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Beyond Discipline: The RPCs and the Law of Lawyering

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The Rules of Professional Conduct are the principal regulatory code for the disciplinary aspects of law practice. The RPCs, however, have also become the core of the broader “law of lawyering” central to many other facets of law practice beyond regulatory discipline. In this column, we’ll look at three: disqualification; civil liability for breach of fiduciary duty; and fees.

In doing so, four caveats are in order. First, appellate decisions beyond the RPCs are equally central to the broader law of lawyering. The key question of whether an attorney-client relationship exists, for example, is defined by case law under *In re Weidner*, 310 Or 757, 768-73, 801 P2d 828 (1990). Second, discipline and other applications of the RPCs are not mutually exclusive. *In re Kluge*, 335 Or 326, 66 P3d 492 (2003), for example, involved a lawyer who was both disqualified and disciplined. Third, due to differing standards of proof, application of the RPCs in one forum will not necessarily dictate the result in others. The Supreme Court in *In re McMnamin*, 319 Or 609, 879 P2d 173 (1994), for example, declined to discipline a lawyer who had earlier been disqualified by the Multnomah County Circuit Court. Finally, the Supreme Court recently reminded trial courts in *In re Marandas*, 351 Or 521, 540, 270 P3d 231

(2012), that they have the inherent authority to sanction lawyers even when the conduct involved does not necessarily violate the RPCs.

Disqualification

The Supreme Court has long held that Oregon trial courts have the authority to disqualify counsel for violations of the professional rules. *State ex rel. Bryant v. Ellis*, 301 Or 633, 724 P2d 811 (1986), both summarizes and illustrates this authority. It is also important to note that disqualification can be invoked both on motion in a particular proceeding or by a separate action for an injunction against the lawyers or firm involved. *PGE v. Duncan, Weinberg, Miller & Pembroke, P.C.*, 162 Or App 265, 986 P2d 35 (1999), both summarizes and illustrates this latter facet of disqualification.

Civil Liability

In *Kidney Association of Oregon, Inc. v. Ferguson*, 315 Or 135, 142-44, 843 P2d 442 (1992), the Supreme Court explained that the professional rules are broadly reflective of our underlying fiduciary duties. *Kidney Association* notes, for example, that the conflict rules are based on the fiduciary duty of loyalty. An asserted violation of the conflict rules, therefore, can essentially be restated as a civil claim for breach of the fiduciary duty of loyalty. *Larmanger v. Kaiser Foundation Health Plan of the Northwest*, 805 F Supp2d 1050, 1057-58 (D Or 2011), includes a recent discussion of this point.

Fees

Oregon has not (yet) been as explicit as some other states (such as Washington) on whether a material failure to comply with the RPCs will make a fee agreement void or voidable. On one hand, *G.B. v. Morey*, 229 Or App 605, 215 P3d 879 (2009), avoided the issue on jurisdictional grounds (leaving the RPCs to the Bar and the Supreme Court) and *Welsh v. Case*, 180 Or App 370, 43 P3d 445 (2002), held that the issue wasn't presented squarely (enough) by its facts. On the other hand, *Schroeder v. Schaefer*, 258 Or 444, 477 P2d 720 (1970), found that a lack of disclosure rendered a fee agreement unenforceable and *Bechler v. Macaluso*, 2010 WL 2034635 (D Or May 14, 2010) (unpublished), held that failure to comply with the RPCs and ORS 20.340 rendered a contingent fee agreement unenforceable. More broadly, Oregon has long recognized that failure to comply with the law (whether statutory or regulatory) renders a contract unenforceable on public policy grounds. *Compton v. Compton*, 187 Or App 142, 145, 66 P3d 572 (2003), compiles authority on this general point. Under ORS 9.490(1), the RPCs are professional regulations issued by the Supreme Court that have the force of statutory law.

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