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Two Oregon Privilege Decisions of Note

Mark J. Fucile
Fucile & Reising LLP

This past year saw two significant Oregon Supreme Court decisions on the attorney-client privilege. Although one has broader practical application for most lawyers than the other, both plumb areas that lawyers can readily encounter. The first discusses whether an attorney-client conversation that takes place over an electronic network operated by the client's employer is sufficiently confidential to qualify as privileged. The second addresses whether the "breach of duty" exception that normally makes attorney-client communications underlying a legal malpractice claim discoverable extends to a client's subsequent conversations with "repair counsel" retained to "fix" an asserted error by the client's original lawyer. With the first, the Supreme Court essentially said "it depends." On the second, the Supreme Court gave a firm "no." In this column, we'll look at both.

Using an Employer's Network

The attorney-client privilege protects "confidential communications," which OEC 503(1)(b) defines as "a communication not intended to be disclosed to third persons[.]" In *Gollersrud v. LPMC, LLC*, 371 Or. 739, 541 P.3d 864 (2023), a client communicated with his lawyer on a personal legal matter over his employer's email system. The opponent in the personal legal matter later subpoenaed the employer seeking those communications. The client moved to

quash the subpoena—arguing that the communications remained privileged notwithstanding the fact he was using the employer's email system. The opponent, by contrast, contended that using an employer's email system to communicate with an attorney on a personal legal matter failed to meet OEC 503's necessary predicate to privilege of being a "confidential communication."

As noted, the Supreme Court essentially said: "It depends." The Supreme Court surveyed case law nationally through the lens of Oregon's definition of "confidential communications." The Supreme Court put particular emphasis on the fact that the only evidence in the record on the client's expectation of privacy was his own declaration to the effect that he had never received notice that his employer would actively monitor his private communications over the employer's system. Effectively, the Supreme Court reasoned that simply because an employer has an unstated theoretical ability to review an employee's communications with the employee's lawyer over the employer's system does not—without more—destroy privilege. The Supreme Court cautioned, however, that different facts—particularly notice to an employee that the employer actively monitors communications over the employer's system—might lead to a different result.

Beyond privilege, the ABA in Formal Opinion 11-459 (2011) counseled that under the broader confidentiality rule—ABA Model Rule 1.6 and corresponding state rules—part of a lawyer's responsibility is to educate clients about the requisites of privilege and the risks of communicating over an employer's system. Although on different facts, an Oregon lawyer who had a part-time personal law practice in addition to fulltime employment with the State was disciplined under Oregon RPC 1.6 in *In re Valverde*, 29 DB Rptr. 192 (Or. 2015), for keeping electronic files from his personal law practice on the State's servers despite a clear policy by the State that data stored on its computers was State property. Lawyers should read *Gollersrud*, therefore, with the caution that the Supreme Court itself underscored in its opinion.

Breach of Duty Exception

OEC 503(4)(c) states that privilege does not apply to a "communication relevant to an issue of breach of duty" by a lawyer. On a practical level, this is the evidentiary basis for discovery of a lawyer's file in a legal malpractice case by a client against the lawyer. In some instances, however, the client may have also consulted with other lawyers—either retained directly by the client or provided by the original lawyer's malpractice carrier once a potential error came

to light and often called “repair counsel”—to either assess or attempt to fix the problem that gave rise to the potential claim.

Hill v. Johnson, 371 Or. 494, 538 P.3d 204 (2023), arose in the “repair counsel” context. The plaintiff sued his former attorney for malpractice arising from the entry of a stipulated judgment for which the plaintiff alleged the lawyer did not have the client’s authority. Following the client’s discovery of the judgment, he first retained replacement trial counsel in an effort to set the judgment aside, and when that failed appellate counsel challenging the trial court’s denial of the motion to vacate the judgment. When the denial was upheld on appeal, a legal malpractice claim followed.

In the legal malpractice case, the original lawyer sought repair counsel’s files. The plaintiff produced their billing records but asserted privilege over the balance of their respective files. The original lawyer argued that the “breach of duty” exception extended to repair counsel as well. The trial court agreed, but the Supreme Court reversed on a writ of mandamus. The Supreme Court found that the “breach of duty” exception only applies to communications between the client and the original attorney who allegedly erred and did not extend to subsequent repair counsel retained to correct the asserted error.

The Supreme Court also recently addressed the related "self-defense" exception to the lawyer confidentiality rule, RPC 1.6, in *In re Conry*, 368 Or. 349, 491 P.3d 42 (2021). The Supreme Court in *Conry* held that while lawyers are permitted to reveal otherwise confidential information to defend themselves, the exception is narrowly limited to information that is "reasonably necessary" to the defense involved.

ABOUT THE AUTHOR

Mark J. Fucile of Fucile & Reising LLP advises lawyers, law firms, and corporate and governmental legal departments throughout the Northwest on professional ethics and risk management. Mark has chaired both the WSBA Committee on Professional Ethics and its predecessor, the WSBA Rules of Professional Conduct Committee. Mark has served on the Oregon State Bar Legal Ethics Committee and is a member of the Idaho State Bar Section on Professionalism & Ethics. Mark writes the Ethics Focus column for the Multnomah (Portland) Bar's *Multnomah Lawyer*, the Ethics & the Law column for the WSBA *Bar News* and is a regular contributor on legal ethics to the WSBA *NWSidebar* blog. Mark is the editor-in-chief and a contributing author for the WSBA *Legal Ethics Deskbook* and a principal editor and contributing author for the OSB *Ethical Oregon Lawyer* and the WSBA *Law of Lawyering in Washington*. Before co-founding Fucile & Reising LLP in 2005, Mark was a partner and in-house ethics counsel for a large Northwest regional firm. He also teaches legal ethics as an adjunct for the University of Oregon School of Law at its Portland campus. Mark is admitted in Oregon, Washington, Idaho, Alaska and the District of Columbia. He is a graduate of the UCLA School of Law. Mark's telephone and email are 503.860.2163 and Mark@frllp.com.