

FORMAL OPINION 2005-94

[REVISED 2016]

Conflicts of Interest: Lawyer's Spouse as Real Estate Broker

Facts:

Lawyer is married to Real Estate Broker but does no legal work for Real Estate Broker.

Questions:

1. May Lawyer represent a seller in drafting a listing agreement with Real Estate Broker?
2. May Lawyer represent the seller or buyer in a transaction from which Real Estate Broker will earn a commission?

Conclusions:

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

Discussion:

Because Real Estate Broker is not a client of Lawyer, it is unnecessary to consider the potential applicability of Oregon RPC 1.7 as it relates to a current-client conflict between two clients.¹ However, Lawyer must consider whether Lawyer's own personal interests, or Lawyer's interests in and responsibilities to Lawyer's spouse, would create a conflict in representing seller under either scenario.

¹ For opinions discussing the point at which a lawyer-client relationship is formed, see, for example, OSB Formal Ethics Op No 2005-46; *In re Harrington*, 301 Or 18, 718 P2d 725 (1986); and *In re Weidner*, 310 Or 757, 801 P2d 828 (1990).

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 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 1.0(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.

Marriage is a civil contract (ORS 106.010) carrying with it a myriad of rights and responsibilities under federal and state law.² The degree to which spouses share common rights, liabilities, and interests may affect how significant the risk that the representation of a client will be materially affected by Lawyer's interests in or responsibility to his or her spouse.³ See *Restatement (Third) of the Law Governing Lawyers* § 125 (2000) (supplemented periodically).

The Oregon Supreme Court recently discussed a similar situation in which Lawyer served as both lawyer and broker for a client, addressing whether there was a significant risk that representation of the client in a bankruptcy and real estate transaction would be materially limited by the lawyer's personal interest in receiving a sales commission. The court determined that the prospect of receiving a commission was not enough, standing alone, to create a conflict under Oregon RPC 1.7(a)(2). *In re Spencer*, 355 Or 679, 692, 330 P3d 538 (2014). Even so, the court cautioned:

If, as other jurisdictions have held, additional aspects of a real estate transaction (on which the Bar does not rely here) can result in a current conflict under RPC 1.7(a)(2), careful lawyers who seek to serve as both a client's legal advisor and broker in the same real estate transaction would be advised to satisfy the advice and consent requirements

² Spouses may file joint tax returns becoming jointly and severally liable for income taxes for relevant years; they may incur joint and several liabilities for acquisition of major assets; they share government regulated benefits, including those regulated by ERISA (Employee Retirement Income Security Act of 1974); if they have lived in a community property state, community property rights may have attached to their assets as they move from state to state; upon filing a petition for dissolution, assets become shared, as a matter of law.

³ Oregon courts have long recognized that a husband and wife do not deal at arms' length and have imposed a fiduciary duty of the highest degree in transactions between them. *Matter of Marriage of Eltzroth*, 67 Or App 520, 679 P2d 1369 (1984). Arguably, this duty alone may trigger Lawyer's duties under Oregon RPC 1.7(a)(2).

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of both RPC 1.8(a) and RPC 1.7(b). *See* ABA Model Rules, Rule 1.8, comment [3] (recognizing that the same transaction can implicate both rules and require that both consent requirements be satisfied).

In re Spencer, 355 Or at 697.

Approved by Board of Governors, February 2016.

COMMENT: For additional information on this general topic and other related subjects, see *The Ethical Oregon Lawyer* § 9.2-1 to § 9.2-1(c) (personal-interest conflicts), § 9.5-1 to § 9.5-1(c) (business transactions between lawyer and client), § 9.6 (informed consent), § 10.3-1 (vicarious application of conflicts rules), chapter 20 (conflicts-waiver letters) (OSB Legal Pubs 2015); *Restatement (Third) of the Law Governing Lawyers* §§ 122, 125–126; ABA Model RPC 1.0(b), (e); and ABA Model RPC 1.7–1.8.