Oregon State Bar Elder Law Newsletter

Volume 20
Number 3
August 2017

Avoiding common ethical missteps and sources of complaint

By Linn D. Davis, Attorney at Law

About seven percent of the 2,000 or so inquiries and complaints to the Bar last year about lawyer conduct arose out of elder law, estate planning, probate, and conservator or guardianship matters. By keeping in mind some common ethical missteps which might lead to a finding of misconduct, lawyers may reduce the likelihood of becoming the subject of an ethics complaint.

Many complaints arise from uncertainty about the lawyer's role. First and foremost, be clear in your own mind whom you represent. It is that person to whom you owe lawyerly duties of loyalty and confidentiality. Deal with him or her directly as much as possible. Next, make certain the others you deal with, especially family members or other persons who may be close to the client, know exactly who you represent. Once again, dealing with the client directly and including the client in his or her role as your client in any communications you have with others will assist all involved to remain clear about who your client is. For instance, even in situations where you are sharing information with family members with the consent or at the direction of your client, explicitly state to those family members the basis upon which you are doing so, thereby avoiding confusion that you are anything but an agent of the client.

Avoid forming a lawyer-client relationship, with all its attendant duties and conflicts, with persons or entities whom you do not intend to represent. The creation of a lawyer-client relationship does not require an express written or oral agreement. Oregon Evidence Code 503(1)(a) defines a client for purposes of the lawyer-client privilege as a person (or entity) "who is rendered professional legal services by a lawyer or who consults a lawyer with a view to obtaining professional legal services from the lawyer." Where the formation of a lawyer-client relationship is contested, courts look to factual circumstances, including a past lawyer-client relationship, legal services performed, and other evidence of objective facts that place the lawyer on notice of the putative client's intent, the lawyer's shared intent to form a lawyer-client relationship, and action by the lawyer that would induce a reasonable person in the putative client's position to rely on the lawyer's professional advice. *In re Weidner*, 310 Or 757, 770 (1990).

Lawyers may have a conflict of interest when the interests of multiple clients conflict with one another or the lawyer's own interests conflict with a client's. A single client may have several competing interests or duties. However, the competing interests and duties of a single client do not create a conflict of interest for the lawyer except as they might interact with another of the lawyer's clients' interests

Continued on page 2

In this issue

Focus on ethics

Plus

Common ethical missteps

Continued from page 1

Linn D. Davis is assistant general counsel and client assistance office manager of the Oregon State Bar.

or the lawyer's own interests. Hence, a lawyer who represents a personal representative to an estate does not have a conflict of interest merely because the personal representative is also a creditor or beneficiary of the estate. See *Oregon Formal Ethics* Op. 2005-119. Rather, the lawyer should counsel the client to abide by fiduciary duties despite the client's other interests and inform the client of the potential consequences of breaching those duties. A lawyer for a personal representative who, by virtue of giving the beneficiaries individual legal advice about the estate or advising the beneficiaries on other legal matters undertakes or is found to represent the beneficiaries, may as a result find herself with a conflict of interest as a result. *Oregon Formal Ethics* Op. 2005-119 n. 2. Where a client ceases serving as personal representative, be aware of the potential for a conflict of interest in undertaking to represent a successor personal representative. *Oregon Formal Ethics* Op. 2005-62. These principles also apply to a lawyer for a trustee of a trust and his interactions with beneficiaries of the trust.

A lawyer dealing with a client whose capacity is diminished or diminishing should consult *Oregon Formal Ethics* Op. 2005-41, which discusses Oregon RPCs and ethics opinions that may be implicated in those situations.

The death of a client does not end a lawyer's duties to the client. A lawyer's duties of loyalty and confidentiality to the client survive and continue. See OEC 503(3) (providing for waiver of privilege by personal representative of a deceased client); *In re Hostetter*, 348 Or 574, 583 (2010) (so long as the former client's interests survive his or her death, those interests must be considered in analyzing whether a former client conflict of interest exists under RPC 1.9).

Be aware of the difficulties and chaos that may arise for your clients or your clients' interests in the future if you have not made proper succession plans for your office and its files. Take advantage of the resources provided by the PLF in its free manual *Planning Ahead: A Guide to Protecting Your Clients' Interests in the Event of Your Disability or Death*.

Finally, the Bar's Ethics Helpline is available during business hours to 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. Calls to the helpline do not create an attorney-client relationship between callers and the lawyers employed by the Oregon State Bar and the information submitted and responses provided are public records. To protect the confidentiality of client information, questions posed to General Counsel's Office are requested to be in the form of a hypothetical.

Lawyers seeking privileged legal ethics advice should consult a lawyer of their choice in private practice. ■

National Center on Law and Elder Rights

A new national resource center for the legal services and aging and disability community has recently been launched. The National Center on Law and Elder Rights (NCLER) provides resources from Justice in Aging, the American Bar Association Commission on Law and Aging, the National Consumer Law Center, and The Center for Social Gerontology—all in one place.

NCLER is a one-stop support center for the legal services and aging and disability community to access trainings and technical assistance on a broad range of legal issues that affect older adults. The center was created and is administered by Justice in Aging under a contract with the Administration on Community Living (ACL).

Once you opt in to receive emails from NCLER, you will get notice of free webinars, be able to request case consultations, and be given access to substantive technical assistance and elder rights resources to help you improve the lives of older adults in your community.

Sign up at https://ncler.salsalabs.org/nclersignup/index.html?eType=EmailBlastContent&eId=ac412cad-bddb-48a1-88a4-e64cab86e54a ■

Client protection and self-protection:

The case for documentation, civility and (at times) withdrawal

By Peter R. Jarvis, Attorney at Law

Peter Jarvis is a partner in Holland & Knight's Portland office, where he practices primarily in the area of attorney professional responsibility and risk management.

At its core, elder law is not about abstractions but about care and concern for human beings. It's also about the need to balance the rights of individuals who are or may be under a disability against the rights and duties of those who interact with them. So when RPC 1.14(a) informs us that a lawyer with a client under a disability "shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client," the RPC may strike a reasonable balance in the abstract but it does not give us much detail on how to proceed.

Few of us are trained as health-care professionals and all of us experience second-guessing with 20-20 hindsight. Fortunately, lawyers can implement habits of mind and practices that reduce the potential risk to themselves while increasing the potential benefits to their clients.

Documentation

Based on more than three decades of serving as a lawyer for lawyers, I can say with certainty that attorneys almost never regret the contemporaneous documentation of events, but often have reason to regret the absence of documentation. This is true for several reasons.

One is that contemporaneous written documentation can often mean the difference between triable issues of fact and motions for summary judgment. Another is that even the most conscientious of lawyers may not recall later what was said or why. A third is that contemporaneous written documentation—which is particularly easy to do in the email era—can and often will prevent misunderstandings, both with clients and with others. In addition, documentation is particularly worthwhile when a client suddenly wishes to shift direction or do something that, though arguably or even entirely lawful, is contrary to the lawyer's advice.

Documentation can also be employed proactively. Suppose, for example, that I receive an email from someone claiming to be the new lawyer for one of my elderly clients, in which I am asked to forward that client's file to the new lawyer so she can redo the client's estate plan. Suppose further that I don't doubt the bona fides of the new lawyer but that I do have doubts about the continuing competence of the elderly individual.

Whatever one makes of my right under Oregon RPC 1.14(b) to take "reasonably necessary protective action" on this client's behalf, it is clear that I may, upon turning over the file, state to the new lawyer in writing that I assume the prospective lawyer has met with the client and has determined that he or she is competent to engage a new attorney; and that if this assumption is incorrect, the new lawyer must let me know immediately.

Alternatively, suppose that a client wishes to revise an estate plan but the lawyer anticipates that family members who will be excluded from the revised plan may challenge the client's competence or make claims of undue influence. In order to reduce the risk of such challenges, the lawyer may wish to consider such steps as obtaining contemporaneous documentation of competence from the client's health-care providers and making an electronic recording of a competent client expressing his or her wishes.

Civility

Several years ago, I coauthored an article entitled "The Practical Case for Civility."[1] The position of that article was that, while there may be times when overly aggressive "Rambo lawyering" is in a client's interest, there are many more times when civility will serve the interests of both lawyer and client better.

Continued on page 4

Documentation, civility, withdrawal

Continued from page 3

In the article we noted multiple reasons that favor civility:

- Most lawyers, like most human beings, don't do their best thinking when they are irate.
- Uncivil behavior tends to beget more uncivil behavior, and lead to greater expense and greater client dissatisfaction.
- Uncivil behavior tends to be poorly received by bar disciplinarians, judges, and juries.

Quite apart from the real-world benefits of civility, Oregon RPC 2.1 expressly states that in the course of giving candid advice to a client, "a lawyer may refer not only to law but to other considerations such as moral, economic [and] social ... factors, that may be relevant to the client's situation."

Or as noted in Official Comment [2] to ABA Model Rule 2.1, "Advice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate." Civility and consideration for others is thus a legitimate part of providing adequate legal service that goes beyond purely technical advice.

Withdrawal

Under Oregon RPC 1.2(c), an Oregon lawyer cannot advise or assist a client in committing conduct that the lawyer knows to be "illegal or fraudulent." Moreover, the term "illegal" here is apparently intended to cover not only criminal conduct (as in most jurisdictions) but also conduct that would lead to a civil fine.

If a client, upon crossing a lawyer's physical or electronic threshold, immediately announces an intent to lie, cheat, or steal, the problem is both clear and easy to avoid. Not infrequently, however, lawyers find themselves confronted with a client who started out with what were (or what the lawyer perceived to be) lofty ideals and goals, only to feel constrained by subsequent events to act in a decidedly less lofty manner.

Even by the time of Aristotle it was apparently a truism that "Well begun is half done." That does not mean, however, that all beginnings require completions. Oregon RPC 1.16 gives lawyers considerable room to withdraw from representations rather than become involved in what is or reasonably might appear to be questionable conduct.

In addition, lawyers who find themselves in a tight spot might wish to bear two things in mind. First, Oregon RPC 1.6(b)(3) allows a lawyer to seek advice or input from other lawyers about what is or is not permissible. Second, lawyers should consider not only how a situation may appear to them at the current time but also how adverse parties in litigation or bar disciplinarians may view the matter with the benefit of 20/20 hindsight.

Lawyers who choose to withdraw when difficult situations arise should, of course, think carefully about what they should say and to whom. When, for example, motions for leave to withdraw are filed in court, it will often be impermissible for a lawyer to say more, at least initially, than that the lawyer believes there is a basis for withdrawal but the duty of confidentiality under Oregon RPC 1.6(a) prevents the attorney from saying more.

If, on the other hand, the lawyer needs to extricate herself from what appears to be a fraudulent transaction outside of litigation, a so-called "noisy withdrawal" may be required. Cf. Oregon RPC 1.6(b)(5), 4.1(b); Peter R. Jarvis & Trisha M. Rich, "The Law of Unintended Consequences," 44 Hofstra L Rev. 421 (2015). ■

Footnote

1. Jarvis, Peter R. and Lachter Katie M. "The Practical Case for Civility." *Essential Qualities of the Professional Lawyer*. ed. Paul A. Haskins, United States: American Bar Association, 2013. 49-57.

Conflicts of interest in representing professional fiduciaries

By Calon Russell, Attorney at Law

Calon Russell is an associate at Holland & Knight, LLP. He represents lawyers and law firms in both transactional and litigation matters, including: law firm succession planning; partnership disputes; law firm formation/ dissolution; fee disputes; lawyer mobility; lawyer disciplinary proceedings; disqualification motions; and risk management—including managing conflicts of interest.

Elder law practitioners and professional fiduciaries cross paths often. The two groups are similar in that they both act in a representative capacity, but they are different in that professional fiduciaries also act in a client capacity. This dual role adds a level of complexity to the elder lawyer's duty to avoid conflicts of interest. For example, a particular lawyer and a particular professional fiduciary may in one matter have an attorney-client relationship and in another matter be on opposite sides of a protective proceeding. This dynamic raises the question of when, if ever, does a lawyer's representation of a professional fiduciary in one matter lead to a conflict in another matter in which the professional fiduciary also happens to be involved?

To add some detail to this hypothetical, suppose a lawyer (L) represents a professional fiduciary (PF) in her capacity as a guardian for Bob. In a totally separate proceeding L represents Jane, who wants L to oppose PF's appointment as guardian.

The appropriate analysis centers on Oregon RPC 1.7(a), which states in pertinent part:

> A current conflict of interest exists if:
>
> (1) the representation of one client will be directly adverse to another client; [or]
>
> (2) 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 . . . .

PF is clearly L's client in the Bob matter, and at first glance, it may appear that L is simultaneously "directly adverse" to PF in the Jane matter. But that may not be the case. The rule against being directly adverse to a current client is generally understood to be limited to taking positions that are directly adverse to a current client's legal interests as opposed to, for example, a client's financial interests.

This limitation makes sense because lawyers regularly undertake representation of one client that might have a detrimental effect on another client's business or financial interests. This is particularly true where lawyers represent competitors within a single industry. Suppose, for example, that a lawyer assists a developer in procuring a plot of land while the lawyer is currently representing a number of other developers. That work may increase one client's competitive advantage over the others, and it will obviously preclude all the other developer-clients from procuring that same land. But such adversity is generally too tenuous to create a conflict of interest.

With this distinction in mind, does opposing PF's appointment in the Jane matter require taking a position adverse to PF's legal interests, or merely taking a position adverse to PF's business/financial interest in getting more work? Although the author is not aware of directly on-point authority, he thinks the answer is the latter—at least so long as the focus is on whether or not Jane needs a guardian rather than, for example, whether PF would be better or worse than any other potential guardian.[1] If the focus is limited to whether Jane needs a guardian, then L is merely advocating for Jane's legal interests. PF has no legal right to be appointed, and even if PF's appointment is denied, such denial will only affect PF's financial interests rather than PF's legal interests.

But that conclusion does not end the inquiry. Under RPC 1.7(a)(2), L must still ask whether there is a "significant risk" that L's representation of PF in the Bob matter will "materially limit" L's ability to represent Jane.

Assessing these "material limitation" conflicts is inherently a fact-specific undertaking. One factor to consider is how often L has represented PF and how lucrative that work has been. If L regularly represents PF and makes substantial money doing so, there may be a risk that L will be less zealous in the Jane matter in order to avoid antagonizing PF. But this

Continued on page 6

Conflicts

Continued from page 5

To the extent there is risk of a conflict, the safest option will be to seek a waiver.

risk is much less substantial if L and PF do not regularly or extensively work together. Another factor, alluded to above, is whether there will be an occasion or need to attack PF's credentials on behalf of Jane, which would also raise the prospect of a material limitation conflict, and could arguably even rise to the level of a direct adversity conflict.

To the extent there is risk of a conflict, the safest option will be to seek a waiver. A waiver is generally an option so long as the lawyer reasonably believes that she can provide competent and diligent representation to both clients, and each client gives informed consent confirmed in writing. See Oregon RPC 1.7(b).

Indeed, a lawyer who performs substantial work for a particular professional fiduciary may consider the possibility of seeking an advance waiver or future-conflicts waiver that allows the lawyer to oppose that particular professional fiduciary in any and all matters which are unrelated to the matters being handled for that professional fiduciary. A word of caution is warranted with this approach, however, as such waivers are still a relatively untested concept in many jurisdictions, and their enforceability may depend heavily on the language used in the waiver letter. But that is a topic unto itself. ■

Footnote

1. This is the opinion of the author and does not necessarily reflect the opinion of his firm, Holland & Knight LLP, or his colleagues.

Scammers claim to be Social Security Administration employees

On July 19, 2017, Gale Stallworth Stone, acting inspector general of the Social Security Administration (SSA), issued a warning about a new SSA employee impersonation scheme.

Earlier, SSA and its Office of the Inspector General (OIG) had alerted citizens about an OIG employee impersonation scheme that targeted former clients of Kentucky disability attorney Eric Conn. The agencies are now receiving reports from citizens across the country about other phone calls from an individual posing as an SSA employee. The caller attempts to acquire personally identifiable information from victims in order to edit the victims' direct deposit, address, and telephone information with SSA.

The reports indicate that the impersonator calls from a telephone number with a 323 area code. The caller claims to be an SSA employee, and in some instances, tells the victim that he or she is due a 1.7 percent cost-of-living adjustment (COLA) increase in their Social Security benefits. The impersonator goes on to ask the victim to verify all of their personal information including their name, date of birth, Social Security number, parents' names, etc. to receive the increase. If the impersonator is successful in acquiring this information, he uses it to contact SSA and request changes to the victim's direct deposit, address, and telephone information.

SSA employees occasionally contact citizens by telephone for customer-service purposes. In only a few limited special situations, usually already known to the citizen, an SSA employee may request the citizen confirm personal information over the phone. If a person receives a suspicious call from someone alleging to be from SSA, citizens may report that information to the OIG at 1-800-269-0271 or online via https://oig.ssa.gov/report.

Citizens are warned to be cautious, and to avoid providing Social Security numbers or bank account numbers to unknown persons over the phone or Internet unless certain of the recipient.

If a person has questions about any communication—email, letter, text, or phone call—that claims to be from SSA or the OIG, he or she should contact the local Social Security office, or call Social Security's toll-free customer service number at 800.772.1213, 7:00 a.m. to 7:00 p.m., Monday through Friday, to verify its legitimacy. Those who are deaf or hard-of-hearing can call Social Security's TTY number at 800.325.0778. ■

2017 Elder Law Section unCLE program

By Mark Williams

The Elder Law Section held its annual unCLE program on May 5, 2017, in Eugene at the Valley River Inn.

Registration maxed out at 80 several weeks prior to the session. (It happens earlier every year.) Those in attendance consistently give the program the highest possible ratings and highly recommend it to others as a unique program to allow elder law practitioners the opportunity to get together for a day-long session of brainstorming, networking, and the exchange of ideas and forms on topics ranging from estate planning to guardianship to Medicaid to office practice management.

Despite its title, the Oregon State Bar has granted 5 general CLE credits for the program.

Next year's unCLE is already set for May 4, so mark your calendars now. ■

Kathryn Belcher in action as moderator of one of the many breakout sessions. The fundamental concept of unCLE is that there are no presenters, just moderators.

Event organizer Mark Williams catching up with Bend attorney Lisa Bertalan at one of the event's many opportunities for socializing.

Don Dickman received a plaque to commemorate his many years of service to the Elder Law Section as Chair of the CLE committee.

Participants at a breakout session

It's not all serious: Steve Owen and Orrin Onken between sessions.

Elder Law Section Annual Meeting

Friday, October 6, 2017/Noon
Oregon Convention Center
777 NE Martin Luther King Jr. Blvd; Portland

Resources for elder law attorneys

Events

Trust and Estate Planning with Life Insurance
OSB audio seminar via telephone
September 7, 2017/10 a.m.–11 a.m.
http://or.webcredenza.com/catalog.aspx?browse=ViewProg&catid=22951

Mandatory Elder Abuse Reporting for Lawyers
OSB CLE seminar/webcast
September 7, 2017/Noon–1 p.m.
Oregon State Bar Center, 16037 SW Upper Boones Ferry Road, Tigard
https://osbar.inreachce.com/Pricing/BundlePricingSelection/654dd0c7-9342-405c-9554-fcb19b576531

Staying Within the Lines: Avoiding Ethical Penalties and Infractions
Webinar
September 11, 2017/10 a.m.–11 a.m.
http://www.mesacle.com/regs/webreg.php?BarID=13701&EventID=0911171

The Ties That Bind: Avoiding Inappropriate Entanglements in the Practice of Law
Webinar
September 19, 2017/10:00–11:00 a.m.
http://www.mesacle.com/regs/webreg.php?BarID=13701&EventID=0919171

Elder Abuse
September 20, 2017/Noon to 1:00 p.m.
Naegeli Deposition and Trial; Portland
Sponsored by the Solo & Small Firm Section
RSVP for non-members: Michael L. Cooper: mlcooper@lawyer.com

Guardianships and Conservatorships
Annual Elder Law Section CLE Program
October 6, 2017
Oregon Convention Center; Portland

Uncommonly Discussed Issues Affecting Service Members and Veterans: Aging and Elderly Veterans and Families
Live Seminar in Medford (location TBA)
Tuesday, October 17, 2017/2:00 p.m.–5:00 p.m.

NAELA Summit
November 15–17, 2017
Newport Beach, California
NAELA

Aging in America
American Society of Aging Conference
March 26–29, 2018
San Francisco, California
American Society on Aging ■

Publication

The American Bar Association's *PRACTICAL Tool for Lawyers* helps lawyers identify and implement decision-making options for persons with disabilities that are less restrictive than guardianship. A 22-page Resource Guide expands on the steps and includes links to key resources. PDF and Word versions of both publications are available at no cost. Download at http://www.americanbar.org/groups/law_aging/resources/guardianship_law_practice/practical_tool.html ■

Elder Abuse Hotline: 855.503.7233

This toll-free number allows you to report abuse or neglect of any child or adult to the Oregon Department of Human Services.

Websites

Elder Law Section website
OSB Elder Law Section
The website provides useful links for elder law practitioners, past issues of Elder Law Newsletter, and current elder law numbers.

National Academy of Elder Law Attorneys (NAELA)
www.naela.org
A professional association of attorneys dedicated to improving the quality of legal services provided to elders and people with special needs

Consumer Financial Protection Bureau (CFPB)
https://www.consumerfinance.gov/consumer-tools/managing-someone-elses-money/
Download Oregon-specific guides for financial fiduciaries.

OregonLawHelp
www.oregonlawhelp.org
Helpful information for low-income Oregonians and their lawyers

Aging and Disability Resource Connection of Oregon
www.ADRCofOregon.org
Includes downloadable *Family Caregiver Handbook*, available in English and Spanish versions

Important elder law numbers

as of
July 1, 2017

Supplemental Security Income (SSI) Benefit Standards	
Eligible individual	$735/month
Eligible couple	$1,103/month
Medicaid (Oregon)	
Asset limit for Medicaid recipient	$2,000/month
Long term care income cap	$2,205/month
Community spouse minimum resource standard	$24,180
Community spouse maximum resource standard	$120,900
Community spouse minimum and maximum monthly allowance standards	$2,030/month; $3,022.50/month
Excess shelter allowance	Amount above $609/month
SNAP (food stamp) utility allowance used to figure excess shelter allowance	$449/month
Personal needs allowance in nursing home	$60/month
Personal needs allowance in community-based care	$164/month
Room & board rate for community-based care facilities	$571/month
OSIP maintenance standard for person receiving in-home services	$1,235
Average private pay rate for calculating ineligibility for applications made on or after October 1, 2016	$8,425/month
Medicare	
Part B premium	$109.00/month*
Part B premium for those new to Medicare in 2016	$134.00/month*
Part D premium	Varies according to plan chosen
Part B deductible	$183/year
Part A hospital deductible per spell of illness	$1,316
Skilled nursing facility co-insurance for days 21–100	$164.50/day

* Premiums are higher if annual income is more than $85,000 (single filer) or $170,000 (married couple filing jointly).

Oregon State Bar

Elder Law Section