TAKING A STROLL THROUGH THE RULES OF PROFESSIONAL CONDUCT

PART ONE

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1. Background of Rules Applicable to Lawyers

Oregon adopted the American Bar Association's first ethical code, the Model Code of Professional Responsibility, in 1971. *See, In re Porter,* 320 Or. 692, 890 P2d 1377, 1383 n.8 (1995). But Oregon only adopted the ABA's model Disciplinary Rules (DRs), rather than the entirety of the ABA Model Rules. *In re Tonkin,* 292 Or. 660, 642 P2d 660 (1982). The ABA overhauled its Model Rules in 1983, but Oregon did not adopt the revised rules. *In re Porter,* 890 P2d at 1383 n.8. The ABA disseminated another revision of its Model Rules in 2002, and those were adopted, *without official comments*, effective January 1, 2005. *See, In re Conduct of Gatti*, 356 Or. 32, 49, 333 P3d 994 (2014)(the ORPC are derived from the American Bar Association Model Rules). The Legislature codified the rules of professional conduct at ORS 9.490 (1):

> "The board of governors, with the approval of the house of delegates given at any regular or special meeting, shall formulate rules of professional conduct, and when such rules are adopted by the Supreme Court, shall have power to enforce the same. Such rules shall be binding upon all members of the bar."

Since 1995, the professional conduct of Oregon lawyers has been governed by the Oregon Rules of Professional Conduct ("ORPC").[1] A copy of the ORPC, as amended January 1, 2014, is attached to these materials.

Although Oregon did not adopt the official comments, Oregon courts will look to the commentary to the ABA model rule for its persuasive value when an Oregon rule is identical to the model rule. *See, In re Hostetter*, 348 Or. 574, 590, 238 P.3d 13 (2010).

The Oregon State Bar Board of Governors issues formal ethics opinions, available (with a search function) on the State Bar website. The Board has withdrawn opinions based on the DRs, although those are still available for purchase by contacting the State Bar's General Counsel's office.

Research tips:

You can find the ABA model rules on the ABA website: http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents.html

[1] Conduct before the effective date is still governed by the former DRs.

You can search ethics opinions at www.osbar.org/ethics/ethicsops.html
You might want to review Annotated Model Rules of Professional Conduct[2] from the ABA website, where it is described as "the ABA's definitive resource for information about how courts, disciplinary bodies, and ethics committees apply the lawyer ethics rules. Each chapter begins with the rule and its comment, and then presents a detailed discussion of how the rule has been applied." You can buy the book on the ABA website, or this book is available for attorneys to check out at Lewis & Clark's Boley Law Library (call number KF 305A2), and at the Multnomah County Courthouse library.

2. Judicial Conduct Code

The Oregon Code of Judicial Conduct ("OCJC") "establishes standards for the ethical conduct of judges and judicial candidates.[3] The Oregon Supreme Court "approved a comprehensive revision of the Code, effective December 1, 2013." *Moro v. State,* 354 Or. 657, 662 n.1, 320 P.3d 539 (2014)**.**

A judge or judicial candidate shall comply with the provisions of [the OCJC] and may be disciplined for violation of the Code." Rule 1.1 Canons of judicial ethics are binding upon judges. ORS 9.460-9.580. *Jenkins v. Oregon State Bar*, 241 Or. 283, 405 P.2d 525 (1965).

A judicial code of ethics serves aspirational and precautionary purposes. *State v. Pierce,* 263 Or.App. 515, 523-524, 333 P3d 1069 (2014). "The standards for disqualification help assure public confidence in the judiciary." *Id.* (citation omitted).

Ideally, most lawyers won't have reason to refer to the OCJC unless they plan to run for judicial office, or act as a judge pro tem. *In re Lemery*, 339 Or. 432, 120 P.3d 1221 (2005). But if you have the misfortune to find yourself before an impartial or unfit judge, look to the OCJC.

Perhaps the most common reason for practicing lawyers to refer to the OCJC is when they believe a judge should not hear a case. *See, e.g., State v. Pierce.* OCJC Rule 3.3 requires judges to be impartial and fair, while OCJC Rule 4.10 prevents judges from accepting gifts or loans from persons likely to come before the judge. ORS 14.210 sets out the grounds for disqualification of a trial judge, while ORS 14.275 applies to appellate judges. The latter statute provides, in part, that an appellate judge may be disqualified if, among other things, "the judge's participation in the cause would violate the Oregon Code of Judicial Conduct."

The OCJC also addresses improper conduct. The Oregon Supreme Court has delivered a number of opinions on this issue. A Marion County judge was suspended for thirty days for admonishing and belittling defense counsel in and out of the presence of the jury, not allowing counsel proper cross-examination, and undermining defendant's confidence in defense counsel. *In re Ochoa,* 342 Or. 571, 157 P.3d 183 (2007) (decided under former judicial code). A pro tem judge in Tillamook County was censured for discussing the case with a party during the morning

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[2] Bennett, E., Cohen, E. and Whittaker, M. ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT (7th Ed 2011).

[3] You can find the OCJC on the Oregon Judicial Department website: http://www.ojd.state.or.us

recess. *In re Lemery,* 339 Or. 432, 120 P.3d 1221 (2005) (decided under former judicial code). A Multnomah County judge was censured for ordering someone under the DUII supervision program to leave a bar in which the judge was also present, and to report to her courtroom the following court day, where she found him in contempt of his probation - and used profanity ("bullshit") in her courtroom exchange with the person. *In re Baker,* 335 Or. 591, 74 P.3d 1077 (2003) (decided under former judicial code).

Research tips:

You can find the Oregon Code of Judicial Conduct (2013 Revision) at: http://www.ojd.state.or.us/Web/ojdpublications.nsf/Files/CodeJudicialConduct.pdf/$File/CodeJudicialConduct.pdf

3. Overview of the Oregon Rules of Professional Conduct ("ORPC")

The ORPC is broken down into eight parts:

- Client-Lawyer Relationship
- Counselor
- Advocate
- Transactions with Persons Other than Clients
- Law Firms and Associations
- Public Service
- Information about Legal Services
- Maintaining the Integrity of the Profession

Only the first section, "Client-Lawyer Relationship" is discussed in these CLE materials. (Other parts are addressed in separate materials.) The client-lawyer relationship section contains the rules attorneys consider often, covering conflict checks, secrets and trust accounts.

1) Rule 1.1 Competence

RPC 1.1 requires that, "[a] lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." The Oregon Supreme Court often cites to pre-ORPC cases in this area. The following discussion is from *In re Conduct of Obert,* 352 Or. 231, 250, 282 P.3d 825 (2012)[4]:

> "RPC 1.1 provides that, '[a] lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.' Whether a lawyer has provided competent representation 'is a fact-specific inquiry.' *In re Eadie*, 333 Or. 42, 60, 36 P.3d 468 (2001). The standard for assessing competent representation is an objective one; the accused lawyer's mental state is not relevant. *In re Bettis*, 342 Or. 232, 237, 149

[4] The accused knowingly collected an excessive fee, failed to respond to a lawful demand for information from disciplinary authority, and failed to provide competent representation (untimely filings of post-trial motions and appeal notices).

P.3d 1194 (2006). This court's cases concerning incompetence of representation show that incompetence is found 'where there is a lack of basic knowledge or preparation, or a combination of those factors.' *Gastineau*, 317 Or. at 553, 857 P.2d 136. The focus is not on whether a lawyer may have neglected a particular task, but rather whether his or her representation in the 'broader context of the representation' reflects the knowledge, skill, thoroughness, and preparation that the rule requires. *In re Magar*, 335 Or. 306, 320, 66 P.3d 1014 (2003)."

Query: How does this apply in the pro bono context?

2) Rule 1.2 Scope Of Representation And Allocation Of Authority Between Client And Lawyer

As of the date of writing, Oregon has not decided any reported cases involving ORPC 1.2. The official comments to this section provide:

> "Subsection (a) is similar to DR 7-101(A) and (B), but expresses more clearly that lawyers must defer to the client's decisions about the objectives of the representation and whether to settle a matter. Subsection (b) is a clarification of the lawyer's right to limit the scope of a representation. Subsection (c) is similar to DR 7-102(A)(7), but recognizes that counseling a client about the meaning of a law or the consequences of proposed illegal or fraudulent conduct is not the same as assisting the client in such conduct."

Guidance can be found in other jurisdictions. Settlement without the client's authority is a fairly common reason for invoking this rule, which requires a lawyer to

> "abide by a client's decisions concerning the objectives of the representation and, when appropriate, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter."

See, Attorney Grievance Com'n of Maryland v. Zhang, ___ A.3d ___, 2014 WL 3558798, *13 (Md. 2014) (slip opinion).

Less often, a lawyer will abandon his or her client at a hearing or trial, also a violation under this rule. *In re Isler,* 233 Ariz. 534, 315 P.3d 711 (2014). More often, the rule is invoked when the lawyer fails to follow the client's instructions. *Attorney Grievance Com'n of Maryland v. Costanzo,* 432 Md. 233, 244, 68 A.3d 808 (2013) (failing to file suit on Complainant's behalf).

Query: How does this apply in the pro bono context?

3) Rule 1.3 Diligence

This is a one-sentence rule: "A lawyer shall not neglect a legal matter entrusted to the lawyer." It is identical to DR 6-101(B), as Oregon did not adopt the exact language of the ABA

Model Rule, which requires a lawyer to "act with reasonable diligence and promptness in representing a client." (ORPC Official Comment).

Neglect is "the failure to act or the failure to act diligently." *In re Magar*, 335 Or. at 321. The Oregon court recognizes that everyone makes mistakes from time to time. "An isolated incident of negligent conduct does not establish neglect; rather, unethical neglect exists when there is a course of neglectful conduct in the representation of a client." *In re Snyder,* 348 Or. 307, 316, 232 P.3d 952 (2010) (citations omitted) (rule not violated; the court held that the accused had made a strategic decision not to take any action in the case because of the client's medical instability, and that the accused's lack of action in the case reflected that strategic decision.) For an example of a "course of neglectful conduct," read *In re Conduct of Jackson,* 347 Or. 426, 436, 223 P.3d 387 (2009).

4) **Rule 1.4 Communication**

You can't keep your clients in the dark. This rule requires that you keep your clients "reasonably informed" about the status of the matter you're handling, and "promptly comply with reasonable requests for information." You must explain the matter "to the extent reasonably necessary" to allow your client to make "informed decisions regarding the representation." Although "not every failure to respond to a client's requests [for information] also constitutes a failure to explain a matter sufficiently," *In re Koch*, 345 Or. 444, 455, 198 P.3d 910 (2008), a lawyer must consult with his or her client and discuss concerns that a claim may lack merit or should not be pursued. *In re Geurts*, 290 Or. 241, 246 n. 6, 620 P.2d 1373 (1980) (the fact that a client's claim lacks merit "cannot excuse a failure promptly to consult with the client and discuss this conclusion with him")[5].

"[D]eciding whether a lawyer has violated RPC 1.4 requires a careful examination of all of the facts." *In re Groom*, 350 Or. 113, 124, 249 P.3d 976 (2011). The failure to communicate must go beyond "bad customer relations." *In re Snyder,* 348 Or. at 315 (rule violated because accused did not apprise his client of the case status when he did not tell this client about his communications with the client's health insurer regarding recovery rights, or his own judgment that settlement negotiations should not be (and therefore had not been) commenced; the lawyer also violated the rule by failing to respond to reasonable requests for information when he ignored his client's repeated requests for updates and information about the case and for confirmation of the client's understanding of how the case would proceed.)

Query: May sophisticated clients be given less information than unsophisticated clients?

5) **RULE 1.5 FEES**

This rule protects the client from excessive fees, and sets some baselines for what can be charged, and how and when to notify the client of the lawyer's fees.

Timing is important. "[T]he fee must not be 'clearly excessive' at both the time the client and the attorney enter into an agreement and at the time that the attorney charges and collects the fee. *In re Gastineau*, 317 Or. 545, 550–51, 857 P.2d 136 (1993). Thus, a fee could be

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[5] This 1980 case was cited in *In re Snyder*, 348 Or. 307, 316, 232 P.3d 952 (2010).

reasonable at the time the parties enter into the agreement but 'clearly excessive' when the attorney collects that fee." *In re Conduct of Obert,* 352 Or. 231, 243, 282 P.3d 825 (2012).

Also, it might seem obvious, but "a lawyer violates RPC 1.5(a) when the lawyer 'collects a nonrefundable fee, does not perform or complete the professional representation for which the fee was paid, but fails promptly to remit the unearned portion of the fee.' *Gastineau*, 317 Or. at 551, 857 P.2d 136. Whether a lawyer has performed or completed the professional representation turns on whether the lawyer took 'substantial steps to complete the agreed-upon work.' *In re Balocca*, 342 Or. 279, 291,151 P.3d 154 (2007)." *Id.*

What are "substantial steps"? Simply meeting with a client does not constitute a "substantial step" towards completing work on the matter. *In re Conduct of Obert,* 352 Or. at 245; *see, In re Balocca,* 342 Or. at 291-292 (meeting with the client once about bankruptcy but not performing any work).

As for contingent fees, "RPC 1.5 imposes only limited restrictions on contingency fees."*In re Conduct of Spencer,* 355 Or. 679, 692, 330 P.3d 538 (2014).

> "RPC 1.5(a) generally prohibits 'illegal' and 'clearly excessive fee[s],' and RPC 1.5(c) prohibits contingency fees in certain domestic relation cases and also in criminal cases. Beyond that, the Rules of Professional Conduct rely on other, more 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. *See, e.g.*, RPC 2.1 (providing that a lawyer 'shall exercise independent professional judgment and render candid advice')."

Id.

6) **Rule 1.6 Confidentiality Of Information**

Oregon Evidence Code 503 sets out the attorney-client privilege. ORPC 1.6 is its ethical counterpart:

> "A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b)." ORPC 1.6(a)

"The professional obligation to 'preserve' the client's secrets 'at every peril to the attorney,' [was] first codified in Oregon's Deady Code of 1865 following the Field Codes of New York and California ***." *State v. Keenan,* 307 Or. 515, 519, 771 P.2d 244 (1989). The current statutory reference is ORS 9.460 ("Duties of attorneys"), which provides, in part, that an attorney shall "Maintain the confidences and secrets of the attorney's clients consistent with the rules of professional conduct established pursuant to ORS 9.490." ORS 9.460(3).

Lawyers must "make reasonable efforts to prevent the inadvertent or unauthorized disclosure" of client information. ORPC 1.6(c). This rule "offers broad protection to information relating to the representation of a client." OSB Formal Ethics Opinion No 2005-96 (revised 2014). This opinion explained that the protection extends to notarial journals in law offices:

> "If the information pertaining to a prior notarization constitutes or contains protected client information, lawyers must prohibit, and cause their office staff to prohibit, subsequent signers from reviewing these confidences or secrets. Presumably, this can be done either by covering over the names and signatures of other clients at the time of the subsequent signing or by having a separate page of the journal for notarial actions in which protected information relating to the representation of a client is involved."

This rule has taken on new meaning in the electronic era. "Information relating to the representation of a client may include metadata in a document. Taken together, the two rules [ORPC 1.1 and 1.6(a)] indicate that a lawyer is responsible for acting competently to safeguard information relating to the representation of a client contained in communications with others. 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." OSB Formal Opinion No. 2011-187. "With respect to metadata in documents, reasonable care includes taking steps to prevent the inadvertent disclosure of metadata, to limit the nature and scope of the metadata revealed, and to control to whom the document is sent. What constitutes reasonable care will change as technology evolves." *Id.*

Another practical application concerns recycling a law firm's office paper. A law firm may recycle client documents using a recycling service, but the law firm must make "reasonable efforts to ensure that recycling company's conduct is compatible with Law Firm's obligation to protect client information, the proposed contract is permissible. Reasonable efforts include, at least, instructing the recycling company about Law Firm's duties pursuant to Oregon RPC 1.6 and obtaining its agreement to treat all materials appropriately." OSB Formal Ethics Opinion No 2005-141.

Properly obtained client information may only be revealed pursuant to the list in ORPC 1.6(b). For example, "[p]ursuant to Oregon RPC 1.6(b)(1), [a lawyer] may ethically reveal information relating to the representation of Client A to the extent that [the lawyer] reasonably believes necessary to prevent the future crime." OSB Formal Ethics Opinion No. 2005-34. A lawyer's "obligation not to reveal information relating to the representation of a client continues even when moving to withdraw from representing Client. See Oregon RPC 1.6(a). To the extent the withdrawal is based on "information relating to the representation of a client," the Lawyer may not reveal the basis for the withdrawal to the court unless disclosure is permitted by one of the narrow exceptions in Oregon RPC 1.6(b)." OSB Formal Ethics Opinion No. 2011-185.

When is a secret not a secret? When it is within the "crime or fraud" exception to the lawyer-client privilege. *Reynolds v. Schrock*, 341 Or. 338, 351, 142 P.3d 1062 (2006). Actions by a lawyer that fall within the "crime or fraud" exception to the lawyer-client privilege are outside the lawyer-client relationship when evaluating whether a lawyer's conduct is protected. *Id.,* at 351. "'There is no privilege * * * [i]f the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud.' OEC 503(4)(a); see also Rule of Professional Conduct 1.6(b)(1) (providing that a lawyer may reveal client confidences when reasonably necessary 'to disclose the intention of the lawyer's client to commit a crime and the information necessary to prevent the crime')." *Singh v. McLaughlin,* 255 Or.App. 340, 351, 297 P.3d 514 (2013).

Query: Should your firm have a rule prohibiting the reading of client files on public transportation?

Research Tip: Check out the free PLF CLE presentation titled "Metadata: Complying with Oregon Formal Opinion 2011-187." **https://www.osbplf.org**

7) RULE 1.7 CONFLICT OF INTEREST: CURRENT CLIENTS

No one likes to turn down business, but lawyers cannot represent every client who calls. ORPC 1.7 (b) (1) and (4) provide that "a lawyer shall not represent a client if the representation involves a current conflict of interest," unless the lawyer reasonably believes, among other things, that he or she can provide competent and diligent representation and the client gives informed consent in writing. RPC 1.7(a)(2) provides that a current conflict exists if "there is a significant risk that the representation of one or more clients will be materially limited by * * * a personal interest of the lawyer."

In a joint representation, failure to comply with RPC 1.7(a)(1), requiring the lawyer to apprise all of the jointly represented clients of the information that they needed to make decisions about the lawsuit - "also means that [the lawyer] failed to explain matters to the extent necessary for informed decision-making under RPC 1.4(b)." *In re Conduct of Gatti,* 356 Or. 32, 34, 333 P3d 994 (2014).

What about attorneys who office share, and find themselves representing opposing parties? This was addressed in OSB Formal Ethics Opinion No. 2005-50 (revised 2014). Neither of the lawyers must give up their client, but each must safeguard their client's confidential information. Had the two lawyers been in the same firm, this would not be possible. *Id.; OSB Formal Ethics Opinion No.* 2005-28.

Former DR 5-105(A)(3) addressed "issue conflicts": promoting an issue in one case while opposing it in another. The ORPC does not use this term, but it is covered in Rule 1.7. OSB Formal Ethics Opinion No. 2007-177. The OSB Board of Governors has looked to Comment 24 to ABA Model Rule 1.7 (2003) for guidance on this issue. *Id.* That comment provides:

> "A lawyer may represent parties having antagonistic positions on a legal question that has arisen in different cases, unless representation of either client would be adversely affected. Thus, it is ordinarily not improper to assert such positions in cases pending in different trial courts, but it may be improper to do so in cases pending at the same time in an appellate court."

The Board of Governors went on to explain:

> "Under Oregon RPC 1.7(b)(3), clients with directly adverse interests cannot waive the conflict if the lawyer is 'obligate[d] . . . to contend for something on behalf of one client that the lawyer has a duty to oppose on behalf of another client. . . .' Oregon RPC 1.7(b)(3) is unique to Oregon and is not part of the ABA Model Rules. (Model Rule 1.7(b)(3) prohibits simultaneous representation if it involves 'the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other

> proceeding before a tribunal.') The question, then, is whether a lawyer representing two clients who have differing positions on a legal issue is obligated to to contend something for one that the lawyer must oppose for the other."

OSB Formal Ethics Opinion No. 2007-177. The answer is: if the lawyer must take a position in one case which adversely affects another client in a different case, the lawyer has a conflict which cannot be waived. *Id.* The Board recognizes that "there is no safeguard that a lawyer or firm can reasonably take to avoid issue conflicts in the same manner that a lawyer or firm can avoid traditional conflicts by keeping lists of the names of current and former clients." *Id.* With that in mind, before a lawyer can be found to have violated an ethics rule, "Actual knowledge, or at least negligence in not knowing, must first be proved." *Id.* For multi-lawyer firms:

> " … a conflict of interest under RPC 1.7(a)(1) is not present solely because one or more lawyers in a firm assert conflicting legal positions on behalf of different clients whom the lawyers represent in factually unrelated cases. If, however, a lawyer actually knows or reasonably should know of the assertion of the conflicting positions and also actually knows or reasonably should know that an outcome favorable to one client in one case will, or is at least highly likely to, affect the client adversely in another case, a conflict is present and no waiver is permissible. We stress, however, that there will be a great many instances in which a lawyer will not be chargeable with knowledge of issue conflicts under a 'reasonably should know' standard."

Id.

This rule applies to the relationship between corporate counsel and the corporation, in certain circumstances. "If the circumstances are such that there is a significant risk that Lawyer's representation of Corporation will be materially limited by Lawyer's interests as an officer, director, or shareholder, Lawyer may not act as counsel with respect to the matter giving rise to the conflict unless Corporation consents after full disclosure pursuant to Oregon RPC 1.7(a)(2)and (b)1 and 1.0(b) and (g)." OSB Formal Ethics Opinion 2005-91.

> ***Query:*** What do you do if you are working with corporate counsel, know that he or she is an officer, director, or shareholder, and sense that he or she is not promoting the corporation's best interests but rather his or her own?[6]

Sometimes, a lawyer cannot represent a client because the lawyer is vehemently opposed to the client's proposed legal position. *Cf. Estates Theatres, Inc. v. Columbia*

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[6] This is a matter for another section of these CLE materials. Briefly, Oregon RPC 8.3 provides, in pertinent part:

"(a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects shall inform the Oregon State Bar Client Assistance Office.

. . . .

(c) This rule does not require disclosure of information otherwise protected by Rule 1.6 or ORS 9.460(3). . . ."

Pictures Indus., Inc., 345 F.Supp. 93 (SDNY 1972). Those are rare cases. OSB Formal Ethics Opinion No. 2007-177.

8) **Rule 1.8 Conflict Of Interest: Current Clients: Specific Rules**

The first part of this rule prohibits lawyers from doing business with their clients, unless the clients have consulted with another lawyer about the arrangement. *In re Conduct of Spencer,* 355 Or. at 698 ("the accused violated RPC 1.8(a) when he entered into a business transaction with [client] without advising her to seek independent legal advice and giving her reasonable opportunity to do so, and without obtaining her written consent.")

The second part of this rule prohibits knowingly acquiring "an ownership, possessory, security or other pecuniary interest adverse to the client" (with certain exceptions). This subsection includes a mental state requirement: a violation only occurs when the lawyer acts "knowingly." A lawyer acts knowingly when the lawyer is consciously aware of essential facts giving rise to violation, even if the lawyer does not think his or her conduct violates any rule. *In re Schenck*, 345 Or. 350, 369, 194 P.3d 804 (2008), *modified on reconsideration* 345 Or. 652 (2009).

> "'RPC 1.8(a) does not apply to agreements to provide legal services but it does apply to other business transactions.' *In re Conduct of Spencer,* 355 Or. 679, 687, 330 P.3d 538 (2014). The commentary to ABA Rule 1.8(a) notes that this rule does not apply 'to standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others, for example, banking or brokerage services, medical services, products manufactured or distributed by the client, and utilities' services.' ABA Model Rules, Rule 1.8, comment [1]. This means that if, for example, the client is a bank, Rule 1.8(a) does not prevent the lawyer from availing himself of herself of the bank's services. 'In such transactions, the lawyer has no advantage in dealing with the client, rendering the prohibition 'unnecessary and impractical.'"

Id, n.8.

"RPC 1.8(a) requires that a lawyer who wishes to serve as his or her client's [real estate] broker in a real estate transaction provide the requisite disclosure and receive the client's informed consent before doing so." *In re Conduct of Spencer,* 355 Or. at 697.

As with the previous section, in a joint representation, failure to comply with RPC 1.8(a)(1), requiring the lawyer to apprise all of the jointly represented clients of the information that they needed to make decisions about the lawsuit - "also means that [the lawyer] failed to explain matters to the extent necessary for informed decision-making under RPC 1.4(b)." *In re Conduct of Gatti,* 356 Or. at 34.

9) **Rule 1.9 Duties To Former Clients**

This rule comes into play when lawyers change firms (as well as at other times). When a lawyer leaves his or her firm, the lawyer will have a "former client" relationship with the firm's clients for purposes of Oregon RPC 1.9.1 *See In re Brandsness*, 299 Or. 420, 427–428, 702 P.2d 1098 (1985) (decided under former DRs); OSB Formal Ethics Opinion No. 2005-120.

> "Pursuant to Oregon RPC 1.9(a), a lawyer is prohibited from acting adversely to a former client if the current and former matters are the same or substantially related. Matters are "substantially related" if they involve the same transaction or legal dispute or if there is a substantial risk that confidential factual information obtained in the prior representation would materially advance the current client's position in the new matter. Oregon RPC 1.9(a); ABA Model Rule 1.9 comment [3].
>
> The lawyer also will have a conflict with a client of the lawyer's former law firm, even if the lawyer did no work on the client's matters at the former firm, if the lawyer acquired confidential information material to the current client's matter. Oregon RPC 1.9(b); OSB Formal Ethics Op Numbers 2005-11, 2005-17."

Id.

This type of analysis is sometimes referred to as a "matter-specific" approach. Under the Oregon RPCs, a "matter" includes "any judicial or other proceeding, application, request for ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest, or other particular matter involving a specific party or parties[.]" Oregon RPC 1.0(i). "The scope of a matter and the degree of a lawyer's involvement in it depend on the facts of the particular situation or transaction." *Id.*

If there is no matter-specific conflict, then the lawyer may take a matter adverse to a former client - with a huge caveat: the lawyer may not undertake an adverse representation if the lawyer has acquired confidential information that could be used to materially advance the new client's position. OSB Formal Ethics Opinion No 2005-17. If material confidential information had been obtained from the former client, the lawyer could continue with the representation if he or she obtains informed consent in writing. *Id.*

But what about the lawyers at the firm from which the lawyer departed ("Old Firm")? What ethical restrictions do they have concerning the departing lawyer's clients that left with the lawyer? "Old Firm will need conflicts waivers to pursue matters involving its former Client only when "any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter." Oregon RPC 1.10(b)." OSB Formal Ethics Opinion No. 2005-128. If the Old Firm retained any of the departing client's files, the Old Firm must "takes sufficient steps to assure that no lawyer at Old Firm will actually acquire the information in the future—for example, by segregating, restricting access to, or destroying such materials or returning them to Client without retaining copies." *Id.*

> ***Research Tips:*** In OSB Formal Ethics Opinion No 2005-17, the OSB Board of Governors suggested that lawyers consult the following sources for more information on this topic:

- *PGE v. Duncan, Weinberg, Miller & Pembroke*, 162 Or. App 265, 986 P.2d 35 (1999) (former-client conflicts of interest and disqualification motions filed as result thereof);
- THE ETHICAL OREGON LAWYER §§9.2–9.6 (Oregon CLE 2003);
- RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§121–124, 128–132 (2003); and
- ABA Model Rule §1.9.

10) **Rule 1.10 Imputation Of Conflicts Of Interest; Screening**

This is another rule that applies when lawyers change firms. ORPC 1.10(c) permits screening of newly hired lawyers who bring conflicts to a firm.

And, following Rule 1.9, RPC 1.10(b) allows the " Old Firm" to oppose "the departed lawyer's former client if the remaining lawyers did not acquire any confidential information while the client was represented by the firm and there are measures in place to ensure that information in the former client's file is unavailable to the remaining lawyers." OSB Formal Ethics Opinion No. 2005-174.

This rule also applies to lawyers "associated in a firm," prohibiting those lawyers from knowingly representing a client that the lawyer could not represent under Rules 1.7 or 1.9 if they were practicing solo - unless the prohibition is based on family relations and another lawyer in the firm can represent the family member/client without "material limitation."

Query: How does this apply in the pro bono context?

11) **Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees**

The rules differentiate between lawyers leaving the government for private practice, or vice versa. In the former situation, the lawyers in the private firm will be disqualified unless screening is done; but there is no conflict imputation to the government of a lawyer leaving private practice.

a. Leaving a Government Job for the Private Sector

If a lawyer leaves a government job to work in a law firm, conflicts are analyzed using a three-part analysis (with the example being a lawyer leaving the District Attorney's office).

1. The lawyer cannot defend clients in matters that are the same or substantially related to matters that the lawyer handled at the district attorney's office, unless the client and the state give informed consent, confirmed in writing.
2. The lawyer cannot defend a client on a matter that was prosecuted by other deputy district attorneys during the lawyer's tenure in the office if the lawyer obtained confidential information that is material to the matter, except with the informed consent of the client and the state, confirmed in writing.
3. The lawyer's disqualification **will** be imputed to the other lawyers in the private law firm, unless the lawyer is screened from participating in the matter pursuant to ORPC 1.10(c).

OSB Formal Ethics Opinion 2005-120; *In re Lemery*, 7 DB Rptr 125 (1993) (former district attorney disciplined for representing private client adversely to state in matter significantly related to matter he worked on while serving as district attorney, without first obtaining state's consent).

b. Leaving Private Practice to Work for the Government

Conversely, if a lawyer leaves private practice to work for the government, a three-part analysis is applied (with the example being the lawyer going to the District Attorney's office):

1. The lawyer cannot prosecute a former client whom he or she formerly represented in the same or a substantially related matter, unless the former client and the state give informed consent, confirmed in writing.
2. The lawyer cannot prosecute a former client of his or her law firm about whom the lawyer obtained confidential information that is material to the matter without the informed consent of the law firm's former client and the state, confirmed in writing.
3. The lawyer's disqualification **is not** imputed to the other lawyers in the district attorney's office under ORPC 1.11(d).

OSB Formal Ethics Opinion 2005-120.

12) Rule 1.12 Former Judge, Arbitrator, Mediator Or Other Third-Party Neutral

What if you want to be a judge, arbitrator or mediator? Hopefully obviously, you cannot represent a party if you have been a neutral in that same matter, without informed consent confirmed in writing. ORPC 1.12(a).

But what about conflicts? The standard rules apply. ORPC 1.7(a)(2) provides that a current conflict of interest exists if there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer. Being a pro tem judge does not excuse you from the ORPC. *See, In re Zafiratos*, 259 Or. 276, 486 P.2d 550 (1971) (lawyer disciplined for bringing civil action for property damage arising out of motor vehicle collision when accused had acted as a part-time municipal judge in a related proceeding) (cited in OSB Formal Ethics Opinion 2005-39).

13) Rule 1.13 Organization As Client

Lawyers who represent companies have an ethical obligation to report to "higher authority in the organization" any actual or intended action by a company officer or employee that violates the law or might make the company violate the law. ORPC 1.13(b). The lawyer must explain to such officer or employee when the organization's interests are adverse to those of the officer or employe. ORPC 1.13(f).

"A lawyer who represents an entity, such as a corporation or partnership, generally represents that entity only and not its employees, shareholders, or owners." OSB Formal Ethics Opinion 2005-85.[7] "A contrary rule could well require the lawyer to withdraw whenever the two shareholders disagreed on a matter. Cf. OSB Formal Ethics Op No 2005-40; DC Bar Legal Ethics Op No 216 (1991)." *Id.* That said, though, lawyers may represent the company and one of its employees, subject to compliance with Rule 1.7. ORPC 1.13(g). *See,* OSB Formal Ethics

[7] *See,* OSB Formal Ethics Op No 2005-46, noting that the modern test for the presence or absence of a lawyer-client relationship is, in essence, the reasonable expectations test.

Opinion 2005-27 (Lawyer is retained by Trade Association to represent its interests. While the representation of Trade Association is continuing, Lawyer is asked to represent one Trade Association member against another Trade Association member in a matter unrelated to the work that Lawyer is doing for Trade Association. The member whom Lawyer is asked to oppose is not and has not been an individual client of Lawyer. Lawyer may proceed.)

If Rule 1.7 requires the organization's consent, such consent can only be given by "an appropriate official of the organization other than the individual who is to be represented, or by the shareholders." ORPC 1.13 (g).

14) **Rule 1.14 Client With Diminished Capacity**

The rule requires that the "lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client." Rule 1.14(a). But when the lawyer "reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian." Rule 1.14(b). If the lawyer takes that step, the information "relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests." Rule 1.14(c).

Entire CLE's have been devoted to this subject. You can read an article about what lawyers should know about their clients' capacity to make decisions in the August-September 2011 Bar Bulletin: https://www.osbar.org/publications/bulletin/11augsep/imok.html

15-1) **Rule 1.15-1 Safekeeping Property**

Who owns your case files? A lawyer's case files are "property" of the client that must be returned. *In re Worth*, 336 Or. 256, 270, 82 P.3d 605 (2003) (lawyer violated predecessor of RPC 1.15–1(d)[8] when he failed to return client files when requested to do so); *In re Devers*, 317 Or. 261, 265, 855 P.2d 617 (1993) (same). This conclusion is based on subsection (d) which provides: "[a] lawyer shall promptly deliver to the client or third person funds or other property that the client or third person is entitled to receive." *In re Snyder,* 348 Or. 307, 232 P.3d 952 (2010).

[8]DR 9–101(C)(4)

"Unless a lawyer is entitled to, and is exercising, lien rights under ORS 87.430[9], a client is entitled to the return of the client's property upon demand." *In re Arbuckle,* 308 Or. 135, 138, 775 P.2d 832 (1989) (decided under DR 9-101(B)(4)).

What is the client "entitled to receive"? "Client wills unquestionably constitute client property." OSB Formal Ethics Opinion 2005-43. But what about the lawyer's work product? The Board of Governors has ruled that "entire file" in this context means:

> "papers and property that the client provided to the lawyer; litigation materials, including pleadings, memoranda, and discovery materials; all correspondence; all items that the lawyer has obtained from others, including expert opinions, medical or business records, and witness statements. The client file also includes the lawyer's notes or internal memoranda that may constitute 'attorney work-product.' *See, e.g.*, Minnesota Ethics Opinion 13 (1989)." OSB Formal Ethics Opinion 2005-125.

Cases from other jurisdictions interpreting the Model Code have also ruled that work product, prepared by the lawyer for the client, belongs to the client. *In re George,* 28 S.W.3d 511, 516 (Tex. 2000); *Quantitative Financial Strategies Inc. v. Morgan Lewis & Bockius, LLP,* 2002 WL 434380, *4 (Pa.Com.Pl. 2002) (unreported; "Notes and memoranda are part of the package of goods and services which a client purchases when they retain legal counsel.") What may the lawyer retain from a client file? That is determined on a case-by-case basis. In OSB Formal Ethics Opinion 2005-125, the Board wrote:

> "At times, lawyer files also may contain documents such as personal notes made by the lawyer that do not so much bear on the merits of the client's position in a matter as they do on the lawyer-client relationship. A lawyer might, for example, note in a file that the lawyer has consulted the lawyer's own counsel to explore the lawyer's potential exposure to discipline or to explore malpractice liability to the client. Documents reflecting matters of this type need not be produced to the client. *Cf.* Oregon RPC 1.6(b)(3) (lawyer may reveal confidential client information 'to secure legal advice about the lawyer's compliance with these Rules')."

ORPC 1-15.1 is also applied when a lawyer changes firms, as the rule pertains to the client's property. Assuming that the "Old Firm" does not have a valid and enforceable lien on any client property for unpaid fees, the Old Firm must promptly surrender client property to the departing lawyer, if the clients so request. OSB Formal Ethics Opinion 2005-70. As for any portion of the file that does not constitute client property, ORPC 1.16(d) applies:

> (d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which

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[9] ORS 87.430 provides: "An attorney has a lien for compensation whether specially agreed upon or implied, upon all papers, personal property and money of the client in the possession of the attorney for services rendered to the client. The attorney may retain the papers, personal property and money until the lien created by this section, and the claim based thereon, is satisfied, and the attorney may apply the money retained to the satisfaction of the lien and claim."

> the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers, personal property and money of the client to the extent permitted by other law.

Id. As a practical matter, the only way to "protect a client's interests" would be to turn over all parts of the file that a client might reasonably need. See OSB Formal Ethics Op No 2005-125, regarding payment for photocopy costs and the identification of certain documents that may need to be provided to a client who requests them.

15-2) **Rule 1.15-2 Iolta Accounts And Trust Account Overdraft Notification**

"Client funds ... deposited in an [IOLTA[10]] ... for the client's benefit and the net interest earned by funds in such an account shall be held in trust as property of the client." ORPC 1.15-2. "If the amount of money involved is substantial and is expected to be held for enough time that it could earn net interest, [the client's] funds must be placed in an interest-bearing trust account in one of the institutions identified in Oregon RPC 1.15-2(h), with the interest accruing to the benefit of the client. Oregon RPC 1.15-2(c)." OSB Formal Ethics Opinion No. 2005-117.

This rule applies to fees received by a lawyer working as a mediator or arbitrator. OSB Formal Ethics Opinion No. 2005-135. Although there is no attorney-client relationship, the rule applies because those fees are "property of third persons." *Id.* This rule does not apply to non-lawyers who are acting as mediators or arbitrators. It also differs from ABA Model Rule 1.15(a) which requires separate handling only of funds received "in connection with a representation," although courts have applied the obligation to lawyers functioning in other roles. *Id.*

> **Research Tips:**
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> The security of client trust funds held in banks was an issue of concern to lawyers during the 2008 recession. Former Bar Counsel Sylvia Stevens addressed these questions in an article titled "Trust Accounts and the FDIC: Protecting Client Funds in Uncertain Times." http://www.osbar.org/publications/bulletin/08oct/barcounsel.html
>
> You can also borrow CLE materials from the PLF on this topic: "Trust Accounting: Your Financial and Ethical Responsibilities" (May 12, 2011; MCLE credit extended to Dec. 31, 2014). www.osbplf.org/cle/past

16) **Rule 1.16 Declining Or Terminating Representation**

We've all had clients that we'd like to ditch, quietly of course. But lawyers can't terminate the attorney-client relationship without following ORPC 1.16. So long as the withdrawal does not have a material adverse effect on the client, or good cause exists (such as client fraud), the lawyer may withdraw. Withdrawing requires an application to the court, and notice as required by the Uniform Trial Court Rules. ORPC 1.16 (c). Termination involves taking "steps to the extent reasonably practicable to protect a client's interests." ORPC 1.16(d).

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[10] IOLTA is an acronym for "Interest on Lawyer Trust Accounts."

Sometimes, withdrawal is mandatory. RPC 1.16(a)(1) (withdrawal required when representation will result in violation of RPC or other law). Continuing representation at that point can lead to sanctions. *In re Conduct of Paulson,* 346 Or. 676, 678, 216 P.3d 859 (2009) (continuing to practice law after suspension of license).

Failure to follow this rule can lead to sanctions. *In re Conduct of Castanza,* 350 Or. 293, 295, 253 P3d 1057 (2011) (accused failed to: (1) allow his clients sufficient time to employ another counsel; (2) make any attempts to postpone the trial date; (3) file a notice of change or withdrawal of counsel as the Uniform Trial Court Rules require; (4) respond to the defendant's motion to dismiss, thus permitting the trial court to dismiss the action; (5) respond to the opposing attorney's proposed general judgment and cost bill; and (6) communicate with his clients concerning the general judgment and cost bill.); *In re Conduct of Paulson,* 346 Or. at 695 (the accused was suspended, and "basically left his client to fend for himself in the matter").

Research Tips:

The OSB published a two-part series on this issue in the Bar Counsel column of the October and November 2010 issues of the Oregon State Bar Bulletin. http://www.osbar.org/publications/bulletin/10oct/barcounsel.html and https://www.osbar.org/publications/bulletin/10nov/barcounsel.html

17) **Rule 1.17 Sale Of Law Practice**

Oregon RPC 1.17 expressly contemplates the purchase and sale of a law practice. OSB Formal Ethics Opinion 2005-106. It is cited as an exception to ORPC 1.6(a) about revealing confidences:

> "A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
> *****
> (6) in connection with the sale of a law practice under Rule 1.17"

Estate planning attorneys must make sure that client wills are returned to the clients, or put in the safekeeping of successor counsel. OSB Formal Ethics Opinion 2005-43.

18) **Rule 1.18 Duties To Prospective Client**

If you talk to someone, even over the phone, about the possibility of forming a client-lawyer relationship, you owe that person a duty of confidentiality. ORPC 1.18(a); *see, In re Spencer*, 335 Or. 71, 58 P.3d 228 (2002) (the accused violated former DR 9-104 by failing to return documents sent to him for review by a person he ultimately did not represent - the rule applied even though the person was not a client.) Even if you are not retained, you cannot use the information you learned in that conversation, except as Rule 1.9 would permit with respect to information of a former client. ORPC 1.8(b). And treating a potential client the same as a former client, you might be realizing, raises the possibility of a conflict situation. ORPC 1.18(c) precludes you from representing a client adverse to the prospective client in the same or substantially related matter, if you received information from the prospective client that could be

significantly harmful to the prospective client in that matter. OSB Formal Ethics Op No 2005-138. You can, if appropriate, obtain written informed consent from both parties. ORPC 1.18(d). Or someone else in your firm can represent the client if they screening, notice and consent rules discussed above are followed.

Research Tips:

See Sylvia Stevens' article: "Prospective Clients: Effective Use of RPC 1.18," OSB Bulletin February/March 2010. https://www.osbar.org/publications/bulletin/10febmar/barcounsel.html

Query: What ethical duties do you owe to someone you chat to about legal representation at a cocktail party?

4. Standards of Proof

In an ethics proceeding that goes to a hearing, the State Bar is adverse to the accused attorney. The Bar has the burden of establishing a violation of the ORPC by clear and convincing evidence. Bar Rules of Procedure (BR) 5.2. " 'Clear and convincing evidence' means evidence establishing that the truth of the facts asserted is highly probable." *In re Magar*, 335 Or. at 308.

5. Calling the Bar for Help

Lawyers are urged to contact the Oregon State Bar for information about ethical issues. http://www.osbar.org/ethics/ethicsadvice.html [11]

Such a call, however, is not insurance against a subsequent ethical violation. "[A]dvice from the Bar that leads a lawyer to engage in a particular set of actions *** does not estop the Bar from subsequently bringing disciplinary charges if warranted by the resulting conduct." *In re*

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[11] "The Oregon State Bar offers the assistance of its General Counsel's Office to discuss your legal ethics questions. One of the lawyers in General Counsel's Office can help you identify applicable disciplinary rules, point out relevant formal ethics opinions and other resource material, and give you a reaction to your ethics question. No attorney-client relationship is established between callers and the lawyers employed by the Oregon State Bar and the information submitted and responses provided are public records. Lawyers seeking legal ethics advice subject to the lawyer-client privilege should consult a lawyer of their choice in private practice. To protect the confidentiality of client information, questions posed to General Counsel's Office are requested to be in the form of a hypothetical.

A written advisory opinion from the OSB General Counsel, Legal Ethics Committee or Board of Governors may be considered by the Supreme Court as evidence of the lawyer's good faith effort to comply with the disciplinary rules and as a basis for mitigating any sanction imposed if a violation is found. Bar members who wish to request a written advisory ethics opinion from OSB General Counsel should review this article."

Brandt/Griffin, 331 Or. 113, 132, 10 P.3d 906 (2000). Also, the Bar's advice cannot be asserted as a defense to the charged violations. *In re Ainsworth,* 289 Or. 479, 490, 614 P.2d 1127 (1980).

6. Sanctions

In determining the appropriate sanction, the court seeks to "protect the public and the administration of justice from lawyers who have not discharged properly their duties to clients, the public, the legal system, or the profession." *In re Renshaw*, 353 Or. 411, 419, 298 P.3d 1216 (2013) (citations omitted). The court considers the appropriate sanction in light of its own case law. *In re Jackson*, 347 Or. 426, 441, 223 P.3d 387 (2009)*; In re Snyder,* 348 Or. at 318.

The court will consider the following factors in deriving a presumptive sanction: (1) the ethical duty violated; (2) the lawyer's mental state; and (3) the actual or potential injury caused by the misconduct. *In re Jackson*, 347 Or. at 440; American Bar Association's Standards for Imposing Lawyer Sanctions (1991) (amended 1992) (ABA Standards) 3.0(a)-(c). The court will also consider whether any aggravating or mitigating circumstances justify an adjustment to that presumptive sanction. *Jackson*, 347 Or. at 440–41, 223 P.3d 387; ABA Standard 3.0(d). Prior discipline is an aggravating circumstance. *In re Conduct of Spencer,* 355 Or. 679, 699, 330 P.3d 538 (2014).