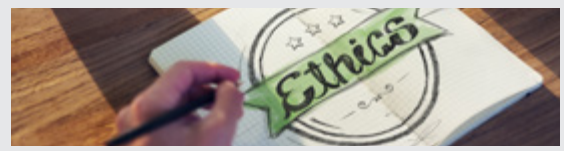
Q&A



LAWYER LIABILITY AND ETHICS

From Russia with Love—Lawyer Beats Conflict of Interest Charge

Joseph Brophy

A recent decision from a disciplinary proceeding in Oregon highlights the importance of precision when lawyers certify that their client understands an agreement they have signed and highlights the fine line between what does and does not constitute a conflict of interest. Plus, since the Maricopa Lawyer is always up on the important news of the day, Russia makes an appearance.

Client lived in St. Petersburg, Russia, before "an internet service that matched men with Russian women" found her one true love. Prince Charming made the trip from America to Russia to meet Client, as well as two other women he met through the website. After what was undoubtedly a rigorous interview process, Cupid's arrow found Client and Prince Charming. They returned to the United States and were married shortly thereafter in 2007.

A few days before the wedding, Prince Charming, clearly a hopeless romantic, told Client that she had to sign a prenuptial agreement or else he would not marry her, and she would be forced to return to Russia. Client retained Lawyer because she barely spoke English and could not understand much of the agreement. Lawyer advised Client that if Prince Charming died or they got divorced Client would get nothing. Client signed the agreement verifying that she fully read and understood the agreement. Lawyer also certified that Client acknowledged her full understanding of the agreement.

Everyone make sure you are sitting down—the marriage did not last. In 2017, Client decided to seek a divorce. She retained Lawyer once again, telling Lawyer for the first time that at the time she signed the agreement in 2007 she felt pressured into signing. Lawyer petitioned the court for dissolution and spousal support. Prince Charming moved for summary judgment on the claim for spousal support. In response to that motion, Client claimed that she had not understood the prenuptial agreement and had not voluntarily signed because of her limited knowledge of English.

The trial court found that Lawyer had a conflict of interest as the attorney who certified in 2007 Client's understanding of the agreement which Client now claimed she in fact had not understood. The court told Lawyer she must either withdraw or the court would file a bar complaint. Lawyer withdrew. Nevertheless, the State Bar of Oregon charged Lawyer with violating ER 1.7, which prohibits a lawyer from representing a client if there is a significant risk that a conflict of interest may materially limit the lawyer's representation.

The Bar argued that Lawyer violated ER 1.7 because she had a personal interest in the dispute over the enforceability of the prenuptial agreement in that Lawyer knew she failed to effectively communicate the terms and consequences of the agreement and that Client had lied to her about understanding the agreement. The Bar reasoned that a conflict arose because Client could potentially sue Lawyer for malpractice erroneously signing the prenuptial agreement certification.

A 2-1 decision of the Disciplinary Board found there was no conflict of interest. The Board found it critical that Lawyer did not certify that Client understood the agreement, but rather that Client "acknowledged she understood the agreement." It was undisputed that Client said she lied to Lawyer about her understanding of the agreement, and the Bar produced no evidence that Lawyer should have been aware of this lie. The Board reasoned that "absent evidence to the contrary, an attorney is entitled to rely on a client's assurances that she understands what the attorney is explaining." The Board reached the same conclusion on the duress that Client was under, concluding that there was no reason Lawyer should have been aware of that either.

Regarding the possibility that Lawyer would be a material witness in the dissolution proceeding, the Board noted that although that was a possibility (albeit not a charge brought against Lawyer for violating ER 3.7), any testimony by Lawyer would be on uncontested issues, which is allowed under ER 3.7. Client admitted she told Lawyer she understood the agreement and was lying when she did so. No one was claiming anything to the contrary.

The Board's dissenter would have sanctioned Lawyer because she should have recognized the conflicts of interest reconciling her advice in 2007 with her statements in the 2017 dissolution and spousal support matter. The potential conflicts found by the dissent include: exposure to claims from either party to the prenuptial agreement for the error in Lawyer's certification; exposure to claims from Client for inadequately advising her in 2007; or becoming a witness in the spousal support matter. The dissent also found that notwithstanding the favorable language in the certification signed by Lawyer certifying only Client's "acknowledgment" of understanding, she still had a duty to properly inform her client, and failed in that duty, arguably leaving Lawyer exposed to personal liability that would materially limit her 2017 representation of client.

Given the split between the panel, trial court and State Bar of Oregon, this is obviously a close question. When you certify your client's understanding of a written agreement, you may want to make room of the possibility that your client may not be entirely candid with you, or may take that position in the future, and reflect that possibility in your certification. ■

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