

CONDEMNATION ETHICS

Ethical Considerations in Eminent Domain Litigation

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Mark J. Fucile

Fucile & Reising LLP
115 NW 1st Avenue, Suite 401
Portland, OR 97209
503.224.4895
mark@frllp.com
www.frllp.com

Mark Fucile is a partner with Fucile & Reising LLP, where he focuses on legal ethics, condemnation litigation and product liability defense. In his legal ethics practice, Mark handles professional responsibility, regulatory and attorney-client privilege matters and law firm related litigation for lawyers, law firms and legal departments throughout the Northwest. Mark is a former member of the Oregon State Bar Legal Ethics Committee, is the past chair and a current member of the Washington State Bar Rules of Professional Conduct Committee and is a member of the Idaho State Bar Professionalism & Ethics Section. Mark is a contributing editor-author for the Oregon State Bar's Ethical Oregon Lawyer and the Washington State Bar's Legal Ethics Deskbook. He is also the ethics columnist for the Multnomah Bar's Multnomah Lawyer and the Washington State Bar News and is a regular contributor on law firm risk management to the Oregon State Bar Bulletin. In his condemnation practice, Mark represents property owners in direct and inverse condemnation cases in state and federal court and also has significant experience representing agencies and utilities as condemners. He is the contributing editor for condemnation/inverse condemnation for the Oregon State Bar's Real Estate & Land Use Digest and was the author of a two-part series on Oregon condemnation procedure and valuation in 2004 for the Oregon State Bar's Litigation Journal. Mark is admitted in Oregon, Washington, Idaho, Alaska and the District of Columbia. B.S., Lewis & Clark College, 1979; J.D., UCLA School of Law, 1982.

This paper addresses the substantive ethics rules, opinions and cases in two principal areas of particular relevance to condemnation lawyers: (1) multiple client conflicts; and (2) communications with represented parties.

1. Multiple Client Conflicts

Conflict issues present themselves in three principal ways in condemnation litigation: (1) conflicts among current clients; (2) conflicts between current and former clients; and (3) conflicting legal positions taken for different current clients.¹

¹Multiple client conflict analysis only comes into play if there is, or has been, an attorney-client relationship between the lawyer and the party involved. Oregon does not have a specific bar rule on this point. Rather, the Oregon Supreme Court has articulated a standard that is generally known as the “reasonable expectations of the client” test for determining the presence or absence of an attorney-client relationship:

We hold that, to establish that the lawyer-client relationship exists based on reasonable expectation, a putative client’s subjective, uncommunicated intention or expectation must be accompanied by evidence of objective facts on which a reasonable person would rely as supporting [the] existence of that intent; by evidence placing the lawyer on notice that the putative client had that intent; by evidence that the lawyer shared the client’s subjective intention to form the relationship; or by evidence that the lawyer acted in a way that would induce a reasonable person in the client’s position to rely on the lawyer’s professional advice. The evidence must show that the lawyer understood or should have understood that the relationship existed, or acted as though the lawyer was providing professional assistance or advice on behalf of the putative client * * *.
In re Weidner, 310 Or 757, 770, 801 P2d 828 (1990) (footnote omitted).

In applying this test to corporations and partnerships, separation between the entity and its owners is generally maintained. See OSB Formal Ethics Op 2005-85; *but see In re Banks*, 283 Or 459, 474-75, 584 P2d 284 (1978) (creating an exception where, absent an agreement to the contrary, a lawyer for a corporation owned by a single person or unified family is deemed to represent both the corporation and its owner(s)). With government agencies, the component agencies of a governmental unit (*i.e.*, the State or a city) are generally viewed as an integrated part of the whole for conflict purposes. See OSB Formal Ethics Op 2005-122.

a. Current Client Conflicts

Conflicts of interest among current clients are governed by Oregon Rule of Professional Conduct 1.7(a)²:

- (a) Except as provided in paragraph (b) [waivers], 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 * * *.

Under the RPC 1.7(b), current client conflicts are effectively divided into two categories, nonwaivable and waivable:

- (b) Notwithstanding the existence of a current client 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.

²Oregon adopted new ethics rules effective January 1, 2005. The new Oregon Rules of Professional Conduct, together with updated ethics opinions incorporating the new RPCs, are available on the Oregon State Bar's web site at www.osbar.org.

As defined in RPC 1.7(b)(3), a nonwaivable conflict exists if a single lawyer (or law firm) attempts to represent both sides in the same case or transaction. *See, e.g., In re McKee*, 316 Or 114, 133-35, 849 P2d 509 (1993) (Peterson, C.J., concurring) (decided under the analogous provision of the former Oregon Code of Professional Responsibility and finding a nonwaivable conflict where the attorney involved represented both spouses in a marital dissolution proceeding); *In re Harrington*, 301 Or 18, 29-31, 718 P2d 725 (1986) (disciplining an attorney for representing both the lender and the borrower in the same transaction). More subtly, a nonwaivable conflict also exists when a lawyer represents two clients competing for a fixed pool of resources *and* that fixed pool is not large enough to satisfy each of the clients' individual claims to that fixed pool. *See, e.g., In re Barber*, 322 Or 194, 196, 904 P2d 620 (1995) (finding a nonwaivable conflict where an attorney represented two claimants in an automobile accident case in which the available insurance proceeds were not sufficient to satisfy their claims); *In re Claussen*, 322 Or 466, 478-79, 909 P2d 862 (1996) (holding that a nonwaivable conflict existed when the same law firm represented both the debtor and the principal secured creditor in a bankruptcy proceeding); see *generally* OSB Formal Ethics Ops 2005-72, 2005-158 (discussing the presence or absence of sufficient resources to satisfy claimants in determining whether a nonwaivable conflict exists).

With waivable conflicts under RPC 1.7(b), a lawyer may represent one current client against another current client in unrelated business or litigation matters if *both* clients give their informed consent. "Informed consent" is, in turn, defined in RPC

1.0(g) as “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.” *See also In re Brandt/Griffin*, 331 Or 113, 132-37, 10 P3d 906 (2000) (outlining analogous standards under the former Oregon Code of Professional Responsibility). RPC 1.0(g) requires that conflict waivers include a recommendation that the client seek independent counsel concerning the waiver and the client’s consent be confirmed in writing.

Current client conflicts in condemnation actions can arise both for counsel for the plaintiff government agency and for the defendant property owner and other interest holders.

On the governmental side, current client conflicts arise with greatest frequency if the agency involved uses outside counsel. In that situation, the agency’s outside attorney faces the same range of conflict issues present in any litigation context. *See* OSB Formal Ethics Op 2005-122 (addressing conflict issues generated by governmental clients and the use of advance consent agreements to waive conflicts with government agencies); *see also* ABA Formal Ethics Op 97-405 (1997) (discussing conflicts in representing governmental bodies). Therefore, if outside counsel is asked to represent an agency adverse to one of the outside counsel’s current clients on an unrelated matter, the outside counsel could only proceed if both clients agreed after full disclosure.

On the defense side, conflicts arise most often among the various parties holding interests in the property involved—owners, secured lenders, tenants and easement holders. Under ORS 35.245, a jury in a condemnation proceeding typically renders a general verdict fixing the total compensation due *without* regard to how that fund should be divided among the various parties holding interests in the property. See generally *State Dept. of Trans. v. Montgomery Ward Dev.*, 79 Or App 457, 467-68, 719 P2d 507, *rev denied*, 301 Or 667 (1986). If the defendants cannot agree among themselves on a division of the award, the trial court will then conduct a supplemental equitable proceeding to apportion the defendants' respective shares in the jury's award. See generally *Dept. of Transportation v. Weston Investment Co.*, 134 Or App 467, 473-75, 896 P2d 3 (1995); *State Highway Com. v. Burk*, 200 Or 211, 258-59, 265 P2d 783 (1954). Leases or security agreements often define the parties' rights in the event of condemnation. See generally *Urban Renewal v. Wieder's*, 53 Or App 751, 753-55, 632 P2d 1334, *rev denied*, 292 Or 334 (1981). Therefore, it is frequently possible for a property owner's attorney to represent the owner's secured lender as well because the lawyer's only job is to obtain the largest possible award overall. Contrast *State Dept. of Trans. v. Montgomery Ward Dev.*, *supra*, 79 Or App at 467 (where the owner and secured lender were represented by separate counsel because they had conflicting interests in the total sum to be awarded by the jury even though they had agreed as to their respective percentage shares of the jury's award). But in the absence of an agreement as to the division of the single fund awarded by the jury, the defendants'

divergent interests in that single fund may create a nonwaivable conflict. See OSB Formal Ethics Op 2000-158.

b. Former Client Conflicts

Former client conflicts are governed by RPC 1.9(a) and (c):

- (a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless each affected client gives informed consent, confirmed in writing.

- (c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:
- (1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or
 - (2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

Under RPC 1.9, there are two kinds of former client conflicts. First, former client conflicts arise when a new matter for a current client is the same or is substantially related to a matter the lawyer (or the lawyer's firm) handled for a former client. See *generally* OSB Formal Ethics Ops 2005-11, 2005-17, 2005-174 (discussing former client conflicts under the analogous provision of the former Oregon Code of Professional Responsibility). Second, former client conflicts arise when a new matter for a current client would require the lawyer (or the lawyer's firm) to use a former client's confidential information adversely to the former client. *Id.* Unlike conflicts

between current clients, former client conflicts are always capable of waiver if the clients involved give their informed consent. RPC 1.9(a), (c). Given the sensitivity of the subjects involved, however, it is very difficult as a practical matter to obtain waivers of most former client conflicts.

In the condemnation context, an example of “substantially related” former client conflict is a situation in which a lawyer is asked by a government agency to represent it in condemning property that the lawyer had formerly assisted the present owner in acquiring. *See, e.g., In re Ronnau*, 8 Or DB Rptr 153 (1994) (attorney disciplined under the analogous provision of the former Oregon Code of Professional Responsibility for representing buyers in an amendment of the legal description to a land sale contract in which he had formerly represented the sellers). An example of a former client conflict based on confidential information is where a lawyer had acquired confidential information about environmental conditions affecting a property through an earlier representation of the property’s owner and then the lawyer is asked to represent an agency in the acquisition of that property where the environmental condition would be an issue as to the property’s value. *See, e.g., In re Mammen*, 9 Or DB Rptr 203 (1995) (attorney disciplined under the analogous provision of the former Oregon Code of Professional Responsibility for representing a property owner in a lease transaction in which he had gained confidential information concerning the property involved from the lessees through a prior representation of them).³

³This would also present a “substantially related” former client conflict.

c. Issue Conflicts

“Issue” conflicts arise under RPC 1.7(a)(2) when a lawyer’s representation of one client “will be materially limited by the lawyer’s responsibilities to another client.”

The ABA Committee on Ethics and Professional Responsibility outlined the rationale underlying “issue” conflicts in analyzing ABA Model Rule of Professional Conduct 1.7:

The Committee is * * * of the opinion that if * * * two matters are being litigated in the same jurisdiction, and there is a substantial risk that the law firm’s representation of one client will create a legal precedent, even if not binding, which is likely materially to undercut the legal position being urged on behalf of the other client, the lawyer should either refuse to accept the second representation or (if otherwise permissible) withdraw from the first, unless both clients consent after full disclosure of the potential ramifications of the lawyer continuing to handle both matters. ABA Formal Ethics Op 93-377 at 3-4 (1993).

If a lawyer (and the lawyer’s firm) consistently represents only one side in condemnation litigation, then the likelihood of encountering a positional conflict is comparatively remote. See generally ABA Formal Ethics Op 93-377. But, if a lawyer (or the lawyer’s firm) represents both government agencies and property owners, then issue conflicts are a possibility. *Id.*

For example, a lawyer when representing a city might wish to argue that non-deeded lost access is not compensable. See generally *Dept. of Transportation v. DuPree*, 154 Or App 181, 185-86, 961 P2d 232 (1998); *Curran v. ODOT*, 151 Or App 781, 784-85, 951 P2d 183 (1997). That same lawyer, however, might wish to contend in another case in the same court for a property owner that such an access loss is compensable. See generally *Douglas County v. Briggs*, 34 Or App 409, 413, 578 P2d

1261 (1978), *aff'd*, 286 Or 151, 593 P2d 1115 (1979); *Sweet v. Irrigation Canal Co.*, 198 Or 166, 190, 254 P2d 700, *reh'g den*, 198 Or 202 (1953).

2. Communications with Represented Parties

RPC 4.2 governs communications with represented parties:

In representing a client or the lawyer's own interests, a lawyer shall not communicate or cause another to communicate on the subject of the representation with a person the lawyer knows to be represented by a lawyer on that subject unless:

- (a) the lawyer has the prior consent of a lawyer representing such other person;
- (b) the lawyer is authorized by law or by court order to do so; or
- (c) a written agreement requires a written notice or demand to be sent to such other person, in which case a copy of such notice or demand shall also be sent to such other person's lawyer.

Issues relating to communications with represented parties arise for both governmental and property owners' counsel in condemnation litigation. See *generally* Mark J. Fucile, "Who's Fair Game? Who You Can and Can't Talk to on the Other Side," 66 Oregon State Bar Bulletin 27 (Oct 2005).

a. Government Counsel

As counsel for a public agency in a condemnation case, "contact" issues often arise either in the context of various required notices or in connection with appraisal inspections.

(1) Official Notices

ORS 35.346(3) includes a requirement that a government agency provide at least 15 days advance notice "to the owner" of the property involved in an acquisition of

a planned appraisal inspection. Similarly, ORS 35.346(1) requires pre-condemnation offers be sent “to the owner or party having an interest to purchase the property * * *.” Do these communications fall within the “authorized by law” exception if the attorney for the government agency knows that the property owner is represented by counsel? The law is not entirely clear. *In re Williams*, 314 Or 530, 840 P2d 1280 (1992), involved, in pertinent part, an attorney found to have violated the analogous predecessor to RPC 4.2 by accompanying his mobile home park tenant client to a meeting with the mobile home park landlord provided for under former ORS 90.600(1) (1991) to discuss a rent increase when he knew the landlord was represented by counsel (who was not present at the meeting). At the same time, the Oregon Supreme Court in *Williams* noted that “[t]here may be situations—such as statutes that require the giving of a notice, see, e.g., ORS 20.080—that imply that authorization to make the communication exists, notwithstanding knowledge of the lawyer that the other person is represented by a lawyer.” 314 Or at 539 n.3; *but see* OSB Formal Ethics Ops 2005-6, 2005-144 (noting that the “authorized by law” exception has been construed narrowly). A conservative approach that would stay clear of RPC 4.2 while at the same time complying with the nominal requirements of ORS 35.346(1) and (3) is to direct the notice to the property owner in care of the attorney. This avoids the argument that the agency has somehow failed to comply with the requirements of the condemnation code while at the same time ensures that the communication is directed to the lawyer rather than the represented property owner. *Cf. In re Schenck*, 320 Or 94, 101-02, 879 P2d 863 (1994) (“no contact” rule violated when a lawyer sent a document production request directly to a

represented party with a copy to the party's attorney); *In re Hedrick*, 312 Or 442, 448-49, 822 P2d 1187 (1991) ("no contact" rule violated when a lawyer sent a demand letter directly to a represented party with a copy to the party's attorney).

(2) Appraiser's Inspection

Since the Legislature amended ORS Chapter 35 in 1997, a property owner has had a specific right under ORS 35.346(3) to accompany the government's appraiser on the appraiser's inspection of the property involved in a condemnation case. Given that RPC 4.2 prohibits an attorney from causing one of the lawyer's agents from initiating communications with a represented party as well, a government lawyer cannot direct the appraiser to interview the property owner during the inspection if the property owner's lawyer has not given specific permission for such communication to take place. See OSB Formal Ethics Ops 2005-161 (dealing with State agency personnel in particular), 2005-6 (discussing the "no contact" rule generally). If, however, the property owner *volunteers* a statement to the appraiser that runs counter to the property owner's position at trial, that statement may be considered an admission. See *State Dept. of Transportation v. Jeans*, 80 Or App 582, 585-86, 723 P2d 344 (1986) (noting that a property owner's voluntary statement to an appraiser during the course of an inspection might be admissible as a party admission).

b. Counsel for Private Parties

In many instances, the preparation of a property owner's condemnation case will turn on key land use decisions and regulations encompassed within the records of the very public agency that is acquiring the property involved. This, in turn, raises the

issue of whether the property owner's counsel can obtain such information directly from the agency or whether the attorney must instead channel the request through the agency's counsel. The Oregon State Bar has issued opinions dealing with both records and witness interviews.

(1) Obtaining Records from an Agency

In Formal Ethics Opinion 2005-144, the OSB concluded that because records are available generally under the public records inspection laws, an attorney may obtain a public record directly from an agency in this context *without* notifying the agency's counsel. But the OSB emphasized that the attorney may not use the acquisition of public records in this context as a means to communicate with government agency staff in an otherwise prohibited manner as to the records' substantive content. *Cf. In re Spies*, 316 Or 530, 536, 852 P2d 831 (1993) (lawyer in a land use case sanctioned for communicating directly with a member of the defendant county board of commissioners).

(2) Contacting Employees of Represented Agencies

In Formal Ethics Opinion 2005-152, the OSB concluded that the same general rules that apply to witness interviews and other substantive contacts with current and former employees of corporations (see OSB Formal Ethics Op 2005-80) should be used in the governmental context⁴ as well:

⁴Formal Ethics Opinion 2005-152 is phrased in terms of State agency employees. But there is nothing in the opinion that suggests that its rationale and conclusions would not be applicable to local government agencies as well.

- Absent consent from the agency's lawyer, an adverse party's attorney cannot contact agency management directly.
- Again absent consent, an adverse party's attorney cannot contact nonmanagement employees directly if that employee's conduct is at issue in the case.
- Agency nonmanagement employees whose conduct is not at issue may be contacted directly.
- Former agency employees—regardless of the position they held—may be contacted directly as long as the adverse party's attorney does not inquire as to matters that fall within the attorney-client privilege.

Even with those current and former employees who are “fair game,” however, a lawyer initiating the contact cannot use an interview to invade the agency's attorney-client privilege by asking what the employee discussed with the agency's counsel. See *Brown v. State of Or., Dept. of Corrections*, 173 FRD 265, 269 (D Or 1997) (applying RPC 4.2's predecessor in a State agency context).