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Traps for the Unwary: The Dangers of Dabbling

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In law firm risk management circles, "dabbling" has a specific connotation. It generally refers to a lawyer who strays into practice areas in which the lawyer is not fully competent. The motivations of "dabblers" vary. In some instances, the lawyer is trying to help a friend or relative. In others, the lawyer is attempting to generate more business. Regardless of the motivation, "dabbling" presents the risk that a lawyer who is not familiar with the practice area involved will make mistakes that can lead to both bar discipline and civil damage claims for legal malpractice. In this column, we'll survey both the dangers of "dabbling" and potential approaches to safely take on work in a new area.

The Dangers

Under RPC 1.1, lawyers have a regulatory duty of competence for the work they are handling—with "competent representation" defined as "the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." That same duty is reflected in the standard of care, which Oregon Uniform Civil Jury Instruction 45.04 describes as "the duty to use that degree of care, skill, and diligence ordinarily used by attorneys practicing in the same or similar circumstances in the same or similar community."

The Oregon State Bar Disciplinary Reporter reflects a long history of "dabblers" being disciplined when they ran into problems and didn't seek help. Some involved completely new areas. *In re Gresham*, 318 Or 162, 864 P2d 360 (1993), for example, involved a lawyer who was disciplined for lack of competence in handling his first probate case. Others concerned lawyers who were moving to adjacent areas. *In re Breckon*, 18 DB Rptr 220 (Or 2004), for example, involved a lawyer who had some family law experience but had never handled a dissolution involving significant real property issues. Some involved deficiencies in substantive legal areas. *In re Later*, 22 DB Rptr 340 (Or 2008), for example, involved nuanced issues of workers compensation and employment law. Others were procedural shortcomings. *In re Hilborn*, 22 DB Rptr 102 (Or 2008), for example, involved a lawyer handling a case that was removed to federal court and neither he nor his staff knew how to use the federal court's electronic filing system. Some, like *Gresham*, involved relatively junior lawyers. Others concerned more senior lawyers. *In re Spies*, 316 Or 530, 852 P2d 831 (1993), for example, involved an experienced land use lawyer who took on a divorce case.

Although these Oregon illustrations were disciplinary cases, it is not hard to imagine legal malpractice claims flowing from the same circumstances. In

fact, the ABA's Profile of Legal Malpractice Claims series surveying legal malpractice claims nationally reported in 2020 for the previous five-year period that nearly 16 percent of claims nationally involved "failure to know/properly apply [the] law." The statistics from the latest ABA report were not an anomaly. Earlier versions of the ABA series dating back to 1985 reflect similar statistics. In short, both "dabbling" and the associated risks are nothing new. It remains to be seen how the move to more dispersed working environments accelerated by the pandemic will affect peer review and internal controls within law firms that are intended to discourage dabbling in favor of studied practice expansion.

Potential Approaches

The comments to ABA Model Rule 1.1 suggest a variety of ways that lawyers can gain the knowledge necessary to safely move into new areas. Comment 2 to the ABA Model Rule counsels that, depending on the area, lawyers may be able to gain the requisite competence through individual study. In others that are more "hands on," the same comment suggests associating another lawyer who is experienced in the area involved. Although Comment 4 to ABA Model Rule 1.1 states that a lawyer can accept a matter in which the lawyer is not fully competent as long as "the requisite level of competence can be

achieved by reasonable preparation," Comment 4 should serve as a cautionary note rather than an excuse.

The Oregon Supreme Court in *Gresham* (318 Or at 169 n.2) also pointed to the resources available from the Professional Liability Fund:

> Matters need not have come to this. Lawyers occasionally get in "over their heads." Inaction, accompanied by anxiety and internal hand-wringing, sometimes results. In some cases, actionable negligence occurs. The Oregon State Bar Professional Liability Fund (PLF), in Bar publications and in notices sent to all members of the Bar, repeatedly has encouraged lawyers who find themselves in that situation to call the PLF for assistance. We echo that suggestion.

The Multnomah Bar, the OSB and the PLF collectively have a wide variety of both free and low-cost CLE resources available. The "Bar Books" section of the OSB web site offers in-depth Oregon practice guides included as a benefit of OSB membership. The Multnomah Bar and the OSB, together with bar groups focusing on specific practice areas, also afford lawyers opportunities for informal mentoring and networking.

The path to competence for a particular matter in a new area will understandably vary depending on the overall experience of the lawyer and the novelty of the issues. At the same time, both RPC 1.1 and the standard of care require us to have the knowledge and skills necessary to handle new areas we take on.

ABOUT THE AUTHOR

Mark J. Fucile of Fucile & Reising LLP handles professional responsibility, risk management 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 a member of the Oregon State Bar Legal Ethics Committee and the Idaho State Bar Section on Professionalism & Ethics. Mark writes the Ethics Focus column for the Multnomah (Portland) Bar's *Multnomah Lawyer*, the Ethics & the Law column for the WSBA *Bar News* and is a regular contributor on legal ethics to the WSBA *NWSidebar* blog. Mark is the editor-in-chief and a contributing author for the WSBA *Legal Ethics Deskbook* and a principal editor and contributing author for the OSB *Ethical Oregon Lawyer* 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.