

# ***THIRD ANNUAL*** **ETHICS UPDATE**

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February 2005 Multnomah Lawyer Ethics Focus Column

*Multnomah Lawyer Ethics Focus columns are on the web at [www.mbabar.org](http://www.mbabar.org). The columns included for today’s course materials, together with Mark’s others on legal ethics, the attorney-client privilege and law firm risk management are also available in the Resources Section of Fucile & Reising LLP’s web site at [www.frllp.com](http://www.frllp.com).*

## **Section 1: Conflicts Developments**

“What’s the Issue? New OSB Ethics Opinion on Issue Conflicts”  
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July-August 2007 Multnomah Lawyer Ethics Focus Column

**July-August 2007 *Multnomah Lawyer Ethics Focus***

**What's the Issue?  
New OSB Ethics Opinion on Issue Conflicts**

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

Imagine this scenario: You are a land use lawyer. A nearby city has adopted a controversial new noise ordinance that appears to have many ambiguities. You have two clients who operate major businesses in that city: one is a company that builds and tests pile-drivers and another is a clinic that assists the chronically sleep deprived. The two businesses are not near each other, but both are planning expansions which will require permit approvals by the city council that will touch on the new ordinance. Your pile-driver client needs a generous decibel count under the ordinance to conduct its quality testing. Your sleep clinic client needs a quiet environment because its patients stay overnight so that clinic doctors can monitor their sleep patterns. Coincidentally, you are scheduled to present their permit requests to the city council on the same day back-to-back. As you are driving to the hearings, you recall that under the “old rules” there was something called an “issue conflict” and wonder what the standards are now under the new Rules of Professional Conduct.

The Oregon State Bar issued a new ethics opinion earlier this year that takes a comprehensive look at issue conflicts under the new rules. The opinion, 2007-177, looks at both what issue conflicts are and what they are not. In doing so, it draws on both the new Oregon RPCs and helpful interpretative guides from

the ABA Model Rules and their accompanying comments from which the Oregon rules are now patterned. 2007-177 is available on the OSB's web site at [www.osbar.org](http://www.osbar.org). Like the opinion, this column looks at both what issue conflicts are and what they are not.

**What Issue Conflicts Are.** Under the former Oregon DRs, issue conflicts were treated as a separate category of conflicts. Former DR 5-105(A)(3) found that issue conflicts only occurred in a relatively narrow setting: “[When a lawyer takes conflicting legal positions for different clients in separate cases and the lawyer actually knows that the assertion of the conflicting positions and also actually knows that an outcome favorable to one client in one case will adversely affect the client in another case[.]” Again under former DR 5-105(A)(3), conflicts of this kind could be waived by the clients involved.

Like the ABA Model Rules on which they are based, the new Oregon RPCs do not include a specific rule on issue conflicts. Rather, in both issue conflicts are treated as a subset of the general rule on current, multiple client conflicts: RPC 1.7. Under RPC 1.7, current client conflicts exist if: “(1) the representation of one client will be directly adverse to another client; [or] (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client, a former client or a third person or by a personal interest of the lawyer[.]”

Unlike the ABA Model Rules, however, Oregon did not adopt the accompanying comments as have many other states. ABA Model Rule 1.7 includes a specific comment (Comment 24) addressing issue conflicts:

“Ordinarily a lawyer may take inconsistent legal positions in different tribunals at different times on behalf of different clients. The mere fact that advocating a legal position on behalf of one client might create precedent adverse to the interests of a client represented by the lawyer in an unrelated matter does not create a conflict of interest. A conflict of interest exists, however, if there is a significant risk that the lawyer’s action on behalf of one client will materially limit the lawyer’s effectiveness in representing another client in a different case. . . . If there is significant risk of material limitation, then absent informed consent of the affected clients, the lawyer must refuse one of the representations or withdraw from one or both matters.”

The new Oregon ethics opinion essentially fills the gap left when we moved from the old rules to the new but did not also adopt the comments. In doing so, 2007-177 takes an approach that is very similar to both the old rule and the current ABA comment. It defines an issue conflict in very narrow terms:

“The critical question is whether the outcome in Client A’s matter will or is highly likely to affect the outcome of Client B’s matter. This test would be met if, for example, one case is pending on appeal before the Oregon Supreme Court or the Oregon Court of Appeals and the other case is pending at the trial court level and will necessarily be controlled by the forthcoming decision.”

Again like both the old rule and the current ABA comment, 2007-177 also finds that most (but not all) issue conflicts are waivable.

**What Issue Conflicts Are Not.** 2007-177 also outlines when issue conflicts do not exist:

“[Issue conflicts do not exist] every time there are two cases pending at the trial court level in different counties or judicial districts. Whether [they exist] ...when, for example, two cases are simultaneously pending before two different trial court judges in the same county or judicial district will depend on what the lawyer reasonably knows or should know about the likelihood that one case will affect the other under the circumstances in question. For example, the outcome may depend in part on whether the issue is likely to be dispositive in one or both cases or constitutes only a remote fallback position.”

2007-177 also stresses that issue conflicts do not arise when different lawyers at the same firm in different cases take conflicting legal positions for different clients without knowing of the contrasting positions and their impact: “[I]t would be inappropriate to hold that on pain of discipline, all lawyers at a firm are chargeable with full ‘issue conflict’ knowledge of every other lawyer at the firm. Actual knowledge, or at least negligence in not knowing, must first be proved.”

**Summing Up.** To return to our opening example, the lawyer involved should not have an issue conflict as long as the permit applications for the clients involved will not require the lawyer to take contradictory positions on precisely the same point for the different clients. Nonetheless, the example also highlights that as lawyers increasingly specialize in particular areas of the law, the

possibility for issue conflicts between clients in those areas has also increased in equal measure.



## **Section 2: High Tech Ethics**

“High Tech Ethics: New ABA Opinion on Metadata”

Mark J. Fucile

February 2007 Multnomah Lawyer Ethics Focus Column

**February 2007 *Multnomah Lawyer Ethics Focus***

**High Tech Ethics:  
New ABA Opinion on Metadata**

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

Imagine this scenario: You are negotiating a major contract for a client. Relations with your counterpart on the other side are polite and professional. Nonetheless, whenever you seem to be on the verge of agreeing on particular points, the other side injects new issues that are prolonging the negotiations. You know that your counterpart is answering to a team of executives but you and your client are not sure who it is on the other side that may be calling the shots. You receive a new version of the draft contract from your counterpart in Word via email. Your teenager has told you that there's something called "metadata" "embedded" in electronic documents coming in the original word processing format that includes information about both when and who made changes to documents. Can you look at the metadata to determine who on the other side is directing the nettlesome changes?

There is no direct guidance here in the form of an Oregon State Bar ethics rule or opinion. Other states that have examined the issue have come to varying conclusions. The American Bar Association's Standing Committee on Ethics and Professional Responsibility, however, recently issued an ethics opinion on the review and use of metadata. Although the ABA's ethics opinions are not controlling, the opinion, 06-442, offers a useful summary of both the law and the

issues in this area. It is available on the ABA Center for Professional Responsibility's web site at [www.abanet.org/cpr](http://www.abanet.org/cpr) and looks at the issues from the perspective of both the sender and the recipient.

***From the Sender's Perspective.*** 06-442 draws a distinction between documents produced in the course of formal discovery and those simply exchanged during negotiations.

On the former, it notes that a producing party may have a duty to produce metadata if relevant and requested or to assert any appropriate privilege because ABA Model Rule 3.4(a) (like its Oregon equivalent) prohibits lawyers from obstructing another's access to evidence or unlawfully altering or concealing documents. The new federal electronic discovery rules that went into effect this past December sharpen that point in federal litigation.

On the latter, it notes that a lawyer's duty of competent representation generally includes an obligation to protect a client's confidential information under Model Rules 1.1 (competence) and 1.6 (confidentiality) (which are also similar to their Oregon equivalents). Although 06-442 carefully sidesteps the issue of whether a lawyer who allows confidential information to slip through to the other side in the form of metadata has violated the standard of care in either a liability or a regulatory sense, it counsels sending documents that might otherwise contain such information in an "imaged" or "hard copy" format (such as fax, "pdf" or simply paper), "scrubbing" such information (using software designed for this function) from the document before sharing it with the other side or executing a "claw back" agreement with the other side (allowing each party to "claw back"

privileged documents that were inadvertently produced). Beyond confidential information, 06-442 notes that virtually all electronic documents that are in their original word processing format (such as Word or WordPerfect) contain a variety of metadata that is not confidential and, therefore, may be shared with the other side.

***From the Receiver's Perspective.*** 06-442 predicates its comments on the receiver's end with the assumption that the lawyer recipient has obtained the document lawfully and, therefore, is not in breach of Model Rule 4.4(a) (which prohibits gathering evidence in a way that violates the rights of a third party and which is similar to its Oregon equivalent).

In either a discovery or negotiating context, 06-442 counsels that a lawyer on the receiving end is not prohibited in the first instance from looking at metadata in a document that the lawyer receives from the other side. If, however, the metadata contains what appears to be inadvertently produced privileged information, then Model Rule 4.4(b) (which is substantively identical in both the ABA and Oregon versions) directs that the lawyer notify his or her counterpart on the other side of the receipt of the information involved. At that point, both the ABA and Oregon versions of RPC 4.4(b) characterize whether privilege has been waived as question of substantive evidence law rather than a matter of professional ethics. Oregon State Bar Formal Ethics Opinion 2005-150 discusses inadvertent production of privileged materials from the ethics perspective and *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's state and federal courts on privilege waiver from an evidentiary perspective. OSB Formal Ethics Opinion 2005-150 also discusses the potential disqualification risk for a recipient of simply using an opponent's privileged information without first obtaining a court's ruling that privilege has been waived. OSB Formal Ethics Opinion 2005-150 is available on the OSB's website at [www.osbar.org](http://www.osbar.org).

**Summing Up.** ABA Formal Opinion 06-442 is neither the only nor even the last word on the use of metadata. As we move further into an era when documents of all types are increasingly shared in electronic formats, however, it offers both a useful summary of where the law is and where it may be headed in the years ahead.

### **Section 3: Inadvertent Production**

“Inadvertent Production: New Federal Rules”

Mark J. Fucile

May 2007 Multnomah Lawyer Ethics Focus Column

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**Inadvertent Production:  
New Federal Rules**

**By Mark J. Fucile  
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When inadvertent production issues surface in civil litigation, they generally fall into three categories. *First*, under the Rules of Professional Conduct, is there an ethical duty to notify opposing counsel of the receipt of what appears to be inadvertently produced privileged material? *Second*, under the applicable procedural rules, how is possible privilege waiver litigated? *Third*, under the relevant evidence code, has privilege been waived by inadvertent production? In federal civil litigation here, the Oregon RPCs supply the controlling rule on the first point but there have recently been significant changes adopted by the U.S. Supreme Court on the second and proposed to Congress on the third.

***Ethical Duties.*** In either Oregon state or federal court (where the Oregon RPCs are adopted by Local Rule 83.7(a)), Oregon RPC 4.4(b) and Oregon State Bar Formal Ethics Opinion 2005-150 (available on the OSB's web site at [www.osbar.org](http://www.osbar.org)) counsel that "[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."

Similar guidance comes nationally from ABA Model Rule of Professional Conduct 4.4(b) and ABA Formal Ethics Opinions 05-437 and 06-440 (available

on the ABA Center for Professional Responsibility's web site at [www.abanet.org/cpr](http://www.abanet.org/cpr)).

***Procedural Framework.*** The amendments to the Federal Rules of Civil Procedure that became effective this past December contained a new section that specifically outlines the procedure for litigating possible privilege waiver through inadvertent production. FRCP 26(b)(5)(B) now provides:

“If information is produced in discovery that is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The producing party must preserve the information until the claim is resolved.”

New FRCP 26(f)(4) also encourages the use of so-called “claw back” agreements (either by informal agreement or stipulated order) under which inadvertently produced confidential material can be “clawed back” by the producing party under specified conditions. The Advisory Committee Notes accompanying these changes emphasize that the intent is not to create a “free pass” for inadvertent production. They highlight, however, that inadvertent



production is becoming more common as document production has increasingly evolved from paper correspondence to email and the cost of constructing privilege screens has increased in tandem. The Advisory Committee observed that the new rules are an attempt to provide an orderly framework for resolving inadvertent production issues. Both the new rules and the accompanying Advisory Committee Notes are available on the federal judiciary's web site at [www.uscourts.gov/rules](http://www.uscourts.gov/rules).

***Privilege Waiver.*** The professional rules, both in Oregon under RPC 4.4(b) and nationally under ABA Model Rule 4.4(b), make plain that whether privilege has been waived is a question of applicable evidence law rather than ethics. Here, too, there are potentially far-reaching developments at the federal level. The Advisory Committee on Evidence Rules has proposed a new federal rule of evidence addressing privilege waiver that would apply to both the attorney-client privilege and work product and would also apply to all federal proceedings regardless of the basis for federal jurisdiction. Proposed FRE 502(b) addresses inadvertent production and as I write this reads:

“A disclosure of a communication or information covered by the attorney-client privilege or work product protection does not operate as a waiver in a state or federal proceeding if the disclosure is inadvertent and is made in connection with federal litigation or federal administrative proceedings and if the holder of the privilege or work product protection took reasonable precautions to prevent disclosure and took reasonably prompt measures, once the holder knew or should have known of the

disclosure, to rectify the error, including (if applicable) following the procedures in Fed. R. Civ. P. 26(b)(5)(B).”

Like the amendments to the FRCP in this regard, the Advisory Committee on Evidence Rules’ report generally reflects the same approach and concerns as expressed by the Advisory Committee on Federal Rules of Civil Procedure. Under 28 USC § 2074(b), Congress must approve any rule creating or affecting an evidentiary privilege and as I write this proposed FRE 502 remains under review. If approved, it would take effect in December 2008. The proposed rule, the Advisory Committee’s report and current information on the proposal’s status and form are also available on the federal courts’ web site.

For lawyers in Oregon’s federal court, the practical substance of the new standard is not far from the current court-made one articulated by such leading cases as *In re Sause Brothers Ocean Towing*, 144 FRD 111, 113-15 (D Or 1991) (federal question) and *Goldsborough v. Eagle Crest Partners, Ltd.*, 314 Or 336, 342-43, 838 P2d 1069 (1992) (diversity). Codification of a standard, however, would, in combination with the adoption of RPC 4.4(b) in 2005 and FRCP 26(b)(5)(B) in 2006, bring a level of uniformity to questions surrounding inadvertent production in federal civil litigation that this evolving area has not seen before.

## **Section 4: The “No Contact” Rule**

“The New Rules:

What’s Inside the Box? Part 3-The No Contact Rule”

Mark J. Fucile

February 2005 Multnomah Lawyer Ethics Focus Column

February 2005 *Multnomah Lawyer Ethics Focus*

**The New Rules:  
What's Inside the Box? Part 3-The No Contact Rule**

**By Mark J. Fucile  
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In this month's installment of our look at the new rules, we'll examine the "no contact with represented parties" rule. The old rule was DR 7-104(A)(1). The new rule is RPC 4.2. The new rule, and its likely application, is very similar to the old one: it generally prohibits a lawyer from communicating on the subject matter of the representation with someone the lawyer knows to be represented. We'll first look at the elements of the rule, then turn to the exceptions and conclude with how it applies in the entity context.

*The Elements.* Like the old rule, RPC 4.2 has four primary components. First, it prevents a lawyer (acting in either a representative capacity or pro se) from communicating with a represented party and also prohibits a lawyer from using another person (for example, the lawyer's paralegal, secretary or investigator and, in some instances, the lawyer's own client) to make an "end run" around the other side's attorney. Second, although the term "communicate" is not defined in the new rule (nor was it in the old), there is nothing to indicate that it is any less broad than it was in the old rule and, accordingly, will likely apply to many forms of communication (for example, in-person, telephone and surface and electronic mail). Third, it applies to communications "on the subject matter of the representation" (for example, small talk about the weather during a

break in a deposition is permitted, but calling the other party with a settlement offer is not). Fourth, the lawyer must actually know that the other party is represented—although that knowledge can be inferred from the circumstances (for example, an opposing party gives you a document suggesting that it was prepared by a lawyer and that the lawyer represents that person).

*The Exceptions.* Like the old rule, RPC 4.2 also has three exceptions. First, a lawyer can make a direct contact when the lawyer has permission from the other side's attorney. Second, a lawyer can make a direct contact when the communication is authorized by law (for example, a summons) or a court order. Third, a lawyer can make a direct contact when a written agreement (for example, a contract) requires written notice of specified events—as long as the notice is also transmitted to the other party's attorney.

*The Entity Context.* Oregon has two very helpful ethics opinions applying the no contact rule in the entity context: 1991-80, which addresses the corporate context, and 1998-152, which generally applies 1991-80 to the governmental context. The Oregon State Bar is in the process of updating and reissuing the current ethics opinions with the appropriate citations to the new rules. As we went to press, the updated opinions had not yet been released. But they are expected to remain the same in this area because the new rule is so similar to the old rule. Assuming that, corporate and governmental officers, directors and management fall within the entity's representation and are "off limits." Corporate and governmental employees for whose conduct a party seeks to hold the entity liable also fall within the entity's representation and are "off limits." By contrast,

line-level employees who are simply occurrence witnesses are generally outside the entity's representation and are "fair game." Finally, all former employees are generally "fair game" as long as the contact does not invade the former employer's attorney-client privilege. See *Brown v. State of Or., Dept. of Corrections*, 173 FRD 265, 269 (D Or 1997) (applying DR 7-104(A)(1) in the entity context).