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**Memorial Day:
Duties to Deceased Clients**

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When we think of our duties to former clients, we usually focus on the former client conflict rule, RPC 1.9, and the confidentiality rule, RPC 1.6. We understand instinctively that those duties can last a long time. In a decision last year, however, the Oregon Supreme Court reminded us that our duties to former clients can even extend beyond the client's death. In this column, we'll look at both our duties of loyalty and confidentiality to deceased clients.

Conflicts

In re Hostetter, 348 Or 574, 238 P3d 13 (2010), involved a lawyer who assisted a borrower, Ingle, in obtaining a series of secured loans from a private lender, Hohn. The lawyer also later represented Ingle in obtaining partial releases from the mortgage involved. Ingle died in 2004 and her daughter was appointed the personal representative of her mother's estate. After Ingle's death, the lawyer represented Hohn on a probate claim based on the loan agreements that he had earlier prepared for Ingle. Ingle's daughter filed a complaint with the Bar and the issue in the disciplinary proceeding was whether the lawyer violated the former client conflict rule when he handled the probate claim for Hohn seeking to enforce the loan agreements he had prepared for Ingle. The Supreme Court found a former client conflict.

The Supreme Court first noted that that the former client conflict rule applies to deceased clients. In doing so, the Court observed that both former DR 5-105(C) and current RPC 1.9(a) are framed in terms of whether a lawyer's current representation is materially adverse to the "interests" of a former client in the same or substantially related matter. As the Court put it:

"The wording of those rules focuses on the *interests* of the former client. . . . [A] client's interests can and often do survive a client's death, [and] the rules' protections extend to a former client even after his or her death. But it not just any *interests* of the former client that must survive. In the context of the disciplinary rule, it is the former client's interests that pertain to the matter in which the lawyer previously represented the former client. It is those interests that must survive the former client's death." 348 Or at 584 (emphasis in original).

The Court found the requisite link in the case at hand and also concluded that the respective positions of the former client and the current client were materially adverse. Under the facts before it, *Hostetter* focused largely on our duty of loyalty to former clients. The Court noted, however, that the duty of confidentiality to former clients can also create a disqualifying conflict. We'll next turn to the duty of confidentiality.

Confidentiality

The duty of confidentiality in Oregon is rooted in both RPC 1.6 and ORS 9.460(3). Both are broad in scope and neither has an expiration date. The duty of confidentiality is also fiduciary in character (*see In re Lackey*, 333 Or 215, 229, 37 P3d 172 (2002)). It encompasses the attorney-client privilege, but is not limited solely to attorney-client communications. RPC 1.6, for example, frames

the duty as “[a] lawyer shall not reveal information relating to the representation of a client[.]” ORS 9.460(3), in turn, requires that lawyers “[m]aintain the confidences and secrets of the attorney’s clients[.]”

Other than a narrow exception involving testamentary disputes, the attorney-client privilege is generally construed to survive the death of the client. The United States Supreme Court in *Swidler & Berlin v. United States*, 524 US 399, 118 S Ct 2081, 141 L Ed2d 379 (1998), surveyed the long history of this facet of the privilege and concluded that it remains as central to fostering the privilege today as it did a century ago. Our own federal district court relied on *Swidler* comparatively recently in making this same point in *United States v. Regale*, No. CRIM. 01-321-KI, 2006 WL 696312 (D Or March 14, 2006) (unpublished). Under OEC 503(e)(3), the privilege of deceased client is vested in the personal representative. If there is no personal representative, however, it remains the duty of the lawyer to assert the privilege on behalf of the deceased client pending further direction of a reviewing court.

The Oregon State Bar in Formal Ethics Opinion 2005-23 (2005) examined the duration of the broader duty of confidentiality encompassed within RPC 1.6. The opinion uses the example of a retired lawyer who would like to give some of his files to an educational institution for historical research. The files contain confidential information that the lawyer obtained from clients over the years. The Bar concluded that the lawyer could not do so because, even with the passage of

time, the information remained confidential and the lawyer remained bound by the duty of confidentiality.

ABOUT THE AUTHOR

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