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ABA “Ethics 20/20” Amendments (Sort of) Come to Oregon

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

This past Fall the Oregon State Bar House of Delegates approved and the Oregon Supreme Court adopted a series of amendments to the Rules of Professional Conduct based on the American Bar Association “Ethics 20/20” Commission’s recommendations. The Ethics 20/20 Commission was a multi-year review of the ABA’s influential Model Rules of Professional Conduct that focused primarily on the impact of technology and outsourcing on law practice since the Model Rules were last comprehensively updated in 2002 and 2003.

The Ethics 20/20 Commission’s reports and recommendations were considered by the ABA House of Delegates in August 2012 and February 2013 and resulted in a number of changes to both the Model Rules and the accompanying comments. Extensive materials from the Ethics 20/20 Commission are available on the ABA web site at:

http://www.americanbar.org/groups/professional_responsibility/aba_commission_on_ethics_20_20.html.

Oregon’s adoption of the Ethics 20/20 amendments is tempered by the fact that we are one of a dwindling handful of states that have not adopted the integrated comments to the ABA Model Rules. Much of the Ethics 20/20 Commission’s work is reflected in the comments rather than rules themselves.

The impact of the Ethics 20/20 amendments in Oregon, therefore, is comparatively muted. In this column, we'll survey the amendments as adopted here and where Oregon lawyers can look to for similar guidance on the ethical and risk-management implications of the increasing prominence of both technology and outsourcing for law firms large and small.

On a side note, the Ethics 20/20 Commission also amended the lawyer marketing component of the ABA Model Rules in several respects. We discussed Oregon's new advertising rules that reflect both the ABA Model Rules and Oregon's own unique history in this area in last month's column.

The 20/20 Amendments

A prime focus of the Ethics 20/20 Commission was on the evolving impact of technology on law practice. Many of the Model Rule amendments and their Oregon counterparts, therefore, focus on "electronic" issues. RPC 1.0(q), for example, changes the term "e-mail" to "electronic communications" in describing what constitutes a "writing." Similarly, RPC 4.4(b) was amended to include the phrase "electronically stored information" within the scope of the rule's treatment of inadvertently sent confidential material and RPC 1.6 was amended to add a new subsection "c" that underscores our duty to protect client confidentiality by making reasonable efforts to avoid inadvertent disclosure or unauthorized access to client confidential information. Most of the Ethics 20/20 changes addressing technology, however, were in the comments and wove together the twin themes

of lawyer competence in using new technology and the continuing duty to protect client confidentiality when communicating with clients or storing their files electronically.

Another principal focus of the Ethics 20/20 Commission was on increased outsourcing of both lawyer and nonlawyer services. The disconnect between the ABA Model Rules and the Oregon RPCs due to our lack of comments is fairly stark when it comes to these amendments. The only amendment to the Oregon RPCs on this front is to change the word “assistants” to “assistance” in the title to RPC 5.3, which addresses supervisory duties over nonlawyers. Again, most of the Ethics 20/20 changes in this area were directed to the comments and include detailed guidance on a lawyer’s responsibilities for both selecting and supervising outsourced lawyer and nonlawyer services.

Oregon Guidance

Although Oregon lawyers do not have the benefit of comments to accompany our RPCs, we do have a relatively comprehensive set of ethics opinions. The difference, of course, is that in most states that have adopted comments, such as Washington, they are “official” in the sense that they are the interpretative guidance being offered by the respective supreme courts. In Oregon, by contrast, even opinions issued by the OSB are “advisory” only under RPC 8.6 and do not preclude prosecution even if followed.

While not a perfect substitute for comments tightly integrated into the ABA Model Rules, OSB Formal Ethics Opinions 2011-187 and 2011-188 are excellent examples of the very helpful guidance available in the areas of technology and outsourcing. These opinions, like the rest of the OSB library, are available on the OSB's web site at www.osbar.org. Ironically, many cite the ABA Model Rule comments.

Opinion 2011-187 addresses "metadata" that is embedded within documents transmitted electronically. The opinion examines the duties of both senders and receivers. On the former, Opinion 2011-187 concludes that we must competently use technology so that we will not inadvertently reveal client confidential information. On the latter, Opinion 2011-187 finds that lawyers must follow RPC 4.4(b)'s duty to notify opposing counsel if they receive what appears to be inadvertently sent confidential information within metadata.

Opinion 2011-188, in turn, addresses access and storage of law firm files with third-party "cloud" service providers. The opinion weaves together many of the same themes incorporated into the Ethics 20/20 comments, including the bedrock duties of competence and confidentiality. Opinion 2011-188 notes that lawyers are responsible for understanding the technology they are employing well enough to both chose and supervise third party vendors that comply with our own duty of confidentiality.

ABOUT THE AUTHOR

Mark J. Fucile of Fucile & Reising LLP focuses on legal ethics, product liability defense and condemnation litigation. 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. He is a past member of the Oregon State Bar's Legal Ethics Committee, is a past chair of the Washington State Bar Rules of Professional Conduct Committee, is a member of the Idaho State Bar Professionalism & Ethics Section and is a co-editor of the OSB's Ethical Oregon Lawyer and the WSBA's Legal Ethics Deskbook. Mark also writes the monthly Ethics Focus column for the Multnomah (Portland) Bar's Multnomah Lawyer, the quarterly Ethics & the Law column for the WSBA NWLawyer (formerly Bar News) and is a regular contributor on risk management to the OSB Bar Bulletin, the Idaho State Bar Advocate and the Alaska Bar Rag. Mark's telephone and email are 503.224.4895 and Mark@frllp.com.