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Liability Shields for Lawyers: Do Recent Oregon Mediation Act and Attorney-Client Privilege Cases Demand Greater Disclosure to Clients?

A strict interpretation of the Oregon mediation statutes and evidence code trumps ethical considerations and gives protection to lawyers who have been sued for malpractice. That is the message from two recent Oregon appellate decisions on mediation confidentiality and attorney-client privilege. But the flip side is that the courts may have opened up a Pandora's box of new disclosure requirements for Oregon lawyers.

Alfieri v. Solomon and *Crimson Trace Corp. v. Davis Wright Tremaine LLP* raise critical questions: If, per *Alfieri*, mediation communications between a client and the client's own lawyer cannot be used in a subsequent malpractice case against the lawyer, can lawyers ethically shield themselves from malpractice liability by advising a client to mediate? And what happens when lawyers become concerned about conflicts and malpractice while they are representing a client and ask other lawyers in their firm for legal advice? Per *Crimson*, if the lawyers are seeking personal legal advice from other lawyers in the firm, those intra-firm conversations are privileged, and the lawyers need not disclose the content of the conversations if the client later sues them for malpractice. But if some lawyers in the firm are giving personal legal advice to other lawyers in the firm while the firm is still representing its client, must the lawyers obtain a signed conflict waiver from their client before they start giving protected legal advice to each other?

ALFIERI

In *Alfieri*, a client sued for malpractice following mediation of an employment lawsuit. Among other allegations, the client asserted that the attorney had not advised him that the former employer had not complied with terms of the settlement agreement, calling into question its enforceability. *Alfieri v. Solomon*, 263 Or App 492 (June 11, 2014).

The court strictly construed the mediation confidentiality provisions in ORS 36.220-36.238. All communications between the attorney and his client relating to the substance of the settlement agreement—from the time the parties entered mediation until mediation ended with a signed agreement—were held to be confidential and not admissible in evidence, even in a subsequent malpractice action. (In 2009, the Oregon federal court came to the same

conclusion. *Fehr v. Kennedy*, 2009 WL 2244193 (D Or July 24, 2009), aff'd 387 Fed Appx 789 (9th Cir 2010).)

The bottom line of *Alfieri* is that what happens in mediation stays in mediation—even if it effectively allows an attorney to get away with malpractice and maybe even an ethics violation.

The *Alfieri* court did not grapple with the ethical implications of its strict statutory construction, but Texas courts, interpreting a somewhat different statute, did and have allowed disclosure of mediation communications in cases of attorney malpractice and an executor's breach of fiduciary duty. *Avary v. Bank of Am., N.A.*, 72 SW3d 779 (Tex App 2002), *Alford v. Bryant*, 137 SW3d 916 (Tex App 2004).

California has a broad mediation confidentiality statute. California courts have maintained mediation confidentiality in legal malpractice cases, but also have expressed dismay at the result. *Cassel v. Superior Court*, 51 Cal 4th 113 (2011); *Wimsatt v. Superior Court*, 152 Cal App 4th 137, 163 (2007) ("We believe that the purpose of mediation is not enhanced by such a result because wrongs will go unpunished and the administration of justice is not served."). California is now considering a legislative fix. California Law Review Commission's in-progress study at <http://www.clrc.ca.gov/K402.html>.

The solution might be for Oregon to adopt an exception to mediation confidentiality in legal malpractice cases, as at least fifteen states and the District of Columbia already have. The Uniform Mediation Act allows disclosure of information "sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice against a mediation party, nonparty participant, or representative of a party based on conduct occurring during a mediation." UMA § 6(a)(6).

Until Oregon adopts such a reform (or until *Alfieri* is reversed), attorneys are in an ethical bind. After *Alfieri*, lawyers must consider RPC 1.8(h)(1), which states, "A lawyer shall not . . . make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement." And since the mediation statutes appear to require complete confidentiality that extends to all subsequent "adjudicatory" proceedings, ORS 36.222(7), the lawyer also has to consider RPC 1.8(h)(4) that prohibits limiting the client's right to pursue a bar complaint—whether or not the client has independent advice.

An agreement to mediate, whether or not in writing or signed by the lawyer, effectively shields the lawyer from a malpractice claim. The situation is made even clearer where both the client and the lawyer sign a typical mediation agreement in which all signators agree to keep mediation communications confidential. So under RPC 1.8(h)(1), must the client have

independent representation to agree to enter into mediation? That may seem an absurd conclusion, given the favor with which courts generally view mediation, but the RPCs would seem to compel both disclosure and independent representation.

The analysis may be even simpler. RPC 1.4(b) requires the lawyer to “explain a matter to the extent reasonably necessary to the permit the client to make informed decisions regarding the representation,” and RPC 1.7(a)(2) and (b) require informed consent where there is “a significant risk that representation . . . will be materially limited . . . by a personal interest of the lawyer.” While the lawyer’s interest may remain aligned with the client’s, at the least, clients may want to be informed that the lawyer has some special protections if the client agrees to mediate.

The situation is further complicated because confidentiality must be waived by all parties. ORS 36.222(2). Therefore, even if a lawyer agrees that he or she will not claim the protections of the mediation statutes, the other parties to the mediation still may assert confidentiality. (And the lawyer may risk a later claim by the PLF that the lawyer has comprised the defense of the malpractice claim.) So unless all parties agree to an advance confidentiality waiver, an unlikely scenario, it may be impossible to escape the issues presented by *Alfieri*.

CRIMSON TRACE

In *Crimson Trace Corp. v. Davis Wright Tremaine LLP* [DWT], 355 Or 476 (May 30, 2014), the Supreme Court held that communications between lawyers and their firm’s Quality Assurance Committee [QAC] (in effect, “in-house” counsel) were privileged under Oregon Evidence Code 503 and need not be disclosed to the firm’s client in a subsequent legal malpractice action—even though the communications concerned the very matter the lawyer was handling for the client and occurred during the course of the underlying case.

A DWT attorney who had prosecuted a patent was part of the law firm team bringing an action on behalf of Crimson to enforce the patent. The alleged infringers counterclaimed, asserting that Crimson and DWT lawyers had deceptively omitted material information when they submitted the patent to the Patent and Trademark Office. Concerned about conflicts of interest, the DWT lawyers consulted with the QAC, and one emailed the client’s CEO: “Under the circumstances, I should advise you that someone could argue I have a conflict of interest in that I may be defending my partner at the same time as I am representing Crimson. * * * I frankly don’t see this as an issue, but I do want you to know that you certainly have the right to consult with independent counsel to fully consider this.”

In the ensuing malpractice action, the trial court found a “fiduciary exception” to the privilege, ruling that the conflict of interest meant DWT could not assert attorney-client privilege. The

trial court reasoned that DWT did not disclose a potential conflict to Crimson, did not seek its consent to DWT's continued representation, and did not seek to withdraw from representation in the litigation.

The Supreme Court, on mandamus, disagreed with the trial court. The Court concluded that OEC 503(4) was a complete enumeration of exceptions to the attorney-client privilege and did not include a "fiduciary exception". Thus, the intra-firm communications need not be disclosed in a later malpractice case.

The court rejected an *amicus* argument that maintaining the privilege would condone the firm's violation of its duty of loyalty to its current client: "OTLA's argument is essentially one of policy. Our task is one of statutory interpretation." Ethical considerations, the court held, should not be conflated with the scope of the privilege. *Crimson Trace*, 355 Or at 490.

As does *Alfieri*, *Crimson* creates an ethical problem for the lawyers: if a lawyer wants to maintain an attorney-client privilege when he or she discusses potential error with other lawyers in the firm, do the communications create a firm-wide conflict of interest that must be disclosed to the client and waived in writing if the firm continues to represent the client?

RPC 1.7(a)(1) and (2) say that a current conflict of interest exists if the representation of one client will be directly adverse to another client or if there is a "significant risk" that representation of the client will be materially limited by a lawyer's responsibilities to another client (which could be a colleague at the firm or the firm itself) or a personal interest of the lawyer. RPC 1.10(a) imputes the conflict of interest to all lawyers of the firm: "While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so. . . . unless the prohibition is based on a personal interest of the prohibited lawyer . . . and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm."

When a lawyer talks to his in-house counsel, members of the in-house panel now have two clients whose interests may be adverse: The attorney seeking legal advice and the outside paying client the firm is representing. The lawyer and the firm can't have it both ways—claiming privilege as a "client" but not disclosing that the firm is serving potentially adverse clients and not obtaining a written waiver.

In making the disclosure, a lawyer must communicate "adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." RPC 1.7(b) (requiring informed consent as part of waiver to allow continued representation despite current conflict of interest); RPC 1.0(g) (defining "informed consent"). Each affected client must consent to continued representation in writing. RPC 1.7(b)(4). And in some cases the conflict may be so severe that the lawyer must withdraw. Under RPC 1.7(b)(3),

the lawyer must ensure that continued representation “does not obligate the lawyer to contend for something on behalf of one client that the lawyer has a duty to oppose on behalf of another client.”

In the *Crimson* scenario, an attorney must disclose not only that the client may have a malpractice claim (a helpful form letter is available on the Professional Liability Fund website), but also that all members of the firm might have a conflict that must be waived in writing, thanks to the consultation within the firm. Under RPC 1.0(g), that letter is also required to recommend that the client seek independent legal advice to determine if consent should be given.

The best option may be to call the PLF before doing anything else. See Helen Hirschbiel, *Mistakes Were Made: Regaining Your Stride After a Misstep*, Oregon State Bar Bull. July 2014. A further option may be to call outside counsel.

The irony is that consultation within the firm may increase the risks that the client will make a claim because the lawyer now might have to obtain informed consent on two fronts: (1) consent to continue the representation despite a possible error by the lawyer, and (2) consent to continued representation despite the conflict created by the firms’ lawyers now representing both themselves and their client, information that might scare any client.

So for Oregon lawyers, the immediate issue is not whether *Alfieri* and *Crimson Trace* were correctly decided—these are difficult legal and policy issues. But the courts’ decisions to give no weight to the ethical rules create significant complications for Oregon lawyers.