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Confidentiality Revisited, Part 2: The Exceptions

June 1, 2020 | in [General](#)

JUNE 2020 BAR BULLETIN

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"Now, we're not ones to go 'round spreadin' rumors,

Why, really we're just not the gossipy kind,

No, you'll never hear one of us repeating gossip,

So you'd better be sure to listen close the first time!"

– The Hee Haw television show "Rumors" song.

"While we laud the principles protecting the sanctity of attorney-client confidences and secrets, we are cognizant that there are occasions when revealing a client's statements may be justified. These occasions are extremely limited, however, consistent with the profession's goal of establishing and maintaining trust in the judicial process."

– In re Schafer, 149 Wn.2d 148, 162-63 (2003).

In Part 1 of this article, published in the April issue of the Bar Bulletin, we examined the ethical duty of confidentiality as set out in RPC 1.6. After taking a break in May for some social and ethical distancing, this month we survey the exceptions to the rule.¹ We will look first at the "qualifiers" of the duty, as set out in RPC 1.6(a), and then turn to the specific exceptions enumerated in RPC 1.6(b).

RPC 1.6(a): The Qualifiers

The "shall not reveal" duty of confidentiality in RPC 1.6(a) includes three qualifiers, each of which is prefaced with the word "unless":

"A lawyer shall not reveal information relating to the representation of a client **unless** the client gives informed consent, the disclosure is impliedly authorized to carry out the representation or the disclosure is permitted by paragraph (b)."

(Emphasis added.)

We'll examine the "paragraph (b)" exceptions in the next section—leaving informed consent and implied authority. Of the two, implied authority is much more common than informed consent.

Informed consent to disclosure requires a knowing waiver. Informed consent is rarely invoked, for two principal reasons: First, with respect to privilege, as Professors Aronson and Howard note in *The Law of Evidence in Washington*, "the privilege cannot be redeemed once it has been waived."² Second, as they further observe in the same treatise, "the privilege is waived as to all communications about that matter."³ In short, a card laid is a card played. Not only can a waiver not be "undone", the scope is potentially very broad. Therefore, a client's informed consent to a waiver is typically reserved for extremely rare circumstances and only after the client has been fully advised — preferably in writing — of the potentially far-reaching consequences.⁴

Implied authority, by contrast, is relatively common. Implied authority is what permits us to stand-up in court and say: "Good morning, Your Honor, I am here on behalf of the ABC Company." Implied authority tempers the otherwise very broad definition of "information relating to the representation of a client" by allowing us to make practical use of that information when required. At the same time, it is not intended to be "an exception that swallows the rule." Rather, we must use implied authority, in the phraseology of Comment 5 to RPC 1.6, only "when appropriate in carrying out the representation."

RPC 1.6(b): The Exceptions

Before surveying individual exceptions, we note that Washington RPC 1.6 differs to some extent from its counterpart ABA Model Rule. Washington did not adopt all of the ABA Model Rule exceptions, either in total or in terms of the exact language. Therefore, when comparing our rule with either the ABA Model Rule or analogous rules in other states, care should be taken in examining the specific exception involved.

There are eight exceptions; one "shall" and seven "may's." The disclosure standard for all eight, however, is: "[T]o the extent the lawyer reasonably believes necessary." RPC 1.6(b). While it would appear, therefore, that the disclosure obligation is to be judged by the assessment of the specific lawyer involved (a subjective standard) and not a reasonably prudent lawyer (an objective standard), that may not be the case. RPC 1.0A, Terminology, provides at subpart (i): "Reasonable belief" or "reasonably believes" when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable." So, it appears to us that, per the applicable definition, the objective "reasonable man" standard applies.

RPC 1.6(b)(1): Preventing Reasonably Certain Death or Substantial Bodily Harm.

The most important "exception" difference between the ABA Model Rule 1.6 and Washington's rule is that our Supreme Court chose, in RPC 1.6(b)(1), to make mandatory the duty to disclose information relating to the representation so as "to prevent" reasonably certain death or substantial bodily harm.

The exception applies to both threats that a client may make to injure or take the life of another person, or their own. In practice areas that involve deeply sensitive personal matters, such as representing victims of physical, emotional, or sexual abuse, the latter can be much more common than the former. With either, lawyers should carefully assess whether the client is simply "blowing off steam" or appears ready to inflict the harm expressed. Disclosing threats to injure another person will likely mean that the lawyer must withdraw because the lawyer has taken an action adverse to the client.⁵ By contrast, revealing otherwise confidential information to, for example, a treating psychiatrist to prevent a client suicide, may not.

RPC 1.6(b)(2): Preventing the Client from Committing a Crime.

With respect to the duty to disclose information to "prevent" a client from committing a crime, Washington's RPC 1.6(b)(2) is broader than its ABA Model Rule counterpart in key respects. Unlike the ABA Model Rule, Washington's exception is simply predicated on the prevention of a "crime". The ABA rule limits disclosure to conduct having the potential to... "[R]esult in substantial injury to the financial interests or property of another..." The ABA Model Rule also conditions the obligation to disclose to those circumstances where the crime involves the use of the lawyer's services; Washington's version of the rule does not.

RPC 1.6(b)(3): Preventing, Mitigating or Rectifying Financial Injury from Crime or Fraud Using the Lawyer's Services.

This exception has its genesis in the Enron financial scandal of the early 2000s, and Washington's version mirrors its ABA Model Rule counterpart. This exception was considered and adopted when the ABA Model Rules were being comprehensively reviewed and updated by the ABA Ethics 2000 Commission. The Commission concluded that if a client used a lawyer's services to commit a crime or fraud that resulted in substantial financial injury to third parties, the client had sufficiently abused the attorney-client relationship so that upon discovering the fraud, the lawyer involved should have the discretion to both prevent a planned or ongoing fraud and to mitigate or rectify one that had already occurred.⁶

RPC 1.6(b)(4): Securing Legal Advice on the RPCs.

This exception, which was also developed by the ABA Ethics 2000 Commission and was recommended in Washington by the WSBA's follow-on Ethics 2003 Committee, allows lawyers seeking legal advice on their own compliance with the RPCs to share enough otherwise confidential information with consulting outside counsel to receive meaningful guidance.⁷ In doing so, both the ABA and the WSBA recognized the benefit of allowing lawyers to seek guidance outside their firms⁸ and the practical limits of using hypotheticals in what are often very fact-dependent situations.

RPC 1.6(b)(5): Revealing Information to Establish a Claim or Defense.

Although commonly called the "self-defense" exception, this provision permits lawyers to reveal sufficient information to pursue either a claim (such as a lawsuit for fees) or a defense (such as a response to a Bar grievance or a legal malpractice claim). The scope of the disclosure, however, should be narrowly tailored to the contours of the matters involved in the claim or defense. In other words, a claim against a lawyer for missing a statute of limitation based on a law firm staff member's calendaring error does not open the door to revealing a client's "deep dark secret" that has nothing to do with the asserted error. In *In re Boelter*, 139 Wn.2d 81, 985 P.2d 328 (1999), for example, a lawyer was disciplined for threatening to report a client to the IRS as leverage in collecting a delinquent bill. Similarly, the exception is framed in terms of asserting or responding to claims or charges in formal proceedings rather than mere criticism about, for example, slow service posted on a consumer review website.⁹

RPC 1.6(b)(6): Court Orders.

This exception allows a lawyer to reveal confidential information sufficient to comply with a court order. This issue most frequently arises when a lawyer is required to seek leave of a court to withdraw and the court requires an explanation more detailed than "professional considerations." WSBA Advisory Opinion 201701 (2017), addresses this scenario in detail and notes that, if ordered, a lawyer can ordinarily reveal the confidential information requested as long as appropriate procedural safeguards such as in camera review and sealed filings are used.

RPC 1.6(b)(7): Information for Conflict Checks.

This exception was added to the ABA Model Rule in 2012¹⁰ and later to the Washington RPCs. The purpose of the exception is to facilitate conflict checks when a lawyer changes firms or a firm's configuration changes. The exception provides that it is generally permissible to share basic information necessary for the new firm to run a conflicts check but only if the information disclosed does not prejudice the client or "compromise" the attorney-client privilege.

RPC 1.6(b)(8): Fiduciary Breach.

This exception, which is unique to Washington,¹¹ allows a lawyer "to inform a tribunal about any breach of fiduciary responsibility when the client is serving as a court appointed fiduciary[.]" In *In re Guardianship of Karan*, 110 Wn. App. 76, 38 P.3d 396 (2002), Division III held that an attorney retained to establish a guardianship following the death of a minor's father owed a duty of care to the minor-ward to ensure that the proceeds of the father's life insurance policy, of which the minor was the beneficiary, were protected by establishing a blocked account or posting a bond. The child's mother had initially retained the lawyer. She was appointed as guardian and depleted the funds. RPC 1.6(b)(8) informs the Karan duty by protecting a lawyer representing a dishonest guardian from allegations of breach of the duty of confidentiality.

Parting Thoughts

Our duty of confidentiality is sacrosanct. We may not "go 'round spreadin' rumors." But, as our opening quote from the Washington Supreme Court acknowledges, lawyers must occasionally tell a client's secret, albeit sparingly and only after carefully evaluating the facts and RPC 1.6.

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¹ As noted, this column focuses on RPC 1.6. There are, however, other exceptions in the RPCs—such as RPC 3.3, which deals with candor toward a tribunal, and RPC 1.13(c), which addresses reporting corporate fraud or other serious wrongdoing "up" to higher authority in the organization concerned and "out" to appropriate authorities if the organization fails to take action. By contrast, lawyers are not generally free to create new exceptions not included in RPCs. See, e.g., *In re Schafer*, supra, 149 Wn.2d at 167 (no "whistleblower" exception).

² Robert H. Aronson and Maureen A. Howard, *The Law of Evidence in Washington* at 9-9 (rev. 5th ed. 2018).

³ *Id.* at 9-23.

⁴ RPC 1.0A(e) defines "informed consent" as "the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct."

⁵ See generally RPC 1.7(a)(2) (conflicts between a lawyer and the lawyer's client); RPC 1.16 (withdrawal).

⁶ See ABA, *A Legislative History: The Development of the ABA Model Rules of Professional Conduct, 1982-2013 at 131* (2013) (ABA Legislative History).

⁷ *Id.*; see also WSBA, *Reporter's Explanatory Memorandum to the Ethics 2003 Committee's Proposed Rules of Professional Conduct at 13* (2003) (on file with author) (Ethics 2003 Memo).

⁸ *Guidance sought inside a law firm from designated firm counsel is protected by the firm's own internal attorney-client privilege. See generally VersusLaw, Inc. v. Stael Rives, LLP*, 127 Wn. App. 309, 111 P.3d 866 (2005) (recognizing internal law firm privilege and discussing its boundaries); ABA Formal Op. 08-453 (2008) (addressing internal law firm privilege).

⁹ For a discussion of responding to negative online reviews, see Mark J. Fucile, *The Delicate Art of Responding to Negative Online Reviews*, 72, No. 3 WSBA NWLawyer 10 (April/May 2018).

¹⁰ See ABA Legislative History at 143.

¹¹ See Ethics 2003 Memo at 14.

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