

**July-August 2007 *Multnomah Lawyer Ethics Focus***

**What's the Issue?  
New OSB Ethics Opinion on Issue Conflicts**

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Imagine this scenario: You are a land use lawyer. A nearby city has adopted a controversial new noise ordinance that appears to have many ambiguities. You have two clients who operate major businesses in that city: one is a company that builds and tests pile-drivers and another is a clinic that assists the chronically sleep deprived. The two businesses are not near each other, but both are planning expansions which will require permit approvals by the city council that will touch on the new ordinance. Your pile-driver client needs a generous decibel count under the ordinance to conduct its quality testing. Your sleep clinic client needs a quiet environment because its patients stay overnight so that clinic doctors can monitor their sleep patterns. Coincidentally, you are scheduled to present their permit requests to the city council on the same day back-to-back. As you are driving to the hearings, you recall that under the “old rules” there was something called an “issue conflict” and wonder what the standards are now under the new Rules of Professional Conduct.

The Oregon State Bar issued a new ethics opinion earlier this year that takes a comprehensive look at issue conflicts under the new rules. The opinion, 2007-177, looks at both what issue conflicts are and what they are not. In doing so, it draws on both the new Oregon RPCs and helpful interpretative guides from

the ABA Model Rules and their accompanying comments from which the Oregon rules are now patterned. 2007-177 is available on the OSB's web site at [www.osbar.org](http://www.osbar.org). Like the opinion, this column looks at both what issue conflicts are and what they are not.

**What Issue Conflicts Are.** Under the former Oregon DRs, issue conflicts were treated as a separate category of conflicts. Former DR 5-105(A)(3) found that issue conflicts only occurred in a relatively narrow setting: “[When a lawyer takes conflicting legal positions for different clients in separate cases and the lawyer actually knows that 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[.]” Again under former DR 5-105(A)(3), conflicts of this kind could be waived by the clients involved.

Like the ABA Model Rules on which they are based, the new Oregon RPCs do not include a specific rule on issue conflicts. Rather, in both issue conflicts are treated as a subset of the general rule on current, multiple client conflicts: RPC 1.7. Under RPC 1.7, current client conflicts exist if: “(1) the representation of one client will be directly adverse to another client; [or] (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[.]”

Unlike the ABA Model Rules, however, Oregon did not adopt the accompanying comments as have many other states. ABA Model Rule 1.7 includes a specific comment (Comment 24) addressing issue conflicts:

“Ordinarily a lawyer may take inconsistent legal positions in different tribunals at different times on behalf of different clients. The mere fact that advocating a legal position on behalf of one client might create precedent adverse to the interests of a client represented by the lawyer in an unrelated matter does not create a conflict of interest. A conflict of interest exists, however, if there is a significant risk that the lawyer’s action on behalf of one client will materially limit the lawyer’s effectiveness in representing another client in a different case. . . . If there is significant risk of material limitation, then absent informed consent of the affected clients, the lawyer must refuse one of the representations or withdraw from one or both matters.”

The new Oregon ethics opinion essentially fills the gap left when we moved from the old rules to the new but did not also adopt the comments. In doing so, 2007-177 takes an approach that is very similar to both the old rule and the current ABA comment. It defines an issue conflict in very narrow terms:

“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 decision.”

Again like both the old rule and the current ABA comment, 2007-177 also finds that most (but not all) issue conflicts are waivable.

**What Issue Conflicts Are Not.** 2007-177 also outlines when issue conflicts do not exist:

“[Issue conflicts do not exist] every time there are two cases pending at the trial court level in different counties or judicial districts. Whether [they exist] ...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 fallback position.”

2007-177 also stresses that issue conflicts do not arise when different lawyers at the same firm in different cases take conflicting legal positions for different clients without knowing of the contrasting positions and their impact: “[I]t would be inappropriate to hold that on pain of discipline, all lawyers at a firm are

chargeable with full 'issue conflict' knowledge of every other lawyer at the firm. Actual knowledge, or at least negligence in not knowing, must first be proved.”

**Summing Up.** To return to our opening example, the lawyer involved should not have an issue conflict as long as the permit applications for the clients involved will not require the lawyer to take contradictory positions on precisely the same point for the different clients. Nonetheless, the example also highlights that as lawyers increasingly specialize in particular areas of the law, the possibility for issue conflicts between clients in those areas has also increased in equal measure.

#### **ABOUT THE AUTHOR**

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