

How Lawyers Stumble into Personal-Interest Conflicts

A Divergence in Loyalty

By Nik Chourey



Nik Chourey

Conflicts! It's members' most common concern when I connect with them on the Oregon State Bar's Ethics Helpline.

The lawyers' hypotheticals are never routine. This is because the truth is stranger than fiction, but also because identification of conflicts evades a *per se* approach.¹ Conflict analysis is incredibly fact-specific, requiring deliberate consideration. This is the case for spotting conflicts, and in seeking a client's written waiver of the conflict if permitted.²

Conflicts often involve intense emotions in our clients, and even in ourselves. There are many personal circumstances for attorneys that squarely implicate ethics rules on conflicts, because they may result in division of our client loyalty. Such a divergence in the undivided loyalty we owe our clients is governed by Rule of Professional Conduct (RPC) 1.7(a)(2).³

Recognizing the importance of identifying self-interest conflicts in lawyers' day-to-day practice, the ABA recently issued a new

ethics opinion that lends helpful context to Oregon's rules, including an analysis of the degrees of personal relationships with opposing counsel that might impact a lawyer's representation of a client.⁴

We Must See and Avoid Conflicts

Conflict awareness and avoidance are required attorney skills. The rules mandate that we exercise reasonable care to identify and avoid conflicts, including the application of an effective conflicts check system.⁵

The core principle is straightforward: a personal-interest conflict of interest exists when circumstances raise a "significant risk" that an attorney's personal interest will "materially limit" the representation. RPC 1.7(a)(2). A lawyer's personal interest can stem from myriad considerations — the lawyer's own financial well-being, the lawyer's personal relationships, the lawyer's interest in avoiding malpractice claims or discipline, or the lawyer's interest in maintaining a good reputation in the legal community.

Representation when a personal-interest conflict exists is prohibited, unless the lawyer reasonably believes it is possible to continue to provide diligent and competent representation and the client provides written,⁶ informed consent.⁷ RPC 1.7(a)(2), RPC 1.7(b). When a personal interest conflict requires an attorney to withdraw from the representation,⁸ attorneys must do so mindfully and in accord with the duties upon withdrawal, under RPC 1.16. Ordinarily, an attorney's personal-interest conflict will not be imputed to the other members of their law firm.⁹

We Owe Undivided Loyalty to our Clients

No ethical duties are more important than the duties we owe to our clients.¹⁰ Like our duty of confidentiality, our duty of loyalty to clients is at the core of our joint professional identity.

Consistent with these foundational principles, disciplinary authority provides that a single conflict violation warrants suspension. It is well established "that a finding that a lawyer has violated the rule prohibiting current or former client conflicts of interests, standing alone, typically justifies a 30-day suspension." *In re Hostetter*, 348 Or 574, 603 (2010).

Lawyers with an understanding of how personal-interest conflicts may arise are better-suited to reduce regulatory risk and avoid ethical dilemmas. As noted earlier, a lawyer has a personal-interest conflict with a current client when there is a "significant risk" that the lawyer's representation will be "materially limited" by a personal interest of the lawyer. RPC 1.7(a)(2).

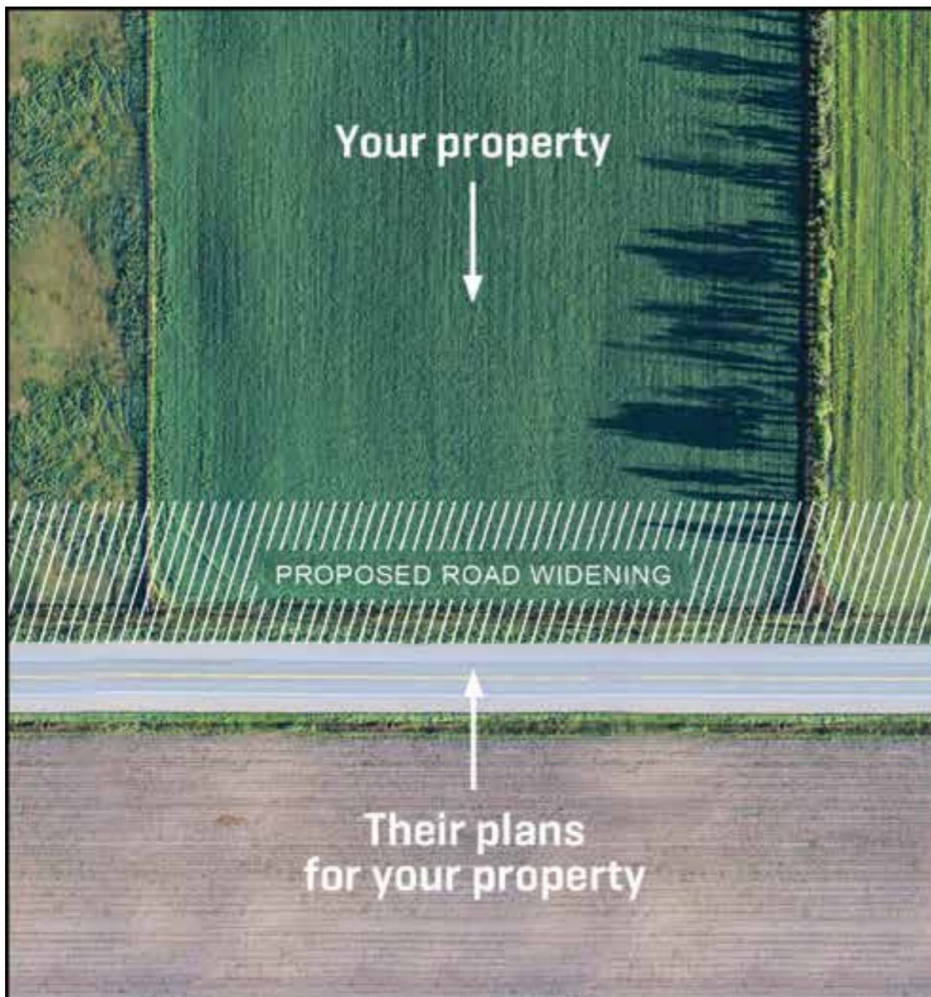
Because conflicts analysis is so fact-specific, I offer the following hypothetical tales of personal-interest conflicts within a caseload of additional rule violations. If the fact patterns start to sound familiar, a call to the ethics helpline may be in order.

Chronicles of Conflicts: Oregon Attorneys and their Current Clients

Malpractice: Attorney's Interest to Avoid Liability

Attorney A represents Client B in a high-value personal injury claim, but Attorney A lacks the attention to detail and knowledge reasonably necessary to represent Client B. Attorney A does not know how and when to timely file suit to preserve Client B's legal rights. Only when an insurance claims adjuster alerts him to the passing of the statute of limitations does Attorney A recognize his professional error.

Attorney A is embarrassed that (in his view) his staff totally blew the deadline to file,¹¹ and he's concerned about his reputation and individual liability. So Attorney A conceals his mistake from Client B and sends her a fabricated complaint that he falsely claims was filed.



Your property



PROPOSED ROAD WIDENING



Their plans
for your property

When they take your land, we take your side.

The first rule of taking on the government is to never take it on alone. Find someone who will fight for you – someone with a track record of results. With one of the most active eminent domain practices in Oregon over the last decade and a history of taking the government to trial when called for, Olsen Barton has positioned itself to negotiate forcefully for its clients. With us on your side, the government knows it has two choices: a reasonable offer or they will see us in court.

OLSEN  BARTON
ATTORNEYS

BUILT FOR REAL ESTATE
OLSENBARTON.COM | 503.468.5573

Attorney A fails to advise Client B of the legal options and information reasonably necessary for her to make informed decisions about the representation, including Attorney A's conflict in continuing the representation when he has shown no intention to repair his error.

In addition, Attorney A does not reach out to the OSB Professional Liability Fund (PLF). Instead he falsely advises Client B that she is unlikely to recover any damages because *she* caused the accident (omitting material information, i.e., that recovery is unlikely *because* of Attorney A's failure to timely file suit, act to repair and seek the advice of the PLF).

In doing so, Attorney A's conduct directly implicates RPC 1.7(a)(2), among other rules, because he continued to provide Client B with legal advice when there was a significant risk his own interest in avoiding malpractice materially limited his professional judgment.

Bar Complaint: Attorney's Interest to Avoid Liability

Attorney B represents Client C in a pending criminal matter. Client C submits a bar complaint against Attorney B, alleging that Attorney B has failed to respond to his request for an accounting of the \$50,000 that Client C paid to him or his reasonable requests for case information. Having stolen Client C's funds, Attorney B refuses to respond in substance to the bar's investigation or respond to Client C's requests.

Knowing that Client C is copied on his responses to the bar's investigation, Attorney B claims that because Client C has felony convictions, he cannot be believed; that the bar complaint, as a public record, will only lead to additional criminal charges against Client C; and that Attorney B is the only attorney smart enough to save Client C from a true-life sentence. Seeing this response, Client C concludes that he cannot terminate Attorney B and risk grievous harm to his criminal case.

Without any of Client C's funds remaining, Attorney B disregards Client C's directive that he use his \$50,000 to effectuate a civil compromise and/or offer full restitution. Instead, Attorney B repeatedly delays the criminal proceeding and bar investigation to avoid exposure to his own criminal and professional liabilities. Client C is left without any legal services of value or any his funds, and he cannot leverage a favorable plea agreement.

Welcome to the Team

Introducing our newest attorneys

Again, Attorney B's conduct implicates RPC 1.7(a)(2) because there is a significant risk that his professional judgment will be limited by his own interest in avoiding criminal prosecution and professional discipline.

Financial: Attorney's Profit Interest Above Client Interests

Attorney B also represents Client D in a land-sales transaction. In representing Client D, Attorney B knows that this client is elderly, infirm and intends to use his life's savings to purchase land and retire. Because of his representation of Client C in the case discussed above, Attorney B knows that he will need \$50,000 fast to replace the funds that he converted from Client C.

With this motivation, Attorney B then enters into a loan with Client D, borrowing \$50,000 with no maturity date, security or clearly stated interest rate. Attorney B does not comply with the rules controlling such a business transaction with Client D, under RPC 1.8; and he fails to inform Client D that this loan may frustrate his objective in purchasing the land. Based on his reliance and confidence in him as his attorney, Client D accepts Attorney B's subsequent recommendations to agree to various unfavorable and amended loan agreements. Attorney B fails to make any payments to Client D on the loans.

Attorney B also drafts a will for Client D that would in part forgive the loan to Attorney B, contrary to Client D's intentions for his destitute and deserving beneficiaries. Fearing that Client D would act to collect his debt from Attorney B if the client's land purchase moved forward, Attorney B works to derail and delay the transaction at the heart of his representation. Here, Attorney B's conduct implicates RPC 1.7(a)(2), because his professional judgment is limited by his own financial interests.

Family Staff and Long-Term Clients: Disloyalty to Other Clients

Attorney Y reluctantly took over his father's estate-planning practice composed of many of the families in and around their small town. Attorney Y also represents the Pumpkin Pals, a much more lucrative, long-time client. Attorney Y serves as the Pumpkin Pals' legal advisor, board member and treasurer, and he depends on the organization for most of his annual income.

Attorney Y does not know how to practice probate law, so he has left that work entirely unsupervised to his longtime



PAUL BALMER

Paul is an associate in our Litigation Department and a graduate of the University of California, Berkeley, School of Law. While a law student, Paul worked at Tonkon Torp as a Summer Associate.



LAUREN BERNTON

Lauren is an associate in our Litigation Department. She works with multinational companies, regional companies, and local businesses as an advocate to help them achieve their goals through trial and dispute resolution strategies.



DANICA HIBPSHMAN

Danica is an attorney in our Business Department and Cannabis Industry Group. She joined the firm after working with the Oregon Liquor Control Commission where she most recently served as Director of Licensing and Senior Policy Advisor.



CHRISTOPHER MOREHEAD

Chris is an associate in our Labor & Employment Group. He joined us after working several years at an international firm representing employers of all sizes. Chris is admitted to practice in Oregon and Washington.



KATE ROTH

Kate is an associate in our Tax and Executive Compensation & Employee Benefits groups. She joined the firm from the U.S. Tax Court where she worked as a judicial law clerk.



ERIN ROYCROFT

Erin is an associate in our Labor & Employment Group. She joined the firm from the Oregon Court of Appeals, where she served as a judicial clerk.



KALIA WALKER

Kalia is an associate in our Litigation Department where she focuses her practice on helping private and public entities successfully navigate disputes in state and federal court



503.802.2024
tonkon.com



**Helping Attorneys
with Catastrophic
and Non-Catastrophic
Injury Cases**

**Specializing in Life Care Plans
and Medical Cost Projections**

Assisting attorneys with the critical task of identifying projected future care needs and their associated costs. How do you determine your client's projected future care needs and their associated costs for your settlement purposes or trial?

OTHER SERVICES:

Medicare Set-Asides
Case Management Services
Legal Nurse Consulting
Attend Independent Medical Exams (IME/DMEs)

**SERVING ATTORNEYS
NATIONWIDE**
OConnellandAssociates.net

**TRADEMARK
Copyright & Patent Searches**

*"Experienced Washington office
for attorneys worldwide"*

FEDERAL SERVICES & RESEARCH:

Attorney directed projects at all Federal agencies in Washington, DC, including: USDA, TTB, EPA, Customs, FDA, INS, FCC, ICC, SEC, USPTO, and many others. Face-to-face meetings with Gov't officials, Freedom of Information Act requests, copyright deposits, document legalization @ State Dept. & Embassies, complete trademark, copyright, patent and TTAB files.

COMPREHENSIVE: U.S. Federal, State, Common Law and Design searches,
INTERNATIONAL SEARCHING

EXPERTS: Our professionals average over 25 years experience each

FAST: Normal 2-day turnaround with 24-hour and 4-hour service available

GOVERNMENT LIAISON SERVICES, INC.
200 N. Glebe Rd., Suite 321
Arlington, VA 22203

Ph: 703-524-8200, Fax: 703-525-8451

Minutes from USPTO & Washington, DC

TOLL FREE: 1-800-642-6564

www.GovernmentLiaison.com
info@GovernmentLiaison.com

non-lawyer paralegal, who happens to be his Cousin E — even though Attorney Y knows that Cousin E is addicted to gambling. Cousin E holds unsupervised access to the firm's trust account and funds in clients' trusts, and Attorney Y knows that Cousin E occasionally funds his gambling from client funds. But Cousin E is family, and he eventually does win and restore clients' funds.

This time, however, Attorney Y learns that Cousin E has stolen all of the Pumpkin Pals' funds for their annual Pumpkin Toss, as well as most of the funds from several client trusts. Attorney Y notifies the Pumpkin Pals and law enforcement, but fails to communicate with or disclose the theft to his other victim-clients. Following his criminal convictions, Cousin E is ordered to make restitution to all of his victim-clients. Attorney Y pays himself and Pumpkin Pals from Cousin E's restitution, but Attorney Y does not notify or pay restitution to his other victim-clients.

Without question, Attorney Y's continuing representation of his clients was materially limited by his loyalty to his family member and personal financial interest in retaining the long-term representation of the Pumpkin Pals.

Conclusion

Because lawyers are human, we have personal interests. But because we are professionals, we must stay attuned for any adverse impact such interests have on our independent professional judgment.

Lawyers with ethical concerns are always welcome to contact the Legal Ethics Helpline or turn to legal ethics resources on Bar Books for answers. Together, we can work to manage hard ethical questions that may arise during the practice of law. ■

Nik Chourey is deputy general counsel for the Oregon State Bar. Reach him at nchourey@osbar.org or connect with him on the bar's Legal Ethics Helpline at (503) 431-6475.

ENDNOTES

1. See OSB Legal Ethics Op 2009-182 (https://www.osbar.org/_docs/ethics/2009-182.pdf).
2. Whether a conflict may be waived by a client's informed written consent turns on the elements of RPC 1.7(b), including — under RPC 1.7(b)(1) — whether the lawyer "reasonably believes" that she "will be able to provide competent and diligent representation" to the client. Reasonableness is

considered under the circumstances, and may be informed by the defined terms of "reasonable" and "reasonably believes." RPC 1.0(k) and RPC 1.0(l), respectively.

3. See https://www.osbar.org/_docs/rulesregs/orpc.pdf.
4. ABA Formal Op. No. 494: Conflicts Arising Out of a Lawyer's Personal Relationship with Opposing Counsel.
5. RPC 1.0(h): "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.
6. RPC 1.0(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. 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.
7. 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.
8. RPC 1.16(a)(1): Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if the representation will result in violation of the Rules of Professional Conduct or other law. Note also that a resignation caused by a current client conflict is governed by UTCR 3.140 (see https://www.courts.oregon.gov/rules/UTCR/2020_UTCR_ch3.pdf).
9. RPC 1.10(a): 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.
10. Suspension is generally appropriate when a lawyer knows of a conflict and does not fully disclose to a client the possible effect of that conflict, and causes injury of potential injury. ABA Standard 4.32.
11. Of course, Attorney A, not his non-lawyer staff, is responsible for Attorney A's compliance with the Rules of Professional Conduct. RPC 5.3.

IMPORTANT NOTICES

The Professional Liability Fund thanks the Oregon State Bar for allowing us to reprint this article and for allowing Oregon lawyers to use and conform its contents for the operations of their firms.

This material is provided for informational purposes only and does not establish, report, or create the standard of care for attorneys in Oregon, nor does it represent a complete analysis of the topics presented. Readers should conduct their own appropriate legal research. The information presented does not represent legal advice. This information may not be republished, sold, or used in any other form without the written consent of the Oregon State Bar Professional Liability Fund except that permission is granted for Oregon lawyers to use and modify these materials for use in their own practices. © 2025 OSB Professional Liability Fund