

FORMAL OPINION NO 2005-70

[REVISED 2015]

Lawyer Changing Firms: Duty of Loyalty

Facts:

Lawyer is an associate or partner at Firm A. Lawyer is considering leaving Firm A and going to Firm B.

Questions:

1. Before Lawyer notifies Firm A, may Lawyer inform clients for whom Lawyer does work at Firm A of Lawyer's intention to go to Firm B?

2. If Lawyer leaves Firm A and joins Firm B, may Lawyer take the files of clients for whom Lawyer has done or is doing work?

3. After Lawyer leaves, may Lawyer personally contact clients for whom Lawyer did work while at Firm A to solicit their business for Firm B?

Conclusions:

1. See discussion.
2. Yes, qualified.
3. Yes, qualified.

Discussion:

1. *Contact with Clients While Still at Firm A.*

The primary duty of all lawyers is the fiduciary duty that lawyers owe to their clients. *Cf.* OSB Formal Ethics Op No 2005-26. Depending on the nature and status of Lawyer's work, this duty may well mean that advance notification is necessary to permit the clients to decide whether they wish to stay with Firm A, to go with Lawyer to Firm B, or to pursue some other alternative.

However, Lawyer's fiduciary duty to Firm A may require Lawyer to give notice to Firm A of Lawyer's intent to change firms prior to contacting clients of Firm A. *See* Pennsylvania Ethics Op No 2007-300 (noting a departing lawyer may have a duty to notify old firm prior to substantive discussion about association with another firm). As this duty depends on specific facts, we cannot say whether the duty of advance notice exists here.¹

Lawyer owes duties to Firm A, Lawyer's current firm, arising out of the contractual, fiduciary, or agency relationship between Lawyer and Firm A. This contractual, fiduciary, or agency duty might be violated if, while still being compensated by Firm A, Lawyer endeavors to take clients away from Firm A. *Cf.* OSB Formal Ethics Op No 2005-60; ABA Formal Ethics Op No 99-414; *Joseph D. Shein, P.C. v. Myers*, 394 Pa Super 549, 576 A2d 985 (1990); *Adler, Barish, Daniels, Levin & Creskoff v. Epstein*, 482 Pa 416, 393 A2d 1175, 1182–86 (1978).² If Lawyer's conduct would, under the circumstances, amount to "conduct involving dishonesty, fraud, deceit or misrepresentation that reflects adversely on the lawyer's fitness to practice law" in violation of Oregon RPC 8.4(a)(3), Lawyer would be subject to discipline. Absent specific facts, we cannot say whether that would be the case here.

¹ For example, while Lawyer would generally notify Firm A before contacting clients, Lawyer might not notify Firm A if Lawyer believes Firm A will engage in obstructive conduct preventing Lawyer from contacting clients or transitioning to Firm B. If Lawyer is able to notify Firm A in advance, Lawyer and Firm A may send a joint notice to clients to permit clients to decide how to continue their representation. Some states require joint notification to clients from both the old firm and the departing lawyer. *See* Virginia RPC 5.8; Florida RPC 4-5.8. We do not express an opinion about whether joint notification is required in Oregon.

² Lawyer and Firm A should be aware of their ethical obligations under Oregon RPC 5.6 (prohibiting restrictions on right to practice) and Oregon RPC 1.16(d) (lawyer shall take reasonably practicable steps to protect client upon terminating representation). For example, Lawyer and Firm A should not engage in behavior that prejudices client during transfer from Firm A to Firm B.

Regardless of the contractual, fiduciary, or agency relationship between Lawyer and Firm A, however, it is clear under Oregon RPC 8.4(a)(3) that Lawyer may not misrepresent Lawyer's status or intentions to others at Firm A. *See In re Smith*, 315 Or 260, 843 P2d 449 (1992); *In re Murdock*, 328 Or 18, 968 P2d 1270 (1998) (although not expressly written, implicit in disciplinary rules and in duty of loyalty arising from lawyer's contractual or agency relationship with his or her law firm is duty of candor toward that law firm). *Cf. In re Hiller*, 298 Or 526, 694 P2d 540 (1985); *In re Houchin*, 290 Or 433, 622 P2d 723 (1981).

2. *Control over Client Files and Property.*

Oregon RPC 1.15-1(a), (d), and (e) provide, in pertinent part:

(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession separate from the lawyer's own property. Funds, including advances for costs and expenses and escrow and other funds held for another, shall be kept in a separate "Lawyer Trust Account" maintained in the jurisdiction where the lawyer's office is situated. Each lawyer trust account shall be an interest bearing account in a financial institution selected by the lawyer or law firm in the exercise of reasonable care. Lawyer trust accounts shall conform to the rules in the jurisdictions in which the accounts are maintained. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation.

....

(d) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

(e) When in the course of representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate

by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.

Pursuant to these sections, and assuming that Firm A does not have a valid and enforceable lien on any client property for unpaid fees, Firm A must promptly surrender client property to Lawyer, if the clients so request. *Cf.* OSB Formal Ethics Op No 2005-60; OSB Formal Ethics Op No 2005-90; OSB Formal Ethics Op No 2005-125.³

With respect to any portion of the file that does not constitute client property, it is necessary to consider Oregon RPC 1.16(d):

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers, personal property and money of the client to the extent permitted by other law.

As a practical matter, and assuming again that Firm A does not have a valid and enforceable lien, the only way to “protect a client's interests” would be to turn over all parts of the file that a client might reasonably need. See OSB Formal Ethics Op No 2005-125, regarding payment for photocopy costs and the identification of certain documents that may need to be provided to a client who requests them.

³ As noted in OSB Formal Ethics Op No 2005-60, Firm A may not insist that clients physically pick up their files in person if Firm A receives written directions from the clients to send the files elsewhere. In the period of time before receiving a client's decision about who will handle a matter, neither Firm A nor Lawyer should deny each other access to information about a client or a matter that is necessary to protect a client's interests. *Cf.* Oregon RPC 1.1 (lawyer shall provide competent representation to client; competent representation requires legal knowledge, skill, thoroughness, and preparation reasonably necessary for representation); Oregon RPC 1.3 (lawyer shall not neglect legal matter entrusted to lawyer).

3. *Solicitation of Former Clients.*

The Oregon Rules of Professional Conduct generally do not prohibit Lawyer from soliciting the clients of other lawyers.⁴ Although in-person or telephone solicitation is generally prohibited by Oregon RPC 7.3(a),⁵ Oregon RPC 7.3(a)(2) contains an exception for former clients, subject to the limitations in Oregon RPC 7.3(b)(3).⁶ Clients for whom Lawyer worked while at Firm A are Lawyer's former clients.

⁴ Lawyer may have fiduciary obligations to Firm A that may affect Lawyer's ability to solicit clients at certain times. *See also Restatement (Third) of the Law Governing Lawyers* § 9 (2000) (supplemented periodically).

⁵ Oregon RPC 7.3(a) provides:

(a) A lawyer shall not by in-person, live telephone or real-time electronic contact solicit professional employment when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain, unless the person contacted:

(1) is a lawyer; or

(2) has a family, close personal, or prior professional relationship with the lawyer.

⁶ Oregon RPC 7.3(b) provides:

(b) A lawyer shall not solicit professional employment by written, recorded or electronic communication or by in-person, telephone or real-time electronic contact even when not otherwise prohibited by paragraph (a), if

(1) the lawyer knows or reasonably should know that the physical, emotional or mental state of the target of the solicitation is such that the person could not exercise reasonable judgment in employing a lawyer;

(2) the target of the solicitation has made known to the lawyer a desire not to be solicited by the lawyer; or

(3) the solicitation involves coercion, duress or harassment.

Lawyer also may solicit the former clients in writing if the requirements of Oregon RPC 7.1⁷ and Oregon RPC 7.3 are met.

Approved by the Board of Governors, September 2015.

⁷ Oregon RPC 7.1 provides:

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

COMMENT: For additional information on this general topic and other related subjects, see *The Ethical Oregon Lawyer* § 12.4-1 (handling and distributing client property), § 12.4-2 (client files), § 13.3-2(b) (lawyer's duty to the firm), § 13.3-4(b) to § 13.3-4(b)(2) (lawyers leaving a firm) (OSB Legal Pubs 2015); *Restatement (Third) of the Law Governing Lawyers* §§ 9(3), 16, 33, 43, 44-46 (2000) (supplemented periodically); ABA Model RPC 1.1; ABA Model RPC 1.3; ABA Model RPC 1.15-1.16(d); ABA Model RPC 7.3(a)-(b); and ABA Model RPC 8.4(c). See also Washington Advisory Op No 1702 (1997) (available at <www.wsba.org/resources-and-services/ethics/advisory-opinions>).