

FORMAL OPINION NO 2009-181

Government Lawyer Employment Negotiations

Facts:

Lawyers *A* and *B* and Judge *C* are interested in employment with the Oregon Department of Justice (DOJ).

Lawyer *A* is a hearings officer for a state agency who conducts contested-case hearings between the state and other parties. In those cases, the state is a party and is represented by the DOJ.

Lawyer *B* is the chair of a state agency and presides over hearings conducted by the agency, which result in decisions affecting the substantial rights of the parties. DOJ does not represent Lawyer *B*'s agency in those matters.

Judge *C* is a circuit court judge, who hears all stages of criminal proceedings at the trial level. When cases heard by Judge *C* are appealed, DOJ represents the state.

Questions:

1. May Lawyer *A* apply or negotiate for a position with DOJ while serving as the hearings officer in a pending contested case in which the state is represented by DOJ?

2. May Lawyer *A* apply or negotiate for employment with DOJ while DOJ represents the state in any appeal of Lawyer *A*'s decision and DOJ provides advice to Lawyer *A* in his capacity as the hearings officer?

3. May Lawyer *B* apply or negotiate for a position with the DOJ during the pendency of a proceeding involving her agency?

4. May Judge *C* apply or negotiate for a position with the DOJ either during the pendency of the trial or during an appeal from Judge *C*'s decision?

Conclusions:

1. See Discussion.
2. See Discussion.
3. Yes.
4. See Discussion.

Discussion:

Oregon RPC 1.12(b) provides in pertinent part that:

A lawyer shall not negotiate for employment with any person who is involved as a party or as a lawyer for a party in a matter which the lawyer is participating personally and substantially as a judge or other adjudicative officer or as an arbitrator, mediator or other third party neutral. . . .

In other words, a judge or other adjudicator who is participating personally and substantially¹ in a matter² may not negotiate for employment with any of the parties or their lawyers. The rationale for the rule is obvious: it preserves confidence in the integrity of the system by ensuring that the impartiality of neutral adjudicators is not compromised by their consideration of employment opportunities.

¹ Oregon RPC 1.0(o) provides that when the term *substantial* is used “in reference to degree or extent” it means “a material matter of clear and weighty importance.” OSB Formal Ethics Op No 2005-120 (rev 2015) discusses the meaning of “personally and substantially” in connection with Oregon RPC 1.12(a). Citing ABA Formal Ethics Op No 342 (1975) (“Substantial responsibility . . . contemplates a responsibility requiring the official to become personally involved to an important, material degree, in the investigative or deliberative processes regarding the transactions or facts in question . . .”), OSB Formal Ethics Op No 2005-120 (rev 2015) concludes that a lawyer participates “personally and substantially” in a matter if the lawyer works on the particular matter or acquires material confidential information about it.

² The term *matter* is defined in Oregon RPC 1.0(i) as “any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties; and any other matter covered by the conflict of interest rules of a government agency.”

Oregon law provides little guidance regarding the meaning of the term *negotiate*. According to *Webster's Third New International Dictionary*, negotiate means “to confer with another so as to arrive at the settlement of some matter . . . to arrange for or bring about through conference, discussion or compromise.” ABA Formal Ethics Op No 96-400 offers some clues in its discussion of the conflict that can result from a private lawyer’s pursuit of employment with an adversary firm. As relevant here, that opinion suggests that the job-seeking lawyer’s interest in the employment must be concrete, communicated, and reciprocated before the job search becomes problematic.

Drawing from the ABA’s analysis, the mere submission of an unsolicited application for employment or the gathering of preliminary information about a position cannot logically be construed as “negotiation” for employment. It is not possible to draw a bright line where “negotiating for employment” begins. However, when the interests of the candidate and the employer are mutual and concrete and involve substantive discussions of the candidate’s specific qualifications, business potential, salary expectations, and terms of employment, it is fair to say that the parties are “conferring to arrive at the settlement of some matter” and attempting to “bring about a result through conference, discussion or compromise.” Certainly at that point, if not before, the candidate is negotiating for employment within the meaning of Oregon RPC 1.12(b).

Lawyer A.

As the decision-maker in contested-case hearings, Lawyer A participates personally and substantially as an adjudicative officer. DOJ is a “lawyer for a party” in those matters. Oregon RPC 1.12(b) does not prohibit Lawyer A from applying for a position with DOJ, but it does preclude Lawyer A from “negotiat[ing] for” employment with DOJ while Lawyer A is participating in any case in which DOJ represents the state.

While Lawyer A’s mere submission of an application to DOJ during the pendency of a contested case does not violate Oregon RPC 1.12(b), Lawyer A might violate Oregon RPC 8.4(a)(4) or (a)(5) by doing

so.³ If Lawyer A’s application indicates that DOJ will have special consideration in the pending case if it looks upon the application favorably, Lawyer A’s conduct may constitute “prejudice[e] to the administration of justice” in violation of Oregon RPC 8.4(a)(4). If the application states or implies that Lawyer A’s decision will be influenced by DOJ’s response to the application it would violate the prohibition in Oregon RPC 8.4(a)(5) against stating or implying “an ability to influence improperly a government agency.”⁴

Lawyer A does not violate Oregon RPC 1.12(b) by negotiating for employment with DOJ while DOJ represents the state in an appeal from Lawyer A’s decision. In this instance, although DOJ is serving as a “lawyer for a party,” the case is no longer “a matter in which the lawyer is participating personally and substantially as a judge.”

Lawyer B.

Lawyer B participates personally and substantially in adjudicative matters for her agency, but she does not violate Oregon RPC 1.12(b) by applying or negotiating for a position with DOJ during the pendency of those matters because DOJ is neither a party nor a lawyer for a party in the agency matters.

³ Oregon RPC 8.4(a) makes it professional misconduct for a lawyer to, among other things:

(4) engage in conduct that is prejudicial to the administration of justice;

(5) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate these Rules or other law

⁴ For a discussion of how the terms in Oregon RPC 8.4(a)(4) are interpreted, see *In re Haws*, 310 Or 741, 801 P2d 818 (1990).

Judge C.

As discussed above, it is not a violation of Oregon RPC 1.12(b) for Judge *C* to simply apply for a position with DOJ while presiding over a criminal trial. Judge *C* also does not violate Oregon RPC 1.12(b) by bargaining or otherwise negotiating for a position with DOJ during the pendency of a criminal trial because the plaintiff in the case is not the prospective employer.⁵

DOJ is part of the government of the State of Oregon. However, DOJ as a government employer is not the same entity as the State of Oregon in most local government criminal proceedings, for purposes of this rule.⁶ In addition, DOJ and the district attorney's office are separate "law firms," and in most instances DOJ does not represent the state in criminal proceedings.⁷ Accordingly, in a typical case, it cannot be said that when Judge *C* seeks employment with DOJ he is seeking employment with a party or a lawyer for a party to a criminal trial.

⁵ Other authorities that may bear on the propriety of a judge seeking private employment, such as the Code of Judicial Conduct and Article VII (Amended) of the Oregon Constitution, are outside the scope of this opinion.

⁶ In a criminal case, the district attorney prosecutes crimes in the name of "The State of Oregon." However, the "State of Oregon" in the criminal case is not the state as a governmental entity; rather, the prosecutor is responsible to "the people" of the state, and particularly those who live in the prosecutor's jurisdiction. *See* ABA Criminal Justice Prosecution Function and Defense Function Standards § 3-1.3 (3d ed 1992). *See also United States v. Robertson*, 15 F3d 862, 878 (9th Cir 1994), *rev'd*, 514 US 669, 115 S Ct 1732, 131 L Ed 2d 714 (1995) and *opinion reinstated in part*, 73 F3d 249 (9th Cir 1996) ("The prosecutor's client is the justice system."); *Upton v. Thompson*, 930 F2d 1209, 1215 (7th Cir 1991) (a prosecutor's client is not an individual, but society as a whole).

⁷ On occasion, a lawyer employed by DOJ may be specially appointed to prosecute a criminal case at trial. In that situation, Judge *C* could not negotiate with DOJ for employment during the pendency of the matter because DOJ would be a lawyer for a party.

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Judge C's negotiation for employment with DOJ during the pendency of an appeal from one of his own decisions would also not violate Oregon RPC 1.12(b). Even though DOJ is the lawyer for a party in the appeal, once the case is on appeal, Judge C is no longer participating "personally and substantially" in the matter.

Approved by Board of Governors, February 2009.

COMMENT: For additional information on this general topic and other related subjects, see *The Ethical Oregon Lawyer* § 8.11 (conduct prejudicial to the administration of justice), § 11.4-4 (judicial branch lawyers) (OSB Legal Pubs 2015).