

This outline was created for the July 2006 Oregon bar exam. The law changes over time, so use with caution. If you would like an editable version of this outline, go to www.barexammind.com/outlines.

Ethics

I. Study Hints – unique Oregon areas

- a. Conflicts of interest
- b. Attorney advertising
- c. Likely to be asked:
 - i. COI
 - ii. confidential information
 - iii. use of client property
 - iv. dishonesty rule
 - v. lying client who wants to take stand
- d. Unlikely to be asked:
 - i. Judicial ethics
 - ii. Bar discipline

II. Conflicts of Interest

- a. Client vs. Client conflicts
 - i. Step One: who is a client?
 - 1. person or entity seeking legal services from a lawyer
 - ii. Step Two: Former or Current conflict?
 - 1. Former: client for whom the matter has been completed; closed file
 - 2. Current: client for whom lawyer giving ongoing advice; open file
 - 3. Test: *client's reasonable expectation*
 - iii. Step Three: Resolve the Conflict
 - 1. Current Client Conflict: if accepting new client would violate either the duty of loyalty or the duty of confidentiality, then COI and can't take on new client
 - a. *Duty of Confidentiality*: duty to maintain a client's confidences (everything client tells us) and secrets (everything else we've learned of a confidential nature during course of rep) – aka actual conflict
 - i. Test: did or would lawyer have been *reasonably likely* to learn confidential info about client that he might be required to reveal in repping new client?
 - 1. ie, are the two matters substantially related?
 - 2. Oregon case law says there are two aspects:
 - a. *Matter-specific*: are the two matters the same?
 - b. *Information-specific*: ie, learning something

- b. *Duty of Loyalty*: duty to act in general best interests of client
 - i. Eg, suing a current client
 - 2. Former Client Conflict:
 - a. *Duty owed*: only owe duty of confidentiality to former clients
 - 3. Consent???
 - a. Some conflicts consentable, some not
 - b. *Former client*: always consentable
 - c. *Current client*: NOT waivable; may not even ask to consent to use of confidential information against them
 - i. However, may consent to a breach of duty of loyalty, but not of confidentiality!
 - ii. OREGON: both clients must give consent
 - d. **Full Disclosure & Consent [HUGE]**
 - i. In writing, discussing **three** items:
 - 1. Identify all clients and lawyer's role;
 - 2. discuss the risks of going forward to lawyers zeal & adverse use of information; AND
 - 3. recommend consultation with independent counsel
 - ii. have client sign and return a copy
- b. Specialized Conflicts Issues
 - i. Screens
 - 1. RULE: lawyer and lawyer's new firm can't accept a client if that acceptance would have created a COI had the lawyer remained employed by the former firm
 - 2. OREGON: redefines "former firm"
 - a. Firm that we left at the exact moment we left it!
 - b. And only clear the issues that the client employed the firm for at time lawyer left
 - c. And only to the extent that lawyer did work for that client
 - 3. If still a conflict, then switching lawyer must be screened:
 - a. Can be screened anytime; even in middle of litigation!
 - b. *Procedures for screen*:
 - i. 4 affidavits:
 - 1. lawyer who switches must serve on his former firm an affidavit swearing that he will neither *participate* nor *discuss*
 - a. and a second affidavit to former firm saying he complied
 - 2. member of lawyer's new firm gives affidavit to former firm that he is aware of issue and describe screen procedures
 - a. and a second affidavit saying that the new firm complied

- c. Client vs. Lawyer conflicts: almost always consentable
 - i. **Business transactions** with client and client expects lawyer to exercise *professional judgment*, then:
 - 1. terms of transaction must be “fair and reasonable” to client;
 - 2. terms must be fully disclosed and transmitted to client and in a manner reasonably understood *by client*;
 - 3. client advised in writing to seek independent legal counsel; and
 - 4. client consents in writing to essential terms of transaction and lawyer’s role in transaction
 - ii. **Use of client’s information** by lawyer:
 - 1. not to disadvantage of the client, except as permitted by law or after informed consent
 - iii. **Receiving gifts** from client:
 - 1. can’t solicit substantial gifts or prepare an instrument giving lawyer or relative a substantial gift,
 - a. UNLESS related to client
 - iv. **Media rights**:
 - 1. during rep, can’t get literary or media rights to client’s story
 - v. **Advancing money** to client:
 - 1. only litigation expenses; nothing else
 - vi. **Fees paid by third party**:
 - 1. may accept compensation as long as:
 - a. client provides informed consent;
 - b. no interference with professional relationship; And
 - c. confidential info is protected
 - vii. Acquire **interest in litigation**:
 - 1. only liens or reasonable contingency fee contract permitted
 - d. Lawyer as Witness
 - i. Called by client
 - 1. cannot do it; UNLESS
 - a. uncontested matter
 - b. nature and value of lawyer’s services rendered
 - c. disqualification would work substantial hardship on client
 - d. lawyer is pro se
 - e. another member of firm is called as witness
 - ii. Called by opponent
 - 1. if obvious that lawyer may be called against client, may continue in representation until it IS apparent that lawyer’s testimony is prejudicial OR may be prejudicial to case
 - e. Sex with client
 - i. Just say no to sex with current clients
- III. Confidential Information
- a. Atty-Client Privilege
 - i. A rule of evidence
 - ii. THEREFORE, only applies in COURT OF LAW

- iii. Applies to confidential communications between client and lawyer
- b. Work Product Doctrine
 - i. A rule of discovery
 - ii. Don't talk about on ethics exam
- c. Duty to Maintain Confidences
 - i. Applies to all information relating to representation of client that *would be privileged if we were in a court of law*
 - ii. Applies to "secrets": info lawyer learns in course of representation that fits 3 categories:
 - 1. client requested info be held in confidence
 - 2. disclosure would be embarrassing to client
 - 3. disclosure would likely be detrimental to client
- d. Some special problem areas:
 - i. Documents
 - 1. separate past and present
 - 2. if doc *preexisted* lawyer-client relationship, then likely not privilege
 - 3. if doc made *during* relationship, then was doc made for the lawyer?
 - a. Yes = privileged
 - ii. Crime Exception
 - 1. separate past from future
 - 2. if client seeks advice to commit a crime, then no duty of confidentiality
 - 3. if client merely commits a crime or fraud during course of representation, then that is considered a past crime and therefore is confidential
 - a. Urge client to rectify consequences
 - 4. if client tells lawyer he intends to commit a crime, lawyer has discretion as to whether disclose
 - a. if chooses to disclose, may disclose:
 - i. confidential info that evidences intent to commit crime; and
 - ii. confidential info needed to prevent crime
 - iii. Disclosure to Prevent Bodily Injury
 - 1. **regardless of whether activity constitutes a crime,**
 - a. a lawyer MAY reveal info relating to rep to prevent *certain* death or *substantial* bodily harm
 - iv. Disclosure for Lawyer's self-defense
 - 1. malpractice or billing dispute
 - v. Duty to Report Child Abuse
 - 1. Layer has
 - a. Reasonable cause to believe that
 - b. Any child with whom lawyer comes in contact
 - c. Has suffered abuse

- d. Or that any person with whom lawyer contacts has abused a child,
- e. Lawyer must immediately report or cause to report
- 2. Child Abuse
 - a. Physical assault/injury
 - b. Any injury at variance with cause given
 - c. Mental cruelty
 - d. Sex abuse
 - e. Negligent mistreatment if likely to endanger health
 - f. EXCEPTIONS:
 - i. Does not include reasonable discipline
 - ii. **Duty to report does not extend to:**
 - 1. info protected by atty-client privilege; AND
 - 2. communications in course of rep if info would be detrimental to client

IV. Lawyer Trust Accounts

- a. Trust account is clearly defined and designated as a “trust account” and separate from any office account and used for client’s money only
- b. Seven principles:
 - i. Give money back to client
 - ii. If client wants you to have money, put in LTA
 - iii. If client wants you to hold property, perform as a professional bailee
 - iv. If money belongs to you, take it out of LTA right away
 - v. If ownership disputed, leave in LTA
 - vi. Lawyer must promptly account to and notify client of any changes
 - vii. Only lawyer money in LTA to cover bank fees
- c. Special situation: fees and costs paid in advance
 - i. Any sums paid in advance are presumed to belong to client and put in LTA and are presumed to be drawn down as work progresses
 - ii. Fees deposited in office account if written agreement that fees constitute a non-refundable retainer

V. Dishonesty [**always mention**]

- a. Lawyer can’t engage in dishonesty, fraud, deceit, or misrepresentation that *reflects adversely* on the lawyer’s *fitness to practice* law.
- b. Is a violation even if act proscribed by another provision in ethics code
- c. EXCEPTIONS:
 - i. Lawyer may give advice regarding covert criminal or civil investigations without violating his duty of honesty
 - ii. Good Faith Needed: lawyer believes there is a reasonable possibility for illegal activity

VI. Client Who Intends to Lie as a Witness

- a. Lying in court is perjury and should be treated as a future crime with discretionary disclosure
- b. Steps:
 - i. Lawyer must attempt to dissuade client from lying;
 - ii. If client persists, lawyer must withdraw

- c. Even if arguable legal, lawyer may refuse to go forward if lawyer believes the conduct to be illegal
- d. If lawyer knows of the lie and goes forward, then client has violated:
 - i. Using perjured testimony
 - ii. Creating false evidence
 - iii. Dishonesty duty
- e. Witness who HAS already LIED
 - i. Lawyer realizes client has lied on stand
 - ii. If evidence is *material*, then
 - iii. Lawyer shall take reasonable remedial measures, including disclosure to tribunal

VII. OTHER AREAS THAT MAY BE TESTED

- a. Advertising
 - i. RULE: prohibits advertisements that are false or misleading
 - 1. eg, claims of results; comparing quality of lawyer; improper influence
 - ii. Direct Mail Rule:
 - 1. unsolicited, written communication to person known to be in need of legal services
 - 2. bottom of envelop and each page of communication must say “advertisement” in at least **14-point bold type**
- b. In-Person Solicitation
 - i. Personal contact; live personal contact; real-time electronic communication *if done* with purpose of seeking a personal relationship
 - ii. RULE: Lawyer may not solicit professional employment from client if *significant* motive is lawyer’s *pecuniary* gain
 - 1. EXCEPTIONS:
 - a. May solicit other lawyers
 - b. May solicit relatives
 - c. May solicit close friends
 - d. *May solicit our current and former clients* (but not non-clients)
 - iii. Contact prohibited when:
 - 1. purpose of contact is coercion, duress, or harassment; OR
 - 2. lawyer knows or should know that person’s physical/emotional/mental state is such that person could not exercise reasonable judgment in deciding to employ lawyer
 - iv. Paying Other to Find clients:
 - 1. prohibited
 - 2. EXCEPTION:
 - a. Lawyers permitted to find and refer clients and gain referral fee, if
 - b. Client informed AND total fee not excessive
- c. Fees
 - i. Cannot be “clearly excessive”

- ii. Factors to determine reasonableness of fee:
 - 1. time and labor required
 - 2. skill of lawyer
 - 3. difficulty of questions
 - 4. results obtained
 - 5. precluded lawyer from other requirements
 - 6. fixed or contingent
 - iii. **contingent fees**
 - 1. must be in writing
 - a. plain and simple language
 - b. give client 24-hour right to rescind
 - 2. No contingency fees in
 - a. Criminal cases
 - b. Domestic relations
- d. No-contact Rule
 - i. Communication with represented parties
 - 1. must get permission from adverse attorney
 - 2. to communicate about *subject* of the representation
 - 3. lawyer must know other side is represented
 - ii. Communication with UNrepresented parties
 - 1. permitted, so long as does not include giving legal advice except to get a lawyer
 - 2. don't imply that you are disinterested
- e. Threatening criminal prosecution
 - i. Lawyer in civil matter to obtain an advantage may NOT threaten to call cops, UNLESS
 - 1. lawyer reasonably believes the charge to be true; AND
 - 2. purpose of threat is to induce reasonable action to make good the wrong that is the subject of the charge
- f. Trial witnesses
 - i. Can't pay witnesses to testify (even expert)
 - 1. May pay for time or professional service
 - ii. Lawyers may not advise witness to hide to avoid testifying
- g. Trial publicity
 - i. Lawyer shall not make extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if:
 - 1. lawyer knows/should know it will have a substantial likelihood of materially prejudicing the jury
- h. Unauthorized practice
 - i. Two ways a licensed atty may violate:
 - 1. practice law in jurisdiction where not admitted; AND
 - 2. assisting a person not a member of Oregon Bar
 - ii. No partnerships with nonlawyers if
 - 1. any partnership activities consist of practice of law
- i. Supervisory & Subordinate Lawyers

- i. **Subordinate lawyer** does NOT violate RPC if acts in accordance with supervisory lawyer's reasonable resolution of an arguable question of professional duty
 - ii. **Supervisory lawyer** is in violation if he orders or ratifies the conduct involved, or is a partner and has supervision and knows of conduct and fails to take reasonable remedial action
- j. General duties to clients
 - i. Competency: knowledge skill and prep reasonably necessary to rep
 - ii. Diligence
 - iii. Communication: keep reasonably informed
- k. Termination of Representation
 - i. Protect Client and Return Unearned Fees and property
 - 1. reasonable notice of withdrawal
 - 2. give client time to find new lawyer
 - ii. Mandatory Withdrawal:
 - 1. if rep would involve a violation of any RPC
 - 2. if lawyer is fired
 - 3. if lawyer's physical or mental condition requires it
 - iii. Permissive Withdrawal:
 - 1. may withdrawal for any good cause shown
 - a. not getting paid
 - b. client not taking advice
 - c. client wants you to act unreasonably
- l. Duty to Report Misconduct
 - i. Having knowledge that
 - ii. Another lawyer has violated rule
 - iii. That raises a substantial question as to
 - iv. That lawyer's honesty, trustworthiness, or fitness as a lawyer
 - v. MUST inform the Bar

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