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News from the North: The New Washington RPCs

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On July 10, the Washington Supreme Court adopted new Rules of Professional Conduct that became effective September 1. The change in Washington is not as dramatic as when Oregon moved from the Disciplinary Rules to the RPCs last year. Washington adopted a variant of the ABA's Model Rules in 1985 and the new set is an incremental update. At the same time, there are important developments in several areas. And, with more Oregon lawyers holding Washington licenses, the changes will bring the two states into close alignment on most issues. In this column we'll look briefly at the new Washington rules in three areas: conflicts; confidentiality; and the "no contact" rule. The new rules, the accompanying official comments and the report of the special committee that developed the new rules are available on the Washington State Bar's web site at www.wsba.org.

Conflicts. Although the conflict rules have been restructured somewhat, the substance of the current (RPC 1.7) and former (RPC 1.9) client conflict rules remain the same in practical effect. In other words, a conflict under the "old" rules will remain a conflict under the "new" rules. The key terminology, however, has changed in several respects. The old rules, for example, framed waivers in terms of "consultation" and "full disclosure"; the operative phrase under the new rules is "informed consent." In a potentially useful technical change, the

definition of “writing” now specifically includes email. That should allow most conflict waivers to be confirmed by email (those involving business transactions with clients still require client signatures). The Washington Supreme Court considered, but did not adopt, a proposed comment dealing with advance waivers. Its rejection of the comment, however, should not preclude the use of advance waivers in appropriate circumstances such as those executed by sophisticated corporate clients with in-house legal advice available.

Confidentiality. The structure and overall thrust of the confidentiality rule, RPC 1.6, remain the same. But the potential scope of both the material protected and the exceptions have broadened. Under the old version of RPC 1.6, a lawyer had a duty to keep two categories of material confidential: “confidences,” which were communications protected by the attorney-client privilege; and “secrets,” which were “other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would likely be detrimental to the client.” Under the new version of RPC 1.6, the scope of the rule expands to encompass “information relating to the representation of a client.” The comments to the new rule note that this phrase “should be interpreted broadly” and includes information “protected by . . . but not necessarily limited to, confidences and secrets.” In some circumstances, therefore, the new rule will impose a duty of confidentiality on information that while technically “public” may not be widely

known and was only learned by the lawyer as a result of the lawyer's representation of the client.

Under the old version of RPC 1.6, there were four primary exceptions to the rule which authorized, but did not require, a lawyer to reveal confidential information: (1) to prevent the client from committing a crime; (2) to establish a claim or defense by the lawyer in a dispute with the client; (3) to comply with a court order; and (4) to inform a court of a breach of fiduciary duty by a court-appointed fiduciary such as a personal representative of an estate. Under the new version of RPC 1.6, the current exceptions are retained and three new exceptions are added: (1) to prevent "reasonably certain death or substantial bodily harm"; (2) to prevent, mitigate or rectify a financial fraud that would result in substantial financial harm and in which the client has used the lawyer's services; and (3) to secure advice about compliance with the RPCs. Except for disclosures to prevent death or substantial bodily harm (where disclosure is mandatory), disclosure under the other exceptions remains permissive rather than mandatory.

The "No Contact" Rule. The changes to RPC 4.2 are threefold but comparatively minor. The first broadens the scope of the rule slightly by substituting represented *person* for *party*. The second deletes RPC 4.2(b), which dealt with communications in limited-scope representations under RPC 1.2, and moves it to a comment instead. The third expands the "authorized by law"

exception to include court orders. The comments to RPC 4.2 specifically note that the leading case in Washington on the “no contact” rule in the corporate context, *Wright v. Group Health Hospital*, 103 Wn2d 192, 691 P2d 564 (1984), remains the guiding standard.

I was on the WSBA special committee that developed the new rules. Although they are not exactly the same as their Oregon or Idaho counterparts, Washington’s update moves the Northwest professional rules into very close orbit.

ABOUT THE AUTHOR

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