

October 2009 *Multnomah Lawyer Ethics Focus*

## The Mysterious ORS Chapter 9: Lawyers' Statutory Duties

By Mark J. Fucile  
Fucile & Reising LLP

When we think of the regulatory structure governing lawyers, we usually focus on the Rules of Professional Conduct. That's natural as the RPCs lie at the heart of our regulatory obligations. Lawyers in Oregon, however, also have statutory duties under ORS Chapter 9 that, although instinctively understood because they largely parallel the RPCs, are far less known. In this column, we'll look at three aspects of those statutory duties. First, we'll briefly examine the constitutional basis for the duties that come to us from the Legislature rather than the Supreme Court. Second, we'll then outline the duties themselves. Finally, we'll explore the practical consequences of those duties beyond the RPCs.

**Constitutional Basis.** Many lawyers correctly note that most of our duties flow from the RPCs as approved by the Supreme Court and because we're "officers of the court." Fewer lawyers know that Oregon statutory law plays a role with both. On the former, ORS 9.490(1) makes the RPCs "binding upon all members of the bar" (which, in turn, is defined by ORS 9.005(7) as the Oregon State Bar). On the latter, ORS 9.010(1) anoints us as "officer[s] of the court." The Supreme Court has observed that, as a matter of state constitutional law, "the legislature may regulate the legal profession and the practice of law, provided that a statute does not unduly burden or unduly interfere with the

judiciary in the exercise of its judicial functions.” *State ex rel Acocella v. Allen*, 288 Or 175, 181, 604 P2d 391 (1979); accord *State ex rel Metropolitan Public Defender Services, Inc. v. Courtney*, 335 Or 236, 240-41, 64 P3d 1138 (2003).

The statutory duties that echo their professional rule counterparts, therefore, coexist constitutionally with the RPCs.

**Statutory Duties.** The core of our statutory duties lies in ORS 9.490 and ORS 9.460. The first, as noted, makes the RPCs binding on all members of the bar (including under ORS 9.241 out-of-state lawyers who are practicing here temporarily). The second, however, contains duties that, while they echo the professional rules, are stated as elements of state statutory law. These include both general injunctions to follow state and federal law (ORS 9.460(1)) and specific duties to, for example, “[m]aintain the confidences and secrets of the attorney’s clients” (ORS 9.460(3)). On the latter in particular, the Supreme Court noted in *State v. Keenan*, 307 Or 515, 519, 771 P2d 244 (1989), that the statutory duty of confidentiality and its professional rule counterpart (presently RPC 1.6) are broader than the attorney-client privilege standing alone.

**Practical Consequences.** Somewhat counterintuitively, the practical consequences of our statutory duties lie largely beyond the regulatory realm. Lawyers can certainly be disciplined for violations of their statutory duties. See, e.g., *In re Lackey*, 333 Or 215, 222-25, 37 P3d 172 (2002) (discipline for violation of ORS 9.460(3)). At the same time, the Supreme Court has stated (see, e.g., *In*

*re Lawrence*, 332 Or 502, 511, 31 P3d 1078 (2001)) that because our principal statutory duties largely mirror the RPCs a violation will not usually enhance a disciplinary sanction.

It is important to remember, however, that the duties reflected in both the RPCs and statutory law have a very active life beyond lawyer discipline. In matters involving lawyer testimony, for example, the Supreme Court in *Keenan* (at 519) observed that “[t]o hold that, except for the rules of evidentiary privilege, the general obligation to testify overrides an attorney’s professional obligation of secrecy would be too facile, where, as in Oregon, the professional obligation is statutory law.” Similarly, in situations involving lawyer civil liability and related fee forfeiture, the Supreme Court concluded in *Kidney Association of Oregon v. Ferguson*, 315 Or 135, 142 n.12, 843 P2d 442 (1992), that “although the rules do not establish the standard of care in a negligence action, the rules *do*, in part, describe a lawyer’s fiduciary duty to his client.” (Emphasis in original.) Further, the Court of Appeals in *Tydeman v. Flaherty*, 126 Or App 180, 187-88, 868 P2d 755 (1994), found that a breach of these fiduciary duties can also state a claim for negligence under the applicable standard of care. Finally, the Supreme Court in *State ex rel Bryant v. Ellis*, 301 Or 633, 636-40, 724 P2d 811 (1986), after noting that the professional rules in Oregon have the force of state statutory law by virtue of ORS 9.490, held that trial courts have inherent equitable power to disqualify lawyers in breach of their professional and fiduciary duties. In short,

although Chapter 9 may be less familiar to lawyers than the RPCs, its duties can resonate with equal force in many important facets of law practice.

### **ABOUT THE AUTHOR**

Mark J. Fucile of Fucile & Reising LLP focuses on legal ethics, product liability defense and condemnation litigation. In his legal ethics practice, Mark handles professional responsibility, regulatory and attorney-client privilege matters and law firm related litigation for lawyers, law firms and legal departments throughout the Northwest. He is a past member of the Oregon State Bar's Legal Ethics Committee, is a past chair of the Washington State Bar Rules of Professional Conduct Committee, is a member of the Idaho State Bar Professionalism & Ethics Section and is a co-editor of the OSB's Ethical Oregon Lawyer and the WSBA's Legal Ethics Deskbook. Mark also writes the monthly Ethics Focus column for the Multnomah (Portland) Bar's Multnomah Lawyer, the quarterly Ethics & the Law column for the WSBA Bar News and is a regular contributor on risk management to the OSB Bar Bulletin, the Idaho State Bar Advocate and the Alaska Bar Rag. Mark's telephone and email are 503.224.4895 and Mark@frllp.com.