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**The New Rules:
What's Inside the Box? Part 2—Confidentiality**

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In this month's installment on the new Oregon Rules of Professional Conduct, we'll look at three facets of the new confidentiality rule, RPC 1.6: what falls within the scope of "confidential information," the exceptions and waivers.

Scope. Under the old rule, DR 4-101, two kinds of information fell within a lawyer's duty of confidentiality: "confidences," which covered communications encompassed by the attorney-client privilege; and "secrets," which covered other confidential information that would harm the client if disclosed. With the new rule, the scope shifts to the potentially broader concept of "information relating to the representation of a client." Although the new rule abandons the words "confidences" and "secrets," it defines "information relating to the representation of a client" in RPC 1.0(f) by using the old phrasing from DR 4-101(A): "Information relating to the representation of a client" denotes 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 to be detrimental to the client." It remains to be seen whether the Supreme Court will see this as a distinction with a difference.

Exceptions. Under the old rule, there were four principal exceptions allowing a lawyer to reveal confidential information unilaterally: (1) where disclosure was required by law or court order; (2) where the client intended to commit a crime and the information revealed was necessary to prevent that crime; (3) where there was a dispute between the lawyer and the client over the lawyer's services or the lawyer otherwise needed to defend against claims involving the client's conduct; and (4) where the lawyer was selling a law practice. The new rule retains these four exceptions in RPC 1.6(b) and adds two more. A lawyer is now permitted to reveal confidential information to prevent reasonably certain death or substantial bodily harm whether or not the result of the client's conduct would be a crime. A lawyer is also now permitted to reveal confidential information to secure legal advice about compliance with the RPCs. Given the already broad sweep of the old exceptions, it again remains to be seen whether the additional exceptions will be significant to the Supreme Court.

Waiver. A client can authorize a lawyer to disclose information falling within RPC 1.6 just as a client could under former DR 4-101. As with other aspects of consent under the new rules, waivers for RPC 1.6 are framed in terms of "informed consent." Under RPC 1.0(g), informed consent by a client "denotes the agreement . . . 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."

In sum, the new rule is more like the old one than it is different. Nonetheless, as noted, the nuances of the new rule and the incremental changes remain to be explored by the Supreme Court.

ABOUT THE AUTHOR

Mark J. Fucile of Fucile & Reising LLP focuses on legal ethics, product liability defense and condemnation litigation. In his legal ethics practice, Mark 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 is a past member of the Oregon State Bar's Legal Ethics Committee, is a past chair of the Washington State Bar Rules of Professional Conduct Committee, is a member of the Idaho State Bar Professionalism & Ethics Section and is a co-editor of the OSB's Ethical Oregon Lawyer and the WSBA's Legal Ethics Deskbook. Mark also writes the monthly Ethics Focus column for the Multnomah (Portland) Bar's Multnomah Lawyer, the quarterly Ethics & the Law column for the WSBA Bar News and is a regular contributor on risk management to the OSB Bar Bulletin, the Idaho State Bar Advocate and the Alaska Bar Rag. Mark's telephone and email are 503.224.4895 and Mark@frllp.com.