

February 2013 *Multnomah Lawyer Ethics Focus*

**Delicate Advice:  
Counseling a Client to Breach a Contract**

**By Mark J. Fucile  
Fucile & Reising LLP**

With the difficult economic times of the past few years, lawyers have sometimes been confronted with providing delicate advice: counseling a client to breach a contract. Circumstances vary, but the recent past has provided many ready examples of situations where it may be in the client's economic interest to breach a contract because the attendant damages or other penalties may be less than the cost of seeing the contract through to completion. The Oregon State Bar has had an ethics opinion on this subject for over 20 years, first under the former Disciplinary Rules as Formal Ethics Opinion 1991-92 and currently under the Rules of Professional Conduct as Formal Ethics Opinion 2005-92 (which is available on the OSB web site at [www.osbar.org](http://www.osbar.org)). Both provide the same nuanced answer: "Yes, qualified." In this column, we'll look at both aspects and also touch on some related areas.

***The "Yes" Part***

Formal Ethics Opinion 2005-92, like its counterpart under the former DRs, relies on the broad right lawyers have to counsel clients on the legal consequences of possible conduct. RPC 1.2(c), which is at the core of the current ethics opinion, puts it this way: "[A] lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel

or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.”

***The “Qualified” Part***

Formal Ethics Opinion 2005-92, again like its counterpart under the former DRs, qualifies the scope of a lawyer’s ability to counsel clients by noting that a lawyer cannot help a client defraud others or engage in otherwise illegal conduct. RPC 1.2(c) also supplies the underpinning for this aspect of the opinion: “A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is illegal or fraudulent[.]” The qualification for fraud is self-explanatory—as long as the lawyer realizes why the client may be seeking the advice involved. The qualification on “illegality,” however, can be more difficult given the comparatively broad spectrum of conduct that might be considered “illegal” by statute or regulation. In *Milavetz, Gallop & Milavetz, P.A. v. United States*, \_\_\_ US \_\_\_, 130 SCt 1324, 176 LEd2d 79 (2010), for example, the U.S. Supreme Court concluded that law firms fall within the limitations on pre-bankruptcy advice imposed by the federal Bankruptcy Abuse Prevention and Consumer Protection Act. Moreover, it is important to note that Oregon’s rule is broader than the corresponding ABA Model Rule on which it is based, with Oregon RPC 1.2(c) using the word “illegal” and ABA Model Rule 1.2(d) using the word “criminal.” With each qualifier, lawyers need to make sure they fully

understand both the factual and legal context in which their advice is being sought.

***Related Areas***

Formal Ethics Opinion 2005-92 is limited to advice on breaching a contract. Closely related areas, however, can often surface under analogous circumstances. In *Reynolds v. Schrock*, 341 Or 338, 142 P3d 1062 (2006), for example, the Oregon Supreme Court recognized a qualified privilege from liability (to third persons) for a lawyer rendering otherwise lawful advice to a client on breaching a fiduciary duty to another party. Similarly, RPC 3.4(c) generally prohibits a lawyer from disobeying “an obligation under the rules of a tribunal, except for an open refusal based on an assertion that no valid obligation exists[.]” *In re Tamblyn*, 298 Or 620, 695 P2d 902 (1985), although decided under the former DRs, addressed this last point in dismissing a bar complaint against a lawyer for advising a client to disregard a court order the Supreme Court later determined was void. As with the qualifiers discussed earlier, lawyers need to carefully consider the factual and legal context involved before advising a client to disobey obligations in these other equally sensitive areas.

## **ABOUT THE AUTHOR**

Mark J. Fucile of Fucile & Reising LLP focuses on legal ethics, product liability defense and condemnation litigation. In his legal ethics practice, Mark handles professional responsibility, regulatory and attorney-client privilege matters and law firm related litigation for lawyers, law firms and legal departments throughout the Northwest. He is a past member of the Oregon State Bar's Legal Ethics Committee, is a past chair of the Washington State Bar Rules of Professional Conduct Committee, is a member of the Idaho State Bar Professionalism & Ethics Section and is a co-editor of the OSB's Ethical Oregon Lawyer and the WSBA's Legal Ethics Deskbook. Mark also writes the monthly Ethics Focus column for the Multnomah (Portland) Bar's Multnomah Lawyer, the quarterly Ethics & the Law column for the WSBA NW Lawyer (formerly the Bar News) and is a regular contributor on risk management to the OSB Bar Bulletin, the Idaho State Bar Advocate and the Alaska Bar Rag. Mark's telephone and email are 503.224.4895 and Mark@frllp.com.