

FORMAL OPINION NO 2005-62

Conflicts of Interest, Current and Former Clients: Representation of Original and Successor Personal Representatives

Facts:

Lawyer represents First Personal Representative. After First Personal Representative resigns, Second Personal Representative is appointed.

Questions:

1. May Lawyer represent Second Personal Representative?
2. If Lawyer does not represent Second Personal Representative, may Lawyer represent First Personal Representative in pursuing the claim for fees and expenses against the estate?
3. If Lawyer represents Second Personal Representative and does not continue to represent First Personal Representative, may Lawyer represent Second Personal Representative in opposing such a claim?

Conclusions:

1. Yes, qualified.
2. Yes.
3. No, qualified.

Discussion:

Under Oregon law, a lawyer for a personal representative represents the personal representative and not the estate or the beneficiaries as such. *See, e.g.*, ORS 113.135; *In re Phelps*, 306 Or 508, 517, 760 P2d 1331 (1988); *In re Howard*, 304 Or 193, 204, 743 P2d 719 (1987); ORS 114.305(18) (personal representative is entitled to “[e]mploy qualified persons, including attorneys, . . . to advise and assist the personal representative). *Cf. In re Stauffer*, 327 Or 44, 956 P2d 967 (1998); *Grievance Comm., Wyoming State Bar v. Riner*, 765 P2d 925, 927 (Wyo 1988);

Lasky, Haas, Cohler & Munter v. Superior Court, 172 Cal App 3d 264, 218 Cal Rptr 205, 216 (Ct App 1985). The personal representative undoubtedly owes a fiduciary duty to the estate and its beneficiaries. The lawyer for the personal representative owes a similar duty to help the personal representative fulfill his or her obligations to the estate and its beneficiaries and to advise the personal representative about any conflicts of interest or other problems that the personal representative may face in the discharge of his or her duties. *Cf. Roberts v. Fearey*, 162 Or App 546, 986 P2d 690 (1999) (former trustee’s lawyer owed no duty to protect trust or beneficiaries from economic losses from former trustee’s questionable loans). Nevertheless, the personal representative’s lawyer is still just that—the *personal representative’s* lawyer.

It follows that because First Personal Representative was Lawyer’s client, Lawyer may ethically continue to represent First Personal Representative after First Personal Representative no longer holds that position. On the other hand, and absent a conflict of interest, there is no reason Lawyer cannot represent Second Personal Representative just because Lawyer has also represented First Personal Representative.

With respect to the representation of Second Personal Representative, Oregon RPC 1.9 provides, in pertinent part:

(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 interest are materially adverse to the interests of the former client unless each affected client gives informed consent,¹ confirmed in writing.

....

¹ The applicable definition of *informed consent* is set forth in Oregon RPC 1.0(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.

(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.

Representing Second Personal Representative against First Personal Representative in First Personal Representative's claim to recover fees and expenses would be substantially related to Lawyer's previous representation of First Personal Representative as a "matter-specific" former-client conflict, if not also an "information-specific" conflict. Lawyer therefore could not represent Second Personal Representative in the defense of such a claim unless First Personal Representative gave informed consent, confirmed in writing. See OSB Formal Ethics Op No 2005-11 and OSB Formal Ethics Op No 2005-17, discussing current- and former-client conflicts of interest, respectively.

Approved by Board of Governors, August 2005.

COMMENT: For additional information on this general topic and related subjects, see *The Ethical Oregon Lawyer* § 5.3-4 (identifying the client in estate and trust situations), § 6.2-4 (duration of duty of confidentiality), § 10.2-1(a) (matter-specific former-client conflicts), § 10.2-2(e)(6) (estate and trust conflicts), § 16.2-2(b) (exceptions to the privity requirement), § 16.4-11(b) (estate administration) (OSB Legal Pubs 2015); *Restatement (Third) of the Law Governing Lawyers* §§ 14 cmt f, 51 cmt f (2000) (supplemented periodically); and ABA Model RPC 1.9.

