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Why Conflicts Matter

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As professionals, Oregon lawyers have long had a duty to follow the RPCs or their predecessors. And there have long been disciplinary consequences for failing to do so. Without diminishing their role as either an ethical compass or a regulatory code, the professional rules—especially those relating to conflicts—have also in recent years increasingly come to form the substantive law of legal malpractice, lawyer breach of fiduciary duty, disqualification and fee forfeiture. In short, conflicts matter today in a very practical way.

In this article, we'll look at several Oregon cases that highlight the practical importance of the conflict rules beyond the disciplinary setting. In later installments, we'll consider how engagement letters and conflict waivers can help you manage conflicts to reduce civil as well as regulatory risk.

Legal Malpractice. The Oregon Supreme Court has long held that violations of the professional rules do not create a private cause of action in and of themselves nor do they constitute negligence per se. See *Bob Godfrey Pontiac v. Roloff*, 291 Or 318, 324-37, 630 P2d 840 (1981); *O'Toole v. Franklin*, 279 Or 513, 524, 569 P2d 561 (1977). At the same time, conflicts *can* have two important roles in legal malpractice cases. The first is legal: a conflict can be evidence of a lawyer's negligence in breaching the standard of care. See

Tydeman v. Flaherty, 126 Or App 180, 187-88, 868 P2d 755 (1994). The second is tactical: a conflict opens the door to a jury argument that any harm to the client was motivated by the lawyer's self-interest rather than by simple negligence.

Tydeman illustrates both. The plaintiff was the lawyer's by then former client. The plaintiff alleged that the lawyer had negligently handled judgment lien litigation by, in part, not pursuing claims against another of the lawyer's clients. The plaintiff contended that the lawyer was *negligent* in handling the claim in light of the conflict. At the same time, the conflict also allowed the plaintiff to argue *why* the lawyer supposedly "pulled his punches."

Reversing a motion to dismiss, the Court of Appeals allowed the claim to move forward. In doing so, it noted pointedly that although the conflict involved a violation of the professional rules, it also alleged a breach of the standard of care and stated—at least on the pleadings—a claim for legal malpractice.

Breach of Fiduciary Duty. In *Kidney Association of Oregon v. Ferguson*, 315 Or 135, 144-48, 843 P2d 442 (1992), the Supreme Court held that a violation of the conflict rules can also constitute a breach of the fiduciary duty of loyalty. As the Supreme Court put it: "In the determination [of] whether a lawyer breached a fiduciary duty to a client, the court may consider the standard of conduct prescribed by the disciplinary rules." *Id.* at 144. A client must still prove causation and damages. But, the specter of a conflict will provide a skilled opponent with a powerful tool to use with a jury.

The potential sweep of breach of fiduciary duty claims against lawyers is quite broad. It embraces both claims by clients and under a 1999 Oregon Supreme Court decision—*Granewich v. Harding*, 329 Or 47, 985 P2d 788 (1999)—also extends in some circumstances to nonclients. More fundamentally, a breach of fiduciary duty claim built around a conflict strikes at the heart of the attorney-client relationship—the duty of loyalty. The comments to ABA Model Rule 1.7, which is the current client conflict rule and the pattern upon which Oregon’s corresponding RPC 1.7 is based, lead with this: “Loyalty and independent judgment are essential elements in the lawyer’s relationship to a client.” Juries might have difficulty grasping the nuances of complex business transactions or litigation that may underlie a claim against a lawyer. By contrast, loyalty is a simple but powerful concept that they readily understand.

Disqualification. Although court decisions provide the procedural law of disqualification in terms of standing and timeliness, the RPCs effectively supply the substantive law. See *State ex rel Bryant v. Ellis*, 301 Or 633, 636-39, 724 P2d 811 (1986). Courts look primarily to the rules governing current or former client conflicts in determining whether a lawyer or law firm should be disqualified. See, e.g., *Unified Sewerage Agency v. Jelco, Inc.*, 646 F2d 1339, 1344-45 (9th Cir 1981) (applying Oregon current client conflict rules); *PGE v. Duncan, Weinberg, Miller & Pembroke, P.C.*, 162 Or App 265, 278-288, 986 P2d 35 (1999) (applying former client conflict rules); *Admiral Insurance Co. v. Mason*

Bruce & Girard, Inc., 2002 WL 31972159 (D Or Dec 5, 2002) (involving elements of both current and former client conflicts).

In applying the current or former conflict rules, courts like the ones in these Oregon examples often examine disciplinary decisions. But, it is only for guidance on whether a conflict exists; the sanction in the disqualification context is clear—forcible removal from the case. Moreover, as we’ll see in the next section, a disqualified law firm’s problems don’t necessarily end when the court’s order is entered.

Fee Forfeiture. A lawyer’s breach of fiduciary duty to a client can result in forfeiture of all or part of the lawyer’s fees. See *Kidney Association of Oregon v. Ferguson, supra*, 315 Or at 143-44; accord *PGE v. Duncan, Weinberg, Miller & Pembroke, P.C., supra*, 162 Or App at 277 (discussing *Kidney Association*). The rationale is that the full or partial loss of the lawyer’s compensation is a remedy for the lawyer’s breach of the fiduciary duty of loyalty—in other words, a lawyer shouldn’t get paid for being disloyal. As with a breach of fiduciary duty claim, courts use the conflict rules as the yardstick for measuring whether a lawyer has breached the fiduciary duty of loyalty.

An emerging trend nationally is for clients who have had their lawyers disqualified for conflicts to seek the return of fees paid to the law firm. The concept, as noted, is tied closely to breach of fiduciary duty. In practical terms, it also reflects the fact that a client who has had legal counsel disqualified for a

conflict of the law firm's making has lost his or her "investment" in the law firm in terms of the fees paid. Given the choice of who should bear that loss, courts are increasingly saying it should be the law firm rather than the client.

Clients may also try to use the conflict rules as a shield rather than as a sword in defending against fee collection efforts. See, e.g., *Welsh v. Case*, 180 Or App 370, 43 P3d 445 (2002). Turned in this direction, the argument is that a lawyer shouldn't be allowed to collect a fee that was earned while the lawyer was in breach of the fiduciary duty of loyalty. Again, the conflict rules are used as the gauge for determining whether a breach occurred.

Although there are important professional reasons to follow the conflict rules, there are equally important practical ones. Conflicts are no longer the sole province of bar discipline. The professional rules on conflicts essentially form the substantive law for lawyer civil liability ranging from legal malpractice to fee forfeiture. In sum, conflicts today matter in a very practical way.

ABOUT THE AUTHOR

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