

Ethics Focus

Don't Do This at Home Conflict Waivers for Malpractice

by Mark Fucile
Fucile & Reising



Although all lawyers are charged with knowing the Rules of Professional Conduct, most lawyers don't deal with conflict waivers every day. Still fewer do so against the backdrop of the always difficult circumstance of possible malpractice. If we think that we may have committed malpractice, we have important regulatory and fiduciary duties to inform the client concerned and to obtain the client's consent if we are to continue on the matter involved. Although errors often trigger understandable embarrassment, this is not a situation where a lawyer can stick his or her respective head in the sand or should be rifling through the firm word processing system for something that looks like the right kind of waiver form.

Oregon lawyers have wise counsel a phone call away at the Professional Liability Fund. The PLF can assist lawyers with both evaluating a particular situation and providing an appropriate template for any required conflict waiver. In this column, we'll first survey the regulatory duties involved and then discuss contacting the PLF.

Regulatory Duties

Under RPC 1.4 - the "communication rule" - we have a duty to keep our clients apprised of material developments in their matters. Therefore, if a material "bad" event occurs, we have a responsibility to let our client know and to, in the phraseology of RPC 1.4(b), explain it

"to the extent reasonably necessary to permit the client to make informed decisions[.]" Not all "bad" events, of course, involve malpractice. Simply because a motion was denied, for example, does not in and of itself imply anything about the skill with which the losing side argued. Further, we are permitted a reasonable period of time to evaluate a situation so that we can present the client with both the "bad" event and the range of resulting options in context. At the same time, the Oregon Supreme Court noted in *In re Obert*, 336 Or 640, 89 P3d 1173 (2004), that simply saying nothing is not an option and, at its most extreme, may fester into misrepresentation by omission.

Under RPC 1.7(a)(2) - the "conflict rule" - we have a duty to obtain a conflict waiver from our client if we have committed an arguable material error and wish to continue on the case. Again, not all errors or omissions necessarily trigger a conflict. The Oregon Supreme Court put it this way in *In re Knappenberger*, 337 Or 15, 28, 90 P3d 614 (2004): "Many errors by a lawyer may involve a low risk of harm to the client or a low risk of ultimate liability for the lawyer, thereby vitiating the danger that the lawyer's own interests will endanger his or her exercise of professional judgment on behalf of the client." The Supreme Court in *Knappenberger* declined to draw a bright line on when a conflict waiver is necessary in this context, noting (at 29) that a "conclusion will depend on the facts and circumstances of each case." If that threshold is crossed, however, the OSB in Formal Ethics Opinion 2005-61 concluded that a lawyer must obtain a conflict waiver from the client to continue on the matter.

Contacting the PLF

If we have committed what may arguably be a material error or omission, then we have a contractual duty under Section

VII of the PLF Plan to notify the PLF. The same requirement would typically apply to excess carriers as well. The failure to do so could, in a given situation, put coverage at risk.

Beyond any contractual duties, contacting the PLF can be critical for two other reasons.

First, the PLF can help you gauge the nature of the problem, provide options (including, in some circumstances, "repair counsel") and can assist you in determining whether or not it makes sense to withdraw or stay on. The PLF brings both a wealth of experience and a professional detachment that a lawyer caught in the middle of this kind of problem simply cannot replicate. Under most circumstances, consultation with claims counsel at the PLF will be protected from later discovery by the work product rule and, if outside counsel is appointed, the attorney-client privilege.

Second, if you wish to stay on, the PLF also has a form conflict waiver available on its website. The template contains the "boilerplate" required by RPC 1.7 and points to where the individual lawyer will need to insert his or her explanation of the particular facts involved. The PLF template notes that it is not asking the client to waive any claim. Rather, the template explains that client consent is necessary for the lawyer to remain on the matter. Although some clients change lawyers in this circumstance, others welcome an avenue for a long-serving lawyer to continue.

Summing Up

Telling clients about mistakes is never easy. But, in those circumstances, it is essential that we inform our clients and that we use appropriate waivers if it makes sense to stay on the matter concerned.

Originally published in the November 2014 issue of *Multnomah Lawyer*. © Multnomah Bar Association. Reprinted with permission.

IMPORTANT NOTICES

This material is provided for informational purposes only and does not establish, report, or create the standard of care for attorneys in Oregon, nor does it represent a complete analysis of the topics presented. Readers should conduct their own appropriate legal research. The information presented does not represent legal advice. This information may not be republished, sold, or used in any other form without the written consent of the Oregon State Bar Professional Liability Fund except that permission is granted for Oregon lawyers to use and modify these materials for use in their own practices. © 2021 OSB Professional Liability Fund