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Why Conflicts Matter

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Both the current Washington Rules of Professional Conduct and the proposed amended version are prefaced with views on their role in the practice of law. The current set notes that the RPCs “point the way to the aspiring and provide standards” to judge lawyers’ conduct in a disciplinary sense. The proposed amendments now under consideration echo that intent: “The Rules simply provide a framework for the ethical practice of law.” Without diminishing either that aspiration or their role as a disciplinary code, the professional rules—particularly those relating to conflicts—also increasingly form the substantive law of legal malpractice, lawyer breach of fiduciary duty, disqualification, fee forfeiture and lawyer-related Consumer Protection Act claims. In short, conflicts matter today in a very practical way.

In this inaugural edition of the quarterly Ethics Page, we’ll look at several Washington cases that underscore the practical importance of the conflict rules beyond the disciplinary setting. When the Ethics Page returns in the Fall, we’ll then consider ways of managing conflicts to reduce risk.

Legal Malpractice. The Washington Supreme Court in *Hizey v. Carpenter*, 119 Wn.2d 251, 257-66, 830 P.2d 646 (1992), ruled that the RPCs themselves cannot be cited directly in establishing the standard of care for legal malpractice. At the same time, the Supreme Court in *Hizey* found that an expert could

incorporate the concepts underlying the rules into an opinion on the standard of care. Because the conflict rules are grounded in a lawyer's fiduciary duty of loyalty to a client, the practical import of *Hizey's* distinction for conflict-based malpractice claims is not as significant as it might first appear—a violation of the conflict rules will simply be recast as a corresponding violation of the legal duty of an agent (the lawyer) to the principal (the client).

Breach of Fiduciary Duty. In a parallel decision issued within months of *Hizey*, the Washington Supreme Court made explicit the link between the conflict rules and a lawyer's fiduciary duty of loyalty. The Supreme Court in *Eriks v. Denver*, 118 Wn.2d 451, 457-61, 824 P.2d 1207 (1992), held that a lawyer with an unwaived multiple client conflict had violated both the conflict rules and the fiduciary duty of loyalty. In doing so, *Eriks* allows the RPCs to be considered directly in assessing whether a lawyer has breached a fiduciary duty to a client.

Disqualification. Although court decisions provide the procedural law of disqualification in terms of standing and the like, the RPCs effectively supply the substantive law. A recent case from the federal district court in Seattle, *Oxford Systems, Inc. v. CellPro, Inc.*, 45 F. Supp. 2d 1055 (W.D. Wash. 1999), is an excellent example of this trend. *Oxford* turned on whether the law firm involved had a current or former client conflict. The court looked directly to the corresponding RPCs—1.7 for current client conflicts and 1.9 for former client conflicts—in resolving those questions.

Fee Forfeiture. The Supreme Court in *Eriks* also held that a lawyer's breach of fiduciary duty may result in full or partial fee forfeiture: "Disgorgement of fees is a reasonable way to 'discipline specific breaches of professional responsibility, and to deter future misconduct of a similar type.'" 118 Wn.2d at 463 (citation omitted). The Court of Appeals recently reiterated that view in *Cotton v. Kronenberg*, 111 Wn. App. 258, 275, 44 P.3d 878 (2002), in affirming the complete forfeiture of a lawyer's fee in the face of a conflict and an accompanying breach of fiduciary duty.

Consumer Protection Act. Under *Short v. Demopolis*, 103 Wn.2d 52, 61, 691 P.2d 163 (1984), the Washington Consumer Protection Act (CPA) applies to the "entrepreneurial aspects" of practicing law including "the way a law firm obtains, retains, and dismisses clients." In *Eriks*, the Supreme Court found that a lawyer's conflicts might constitute a violation of the CPA if they were triggered by "entrepreneurial purposes." 118 Wn.2d at 465. The Court of Appeals in *Cotton* took that same approach. 111 Wn. App. at 273-75. The practical dimension of the CPA is that it adds an attorney fee remedy for a successful claimant.

Although there are important professional reasons as reflected in the preamble to the RPCs to follow the rules on conflicts, there are also important practical reasons. Conflicts are no longer the exclusive province of bar discipline. As illustrated by the cases we've just examined, the professional rules on conflicts form the essential substantive law on a spectrum from legal

malpractice to disqualification. Or, put simply, conflicts matter in a very practical way.

ABOUT THE AUTHOR

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