

September 2019 *Multnomah Lawyer Ethics Focus*

Home Turf: Handling Multiple Cases in the Same Courthouse

**By Mark J. Fucile
Fucile & Reising LLP**

Many lawyers routinely handle multiple cases in the same courthouse. In most circumstances, no unique professional responsibility issues are present when a firm's mix of cases is varied and the judges assigned are from a relatively large pool. Risks can sharpen, however, when the cases a firm handles are within a narrow practice area and a single judge or small panel handles the docket involved. In this column, we'll look at three: (1) "issue" conflicts; (2) "affidaviting" judges; and (3) ex parte contacts.

"Issue" Conflicts

In many respects, a lawyer's stock-in-trade is making legal arguments that fit the facts of whatever cases come through the door. For the most part, there is nothing wrong with this time-honored approach. Conflicts can arise, however, if a lawyer presents a legal argument in one case and knows that, if the lawyer prevails on that argument, it will harm another client the firm is representing in a different case in the same courthouse.

OSB Formal Opinion 2007-177 (rev 2016) addresses "issue" conflicts in depth and across multiple forums. Oregon treats issue conflicts as a form of multiple-client conflict under RPC 1.7(a)(1). Formal Opinion 2007-177 explains (at 4) how issue conflicts can arise in the same courthouse:

“The critical question is whether the outcome in Client A’s matter will or is highly likely to affect the outcome of Client B’s matter . . . Whether it would be met when, for example, two cases are simultaneously pending before two different trial court judges in the same county or judicial district will depend on what the lawyer reasonably knows or should know about the likelihood that one case will affect the other under the circumstances in question. For example, the outcome may depend in part on whether the issue is likely to be dispositive in one or both cases or constitutes only a remote fall-back position.”

Formal Opinion 2007-177 concludes that issue conflicts—while rare—are non-waivable when they occur.

Lawyers who typically handle cases on the same side—such as prosecutors or insurance defense counsel—are unlikely to run into issue conflicts because they are typically arguing consistent legal positions across multiple cases. But, lawyers whose practices blend sides—such as in family law (husbands and wives) and bankruptcy (debtors and creditors)—and who handle those cases in front of a single judge or small panel of judges need to be attentive to potential conflicts that can arise out of divergent legal positions.

“Affidaviting” Judges

Oregon has long had a low bar for changing a judge who has been assigned to hear a matter—as long as it is done within the timelines and procedures provided in ORS 14.250-.270. ORS 14.260(1) allows a lawyer to file a motion and supporting affidavit (leading to the colloquial term “affidaviting”)

stating that “the party or attorney believes that the party or attorney cannot have a fair and impartial trial or hearing before the judge[.]” Although ORS 14.260(1) includes a good faith requirement, the Supreme Court has held that the requisite belief simply needs to be subjective.

OSB Formal Opinion 2018-193 (2018) examines many issues surrounding “affidaviting.” One in particular affects lawyers who routinely appear before the same judge or a small panel. Formal Opinion 2018-193 puts it this way (at 5):

“Filing an affidavit for change of judge can have significant consequences for a lawyer. Lawyers may be concerned about the effect that filing such an affidavit could have on their own reputation or practice, or on their other clients in the future. This is particularly true for lawyers who practice in smaller counties where the local Bar and pool of available judges are relatively small, and for lawyers who typically represent only one class of litigants (such as in criminal and personal-injury contexts).”

Formal Opinion 2018-193 concludes that generally a lawyer must only evaluate the merits of “affidaviting” the judge assigned in the specific case at hand. At the same time, the opinion counsels that a lawyer can consider the impact an affidavit might have with, for example, the other judges on a small panel of disqualifying one of their colleagues.

Ex Parte Contacts

RPC 3.5(b) prohibits a lawyer from communicating ex parte with a judge “on the merits” of a pending case. Oregon Code of Judicial Conduct 3.9(A)

mirrors the lawyer version of the prohibition and CJC 3.9(B) obliges a judge receiving an unauthorized ex parte communication to notify the other parties and provide them with an opportunity to respond.

When handling many cases before the same judge, that very familiarity can lead lawyers to treat communications more informally—sometimes with unfortunate results. In *In re Hobson*, 13 DB Rptr 120 (Or 1999), for example, a lawyer was disciplined under the similar predecessor to current RPC 3.5(b). When the lawyer was on his way to deliver the judgment following a just-concluded trial to the judge's chambers, he ran into the judge on the sidewalk outside the courthouse. In the course of their conversation, the lawyer had the judge sign the judgment before providing a copy to opposing counsel. With often more informal electronic communications increasingly the norm, prudent lawyers will take even more care to make sure their contacts with judges don't cross the line into prohibited ex parte communications.

ABOUT THE AUTHOR

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.

Page 5

Mark writes the monthly Ethics Focus column for the Multnomah (Portland) Bar's *Multnomah Lawyer*, the quarterly Ethics & the Law column for the WSBA *NWLawyer* 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 OSB *Ethical Oregon Lawyer*, the WSBA *Legal Ethics Deskbook* and the WSBA *Law of Lawyering in Washington*. Before co-founding Fucile & Reising LLP 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 Oregon, Washington, Idaho, Alaska and the District of Columbia. He is a graduate of the UCLA School of Law. Mark's telephone and email are 503.224.4895 and Mark@frllp.com.