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RPC 6.5: Conflict Solution for Pro Bono Clinics

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When the ABA Model Rules of Professional Conduct were being comprehensively reviewed 20 years ago by the “Ethics 2000” Commission, it noted a potential disincentive to pro bono service in the conflict rules:

[A] strict application of the conflict-of-interest rules may be deterring lawyers from serving as volunteers in programs in which clients are provided short-term limited legal services under the auspices of a nonprofit organization or a court-annexed program. The paradigm is the legal-advice hotline or pro se clinic, the purpose of which is to provide short-term limited legal assistance to persons of limited means who otherwise would go unrepresented.

ABA, A Legislative History: The Development of the ABA Model Rules of Professional Conduct 1982-2013 at 728 (2013).

The solution the Ethics 2000 Commission proposed—and the ABA House of Delegates adopted—was Model Rule 6.5, which slightly relaxes the conflict rules in the context of short-term advice clinics and their equivalents. Oregon, in turn, adopted the rule as RPC 6.5 in 2005. In this column, we’ll survey both the mechanics and limitations of RPC 6.5.

Mechanics

The principal way RPC 6.5 relaxes RPCs 1.7 on current client conflicts and 1.9 on former client conflicts and their imputation to the lawyer’s firm as a whole under RPC 1.10 (the “firm unit” rule) is by exempting their application in

short-term clinic setting when the lawyer involved does not have actual knowledge of a conflict:

(a) A lawyer who, under the auspices of a program sponsored by a nonprofit organization or court, provides short-term limited legal services to a client without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter:

(1) is subject to Rules 1.7 and 1.9(a) only if the lawyer knows that the representation of the client involves a conflict of interest; and

(2) is subject to Rule 1.10 only if the lawyer knows that another lawyer associated with the lawyer in a law firm is disqualified by Rule 1.7 or 1.9(a) with respect to the matter.

(b) Except as provided in paragraph (a)(2), Rule 1.10 is inapplicable to a representation governed by this Rule.

Under RPC 6.5, for example, a big firm lawyer could offer on-the-spot advice to a tenant at a pro bono clinic about the tenant's rights vis-à-vis a landlord without first running a conflict check on the landlord as long as the lawyer didn't know that the landlord was a client of the lawyer's firm. Comment 1 to ABA Model Rule 6.5 underscores the rationale:

In these programs, such as legal-advice hotlines, advice-only clinics or pro se counseling programs, a client-lawyer relationship is established, but there is no expectation that the lawyer's representation of the client will continue beyond the limited consultation. Such programs are normally operated under circumstances in which it is not feasible for a lawyer to systematically screen for conflicts of interest as is generally required before undertaking a representation.

Comment 4 to ABA Model Rule 6.5 balances encouraging pro bono in this context with the continuing duty of loyalty to clients of the lawyer's firm by not disqualifying the lawyer's firm from work that may be adverse to the clinic client through other lawyers at the firm:

By virtue of paragraph (b), however, a lawyer's participation in a short-term limited legal services program will not preclude the lawyer's firm from undertaking or continuing the representation of a client with interests adverse to a client being represented under the program's auspices. Nor will the personal disqualification of a lawyer participating in the program be imputed to other lawyers participating in the program.

Limitations

Although very useful in encouraging pro bono work, RPC 6.5 is intentionally constructed with three primary limitations.

First, on a practical level, it is oriented around advice-only clinics and similar settings where, in the phraseology of the rule, there is no "expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter[.]" Comment 5 to ABA Model Rule 6.5 observes that if further representation is undertaken, then the conflict rules (and the corresponding need for conflict checks before proceeding) are triggered: "If, after commencing a short-term representation in accordance with this Rule, a lawyer

undertakes to represent the client in the matter on an ongoing basis, Rules 1.7, 1.9(a) and 1.10 become applicable.”

Second, Comment 2 to ABA Model Rule 6.5 counsels that the clients assisted should be informed consistent with all limited scope representations—ABA Model Rule 1.2(c) and RPC 1.2(b) in Oregon—of the limited nature of the representation. The comment then adds: “If a short-term limited representation would not be reasonable under the circumstances, the lawyer may offer advice to the client but must also advise the client of the need for further assistance of counsel.”

Finally, Comment 2 to the ABA Model Rule notes that, except for the conflict rule exceptions, the balance of the RPCs apply—including those relating to client confidentiality. This recognizes that although the contact with the clients is by definition “short-term,” attorney-client relationships are nonetheless formed.

Summing Up

Oregon RPC 6.5, like the ABA Model Rule on which it is based, strikes a practical balance on conflicts that encourages lawyers to participate in pro bono clinics and similar venues.

ABOUT THE AUTHOR

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