

FORMAL OPINION NO 2005-93

Conflicts of Interest, Current Clients: Lawyer Drafting Parent's Will and Probating Parent's Estate

Facts:

Parent *A*, the father of Lawyer *A*, asks Lawyer *A* to draft a will for Parent *A* in which Lawyer *A* will be left a substantial gift.

Lawyer *B* is asked to act as counsel for the personal representative in probating the estate of Parent *B*, Lawyer *B*'s mother. Lawyer *B* and several of Lawyer *B*'s siblings are all beneficiaries of Parent *B*'s estate.

Questions:

1. May Lawyer *A* draft the will?
2. May Lawyer *B* serve as counsel for the personal representative, or as personal representative, of Parent *B*'s estate?

Conclusions:

1. Yes, qualified.
2. Yes, qualified.

Discussion:

Oregon RPC 1.8(c) provides, in pertinent part:

(c) A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift, unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include a spouse, domestic partner, child, grandchild, parent, grandparent, or other relative or individual with whom the lawyer or the client maintains a close familial relationship.

Oregon RPC 1.7 provides, in pertinent part:

(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.

....

(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 1.8(c) permits Lawyer A to draft the will for Parent A. Whether Oregon RPC 1.7 would require that Lawyer A do so only with Parent A's informed consent, confirmed in writing,¹ cannot be determined

¹ 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.

....

with certainty under the facts given. *Cf. In re Tonkon*, 292 Or 660, 642 P2d 660 (1982).

Lawyer *B*'s client would be the personal representative of Parent *B*'s estate and not the beneficiaries. OSB Formal Ethics Op No 2005-62. Lawyer *B* could not advise the personal representative client to violate or assist in the violation of any statutory or common-law obligations owed by the personal representative to the other beneficiaries. *See* OSB Formal Ethics Op No 2005-119. Similarly, Lawyer could not violate such duties directly if Lawyer were acting as the personal representative. *Cf. Oregon RPC 1.2*²; *Oregon RPC 8.4*³.

(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.

² Oregon RPC 1.2(c) provides:

(c) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is illegal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

³ Oregon RPC 8.4(a) provides, in pertinent part:

(a) It is professional misconduct for a lawyer to:

(1) violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(2) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(3) engage in conduct involving dishonesty, fraud, deceit or misrepresentation that reflects adversely on the lawyer's fitness to practice law; [or]

If the circumstances suggest that the exercise of Lawyer *B*'s independent professional judgment as counsel for the personal representative reasonably may be affected by Lawyer *B*'s status as a beneficiary, Lawyer *B* also could not proceed absent the personal representative's informed consent, confirmed in writing. Oregon RPC 1.7(a)(2); Oregon RPC 1.0(b), (g). Whether Lawyer *B* could serve as the personal representative of an estate in which Lawyer *B* is also a beneficiary is a matter within the discretion of the probate court. Although Oregon RPC 1.7 would not apply, because Lawyer *B* would not have a client but would be acting *pro se*, Lawyer *B* would be obligated to ensure that the probate court was fully informed of the situation in making the appointment.

Approved by Board of Governors, August 2005.

(4) engage in conduct that is prejudicial to the administration of justice.

COMMENT: For additional information on this general topic and other related subjects, see *The Ethical Oregon Lawyer* § 7.5-2 (assisting in illegal or fraudulent conduct), § 9.2-1 to § 9.2-1(c) (personal-interest conflicts), § 9.4 (gifts from client to lawyer), § 9.6 (informed consent), § 20.2-1 to § 20.2-2 (*informed consent* and *written confirmation* defined), § 21.2 to § 21.2-2(b) (obey the law when negotiating), § 21.3 to § 21.3-2(a) (refraining from making misrepresentations in negotiations) (OSB Legal Pubs 2015); *Restatement (Third) of the Law Governing Lawyers* §§ 8, 94, 121–122, 125, 127 (2000) (supplemented periodically); ABA Model RPC 1.0(b), (e); ABA Model RPC 1.2; ABA Model RPC 1.7; ABA Model RPC 1.8(c); and ABA Model RPC 8.4.