

CHAPTER 1B

**THE ETHICS YEAR IN REVIEW**

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**MARK J. FUCILE** of Fucile & Reising LLP handles professional responsibility, regulatory and attorney-client privilege issues for lawyers, law firms and corporate and governmental legal departments throughout the Northwest. Mark has chaired both the WSBA Committee on Professional Ethics and its predecessor, the WSBA Rules of Professional Conduct Committee. Mark is also a former member of the Oregon State Bar Legal Ethics Committee and is a current member of the Idaho State Bar Section on Professionalism & Ethics. Mark writes the quarterly Ethics & the Law column for the WSBA *NWLawyer*, the monthly Ethics Focus column for the Multnomah (Portland) Bar's *Multnomah Lawyer* and is a regular contributor on legal ethics to the WSBA *NWSidebar* blog. Mark is a contributing author/editor for the current editions of the WSBA *Legal Ethics Deskbook*, the WSBA *Law of Lawyering in Washington* and the OSB *Ethical Oregon Lawyer*. Before co-founding his firm in 2005, Mark was a partner and in-house ethics counsel for a large Northwest regional firm. He also teaches legal ethics as an adjunct for the University of Oregon School of Law at its Portland campus. Mark is admitted in Washington, Oregon, Idaho, Alaska and the District of Columbia. He is a graduate of the UCLA School of Law.

*Note: The developments reported here focus on Washington and the ABA. They are intended to be illustrative rather than encyclopedic.<sup>1</sup> The term “recent” is arbitrarily limited to this year through early November and last year. Other developments on a range of law firm risk management and related privilege issues, including unpublished decisions of the Washington Court of Appeals, are discussed in my posts on the WSBA NWSidebar blog.*

## **I. New Rules and Comments**

- **ABA “20/20” Amendments Adopted in Washington**

Earlier this decade, the ABA 20/20 Commission, which had been appointed to review the ABA Model Rules (and related practice regulations) since the last comprehensive set of amendments in the early 2000s, issued a series of reports recommending largely technical changes. Those were adopted by the ABA in 2012 and 2013 and then referred to the states. In Washington, the WSBA Committee on Professional Ethics reviewed the 20/20 proposals and suggested a number of amendments to the corresponding Washington RPCs. Those were eventually adopted by the Washington Supreme Court and became effective in September 2016. Two of the most interesting changes relate to the use of technology in law practice: (1) Comment 8 to RPC 1.1 was amended to include the responsibility to keep abreast of relevant technology as a part of the duty of competence; and (2) the confidentiality rule, RPC 1.6, was amended to add a new subsection “c” that includes a duty to make reasonable efforts to prevent inadvertent or unauthorized disclosure of client confidential information.

- **Proposed Comment 22 to RPC 1.7 on Advance Waivers**

When the WSBA Ethics 2003 Committee proposed substantial updates to the RPCs in 2004, its report included a recommendation to adopt a new Comment 22 to RPC 1.7 that would expressly permit advance waivers. The Ethics 2003 proposal was based on a corresponding comment to ABA Model Rule 1.7 adopted as a part of the ABA’s Ethics 2000 amendments.<sup>2</sup> The Washington Supreme Court, however, deleted the proposed comment and simply listed it as “Reserved” when it acted on the Ethics 2003 proposals in 2006. The Supreme Court did not elaborate on the term “reserved” then and has not done so since. In an effort to eliminate this ambiguity, the WSBA Committee on Professional Ethics earlier this year proposed adopting Comment 22 to ABA Model Rule 1.7, which reads:

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<sup>1</sup> In particular, disqualification decisions involving confidential information often contain limited facts in public filings and, therefore, are not necessarily of great utility beyond the contours of the cases concerned. *See, e.g., In re Examination of Privilege Claims*, 2016 WL 8669870 (W.D. Wash. July 22, 2016); *Moi v. Chihuly Studio, Inc.*, No. C17-0853-RSL (W.D. Wash. Oct. 25, 2017) (available on the U.S. Courts’ PACER system).

<sup>2</sup> WSBA Ethics 2003 Committee materials remain available on the WSBA web site. Information concerning the ABA Ethics 2000 Commission’s work is summarized in ABA, *A Legislative History: The Development of the ABA Model Rules of Professional Conduct, 1982-2013* (2013).

“Whether a lawyer may properly request a client to waive conflicts that might arise in the future is subject to the test of paragraph (b). The effectiveness of such waivers is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails. The more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences of those representations, the greater the likelihood that the client will have the requisite understanding. Thus, if the client agrees to consent to a particular type of conflict with which the client is already familiar, then the consent ordinarily will be effective with regard to that type of conflict. If the consent is general and open-ended, then the consent ordinarily will be ineffective, because it is not reasonably likely that the client will have understood the material risks involved. On the other hand, if the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise, such consent is more likely to be effective, particularly if, e.g., the client is independently represented by other counsel in giving consent and the consent is limited to future conflicts unrelated to the subject of the representation. In any case, advance consent cannot be effective if the circumstances that materialize in the future are such as would make the conflict nonconsentable under paragraph (b).”<sup>3</sup>

The WSBA Board of Governors concurred in the amendment and forwarded the proposal on to the Washington Supreme Court for its review.

- **Possible Changes in the Lawyer Marketing Rules**

Since the United States Supreme Court’s seminal decisions in *Bates v. State Bar of Arizona*, 433 U.S. 350, 97 S. Ct. 2691, 53 L. Ed.2d 810 (1977), and *Ohralik v. Ohio State Bar Association*, 436 U.S. 447, 98 S. Ct. 1912, 56 L. Ed.2d 444 (1978), the lawyer marketing rules—Title 7 in both the ABA Model Rules and the Washington RPCs—have been in a near-constant state of evolution. Initially, the driving force was continuing constitutional developments in the wake of *Bates* and *Ohralik*. More recently, technology has been the principal driver. In 2015 and 2016, the Association of Professional Responsibility Lawyers, a leading national organization of legal ethics lawyers, issued two reports proposing a significant simplification of the lawyer marketing rules around the core constitutional concepts in *Bates* and *Ohralik*: generally permitting lawyer advertising as long as it is truthful and permitting restrictions on direct solicitation only in circumstances that amount to harassment. The WSBA is currently reviewing the APRL proposals as is the ABA. A separate panel will be discussing these developments in detail. More information on these developments nationally, including links to the APRL reports, is available on the ABA Center for Professional Responsibility’s web site.

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<sup>3</sup> For additional discussion of advance waivers under Comment 22 to ABA Model Rule 1.7, see ABA Formal Opinion 05-436 (2005).

## II. New Ethics Opinions<sup>4</sup>

- **Virtual Office Practice:**  
**WSBA Advisory Opinion 201601 (2016)**

This opinion surveys issues from the perspective of both “virtual offices”—typically a solo practicing somewhere other than a traditional “brick and mortar” office—and “virtual firms”—where a group of lawyers is practicing virtually at several locations. The issues discussed range from marketing considerations for virtual offices, such as the office address listed in public communications, and supervisory duties when lawyers and staff are in multiple locations. A separate panel will be discussing this advisory opinion and other virtual practice issues in detail.

- **Withdrawal:**  
**WSBA Advisory Opinion 201701 (2017)**

This opinion outlines what a lawyer can—and cannot—say in public court filings and related public court proceedings when seeking court permission to withdraw. In doing so, the opinion discusses the intersection of the withdrawal rule—RPC 1.16—and the confidentiality rule—RPC 1.6. The opinion is a useful adjunct to Comment 3 to RPC 1.16 that also addresses this subject. The opinion also suggests procedural mechanisms—such as sealed filings and *in camera* proceedings—if the court concerned orders a fuller explanation of the lawyer’s reasons for seeking withdrawal.

- **Withdrawal:**  
**ABA Formal Opinion 476 (2016)**

This opinion focuses on withdrawal in the specific context of nonpayment of fees in civil litigation. It is a useful complement to the new WSBA opinion discussed in the preceding paragraph.

- **Electronic Communications:**  
**ABA Formal Opinion 477R<sup>5</sup> (2017)**

This opinion updates—but does not replace—ABA Formal Opinion 99-413 (1999), which has been the ABA’s key ethics opinion on email confidentiality. The new opinion incorporates the Ethics 20/20 amendments to competence and confidentiality discussed in the first paragraph above in the “new rules” section. In light of federal law prohibiting the unauthorized interception of electronic communications, the new opinion does not require that email routinely be encrypted but notes that encryption and similar measures may be required in particular circumstances in light of the sensitivity of the information concerned.

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<sup>4</sup> The WSBA and ABA opinions discussed are available on their respective web sites.

<sup>5</sup> The “R” refers to a revised version of the opinion issued on May 22, 2017.

### III. New Court Decisions

- **Communications with Former Employees of an Organizational Client:**  
*Newman v. Highland School District No. 203*,  
186 Wn.2d 769, 381 P.3d 1188 (2016)

*Newman* addresses a key question when a lawyer is representing an organization in litigation and the witnesses encompass both current and former employees of the organization: do communications with former employees who are not otherwise represented fall within the organization's attorney-client privilege? In a split decision, a majority of the Washington Supreme Court said "no." The majority drew the line on privilege at the point an employee leaves the organization (if not separately represented). The dissent argued that the privilege should still attach if the communication concerned the former employee's work for the organization. *Newman* addressed privilege only and did not discuss associated work product such as attorney notes of interviews with former employees.

- **The Importance of Defining the Client in Engagement Agreements:**  
*Atlantic Specialty Insurance Company v. Premera Blue Cross*,  
2016 WL 1615430 (W.D. Wash. Apr. 22, 2016) (unpublished)

*Atlantic* is an excellent illustration of the importance of defining the client in an engagement agreement. *Atlantic* was an insurance coverage case in federal court in Seattle. The defendant was initially represented by its longstanding corporate counsel. The law firm, however, was also representing an affiliate of the plaintiff in an unrelated Oregon coverage case. In the Oregon matter, the law firm had not limited the client to the particular affiliate involved through an engagement agreement. Instead, it had received without objection a set of "case handling guidelines" that defined the client broadly to include essentially the affiliate's entire corporate family—which included the plaintiff in the Seattle case. The plaintiff in the Seattle case moved to disqualify the law firm as having a conflict under the current multiple-client conflict rule, RPC 1.7(a)(1). The court agreed and disqualified the law firm.

- **Court Order on Withdrawal Precludes Subsequent Legal Malpractice Claim Over the Withdrawal:**  
*Schibel v. Eymann*,  
189 Wn.2d 93, 399 P.3d 1129 (2017)

In *Schibel*, the Washington Supreme Court held that a trial court's order approving a lawyer's withdrawal precludes a subsequent malpractice claim by the former client over the withdrawal. The court reasoned that collateral estoppel applied because the former client had the opportunity to litigate the withdrawal in

the original proceeding. *Schibel* addresses malpractice claims only and not bar grievances. In either event, *Schibel* suggests that at least in some particularly difficult circumstances, a lawyer may wish to consider seeking leave to withdraw even if it is not technically required under CR 71 to gain judicial review and approval of the withdrawal.

- **Supreme Court Discusses Insurance Defense Conflicts in Reservation of Rights Context:**  
*Arden v. Forsberg & Umlauf*,  
Wn.2d \_\_\_\_\_, 402 P.3d 245 (2017)

*Arden* involved claims for legal malpractice and breach of fiduciary duty. The defendant law firm had defended the plaintiffs in a civil damage case in which their insurance carrier had issued a reservation of rights. The carrier eventually funded the settlement of the underlying matter but the Ardens sued the law firm anyway. Although the law firm had advised the Ardens that it was not providing them with coverage advice (and the Ardens had separate coverage counsel), the law firm had not informed the Ardens that it also did other unrelated coverage work for the carrier that had issued the reservation. The Ardens later claimed that the law firm had a conflict under RPC 1.7(a)(2), which governs “material limitation” conflicts, based on its relationship with the carrier. The Supreme Court unanimously affirmed dismissal by the lower courts based on plaintiffs’ lack of damages. The majority raised, but did not resolve, the conflict issue in the face of dueling expert opinions on the standard of care. The concurrence characterized the detour into the asserted conflict as “dicta” and concluded that the lack of damages should have been dispositive. *Arden* injects a degree of uncertainty into at least the defense of cases under a reservation of rights and, at least as a matter of risk management, suggests that a law firm obtain a conflict waiver if the firm represents the carrier in other matters or (again as a matter of risk management) has other economic relationships with the carrier (such as serving as “panel” counsel).

- **Engagement Agreements and Disqualification:**  
*Cox v. Alliant Insurance Services, Inc.*,  
2017 WL 4640452 (E.D. Wash. Sept. 19, 2017) (unpublished)

Plaintiffs in this commercial case moved to disqualify defense counsel. One of the plaintiffs argued, in relevant part, that he was a former client of defense counsel in a “substantially related” matter under RPC 1.9. The federal district court in Spokane, however, denied the motion. The court concluded that although the plaintiff had been a representative for the corporation involved, the corporation (which was not a plaintiff)—and not the individual—was the client of the defense firm. The court determined, therefore, that no attorney-client relationship had existed between the plaintiff and the defense firm in the matter involved. In reaching this conclusion, the court looked to the engagement agreement—which had defined the corporation alone as the client—as a primary

piece of evidence. *Cox* reinforces the important role that engagement agreements play in defining who is—and who is not—the client of the law firm.