



Litigation Ethics North and South of the Columbia

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Since Oregon and Washington adopted reciprocal admission in 2002, defense lawyers increasingly practice in both states. Defense counsel handling cases on both sides of the Columbia know that Oregon and Washington each use variants of civil rules based on the Federal Rules of Civil Procedure. They are also acutely aware, however, that significant differences remain, ranging from the absence of expert discovery in Oregon to ER 904 notices in Washington. So, too, with litigation ethics. Although the professional rules in Oregon and Washington each use versions of the ABA Model Rules of Professional Conduct, important differences remain north and south of the Columbia.



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In this article, we'll begin with a note on choice of law in cross-border practice and then examine three key areas of litigation ethics where important distinctions remain: (1) applying the "no contact" rule in the corporate setting; (2) handling inadvertent production; and (3) determining whether insurance defense counsel have one client or two. With each, we'll focus on state court practice. It is important to remember, however, that local rules in our Northwest federal courts adopt, respectively, the Oregon (Oregon District LR 83-7(a)) and Washington (Western District GR 2(e)(2) and Eastern District LR 83.3(a)) Rules of Professional Conduct.

Choice of Law

Litigators seldom need to look beyond the courthouse to determine which state's professional rules apply. Oregon and Washington have both adopted choice of law rules patterned on ABA Model Rule 8.5(b). Their respective versions of RPCs 8.5(b) are identical and provide that the professional rules of the forum state apply in litigation matters. There are, however, subtle differences in two important respects.

First, the methods of enforcing the professional rules differ on a practical level. The ABA's annual Survey on Lawyer Discipline Systems (available at www.abanet.org/cpr/discipline/sold/home.html) suggests that on a per capita basis, Oregon-based lawyers are much more likely to have a bar complaint filed against them and to be formally prosecuted by their state bar than their counterparts in Washington. In fact, for 2009 (the last year for which the ABA comparative statistics are available), an Oregon lawyer was roughly four times as likely to be the target of a formal disciplinary prosecution as a Washington lawyer. By contrast, reported decisional law suggests that Washington's courts often play a more direct role in supervising the professional conduct of lawyers appearing before them than their Oregon counterparts. In *Magaña v. Hyundai Motor America*, 167 Wn2d 570, 220 P3d 191 (2009), for example, the Washington Supreme Court affirmed an \$8 million default judgment entered as a discovery sanction for withholding material documents in a product liability case, chastising both the defendant automaker's legal department

and its outside national counsel in the process. By contrast, a few months before *Magaña*, the Oregon Court of Appeals in *G.B. v. Morey*, 229 Or App 605, 215 P3d 879 (2009), observed that asserted attorney ethics violations are the province of the disciplinary system rather than the trial courts.

Second, Oregon's professional rules contain more unlabelled "traps" than the Washington rules. When Oregon last comprehensively updated its professional rules, in 2005, it retained some of the verbiage of its former Disciplinary Rules without calling out those distinctions from ABA Model Rule terminology in accompanying comments (and, indeed, Oregon, unlike most jurisdictions, has not adopted any comments at all). By contrast, when Washington last systematically amended its professional rules in 2006, it plainly labeled key distinctions from the ABA Model Rules with "Washington comments" that explain the differences and are largely rooted in longstanding Washington case law. As a result, even a well-intentioned lawyer is at greater risk of running afoul of unsuspecting traps in the Oregon rules than in the Washington RPCs.

The "No Contact" Rule in the Corporate Context

Oregon and Washington have both adopted variants of the "no contact" rule (RPC 4.2 in each) that are comparatively similar in overall concept. But they differ in a key respect when applied in the corporate (or other entity) context. Both protect corporate officers and senior managers from direct contact by opposing counsel by including them within the scope of corporate counsel's

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representation. Oregon and Washington take differing approaches, however, to line-level corporate employees whose conduct is at issue.

In Oregon, a line-level corporate employee whose conduct is at issue is considered within corporate counsel's representation and, therefore, is "off limits" from direct contact by opposing counsel. Oregon State Bar Formal Ethics Opinion 2005-80 (2005) notes that this approach is based on the fact that the opposing party is attempting to hold the corporation vicariously liable for the acts of its employee.

In Washington, by contrast, a line-level corporate employee is construed to fall within corporate counsel's representation only if the employee is a "speaking agent" under Washington Evidence Rule 801(d)(2) (iv). Comment 10 to Washington RPC 4.2 notes that this approach is based on the Washington Supreme Court's decision in *Wright v. Group Health Hospital*, 103 Wn2d 192, 691 P2d 564 (1984). Professor Robert Aronson of the University of Washington School of Law in his *Law of Evidence in Washington* (at § 801.04[3][b][v] (2007 rev ed)) observes that this standard potentially draws a much smaller circle of employees within corporate counsel's representation for purposes of the rule than most other states (or the federal rules). In *Wright*, for example, the Washington Supreme Court found that corporate defense counsel's representation did not automatically extend to nurses who were involved in the care of the claimant in a medical malpractice case.

Inadvertent Production

Oregon and Washington generally reach the same result in handling inadvertent production issues. Washington, however, has moved to a rule-based system that makes the analysis much more straightforward than in Oregon at a time when electronically stored information plays an increasingly prominent role in both discovery generally and inadvertent production in particular.

In Oregon, the duty to notify opposing counsel of the receipt of what appears to be inadvertently produced privileged information is found in RPC 4.4(b). Oregon State Bar Formal Ethics Opinion 2005-150 (2005) notes that the associated questions of how to litigate potential privilege waiver and the criteria for determining whether privilege has been waived are governed by, respectively, procedural and evidence law. Although Oregon's Council on Court Procedures (see <http://legacy.lclark.edu/~ccpl/index.htm>) has proposed amendments that address some electronic discovery issues, Oregon's procedural rules have not (at least yet) been amended to parallel Federal Rule of Civil Procedure 26 in this regard. In short, the specific method—and accompanying interim duties—for litigating waiver through inadvertent production in Oregon state court are presently open questions. As for waiver itself, although Oregon case law (see, e.g., *Goldsborough v. Eagle Crest Partners, Ltd.*, 314 Or 336, 838 P2d 1069 (1992)) uses a set of criteria that is functionally similar to new Federal Rule of Evidence 502, Oregon does not have a black-letter rule on this point either.

In Washington, by contrast, guidance is both clearer and rule-based. Washington RPC 4.4(b), like its Oregon counterpart, requires lawyers receiving what appears to be an opponent's inadvertently produced privileged material to notify opposing counsel. In 2010, Washington approved amendments to, respectively, its Civil and Evidence Rules that mirror the corresponding federal rules in this area. Under CR 26(b)(6), a party receiving inadvertently produced material must now return or destroy the material or sequester it pending resolution by the court of whether privilege has been waived (and, in doing so, generally reflects the precepts articulated in existing Washington case law under *In re Firestorm* 1991, 129 Wn2d 130, 916 P2d 411 (1996), and *Richards v. Jain*, 168 F Supp2d 1195 (WD Wash 2001)). New Washington ER 502, in turn,

focuses the question of privilege waiver on the reasonable steps the holder took to prevent disclosure (and, in doing so, generally reflects existing Washington case law under *Sitterson v. Evergreen School Dist. No. 114*, 147 Wn App 576, 196 P3d 735 (2008)).

The Client in Insurance Defense

Oregon and Washington take opposite positions on whether insurance defense counsel have one client or two. Under a series of ethics opinions (OSB Formal Ethics Ops 2005-30 (2005), 2005-77 (2005), 2005-121 (2005)), Oregon views insurance defense counsel (absent specific agreement to the contrary) as having two clients: the insured and the insurer. Washington, in turn, under both case law (*Tank v. State Farm Fire & Cas. Co.*, 105 Wn2d 381, 715 P2d 1133 (1986)) and a state bar ethics opinion (WSBA Formal Ethics Op 195 (1999; amended 2009)), finds that insurance defense counsel represent only the insured, with the carrier considered a third party payor—albeit one generally covered by a "common interest" privilege. The distinction is not merely academic, as Oregon's "two-client" approach has on occasion been the basis for carriers to seek disqualification of counsel. In *Sabrix, Inc. v. Carolina Cas. Ins. Co.*, No. CV-02-1470-HU, 2003 WL 23538035 (D Or July 23, 2003) (unpublished), for example, a carrier sought disqualification of a firm handling a coverage matter against it that was also defending one of its insureds in unrelated litigation in another state. Although the court denied the motion, it underscores the need to carefully assess and address the conflict implications of Oregon's "two-client" model.

Summing Up

Although civil practice and litigation ethics in Oregon and Washington differ, defense counsel practicing on both sides of the Columbia should still keep the distinctions in mind. ☪