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## **Commenting on the Comments: The ABA Model Rule Comments in Oregon**

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When Oregon moved from the old “DRs” to the RPCs a decade ago, the Supreme Court adopted professional rules patterned closely on the ABA’s influential Model Rules of Professional Conduct. Then, as now, the ABA Model Rules contained an integrated set of “black letter” rules and an accompanying set of interpretive comments. The ABA Model Rules explain (in Comment 21 to the “Scope” section) the relationship between the two intended by the drafters:

“The Comment accompanying each Rule explains and illustrates the meaning and purpose of the Rule. . . . The Comments are intended as guides to interpretation, but the text of each Rule is authoritative.”

When the Oregon State Bar initially recommended switching from the DRs to the RPCs, the Bar’s study committee focused on the rules rather than the comments. The study committee’s report, which remains available on the OSB web site (“Final Report of the Special Legal Ethics Committee on Disciplinary Rules,” June 14, 2003), was not against eventually adopting the comments. Rather, the study committee’s report noted the significant change that simply replacing the text of our rules involved and, therefore, did not include the comments “at this time.” The study committee’s report emphasized (at 9), however, that “it is the intention of the . . . Committee that the Comment[s] be a recognized interpretive guide.”

Today, the ABA reports that 39 states and the District of Columbia have adopted the comments as their supreme courts' official guides for interpreting their RPCs. Regionally, these include Washington, Idaho and Alaska. Another four states have adopted the comments as "unofficial" guides for interpreting their RPCs. Oregon is not among them. Despite the original study committee's hope, Oregon has not revisited adopting the comments.

Particularly in those states where the supreme courts have adopted the comments as "official" guidance, the practical utility is just that: they represent the respective supreme courts' own guidance on what the text of the rules means. By contrast, even Oregon's very comprehensive set of ethics opinions is—under Oregon's unique RPC 8.6—advisory only and, consequently, does not preclude lawyers from being disciplined if the Supreme Court takes a different view on a particular rule than the Bar (as has happened on occasion).

At the same time, Oregon's history does not mean that the comments are not an important resource for Oregon lawyers. In fact, the Oregon Supreme Court has used the comments in recent years for precisely the reason the ABA drafters and the OSB study committee envisioned: to explain and illustrate the text of the rules.

Two ready examples are *In re Hostetter*, 348 Or 574, 238 P3d 13 (2010), and *In re Spencer*, 355 Or 679, 330 P3d 538 (2014).

*Hostetter* involved the former client conflict rule—RPC 1.9—and the interpretation of what constitutes a “substantially related” matter that would trigger application of the rule and a potentially disqualifying conflict. The Supreme Court turned to the ABA Model Rule comment and its integrated definition in answering that key question, noting (at 348 Or at 590): “That definition is not binding on this court, but we consider it for its persuasive value.”

*Spencer* addressed the “doing business with clients” rule—RPC 1.8(a)—and the interpretation of what constitutes a “business transaction” that falls within the rule and the resulting responsibility for meeting the rule’s high bar for disclosure and consent. Again, the Supreme Court turned to the ABA Model Rule comment in answering that central question, observing (at 355 Or 686): “Given the identity between the text of RPC 1.8(a) and the text of the ABA rule on which it was modeled, we find the commentary to ABA [Model] Rule 1.8(a) persuasive in interpreting the meaning of Oregon’s rule.”

The Oregon State Bar has made similar use of the comments in recent ethics opinions, including those addressing emerging technology issues such as listservs (OSB Formal Op. 2011-184), metadata (OSB Formal Op. 2011-187) and social media (OSB Formal Op. 2013-189).

These cases and ethics opinions also illustrate two important practical reasons for using the comments as a risk management resource. First, because Oregon’s professional rules are now based on the ABA Model Rules, the

accompanying comments often supply answers to the key nuances that lawyers confront in real life. Second, as the old DRs fade into history, the body of case law developed under that set of professional rules adopted here in Oregon in 1970 often no longer offers insights into contemporary practice topics.

The comments are also a readily available resource. They are available (for free) on the ABA Center for Professional Responsibility's web site at: [http://www.americanbar.org/groups/professional\\_responsibility.html](http://www.americanbar.org/groups/professional_responsibility.html).

Perhaps someday Oregon will join the vast majority of jurisdictions that officially integrate the comments into the professional rules. In the meantime, however, the comments still offer extremely useful practical guidance on the meaning and application of the RPCs crafted by the drafters of the corresponding ABA Model Rules.

## **ABOUT THE AUTHOR**

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