

## **FORMAL OPINION NO 2005-110**

[REVISED 2016]

### **Conflicts of Interest, Former Clients: Former Client as Adverse Witness**

#### **Facts:**

Lawyer formerly represented Expert Witness, who is employed by the state and who often testifies as an expert witness on behalf of the state in criminal trials. During the course of representing Expert Witness, Lawyer learned of wrongdoing by Expert Witness in the performance of Expert Witness's official duties. Lawyer's representation of Expert Witness is now concluded.

Lawyer is subsequently asked to represent Defendant, who is charged with a crime. Lawyer learns that Expert Witness will be called by the state to testify as an expert witness in the prosecution of Defendant.

#### **Question:**

May Lawyer undertake to represent or continue to represent Defendant in a criminal case in which Expert Witness will be a witness for the state?

#### **Conclusion:**

No, qualified.

#### **Discussion:**

Oregon RPC 1.6 provides, in pertinent part:

(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).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to disclose the intention of the lawyer's client to commit a crime and the information necessary to prevent the crime;

(2) to prevent reasonably certain death or substantial bodily harm;

(3) to secure legal advice about the lawyer's compliance with these Rules;

(4) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

(5) to comply with other law, court order, or as permitted by these Rules . . . .

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 interests are materially adverse to the interests of the former client 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.

Oregon RPC 1.0(b) and (g) provide:

(b) "Confirmed in writing," when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. . . . If it is not

feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.

....

(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 question raised herein may properly be analyzed from the vantage point of either Oregon RPC 1.6 or Oregon RPC 1.9. *See also* OSB Formal Ethics Op No 2005-17.

A lawyer is not required to decline employment or to withdraw from a case merely because a former client will testify as an adverse witness. However, Oregon RPC 1.6 prohibits Lawyer from disclosing information learned from Expert Witness except with informed consent from Expert Witness, and Oregon RPC 1.9(c) simply prohibits the disclosure if the information will be used to Expert Witness’s disadvantage. Oregon RPC 1.9(a) also prohibits Lawyer from representing Defendant absent Expert Witness’s informed consent, confirmed in writing, because Lawyer’s possession of confidential information about Expert Witness’s wrongdoing that is relevant to the new matter makes the current and former matter substantially related.<sup>1</sup> *See* OSB Formal Ethics Op No 2005-11. *Cf. State v. Riddle*, 330 Or 471, 8 P3d 980 (2000); *In re Howser*, 329 Or 404, 987 P2d 496 (1999); *United States v. Moscony*, 927 F2d 742 (3d Cir 1991).

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<sup>1</sup> Matters are *substantially related* for purposes of Oregon RPC 1.9 if they involve the same transaction or legal dispute or if there is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client’s position in the subsequent matter. ABA Model Rule 1.9 cmt [3].

It is also important to note, that if something is generally known<sup>2</sup>, but adverse to a former client, an attorney may be able to use that information against the former client. Oregon RPC 1.9(c)(1). Although the Oregon Supreme Court has not addressed this issue, courts in other jurisdictions have concluded that knowing a former client's conviction history would be generally known and would not be enough to disqualify the

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<sup>2</sup> This phrase *generally known* is not defined in the Oregon Rules of Professional Conduct, the Model Rules, or any accompanying comments. Because of this, the following *Restatement* definition of *generally known* is a good reference:

Whether information is generally known depends on all circumstance relevant in obtaining the information. Information contained in books or records in public libraries, public-record depositories such as government offices, or in publicly accessible electronic-data storage is generally known if the particular information is obtainable through publicly available indexes and similar methods of access. Information is not generally known when a person interested in knowing the information could obtain it only by means of special knowledge or substantial difficulty or expense. Special knowledge includes information about the whereabouts or identity of a person or other sources from which the information can be acquired, if those facts are not themselves generally known.

*Restatement (Third) of the Law Governing Lawyers*, § 59 cmt d (2001). Courts have allowed the use of information that is generally known against former clients because the point for requiring confidentiality no longer exists. ABA Center for Professional Responsibility, *A Legislative History: The Development of the ABA Model Rules of Professional Conduct 1982-2005*, 220 (2006) (reviewing the history of Model RPC 1.9). A case law example of what was found to be generally known and what is not can be found in *Cohen v. Wolgin*, No CIV A 87-2007, 1993 WL 232206 (ED Pa, June 24, 1993), in which the court found magazine and newspaper articles, court pleadings, published court decisions, and public records in government offices to be generally known information, while pleadings filed under seal and records of an international court are not. However, just because the information is publicly available does not mean that the information is generally known. *In re Adelpia Communications Corp.*, No 02-41729REG, 04 Civ 2192DAB, 2005 WL 425498 (SDNY, Feb 16, 2005) (list of properties owned by particular parties was not generally known information; information was publicly available, but would require substantial difficulty or expense to produce a list of the properties owned by the parties and related entities).

attorney. *See State v. Mancilla*, No A06-581, 2007 WL 2034241 (Minn Ct App July 17, 2007); *State v. Sustaita*, 183 Ariz 240, 902 P2d 1344 (Ct App 1995); *United States v. Valdez*, 149 FRD 223 (D Utah 1993). The reasoning for criminal convictions to be generally known is because they are part of the public record that require no expertise or expense to access them. *Mancilla*, at \* 8.

**Approved by Board of Governors, November 2016.**

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COMMENT: For additional information on this general topic and other related subjects, see *The Ethical Oregon Lawyer* § 6.2-1 to § 6.2-4 (components of duty of confidentiality), § 6.3-1 (client consent), § 10.2 to § 10.2-2(c) (multiple-client conflicts rules) (OSB Legal Pubs 2015); *Restatement (Third) of the Law Governing Lawyers* §§ 59–60, 62, 121–122, 129, 132 (2000) (supplemented periodically); ABA Model RPC 1.0(b), (e); ABA Model RPC 1.6–1.7; and ABA Model RPC 1.9.