

September 2025 *Multnomah Lawyer Ethics Focus*

Gone But Not Forgotten: Conflicts and Claims Involving Former Firm Lawyers

Mark J. Fucile
Fucile & Reising LLP

In today's mobile practice environment, lawyers are constantly joining—and leaving—law firms. When a lawyer leaves a firm, we often have good memories of a colleague who has embarked on a new chapter in their professional life. In a few instances, however, we may be left with lingering questions over conflicts and claims. In this column, we'll survey those less frequent, but often difficult issues.

Before we do, however, three qualifiers are in order.

First, although conflicts and claims are important, they are by no means the only issues that can arise after lawyers depart. The Oregon State Bar Professional Liability Fund has very useful checklists addressing a host of practical questions for departing lawyers and their law firms available on its website.

Second, we'll focus on conflicts and claims that remain following a lawyer's departure. OSB Formal Opinion 2005-70 (rev. 2024) and ABA Formal Opinion 99-414 (1999), in turn, discuss the transition process itself and offer practical guidance on ethical and fiduciary considerations for departing lawyers and their "old" and "new" law firms.

Third, compensation for past work can be a nagging sore point if not addressed promptly when a lawyer is leaving. *Gray v. Martin*, 63 Or. App. 173, 663 P.2d 1285 (1983), and *In re Williams, Love, O’Leary, & Powers, P.C.*, 2012 WL 400278 (Bankr. D. Or. Feb. 7, 2012) (unpublished), address these issues generally in the context of, respectively, partner and non-partner departing lawyers. We’ll leave this often-contentious area for another day.

Conflicts

When lawyers are practicing together as firm, RPC 1.10(a)—which is sometimes called “the firm unit rule”—generally imputes one law firm lawyer’s conflicts to the firm as a whole.

But what about when a lawyer has left the firm and taken the client with them that would otherwise trigger a conflict? RPC 1.10(b) addresses this scenario and generally ends the imputation if the departing lawyer was the only firm lawyer working on the matter involved:

(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.

Under RPC 1.10(b), therefore, if the departed lawyer was the only firm lawyer who worked for a client that left with the lawyer—and the firm is doing no other work for that client—the firm can be adverse to that former client without seeking a waiver from the former client.

Sometimes lawyers have very “siloed” practices and truly are the only ones who worked for a client before departing with the client. More frequently, however, other firm lawyers may have played roles in representing the client and remain at the firm. An associate, for example, assisted a departed partner with a brief or another partner helped with depositions in the same case. In that instance, the “institutional knowledge” remains even if the client does not and the firm must obtain a conflict waiver from the former client to be adverse to the former client if the matter is the “same or substantially related” to the work the firm did earlier for the former client. As an illustration, the federal court in Seattle disqualified a law firm in *Oxford Systems, Inc. v. CellPro, Inc.*, 45 F. Supp.2d 1055 (W.D. Wash. 1999), when the firm appeared on the other side of a case that was related to litigation that a former lawyer handled for before departing—but other lawyers who had worked on the case remained.

RPC 1.10(b)(2) specifically uses the word “lawyer” in measuring the prohibition. OSB Formal Opinion 2005-128 (rev. 2016) suggests that if only the file from earlier work remains, restrictions could be put in place administratively to ensure that current firm lawyers working on a related adverse matter don’t have access to it. Similarly, nonlawyer staff who worked on the matter involved could be screened so that the remaining firm lawyers working on a related adverse matter don’t have access to their knowledge.

Claims

Roach v. Mead, 301 Or. 383, 722 P.2d 1229 (1986), states the unremarkable proposition that law firms are vicariously liable for the negligence of their lawyers and that liability continues after a lawyer has left if the negligence occurred while the lawyer was at the firm. In other words, while the departed lawyer can be sued, so can the departed lawyer’s old firm.

If an error is only discovered after a client left with a departed lawyer, ABA Formal Opinion 481 (2018) reasons that the “old” firm does not technically have a duty under the “communication rule”—Model Rule 1.4 (on which Oregon’s corresponding rule is generally patterned)—to inform the client because the rule is directed only to current clients. The ABA opinion quickly adds, however, that many other factors counsel informing the former client (through current counsel,

if applicable) along with the firm's insurance carrier. The former blunts "cover-up" contentions, and the latter avoids coverage issues.

ABOUT THE AUTHOR

Mark J. Fucile of Fucile & Reising LLP advises lawyers, law firms, and corporate and governmental legal departments throughout the Northwest on professional ethics and risk management. Mark has chaired both the WSBA Committee on Professional Ethics and its predecessor, the WSBA Rules of Professional Conduct Committee. Mark has served on the Oregon State Bar Legal Ethics Committee and is a member of the Idaho State Bar Section on Professionalism & Ethics. Mark writes the Ethics Focus column for the Multnomah (Portland) Bar's *Multnomah Lawyer*, the Ethics & the Law column for the WSBA *Bar News* and is a regular contributor on legal ethics to the WSBA *NWSidebar* blog. Mark is the editor-in-chief and a contributing author for the WSBA *Legal Ethics Deskbook* and a principal editor and contributing author for the OSB *Ethical Oregon Lawyer* 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 503.860.2163 and Mark@frllp.com.