

## FORMAL OPINION NO 2005-50

[REVISED 2014]

### **Conflicts of Interest, Current Clients: Office Sharers Representing Opposing Parties**

#### **Facts:**

Lawyer *A* and Lawyer *B*, who maintain independent practices, share office space. Both lawyers handle personal-injury litigation.

#### **Questions:**

1. May Lawyer *A* represent the plaintiff in a lawsuit in which Lawyer *B* represents the defendant?
2. Would the answer be different if Lawyer *A* and Lawyer *B* share a common employee who is in possession of confidences and secrets of both Lawyer *A*'s clients and Lawyer *B*'s clients?

#### **Conclusions:**

1. Yes, qualified.
2. Yes.

#### **Discussion:**

If Lawyer *A* and Lawyer *B* were part of the same firm, the simultaneous representation of a plaintiff and a defendant in the same litigation would give rise to a prohibited, nonwaivable conflict of interest. See, for example, Oregon RPC 1.7,<sup>1</sup> discussed in OSB Formal Ethics Op No 2005-28.

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<sup>1</sup> Oregon RPC 1.7 provides:

(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:

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

Nevertheless, and as long as Lawyer A and Lawyer B (1) do not hold themselves out to the public as members of the same firm through joint advertising, a joint letterhead, or otherwise; (2) respect the confidentiality of information relating to the representation of their respective clients and cause their employees to do so; and (3) keep their respective files separately, there is no reason why Lawyer A and Lawyer B cannot represent opposite parties. *See also* Oregon RPC 1.0(d).<sup>2</sup>

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(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.

(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.

<sup>2</sup> 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.

We do not believe that these requirements prohibit office sharers from using the same telephone system or the same file room as long as the files are physically separated and the appropriate limitations on access to files are made clear to, and are observed by, the lawyers and their employees. If a common telephone system is used, however, office sharers may not represent adverse parties unless they have taken steps to assure that telephone messages that contain confidential client information or legal advice (i.e., information relating to the representation of a client<sup>3</sup>) are not given to or transmitted by shared personnel. Similarly, mail must not be opened by shared personnel.

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<sup>3</sup> Oregon RPC 1.6 provides, in pertinent part:

(a) 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).

(b) 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;

(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. . . .

If, on the other hand, Lawyer *A* and Lawyer *B* share a secretary or other employee who is in possession of the confidences or secrets of both Lawyer *A*'s clients and Lawyer *B*'s clients, or if any of the other steps outlined above are not taken, the simultaneous representations of the plaintiff and the defendant would be prohibited by either if not both Oregon RPC 1.6 and Oregon RPC 1.7. *See also* Oregon RPC 1.0(f).<sup>4</sup> *Cf.* OSB Formal Ethics Op No 2005-44; OSB Formal Ethics Op No 2005-28; OSB Formal Ethics Op No 2005-12 (rev 2015).

**Approved by Board of Governors, April 2014.**

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(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 . . .

(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.

<sup>4</sup> 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.

COMMENT: For additional information on this general topic and related subjects, see *The Ethical Oregon Lawyer* § 2.5-2 (firm relationships), § 10.3-2 (office sharers), § 13.2-1(a) to § 13.2-1(a)(2) (office sharing) (OSB Legal Pubs 2015); *Restatement (Third) of the Law Governing Lawyers* § 123 (2000) (supplemented periodically); ABA Model RPC 1.6; and ABA Model RPC 1.7. *See also* Barbara Fishleder, *Office Sharing*, 52 OSB Bulletin 23 (June 1992). *Cf. State v. Charlesworth*, 151 Or App 100, 951 P2d 153 (1997), *rev den*, 327 Or 82 (1998) (*former* DR 4-101(D) imposed duty to exercise reasonable care to prevent employees from disclosing client secrets; but this rule is not a ground to suppress evidence obtained as a result of the disclosure).