

Changing Our Vocabulary, the Effect of the Oregon RPCs
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Effective January 1, 2005, Oregon will join the over 40 states that have already adopted a version of the ABA Model Rules of Professional Conduct. For the most part, the change to the new Oregon rules (the “Oregon RPCs”) will be a matter of old wine in new bottles. In general, things that are prohibited by the present Oregon rules (“the Oregon DRs”) will still be prohibited and things that are permitted by the Oregon DRs will be permitted by the Oregon RPCs as well.

Nonetheless, there are significant changes to both the substantive content and the terminology employed in a number of instances. In many respects, the Oregon RPCs will change the way we talk about ethics by changing the very vocabulary that we have become accustomed to using. Consider the following two changes regarding conflicts and confidentiality.

I. “Actual” and “Likely” Conflicts

For the last two decades, the most critical aspect of Oregon’s ethics rules regarding conflicts of interest involving multiple current clients has been the definition of actual and likely conflicts under Oregon DR 5-105(A). By definition and in light of Oregon DR 5-105(E) and (F), actual conflicts could not be waived but likely conflicts could be waived with client consent based on full disclosure as defined in Oregon DR 10-101(B).

The Oregon RPCs will no longer use the terms “actual” and “likely,” and new definitions of “confirmed in writing” and “informed consent” will take the place of the present “full disclosure.” See Oregon RPC 1.7¹ and Oregon RPC 1.0(b) and (g).² Although the categories are

¹ Oregon RPC 1.7 provides:

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a current conflict of interest. A current conflict of interest exists if:

- (1) the representation of one client will be directly adverse to another client;
- (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client, a former client or a third person or by a personal interest of the lawyer; or
- (3) the lawyer is related to another lawyer, as parent, child, sibling, spouse, or domestic partner, in a matter adverse to a person whom the lawyer knows I represented by the other lawyer in the same matter.

(b) Notwithstanding the existence of a current conflict of interest under paragraph (a), a lawyer may represent a client if:

- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
 - (2) the representation is not prohibited by law;
 - (3) the representation does not obligate the lawyer to contend for something on behalf of one client and the lawyer has a duty to oppose on behalf of another client;
- and

somewhat differently expressed, the new rules, like the old, will divide the world of current client conflicts into non-waiveable conflicts, waiveable conflicts and all others. With some significant differences, non-waiveable conflicts equate to actual conflicts and waiveable to likely conflicts.

II. “Confidences and Secrets”

Another significant vocabulary change occurs when discussing confidential information: no longer will we use the terminology “confidences and secrets.” Even though the present dichotomy between confidences and secrets and the lawyer’s duty to protect both of them have been with Oregon lawyers for a long time, the new rules do not use either of these terms but instead provide in Oregon RPC 1.6(a) that 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 another exception exists.

In effect, Oregon RPC 1.6(a) places both confidences and secrets within the single new category of “information relating to the representation of a client” and then leaves it to the substantive law of evidentiary attorney-client privilege to sort out what lawyers may or may not be compelled by courts to disclose over their clients’ objections. Although there may, at the margins, be some kinds of information that would not be client secrets under the DRs but that would constitute information relating to the representation of a client under the RPCs, we do not believe that any distinction that may exist will often prove to be material.

Two important points need to be made: (1) this is by no means a full discussion of either of these changes, and (2) these changes are by no means the only two changes to our vocabulary as a result of the Oregon Supreme Court’s adoption of the new rules. These two changes do, however, demonstrate that while the face of the rules may have received a lift, the substance underneath is largely the same.

(4) each affected client gives informed consent, confirmed in writing.

² Oregon RPC 1.0(b) provides: “Confirmed in writing,” when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. See paragraph (g) for the definition of “informed consent.” If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.

Oregon RPC 1.0(g) provides: “Informed consent” denotes 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. When informed consent is required by these Rules to be confirmed in writing or to be given in a writing signed by the client, the lawyer shall give and the writing shall reflect a recommendation that the client seek independent legal advice to determine if consent should be given.