Tricky Currents:
Ethical Issues in Water Resource Litigation

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16th Annual Oregon Water Law Conference
November 2, 2007
Portland

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Note: The Rules of Professional Conduct and Oregon State Bar ethics opinions cited in these articles are available on the Oregon State Bar's web site at www.osbar.org.

I. WHY CONFLICTS MATTER

Reprinted from the June 2005 OSB Bar Bulletin

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.

II. MANAGING CONFLICTS

Reprinted from the July 2005 OSB Bar Bulletin

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.

III. THE "WHO IS THE CLIENT?" QUESTION

Reprinted from the December 2006 OSB Bar Bulletin

One of the key elements in analyzing conflicts is identifying who your client is in a given representation. Sometimes that task is easy: it's the single person sitting across the desk from you. But many times it's not. Physically or virtually there may be several people sitting across the desk from you—a family, business partners, a government agency or a corporate affiliate. The "who is the client?" question looms large in many situations because it tells us to whom we owe our duties of loyalty and confidentiality—and to whom we do not. This, in turn, has important consequences when assessing conflicts across a spectrum from regulatory compliance for bar discipline to civil liability for legal malpractice or breach of fiduciary duty because the duties of loyalty and confidentiality in most situations flow to our clients alone. In this column,

we'll first look at the general rule for deciding whether an attorney-client relationship exists and then apply that rule in three common entity contexts: corporations and their affiliates; partnerships, joint ventures and trade associations ; and governmental entities.

With all of these entities, engagement letters provide an excellent venue for defining who the client is in a given representation. This is particularly important if the lawyer has initially met with more than one person as part of the background context of a representation and will only be representing one. Depending on the setting, polite "nonrepresentation" letters to those not being represented offer a useful supplement to an engagement agreement to let the nonrepresented parties know which side the lawyer is on. In the face of an engagement agreement with the client, conduct consistent with that agreement and, depending on the circumstances, nonrepresentation letters, it will be difficult for another party to assert that the lawyer was also representing that party if the result is not to the nonclient's liking.

The General Rule

The general rule for determining whether an attorney-client relationship exists was set out in *In re Weidner* 310 Or 757, 770, 801 P2d 828 (1990).[1] It is sometimes called the "reasonable expectations of the client" test and has two parts. The first is subjective: does the client subjectively believe that the lawyer is representing the client? The second is objective: is the client's subjective belief objectively reasonable under the circumstances? Both elements of the test must be satisfied for an attorney-client relationship to exist.

In making this determination, the Supreme Court noted in *In re Mettler*, 305 Or 12, 18, 749 P2d 1010 (1988), that "[a] formal agreement to pay a fee is not a prerequisite to the relationship." Rather, *Mettler* found that an attorney-client "relationship can be inferred from the

[1]*Accord* OSB Formal Ethics Op 2005-46; *Admiral Insurance Co. v. Mason, Bruce & Girard, Inc.*, 2002 WL 31972159 (D Or 2002) (applying *Weidner*).

conduct of the parties."[2] At the same time, the Supreme Court also noted in *Mettler* that "it is unlikely that a lawyer-client relationship will exist when neither the lawyer nor the 'client' intend such [a] relationship."[3] Read in tandem, *Weidner* and *Mettler* underscore both the practical effect and the practical utility of the combination of a clear written engagement agreement with the client and nonrepresentation letters to any nonclients with whom the lawyer met preliminarily.

Corporations and Their Affiliates

The Oregon Supreme Court offered an important clarification to the "who is the client question?" in the corporate context when it adopted RPC 1.13 as a part of the switch from the Disciplinary Rules to the Rules of Professional Conduct in 2005. New RPC 1.13(a), which did not have a corresponding predecessor under the old DRs, adopts the "entity approach" to corporate representation: a lawyer representing a corporation is deemed to represent the corporation rather than its individual shareholders or officers. This is the same tact taken by Section 131 of the Restatement (Third) of the Law Governing Lawyers (2000) and the ABA's Model Rules of Professional Conduct. The "entity approach" doesn't preclude joint representation of both the corporation and one of its constituent members, such as an individual officer or director. But in those instances, any dual representation would be subject to RPC 1.7's multiple client conflict rules.

A related and often more difficult issue is whether representation of one corporate affiliate will be deemed representation of the entire "corporate family." There is no hard and fast rule. ABA Formal Ethics Opinion 95-390 (1995), which analyzes this issue in detail, suggests

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[2] *Id.*

[3] *Id*. at 20; *see also Lord v. Parisi*, 172 Or App 271, 280, 19 P3d 358 (2001) (fact that a lawyer prepared a document for his client that a nonclient also signed did not create an attorney-client relationship with, or other duties to, the nonclient).

two measures that will weigh on the side of considering all elements of a corporate family to be the same for conflict purposes. First, if the client has informed the lawyer that the corporate family should be considered a unified whole, then it will generally be treated as such. Second, even absent such an agreement, a corporate affiliate may be treated as a member of a broader corporate family when it shares common general and legal affairs management. At the same time, such affiliate relationships are most often found to constitute a single client when control is exercised through majority ownership of the affiliate by the corporate parent.[4]

Oregon has an important judicial exception to the entity approach to corporate representation. Under *In re Banks*, 283 Or 459, 584 P2d 284 (1978), the Oregon Supreme Court held that representation of a closely-held corporation wholly owned by either an individual noncorporate shareholder or a unified family will normally constitute representation of the shareholders as well. In analyzing *Banks*, Oregon State Bar Formal Ethics Opinion 2005-85 concluded, however, that (absent the Supreme Court speaking further to this point), there is no "reverse *Banks* rule." In other words, representation of a corporation's shareholder will not automatically be deemed to also constitute representation of the corporation. *Banks* also highlights the practical importance of clearly identifying who the client is in the initial engagement agreement. Although *Banks* is the "default" position in Oregon corporate representation, that can be modified by agreement with the client so that the lawyer will represent the corporate entity only.

[4] *See also* Restatement, *supra*, § 131, cmt d at 367.

Partnerships, Joint Ventures and Trade Associations

Partnerships generally present the same "who is the client?" question that corporations do under RPC 1.13(a) and OSB Formal Ethics Op 2005-85.[5] The analytical framework for working through this question in the partnership context is generally the same as well:

- The representation of a partnership will normally be limited to the entity and will not extend as a matter of law to the individual partners.
- The converse is also true—representation of an individual partner will normally be limited to that individual only and will not be construed as extending to the partnership as a whole.
- A single lawyer, subject to the conflict constraints imposed by RPC 1.7, could in theory jointly represent both a partnership and one or more individual partners.

Joint ventures and trade associations are generally treated the same as corporations and partnerships in this context under 1.13(a) and OSB Formal Ethics Opinion 2005-27.[6]

Governmental Entities

Under RPC 1.13(a), the entity approach applies to governmental representation and the "client" is the governmental entity and not its constituent members. The often more difficult question in the governmental context is which agency or level of government a lawyer will be deemed to represent. OSB Formal Ethics Opinion 2005-122 frames both the clear issue and the imperfect answer:

> "Within the context of the governmental entity, the client will sometimes be a specific agency, will sometimes be a branch of government, and will sometimes be an

[5] Accord ABA Formal Ethics Op 91-361 (1991) (addressing partnerships in particular); Restatement §131, cmt a.

[6] *Accord* ABA Formal Ethics Op 92-365 (1992) (discussing trade associations); Restatement § 131, cmt a.

entire governmental level (e.g., city, county, or state) as a whole. ABA Model Rule 1.13 comment [9] ('Although in some circumstances the client may be a specific agency, it may also be a branch of government, such as the executive branch, or the government as a whole.'). In essence, it is up to the lawyer and the government 'client' to define who or what is to be considered the client, much as the process works in private-side representations of for-profit entities."[7]

OSB Formal Ethics Opinion 2005-122 also notes that "[r]epresentation of a state does not constitute representation of political subdivisions of the state, and vice versa."[8] Therefore, representation of the State of Oregon would not mean that a lawyer was deemed as a matter of law to also represent its counties. The same would apply to cities.

Summing Up

In some areas, the RPCs, ethics opinions and case law draw a bright line between who a lawyer does and does not represent in an entity setting. In many other contexts, the line is much less distinct. Even with the adoption of RPC 1.13(a), the "who is the client?" question will remain a very fact-specific exercise. With all of these areas, however, lawyers can help answer that question by carefully defining the client in a written engagement letter and then handling the representation consistent with the engagement agreement.

[7] *Id.* at 322 (footnote omitted).

[8] *Id*. at 322 n.2; s*ee also* ABA Formal Ethics Op 97-405 (1997) (discussing governmental representation); Restatement § 97, cmt c (addressing client identity in the governmental context).