

FORMAL OPINION NO 2005-160

Conflicts of Interest:

Former State Appellate Public Defender in Private Practice

Facts:

Lawyer in private practice seeks to represent clients who wish to appeal the denial of postconviction relief. The appeals may include allegations that the original trial lawyer or the lawyer on the direct appeal rendered ineffective or inadequate assistance of counsel. Before entering private practice, Lawyer was employed as a deputy defender in the state office that represents indigent clients on direct appeals from criminal convictions (Lawyer's "Former Office").

Questions:

1. May Lawyer represent a client who was represented by another lawyer in the Former Office while Lawyer was employed there?

2. May Lawyer represent a client who was represented by another lawyer in the Former Office either before or after Lawyer was employed there?

3. May Lawyer represent a client whose codefendant was represented by either Lawyer or another lawyer in the Former Office while Lawyer was employed there?

4. May Lawyer represent a client whose codefendant was represented by another lawyer in the Former Office either before or after Lawyer was employed there?

Conclusions:

1. Yes, qualified.
2. Yes.
3. Yes, qualified.
4. Yes, qualified.

Discussion:

Oregon RPC 1.7 provides, in pertinent part:

(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:

....

(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 . . .

....

(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 1.9 provides:

(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.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client:

(1) whose interests are materially adverse to that person;
and

(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter, 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.

1. *Another Lawyer in Former Office Represented the Client during Lawyer's Employment.*

If there is a significant risk that Lawyer's responsibilities to a client will be materially limited by Lawyer's personal loyalties to Lawyer's former colleagues at Former Office, Lawyer has a current-client conflict under Oregon RPC 1.7(a)(2). Lawyer may not proceed except with the client's informed consent, confirmed in writing, assuming Lawyer reasonably believes that Lawyer can provide competent and diligent representation to a client in the face of Lawyer's personal-interest conflict. Oregon RPC 1.7(b)(1). These are obviously fact-specific queries that will depend not only on Lawyer's past or continuing relations with Lawyer's former colleagues but also on the nature of the error to be alleged on appeal, whether Lawyer was contemplating returning to Lawyer's Former Office for future employment, whether Lawyer participated directly or indirectly in the case, whether the representation would adversely affect one or more of Lawyer's other clients, and other matters. Cf. OSB Formal Ethics Op No 2005-120 (rev 2015); ABA Formal Ethics Op No 342 (1975).

2. *Another Lawyer in Former Office Represented the Client before or after Lawyer Was Employed.*

The analysis under these facts is the same as above. If there is a significant risk that Lawyer's personal loyalties to Lawyer's colleagues at Former Office will materially limit Lawyer's representation of a client, Lawyer can proceed only if Lawyer believes that Lawyer can provide competent and diligent representation and with the client's informed consent as permitted in Oregon RPC 1.7(b).

3. *Lawyer or Former Office Represented the Client's Codefendant during Lawyer's Employment.*

In addition to a lawyer's ethical duty of loyalty to a client and the current-client-conflict limitations of Oregon RPC 1.7, a criminal defendant has a Sixth Amendment right to be represented by counsel whose loyalties are undivided. *See Wood v. Georgia*, 450 US 261, 271, 101 S Ct 1097, 67 L Ed 2d 220 (1981). Although joint representation of codefendants is not *per se* unconstitutional, "a possible conflict [of interest]

inheres in almost every instance of multiple representation.” *Cuyler v. Sullivan*, 446 US 335, 348, 100 S Ct 1708, 64 L Ed 2d 333 (1980). Joint representation is thus permitted only when both clients consent. *See Holloway v. Arkansas*, 435 US 475, 482, 98 S Ct 1173, 55 L Ed 2d 426 (1978) (requiring knowing waiver of right to conflict-free counsel). In some instances, a court may decline to permit joint representation even with the clients’ consent. *See Wheat v. United States*, 486 US 153, 162, 108 S Ct 1692, 100 L Ed 2d 140 (1988). In most cases, a conflict of interest between codefendants continues on appeal and through postconviction proceedings. Codefendants may continue to argue, for example, about relative degrees of culpability.

If Lawyer represented the current client’s codefendant at an earlier stage of the case, and the client and codefendant continue to have conflicting interests in the postconviction matters, Lawyer’s representation of the client will be adverse to Lawyer’s former client (the codefendant). Moreover, even if Lawyer was not directly responsible for the codefendant’s earlier representation, Lawyer may be deemed to have been the codefendant’s lawyer if Lawyer was personally involved to a substantial degree in that representation.

If representation of the current client in the postconviction appellate proceeding would injure or damage the codefendant in connection with the earlier trial or direct appeal, the postconviction matter is “the same or substantially related matter” under Oregon RPC 1.9. *Cf.* OSB Formal Ethics Op No 2005-17; OSB Formal Ethics Op No 2005-11. If so, Lawyer can proceed only with appropriate conflicts waivers.

4. *The Codefendant Was Represented by Former Office before or after Lawyer’s Employment There.*

If Lawyer obtained information relating to the representation of a former client of Former Office that was protected by Oregon RPC 1.6 and that Lawyer was subsequently in a position to use the information adversely to the former client, Lawyer could not represent a subsequent

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client whose interests were materially adverse without appropriate conflicts waivers. OSB Formal Ethics Op No 2005-120 (rev 2015).

Approved by Board of Governors, August 2005.

COMMENT: For additional information on this general topic and other related subjects, see *The Ethical Oregon Lawyer* § 10.2-1 (conflicts between current clients and former clients), § 20.2-1 (*informed consent* defined), § 20.2-2 (*written confirmation* defined) (OSB Legal Pubs 2015); *Restatement (Third) of the Law Governing Lawyers* §§ 121, 132 (2000) (supplemented periodically); ABA Model RPC 1.7; and ABA Model RPC 1.9–1.10.