TAKING A STROLL THROUGH THE RULES OF PROFESSIONAL CONDUCT

PART TWO

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The first part of this presentation addressed ORPC Section 1. A video of that presentation, and the accompanying written materials, are available for CLE credit on my website.

Gaps in numbering reflect sections that are reserved for potential rules in the future.

Section 2 - Counselor

Rule 2.1 ADVISOR

A lawyer must "exercise independent professional judgment and render candid advice." In providing that advice, "a lawyer may refer not only to the law, but to other considerations, such as moral, economic, social and political factors that may be relevant to the client's situation." This is one of the "general rules to ensure that a lawyer does not place his or her own interests in receiving a fee ahead of the client's interests." *In re Conduct of Spencer*, 355 Or 679, 692, 330 P3d 538 (2014).

Oregon adopted the ABA rule. This rule has no exact counterpart in the former Disciplinary Rules, so for research purposes, it's probably best to search for cases involving the ABA Model Rule language.[1]

Cases addressing the ABA rule note that "absent 'rare situations,' lawyers cannot ethically give mere technical advice to clients…" *Nat'l Fed'n of Indep Bus v Perez*, 2016 WL 3766121, at *31 (ND Tex June 27, 2016). Also, this rule imposes an obligation on counsel to consult with their clients before asserting a new defense. *Commissariat A L'Energie Atomique v Samsung Elecs Co, Ltd*, 430 F Supp 2d 366, 370 (D Del 2006).

Rule 2.3 EVALUATION FOR USE BY THIRD PERSONS

Oregon has adopted the ABA Model Rule on evaluating a matter affecting a client for the use of a third person. "ABA Model Rule of Professional Conduct 2.3 makes a special provision for cases where a lawyer is asked by a client to evaluate

[1] Research tip: In the former Oregon disciplinary rules, the concept to search is "the exercise of independent judgment," mentioned specifically in DRs 2-103, 5-101, 5-104, 5-108 and 7-101.

that client's internal information for the use of an outside party, such as a government agency." *US SEC v Fehn*, 97 F3d 1276, 1294 (9th Cir 1996) (in an SEC investigation a lawyer was asked by the client to evaluate the client's internal information for the use of an outside party). Such an evaluation does not make the third party a client of the lawyer who prepared the evaluation. "Not every beneficiary of a lawyer's advice is deemed a client." *Murray v Metro Life Ins Co*, 583 F3d 173, 177 (2d Cir 2009). If there could be a material adverse effect on a client, the lawyer may not prepare the evaluation without the client's consent.

Rule 2.4 LAWYER SERVING AS MEDIATOR

In private mediations, lawyer mediators cannot represent parties to a mediation, must obtain parties' consent their role as mediator, may memorialize the mediation agreement, must recommend that parties obtain independent legal advice before executing documents, and may file documents with the court if all parties consent. Oregon does not exactly follow the ABA Model Rule; it applies only to mediation (the Model Rule applies to mediation and arbitration), and the Oregon Rule specifically does not apply to "mediation programs established by operation of law or court order." Rule 2.4(c). ORPC 2.4 is similar to former DR 5-106.

Section 3 - Advocate

Rule 3.1 MERITORIOUS CLAIMS AND CONTENTIONS

Lawyers may not knowingly bring or defend a proceeding, assert a position therein, delay a trial or take other action on behalf of a client, unless there is a basis in law and fact for doing so that is not frivolous.

This is the ABA Model Rule, tailored slightly to track the language of DR 2-109(A)(2) and DR 7-102(A)(2). It was applied where a lawyer challenged, without appropriate factual basis, a district court's handling of his client's trial. *United States v Brown*, 72 F3d 25 (5th Cir 1995), and where a lawyer presented a fictional bankruptcy petition. *In re Husain*, 533 BR 658, 694 (Bankr ND Ill 2015).

If a lawyer has a plausible explanation for the assertion, there is no rule violation. *In re Conduct of Marandas*, 351 Or 521, 539, 270 P3d 231 (2012) (the accused's proffered interpretation of former ORS 18.455, as applied to the facts of his case, was plausible. We need not determine whether his interpretation was ultimately correct or not—it is sufficient to conclude, as we do, that it was not "frivolous" or "unwarranted" within the meaning of the disciplinary rules.)

Rule 3.3 CANDOR TOWARD THE TRIBUNAL

Other than the last paragraph[2], this rule draws from former DRs 7-102 and 7-106. These rules are ongoing and apply continuously to the end of the proceeding. This section has numerous subparts.

1. No knowingly false statements

Lawyers may not knowingly make false statements of fact or law to a tribunal – or fail to correct a false statement of material fact that was made earlier. Like the look-alike siblings who pretend to be each other and don't want to 'fess up in court:

> "Lawyer clearly was compelled to call on B to tell the truth. *See, e.g., In re A*., 276 Or 225, 554 P2d 479 (1976); Oregon RPC 1.6; ORS 9.460(3); and Oregon RPC 3.3(b),1 discussed in OSB Formal Ethics Op No 2005-34. *Cf. In re Hartman/McKanna*, 332 Or 241, 25 P3d 958 (2001) (lawyers counseled client to return improperly obtained documents and eventually gained client's permission to do so).
>
> B's refusal to do so shows that B intends to continue the pattern of deception begun by A when A was stopped. Lawyer may not ethically assist B in doing so. See, e.g., Oregon RPC 8.4(a)(3) (prohibiting lawyer from engaging in 'conduct involving dishonesty, fraud, deceit or misrepresentation that reflects adversely on the lawyer's fitness to practice law'); Oregon RPC 8.4(a)(4) (prohibiting lawyer from engaging in 'conduct that is prejudicial to the administration of justice'); Oregon RPC 1.2(c) (prohibiting lawyer from 'counsel[ing] a client to engage, or assist[ing] a client, in conduct that the lawyer knows is illegal or fraudulent'). *See also In re Haws*, 310 Or 741, 801 P2d 818 (1990); *In re Hockett*, 303 Or 150, 734 P2d 877 (1987); *In re Walker*, 293 Or 297, 647 P2d 468 (1982); *In re Jenson*, 1 DB Rptr 107 (1986)."

Formal Ethics Opinion No. 2005-53; *In re Willes*, 17 DB Rptr 271 (2003).

2. Tell the court of adverse controlling legal authority

Lawyers must tell the tribunal of legal authority in the controlling jurisdiction which is directly adverse to their clients' positions, if not disclosed by opposing counsel. "The Ninth Circuit has observed that this rule 'is an important one, especially in the district courts, where its faithful observance by attorneys assures that judges are not the victims of lawyers hiding the legal ball.'" *United States v Blondeau*, 2016 WL 1072849, at *1 (SD Cal Mar. 15, 2016) (citation omitted). "An argument in the teeth of uncited and undistinguished contrary

[2] "In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse."

authority is not warranted by existing law. An argument that does not mention directly-contrary authority is not a good faith argument for its modification or reversal." *Golden Eagle Distrib Corp v Burroughs Corp*, 809 F2d 584, 586 (9th Cir 1987).

3. Don't offer false evidence; if you do, take remedial measures.

Lawyers cannot offer false evidence. *In re Clark*, 2009 WL 2602349, at *5 (Bankr D Or Aug. 21, 2009) (attorney falsely represented in his Declaration in support of the Amended Motion that there was an immediate need for filing new cases). Likewise, offering into evidence a document notarized over the telephone

> "would violate Oregon RPC 3.3(a)(3) and (a)(5). *Cf. In re Morin*, 319 Or 547, 878 P2d 393 (1994) [witnessing and notarizing wills outside presence of clients]; *In re Hawkins*, 305 Or 319, 751 P2d 780 (1988) [execution of false jurat, use of false evidence, and filing of false affidavit]; *In re Kraus*, 289 Or 661, 616 P2d 1173 (1980) [notarizing signatures on pleadings without the presence of the affiant]; *In re Scott*, 255 Or 77, 464 P2d 318 (1970) [notarizing document without the presence of the affiant]."

Formal Ethics Opinion 2005-5.

If a lawyer, the lawyer's client or witness has offered false evidence, the lawyer must "take reasonable remedial measures" including telling the tribunal. (But the rule does **not** require disclosure of information otherwise protected by Rule 1.6.) "If the client insists on offering false evidence, the lawyer must inform the client of the lawyer's duty not to offer false evidence and, if it is offered, to take appropriate remedial action." *United States v Williams*, 698 F3d 374, 388 (7th Cir 2012).

4. Don't conceal evidence.

Lawyers cannot conceal or fail to disclose to a tribunal "that which the lawyer is required by law to reveal" and lawyers can't engage in illegal conduct, or conduct contrary to the ORPC. In *Kensington Int'l Ltd v Republic of Congo*, 2007 WL 2456993, at *1 (SDNY Aug. 24, 2007), *aff'd* 284 Fed Appx 826 (2d Cir 2008) the lawyer in bad faith attempted to dissuade a non-party witness from attending a post-judgment deposition

Don't lie for your client. In *In re Myles*, 18 DB Rptr 77 (2004), the attorney signed and submitted an affidavit to an ALJ supporting his client's claim for unemployment benefits, in which he falsely stated that a potential witness had a reputation for untruthfulness in the community.

A lawyer may refuse to offer evidence that the lawyer reasonably believes is false – ***except*** for the testimony of a defendant in a criminal case. For a discussion of

how a lawyer should "navigate his duties, when faced with a perjury-bent client," read *United States v Stewart*, 931 F Supp 2d 1199, 1202 (SD Fla 2013). In that criminal case, the court noted: "even where an attorney strongly suspects that his client is about to commit perjury, the attorney cannot keep a criminal defendant off the stand. To do so would violate the defendant's 'fundamental right to testify in his defense.' " *Id*., at 1214-1215. This means that a criminal defense attorney who *reasonably believes*—but does not *know*—that a client will commit perjury face a Hobson's choice:

> "If the lawyer offers his client's testimony, he may be accused of offering false evidence; if he refuses to offer that testimony, he may be accused of violating the defendant's constitutional rights and later face claims of ineffective assistance of counsel. As noted above, the Model Rule makes some effort to address this dilemma…"

Id., at 1216.

5. Don't hide facts at ex parte

Lawyers must reveal all facts, favorable and adverse, to the court during ex parte. *Reciprocal Discipline of Page*, 326 Or 572, 574–75, 955 P2d 239, 240–41 (1998) (decided under former DR 1-102(A)(3)) (lawyer used white-out to change terms in signed agreement before submitting it to court). The court noted:

> "We view the violation of the disclosure requirements of ORS 9.460[(2)] and [DR] 1–102(A)[(3)] as a serious matter, particularly in the context of an ex parte presentation to the judge. * * * Our experience has been [that] all judges regularly rely upon the candor, honesty and integrity of the lawyer in handling ex parte matters which are presented to them. * * * Judges must be able to rely upon the integrity of the lawyer."

Id., at 580–81 (citation omitted).

Rule 3.4 FAIRNESS TO OPPOSING PARTY AND COUNSEL

This is a seven-part rule. Thou shalt not:

- (a) knowingly and unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;
- (b) falsify evidence; counsel or assist a witness to testify falsely; offer an inducement to a witness that is prohibited by law; or pay, offer to pay, or acquiesce in payment of compensation to a witness contingent upon the

content of the witness's testimony or the outcome of the case; except that a lawyer may advance, guarantee or acquiesce in the payment of:
    - (1) expenses reasonably incurred by a witness in attending or testifying;
    - (2) reasonable compensation to a witness for the witness's loss of time in attending or testifying; or
    - (3) a reasonable fee for the professional services of an expert witness.
- (c) knowingly disobey an obligation under the rules of a tribunal, except for an open refusal based on an assertion that no valid obligation exists;
- (d) in pretrial procedure, knowingly make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;
- (e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused;
- (f) advise or cause a person to secrete himself or herself or to leave the jurisdiction of a tribunal for purposes of making the person unavailable as a witness therein; or
- (g) threaten to present criminal charges to obtain an advantage in a civil matter unless the lawyer reasonably believes the charge to be true and if the purpose of the lawyer is to compel or induce the person threatened to take reasonable action to make good the wrong which is the subject of the charge.

Some examples of how this rule has been applied:

- Don't play the judge and opposing counsel off each other. In *In re Wilson*, 342 Or 243, 149 P3d 1200 (2006), the attorney falsely represented to opposing counsel that the court had postponed the trial of a domestic relations case set for the following day, and then falsely represented to the court, both orally and in a subsequent affidavit, that opposing counsel had withdrawn her objection to the reset.
- Parties are entitled to "fair competition for evidence." I*n re Marriage of Wiggins*, 279 P3d 1, 8 (Colo 2012) (right to object to subpoenaed documents).

Rule 3.5 IMPARTIALITY AND DECORUM OF THE TRIBUNAL

A lawyer shall not:

"(a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;

(b) communicate ex parte on the merits of a cause with such a person during the proceeding unless authorized to do so by law or court order;
(c) communicate with a juror or prospective juror after discharge of the jury if:

(1) the communication is prohibited by law or court order;
(2) the juror has made known to the lawyer a desire not to communicate; or
(3) the communication involves misrepresentation, coercion, duress or harassment;

(d) engage in conduct intended to disrupt a tribunal; or
(e) fail to reveal promptly to the court improper conduct by a venireman or a juror, or by another toward a venireman or a juror or a member of their families, of which the lawyer has knowledge."

1. When can you give a gift to a judge?

This is allowed if it's "ordinary social hospitality." How about setting up a vacation fund for a judge?

"If the lawyers are not seeking to influence the judge by creating the 'vacation fund' and do not know that the judge's acceptance of the gift would violate the JRs, then soliciting and donating the funds does not violate Oregon RPC 3.5(a) or 8.4(a)(5). What the lawyers intend, of course, is a question of fact in every case. Lawyers should be mindful as well of the prohibitions against bribery. See, e.g., ORS 162.015(1), which provides:

> A person commits the crime of bribe giving if the person offers, confers or agrees to confer any pecuniary benefit upon a public servant with the intent to influence the public servant's vote, opinion, judgment, action, decision or exercise of discretion in an official capacity."

Formal Ethics Opinion No. 2005-56.

2. Contact with jurors

There is a "venerable rule in legal ethics prohibiting ex parte contacts with represented parties. The rule exists in order to 'preserv[e] ... the attorney-client relationship and the proper functioning of the administration of justice.' It is a rule governing attorney conduct and the duties of attorneys, and does not create a right in a party not to be contacted by opposing counsel. Its objective is to establish ethical standards that foster the internal integrity of and public confidence in the judicial system." *United States v Talao*, 222 F3d 1133, 1138 (9th Cir 2000).

In *In re R*, 276 Or 365, 367, 554 P2d 522, 523 (1976), the client – during trial - picked up a hitchhiker who turned out to be one of the jurors. Neither immediately

recognized the other, but they did after a short ride. Both were embarrassed but the juror continued to his destination some 10-15 miles away. The trial and the case were not discussed. The decision was vacated on other grounds, and the lawyer never reported this conduct. This was a bad decision, as the Supreme Court concluded: "it is immaterial when the accused learned of the juror contact because if an attorney learns of improper conduct at any time that any court can rectify the effect of that conduct, the attorney has an obligation to inform such court." *Id.,* at 368.

Rule 3.6 TRIAL PUBLICITY

This rule has a long history. The first attempt to control the "ill effects of attorney-generated trial publicity" dates back to 1908, when the American Bar Association established Canon 20, which "[g]enerally ... condemned" newspaper publications "by a lawyer" regarding a pending case because such publications "may interfere with a fair trial in the Courts and otherwise prejudice the due administration of justice." *Attorney Grievance Comm'n of Maryland v Gansler*, 377 Md 656, 677, 835 A2d 548 (2003). During the 1950s and 1960s, excessive media involvement in cases required reversal of a number of criminal convictions on the ground that excessive trial publicity deprived the defendants of due process. *Id.,* at 678. In 1968, the ABA established goals for lawyers, stating that it was a "duty" of a lawyer to prevent the "release" of information for "dissemination" that is reasonably likely to interfere with a fair trial. *Id.*, at 681. In 1983, the ABA proposed a new model code in response to concerns that the "reasonable likelihood" standard of the prior rule might not meet the requirements of the First Amendment. *Id.* The current rule attempts "to regulate trial publicity in a way that constitutionally balanced the lawyers' right to free expression and an accused's right to a fair trial." *Id*., at 681-682.

Currently, free speech protections allow lawyers to comment on cases – with restrictions intended to prevent prejudice. Lawyers must exercise reasonable care to prevent their employees from making an extrajudicial statement that they themselves are prohibited from making under this rule. The lawyer may state:

> "(1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;
> (2) information contained in a public record;
> (3) that an investigation of a matter is in progress;
> (4) the scheduling or result of any step in litigation;
> (5) a request for assistance in obtaining evidence and information necessary thereto;
> (6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and
> (7) in a criminal case, in addition to subparagraphs (1) through (6):

(i) the identity, residence, occupation and family status of the accused;
(ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;
(iii) the fact, time and place of arrest; and
(iv) the identity of investigating and arresting officers or agencies and the length of the investigation."

Rule 3.6(b). In adopting the ABA Model Rule, Alabama noted:

> "Preserving the right to a fair trial necessarily entails some curtailment of the information that may be disseminated about a party prior to trial, particularly where trial by jury is involved. If there were no such limits, the result would be the practical nullification of the protective effect of the rules of forensic decorum and the exclusionary rules of evidence."

United States v McGregor, 838 F Supp 2d 1256, 1263 (MD Ala 2012).

In addition, the lawyer can reply to charges publicly made against him or her, and may participate in the proceedings of legislative, administrative or other investigative bodies. Rule 3.6(c).

Rule 3.7 LAWYER AS WITNESS

"This rule protects the integrity of the judicial process by: (1) eliminating the possibility that the lawyer will not be an objective witness, (2) reducing the risk that the finder of fact may confuse the roles of witness and advocate, and (3) promoting public confidence in a fair judicial system." *Jensen v Poindexter*, 352 P3d 1201, 1206 (Okla 2015).

As the trial lawyer for a party, if you are called as a witness, you must withdraw, unless this would cause "substantial hardship":

> "Unless one of these categories applies, Lawyer A may not try the case and be a witness. Note that the supreme court has held that a lawyer's particular skills and a client's emotional makeup do not constitute circumstances warranting application of the 'substantial hardship' exception. *In re Lathen*, 294 Or 157, 164–165, 654 P2d 1110 (1982). Note also that Oregon RPC 3.7(a) prevents a lawyer only from trying a case."

Formal Ethics Opinion No. 2005-8. This rule does not prevent a lawyer from assisting in pretrial matters. *Id.,* citing to State Bar of Michigan Ethics Opinion RI-264 (1996) ("The advocate in [a] nonadjudicative forum is not bound by [ABA Model RPC] 3.7." Model Rule 3.7 should be applied, however, to arbitration proceedings.). For additional information on this general topic and other related

subjects, the Formal Ethics Opinion directs readers to the Restatement (Third) Of The Law Governing Lawyers §108 (2003).

Rule 3.8 SPECIAL RESPONSIBILITIES OF A PROSECUTOR

> The prosecutor in a criminal case shall:
>
> (a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause; and
> (b) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.

There is a split of authorities on the interpretation of this rule, as described in *State ex rel Oklahoma Bar Ass'n v Ward*, 353 P3d 509, 520–22 (Okla 2015):

> "The [Oklahoma Bar Association ("OBA")] contends that a prosecutor's ethical duty of disclosure under Rule 3.8(d) of the ORPC is broader and more extensive than the scope of disclosure under applicable law because Rule 3.8(d) requires the disclosure of all 'evidence or information' favorable to the defense without regard to the anticipated impact of the evidence or information at trial. Although a formal opinion from the ABA Standing Committee on Ethics and Professional Responsibility and the Supreme Court of North Dakota have recently adopted this rationale, we decline to adopt such interpretation and instead join a majority of courts and construe Rule 3.8(d) of the ORPC in a manner consistent with the scope of disclosure required by applicable law.
>
> ¶ 33 We agree with the Colorado Supreme Court's interpretation of Rule 3.8(d):
>
> > [D]iscovery violations in criminal cases are different from other kinds of disciplinary rule violations for a number of reasons. First, discovery issues arise in almost every criminal case. Trial courts routinely make findings of fact and enter orders and sanctions designed to respond to the severity of the violation. As a result, the problems are visible, immediately addressed, and any harm to the public or the individual parties is dealt with in the context of the pending case....
> > [M]anagement, regulation, and supervision of discovery [is] preeminently a trial court function.
>
> *In re Attorney C*, 47 P.3d at 1173. And any discovery violations not appropriately dealt with by the trial courts of this state can be redressed on

appeal by the Court of Criminal Appeals within the context of the particular case. The role of this Court in criminal discovery is limited to those 'cases in which conduct occurs that reflects upon the character of the prosecutor: conduct that cannot be fully addressed by orders relating to the underlying case.' *Id*. at 1174."

Rule 3.9 ADVOCATE IN NONADJUDICATIVE PROCEEDINGS

If we represent a client before a legislative body or administrative agency in a nonadjudicative proceeding, we must ("shall") disclose that the appearance is in a representative capacity, and we must ("shall") conform to Rules 3.3(a) through (c), 3.4(a) through (c), and 3.5.

"This Rule only applies when a lawyer represents a client in connection with an official hearing or meeting of a governmental agency or a legislative body to which the lawyer or the lawyer's client is presenting evidence or argument. It does not apply to representation of a client in a negotiation or other bilateral transaction with a governmental agency or in connection with an application for a license or other privilege or the client's compliance with generally applicable reporting requirements, such as the filing of income-tax returns. Nor does it apply to the representation of a client in connection with an investigation or examination of the client's affairs conducted by government investigators or examiners." 2004 ABA Model Code Comment, Rule 3.9.

Section 4 – Transactions with Persons other than Clients

Rule 4.1 TRUTHFULNESS IN STATEMENTS TO OTHERS

While representing a client, a lawyer shall not knowingly make a false statement of material fact or law to a third person, or fail to disclose a material fact when disclosure is necessary to avoid assisting an illegal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6. See, e.g., *Matter of Discipline of Olkon*, 795 F2d 1379, 1384 (8th Cir 1986) (lawyer knew that his client operated a prostitution business but denied this knowledge to the court in a response).

This rule applies to all aspects of a lawyer's work. "[B]oth the federal and state courts have been ready to discipline or hold liable attorneys who make knowing, material misrepresentations to third persons during settlement negotiations." *Ausherman v Bank of Am Corp*, 212 F Supp 2d 435, 448 (D Md 2002).

Rule 4.2 COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL

This rule is based on what you know about a person being represented. So rely on "better safe than sorry." This rule is not violated if you do not *know* that the person to whom you propose to speak is represented by counsel on the same or related matters. Formal Ethics Opinion 2005-16.

When you do know that a party is represented, Formal Ethics Opinion No. 2005-6 provides that absent consent by opposing counsel, you may not communicate about the matters at issue with the opposing party or cause yourclients or others (such as investigators or claims adjustors) to do so, either in person or in writing.

> "From the wording of this rule, it should be clear that the proposed conduct described above is prohibited. *See, e.g., In re Schenck*, 320 Or 94, 101, 879 P2d 863 (1994) (lawyer violated rule by sending Notice to Produce directly to represented party); *In re Smith*, 318 Or 47, 49, 861 P2d 1013 (1993) (inactive member of bar, representing self, is subject to provisions of rule); *In re Murray*, 287 Or 633, 601 P2d 780 (1979) (lawyer who causes client to communicate with opposing party in writing would be in violation of this rule); *In re Lewelling*, 296 Or 702, 678 P2d 1229 (1984) (acting on impulse is not a defense); *In re Peter A. Schwabe, Sr*., 242 Or 169, 408 P2d 922 (1965) (disciplining lawyer who, inter alia, telephoned opposing party to learn whether that party really had hired counsel after lawyer had received letter from counsel indicating that counsel had been hired); *In re Otto W. Heider*, 217 Or 134, 341 P2d 1107 (1959) (contact held not justified by business relationship between lawyer and opposing party).
>
> Two qualifications should be noted. First, Oregon RPC 4.2 does not prohibit, per se, communications between parties who happen to have counsel and does not prohibit a lawyer from answering a client's question about whether the client may communicate with the represented person. What is prohibited is simply the initiation by lawyers of such communications. See OSB Formal Ethics Op No 2005-147. *Cf. Wilson v. Brand S Corp*., 621 P2d 748 (Wash 1980). Second, there are circumstances in which direct communications may be proper under the 'authorized by law' provision. See, e.g., ORS 20.080(1), which provides for certain written demands to be served 'on the defendant'; ORS 18.265(1)(a), which provides for 'mail addressed to the judgment debtor'; and ORCP 7 D, which provides for service of process on a party. See also *U.S. v. Schwimmer*, 882 F2d 22 (2d Cir 1989) (former DR 7- 104(A)(1) did not prohibit prosecutor from asking questions of represented party during grand jury proceedings). As a general proposition, however, the cases cited above indicate that the 'authorized by law' exception will be narrowly construed."

Lawyers may access publicly available information on a social networking site. Doing so is not

> "a 'communication' prohibited by Oregon RPC 4.2. OSB Formal Ethics Op No 2005-164 discusses the propriety of a lawyer accessing the public portions of an adversary's website and concludes that doing so is not 'communicating' with the site owner within the meaning of Oregon RPC 4.2. The Opinion

> compared accessing a website to reading a magazine article or purchasing a book written by an adversary. The same analysis applies to publicly available information on a person's social networking web pages."

Formal Ethics Opinion No. 2013-189.

Rule 4.3 DEALING WITH UNREPRESENTED PERSONS

In dealing on behalf of a client, or for the lawyer's own interests, with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client or the lawyer's own interests.

Again, better safe than sorry. The Oregon State Bar addressed questions in this area in Formal Ethics Opinion No. 2005-16:

> Lawyer *A* represents Client *A*, who was injured when struck by a car driven by a person whom Lawyer *A* does not know to be represented by counsel. Lawyer *A* would like to send a letter to this person, informing the person of the seriousness of the injuries to Client *A* and recommending that the person instruct his or her insurance carrier to accept a policy-limits demand.
>
> Lawyer *B*, who represents Criminal Defendant *B*, learns that Wit- ness, who may or may not also be implicated in the same crime, has been subpoenaed to appear before the grand jury investigating Criminal Defendant *B.* To help Criminal Defendant *B*, Lawyer *B* would like to advise Witness to assert the Fifth Amendment privilege against self- incrimination. Lawyer *B* does not know whether Witness has counsel.

Neither of these acts is permissible under ORPC 4.3.

> "Oregon RPC 4.2 does not apply because Lawyer A and Lawyer B do not know that the persons to whom they propose to speak are represented by counsel on the same or related matters. *Cf.* OSB Formal Ethics Op No 2005-6. On the other hand, Oregon RPC 4.3 applies and would clearly be violated by the proposed conduct. *Cf. In re Bauer*, 283 Or 55, 581 P2d 511 (1978) (lawyer not guilty of violating *former* DR 7-105(A)(2) because no advice was given)."

As to social media, it is OK to "friend" unrepresented parties, so long as you do not claim or imply that you are "disinterested," as people are in control of their

own social media, and can whether to accept your offer to be "friends." Formal Ethics Opinion No. 2013-189. n. 3, 4.

Rule 4.4 RESPECT FOR THE RIGHTS OF THIRD PERSONS; INADVERTENTLY SENT DOCUMENTS

1. Respecting third persons

In representing a client, do not embarrass, delay, or harass third persons or violate their rights just to obtain evidence. The ABA Model Rule comment notes:

> "It is impractical to catalogue all such rights, but they include legal restrictions on methods of obtaining evidence from third persons and unwarranted intrusions into privileged relationships, such as the client-lawyer relationship."

The North Carolina State Bar's comments are more specific:

> "Threats, bullying, harassment, insults, slurs, personal attacks, unfounded personal accusations generally serve no substantial purpose other than to embarrass, delay, or burden others and violate this rule."

2. Inadvertently sent documents

> (b) A lawyer who receives a document or electronically stored information relating to the representation of the lawyer's client and knows or reasonably should know that the document or electronically stored information was inadvertently sent shall promptly notify the sender.

What if you are the lawyer who sent the privileged materials by mistake? You might be in trouble, as, fundamentally, you have a duty to exercise reasonable care to make sure this doesn't happen. If it does, a fact question may be presented as to whether your actions were reasonable. In *Goldsborough v. Eagle Crest Partners, Ltd*., 314 Or 336, 838 P2d 1069 (1992), the court held that in the absence of evidence to the contrary, an inference may be drawn that a lawyer who voluntarily turns over privileged material during discovery acts within the scope of the lawyer's authority from the client and with the client's consent.

What if you receive information that looks like it was sent by mistake? And what about metadata? That is a topic in itself, but I'll address it briefly as it is very important.

> "Metadata generally means 'data about data.' [For our purposes], metadata means the embedded data in electronic files that may include information such as who authored a document, when it was created, what software was used, any comments embedded within the content, and even a record of changes made to the document."

Formal Ethics Opinion No. 2011-187.[3] This Opinion provides guidance via three scenarios:

> "Lawyer A e-mails to Lawyer B a draft of an Agreement they are negotiating on behalf of their respective clients. Lawyer B is able to use a standard word processing feature to reveal the changes made to an earlier draft ("metadata"). The changes reveal that Lawyer A had made multiple revisions to the draft, and then subsequently deleted some of them.
>
> Same facts as above except that shortly after opening the document and displaying the changes, Lawyer B receives an urgent request from Lawyer A asking that the document be deleted without reading it because Lawyer A had mistakenly not removed the metadata.
>
> Same facts as the first scenario except that Lawyer B has software designed to thwart the metadata removal tools of common word processing software and wishes to use it to see if there is any helpful metadata in the Agreement."

The Opinion then answers the following questions:

> 1. Does Lawyer A have a duty to remove or protect metadata when transmitting documents electronically? *See ORPC 1.1 and 1.6(a). "Competency in relation to metadata requires a lawyer utilizing electronic media for communication to maintain at least a basic understanding of the technology and the risks of revealing metadata or to obtain and utilize adequate technology support." Id.*
>
> 2. May Lawyer B use the metadata information that is readily accessible with standard word processing software? *Yes, qualified. "Given the sending lawyer's duty to exercise reasonable care in regards to metadata, the receiving lawyer could reasonably conclude that the metadata was intentionally left in.6 In that situation, there is no duty under Oregon RPC 4.4(b) to notify the sender of the presence of metadata.*
> *If, however, the receiving lawyer knows or reasonably should know that metadata was inadvertently included in the document, Oregon RPC 4.4(b) requires only notice to the sender; it does not require the receiving lawyer to return the document unread or to comply with a request by the sender to return the document." Id.*

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[3] For research, one place to start is with a national survey: Joshua J. Poje, Metadata Ethics Opinions Around the U.S., American Bar Association, available online at: www.americanbar.org/groups/departments_offices/legal_technology_resources/resources/charts_fyis/metadatachart.html

3. Must Lawyer B inform Lawyer A that the document contains readily accessible metadata? *No.*

4. Must Lawyer B acquiesce to Lawyer A's request to delete the document without reading it? *No, qualified. "[B]efore deciding what to do with an inadvertently sent document, the receiving lawyer should consult with the client about the risks of returning the document versus the risks of retaining and reading the document and its metadata." Id.*

5. May Lawyer B use special software to reveal the metadata in the document? *No.*

Section 5 – Law Firms and Associations

Rule 5.1 RESPONSIBILITIES OF PARTNERS, MANAGERS, AND SUPERVISORY LAWYERS

You are responsible for your law partner's violation of ethics rules under certain circumstances. Consider attorney Matthew Farmer's claims in 2006 that his partner at Holland & Knight padded the firm's bill to their insurance client. (Wall Street Journal; http://www.wsj.com/articles/SB115689325718248915).

> "A lawyer shall be responsible for another lawyer's violation of these Rules of Professional Conduct if:
> (a) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or
> (b) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action."

Thou shalt mentor, and not overburden, thy associates. Under the ABA Model Rule, "supervisory lawyers, including a firm director or manager, may violate ethical responsibilities when subordinate lawyers have excessive workloads." Competence & Diligence: Excessive Workloads of Indigent Defense Providers, OR Eth Op 2007-178 (Sept. 2007). Oregon RPCs have no counterpart to this rule, but

> "If supervisory Lawyer *B* or executive director Lawyer *C* know that Lawyer *A* or other subordinate lawyers have workloads that prevent them from providing competent representation to each client, they are responsible for the misconduct of the subordinate lawyer if they fail to take effective remedial actions."

Id.

Rule 5.2 RESPONSIBILITIES OF A SUBORDINATE LAWYER

You can't get around the disciplinary rules by not being the lead attorney.

> (a) A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.
> (b) A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

In a Kentucky legal malpractice lawsuit, *McMurtry v Wiseman*, 445 F Supp 2d 756, 779 (WD Ky 2006), the court refused to dismiss a nonsupervisory lawyer, writing:

> "Commentary (1) to Model Rule 5.2 states that '[a]lthough a lawyer *is not relieved* of responsibility for a violation by the fact that the lawyer acted at the discretion of a supervisor, that fact may be relevant in determining whether a lawyer had the knowledge required to render conduct in violation of the Rules.' (emphasis added). This rule is supported by the *Restatement of Law Governing Lawyers*, § 12(1), which states that '[f]or purposes of professional discipline, a lawyer must conform to the requirements of an applicable lawyer code even if the lawyer acted at the direction of another lawyer or other person.'"

Rule 5.3 RESPONSIBILITIES REGARDING NONLAWYER ASSISTANCE

With respect to a nonlawyer employed or retained, supervised or directed by a lawyer:

> (a) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and
> (b) except as provided by Rule 8.4(b), a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:
>
> > (1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or
> > (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Inside the office, it is important to know how your staff are behaving. In an Oklahoma case, the attorney's staff mishandled a client's insurance settlement proceeds, and the court issued a stinging opinion:

> "A lawyer is duty-bound to supervise the work done by lay personnel and stands ultimately responsible for work done by all nonlawyer staff. While a lawyer's delegation of an entrusted task to a staff person is not improper, it is the lawyer who must supervise the work that is passed on to another and exercise complete, though indirect, professional control over the actions of the employees. The work of lay personnel is done by them as agents of the lawyer employing them. A lawyer who fails properly to supervise lay personnel, particularly when he has knowledge that the employee is engaging in conduct that would violate the Rules of Professional Conduct is guilty of dereliction. It is the lawyer who has the ultimate responsibility to ensure that the internal processing system of his office is in compliance with his professional obligations. Within the meaning of ORPC Rule 5.3, the lawyer's knowledge of the flawed conduct and failure to correct it is considered an approval of the assistant's wrongful actions. Violating the Rules of Professional Conduct through the acts of another is professional misconduct under Rule 8.4(a). Dishonesty, deceit, fraud or misrepresentation amount to professional misconduct under Rule 8.4(c)."

State ex rel Oklahoma Bar Ass'n v Taylor, 4 P3d 1242, 1251 (Okla 2000).

Outside the office, lawyers may contract with a third-party vendor to store client files and documents online on a remote server, so long as they comply with the duties of competence and confidentiality to reasonably keep the client's information secure within a given situation. Formal Ethics Opinion No. 2011-188. This may include ensuring the service agreement requires the vendor to preserve the confidentiality and security of the materials, and that the vendor send notice of any unauthorized third-party access to the materials. The lawyer should also investigate how the vendor backs up and stores its data and metadata to ensure compliance with the Lawyer's duties (just like shredding confidential documents). Lawyers handling matters involving national security interests "may want to take additional security precautions." *Id.*

Rule 5.4 PROFESSIONAL INDEPENDENCE OF A LAWYER

With some exceptions, clearly set out in this rule, lawyers may not share fees with nonlawyers. Note that during the period of suspension or disbarment, a suspended or disbarred lawyer is a nonlawyer within the meaning of Oregon RPC 5.4(a). *Cf. Parquit Corp. v. Ross*, 273 Or 900, 901, 543 P2d 1070 (1975) (treating suspended lawyer as nonlawyer); *see, State ex rel Oregon State Bar v. Lenske*, 284 Or 23, 31, 34–35, 584 P2d 759 (1978) (employment of disbarred or suspended lawyer is permitted under same unauthorized practice limitations that govern nonlawyers generally). Formal Ethics Opinion No. 2005-25.

Lawyers cannot form partnerships with nonlawyers, if any of the activities of the partnership consist of the practice of law.

Lawyers cannot contract with nonlawyers regarding the practice of law. "A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services." Rule 5.4(c). This rule invalidated a contract between a lawyer and a doctor, pursuant to which the doctor would be paid a percentage of the attorney fees recovered by the lawyer, in exchange for her introduction of the lawyer to her patients/potential clients and for her medical legal consultation work on those patient's/client's cases. *Martello v Santana*, 874 F Supp 2d 658, 666 (ED Ky 2012), *aff'd*, 713 F3d 309 (6th Cir 2013).

A separate rule applies to getting paid for a referral to a nonlawyer. "A lawyer shall not refer a client to a nonlawyer with the understanding that the lawyer will receive a fee, commission or anything of value in exchange for the referral, but a lawyer may accept gifts in the ordinary course of social or business hospitality." Rule 5.4(e).

> "The provisions of this Rule express traditional limitations on sharing fees. These limitations are to protect the lawyer's professional independence of judgment. Where someone other than the client pays the lawyer's fee or salary, or recommends employment of the lawyer, that arrangement does not modify the lawyer's obligation to the client. … [S]uch arrangements should not interfere with the lawyer's professional judgment."

In re Application of Oklahoma Bar Ass'n to Amend Oklahoma Rules of Prof'l Conduct, 171 P3d 780, 866–67 (Okla 2007). This rule does not prohibit one lawyer paying another for a referral, especially if the referring lawyer participates in the case. See, *Crockett & Myers, Ltd v Napier, Fitzgerald & Kirby, LLP*, 664 F3d 282 (9th Cir 2011) (Nevada).

Rule 5.5 UNAUTHORIZED PRACTICE OF LAW; MULTIJURISDICTIONAL PRACTICE

When are you prohibited from "assisting another" to practice law? You can assist your clients in conduct that can lawfully be performed by nonlawyers (such as handling FED actions under ORS Chapter 105). Formal Ethics Opinion No. 2005-20. But you may not let your client "fill in the blanks" and sign your name. *Id.* A lawyer must supervise and control the work that is done in the lawyer's name. *In re Jones*, 308 Or 306, 779 P2d 1016 (1989). You may hire suspended or disbarred lawyers to work for you, so long as they do not give legal advice and do work that can be done by law clerks or legal assistants. Formal Ethics Opinion No. 2005-24.

Multijurisdictional practice has exploded in the last 30 years, since the U.S. Supreme Court decided that lawyers can practice in states other than where they live. *Supreme Court of New Hampshire v Piper*, 470 US 274, 283, 105 S Ct 1272 (1985) ("[T]he right to practice law is protected by the Privileges and Immunities Clause."). This mirrors advances in technology which have made interstate practice

common. For clients with business in more than one state, it is very expensive, and impractical, to hire local counsel every time a client needs representation for a matter outside of the state. Susan Poser, Multijurisdictional Practice For a Multijurisdictional Profession, 81 Neb. L. Rev. 1379 (2003). Ethics rules have evolved to address this change in legal practice.

> "Local admission had traditionally served as the basis for lawyer discipline, and states had not typically authorized discipline of attorneys other than those licensed in the host state. As recently as 2002, for instance, an overview of state disciplinary rules revealed that a minority of states applied disciplinary rules to both members of the state bar and other attorneys practicing law in the host state. Charles W. Wolfram, Expanding State Jurisdiction to Regulate Out–of–State Lawyers, 30 Hofstra L.Rev. 1015, 1050 (2002); *see, e.g*., Ark. R. of Prof'l Conduct 8.5 (1997) (applying rules to admitted lawyers or lawyers 'practicing in this jurisdiction.'); Idaho R. of Prof'l Conduct 8.5 (2000) (lawyers from other jurisdictions are subject to Idaho disciplinary rules 'with respect to any practice of law conducted in this state.'); Md. R. of Prac. and P. 16–701(a) (2000) (providing that 'attorney' includes a person not admitted but 'who engages in the practice of law in this State.'); N.D. R. of Prof'l Conduct 8.5 (2000) (stating that rule applies to lawyers admitted elsewhere 'who actually engage in this jurisdiction in the practice of law' in North Dakota). With the advent of the ABA Model Rules specifically addressing multidisciplinary practice issues, as discussed in this opinion, other states have gradually adopted more comprehensive approaches to their disciplinary rules. See Eli Wald, Federalizing Legal Ethics, Nationalizing Law Practice, and the Future of the American Legal Profession in the Global Age, 48 San Diego L.Rev. 489, 493 (2011); Cynthia L. Fountaine, Have License, Will Travel: An Analysis of the New ABA Multijurisdictional Practice Rules, 81 Wash. U. L.Q. 737, 759 (2003)."

State ex rel York v W Virginia Office of Disciplinary Counsel, 231 W Va 183, 188, 744 SE2d 293 (2013). Rule 5.5 sets out the ways in which someone not admitted to the Oregon State Bar may temporarily practice law here without violating ethics rules. It also sets out the pro hac vice rule to be followed if you are local counsel.[4] For more information about when practicing law in another state temporarily starts looking more like permanently practicing law there, see the State Bar Counsel's column in the June 2007 Bar Bulletin.[5]

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[4] For a useful article on pro hac vice admission in Oregon, see the Oregon State Bar Bulletin article on *pro hac vice* issues.
https://www.osbar.org/publications/bulletin/14augsep/barcounsel.html

[5] https://www.osbar.org/publications/bulletin/07jun/barcounsel.html

Rule 5.6 RESTRICTIONS ON RIGHT TO PRACTICE

Lawyers are not subject to non-competition agreements except those concerning benefits upon retirement. The underlying purpose of this rule "is to ensure the freedom of clients to select counsel of their choice, despite its wording in terms of the lawyer's right to practice." *Jacob v. Norris, McLaughlin & Marcus*, 128 N.J. 10, 18, 607 A.2d 142 (1992). "Lawyer covenants against competition are impermissible and … lawyers may not provide in any agreements between them that a withdrawing lawyer pay any sort of penalty as a precondition to engaging in competition." Formal Ethics Opinion No. 2005-29.

As the rule is based on assuring enough lawyers for clients to choose among, the retirement exception is analyzed differently:

> "the retirement benefits exception to rule 5.6 provides protection for a law firm's 'legitimate interest in its own survival and economic well-being and in maintaining its clients....' *Cohen v. Lord, Day & Lord*, 75 N.Y.2d 95, 101, 550 N.E.2d 410, 551 N.Y.S.2d 157 (1989); *see also Howard v. Babcock*, 6 Cal.4th 409, 421, 863 P.2d 150, 25 Cal.Rptr.2d 80 (1993) (recognizing commercial concerns of law practice). By exempting 'retirement benefits"' from the category of postemployment payments that cannot properly be forfeited upon competition, the rule enables law firms to provide members with postdeparture compensation without compromising their own financial stability. *See Donnelly v. Brown, Winick, Graves, Gross, Baskerville, Schoenebaum & Walker, P.L.C.*, 599 N.W.2d 677, 681 (Iowa 1999) ('[t]here is no doubt that the Rule is designed to permit attorneys to have retirement plans that have noncompetition conditions—there is simply no other explanation for the exception to the Rule' [internal quotation marks omitted]). It would be illogical to expect law firms to pay out large sums of cash to departing lawyers while fearing that their cash flow will be threatened by competing lawyers and the loss of potential clients. Implicit in the retirement benefits exception, therefore, is the notion that the public's interest in fostering liberal competition among practitioners must be balanced against a law firm's interest in maintaining a steady income flow for the purpose of providing former members with substantial remuneration upon retirement."

Schoonmaker v Cummings & Lockwood of Connecticut, PC, 252 Conn 416, 439–40, 747 A2d 1017, 1031 (2000).

Section 6 – Public Service

Rule 6.3 MEMBERSHIP IN LEGAL SERVICES ORGANIZATION

This rule was adopted, in part, to address the shortfall of legal services for indigent clients. Linninger, Tom, *Deregulating Public Interest Law,* 88 Tulane Law

Rev 727 (2014). Rule 6.3 allows a lawyer to serve as a director, officer or member of a legal services organization, apart from the law firm in which the lawyer practices, even if that organization serves persons having interests adverse to a client of the lawyer. The rule contains a caveat:

> "The lawyer shall not knowingly participate in a decision or action of the organization:
>
> > (a) if participating in the decision or action would be incompatible with the lawyer's obligations to a client under Rule 1.7; or
> > (b) where the decision or action could have a material adverse effect on the representation of a client of the organization whose interests are adverse to a client of the lawyer."

Rule 6.4 LAW REFORM ACTIVITIES AFFECTING CLIENT INTERESTS

This rule allows a lawyer to serve as a director, officer or member of an organization involved in reform of the law or its administration, even if that reform may affect the interest of a client of the lawyer. If there is a potential conflict of interest, the lawyer must disclose that fact but need not identify the client. The 2004 ABA Model Code Comment provides:

> "Lawyers involved in organizations seeking law reform generally do not have a client-lawyer relationship with the organization. Otherwise, it might follow that a lawyer could not be involved in a bar association law reform program that might indirectly affect a client. See also Rule 1.2(b). For example, a lawyer specializing in antitrust litigation might be regarded as disqualified from participating in drafting revisions of rules governing that subject. In determining the nature and scope of participation in such activities, a lawyer should be mindful of obligations to clients under other Rules, particularly Rule 1.7. A lawyer is professionally obligated to protect the integrity of the program by making an appropriate disclosure within the organization when the lawyer knows a private client might be materially benefitted."

Rule 6.5 NONPROFIT AND COURT-ANNEXED LIMITED LEGAL SERVICES PROGRAMS

ORPC 6.5 helps lawyers avoid conflicts when they volunteer at low-income legal clinics, legal-advice hotlines, advice-only clinics, pro se counseling programs, and similar limited legal services programs. "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. See, e.g., Rules 1.7, 1.9 and 1.10." 2004 ABA Model Code Comment.

> (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 Rule 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.

The 2004 ABA Model Code Comment provides, in part:

"[4] Because the limited nature of the services significantly reduces the risk of conflicts of interest with other matters being handled by the lawyer's firm, paragraph (b) provides that Rule 1.10 is inapplicable to a representation governed by this Rule except as provided by paragraph (a)(2). Paragraph (a)(2) requires the participating lawyer to comply with Rule 1.10 when the lawyer knows that the lawyer's firm is disqualified by Rules 1.7 or 1.9(a). 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.

[5] If, after commencing a short-term limited 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."

Section 7 – Information About Legal Services

Rule 7.1 COMMUNICATION CONCERNING A LAWYER'S SERVICES

Don't advertise or tell others that you are more than you are. A lawyer who is a part-time judge cannot instruct his staff to answer the phone with "Judge ____'s office." Formal Ethics Opinion No. 2005-31. A law firm may continue to use in its name the name of former partner who has retired from active practice of law, so long as use of the retired lawyer's name is not misleading. OSB Formal Ethics Op No 2005-169. An Oregon law firm may identify on its letterhead a Washington firm as an "associated office." OSB Formal Ethics Op No 2005-109. Intentionally deceptive and misleading conduct in a lawsuit constitutes unprofessional conduct that violates this rule. *In re Hubbard*, 2013 WL 435945, *5 (SD Cal Feb. 4, 2013) (lawyer signed settlement agreement on behalf of client who had died).

Rule 7.2 ADVERTISING

Advertising is an exception to the prohibition against paying for referrals. *See, Rubenstein v Statewide Grievance Comm,* 2003 WL 21499265, *11 (Conn Super Ct June 10, 2003) (unpublished) (lawyer paid $50 to employees for client referrals).

This rule also prohibits quid pro quo arrangements. Formal Ethics Opinion No 2005-2

Advertising must include the name and office address of at least one lawyer or law firm responsible for its content.

Be wary of cross-jurisdiction marketing. In a useful article titled *Risk Management in Law Firm Marketing*, Oregon lawyer Mark Fucile writes that those of us here in northern Oregon may also practice in southern Washington. "Oregon under its RPC 7.1(a)(4) allows lawyers to market themselves as specialists (as long as that is true), but Washington under its RPC 7.4 generally does not." http://www.osbar.org/publications/bulletin/09jan/practice.html

Rule 7.3 SOLICITATION OF CLIENTS

Lawyers cannot make cold calls (unless the person contacted is a lawyer, or has a family, close personal, or prior professional relationship with the lawyer). A California federal court held that a law firm did not "solicit" clients, so as to be subject to ethics rules governing solicitation, when it sent notices to brokers and dealers, containing information regarding pendency of class action required to be communicated under Private Securities Litigation Reform Act, indicating how the law firm could be reached by any shareholder desiring to have firm as class action representative. *Knisley v Network Associates, Inc*, 77 F Supp 2d 1111 (ND Cal 1999).

But even the exceptions do not apply if the lawyer knows or reasonably should know that the physical, emotional or mental state of the target of the solicitation is such that the person could not exercise reasonable judgment in employing a lawyer; if the target of the solicitation has made known to the lawyer a desire not to be solicited by the lawyer; or if the solicitation involves coercion, duress or harassment.

Lawyers may send greeting cards or letters to their current and former clients, with thanks for employing them. Formal Ethics Opinion 2005-35. In fact, this act is constitutionally protected. *See, e.g., Shapero v. Kentucky Bar Ass'n*, 486 US 466, 108 S Ct 1916, 100 L Ed 2d 475 (1988).

Lawyers may also hold open houses, so long as they do not solicit anyone's business. "The fact that improper in-person solicitation could theoretically occur is not sufficient by itself, however, to prohibit Lawyer C from sending the invitations or holding the party. *Cf. In re Blaylock*, 328 Or 409, 978 P2d 381 (1999) (lawyer

must act intentionally to violate *former* DR 2-104(a))." Formal Ethics Opinion No. 2005-35.

When you do solicit professional employment in writing, you must include the words "Advertising Material" on the outside of the envelope, if any, and at the beginning and ending of any recorded or electronic communication (unless the recipient is a lawyer, or has a family, close personal, or prior professional relationship with the lawyer).

This rule contains an exception for prepaid or group legal service plans. Lawyers may participate in such organizations, use in-person or telephone contact to solicit memberships or subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.

Rule 7.5 FIRM NAMES AND LETTERHEADS

> "Use of the term associates or of counsel by lawyers who are not truly associated or of counsel with each other in private practice, but who merely share office space and other services, is misleading within the meaning of these rules because it 'impl[ies] that they practice in a partnership or other organization' when in fact they do not. Oregon RPC 7.5(d); *Cf. In re Sussman and Tanner*, 241 Or 246, 405 P2d 355 (1965). Similarly, use of the name 'A, B & C, Lawyers' is misleading if no law firm exists in which all three lawyers are a part because that is what the name suggests. *Cf. In re Bach*, 273 Or 24, 29, 539 P2d 1075 (1975)."

Formal Ethics Opinion No. 2005-12. In a case decided under *former* DR 2-102:

> Facts: Attorneys A and B are employed by an insurer. A and B defend insureds' liability claims for the insurer.
>
> Question: Can A and B refer to themselves on their letterhead and pleadings as "A & B, Attorneys at Law," "A & B, Attorneys at Law, Not a Partnership," or "A and B, Attorneys at Law, an Association of Attorneys," without disclosing their status as employees of the insurer?
>
> Conclusion: No.

OR Eth Op 1998-153 (Sept. 1998), 1998 WL 717727. The purpose of this rule is to "protect the public by prohibiting the use by lawyers of names which would mislead nonlawyers concerning the identity, responsibility, or status of those who use such names. *See In re Shannon*, 292 Or 339, 341, 638 P2d 482 (1982) ("Shannon and Johnson's Hollywood Law Center" was not misleading because the office was in Portland's Hollywood neighborhood.)

Trade names may be used if they do not imply a connection with a government agency or with a public or charitable legal services organization. But using superlatives is frowned on, such as the name "Alpha Center for Divorce Mediation":

> "In our examination of the use of the term 'Alpha' in the trade name title of this law firm's practice, we conclude that the word adds no informative content other than serving the impermissible purpose of invoking the notion of primacy."

In re Comm on Attorney Advert, 213 NJ 171, 187, 61 A3d 930, 940 (2013) (unpublished).

For multijurisdictional law practices, the firm may use the same name or other professional designation in each jurisdiction, but identification of the lawyers in an office of the firm shall indicate the jurisdictional limitations on those not licensed to practice in the jurisdiction where the office is located.

You may not use the name of a lawyer holding a public office, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.

When is "Of Counsel" on a letterhead allowed? If the lawyer has a continuing professional relationship with a lawyer or law firm, other than as partner or associate. Similarly, a lawyer may be designated as "General Counsel" or by a similar professional reference on a client's stationery, if the lawyer of the lawyer's firm devotes a substantial amount of professional time in the representation of that client.

Section 8 – Maintaining the Integrity of the Profession

Rule 8.1 BAR ADMISSION AND DISCIPLINARY MATTERS

When you are applying for admission to the bar, do not lie. And make sure you meet the rules. *Appeal of Dundee*, 249 Neb 807, 808, 545 NW2d 756 (1996) (appeal denied because Dundee had not met the educational requirements). Failure to disclose relevant information on your application is also not well received. *In re Bradley*, 50 So3d 114 (La 2010) (candidate admitted, on probation).

After joining the Bar, if and when the Bar asks you for information, you must respond. Failure to do so is a disciplinary violation. *Lawyer Disciplinary Bd v Turgeon*, 210 W Va 181, 190, 557 SE2d 235 (2000); *State ex rel Oklahoma Bar Ass'n v Whitworth*, 183 P3d 984, 988 (Okla 2008); *In re Miles*, 324 Or 218, 923 P2d 1219 (1996) (decided under *former* DR 1–103(C)).

Rule 8.2 JUDICIAL AND LEGAL OFFICIALS

This rule lets lawyers campaign for judicial office, subject to any limitations in the Code of Judicial Conduct. *Cf. In re Fadeley*, 310 Or 548, 802 P2d 31 (1990); Formal Ethics Opinion NO. 2005-36.

The rest of this rule prohibits slandering judges and judge candidates. Why do we need this? Well, because there are lawyers who make false statements regarding the integrity of a judge, a magistrate, a legal officer and a lawyer without basis in fact and with reckless disregard for the truth or falsity of the statements. *In re Disciplinary Action Against Graham*, 453 NW2d 313, 315 (Minn 1990) (accusing a judge and others of a conspiracy fixing the outcome in a federal case).

Rule 8.3 REPORTING PROFESSIONAL MISCONDUCT

Reporting is mandatory, to protect the public and the legal system.

If you know that another lawyer has violated the ORPC in a way that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, you "shall" inform the Oregon State Bar Client Assistance Office. (Reports about judges violated the standards of judicial conduct are made to the Commission on Judicial Fitness. FYI, Commission records are confidential. ORS 1.440.)

The only exceptions to this rule are if you learn of the violation while serving on the State Lawyers Assistance Committee, the PLF, or the PLF's loss prevention programs of the Professional Liability Fund, including the Oregon Attorney Assistance Program.

Rule 8.4 MISCONDUCT

There are seven types of misconduct spelled out by this rule.

1. Violating the ORPC

It is, for example, professional misconduct to seek duplicate damages, if you're not sure which of two accidents caused your client's damages and you've already collected for one accident. Formal Ethics Opinion No. 2005-19; *See In re Popick*, 3 DB Rptr 21 (1989). This violation of the ORPC is also a violation of Rule 8.4(a)(1).

2. Committing a crime that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects

A felony, like taking a bribe to lobby an issue on behalf of your client, violates this rule. Formal Ethics Opinion No. 2005-7.

Attorneys can be disbarred for committing crimes involving moral turpitude. ORS 9.527(2). That means: (1) a crime that was knowingly or intentionally committed; (2) which fits a definition from 1896: "an act of baseness, vileness, or depravity in the private or social duties which a man owes to his fellow man, or to society in general, contrary to the accepted and customary rule of right and duty between man and man." *In re Nuss*, 335 Or 368, 376-77, 67 P3d 386 (2003) (harassment of a minor does not fit the definition).

The criminal conduct must show that you lack the characteristics of trustworthiness and integrity that are essential to the practice of law. *In re Phinney*, 354 Or 329, 335, 311 P3d 517 (2013) (As treasurer for an alumni association, attorney repeatedly took association funds for his personal use. Court found that attorney's breach of his fiduciary duties to the association called into question his trustworthiness in handling client money.); *In re Renshaw*, 353 Or 411, 298 P3d 1216 (2013) (Managing shareholder of law firm committed theft by deception (which reflected adversely on his honesty and trustworthiness) when he took unauthorized shareholder distributions, used firm funds to pay personal expenses and coded them to accounts receivable, and used the firm's credit card and line of credit to pay personal expenses.)

Don't shoplift; it reflects adversely on your honesty. *In re Kimmell*, 332 Or 480, 31 P3d 414 (2001).

No exchanging sex for legal services! *In re Howard*, 297 Or 174, 681 P2d 775 (1984).

3. Engaging in conduct involving dishonesty, fraud, deceit or misrepresentation that reflects adversely on the lawyer's fitness to practice law

The conduct does not need to involve the practice of law. *In re Carpenter*, 337 Or 226, 234, 95 P3d 203 (2004) (decided under former DR 1-102(A)(3); accused represented himself in an online message as a local high school teacher indicating that he had engaged in sexual conduct with conduct with students.); *In re Germundson*, 301 Or 656, 662, 724 P2d 793 (1986) (lawyer executed promissory note as representative of corporation when lawyer knew he had no authority to act on behalf of that corporation violated DR 1–102(A)(3)).

a. Dishonesty

Dishonesty is conduct evidencing a disposition to lie, cheat, or defraud, as well as a lack of trustworthiness or integrity. *In re Claussen*, 331 Or 252, 260, 14 P3d 586 (2000); *In re Dugger*, 334 Or 602, 609, 54 P3d 595 (2002) (claiming ownership of client's accounts); *In re Kluge*, 335 Or 326, 66 P3d 492 (2003). Knowledge or intent is required. *In re Martin*, 328 Or 177, 185-86, 970 P2d 638 (1998) (cashing retainer check and spending proceeds before they had been earned.)

b. Misrepresentation

To violate this rule, an attorney's misrepresentations must be knowing, false, and material in the sense that the misrepresentations would or could significantly influence the hearer's decision-making process. *In re Eadie*, 333 Or 42, 53, 36 P3d 468 (2001) (decided under former DR 1-102(A)(3); the accused intentionally failed to disclose a material fact, that he intended to seek costs, to obtain acquiescence to settle the dispute); *In re Kluge*, 332 Or 251, 255, 19 P3d 938 (2001) (decided under former DR 1-102(A)(3); the accused misrepresented himself as a notary in administering a deposition oath).

Also, you can't leave a client with a false impression caused by an unintentional misstatement. *In re Williams*, 314 Or 530, 840 P2d 1280 (1992) (misrepresenting that tenant's money was held in trust); *In re Boardman*, 312 Or 452, 822 P2d 709 (1991) (lying about being the personal representative of an estate).

Receiving a direct financial gain from a misrepresentation is treated more severely than if money is not involved. *See*, *In re Houchin*, 290 Or 433, 438, 622 P2d 723 (1981) (lawyer suspended for 30 days for enrolling as a student in community college course that he was teaching to qualify for Veterans' Administration benefits; decided under former DR 1–102(A)(4)).

4. Engaging in conduct prejudicial to the administration of justice.

This rule is violated when a lawyer's wrongful conduct has the potential to cause harm either to the procedural functioning of a judicial proceeding or to the substantive interest of a party to that proceeding. *In re Claussen*, 322 Or 466, 482, 909 P2d 862 (1996) (failing to advise bankruptcy court of a connection to any creditor or adverse interest; decided under former DR 1-102(A)(4)); *Conduct of Morris,* 326 Or 493, 953 P2d 387 (1998)(lawyer directing her legal assistant to alter a final account that already had been signed and notarized, and then filing it with the probate court; decided under former DR 1-102(A)(4)).

It is also violated if you show up in while impaired. *In re Conduct of Wyllie*, 326 Or 447, 952 P2d 550 (1998), *adh'd to on recons*, 326 Or 622, 956 P2d 951 (1998) (decided under former DR 1–102(A)(4)), the attorney appeared in court on

at least five occasions while impaired by use of alcohol such that the judge was distracted from the substance of proceeding; on two occasions, his condition resulted directly in need to delay proceedings, and his impaired state while representing criminal clients created a risk of ineffective assistance of counsel.)

5. Stating or implying that you can influence government agencies or officials, by means that violate the ORPC.

For example, this rule was violated in *In re Holste*, 302 Kan 880, 358 P3d 850 (2015). There, the accused was a county attorney who also had a private practice. He threatened to file felony criminal charges against the defendant if defendant did not withdraw his motion to set aside a default judgment.

6. Knowingly assisting a judge in conduct that violates the ORPC.

Making loans to a judge before whom you appear is a violation of ORPC 3.5(a), and also the Canon of Judicial Ethics. So such act also violated ORPC 8.4(6). *See, Lisi v Several Attorneys*, 596 A2d 313 (RI 1991); Formal Ethics Opinion No. 2005-56.

7. Intimidating or harassing someone because of his or her status.

This paragraph reflects language in Comment [3] of the ABA Model Code:

> "Discrimination and harassment by lawyers in violation of paragraph [7] undermine confidence in the legal profession and the legal system. Such discrimination includes harmful verbal or physical conduct that manifests bias or prejudice towards others. Harassment includes sexual harassment and derogatory or demeaning verbal or physical conduct. Sexual harassment includes unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature. The substantive law of antidiscrimination and anti-harassment statutes and case law may guide application of paragraph [7]."

Rule 8.5 DISCIPLINARY AUTHORITY; CHOICE OF LAW

If you're an Oregon lawyer, the ORPC applies to you, no matter where your conduct occurs.

Rule 8.6 WRITTEN ADVISORY OPINIONS ON PROFESSIONAL CONDUCT; CONSIDERATION GIVEN IN DISCIPLINARY PROCEEDINGS

ORPC 8.6 authorizes the Oregon State Bar Board of Governors to issue written advisory opinions on ORPC questions. The Oregon State Bar Legal Ethics Committee and General Counsel's Office may also issue informal written advisory opinions on questions under these Rules.

In evaluating a charge against a lawyer, the Disciplinary Board and the Oregon Supreme Court may consider the lawyer's good faith effort to comply with a previously issued written advisory opinion as a good faith effort to comply with the ORPC, and a basis for mitigation of sanctions.

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Research Tip:

There is a handy DR-ORPC cross-reference chart at the end of the Oregon Rules of Professional Conduct.