Chapter 1

Hot Topics in Legal Ethics

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Mark J. Fucile
Fucile & Reising LLP

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Mark J. Fucile of Fucile & Reising LLP focuses on legal ethics and product liability defense. 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 Legal Ethics Committee, is the inaugural chair of the Washington State Bar Committee on Professional Ethics and is a member of the Idaho State Bar Professionalism & Ethics Section. Mark is a co-editor of the OSB Ethical Oregon Lawyer, the WSBA Legal Ethics Deskbook and the WSBA Law of Lawyering in Washington. Mark also writes the monthly Ethics Focus column for the Multnomah Bar's Multnomah Lawyer, the quarterly Ethics & the Law column for the WSBA NWLawyer and is a regular contributor on risk management to the OSB Bar Bulletin and the Idaho State Bar Advocate. Mark served for many years as an in-house ethics counsel at a large Northwest regional firm. Mark also teaches legal ethics as an adjunct for the University of Oregon School of Law at its Portland campus. Mark is admitted in Oregon, Washington, Idaho, Alaska and the District of Columbia. He is a graduate of the UCLA School of Law.

I. PLOWING NEW GROUND: RECENT DECISIONS FROM OREGON'S COURTS[1]

A. New Standards or Important Clarifications

"Aggregate Settlement" Defined

In re Gatti,
356 Or 32, 333 P3d 994 (2014)

RPC 1.8(g), which governs aggregate settlements, is unusual in that neither the Oregon rule nor its predecessor under the former Disciplinary Rules—DR 5-107(A)—contain a definition of what constitutes an "aggregate" settlement. In an added twist, the corresponding ABA Model Rule on which the Oregon rule is patterned does not contain a definition either. This has great practical significance for plaintiffs' counsel (and their defense counsel counterparts) because a collection of settlements that falls within the rule requires extensive disclosure and consent from all of the clients involved.[2]

The lawyer in this case settled 15 abuse claims against the Archdiocese of Portland at a mediation and later resolved related claims against the State of Oregon for the same clients through direct negotiations. With each set, the lawyer had received individual baseline authority from each client, totaled that in making collective offers to the defendants and then used a formula to divide the excess he was able to extract from the defendants above the sum of their individual authority. Although all of the cases were resolved at the same time with each defendant, neither set of settlements contained an explicit requirement that all resolve for any of the individual settlements to be effective.

At the time the settlements occurred, the only definition of what constituted an aggregate settlement in Oregon were two Oregon State Bar ethics opinions: 2000-158, addressing former DR 5-107(A); and 2005-158, addressing RPC 1.8(g). Both opinions defined an aggregate settlement as one that is "all-or-nothing": all of the clients must agree for any of the settlements to be effective.

The Bar argued that, notwithstanding its ethics opinions, the lawyer had violated RPC 1.8(g). The Supreme Court agreed. The Supreme Court noted that it is not limited by the Bar's ethics opinions. Instead, the Supreme Court looked to a definition that the American Law Institute had developed after the conduct at issue in this case for ALI's *Principles of Aggregate Litigation* (2010). The ALI definition (§ 3.16) includes two alternative formulations: (1) "all-or-nothing" settlements; and (2) where a settlement total is allocated using something other than simply individual case values. The ALI *Principles* refer to the first as "collective conditionality" and the second as "collective

[1] The decisions reported are current through October 22. Any major developments between the materials date for this paper and the CLE will be updated during the presentation.

[2] Because settlements in class actions are subject to close judicial review, Comment 13 to ABA Model Rule 1.8 exempts class actions from the aggregate settlement rule. ABA Formal Ethics Opinion 06-438 (2006) discusses the disclosures required for an aggregate settlement and generally includes both the total amount and the share each client is sharing in that total.

allocation." The Supreme Court found that the settlements with both the Archdiocese and the State involved "collective allocation" in light of the formula the lawyer had used to divide the respective "surpluses" above the simple totals of individual authority. Therefore, it disciplined the lawyer under RPC 1.8(g) because he had not made the extensive disclosures required under the rule.

The Supreme Court also disciplined the lawyer under RPC 1.7(a)(1) for a multiple client conflict. The Supreme Court found that the lawyer's use of the formula to divide the "surplus" above collective baseline authority also triggered a multiple client conflict. The Supreme Court reserved judgment on whether conflicts of this kind are waiveable because, on the facts before it, the lawyer had not obtained conflict waivers. For the same reason, the Supreme Court also did not reach the issue of whether the clients on their own (*i.e.*, not involving their lawyer) could agree to an allocation method in this kind of situation.[3]

The "Doing Business with Clients" Rule Interpreted
In re Spencer,
355 Or 679, 330 P3d 538 (2014)

RPC 1.8(a) governs lawyer-client business deals.[4] The Oregon Supreme Court over the years had issued a number of opinions on DR 5-104(A), the current rule's predecessor. The *Spencer* case, however, is the Supreme Court's first detailed treatment of the current rule. As the Supreme Court noted in disciplining the lawyer involved, the current rule is even broader than its predecessor. DR 5-104(A) regulated lawyer-client business transactions if the lawyer and the client had "differing interests therein and if the client expects the lawyer to exercise the lawyer's professional judgment therein for the protection of the client[.]" RPC 1.8(a), by contrast, contains no similar qualifiers and applies when "[a] lawyer . . . enter[s] into a business transaction with a client or knowingly acquire[s] an ownership, possessory, security or other pecuniary interest adverse to a client[.]"

Spencer involved the first element of the disjunctive.[5] The lawyer was also a licensed real estate broker. He was representing a bankruptcy client and tried to help the client shield assets by purchasing a home. The lawyer located a property and assisted the client with the purchase in his role as a real estate broker (and received a commission in the process). The client later filed a bar complaint over these twin roles. The lawyer conceded that he had not obtained a conflict waiver. Instead, he argued that RPC 1.8(a) should be read consistently with former DR 5-104(A) and contended that no waiver was necessary because his interests were aligned with the client in the transaction.

[3] The lawyer was also disciplined under RPC 1.4, which addresses required communication with clients.

[4] Under Comment 1 to RPC 1.8, standard commercial transactions—such as having a checking account with a bank client—are excluded from the rule.

[5] ABA Formal Ethics Opinion 00-418 (2000) addresses the second element—such as taking stock in lieu of fees—extensively.

The Supreme Court disagreed. It focused on the broader wording of the new rule. Relying on that and the commentary from the corresponding ABA Model Rule, the Supreme Court concluded that RPC 1.8(g) prohibits business transactions with clients outright unless they meet the accompanying informed consent and related requirements.[6]

The Client in Insurance Defense Clarified
Evraz, Inc., N.A. v. Continental Ins. Co.,
2013 WL 6174839 (D Or Nov 21, 2013) (unpublished),
reconsideration denied, 2014 WL 2093838 (D Or May 16, 2014) (unpublished)

States vary in their approach on whether an insurance defense counsel has one client (the insured only) or two (both the insured and the carrier). In Oregon, the "default" position has traditionally been the insured and the carrier under a series of Oregon State Bar ethics opinions (*see, e.g.*, OSB Formal Ethics Ops. 2005-30, 2005-77, 2005-121, 2005-157). At the same time, Oregon ethics authorities (including the OSB *Ethical Oregon Lawyer*) suggested that this "two client" model could be modified by agreement or the circumstances to limit the "client" to the insured only—leaving the carrier solely as a third-party payor. The United States District Court in *Evraz* recognized that the "two client" model could be modified.

Evraz arose in a classic scenario in this area: a corporate client that had used its long-time law firm on an underlying matter (in this instance, an environmental case) wanted to use the same firm against a carrier in a related coverage case. The carrier argued that Oregon's "two client" model created a disqualifying conflict for the firm. The District Court disagreed. The District Court noted that the corporate client had both retained and paid the law firm itself in the underlying environmental case (and then sought reimbursement from the carrier). The District Court found that, under these circumstances, no attorney-client relationship arose between the law firm and the carrier and, accordingly, there was no disqualifying conflict either.

B. Useful Reminders

The Substantial Relationship Test and Disqualification
Roberts v. Legacy Meridian Park Hosp., Inc.,
2014 WL 294549 (D Or Jan 24, 2014) (unpublished)

Although breaking no new ground, *Roberts* contains a useful review of the substantial relationship test under RPC 1.9 in the disqualification context. One of the defense firms had earlier represented the plaintiff doctor in two unrelated and since closed malpractice cases. The District Court found that RPC 1.9 was not triggered and denied the motion.

[6] Under RPC 1.8(a), the client must be advised of the desirability of seeking independent counsel and given the opportunity to do so. The transaction must also be "fair and reasonable" to the client and the terms must be disclosed in writing in a manner "that can be reasonably understood by the client[.]"

Reciprocal Discipline Procedure
In re Sione,
355 Or 600, 330 P3d 588 (2014)

With the increasing frequency of multi-state licensing, reciprocal discipline has also increased. The *Sione* case contains a useful outline by the Supreme Court on its reciprocal procedures under BR 3.5 in a case involving discipline of a California-based lawyer who is also licensed in Oregon.

C. Other Items of Note

The Supreme Court this year adopted a package of amendments to the RPCs at the end of 2013 that became effective on January 1, 2014. *See* CJO No. 13-071, dated December 30, 2013, available on the Supreme Court's web site at:

http://www.publications.ojd.state.or.us/docs/RULE214.pdf.

The amendments primarily affected: lateral-hire screening under RPC 1.10; the marketing rules in Title 7 to the RPCs; and miscellaneous changes to reflect the ABA "20-20" amendments to the corresponding ABA Model Rules. On balance, the package of amendments continues the trend of tighter integration of the text of Oregon's RPCs with the ABA Model Rules. Oregon remains, however, one of a dwindling number of states that has not also adopted comments to its RPCs patterned on the ABA Model Rule comments.

Following adoption of these RPC amendments, the Oregon State Bar amended many of its ethics opinions to reflect the updated rules. Those opinions are available on the OSB web site at:

https://www.osbar.org/ethics/ethicsops.html.

Further proposals for amendments to the RPCs will be considered by the Oregon State Bar House of Delegates on November 7: classifying harassment based on several specific categories, including race and gender, as professional misconduct under RPC 8.4(a); expanding authorized temporary practice under RPC 5.5 to foreign lawyers under certain circumstances; and allowing lawyers to advise and assist clients with Oregon's marijuana-related laws under RPC 1.2. Any proposed amendments approved by the HOD would still need Supreme Court approval. Information concerning this year's HOD meeting is available on the OSB web site at:

https://www.osbar.org/_docs/leadership/hod/2014/14HODagenda.pdf.

Earlier this year, the ABA also reviewed Oregon's discipline system. As I write this, the ABA's report is due for release later this Fall. The OSB has established its own review committee to review the ABA report and make recommendations to the Board of Governors on the ABA's suggestions. Any changes implemented would need Supreme Court approval.

II. INTERNAL LAW FIRM PRIVILEGE: OREGON WEIGHS IN WITH *CRIMSON TRACE*[7]

Crimson Trace Corp. v. Davis Wright Tremaine LLP,
355 Or 476, 326 P3d 1181 (2014)

Courts nationally have long recognized that law firms can hold their own internal privilege if a firm lawyer consults with a designated general counsel, ethics partner or the equivalent in a confidential setting. At the same time, courts nationally have also long recognized that a conflict arises (and the corresponding need for a waiver exists), if a law firm makes what is arguably a material error in handling a client's case and wishes to continue on the case. In recent years, this tension has played out in the context of malpractice litigation around the country when a by-then former client seeks discovery of the internal advice given concerning the error while the client was still represented by the firm.

The number of authorities addressing this tension is still small and developing. Some courts have viewed the issue solely from the perspective of evidence law in construing whether their respective state evidence codes contain an exception in this context. Ethics authorities, by contrast, have generally focused on the conflict involved while deferring to courts in interpreting evidentiary privilege. Still other courts have recognized a so-called "fiduciary exception" to internal law firm privilege and ordered production when the internal consultation occurred while a malpractice plaintiff was still a client of the firm.

The Oregon Supreme Court joined this debate this year with *Crimson Trace*. The generic facts were similar to others around the country. During the course of handling a matter, law firm lawyers consulted with members of an internal risk management committee about, in pertinent part, an asserted error in handling the client's case. In later malpractice litigation, the by-then former client sought discovery of the consultations. The trial court—after conducting an *in camera* review—ordered production. The law firm then sought interlocutory appellate review in the Supreme Court through a mandamus petition. The Supreme Court allowed review and reversed the trial court.

In doing so, the Supreme Court first recognized that law firms can hold their own internal privilege as long as the standard requirements are met. But, the Supreme Court declined to recognize a "fiduciary exception." The Supreme Court specifically declined to tie its privilege analysis to the RPCs—holding that the former have "no bearing" (355 Or at

[7]For other interesting privilege-related decisions this year, *see Alfieri v. Solomon*, 263 Or App 492, 329 P3d 26 (2014) (addressing the application of the mediation confidentiality statute in the context of a legal malpractice claim), *Longo v. Premo*, 355 Or 525, 326 P3d 1152 (2014) (addressing the scope of the "self-defense" exception to the attorney-client privilege in the context of a post-conviction proceeding in which the petitioner was advancing an ineffective assistance of counsel argument), and *Brumwell v. Premo*, 355 Or 543, 326 P3d 1177 (2014) (similar to *Longo*).

501) on the latter.[8] Instead, the Supreme Court used its traditional template for statutory construction under *PGE v. BOLI*, 317 Or 606, 859 P2d 1143 (1993), in analyzing OEC 503. The Supreme Court found no "fiduciary exception" in the plain text of the evidentiary privilege rule and declined to read one in.

III. OUTSOURCING AND TECHNOLOGY: ACCELERATING TRENDS AND NEW PRACTICE NORMS

Two of the most significant practice trends in recent years are increased outsourcing and the increasing integration of technology into law practice. Neither is new, with, for example, the first ABA ethics opinions addressing contract lawyers in 1988 and electronic communications in 1999.[9]

As both trends have continued to accelerate, ethics rules and opinions nationally and locally have followed. In doing so, they have often woven together two fundamental duties—competence and confidentiality. With both outsourcing and technology, we have a duty to competently select vendors and systems that preserve client confidentiality. These twin concepts are neatly captured in Comments 18 and 19 to ABA Model Rule 1.6, which are captioned "Acting Competently to Preserve Confidentiality."

The ABA "20-20" amendments to the Model Rules stressed these twin concepts as applied to both outsourcing and technology—particularly in the global context.[10] These concepts were also discussed extensively in a 2008 ABA ethics opinion addressing outsourced legal and support services, ABA Formal Ethics Opinion 08-451 (2008).

As noted earlier, Oregon adopted amendments to our RPCs that became effective this year inspired by the ABA "20-20" project. The impact here, however, was comparatively muted because many of the ABA "20-20" changes were to the comments rather than the text of the rules themselves. As also noted earlier, the Oregon is one of the relatively few states that have not adopted comments to its RPCs. The Oregon State Bar, however, issued a very instructive ethics opinion—2011-188—that addressed these twin concepts in the particular context of outsourced cloud computing services.[11] The Oregon opinion underscored two particular facets of competence and confidentiality. First, it noted that if a lawyer is going to use a particular form of outsourced technology, the lawyer has to undertake sufficient "due diligence" as a part of the duty of competent representation (on the lawyer's own or with technical assistance) to have a reasonable assurance that the vendor and the technology being used are employing safeguards on confidentiality that are consistent with the lawyer's corresponding duty. Second, reflecting the pace of developments in outsourcing and technology, the Oregon opinion stressed

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[8] It is important to emphasize, however, that *Crimson Trace* does not excuse the requirement of a conflict waiver in appropriate circumstances either. *See generally* Mark J. Fucile, "Uncomfortable Intersection: Internal Law Firm Privilege and Duties to Clients," 74 Oregon State Bar *Bulletin* 34 (Aug-Sept 2014).

[9] Respectively, ABA Formal Ethics Ops. 88-356 (1988) and 99-413 (1999).

[10] The ABA 20-20 amendments and a variety of related materials are available on the ABA's web site at: http://www.americanbar.org/groups/professional_responsibility/aba_commission_on_ethics_20_20.html.

[11] Other recent Oregon opinions addressing technology are 2011-187, which deals with electronic metadata, and 2013-189, which discusses investigations through social media.

that a lawyer also has a continuing duty to competently reevaluate the security measures employed to make sure that they remain consistent with the lawyer's duty of confidentiality.