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Helping Those in Need: Oregon's Unique Lawyer-Mediator Rule

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Although most of Oregon's Rules of Professional Conduct are patterned on the corresponding ABA Model Rules, Oregon RPC 2.4(b) is unique regionally in allowing lawyer-mediators to prepare documents implementing a settlement reached at a mediation and to file them in court. This provision traces its roots to a concerted effort in the late 1990s to address the unmet legal needs of *pro se* litigants primarily in the area of family law. Oregon's rule has evolved since then but still provides a useful tool in that context. At the same time, lawyer-mediators using this tool need to remain sensitive to the line between the relatively limited follow-on tasks permitted by RPC 2.4(b) and the very real conflicts they face if they go beyond those boundaries.

In this column, we'll first briefly survey the history of RPC 2.4(b) for context. We'll then outline the tasks permitted by the rule. We'll conclude with a discussion of the inherent conflict risks if a lawyer-mediator crosses the boundaries set by RPC 2.4(b).

Historical Context

The origins of RPC 2.4(b) help explain what is—and what is not—permitted by the rule.

As initially adopted in 1986, former Oregon DR 5-106 allowed lawyer-mediators to draft settlement agreements reflecting the resolution reached during mediation but not related implementing documents. Similarly, because DR 5-106 classified appearing in court as a representational activity, it prohibited mediators from filing a resulting stipulated judgment with a court. OSB Formal Opinion 1991-101 (1991) summed-up (at 2) the parameters of the rule in its original form by noting that although a lawyer-mediator could draft a settlement agreement "Attorney could not . . . then endeavor to represent one or both spouses in placing the agreement of record with the court." In 1997, however, the Legislature created the Oregon Family Law Legal Services Commission to, in relevant part, develop ways to better assist litigants of modest means in the family law area who were often representing themselves *pro se*. The Commission worked with the Oregon State Bar to develop an amendment to DR 5-106 in 1998 that permitted lawyer-mediators to file an agreed order or judgment with the court concerned to implement the settlement. In 2001, this provision was reframed to extend beyond simply a stipulated order or judgment to encompass "documents" more generally—but remained tethered to the idea that the "documents" involved reflected or implemented the agreement reached at the mediation.

Tasks Permitted by the Rule

When Oregon moved from the old "DRs" to the RPCs in 2005, former DR 5-106(B) was carried over as RPC 2.4(b) and reads:

> "A lawyer serving as a mediator:
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> "(1) may prepare documents that memorialize and implement the agreement reached in mediation;
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> "(2) shall recommend that each party seek independent legal advice before executing the documents; and
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> "(3) with the consent of all parties, may record or may file the documents in court."

In keeping with these changes, OSB Formal Opinion 2005-101 (2015 rev) was also updated to read consistent with the rule.

RPC 2.4(c) adds that subsection (b)(2) does "not apply to mediation programs established by operation of law or court order."

Although RPC 2.4(b) clearly traces its lineage to family law, it is not limited on its face to that practice area.

Remaining Risks

OSB Formal Opinion 2005-101 explains (at 2) the underlying rationale for the conflict rules not applying within the narrow spectrum of activities covered by RPC 2.4(b):

> "Pursuant to RPC 2.4, an Oregon lawyer who acts as mediator does not represent any of the parties to the mediation. This is why, among other things, the multiple-client conflict-of-interest rules set forth in Oregon RPC 1.7 do not apply."

Lawyer-mediators using RPC 2.4(b) need to remain acutely aware of its limited scope. In *In re Van Thiel*, 24 DB Rptr 282 (Or 2010), a lawyer was disciplined under RPC 2.4 for essentially moving beyond his role as mediator in a divorce proceeding. OSB Formal Opinion 2005-101 also emphasizes that mediators will only qualify for the "safe harbor" provided by RPC 2.4(b)(1) and (3) if they comply with the requirement in RPC 2.4(b)(2) of "recommend[ing] that each party seek independent legal advice before executing the documents" or are excused from that requirement by RPC 2.4(c) as noted above.

More fundamentally, outside the confines of RPC 2.4(b), the Oregon Supreme Court in, among others, *In re McKee*, 316 Or 114, 849 P2d 509 (1993), has long held that representing both sides in a divorce is prohibited. In that vein, the OSB *Ethical Oregon Lawyer* treatise (2015 rev ed at 10-22) classifies such conflicts as non-waivable under RPC 1.7. Therefore, mediators who attempt to represent both sides in a divorce beyond the settlement agreement and implementing documents specifically permitted by RPC 2.4(b) are potentially at

risk of both regulatory discipline and, because the conflict rules are a reflection of the underlying fiduciary duty of loyalty, potential civil damage claims.

RPC 1.12(a) does permit a mediator to later represent one of the parties to a mediation in the matter involved—but only if "all parties to the proceeding give informed consent, confirmed in writing." As with other conflict waivers, informed consent under RPC 1.12(a) must include (under RPC 1.0(g)) "a recommendation that the client seek independent legal advice to determine if consent should be given."

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