

FORMAL OPINION NO 2005-44
Conflicts of Interest, Current Clients:
Part-Time Nonlawyer Employees

Facts:

Law Firm A presently employs Nonlawyer on a part-time basis. Nonlawyer also proposes to work part-time for Law Firm B. Law Firm A and Law Firm B are presently on opposite sides of several matters.

Question:

May Law Firm A and Law Firm B simultaneously employ Nonlawyer?

Conclusion:

Yes, qualified.

Discussion:

The answer to this question depends in part on the nature of Nonlawyer's employment by the two firms and in part on what Nonlawyer may actually know. If Nonlawyer's employment does not provide Nonlawyer with access to information relating to the representation of a client¹ of either firm, there is no reason to prohibit the simultaneous employment. This conclusion would likely be true if, for example, Nonlawyer is employed by both firms as a janitor or a messenger. If, on the other hand, Nonlawyer is employed in a position that gives Nonlawyer access to information relating to the representation of a client (for

¹ Oregon RPC 1.0(f) provides:

“Information relating to the representation of a client” denotes 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.

example, Nonlawyer is employed as a secretary or legal assistant), the answer becomes more complex. Oregon RPC 1.10(a) provides:

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

Oregon RPC 1.0(d) provides:

“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. Any other lawyer, including an office sharer or a lawyer working for or with a firm on a limited basis, is not a member of a firm absent indicia sufficient to establish a de facto law firm among the lawyers involved.

The net effect of these two sections is that when a single lawyer is employed by two firms, the firms are considered as a single unit for conflict-of-interest purposes. It therefore follows that the handling of opposite sides of a matter by the two firms that have a common lawyer would give rise to a conflict of interest under Oregon RPC 1.7(a)² and

² Oregon RPC 1.7(a) provides:

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:

(1) the representation of one client will be directly adverse to another client;

(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; or

(3) the lawyer is related to another lawyer, as parent, child, sibling, spouse or domestic partner, in a matter adverse to a person whom the lawyer knows is represented by the other lawyer in the same matter.

would be prohibited under Oregon RPC 1.7(b).³ Cf. OSB Formal Ethics Op No 2005-40 and sources cited therein.

On the other hand, there is no clear basis for applying these rules directly to nonlawyers. The only directly applicable rule in such situations is Oregon RPC 5.3(a), which provides:

[A] lawyer having direct supervisory authority over the non-lawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer.

If the lawyer is prohibited by Oregon RPC 1.6(a)⁴ from revealing information relating to the representation of a client, so too would the Nonlawyer assistant.

Thus, as long as a firm takes reasonable care⁵ to make sure that Nonlawyer has not in fact worked on or acquired information relating to

³ Oregon RPC 1.7(b) provides:

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.

⁴ 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).

⁵ Oregon RPC 1.0(h) provides:

“Knowingly,” “known,” or “knows” denotes actual knowledge of the fact in question, except that for purposes of determining a lawyer’s knowledge of the existence of a conflict of interest, all facts

the representation of a client with respect to any matter on which the two firms' clients are adverse, the firm has met its obligation under Oregon RPC 5.3. *Cf.* OSB Formal Ethics Op No 2005-50 (rev 2014). If, on the other hand, a firm discovers or should have discovered that Nonlawyer has acquired information relating to the representation of a client with respect to any matter on which the firms are adverse, simultaneous employment would be improper unless both clients consent after full disclosure. *Cf.* Oregon RPC 1.6(a); OSB Formal Ethics Op No 2005-23 (rev 2014); OSB Formal Ethics Op No 2005-17. *See also* Oregon RPC 1.0(g).⁶

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which the lawyer knew, or by the exercise of reasonable care should have known, will be attributed to the lawyer. A person's knowledge may be inferred from circumstances.

⁶ Oregon RPC 1.0(g) provides:

“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.

COMMENT: For additional information on this general topic and related subjects, see *The Ethical Oregon Lawyer* § 10.3-1 (vicarious application of the conflicts rules), § 10.3-2 (office sharers), § 13.2-1(a) to § 13.2-1(a)(2) (sole proprietorships and office sharing), § 13.3-3 (employment of nonlawyers) (OSB Legal Pubs 2015); *Restatement (Third) of the Law Governing Lawyers* § 123 (2000) (supplemented periodically); ABA Model RPC 1.0(c); ABA Model RPC 1.6; ABA Model RPC 1.7; ABA Model RPC 1.10(a); and ABA Model RPC 5.3(a).

See also Barbara Fishleder, *Office Sharing*, 52 OSB Bulletin 23 (June 1992). *Cf. State v. Charlesworth*, 151 Or App 100, 951 P2d 153 (1997) (*former* DR 4-101(D) imposed duty to exercise reasonable care to prevent employees from disclosing client secrets, but this duty is not a ground to suppress evidence obtained as result of disclosure).