

# LAWYER ENGAGES IN BUSINESS TRANSACTION WITH CLIENT

## Reporting to the PLF – No longer required effective January 1, 2016

When you engage in a business transaction with a client, you have an ethical duty to make certain disclosures pursuant to ORPC 1.0(g) and 1.8(a). In prior years under the PLF Primary Claims Made Plan, lawyers were required to provide the PLF with copies of such disclosure letters or risk exclusion of coverage. The reporting requirement to the PLF has been removed for plan year 2016.

**Lawyers are no longer required to provide the PLF with copies of disclosure and consent letters when engaging in business transactions with clients.** Caveat: Your ethical duty of disclosure and consent is unchanged. For the convenience of practitioners, a sample disclosure and consent letter for engaging in business transactions with clients is available below.

## SAMPLE DISCLOSURE LETTER TO CLIENT

[Date]

[Name and Address]

Re: [Subject]

Dear [Name]:

This letter confirms that we have discussed **[specify the essential terms of the business transaction that you intend to enter into with your client and your role in the transaction. Be sure to inform the client whether you will be representing the client in the transaction. This is required by ORPC 1.8(a)(3)].** This letter also sets forth the conflict of interest that arises for me as your attorney because of this proposed business transaction.

The Oregon Rules of Professional Conduct prohibit an attorney from representing a client when the attorney's personal interests conflict with those of the client unless the client consents. Consequently, I can only act as your lawyer in this matter if you consent after being adequately informed. Rule 1.0(g) provides as follows:

(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.

Although our interests presently appear to be consistent, my interests in this transaction could at some point be different than or adverse to yours. Specifically, **[include an explanation which is sufficient to apprise the client of the potential adverse impact on the client of the matter to which the client is asked to consent, and any reasonable alternative courses of action, if applicable].**

Please consider this situation carefully and decide whether or not you wish to enter into this transaction with me and to consent to my representation of you in this transaction. Rule 1.8(a)(2) requires me to recommend that you consult with another attorney in deciding whether or not your consent should be given. Another

attorney could also identify and advise you further on other potential conflicts in our interests.

I enclose an article "Business Deals Can Cause Problems," which contains additional information.

If you do decide to consent, please sign and date the enclosed extra copy of this letter in the space provided below and return it to me.

Very truly yours,

[Attorney Name and Signature]

I hereby consent to the legal representation, the terms of the business transaction, and the lawyer's role in transaction as set forth in this letter:

---

[Client's Signature]

[Date]

Enclosure: "Business Deals Can Cause Problems," by Jeffrey D. Sapiro

#### IMPORTANT NOTICES

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. © [2015] OSB Professional Liability Fund.

***BUSINESS DEALS CAN CAUSE PROBLEMS (Complying With ORPC 1.8(a))***

*By Jeffrey D. Sapiro, Disciplinary Counsel, Oregon State Bar*

Something that clients often lose sight of is that attorneys are not only legal advisors, but are business people as well. It is no secret that most practitioners wish to build a successful practice, rendering quality legal services to their clients, as a means of providing a comfortable living for themselves and/or their families. Given this objective, it is not surprising that many attorneys are attracted to business opportunities outside their practices that may prove to be financially rewarding. The fact that these business opportunities are often brought to an attorney's attention by a client or through involvement in a client's financial affairs is reason to explore the ethical problems that may arise.

ORPC 1.8(a) and 1.0(g) read as follows:

*Rule 1.8 Conflict of Interest: Current Clients: Specific Rules*

*(a) 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.*

*ORPC 1.0 Terminology*

*(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.*

The rationale behind this rule should be obvious. An attorney has a duty to exercise professional judgment solely for the benefit of a client, independent of any conflicting influences or loyalties. If an attorney is motivated by financial interests adverse to that of the client, the undivided loyalty due to the client may very well be compromised. (See also ORPC 1.7 and 1.8(c) and (i)) Full disclosure in writing gives the client the opportunity and necessary information to obtain independent legal advice when the attorney's judgment may be affected by personal interest. Under ORPC 1.8(a) it is the client and not the attorney who should decide upon the seriousness of the potential conflict and whether or not to seek separate counsel.

A particularly dangerous situation is where the attorney not only engages in the business aspect of a transaction, but also furnishes the legal services necessary to put the deal together. In *In re Brown*, 277 Or 121, 559 P2d 884, rev. den. 277 Or 731, 561 P2d 1030 (1977), an attorney became partners with a friend of many years in a timber business, the attorney providing legal services and the friend providing the capital. The business later incorporated, with the attorney drafting all corporate documents, including a buy-sell

agreement permitting the surviving stockholder to purchase the other party's stock. The Oregon Supreme Court found that the interests of the parties were adverse for a number of reasons, including the disparity in capital invested and the difference in the parties' ages, resulting in a potential benefit to the younger attorney under the buy-sell provisions. Despite the fact that the friend was an experienced businessman, the court held that the attorney violated the predecessor to ORPC 1.8(a), DR 5-104(A), because the friend was never advised to seek independent legal advice.

Subsequent to *Brown*, the Supreme Court has disciplined several lawyers for improper business transactions with clients. Among these cases are *In re Drake*, 292 Or 704, 642 P2d 296 (1982), which provides a comprehensive analysis of ORPC 1.8(a)'s predecessor, DR 5-104(A); *In re Montgomery*, 292 Or 796, 643 P2d 338 (1982), in which the fact that the client was a more sophisticated business person than the attorney did not affect the court's analysis; *In re Germundson*, 201 Or 656, 724 P2d 793 (1986), in which a close friendship between the attorney and the client was deemed insufficient reason to dispense with conflict disclosures; and *In re Griffith*, 304 Or 575, 748 P2d (1987), in which the court noted that, even if no conflict is present when a transaction is entered into, subsequent events may lead to a conflict requiring disclosures or withdrawal by the attorney.

Even in those situations where the attorney does not furnish legal services, problems may develop. There is a danger that, while the attorney may feel he or she is merely an investor in a business deal, the client may believe the attorney is using his or her legal skills to protect the client's interests in the venture. Indeed, this may be the very reason the client approached the attorney with a business proposition in the first place. When a lawyer borrows money from a client, there may even be a presumption that the client is relying on the lawyer for legal advice in the transaction. *In re Montgomery*, 292 Or 796, 643 P2d 338 (1982). To clarify for the client the role played by the attorney in a business transaction, ORPC 1.8(a)(3) now provides that a client's consent to the attorney's participation in the transaction is not effective unless the client signs a writing that describes, among other things, the attorney's role and whether the attorney is representing the client in the transaction.

In order to avoid the ethical problems addressed by the conflict of interest rules, the Supreme Court has said that an attorney must at least advise the client to seek independent legal counsel (*In re Bartlett*, 283 Or 487, 584 P2d 296 (1978)). This is now required by ORPC 1.8(a)(2). The attorney should disclose not only that a conflict of interest may exist, but should also explain the nature of the conflict "in such detail so that (the client) can understand the reasons why it may be desirable for each to have independent counsel. . ." (*In re Boivin*, 271 Or 419, 424, 533 P2d 171 (1975)). Risks incident to a transaction with a client must also be disclosed (ORPC 1.0(g); *In re Montgomery*, 297 Or 738, 687 P2d 157 (1984); *In re Whipple*, 296 Or 105, 673 P2d 172 (1983)). Such a disclosure will help ensure that there is no misunderstanding over the role the attorney is to play in the transaction and will help prevent the attorney from running afoul of the disciplinary rule discussed above.

*Reprinted with Permission of Author*