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RPC 2.4(b): Oregon's Unique Lawyer-Mediator Rule

Mark J. Fucile
Fucile & Reising LLP

Most Oregon RPCs are based on their ABA Model Rule counterparts. Oregon RPC 2.4(b), however, is not one of them. Under Oregon's unique rule, a mediator is allowed to both prepare documents implementing a settlement reached through mediation and file them with the court. Neither ABA Model Rule 2.4 nor corresponding versions regionally in Washington, Idaho, and Alaska incorporate that additional authority.

The Oregon rule traces its roots to an effort in the late 1990s to address the unmet legal needs of *pro se* litigants—principally in family law. Oregon's rule has evolved since then but still provides a useful tool in that context. At the same time, lawyer-mediators using this tool need to remain sensitive to the line between the relatively limited follow-on tasks permitted by RPC 2.4(b) and the very real conflicts they face if they go beyond those boundaries.

In this column, we'll first briefly survey the history of Oregon RPC 2.4(b) for context. We'll next outline the tasks permitted by the rule. We'll then conclude with a discussion of the conflict risks involved if a lawyer-mediator crosses the boundaries set by RPC 2.4(b).

Historical Context

The origins of RPC 2.4(b) help explain what is—and what is not—permitted by the rule.

As originally adopted in 1986, former Oregon DR 5-106 allowed lawyer-mediators to draft settlement agreements reflecting the resolution reached during a mediation but not related implementing documents. Similarly, because DR 5-106 classified appearing in court as a representational activity, it prohibited mediators from filing resulting documents with a court. OSB Formal Opinion 1991-101 (1991) summarized this approach by noting (at 2) that although a lawyer-mediator could draft a settlement agreement, "Attorney could not . . . then endeavor to represent one or both spouses in placing the agreement of record with the court."

In 1997, however, the Legislature created the Oregon Family Law Legal Services Commission to, in relevant part, develop ways to better assist litigants of modest means in the family law area who were often representing themselves *pro se*. The Commission worked with the Oregon State Bar to develop an amendment to DR 5-106 in 1998 that permitted lawyer-mediators to file an agreed order or judgment with the court concerned to implement a settlement. In 2001, this provision was reframed to extend beyond simply a stipulated order or

judgment to encompass "documents" more generally—but remained tethered to the idea that the "documents" involved reflected or implemented the agreement reached through mediation.

When Oregon moved from the old "DRs" to the RPCs in 2005, former DR 5-106(B) was carried over as RPC 2.4(b). It has remained unchanged since.

Tasks Permitted by the Rule

RPC 2.4(b) reads:

> A lawyer serving as a mediator:
>
> (1) may prepare documents that memorialize and implement the agreement reached in mediation;
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> (2) shall recommend that each party seek independent legal advice before executing the documents; and
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> (3) with the consent of all parties, may record or may file the documents in court.

Reflecting these changes, the parallel Oregon State Bar opinion was renumbered and updated in 2005. The opinion is available on the OSB web site as Formal Opinion 2005-101 (rev. 2022).

RPC 2.4(c) adds that subsection (b)(2) does "not apply to mediation programs established by operation of law or court order."

Although RPC 2.4(b) originated in the family law context, there is nothing on its face limiting it to that setting.

Remaining Risks

Formal Opinion 2005-101 explains (at 2) the underlying rationale for the conflict rules not applying within the narrow spectrum of tasks included in RPC 2.4(b):

> Pursuant to Oregon RPC 2.4, an Oregon lawyer who acts as mediator does not represent any of the parties to the medication. This is why, among other things, the multiple-client conflict of interest rules set forth in Oregon RPC 1.7 do not apply.

Lawyer-mediators using RPC 2.4(b), however, need to remain acutely aware of its limited scope. In *In re Van Thiel*, 24 DB Rptr 282 (Or. 2010), for example, a lawyer was disciplined under RPC 2.4 for first mediating a divorce and then when the mediation was unsuccessful, representing one of the parties in the continuing dissolution. Formal Opinion 2005-101 also emphasizes that mediators only qualify for the "safe harbor" provided by RPC 2.4(b)(1) and (3) if they comply with the requirement in RPC 2.4(b)(2) of "recommend[ing] that each party seek independent legal advice before executing the documents" or are excused from that requirement by RPC 2.4(c) as noted above. More fundamentally, outside the confines of RPC 2.4(b), the Oregon Supreme Court

in, among others, *In re McKee*, 316 Or. 114, 849 P.2d 509 (1993), has long held that representing both sides in a divorce is a nonwaivable conflict.

Following a mediation, RPC 2.4(a)(1) prohibits the lawyer-mediator from "act[ing] as a lawyer for any party against another party in the matter in mediation or in any related proceeding[.]" RPC 2.4(a) does not include a waiver mechanism for the lawyer-mediator. By contrast, another lawyer at the mediator's firm may later represent a party to the mediation in related proceedings if, under RPC 1.12(c), the lawyer-mediator is screened from the later work and "written notice is promptly given to the parties and any appropriate tribunal to enable them to ascertain compliance with the provisions of this rule."

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.