

May 2019 *Multnomah Lawyer Ethics Focus*

**Instant Answers:
Providing Advice under Time Constraints**

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We've all likely had situations where panicked clients called and needed answers on the spot. In most circumstances with existing clients, we're able to give them a quick reaction and then get back to them with a more detailed answer as time permits. More recently, however, web-based commercial platforms have emerged that promise virtually instant answers for a nominal fee from cooperating lawyers throughout the country. These newer services impact lawyers in two ways. First, for lawyers thinking of participating in such platforms, there are important considerations to evaluate before jumping on-board. Second, the advertising for such services inevitably leaves the impression that all lawyers should be able offer similar instant answers.

In this column, we'll look at three risk management issues that affect both categories: (1) adequately vetting conflicts; (2) effectively limiting the scope for a short-duration representation; and (3) meeting the standard of care. By focusing on these three, I don't mean to exclude others. Particularly with lawyers thinking of participating in web-based platforms, other "due diligence" should include an examination whether the compensation mechanism complies with Oregon RPC 5.4, which generally prohibits fee-splits with non-lawyers and potential

unauthorized practice considerations if questioners are from jurisdictions where the answering lawyer is not licensed.

Vetting Conflicts

There is no special exemption from the conflict rules for short-duration representations. In *In re Knappenberger*, 338 Or 341, 108 P3d 1161 (2005), for example, the husband in a divorce proceeding consulted for about two hours with a lawyer. Although brief, the consultation was confidential and the lawyer sent the husband a bill. Later, the wife in the same divorce proceeding hired the lawyer to represent her. The lawyer's conflict system was rudimentary at best and, for whatever reason, he didn't recognize the conflict until the husband's new lawyer pointed it out and demanded he withdraw. Although the lawyer eventually withdrew, the Oregon Supreme Court nonetheless disciplined the lawyer for failure to detect and more quickly resolve the conflict.

With most lawyers today using—or at least having available—computerized conflict systems, conflicts can be checked relatively quickly. In short, there is no technological room for excuse. Especially in consumer-oriented practice areas like our opening illustration, failure to run a conflict check before providing advice can be a quick path to a disqualifying conflict and potential regulatory discipline. Whether a lawyer participating in a web-based

platform or one handling a more mundane initial telephone call, lawyers need to run a conflict check before taking on a client—regardless of the anticipated duration of the attorney-client relationship.

Limiting the Scope

Oregon RPC 1.2(b) allows lawyers to “limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.” Particularly if a lawyer is handling a short-duration matter, it can be imperative from the risk management perspective to confirm the representation’s limited scope. Circumstances vary, but a written engagement agreement can provide critical evidence of what—and what not—the lawyer was hired to do. Although a written agreement preferably precedes the substantive advice provided, it may follow an oral agreement in many circumstances such as an hourly matter billed in arrears.

Even a written agreement cannot provide complete assurance that a lawyer will be shielded from a claim if the advice rendered turns out to be inadequate. RPC 1.2(b) is specifically prefaced on the phrase “if the limitation is reasonable under the circumstances[.]” If the nature of the inquiry fielded is inherently one that cannot be answered through a short-duration consultation, it is entirely conceivable that a later fact-finder—whether a court, a jury or a bar

regulator—might find that the limitation did not meet the key predicate test under RPC 1.2(b). Comment 7 to the corresponding ABA Model Rule puts it this way:

“If . . . a client’s objective is limited to securing general information about the law the client needs in order to handle a common and typically uncomplicated legal problem, the lawyer and client may agree that the lawyer’s services will be limited to a brief telephone consultation. Such a limitation, however, would not be reasonable if the time allotted was not sufficient to yield advice upon which the client could rely.”

The Standard of Care

The federal district court neatly summarized the standard of care governing Oregon lawyers in *Hamilton v. Silven, Schmeits & Vaughan, P.C.*, 2011 WL 6887132 at *3 (D Or Oct 19, 2011) (unpublished) (citation omitted): “[T]he standard of care requires the lawyer ‘to use that care, skill and diligence which would ordinarily be used by lawyers in the community in similar circumstances.’” Comment 7 to ABA Model Rule 1.2 noted above also counsels that “[a]lthough an agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”

Lawyers contemplating short-duration representations need to carefully evaluate whether the time allotted by the client is really sufficient to competently

address the issues involved. If the client is not willing to expand the time allotted to handle a matter with sufficient competence and care, the most prudent course—at least from the risk management perspective—may be to “pass” altogether.

ABOUT THE AUTHOR

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