

August 2012 WSBA *Bar News Ethics & the Law* Column

**Know Before You Go:
Practicing Across State Lines in the Northwest**

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The past decade has seen profound change in lawyers' ability to practice across state lines in the Northwest. Ten years ago, Washington, Oregon and Idaho entered into the "Tri-State Compact" that was unique for its time in coordinating reciprocal admission among three geographically contiguous states. Since then, all three states adopted broad "multijurisdictional practice" rules allowing authorized temporary practice in a wide variety of circumstances. At the same time, all three also amended their respective Rules of Professional Conduct to move them into much closer alignment. As a result, lawyers can now both practice across state lines in the Northwest with relative ease and will encounter professional rules that are comparatively similar in all three.

Despite these very significant changes, jurisdictional variations remain and lawyers who aren't familiar with those nuances are putting themselves at risk. In this column, we'll first look at the continuing relevance of jurisdictional variation. We'll then survey the resources available to conveniently learn about those parochial differences. Finally, we'll briefly address the risks lawyers run if they don't "know before you go."

Jurisdictional Variation

Although the RPCs in Washington, Oregon and Idaho have moved into much tighter alignment over the past decade, it shouldn't come as a surprise that differences remain. In an analogous context, all three use rules of civil procedure based on their federal counterparts. Yet, ER 904 notices may be a relative mystery to Oregon lawyers heading north and Oregon's absence of expert disclosure is likely even more mysterious to Washington lawyers heading south.

Moreover, it is not simply that some rules are different. Variation arises from multiple sources in unpredictable ways. In some instances, the rules themselves are indeed different. In others, the same rules have been interpreted or qualified differently by comments that accompany the rules, state bar ethics opinions or decisional law.

Differing Rules. Some rules are simply different. Oregon and Idaho, for example, give lawyers the discretion to reveal confidential information when necessary to prevent reasonably certain death or substantial bodily harm under their respective exceptions to the confidentiality rule, RPC 1.6. Washington, by contrast, imposes a mandatory duty of disclosure in that circumstance under its corresponding rule. More subtly, similar rules sometimes use different terms that alter their scope. Oregon's version of the "no contact" rule, RPC 4.2, for example, extends the prohibition broadly to the entire "subject" involved while

Washington and Idaho confine the prohibition more narrowly to the particular “matter” in which the person involved is contacted. In still other instances, the rules contain differing definitions for the same terms. Washington and Idaho, for example, define their respective confidentiality rules, RPC 1.6, broadly to include “information relating to the representation of the client.” Oregon, by contrast, uses that same phrase but limits it to the definition of “confidences” and “secrets” found in its former Disciplinary Rules.

Differing Interpretations. Washington and Idaho have comments to their rules approved by their respective Supreme Courts. Oregon, by contrast, does not. Even in the two that do, the comments are not uniform. Idaho, for example, has a specific comment (Comment 22 to RPC 1.7) approving (in appropriate circumstances) “advance” waivers of future conflicts. In Washington, however, a similar proposed comment was deleted by the Supreme Court and the word “Reserved” was substituted in its place. In other instances, state bar ethics opinions supply what comments do not. Oregon, for example, has an ethics opinion (2005-122) that approves “advance” waivers of future conflicts even though, as noted, Oregon has no comments to its rules. Finally, decisional law remains central to the nuances in each state. Washington, for example, defines a represented person in the corporate context for purposes of the “no contact” rule by looking to whether the person involved is a “speaking agent” of the corporation under the Evidence Rules in accord with a long-standing Supreme

Court decision (*Wright v. Group Health Hosp.*, 103 Wn.2d 192, 691 P.2d 564 (1984)). Oregon, to use an example from another setting, equates the owner of a closely held business with the business itself for conflict purposes (in most circumstances) under an equally long-standing Supreme Court decision (*In re Banks*, 283 Or. 459, 584 P.2d 284 (1978)). Idaho, in turn, defines the existence of an attorney-client relationship that is the predicate for conflict analysis using multiple tests developed under its own decisional law (discussed in *Balivi Chemical Corp. v. JMC Ventilation Refrigeration, LLC*, No. CV-07-353-S-BLW, 2008 WL 313792 (D. Idaho Feb. 1, 2008) (unpublished)).

The examples noted are just that: examples rather than a catalog. They highlight both that jurisdictional variations flow from many sources that do not follow a predictable pattern and no one state of the three is reliably more “strict” in its application than the other two.

Resources

State bar web sites in each state (www.wsba.org, www.osbar.org, www.isb.idaho.gov) are excellent starting points for resources that are both practical and accessible. All three have the latest versions of each state’s respective RPCs, the accompanying comments (for Washington and Idaho) and state bar ethics opinions. All three also have searchable databases for articles that have appeared in each state’s bar magazine that touch on a wide variety of state-specific ethics and risk management issues. Finally, all three have contact

information for the general counsel's office of each state bar for questions and suggestions on other resources (including bar-sponsored publications and CLE programs).

Even these useful resources, however, vary in style and content. Washington, for example, has very helpfully labeled comments that vary substantially from the corresponding ABA Model Rule comment as "Washington Comments" and "Washington Revisions." Although Oregon does not have comments, it has a comprehensive set of ethics opinions that were updated in 2005 when it moved from its former Disciplinary Rules to the RPCs. By contrast, although Idaho has both comments and ethics opinions, the latter have not been updated since Idaho last comprehensively amended its RPCs in 2004.

Consequences

All three states adopted choice-of-law provisions (RPC 8.5(b) in each) that generally apply the forum state's RPCs to conduct in that state. In short, if you are handling a matter in another state, you are expected to be familiar with the professional rules in that state.

The consequences of failing to know and follow the rules are several and are not mutually exclusive.

First, out-of-state lawyers are subject to the disciplinary authority of both the forum state and their home state under similar versions of RPC 8.5(a) in Washington, Oregon and Idaho. In other words, you can be disciplined by the

forum state and also in your home state (most commonly as reciprocal discipline but also in theory as a direct regulatory action).

Second, out-of-state lawyers may be disqualified just like their in-state counterparts (*Qwest v. Anovian, Inc.*, No. C08-1715RSM, 2010 WL 1440765 (W.D. Wash. Apr. 8, 2010) (unpublished)) and are also subject to having their *pro hac vice* admission revoked (*Hahn v. Boeing Co.*, 95 Wn.2d 28, 621 P.2d 1263 (1980)).

Third, although the range of civil remedies varies, all three Northwest states recognize the principle that a violation of the RPCs can translate into a civil claim for the breach of the underlying fiduciary duty involved (*Eriks v. Denver*, 118 Wn.2d 451, 824 P.2d 1207 (1992); *Kidney Association of Oregon v. Ferguson*, 315 Or. 135, 843 P.2d 442 (1992); *Blough v. Wellman*, 132 Idaho 424, 974 P.2d 70 (1999)). A breach of the fiduciary duty of loyalty in particular—in other words, a conflict—may lead to both civil damages flowing from the breach and the accompanying remedies of fee forfeiture and fee disgorgement under the rationale that a disloyal agent is not entitled to compensation.

Summing Up

Over the past decade it has become much easier for lawyers and their firms to practice seamlessly across state boundaries throughout the Northwest. During that same period, the professional rules in all three states have moved into much tighter alignment. Nonetheless, important jurisdictional differences lurk

in many unpredictable places within the respective rules. Lawyers need to be as familiar with the nuances of the RPCs in the particular state in which they are handling a matter as they are with the substantive law of the matter involved. If not, they run the risk of very real adverse consequences in both their forum and home states.

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