

ETHICS NORTH & SOUTH OF THE COLUMBIA

**Washington Defense Trial Lawyers
SW Washington Membership CLE**

April 2, 2010—Portland

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

fucile  reising | LLP

PERSPECTIVE

- ▶ **A little background....**
 - **Ethics practice**
 - **Products practice**

INTRODUCTION

- ▶ **Whose Law Applies?**
- ▶ **Three Key Differences**
- ▶ **Some Other Differences**

WHOSE LAW APPLIES?

- ▶ **More similarities than differences**
- ▶ **A quick history of the Oregon RPCs (and their lack of comments)**
- ▶ **An equally quick history of the Washington RPCs and comments**

WHOSE LAW APPLIES?

- ▶ **Choice of law under RPC 8.5(b)**
- ▶ **Litigation conduct generally governed by forum state**
- ▶ **For other conduct, look to where “predominate effect” occurs**

THREE KEY DIFFERENCES

- 1. “No contact” rule**
- 2. Inadvertent production**
- 3. Who is the client in insurance defense?**

“NO CONTACT” RULE

- ▶ **Same basic rule: RPC 4.2**
- ▶ **But different application with entities**

“NO CONTACT” RULE

- ▶ ***Oregon:***
OSB Formal Ethics Op. 2005-80

- ▶ ***Washington:***
Comment 10 & *Wright v. Group Health*, 103 Wn.2d 192 (1984)

INADVERTENT PRODUCTION

▶ *Oregon:*

- **Ethics:** RPC 4.4(b)
- **Procedure:** Nothing (yet)
- **Evidence:** *Goldsborough v. Eagle Crest Partners,*
314 Or. 336 (1992)

INADVERTENT PRODUCTION

▶ *Washington:*

- **Ethics:** RPC 4.4(b)
- **Procedure:** CR 26(b)(6)
- **Evidence:** *Sitterson v. Evergreen School Dist. No. 114*,
147 Wn. App. 576,
(2008) (Div. 2)

INADVERTENT PRODUCTION

- ▶ **Disqualification Risk to the Recipient**
 - *Richards v. Jain*,
168 F. Supp.2d 1195 (W.D. Wash.
2001)
 - OSB Formal Ethics Op. 2005-150

WHO IS THE CLIENT?

- ▶ *Oregon:*
 - “2 client” state
 - OSB Formal Ethics Op. 2005-121
 - Exception to the “default”

WHO IS THE CLIENT?

- ▶ *Washington:*
 - “1 client” state
 - *Tank v. State Farm*, 105 Wn.2d 381 (1986)
 - WSBA Formal Ethics Op. 195

SOME OTHER DIFFERENCES

- ▶ **“Specialists”**
 - Oregon 7.4—“Reserved”
 - Washington 7.4—Generally “no”

- ▶ **Trust Account Location**
 - Oregon RPC 1.15-1(a)—*Office Based*
 - Washington RPC 1.15A(i)—*License Based*

SOME OTHER DIFFERENCES

- ▶ **Security (after the fact) for Fees**
 - **Oregon RPC 1.8(a)—“No deal” (so far)**
 - **Washington RPC 1.8(a)—“Deal”**

- ▶ **Conflict Waivers & “Informed Consent”**
 - **Oregon RPC 1.0(g)—Recommending independent counsel**
 - **Washington RPC 1.0(e)—No (but a good idea)**

RPCs NOW MOSTLY SIMILAR

- ▶ **Conflict Rules, RPCs 1.7-1.9**
- ▶ **Confidentiality Rule, RPC 1.6**
- ▶ **Screening Rule, RPC 1.10**
- ▶ **Entity Client Rule, RPC 1.13**
- ▶ **Withdrawal Rule, RPC 1.16**
- ▶ **Prospective Client Rule, RPC 1.18**

ENFORCEMENT CAN BE DIFFERENT

▶ *Oregon:*

- **More bar complaints and bar prosecutions per capita**

▶ *Washington:*

- **More disqualification and breach of fiduciary duty cases**

RESOURCES

- ▶ **OSB Ethical Oregon Lawyer**
- ▶ **OSB Ethics Opinions**
- ▶ **OADC**

- ▶ **WSBA Legal Ethics Deskbook**
- ▶ **WSBA Ethics Opinions**
- ▶ **WDTL**

FOR FURTHER READING

- ▶ **“Inadvertent Production Revisited (Again)”**
—October 2009 WSBA Bar News
- ▶ **“The Shifting Sands of Inadvertent Production”**
—Winter 2009 OADC Magazine
- ▶ **“A Tri-State Look at the Tri-Partite Relationship”**
—November 2006 WSBA Bar News

QUESTIONS?