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Conflicts Part 1: Why Conflicts Matter

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One result of clients spreading their work around more frequently today than in years past is that lawyers run into conflicts with existing clients more frequently now, too. In this month's column and in the next two, we'll look at three aspects of conflicts. This month, we'll examine why conflicts matter. Next month, we'll discuss the key ingredients for a conflict waiver. Finally, we'll take a look at how conflicts can be avoided in the first place through structuring the scope of a representation.

Why do conflicts matter? The introduction to the ABA's Model Rules of Professional Conduct notes that the professional rules "provide a framework for the ethical practice of law." Without diminishing that aspiration, the professional rules—particularly those relating to conflicts—also increasingly form the substantive law of legal malpractice, lawyer breach of fiduciary duty, disqualification and fee forfeiture in addition to their continuing role as a disciplinary code.

A recent case illustrates this shift. *Bramel v. Brandt*, 190 Or App 432, 79 P3d 375 (2003), was the subsequent civil chapter of a disciplinary case, *In re Brandt/Griffin*, 331 Or 113, 10 P3d 906 (2000), that involved significant issues on Oregon's conflict waiver standards. In brief, the defendant lawyers had

represented a large group of automotive hand tool distributors—including plaintiff Bramel—in business tort litigation against a manufacturer/franchisor. Literally at the last minute in “global” settlement negotiations, the franchisor proposed hiring the lawyers to review its franchise practices if the settlement was completed. The lawyers reluctantly agreed after receiving advice from the Oregon State Bar. They disclosed the arrangement in both the settlement agreements with the clients and in a conflict waiver agreement that contained the requisite recommendation to seek independent counsel on whether to waive the conflict. The plaintiff sought the recommended independent counsel from an experienced ethics and business practitioner who tried to use the situation to bargain-down the lawyers’ contingent fee. When the lawyers refused, the plaintiff completed the settlement and filed a bar complaint against the lawyers as a predicate to a later breach of fiduciary duty claim seeking the return of the contingent fee.

In the civil case, the plaintiff argued that the lawyers’ disclosure was inadequate, and, as a result, they had an unwaived conflict. The plaintiff contended that the unwaived conflict constituted a breach of fiduciary duty and sought fee forfeiture as his remedy. The trial court dismissed the case on the statute of limitation and the Court of Appeals affirmed. In doing so, however, the Court of Appeals noted that under *Kidney Association of Oregon v. Ferguson*, 315 Or 135, 843 P2d 442 (1992), a lawyer’s conflict of interest may also constitute a breach of the fiduciary duty of loyalty and that, at the discretion of the

reviewing court, might warrant full or partial fee forfeiture as a potential remedy. Oregon isn't alone in this trend. Both Washington and California, for example, have recently held that violations of the conflict rules could be cast as breach of fiduciary duty claims seeking, among other remedies, fee forfeiture—see, e.g., *Cotton v. Kronenberg*, 111 Wn App 258, 44 P3d 878 (2002), and *A.I. Credit Corp. v. Aguilar & Sebastinelli*, 113 Cal App 4th 1072, 6 Cal Rptr 3d 813 (2003).

Bramel illustrates how conflicts are no longer the exclusive province of the bar. Although the client there did file a bar complaint, it was as a precursor to his later civil suit seeking fee forfeiture based on an asserted conflict-based breach of fiduciary duty. In short, conflicts today matter in a very practical way.

ABOUT THE AUTHOR

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