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New Year's Resolution: Better Conflict Checks

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

In the lawyer version of the perennial New Year's resolution to "exercise more," some of us vow each year to "do better conflict checks." And, like "exercise more," "do better conflict checks" is a good idea that often doesn't make it to February. This past year saw two Oregon cases that give all of us an incentive to "do better conflict checks." The first involved a lawyer who didn't have a conflict system. The second concerned a lawyer who had very sophisticated, computer-based system available but didn't use it. In the first instance, the lawyer was disciplined. In the second, the lawyer's firm was disqualified.

In re Knappenberger, 338 Or 341, 108 P3d 1161 (2005), involved a family law practitioner. The husband in a divorce proceeding consulted the lawyer about representing him in that and also discussed a related restraining order proceeding. Ultimately, the husband retained other counsel. The lawyer sent the husband a bill for the consultation and the Oregon Supreme Court later found that the husband was the lawyer's client for that limited period. About a month later, the wife consulted the same lawyer and hired the lawyer to represent her in both proceedings. The lawyer didn't use a conventional conflict checking system—relying only on his memory and his address list. He didn't recall

meeting with the husband and his “conflict checking” system didn’t catch the earlier contact with the husband either. Although he later withdrew when the husband’s new lawyer threatened a disqualification motion, the Oregon Supreme Court disciplined the lawyer for a former client conflict. In doing so, the Supreme Court noted pointedly that the lawyer “had no real procedure for checking for conflicts” and “a lawyer in the accused’s situation may not rely solely on his or her memory to avoid prohibited conflicts of interest.” 338 Or at 355, 356.

Philin v. Westhood, Inc., 2005 WL 582695 (D Or Mar 11, 2005)

(unpublished), by contrast, involved a commercial dispute over investments in a golf course. In 2002, one of the defendant’s directors sought legal advice from a partner in the Boston office of a major national law firm. In a meeting lasting about an hour, he discussed with the lawyer the assertions that the plaintiff’s predecessor in interest was making concerning the defendant. The lawyer apparently did not run a conflict check or open a new file at that time. The lawyer had no further contact with the director until September 2004, when the director contacted the lawyer again to let him know that it appeared that litigation over the dispute might be imminent. The lawyer acknowledged the earlier discussion, but again did not run a conflict check or open a new file. Meanwhile, the law firm’s Portland office had taken on the plaintiff as a client in 2003 in the same dispute and filed a complaint against the defendant in September 2004. Before opening the matter, the Portland office ran a conflict check using the law firm’s

computerized system. Because the Boston partner never entered the client in the system, however, the conflict check did not reveal a problem. Once the complaint was served, the defendant raised the conflict with the law firm and then moved to disqualify the law firm when it did not withdraw. The District Court found that an attorney-client relationship had been formed in 2002 between the defendant and the law firm and disqualified the law firm under both the current and former client conflict rules.

Although the firm structures were vastly different in *Knappenberger* and *Philin*, the parallels are striking: short, exploratory conferences with potential clients that reviewing courts later held ripened into attorney-client relationships; no conflict checks on in-take; and later disqualifying conflicts when the other side in the disputes became clients of the lawyer and law firm involved. With each the results could have been avoided simply by entering the initial consultations in a conflicts database or put simply, by doing “better conflict checks.”

ABOUT THE AUTHOR

Mark J. Fucile of Fucile & Reising LLP focuses on legal ethics, product liability defense and condemnation litigation. In his legal ethics practice, Mark handles professional responsibility, regulatory and attorney-client privilege matters and law firm related litigation for lawyers, law firms and legal departments throughout the Northwest. He is a past member of the Oregon State Bar’s Legal Ethics Committee, is a past chair of the Washington State Bar

Rules of Professional Conduct Committee, is a member of the Idaho State Bar Professionalism & Ethics Section and is a co-editor of the OSB's Ethical Oregon Lawyer and the WSBA's Legal Ethics Deskbook. Mark also writes the monthly Ethics Focus column for the Multnomah (Portland) Bar's Multnomah Lawyer, the quarterly Ethics & the Law column for the WSBA Bar News and is a regular contributor on risk management to the OSB Bar Bulletin, the Idaho State Bar Advocate and the Alaska Bar Rag. Mark's telephone and email are 503.224.4895 and Mark@frllp.com.