

FORMAL OPINION NO 2005-148

[REVISED 2014]

**Conflicts of Interest, Former Clients:
Representing One Spouse in Dissolution
after Joint Estate Planning**

Facts:

Lawyer previously represented Wife and Husband in family estate-planning matters. Wife now has asked Lawyer to represent her in the dissolution of the parties' marriage. Neither Husband nor Wife is still a current client of Lawyer.

Question:

May Lawyer undertake the representation of Wife against Husband in the dissolution proceedings?

Conclusion:

See discussion.

Discussion:

Oregon RPC 1.9(a) and (c) provide:

(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 give

Finally, Oregon RPC 1.6(a) provides:

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).¹

¹ The exceptions in Oregon RPC 1.6(b) do not apply here:

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;

In this scenario, Wife is a potential current client and Husband is a former client. It is necessary to determine whether the proposed representation would constitute a former-client conflict under Oregon RPC 1.9(a). We do this by determining whether the current and former matters are the

(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; or

(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.

(7) to comply with the terms of a diversion agreement, probation, conditional reinstatement or conditional admission pursuant to BR 2.10, BR 6.2, BR 8.7 or Rule for Admission Rule 6.15. A lawyer serving as a monitor of another lawyer on diversion, probation, conditional reinstatement or conditional admission shall have the same responsibilities as the monitored lawyer to preserve information relating to the representation of the monitored lawyer's clients, except to the extent reasonably necessary to carry out the monitoring lawyer's responsibilities under the terms of the diversion, probation, conditional reinstatement or conditional admission and in any proceeding relating thereto.

(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.

same or substantially related within the meaning of the rule. As with former-client conflicts under *former* DR 5-105(C), matters are substantially related if there is either a matter-specific conflict as discussed in OSB Formal Ethics Op No 2005-11 or an information-specific former-client conflict as discussed in OSB Formal Ethics Op No 2005-17. If either type of former-client conflict exists, Lawyer may proceed only if both Wife and Husband give their informed consent and the consent is suitably confirmed in writing. If neither type of former-client conflict exists, Lawyer may proceed without the consent of either Husband or Wife.

On the limited facts presented, it does not appear that Lawyer would be in possession of information relating to the representation of Husband that would not already be known to Wife or to which Wife would not otherwise have access. *Cf. In re Brandsness*, 299 Or 420, 702 P2d 1098 (1985); OEC 503(4)(e) (no privilege as between jointly represented clients who have a falling-out); OSB Formal Ethics Op No 2005-17. If this is so, no information-specific former-client conflict would exist.

Are the estate planning and the marital dissolution the same or substantially related matters because they are “matter-specific”? Without more, it cannot be said that estate planning on the one hand and marital dissolution on the other constitute the same matter. *See, e.g., Portland Gen. Elec. Co. v. Duncan, Weinberg, Miller & Pembroke, P.C.*, 162 Or App 265, 986 P2d 35 (1999); *cf.* OSB Formal Ethics Op No 2005-11.

The key question, then, is whether Lawyer’s representation of Wife in the marital dissolution is a matter-specific conflict because it will work to Husband’s injury or prejudice in connection with the estate planning that Lawyer did for him. Even though it may generally be true, pursuant to ORS 112.315, that a divorce revokes all provisions in a will in favor of the testator’s former spouse, the revocation of wills in that manner is not sufficient to create a conflict of interest unless the parties are legally bound not to revoke or change their wills. *Cf.* ABA Formal Ethics Op No 05-434 (absent additional factors, there is no conflict in representing testator in disinheriting beneficiary who is also client, because testator is free to change will at any time).

If, however, Wife and Husband had legally bound themselves not to change their wills or if Lawyer's representation of Wife would require Lawyer to try to wrest control away from Husband of business or estate-planning entities that Lawyer had formed while representing Wife and Husband, a matter-specific former-client conflict would exist. *In re Brandsness*, 299 Or 420. In this case, Lawyer could not represent Wife adversely to Husband in the marital dissolution without first obtaining informed consent from both Wife and Husband that is confirmed in writing.

Approved by Board of Governors, April 2014.

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) (OSB Legal Pubs 2015); *Restatement (Third) of the Law Governing Lawyers* §§ 121, 132 (2000) (supplemented periodically); and ABA Model RPC 1.9.

