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The Vow of Silence: Confidentiality in Electronic Times, Part 2

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This month we continue our look at the duty of confidentiality by examining the electronic challenges to that duty that have emerged as both our communications with our clients and our files have increasingly moved to electronic form. We'll also survey the exceptions to the rule.

Electronic Challenges. The duty of confidentiality is not merely to remain silent. When we are receiving or transmitting information to our clients we have a duty to choose means that are private. Comment 17 to the ABA Model Rule 1.6, upon which Oregon's RPC 1.6 is generally patterned, phrases this aspect of the duty as choosing means that afford "a reasonable expectation of privacy." OEC 503(1)(b) arrives at this same point by noting that the lawyer-client privilege applies to "a communication not intended to be disclosed to third persons[.]" The increasing use of electronic communications has highlighted this element of the duty. Just as in the past we wouldn't share a client's deep dark secret in a crowded coffee shop where it could be easily overhead, in the present we wouldn't share that deep dark secret over an open, monitored public wi-fi network at that same coffee shop. ABA Formal Ethics Opinion 99-413 applies these concepts to email and Formal Ethics Opinion 06-442 does the same for electronic "metadata" embedded in electronic documents. In doing so, the

former in particular catalogs the federal statutory protections that generally apply to unencrypted email to provide the requisite expectation of privacy in most (but not all) circumstances.

Once we have a client's confidential information, we then have a duty to maintain it. Comment 16 to ABA Model Rule 1.6 terms this aspect of the duty as "[a] lawyer must act competently to safeguard information relating to the representation of a client[.]" OSB Formal Ethics Opinion 2005-141 and ABA Formal Ethics Opinion 95-398, for example, generally allow lawyers to employ, respectively, outside recycling and computer services as long as the lawyers take appropriate steps under the circumstances to meet their underlying duty of confidentiality. To return to our "deep dark secret" example, a lawyer using an outside recycling service should shred a draft file memo analyzing the secret before turning it over to the recycling service. In an era where we may increasingly have our "file rooms" literally on a laptop computer or a "memory key," we also need to take reasonable steps to maintain the physical security of these practice tools.

Finally, both during and after a lawyer-client relationship, a lawyer has an affirmative duty to protect client confidentiality. As we'll note below, RPC 1.6(b)(5) allows a lawyer to reveal confidential client information if ordered to do so by a court. Comment 13 to ABA Model Rule 1.6 stresses, however, that a lawyer in this circumstance "should assert on behalf of the client all nonfrivolous

claims that the order is not authorized by other law or that the information sought is protected against disclosure by the attorney-client privilege or other applicable law." This is consistent with both the Legislative Commentary to OEC 503 and the Oregon Supreme Court's directive in *Frease v. Glazer*, 330 Or 364, 370, 4 P3d 56 (2000). Again, in an era where both our communications and our files are in electronic form, we have a duty to defend the confidentiality of our current and former clients' protected information from, for example, broad third party subpoenas directed to our files.

Exceptions. RPC 1.6(b) contains six exceptions. They are generally consistent with prior Oregon law under former DR 4-101(C). It is important to stress, however, that the exceptions are narrow and, under *In re Lackey*, 333 Or 215, 37 P3d 172 (2002), lawyers are not free to invent new ones not already provided by law. It is also important to stress that Oregon's exceptions are discretionary ("may reveal"), not mandatory ("shall reveal"). The first allows a lawyer to disclose a client's intent to commit a future crime. The second permits a lawyer to disclose information necessary to prevent "reasonably certain death or substantial bodily injury" even if the conduct does not constitute a crime. The third allows a lawyer to consult with another lawyer about compliance with the RPCs. The fourth governs claims and defenses in disputes between clients and lawyers. The fifth is the exception noted earlier for compliance with court orders

(or other law or the RPCs). The final exception allows very limited and specific kinds of disclosure relating to the sale of a law practice under RPC 1.17.

Summing-Up. The duty of confidentiality was a bedrock principle of lawyering when paper reigned supreme. It remains one of the central duties of our profession in our new electronic times.

ABOUT THE AUTHOR

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