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Five Years with the RPCs: A Look Back and a Peek Ahead

By Mark J. Fucile
Fucile & Reising LLP

Five years ago this month, the Rules of Professional Conduct replaced the Disciplinary Rules. The Oregon State Bar also updated its influential formal ethics opinions later in 2005 to reflect the new RPCs. In this column, we'll take a look back at those changes and a look forward at what developments are brewing both locally and nationally.

Looking Back. Oregon had been using the DRs since 1970 and was one of the last states to move to regulations based on the ABA's Model Rules of Professional Conduct. Despite our long tenure with the DRs, one of the most reassuring aspects of the transition is that the essential substance of our professional obligations didn't change even though the form of the rules did. For example, although the RPCs frame conflict waivers in terms of "informed consent" rather than "full disclosure" as used in the DRs, the practical similarity in the concepts readily outweighed any semantic differences. Even where the RPCs contained new rules that had no direct counterparts under the DRs, such as duties to prospective clients under RPC 1.18 and the entity client rule under RPC 1.13, the concepts contained in those new rules generally reflected broad tenets already a part of Oregon law and practice.

That's not to say that the change to the RPCs was not a very significant development. Oregonians have a well-earned tradition of going our own way—from not pumping our own gas to not having expert discovery in state court. But, in an era when our practices increasingly cross state lines (both physically and electronically), having a relatively common set of professional rules is of great practical benefit. Further, even if our practices don't take us beyond Oregon, having the additional clarity of "black letter" rules in key areas, such as the prospective and entity client provisions just noted, makes it easier for all of us to understand our obligations.

Looking Forward. As we move ahead with the RPCs, we are likely to continue to see incremental, rather than wholesale, change. The Supreme Court's order adopting the RPCs five years ago contained a transition rule that continued to apply the old DRs to conduct occurring before January 1, 2005. That, in turn, meant that the Court only began issuing decisions based on the RPCs relatively recently. The initial decisions from the Court applying the RPCs reflect more conceptual continuity than major differences with their predecessors applying the DRs. When Oregon adopted the RPCs in 2005, the revisions did not contain official comments to the new rules as roughly 40 other states have based on the comments to the ABA Model Rules. Last year the Oregon State Bar approached the Supreme Court about the possibility of adding comments to our rules, but the Court suggested deferring consideration of comments for now.

Similarly, potentially far-ranging changes to the advertising rules were tabled last year by the Board of Governors in favor of case-by-case development in view of the controlling role that constitution law (both state and federal) plays in this area. Both the decisions interpreting the RPCs and potential amendments to the rules that we are apt to see in the next five years, therefore, will likely be evolutionary rather than revolutionary.

At the same time, law practice will continue to be influenced by the broader economic and technological trends that affect us all with increasing speed. For instance, Oregon became a leader in reciprocal admissions when it partnered with Washington and Idaho in 2002 to permit integrated regional reciprocity. Although that early initiative now seems modest compared to more recent developments (regionally, nationally and internationally), it is a good example of how law practice has been shaped by broader economic trends that, to borrow a phrase from New York Times columnist Thomas Friedman, have made the world "flatter." Similarly, the rapid changes in technology over the past two decades have altered law practice in ways large and small. On occasion, the changes in technology have led directly to rule changes—such as the amendments to the federal procedural and evidence rules we saw in the past decade reflecting the increasingly central role of electronic discovery. More often, however, we will continue to be challenged to apply our existing rules to

new contexts—such as the OSB's ethics opinion (2005-164) addressing the "no contact" rule in the context of web sites and other internet communications.

As Yogi Berra once put it: "When you come to a fork in the road, take it." While we can't anticipate all of the "forks in the road" that economic and technological trends may bring, we can expect that they will continue to shape both our practices and the professional rules in the years ahead.

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.