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Choice of Law Is Boring . . . Until It's Not

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Choice of law is an odd topic. In law school, it can have a powerful ability to induce drowsiness. Even in practice, choice of law doesn't come up all that often because the laws of most jurisdictions are relatively similar. When there is a distinction that makes a difference in the outcome of a case, however, choice of law becomes really interesting. In this column, we'll first look at the basic choice of law rules governing lawyer conduct and then turn to some illustrations of state variation that can make a difference in common practice settings.

The Basic Rules

Since Oregon moved from the former Disciplinary Rules to the Rules of Professional Conduct in 2005, choice of law principles have been a part of the RPCs themselves. (Before then, choice of law was governed in Oregon disciplinary matters by the Bar Rules of Procedure. See *In re Summer*, 338 Or 29, 35, 105 P3d 848 (2005).) RPC 8.5(b) now addresses choice of law as it relates to lawyer discipline. RPC 8.5(b), however, reflects the same general principles applied in other law firm contexts such as fee agreements (see, e.g., *Frost v. Lotspeich*, 175 Or App 163, 188-89, 30 P3d 1185 (2001)), lawyer civil liability (see, e.g., *Spirit Partners, LP v. Stoel Rives LLP*, 212 Or App 295, 304,

157 P3d 1194 (2007)), and disqualification (see, e.g., *Philin Corp. v. Westhood, Inc.*, 2005 WL 582695 at *9-*10 (D Or Mar 11, 2005) (unpublished)).

RPC 8.5(b) divides choice of law analysis into two categories.

First, for conduct arising in the context of a court proceeding, RPC 8.5(b)(1) generally applies the law of the forum.

Second, for conduct arising outside the context of a court proceeding, RPC 8.5(b)(2) uses “the rules of the jurisdiction in which the lawyer’s conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct.” RPC 8.5(b)(2) also notes that a lawyer will not be subject to discipline if the lawyer’s conduct meets the rules of the jurisdiction in which the lawyer “reasonably believes” the conduct will have its predominant effect.

With either, it is important to remember that although RPC 8.5(b) governs choice of law, RPC 8.5(a) addresses disciplinary authority and makes plain that the Oregon Supreme Court retains disciplinary authority over Oregon lawyers no matter where asserted misconduct takes place.

How They Can Make a Difference

With the adoption of the RPCs in 2005, Oregon moved into much closer alignment with the many other jurisdictions nationally that have professional rules patterned on the ABA Model Rules. Notwithstanding the closer alignment, Oregon’s RPCs, like most of their counterparts across the country, still differ in

many respects from the ABA Model Rules in both their form and their interpretation. The sources of this variation are several and are not consistent from state to state. In some instances, the wording of particular state rules is different from the ABA Model Rules. In others, case law or ethics opinions account for the variation. In still others, the variation flows from the fact that most states have official comments patterned generally on those that accompany the ABA Model Rules, but Oregon never adopted comments.

To take a few examples in common litigation scenarios from Oregon and Washington:

- In Oregon, a line-level employee whose conduct is at issue generally falls within corporate counsel's representation and, therefore, is "off limits" from direct contact by opposing counsel under RPC 4.2 (OSB Formal Ethics Op. 2005-80). In Washington, by contrast, the limitation only applies if the line-level employee is classified as a "speaking agent" of the corporate employer under the Washington Evidence Rules (*Wright v. Group Health Hospital*, 103 Wn2d 192, 691 P2d 564 (1984)).
- In Oregon, an adverse expert in a state court proceeding can, in theory, be contacted directly by opposing counsel (OSB Formal Ethics Op. 2005-132, with caveats). In Washington, by contrast, opposing counsel can only contact an adverse expert through a deposition (*In re Firestorm 1991*, 129 Wn2d 130, 916 P2d 411 (1996)).

- In Oregon, an insurance defense lawyer is generally considered to have two clients—the insured and the insurer (OSB Formal Ethics Op. 2005-121). In Washington, by contrast, an insurance defense lawyer only has one client—the insured (*Tank v. State Farm*, 105 Wn2d 381, 715 P2d 1133 (1986)).

In short, although Oregon’s RPCs are now based on the ABA Model Rules, “model” doesn’t mean “uniform.” Material nuances remain from state to state in areas that are not necessarily predictable. With lawyers more frequently practicing across state lines, the chance that choice of law can “get interesting” is increasing as well.

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