

## **FORMAL OPINION NO 2018-194**

### **Conflicts of Interest, Current Clients: Representing Husband and Wife in Preparation of Estate Plan Involving Waiver of Elective Share**

#### **Facts:**

Married Couple approaches Lawyer jointly and asks Lawyer to represent both of them in the matters described below.

Married Couple have been married for 15 years and both have children from their previous marriages. They have no children from their current marriage.

Married Couple own their house as tenants by the entirety, but have kept the majority of their assets separate. Spouse *A* has substantially more assets than Spouse *B*. They inform Lawyer that it is their individual intent that they would prefer that their estate plans provide that their separate assets be distributed to their children by their previous marriages and their jointly owned assets pass to the surviving spouse by right of survivorship.

Because of the value of Spouse *A*'s separate property, it is clear to Lawyer that Spouse *B* would have an elective share claim if Spouse *A* were to die first. An elective share claim would defeat Married Couple's current intentions for their estate plan.

Married Couple do not have a prenuptial agreement.

#### **Questions:**

1. May Lawyer provide information to Married Couple as to their respective elective share rights under ORS 114.600 to 114.725?

2. May Lawyer advise both Spouse *A* and Spouse *B* as to whether they should waive their elective share rights as provided in ORS 114.620(1)?

3. May Lawyer prepare an agreement to mutually waive the elective share rights of Married Couple?

4. After Spouse *A* and Spouse *B* have executed an agreement to waive the elective share, may Lawyer advise Married Couple concerning their estate plan?

**Conclusions:**

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

**Discussion:**

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.

1. *Lawyer May Provide Information about the Elective Share and Its Potential Waiver to Both Spouses.*

Under Oregon's elective share statute, a surviving spouse may elect to receive a percentage share of the decedent's estate according to a formula based on the length of the marriage. ORS 114.605. Absent a waiver of that right, the elective share will override a contrary provision in the decedent's will. ORS 114.605. However, that legal right can be waived. Under ORS 114.620, a spouse may enter into a written agreement, before or after the marriage, to waive his or her elective share. Such agreement to waive the elective share is a type of prenuptial or postnuptial agreement. *In re Estate of Richard B. Wilber*, 165 NH 246, 75 A3d 1096, 1099 (2013).

Providing general information about the elective share does not create a significant risk that Lawyer's responsibility to one client will be materially impaired by his responsibilities to the other. Each spouse has a fiduciary obligation to the other requiring full disclosure and fairness. *Day v. Vitus*, 102 Or App 97, 792 P2d 1240, *rev den*, 310 Or 281 (1990); *Matter of Marriage of Eltzroth*, 67 Or App 520, 526, 679 P2d 1369 (1984); *Bauer v. Bauer*, 1 Or App 504, 464 P2d 710 (1970). Providing information about the elective share and its waiver to both spouses is consistent with each spouse's duty to each other. Therefore, it does not create a significant risk of impairing Lawyer's obligation to either spouse for Lawyer to provide such information to both spouses.

2. *Advice to Waive Elective Share Presents a Current-Client Conflict Of Interest.*

Spouses often seek joint representation in estate planning. Typically, the interests of the spouses will be aligned for such purposes. However, there are exceptions in which simultaneous representation would be prohibited. OSB Formal Ethics Op No 2005-86. For example, "spouses with children by prior marriages may have very different opinions concerning how their estates should be divided." OSB Formal Ethics Op No 2005-86. Thus, an attorney was reprimanded for repre-

senting both spouses in revising their estate plans in *In re Plinski*, 16 DB Rptr 114 (2002). In that case, the spouses' interests were adverse because they had children from prior marriages, their respective estates were of different values, they had ongoing financial disagreements, and one spouse was, for reasons of health and disposition, likely susceptible to pressure from the other. *In re Plinski*, 16 DB Rptr 114.

An agreement to waive the elective share presents such conflicting interests. As with any prenuptial or postnuptial agreement, it requires one or both spouses to give up potentially valuable legal rights. Such agreement may be particularly fraught with issues that could impair a lawyer's ability to provide competent and diligent representation to both spouses. By definition, it contemplates that the spouses might leave the majority of their estates to others. One or both spouses may wish to provide for children from another marriage. There may be a potential imbalance between the spouses' respective estates, such that the right to an elective share could be more important to one spouse than the other. One spouse may be more sophisticated than the other; one may be in better health and more likely to benefit from the elective share. Waiver elective shares might even require renegotiation of the terms of a prenuptial agreement. Any of those factors creates "a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client." Oregon RPC 1.7(a)(2).

Some conflicts may be waivable with informed consent confirmed in writing. Oregon RPC 1.7(b)(1) allows such waiver if "the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client." Comment 15 to ABA Model RPC 1.7 notes that "[c]onsentability is typically determined by considering whether the interests of the clients will be adequately protected if the clients are permitted to give their informed consent to representation burdened by a conflict of interest." The *Restatement (Third) of the Law Governing Lawyers* § 122, comment g(iv), explains:

The general standard . . . assesses the likelihood that the lawyer will, following consent, be able to provide adequate representation to the clients. The standard includes the requirements both that the consented-to conflict not adversely affect the lawyer's relationship with either

client and that it not adversely affect the representation of either client. In general, if a reasonable and disinterested lawyer would conclude that one or more of the affected clients could not consent to the conflicted representation because the representation would likely fall short in either respect, the conflict is nonconsentable.

Were Lawyer to represent both spouses with respect to an agreement to waive the elective share, Lawyer would be literally representing both sides of an agreement likely to benefit one client more than the other. Such conflict may be waivable in limited circumstances, but it is perilous. The Oregon Supreme Court observed, in a case where an attorney drafted an employment contract while representing both the employer and the employee, that “[i]t is never proper for a lawyer to represent clients with conflicting interests no matter how carefully and thoroughly the lawyer discloses the possible effect and obtains consent.” *In re Jans*, 295 Or 289, 295, 666 P2d 830 (1983). The court explained:

“It is of the utmost importance that the attorney representing both parties to a transaction reflect upon the rationales behind conflict of interest proscriptions. It is not sufficient that the attorney believes himself able adequately to represent potentially differing interests, or even that all parties have consented. The possibility of subconsciously favoring the interests of either party, the appearance of impropriety that may arise from even the slightest dissatisfaction, the likelihood of receiving confidential information from one party that is damaging or helpful to the other, and the possibility that a court will subsequently disagree with the attorney’s decision that he was able adequately to represent both interests—all dictate extreme caution in these situations.

The temptation to represent potentially conflicting interests is particularly difficult to resist in family disputes. Often the attorney is the ‘family lawyer’ and has represented husband, wife, and even the children on previous occasions. . . . If the parties have not clearly understood the lawyer’s ethical responsibilities *ab initio*, the ensuing rancor may be directed toward him.”

*In re Jans*, 295 Or at 295 n 7 (quoting Robert Aronson, *Conflict of Interest*, 52 Wash L Rev 807, 826–27 (1977)); see also *In re Robertson*, 290 Or 639, 648, 624 P2d 603 (1981) (lawyer is disciplined for representing both buyer and seller of real property).

Comment 30 to ABA Model RPC 1.7 notes that “[a] particularly important factor in determining the appropriateness of common representation is the effect on client-lawyer confidentiality.” Attorney-client privilege is typically waived among clients who are jointly represented. OEC 503(4)(e). Such lack of confidentiality may make it difficult for Lawyer to explore whether one spouse has concerns about waiving the elective share, since that spouse may be reluctant to fully share those concerns with the other spouse. That, in turn, impairs Lawyer’s ability to fully advise each spouse.

In addition to potentially impairing the lawyer’s ability to represent the spouse who might object to waiving the elective share, the conflict also creates risk for the other spouse. A spouse may make certain estate planning decisions based on what he or she believes to be other spouse’s waiver of the elective share. A later finding that the waiver was invalid, due to the attorney’s conflictive representation, would likely frustrate the decedent’s estate plan that counted on that waiver of elective share.

Under the facts as presented here, the conflict is very likely to be nonconsentable. The facts listed are likely to impair Lawyer’s ability to give complete, competent, and diligent advice to both spouses as to waiver of the elective share. In particular, the existence of children from previous marriages and the imbalance between the spouses’ separate estates heightens their need for thorough and independent advice. One may reasonably expect Lawyer’s ability to render such advice to be impaired by Lawyer’s duties to the other spouse.

There may be other circumstances in which a lawyer could reasonably believe that he or she could provide competent and diligent representations to both parties to an agreement to waive the elective share. That is more likely if the elective share appears unlikely to substantially affect the estate plan,<sup>1</sup> the spouses do not have children from

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<sup>1</sup> It is not always clear, at the time an estate plan is created, whether a devise is likely to be more or less than the elective share. The value of the estate and the devise may be changed by fluctuating values of joint and separate assets, unforeseen expenses, and other inheritances or gifts. Additionally, the statutory percentage of the elective share changes with the length of the marriage.

prior marriages, their separate assets are similar in value, they are both highly sophisticated and unlikely to be susceptible to pressure, and they are similarly positioned with respect to life expectancy. *See In re Plinski*, 16 DB Rptr 114 (2002). Additionally, OSB Formal Ethics Opinion No. 2005-86 sets forth a list of factors that, in rare circumstances, might allow for joint representation during a divorce. Although that opinion addressed different circumstances, some of the listed factors may be applicable here, including:

- (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 [or, here, waiver of the elective share] before consulting the lawyer;
- (5) The lawyer must be in a position to conclude that each party has provided full disclosure of all assets . . .

To sum up, the more important the elective share appears to be to either spouse, the less likely the conflict is to be waivable, and vice versa.

A lawyer weighing the totality of these factors might reasonably believe that he or she could competently and diligently represent both spouses with respect to an agreement to waive the elective share. Even in a case in which the conflict is waivable, the lawyer would still be required to obtain both clients' informed consent pursuant to Oregon RPC 1.7(b).

### 3. *Preparation of Agreement Waiving Elective Share.*

The same analysis applies with respect to preparing the agreement to waive the elective share. Once Lawyer has undertaken to represent both spouses with respect to estate planning, there is a conflict if he represents either spouse with respect to drafting an agreement to waive the elective share. For example, an attorney drafted a property settlement on behalf of divorcing spouses in *Matter of Marriage of Eltzroth*, 67 Or App 520. The lawyer "acted only as a scrivener" and "did not provide independent advice to either party." *Matter of Marriage of Eltzroth*, 67 Or App at 526. Nonetheless, the court of appeals noted that it did "not con-

done the conduct of the attorney in continuing to represent both parties” to the agreement. *Matter of Marriage of Eltzaroth*, 67 Or App at 526 n 7.

This conflict may be avoided if Lawyer has not yet undertaken representation of one of the spouses with respect to estate planning. As attorney for only one of the spouses, Lawyer may prepare an agreement mutually waiving the elective share on behalf of the spouse that Lawyer represents. It is not mandatory that both parties to a prenuptial or post-nuptial agreement be represented by counsel, although that is a factor in determining whether such agreement is enforceable. *Matter of Marriage of Leathers*, 98 Or App 152, 779 P2d 619 (1989), *rev den*, 309 Or 625 (1990).

4. *Advice Concerning Estate Plan after Execution of Agreement to Waive Elective Share.*

Once the issue of waiver of the elective share has been eliminated by execution of an agreement, Lawyer may represent Spouse A and Spouse B in preparation of their estate planning, absent other circumstances that would create a conflict of interest under Oregon RPC 1.7.

**Approved by the Board of Governors, March 2018.**

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COMMENT: For additional information on this general topic and other related subjects, see *The Ethical Oregon Lawyer* chapter 9 (economic and personal conflicts), chapter 10 (multiple-client conflicts) (OSB Legal Pubs 2015); and *Restatement (Third) of the Law Governing Lawyers* chapter 8 (conflicts of interest) (2000).