

FORMAL OPINION NO. 2005-10
Conflicts of Interest, Current Clients:
Lawyer Has Other Business

Facts:

In addition to Lawyer's private law practice, Lawyer owns a real estate firm and a title insurance company that occasionally do business with Lawyer's clients.

Questions:

1. Is it ethical for Lawyer to own other enterprises that may do business with Lawyer's clients?
2. May Lawyer advise clients concerning business transactions with such enterprises?

Conclusions:

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

Discussion:

With respect to the first question, there is nothing in the rules of professional conduct per se that prohibits lawyers from engaging in other businesses. Although it is possible that an arrangement such as the one described above could give rise to improper in-person solicitation of clients or to other abuses, there is no reason to believe that such abuses are occurring here. *Cf.* Oregon RPC 8.4(a)(1), 7.3 (discussed in OSB Formal Ethics Op No 2005-2).

The second question requires analysis of Oregon RPC 1.7 and Oregon RPC 1.8(a). The former provides, in pertinent part:

(a) [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(a) provides:

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.

The definition of *informed consent* that applies to both of these sections is set forth in Oregon RPC 1.0(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.

In this case, Lawyer would have a conflict under Oregon RPC 1.7(a) if there is a substantial risk that Lawyer's representation of one client would be “materially limited . . . by a personal interest of the lawyer.” Similarly, Lawyer would have a conflict under Oregon RPC 1.8(a) whenever Lawyer enters into a business transaction with a client or knowingly acquires an interest adverse to the client. In either case,

Lawyer can proceed only with the duly confirmed informed consent of the client. Oregon RPC 1.7(b), 1.8(a)(3).

It is also important to note that even if the interests of Lawyer and Client are aligned at the outset, shifts in the relative interests of the parties may trigger the requirement for informed consent at a later time. *See, e.g., In re Griffith*, 304 Or 575, 748 P2d 86 (1987); *In re Harris*, 304 Or 43, 741 P2d 890 (1987); *In re Luebke*, 301 Or 321, 722 P2d 1221 (1986); *In re Bishop*, 297 Or 479, 686 P2d 350 (1984); *In re Samuels/Weiner*, 296 Or 224, 674 P2d 1166 (1983). *Cf. In re Thorp*, 296 Or 666, 679 P2d 857 (1984). With consent based on full disclosure, however, Lawyer clearly may proceed in any event. *Cf. In re Griffith, supra*, 304 Or at 620 (former rule on business transactions with clients does not apply when lawyer is only part owner of business that is not lawyer's alter ego but is truly separate entity). Nevertheless, Oregon RPC 1.7 could still apply. *Cf. In re Tonkon*, 292 Or 660, 666–667, 642 P2d 660 (1982).

Approved by Board of Governors, August 2005.

COMMENT: For additional information on this general topic and other related subjects, see THE ETHICAL OREGON LAWYER §§8.2–8.5, 8.9–8.12, 12.9–12.12 (Oregon CLE 2003); and RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§121–122, 125–126 (2003). *See also* ABA Model Rules §§1.7–1.8.