

## FORMAL OPINION NO 2007-177

### Issue Conflicts

#### Facts:

Lawyer represents Client A in litigation pending in Court A and Client B in litigation pending in Court B. Client A and Client B are unrelated. In addition, the matters of Client A and Client B are factually unrelated and involve unrelated adverse parties. Nevertheless, the matters do or may share a common legal issue. Client A contends, or may contend, that the law should be construed to impose liability when a given set of facts exists, and Client B contends, or may contend, that the law should be construed not to impose liability under the same set of facts, albeit involving different parties. There are no differences between Client A's and Client B's cases that would allow Lawyer to reconcile the two clients' legal positions on this potentially overlapping legal issue.

#### Questions:

1. Under what circumstances, if any, may Lawyer X represent both Client A and Client B, either with or without conflicts waivers?
2. Are the answers the same if Lawyer represents only Client A and Lawyer Y, at the same firm, represents only Client B?

#### Conclusions:

1. See discussion.
2. See discussion.

#### Discussion:

The situation presented is often described as an "issue" or "positional" conflict since it is only the two clients' positions on a legal issue that are inconsistent. Under *former* DR 5-105(A)(3), issue conflicts were

treated separately from other conflicts of interest.<sup>1</sup> *Former* DR 5-105(A)(3) provided:

A conflict of interest is not present solely because one or more lawyers in a firm assert conflicting legal positions on behalf of different clients whom the lawyers represent in factually unrelated cases. If, however, a lawyer actually knows of the assertion of the conflicting positions and also actually knows that an outcome favorable to one client in one case will adversely affect the client in another case, the lawyer may not continue with both representations or permit other lawyers at the same firm to do so unless all clients consent after full disclosure.

The Oregon Rules of Professional Conduct (RPCs) do not treat issue conflicts as a separate category of conflict; they are encompassed by the general current-client conflicts-of-interest rule, Oregon RPC 1.7, which 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:

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<sup>1</sup> Issue or positional conflicts do not include situations such as *In re Bristow*, 301 Or 194, 721 P2d 437 (1986), in which the court held that a lawyer could not simultaneously attack and support the validity of a particular franchising system, even though the work was being done in two separate cases.

- (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 1.7 is based on ABA Model RPC 1.7. Comment 24 to ABA Model RPC 1.7 (2003) offers the following explanation of the so-called issue conflict:

A lawyer may represent parties having antagonistic positions on a legal question that has arisen in different cases, unless representation of either client would be adversely affected. Thus, it is ordinarily not improper to assert such positions in cases pending in different trial courts, but it may be improper to do so in cases pending at the same time in an appellate court.

ABA ethics opinions on the subject and other authorities reached essentially the same result. *See, e.g.*, ABA Formal Ethics Op No 93-377; California RPC 3-310 discussion (2002); New York City Bar Formal Ethics Op 1990-4; DC Bar Ethics Op No 265 (1996); State Bar of Michigan Ethics Op No RI-331 (2003). *See also* Geoffrey C. Hazard, W. William Hodes & Peter R. Jarvis, 1 *The Law of Lawyering* § 11.10 (4th ed 2015) (supplemented periodically); *Restatement (Third) of the Law Governing Lawyers* § 135 (2000) (supplemented periodically) (“Restatement”).

Under Oregon RPC 1.7(b)(3), clients with directly adverse interests cannot waive the conflict if the lawyer is “obligate[d] . . . to contend for something on behalf of one client that the lawyer has a duty to oppose on behalf of another client.” Oregon RPC 1.7(b)(3) is unique to Oregon and is not part of the ABA Model RPCs. (Model RPC 1.7(b)(3) prohibits simultaneous representation if it involves “the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal.”) The question,

then, is whether a lawyer representing two clients who have differing positions on a legal issue is obligated to contend something for one that the lawyer must oppose for the other.

Our review of authorities interpreting ABA Model RPC 1.7, which is consistent with the language of *former* DR 5-101(A)(3), leads to the conclusion that Oregon RPC 1.7(b)(3) applies to issue conflicts only if the lawyer is obligated to take opposing positions for the clients or if the outcome in one case will, or is at least highly likely to, affect the outcome in the other. Clearly, Lawyer X could not represent Clients A and B simultaneously if they were opposing each other on an issue (say, for instance, the application of a new land use statute) in the same matter.<sup>2</sup> On the other hand, representation of Client A in a single case or matter does not automatically require Lawyer X to appear on Client A's behalf in all other cases in which the same issue does or may arise.

The critical question is whether the outcome in Client A's matter will or is highly likely to affect the outcome of Client B's matter. This test would be met if, for example, one case is pending on appeal before the Oregon Supreme Court or the Oregon Court of Appeals and the other case is pending at the trial court level and will necessarily be controlled by the forthcoming appellate decision. On the other hand, it would not be met every time there are two cases pending at the trial court level in different counties or judicial districts. Whether it would be met when, for example, two cases are simultaneously pending before two different trial court judges in the same county or judicial district will depend on what the lawyer reasonably knows or should know about the likelihood that one case will affect the other under the circumstances in question. For example, the outcome may depend in part on whether the issue is likely to be dispositive in one or both cases or constitutes only a remote fall-back position.

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<sup>2</sup> Oregon RPC 1.0(i) defines "matter" as "any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties. . . ." *Cf.* OSB Formal Ethics Op No 2005-11.

When considering issue conflicts, it is also important to consider the knowledge requirement applicable to conflicts analysis. Oregon RPC 1.0(h) provides:

“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.

Issue conflicts are unlike more typical multiple-client conflicts in that there is, as a practical matter, no way for everyone in a multilawyer firm to know every current or potential issue that may arise in every case the firm is handling. Indeed, even a solo practitioner cannot know whether or when an issue conflict may arise in the future with regard to, say, a hearsay objection that may emerge only at trial. In other words, there is no safeguard that a lawyer or firm can reasonably take to avoid issue conflicts in the same manner that a lawyer or firm can avoid traditional conflicts by keeping lists of the names of current and former clients. *Cf. In re Knappenberger*, 338 Or 341, 108 P3d 1161 (2005) (lawyers must keep such records).

The RPCs are intended be construed in a practicable manner that does not create unavoidable traps for even the most conscientious of lawyers and that does not unduly restrict a client’s right to retain the lawyer or firm of the client’s choice.<sup>3</sup> *Cf.* OSB Formal Ethics Op No 2005-120 (rev 2015); OSB Formal Ethics Op No 2005-174. It follows that it would be inappropriate to hold that on pain of discipline, all lawyers at a firm are chargeable with the full “issue conflict” knowledge of every other lawyer at the firm. Actual knowledge, or at least negligence in not knowing, must first be proved. This is consistent with the general conflict imputation rule, which is contained in Oregon RPC 1.10(a):

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<sup>3</sup> Paragraph [14] of the SCOPE provisions of the ABA Model RPCs provides that the Rules of Professional Conduct are “rules of reason” to be interpreted “with reference to the purposes of legal representation and of the law itself.”

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, unless the prohibition is based on a personal interest of the prohibited lawyer or on Rule 1.7(a)(3) and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.

Accordingly, we conclude that a conflict of interest under Oregon RPC 1.7(a)(1) is not present solely because one or more lawyers in a firm assert conflicting legal positions on behalf of different clients whom the lawyers represent in factually unrelated cases. If, however, a lawyer actually knows or reasonably should know of the assertion of the conflicting positions and also actually knows or reasonably should know that an outcome favorable to one client in one case will, or is at least highly likely to, affect the client adversely in another case, a conflict is present and no waiver is permissible. We stress, however, that there will be a great many instances in which a lawyer will not be chargeable with knowledge of issue conflicts under a “reasonably should know” standard.

We also note that the absence of a conflict under Oregon RPC 1.7(a)(1) will not always guarantee the absence of a conflict under Oregon RPC 1.7(a)(2) since it is possible that a lawyer could be so strongly committed to one client’s legal position that the lawyer could not adequately or fairly represent the other client’s legal position. *Cf. Estates Theatres, Inc. v. Columbia Pictures Indus., Inc.*, 345 F Supp 93 (SDNY 1972). In our opinion, however, such situations are likely to constitute the exception and not the rule.

**Approved by Board of Governors, February 2007.**

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COMMENT: For additional information on this general topic and other related subjects, see *The Ethical Oregon Lawyer* § 10.2 (multiple-client conflicts rules), § 10.2-2 to § 10.2-2(c) (conflicts between current clients), § 10.2-3 (issue conflicts), chapter 20 (conflicts-waiver letters) (OSB Legal Pubs 2015); *Restatement (Third) of the Law Governing Lawyers* §§ 123, 128 (2000) (supplemented periodically); and ABA Model RPC 1.7.