

FORMAL OPINION NO 2005-174

Conflicts of Interests, Former Clients: Vicarious Disqualification in Public Defender Organizations

Facts:

Lawyer works in a public defender firm. Lawyer previously represented Client *X* on charges for which Client *X* was convicted and served a jail sentence. Lawyer also previously represented Client *Y* on charges for which Client *Y* was convicted and sentenced to probation. At the conclusion of each case, Lawyer's file was closed and put into storage. The public defender firm no longer represents former Client *X* or Client *Y*.

Lawyer has now been appointed to represent Client *Z*. In reviewing the file, Lawyer realizes that former Client *X* will be one of the state's witnesses against Client *Z* and that former Client *Y* is a codefendant for whom separate counsel has been appointed.

Questions:

1. May Lawyer represent Client *Z* in the new matter?
2. If Lawyer cannot continue, may another lawyer in Lawyer's firm represent Client *Z*?
3. Would the answer be different if Lawyer no longer worked in the public defender firm when Client *Z*'s case was assigned?

Conclusions:

1. See discussion.
2. No.
3. Yes.

Discussion:

1. *Former-Client Conflicts.*

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.

Representation of Client Z does not involve the same matter that the public defender firm handled for Client X or Client Y. The question, then, is whether the matters are substantially related. As under *former* DR 5-105(C), "substantially related" matters that give rise to former-client conflicts under Oregon RPC 1.9(a) fall into two categories. The first category is called a "matter-specific" former-client conflict. Matter-specific former-client conflicts occur when a lawyer's representation of a current client whose interests are adverse to the interests of a former client will require the lawyer to attack or undercut the work in the same transaction or legal dispute in which the lawyer represented the former client.

The second category of former-client conflicts is called an "information-specific" conflict. Information-specific former-client conflicts occur when there is a substantial risk that confidential factual information as would normally have been obtained in the prior repre-

sentation would materially advance the new client's position in the new matter.¹

All former-client conflicts may be waived if both the current and former clients involved give their informed consent, confirmed in writing. Oregon RPC 1.9(a).

In this instance, no matter-specific former-client conflict exists. The matter that Lawyer has been appointed to with regard to Client Z is not the same as either of the matters that Lawyer was appointed to with regard to Client X and Client Y. The facts allow for the possibility that former Client Y may still be on probation, which probation may be revoked if Client Y is convicted in the new matter. However, the revocation would be based on Client Y's failure to abide by the conditions of probation and would not result directly from Lawyer's defense of Client Z in the new matter, even if the defense involves attempting to shift blame to Client Y. Accordingly, Lawyer would not be undercutting or attacking the work Lawyer did previously for Client Y.

Whether an information-specific former-client conflict exists depends on the facts of the specific cases involved. For example, Lawyer will have an information-specific former-client conflict if Lawyer acquired confidential factual information relating to the representation² of former Client X or Client Y that Lawyer could use to materially advance Client Z's position in the new case, such as by discrediting former Client X's testimony or arguing that former Client Y was culpable rather than Client Z.

¹ See *In re Brandsness*, 299 Or 420, 430, 702 P2d 1098 (1985) (defining "matter-specific" former-client conflicts); accord *In re Howser*, 329 Or 404, 410, 987 P2d 496 (1999) (quoting *Brandsness* with approval on this point); OSB Formal Ethics Op No 2005-11 (discussing "matter-specific" former-client conflicts); and OSB Formal Ethics Op No 2005-17 (discussing "information-specific" former-client conflicts).

² Oregon RPC 1.0(f) defines *information relating to the representation* as "both information protected by the attorney-client privilege under applicable law, and other information gained in a current or former professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client."

In contrast, the simple fact that Lawyer represented former Client X or Client Y in the past and is adverse to them now does not, in and of itself, constitute a former-client conflict that would preclude Lawyer from representing Client Z in a proceeding involving the former clients.

2. *Vicarious Disqualification.*

Oregon RPC 1.10(a) imputes the disqualification of one lawyer in a firm to all of the lawyers in the same firm:

(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 materially limiting the representation of the client by the remaining lawyers in the firm.

Oregon RPC 1.0(d) defines *law firm* to include a public defender's organization:³

“Firm” or “law firm” denotes a lawyer or lawyers, including “Of Counsel” lawyers, in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a private or public legal aid or public defender organization, a legal services organization or the legal department of a corporation or other public or private organization.

Accordingly, if Lawyer is disqualified from representing Client Z due to a former-client conflict with former Client X or Client Y, the conflict cannot be “cured” by assigning the Client Z matter to another lawyer in Lawyer’s firm. Rather, Lawyer’s former-client conflict is

³ This is not the rule in every jurisdiction. Some courts have declined to treat a public defender office as a “law firm” for conflict purposes, but make a case-by-case determination whether the comparison is appropriate. *See, e.g., Graves v. State*, 94 Md App 649, 619 A2d 123 (1993), *rev’d on other grounds*, 334 Md 30, 637 A2d 1197 (1994), and *abrogated by Duvall v. State*, 399 Md 210, 923 A2d 81 (2007); *State v. Bell*, 90 NJ 163, 447 A2d 525 (NJ 1982). *Cf. Com. v. Westbrook*, 484 Pa 534, 400 A2d 160 (1979); *Turner v. State*, 340 So 2d 132 (Fla Dist Ct App 1976).

imputed to Lawyer's public defender firm as a whole, just as it would be in a private civil law firm.

Although Oregon RPC 1.10(c) permits screening of newly hired lawyers who bring conflicts to a firm, the rule does not allow screening of Lawyer to prevent imputation of Lawyer's former-client conflicts. Therefore, if Lawyer has a former-client conflict, the conflict will be imputed under Oregon RPC 1.10(a) to Lawyer's public defender firm as a whole.

3. *Former-Client Conflicts after a Lawyer Leaves a Firm.*

The former-client conflict and vicarious disqualification issues are analyzed differently if Lawyer is no longer at the public defender firm. 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.

Accordingly, lawyers in a firm may represent new clients adverse to a former client in matters that are the same or substantially related, if no lawyer remaining at the firm has protected information relating to the representation of the former client that is material to the new matter. As discussed in OSB Formal Ethics Op No 2005-128 (rev 2016), lawyers remaining in a firm, who did not work on the former client's matter and who did not otherwise acquire confidential information relating to the representation of the former client, have no conflict of interest with the former client. If the firm still has physical or electronic files or information pertaining to the former client that would otherwise give rise to a conflict under Oregon RPC 1.9, the physical files and electronic information must be made unavailable to the lawyers remaining in the firm. In this instance, if the files of former Client X and Client Y are in storage,

and appropriate safeguards are in place to prevent access to those files by any lawyer of the firm during the pendency of Client Z's new matter, no former-client conflict exists.

4. *Conclusion.*

Former-client conflicts exist only in the circumstances defined in Oregon RPC 1.9. Absent either a matter-specific or an information-specific conflict, a lawyer may oppose a former client. Furthermore, if a lawyer has a former-client conflict, the conflicts can be waived under Oregon RPC 1.9 by the affected current and former clients giving their informed consent, confirmed in writing.

If any lawyer has a former-client conflict, the conflict is imputed to the lawyer's law firm as a whole by Oregon RPC 1.10(a). When a lawyer who has represented a client leaves a firm, Oregon RPC 1.10(b) permits the lawyers remaining at the firm to oppose the departed lawyer's former client if the remaining lawyers did not acquire any confidential information while the client was represented by the firm and there are measures in place to ensure that information in the former client's file is unavailable to the remaining lawyers.

Approved by Board of Governors, August 2005.

COMMENT: For additional information on this topic and other related subjects, see *The Ethical Oregon Lawyer* § 9.2-1(c) (personal-interest conflicts), § 10.2-1 to § 10.2-1(b) (conflicts between current and former clients), § 10.2-3 (issue conflicts) (OSB Legal Pubs 2015); *Restatement (Third) of the Law Governing Lawyers* §§ 121, 123, 132 (2000) (supplemented periodically); and ABA Model RPC 1.9–1.10.