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Posted: January 10, 2022

Washington Supreme Court Outlines Contours of Confidential Rule

By Mark J. Fucile
Fucile & Reising LLP

The Washington Supreme Court recently addressed the scope of the confidentiality rule—RPC 1.6—in *In re Cross*, __ Wn.2d __, __ P.3d __, 2021 WL 6068825 (Dec. 23, 2021).

Cross had represented a client in a criminal case arising out of an accident involving an all-terrain vehicle the client was driving. When the criminal case resolved, Cross and the client held a confidential discussion about the possibility of pursuing a product liability claim against the ATV manufacturer. Based on Cross's advice, the client decided not to file a product liability claim. A passenger in the ATV accident later sued Cross's by-then former client. When the former client's defense lawyer in the civil case moved to add an affirmative defense attributing the accident to a product defect, the passenger opposed the motion. To support the opposition, the passenger's lawyer obtained a declaration from Cross in which he disclosed the confidential conversation he had with the former client evaluating the possibility of bringing a product claim and revealing that the former client had decided not to pursue such a claim in light of the costs and risks. A bar grievance followed.

Cross did not contest the central facts of the grievance and admitted that providing a declaration against his former client was a "mistake." His principal

defense was that he did not understand revealing the information involved violated the RPCs and that his actions were instead merely negligent.

The Supreme Court made three principal points in disciplining the lawyer.

First, the Supreme Court noted that RPC 1.6(a) broadly prohibits a lawyer from revealing (absent exceptions not applicable in *Cross*) "information relating to the representation of a client." The Supreme Court observed that the comments to RPC 1.6 underscore that the duty of confidentiality under RPC 1.6 includes the attorney-client privilege but is broader than privilege standing alone. The predicate phrase "information relating to the representation of a client" is neither new nor novel. RPC 1.6 has included that term since 2006 (when it replaced "confidences and secrets") and it is patterned on the corresponding ABA Model Rule. Again absent exceptions not applicable in *Cross*, the duty of confidentiality generally extends beyond the end of an attorney-client relationship under RPC 1.9(c) (that governs the continuing duty of confidentiality to former clients).

Second, notwithstanding the broader potential scope of the current rule than its pre-2006 predecessor, the Supreme Court found, in essence, that Cross would have violated the old rule, too, because his declaration revealed confidential attorney-client communications that fell within privilege. As the

Supreme Court put it: "[A] discussion with a client about the pros and cons of filing a civil lawsuit *is* privileged and confidential." *Id*. at *6 (emphasis in original).

Finally, the Supreme Court concluded that "a lawyer need not know that his intentional actions violated the RPCs for those actions to be considered 'knowing.'" *Id*.

Cross serves as both a useful reminder of the broad sweep of our duty of confidentiality under RPC 1.6 and as a cautionary example suggesting being very wary of any request from a third-party to reveal confidential information without clear consent from the client involved.

ABOUT THE AUTHOR

Mark J. Fucile of Fucile & Reising LLP advises lawyers, law firms and legal departments throughout the Northwest on professional responsibility and risk management. Mark has chaired both the WSBA Committee on Professional Ethics and its predecessor, the WSBA Rules of Professional Conduct Committee. Mark is a member of the Oregon State Bar Legal Ethics Committee and the Idaho State Bar Section on Professionalism & Ethics. Mark writes the Ethics Focus column for the Multnomah (Portland) Bar's *Multnomah Lawyer*, the Ethics & the Law column for the WSBA *Bar News* and is a regular contributor on legal ethics to the WSBA *NWSidebar* blog. Mark is a contributing author and the editor-in-chief for the WSBA *Legal Ethics Deskbook* and is a contributing author and principal editor for the OSB *Ethical Oregon Lawyer* and the WSBA *Law of Lawyering in Washington*. Before co-founding Fucile & Reising LLP in 2005, Mark was a partner and in-house ethics counsel for a large Northwest regional firm. He also teaches legal ethics as an adjunct for the University of Oregon School of Law at its Portland campus. Mark is admitted in Oregon, Washington, Idaho, Alaska and the District of Columbia. He is a graduate of the UCLA School of Law. Mark's telephone and email are 503.224.4895 and Mark@frllp.com.