

Washington Lawyers' Duty of Confidentiality--Past, Present, and Proposed.

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Distant Past (1928-1972)

RCW 2.48.230 (Laws of 1917, Ch. 115, Sec. 20) - "The code of ethics of the American Bar Association shall be the standard of ethics for the members of the bar of this state." *In re Randall*, 72 Wn.2d 676 (1967) (Citing RCW 2.48.230 and applying ABA Canons of Professional Ethics.)

Key Provisions of the ABA Canons of Professional Ethics (1908-1970)

Canon 37. Confidences of a Client. (added in 1928)

It is the *duty of a lawyer to preserve his client's confidences*. This duty outlasts the lawyer's employment, and extends as well to his employees; and neither of them should accept employment which involves or may involve the disclosure or use of these confidences, either for the private advantage of the lawyer or his employees or to the disadvantage of the client, without his knowledge and consent, and even though there are other available sources of such information. A lawyer should not continue employment when he discovers that this obligation prevents the performance of his full duty to his former or to his new client.

If a lawyer is accused by his client, he is not precluded from disclosing the truth in respect to the accusation. The announced *intention of a client to commit a crime is not included within the confidences which he is bound to respect*. He may properly make such disclosures as may be necessary to prevent the act or protect those against whom it is threatened.

Canon 41. Discovery of Imposition and Deception. (added in 1928)

When a lawyer discovers that some *fraud* or deception has been practiced, which was unjustly imposed upon the court or party, he should endeavor to *rectify it*; at first by advising his client, and if his client refuses to forego the advantage thus unjustly gained, he should promptly *inform the injured person* or his counsel, so that they may take appropriate steps.

Henry S. Drinker, Legal Ethics (1953 Columbia Univ. Press, N.Y.)

In the leading treatise of the mid-20th century on lawyer ethics, Henry Drinker discussed, beginning at page 131, Canon 37 of the ABA Canons of Professional Ethics on the duty of a lawyer to preserve a client's confidences. On page 133, he quoted from an ABA opinion that the canon's purpose was "to state with particularity important applications and exceptions, and that it was not intended to exclude other well-recognized exceptions." On pages 137 to 139, Drinker summarized, under the heading "When Disclosure Is Proper" the judicial decisions and ethics opinions to that time that had recognized many exceptions to confidentiality. The following excerpt is that full section, without its 28 footnotes, but with selected passages emphasized.

When Disclosure Is Proper

Although Canon 37 contains no specific exception covering communications *where disclosure to the authorities is essential to the public safety, such is necessarily implied*. Accordingly, where a lawyer has confidential information from a foreign government with which the United States is at war, he should reveal to the proper authority the fact that he has received it, and abide the latter's decision; and *he may tell of*

subversive activities of his client, the common defense transcending Canon 37.

A lawyer *may disclose the whereabouts of a client jumping bail. The lawyer for an administrative body may reveal gross abuses by it after having advised the highest officials and refusal by them to act, the lawyer thus invoking public opinion to remedy the situation.*

He may advise the Industrial Commission of the nature and extent of injuries to the plaintiff in a case conducted by him, the plaintiff having falsely testified as to them.

A disclosure of confidential information may be made *where necessary to prevent a contemplated crime, or fraud.*

Canon 29 is subject to Canon 37. Where a fraud is possible but not clear, the lawyer should withdraw. A lawyer should inform the surrogate of the proposed concealment by his client-executor of an existing grandchild from whom his client proposes to abstract the estate; but he may not tell his client's husband of her plan to cut him out of her will as to property in her name but the result of their joint labors. However, one holding a former will of a wife who had agreed to a mutual disposition of property belonging to her and her deceased husband was held bound to disclose this when she tried to avoid her obligation.

A lawyer may not inform the collector of a failure by his client to disclose income, or of his client's address; or reveal to the authorities that his client paid for a promise of preferential treatment after induction.

The exception in the second paragraph of the Canon relative to the announced intention of his client to commit a crime includes a fraud on others but not a crime or fraud which has been completed. The lawyer may make such disclosures as are necessary to protect himself against false accusations, or to protect his rights, including reasonable compensation, but may not in order to avoid being sent to jail by the judge. He may not use confidential information as to his client's funds to enable him to collect his fee, but may use information not obtained from the client, and in suing one client for a fee, may use non-confidential information obtained from another client.

Where a lawyer's client has aided in the prosecution of charges against him, the lawyer may reveal such confidences as are material to the proceeding.

The privilege is not binding where the client either conspires with the lawyer or deceives him, or falsely accuses him, but is not forfeited merely by the client's acting in bad faith to his own creditors. One defamed by a former client whom he is suing for slander may, in order to protect his good name, advise other clients in the same trade of the true facts.

Before making a permissible disclosure he should, if possible, notify his client of his intention to do so and give him reasonable opportunity himself to disclose the information or to show that the lawyer's information is incorrect or irrelevant.

It has been held that damages may be collected by one injured by a gross breach of a lawyer's duty not to divulge confidential communications.

Duty of Confidentiality Was Coterminous with Attorney-Client Privilege.

Under the Canons of Professional Ethics (CPE), the duty of confidentiality expressed in Canon 37 was simply a statement of the common law rule known as the attorney-client privilege. The Drinker treatise at 132, after quoting Canon 37, said as much:

“The rule of this Canon, that confidential communications by or on behalf of a client may not be disclosed without his consent, has long been a rule of the common law, and is in many jurisdictions the subject of statute. As such, its application is usually a question of

law more than of ethics.”

And in a footnote to the quoted text of Canon 37, Drinker offered Professor Wigmore’s articulation of it:

“John H. Wigmore thus states the rule (*Evidence* [3d ed.], sec. 2290-2329): ‘Where legal advice of any kind is sought from a professional legal adviser in his capacity as such, the communications relating to that purpose, made in confidence by the client, are at his instance permanently protected from disclosure by himself or by the legal adviser, except the protection be waived.’”

Thus, under the CPE the lawyer’s duty of confidentiality and the attorney-client privilege were coterminous. The duty applied to all privileged information, but only to privileged information. And Canon 37 was merely one articulation of the attorney-client privilege. In *Dike v. Dike*, 75 Wn.2d 1, 10 (1968), the Washington State Supreme Court, quoted from the Drinker treatise passages noted above, and after quoting the brief attorney-client privilege statute, RCW 5.60.060(2), stated:

“The *attorney-client privilege* is somewhat more comprehensively *defined in CPE 37*, which provides in part:

‘It is the duty of a lawyer to preserve his client's confidences.

This duty outlasts the lawyer's employment,

. . . The announced intention of a client to commit a crime is not included within the confidences which he is bound to respect. He may properly make such disclosures as may be necessary to prevent the act or protect those against whom it is threatened.’

. . . .

The *attorney-client privilege*, as defined in Canon 37, is not absolute; but rather is subject to recognized exceptions. Drinker, *supra*, p. 133.

The exceptions which have arisen are the result of a balancing process in which the courts have had to weigh the benefits of the privilege against the public interest” (Emphasis added.)

The significance of the CPE duty of confidentiality being coterminous with the attorney-client privilege lies in the applicability to that duty of the policy-based case law that set boundaries on the attorney-client privilege, such as the crime-fraud exception to the privilege. Those boundaries should have applied equally to the CPE duty of confidentiality.

Crime-Fraud Exception to Attorney-Client Privilege.

Since the seminal English case of *Queen v. Cox*, 14 Q.B. 153 (1884), state and federal courts have denied applicability of the attorney-client privilege to communications by a client intending to commit a crime or fraud. The Washington State Supreme Court, in 1899, recognized the doctrine of *Queen v. Cox*, but without directly citing it, in *Hartness v. Brown*, 21 Wash. 655, 668 (1899), saying, “The rule, however, is well settled that communications made to counsel in contemplation of fraud or a criminal act are not privileged.” Other Washington cases applying the crime-fraud exception are *State v. Richards*, 97 Wash. 587, 591 (1917); *Dike v. Dike*, 75 Wn.2d 1, 14 (1968); *State v. Metcalf*, 14 Wn. App. 232, 239-40 (1975); *Whetstone v. Olson*, 46 Wn. App. 308, 310 (1986); *State v. Hansen*, 122 Wn. 2d 712, 720-21 (1993).

The U.S. Supreme Court described the policy underlying the crime-fraud exception in *United States v. Zolin*, 491 U.S. 554, 562 (1989), as follows:

“The attorney-client privilege must necessarily protect the confidences of wrongdoers, but the reason for that protection—the centrality of open client and attorney communication to the proper functioning of our adversary system of justice—ceases to operate at a certain point, namely, where the desired advice refers not to prior wrongdoing, but to future wrongdoing. It is the purpose of the crime-fraud exception to the attorney-client privilege to assure that the “seal of secrecy,” between lawyer and client does not extend to communications made for the purpose of getting advice for the commission of a fraud or crime.” (Citations and quotations omitted.)

Cases applying the crime-fraud exception are collected at <http://dougshafer.com/OpeningBrief.pdf>. While it is logical, for the reasons given above, to apply the crime-fraud exception to the duty of confidentiality, there is little case law that clearly does so. One such case is *In re Marriage of Decker*, 153 Ill. 2d 298, 606 N.E.2d 1094 (1992); see also Illinois State Bar Association Advisory Opinion 93-16. The ABA’s adoption in 1928 of CPE Canon 41, quoted above, requiring a lawyer who discovers his client has engaged in fraud to rectify it by informing the injured party reflects the policy underlying the crime-fraud exception.

Intermediate Past (1972-1985)

In 1969, the ABA replaced the Canons of Professional Ethics by adopting, effective January 1, 1970, the Code of Professional Responsibility (CPR). Due to a concerted implementation effort, substantially all the states had adopted it by mid-1973. The Washington State Supreme Court adopted the CPR effective January 1, 1972. The key operative provisions of the CPR dealing with confidentiality were Disciplinary Rules (DR) 4-101 and 7-102.

DR 4-101 Preservation of Confidences and Secrets of a Client. (in part)

(A) "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 be likely to be detrimental to the client.

(B) Except when permitted under sections (C) and (D), a lawyer shall not knowingly during or after termination of the professional relationship to his client:

(1) Reveal a confidence or secret of his client.

....

(C) A lawyer may reveal:

(1) Confidences or secrets with the consent of the client or clients affected, but only after a full disclosure to them.

(2) Confidences or secrets when permitted under disciplinary rules or required by law or court order.

(3) The intention of his client to commit a crime and the information necessary to prevent the crime.

(4) Confidences or secrets necessary to establish or collect his fee or to defend himself or his employees or associates against an accusation of wrongful conduct.

DR 7-102 Representing a Client Within the Bounds of the Law. (in part)

(B) A lawyer who receives information clearly establishing that:

(1) His client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon his client to rectify the same, and if his client refuses or is unable to do so, he shall

reveal the fraud to the affected person or tribunal. [as adopted in Washington, the last clause read: “he shall reveal the fraud to the affected tribunal and may reveal the fraud to the affected person.”]

Noteworthy Events of the Era Relating to Lawyers’ Duty of Confidentiality

1. In 1970 after a three-year study, the ABA Special Committee on Evaluation of Disciplinary Enforcement issues a report (the Clark Report) declaring the inadequate lawyer disciplinary system “a scandalous situation.” It reported, “[T]he prevailing attitude of lawyers toward disciplinary enforcement ranges from apathy to outright hostility. Disciplinary action is practically nonexistent in many jurisdictions; practices and procedures are antiquated; many disciplinary agencies have little power to take effective steps against malefactors.”

2. In early 1972, the U.S. Securities and Exchange Commission (SEC) sued the sixth largest U.S. law firm, New York Wall Street firm White & Case and a prominent Chicago law firm, charging the firms and certain named lawyers with aiding and abetting securities fraud by having failed to reveal fraud they discovered in pre-merger securities filings of their corporate client, National Student Marketing Corp. The SEC’s position was that the lawyers had a duty under the securities laws and under DR 7-102(B) to reveal that fraud before the merger closing. The SEC announced its intention to enforce its position in other cases against corporate and business lawyers and their firms and that it was considering a new agency rule to codify its position.

3. The Corporation, Banking, and Business Law section of the ABA responded defensively to the SEC’s threatening position. It formed a “Committee on Counsel Responsibility and Liability” (commonly called “Don Evans Committee”) which continued to pursue the sections’s interests until the ABA adoption of the Model Rules of Professional Conduct. By February 1974, the ABA had amended DR 7-102(B) by appending to it a clause (commonly called “the except clause”) reading, “except when the information is protected as a privileged communication.” In September 1975, the ABA Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 341 interpreting the except clause as encompassing both client confidences and secrets, thereby effectively reversing the rule from one requiring disclosure of fraud discoveries to one forbidding such. Only about twelve states adopted the except clause amendment to DR 7-102(B), and Washington state was not among them.

More details about the effectiveness of the Don Evans Committee are available in my December 2002 comments to the SEC on its proposed “noisy withdrawal rule” for corporate lawyers at <http://www.sec.gov/rules/proposed/s74502/daschafer121602.htm>.

4. In 1976, the California Supreme Court found a psychotherapist liable for failing to warn the target of a patient’s dangerous threats (that the patient carried out, murdering his target). *Tarasoff v. Regents of the University of California*, 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976). The next year, a Seattle lawyer was sued for having failed to voluntarily disclose information about his client’s dangerousness. The appellate opinion disposing of that case exonerated that lawyer, but suggested that with slightly different facts a lawyer would have a duty to warn a dangerous client’s targeted victim. *Hawkins v. King County*, 24 Wash. App. 338 (1979). Both the *Tarasoff* and the *Hawkins* cases received considerable attention from lawyers, who feared personal liability from those precedents. Additional detail about these developments during the 1970s are at <http://www.dougschafer.com/ReplyBrief.pdf>.

5. In 1977, the ABA formed the Commission on Evaluation of Professional Standards (commonly called the Kutak Commission after its chairman, Robert Kutak) to re-write the national bar’s model ethics code. On the duty of confidentiality, the Kutak Commission’s drafts generally supported exceptions that required or permitted lawyers to disclose client information to prevent crime and fraud and permitted

disclosures to rectify a client's past crime or fraud that had been furthered by the unwitting lawyer's services. But ABA constituents with more clout than the Kutak Commission sought to enact ethics rules that would shield them from liability to agencies and third parties. The result was the ABA's adoption in 1982 of the Model Rules of Professional Conduct with a nearly absolute duty of confidentiality, except for disclosures to prevent client crime likely to produce imminent death or substantial bodily harm. See, Schneyer, Ted, *Professionalism as Bar Politics: The Making of the Rules of Professional Conduct*, 14 *Law & Social Inquiry* 677 (1989). For some of the Kutak Commission's drafts of its rule on confidentiality, see <http://www.evergreenethics.com/HistoricFraudRules.html>.

Recent Past and Present(1985-2004)

The 1983 ABA Model Rules of Professional Conduct.

The ABA's 1983 version of Rules 1.6 and 3.3.

Rule 1.6. Confidentiality of Information.

(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).

(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

(1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or

(2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

Rule 3.3. Candor Toward the Tribunal. (part)

(a) A lawyer shall not knowingly:

(1) Make a false statement of material fact or law

The Washington State versions of Rules 1.6 and 3.3 as adopted and effective Sept. 1, 1985.

Rule 1.6. Confidentiality of Information.

(a) A lawyer shall not reveal confidences or secrets relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in section (b).

(b) A lawyer may reveal such confidences or secrets to the extent the lawyer reasonably believes necessary:

(1) To prevent the client from committing a crime; or

(2) To establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client, or pursuant to court order.

Rule 3.3. Candor Toward the Tribunal. (part)

(a) A lawyer shall not knowingly:

(1) Make a false statement of material fact or law

to a tribunal;

(2) Fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;

....

(4) offer evidence that the lawyer knows to be false. If the lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.

(b) The duties stated in paragraph (a) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(c) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

to a tribunal;

(2) Fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client unless such disclosure is prohibited by rule 1.6;

....

(4) Offer evidence that the lawyer knows to be false.

(b) The duties stated in section (a) continue to the conclusion of the proceeding.

(c) If the lawyer has offered material evidence and comes to know of its falsity, the lawyer shall promptly disclose this fact to the tribunal unless such disclosure is prohibited by rule 1.6.

(d) If the lawyer has offered material evidence and comes to know of its falsity, and disclosure of this fact is prohibited by rule 1.6, the lawyer shall promptly make reasonable efforts to convince the client to consent to disclosure. If the client refuses to consent to disclosure, the lawyer may seek to withdraw from the representation in accordance with rule 1.15.

(e) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

Professor Aronson's 1985 Admonition Was Rejected.

In adopting Rule 1.6, the Washington State Supreme Court was unpersuaded by a comment letter submitted by University of Washington Law School Ethics Professor Robert H. Aronson. In his March 28, 1985 letter he urged the Court to adopt a rule that *requires* lawyer revelations to prevent client crime or fraud and that *permits* revelations to rectify client crime or fraud:

"(3) With respect to the substantive provisions of the proposed Rules, I am most concerned with Rules 1.6 and 3.3, dealing with the tension between the lawyer's duties of candor and confidentiality. Under Rule 1.6(b)(1), there is an exception to the duty of confidentiality with respect to information "the lawyer reasonably believes necessary ... [t]o prevent the client from committing a crime." Since this is a departure from the ABA's Model Rule 1.6(b)(1), and since virtually every state that has considered the Model Rules has rejected the ABA's version, the basis for the Washington proposed Rule 1.6(b)(1) is not uniformity. However, whereas the proposed Rule would permit revelation only to prevent the client from committing a future crime, other jurisdictions

that have adopted or proposed adoption of the new rules have also permitted (in some cases, required) revelation necessary to prevent a future fraud, and to rectify criminal or fraudulent client acts in which the lawyer's services had been used.

Under present Disciplinary Rule 7-102(B)(1), a lawyer in Washington who receives information clearly establishing that his client has,

“in the course of the representation, perpetrated a fraud upon a person or tribunal, shall promptly call upon his client to rectify the same, and if his client refuses or is unable to do so, he shall reveal the fraud to the affected tribunal and may reveal the fraud to the affected person.”
(Emphasis added.)

If Rule 1.6(b)(1) is adopted as presently proposed, lawyers in Washington will not be permitted to reveal either the client's intent to defraud another, or prior fraud occurring during the lawyer's representation, and will not be required to reveal even the client's intent to commit a crime. At a time when public respect for lawyers is at an all-time low and lawyers are increasingly being found in complicity with their client's criminal or fraudulent conduct, it is inconceivable to me that the Washington Supreme Court intends to go on record as proposing to lessen the duty of lawyers to protect the public from their clients' criminal or fraudulent conduct. Although the reasons for vigilant protection of client confidences are strong, those policy bases disappear when the client seeks, not representation for past acts, whether criminal or not, but rather to harm others in the future. Likewise, a client is entitled to complete confidentiality with respect to proper legal representation, but has no justified expectation of confidentiality when he uses the attorney to perpetrate a fraud on another person. It is unthinkable for Washington to prohibit revelation under those circumstances when it now requires it.

I would propose that the Court clearly reaffirm its commitment to protect the public and the integrity of lawyers and the legal system, consistent with its strong concern for client confidentiality, by adopting a Rule such as that recently adopted by the New Jersey Supreme Court [requiring lawyer revelations as necessary to prevent client crime or fraud, and permitting such revelations to rectify a criminal or fraudulent act that was furthered by the lawyer's services.]

The 1990 Adoption of WA-RPC Rule 1.6(c).

In 1988, the Washington State Bar's Board of Governors was unwilling to approve a formal opinion recognizing that newly adopted Rules 1.6 and 3.3 barred a lawyer from revealing the misappropriation of estate funds by his or her client serving as a guardian or personal representative. It agreed that those rules, as written, compelled that conclusion, but felt the result should be otherwise. That led to the 1990 adoption of Rule 1.6(c), stating “A lawyer may reveal to the tribunal confidences or secrets which disclose any breach of fiduciary responsibility by a client who is a guardian, personal representative, receiver, or other court appointed fiduciary.” If Washington state officials in 1985 had adopted the ABA version of Rule 3.3 rather than the version that it rejected (proposed by the American College of Trial Lawyers), then Rule 3.3(a)(2) would have produced the desired result and the amendment would have been unnecessary.

The ABA Ethics 2000 Commission Project

The Ethics 2000 Commission (nicknamed E2K) was formed in 1997 to review the Model Rules of Professional Conduct. It submitted a report to the House of Delegates at the August 2001 Annual Meeting. The report was debated at the August 2001 Annual and February 2002 Midyear Meetings. The changes to the Model Rules as amended during the debate were final at the end of the February 2002 Midyear Meeting. The Model Rules were further amended in August 2002 based on House debate of Reports and Recommendations by the Multijurisdictional Practice Commission (Rules 5.5 and 8.5) and the Standing Committee on Ethics and Professional Responsibility (Rules 7.2 and 7.5). Additional amendments to Rules 1.6 and 1.13 were made in August 2003 based on House debate of the Report and Recommendation of the Task Force on Corporate Responsibility.

A collection of links to Internet pages relating to E2K is <http://www.evergreenethics.com/E2K/>

The current text of the ABA Model Rules of Professional Conduct including comments is posted on-line at http://www.abanet.org/cpr/mrpc/mrpc_toc.html.

The WSBA Ethics 2003 Committee

In early 2003, the Washington State Bar Association formed a Special Committee for the Evaluation of the Rules of Professional Conduct ("Ethics 2003 Committee") to review the revised ABA Model Rules of Professional Conduct, to undertake a comprehensive study and evaluation of the ABA revisions, to consider the suitability of adopting the ABA revisions and commentary in Washington, to consider other appropriate changes to Washington's Rules of Professional Conduct, and to submit its recommendations to the WSBA Board of Governors.

The Committee issued its Report and Recommendation to the Board of Governors in March 2004. In July 2004 the Board completed its review of the report and approved (as modified by the Board) the Ethics 2003 recommendation for presentation to the Supreme Court pursuant to the provisions of GR 9. The proposed changes were submitted to the Supreme Court the week of October 11, 2004.

<http://www.wsba.org/lawyers/groups/ethics2003/default.htm> is the web page for the Ethics 2003 Committee. Posted there are its minutes, interim reports, and its GR9 submission.

Proposed (2005)

Separate handouts will be used to discuss the WSBA proposed changes to Rules 1.6 and 3.3

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