See also In re Thies*, 305 Or 104, 750 P2d 490 (1988); *In re Hockett*, 303 Or 150, 734 P2d 877 (1987).

At a minimum, the following factors must be present before it can be said that the proposed representation will not constitute a directly adverse conflict that would prohibit joint representation:

- (1) Both parties must agree that the marriage be dissolved;
- (2) There must be no minor children born or adopted during the marriage, and the wife must not be pregnant;
- (3) The marital estate must not contain substantial assets or liabilities;
- (4) The parties must have fully agreed on the disposition of all assets and liabilities before consulting the lawyer;

(5) The lawyer must be in a position to conclude that each party has provided full disclosure of all assets, as mandated by ORS 107.105(1)(f);

(6) Based on the lawyer's independent professional judgment, the distribution of assets and liabilities agreed on by the parties must be supported by law and must approximate what would probably be awarded should the parties proceed to trial;

(7) The parties must agree that neither shall make support payments pursuant to ORS 107.105(1)(d), and the lawyer must independently conclude, after full consideration of relevant case law and the factors set forth in ORS 107.105(1)(d), that neither party would be justified in seeking such an award;

(8) After a reasonable investigation of the facts, the lawyer must conclude that neither party would be justified in seeking any pendente lite or other interim order under ORS 107.095; and

(9) It must reasonably appear to the lawyer that both spouses are competent to handle their affairs and that neither spouse is acting under duress or undue domination by the other.

Even if the interests of the spouses are not directly adverse, there is nevertheless a significant risk in such joint representations that the lawyer's representation of one spouse will be materially limited by the lawyer's obligations to the other. Oregon RPC 1.7(a)(2). Accordingly, the lawyer must communicate adequate information and explanation about the material risks of and reasonably available alternatives to the joint representation and each spouse must give informed consent to the joint representation, confirmed in writing. Oregon RPC 1.7(b). *See, e.g., In re Bryant*, 12 DB Rptr 69 (1998) (lawyer who merely "put into legal language" dissolution agreement worked out previously by husband and wife nonetheless had actual conflict of interest when minor children and substantial assets were involved, despite lawyer's recommendation that both clients seek separate counsel); *In re Taub*, 7 DB Rptr 77 (1993) (lawyer disciplined for representing both husband and wife in divorce after wife expressed doubts regarding settlement to lawyer; lawyer's

claim that he did not represent either party and provided only scrivener services was rejected).

In the rare case in which all of the above factors are present, dual representation may be permissible. It should be emphasized, however, that in any particular case, there may also be disputes between the parties on other issues that could lead to the conclusion that dual representation is inappropriate. In addition, a situation in which dual representation is permissible at the outset may turn into one in which dual representation is impermissible. *In re Johnson*, 300 Or at 60.

Approved by Board of Governors, August 2005.

COMMENT: For additional information on this general topic and other related subjects, see *The Ethical Oregon Lawyer* § 5.1 (client identification), § 5.2 (determining whether a lawyer-client relationship exists), § 10.2-2 to § 10.2-2(d) (current-client conflicts), § 10.2-2(e)(6) to § 10.2-3 (specific current-client conflicts), § 10.3-1 (vicarious application of the conflicts rules) (OSB Legal Pubs 2015); *Restatement (Third) of the Law Governing Lawyers* §§ 122, 128, 130 (2000) (supplemented periodically); ABA Model RPC 1.0(b), (e)–(f); and ABA Model RPC 1.7. See also Washington Advisory Op No 903 (1985) (available at <www.wsba.org/resources-and-services/ethics/advisory-opinions>).