

FIRST ANNUAL **ETHICS TUNE-UP**

**Multnomah Bar Association
December 15, 2005
Portland**

**Mark J. Fucile
Fucile & Reising LLP
503.224.4895
Mark@frllp.com
www.frllp.com**

Mark J. Fucile is a partner with Fucile & Reising LLP, where he focuses on legal ethics and products liability defense. 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. Mark is a past chair and is a current member of the Washington State Bar Rules of Professional Conduct Committee, is a former member of the Oregon State Bar Legal Ethics Committee and is a member of the Idaho State Bar Professionalism & Ethics Section. He is a contributing author/editor for the current editions of the Washington State Bar's Legal Ethics Deskbook and the Oregon State Bar's Ethical Oregon Lawyer. Mark also writes the quarterly Ethics & the Law column for the Washington State Bar News and the monthly Ethics Focus column for the Multnomah Bar's Multnomah Lawyer and is a regular contributor on law firm risk management for the Oregon State Bar Bulletin, the Idaho State Bar Advocate and the Alaska Bar Rag. In his products liability defense practice, Mark represents national and Northwest manufacturers in cases involving automobiles, building materials and industrial products. He is a member of the Oregon Association of Defense Counsel, the Washington Defense Trial Lawyers, the Defense Research Institute and the International Association of Defense Counsel. Mark is admitted in Oregon, Washington, Idaho, Alaska and the District of Columbia. He received his B.S. from Lewis & Clark College and his J.D. from UCLA.

TABLE OF CONTENTS
AND PROGRAM OUTLINE

- Section 1: Why Conflicts Matter**
“Why Conflicts Matter”
Mark J. Fucile
June 2005 Oregon State Bar Bulletin
- Section 2: Engagement Letters as a Lawyer’s Best Friend**
“Starting Right:
Using Engagement Letters as a Risk Management Tool”
Mark J. Fucile
July 2005 Oregon State Bar Bulletin
- Section 3: Multijurisdictional Practice and Licensing**
“The New Rules: What’s Inside the Box?
Part 4-Multijurisdictional Practice”
Mark J. Fucile
March 2005 Multnomah Lawyer
- Section 4: The “No Contact” Rule**
“Who’s Fair Game?
Who You Can and Can’t Talk to on the Other Side”
Mark J. Fucile
October 2005 Oregon State Bar Bulletin
- Section 5: Inadvertent Production**
“Inadvertent Production: Gold Nugget or Rotten Egg?”
Mark J. Fucile
February 2004 Multnomah Lawyer
- Section 6: Disqualification Developments**
“New Year’s Resolution: Better Conflict Checks”
Mark J. Fucile
Forthcoming January 2006 Multnomah Lawyer

Oregon State Bar Bulletin and Multnomah Lawyer articles are available on the web at, respectively, www.osbar.org and www.mbabar.org.

Section 1: Why Conflicts Matter

“Why Conflicts Matter”

Mark J. Fucile

June 2005 Oregon State Bar Bulletin

June 2005 OSB Bar Bulletin *Managing Your Practice* Column

Why Conflicts Matter

**By Mark J. Fucile
Fucile & Reising LLP**

As professionals, Oregon lawyers have long had a duty to follow the RPCs or their predecessors. And there have long been disciplinary consequences for failing to do so. Without diminishing their role as either an ethical compass or a regulatory code, the professional rules—especially those relating to conflicts—have also in recent years increasingly come to form the substantive law of legal malpractice, lawyer breach of fiduciary duty, disqualification and fee forfeiture. In short, conflicts matter today in a very practical way.

In this article, we'll look at several Oregon cases that highlight the practical importance of the conflict rules beyond the disciplinary setting. In later installments, we'll consider how engagement letters and conflict waivers can help you manage conflicts to reduce civil as well as regulatory risk.

Legal Malpractice. The Oregon Supreme Court has long held that violations of the professional rules do not create a private cause of action in and of themselves nor do they constitute negligence per se. See *Bob Godfrey Pontiac v. Roloff*, 291 Or 318, 324-37, 630 P2d 840 (1981); *O'Toole v. Franklin*, 279 Or 513, 524, 569 P2d 561 (1977). At the same time, conflicts *can* have two important roles in legal malpractice cases. The first is legal: a conflict can be evidence of a lawyer's negligence in breaching the standard of care. See

Tydeman v. Flaherty, 126 Or App 180, 187-88, 868 P2d 755 (1994). The second is tactical: a conflict opens the door to a jury argument that any harm to the client was motivated by the lawyer's self-interest rather than by simple negligence.

Tydeman illustrates both. The plaintiff was the lawyer's by then former client. The plaintiff alleged that the lawyer had negligently handled judgment lien litigation by, in part, not pursuing claims against another of the lawyer's clients. The plaintiff contended that the lawyer was *negligent* in handling the claim in light of the conflict. At the same time, the conflict also allowed the plaintiff to argue *why* the lawyer supposedly "pulled his punches."

Reversing a motion to dismiss, the Court of Appeals allowed the claim to move forward. In doing so, it noted pointedly that although the conflict involved a violation of the professional rules, it also alleged a breach of the standard of care and stated—at least on the pleadings—a claim for legal malpractice.

Breach of Fiduciary Duty. In *Kidney Association of Oregon v. Ferguson*, 315 Or 135, 144-48, 843 P2d 442 (1992), the Supreme Court held that a violation of the conflict rules can also constitute a breach of the fiduciary duty of loyalty. As the Supreme Court put it: "In the determination [of] whether a lawyer breached a fiduciary duty to a client, the court may consider the standard of conduct prescribed by the disciplinary rules." *Id.* at 144. A client must still prove causation and damages. But, the specter of a conflict will provide a skilled opponent with a powerful tool to use with a jury.

The potential sweep of breach of fiduciary duty claims against lawyers is quite broad. It embraces both claims by clients and under a 1999 Oregon

Supreme Court decision—*Granewich v. Harding*, 329 Or 47, 985 P2d 788 (1999)—also extends in some circumstances to nonclients. More fundamentally, a breach of fiduciary duty claim built around a conflict strikes at the heart of the attorney-client relationship—the duty of loyalty. The comments to ABA Model Rule 1.7, which is the current client conflict rule and the pattern upon which Oregon’s corresponding RPC 1.7 is based, lead with this: “Loyalty and independent judgment are essential elements in the lawyer’s relationship to a client.” Juries might have difficulty grasping the nuances of complex business transactions or litigation that may underlie a claim against a lawyer. By contrast, loyalty is a simple but powerful concept that they readily understand.

Disqualification. Although court decisions provide the procedural law of disqualification in terms of standing and timeliness, the RPCs effectively supply the substantive law. See *State ex rel Bryant v. Ellis*, 301 Or 633, 636-39, 724 P2d 811 (1986). Courts look primarily to the rules governing current or former client conflicts in determining whether a lawyer or law firm should be disqualified. See, e.g., *Unified Sewerage Agency v. Jelco, Inc.*, 646 F2d 1339, 1344-45 (9th Cir 1981) (applying Oregon current client conflict rules); *PGE v. Duncan, Weinberg, Miller & Pembroke, P.C.*, 162 Or App 265, 278-288, 986 P2d 35 (1999) (applying former client conflict rules); *Admiral Insurance Co. v. Mason Bruce & Girard, Inc.*, 2002 WL 31972159 (D Or Dec 5, 2002) (involving elements of both current and former client conflicts).

In applying the current or former conflict rules, courts like the ones in these Oregon examples often examine disciplinary decisions. But, it is only for

guidance on whether a conflict exists; the sanction in the disqualification context is clear—forcible removal from the case. Moreover, as we’ll see in the next section, a disqualified law firm’s problems don’t necessarily end when the court’s order is entered.

Fee Forfeiture. A lawyer’s breach of fiduciary duty to a client can result in forfeiture of all or part of the lawyer’s fees. See *Kidney Association of Oregon v. Ferguson, supra*, 315 Or at 143-44; accord *PGE v. Duncan, Weinberg, Miller & Pembroke, P.C., supra*, 162 Or App at 277 (discussing *Kidney Association*). The rationale is that the full or partial loss of the lawyer’s compensation is a remedy for the lawyer’s breach of the fiduciary duty of loyalty—in other words, a lawyer shouldn’t get paid for being disloyal. As with a breach of fiduciary duty claim, courts use the conflict rules as the yardstick for measuring whether a lawyer has breached the fiduciary duty of loyalty.

An emerging trend nationally is for clients who have had their lawyers disqualified for conflicts to seek the return of fees paid to the law firm. The concept, as noted, is tied closely to breach of fiduciary duty. In practical terms, it also reflects the fact that a client who has had legal counsel disqualified for a conflict of the law firm’s making has lost his or her “investment” in the law firm in terms of the fees paid. Given the choice of who should bear that loss, courts are increasingly saying it should be the law firm rather than the client.

Clients may also try to use the conflict rules as a shield rather than as a sword in defending against fee collection efforts. See, e.g., *Welsh v. Case*, 180 Or App 370, 43 P3d 445 (2002). Turned in this direction, the argument is that a

lawyer shouldn't be allowed to collect a fee that was earned while the lawyer was in breach of the fiduciary duty of loyalty. Again, the conflict rules are used as the gauge for determining whether a breach occurred.

Although there are important professional reasons to follow the conflict rules, there are equally important practical ones. Conflicts are no longer the sole province of bar discipline. The professional rules on conflicts essentially form the substantive law for lawyer civil liability ranging from legal malpractice to fee forfeiture. In sum, conflicts today matter in a very practical way.

Section 2: Engagement Letters as a Lawyer's Best Friend

"Starting Right:
Using Engagement Letters as a Risk Management Tool"
Mark J. Fucile
July 2005 Oregon State Bar Bulletin

July 2005 OSB *Bar Bulletin* *Managing Your Practice* Column

Starting Right: Using Engagement Letters as a Risk Management Tool

**By Mark J. Fucile
Fucile & Reising LLP**

For a variety of reasons, lawyers' decisions today are increasingly being "second guessed" and the civil and regulatory consequences of "wrong" decisions are potentially more severe than in the past. One way lawyers can protect themselves in the face of these trends is "defensive lawyering"—managing your practice in a way that attempts to reduce civil and regulatory risk by documenting the key milestones in a representation. Engagement letters offer four key tools in defensive lawyering.

Defining the Client. At first blush, it might seem odd that you need to say who your client is. In many circumstances, however, you may be dealing with more than one person or entity as a part of the background context of a representation—multiple company founders, a developer and a property owner, one distinct part of a corporate group or several family members. In those situations it is important to make clear to whom your duties will—and will not—flow so that if the other people in the circle you are dealing with are disappointed later, they can't claim you were representing them too, and that you didn't protect them.

In Oregon, whether an attorney-client relationship exists in a particular circumstance is governed by the "reasonable expectations of the client" test set

out in *In re Weidner*, 310 Or 757, 770, 801 P2d 828 (1990). The test is twofold: (1) does the client subjectively believe you are the client's lawyer? and (2) is that subjective belief objectively reasonable under the circumstances? Engagement letters allow you to set out clearly who your client will be in a given circumstance. Depending on the setting, polite "nonrepresentation" letters to those you will not be representing may also offer a useful supplement to an engagement agreement to let the nonrepresented parties know which side you are on. In the face of an engagement agreement with your client, conduct consistent with that agreement, and depending on the circumstances, nonrepresentation letters, it will be difficult for another party to assert that you were his or her lawyer too, under either element of the *Weidner* test. Defining who is being represented also benefits your client because it clarifies from the outset whom you will be looking to for strategic and tactical decisions on the "client side" of the relationship.

Defining the Scope of the Representation. Engagement letters offer an excellent opportunity to define the scope of a representation. As the law grows more complex, it is becoming more common for businesses and even some individuals to have more than one lawyer handle discrete aspects of their legal needs. If you are handling a specific piece of a client's work, it is prudent to set that out in the engagement letter. That way, you are less likely to be blamed later if another aspect of the client's work, that you were not responsible for, doesn't turn out to the client's liking.

Oregon RPC 1.2(b) allows a lawyer to "limit the scope of the representation if the limitation is reasonable under the circumstances and the

client gives informed consent.” An engagement letter that outlines the scope of the services to be provided will go a long way toward meeting this requirement. It also benefits the client by fostering at the outset of the representation a conversation between the lawyer and the client concerning the client’s goals and the lawyer’s assessment of those goals.

Defining the scope of the representation can also offer a practical tool in managing conflicts by structuring the relationship in a way that eliminates conflicts in the first place. A conflict exists when the positions of multiple current or former clients are “directly” (to use the RPC 1.7 formulation for current clients) or “materially” (to use the RPC 1.9 terminology for former clients) “adverse.” If a representation is structured in a way that eliminates adversity between the positions of the clients involved, it may be possible to take on work that might otherwise have been precluded outright or that at the least would have required waivers. For example, a manufacturer and a distributor with consistent positions in a product liability claim might wish to hire the same lawyer to handle their defense more efficiently. By agreeing (among themselves and without the lawyer acting as an intermediary) to litigate any cross-claims for indemnity in a separate forum with separate counsel, the two clients may have effectively eliminated any potential conflict that would have precluded a single lawyer from defending both. An engagement letter is the perfect place to document structural arrangements of this kind.

Documenting Conflict Waivers. Lawyers have important professional responsibilities for managing conflicts. See *generally* RPCs 1.7 (current client

conflicts), 1.8 (lawyer self-interest conflicts) and 1.9 (former client conflicts). At the same time, conflicts of interest (or alleged conflicts of interest) can also present themselves in other litigation directed against lawyers—including disqualification, malpractice and breach of fiduciary duty claims. See generally *PGE v. Duncan, Weinberg, Miller & Pembroke, P.C.*, 162 Or App 265, 278-288, 986 P2d 35 (1999) (disqualification); *Tydeman v. Flaherty*, 126 Or App 180, 187-88, 868 P2d 755 (1994) (malpractice); *Kidney Association of Oregon v. Ferguson*, 315 Or 135, 144-48, 843 P2d 442 (1992) (breach of fiduciary duty). Given these risk factors, carefully documenting client consent to conflicts is important—both ethically and practically—and engagement letters offer an ideal time to do that.

Both RPC 1.7, which governs current client conflicts, and RPC 1.9, which controls former client conflicts, require that conflict waivers be confirmed in writing. Engagement letters that either include a conflict waiver or incorporate a separate standalone waiver protect both the lawyer and the client because they (1) document the disclosures that the lawyer made to the client and (2) confirm the basis upon which the client granted the waiver. See generally *In re Brandt/Griffin*, 331 Or 113, 10 P3d 906 (2000) (discussing the content of conflict waivers under the former Oregon Code of Professional Responsibility). In that context, the more detailed the letter, the better—both from the perspective of fully explaining the issues involved to the client and increasing the likelihood that the client will be held to the waiver.

Documenting Rates and Mechanisms to Change Rates. An engagement letter is a great venue to both confirm existing rates and related charges for the work to be performed and to preserve your ability to modify those rates and charges during the course of the representation. When Oregon moved to the RPCs at the beginning of the year, it did not adopt the portion of ABA Model Rule 1.5(b) that, at least with new clients, requires an explanation of fees and expenses. Nonetheless, clearly communicating current rates can prevent misunderstandings with the client later. Further, specifically reserving the right to change those fees will generally avoid having to go back to the client for specific consent because the ability to modify the rate has been built-in up front.

In sum, engagement letters aren't an insurance policy. But in an environment in which lawyers' decisions are increasingly being "second guessed" and the consequences of "wrong" decisions can be significant, engagement letters are key tools in defensive lawyering.

Section 3: Multijurisdictional Practice and Licensing

“The New Rules: What’s Inside the Box?”

Part 4-Multijurisdictional Practice”

Mark J. Fucile

March 2005 Multnomah Lawyer

March 2005 *Multnomah Lawyer Ethics Focus*

**The New Rules:
What's Inside the Box? Part 4-Multijurisdictional Practice**

**By Mark J. Fucile
Fucile & Reising LLP**

In this final installment of our look at the new rules, we'll examine the new multijurisdictional practice rule. The old rule on licensing was DR 3-101. It prohibited the unauthorized practice of law by both nonlawyers and lawyers who were not licensed here or otherwise specially admitted. The new rule is RPC 5.5. It retains the prohibitions against unauthorized practice found in DR 3-101. RPC 5.5 then authorizes several specific categories of temporary practice here by out-of-state lawyers.

Before we turn to the specifics, let's start with a little history for context. Lawyers have been traveling across jurisdictional boundaries for a long time. Litigators, for example, have long been able to get temporarily admitted in another state to handle an individual case under pro hac vice rules. More recently, many states—including Oregon—have adopted varying reciprocal admission rules to accommodate lawyers who routinely practice in more than one jurisdiction. But, lawyers who only occasionally handled matters in other states and who didn't have the pro hac vice mechanism available to authorize their presence were in somewhat of a limbo. Most often it was business lawyers who were in another state handling a transaction for a "home state" client. Even litigators, though, ran into this problem when a case was being arbitrated rather

than handled in court because many states don't have pro hac vice rules beyond formal judicial proceedings.

Although virtually all states have regulations or statutes preventing the unauthorized practice of law, the risk to lawyers wasn't typically from regulatory authorities. Rather, it came from their own clients who, disappointed with the result in a matter, might argue that they had no duty to pay their lawyers because the lawyers were engaged in the unauthorized practice of law by providing the services involved in a jurisdiction in which the lawyers weren't licensed. Sound far-fetched? Many lawyers thought so until the California Supreme Court voided a fee agreement on exactly that theory in *Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court*, 17 Cal 4th 119, 949 P2d 1, 70 Cal Rptr 2d 304 (1998), and effectively denied over \$1 million in fees to a New York law firm because its lawyers providing services to a California client were not licensed there. In the wake of *Birbrower*, the ABA appointed a special commission to examine multijurisdictional practice issues and eventually adopted a temporary practice rule that became the model for Oregon RPC 5.5 and similar regulations nationwide.

Oregon's version creates six categories of authorized multijurisdictional practice.

First, out-of-state lawyers are allowed to handle a matter here in association with an Oregon-licensed lawyer. For example, a Washington lawyer from a firm's Seattle office can assist on a matter its Portland office is handling.

Second, out-of-state lawyers are permitted to work on matters here if they have been admitted pro hac vice or expect to be so once the case is filed. This covers not only traditional pro hac vice admission, but also work such as investigations before a case is filed.

Third, out-of-state lawyers are authorized to handle arbitrations and mediations here that are related to their “home state” and for which formal pro hac vice rules do not exist. For example, a Seattle lawyer could arbitrate or mediate a case in Portland for a Washington client.

Fourth, out-of-state lawyers are permitted to handle matters here that are related to their “home state” practice. To continue our Seattle lawyer example, the lawyer could negotiate a business transaction in Portland for a Washington client.

Fifth, out-of-state corporate counsel are allowed to provide temporary services here to their corporate employers. This provision supplements Oregon’s in-house counsel admission rule by allowing temporary practice here by in-house lawyers. For example, a Seattle-based in-house lawyer could handle a matter for the company’s Portland office.

Sixth, out-of-state lawyers who are authorized to practice here by federal law may do so. For example, a military lawyer from Fort Lewis could handle a court-martial here.

When it adopted the RPCs, the Supreme Court limited the new multijurisdictional practice rules to a three-year trial period. Unless extended by further order of the Court, they will sunset at the end of 2007. Given the nature

of practice today and the frequency with which lawyers cross interstate borders in both directions, these very practical rules will hopefully have proven their merit to the Court long before then.

Section 4: The “No Contact” Rule

“Who’s Fair Game?

Who You Can and Can’t Talk to on the Other Side”

Mark J. Fucile

October 2005 Oregon State Bar Bulletin

October 2005 OSB *Bar Bulletin Managing Your Practice Column*

Who's Fair Game? Who You Can and Can't Talk to on the Other Side

**By Mark J. Fucile
Fucile & Reising LLP**

Oregon RPC 4.2 governs communications with represented parties. The “no contact” rule is designed to protect clients by channeling most communications through counsel for each side. Although RPC 4.2 is simple on its face, it can be difficult in application. At the same time, it involves situations that lawyers encounter frequently and where they risk sanctions for “guessing wrong.”

In this column we'll look at who you can—and can't—talk to on the other side. Although the focus is on the litigation context where this arises most frequently, the concepts discussed apply with equal measure outside litigation. We'll first survey the elements of the “no contact” rule, then turn to its exceptions and conclude with how the rule applies in the corporate context.

Before we do, a note on the relationship between RPC 4.2 and its predecessor, DR 7-104(A)(1), is warranted. Subject to further development of the new rule by the Oregon Supreme Court, the cases applying DR 7-104(A)(1) should still be “good law.” In fact, the new Oregon ethics opinions rely heavily on prior decisions under DR 7-104(A)(1) in discussing RPC 4.2.

The Elements

The “no contact” rule has four primary elements: (1) a lawyer; (2) a communication; (3) about the subject of the representation; and (4) with a person the lawyer knows to be represented.

A Lawyer. The “lawyer” part is easy. Under its terms, RPC 4.2 applies to both lawyers acting in a representative capacity and lawyers representing themselves. But what about people who work for the lawyer—such as paralegals, secretaries and investigators? And what about our own clients? Clients are not prohibited from contacts with each other during a lawsuit and in fact, often continue to deal with each other on many fronts while disputes are underway. See OSB Legal Ethics Op 2005-6. Nonetheless, a lawyer should not “coach” a client for a prohibited “end run” around the other side’s lawyer. *Id.*

Communication. “Communicate” is not defined specifically in the rule. The safest course though is to read this term broadly to include communications that are either oral—both in-person and telephone—or written—both paper and electronic.

Subject Matter of the Representation. RPC 4.2 does not prohibit *all* communications with the other side. Rather, it prohibits communications “on the subject of the representation” where the party is represented on “that subject.” In a litigation setting, the “subject of the representation” will typically mirror the issues in the lawsuit as reflected in the pleadings or positions that the parties have otherwise staked out. See OSB Legal Ethics Op 2005-126. For example, asking an opposing party in an automobile accident case during a break in a

deposition whether the light was red or green will likely run afoul of the rule. By contrast, exchanging common social pleasantries with an opposing party during a break in a deposition should not.

Person the Lawyer Knows to Be Represented. RPC 4.2 is framed in terms of actual knowledge that a party is represented. Actual knowledge, however, can be implied from the circumstances under RPC 1.0(h).

The Exceptions

There are three exceptions to the “no contact” rule: permission by opposing counsel, communications that are “authorized by law,” and notices that are required by written contract to be served directly on the parties.

Permission: RPC 4.2(a). Because the rule is designed to protect clients from overreaching by adverse counsel, permission for direct contact must come from the party’s lawyer rather than from the party. The rule does not require permission to be in writing. A quick note or e-mail back to the lawyer who has granted permission, however, will protect the contacting lawyer if there are any misunderstandings or disputes later.

Authorized by Law: RPC 4.2(b). Contacts that are expressly permitted by law (or under the pending amendments, court order) do not violate the rule. Service of a summons or obtaining documents under public records inspection statutes, for example, fall within the exception. See OSB Legal Ethics Op 2005-144 (public records). At the same time, the phrase “authorized by law” is more ambiguous in its application than in its recitation. See generally *In re Williams*, 314 Or 530, 840 P2d 1280 (1992) (reading the “authorized by law exception”

narrowly under RPC 4.2's analogous predecessor), DR 7-104(A)(1).); OSB Legal Ethics Op 2005-144. The safest course is to read this exception narrowly and to rely on permission from opposing counsel instead if direct contact is necessary.

Contractual Notice: RPC 4.2(c). Notices that are required by written agreements to be served directly to parties are permitted as long as the notice is also sent to the other person's lawyer. Although not a specific part of the exception, the safest course is to transmit the lawyer's copy at the same time as the required contractual notice other person.

The Corporate Context

A key question in applying the "no contact" rule in the corporate context is: Who is the represented party? Or stated alternatively, if the corporation is represented, does that representation extend to its current and former officers and employees?

Oregon has a series of ethics opinions and decisions that have developed some relatively "bright line" distinctions. Legal Ethics Opinion 2005-80 addresses corporate employees and Legal Ethics Opinion 2005-152 does the same for governmental employees. Both 2005-80 and 2005-152 set out four categories of employees and then define whether they are "fair game" or "off limits":

Current Management Employees. Current corporate officers, directors and managers are swept under the entity's representation and, therefore, are "off limits" outside formal discovery such as depositions. Applying the rule to corporate officers and directors is straightforward. Deciding who is a "manager"

for purposes of the rule, however, can be more difficult: 2005-80 notes that it is a fact-specific exercise and depends largely on the duties of the individual in relation to the issues in the litigation. See also OSB Legal Ethics Op 2005-144. A senior manager of grocery store chain, for example, would likely be off-limits even if not an officer of the corporation when the manager had responsibility for negotiating a vegetable supply contract that was the subject of litigation with a grower. The night shift manager for the produce department at one of the company's stores, by contrast, would likely be fair game as long as the litigation did not raise issues within the purview of that person's responsibilities.

Current Employees Whose Conduct Is at Issue. Current employees whose conduct is at issue are treated as falling within the entity's representation. Party admissions under Oregon Evidence Code 801(d)(2)(D) include statements by "a party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship[.]" Therefore, an employee whose conduct is attributable to the corporation will fall within the company's representation. For example, if a company truck driver runs a red light, causes an accident, jumps out of the cab and yells "it's all my fault," that employee will fall within the company's representation and will be off limits outside formal discovery.

Current Employees Whose Conduct Is Not at Issue. Current employees whose conduct is not directly at issue are generally "fair game." To return to the truck driver example, let's add the twist that another company driver was following behind and both witnessed the accident and heard the admission. The

second driver would simply be an occurrence witness and would not fall within the company's representation.

Former Employees. Former employees of all stripes are fair game as long as they are not separately represented in the matter by their own counsel. The only caveat is that a contacting lawyer cannot use the interview to invade the former employer's attorney-client privilege or work product protection. See *Brown v. State of Or., Dept. of Corrections*, 173 FRD 265, 269 (D Or 1997) (applying former DR 7-104(A)(1) in the entity context).

Summing Up

Potential sanctions for unauthorized contact can include disqualification, suppression of the evidence obtained and bar discipline. Given those possible sanctions, coupled with the natural reaction of opposing counsel upon learning of a perceived "end run" to get to his or her client, this is definitely an area where discretion is the better part of valor.

Section 5: Inadvertent Production

“Inadvertent Production: Gold Nugget or Rotten Egg?”

Mark J. Fucile

February 2004 Multnomah Lawyer

February 2004 *Multnomah Lawyer Ethics Focus*

Inadvertent Production: Gold Nugget or Rotten Egg?

**By Mark J. Fucile
Fucile & Reising LLP**

Imagine this scenario: You just received five boxes of documents from opposing counsel in response to a production request. You and your paralegal dig into the boxes and you run across some e-mail print-outs. You notice that one of the e-mails contains a damaging admission by your opponent and you are envisioning it as a billboard-size trial exhibit. You then realize that your gold nugget is from in-house counsel to the president of the opposing party and, therefore, was privileged at the time it was written. You got a privilege log with the production, but the e-mail wasn't listed. Given its content, though, you conclude that your opposite number likely produced it inadvertently.

What do you do? Do you need to tell opposing counsel? Has the privilege been waived? If you don't tell the other side and instead simply use an inadvertently produced document, is there a risk *to you* that might turn your gold nugget into a rotten egg?

In an age when privileged communications increasingly travel electronically instead of paper form under law firm or office of general counsel letterhead, it is also becoming more common for at least some privileged documents to slip through even a well-designed review. When that happens, there are typically three sets of issues: (1) ethics issues on notification; (2)

privilege issues on waiver; and (3) practical issues in handling the documents to minimize the recipient's risk.

The Oregon State Bar in Legal Ethics Opinion 1998-150 crisply summarizes the ethical duties of the recipient: (1) stop reading when you determine that the material is privileged; (2) promptly notify opposing counsel; (3) follow opposing counsel's instructions on return—or file the documents under seal with the court if you believe privilege has been waived and the documents might be destroyed if you return them; and (4) seek the court's early determination of any privilege-waiver questions.

Ethics Opinion 1998-150 is careful to note that a lawyer complying with these ethical obligations *does not* forgo the right to argue that privilege has been waived through inadvertent production. Privilege waiver is controlled by substantive law. *Goldsborough v. Eagle Crest Partners*, 314 Or 336, 838 P2d 1069 (1992), and *In re Sause Brothers Ocean Towing*, 144 FRD 111 (D Or 1991), are the leading cases in Oregon. Although the state and federal formulations vary somewhat, they generally look at the following case-specific factors to determine whether privilege has been waived through inadvertence: the reasonableness of the precautions taken against disclosure; the time taken to raise the error; the overall scope of discovery; the extent of the inadvertent production; and fairness to both sides.

Are there risks if you conclude on your own that privilege has been waived and use the documents without either telling your opponent or first litigating privilege waiver? The short answer is “yes”—and that's where the “rotten egg”

potential comes in. A recent federal case from Seattle illustrates the risk. *Richards v. Jain*, 168 F Supp 2d 1195 (WD Wash 2001), was not a true “inadvertent” production case because the plaintiffs’ law firm received the privileged documents directly from its client who had secretly taken them with him when he left his job with the defendants. Rather than notify their opponents and litigate the waiver issue up front, the law firm simply used the documents in formulating its case strategy. When the defendants found out, they moved to disqualify the plaintiffs’ firm. The court agreed—holding that because there was no other way to “unring the bell” to erase the law firm’s knowledge of the confidential information, disqualification was an appropriate sanction. Although disqualification is only one possible remedy, *Richards* shows how your gold nugget might turn into a rotten egg if you don’t handle it with care.

Section 6: Disqualification Developments

“New Year’s Resolution: Better Conflict Checks”
Mark J. Fucile
Forthcoming January 2006 Multnomah Lawyer

January 2006 *Multnomah Lawyer Ethics Focus*

New Year's Resolution: Better Conflict Checks

**By Mark J. Fucile
Fucile & Reising LLP**

In the lawyer version of the perennial New Year's resolution to "exercise more," some of us vow each year to "do better conflict checks." And, like "exercise more," "do better conflict checks" is a good idea that often doesn't make it to February. This past year saw two Oregon cases that give all of us an incentive to "do better conflict checks." The first involved a lawyer who didn't have a conflict system. The second concerned a lawyer who had very sophisticated, computer-based system available but didn't use it. In the first instance, the lawyer was disciplined. In the second, the lawyer's firm was disqualified.

In re Knappenberger, 338 Or 341, 108 P3d 1161 (2005), involved a family law practitioner. The husband in a divorce proceeding consulted the lawyer about representing him in that and also discussed a related restraining order proceeding. Ultimately, the husband retained other counsel. The lawyer sent the husband a bill for the consultation and the Oregon Supreme Court later found that the husband was the lawyer's client for that limited period. About a month later, the wife consulted the same lawyer and hired the lawyer to represent her in both proceedings. The lawyer didn't use a conventional conflict checking system—relying only on his memory and his address list. He didn't recall

meeting with the husband and his “conflict checking” system didn’t catch the earlier contact with the husband either. Although he later withdrew when the husband’s new lawyer threatened a disqualification motion, the Oregon Supreme Court disciplined the lawyer for a former client conflict. In doing so, the Supreme Court noted pointedly that the lawyer “had no real procedure for checking for conflicts” and “a lawyer in the accused’s situation may not rely solely on his or her memory to avoid prohibited conflicts of interest.” 338 Or at 355, 356.

Philin v. Westhood, Inc., 2005 WL 582695 (D Or Mar 11, 2005)

(unpublished), by contrast, involved a commercial dispute over investments in a golf course. In 2002, one of the defendant’s directors sought legal advice from a partner in the Boston office of a major national law firm. In a meeting lasting about an hour, he discussed with the lawyer the assertions that the plaintiff’s predecessor in interest was making concerning the defendant. The lawyer apparently did not run a conflict check or open a new file at that time. The lawyer had no further contact with the director until September 2004, when the director contacted the lawyer again to let him know that it appeared that litigation over the dispute might be imminent. The lawyer acknowledged the earlier discussion, but again did not run a conflict check or open a new file. Meanwhile, the law firm’s Portland office had taken on the plaintiff as a client in 2003 in the same dispute and filed a complaint against the defendant in September 2004. Before opening the matter, the Portland office ran a conflict check using the law firm’s computerized system. Because the Boston partner never entered the client in the system, however, the conflict check did not reveal a problem. Once the

complaint was served, the defendant raised the conflict with the law firm and then moved to disqualify the law firm when it did not withdraw. The District Court found that an attorney-client relationship had been formed in 2002 between the defendant and the law firm and disqualified the law firm under both the current and former client conflict rules.

Although the firm structures were vastly different in *Knappenberger* and *Philin*, the parallels are striking: short, exploratory conferences with potential clients that reviewing courts later held ripened into attorney-client relationships; no conflict checks on in-take; and later disqualifying conflicts when the other side in the disputes became clients of the lawyer and law firm involved. With each the results could have been avoided simply by entering the initial consultations in a conflicts database or put simply, by doing “better conflict checks.”