

FORMAL OPINION NO 2005-128

[REVISED 2016]

Conflicts of Interest, Current and Former Clients: Lawyer Changing Firms, Imputed Disqualification

Facts:

While Lawyer was at Former Firm, Lawyer was the only lawyer who worked on or acquired information relating to the representation of Client. Subsequently, Lawyer left Former Firm to start New Firm, and Client directed all pending or further work to New Firm.

Question:

May Former Firm represent parties adversely to Client without Client's consent?

Conclusion:

Yes, qualified.

Discussion:

Oregon RPC 1.10(b) provides:

(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.

Oregon RPC 1.6 provides:

(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:

....

(6) in connection with the sale of a law practice under Rule 1.17 or to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm. In those circumstances, a lawyer may disclose with respect to each affected client the client's identity, the identities of any adverse parties, the nature and extent of the legal services involved, and fee and payment information, but only if the information revealed would not compromise the attorney-client privilege or otherwise prejudice any of the clients. The lawyer or lawyers receiving the information shall have the same responsibilities as the disclosing lawyer to preserve the information regardless of the outcome of the contemplated transaction.

....

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

Oregon RPC 1.9(c) provides:

(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.

Former Firm's representation in matters adverse to Client may give rise to former-client conflicts that could be waived only with the informed consent of all affected clients, confirmed in writing. See, for example, Oregon RPC 1.0(b) and (g) as cited in OSB Formal Ethics Op No 2005-17 and OSB Formal Ethics Op No 2005-11.

Because Lawyer has left Former Firm, however, Former Firm will need conflict waivers to pursue matters involving Client only when the matter is the same or substantially related to that in which Lawyer formerly represented Client while associated with Former Firm, and any lawyer remaining in Former Firm has information protected by Oregon RPC 1.6 and Oregon RPC 1.9(c) that is material to the matter. Oregon RPC 1.10(b).

As presented in these facts, no lawyer still at Former Firm worked on, or acquired information relating to the representation of Client while Lawyer was at Former Firm. Cf. OSB Formal Ethics Op No 2005-120 (rev 2015) and sources cited; *Gas-A-Tron of Arizona v. Union Oil Co. of California*, 534 F2d 1322 (9th Cir), *cert den*, 429 US 861 (1976).¹ The sole remaining question, then, is whether it can be said that any lawyer remaining at Former Firm subsequent to Lawyer’s departure acquired information or is deemed to “have” information relating to the representation of Client while Lawyer was at Former Firm, and whether Former Firm has retained files, including electronic documents, of Client that contain information that is material to the matter.

If Former Firm takes sufficient steps to assure that no lawyer at Former Firm has or will actually acquire information relating to the representation of Client while Lawyer was at Former Firm—by, for example, segregating, restricting access to, or destroying such materials or returning them to Client without retaining copies—Former Firm has or will have established that no lawyer remaining at Former Firm will have

¹ Cf. Oregon RPC 1.9(b), which prohibits a lawyer from being adverse to a client of the lawyer’s former law firm if the lawyer “had acquired information” about the former firm’s client that is protected by Oregon RPC 1.6 and Oregon RPC 1.9(c) and is material to the matter. ABA Model RPC 1.9 cmt [5] explains that Model RPC 1.9(b) operates to disqualify the lawyer who has *actual* knowledge of protected information.

such information, and any obligations under Oregon RPC 1.10(b) will clearly have been met.² *See also* OSB Formal Ethics Op No 2005-174.

Approved by Board of Governors, February 2016.

² Cf. Oregon RPC 1.18, which permits a firm to undertake a representation adverse to a prospective client who consulted with one member of a firm, provided the consulting member is adequately screened from participating in the matter, and written notice is promptly given to the prospective client. Adequate screening means employing procedures reasonably adequate to protect information that the isolated lawyer is obligated to protect.

COMMENT: For additional information on this general topic, and other related subjects, see *The Ethical Oregon Lawyer* § 10.2-1 to § 10.2-1(b) (conflicts between current and former clients), § 10.2-2 (conflicts between current clients), § 10.3-4 (application of conflicts rules when lawyer leaves a firm) (OSB Legal Pubs 2015); *Restatement (Third) of the Law Governing Lawyers* §§ 121–124, 132 (2000) (supplemented periodically); ABA Model RPC 1.6; and ABA Model RPC 1.9–1.10.