

FORMAL OPINION NO. 2005-14

Deputy District Attorneys Representing Private Parties

Facts:

Deputy District Attorney *A* is prosecuting a person for DUII. During the course of the investigation, Deputy District Attorney *A* learns that a victim who was injured as a result of the DUII incident needs counsel for a civil damages action against the criminal defendant.

Deputy District Attorney *B* is prosecuting another criminal defendant for the negligent homicide of a married couple. While the prosecution is pending, Deputy District Attorney *B* is asked to probate the estates of the couple but not to assist in any way in the wrongful death civil action against the criminal defendant.

Questions:

1. May Deputy District Attorney *A* represent the DUII victim?
2. May Deputy District Attorney *B* probate the estates of the couple?
3. Would the answer be different if Deputy District Attorney *A* and Deputy District Attorney *B* sought to undertake these tasks after they left the District Attorney's Office and devoted their time wholly to private practice?

Conclusions:

1. No.
2. No.
3. Yes, qualified.

Discussion:

Pursuant to ORS 8.726, deputy district attorneys in certain counties may engage part-time in private practice. ORS 8.720 provides, however, that

[a] district attorney shall not receive any fee or reward from any private person for services in any criminal action, nor during the pendency of

such prosecution can the district attorney act as attorney for either party in any civil action, suit or proceeding involving substantially the same controversy.

Cf. In re Snyder, 276 Or 897, 559 P2d 1273 (1976). This provision must be read together with Oregon RPC 8.4(a)(2), which prohibits a lawyer from “commit[ting] a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects,” and Oregon RPC 1.11(d)(2), which provides that a lawyer, currently serving as a public officer or employee, shall not

(i) use the lawyer’s public position to obtain, or attempt to obtain, special advantage in legislative matters for the lawyer or for a client.

(ii) use the lawyer’s public position to influence, or attempt to influence, a tribunal to act in favor of the lawyer or of a client.

(iii) accept anything of value from any person when the lawyer knows or it is obvious that the offer is for the purpose of influencing the lawyer’s action as a public official.

(iv) either while in office or after leaving office use information the lawyer knows is confidential government information obtained while a public official to represent a private client.

(v) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless the lawyer’s former client and the appropriate government agency give informed consent, confirmed in writing; or

(vi) negotiate for private employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially, except that a lawyer serving as a law clerk or staff lawyer to or otherwise assisting in the official duties of a judge, other adjudicative officer or arbitrator may negotiate for private employment as permitted by Rule 1.12(b) and subject to the conditions stated in Rule 1.12(b).

Oregon RPC 1.11(c) provides:

. . . As used in this rule, the term “confidential government information” means information that has been obtained under governmental authority and which, at the time this Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose and which is not otherwise available to the public.

Deputy District Attorney A’s simultaneous prosecution of the criminal case and the civil case would violate ORS 8.720, Oregon RPC 8.4(a)(2), and Oregon RPC 1.11(d)(2)(ii). In fact, a violation of Oregon RPC

1.11(d)(2)(iii) could be present as well. *Cf. Callahan v. Jones*, 200 Wash 241, 93 P2d 326 (1939).

Whether Deputy District Attorney *B*'s proposed probate of the estates would violate any of these provisions is a somewhat closer question, but we believe that there would still be at a minimum a violation of ORS 8.720 and Oregon RPC 8.4(a)(2) because the homicide case and the wrongful death case involve "substantially the same controversy." *Cf. In re McMahon*, 266 Or 376, 513 P2d 796 (1973) (disciplining deputy city attorney under former DR 8-101(A)(3) for accepting gratuities from bail bondsman who did business with city); *In re Hockett*, 303 Or 150, 734 P2d 877 (1987) (broadly construing term *illegal* as used in former DR 7-102(A)(8)).

The restrictions listed above apply less severely in the case of former government lawyers than in the case of current government lawyers. Unless the former deputy district attorneys possess confidential government information that is relevant to their proposed private representations and are unable to secure government consent to the use of that information on behalf of their private clients, these sections could not prevent them from handling the matters at issue after they leave government service. In the case of former government lawyers, however, it is also necessary to consider Oregon RPC 1.11(a), which provides that a lawyer who has formerly served as a public officer or employee of the government

(2) shall not represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation.

Pursuant to this section, Deputy District Attorney *A* would need government consent to handle the private action against the drunk driver. *Cf. OSB Formal Ethics Op No 2005-120*. We do not believe, however, that Oregon RPC 1.11(a)(2) would apply in the case of Deputy District Attorney *B*.

Approved by Board of Governors, August 2005.

COMMENT: For additional information on this general topic and other related subjects, see THE ETHICAL OREGON LAWYER §§12.17, 14.4 (Oregon CLE 2003); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §133 (2003); and OSB Formal Ethics Op No 2005-7. *See also* Washington Formal Ethics Op No 1 (1950) (finding same based on Washington statutes).