

## FORMAL OPINION NO 2005-17

### Conflicts of Interest, Former Clients: Use of Confidential Information

#### Facts:

Lawyer A prepared a will for Client A. After the lawyer-client relationship between Lawyer A and Client A terminated, Lawyer A was asked to assist another client in selling a boat to former Client A.

Lawyer B prepared a will for Client B. After the lawyer-client relationship between Lawyer B and Client B terminated, Lawyer B was asked by another client to collect money from Client B.

Lawyer C represented Client C in marital dissolution proceedings. After those proceedings concluded and the lawyer-client relationship ended, Lawyer C was asked to represent a subsequent spouse of Client C in dissolution proceedings against Client C.

#### Question:

May Lawyer A, Lawyer B, and Lawyer C undertake these representations without disclosure to and consent from their former and current clients?

#### Conclusion:

See discussion.

#### Discussion:

The rules that are relevant to this matter are Oregon RPC 1.6, Oregon RPC 1.8(b), and Oregon RPC 1.9. Oregon RPC 1.6<sup>1</sup> provides:

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<sup>1</sup> In addition, ORS 9.460(3) provides that a lawyer “shall . . . [m]aintain the confidences and secrets of the attorney’s clients consistent with the rules of professional conduct established pursuant to ORS 9.490.” Oregon RPC 1.6 uses the phrase *information relating to the representation of a client* to describe the information covered by the phrase *confidences and secrets* in former DR 4-101. See Oregon RPC 1.0(f).

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

Oregon RPC 1.8(b) provides:

A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, confirmed in writing, except as permitted or required under these Rules.

Oregon RPC 1.9 provides:

(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.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client:

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter; 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.

See *In re Brandsness*, 299 Or 420, 702 P2d 1098 (1985), discussing and creating the matter-specific and information-specific former-

client conflicts categories used in subsequent cases and in OSB Formal Ethics Op No 2005-11.<sup>2</sup>

None of the situations described above presents a representation adverse to a former client involving the same transaction or legal disputes. Thus, there is no matter-specific conflict. *Cf.* OSB Formal Ethics Op No 2005-11. It follows that unless the lawyers have acquired some confidential information in representing the former clients that could be used to materially advance the new client's position, there is no information-specific conflict and the matters are not substantially related within the meaning of Oregon RPC 1.9(a). Similarly, unless the lawyers have information from the prior representations that could be used to the material disadvantage of their former clients in violation of Oregon RPC 1.9(c), the lawyers may accept those representations without the consent of the former or new clients.

The facts do not suggest that Lawyer A would have learned any confidential information from Client A that would be material and detrimental to Client A if used in the boat-sale transaction. If material confidential information that could be used adversely to the former client was obtained, however, informed consent from both the current and former clients would be necessary. To be effective, the informed consent must be confirmed in writing and would have to include a discussion of the potential for adverse use of the confidential information and the possible effect of that use on the former client. *Cf.* Oregon RPC 1.0(h).<sup>3</sup> *See also* OSB Formal Ethics Op No 2005-11.

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<sup>2</sup> For additional Oregon ethics opinions on former-client conflicts questions, see OSB Formal Ethics Op No 2005-28 (conflict of interest in representing both sides in adoption); OSB Formal Ethics Op No 2005-62 (representation of original and successor personal representatives); OSB Formal Ethics Op No 2005-120 (rev 2015) (former and current conflicts of interest); OSB Formal Ethics Op No 2005-128 (rev 2016) (conflict of interests when lawyer changes firms); OSB Formal Ethics Op No 2005-174 (former client conflict in public defender organization).

<sup>3</sup> Oregon RPC 1.0(g) provides:

“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

There is a possibility that in the course of preparing Client *B*'s will, Lawyer *B* obtained information about Client *B*'s assets that could be used to Client *B*'s detriment in the subsequent collection action. If so, Lawyer *B* may not accept the representation of Client *B* without informed consent, confirmed in writing, of both the current and former clients.

If Lawyer *C* gained material information through the prior representation of Client *C* that is not otherwise known to the spouse who subsequently sought to employ Lawyer *C* and that could be used to former Client *C*'s disadvantage in the new matter, Lawyer *C* could not represent the spouse without informed consent, confirmed in writing, of both the current and former clients. There is no reason to apply the information-specific category if, in fact, the spouse already knows the information in question. *Cf.* OEC 503(4)(e) (no privilege between jointly represented clients who share a lawyer and who subsequently have a falling out).

**Approved by Board of Governors, August 2005.**

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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.

*See* Peter R. Jarvis, Mark J. Fucile & Bradley F. Tellam, *Waiving Discipline Away: The Effective Use of Disclosure and Consent Letters*, 62 OSB Bulletin 69 (June 2002).

COMMENT: For additional information on this general topic and related subjects, see *Portland Gen. Elec. Co. v. Duncan, Weinberg, Miller & Pembroke, P.C.*, 162 Or App 265, 986 P2d 35 (1999) (former-client conflicts of interest and disqualification motions filed as result thereof); *The Ethical Oregon Lawyer* § 10.2 to § 10.2-1(b) (multiple-client conflicts rules) (OSB Legal Pubs 2015); *Restatement (Third) of the Law Governing Lawyers* §§ 121–124, 128–132 (2000) (supplemented periodically); and ABA Model RPC 1.9.