OCTOBER 2013

GUS J. SOLOMON INN OF COURT

Dealing with situations that will not "Please the Court" (as well as Court practices that are not pleasing).

Judge Ed Jones
Marc Blackman
Alison "Tex" Clark
Ramon Pagon
Kristen Tranetzki
Jonathan Trause

Rick Saturn
Kendra Matthews
Steven Burke
Dylan Cernitz
Tyler Volm

2013 Gus J. Solomon Lawyer Survey

66 Lawyers Surveyed (excluding October Pupilage Group and Judges)
22 responses: 6 Master Benchers; 10 Barristers; 6 Associates

1. What are the top five judicial or court practices that drive you crazy?

Some examples to get your thoughts flowing:

- The court systematically taking the bench late (appearance at 8:30, court really doesn't take the bench until 10).
- Set-overs due to lack of judicial availability.
- Being dressed down by the court in front of a client and/or the jury.
- Delays in issuing written opinions.

Responses:

<u>Scheduling</u>

- Stacking cases, i.e., more than one case scheduled for the same time (not really judge's fault).
- Set overs due to lack of judicial availability.
- Not having enough judges for cases scheduled.
- Scheduling motions in Multnomah County.
- Set overs.
- Late-notice set-overs.
- Setting over cases with no notice.
- Time-wasting procedural hearings (having a ton of attys and clients show up just to set another date, case assignment, trial call---Clackamas County gets by just fine without this).

- Courts that try to move things along simply for the fact of moving things along despite what the parties say about negotiations, complexities of the case, etc.

- Being late to the bench.

- OH MY GOD when judges take the bench late---If I were late I get yelled at, if my client is late s/he gets a warrant.

- Appearing late on the bench and not apologizing or even hinting that it is a bad practice and rude to the attorneys and parties.

- Starting on time is the worse. This is especially tough for criminal and family law attorneys where they may have hearings every 30 minutes.

- I really appreciated how Maurer would send longer matters to the end of the ex parte line, and get everyone through with shorter business.
  a. And attorneys could help by waiting until the end, if they know that they have longer, contested matters.
  b. This is an issue with clerks just as much as it is with the Judge, but I really believe in the idea of an open courthouse. As such, the courtroom should be open, unlocked in the morning by 8:15, 8:30 and should remain open. If attorneys have a hearing at 8:30, then the courtroom should be open at 8:00 AM. I have seen too many times where attorneys and parties are in the hallway waiting at 8:55, because the court is not unlocked until 8:57.

<u>Preparation / Pre-Hearing</u>

- Not reading what the parties have submitted before taking the bench and not telling the attorneys.

- Not reading briefs prior to oral arguments on motions.

- Judge has not reviewed the papers or is unprepared at the hearing.

- Documents lost between clerk's office and chambers (state court, with staffing issues due to insufficient funding certainly acknowledged).

Unwritten Rules

- Home-towning
- Having some "local rule" (i.e., attorneys must include some number, or code, or something, on a pleading when filed), and rejecting documents based on this rule when said rule IS NOWHERE TO BE FOUND IN ANY WRITING MATERIAL ANYWHERE.....
- Unwritten "rules" that differ from judge to judge, courthouse to courthouse

Demeanor / Comments to Attorneys

- General crankiness.
- Being dressed down by judge.
- The court commenting on attorney performance in front of a jury (or really the court commenting on anything outside what is necessary to make the trial go smoothly in front of a jury. Poor conduct on the part of an attorney should be dealt with by sidebar, never in front of the jury).
- Judges acting very friendly towards one attorney while acting hostile/disrespectful towards the other in front of a jury/client.
- Getting yelled at by a judge for something his/her staff misunderstood.
- Comments about the way lawyers are dressed that imply a dress code that is discriminatory based on gender. Only men are expected to wear ties.
- This only happened once, but an older male judge, from the bench, recently stopped in the middle of a question to a male opposing counsel to ask if I was a "Miss" or a "Mrs." (I felt too on the spot to say "Ms." so I said "Miss" and then felt like a school girl for the rest of the hearing.)
- Court constantly lets parties get away with blowing deadlines.
- Criminal defense specific, but making defense attys fill out ALL of the paperwork (bench warrants, case readiness reports, etc.).

- Allowing counsel to engage in unproductive characterizations and argument in chambers.

- Courts that question a criminal defendant's decision to go to trial. Unless the court has some reason to believe otherwise, defense counsel has done their job. She has advised her client of the risks and benefits. And for whatever reason, that defendant is choosing to exercise his or her constitutional right. Set the case for trial and move on.

- A trial judge's "rehabilitation" of a potential juror who admits to bias and doubts as to their ability to be objective.

- Tennis shoes under black robe. I know this is controversial, but if the attorneys and litigants are expected to dress up for court so should the judge. (Don't credit me here. :/)

Taking Evidence

- Talking to staff during testimony of a witness.

- Judge not appearing to listen…litigants question fairness of process.

- Judge interjecting questions after opposing counsel's exam which are clearly inadmissible under the OEC.

- Allowing counsel for a party to call a witness out of order because of a claimed conflict on the part of the witness without first clearing it with counsel for the party whose case is being interrupted.

- Allowing counsel to "testify" about claimed facts/evidence that does not come into the case otherwise (through a competent witness with first-hand knowledge, etc.).

- Not allowing counsel to make a record on an objection (I have no idea why judges do this, ever).

- Confusing admissibility with weight in order to keep something out of evidence. That is, something is offered, the proponent says it goes to X, and the judge (and opposing counsel) say, "Hmm, not really, I mean, it could be read both ways, not admissible."

- Not understanding the rules of hearsay, generally speaking.

- Misunderstanding, or flat-out refusing, to apply the rules of evidence.

Pro Se

- Deference given to pro se family law litigants (ex: hearsay admitted, missed deadlines forgiven).

- Calling pro se cases when there are lawyer represented clients obviously in the courtroom.

- Too much leniency for pro se shenanigans.

Decision-Making

- Delays in issuing decisions and written opinions.

- Delays in issuing written opinions.

- Delays in issuing written opinions.

- Delays in opinions, in particular SJ decided too near to trial date, such that you have to prepare for trial on issues that end up not being in the case.

- Issuing important decisions without written or substantive explanation.

- Refusing (polite requests) to articulate findings on the record on a subject that may well be the subject of an appeal (leaving the reviewing court to guess/speculate ….).

- Sitting on case and not making ruling

- Calling counsel into chambers before trial/hearing starts to inform how he/she will rule where there are unresolved issues of fact relevant to the issue at hand.

- Expounding conclusions to counsel on significant factual issues before hearing any evidence.

- Judge who try to act more like a mediator than a decision-maker.
- Actively blending settlement dialogue with pretrial dialogue.
- Court not honoring statutory mandated time limits.
- Avoidance of deciding certain issues that are squarely within their purview (ex: custody determinations not made by statutory guidelines but instead by ordering appointment of a child's attorney when statute would give clear answer).
- Judge ignoring clear precedent.
- Judge making ruling then letting losing side to continue to argue and change their mind.
- Judges who were previously criminal attorneys not understanding civil matters.
- Judges issuing FAPA's based upon information not placed into the Petition and not at least supplementing the Petition so that the Respondent has adequate information to present a defense.
- Failing to award sanctions/fees in those cases where one party denies RFA admissions where the subject matter is not something the responding party really can/does in good faith have grounds to deny, forcing the requesting party to incur expense to prove the same.
- Stop denying attorney fees as sanctions in discovery disputes. If the bench doesn't want attorneys to take up their time with these types of arguments, give them a disincentive other than yelling at both parties. Hit them in their pocketbooks.

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2. Name five dicey issues for lawyers to navigate in court?

- "Affidaviting" a judge.
- Telling the judge you believe he/she has a conflict.
- Notifying the court that a decision is overdue.
- Telling the court about a client's misrepresentation or lie.

Responses:

- I agree with the above examples.

Moving to Change Judge

- Affidaviting a judge. (Listed 5 times.)

Dealing with an Overdue Decision

- Notifying the court that a decision is overdue. (Even though the UTCR requires it after 60 and 90 days, I hate doing it and generally only do it if opposing counsel signs it too.)

- Notifying the court that a decision is overdue.

- Telling judge decision is overdue

- Notifying the court that a decision is overdue.

- There were times when the Presiding office would get a phone call from a lawyer who has been waiting for an opinion for 90 days and they don't know what to do because their clients are losing money. They've sent letters and receive no response.

Judges

- Getting a hearing scheduled on a difficult motion and no response from the court—how hard do you push?

- Making a record and judge does not want you to make a record (how far do you go?)

- When you're trying to make a record and the judge shuts you down, but you need to properly preserve the issue but haven't quite done it
- Making a record about perceived bias by a judge.
- Maintaining composure when judge is personally insulting you.
- Motions for reconsideration and requests for interlocutory appeals (when allowed).
- Motions for reconsideration.
- Expressing concerns about a judge's voir dire questions or comments to a special jury panel.
- Judge being overwhelmed/not knowing case.
- Attempting to explain civil law in an informative and non-offensive manner to judges who do not have experience in it.
- Telling judge they are flat out wrong
- Not reacting when the court makes a clearly erroneous ruling.
- Containing disgust when judge rules against client's interest.
- What to do when judge criticizes you
- Showing respect for court / judge when you don't have it.
- Figuring out a judge's preferences for case handling, anything from formatting to communicating with clerk to setting hearings, then the judge seems to change those references once I get them figured out.
- Each judge's preferences as to exhibits, approaching witness, etc.
- Perfecting the record after it is clear that the court doesn't want to hear your argument.

- "I made sure that a copy of my brief was delivered to the judge's chambers the Friday before a hearing the following week. When we got to the courtroom to argue the motion, the judge was furious at me for failing to deliver a copy to her. She left the courtroom in a huff to go to chambers to read my brief. While the judge was gone, my paralegal sent me an email confirming that the messenger service delivered my brief on Friday afternoon and left it with the women staffers in the judge's office.

  I then asked the staff whether they had received my brief and they admitted they got it and forgot to give it to the judge. I decided it was not good form to rat out the judge's staff. I hoped they would tell the judge when she returned to the courtroom. They did not. Needless to say, the judge proceeded to treat me like crap and was very opposed to my position."

- Pointing out to the judge an error by his/her staff.

<u>Opposing Counsel</u>

- Handling pro se litigants—advocating for my client while not being too hard on the pro se party.

- Objecting continuously to a novice (who, say, simply cannot direct without leading heavily).

- Calling your opposing counsel a liar (without looking like a jerk).

- Raising unethical conduct of opposing counsel.

- Notifying the court about opposing counsel's misrepresentation or lie.

- Bringing opposing counsel or opposing party's bad behavior to the court's attention without being viewed as equally badly behaved -- for example, in discovery disputes.
- Handling discovery disputes— being a good advocate while not appearing petty to the court.

- Sanctions motions.

Client

- When your client does not want to be cooperative, even though the lawyer recommends it, and getting across to the court that the position is your client's choice.

- Client committed perjury.

- Reporting to the Court in front of the client that we are not ready, must reset, etc. because of something the client has done (not fulfilled some requirement or responsibility).

Withdrawing

- Withdrawing in a way that doesn't signal to the court that your client is a liar. Could be they just can't pay your bill, but all you can say in your affidavit is that there is a conflict.

- Having to withdraw from a case for reasons that are privileged and having a judge push you to tell them, on the record, why you're withdrawing. It's privileged, damn it.
- Pushing back when the court begins to ask questions that encroach on attorney-client privilege (particularly if withdrawing in an appointed case).

Conflicts

- Telling judge of conflict

- Opposing counsel moving to order you off the case…when you do not necessarily perceive a conflict.

Miscellaneous

- Fessing up to messing something up (i.e., the parties asked for you to impose x sentence, you did, now we are back here because we realized that under the law you can't impose x sentence and that was a complete lapse on our part).

- One of the trickiest issues is having a jury trial, because there is so much coordination and movement of the jury. Some of the courtrooms are not well designed for a jury trial. The jury room is down the hallway or on the other side of

the building and so anytime there is an extensive objection, it can take ten minutes to move the jury. Making sure jurors don't see a defendant's prison clothes. Showing exhibits on projector screens where they may not be space.

a. It's minimizing those small time eaters that force the jury to go out for two minutes with ten minutes of moving the jury from the courtroom to the jury room. Those add up and can extend a trial by another half-day.

b. Working with the space and layout of the courtroom.

2013 Gus J. Solomon Judicial Survey

8 Judges Surveyed - 2 Responses

Annoying lawyer practices:

- Obvious expressive reactions to rulings.
- Implicit pressure that court should change ruling by implying that judge is acting as a rogue and ruling in way that goes against what all the other judges are doing or going against established case law
- Snarky remarks to the jury like, "the judge said I can't talk about that."
- Deliberately pushing the envelope in inappropriate situations (i.e., not involving a crucial piece of evidence, but just trying to gain strategic advantage) -- going to the brink of the cliff when the judge has already ruled on an issue and testing the limits of the ruling without checking in with the court, gamesmanship with syntax, cloaked argument in voir dire, trying to sneak in evidence or questions that have already been addressed by an objection and ruled upon by the court.
- How about this -- one attorney actually gave his client written out Q and A and his client just read the answers to the questions!
- New prosecutors who haven't had the "Prosecutor 101" on addressing right to counsel and right to silence issues for criminal defendants.

- Contesting everything because you can, making opposing counsel jump through every possible hoop in civil cases.

- Citing cases incorrectly or citing phrases out of context. Failing to shepardize or note caselaw in opposition.

- Specious arguments in motions or responses just because you feel you have to come up with something to say. It's a waste of valuable judicial resources to have judges chasing down some legal trail that in the end is barely supportable.

- Not showing up for oral argument even though the attorney opted in for oral argument.

- Have your cell phone ring during oral arguments; this may be worse if its not your oral argument.

- Getting caught lying. Saying one thing in the brief & just the opposite at oral argument.

- The next are more faux pas that decrease the person's persuasiveness:

    - Not answering an asked question or saying I'll get to that in a minute.

    - Pointing a finger at a judge while saying that the judge made a mistake in a prior opinion.

    - Responding to a question by saying: "Well anybody who knows anything about the subject matter knows that's a dumb question."

MOTION FOR CHANGE OF JUDGE/AFFIDAVIT OF PREJUDICE

STATUTES:

ORS 14.250 Disqualification of judge; transfer of cause; making up issues.

No judge of a circuit court shall sit to hear or try any suit, action, matter or proceeding when it is established, as provided in ORS 14.250 to 14.270, that any party or attorney believes that such party or attorney cannot have a fair and impartial trial or hearing before such judge. In such case the presiding judge for the judicial district shall forthwith transfer the cause, matter or proceeding to another judge of the court, or apply to the Chief Justice of the Supreme Court to send a judge to try it; or, if the convenience of witnesses or the ends of justice will not be interfered with by such course, and the action or suit is of such a character that a change of venue thereof may be ordered, the presiding judge may send the case for trial to the most convenient court; except that the issues in such cause may, upon the written stipulation of the attorneys in the cause agreeing thereto, be made up in the district of the judge to whom the cause has been assigned.

ORS 14.260 Affidavit and motion for change of judge; time for making; limit of two changes of judge.

(1) Any party to or any attorney appearing in any cause, matter or proceeding in a circuit court may establish the belief described in ORS 14.250 by motion supported by affidavit that such party or attorney believes that such party or attorney cannot have a fair and impartial trial or hearing before such judge, and that it is made in good faith and not for the purpose of delay. No specific grounds for the belief need be alleged. Such motion shall be allowed unless the judge moved against, or the presiding judge for the judicial district, challenges the good faith of the affiant and sets forth the basis of such challenge. In the event of such challenge, a hearing shall be held before a disinterested judge. The burden of proof shall be on the challenging judge to establish that the motion was made in bad faith or for the purposes of delay.

(2) The affidavit shall be filed with such motion at any time prior to final determination of such cause, matter or proceedings in uncontested cases, and in contested cases before or within five days after such cause, matter or proceeding is at issue upon a question of fact or within 10 days after the assignment, appointment and qualification or election and assumption of office of another judge to preside over such cause, matter or proceeding.

(3) No motion to disqualify a judge shall be made after the judge has ruled upon any petition, demurrer or motion other than a motion to extend time in the cause, matter or proceeding. No motion to disqualify a judge or a judge pro tem, assigned by the Chief Justice of the Supreme Court to serve in a county other than the county in which the judge or judge pro tem resides shall be filed more than five days after the party or attorney appearing in the cause receives notice of the assignment.

(4) In judicial districts having a population of 100,000 or more, the affidavit and motion for

change of judge shall be made at the time and in the manner prescribed in ORS 14.270.

(5) No party or attorney shall be permitted to make more than two applications in any cause, matter or proceeding under this section.

ORS 14.270 Time of making motion for change of judge in certain circumstances; limit of two changes of judge.

An affidavit and motion for change of judge to hear the motions and demurrers or to try the case shall be made at the time of the assignment of the case to a judge for trial or for hearing upon a motion or demurrer. Oral notice of the intention to file the motion and affidavit shall be sufficient compliance with this section providing that the motion and affidavit are filed not later than the close of the next judicial day. No motion to disqualify a judge to whom a case has been assigned for trial shall be made after the judge has ruled upon any petition, demurrer or motion other than a motion to extend time in the cause, matter or proceeding; except that when a presiding judge assigns to the presiding judge any cause, matter or proceeding in which the presiding judge has previously ruled upon any such petition, motion or demurrer, any party or attorney appearing in the cause, matter or proceeding may move to disqualify the judge after assignment of the case and prior to any ruling on any such petition, motion or demurrer heard after such assignment. No party or attorney shall be permitted to make more than two applications in any action or proceeding under this section.

CASES:

STATE ex rel GREGORY KAFOURY v JONES, 315 Ore. 201; 843 P.2d 932 (1992)
STATE ex rel OLIVER V. CROOKHAM, 302 Or 533, 731 P2d 1018 (1987)
STATE ex rel BOWMAN v. CROOKHAM, 302 Ore. 544; 731 P.2d 1025 (1987)

Supplementary Local Rule 7.045

7.045 MOTION FOR CHANGE OF JUDGE

(1) If a judge is assigned at Call, at a case scheduling conference before the presiding judge or at an Initial Case Management Conference before any judge, and a party intends to file a motion for a change of the judge assigned, the intention to file the motion must be announced at the time of assignment. An original and two copies of a motion, order, and supporting affidavit must be delivered to the Presiding Judge. Failure to submit all three documents timely, with the copies, will result in sanctions as provided by UTCR 1.090. The requesting party is responsible for serving a copy of the motion, affidavit and order on the judge being disqualified and each other party to the action who is not in default.

(2) For Judges assigned through the Motion Calendaring Department pursuant to SLR 5.015, the following procedures shall apply:

(a) If a party setting a motion intends to disqualify the assigned judge, the party must announce the intent to the motion clerk at the time of assignment and appear at ex parte by the close of the next judicial day to present duplicate copies of a motion, order, and affidavit to the Presiding Judge. The requesting party is responsible for serving a copy of the motion, affidavit and order on the judge being disqualified and each other party to the action who is not in default.

(b) If the non-setting party intends to disqualify the assigned judge, that party must, by the close of the next judicial day after receiving actual notice the motion is assigned to that judge, notify the motion clerk and appear at ex parte to present duplicate copies of a motion, order, and affidavit. The requesting party is responsible for serving a copy of the motion, affidavit and order on the judge being disqualified and each other party to the action who is not in default.

(c) If a motion for change of judge under this provision is allowed, the moving party on the underlying motion shall contact the calendaring office to reschedule the underlying motion and shall comply with the requirements of SLR 5.015 as to the new assignment.

(3) If a judge is assigned in any other manner, a motion to disqualify that judge, with an order and supporting affidavit, must be presented to the Presiding Judge at ex parte by the close of the judicial day following notice of the assignment. A copy of the motion, affidavit and order must be served on the judge being disqualified by the moving party and each party to the action who is not in default.

(4) In small claims, FEDs, violations and misdemeanor offenses, the Presiding Judge may assign a motion for change of judge to another judge for decision.

(5) For purposes of ORS 14.250 et seq. and this Rule, a judge who enters rulings or orders in any arraignment, pre-trial release request at the time of arraignment, pre-trial conference, an Initial Case Management Conference pursuant to SLR 7.011, or daily Call pursuant to SLR 7.055, shall not be considered to have ruled on a particular matter within the meaning of ORS 14.260(3). A party shall not waive any right pursuant to ORS 14.250 et seq. as to such judge by failing to move for change of judge at the time of appearance before such judge at any proceeding listed in this paragraph.

Delayed Decision-Making

Uniform Trial Court Rules

CHAPTER 2—Standards for Pleadings and Documents

2.030 MATTERS UNDER ADVISEMENT MORE THAN 60 DAYS

(1) If any judge shall have any matter under advisement for a period of more than 60 days, it shall be the duty of all parties to call the matter to the court's attention forthwith, in writing.

(2) If the matter remains under advisement for 90 days, all parties are required again to call the matter to the judge's attention forthwith, in writing, with copies to the presiding judge, if any, and the Chief Justice.

Available at http://courts.oregon.gov/OJD/docs/programs/utcr/2012_UTCR_ch02.pdf

District of Oregon - Local Rules of Civil Procedure

LR 83-13 Reminders to the Court

(a) Matters Under Advisement

If any matter, including a motion or a decision in a bench trial, is under advisement more than sixty (60) days, the parties must jointly send the assigned judge a letter or send an e-mail to the appropriate courtroom deputy clerk describing the matter and stating when it was taken under advisement.

(b) Failure to Schedule a Preliminary Pretrial Conference

Unless a trial date has already been set, if the assigned judge fails to schedule a preliminary pretrial conference within fourteen (14) days after the lodging of the pretrial order or order waiving the pretrial order, each affected party must send the assigned judge a letter advising that no conference has been set.

Available at http://www.ord.uscourts.gov/index.php/attorneys/local-rules/local-rules-of-civil-procedure

Dealing with a Client's Lie.

West's Oregon Revised Statutes Annotated
Oregon Rules of Professional Conduct
Client-Lawyer Relationship

Rules of Prof. Conduct, Rule 1.6

Rule 1.6 Confidentiality of Information

Currentness

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to disclose the intention of the lawyer's client to commit a crime and the information necessary to prevent the crime;

(2) to prevent reasonably certain death or substantial bodily harm;

(3) to secure legal advice about the lawyer's compliance with these Rules;

(4) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

(5) to comply with other law, court order, or as permitted by these Rules; or

(6) to provide the following information in discussions preliminary to the sale of a law practice under Rule 1.17 with respect to each client potentially subject to the transfer: the client's identity; the identities of any adverse parties; the nature and extent of the legal services involved; and fee and payment information. A potential purchasing lawyer shall have the same responsibilities as the selling lawyer to preserve information relating to the representation of such clients whether or not the sale of the practice closes or the client ultimately consents to representation by the purchasing lawyer.

(7) to comply with the terms of a diversion agreement, probation, conditional reinstatement or conditional admission pursuant to BR 2.10, BR 6.2, BR 8.7 or Rule for Admission Rule 6.15. A lawyer serving as a monitor of another lawyer shall have the same responsibilities as the monitored lawyer to preserve information relating to the representation of the monitored lawyer's clients, except to the extent reasonably necessary to carry out the monitoring lawyer's responsibilities under the terms of the diversion, probation, conditional reinstatement or conditional admission and in any proceeding relating thereto.

Credits
[Adopted effective January 1, 2005. Amended effective November 30, 2005; November 16, 2006; January 20, 2009.]

West's Oregon Revised Statutes Annotated
Oregon Rules of Professional Conduct
Advocate

Rules of Prof. Conduct, Rule 3.3

Rule 3.3. Candor toward the tribunal

Currentness

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel;

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if permitted, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false;

(4) conceal or fail to disclose to a tribunal that which the lawyer is required by law to reveal; or

(5) engage in other illegal conduct or conduct contrary to these Rules.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if permitted, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, but in no event require[s] disclosure of information otherwise protected by Rule 1.6.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

Credits
[Adopted effective January 1, 2005. Amended effective November 30, 2005; December 6, 2010.]

Rules of Prof. Conduct, Rule 3.3, OR R PROF COND Rule 3.3

276 Or. 225
Supreme Court of Oregon.

In re Complaint as to the Conduct of A., Accused.

Argued and Submitted June 7, 1976. | Decided Sept. 23, 1976.

Disciplinary proceeding was initiated on a complaint filed by the Oregon State Bar and, from a decision of the Disciplinary Review Board, an appeal was taken. The Supreme Court held that failure to withdraw once client refused to permit lawyer to correct a deception that client had perpetrated upon court was not a basis for imposing discipline where, at time of occurrence, there was substantial disagreement over the applicable duty, the duty to disclose or the duty to protect the client's confidences and secrets as well as the proper course of conduct when such conflict arose, and the lawyer, who was never formally charged with any failure to withdraw as a violation of professional conduct, made several good faith attempts to ascertain the proper course of action and to conform his own conduct to that standard; it was further held that members of the Oregon State Bar must in the future withdraw from a case when a client refuses to allow disclosure of a fraud perpetrated by the client upon a tribunal.

Complaint dismissed.

West Headnotes (4)

[1] Attorney and Client
Candor, and Disclosure to Opponent or Court

Disciplinary rule in effect at time of alleged occurrence, requiring a lawyer who knows that his client has perpetrated a fraud on a tribunal to call upon client to rectify same and to reveal fraud to tribunal in event client refuses, did not require revelation of client's misconduct to court if disclosure would violate a confidence or secret of client and, hence, did not bring into play further rule providing for mandatory withdrawal by lawyer if he knows or it is obvious that his continued employment by client will result in violation of a disciplinary rule.

[2] Attorney and Client
Duty to Accept or Decline Representation

Policy of Oregon State Bar of encouraging client to permit lawyer to make disclosure, of informing client that lawyer will have to withdraw if there is no disclosure, and of performing as required by withdrawing in absence of disclosure is correct and should be followed in future when conflicts arise between duty to protect a client's confidences and secrets and duty to prevent a fraud on a tribunal.

1 Cases that cite this headnote

[3] Attorney and Client
Defenses

Failure to withdraw once client refused to permit lawyer to correct a deception that client had perpetrated upon court was not a basis for imposing discipline where, at time of occurrence, there was substantial disagreement over the applicable duty, the duty to disclose or the duty to protect the client's confidences and secrets, as well as the proper course of conduct when such a conflict arose, and the lawyer, who was never formally charged with any failure to withdraw as a violation of professional conduct, made several good faith attempts to ascertain the proper course of action and to conform his own conduct to that standard.

1 Cases that cite this headnote

[4] Attorney and Client
Duty to Accept or Decline Representation

Members of the Oregon State Bar must withdraw from a case when a client refuses to allow disclosure of a fraud that client has perpetrated on a tribunal.

Attorneys and Law Firms

***226** ****480** Walter H. Evans, Jr., of Evans & Peek, Portland, argued the cause and filed briefs for the accused.

Phillip D. Chadsey, Portland, argued the cause and filed a brief for the Oregon State Bar. With him on the brief were Charles F. Hinkle and Thomas B. Hebert, Portland.

Before DENECKE, C.J., and O'CONNELL, HOLMAN [*] ,TONGUE, HOWELL and BRYSON, JJ.

Opinion

***227** PER CURIAM.

This is a disciplinary proceeding initiated by the Oregon State Bar against the accused, wherein the accused is charged with misleading the trial court in a divorce suit. The review committee of the Bar was divided, with three members voting for a reprimand and two members voting to dismiss the charges.

The facts and dates involved are important.

Gordon Goheen, who was the client involved in this case, was married to Alice Goheen and they had three children. Gordon's mother had become senile and incompetent by 1964. Gordon, pursuant to a power of attorney, sold his mother's residence and invested the proceeds in a mutual fund in his own name. He was the only prospective heir. In 1965 Gordon was appointed guardian of his mother's estate in Polk County. In 1966 the Goheens were divorced, but the mother's guardianship funds were not an issue in the divorce and were retained by Gordon. The accused was not involved in any of these proceedings.

The Goheens eventually remarried, but another divorce proceeding was filed in 1971. At that time Gordon first retained the accused who, during interviews with Gordon, found out that he had never filed an inventory of the guardianship assets or taken any other action in connection with the guardianship. The accused also learned that Gordon had applied for welfare payments for his mother and that payments had been made for the mother's support. The accused advised Gordon that he was probably guilty of welfare fraud because his mother's guardianship assets in the mutual fund had not been disclosed in the welfare application. By that time these assets were worth approximately $20,000. The accused instructed his client to terminate the welfare payments, and he began preparing an accounting of the guardianship assets for his client. Shortly thereafter, however, Goheen advised the accused that his mother had died ***228** and was buried in Salem. Accused then told Goheen that his mother's estate should be probated so that the guardianship assets could be included in the estate and the welfare payments refunded. Goheen also told the accused that he had already contacted the Public Welfare Commission and made arrangements for repayment of the amounts paid by the Commission. Thereafter, the accused initiated probate proceedings and filed an inventory listing the mutual funds. The guardianship was eventually terminated by transferring the guardianship assets to the mother's estate. The welfare claim was submitted and paid.

****481** The day after the probate proceedings were filed, Gordon's deposition was taken by his wife's attorney in the pending divorce suit. In response to a question, Goheen indicated that he held some mutual funds as his mother's legal guardian, and that he had used some of these funds for her support. He was then asked:
'Q Do you still do that on a regular basis?

'A No, it's not being taken out now. There's been enough of an income I believe that's been able to take care of her payments.'

That line of questioning was not pursued any further, and Gordon was not asked whether his mother was alive, the status of her health, or any further questions about her. He did not volunteer the fact that his mother had died.

The divorce suit was heard on October 29, 1971. The primary issues involved custody of the children and the division of the property. Gordon testified as to the parties' respective assets and indicated that the mutual fund, while in his own name, belonged to his mother. Thereafter, the following exchange occurred:
'Q Is any part of that fund being used for your mother's upkeep at this time?

'A No.

'* * *

'Q Where is your mother at this time?

***229** 'A Salem.

'* * *

'THE COURT: If some official from American Express Stock Fund were here and he had your account, what name would it show on that account?

'THE WITNESS: It would show mine, I believe, your Honor.

'* * *

'THE COURT: If you are the guardian over your mother's estate, why wouldn't that account show you as the guardian?

'THE WITNESS: I'm afraid that was an oversight on my part, your Honor. Until I met with Mr. Anderson because of this, I had not realized that it should have been such and I find that her name should have also been on that account, the checking account, but I was the only son.

'THE COURT: Have you changed it since learning?

'THE WITNESS: Yes. It's in the process of being changed through the Polk County. Is that correct, Mr. Anderson?

'THE COURT: Tell me what you know.

'THE WITNESS: Yes. Yes. It was when I found that this was legally wrong.

'THE COURT: Is it correct then for the five years plus you have been guardian and you have not filed any inventory that reflected either the checking account or the stock fund account?

'THE WITNESS: For some reason, no, other than with Social Security and the Veterans Administration as far as the money they paid me. I possibly could say-I say this out of my own memory to the best of my knowledge the Court has not required me to make a dollar by dollar account of this.

'THE COURT: Because your mother does not have a husband and because you are the only son, did you enter into any verbal arrangement with her that upon her death, you do just consider this money yours and therefore it wouldn't have to be probated in any way?

'THE WITNESS: Well, the only reason it might have to be probated-yes.

'THE COURT: You made that arrangement with your mother?

***230** 'THE WITNESS: Yes, that I handle her affairs. That was made, your Honor, ****482** back when I was made power of attorney originally-after my father's death she's been mentally, really incapacitated. This is why the home was originally sold because of senility. She had a number of strokes. She would leave things-burn food on the stove.

'THE COURT: Had she died in the interim, you would have treated all of this money as your own? You would not have probated her estate so far as these funds?

'THE WITNESS: I would have probated it only in regards to any debts she might have, but I don't know. I had not thought that far ahead about that type of thing because-I suppose it went as far as it did because I didn't have other brothers or sisters, or anybody to consult. I did it on my own.'

Eventually, the trial judge, in an oral decision, awarded custody of the children and the family home to Gordon. To offset the award of the home, he provided that Mrs. Goheen should receive an award of $5,000, plus $1,500 for her interest in their personal property, payable initially in installments, but that 'the whole balance will become due and payable upon the death of his mother also provided that if her estate is probated not later than termination of that probate.' The court also found that the mutual fund was a gift to Gordon from his mother, and awarded the wife an additional $5,000 judgment 'payable on the death of (Gordon's) mother but in no event payable later than five years from the date of the decree.'

At the disciplinary hearing the accused testified that he had been concerned about Gordon's statement that his mother was in Salem, because it was apparent from the oral decision that the trial court believed that Mrs. Goheen was still alive. He also testified that after the trial court's decision, he had a talk with his client:

'I told him that I felt that the Judge had obviously drawn the wrong conclusion and misunderstood what his intentions were. Gordon said to me, 'Look, if the examiner had asked me one more question and if he would have asked me whether my mother was alive or ***231** dead, I would have told him.' I said the Judge having misunderstood, I feel that we should clear that up with him. But I did tell him, too, that I felt under the total context of the case that the Judge would be quite critical of him, that in view of the Welfare and conversion problem, I felt the conversion problem wasn't entirely academic, that I thought he ought to know that the Judge would be unpredictable in his outlook. And Gordon said, well, he didn't see where he done any wrong and he wasn't going to take that chance.'

Gordon also testified at the hearing and stated that the accused had advised him before the divorce trial that he might be in serious difficulty because of his application for welfare for his mother without disclosing the guardianship assets. He also stated that the accused had advised him to answer all questions truthfully during the divorce suit but not to volunteer. The record indicates that the accused told Gordon that 'it was not in his interest to get in a discussion of his mother's affairs on account of the Welfare and on account of the conversion of funds. And he agreed to tell the truth just as it was.' Gordon also testified that he did not think his statement about his mother's whereabouts was to the issue in the divorce suit, that he expected further questioning about his mother's condition, that he was sure his wife already knew of his mother's death, and that he had been told not to volunteer. He also stated that he knew he was 'vulnerable' because of the welfare fraud.

Apparently the accused and his client believed that if the trial court knew that Gordon's mother was dead and that her estate was being probated, the court, in making its distribution in the divorce suit, would be interested in the amount of claims against the estate and that if this subject were pursued the evidence of the ****483** welfare fraud would be revealed. In fact, the trial judge testified that had he known the true facts, he would have inquired about the extent of any claims against the estate, and that if he knew that welfare payments had been made when the estate had substantial ***232** assets, it 'would have caused me to react.' He also stated that had he known the true facts, he would have increased the award to Mrs. Gordon Goheen.

After the court's oral decision, and after Gordon refused to allow the accused to talk to the judge, the accused discussed his situation with his partner. They both recognized the accused's conflict between his duty to protect the lawyer-client confidentiality and the accused's duty to prevent a fraud upon the court. The accused also called the State Bar office for an opinion on this matter and was told that he would have to submit his question in writing and that it would be referred to the Ethics Committee and passed upon at its next meeting. The situation required a more immediate resolution and so, after some research on his own, the accused apparently made the determination that it would be best to remain silent under these circumstances. The accused then drafted a decree in conformity with the judge's oral decision.

The amended complaint filed by the Bar contained the following charge: [1]

'* * * In the course of that trial, respondent, Gordon G. Goheen misled the Court to believe that his mother, Cecile G. Goheen, was still alive and that he was ***233** obligated to provide for her care from income he was receiving from certain stock which hs mother had previously transferred to him. This stock, and the income from it, the Court was led to believe, was not then available and might not be available within the immediate subsequent five-year period for use by the respondent, Gordon G. Goheen, to pay the petitioner, Alice C. Goheen, for her share of the marital property upon dissolution of the marriage.
'The Accused, knowing that his client, Gordon G. Goheen, had falsely misled the Court into believing that Cecile G. Goheen was still alive, failed to advise the Court of her death and that his client was no longer under any obligation to use the income from the stocks for the support of his mother.'

The Trial Committee made Inter alia the following findings:
'* * *

'10. After the client's testimony, the Court retired to its chambers, and Anderson asked the client to correct or allow him to correct any misunderstanding the judge might have on this point.

'11. The client refused both requests on the grounds that he had told the truth and that the judge did not misunderstand.

'12. When the Court returned to the bench and issued its decree, Anderson ****484** realized for the first time that the Court had accepted as true the inference the client's mother was alive.

'* * *

'16. Disclosure of the error of the Court by Mr. Anderson to the Court could have exposed the client to criminal fraud prosecution concerning welfare claims to the mother.

'* * *

'18. The Court found that the assets of the Fund were owned by client, when in truth the ownership was in the name of the personal representative of the estate of Cecile G. Goheen.

'* * *.'

However, the Trial Committee found the accused ***234** had violated Disciplinary Rule DR7-102(B) which requires a lawyer to reveal his client's fraud to the Court. The Committee found the rule had been violated by perpetrating
'a fraud on the Court during the trial by only introducing evidence of the guardianship which would indicate the client's mother was alive and By not introducing evidence that the mother's estate was being probated especially since Anderson was the Attorney for the personal representative.' (Emphasis added.)

This finding cannot stand because it was not alleged in the pleading and it was never argued that the accused committed an ethical violation in this fashion. Moreover, counsel for the Bar, after the Trial Committee had made its findings, wrote a letter to the chairman of the Review Committee in which he stated, with commendable frankness:
'As counsel for the Oregon State Bar I find myself in the unusual position of agreeing with the Accused that the Trial Board's conclusion of law that he violated Disciplinary Rule DR7-102(B) 'by perpetrating a fraud on the Court during the trial by only introducing evidence of the guardianship which would indicate that the client's mother was alive and by not introducing evidence that the mother's estate was being probated, especially since Anderson was the attorney for the personal representative' was unjustified.

'It is and remains the Bar's position that the Accused violated Disciplinary Rule DR7-102(B) by not withdrawing from the case when he knew that his client had misled the Court.

'I personally feel the evidence is clear that the Accused was very concerned about the ethical dilemma which his client had placed him in, But did nothing on his own to mislead the Court as the Trial Board's conclusion states.

'While I feel a written reprimand is appropriate for not having withdrawn under the circumstances, It would be an injustice to the Accused if the basis for the reprimand was that he perpetrated a fraud upon the Court as the result of his own conduct.' (Emphasis ours.)

After reviewing the evidence, two members of the ***235** Review Committee found that the accused participated in Gordon's intentional misleading of the court and that, at the very least, he should have withdrawn as attorney when he knew that Gordon had misled the court. They concluded that the prohibition against disclosing information obtained during the attorney-client relationship, DR4-101(B), must yield to the rule prohibiting him from permitting deceit to be practiced upon the court, DR7-102(B).

Another member of the Review Committee concurred in the recommendation of a public reprimand on the basis that the accused had a duty to insist that his client permit him to correct the client's deception and, failing that, to withdraw from the case. He noted that the accused had an ethical duty to not 'blow the whistle' on his client, but he also felt that the accused permitted himself to become part of the deception 'by failing to immediately disassociate himself from it.'

Two other members of the Review Committee dissented and filed an opinion which stated, in part:
'In these proceedings the interest of the public is the paramount consideration. ****485** The public has an interest not only in full and fair disclosure, but also in the maintenance of confidential relationships between attorneys and clients and complete advocacy of the client's interests by his lawyer. A lawyer who discloses his client's secrets or who presents evidence to assist the other side is as derelict as one who lies to the court.

'This proceeding does not involve a lawyer who lied, but instead a client who answered questions incompletely. If counsel had intervened he would have been subject to charges of breach of confidence, and failure to diligently advocate his client's cause. By not intervening he is accused in effect of helping to obstruct justice. I submit that the accused in effect would have been criticized by someone regardless of what he did.'

On appeal to this court, the Bar has reiterated its position that the evidence in this case does not warrant any inference that the accused intentionally attempted to mislead the court. However, the Bar also ***236** contends that the accused should have either disclosed the true facts to the court or withdrawn as counsel.

It is obvious from the record that the members of the Trial Committee and the Review Board, as well as counsel for the Bar, have several different opinions as to the appropriate ethical conduct in this situation. In our view, this reflects the general disagreement among members of the Bar as to which policy should prevail in this situation-the duty to protect the client's confidences and secrets, or the duty to prevent a fraud on the court.

DR2-110(B)(2) provides for mandatory withdrawal by the lawyer if 'he knows or it is obvious that his continued employment will result in violation of a Disciplinary Rule.' The only disciplinary rule which the accused is alleged to have violated is DR7-102(B)(1). The latter provides, in effect, that if the lawyer knows that his client has perpetrated a fraud on a tribunal, he shall call upon the client to rectify the same, and if the client refuses, the lawyer is required to reveal the fraud to the tribunal. However, DR4-101 provides that a lawyer shall not knowingly reveal a confidence or secret of his client. The potential conflicts between the requirement to report to the court and the duty to maintain the confidences or secrets of a client are obvious.

A similar case involving this conflict was once before the ABA Committee on Professional Ethics, chaired by H. Drinker, author of Legal Ethics (1953), and is reported in Formal Opinion 287 (June 27, 1953). In that case, the attorney represented the husband in a contested divorce suit. In a subsequent related matter the client advised the attorney he had committed perjury in the first suit, that his wife was aware of it, and that she threatened to disclose the true facts unless support money was forthcoming. The questions posed were: What is the duty of the attorney to the court, and what is the duty of the attorney to the client? The opinion makes it clear that ABA Canons 29 ***237** and 41 (the predecessors of DR7-102 requiring the attorney to report the fraud to the court) do not apply to confidences and secrets of a client protected under Canon 37 (now DR4-101 requiring the preservation of the confidences and secrets of a client). The majority opinion stated:

> '* * * We do not consider that either the duty of candor and fairness to the court, as stated in Canon 22, or the provisions of Canon 29 and 41 above quoted are sufficient to override the purpose, policy and express obligation under Canon 37.'

Regarding the action to be taken by the lawyer, the committee stated:
'In the case stated the lawyer should urge his client to make the disclosure, advising him that this is essential to secure for him any leniency in the event of the court's finding out the truth. He should also advise him to tell his wife ****486** that he proposes to do so, and thus avoid further blackmail. If the client will not take this advice, the lawyer should have nothing further to do with him, but despite Canons 29 and 41, should not disclose the facts to the court or to the authorities. * * *' [2] ABA Opinions on Professional Ethics 637 (1967).

[1] This was the only formal opinion bearing on this issue at the time of the conduct in question. In light of this opinion, it certainly could not have been 'obvious' at the time of the alleged violation that the accused's continued employment would violate a disciplinary rule, DR7-102(B). As interpreted by Formal Opinion 287, the rule did not require the revelation of the client's misconduct to the court when the disclosure ***238** would violate a confidence or secret of his client. Therefore, the accused was not Required to withdraw under DR2-110(B)(2).

The effect of Formal Opinion 287 is reinforced by ABA's 1974 amendment to DR7-102(B) requiring disclosure by the lawyer to the court. [3] As amended, the rule now reads:
'A lawyer who receives information clearly establishing that (1) His client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon his client to rectify the same, and if his client refuses or is unable to do so, he shall reveal the fraud to the affected person or tribunal, Except when the information is protected as a privileged communication.' (Italics denote the amendment.)

In a very recent opinion by the ABA Committee on Professional Ethics, Formal Opinion 341 (1975), the amendment is explained to have been necessary 'in order to relieve lawyers of exposure to such diametrically opposed professional duties.' The opinion also states:
'One effect of the 1974 amendment to D.R. 7-102(B)(1) is to reinstate the essence of Opinion 287 which had prevailed from 1953 until 1969. It was as unthinkable then as now that a lawyer should be subject to disciplinary action for failing to reveal information which by law is not to be revealed without the consent of the client, and the lawyer is not now in that untenable position. The lawyer no longer can be confronted with the necessity of either breaching his client's privilege at law or breaching a disciplinary rule.

'* * *

'The tradition (which is backed by substantial policy considerations) that permits a lawyer to assure a client that information (whether a confidence or a secret) given to him will not be revealed to third parties is so important that it

should take precedence, in all the most serious cases, over the duty imposed by D.R. 7-102(B). * * *' 61 ABA Journal 1543, 1544 (1975).

***239** There is, however, one significant omission between Formal Opinion 287 and the recent amendment to DR7-102(B) as explained in Formal Opinion 341. In Opinion 287 it was stated that the lawyer 'should have nothing further to do with (a client ****487** who refuses to correct the deception).'[4] No similar statement appears either in the amendment to DR7-102(B) or in Formal Opinion 341.[5]

[2] However, in 1972 the Oregon State Bar promulgated Opinion 227 of the Opinions of the Committee on Legal Ethics. Opinion 227, which was not yet in existence at the time of the conduct now in question, considered ABA Formal Opinion 287 and apparently interpreted it as calling for the Mandatory withdrawal of an attorney who finds himself in a position similar to that which was faced by the accused:

> 'This Committee recommends a continuation of the tradition of nondisclosure, encouraging the client to permit the lawyer to make the disclosure, informing the client that the lawyer will have to withdraw if there is no disclosure, and then performing as required by withdrawing in the absence of such consent.'

Although it is not clear whether this policy reflects the present position of the American Bar Association, in our view it is correct and it should be followed in this state when similar conflicts arise in the future.

[3] However, we do not feel that the accused should be disciplined for his failure to withdraw in this case for several reasons. It should be obvious from the above discussion that there has been substantial disagreement in the Bar over which rule takes precedence in this kind of situation-the duty to disclose or the duty to protect the client's confidences and secrets-as well ***240** as the proper course of conduct when such a conflict arises.[6] Although Formal Opinion 287, which was in effect at the time, suggests that the lawyer withdraw, there is nothing in that opinion which actually Requires withdrawal. Moreover, neither the recent amendment to DR7-102(B) nor Formal Opinion 341 makes any mention of any withdrawal requirement.

The record also discloses that the accused made several good faith attempts to ascertain the proper course of action and to conform his own conduct to that standard. Perhaps most importantly, however, the accused was never formally charged with any failure to withdraw as a violation of professional conduct.

[4] In summary, while we wish to emphasize our agreement with the mandatory withdrawal requirement of Opinion 227 of the State Bar, that opinion was not promulgated until after the conduct involving this accused had occurred. Under similar circumstances in the future, members of the Bar will, of course, follow the directions in Opinion 227 and, if the client refuses to allow disclosure, they must withdraw. However, we believe that it would be unfair to discipline the accused for his failure to do so under the circumstances of this case.

Complaint dismissed.

Parallel Citations

554 P.2d 479

Footnotes

* HOLMAN, J., did not participate in the decision of this case.

1 The complaint also contained a second count charging a separate ethical violation:
'Prior to September 1, 1971, the Accused in the course of representing Gordon G. Goheen learned that Goheen had committed a crime of welfare fraud in violation of ORS 411.630 by falsely representing that his mother, Cecile Dixon Goheen, was without assets and had applied to the State Public Welfare Commission for assistance for her support. As a result of Goheen's representation the State Public Welfare Commission made monthly payments to Cecile Dixon Goheen.
'The Accused, upon learning that his client, Gordon G. Goheen, had made a false application for welfare assistance for Cecile Dixon Goheen, failed to take any action to notify the proper authorities that his client was engaged in a continuing fraud against the State of Oregon and intended to continue to violate the criminal laws of the State of Oregon.'

However, the Trial Committee found, and we agree, that accused is clearly not guilty of the charge in Count II, as he advised his client to withdraw claims for welfare benefits for his mother and arranged for the reimbursement of all previous payments.

2 In regard to a companion case, Opinion 287 concludes:

'He should, in due course, endeavor to persuade the client to tell the court the truth and if he refuses to do so should sever his relations with the client, but should not violate the client's confidence. We yield to none in our insistence on the lawyer's loyalty to the court of which he is an officer. Such loyalty does not, however, consist merely in respect for the judicial office and candor and frankness to the judge. It involves also the steadfast maintenance of the principles which the courts themselves have evolved for the effective administration of justice, one of the most firmly established of which is the preservation undisclosed of the confidences communicated by his clients to the lawyer in his professional capacity.' (Emphasis added.)

3 Apparently, this amendment has not yet been adopted by the Oregon State Bar Association.

4 At another point it is suggested that the lawyer 'should sever his relations with the client.'

5 It is doubtful that this is merely an oversight, for Opinion 341 quotes other language from the same sentence in Opinion 287 which suggests a withdrawal.

6 See also Dissenting Opinion of two members of the Ethics Committee in Formal Opinion 287. Compare Rule 11, Code of Trial Conduct of the American College of Trial Lawyers (1971).

PRO SE/SELF-REPRESENTED LITIGANTS

- Guidance from SCOTUS, Federal Courts, & Oregon Courts:
  - Pleadings filed by *pro se* litigants, "however inartfully pleaded" are held to "less stringent standards" than those drafted by attorneys. *Haines v. Kerner,* 404 US 519 (1972)
  - Pleadings by *pro se* litigants "are entitled to a permissive reading." 96 F3d 1331 (9th Circuit 1996)
  - **Civil Matters**— *Pro se* parties are held to the same standards as represented parties. *Charles Schwab & Co., Inc. v. Pletz,* 95 Or.App. 48 (1989).
    - A *pro se* litigant can be sanctioned under FRCP 11. *Business Guides, Inc. v. Chromatic Communications Enters., Inc.* 498 US 533 (1991)
      - ❖ But generally not done unless *pro se* litigants repeatedly file frivolous actions. See e.g. *Corrigan v. Unknown King County Deputy #1* et. al., 235 Fed Appx 472 (9th Circuit 2007); *cert. denied* 552 US 1257 (2008).
    - In Oregon, about 50% of all Family Law cases involve a self-represented litigant (preferred Family Law term for *pro se* parties).
  - **Criminal Matters**—There is a constitutional right to self-representation in criminal matters. However, the accused "should be made aware of the dangers and disadvantages of self-representation" and any such waiver should be "knowing and intelligent." *Faretta v. California,* 422 US 806 (1975)
    - The test for whether waiver was "knowing and intelligent"—the "totality of the circumstances test"—is the same under both the Oregon and US constitutions. *State v. Meyrick,* 313 Or. 125 (1992).
    - Also, the right to waive counsel is not absolute. A court may deny defendant's request to waive right to counsel if waiver would be disruptive to the judicial process. *State v. Davis,* 110 Or.App. 358 (1991)
  - **Admin Law**—*Pro se* litigants in contested proceedings are to be afforded some latitude in procedural requirements. *Berwick v. AFSD,* 74 Or.App. 460 (1985)
    - "However, an agency is not compelled to excuse a *pro se* litigant from procedural requirements." *Bennett v. Board of Optometry,* 125 Or.App. 66 (1994)
    - But ALJs may attempt to discover facts and pursue arguments and analysis not presented by the parties. Hearings officers have a duty to assist *pro se* parties in presenting all evidence for a full and fair inquiry. *Berwick v. Adult & Family Services Div. Dept. of Human Resources,* 74 Or.App. 460 (1985)
  - **Appellate Law**—an issue must still be preserved in a lower court under ORAP 5.45, even if the party was *pro se* (and even if the ALJ did not perform his or her duties under *Berwick*). *Thomas Creek Lumber v. Board of Forestry,* 188 Or.App. 10 (2003)

- Guidance from Oregon Code of Judicial Conduct
    - JR 2-102(A)—"A judge shall provide to every person who has a legal interest in a proceeding, and to that person's lawyer, the right to be heard according to law."
    - JR 2-107—"A judge shall be faithful to the law and shall decide matters on the basis of facts and applicable law."
    - JR 2-110(A)—"A judge shall be patient, dignified and courteous to litigants, jurors, witnesses, lawyers, court personnel and members of the public."
    - JR 2-110(B)—"A judge shall not act in a way that the judge knows, or reasonably should know, would be perceived by a reasonable person as biased or prejudiced toward any of the litigants, jurors, witnesses, lawyers or members of the public."
    - JR 2-110(C)—"A judge shall require lawyers and court personnel who are subject to the judge's direction or control to act in accord with the principles embodied in paragraphs (A) and (B) of this rule."
    - JR 2-110(D)—"Paragraphs (B) and (C) of this rule do not preclude consideration or advocacy of any issue relevant to the proceeding."

- Guidance from the Oregon Rules of Professional Conduct
    - ORPC 1.8(h)(2)—"A lawyer shall not settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in connection therewith."
    - ORPC 2.4(b)(2)—"A lawyer serving as a mediator shall recommend that each party seek independent legal advice before executing the documents."
    - ORPC 4.3—"In dealing on behalf of a client or the lawyer's own interests with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client or the lawyer's own interests."

West's Oregon Revised Statutes Annotated
Oregon Rules of Professional Conduct
Client-Lawyer Relationship

Rules of Prof. Conduct, Rule 1.8

Rule 1.8. Conflict of Interest: Current Clients: Specific Rules

Currentness

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;

(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and

(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, confirmed in writing, except as permitted or required under these Rules.

(c) A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift, unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include a spouse, domestic partner, child, grandchild, parent, grandparent, or other relative or individual with whom the lawyer or the client maintains a close familial relationship.

(d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

(1) the client gives informed consent;

(2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and

(3) information related to the representation of a client is protected as required by Rule 1.6.

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregate agreement as to guilty or nolo contendere pleas, unless each client gives informed consent, in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

(h) A lawyer shall not:

(1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement;

(2) settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in connection therewith;

(3) enter into any agreement with a client regarding arbitration of malpractice claims without informed consent, in a writing signed by the client; or

(4) enter into an agreement with a client or former client limiting or purporting to limit the right of the client or former client to file or to pursue any complaint before the Oregon State Bar.

(i) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

(1) acquire a lien authorized by law to secure the lawyer's fee or expenses; and

(2) contract with a client for a reasonable contingent fee in a civil case.

(j) A lawyer shall not have sexual relations with a current client of the lawyer unless a consensual sexual relationship existed between them before the client-lawyer relationship commenced; or have sexual relations with a representative of a current client of the lawyer if the sexual relations would, or would likely, damage or prejudice the client in the representation. For purposes of this rule:

(1) “sexual relations” means sexual intercourse or any touching of the sexual or other intimate parts of a person or causing such person to touch the sexual or other intimate parts of the lawyer for the purpose of arousing or gratifying the sexual desire of either party; and

(2) “lawyer” means any lawyer who assists in the representation of the client, but does not include other firm members who provide no such assistance.

(k) While lawyers are associated in a firm, a prohibition in the foregoing paragraphs (a) through (i) that applies to any one of them shall apply to all of them.

Credits
[Adopted effective January 1, 2005. Amended effective November 30, 2005; January 1, 2013.]

Rules of Prof. Conduct, Rule 1.8, OR R PROF COND Rule 1.8
Current with amendments received through 7/1/13.

End of Document

West's Oregon Revised Statutes Annotated
Oregon Rules of Professional Conduct
Counselor

Rules of Prof. Conduct, Rule 2.4

Rule 2.4 Lawyer Serving as Mediator

Currentness

(a) A lawyer serving as a mediator:

(1) shall not act as a lawyer for any party against another party in the matter in mediation or in any related proceeding; and

(2) must clearly inform the parties of and obtain the parties' consent to the lawyer's role as mediator.

(b) A lawyer serving as a mediator:

(1) may prepare documents that memorialize and implement the agreement reached in mediation;

(2) shall recommend that each party seek independent legal advice before executing the documents; and

(3) with the consent of all parties, may record or may file the documents in court.

(c) Notwithstanding Rule 1.10, when a lawyer is serving or has served as a mediator in a matter, a member of the lawyer's firm may accept or continue the representation of a party in the matter in mediation or in a related matter if all parties to the mediation give informed consent, confirmed in writing.

(d) The requirements of Rule 2.4(a)(2) and (b)(2) shall not apply to mediation programs established by operation of law or court order.

Credits
[Adopted effective January 1, 2005. Amended effective November 30, 2005.]

Rules of Prof. Conduct, Rule 2.4, OR R PROF COND Rule 2.4
Current with amendments received through 7/1/13.

End of Document

West's Oregon Revised Statutes Annotated
Oregon Rules of Professional Conduct
Transactions with Persons Other Than Clients

Rules of Prof. Conduct, Rule 4.3

Rule 4.3 Dealing with Unrepresented Persons

Currentness

In dealing on behalf of a client or the lawyer's own interests with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client or the lawyer's own interests.

Credits
[Adopted effective January 1, 2005. Amended effective November 30, 2005.]

Rules of Prof. Conduct, Rule 4.3, OR R PROF COND Rule 4.3
Current with amendments received through 7/1/13.

End of Document