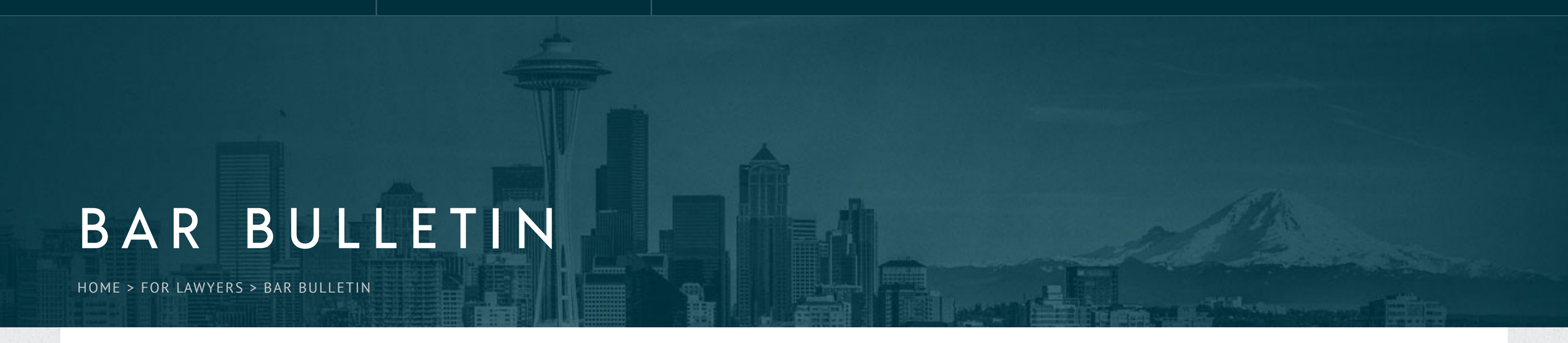

Confidentiality Revisited, Part 1: The Duty

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By Mark Fucile, Mark Johnson, and Michael Sprangers

"Shhh… Be vewy vewy quiet, I'm hunting wabbits." — Mr. Elmer Fudd, hunter and philosopher

"If I maintain my silence about my secret it is my prisoner…if I let it slip from my tongue, I am ITS prisoner." — Arthur Schopenhauer, philosopher and hunter

"[L]awyers are regarded as people who know how to keep secrets, as much as they are regarded as litigators… or drafters of contracts." — In re Schafer, 149 Wn.2d 148, 160 (2003)

While we don't know whether Mr. Fudd's recognition of the importance of silence has influenced the Washington Supreme Court's thoughts regarding client confidentiality, we do know that our Court recognizes it as one of our bedrock duties. Likewise, although we don't know whether Mr. Schopenhauer intended his thoughts about the consequences of failing to keep a secret to be a warning to attorneys, we do know that our Court considers violation of the duty to be a disciplinable offense; Counselor Schafer was suspended from practice for six months for revealing confidential (and privileged) conversations with his client in a declaration. *In re Schafer, 149 Wn.2d 148, 158-159 (2002).*

In this column and the next, we'll revisit the lawyer confidentiality rule — RPC 1.6. This month, we will focus on the scope and duration of the duty of confidentiality along with its application in an increasingly electronic practice environment. Next month, we will survey the eight exceptions (one "shall" and seven "mays").

Scope

RPC 1.6(a) underscores the breadth of the duty of confidentiality in deceptively simple language:

"A lawyer shall not 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 paragraph (b) [outlining the exceptions to the rule]."

Comment 21 to RPC 1.6 addresses the phrase "information relating to the representation of a client":

"The phrase 'information relating to the representation' should be interpreted broadly. The 'information' protected by this Rule includes, but is not necessarily limited to, confidences and secrets. 'Confidence' refers to information protected by the attorney client privilege under applicable law, and 'secret' refers to 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 to be detrimental to the client."

Comment 3, in turn, notes that confidentiality under RPC 1.6 weaves together distinct threads from privilege, work product, and legal ethics:

"The principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-
client privilege, the work product doctrine and the rule of confidentiality established in professional ethics. The attorney-client privilege and work-product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law…."1

The regulatory rule contained in RPC 1.6 also reflects our underlying fiduciary duty of confidentiality.2

Duration

The duration of the duty in many respects can be summarized in three words: "forever and ever."

RPC 1.9(c), which addresses the duties of confidentiality to former clients, expresses this duration with very limited qualifiers:

"A lawyer who has formerly represented a client in a matter … shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client."

Addressing these two subsections in reverse order, RPC 1.9(c)(2) prohibits a lawyer from revealing a former client's confidential information unless it qualifies under one of the exceptions that we will survey next month. As the ABA put it in a comparatively recent opinion examining RPC 1.9(c): "Lawyers . . . have the same duties not to reveal former client confidences under Model Rule 1.9(c)(2) as they have with regard to current clients under Model Rule 1.6."3

RPC 1.9(c)(1) parallels RPC 1.6 in limiting the use of confidential information when doing so would be "to the disadvantage of the former client[.]" The ABA, in Formal Opinion 479 issued in 2017, wrestled with the second alternative in RPC 1.9(c)(1): permitting the use of once confidential information — even to the disadvantage of a former client — when it has become "generally known." Rather, Formal Opinion 479 defines "generally know" quite narrowly: "[I]nformation is generally known within the meaning of Model Rule 1.9(c)(1) if (a) it is widely recognized by members of the public in the relevant geographic area; or (b) it is widely recognized in the former client's industry, profession or trade."4 Importantly, the Opinion cautions that simply because information may be contained in a public record does not necessarily mean that it is "generally known."

Courts have taken a similar approach with regards to the duration of privilege. *In Martin v. Shaen*, 22 Wn.2d 505, 511, 156 P.2d 681 (1945), for example, the Washington Supreme Court emphasized that privilege even survived the death of the client: "[T]he privilege does not terminate with the cessation of the protected relationship, but continues thereafter, even after the death of the person to whom the privilege is accorded[.]"5 The United States Supreme Court reached the same conclusion under federal common law privilege in *Swidler & Berlin v. United States*, 524 U.S. 399, 118 S. Ct. 2081, 141 L. Ed.2d 379 (1998).

Electronic Applications

In today's practice environment, electronic communications and electronic files are often where most lawyers squarely face the duty of confidentiality.6

RPC 1.6(c), added to the Washington RPCs in 2016 and patterned on a similar amendment to the corresponding ABA Model Rule, sets out our duty to safeguard client confidential information:

"A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client."

RPC 1.6(c) is not specific to electronic communications and files but it clearly was intended to apply to both. A companion amendment to Comment 8 to RPC 1.1 on competence emphasizes that we have a responsibility to keep abreast of developments in law firm technology just as we must with legal developments in our practice area.

Comments 18 and 19 to RPC 1.6 tie these twin threads of confidentiality and competence together in their title: "Acting Competently to Preserve Confidentiality." These comments emphasize that a fundamental element of representing our clients competently is protecting their confidential information. At the same time, the two comments recognize that the methods chosen to protect confidentiality in any given circumstance will vary with the sensitivity of the information concerned.

For example, it might be reasonable for a lawyer to use a coffee shop's free public wi-fi to email the lawyer's assistant confirming the time for a court appearance in a public proceeding the next day but using that same free public wi-fi would not be appropriate for communicating with a well-known client about an sensitive matter.

ABA Formal Opinions 99-413 (1999) and 477R (2017) discuss email at length. While continuing to conclude in the later opinion that unencrypted email — at least if sent from a secure network — remains appropriate for many communications due to the reasonable expectation of privacy arising from federal statutory protections against unauthorized interception of electronic communications, it cautions that the security chosen for any given communication will turn on the sensitivity of the matter concerned.

WSBA Advisory Opinion 2215 (2012) addresses cloud-based files in detail. The opinion offers a flexible set of guidelines for selecting a cloud provider. It does not require lawyers to become computer scientists — but it does remind lawyers that they need to obtain appropriate help — whether inside their firms or through outside consultants — if necessary to evaluate the security features of the service involved. ABA Formal Opinion 477R, in turn, goes beyond email to apply the same security criteria noted earlier to the transmission of cloud-based electronic files. To return to our earlier example of the lawyer in the coffee shop, just as the lawyer would not want to use the free public wi-fi for an extremely sensitive electronic conversation, the lawyer would not want to use that public forum for transmitting or receiving an equally sensitive electronic file.

Summing Up

The scope of the duty of confidentiality is broad. Unlike eggs and credit cards, there is, generally, no expiration date. While today's electronic practice has made communication faster and file keeping more efficient and convenient, it has also complicated our duty to protect confidential client information.

Mark J. Fucile, of Fucile & Reising LLP, handles professional responsibility, regulatory and attorney-client privilege matters and law firm related litigation for lawyers, law firms and legal departments throughout the Northwest. He can be reached at 503.224.4895 and Mark@frllp.com.

Mark Johnson is an elected Fellow in the American College of Trial Lawyers and a past president of the Washington State Bar Association. He has been listed in every edition of The Best Lawyers in America since 1995 and Best Lawyers Publishing named him Seattle's Plaintiffs' Legal Malpractice Lawyer of the year three times. Mark is a partner at Johnson Flora Sprangers PLLC in Seattle.

Michael Sprangers is an owner and partner of Johnson Flora Sprangers PLLC. His practice focuses on representing those who have been injured as a result of another's negligence, including professional negligence and negligence resulting in serious personal injury. Michael is an Eagle Member of the Washing State Association for Justice and has presented multiple times at the WSBA Law of Lawyering Conference.

1 See also RCW 5.60.060(2)(a) (attorney-client privilege); CR 26(b)(4) (work product).

2 See Global Enterprises, LLC v. Montgomery Purdue Blankenship & Austin PLLC, 52 F. Supp.3d 1162, 1173 (W.D. Wash. 2014) (describing the duty of confidentiality in fiduciary terms); see generally Restatement (Third) of the Law Governing Lawyers § 60 (2000) (collating the law nationally on this point).

3 ABA Formal Op. 479 (2017) at 2 (emphasis in original).

4 Id. at 5.

5 Martin also notes that a personal representative generally steps into the decedent's shoes for purposes of asserting or waiving privilege. 22 Wn.2d at 511.

6 By focusing on these, we don't mean to exclude others. There are a wide variety of resources available on many other recurring confidentiality issues that can arise from the electronic aspects of law practice today. ABA Formal Opinion 06-442 (2006), for example, addresses confidentiality issues associated with "metadata" embedded in electronic documents. ABA Formal Opinion 11-459 (2011), in turn, discusses the importance of educating clients in the proper use of electronic communications to preserve privilege. Finally, ABA Formal Opinion 483 (2018) surveys obligations in the event of a data breach at a law firm.