

FORMAL OPINION NO 2006-176

[REVISED 2015]

**Conflicts of Interest:
Lawyer Functioning in Multiple Roles in
Client's Real Estate Transaction**

Facts:

Client informs Lawyer that Client would like to buy or sell real estate. Lawyer is willing to represent Client in the transaction and does not represent any other party in the transaction. Lawyer would, however, like to act not only as Lawyer, but also as a real estate agent or broker and as a mortgage broker or loan officer in the transaction.

Question:

May Lawyer serve in all three capacities?

Conclusion:

Yes, qualified.

Discussion:

1. *Potential Limitations of Substantive Law.*

This Committee is authorized to construe statutes and regulations pertaining directly to lawyers, but not to construe substantive law generally. We therefore begin with the observation that if this joint combination of roles is prohibited by substantive law pertaining to real estate agents or brokers, mortgage brokers, or loan officers, Lawyer could not play multiple roles. Similarly, Lawyer would be obligated to meet in full any licensing, insurance, disclosure, or other obligations imposed by the substantive law pertaining to these lines of business. In the discussion that follows, therefore, we assume that there are no such requirements or, alternatively, that Lawyer will meet all such requirements.

2. *Lawyer-Client Conflicts of Interest.*

These facts present the potential for conflicts of interest between Client and Lawyer. Oregon RPC 1.7 states, in 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:

(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)

(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;

(4) 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

(5) each affected client gives informed consent, confirmed in writing.

Lawyer's other business interests in the real estate transaction could give rise to a conflict under Oregon RPC 1.7(a)(2) because there is a significant risk that these other roles might interfere with Lawyer's representation of Client. This would be true whether Lawyer plays the nonlawyer roles as the owner or co-owner of a nonlaw business or as an employee or independent contractor for such a business. Considering an Oregon lawyer's efforts to fulfill his function as both a lawyer and a realtor, the Oregon Supreme Court said:

. . . contrary to the accused's argument, the [lawyer's] interest in acquiring a share of the sales commission is not identical to a lawyer's interest in recovering a contingency fee. A lawyer will recover a contingency fee only if the client succeeds in the matter on which the lawyer provides legal representation. In contrast, the [lawyer's] ability to recover a sales commission did not turn on whether he advanced [his client's] legal interests in the transaction. Indeed, an insistence on protecting [his client's] legal interests could have prevented a sale from closing that, from a broker's perspective, may have made business sense. Therein, we think, lies the problem in the accused's serving as both [his client's] broker and lawyer. In advancing his client's business interests as a broker, the accused may have discounted risks that, as a lawyer, he should counsel his client to avoid or at least be aware of.¹

In re Spencer, 355 Or 679, 691, 330 P3d 538 (2014).

It follows that if Lawyer undertakes multiple roles resulting in a conflict, Lawyer must comply with each of the requirements of Oregon RPC 1.7(b).² Before we turn to the requirements of Oregon RPC 1.7(b), however, we note that since Lawyer will be doing business with Client in

¹ This Ethics Opinion has been revised following the court's opinion, *Spencer*, 355 Or at 697, in which the court rejected the suggestion that simultaneously acting as attorney, real estate broker, and mortgage broker would, *per se*, constitute a current conflict of interest. The court said :

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 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).

² As noted above, we have assumed that multiple roles are legally permissible under applicable substantive law and thus need not consider Oregon RPC 1.7(b)(2). And since it is assumed that Lawyer represents Client and only Client, we need not consider Oregon RPC 1.7(b)(3).

Lawyer's additional roles, it is also necessary to consider the conflict-of-interest limitations in Oregon RPC 1.8(a):

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;

(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and

(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

There is significant overlap between Oregon RPC 1.7(b) and Oregon RPC 1.8(a). For example, both rules would apply whether Lawyer plays the nonlawyer role (or roles) as the owner or co-owner of a nonlaw business or as an employee or independent contractor for such a business. In addition, both rules require Lawyer to obtain Client's informed consent³ and to confirm that consent in a contemporaneous

³ Oregon RPC 1.0(g) provides:

“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.

writing.⁴ See Oregon RPC 1.7(b)(4); Oregon RPC 1.8(a)(3).⁵ The informed consent requirements under Oregon RPC 1.8(a)(3) are more stringent, however:

- It is not enough that Lawyer confirm Client’s waiver by a writing sent by Lawyer, as would be the case under Oregon RPC 1.7. Lawyer must also receive Client’s informed consent “in a writing signed by the client.”
- Lawyer’s writing must clearly and conspicuously set forth each of the essential terms of each aspect of Lawyer’s business relations with Client and the role that Lawyer will play in each such regard, as well as the role that Lawyer will play as Client’s Lawyer. This would include, for example, the fees that Lawyer or others would earn in each capacity and the circumstances under which each such fee would be payable (e.g., only upon closing or without regard to closing). It would also include a clear explanation of any limitation of liability provisions that might exist regarding Lawyer’s other roles.⁶

⁴ Oregon RPC 1.0(b) provides:

“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. See paragraph (g) for the definition of “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.

⁵ For prior formal opinions citing to both Oregon RPC 1.7(a) and Oregon RPC 1.8(a), see OSB Formal Ethics Op No 2005-10 (in addition to lawyer’s private practice, lawyer also owns a real estate firm and a title insurance company that occasionally do business with lawyer’s clients); and OSB Formal Ethics Op No 2005-28 (discussing conflict of interest in representing both sides in adoption).

⁶ For cases and ethics opinions discussing the general level of disclosure requirements when lawyers do business with clients, see, for example, OSB Formal Ethics Op No 2005-32.

- In addition to recommending that Client consult independent counsel, Lawyer must expressly inform Client in writing that such consultation is desirable and must make sure that Client has a reasonable opportunity to secure the advice of such counsel.
- Communications between Lawyer and Client as part of their lawyer-client relationship are subject to Lawyer's duties of confidentiality under Oregon RPC 1.6. Communications between Lawyer and Client in other capacities would not be subject to Oregon RPC 1.6⁷, and Lawyer must explain to Client why this

⁷ Oregon RPC 1.6 provides:

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to disclose the intention of the lawyer's client to commit a crime and the information necessary to prevent the crime;

(2) to prevent reasonably certain death or substantial bodily harm;

(3) to secure legal advice about the lawyer's compliance with these Rules;

(4) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

(5) to comply with other law, court order, or as permitted by these Rules; or

(6) in connection with the sale of a law practice under Rule 1.17 or to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm. . . .

distinction is potentially significant.⁸ This explanation must be given whether Lawyer's multiple roles are carried out from a single office or from physically distinct offices.⁹

Two requirements remain to be discussed. One requirement is that the terms of the business aspects of the transactions between Lawyer and Client be "fair and reasonable" pursuant to Oregon RPC 1.8(a)(1). We assume that this requirement will be met if Client would be unable to obtain the same services from another under more favorable terms. Whether, or to what extent, the "fair and reasonable" requirement could be met if there were other available suppliers at materially lower cost is a subject on which this Committee cannot define any bright-line rule. Other jurisdictions have been more inclined to approve Lawyers' business relations with Clients when the Client is relatively sophisticated. *See, e.g., Atl. Richfield Co. v. Sybert*, 51 Md App 74, 441 A2d 1079 (1982), *aff'd*, 295 Md 347, 456 A2d 20 (1983) (lawyers who acted as realty brokers for sophisticated corporate seller were not barred from recovering real estate commission); *McCray v. Weinberg*, 4 Mass App Ct 13, 340 NE2d 518 (1976) (declining to set aside foreclosure of lawyer's mortgage loan, one of a series, to knowledgeable and experienced client).

⁸ *See, e.g., United States v. Huberts*, 637 F2d 630, 639–40 (9th Cir 1980), *cert den*, 451 US 975 (1981) (lawyer as business agent; no privilege); *United States v. Davis*, 636 F2d 1028, 1043–44, 81-1 US Tax Cas P 9193 (5th Cir 1981) (lawyer as tax preparer; no privilege); *Diamond v. City of Mobile*, 86 FRD 324, 327–28 (SD Ala 1978) (lawyer as investigator; no privilege); *Neuder v. Battelle Pac. Nw. Nat. Lab.*, 194 FRD 289, 292–97 (DDC 2000) (when corporate lawyer acts in nonlegal capacity in connection with employment decisions, communications between lawyer and corporate representatives not privileged). A variant could arise if Lawyer's role were ambiguous, resulting in Client's inability to carry the burden of proof on lawyer-client privilege. *See Groff v. State Indus. Acc. Comm'n*, 246 Or 557, 565–66, 426 P2d 738 (1967) (person asserting privilege has burden of showing that one asserting privilege and nature of testimony offered are both within ambit of privilege); OEC 104(1).

⁹ The explanation about privilege and confidentiality issues might, for example, include a discussion about the effect that a lack of confidentiality could have on an opposing party's ability to call Lawyer as a witness in any subsequent litigation and thus on Lawyer's ability to represent Client in that litigation in light of the lawyer-witness rule, Oregon RPC 3.7.

The other requirement is that Lawyer must “reasonably believe that [Lawyer] will be able to provide competent and diligent representation to” Client under Oregon RPC 1.7(b)(1). This means not only that Lawyer must have the subjective belief that Lawyer can do so, but also that Lawyer’s belief must be objectively reasonable under the circumstances. *See, e.g., Restatement (Third) of the Law Governing Lawyers* § 126, cmt e (2000) (supplemented periodically). Other state bar ethics committees have split on whether such an objectively reasonable belief can exist if, for example, a Lawyer wishes to act both as legal counsel to and insurance agent for a Client, or as legal counsel to and securities broker for a Client.¹⁰ We cannot say that it will always be unreasonable for a Lawyer to conclude that the Lawyer can provide competent and diligent legal advice to a Client while also fulfilling other roles. We note, however, that there will be times when the Lawyer’s conflicting obligations and interests will preclude such roles. *Cf. In re Phelps*, 306 Or 508, 510 n 1, 760 P2d 1331 (1988) (lawyer cannot be both counsel to a party in a transaction and escrow for that transaction); OSB Formal Ethics Op No 2005-55 (rev 2014) (same).

3. *Additional Caveats and Concluding Remarks.*

Given these numerous and delicate potential issues, one might fairly conclude that multidisciplinary practice means having multiple opportunities to be disciplined. *See generally In re Phillips*, 338 Or 125, 107 P3d 615 (2005) (36-month suspension for violation of multiple provisions in former Code of Professional Responsibility in connection with program to help insurance agents sell insurance products to lawyer’s estate planning clients and share in resulting commissions). Nevertheless, it will sometimes, but not always, be permissible for Lawyer to play these multiple roles. The answer will depend on factors including the fairness and reasonableness of the multiple roles, whether it is objectively reason-

¹⁰ *See, e.g.,* California Formal Ethics Op No 1995-140 (lawyer as insurance broker); New York State Bar Association Ethics Op No 2002-752 (lawyer may not provide real estate brokerage services in the same transaction as legal services); New York State Bar Association Ethics Op No 2005-784 (lawyer also acting in entertainment management role).

able to believe that Lawyer can provide competent and diligent representation while playing multiple roles, and whether Lawyer can and does obtain Client's informed consent in a writing signed by the Client. Before concluding this opinion, however, we note three caveats:

- If someone other than Client were to pay Lawyer for the provision of legal services to Client, Lawyer would also have to comply with Oregon RPC 1.8(f).¹¹
- If Lawyer were to endeavor to use Lawyer's role as real estate broker or agent, or mortgage broker or loan officer, to obtain clients for Lawyer's practice of law, Lawyer would have to comply with applicable advertising and solicitation requirements in Oregon RPC 7.1 *et seq.*¹²

¹¹ Oregon RPC 1.8(f) provides:

A lawyer shall not accept compensation for representing a client from one other than the client unless:

- (1) the client gives informed consent;
- (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
- (3) information related to the representation of a client is protected as required by Rule 1.6.

For an ethics opinion discussing this rule, see OSB Formal Ethics Op No 2005-30 (rev 2016) (legal fees paid by insurer).

¹² For the present text and prior formal ethics opinions addressing these requirements, see OSB Formal Ethics Op No 2005-106 (rev 2016) (lawyer who purchases tax advice business may not use that business to engage directly or indirectly in improper solicitation of legal clients); OSB Formal Ethics Op No 2005-101 (rev 2015) (lawyer and psychologist may market a joint "Family Mediation Center"); and OSB Formal Ethics Op No 2005-108 (rev 2015) (lawyer may advertise family mediation service in marriage and family therapy section of Yellow Pages).

Lawyers covered by the Oregon State Bar Professional Liability Fund (PLF) who do not wish to risk losing potentially available legal malpractice coverage should contact the PLF about exclusions that may apply.

Approved by the Board of Governors, September 2015.

COMMENT: For additional information on this general topic and other related subjects, see *The Ethical Oregon Lawyer* § 7.2 to § 7.2-8 (competence), § 7.3 (diligence), § 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) (OSB Legal Pubs 2015); and *Restatement (Third) of the Law Governing Lawyers* §§ 121–122, 125–126 (2000) (supplemented periodically).