

FORMAL OPINION NO 2005-114

Conflicts of Interest, Current Clients: City Councilor or Mayor, Lawyer's Associate Acting as Criminal Defense Counsel

Facts:

Lawyer is an elected city councilor or mayor in the city where Lawyer practices law. Members of Lawyer's law firm represent defendants who are charged with violating state criminal statutes. Members of the city police department investigate, arrest, and testify in some of these cases. The city council does not hire the police officers and is assumed not to be in possession of any confidential information of the city that would be material to the defendants' cases.

Question:

May members of Lawyer's law firm represent criminal defendants when a city police officer may be a witness?

Conclusion:

Yes, qualified.

Discussion:

Oregon RPC 1.7 provides:

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a current conflict of interest. A current conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client;

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer; or

(3) the lawyer is related to another lawyer, as parent, child, sibling, spouse or domestic partner, in a matter adverse to a person

whom the lawyer knows is represented by the other lawyer in the same matter.

(b) Notwithstanding the existence of a current conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not obligate the lawyer to contend for something on behalf of one client that the lawyer has a duty to oppose on behalf of another client; and

(4) each affected client gives informed consent, confirmed in writing.

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.

See also Oregon RPC 1.10(a):

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless the prohibition is based on a personal interest of the prohibited lawyer or on Rule 1.7(a)(3) and does not present a significant risk of mate-

rially limiting the representation of the client by the remaining lawyers in the firm.

Oregon RPC 1.7(a)(1) does not apply because the city is not a client of Lawyer or the firm. Oregon RPC 1.7(a)(2) also does not apply merely because Lawyer or another member of Lawyer's firm may cross-examine a police officer who is an employee of the city. *Cf.* OSB Formal Ethics Op No 2005-102 (rev 2015). Lawyer should be mindful, however, of any personal relationships with police officers that might give rise to a conflict under Oregon RPC 1.7(a)(2) and obtain the client's informed consent, confirmed in writing as necessary.

On the facts as presented, representation of the criminal defendants also would not violate Oregon RPC 1.11(c) and (d), which provide:

(c) Except as the law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. As used in this Rule, the term "confidential government information" means information that has been obtained under governmental authority and which, at the time this Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose and which is not otherwise available to the public. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is timely screened from any participation in the matter substantially in accordance with the procedures set forth in Rule 1.10(c).

(d) Except as law may otherwise expressly permit, a lawyer currently serving as a public officer or employee:

(1) is subject to Rules 1.7 and 1.9; and

(2) shall not:

(i) use the lawyer's public position to obtain, or attempt to obtain, special advantage in legislative matters for the lawyer or a client.

(ii) use the lawyer's public position to influence, or attempt to influence, a tribunal to act in favor of the lawyer or of a client.

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(iii) accept anything of value from any person when the lawyer knows or it is obvious that the offer is for the purpose of influencing the lawyer's action as a public official.

(iv) either while in office or after leaving office use information the lawyer knows is confidential government information obtained while a public official to represent a private client.

(v) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless the lawyer's former client and the appropriate government agency give informed consent, confirmed in writing; or

(vi) negotiate for private employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially, except that a lawyer serving as a law clerk or staff lawyer to or otherwise assisting in the official duties of a judge, other adjudicative officer or arbitrator may negotiate for private employment as permitted by Rule 1.12(b) and subject to the conditions stated in Rule 1.12(b).

Approved by Board of Governors, August 2005.

COMMENT: For additional information on this general topic and other related subjects, see *The Ethical Oregon Lawyer* § 9.6 (informed consent), § 10.2 to § 10.2-2(d) (multiple-client conflicts), § 10.2-3 (issue conflicts), § 10.3-1 (vicarious application of the conflicts rules), § 11.1 to § 11.2 (ethics rules applicable to government lawyers), § 11.4-1 (client identification for government lawyers), § 11.5 (confidentiality and privilege for government lawyers), § 11.5-2 (confidentiality issues for government lawyers) (OSB Legal Pubs 2015); *Restatement (Third) of the Law Governing Lawyers* §§ 74, 96–97, 123–124 (2000) (supplemented periodically); ABA Model RPC 1.0(b), (e); ABA Model RPC 1.7; ABA Model RPC 1.10; and ABA Model RPC 1.11(c)–(d). See also Washington Advisory Op No 1581 (1994); Washington Advisory Op No 1661 (1996); Washington Advisory Op No 1696 (1997); Washington Advisory Op No 2054 (2004). (Washington advisory opinions are available at <www.wsba.org/resources-and-services/ethics/advisory-opinions>).