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Telling Clients About Mistakes: When Do You Need a Conflict Waiver?

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It's every lawyer's nightmare: a serious mistake occurs in handling a case. You're not sure whether it can be repaired or not. The client isn't yet aware of the mistake—or its potential impact. Do you need a conflict waiver from the client to proceed? In two decisions earlier this year, the Oregon Supreme Court looked at when a lawyer who may have committed malpractice needs a conflict waiver to continue handling the case. The Supreme Court didn't draw a bright line in either case, but collectively the pair of decisions offers useful insights into the considerations involved.

In the first, *In re Obert*, 336 Or 640, 89 P3d 1173 (2004), the lawyer missed a filing date and, as a result, the client's appeal was dismissed. The lawyer researched whether the appeal could be reinstated. He concluded that it could not and eventually withdrew. The Oregon State Bar charged the lawyer with violating DR 5-101(A)(1), which is the Oregon personal conflict rule and is similar to ABA Model Rule 1.7(a)(2) elsewhere, because he had not immediately obtained a conflict waiver from the client upon learning that the appeal had been dismissed.

In the second, *In re Knappenberger*, 337 Or 15, 90 P3d 614 (2004), the opposing party had moved to dismiss an appeal on an asserted procedural

defect in service and the appeal was later dismissed on that basis. In the meantime, the lawyer continued to work on the appeal and a related cross-appeal. As in *Obert*, the Bar charged the lawyer with violating DR 5-101(A)(1) because he had not immediately obtained a conflict waiver from the client when the other party had moved to dismiss the appeal.

In both *Obert* and *Knappenberger*, the Supreme Court rejected the Bar's argument that a conflict waiver is required immediately upon a problem surfacing that could possibly lead to a later malpractice claim. Having rejected the Bar's proposed bright line, though, the Supreme Court declined to draw one itself. Instead, the Supreme Court looked to the text of DR 5-101(A)(1), which finds a conflict—albeit a waivable one—“if the exercise of the lawyer's professional judgment on behalf of the lawyer's client will be or reasonably may be affected by the lawyer's own financial, business, property, or personal interests.” The Supreme Court emphasized the impact on the lawyer's professional judgment in *Knappenberger* and echoed this same approach in *Obert*: “It suffices to say that, to prove a violation of DR 5-101(A), the Bar cannot assert simply that an error occurred and, therefore, created some risk, however minimal, of impaired professional judgment as a result of the potential malpractice liability. Rather, the Bar must show by clear and convincing evidence that the lawyer's error, and the pending or potential liability arising from that error, will or reasonably may affect

the lawyer’s professional judgment. That conclusion will depend on the facts and circumstances of each case.” 337 Or at 29; *accord* 336 Or at 648.

Although *Obert* and *Knappenberger* were disciplinary cases, the conflict waiver trigger resonates well beyond that context. In Oregon and elsewhere, a lawyer’s violation of the conflict rules may also signal a breach of the lawyer’s fiduciary duty of loyalty to the client. See *Kidney Association of Oregon v. Ferguson*, 315 Or 135, 843 P2d 442 (1992). Further, the Supreme Court in *Obert* addressed another facet of the malpractice web—a lawyer’s failure to tell the client that an error occurred. In *Obert*, the lawyer waited five months before telling the client that the appeal had been dismissed. The Supreme Court found that this constituted a misrepresentation by material omission. 336 Or at 649. In doing so, the Supreme Court cast this failure to communicate in fiduciary terms as well: “[W]e think * * * that a lawyer effectively jettisons his or her fiduciary responsibility to safeguard a client’s confidence and trust when the lawyer knowingly withholds from a client the all-critical fact that the court has spoken and the client’s case is over.” *Id.*

The Professional Liability Fund provides both guidance on malpractice-related conflict issues and expert assistance in evaluating and “repairing” problems that may have occurred. As *Obert* illustrates, even if a conflict waiver isn’t necessary, prompt communication with the client and attention to the problem is.

ABOUT THE AUTHOR

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