fucile & reising | LLP

December 2016 *Multnomah Lawyer Ethics Focus*

Gone But Not Forgotten: Departed Lawyer Conflicts

By Mark J. Fucile
Fucile & Reising LLP

With the increasing mobility of lawyers today, it is not uncommon for a firm to run a conflict check on a potential new matter and find that a lawyer who has left the firm worked earlier on a closed matter for the now-opposing party. The question then becomes: is that still a conflict for the law firm? The answer depends on the particular facts, but the analytical framework is provided by RPC 1.10(b). Two helpful Oregon State Bar ethics opinions touch on subsidiary issues of files and nonlawyer staff remaining behind even if the lawyer who worked on the closed matter involved has left.

RPC 1.10(b) and Departed Lawyers

RPC 1.10(b) sets out the analytical framework for determining whether a firm still has a conflict when a lawyer who did work for a former client is gone:

> "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."

Under this formulation, if the "new" matter is unrelated to the "old" one handled by the departed lawyer for a former client, then the firm ordinarily has no conflict (absent the comparatively rare circumstance under RPC 1.9(d)(2) of remaining lawyers having a former client's confidential information from a factually unrelated matter that would still be relevant to the new case). If the "new" matter is related to the "old" one, then the answer turns on whether there are any other lawyers remaining at the firm who also acquired the former client's confidential information. Most often, that comes by actually working on the matter involved. But, it can also occur when, for example, a particularly noteworthy case is discussed at office meetings or the firm is small enough that confidential information is effectively shared throughout the firm (or a particular office or practice group). If lawyers remain at the firm who also worked on the matter involved (even in limited roles) and it meets the "same or substantially related" test, then the firm has a former client conflict. Although all former client conflicts can in theory be waived under RPC 1.9, former clients in practice often refuse to grant waivers to their "old" law firms in this setting.

Remaining Files

Former Oregon DR 5-105(J) specifically extended former client conflicts to closed files remaining at a firm even if the lawyer who worked on them had left.

When we moved from the DRs to the RPCs in 2005, however, this prohibition was deleted—leaving RPC 1.10(b) framed in terms of lawyers only.

Oregon State Bar Formal Opinions 2005-128 and 2005-174 note that under the new formulation of the rule the question is whether (as the former puts it at 345) "a lawyer remaining at Old Firm 'has' information if Old Firm has retained files, including electronic documents, of Client that contain information that is material to the [proposed new] matter." OSB Formal Opinion 2005-128 then goes on to outline the steps a firm can take to avoid having a closed file continue to create a conflict (also at 345): "If Old Firm takes sufficient steps to assure that no lawyer at Old Firm will actually acquire the information in the future—for example, by segregating, restricting access to, or destroying such materials or returning them to Client without retaining copies—Old Firm will have established that no lawyer remaining at Old Firm will have such information, and any obligations under Oregon RPC 1.10(b) will clearly have been met." OSB Formal Opinion 2005-174 takes the same approach and reaches the same conclusion.

Remaining Nonlawyer Staff

RPC 1.10(b) pointedly uses the word "lawyer." Yet, nonlawyer staff such as paralegals, assistants and investigators are often privy to the same

confidential information as their lawyer-supervisors. The approach suggested by OSB Formal Opinions 2005-128 and 2005-174 for files implies—but does not state—that similar screening may be available for nonlawyer staff.

Nonetheless, firms examining screening of nonlawyer staff in this context should carefully consider whether they would remain at disqualification risk given the difference between a staff member who may be working directly with the lawyers opposing the former client and a physical file stored off-site. In short, despite the wording of the rule and the approach used by the ethics opinions, the analogy between files and staff may not always be exact. Further, courts have greater discretion to impose disqualification as a remedy in this context than a trial panel applying the literal wording of the RPCs in a disciplinary setting. In *Oxford Systems, Inc. v. CellPro*, *Inc.*, 45 F Supp 2d 1055 (WD Wash 1999), for example, the court in disqualifying a law firm looked (among other things) to the fact that nonlawyer staff remained at the firm who were privy to the former client's confidential information from an earlier related matter. In fact, Washington subsequently amended the comments to its corresponding rule to make the application to nonlawyers explicit.

ABOUT THE AUTHOR

Mark J. Fucile of Fucile & Reising LLP handles professional responsibility, regulatory and attorney-client privilege issues for lawyers, law firms and corporate and governmental legal departments throughout the Northwest. Mark has chaired both the WSBA Committee on Professional Ethics and its predecessor, the WSBA Rules of Professional Conduct Committee. Mark is also a former member of the Oregon State Bar Legal Ethics Committee and is a current member of the Idaho State Bar Section on Professionalism & Ethics. Mark writes the monthly Ethics Focus column for the Multnomah (Portland) Bar's *Multnomah Lawyer*, the quarterly Ethics & the Law column for the WSBA *NWLawyer* and is a regular contributor on legal ethics to the WSBA *NWSidebar* blog. Mark is a contributing author/editor for the current editions of the OSB Ethical Oregon Lawyer, the WSBA *Legal Ethics Deskbook* and the WSBA *Law of Lawyering in Washington*. Before co-founding Fucile & Reising LLP in 2005, Mark was a partner and in-house ethics counsel for a large Northwest regional firm. He also teaches legal ethics as an adjunct for the University of Oregon School of Law at its Portland campus. Mark is admitted in Oregon, Washington, Idaho, Alaska and the District of Columbia. He is a graduate of the UCLA School of Law. Mark's telephone and email are 503.224.4895 and Mark@frllp.com.