

May 2006 *Multnomah Lawyer Ethics Focus*

The Long View of Legal Ethics

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I work in a building that, like the Multnomah Bar, turned 100 years old this year. It has many traditional qualities—red brick walls, exposed timber beams and arched windows. At the same time, except for our law firm and an Irish bar, all of the tenants are cutting edge web or other high tech firms. The legal ethics rules are like my building. They have a traditional foundation but have evolved over the years to fit the changing times and demands of the practice of law.

Not too long after the Multnomah Bar was founded in 1906, the American Bar Association issued the first national set of model ethics rules, the Canons of Professional Ethics, in 1908. They were influential and were eventually adopted with variations in most states, including Oregon. Not too long before the Multnomah Bar celebrates its 100th anniversary, the ABA adopted a new set of model rules in 2002 and 2003. Like the Canons, the ABA's Model Rules of Professional Conduct remain influential and are being adopted with variations in most states, including Oregon. Comparing the ABA Canons with the new Oregon RPCs is a bit like taking a walking tour of my building: the foundations remain while the “tenants” reflect the dynamics of our times.

As for the foundations, let's look at three: conflicts, confidentiality and candor.

Canon 6 dealt with conflicts and, like modern day RPC 1.7, prohibited lawyers from taking on conflicting representations except where the clients involved had consented after disclosure of the conflict. In doing so, both Canon 6 and RPC 1.7 reflect the same bedrock fiduciary principle: we owe our clients a duty of loyalty.

Canon 6 also addressed confidentiality and, like current RPC 1.6, enjoined lawyers from revealing their clients' secrets and confidences. Although Oregon abandoned the terms "secrets" and "confidences" with the move to the RPCs last year, those concepts are still effectively part of our current rules by the way RPC 1.6 and 1.0(f) define the information we are to protect in terms of material protected by the attorney-client privilege and other information "that the client has requested be held inviolate or the disclosure of which would be embarrassing or would likely be detrimental to the client." Again, both the Canons and the RPCs reflect a central fiduciary principle: we owe our clients a duty of confidentiality.

Canon 22 offered succinct advice on candor: "The conduct of the lawyer before the Court and with other lawyers should be characterized by candor and fairness." Those same concepts are now found in RPCs 3.3, which deals with candor toward courts, 4.1, which addresses truthfulness in statements to others, and 8.4(a)(3), which prohibits dishonest conduct. Again, both the old and the new rules reflect the same key fiduciary principle: the duty of honesty.

Some things, of course, have changed and, like the web companies in my 100 year old building, reflect our contemporary economy and society. The lawyer advertising rules, for example, have changed significantly. Canon 27 generally prohibited all advertising and Canon 28 prohibited “stirring up litigation.” RPC 7.1 through 7.5 still contain some restrictions on lawyer advertising, but they permit a broad spectrum of lawyer marketing ranging from web sites to newspaper ads. Multijurisdictional practice is another good example. There is no mention of it in the Canons. RPC 5.5 (and its counterparts around the country based on the analogous ABA Model Rule) now permits temporary practice across state borders in a wide variety of practice settings.

The original Canons concluded with an interesting rule: “The Lawyer’s Duty in Its Last Analysis.” It, in turn, concluded: “[A]bove all a lawyer will find . . . highest honor in a deserved reputation for fidelity to private trust and to public duty[.]” That’s still good advice a century later.

ABOUT THE AUTHOR

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