

New Developments in Lawyer Ethics

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I. RECENT OREGON CASES¹

A. “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 allocation.” The Supreme Court found that the settlements with both the Archdiocese

¹ The decisions reported are current through November 1, 2014. Any major developments between the materials date for this paper and the CLE will be updated during the presentation. In preparing this material, Mark has drawn on similar materials he has put together for other CLE programs and articles for the Multnomah Bar’s *Multnomah Lawyer* and the Oregon State Bar’s *Bar Bulletin*.

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.

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 waivable 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.

B. 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.³ 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.⁴ 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.

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

³Under Comment 1 to RPC 1.8, standard commercial transactions—such as having a checking account with a bank client—are excluded from the rule.

⁴ABA Formal Ethics Opinion 00-418 (2000) addresses the second element—such as taking stock in lieu of fees—extensively.

Supreme Court concluded that RPC 1.8(g) prohibits business transactions with clients outright unless they meet the accompanying informed consent and related requirements.⁵

C. 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.

II. NEW OREGON ETHICS OPINIONS

To date, Oregon has not adopted any completely new ethics opinions in 2014.

However, the Oregon State Bar did amend a number of ethics opinions earlier this year to reflect changes to the Oregon Rules of Professional Conduct—discussed in the next section—that became effective earlier this year.

Those opinions are available on the OSB web site at:

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

⁵ 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[.]”

III. NEW OREGON RULES

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: (1) lateral-hire screening under RPC 1.10; (2) the marketing rules in Title 7 to the RPCs; and (3) 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.

Further proposals for amendments to the RPCs, including a revised version of a proposal to amend RPC 8.4 to include within the ambit of professional misconduct knowingly intimidating or harassing a person based on a variety of specific criteria will be considered by the Oregon State Bar House of Delegates on November 7. 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/leadership/hod/meeting.html>.

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 change implemented would need Supreme Court approval.