

SECOND ANNUAL ETHICS TUNE-UP

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October 2005 Oregon State Bar Bulletin

Managing Your Practice Column

Multnomah Lawyer and Oregon State Bar Bulletin articles are available on the web at, respectively, www.mbabar.org and www.osbar.org. The articles included for today’s course materials, together with Mark’s many others on legal ethics, the attorney-client privilege and law firm risk management will also soon be available in the Resources Section of Fucile & Reising LLP’s web site at www.frllp.com.

Section 1: Why Conflicts Matter

“New Year’s Resolution: Better Conflict Checks”

Mark J. Fucile

January 2006 Multnomah Lawyer Ethics Focus Column

January 2006 *Multnomah Lawyer Ethics Focus*

New Year's Resolution: Better Conflict Checks

**By Mark J. Fucile
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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.”

Section 2: Lawyer Liability Update

“Hazardous Duty Revisited: *Reynolds v. Schrock*”

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December 2006 Multnomah Lawyer Ethics Focus Column

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**Hazardous Duty Revisited:
*Reynolds v. Schrock***

**By Mark J. Fucile
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In my May 2005 column called “Hazardous Duty”, I wrote about a significant lawyer liability decision then newly issued by the Oregon Court of Appeals: *Reynolds v. Schrock*, 197 Or App 564, 107 P3d 52 (2005). In *Reynolds*, the Court of Appeals held that a lawyer could be held liable to a nonclient for knowingly assisting a client in breaching a fiduciary duty to the nonclient. The startling element of *Reynolds* was that the assistance could come in the form of lawful legal advice to the client that the client then used to breach the fiduciary duty to the nonclient. Even the Court of Appeals acknowledged that its decision had “serious implications for attorneys.” The Supreme Court took review of *Reynolds* late last year and on September 8 reversed (341 Or 338, 142 P3d 1062).

The Supreme Court’s decision in *Reynolds* is itself a significant lawyer liability case in two respects. *First*, it created a shield from liability for assisting in the breach of a fiduciary duty when, like the facts before it, the “assistance” comes in the form of providing a client with lawful advice within the scope of a lawyer-client relationship. *Second*, the Supreme Court reaffirmed its own earlier decision in *Granewich v. Harding*, 329 Or 47, 985 P2d 788 (1999), where it announced the more general proposition that a lawyer could be held liable for

assisting in breaching a fiduciary duty to a third party if the lawyer was acting outside the scope of advising the lawyer's client. In this column, we'll look at both facets of the Supreme Court's *Reynolds* decision.

Liability Shield. In reversing the Court of Appeals, the Supreme Court in *Reynolds* recognized a privilege against liability for a lawyer assisting in a client's breach of fiduciary duty. The Supreme Court found that both Section 890 of the Restatement (Second) of Torts and prior Oregon case law suggested that in some narrow circumstances a shield from liability should be recognized to protect important public policy goals. It then found that protection of the lawyer-client relationship was one such goal. In particular, the Supreme Court stressed the importance of having a lawyer's advice unhindered by the prospect that the lawyer might be sued by a nonclient for rendering the advice involved to the lawyer's client. As the Supreme Court put it: "We extend those well-recognized principles to a context that we have not previously considered and hold that a lawyer acting on behalf of a client and within the scope of the lawyer-client relationship is protected by such a privilege and is not liable for assisting the client in conduct that breaches the client's fiduciary duty to a third party." 341 Or at 350. The Supreme Court then listed several factors necessary for the shield to apply, including: (a) the lawyer's advice must be given in the context of a lawyer-client relationship; (b) the lawyer must be acting consistent with the client's interest and not simply for the lawyer's self-interest; and (c) the lawyer must be advising the client on lawful conduct.

Continuing Risk. The Supreme Court's decision in *Reynolds* left open an important area of continuing risk for lawyers. In reversing *Reynolds*, the Supreme Court both distinguished and adhered to its own earlier decision in *Granewich*. The lawyers in *Granewich* were retained to represent a closely held corporation. Later, the lawyers were alleged to have also begun offering advice to the corporation's two majority shareholders on how to "squeeze out" a third shareholder. The minority shareholder sued the two majority shareholders for breach of fiduciary duty and sued the lawyers for assisting in that breach. The Supreme Court held in *Granewich* that lawyers could be held liable for assisting in a breach of fiduciary duty—at least when, as was the case there, the advice was given to nonclients like the majority shareholders. Although the Supreme Court's decision in *Reynolds* creates a shield when advising fiduciaries, the Supreme Court's reliance on *Granewich* underscores that the risks identified in that more common situation remain. Lawyers advising closely held corporations, family groups, partnerships and other joint ventures are often put in situations which invite them to step beyond their role as lawyers for the entities involved and to give advice to individual shareholders, family members or partners as was the case in *Granewich*. Under *Reynolds*, lawyers in that situation would not have the protective shield of privilege for advice beyond their clients.

Reynolds and *Granewich* reinforce what was already good advice: clearly spelling out in an engagement letter who the lawyer represents and then acting consistent with that agreement.

Section 3: Inadvertent Production

"Inadvertent Production *Revisited*"

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February 2006 Multnomah Lawyer Ethics Focus Column

February 2006 *Multnomah Lawyer Ethics Focus*

Inadvertent Production *Revisited*

**By Mark J. Fucile
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Two years ago this month, I wrote a column on inadvertent production. I noted at the time that for a variety of reasons the pendulum had swung from one that essentially rewarded the recipient of inadvertently produced confidential material to one that posed a disqualification risk to the recipient if the material involved wasn't returned and potential privilege waiver wasn't litigated promptly. With the new Oregon Rules of Professional Conduct that were adopted last year, there has been a slight swing back in the pendulum—but disqualification risk still remains if inadvertently produced material isn't handled with care.

When inadvertent production occurs, four key questions usually follow for the recipient: (1) do I need to notify my opponent? (2) do I need to return the document involved? (3) has privilege been waived? and (4) if I don't litigate privilege waiver before I use the document, will bad things happen to me?

Notice. Before the RPCs were adopted last year, the principal guidance in Oregon on these questions was Oregon State Bar Formal Ethics Opinion 1998-150. That opinion, in turn, drew heavily from an ABA ethics opinion on the same subject—Formal Opinion 92-368. 1998-150 counseled that a recipient of inadvertently produced confidential material had to both notify his or her opponent *and* follow the opponent's instructions pending a decision by the court on whether privilege had been waived.

This past year saw the adoption of a new Oregon rule specifically addressing inadvertent production, a new accompanying Oregon ethics opinion and the withdrawal of ABA Formal Opinion 92-368. Oregon RPC 4.4(b) creates a duty to notify an opponent: “A lawyer who receives a document relating to the representation of the lawyer’s client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender.”

Return. At the same time, RPC 4.4(b) does not create a *rule of ethics* on whether a recipient must return inadvertently produced confidential information. Rather, the new ethics opinion, 2005-150, casts that decision as turning on the substantive *law of evidence*: “By its express terms, Oregon RPC 4.4(b) does not require the recipient of the document to return the original nor does it prohibit the recipient from openly claiming and litigating the right to retain the document if there is a nonfrivolous basis on which to do so. The purpose of the rule is to permit the sender to take protective measures; whether the recipient lawyer is required to return the documents or take other measures is a matter of law beyond the scope of the Oregon RPC, as is the question of whether the privileged status of such documents has been waived.”

Waiver. On the question of privilege waiver, *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.

Recipient Risk. 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.” Formal Ethics Opinion 2005-150 cites a federal case from Seattle that 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* drives home the risk of what can happen if a recipient of inadvertently produced confidential information uses the material involved without first litigating privilege waiver and obtaining a ruling from the court.

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 Managing Your Practice Column

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
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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 yell's "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.