

“Model” Doesn’t Mean “Uniform”: The Continuing Importance of State Variation

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Introduction

The past decade has seen sweeping change in the ability of lawyers to practice across state boundaries. Economic and technological forces have been the principal drivers of this trend. But, three significant “structural” developments approved by the ABA House of Delegates ten years ago greatly facilitated increased cross-border practice. First, the House in August 2002 approved recommendations of the Commission on Multijurisdictional Practice encouraging broader reciprocal admission.¹ Second, the House in August 2002 also approved the MJP Commission’s recommendation for a rule allowing specific categories of authorized temporary cross-border practice short of full admission.² Third, the House in February 2002 approved the recommendations of the Ethics 2000 Commission amending the Model Rules of Professional Conduct in a number of key respects.³

These changes helped spur a great practical increase in lawyer mobility as these recommendations were implemented at the state level.⁴ Many states adopted reciprocal admission.⁵ Most now have an “MJP” rule.⁶ Nearly all now have Rules of Professional Conduct closely paralleling the Model Rules.⁷ In short, lawyers can now both move across state boundaries with increased ease and find relatively familiar professional rules in other jurisdictions.

Despite these undeniably significant changes, however, important state variations remain.⁸ The sources of state variation are several. Some reflect differences in the wording of the rules as adopted in particular states from their Model Rule counterparts. Others reflect long-standing state court decisions. Still others reflect the influence of individual state court rules or statutory law.

To illustrate the continuing importance of state variation, this article examines the author’s experience in two states that have long had reciprocal admission: Oregon and Washington. Along with Idaho, Oregon and Washington began a then-novel “Tri-State Reciprocal Admission Compact” in January 2002.⁹ They each adopted “MJP” rules that closely approximate the ABA Model Rule.¹⁰ Both states adopted comprehensive revisions to their professional rules in, respectively, 2005 for Oregon and 2006 for Washington, patterned on the ABA Model Rules.¹¹ Nonetheless, surprising jurisdictional variation remains. For purposes of this article, the variations noted are limited to those that might expose a lawyer to risk of regulatory discipline, court-imposed disqualification or other sanctions or potential civil liability

in one but not the other. The primary purpose of comparing the two is not to simply catalog the differences.¹² Rather, it is to gauge the sources of those differences so that the practical import nationally of state variation can be assessed.

The Pacific Northwest Experience

Oregon and Washington look a lot alike. In fact, both states were created out of what was originally the same territory.¹³ They each have a wet western half running from the Cascades to the Pacific and an arid eastern high desert. They are dominated by large metropolitan areas (Portland and Seattle) yet have vast “wide open spaces.” Their economies have transitioned in the past generation from natural resources to high technology. And, the mascots at their major public universities are all named for prominent local fauna.

Law practice in each also looks a lot alike. Many firms have long had offices in both Portland and Seattle. Many individual lawyers practice in both states. Although the Washington State Bar Association is bigger than the Oregon State Bar, neither is so large that lawyers in particular practice areas don’t know their counterparts.

Notwithstanding these similarities, surprising differences remain in their respective laws of lawyering. The areas highlighted fit into the variations with possible exposure noted above and are ones that a relatively broad spectrum of practitioners may encounter. As was noted earlier, the primary purpose of examining these differences is to probe the sources of the distinctions rather than to simply catalog the contrasts.

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Different Rules. In some instances, the respective RPCs are simply different. Oregon, for example, gives lawyers the discretion to reveal confidential information when necessary to prevent reasonably certain death or substantial bodily harm.¹⁴ Washington, by contrast, makes the duty to disclose mandatory in this circumstance.¹⁵

Different Wording within the Same Rule. In other instances, the variations are more subtle but equally important. Both

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Oregon and Washington use versions of the “no contact” rule that are based largely on ABA Model Rule 4.2.¹⁶ Oregon’s version, however, defines the prohibition as extending broadly to the entire “subject” involved, while Washington’s version hews to the narrower focus on the particular “matter” found in the ABA Model Rule.¹⁷

Different Meanings for the Same Words. In still other instances, the respective RPCs use the same words but they have different meanings. Oregon, for example, defines “information relating to the representation of a client” in its confidentiality rule using the former and comparatively narrower terminology for “confidences” and “secrets.”¹⁸ Washington, by contrast, defines the term more broadly using comments patterned on the ABA Model Rule commentary.¹⁹

Different Commentary on the Same Rule. Oregon does not have official comments to its RPCs but does have a very comprehensive set of state bar ethics opinions.²⁰ Washington does have official comments (and ethics opinions). In some instances, commentary on the same rule creates differences (or at least potential differences) in application. Oregon, for example, has an ethics opinion that specifically approves the use of “advance” conflict waivers (as long as the risks are adequately explained).²¹ When the Washington Supreme Court adopted its current version of RPC 1.7, however, it deleted proposed Comment 22 on advance waivers that mirrored the corresponding ABA Model Rule comment and substituted “Reserved” in its place.²²

Different Interpretations of the Same Rule. In still other instances, court interpretations of the same rule differ. The Oregon Court of Appeals, for example, found (albeit under a relatively similar predecessor version to RPC 1.8(a)) that the modification of a fee agreement to add security for past due fees is not a business transaction with a client.²³ The Washington Supreme Court, by contrast, concluded (again under a comparatively similar predecessor version to RPC 1.8(a)) that a modification of that kind is a business transaction with a client.²⁴

Different Impacts from External Court Rules. Apart from differences within the professional rules and the accompanying commentary, differences arise from the application of external court rules. Oregon, for example, has no expert discovery in state civil proceedings and, therefore, an ethics opinion concludes that a lawyer can directly contact an opposing expert (because no court rule prohibits it).²⁵ Washington, by contrast, has expert discovery patterned on the corresponding federal procedural rules and, therefore, a Supreme Court decision finds that opposing experts may not be contacted directly (because contact is limited to depositions).²⁶

Different Impacts from External Law. Differences also arise from the application of both common law and statutory law. On the former, Oregon, for example, concludes that an insurance defense counsel has two clients for conflict purposes while Washington finds that an insurance defense counsel has only one client.²⁷ On the latter, Oregon, for example, concludes that there is no ethics violation for recording a telephone call (as long as one participant consents)

because such recording is permitted by Oregon statutory law while the same conduct is proscribed by Washington statutory law.²⁸

Different Consequences. There are differences in potential consequences, too. Oregon, for example, concludes that its Unfair Trade Practices Act generally does not apply to the business aspects of law practice.²⁹ Washington, by contrast, finds that its Consumer Protection Act applies to the business aspects of law practice.³⁰

It is important to emphasize that there are far more similarities than differences between the respective laws of lawyering in Oregon and Washington. Even with these comparatively similar neighbors, however, surprising material

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differences remain in an equally surprising number of areas that practitioners encounter relatively routinely. Moreover, there is neither a single source for the differences nor is one state uniformly more “rigorous” in its approach than the other.

Practical Import of State Variation

The Pacific Northwest experience suggests three broad observations on the continuing importance of state variation.


First, although the professional rules have generally drawn into much closer alignment as the Ethics 2000 amendments have been adopted at the state level, “material” state variations may ironically be more important now because it is far easier today to practice across state lines than it was 10 years ago. In other words, the very ease of cross-border practice has increased the likelihood that lawyers may encounter a “state variation.”

Second, state variations are not necessarily obvious even for the well-intentioned cross-border practitioner. As the experience in the Pacific Northwest illustrates, there are multiple sources of state variation and they do not follow a predictable pattern. Both the Oregon and Washington state bars have excellent resources available both on-line and in paper form on their respective laws of lawyering. It is entirely possible, however, that even a diligent cross-border practitioner (whether admitted reciprocally or practicing temporarily under the “MJP” rule) might still not grasp the significance of a variation until it has become a “trap for the unwary.”

Third, the practical consequences of running afoul of a “state variation” are several and are not mutually exclusive. Under Model Rule 8.5(b) and its common law equivalents,³¹

a lawyer's conduct in another jurisdiction will most often be gauged by the law of that state if the lawyer is either appearing in a court proceeding there or the "predominant effect" of the lawyer's conduct occurs in the other state. Model Rule 8.5(a), in turn, grants disciplinary jurisdiction to both the lawyer's "home" state and any venue of cross-border practice.³² Beyond regulatory consequences, failure to know the nuances of a local jurisdiction can also be a fertile ground for legal malpractice by an out-of-state practitioner.³³ Similarly, failure to adhere to local professional rules may subject an out-of-state lawyer to the multijurisdictional practice equivalent of disqualification: revocation of *pro hac vice* admission.³⁴ With any of these, ignorance is generally no excuse.³⁵

Conclusion

The increase in lawyer mobility that we have seen in the past decade has reshaped the practical aspects of law practice in significant ways. Changes in reciprocal admission and temporary multijurisdictional practice have made it easier for firms and individual lawyers alike to practice seamlessly across state boundaries. The increasing alignment of the professional rules over the past 10 years has also made the similarities among state rules far outweigh the differences. Despite that progress, "model" does not yet mean "uniform." The sources of variation among states differ and do not necessarily hold to predictable patterns. In sum, state variation continues to present important practical consequences for cross-border lawyers. 

Endnotes

1. The MJP Commission reports and related resources are available on the ABA Center for Professional Responsibility's web site at: http://www.americanbar.org/groups/professional_responsibility/committees_commissions/commission_on_multijurisdictional_practice.html.

2. *Id.*

3. The Ethics 2000 Commission reports and related resources on the adoption of its recommendations are available on the ABA Center for Professional Responsibility's web site at: http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct.html. See also ABA, A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, 1982-2005 (2006).

4. Other recommendations of the MJP Commission that have facilitated increased cross-border practice include proposals for in-house counsel registration and more uniform *pro hac vice* admission requirements.

5. For state adoption of the MJP Commission's recommendations, see http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/recommendations.authcheckdam.pdf.

6. For state adoption of MJP rules in particular, see http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/recommendations.authcheckdam.pdf.

7. For state adoption of the Model Rules, see http://www.americanbar.org/content/dam/aba/migrated/cpr/pic/ethics_2000_status_chart.authcheckdam.pdf.

8. For summaries of state variation by rule, see http://www.americanbar.org/groups/professional_responsibility/policy/rule_charts.html

9. See OREGON STATE BAR, THE ETHICAL OREGON LAWYER, § 19.2 at 19-2 (2006 rev. ed.).

10. See Oregon RPC 5.5, Washington RPC 5.5. The Oregon and Washington RPCs and state bar ethics opinions are available on the Oregon State Bar and Washington State Bar Association web sites at, respectively: www.osbar.org and www.wsba.org.

11. See OREGON STATE BAR, THE ETHICAL OREGON LAWYER, § 1.2 at 1.2 (Oregon) and § 1.7 at 1-5 (Washington).

12. Indeed, the examples that follow are illustrations only, not an exhaustive list.

13. The Washington Territory was split from the Oregon Territory in 1853: <http://sos.wa.gov/history/Timeline/detail.aspx?id=220>.

14. Oregon RPC 1.6(b)(2) (using the phrase "may reveal").

15. Washington RPC 1.6(b)(1) (using the phrase "shall reveal").

16. Oregon RPC 4.2, Washington RPC 4.2.

17. See *In re Newell*, 234 P.3d 967 (Or. 2010).

18. Oregon RPC 1.0(f).

19. Washington RPC 1.6, Comments 1-4.

20. See <https://www.osbar.org/ethics/toc.html>.

21. OSB Formal Ethics Op. 2005-122 at 324 (2005), citing ABA Formal Ethics Op. 05-346 (2005).

22. For the "legislative" history of Washington comprehensive amendments in 2006, see <http://www.wsba.org/Resources-and-Services/Ethics/Ethics-2003>.

23. *Welsh v. Case*, 43 P.3d 445 (Or. App. 2002).

24. *Valley/50th Ave., L.L.C. v. Stewart*, 153 P.3d 186 (Wash. 2007).

25. OSB Formal Ethics Op. 2005-132 (2005), interpreting Oregon RPCs 3.4(c) and 3.3(a)(5).

26. *In re Firestorm 1991*, 916 P.2d 411 (Wash. 1996), focusing on disqualification for improper invasion of privilege.

27. See OSB Formal Ethics Op. 2005-121 (2005); *Tank v. State Farm Fire & Cas. Co.*, 715 P.2d 1133 (Wash. 1986).

28. OSB Formal Ethics Op. 2005-156 (2005); *Washington RCW 9.73.030(1)(a)*.

29. See *Roach v. Mead*, 722 P.2d 1229 (Or. 1986) (decided in the specific context of a lawyer-client business transaction).

30. See *Short v. Demopolis*, 691 P.2d 163 (Wash. 1984).

31. See Restatement (Third) of the Law Governing Lawyers § 1, cmt. e at 10 (2000).

32. See, e.g., *Attorney Grievance Com'n of Maryland v. Kimmel*, 955 A.2d 269 (Md. 2008).

33. See, e.g., *Viner v. Sweet*, 70 P.3d 1046 (Cal. 2003).

34. See, e.g., *Sisk v. Transylvania Community Hosp., Inc.*, 695 S.E.2d 429 (N.C. 2010).

35. *Butler v. Biocore Medical Technologies, Inc.*, 348 F.3d 1163, 1174 (10th Cir. 2003) (rejecting the "ignorance" defense in affirming the revocation of a lawyer's *pro hac vice* admission for multiple violations of the forum state's professional rules).