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## Why Conflicts Matter

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The Idaho Rules of Professional Conduct are prefaced with several thoughts on their role in our practices. The Preamble describes the RPCs as both a moral compass and a disciplinary code. On the former, the Preamble notes: “The Rules . . . provide a framework for the ethical practice of law.”<sup>i</sup> On the latter, the Preamble observes: “Failure to comply with an obligation or prohibition imposed by a Rule is a basis for invoking the disciplinary process.”<sup>ii</sup>

Without diminishing their role as either an aspirational model or as a disciplinary code, the professional rules—particularly those relating to conflicts—have increasingly come to form the substantive law of disqualification, legal malpractice, lawyer breach of fiduciary duty and fee forfeiture. In short, conflicts today matter in a very practical way.

### Disqualification

Although court decisions provide the procedural law of disqualification in terms of standing and waiver, the RPCs effectively provide the substantive law. *Parkland Corp. v. Maxximum Co.*, 920 F. Supp. 1088 (D. Idaho 1996), illustrates this trend. *Parkland* was a patent infringement case in which the plaintiff contended that the defendants were infringing on the design of a product the defendants were manufacturing. When the plaintiff first asserted the claim, the defendants contacted a lawyer, Horton, to advise them. Horton later sold his

practice to another lawyer, Pedersen, and Pedersen took on both Horton's open *and* closed files—effectively turning Horton's current and former clients into Pedersen's current and former clients. Later, the plaintiff hired Pederson to prosecute his patent claim against the defendants. The defendants moved to disqualify Pedersen, arguing that he had a former client conflict. The District Court agreed.

In doing so, the District Court relied on the RPCs: "It is clear that '[i]n deciding whether to disqualify counsel, the Court looks to the local rules regulating the conduct of the members of its bar.'" *Id.* at 1090 (citation omitted). The District Court then used the former client conflict rule—RPC 1.9—in holding that Pedersen, by virtue of his acquisition of Horton's practice, had a former client conflict because the matters were the same and he had access to Horton's file and the defendants' confidential information in that file.<sup>iii</sup> The District Court disqualified Pedersen based on that conflict.

### **Legal Malpractice**

In *Wick v. Eisman*, 122 Idaho 698, 700, 838 P.2d 301 (1992), the Idaho Supreme Court stated unequivocally that "[a]n attorney who represents multiple clients with conflicting interests may subject that attorney to liability for legal malpractice." In making this point in *Wick*, the Supreme Court echoed an earlier discussion to this same effect in *Johnson v. Jones*, 103 Idaho 702, 705-06, 652 P.2d 650 (1982).

Paragraph 20 of the Preamble notes that the RPCs “are not designed to be a basis for civil liability.” At the same time, the Preamble acknowledges in that same paragraph that “since the Rules do establish standards of conduct by lawyers, a lawyer’s violation of a Rule may be evidence of breach of the applicable standard of conduct.” Among the standards of conduct that the conflict rules in particular establish is the duty of loyalty: “The relationship of client and attorney is one of trust, binding an attorney to the utmost good faith in fair dealing with his client, and obligating the attorney to discharge that trust with complete fairness, honor, honesty, loyalty, and fidelity.” *Blough v. Wellman*, 132 Idaho 424, 426, 974 P.2d 70 (1999) (citing *Beal v. Mars Larsen Ranch Corp., Inc.*, 99 Idaho 662, 667, 586 P.2d 1378 (1978)). Based on the duty of loyalty reflected in the conflict rules, the Supreme Court in *Blough* held: “For a breach or violation of those professional duties, the client may hold the attorney liable or accountable.” *Id.*

Both *Wick* and *Johnson* illustrate this latter point. In each, an element of the malpractice allegations was that the lawyers involved had undisclosed and unwaived conflicts. In effect, *Wick* and *Johnson* find that the duty of loyalty discussed in *Beal* and *Blough* form an element of a lawyer’s standard of care in representing clients. Although a claimant would still need to establish causation and damages, the existence of a conflict can have a major strategic effect on a malpractice claim. It has the potential to take what is otherwise a straightforward

negligence case and to provide the claimant with an inflammatory argument to explain *why* the services supposedly were not rendered properly: the lawyer had a conflict.

### **Breach of Fiduciary Duty**

Because the conflict rules are cast in terms of a lawyer's duty of loyalty to clients, a violation of the conflict rules translates quite directly into a breach of fiduciary duty. See, e.g., *Blickenstaff v. Clegg*, 140 Idaho 572, 97 P.3d 439 (2004); *Damron v. Herzog*, 67 F.3d 211 (9th Cir. 1995) (applying Idaho law). The Idaho Supreme Court in *Blough* succinctly summarized this link:

“[The conflict rules] mandat[e] that a lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interest. Loyalty to a client prohibits undertaking representation directly adverse to that client without the client's consent.” 132 Idaho at 426.

As noted earlier, a conflict can also be cast as an element of a legal malpractice claim.<sup>iv</sup> The significance of a breach of fiduciary duty claim is that a lawyer's services can be performed flawlessly in a technical sense, but if they result in damage to a client flowing from a conflict, the client has a remedy against the lawyer under a theory of breach of fiduciary duty. And, the damage element may not be that illusive in the hands of a skilled opponent: the damage

claimed in many instances is a transaction or other matter that didn't turn out to the client's liking.

Like a legal malpractice claim layered with a conflict, a breach of fiduciary claim centered on a lawyer's conflict is also dangerous ground for a defendant lawyer or law firm. Although juries may have difficulty grasping the complexities of a complicated business transaction or case, they have no difficulty grasping the simple but powerful concept of loyalty—and the breach of loyalty by a professional in whose hands a client has placed his or her trust.

### **Fee Forfeiture**

Under the law of agency, one of the remedies available for a breach of fiduciary duty by an agent is the full or partial forfeiture of the agent's fee. See generally *Rockefeller v. Grabow*, 136 Idaho 637, 39 P.3d 577 (2001). As the Idaho Supreme Court put it in *Rockefeller*, which involved a real estate agent:

“It is the established law of this jurisdiction that an agent's right to compensation will be affected by a violation of his fiduciary duties. . . . Allowing an agent to retain his entire commission as a matter of law when he has breached his fiduciary duties would eviscerate agency law. Secure in his compensation from the principal as long as the assigned task is completed, an agent's only chance of loss from violating his duties would be if he harmed the principal. The higher requirement of acting in the interest of the principal, without

a means of enforcement, would simply cease to exist.” 136 Idaho at 642 (citations omitted).

Applied to lawyers, this means that a lawyer whose conflict breaches a fiduciary duty to a client may be in jeopardy of losing all or part of the fee the lawyer has charged for the matter involved. See *Rockefeller*, 136 Idaho at 643 (discussing fee forfeiture as an equitable remedy); see, e.g., *In re Larson*, No. 03-04001, 2004 WL 307182 at \*7 (Bankr. D. Idaho Jan. 30, 2004) (unpublished) (requiring a lawyer to disgorge a fee in light of a conflict); see also *Cont. Cas. Co. v. Brady*, 127 Idaho 830, 907 P.2d 807 (1995) (no coverage under the malpractice insurance involved for a breach of fiduciary claim seeking fee forfeiture as the principal remedy). This remedy can be used by a client as both a sword to seek the return of fees already paid and as a shield against paying a lawyer’s bill.

### **Summing Up**

There are important professional reasons as reflected in the Preamble to the RPCs to follow the rules on conflicts. Increasingly, there are also very important practical reasons to follow those rules. Conflicts are no longer the exclusive province of bar discipline. The conflict rules have become the substantive law on a spectrum ranging from disqualification to fee forfeiture. Or, put simply, conflicts matter today in a very practical way.

## 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.

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<sup>i</sup> Preamble ¶ 16.

<sup>ii</sup> Preamble ¶ 19.

<sup>iii</sup> The current version of RPC 1.9 on former client conflicts is similar to the version in effect at the time *Parkland* was decided.

<sup>iv</sup> Both legal malpractice and breach of fiduciary duty claims must generally be predicated on the existence of an attorney-client relationship. See generally *Harrigfeld v. J.D. Hancock*, 364 F.3d 1024 (9th Cir. 2004) (applying Idaho law), 140 Idaho 134, 90 P.3d 884 (2004) (answering certified question); see, e.g., *Blickenstaff v. Clegg, supra*, 140 Idaho 572 (illustrating this issue in the context of a breach of fiduciary duty claim against a lawyer). For a discussion of the importance of defining the client in a given representation, see Mark J. Fucile, "Defensive Lawyering: Why Engagement Letters Are a Lawyer's Best Friend," Idaho State Bar Advocate at 12 (Sept. 2004).