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The Vow of Silence: Confidentiality in Electronic Times, Part 1

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Confidentiality is one of our oldest and most fundamental duties as lawyers. The Oregon Supreme Court noted both in *Frease v. Glazer*, 330 Or 364, 370, 4 P3d 56 (2000), and observed that the purpose of this duty is to foster full communication between clients and their lawyers and in that way advance the broader public goals of observance of the law and the effective administration of justice. Although the duty has been a central tenet of the client-lawyer relationship for a long time, what has changed in recent years is that more of our confidential communications with our clients and other related lawyer work product now exist in electronic forms. That hasn't changed the duty, but it has required lawyers to apply the duty in many new settings. In this month's column, we'll look at the sources of the duty of confidentiality and its broad reach. Next month, we'll examine the accompanying electronic challenges to the duty and the exceptions.

Sources. The duty of confidentiality in Oregon has four principal sources. *First*, we have a statutory duty under ORS 9.460(3) to “[m]aintain the confidences and secrets of the attorney’s clients consistent with the rules of professional conduct[.]” *Second*, we have a professional duty under RPC 1.6(a) not to “reveal information relating to the representation of a client unless the client gives

informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted [by one of the exceptions to be discussed next month].” *Third*, we have an evidentiary duty under OEC 503(2)-(3) to assert the attorney-client privilege on behalf of our clients. *Fourth*, we have a fiduciary duty under, among others, *In re Lackey*, 333 Or 215, 229, 37 P3d 172 (2002), and *PGE v. Duncan, Weinberg, Miller & Pembroke, P.C.*, 162 Or App 265, 275-78, 986 P2d 35 (1999), to maintain our clients’ confidential information. These duties transcend the conclusion of a representation (see RPCs 1.6(a), 1.9 and OSB Formal Ethics Op. 2005-23) and even the death of the client (see *Swidler & Berlin v. United States*, 524 US 399, 410, 118 SCt 2081, 141 LEd2d 379 (1998)).

Reach. The duty of confidentiality under ORS 9.460(3) and RPC 1.6 and their corresponding fiduciary principles embrace the attorney-client privilege (see *Frease*, 330 Or at 370). But, the former is broader than the latter. Under RPC 1.6(a), “[a] lawyer shall not reveal information relating to the representation of a client[.]” RPC 1.0(f), in turn, defines “information relating to the representation of a client” as “both information protected by the attorney-client privilege under applicable law, and other information gained in a current or former professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely detrimental to the client.” This definition is generally similar to the definitions of “confidences” (information falling

within the attorney-client privilege) and “secrets” (other confidential information the lawyer learned during the course of the representation) under former DR 4-101(A) that was replaced by RPCs 1.6 and 1.0(f) effective January 1, 2005. At the same time, the potential reach of the new definition is broader because it includes information that the lawyer learned while representing a client that, although technically “public,” is not widely known. For example, a lawyer who discretely handled a sensitive family law matter that resulted in a public record buried deep within the files of the local courthouse would still be bound by the confidentiality obligation because although the record is “public” the information remains not widely known. As RPC 1.0(f) notes, the client need not (although the client may) specifically instruct a lawyer to keep information confidential for the duty to arise; rather, the lawyer must not disclose information gained during the representation that “would be likely to be detrimental to the client.”

Under OEC 503(1)(e) and RPC 5.3(a), both the duty and the protections afforded by the privilege extend to client communications to and from representatives of the lawyer, including paralegals, secretaries, and, in some circumstances, experts who are assisting the lawyer in providing legal services to the client. On the “client side,” confidentiality applies to both individuals and entities. With entities in particular, OEC 503(1)(d) defines “representatives of the client” broadly to include officers, directors and employees who are either providing information to the lawyer so that the lawyer can render legal advice to

the entity or who are receiving legal advice from the lawyer on behalf of the entity.

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