Ethics Issues and Conflict of Interest Analyses in a Small Legal Community

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JEANNE MARIE CLAVERE is a 1987 graduate of the University of Puget Sound School of Law (now Seattle University School of Law). Prior to earning her law degree, she received a Master of Business Administration from DePaul University in Chicago. In February 2010, she joined the staff of the Washington State Bar Association as Professional Responsibility Counsel. After four years with a Seattle law firm, Jeanne Marie began her solo practice in 1992, focusing on estate planning, elder law (including complex guardianships, trusts, and guardian ad litem appointments), and contract based criminal prosecution. As Professional Responsibility Counsel, Jeanne Marie serves as an advisor to members of the bar on the Rules of Professional Conduct as they apply to WSBA Advisory Ethics Opinions, the Rules for Enforcement of Lawyer Conduct, and the ABA Standards for Imposing Lawyer Sanctions. She has been invited to lecture on Professionalism, Civility, and Ethics at all three Washington law schools, for the American Bar Association, and speaks at various local bar CLE's throughout the state. Jeanne Marie is the primary responder on the WSBA Ethics Line and wants every attendee to commit the number to memory and call her first, not after they run into an ethical dilemma.

While in private practice Jeanne Marie appeared before a wide range of courts and tribunals, ranging from Ex Parte hearings to trials on guardianship and criminal issues, and served for many years as a Settlement, Litigation, Adoption, Family Law, Incapacity and Probate Guardian ad Litem in King and Snohomish Counties. Jeanne Marie is Past President of the state Washington Women Lawyers, past Chair of the Washington State Bar Association Elder Law Section and served on the executive committee of the King County Bar Association Guardianship and Elder Law Section. She is a member of the American Bar Association and the ABA's Center for Professional Responsibility, is a Washington Fellow of the American Bar Foundation and is a Master Member of the William L. Dwyer Inn of Court. Jeanne Marie also serves as a Director and Past President of the National Conference of Women's Bar Associations and as their liaison to the ABA Commission on Women in the Profession. She is a Director on the board of the International Action Network for Gender Equity and Law.

Opinions expressed herein are the author's and do not necessarily represent the official or unofficial position of the Washington State Bar Association or the WSBA Office of General Counsel. Members seeking guidance or information about ethics may contact WSBA Professional Responsibility Counsel on the Ethics Line at 206-727-8284 / 800-945-WSBA ext. 8284.

ETHICS ISSUES AND CONFLICT OF INTEREST ANALYSES IN A SMALL LEGAL COMMUNITY

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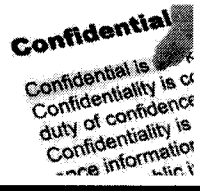
RPC 1.6: CONFIDENTIALITY OF INFORMATION

(a) 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 the disclosure is permitted in paragraph (b).

RPC 1.6 — COMMENT 3

- "The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source."



RPC 1.18: DUTIES TO PROSPECTIVE CLIENTS

- (e) A lawyer may condition conversations with a prospective client on the person's informed consent that no information disclosed during the consultation will prohibit the lawyer from representing a different client in the matter.
- The prospective client may also expressly consent to the lawyer's subsequent use of information received from the prospective client.

AVOIDING CONFLICTS OF INTEREST

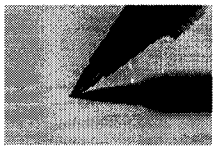
- General rule: RPC 1.7
- Informed consent: RPC 1.7(b)
- Screening mechanisms and procedures: see also RPC 5.3

GENERAL RULE

- A lawyer may not represent a client when:
  - There is a **significant** risk that representation would be **materially** and **adversely** affected by:
    - The lawyers own interests — RPC 1.7 & 1.8
    - The lawyers duties to another client, former client or third party — RPC 1.9 & 1.10

INFORMED CONSENT

- To waive conflict with consent, the RPCs require:
  - Informed consent;
  - Confirmation in writing;
  - And it must be reasonable.



SCREENING MECHANISMS AND PROCEDURES

- Use client intake forms
- Screen during the interview
- Have screening lists and electronic databases
- Screen lawyers and staff

RPC 1.16: TERMINATING REPRESENTATION

- (c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating that representation.
- (d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect client's interests, such as:
  - Giving reasonable notice to the client;
  - Allowing time for employment of other counsel;
  - Surrendering papers and property to which the client is entitled;
  - And refunding any advance payment of fee or expense that has not been earned or incurred.
- The lawyer may retain papers relating to the client to the extent permitted by other law.

RPC 1.13: ORGANIZATION AS CLIENT

- (a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.
- (g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7.

ADVISORY OPINION REVIEW

- See wsba.org for Advisory Opinions
  - Ethics Line: 206-727-8284

The RPCs of Conflict of Analyses: 1.7; 1.8; 1.9; 1.10; 1.13

RPC 1.7 CONFLICT OF INTEREST: CURRENT CLIENTS

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

(1) the representation of one client will be directly adverse to another client; or

(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.

(b) Notwithstanding the existence of a concurrent 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 involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing (following authorization from the other client to make any required disclosures).

Comment

General Principles

[1] [Washington revision] Loyalty and independent judgment are essential elements in the lawyer's relationship to a client. Concurrent conflicts of interest can arise from the lawyer's responsibilities to another client, a former client or a third person or from the lawyer's own interests. For specific Rules regarding certain concurrent conflicts of interest, see Rule 1.8. For former client conflicts of interest, see Rule 1.9. For conflicts of interest involving prospective clients, see Rule 1.18. For definitions of "informed consent" and "confirmed in writing," see Rule 1.0A(e) and (b).

[2] Resolution of a conflict of interest problem under this Rule requires the lawyer to: 1) clearly identify the client or clients; 2) determine whether a conflict of interest exists; 3) decide whether the representation may be undertaken despite the existence of a conflict, i.e., whether the conflict is consentable; and 4) if so, consult with the clients affected under paragraph (a) and obtain their informed consent, confirmed in writing. The clients affected under paragraph (a) include both of the clients referred to in paragraph (a)(1) and the one or more clients whose representation might be materially limited under paragraph (a)(2).

[3] A conflict of interest may exist before representation is undertaken, in which event the representation must be declined, unless the lawyer obtains the informed consent of each client under the conditions of paragraph (b). To determine whether a conflict of interest exists, a lawyer should adopt reasonable procedures, appropriate for the size and type of firm and practice, to determine in both litigation and non-litigation matters the persons and issues involved. See also Comment to Rule 5.1. Ignorance caused by a failure to institute such procedures will not excuse a lawyer's violation of this Rule. As to whether a client-lawyer relationship exists or, having once been established, is continuing, see Comment to Rule 1.3 and Scope.

[4] If a conflict arises after representation has been undertaken, the lawyer ordinarily must withdraw from the representation, unless the lawyer has obtained the informed consent of the client under the conditions of paragraph (b). See Rule 1.16. Where more than one client is involved, whether the lawyer may continue to represent any of the clients is determined both by the lawyer's ability to comply with duties owed to the former client and by the lawyer's ability to represent adequately the remaining client or clients, given the lawyer's duties to the former client. See Rule 1.9. See also Comments [5] and [29].

[5] Unforeseeable developments, such as changes in corporate and other organizational affiliations or the addition or realignment of parties in litigation, might create conflicts in the midst of a representation, as when a company sued by the lawyer on behalf of one client is bought by another client represented by the lawyer in an unrelated matter. Depending on the circumstances, the lawyer may have the option to withdraw from one of the representations in order to avoid the conflict. The lawyer must seek court approval where necessary and take steps to minimize harm to the clients. See Rule 1.16. The lawyer must continue to protect the confidences of the client from whose representation the lawyer has withdrawn. See Rule 1.9(c). See also Washington Comment [36].

Identifying Conflicts of Interest: Directly Adverse

[6] Loyalty to a current client prohibits undertaking representation directly adverse to that client without that client's informed consent. Thus, absent consent, a lawyer may not act as an advocate in one matter against a person the lawyer represents in some other matter, even when the matters are wholly unrelated. The client as to whom the representation is directly adverse is likely to feel betrayed, and the resulting damage to the client-lawyer relationship is likely to impair the lawyer's ability to represent the client effectively. In addition, the client on whose behalf the adverse representation is undertaken reasonably may fear that the lawyer will pursue that client's case less effectively out of deference to the other client, i.e., that the representation may be materially limited by the lawyer's interest in retaining the current client. Similarly, a directly adverse conflict may arise when a lawyer is required to cross-examine a client who appears as a witness in a lawsuit involving another client, as when the testimony will be damaging to the client who is represented in the lawsuit. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only economically adverse, such as representation of competing economic enterprises in unrelated litigation, does not ordinarily constitute a conflict of interest and thus may not require consent of the respective clients.

[7] Directly adverse conflicts can also arise in transactional matters. For example, if a lawyer is asked to represent the seller of a business in negotiations with a buyer represented by the lawyer, not in the same transaction but in another, unrelated matter, the lawyer could not undertake the representation without the informed consent of each client.

Identifying Conflicts of Interest: Material Limitation

[8] Even where there is no direct adverseness, a conflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests. For example, a lawyer asked to represent several individuals seeking to form a joint venture is likely to be materially limited in the lawyer's ability to recommend or advocate all possible positions that each might take because of the lawyer's duty of loyalty to the others. The conflict in effect forecloses alternatives that would otherwise be available to the client. The mere possibility of subsequent harm does not itself require disclosure and consent. The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client. See also Washington Comment [37].

Lawyer's Responsibilities to Former Clients and Other Third Persons

[9] In addition to conflicts with other current clients, a lawyer's duties of loyalty and independence may be materially limited by responsibilities to former clients under Rule 1.9 or by the lawyer's responsibilities to other persons, such as fiduciary duties arising from a lawyer's service as a trustee, executor or corporate director.

Personal Interest Conflicts

[10] The lawyer's own interests should not be permitted to have an adverse effect on representation of a client. For example, if the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice. Similarly, when a lawyer has discussions concerning possible employment with an opponent of the lawyer's client, or with a law firm representing the opponent, such discussions could materially limit the lawyer's representation of the client. In addition, a lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed financial interest. See Rule 1.8 for specific Rules pertaining to a number of personal interest conflicts, including business transactions with clients. See also Rule 1.10 (personal interest conflicts under Rule 1.7 ordinarily are not imputed to other lawyers in a law firm).

[11] [Washington revision] When lawyers representing different clients in the same matter or in substantially related matters are related as parent, child, sibling, or spouse, or if the lawyers have some other close familial relationship or if the lawyers are in a personal intimate relationship with one another, there may be a significant risk that client confidences will be revealed and that the lawyer's family or other familial or intimate relationship will interfere with both loyalty and independent professional judgment. See Rule 1.8(l). As a result, each client is entitled to know of the existence and implications of the relationship between the lawyers before the lawyer agrees to undertake the representation. Thus, a lawyer so related to another lawyer ordinarily may not represent a client in a matter where that lawyer is representing another party, unless each client gives informed consent. The disqualification arising from such relationships is personal and ordinarily is not imputed to members of firms with whom the lawyers are associated. See Rules 1.8(k) and 1.10.

[12] [Reserved.]

Interest of Person Paying for a Lawyer's Service

[13] A lawyer may be paid from a source other than the client, including a co-client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty or independent judgment to the client. See Rule 1.8(f). If acceptance of the payment from any other source presents a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in accommodating the person paying the lawyer's fee or by the lawyer's responsibilities to a payer who is also a co-client, then the lawyer must comply with the requirements of paragraph (b) before accepting the representation, including determining whether the conflict is consentable and, if so, that the client has adequate information about the material risks of the representation.

Prohibited Representations

[14] Ordinarily, clients may consent to representation notwithstanding a conflict. However, as indicated in paragraph (b), some conflicts are nonconsentable, meaning that the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent. When the lawyer is representing more than one client, the question of consentability must be resolved as to each client.

[15] Consentability is typically determined by considering whether the interests of the clients will be adequately protected if the clients are permitted to give their informed consent to representation burdened by a conflict of interest. Thus, under paragraph (b)(1), representation is prohibited if in the circumstances the lawyer cannot reasonably conclude that the lawyer will be able to provide competent and diligent representation. See Rule 1.1 (Competence) and Rule 1.3 (Diligence).

[16] [Washington revision] Paragraph (b)(2) describes conflicts that are nonconsentable because the representation is prohibited by applicable law. For example, in some states substantive law provides that the same lawyer may not represent more than one defendant in a capital case, even with the consent of the clients, and under federal criminal statutes certain representations by a former government lawyer are prohibited, despite the informed consent of the former client. In addition, decisional law in some states other than Washington limits the ability of a governmental client, such as a municipality, to consent to a conflict of interest. See Washington Comment [38].

[17] [Washington revision] Paragraph (b)(3) describes conflicts that are nonconsentable because of the institutional interest in vigorous development of each client's position when the clients are aligned directly against each other in the same litigation or other proceeding before a tribunal. Whether clients are aligned directly against each other within the meaning of this paragraph requires examination of the context of the proceeding. Although this paragraph does not preclude a lawyer's multiple representation of adverse parties to a mediation (because mediation is not a proceeding before a "tribunal" under Rule 1.0A(m)), such representation may be precluded by paragraph (b)(1). See also Washington Comment [38].

Informed Consent

[18] [Washington revision] Informed consent requires that each affected client be aware of the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could have adverse effects on the interests of that client. See Rule 1.0A(e) (informed consent). The information required depends on the nature of the conflict and the nature of the risks involved. When representation of multiple clients in a single matter is undertaken, the information must include the implications of the common representation, including possible effects on loyalty, confidentiality and the attorney-client privilege and the advantages and risks involved. See Comments [30] and [31] (effect of common representation on confidentiality).

[19] Under some circumstances it may be impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent. In some cases the alternative to common representation can be that each party may have to obtain separate representation with the possibility of incurring additional costs. These costs, along with the benefits of securing separate representation, are factors that may be considered by the affected client in determining whether common representation is in the client's interests. See also Washington Comment [39].

Consent Confirmed in Writing

[20] [Washington revision] Paragraph (b) requires the lawyer to obtain the informed consent of the client, confirmed in writing. Such a writing may consist of a document executed by the client or one that the lawyer promptly records and transmits to the client following an oral consent. See Rule 1.0A(b). See also Rule 1.0A(n)

(writing includes electronic transmission). If it is not feasible to obtain or transmit the writing at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. See Rule 1.0A(b). The requirement of a writing does not supplant the need in most cases for the lawyer to talk with the client, to explain the risks and advantages, if any, of representation burdened with a conflict of interest, as well as reasonably available alternatives, and to afford the client a reasonable opportunity to consider the risks and alternatives and to raise questions and concerns. Rather, the writing is required in order to impress upon clients the seriousness of the decision the client is being asked to make and to avoid disputes or ambiguities that might later occur in the absence of a writing.

Revoking Consent

[21] A client who has given consent to a conflict may revoke the consent and, like any other client, may terminate the lawyer's representation at any time. Whether revoking consent to the client's own representation precludes the lawyer from continuing to represent other clients depends on the circumstances, including the nature of the conflict, whether the client revoked consent because of a material change in circumstances, the reasonable expectations of the other client and whether material detriment to the other clients or the lawyer would result.

Consent to Future Conflict

[22] Whether a lawyer may properly request a client to waive conflicts that might arise in the future is subject to the test of paragraph (b). The effectiveness of such waivers is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails. The more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences of those representations, the greater the likelihood that the client will have the requisite understanding. Thus, if the client agrees to consent to a particular type of conflict with which the client is already familiar, then the consent ordinarily will be effective with regard to that type of conflict. If the consent is general and open-ended, then the consent ordinarily will be ineffective, because it is not reasonably likely that the client will have understood the material risks involved. On the other hand, if the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise, such consent is more likely to be effective, particularly if, e.g., the client is independently represented by other counsel in giving consent and the consent is limited to future conflicts unrelated to the subject of the representation. In any case, advance consent cannot be effective if the circumstances that materialize in the future are such as would make the conflict nonconsentable under paragraph (b).

Conflicts in Litigation

[23] Paragraph (b)(3) prohibits representation of opposing parties in the same litigation, regardless of the clients' consent. On the other hand, simultaneous representation of parties whose interests in litigation may conflict, such as coplaintiffs or codefendants, is governed by paragraph (a)(2). A conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question. Such conflicts can arise in criminal cases as well as civil. The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one codefendant. On the other hand, common representation of persons having similar interests in civil litigation is proper if the requirements of paragraph (b) are met.

[24] Ordinarily a lawyer may take inconsistent legal positions in different tribunals at different times on behalf of different clients. The mere fact that advocating a legal position on behalf of one client might create precedent adverse to the interests of a client represented by the lawyer in an unrelated matter does not create a conflict of interest. A conflict of interest exists, however, if there is a significant risk that a lawyer's action on behalf of one client will materially limit the lawyer's effectiveness in representing another client in a different case; for example, when a decision favoring one client will create a precedent likely to seriously weaken the position taken on behalf of the other client. Factors relevant in determining whether the clients need to be advised of the risk include: where the cases are pending, whether the issue is substantive or procedural, the temporal relationship between the matters, the significance of the issue to the immediate and long-term interests of the clients involved and the clients' reasonable expectations in retaining the lawyer. If there is significant risk of material limitation, then absent informed consent of the affected clients, the lawyer must refuse one of the representations or withdraw from one or both matters.

[25] When a lawyer represents or seeks to represent a class of plaintiffs or defendants in a class-action lawsuit, unnamed members of the class are ordinarily not considered to be clients of the lawyer for purposes of applying paragraph (a)(1) of this Rule. Thus, the lawyer does not typically need to get the consent of such a person before representing a client suing the person in an unrelated matter. Similarly, a lawyer seeking to represent an opponent in a class action does not typically need the consent of an unnamed member of the class whom the lawyer represents in an unrelated matter.

Nonlitigation Conflicts

[26] Conflicts of interest under paragraphs (a)(1) and (a)(2) arise in contexts other than litigation. For a discussion of directly adverse conflicts in transactional matters, see Comment [7]. Relevant factors in determining whether there is significant potential for material limitation include the duration and intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that disagreements will arise and the likely prejudice to the client from the conflict. The question is often one of proximity and degree. See Comment [8].

[27] For example, conflict questions may arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may be present. In estate administration the identity of the client may be unclear under the law of a particular jurisdiction. Under one view, the client is the fiduciary; under another view the client is the estate or trust, including its beneficiaries. In order to comply with conflict of interest rules, the lawyer should make clear the lawyer's relationship to the parties involved.

[28] Whether a conflict is consentable depends on the circumstances. For example, a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference in interest among them. Thus, a lawyer may seek to establish or adjust a relationship between clients on an amicable and mutually advantageous basis; for example, in helping to organize a business in which two or more clients are entrepreneurs, working out the financial reorganization of an enterprise in which two or more clients have an interest or arranging a property distribution in settlement of an estate. The lawyer seeks to resolve potentially adverse interests by developing the parties' mutual interests. Otherwise, each party might have to obtain separate representation, with the possibility of incurring additional cost, complication or even litigation. Given these and other relevant factors, the clients may prefer that the lawyer act for all of them. See also Washington Comment [40].

Special Considerations in Common Representation

[29] In considering whether to represent multiple clients in the same matter, a lawyer should be mindful that if the common representation fails because the potentially adverse interests cannot be reconciled, the result can be additional cost, embarrassment and recrimination. Ordinarily, the lawyer will be forced to withdraw from representing all of the clients if the common representation fails. In some situations, the risk of failure is so great that multiple representation is plainly impossible. For example, a lawyer cannot undertake common representation of clients where contentious litigation or negotiations between them are imminent or contemplated. Moreover, because the lawyer is required to be impartial between commonly represented clients, representation of multiple clients is improper when it is unlikely that impartiality can be maintained. Generally, if the relationship between the parties has already assumed antagonism, the possibility that the clients' interests can be adequately served by common representation is not very good. Other relevant factors are whether the lawyer subsequently will represent both parties on a continuing basis and whether the situation involves creating or terminating a relationship between the parties.

[30] A particularly important factor in determining the appropriateness of common representation is the effect on client-lawyer confidentiality and the attorney-client privilege. With regard to the attorney-client privilege, the prevailing rule is that, as between commonly represented clients, the privilege does not attach. Hence, it must be assumed that if litigation eventuates between the clients, the privilege will not protect any such communications, and the clients should be so advised.

[31] As to the duty of confidentiality, continued common representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation. This is so because the lawyer has an equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation that might affect that client's interests and the right to expect that the lawyer will use that information to that client's benefit. See Rule 1.4. The lawyer should, at the outset of

the common representation and as part of the process of obtaining each client's informed consent, advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other. In limited circumstances, it may be appropriate for the lawyer to proceed with the representation when the clients have agreed, after being properly informed, that the lawyer will keep certain information confidential. For example, the lawyer may reasonably conclude that failure to disclose one client's trade secrets to another client will not adversely affect representation involving a joint venture between the clients and agree to keep that information confidential with the informed consent of both clients.

[32] When seeking to establish or adjust a relationship between clients, the lawyer should make clear that the lawyer's role is not that of partisanship normally expected in other circumstances and, thus, that the clients may be required to assume greater responsibility for decisions than when each client is separately represented. Any limitations on the scope of the representation made necessary as a result of the common representation should be fully explained to the clients at the outset of the representation. See Rule 1.2(c).

[33] Subject to the above limitations, each client in the common representation has the right to loyal and diligent representation and the protection of Rule 1.9 concerning the obligations to a former client. The client also has the right to discharge the lawyer as stated in Rule 1.16. See also Washington Comment [41].

Organizational Clients

[34] A lawyer who represents a corporation or other organization does not, by virtue of that representation, necessarily represent any constituent or affiliated organization, such as a parent or subsidiary. See Rule 1.13(a). Thus, the lawyer for an organization is not barred from accepting representation adverse to an affiliate in an unrelated matter, unless the circumstances are such that the affiliate should also be considered a client of the lawyer, there is an understanding between the lawyer and the organizational client that the lawyer will avoid representation adverse to the client's affiliates, or the lawyer's obligations to either the organizational client or the new client are likely to limit materially the lawyer's representation of the other client.

[35] A lawyer for a corporation or other organization who is also a member of its board of directors should determine whether the responsibilities of the two roles may conflict. The lawyer may be called on to advise the corporation in matters involving actions of the directors. Consideration should be given to the frequency with which such situations may arise, the potential intensity of the conflict, the effect of the lawyer's resignation from the board and the possibility of the corporation's obtaining legal advice from another lawyer in such situations. If there is material risk that the dual role will compromise the lawyer's independence of professional judgment, the lawyer should not serve as a director or should cease to act as the corporation's lawyer when conflicts of interest arise. The lawyer should advise the other members of the board that in some circumstances matters discussed at board meetings while the lawyer is present in the capacity of director might not be protected by the attorney-client privilege and that conflict of interest considerations might require the lawyer's recusal as a director or might require the lawyer and the lawyer's firm to decline representation of the corporation in a matter.

Additional Washington Comments (36 - 41)

General Principles

[36] Notwithstanding Comment [3], lawyers providing short-term limited legal services to a client under the auspices of a program sponsored by a nonprofit organization or court are not normally required to systematically screen for conflicts of interest before undertaking a representation. See Comment [1] to Rule 6.5. See Rule 1.2(c) for requirements applicable to the provision of limited legal services.

Identifying Conflicts of Interest: Material Limitation

[37] Use of the term "significant risk" in paragraph (a)(2) is not intended to be a substantive change or diminishment in the standard required under former Washington RPC 1.7(b), i.e., that "the representation of the client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests."

Prohibited Representations

[38] In Washington, a governmental client is not prohibited from properly consenting to a representational conflict of interest.

Informed Consent

[39] Paragraph (b)(4) of the Rule differs slightly from the Model Rule in that it expressly requires authorization from the other client before any required disclosure of information relating to that client can be made.

Authorization to make a disclosure of information relating to the representation requires the client's informed consent. See Rule 1.6(a).

Nonlitigation Conflicts

[40] Under Washington case law, in estate administration matters the client is the personal representative of the estate.

Special Considerations in Common Representation

[41] Various legal provisions, including constitutional, statutory and common law, may define the duties of government lawyers in representing public officers, employees, and agencies and should be considered in evaluating the nature and propriety of common representation.

RPC 1.8
CONFLICT OF INTEREST: CURRENT CLIENTS: SPECIFIC RULES

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;

(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of an independent lawyer on the transaction; and

(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.

(c) A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of the client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.

(d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

(e) A lawyer shall not, while representing a client in connection with contemplated or pending litigation, advance or guarantee financial assistance to a client, except that:

(1) a lawyer may advance or guarantee the expenses of litigation, including court costs, expenses of investigation, expenses of medical examination, and costs of obtaining and presenting evidence, provided the client remains ultimately liable for such expenses; and

(2) in matters maintained as class actions only, repayment of expenses of litigation may be contingent on the outcome of the matter.

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

(1) the client gives informed consent;

(2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and

(3) information relating to representation of a client is protected as required by Rule 1.6.

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client gives informed consent, confirmed in writing. The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and the participation of each person in the settlement.

(h) A lawyer shall not:

(1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless permitted by law and the client is independently represented by a lawyer in making the agreement; or

(2) settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of an independent lawyer in connection therewith.

(i) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

(1) acquire a lien authorized by law to secure the lawyer's fee or expenses; and

(2) contract with a client for a reasonable contingent fee in a civil case.

(j) A lawyer shall not:

(1) have sexual relations with a current client of the lawyer unless a consensual sexual relationship existed between them at the time the client-lawyer relationship commenced; or

(2) have sexual relations with a representative of a current client if the sexual relations would, or would likely, damage or prejudice the client in the representation.

(3) For purposes of Rule 1.8(j), "lawyer" means any lawyer who assists in the representation of the client, but does not include other firm members who provide no such assistance.

(k) While lawyers area associated in a firm with other lawyers or LLLTs, a prohibition in the foregoing paragraphs (a) through (i) of this Rule or LLLT RPC 1.8 that applies to any one of them shall apply to all of them, except that the prohibitions in paragraphs (a), (h), and (i) of LLLT RPC 1.8 shall apply to firm lawyers only if the conduct is also prohibited by this Rule.

(l) A lawyer who is related to another lawyer or LLLT as parent, child, sibling, or spouse, or who has any other close familial or intimate relationship with another lawyer or LLLT, shall not represent a client in a matter directly adverse to a person who the lawyer knows is represented by the related lawyer or LLLT unless:

(1) the client gives informed consent to the representation; and

(2) the representation is not otherwise prohibited by Rule 1.7

(m) A lawyer shall not:

(1) make or participate in making an agreement with a governmental entity for the delivery of indigent defense services if the terms of the agreement obligate the contracting lawyer or law firm:

(i) to bear the cost of providing conflict counsel; or

(ii) to bear the cost of providing investigation or expert services, unless a fair and reasonable amount for such costs is specifically designated in the agreement in a manner that does not adversely affect the income or compensation allocated to the lawyer, law firm, or law firm personnel; or

(2) knowingly accept compensation for the delivery of indigent defense services from a lawyer who has entered into a current agreement in violation of paragraph (m)(1).

Comment

Business Transactions Between Client and Lawyer

[1] A lawyer's legal skill and training, together with the relationship of trust and confidence between lawyer and client, create the possibility of overreaching when the lawyer participates in a business, property or financial transaction with a client, for example, a loan or sales transaction or a lawyer investment on behalf of a client. The requirements of paragraph (a) must be met even when the transaction is not closely related to the subject matter of the representation, as when a lawyer drafting a will for a client learns that the client needs money for unrelated expenses and offers to make a loan to the client. The Rule applies to lawyers engaged in the sale of goods or services related to the practice of law, for example, the sale of title insurance or investment services to existing clients of the lawyer's legal practice. See Rule 5.7. It also applies to lawyers purchasing property from estates they represent. It does not apply to ordinary fee arrangements between client and lawyer, which are governed by Rule 1.5, although its requirements must be met when the lawyer accepts an interest in the client's business or other nonmonetary property as payment of all or part of a fee. In addition, the Rule does not apply to standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others, for example, banking or brokerage services, medical services, products manufactured or distributed by the client, and utilities' services. In such transactions, the lawyer has no advantage in dealing with the client, and the restrictions in paragraph (a) are unnecessary and impracticable.

[2] [Washington revision] Paragraph (a)(1) requires that the transaction itself be fair to the client and that its essential terms be communicated to the client, in writing, in a manner that can be reasonably understood. Paragraph (a)(2) requires that the client also be advised, in writing, of the desirability of seeking the advice of an independent lawyer. It also requires that the client be given a reasonable opportunity to obtain such advice. Paragraph (a)(3) requires that the lawyer obtain the client's informed consent, in a writing signed by the client, both to the essential terms of the transaction and to the lawyer's role. When necessary, the lawyer should discuss both the material risks of the proposed transaction, including any risk presented by the lawyer's involvement and the existence of reasonably available alternatives and should explain why the advice of an independent lawyer is desirable. See Rule 1.0A(e) (definition of informed consent).

[3] The risk to a client is greatest when the client expects the lawyer to represent the client in the transaction itself or when the lawyer's financial interest otherwise poses a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's financial interest in the transaction. Here the lawyer's role requires that the lawyer must comply, not only with the requirements of paragraph (a), but also with the requirements of Rule 1.7. Under that Rule, the lawyer must disclose the risks associated with the lawyer's dual role as both legal adviser

and participant to the transaction, such as the risk that the lawyer will structure the transaction or give legal advice in a way that favors the lawyer's interests at the expense of the client. Moreover, the lawyer must obtain the client's informed consent. In some cases, the lawyer's interest may be such that Rule 1.7 will preclude the lawyer from seeking the client's consent to the transaction.

[4] [Washington revision] If the client is independently represented by a lawyer in the transaction, paragraph (a)(2) of this Rule is inapplicable, and the paragraph (a)(1) requirement for full disclosure is satisfied either by a written disclosure by the lawyer involved in the transaction or by the client's independent lawyer. The fact that the client was independently represented by a lawyer in the transaction is relevant in determining whether the agreement was fair and reasonable to the client as paragraph (a)(1) further requires.

Use of Information Related to Representation

[5] [Washington revision] Use of information relating to the representation to the disadvantage of the client violates the lawyer's duty of loyalty. Paragraph (b) applies when the information is used to benefit either the lawyer or a third person, such as another client or business associate of the lawyer. For example, if a lawyer learns that a client intends to purchase and develop several parcels of land, the lawyer may not use that information to purchase one of the parcels in competition with the client or to recommend that another client make such a purchase. The Rule does not prohibit uses that do not disadvantage the client. For example, a lawyer who learns a government agency's interpretation of trade legislation during the representation of one client may properly use that information to benefit other clients. Paragraph (b) prohibits disadvantageous use of client information unless the client gives informed consent, except as permitted or required by these Rules. See Rules 1.2(d), 1.6, 1.9(c), 3.3, 4.1(b), and 8.1.

Gifts to Lawyers

[6] A lawyer may accept a gift from a client, if the transaction meets general standards of fairness. For example, a simple gift such as a present given at a holiday or as a token of appreciation is permitted. If a client offers the lawyer a more substantial gift, paragraph (c) does not prohibit the lawyer from accepting it, although such a gift may be voidable by the client under the doctrine of undue influence, which treats client gifts as presumptively fraudulent. In any event, due to concerns about overreaching and imposition on clients, a lawyer may not suggest that a substantial gift be made to the lawyer or for the lawyer's benefit, except where the lawyer is related to the client as set forth in paragraph (c).

[7] If effectuation of a substantial gift requires preparing a legal instrument such as a will or conveyance the client should have the detached advice that another lawyer can provide. The sole exception to this Rule is where the client is a relative of the donee.

[8] This Rule does not prohibit a lawyer from seeking to have the lawyer or a partner or associate of the lawyer named as executor of the client's estate or to another potentially lucrative fiduciary position. Nevertheless, such appointments will be subject to the general conflict of interest provision in Rule 1.7 when there is a significant risk that the lawyer's interest in obtaining the appointment will materially limit the lawyer's independent professional judgment in advising the client concerning the choice of an executor or other fiduciary. In obtaining the client's informed consent to the conflict, the lawyer should advise the client concerning the nature and extent of the lawyer's financial interest in the appointment, as well as the availability of alternative candidates for the position.

Literary Rights

[9] An agreement by which a lawyer acquires literary or media rights concerning the conduct of the representation creates a conflict between the interests of the client and the personal interests of the lawyer. Measures suitable in the representation of the client may detract from the publication value of an account of the representation. Paragraph (d) does not prohibit a lawyer representing a client in a transaction concerning literary property from agreeing that the lawyer's fee shall consist of a share in ownership in the property, if the arrangement conforms to Rule 1.5 and paragraphs (a) and (i).

Financial Assistance

[10] [Washington revision] Lawyers may not subsidize lawsuits or administrative proceedings brought on behalf of their clients, including making or guaranteeing loans to their clients for living expenses, because to do so would encourage clients to pursue lawsuits that might not otherwise be brought and because such assistance gives lawyers too great a financial stake in the litigation. See Washington Comment [21].

Person Paying for a Lawyer's Services

[11] Lawyers are frequently asked to represent a client under circumstances in which a third person will compensate the lawyer, in whole or in part. The third person might be a relative or friend, an indemnitor (such as a liability insurance company) or a co-client (such as a corporation sued along with one or more of its employees). Because third-party payers frequently have interests that differ from those of the client, including interests in minimizing the amount spent on the representation and in learning how the representation is progressing, lawyers are prohibited from accepting or continuing such representations unless the lawyer determines that there will be no interference with the lawyer's independent professional judgment and there is informed consent from the client. See also Rule 5.4(c) (prohibiting interference with a lawyer's professional judgment by one who recommends, employs or pays the lawyer to render legal services for another).

[12] Sometimes, it will be sufficient for the lawyer to obtain the client's informed consent regarding the fact of the payment and the identity of the third-party payer. If, however, the fee arrangement creates a conflict of interest for the lawyer, then the lawyer must comply with Rule. 1.7. The lawyer must also conform to the requirements of Rule 1.6 concerning confidentiality. Under Rule 1.7(a), a conflict of interest exists if there is significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in the fee arrangement or by the lawyer's responsibilities to the third-party payer (for example, when the third-party payer is a co-client). Under Rule 1.7(b), the lawyer may accept or continue the representation with the informed consent of each affected client, unless the conflict is nonconsentable under that paragraph. Under Rule 1.7(b), the informed consent must be confirmed in writing.

Aggregate Settlements

[13] [Washington revision] Differences in willingness to make or accept an offer of settlement are among the risks of common representation of multiple clients by a single lawyer. Under Rule 1.7, this is one of the risks that should be discussed before undertaking the representation, as part of the process of obtaining the clients' informed consent. In addition, Rule 1.2(a) protects each client's right to have the final say in deciding whether to accept or reject an offer of settlement and in deciding whether to enter a guilty or nolo contendere plea in a criminal case. The rule stated in this paragraph is a corollary of both these Rules and provides that, before any settlement offer or plea bargain is made or accepted on behalf of multiple clients, the lawyer must inform each of them about all the material terms of the settlement, including what the other clients will receive or pay if the settlement or plea offer is accepted. See also Rule 1.0A(e) (definition of informed consent). Lawyers representing a class of plaintiffs or defendants, or those proceeding derivatively, may not have a full client-lawyer relationship with each member of the class; nevertheless, such lawyers must comply with applicable rules regulating notification of class members and other procedural requirements designed to ensure adequate protection of the entire class.

Limiting Liability and Settling Malpractice Claims

[14] [Washington revision] Agreements prospectively limiting a lawyer's liability for malpractice are prohibited unless permitted by law and the client is independently represented by a lawyer in making the agreement because they are likely to undermine competent and diligent representation. Also, many clients are unable to evaluate the desirability of making such an agreement before a dispute has arisen, particularly if they are then represented by the lawyer seeking the agreement. This paragraph does not, however, prohibit a lawyer from entering into an agreement with the client to arbitrate legal malpractice claims, provided such agreements are enforceable and the client is fully informed of the scope and effect of the agreement. Nor does this paragraph limit the ability of lawyers to practice in the form of a limited-liability entity, where permitted by law, provided that each lawyer remains personally liable to the client for his or her own conduct and the firm complies with any conditions required by law, such as provisions requiring client notification or maintenance of adequate liability insurance. Nor does it prohibit an agreement in accordance with Rule 1.2 that defines the scope of the representation, although a definition of scope that makes the obligations of representation illusory will amount to an attempt to limit liability.

[15] [Washington revision] Agreements settling a claim or a potential claim for malpractice are not prohibited by this Rule. Nevertheless, in view of the danger that a lawyer will take unfair advantage of a client or former client not represented by a lawyer, the lawyer must first advise such a person in writing of the appropriateness of independent representation by a lawyer in connection with such a settlement. In addition, the lawyer must give the client or former client a reasonable opportunity to find and consult an independent lawyer.

Acquiring Proprietary Interest In Litigation

[16] Paragraph (i) states the traditional general rule that lawyers are prohibited from acquiring a proprietary interest in litigation. Like paragraph (e), the general rule has its basis in common law champerty and maintenance and is designed to avoid giving the lawyer too great an interest in the representation. In addition, when the lawyer

acquires an ownership interest in the subject of the representation, it will be more difficult for a client to discharge the lawyer if the client so desires. The Rule is subject to specific exceptions developed in decisional law and continued in these Rules. The exception for certain advances of the costs of litigation is set forth in paragraph (e). In addition, paragraph (i) sets forth exceptions for liens authorized by law to secure the lawyer's fees or expenses and contracts for reasonable contingent fees. The law of each jurisdiction determines which liens are authorized by law. These may include liens granted by statute, liens originating in common law and liens acquired by contract with the client. When a lawyer acquires by contract a security interest in property other than that recovered through the lawyer's efforts in the litigation, such an acquisition is a business or financial transaction with a client and is governed by the requirements of paragraph (a). Contracts for contingent fees in civil cases are governed by Rule 1.5.

Client-Lawyer Sexual Relationships

[17] The relationship between lawyer and client is a fiduciary one in which the lawyer occupies the highest position of trust and confidence. The relationship is almost always unequal; thus, a sexual relationship between lawyer and client can involve unfair exploitation of the lawyer's fiduciary role, in violation of the lawyer's basic ethical obligation not to use the trust of the client to the client's disadvantage. In addition, such a relationship presents a significant danger that, because of the lawyer's emotional involvement, the lawyer will be unable to represent the client without impairment of the exercise of independent professional judgment. Moreover, a blurred line between the professional and personal relationships may make it difficult to predict to what extent client confidences will be protected by the attorney-client evidentiary privilege, since client confidences are protected by privilege only when they are imparted in the context of the client-lawyer relationship. Because of the significant danger of harm to client interests and because the client's own emotional involvement renders it unlikely that the client could give adequate informed consent, this Rule prohibits the lawyer from having sexual relations with a client regardless of whether the relationship is consensual and regardless of the absence of prejudice to the client.

[18] Sexual relationships that predate the client-lawyer relationship are not prohibited. Issues relating to the exploitation of the fiduciary relationship and client dependency are diminished when the sexual relationship existed prior to the commencement of the client-lawyer relationship. However, before proceeding with the representation in these circumstances, the lawyer should consider whether the lawyer's ability to represent the client will be materially limited by the relationship. See Rule 1.7(a)(2).

[19] [Washington revision] When the client is an organization, paragraph (j) of this Rule applies to a lawyer for the organization (whether inside or outside counsel). For purposes of this Rule, "representative of a current client" will generally be a constituent of the organization who supervises, directs or regularly consults with that lawyer on the organization's legal matters. See Comment [1] to Rule 1.13 (identifying the constituents of an organizational client). See also Washington Comments [22] and [23].

Imputation of Prohibitions

[20] Under paragraph (k), a prohibition on conduct by an individual lawyer in paragraphs (a) through (i) also applies to all lawyers associated in a firm with the personally prohibited lawyer. For example, one lawyer in a firm may not enter into a business transaction with a client of another member of the firm without complying with paragraph (a), even if the first lawyer is not personally involved in the representation of the client. The prohibition set forth in paragraph (j) is personal and is not applied to associated lawyers.

Additional Washington Comments [21-31]

Financial Assistance

[21] Paragraph (e) of Washington's Rule differs from the Model Rule. Paragraph (e) is based on former Washington RPC 1.8(e). The minor structural modifications to the general prohibition on providing financial assistance to a client do not represent a change in Washington law, and paragraph (e) is intended to preserve prior interpretations of the Rule and prior Washington practice.

Client-Lawyer Sexual Relationships

[22] Paragraph (j)(2) of Washington's Rule, which prohibits sexual relationships with a representative of an organizational client, differs from the Model Rule. Comment [19] to Model Rule 1.8 was revised to be consistent with the Washington Rule.

[23] Paragraph (j)(3) of the Rule specifies that the prohibition applies with equal force to any lawyer who assists in the representation of the client, but the prohibition expressly does not apply to other members of a firm who have not assisted in the representation.

Personal Relationships

[24] Model Rule 1.8 does not contain a provision equivalent to paragraph (l) of Washington's Rule. Paragraph (l) prohibits representations based on a lawyer's personal conflict arising from his or her relationship with another lawyer. Paragraph (l) is a revised version of former Washington RPC 1.8(i). See also Comment [11] to Rule 1.7.

Indigent Defense Contracts

[25] Model Rule 1.8 does not contain a provision equivalent to paragraph (m) of Washington's Rule. Paragraph (m) specifies that it is a conflict of interest for a lawyer to enter into or accept compensation under an indigent defense contract that does not provide for the payment of funds, outside of the contract, to compensate conflict counsel for fees and expenses.

[26] Where there is a right to a lawyer in court proceedings, the right extends to those who are financially unable to obtain one. This right is affected in some Washington counties and municipalities through indigent defense contracts, i.e., contracts entered into between lawyers or law firms willing to provide defense services to those financially unable to obtain them and the governmental entities obliged to pay for those services. When a lawyer or law firm providing indigent defense services determines that a disqualifying conflict of interest precludes representation of a particular client, the lawyer or law firm must withdraw and substitute counsel must be obtained for the client. See Rule 1.16. In these circumstances, substitute counsel is typically known as "conflict counsel."

[27] An indigent defense contract by which the contracting lawyer or law firm assumes the obligation to pay conflict counsel from the proceeds of the contract, without further payment from the governmental entity, creates an acute financial disincentive for the lawyer either to investigate or declare the existence of actual or potential conflicts of interest requiring the employment of conflict counsel. For this reason, such contracts involve an inherent conflict between the interests of the client and the personal interests of the lawyer. These dangers warrant a prohibition on making such an agreement or accepting compensation for the delivery of indigent defense services from a lawyer that has done so. See ABA Standards for Criminal Justice, Std. 5-3.3(b)(vii) (3d ed. 1992) (elements of a contract for defense services should include "a policy for conflict of interest cases and the provision of funds outside of the contract to compensate conflict counsel for fees and expenses"); People v. Barboza, 29 Cal.3d 375, 173 Cal. Rptr. 458, 627 P.2d 188 (Cal. 1981) (structuring public defense contract so that more money is available for operation of office if fewer outside attorneys are engaged creates "inherent and irreconcilable conflicts of interest").

[28] Similar conflict-of-interest considerations apply when indigent defense contracts require the contracting lawyer or law firm to pay for the costs and expenses of investigation and expert services from the general proceeds of the contract. Paragraph (m)(1)(ii) prohibits agreements that do not provide that such services are to be funded separately from the amounts designated as compensation to the contracting lawyer or law firm.

[29] Because indigent defense contracts involve accepting compensation for legal services from a third-party payer, the lawyer must also conform to the requirements of paragraph (f). See also Comments [11][12].

Settling Malpractice Claims

[30] A client or former client of an LLLT who is not represented by a lawyer is unrepresented for purposes of Rule 1.8(h)(2).

Lawyers Associated In Firms with Limited License Legal Technicians

[31] LLLT RPC 1.8 prohibits LLLTs from engaging in certain conduct that is not necessarily prohibited to lawyers by this Rule. See LLLT RPC 1.8(a) (strictly prohibiting a LLLT from entering into a business transaction with a client); LLLT RPC 1.8(h)(1) (strictly prohibiting a LLLT from making an agreement prospectively limiting the LLLT's liability to a client for malpractice); LLLT RPC 1.8(i) (strictly prohibiting a LLLT from acquiring a proprietary interest in a client's cause of action or the subject matter of the litigation). These prohibitions do not apply to any lawyers in a firm unless the conduct is also prohibited to a lawyer under this Rule.

RPC 1.9
DUTIES TO FORMER CLIENTS

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client

(1) whose interests are materially adverse to that person; and

(2) about whom that lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter; unless the former client gives informed consent, confirmed in writing.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

Comment

[1] After termination of a client-lawyer relationship, a lawyer has certain continuing duties with respect to confidentiality and conflicts of interest and thus may not represent another client except in conformity with this Rule. Under this Rule, for example, a lawyer could not properly seek to rescind on behalf of a new client a contract drafted on behalf of the former client. So also a lawyer who has prosecuted an accused person could not properly represent the accused in a subsequent civil action against the government concerning the same transaction. Nor could a lawyer who has represented multiple clients in a matter represent one of the clients against the others in the same or a substantially related matter after a dispute arose among the clients in that matter, unless all affected clients give informed consent. See Comment [9]. Current and former government lawyers must comply with this Rule to the extent required by Rule 1.11.

[2] The scope of a "matter" for purposes of this Rule depends on the facts of a particular situation or transaction. The lawyer's involvement in a matter can also be a question of degree. When a lawyer has been directly involved in a specific transaction, subsequent representation of other clients with materially adverse interests in that transaction clearly is prohibited. On the other hand, a lawyer who recurrently handled a type of problem for a former client is not precluded from later representing another client in a factually distinct problem of that type even though the subsequent representation involves a position adverse to the prior client. Similar considerations can apply to the reassignment of military lawyers between defense and prosecution functions within the same military jurisdictions. The underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question.

[3] Matters are "substantially related" for purposes of this Rule if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter. For example, a lawyer who has represented a businessperson and learned extensive private financial information about that person may not then represent that person's spouse in seeking a divorce. Similarly, a lawyer who has previously represented a client in securing environmental permits to build a shopping center would be precluded from representing neighbors seeking to oppose rezoning of the property on the basis of environmental considerations; however, the lawyer would not be precluded, on the grounds of substantial relationship, from defending a tenant of the completed shopping center in resisting eviction for nonpayment of rent. Information that has been disclosed to the public or to other parties adverse to the former client ordinarily will not be disqualifying. Information acquired in a prior representation may have been rendered obsolete by the passage of time, a circumstance that may be relevant in determining whether two representations are substantially related. In the case of an organizational client, general knowledge of the client's policies and practices ordinarily will not preclude a subsequent representation; on the other hand, knowledge of specific facts gained in a prior representation that are relevant to the matter in question ordinarily will preclude such a representation. A former client is not required to reveal the confidential information learned by the lawyer in order to establish a substantial risk that the lawyer has confidential information to use in the subsequent matter. A conclusion about the possession of such information may be based on the nature of the

services the lawyer provided the former client and information that would in ordinary practice be learned by a lawyer providing such services.

Lawyers Moving Between Firms

[4] When lawyers have been associated within a firm but then end their association, the question of whether a lawyer should undertake representation is more complicated. There are several competing considerations. First, the client previously represented by the former firm must be reasonably assured that the principle of loyalty to the client is not compromised. Second, the rule should not be so broadly cast as to preclude other persons from having reasonable choice of legal counsel. Third, the rule should not unreasonably hamper lawyers from forming new associations and taking on new clients after having left a previous association. In this connection, it should be recognized that today many lawyers practice in firms, that many lawyers to some degree limit their practice to one field or another, and that many move from one association to another several times in their careers. If the concept of imputation were applied with unqualified rigor, the result would be radical curtailment of the opportunity of lawyers to move from one practice setting to another and of the opportunity of clients to change counsel.

[5] [Washington revision] Paragraph (b) operates to disqualify the lawyer only when the lawyer involved has actual knowledge of information protected by Rules 1.6 and 1.9(c). Thus, if a lawyer while with one firm acquired no knowledge or information relating to a particular client of the firm, and that lawyer later joined another firm, neither the lawyer individually nor the second firm is disqualified from representing another client in the same or a related matter even though the interests of the two clients conflict. See Rule 1.10(e) and (b) for the restrictions on a firm when a lawyer initiates an association with the firm or has terminated an association with the firm.

[6] Application of paragraph (b) depends on a situation's particular facts, aided by inferences, deductions or working presumptions that reasonably may be made about the way in which lawyers work together. A lawyer may have general access to files of all clients of a law firm and may regularly participate in discussions of their affairs; it should be inferred that such a lawyer in fact is privy to all information about all the firm's clients. In contrast, another lawyer may have access to the files of only a limited number of clients and participate in discussions of the affairs of no other clients; in the absence of information to the contrary, it should be inferred that such a lawyer in fact is privy to information about the clients actually served but not those of other clients. In such an inquiry, the burden of proof should rest upon the firm whose disqualification is sought.

[7] Independent of the question of disqualification of a firm, a lawyer changing professional association has a continuing duty to preserve confidentiality of information about a client formerly represented. See Rules 1.6 and 1.9(c).

[8] Paragraph (c) provides that information acquired by the lawyer in the course of representing a client may not subsequently be used or revealed by the lawyer to the disadvantage of the client. However, the fact that a lawyer has once served a client does not preclude the lawyer from using generally known information about that client when later representing another client.

[9] [Washington revision] The provisions of this Rule are for the protection of former clients and can be waived if the client gives informed consent, which consent must be confirmed in writing under paragraphs (a) and (b). See Rule 1.0A(e). With regard to disqualification of a firm with which a lawyer is or was formerly associated, see Rule 1.10.

RPC 1.10
IMPUTATION OF CONFLICTS OF INTEREST: GENERAL RULE

(a) Except as provided in paragraph (c), while lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless the prohibition is based on a personal interest of the disqualified lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.

(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.

(c) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7.

(d) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11. However, lawyers appointed or assigned to represent indigent members of the public (public defenders) are subject to this rule regardless of whether they are government employees.

(e) When the prohibition on representation under paragraph (a) is based on Rule 1.9(a) or (b), and arises out of the disqualified lawyer's association with a prior firm, no other lawyer in the firm shall knowingly represent a person in a matter in which that lawyer is disqualified unless:

(1) the personally disqualified lawyer is screened by effective means from participation in the matter and is apportioned no part of the fee therefrom;

(2) the former client of the personally disqualified lawyer receives notice of the conflict and the screening mechanism used to prohibit dissemination of information relating to the former representation;

(3) the firm is able to demonstrate by convincing evidence that no material information relating to the former representation was transmitted by the personally disqualified lawyer before implementation of the screening mechanism and notice to the former client.

Any presumption that information protected by Rules 1.6 and 1.9(c) has been or will be transmitted may be rebutted if the personally disqualified lawyer serves on his or her former law firm and former client an affidavit attesting that the personally disqualified lawyer will not participate in the matter and will not discuss the matter or the representation with any other lawyer or employee of his or her current law firm, and attesting that during the period of the lawyer's personal disqualification those lawyers or employees who do participate in the matter will be apprised that the personally disqualified lawyer is screened from participating in or discussing the matter. Such affidavit shall describe the procedures being used effectively to screen the personally disqualified lawyer. Upon request of the former client, such affidavit shall be updated periodically to show actual compliance with the screening procedures. The law firm, the personally disqualified lawyer, or the former client may seek judicial review in a court of general jurisdiction of the screening mechanism used, or may seek court supervision to ensure that implementation of the screening procedures has occurred and that effective actual compliance has been achieved.

(f) When LLLTs and lawyers are associated in a firm, an LLLT's conflict of interest under LLLT RPC 1.7 or LLLT RPC 1.9 is imputed to lawyers in the firm in the same way as conflicts are imputed to lawyers under this Rule. Each of the other provisions of this Rule also applies in the same way when LLLT conflicts are imputed to lawyers in a firm.

Comment

Definition of "Firm"

[1] [Washington revision] For purposes of the Rules of Professional Conduct, the term "firm" denotes lawyers, LLLTs, or any combination thereof in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers or LLLTs employed in a legal services organization or the legal department of a corporation or other organization. See Rule 1.0A(c). Whether two or more lawyers constitute a firm within this definition can depend on the specific facts. See Rule 1.0A, Comments [2] - [4].

Principles of Imputed Disqualification

[2] [Washington revision] The rule of imputed disqualification stated in paragraph (a) gives effect to the principle of loyalty to the client as it applies to lawyers who practice in a law firm. Such situations can be considered from the premise that a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client, or from the premise that each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer with whom the lawyer is associated. Paragraph (a) operates only among the lawyers currently associated in a firm. When a lawyer moves from one firm to another, the situation is governed by Rules 1.9(b) and 1.10(b) and (e).

[3] The rule in paragraph (a) does not prohibit representation where neither questions of client loyalty nor protection of confidential information are presented. Where one lawyer in a firm could not effectively represent a given client because of strong political beliefs, for example, but that lawyer will do no work on the case and the personal beliefs of the lawyer will not materially limit the representation by others in the firm, the firm should not be disqualified. On the other hand, if an opposing party in a case were owned by a lawyer in the law firm, and others in the firm would be materially limited in pursuing the matter because of loyalty to that lawyer, the personal disqualification of the lawyer would be imputed to all others in the firm.

[4] [Reserved. See Washington Comment [11].

[5] Rule 1.10(b) operates to permit a law firm, under certain circumstances, to represent a person with interests directly adverse to those of a client represented by a lawyer who formerly was associated with the firm. The Rule applies regardless of when the formerly associated lawyer represented the client. However, the law firm may not represent a person with interests adverse to those of a present client of the firm, which would violate Rule 1.7. Moreover, the firm may not represent the person where the matter is the same or substantially related to that in which the formerly associated lawyer represented the client and any other lawyer currently in the firm has material information protected by Rules 1.6 and 1.9(c).

[6] [Washington revision] Rule 1.10(c) removes imputation with the informed consent of the affected client or former client under the conditions stated in Rule 1.7. The conditions stated in Rule 1.7 require the lawyer to determine that the representation is not prohibited by Rule 1.7(b) and that each affected client or former client has given informed consent to the representation, confirmed in writing. In some cases, the risk may be so severe that the conflict may not be cured by client consent. For a definition of informed consent, see Rule 1.0A(e).

[7] Where a lawyer has joined a private firm after having represented the government, imputation is governed by Rule 1.11(b) and (c), not this Rule. Under Rule 1.11(d), where a lawyer represents the government after having served clients in private practice, nongovernmental employment or in another government agency, former-client conflicts are not imputed to government lawyers associated with the individually disqualified lawyer.

[8] Where a lawyer is prohibited from engaging in certain transactions under Rule 1.8, paragraph (k) of that Rule, and not this Rule, determines whether that prohibition also applies to other lawyers associated in a firm with the personally prohibited lawyer.

Additional Washington Comments (9 - 15)

Principles of Imputed Disqualification

[9] The screening provisions in Washington RPC 1.10 differ from those in the Model Rule. Washington's adoption of a nonconsensual screening provision in 1993 preceded the ABA's 2009 adoption of a similar approach in the Model Rules. Washington's rule was amended and the screening provision recodified as paragraph (e) in 2006, and paragraphs (a) and (e) were further amended in 2011 to conform more closely to the Model Rules version. None of the amendments to this Rule, however, represents a change in Washington law. The Rule preserves Washington practice established in 1993 with respect to screening by allowing a lawyer personally disqualified from representing a client based on the lawyer's prior association with a firm to be screened from a representation to be undertaken by other members of the lawyer's new firm under the circumstances set forth in paragraph (e). See Washington Comment [10].

[10] Washington's RPC 1.10 was amended in 1993 to permit representation with screening under certain circumstances. Rule 1.10(e) retains the screening mechanism adopted as Washington RPC 1.10(b) in 1993, thus allowing a firm to represent a client with whom a lawyer in the firm has a conflict based on his or her association with a prior firm if the lawyer is effectively screened from participation in the representation, is apportioned no part of the fee earned from the representation and the client of the former firm receives notice of the conflict and the screening mechanism. However, prior to undertaking the representation, non-disqualified firm members must evaluate the firm's ability to provide competent representation even if the disqualified member can be screened in accordance with this Rule. While Rule 1.10 does not specify the screening mechanism to be used, the law firm must be able to demonstrate that it is adequate to prevent the personally disqualified lawyer from receiving or transmitting

any confidential information or from participating in the representation in any way. The screening mechanism must be in place over the life of the representation at issue and is subject to judicial review at the request of any of the affected clients, law firms, or lawyers. However, a lawyer or law firm may rebut the presumption that information relating to the representation has been transmitted by serving an affidavit describing the screening mechanism and affirming that the requirements of the Rule have been met.

[11] Under Rule 5.3, this Rule also applies to nonlawyer assistants and lawyers who previously worked as nonlawyers at a law firm. See *Daines v. Alcatel*, 194 F.R.D. 678 (E.D.Wash. 2000); *Richards v. Jain*, 168 F. Supp. 2d 1195 (W.D. Wash. 2001). For the definition of nonlawer for the purpose of Rule 5.3, see Washington Comment [5] to Rule 5.3.

[12] In serving an affidavit permitted by paragraph (e), a lawyer may serve the affidavit on the former law firm alone (without simultaneously serving the former client directly) if the former law firm continues to represent the former client and the lawyer contemporaneously requests in writing that the former law firm provide a copy of the affidavit to the former client. If the former client is no longer represented by the former law firm or if the lawyer has reason to believe the former law firm will not promptly provide the former client with a copy of the affidavit, then the affidavit must be served directly on the former client also. Serving the affidavit on a represented former client does not violate Rule 4.2 because the communication with the former client is not about the "subject of the representation" and the notice is "authorized . . . by law," i.e., the Rules of Professional Conduct.

[13] Rule 1.8(l) conflicts are not imputed to other members of a firm under paragraph (a) of this Rule unless the relationship creates a conflict of interest for the individual lawyer under Rule 1.7 and also presents a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.

[14] For the parallel provision imputing lawyer conflicts to an LLLT when an LLLT has associated with a lawyer, see LLLT RPC 1.10(f).

[15] Public defenders represent individuals, not the government. For this reason, imputed conflicts in public defender firms are determined under this rule rather than RPC 1.11.

RPC 1.13
ORGANIZATION AS CLIENT

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances, to the highest authority that can act on behalf of the organization as determined by applicable law.

(c) Except as provided in paragraph (d), if

(1) despite the lawyer's efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly a violation of law, and

(2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization, then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.

(d) Paragraph (c) shall not apply with respect to information relating to a lawyer's representation of an organization to investigate an alleged violation of law, or to defend the organization or an officer, employee or other constituent associated with the organization against a claim arising out of an alleged violation of law.

(e) A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraphs (b) and (c), or who withdraws under circumstances that require or permit the lawyer to take action under either of those paragraphs, shall proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

(f) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

(g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

(h) For purposes of this Rule, when a lawyer who is not a public officer or employee represents a discrete governmental agency or unit that is part of a broader governmental entity, the lawyer's client is the particular governmental agency or unit represented, and not the broader governmental entity of which the agency or unit is a part, unless:

(1) otherwise provided in a written agreement between the lawyer and the governmental agency or unit; or

(2) the broader governmental entity gives the lawyer timely written notice to the contrary, in which case the client shall be designated by such entity. Notice under this subsection shall be given by the person designated by law as the chief legal officer of the broader governmental entity, or in the absence of such designation, by the chief executive officer of the entity.

Comment

The Entity as the Client

[1] An organizational client is a legal entity, but it cannot act except through its officers, directors, employees, shareholders and other constituents. Officers, directors, employees and shareholders are the constituents of the corporate organizational client. The duties defined in this Comment apply equally to unincorporated associations. "Other constituents" as used in this Comment means the positions equivalent to officers, directors, employees and shareholders held by persons acting for organizational clients that are not corporations.

[2] When one of the constituents of an organizational client communicates with the organization's lawyer in that person's organizational capacity, the communication is protected by Rule 1.6. Thus, by way of example, if an organizational client requests its lawyer to investigate allegations of wrongdoing, interviews made in the course of that investigation between the lawyer and the client's employees or other constituents are covered by Rule 1.6. This does not mean, however, that constituents of an organizational client are the clients of the lawyer. The lawyer may not disclose to such constituents information relating to the representation except for disclosures explicitly or impliedly authorized by the organizational client in order to carry out the representation or as otherwise permitted by Rule 1.6.

[3] [Washington revision] When constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province. Paragraph (b) makes clear, however, that when the lawyer knows that the organization is likely to be substantially injured by action of an officer or other constituent that violates a legal obligation to the organization or is in violation of law that might be imputed to the organization, the lawyer must proceed as is reasonably necessary in the best interest of the organization. As defined in Rule 1.0A(f), knowledge can be inferred from circumstances, and a lawyer cannot ignore the obvious.

[4] In determining how to proceed under paragraph (b), the lawyer should give due consideration to the seriousness of the violation and its consequences, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters, and any other relevant considerations. Ordinarily, referral to a higher authority would be necessary. In some circumstances, however, it may be appropriate for the lawyer to ask the constituent to reconsider the matter; for example, if the circumstances involve a constituent's innocent misunderstanding of law and subsequent acceptance of the lawyer's advice, the lawyer may reasonably conclude that the best interest of the organization does not require that the matter be referred to a higher authority. If a constituent persists in conduct contrary to the lawyer's advice, it will be necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization. If the matter is of sufficient seriousness and importance or urgency to the organization, referral to higher authority in the organization may be necessary even if the lawyer has not communicated with the constituent. Any measures taken should, to the extent practicable, minimize the risk of revealing information relating to the representation to persons outside the organization. Even in circumstances where a lawyer is not obligated by Rule 1.13 to proceed, a lawyer may bring to the attention of an organizational client, including its highest authority, matters that the lawyer reasonably believes to be of sufficient importance to warrant doing so in the best interest of the organization.

[5] Paragraph (b) also makes clear that when it is reasonably necessary to enable the organization to address the matter in a timely and appropriate manner, the lawyer must refer the matter to higher authority, including, if warranted by the circumstances, the highest authority that can act on behalf of the organization under applicable law. The organization's highest authority to whom a matter may be referred ordinarily will be the board of directors or similar governing body. However, applicable law may prescribe that under certain conditions the highest authority reposes elsewhere, for example, in the independent directors of a corporation.

Relation to Other Rules

[6] The authority and responsibility provided in this Rule are concurrent with the authority and responsibility provided in other Rules. In particular, this Rule does not limit or expand the lawyer's responsibility under Rules 1.8, 1.16, 3.3 or 4.1. Paragraph (c) of this Rule supplements Rule 1.6(b) by providing an additional basis upon which the lawyer may reveal information relating to the representation, but does not modify, restrict, or limit the provisions of Rule 1.6(b)(1)-(7). Under paragraph (c) the lawyer may reveal such information only when the organization's highest authority insists upon or fails to address threatened or ongoing action that is clearly a violation of law, and then only to the extent the lawyer reasonably believes necessary to prevent reasonably certain substantial injury to the organization. It is not necessary that the lawyer's services be used in furtherance of the violation, but it is required that the matter be related to the lawyer's representation of the organization. If the lawyer's services are being used by an organization to further a crime or fraud by the organization, Rules 1.6(b)(2) and 1.6(b)(3) may permit the lawyer to disclose confidential information. In such circumstances Rule 1.2(d) may also be applicable, in which event, withdrawal from the representation under Rule 1.16(a)(1) may be required.

[7] Paragraph (d) makes clear that the authority of a lawyer to disclose information relating to a representation in circumstances described in paragraph (c) does not apply with respect to information relating to a lawyer's engagement by an organization to investigate an alleged violation of law or to defend the organization or an officer, employee or other person associated with the organization against a claim arising out of an alleged violation of law.

This is necessary in order to enable organizational clients to enjoy the full benefits of legal counsel in conducting an investigation or defending against a claim.

[8] A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraph (b) or (c), or who withdraws in circumstances that require or permit the lawyer to take action under either of these paragraphs, must proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

Government Agency

[9] The duty defined in this Rule applies to governmental organizations. Defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context and is a matter beyond the scope of these Rules. See Scope [18]. Although in some circumstances the client may be a specific agency, it may also be a branch of government, such as the executive branch, or the government as a whole. For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the relevant branch of government may be the client for purposes of this Rule. Moreover, in a matter involving the conduct of government officials, a government lawyer may have authority under applicable law to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. Thus, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful act is prevented or rectified, for public business is involved. In addition, duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulation. This Rule does not limit that authority. See Scope.

Clarifying the Lawyer's Role

[10] There are times when the organization's interest may be or become adverse to those of one or more of its constituents. In such circumstances the lawyer should advise any constituent, whose interest the lawyer finds adverse to that of the organization of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation. Care must be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged.

[11] Whether such a warning should be given by the lawyer for the organization to any constituent individual may turn on the facts of each case.

Dual Representation

[12] Paragraph (g) recognizes that a lawyer for an organization may also represent a principal officer or major shareholder.

Derivative Actions

[13] Under generally prevailing law, the shareholders or members of a corporation may bring suit to compel the directors to perform their legal obligations in the supervision of the organization. Members of unincorporated associations have essentially the same right. Such an action may be brought nominally by the organization, but usually is, in fact, a legal controversy over management of the organization.

[14] The question can arise whether counsel for the organization may defend such an action. The proposition that the organization is the lawyer's client does not alone resolve the issue. Most derivative actions are a normal incident of an organization's affairs, to be defended by the organization's lawyer like any other suit. However, if the claim involves serious charges of wrongdoing by those in control of the organization, a conflict may arise between the lawyer's duty to the organization and the lawyer's relationship with the board. In those circumstances, Rule 1.7 governs who should represent the directors and the organization.

Additional Washington Comment [15]

[15] Paragraph (h) was taken from former Washington RPC 1.7(c); it addresses the obligations of a lawyer who is not a public officer or employee but is representing a discrete governmental agency or unit.

Hypotheticals

Hypothetical Ethical Issues for Discussion

1. A potential client calls to set an appointment. Your assistant is out, and you answer the phone. They tell you that that they are already represented by another lawyer in town, but they want a "pit-bull." They start telling you a story about a real estate transaction gone very wrong, and they allege fraudulent concealment. After you set an appointment, you realize that the opposing party, Fraudster Bob, is married to a current client, Sweet Sue. What are your ethical obligations?

   What if Sweet Sue tells you she wants to file for dissolution against Fraudster Bob, can you tell her what you know?

2. You are a family law lawyer who currently represents the wife in a dissolution proceeding. You client's husband is pro-se. Your client has learned from her children that the husband is willing to accept a settlement that is much more favorable to your client than Washington law provides for. What are your ethical obligations to your client? To the husband?

3. A new Client comes to your office, seeking representation in a dissolution case. She brings her Mom to the first meeting. Mom wants to help pay for the legal fees and wants to be cc'd on all emails to the Client. Client thinks this is a great idea since Mom is also a paralegal and understands the law better than she does.

   Mom also wants you to include visitation with her grandchildren as part of any parenting plan. Client also thinks this is a great idea too. Finally, Mom is very interested in filing contempt motions and going to trial, but Client thinks everyone should just try to get along.

   You think this is going to be a great case and can't wait to get started. You ask Mom to pay a flat fee to file the dissolution, and then plan to charge by the hour after that.

   What do you put in your written engagement letter?

4. You represent a client in a dissolution case. The opposing party has filed a motion for revision of the parenting plan, and your reply is due today. It's 4:45 p.m. and you client still hasn't gotten back to you to approve the revisions you made to his declaration, which needs to be signed under penalty of perjury.

   He finally calls you and says that he didn't have time to read it, but he is sure it is fine and you can just sign for him. What should you do?

5. You represent your client in a criminal case in Superior Court. The client hired you before she was formally charged, and you accepted a flat fee of $17,000 for representation though trial. Your client fired you the day after arraignment. Do you have to give the money back? How do you decide how much?

6. You are in the middle of a long and ugly trial in Superior Court. You like to share about your job on a blog that you have, which your friends (including some Superior Court law clerks) and family follow. You can't help but share the ups and downs of the trial, along with some criticism of the judge's rulings. But you take out the names of all the parties and the judge so it's all anonymous. Is this ok?

7. Your best friend is another lawyer. You know that your friend is going through some hard times and sometimes he shows up to court a little hung over, or maybe even a little drunk from the night before. Your friend also confided in you that he overslept and missed some client meetings, and then mentioned that his trust account is a "mess." You begin to wonder where he is getting the money for his party-hard lifestyle. What should you do?

Advisory Ethics Opinions

WSBA

Advisory Opinion: 897
Year Issued: 1985
RPC(s): DR 5-101; RPC 1.7
Subject: Conflict of interest; lawyer representing opposing counsel in unrelated matter.

When lawyers or law firms are representing opposing parties in a pending matter, one lawyer or law firm can agree to represent the other in an unrelated matter if the lawyers reasonable believe that the proposed representation will not adversely affect (or be affected by) their other professional responsibilities and all of the clients involved, both current and prospective, consent to the arrangement in writing after disclosure of the material facts. Consent is not required unless it is possible that the prospective representation would materially limit (or be materially limited by) the lawyers' responsibilities to their present clients. Factors relevant to determining whether a prospective representation could materially limit a lawyer's existing responsibilities include the duration and intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that the actual conflict will arise, and the likely prejudice to the client from the conflict if it does arise. This is an objective standard, to which the subjective expectations of the client are relevant only insofar as they are reasonable.

Advisory Opinions are provided for the education of the Bar and reflect the opinion of the Rules of Professional Conduct Committee. Advisory Opinions are provided pursuant to the authorization granted by the Board of Governors, but are not individually approved by the Board and do not reflect the official position of the Bar association. Laws other than the Washington State Rules of Professional Conduct may apply to the inquiry. The Committee's answer does not include or opine about any other applicable law than the meaning of the Rules of Professional Conduct. Advisory Opinions are based upon facts of the inquiry as presented to the committee.

WSBA

Advisory Opinion: 1097
Year Issued: 1987
RPC(s): RPC 1.7
Subject: Conflict of interest; representation of both husband and wife in separate domestic violence cases against each other

The Committee was of the opinion that the representation of both a husband and wife in separate criminal domestic violence cases against each other by one lawyer would constitute a violation of the Rules of Professional Conduct in that there would be a conflict of interest because the lawyer would either be in a position of having to condone perjury by one client, or expose one client to liability for criminal conduct. Therefore, the Committee was of the opinion the lawyer could not meet the requirement in RPC 1.7(a)(1), that the lawyer "reasonably believes the representation will not adversely effect the relationship with the other client."

WSBA

Advisory Opinion: 1170
Year Issued: 1988
RPC(s): RPC 1.7; 1.9
Subject: Conflict of interest; representation adverse to client of another lawyer in same firm

The Committee reviewed your inquiry concerning your continued representation of a client in a dispute with an individual who had become the client of another lawyer in your firm. The Committee was of the opinion that RPC 1.7 and/or 1.9 would dictate that your firm could not continue to represent your client in the dispute with the other individual unless each party consented to such representation after consultation as provided in that rule.

Advisory Opinions are provided for the education of the Bar and reflect the opinion of the Rules of Professional Conduct Committee. Advisory Opinions are provided pursuant to the authorization granted by the Board of Governors, but are not individually approved by the Board and do not reflect the official position of the Bar association. Laws other than the Washington State Rules of Professional Conduct may apply to the inquiry. The Committee's answer does not include or opine about any other applicable law than the meaning of the Rules of Professional Conduct. Advisory Opinions are based upon facts of the inquiry as presented to the committee.

WSBA

Advisory Opinion: 1659
Year Issued: 1996
RPC(s): RPC 1.9; 1.10
Subject: Conflict of interest; checking conflicts when changing firms

You recently transferred employment to another law firm. To check conflicts between clients in your former firm with clients in the firm you are now with, you compared lists from the former firm of your current clients with their spouses' names, as well as past clients' last names, with past current client lists of the firm with which you are now practicing. The Committee determined that you have done all you can to check client conflicts because RPC 1.9 and 1.10 focus on knowingly representing a client when a conflict exists.

Advisory Opinions are provided for the education of the Bar and reflect the opinion of the Rules of Professional Conduct Committee. Advisory Opinions are provided pursuant to the authorization granted by the Board of Governors, but are not individually approved by the Board and do not reflect the official position of the Bar association. Laws other than the Washington State Rules of Professional Conduct may apply to the inquiry. The Committee's answer does not include or opine about any other applicable law than the meaning of the Rules of Professional Conduct. Advisory Opinions are based upon facts of the inquiry as presented to the committee.

WSBA

Opinion: 2055
Year Issued: 2004
RPC(s): RPC 1.5, 1.6, 1.7, 1.8, 1.14, 7.1, 7.2 , 7.3
Subject: law firm to establish separate business to provide investment services and charge fees or commissions

The inquiring lawyer wishes to know whether it is violation of the Rules of Professional Conduct for a law firm practicing primarily in the areas of estate and tax planning to establish a separate business entity for the purposes of offering investment advisor services and investment products such as annuities, mutual funds and other securities. It is anticipated that clients of the to-be-formed business would also be clients of the law practice. The lawyers of the law firm would realize income from the separate business in the form of fees and commissions from the investment products sold.

In Washington, RPC 1.5, 1.6, 1.7, 1.8, 1.14, 7.1, 7.2 and 7.3 would appear to apply most directly to the above situation. RPC 1.7 provides the general rule as to a conflict of interest between an attorney and her or his client. RPC 1.8 provides more specific rules as to conflicts of interest and prohibited transactions with a current client, especially business transactions. RPC 1.5 provides for reasonable attorney fees and fee disclosure requirements. RPC 1.6 provides for the preservation and use of a client's secrets and confidences. RPC 1.14 provides for the preserving the identity of funds and the property of a client. RPC 7.1 provides that a lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. RPC 7.2 provides in part that a lawyer shall not give anything of value to a person for recommending the lawyer's services, except the cost of advertising or communicating. RPC 7.3 provides that a lawyer must have direct contact with prospective clients and cannot for business purposes directly or through a third person solicit a prospective client with whom the lawyer has no family or prior professional relationship.

The above business transaction would likely be prohibited unless the lawyer fully complies with the procedures and requirements enumerated in RPC 1.5, 1.6, 1.7, 1.8(a), (b), (c), (d), (e), and (f), 1.14, 7.1, 7.2, and 7.3.

Generally speaking, the lawyer's interests in obtaining fees or commissions from the sale of the products give the lawyer a financial incentive to sell more products to the client. Additionally, the separate business entity must in fact be separate both physically and financially. A lawyer cannot represent to the customers of the separate business that the customers will receive the benefits of the lawyer's expertise or otherwise provide the customers with false expectations regarding the services provided by the separate business. A lawyer must make clear to the customers of the separate business that there is no attorney/client privilege between such customers and the lawyer. Lastly, the separate business cannot be used as a means of obtaining referrals for the law office and, likewise, the law office cannot be used to refer clients to the separate business.

The burden is on the lawyer to fully comply with the foregoing and it appears to the committee that under the facts presented that the burden here is substantial. It is the committee's opinion that inquirer could not reasonably believe that the representation will not be materially limited by the lawyer's own interests, as an investment advisor or seller of investment products. Further, under the facts of this case, the business appears so inextricably intertwined as to be indistinguishable and therefore would be prohibited.

The RPC Committee cannot offer legal advice as to sufficiency of the contents of any such disclosure or consent required in the rules above. Nor can the RPC Committee comment on whether an attorney, even while acting as a broker, would nevertheless be held to the standard of care of an attorney, as that would also constitute legal advice.

Advisory Opinions are provided for the education of the Bar and reflect the opinion of the Committee on Professional Ethics (CPE) or its predecessor, the Rules of Professional Conduct Committee. Advisory Opinions issued by the CPE are distinguished from earlier RPC Committee opinions by a numbering format which includes the year followed by a sequential number. Advisory Opinions are provided pursuant to the authorization granted by the Board of Governors, but are not individually approved by the Board and do not reflect the official position of the Bar association. Laws other than the Washington State Rules of Professional Conduct may apply to the inquiry. The Committee's answer does not include or opine about any other applicable law other than the meaning of the Rules of Professional Conduct.

WSBA

Opinion: 2134
Year Issued: 2007
RPC(s): RPCs 1.4, 1.7(b), & 8.4
Subject: Representation of Detainees at Guantanamo Bay

I. Overview

The inquiring attorney requests an opinion from the WSBA Rules of Professional Conduct Committee regarding a protective order and memorandum of understanding regarding disclosure of certain national-security records. The requester will be subject to the substantial limitations upon access to these records if and when he represents Guantanamo detainees. See In re Guantanamo Detainee Cases, 344 F. Supp. 2d 174 (D.D.C. 2004). Among the limitations imposed on attorneys for the detainees is a requirement that information regarding classified documents to which they are provided access shall not be disclosed to anyone, including their clients, without further order of the court. See 344 F.Supp.2d at 189-192. In addition, counsel's access to the detainee/client is restricted, again by order of the court, subject to revision or modification on motion.

RPC 1.4 provides, in pertinent part, that a "lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information." On the other hand, a lawyer has a duty to obey the law, including orders of the court. See Restatement of the Law Governing Lawyers, Sec. 105; RPC 8.4(l) (prohibits "any...other act which reflects disregard for the rule of law"); RPC 8.4(j) (prohibits lawyers from"[w]illfully disobey[ing] or violat[ing] a court order directing him to do or cease doing an act which he or she ought in good faith to do or forbear").

Given the national security implications of the records revealed to counsel for the detainees under the limited circumstances described in the case cited above, it is apparent that the court had to decide between total nondisclosure of the records at issue or limited disclosure, subject to further order of the court. Because the order is subject to modification on motion to permit counsel to make use of any document vital to the representation, the order appears to be a reasonable accommodation of serious and competing interests. It does not appear to this writer that obedience to the court's nondisclosure order would ipso facto violate RPC 1.4, such that the requester would have to decline representation of the client. Of course, the client must be informed.

RPC 1.7(b) provides, in pertinent part, that a "lawyer shall not represent a client if the representation of that client will be materially limited by ... the lawyer's own interests," unless the lawyer reasonably believes that "the representation will not be adversely affected" and the "client consents in writing after consultation and a full disclosure of the material facts." It appears that the requester believes that his own potential liability for sanctions for violating the court order may create a conflict of interest. If the lawyer does not believe he or she can represent a client without adverse impacts upon the representation due to the lawyer's own interests, of course, the lawyer must decline representation.

However, there does not appear to be anything inherent in the confidentiality order that necessarily prohibits the representation. As noted above, the lawyer must disclose the limitations placed upon the representation to the client, and obtain the client's consent. Because the requester may move the court for an order modifying the

"Amended Protective Order" in the event that significant information vital to the defense comes to his attention, the order appears to be a reasonable accommodation of competing interests, and the requester's act of signing off on it would not violate RPC 1.7(b).

It is unclear what, if any, additional provisions of the Rules of Professional Conduct the requester would like to see discussed. The undersigned does not believe any other provision of the Rules would be violated by signing off on an enforceable promise to obey the Amended Protective Order.

II. Conclusion

The requester may sign off on the Memorandum of Understanding, but only if he intends to abide by it, and if his client consents to the limitations placed upon the representation by the Memorandum after full disclosure.

Advisory Opinions are provided for the education of the Bar and reflect the opinion of the Committee on Professional Ethics (CPE) or its predecessor, the Rules of Professional Conduct Committee. Advisory Opinions issued by the CPE are distinguished from earlier RPC Committee opinions by a numbering format which includes the year followed by a sequential number. Advisory Opinions are provided pursuant to the authorization granted by the Board of Governors, but are not individually approved by the Board and do not reflect the official position of the Bar association. Laws other than the Washington State Rules of Professional Conduct may apply to the inquiry. The Committee's answer does not include or opine about any other applicable law other than the meaning of the Rules of Professional Conduct.

WSBA

Advisory Opinion: 2154
Year Issued: 2007
RPC(s): RPCs 1.0, 1.7, 1.8, & 2.1; IOs 1383 & 2140
Subject: A lawyer referring estate-client to real estate firm employing the lawyer's wife

ISSUE: May an attorney continue to refer matters to a real estate broker to whom he has previously referred for a number of years and/or to the attorney's spouse who is now employed as an agent for that broker?

ANSWER: So long as there is full disclosure by the attorney that his spouse is employed by the broker and the client gives informed consent, confirmed in writing, the referral to the broker and/or to the attorney's spouse would not be prohibited by the Rules of Professional Conduct.

STATEMENT OF THE FACTS: As a part of his practice, the inquiring attorney practices probate law. This area of practice also involves the sale of real estate as a part of the probate. The attorney has, for the last ten years, referred such transactions to a broker who now employs the spouse of the attorney. The attorney has asked whether he can ethically continue to refer such matters to the broker and/or the attorney's spouse and, if so, what disclosures he is required to make.

ANALYSIS: Under RPC 1.7(a) "a lawyer shall not represent a client if the representation involves a concurrent conflict of interest." As stated in the Comments to RPC 1.7, "loyalty and independent judgment are essential elements in the lawyer's relationship to a client. Concurrent conflicts of interest can arise from the lawyer's responsibilities to another client, a former client or a third person or from the lawyer's own interests." The lawyer must also be mindful of RPC 2.1, which requires him to "exercise independent professional judgment and render candid advice," when evaluating whether or not "the lawyer's own interests" would prevent him from making the referral or undertaking the representation.

The only applicable definition of "concurrent conflict of interest" in this case is "a personal interest of the lawyer," created by the income potential for his spouse from such referrals. RPC 1.7(a)(2). A concurrent conflict of interest will not disqualify the attorney 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 involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and (4) each affected client gives informed consent, confirmed in writing (following authorization from the other client to make any required disclosures)." In this situation, it does not appear that either requirements (2) or (3) need be addressed. As to requirement (1), this is a subjective determination which the attorney must make from the objective facts of each particular case/referral.

As to requirement (4), the only "client" is the probate representative/estate; and,

consequently, the lawyer needs to fully disclose the relationship in writing and receive the written informed consent of the client. As stated in the Comments to RPC 1.7, "The lawyer's own interests should not be permitted to have an adverse effect on representation of a client. . . . a lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed financial interest."

"Informed consent" is now defined by RPC 1.0(e) as "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." Similarly, "confirmed in writing" is now also defined by RPC 1.0(b) "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."

It could be argued that the lawyer is entering into "a business transaction with a client," requiring the greater disclosures and opportunity for independent advice before accepting the "informed consent" of the client, as required by RPC 1.8. However, in this situation the lawyer is not himself doing so. The mere fact of referral to the broker and/or the lawyer's spouse would not rise to this level, so long as the attorney would not be involved in the activities and labors associated with the sale transactions performed by the broker and/or the lawyer's spouse. See also Informal Opinion 1383 and 2140.

Advisory Opinions are provided for the education of the Bar and reflect the opinion of the Rules of Professional Conduct Committee. Advisory Opinions are provided pursuant to the authorization granted by the Board of Governors, but are not individually approved by the Board and do not reflect the official position of the Bar association. Laws other than the Washington State Rules of Professional Conduct may apply to the inquiry. The Committee's answer does not include or opine about any other applicable law than the meaning of the Rules of Professional Conduct. Advisory Opinions are based upon facts of the inquiry as presented to the committee.

WSBA

Opinion: 2229
Year Issued: 2012
RPC(s): RPC 1.6, 1.6(b)(1), 1.6(b)(2), 1.7, 1.16(a)(1)
Subject: Reporting Client to Authorities and Client Confidentiality

Facts:

Attorney has an individual client who is involved in an ongoing financial scam (a confidence game or other fraudulent scheme), the facts of which attorney believes would constitute a crime under applicable state and/or federal law. Attorney learned of the scam in the course of representing the client, but attorney is not directly involved in the scam, nor does attorney believe the client has used his legal services to further the scam. Attorney has never represented the client in any formal proceeding before a tribunal. Attorney wants to volunteer information related to his client's scam to the appropriate law enforcement authorities. May he ethically do so?

Analysis:

RPC 1.6(b)(2) states:

(b) A lawyer to the extent the lawyer reasonably believes necessary:

(2) may reveal information relating to the representation of a client to prevent the client from committing a crime. . .

Comment [20] to RPC 1.6 provides:

Washington's Rule 1.6(b)(2), which authorizes disclosure to prevent a client from committing a crime, is significantly broader than the corresponding exception in the Model Rule. While the Model Rule permits a lawyer to reveal information relating to the representation to prevent the client from "committing a crime . . . that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used the lawyer's services," Washington's Rule permits the lawyer to reveal such information to prevent the commission of any crime.

Comment [14] to RPC 1.6 provides:

Paragraph (b) permits disclosure only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified. Where practicable, the lawyer should first seek to persuade the client to take suitable action to obviate the need for disclosure. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose.

Comment [23] to RPC 1.6 provides:

. . . A lawyer must make every effort practicable to avoid unnecessary disclosure of information relating to a representation, to limit disclosure to those having the need to know it, and to obtain protective orders or make other arrangements minimizing the risk of avoidable disclosure.

Conclusion:

On these facts, where the client's financial scam does not appear to carry the risk of reasonably certain substantial bodily harm, the Rules of Professional Conduct do not require the attorney to disclose information about the scam to law enforcement. See RPC 1.6(b)(1). RPC 1.6(b)(2) does, however, allow the attorney to disclose information about the scam to law enforcement, as long as the attorney only shares that information he reasonably believes necessary to accomplish the law enforcement purpose of the disclosure. See Comments 14 and 23 to RPC 1.6. Here, it may not be "practicable" for the attorney to attempt to avoid disclosure by counseling the client to take "suitable action to obviate the need for disclosure," and – in fact – any such attempt by the attorney may undercut the law enforcement purpose of the disclosure.

In these circumstances, it is likely that the attorney will be compelled to withdraw from continued representation of the client per RPC 1.16(a)(1), which provides that the attorney must withdraw if:

(a) . . .

(1) the representation will result in violation of the Rules of Professional Conduct or other law; . . .

Here, if the attorney elects to disclose information about the client's scam, the attorney's disclosure is likely to create a concurrent conflict of interest under RPC 1.7, in that it would likely create a substantial risk that his representation of the client would be materially limited by the attorney's responsibility to a third person (e.g., law enforcement and/or victims of the client's scam) and/or by the personal interest of the attorney (in determining to make the disclosure to law enforcement).

Advisory Opinions are provided for the education of the Bar and reflect the opinion of the Committee on Professional Ethics (CPE) or its predecessor, the Rules of Professional Conduct Committee. Advisory Opinions issued by the CPE are distinguished from earlier RPC Committee opinions by a numbering format which includes the year followed by a sequential number. Advisory Opinions are provided pursuant to the authorization granted by the Board of Governors, but are not individually approved by the Board and do not reflect the official position of the Bar association. Laws other than the Washington State Rules of Professional Conduct may apply to the inquiry. The Committee's answer does not include or opine about any other applicable law other than the meaning of the Rules of Professional Conduct.

WASHINGTON STATE BAR ASSOCIATION

Advisory Opinion: 201601

Year Issued: 2016

RPC(s): RPC 1.1, 1.6, 1.7, 1.9, 1.15A, 1.18, 5.1, 5.2, 5.3, 5.10, 7.1, 7.2, 8.4

Subject: Ethical Practices of the Virtual Law Office

Increasing costs of doing business, including the costs associated with physical office space, have motivated lawyers to rethink how they deliver legal services. Many lawyers are choosing to do some or all of their work remotely, from home or other remote locations. Advances in the reliability and accessibility of on-line resources, cloud computing, and email services have allowed the development of the virtual law office, in which the lawyer does not maintain a physical office at all.

Although this modern business model may appear radically different from the traditional brick and mortar law office model, the underlying principles of an ethical law practice remain the same. The core duties of diligence, loyalty, and confidentiality apply whether the office is virtual or physical. For the most part, the Rules of Professional Conduct (RPC) apply no differently in the virtual office context. However, there are areas that raise special challenges in the virtual law office. Below we address whether a lawyer needs a physical address. We then summarize some of the ethical issues lawyers with virtual law practices may face.

I. Requirement for Physical Office Address

A. General Requirements

There is no requirement that WSBA members have a physical office address. Section III(B)(1)(of the Bylaws of the Washington State Bar Association (WSBA) requires that each member furnish both a "physical residence address" and a "principal office address." The physical residential address is used to determine the member's district for Board of Governors elections. The principal office address does not need to be a physical address. Similarly, Admission and Practice Rule (APR) 13(b) requires a lawyer to advise the WSBA of a "current mailing address" and to update that address within 10 days of any change. Nothing in that rule indicates the mailing address must be a physical address.

General Rule (GR) 30 permits courts to require service by email. If a lawyer is handling litigation in a jurisdiction that has not adopted such a requirement, the lawyer might wish to serve opposing counsel through hand delivery. The Civil Rules (CR) do not require that a lawyer provide an address for hand delivery. Rather, CR 5(b)(1) provides that if the person to be served has no office, service by delivery may be made by "leaving it at his dwelling house with a person of suitable age and discretion then residing therein." Service, of course, also may be made by mail. Particularly in jurisdictions where it is customary to serve pleadings by hand delivery, providing

the opposing counsel with a physical address to do so (such as a business service center) may mean that the lawyer will get the pleadings considerably faster. If a lawyer does not want to provide opposing counsel with an address for hand delivery, we recommend that the lawyer seek an agreement to have pleadings served by email instead, as permitted under GR 30(b)(4).

B. Address in Advertisements

RPC 7.2(c) requires that lawyer advertisements "include the name and office address of at least one lawyer or law firm responsible for its content." Some lawyers with virtual law practices practice from home and use a post office box for mail. Others contract with business service centers that receive mail and deliveries and also make conference rooms available for meetings.

The term "office address" in RPC 7.2(c) should not be so narrowly construed to mean only the place where the lawyer is physically working. Rather, the "office address" may be the address the lawyer uses to receive mail and/or deliveries. It may also be the address where a lawyer meets in person with clients, but does not have to be.

Therefore, a lawyer who works from home is not required to include her home address on advertising. As long as it is not deceptive or misleading, the lawyer may use a post office box, private mail box, or a business service center as an office address in advertisements.

An address listed in an advertisement may be misleading if a reader would wrongly assume that the lawyer will be available in a particular location. See RPC 7.1. [n.1]. For example, it may be misleading for an out-of-state lawyer to list a Seattle address in an advertisement if the lawyer will not be available to meet in Seattle. However, if the advertisement discloses that the lawyer is not available for in-person meetings in Seattle, the advertisement may not be misleading. See also Section C below.

II. Complying with the RPCs when Using a Virtual Law Office

Lawyers practicing in a virtual law office are no less bound by the ethical duties noted above than their colleagues practicing in a physical office. The standards of ethical conduct set forth in the RPC apply to all lawyers regardless of the setting: physical or virtual. However, certain duties present special challenges to lawyers practicing in the virtual law setting, including the duties of supervision, confidentiality, avoiding misleading communication, and avoiding conflicts of interest as set forth below.

A. Supervision

The duties of supervision embodied in RPC 5.1 [n.2], 5.2 [n.3], 5.3 [n.4] and 5.10 [n.5] apply in all law offices. But staff and other lawyers in a virtual law office might not share any physical proximity to their supervising lawyer, making direct supervision more difficult. Thus a lawyer operating remotely may need to take additional measures to adequately supervise staff and other lawyers in her employ.

B. Confidentiality

The use by a lawyer, whether a virtual office or traditional practitioner, of online data storage maintained by a third party vendor raises a number of ethical questions because any confidential client information included in the stored data is outside of the direct control of the lawyer. WSBA Advisory Opinion 2215 (2012) addresses the lawyer's ethical obligations under RPC 1.1 [n.6], 1.6 [n.7], and 1.15A [n.8]. A lawyer intending to use online data storage should review that opinion, and be especially mindful of several important points emphasized in the

opinion:

- The lawyer as part of a general duty of competence must be able to understand the technology involved sufficiently to be able to evaluate a particular vendor's security and storage systems.

- The lawyer shall be satisfied that the vendor understands, and agrees to maintain and secure stored data in conformity with, the lawyer's duty of confidentiality.

- The lawyer shall ensure that the confidentiality of all client data will be maintained, and that client documents stored online will not be lost, e.g., through the use of secure back-up storage maintained by the vendor.

- The storage agreement should give the lawyer prompt notice of non-authorized access to the stored data or other breach of security, and a means of retrieving the data if the agreement is terminated or the vendor goes out of business.

- Because data storage technology, and related threats to the security of such technology, change rapidly, the lawyer must monitor and review regularly the adequacy of the vendor's security systems.

As the opinion concludes, "A lawyer may use online data storage systems to store and back up client confidential information as long as the lawyer takes reasonable care to ensure that the information will remain confidential and the information is secure from risk of loss."

Lawyers in virtual practices may be more likely to communicate with clients by email. As discussed in WSBA Advisory Opinion 2175 (2008), lawyers may communicate with clients by email. However, if the lawyer believes there is a significant risk that a third party will access the communications, such as when the client is using an employer-provided email account, the lawyer has an obligation to advise the clients of the risks of such communication. See WSBA Adv. Op. 2217 (2012).

C. Duty to Avoid Misrepresentation

Another duty with special implications for lawyers operating virtual law offices is the duty to avoid misrepresentation. RPC 7.1, 8.4(c).[n.9]. A lawyer may not mislead others through communications that imply the existence of a physical office where none exists. Such communications may falsely imply access to the resources that a physical office provides like ready access to meeting spaces or the opportunity meet with the lawyer on a drop in basis. Unless the lawyer has arranged for such resources, she may not imply their existence. RPC 7.1.

Similarly, a lawyer may not mislead others through communications that imply the existence of a formal law firm rather than a group of individual lawyers sharing the expenses related to supporting a practice. For example, in the physical office setting, lawyers who are not associated in a firm may house their individual practices in the same building, with each practice paying its share of the overall rent and utilities for the space. These space-sharing lawyers would be prohibited from implying (e.g. via the use of letterhead or signage on the building) that they practice as single law firm. Similarly, lawyers with virtual law offices cannot state or imply on websites, social media, or elsewhere that they are part of a firm if they are not.

D. Duty to Avoid Conflicts of Interest

A robust conflicts checking system is critical to any law office, physical or virtual, in order to avoid conflicts of interest under RPC 1.7 [n.10], 1.9 [n.11], and 1.18.[n.12]. A robust conflicts checking system will include

Information on current and former clients, prospective clients, related parties, and adverse parties. The conflicts checking system is particularly important in a law firm where an individual firm lawyer's conflicts of interest will be imputed to the rest of the lawyers in the firm. RPC 1.10. [n.13]. In the physical office setting, physical proximity can in some circumstances provide more reliable access to the conflicts checking system. Lawyers in a virtual law practice, who most likely do not have the advantage of physical proximity, must ensure that the conflicts checking system is equally accessible to all members of the practice, lawyers and staff, and that such access is reliably maintained.

Endnotes

1. RPC 7.1 states, "A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services."

2. RPC 5.1 states:

(a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

(c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

3. RPC 5.2 states:

(a) A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.

(b) A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

4. RPC 5.3 states:

With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of thelawyer; and

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

5. RPC 5.10 states:

With respect to an LLLT employed or retained by or associated with a lawyer;

(a) a partner and a lawyer who individually or together with other lawyers possess comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the LLLT's conduct is compatible with the professional obligations of the lawyer and the professional obligations applicable to the LLLT directly; and

(b) a lawyer having direct supervisory authority over the LLLT shall make reasonable efforts to ensure that the LLLT's conduct is compatible with the professional obligations of the lawyer and the professional obligations applicable to the LLLT directly; and

(c) a lawyer shall be responsible for conduct of an LLLT that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if;

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the LLLT is employed, or has direct supervisory authority over the LLLT, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

6. RPC 1.1 states, "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."

7. RPC 1.6 states:

(a) 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 the disclosure is permitted by paragraph (b).

(b) A lawyer to the extent the lawyer reasonably believes necessary:

(1) shall reveal information relating to the representation of a client to prevent reasonably certain death or substantial bodily harm;

(2) may reveal information relating to the representation of a client to prevent the client from committing a crime;

(3) may reveal information relating to the representation of a client to prevent, mitigate or rectify substantial injury

to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(4) may reveal information relating to the representation of a client to secure legal advice about the lawyer's compliance with these Rules;

(5) may reveal information relating to the representation of a client 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;

(6) may reveal information relating to the representation of a client to comply with a court order; or

(7) may reveal information relating to the representation of a client to inform a tribunal about any breach of fiduciary responsibility when the client is serving as a court appointed fiduciary such as a guardian, personal representative, or receiver.

8. Paragraph (c)(3) of RPC 1.15A states:

A lawyer must identify, label and appropriately safeguard any property of clients or third persons other than funds. The lawyer must keep records of such property that identify the property, the client or third person, the date of receipt and the location of safekeeping. The lawyer must preserve the records for seven years after return of the property.

9. RPC 8.4 states, "It is professional misconduct for a lawyer to: . . . (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation . . ."

10. RPC 1.7 provides:

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

(1) the representation of one client will be directly adverse to another client; or

(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.

(b) Notwithstanding the existence of a concurrent 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 involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing (following authorization from

the other client to make any required disclosures).

11. RPC 1.9 provides:

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in whicha firm with which the lawyer formerly was associated had previous represented a client

(1) whose interests are materially adverse to that person; and

(2) about whom that lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter; unless the former client gives informed consent, confirmed in writing.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

12. RPC 1.18 states in part:

(a) A person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

(b) Even when no client-lawyer relationship ensues, a lawyer who has learned information from a prospective client shall not use or reveal that information, except as Rule 1.9 would permit with respect to information of a former client or except as provided in paragraph (e).

(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraphs (d) or (e). If a lawyer or LLLT is disqualified from representation under this paragraph or paragraph (c) of LLLT RPC 1.18, no lawyer in a firm with which that lawyer or LLLT is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d)

...

13. RPC 1.10 states, with certain exceptions:

[W]hile lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless the prohibition is based on a personal interest of the disqualified lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.

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WASHINGTON STATE BAR ASSOCIATION

Advisory Opinion: 201701

Year Issued: 2017

RPC(s): RPC 1.6(a)-(b), 1.13(c)-(e), 1.16(a)-(d), 3.3(c)-(d)

Subject: Lawyer Withdrawal; Disclosure of Confidential Client Information in Motion to Withdraw

Facts:

Lawyer, who has been representing Client in litigation pending in Washington Superior Court, decides that there is a mandatory or permissive basis for withdrawal from the representation under RPC 1.16(a) and (b). [n.1] The basis for withdrawal does not involve a situation in which there is an imminent risk of death or serious bodily injury under RPC 1.6(b)(1), [n.2] permissible "up the ladder" reporting out under RPC 1.13(c) through (e), [n.3] the realization by Lawyer that Lawyer has offered false testimony or evidence under RPC 3.3(c) or (d), [n.4] or any other situation in which Lawyer is required by substantive law or by the RPCs to disclose the reasons for Lawyer's withdrawal. [n.5]

Client is either unwilling or unable to make arrangements for a substitution of counsel. Lawyer understands that pursuant to RPC 1.16(c) and (d), [n.6] as well as Superior Court Civil Rule 71 [n.7] or Superior Court Criminal Rule 3.1(e), [n.8] Lawyer must file a motion for leave to withdraw with the trial court and that if the trial court denies the motion to withdraw, Lawyer must either remain in the case, seek reconsideration by the trial court or seek appellate relief.

Question:

Without violating RPC 1.6, what information about Client may Lawyer provide when filing the motion to withdraw?

Conclusion:

Without violating RPC 1.6, Lawyer may always voluntarily inform the court that Lawyer believes that there is a basis for withdrawal pursuant to RPC 1.16 or that Lawyer believes that professional considerations make it appropriate for the lawyer to seek leave to withdraw. Lawyer may also make other similar statements as long as Lawyer does not disclose the particular reasons or basis for withdrawal. In addition, Lawyer may always state, without violating RPC 1.6, that due to Lawyer's obligations to Client pursuant to RPC 1.6, Lawyer cannot provide a further explanation on the record but will do so in camera if the court so requires.

Lawyer may describe the specific basis for withdrawal on the public record if Client gives informed consent to the statement or if Lawyer owes no duty of confidentiality under RPC 1.6(a).

Lawyer may also offer further information in camera and under seal if ordered to do so by the trial court.

If the trial court orders Lawyer to place any further information on the public record or asserts that the motion to withdraw will be denied unless further information is provided on the public record, and if the information that Lawyer would need to furnish is protected under RPC 1.6(a), then:

• If Client expresses an intent to seek immediate appellate review or if Lawyer is willing to seek immediate appellate review on Client's behalf, Lawyer should not make any further disclosure until the process of appellate review has run its course unless the trial court has threatened to hold the lawyer in contempt for not providing the information or the failure to disclose would somehow violate another RPC.

• If Client does not express an intent to seek immediate appellate review or cannot be found, Lawyer may make additional disclosure on the public record if but only if Lawyer reasonably believes that doing so is required by the trial court in order to obtain permission to withdraw.

Analysis:
This opinion requires that we balance Lawyer's right or duty to seek leave to withdraw with Lawyer's obligations of confidentiality to Client. With respect to the latter, RPC 1.6 provides that:

(a) 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 the disclosure is permitted by paragraph (b).

(b) A lawyer to the extent the lawyer reasonably believes necessary:
(1) shall reveal information relating to the representation of a client to prevent reasonably certain death or substantial bodily harm;
(2) may reveal information relating to the representation of a client to prevent the client from committing a crime;
(3) may reveal information relating to the representation of a client to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;
(4) may reveal information relating to the representation of a client to secure legal advice about the lawyer's compliance with these Rules;
(5) may reveal information relating to the representation of a client 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;
(6) may reveal information relating to the representation of a client to comply with a court order; or
(7) may reveal information relating to the representation to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client;
(8) may reveal information relating to the representation of a client to inform a tribunal about any client's breach of fiduciary responsibility when the client is serving as a court appointed fiduciary such as a guardian, personal representative, or receiver.

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

"The Rules of Professional Conduct are rules of reason." Official Comment [14] to Scope section of Washington Rules of Professional Conduct. It would be unreasonable to construe RPC 1.6(a) to mean that when filing a motion to withdraw, Lawyer cannot state that Lawyer believes there is a basis for withdrawal, that professional

considerations provide grounds for Lawyer's request for withdrawal or other similar statements that do not reveal the specific substantive basis for seeking withdrawal since such statements do not reveal any information protected by RPC 1.6(a). Accord, ABA Formal Ethics Op. 16-476 ("Opinion 16-476"). As noted in Opinion 16-476, most courts will be satisfied that such a statement provides sufficient support for a motion to withdraw that the motion will be granted. If this is or reasonably may be so, no further disclosure of information protected by RPC 1.6(a) will be permitted because Lawyer will not be able to reasonably believe that additional disclosure is necessary within the meaning of any of the subsections of RPC 1.6(b). [n.9]

In addition to stating that Lawyer believes there is a basis for withdrawal under RPC 1.16 or another similar statement, Lawyer may offer to provide additional information to the trial court in camera and under seal if ordered to do so. Such a statement does nothing more than reflect the trial court's authority to order such information and Lawyer's ability to reveal information pursuant to a court order under RPC 1.6(b)(6). The submission of such information pursuant to court order and under seal is an efficient and effective means of explaining the basis for withdrawal while protecting Client's confidentiality under RPC 1.6(a). In addition, Lawyer's implicit assertion that more information could be provided may convince the trial court to grant the motion without further review of information protected by RPC 1.6(a). Unless, if it reasonably appears to Lawyer that disclosure under seal will be sufficient to cause the trial court to permit withdrawal, Lawyer cannot reasonably believe that further disclosure on the record is necessary under RPC 1.6(b). [n.10]

In those very rare instances in which a court rules that it will not accept materials in camera and under seal and will not allow withdrawal unless Lawyer explains the reason or basis for seeking withdrawal on the public record, Lawyer may delay making disclosure and instead seek immediate appellate review of the trial court's ruling. Similarly, if Client announces an intent to seek such review, Lawyer must generally delay providing additional information until the review process has run its course and may delay providing any additional information for so long as the review process is under way. Cf. RPC 1.2(d). [n.11] If, however, Lawyer is threatened with immediate contempt, Lawyer may make disclosure to the extent Lawyer reasonably believes necessary under RPC 1.6(b)(6).

Endnotes:

1. RPC 1.16(a) and (b) provide that:

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall, notwithstanding RCW 2.44.040, withdraw from the representation of a client if:
(1) the representation will result in violation of the Rules of Professional Conduct or other law;
(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or
(3) the lawyer is discharged.
(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:
(1) withdrawal can be accomplished without material adverse effect on the interests of the client;
(2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;
(3) the client has used the lawyer's services to perpetrate a crime or fraud;
(4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;
(5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;
(6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(7) other good cause for withdrawal exists.

2. RPC 1.6 is quoted in full in the Analysis section of this opinion.

3. RPC 1.13(c) through (e) provides that:

(c) Except as provided in paragraph (d), if
(1) despite the lawyer's efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly a violation of law, and
(2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization, then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.

(d) Paragraph (c) shall not apply with respect to information relating to a lawyer's representation of an organization to investigate an alleged violation of law, or to defend the organization or an officer, employee or other constituent associated with the organization against a claim arising out of an alleged violation of law.

(e) A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraphs (b) and (c), or who withdraws under circumstances that require or permit the lawyer to take action under either of those paragraphs, shall proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

4. RPC 3.3(c) and (d) provide that:

(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 1.16.

5. See, e.g., RPC 4.1, which provides in pertinent part that:

In the course of representing a client a lawyer shall not knowingly: * * * (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

6. RPC 1.16(c) and (d) provide that:

(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of another legal practitioner, surrendering papers and property to which the client is entitled and refunding any advance payment

of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.

7. Superior Court Civil Rule 71 states:

(a) Withdrawal by Attorney. Service on an attorney who has appeared for a party in a civil proceeding shall be valid to the extent permitted by statute and rule 5(b) only until the attorney has withdrawn in the manner provided in sections (b), (c), and (d). Nothing in this rule defines the circumstances under which a withdrawal might be denied by the court.

(b) Withdrawal by Order. A court appointed attorney may not withdraw without an order of the court. The client of the withdrawing attorney must be given notice of the motion to withdraw and the date and place the motion will be heard.

(c) Withdrawal by Notice. Except as provided in sections (b) and (d), an attorney may withdraw by notice in the manner provided in this section.

(1) Notice of Intent To Withdraw. The attorney shall file and serve a Notice of Intent To Withdraw on all other parties in the proceeding. The notice shall specify a date when the attorney intends to withdraw, which date shall be at least 10 days after the service of the Notice of Intent To Withdraw. The notice shall include a statement that the withdrawal shall be effective without order of court unless an objection to the withdrawal is served upon the withdrawing attorney prior to the date set forth in the notice. If notice is given before trial, the notice shall include the date set for trial. The notice shall include the names and last known addresses of the persons represented by the withdrawing attorney, unless disclosure of the address would violate the Rules of Professional Conduct, in which case the address may be omitted. If the address is omitted, the notice must contain a statement that after the attorney withdraws, and so long as the address of the withdrawing attorney's client remains undisclosed and no new attorney is substituted, the client may be served by leaving papers with the clerk of the court pursuant to rule 5(b)(1).

(2) Service on Client. Prior to service on other parties, the Notice of Intent To Withdraw shall be served on the persons represented by the withdrawing attorney or sent to them by certified mail, postage prepaid, to their last known mailing addresses. Proof of service or mailing shall be filed, except that the address of the withdrawing attorney's client may be omitted under circumstances defined by subsection (c)(1) of this rule.

(3) Withdrawal Without Objection. The withdrawal shall be effective, without order of court and without the service and filing of any additional papers, on the date designated in the Notice of Intent To Withdraw, unless a written objection to the withdrawal is served by a party on the withdrawing attorney prior to the date specified as the day of withdrawal in the Notice of Intent To Withdraw.

(4) Effect of Objection. If a timely written objection is served, withdrawal may be obtained only by order of the court.

(d) Withdrawal and Substitution. Except as provided in section (b), an attorney may withdraw if a new attorney is substituted by filing and serving a Notice of Withdrawal and Substitution. The notice shall include a statement of the date on which the withdrawal and substitution are effective and shall include the name, address, Washington State Bar Association membership number, and signature of the withdrawing attorney and the substituted attorney. If an attorney changes firms or offices, but another attorney in the previous firm or office will become counsel of record, a Notice of Withdrawal and Substitution shall nevertheless be filed.

8. Superior Court Criminal Rule 3.1(e) states:

Withdrawal of Lawyer. Whenever a criminal cause has been set for trial, no lawyer shall be allowed to withdraw from said cause, except upon written consent of the court, for good and sufficient reason shown.

9. We recognize that there may be situations in which Client grants informed consent to the provision of further information or when the additional information about the basis for withdrawal is not protected under RPC 1.6(a). In such situations, further disclosure would be permitted. In our experience, however, such situations are rare.

10. Although, consistent with RPC 1.6(b)(5), Lawyer may be able to make some reasonable further disclosure in aid of suing Client for unpaid fees, a mere motion to withdraw is not the same as an action for fees. In addition, any disclosure in the course of a claim for fees must not exceed what is reasonably necessary.

11. RPC 1.2(d) provides that:

A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

***

Advisory Opinions are provided for the education of the Bar and reflect the opinion of the Committee on Professional Ethics (CPE) or its predecessors. Advisory Opinions are provided pursuant to the authorization granted by the Board of Governors, but are not individually approved by the Board and do not reflect the official position of the Bar association. Laws other than the Washington State Rules of Professional Conduct may apply to the inquiry. The Committee's answer does not include or opine about any other applicable law other than the meaning of the Rules of Professional Conduct.

WASHINGTON STATE BAR ASSOCIATION

Advisory Opinion: 201801

Year Issued: 2018

RPC(s): RPC 1.4, 1.4(a)(3), 1.16(d), 1.16(a)(3), 1.16(b)(7), 7.3(a)

Subject: Lawyers Moving from Firm-to-Firm in Private Practice

I. Introduction

One of the most prominent features of law practice over the past generation has been the increasing frequency of lawyers moving from firm-to-firm in private practice. [n.1] Increased lawyer mobility has spawned a host of issues for the "old" law firms involved, the lawyers moving laterally and their "new" firms. This advisory opinion surveys three recurring questions when a lawyer (Lawyer) leaves an "old" firm (Old Firm) to either join or establish a "new" firm (New Firm) [n.2] :

1. What notice must the Lawyer and the Old Firm provide to the clients for whom the Lawyer is the principal handling attorney [n.3] and when must that notice be provided?

2. How are file transitions handled in this context?

3. After the Lawyer has left the Old Firm, may the Lawyer discuss the possibility of handling work for clients of the Old Firm with whom the Lawyer has had a prior professional relationship?

II. Analysis

A. Notice Regarding Departure

1. Responsibility for Notice

Neither the Washington RPCs nor the ABA Model Rules include a specific rule comprehensively addressing the duties of a departing lawyer or the firms involved. [n.4] RPC 1.4(a)(3), however, requires a lawyer to "keep the client reasonably informed about the status of the matter[.]" Comment 3 to RPC 1.4 notes in this regard that "paragraph (a)(3) requires that the lawyer keep the client reasonably informed about the status of the matter, such as significant developments affecting the timing or the substance of the representation." As ABA Formal Opinion 99-414 puts it:

"The impending departure of a lawyer who is responsible for the client's representation or who plays a principal role in the law firm's delivery of legal services currently in a matter (i.e., the lawyer's current clients), is

information that may affect the status of a client's matter as contemplated by [ABA Model] Rule 1.4. A lawyer who is departing one law firm for another has an ethical obligation, along with responsible members of the law firm who remain, to assure that those clients are informed that the lawyer is leaving the firm." Id. at 2 (footnote omitted). [n.5]

Therefore, both the Lawyer and the Old Firm have a duty under RPC 1.4(a)(3) to inform the clients affected of the Lawyer's departure.

2. Form and Content of Notice

RPC 1.4(a)(3) does not specify a particular form for the requisite notice to the clients involved. Again, however, ABA Formal Opinion 99-414 offers useful guidance:

"This can be accomplished by the lawyer herself, the responsible members of the firm, or the lawyer and those members jointly. Because a client has the ultimate right to select counsel of his choice, information that the lawyer is leaving and where she will be practicing will assist the client in determining whether his legal work should remain with the law firm, be transferred with the lawyer to her new firm, or be transferred elsewhere." Id. at 3 (footnote omitted).

ABA Formal Opinion 99-414 offers equally useful guidance on the content of notice sent before the Lawyer leaves the Old Firm [n.6] :

"Any initial in-person or written notice informing clients of the departing lawyer's new affiliation that is sent before the lawyer's resigning from the firm generally should conform to the following:

"1) the notice should be limited to clients whose active matters the lawyer has direct professional responsibility at the time of the notice (i.e., the current clients);

"2) the departing lawyer should not urge the client to sever its relationship with the firm, but may indicate the lawyer's willingness and ability to continue her responsibility for the matters upon which she is currently working;

"3) the departing lawyer must make clear that the client has the ultimate right to decide who will complete or continue the matters; and

"4) the departing lawyer must not disparage the lawyer's former firm."

. . .

"If the client requests further information about the departing lawyer's new firm, the lawyer should provide whatever is reasonably necessary to assist the client in making an informed decision about future representation, including, for example, billing rates and a description of the resources available at the new firm to handle the client matter." Id. at 5, 6 (footnotes omitted; emphasis in original). [n.7]

Although ABA Formal Opinion 99-414 suggests that joint notice from the Lawyer and the Old Firm is "preferred," it also recognizes that the personal dynamics of a particular situation may not make that feasible. Therefore, joint notice is not required. Id. at 6-7. [n.8]

3. Timing of Notice [n.9]

As noted, RPC 1.4(a)(3) requires that a lawyer "keep the client reasonably informed[.]" RPC 1.4(a)(3) does not set a specific timeline. Rather, Comment 5 to RPC 1.4 suggests that the timing of communication must be reasonable under the circumstances: "The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of the representation." ABA Formal Opinion 99-414 notes generally that "informing the client of the lawyer's departure in a timely manner is critical to allowing the client decide who will represent him." Id. at 3 (footnote omitted). Although notice would ordinarily occur prior to the Lawyer's departure from the Old Firm, it could occur afterward if the Lawyer's resignation or termination took effect without advance notice to the other party.

B. File Transitions

1. Preeminence of Client-Decisions

File transitions from the Old Firm to the New Firm that result from the Lawyer's lateral move are generally subject to the same considerations as when a client moves a matter from an Old Firm to a New Firm for other reasons. [n.10] As noted earlier, the decision on whether the client chooses to keep the work involved at the Old Firm, move it with the departing Lawyer to the New Firm or shift it to another firm altogether is the client's alone. The Washington Supreme Court in Barr v. Day, 124 Wn.2d 318, 329, 879 P.2d 912 (1994), described this preeminent right of a client to choose legal counsel: "Unlike general contract law, under a contract between an attorney and a client, a client may discharge the attorney at any time with or without cause." See also RPC 1.16(a)(3) (requiring withdrawal if a lawyer is discharged).

2. Client Files

File transition issues are addressed in detail in WSBA Advisory Opinion 181 (rev. 2009) and this opinion will not repeat that comprehensive discussion. In brief, however, Advisory Opinion 181 notes that RPC 1.16(d) requires a lawyer when an attorney-client relationship has been terminated to "take steps to the extent reasonably practicable to protect a client's interests, such as . . . surrendering papers and property to which the client is entitled and refunding any advance payment of fee that has not been earned or incurred." Advisory Opinion 181 defines "the file" broadly and provides guidelines for what must be provided to a former client (or a New Firm at the former client's direction). Generally, Advisory Opinion 181 counsels that the entire file—including the electronic portions—should be provided subject to limited exceptions. The principal exceptions Advisory Opinion 181 identifies are: (1) documents subject to a protective order or similar confidentiality obligation that may control the distribution of particular documents within the file; and (2) "[m]iscellaneous material that would be of no value to the client," which Advisory Opinion 181 describes as "papers [that] will not prejudice the client" including "drafts of papers, duplicate copies, photocopies of research material, and lawyers' personal notes containing subjective impressions such as comments about identifiable persons." [n.11]

RPC 1.16(d) also notes that a "lawyer may retain papers relating to the client to the extent permitted by law." Advisory Opinion 181 counsels in regard to an Old Firm's possessory lien rights concerning a client's file under RCW 60.40.010(1)(a) that "[i]f assertion of the lien would prejudice the former client, the duty to protect the former client's interests supersedes the right to assert the lien." Id. at 1. [n.12]

Upon receipt of a client's written instruction to transfer a file to New Firm or a third law firm, Old Firm has a duty to transfer the file as soon as reasonably possible to avoid prejudice to the client and departing Lawyer has a duty to cooperate as needed to facilitate a timely transfer. In addition, Old Firm has a duty under RPC 1.4 to keep the client reasonably informed about the status of the file transfer.

3. Client Names for Conflict Checks

RPC 1.6(b)(7) generally allows client names and limited matter information to be shared with a New Firm for conflict-checking purposes:

"(b) A lawyer to the extent the lawyer reasonably believes necessary:

. . .

"(7) may reveal information relating to the representation to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client." [n.13]

Comment 13 to RPC 1.6 notes in this regard:

"Any such disclosure should ordinarily include no more than the identity of the persons and entities involved in a matter, a brief summary of the general issues involved, and information about whether the matter is terminated. Even this limited information, however should be disclosed only to the extent reasonably necessary to detect and resolve conflicts of interest that might arise from the possible new relationship."

Therefore, unless the identity of a particular client or the nature of a particular client or matter is itself confidential, [n.14] a departing Lawyer may provide a New Firm with a list of clients and matters for conflict-checking purposes before Lawyer actually joins the New Firm. As a matter of best practice, firms are encouraged to work cooperatively with a departing Lawyer to provide lists of clients and matters (including, if/as needed, the names of adverse and involved persons) on which the Lawyer is working or has worked in the reasonably near past [n.15] so that appropriate conflict-checks can be performed. [n.16]

C. Contact with Old Firm Clients

After Lawyer has left the Old Firm, RPC 7.3(a) governs a Lawyer's ability to contact Old Firm clients for whom s/he was not the principal handling attorney. At this writing, the Washington State Bar Association's Board of Governors has recommended that the Washington Supreme Court amend RPC 7.3(a) in a way that would broaden Lawyer's ability to solicit professional employment from Old Firm clients so long as the solicitation does not violate any of the four prohibitions in the proposed revision. Readers are encouraged to consult the most recent version of this rule available on the Washington courts' website.

III. Conclusion

The personal dynamics of a lawyer departing a firm have the potential to outrun the important professional obligations all concerned have toward the clients involved. Lawyers and their respective Old and New Firms must ensure that client considerations remain paramount despite the often-difficult personal dynamics involved.

Endnotes

1. See generally Robert W. Hillman and Allison Martin Rhodes, Hillman on Lawyer Mobility (rev. 2d ed. 2017); Geoffrey C. Hazard, Jr., W. William Hodes and Peter R. Jarvis, The Law of Lawyering, § 15.11 (rev. 4th ed. 2016).

2. This advisory opinion focuses primarily on the departure aspect of lawyer mobility and the corresponding duties of the departing Lawyer and the Old Firm. The New Firm, too, has obligations in this setting. For example, job negotiations with a potential new-hire who is handling a matter opposite the New Firm may trigger conflict waiver obligations. See ABA Formal Op. 96-400 (1996) (surveying conflict issues arising from job negotiations with a lawyer representing an adverse party). Similarly, the New Firm should also be attentive to imputed conflicts under RPC 1.10(a) and potential screening to address those conflicts under RPC 1.10(d). See generally Daines v. Alcatel, 194 F.R.D. 678 (E.D. Wash. 2000) (applying Washington law and discussing lateral-hire screening).

3. For purposes of this advisory opinion, the term "principal handling attorney" means a lawyer who is primarily responsible for a particular matter or who is the firm's primary contact with the client for the client's work at the firm. See ABA Formal Op. 99-414 (1999) at 2-3 (addressing lawyer departure issues under the ABA Model Rules and defining its scope in similar terms). This definition would apply, for example, to a partner who has primary contact with a client on a matter. By contrast, it would not apply to a junior associate who worked on occasional legal research projects under the partner's supervision in the matter involved. The dividing line, however, is inherently fact-specific—subject to the general legal standard of whether a particular lawyer's departure triggers a duty to keep the client informed of "significant developments affecting the . . . substance of the representation." RPC 1.4, Comment 3.

4. Cf. Florida RPC 4-5.8; Virginia RPC 5.8. ABA Formal Opinion 99-414 has provided guidance nationally in this area since its adoption in 1999. Washington lawyers with offices in other states are encouraged to consult resources available in those states if the matters affected by a lawyer's departure are being handled in other states. Regionally, Alaska and Oregon have advisory opinions discussing the issues involved. See Alaska Bar Ethics Op. 2005-2 (2005); Oregon State Bar Formal Op. 2005-70 (rev. 2015). Court rules, such as CR 71(d) on withdrawal and substitution, may also apply if the matter involved is in litigation. See RPC 1.16(c) (requiring compliance with court rules on withdrawal).

5. Washington RPC 1.4 is patterned on the corresponding ABA Model Rule.

6. The guidance quoted implicitly assumes that the Lawyer is still at the Old Firm at the time the notice is provided and, accordingly, still has fiduciary duties to the Old Firm. See generally Holman v. Coie, 11 Wn. App. 195, 522 P.2d 515 (1974) (discussing intra-law firm fiduciary duties); see also In re Smith, 315 Or. 260, 266, 843 P.2d 449 (1992) (disciplining lawyer for misrepresentation by secretly having clients of old firm sign fee agreements with his soon-to-be new firm and noting "such conduct is a violation of the duty of loyalty owed by a lawyer to his or her firm based on their contractual or agency relationship."). If the Lawyer has already departed the Old Firm and is no longer bound by those fiduciary duties, the nature of the competitive information provided may be broader as long as it is truthful.

7. Many malpractice carriers have template forms for notification letters available for their law firm insureds. The Oregon State Bar Professional Liability Fund, for example, has templates available for both joint and separate client notice letters on its web site at www.osbplf.org. The Oregon templates are not state-specific and are generally consistent with both this opinion and ABA Formal Opinion 99-414.

8. A departing Lawyer is not obliged to take a client to a New Firm and may be precluded from doing so in some instances due to non-waivable conflicts. Similarly, an Old Firm may conclude that it is no longer able to competently handle a client's work due to a departure even if a client does not move with a departing Lawyer. For example, a departing Lawyer may have been the only person at the Old Firm with the specialized expertise needed by the client concerned. When neither the New Firm nor the Old Firm is able to continue the

representation, both the Old Firm and the departing Lawyer should work cooperatively to assist the client in obtaining new counsel.

9. This advisory opinion discusses notice to the clients affected as distinguished from the Lawyer's notice to the Old Firm that the Lawyer is departing. The RPCs do not address the latter except that any contractual notice requirement cannot be so lengthy as to amount to a prohibited restriction on the Lawyer's right to practice under RPC 5.6(a). See generally WSBA Advisory Op. 2118 (2006) (discussing RPC 5.6(a) within the context of contractual non-competition provisions); see also ABA Formal Op. 94-381 (1994) (discussing ABA Model Rule 5.6(a) and noting that courts have often refused to enforce restrictions that violate state variants of the ABA Model Rule). The question of whether the Lawyer has a fiduciary duty to inform the Old Firm of the planned departure before notifying the clients involved is a substantive issue of fiduciary and contract law beyond the scope of the RPCs. See generally Holman v. Coie, supra, 11 Wn. App. 195 (discussing intra-law firm fiduciary duties); RPC 1.6, cmt. 13 ("A lawyer's fiduciary duty to the lawyer's firm may also govern a lawyer's conduct when exploring an association with another firm and is beyond the scope of these Rules."). As a matter of prudent practice, however, a lawyer contemplating leaving a firm should carefully examine any applicable fiduciary and contract considerations as well as the RPCs noted in this opinion. Similar fiduciary considerations apply to recruitment of Old Firm lawyers or staff while still with the Old Firm. In any event, a lawyer may not lie about the lawyer's intentions. See RPC 8.4(c). ABA Formal Opinion 99-414 notes, for example, that a lawyer may generally conduct negotiations or explore alternative office space without telling the soon-to-be "old" firm, but the lawyer cannot lie about the lawyer's intentions if confronted. Id. at 7 n.17.

10. This advisory opinion uses the term "files" to denote paper or electronic client files. It does not address the application of property or trade secret law to form templates or other generic materials that may be deemed proprietary by the Old Firm. See generally Robert W. Hillman, The Property Wars of Law Firms: Of Client Lists, Trade Secrets and the Fiduciary Duty of Law Partners, 30 Fla. St. U. L. Rev. 767 (2003). By contrast, "form" materials containing information classified as confidential under RPC 1.6 or applicable privilege law, should only be taken with the permission of the clients concerned.

11. Presumably, the first category could be addressed through amendment of the protective order or other confidentiality agreement involved to cover a New Firm. The second category is discretionary and may have less relevance when the same Lawyer is to handle the same matter at the New Firm.

12. Issues regarding accrued compensation, return of capital and entitlement to accounts receivable or other anticipated future fee income are matters of substantive contract and statutory law beyond the scope of the RPCs. See generally Dixon v. Crawford, McGilliard, Peterson & Yelish, 163 Wn. App. 912, 262 P.3d 108 (2011) (discussing the valuation of law firm partnership interest upon the withdrawal of one of the firm's partners); McCormick v. Dunn & Black, P.S., 140 Wn. App. 873, 167 P.3d 610 (2007) (discussing valuation of law firm shareholder interest upon withdrawal of one of the law firm's shareholders).

13. See also ABA Formal Op. 09-455 (2009) (discussing this issue generally prior to amendments to ABA Model Rule 1.6 and the Washington RPC 1.6 now reflected in RPC 1.6(b)(7)).

14. Comment 13 to RPC 1.6 cautions that in some circumstances the very fact of consultation may be confidential:

"[T]he disclosure of any information is prohibited if it would compromise the attorney- client privilege or otherwise prejudice the client (e.g., the fact that a corporate client is seeking advice on a corporate takeover that has not been publicly announced; that a person has consulted a lawyer about the possibility of divorce before the person's intentions are known to the person's spouse; or that a person has consulted a lawyer about a criminal

investigation that has not led to a public charge). Under those circumstances, paragraph (a) prohibits disclosure unless the client or the former client gives informed consent."

For a discussion of related issues of client identity specific to the attorney-client privilege, see generally Robert H. Aronson and Maureen A. Howard, The Law of Evidence in Washington, § 9.05[8][a] (rev. 5th ed. 2017).

15. Depending on the circumstances, lists of former clients and matters may need to be expanded in terms of the time covered so that potential former client conflicts under RPC 1.9 can be assessed.

16. If it is not possible for departing Lawyer and new Firm to evaluate a potential conflict of interest without disclosing client confidences to each other, one option might be to retain an intermediary lawyer to whom they may disclose client confidences pursuant to RPC 1.6(b)(4) and who may then analyze the conflict on their behalf. ABA Formal Op. 2009-455 (2009) at 5.

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WASHINGTON STATE BAR ASSOCIATION

Advisory Opinion: 201802

Year Issued: 2018

RPC(s): RPC 1.0A(e), 1.2(a), 1.6(a), 5.4(c)

Subject: Quadripartite and Tripartite Relationships: May Lawyer Provide Client Confidential Information to Third or Fourth Party?

Executive summary: Lawyers are often retained by third parties, like insurers or employers, to defend an assured or an employee, respectively. In the course of doing to, the retained lawyer must often communicate both with the client and with the insurer or employer in order to effectively manage the defense and enable to the insurer or employer to evaluate and resolve the claim.

A vast body of case law has developed regarding this tripartite relationship. The nature of the tripartite relationship differs from jurisdiction to jurisdiction. But generally, communications made within the tripartite relationship are afforded the same or similar protections as lawyer-client privileged communications or work product.

Sophisticated insurers or employers sometimes consult with or engage others to manage the claim or otherwise participate in the tripartite relationship, thereby adding a fourth stakeholder. Although case law involving this quadripartite relationship is not as well developed, the traditional application of the Rules of Professional Conduct inform the relationship similarly.

Before communicating to a fourth party, the lawyer will need to take certain steps in order to avoid disclosing information in violation of the lawyer's duty of confidentiality to the client. This opinion addresses the so-called quadripartite relationship across four different scenarios.

Facts:
Scenario 1:

Driver causes an automobile accident and is sued.

Driver notifies Broker of the claim. Broker tenders the claim to Insurer, who engages Third-Party Administrator to manage the litigation.

Third-Party Administrator hires Lawyer to defend Driver in the lawsuit. Third-Party Administrator asks Lawyer for an initial case evaluation and status reports every 30 days.

Scenario 2:

Supervisor is employed by Company. Supervisor is sued for harassment and discrimination.

Supervisor notifies HR Manager of the lawsuit, and HR Manager reports the claim to Insurer. Insurer appoints Lawyer to defend Supervisor in the lawsuit.

HR Manager asks Lawyer to copy HR Manager and Insurer on all future communications about the case, including status reports and case assessments.

Scenario 3:

Associate is employed by Law Firm. Associate is accused of legal malpractice, and suit is filed against Associate and Law Firm.

Associate informs Partner, who notifies Broker of the claim. Broker tenders the claim to Insurer under Law Firm's professional liability insurance policy. Insurer assigns Lawyer to defend the claim.

Broker asks Lawyer to copy Broker, Partner, and Insurer on Lawyer's all correspondence and status reports.

Scenario 4:

Physician is employed by Hospital. Hospital purchases from Insurer professional liability insurance coverage for Physician as a term of employment.

Physician is sued for medical malpractice. Physician tenders the claim to Insurer, who hires Lawyer to defend Physician in the lawsuit.

In the course of defending Physician, Lawyer drafts a written case assessment, which is addressed to Physician and Insurer. Insurer does not issue a reservation of rights.

Hospital's Risk Manager calls Lawyer and asks (1) for a copy of the written case assessment, (2) to receive copies of all future status reports in the case, and (3) to provide strategic litigation input to the extent that Hospital is a potential co-defendant to the lawsuit. On the particular facts of the lawsuit, there is no indication that the interests of Hospital and Physician are directly adverse.

Questions:

May Lawyer provide the requested information to Third-Party Administrator (Scenario 1), HR Manager and Insurer (Scenario 2), Broker, Partner, and Insurer (Scenario 3), and Risk Manager (Scenario 4)?

Conclusion:

No, unless Lawyer's client in each matter provides informed consent to the disclosures. [n.1]

Discussion:

Traditionally, a lawyer who is retained by an insurer to represent and defend an insured against claims acts within what is commonly referred to as a tripartite relationship. This relationship differs, depending on the

jurisdiction. The tripartite relationship governs or describes how the lawyer, client, and insurer communicate and contribute to the defense.

Often, however, another party can become involved in some aspect of the defense. A third-party administrator, for example, might be hired by the insurer to manage administrative and financial aspects of the claim, paying invoices for legal fees and costs, providing the insurer with consolidated or abridged status reports, or establishing a reserve for the defense and indemnity of the claim. Scenario 1 above sets forth this example. Other examples of a fourth stakeholder or participant include the HR Manager in Scenario 2, the Broker in Scenario 3, and the Hospital Risk Manager in Scenario 4.

Although the tripartite relationship is relatively well defined in many jurisdictions, the addition of a fourth stakeholder or participant is not well defined. Nevertheless, traditional application of the Rules of Professional Conduct inform this so-called quadripartite relationship similarly to that of the tripartite relationship.

Under RPC 1.6(a), 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 the disclosure is permitted by paragraph (b)." The term, "informed consent" refers to "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." RPC 1.0A(e).

When obtaining informed consent, "[t]he lawyer must make reasonable efforts to ensure that the client or other person possesses information reasonably adequate to make an informed decision." RPC 1.0A cmt. 6. This generally requires the lawyer to disclose "the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct and a discussion of the client's or other person's options and alternatives." Id. "Obtaining informed consent will usually require an affirmative response by the client or other person." RPC 1.0A cmt. 7.

"[A] lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by RPC 1.4, shall consult with the client as to the means by which they are to be pursued." RPC 1.2(a). A lawyer must not "permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services." RPC 5.4(c).

Therefore, in each of the four scenarios, Lawyer can seek informed consent from the client to disclose confidential information as requested, provided that in doing so, Lawyer's professional judgment is not directed or regulated by the non-clients.

However, in providing diligent representation to each client, Lawyer should become or remain familiar with law that is applicable to the matter. For example, in obtaining informed consent from a client to make the requested disclosure, Lawyer should analyze the extent to which such disclosures might adversely affect the lawyer-client privilege, work product protections, and other applicable privileges or privacy protections. Such questions are matters of substantive law, which are beyond the scope of this Committee's review.

Similarly, whether a lawyer-client relationship exists between Lawyer and Third-Party Administrator, HR Manager, Insurer, Broker, Partner, and Risk Manager in these various contexts is also a matter of substantive law that turns on the specific facts of the case. See, e.g., Bohn v. Cody, 119 Wn.2d 357, 363, (noting that "[t]he existence of lawyer-client relationship 'turns largely on the client's subjective belief that it exists'") (quoting In re McGlothlen, 99 Wn.2d 515, 522, 663 P.2d 1330 (1983)); but also see, e.g., Tank v. State Farm Fire & Cas. Co., 105 Wn.2d 381, 388, 715 P.2d 1133 (1986) (stating that "[i]n a reservation of rights defense, RPC 5.4(c) demands that

counsel understand that he or she represents only the insured, not the company"). Clark Co. Fire Dist. No. 5 v. Bullivant Houser Bailey, P.C., 180 Wn. App. 689, 699–700, (holding that insurer lacked standing to sue lawyer hired by insurer to defend the assured).

If circumstances were to change such that it later became necessary to reevaluate the parties' interests or to reaffirm or obtain new informed consent from Lawyer's client (e.g., Insurer later issues a reservation of rights or direct adversity arises between Lawyer's client and Third-Party Administrator, HR Manager, Insurer, Broker, Partner, or Risk Manager in these various contexts), then Lawyer must do so. If the circumstances become such that it is no longer in a client's interest to continue to agree that information should be disclosed as requested, then Lawyer must confer with the client about the risks and benefits, and discontinue disclosure if the client so directs.

Endnotes

1. The question of whether information can be disclosed to an outside auditor's service was addressed in earlier advisory opinions. See Wash. Adv. Op. 195 (1999); see also Wash. Adv. Op. 1758 (1997).

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WASHINGTON STATE BAR ASSOCIATION

Advisory Opinion: 201903

Year Issued: 2019

RPC(s): RPC 1.15A, 1.3, 1.16(a), 1.4, ELC 1.2

Subject: Retired Lawyer Maintaining Trust Account To Receive Client Settlement Funds

Facts: The inquiring lawyer is a senior practitioner in a one-person office who plans to retire on December 31, 2019. He indicates that he will be an inactive member of the WSBA after his retirement. The inquirer previously settled a client's damage claims against negligent insureds with a structured settlement. Over the past several years, the defendant's insurance company has periodically issued single checks payable jointly to the client and the attorney and mailed them to the attorney for deposit in his trust account and disbursement to the client and attorney pursuant to a written fee agreement. These payments will continue to be made for several years after the inquirer's retirement.

After retirement, the lawyer wants to continue to receive the settlement payments, process the funds into a "trust account," issue a check to the client for the client's share and retain the balance pursuant to a written fee agreement. According to the inquirer, the "trust" account will not be an IOLTA account.

The former lawyer does not intend to give post-retirement advice to the client or otherwise engage in the unauthorized practice of law. The attorney will limit his dealings with the former client to processing the insurer's check, which he believes does not involve the practice of law.

Question: May an inactive lawyer ethically own and operate a "trust" checking account for the sole purpose of processing settlement checks received after retirement in connection with representation of a former client?

Answer: No. An inactive lawyer may not ethically own or operate a trust account for the receipt of client funds. A lawyer who has an ongoing obligation to administer a trust account for a client's benefit should consult with the client about the means by which that obligation will be satisfied when the lawyer decides to take inactive status.

Analysis: RPC 1.15A is applicable to all property of a client or a third person "in a lawyer's possession in connection with representation." RPC 1.15A(a). Proceeds from a structured settlement are in the lawyer's possession in connection with representation and therefore, subject to RPC 1.15A. The RPCs do not authorize a lawyer to place client property in a trust account that does not comply with RPC 1.15A.

RPC 1.15A safeguards client funds and third parties by imposing procedural and substantive requirements upon the lawyer who holds client property in trust. For instance, a lawyer must provide the client with an annual accounting of funds held in trust. RPC 1.15A (e). A lawyer must promptly disburse funds to a client or other third

party entitled to such funds. RPC 1.15A (f). If two or more persons claim an interest in the funds, the lawyer must disburse the undisputed portions of the funds and take reasonable actions to resolve a dispute with a third party over the funds, including, where appropriate, interpleading the disputed funds. RPC 1.15A(g). The extent of the efforts a lawyer must take to resolve a dispute depend on the amount in dispute, the availability of alternative dispute resolution and the likelihood of informal resolution. Comment 9 to RPC 1.15A. n.1 Only a lawyer admitted to practice law may be an authorized signatory on the account. RPC 1.15A(h)(9). Comment 7 to RPC 5.5 provides that the word "admitted" excludes a lawyer " who while technically admitted is not authorized to practice, because for example, the lawyer is on inactive status."

Because an inactive lawyer cannot be the signatory on an RPC 1.15A trust account, an inactive lawyer cannot set up an RPC compliant account to receive funds related to his representation of a party. This restriction is consistent with the fact that, while many duties imposed by RPC 1.15A are ministerial in nature, other responsibilities require the exercise of legal judgment and the ability to take legal actions. For instance, the lawyer has the responsibility to resolve third party claims to the funds and more particularly, to select and use legal processes to resolve disputes about the funds. This may require the lawyer to interplead the funds. Taking action on behalf of a client to resolve a dispute constitutes the practice of law. See GR 24(a)(4), (practice of law includes "[n]egotiation of legal rights or responsibilities on behalf of another entity or person(s)."). Because an inactive lawyer may not engage in the practice of law, an inactive lawyer cannot satisfy the requirements of RPC 1.15A.

Additionally, the inquirer does not indicate that the client will be consulted about the future disposition of settlement proceeds. The inquirer seems to assume that the client representation ended at the time the parties entered into the settlement agreement. The Committee believes that a question arises as to whether the representation of the client in the matter continues until the last payment is received from the insurer and disbursed to the client. See RPC 1.3, Comment 4. n.2 See also RPC 1.16(a), Comment 1. n.3 Assuming the existence of an attorney client relationship, the attorney remains subject to RPC 1.4, requiring the attorney to keep the client reasonably informed about the status of the matter and to explain matters to the extent reasonably necessary to permit the client to make informed decisions regarding the representation. RPC 1.4. See also RPC 1.7(a)(2).

In sum, the Committee believes that any lawyer who unilaterally decides to open a "trust" account outside the parameters of RPC 1.15A for the purpose of continuing to receive funds related to representation is at risk of violating the RPCs. ELC 1.2 provides: "[A]ny lawyer admitted . . . to practice law in this state . . . is subject to the Rules for Enforcement of Lawyer Conduct. Jurisdiction exists regardless of the lawyer's residency or authority to practice law in this state."

The Committee does not intend to suggest that a lawyer with a fee arrangement such as the one described in the inquiry may not take inactive status. However, before doing so, the lawyer should, after consultation with the client, explore alternatives for receiving and disbursing to future payments in a manner that complies with the RPCs.

Footnotes:

1. Comment 9 to RPC 1.15A states:

Under paragraph (g) the extent of the efforts that a lawyer is obligated to take to resolve a dispute depend on the amount in dispute, the availability of methods for alternative dispute resolution, and the likelihood of informal resolution.

2. RPC 1.3, Comment 4 states in part:

Unless the relationship is terminated as provided in Rule 1.16, a lawyer should carry through to conclusion all matters undertaken for a client. . . . Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so. . .

3. RPC 1.16(a), Comment 1 states in part:

A lawyer should not accept representation in a matter unless it can be performed competently . . . to completion. Ordinarily, a representation in a matter is completed when the agreed-upon assistance has been concluded.

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WASHINGTON STATE BAR ASSOCIATION

Advisory Opinion: 202001

Year Issued: 2020

RPC(s): RPC 1.2(c), 1.7, 1.8(g)

Subject: Multiple Client Representation in Wrongful Death Cases

Summary: An attorney may represent the personal representative in a wrongful death damage claim and provide legal representation to two children, ages 21 and 15, who are statutory beneficiaries.

Facts: A 45-year-old man was killed due to the negligence of a motorist. The man left two children, ages 15 and 21, and a wife. The motorist is insured and has sufficient limits of liability to pay any and all claims arising out of the death. The wife is appointed the personal representative of the estate. The wife employs an attorney to make a damage claim under RCW 4.20.010 (wrongful death), RCW 4.20.046 (general survival statute), and/or RCW 4.20.060 (special survival statute) for (1) economic and noneconomic damages sustained by the wife and children as a result of the death, (2) the economic damages of the estate, and (3) the pain and suffering, anxiety, distress, or humiliation suffered by the husband.

The personal representative (wife) wants the attorney to provide her two children, who are statutory beneficiaries of some of the potential claims, with updates about the case, secure their cooperation in the presentation of damages, defend them at deposition, and prepare them for testimony if the case goes to trial. No guardian ad litem has been appointed for the 15-year-old child.

Issue 1: May the attorney who represents the wife in her capacity as personal representative also represent the wife in her individual capacity as a statutory beneficiary of the claims?

Issue 2: May the attorney who represents the wife also represent the children for the limited purpose of presenting claims for damages for which they are statutory beneficiaries, preparing them to give testimony, and keeping them apprised of the status of the case?

Conclusion:

Issue 1
It is the opinion of the Committee on Professional Ethics that the lawyer can represent the wife in her individual and representative capacities. However, the lawyer should explain to the client the nature of the fiduciary role and insist that the client execute an informed waiver of any right to have the lawyer advocate for the client's personal interest in a way that is inconsistent with the client's fiduciary duty.

Issue 2
It is the opinion of the Committee on Professional Ethics that a lawyer who represents the personal representative may also represent the children, who are statutory beneficiaries, for the limited purpose of presenting damages, preparing them to give testimony, and keeping them apprised of the status of the case, consistent with RPC 1.2(c), if the lawyer obtains informed consent. The lawyer may do so provided there are no facts or circumstances creating a conflict which is not remediable under RPC 1.7 (b).

Other considerations:

Given the complexity of Washington's wrongful death and survival statutory scheme and the potential conflicting interests of the personal representative and statutory beneficiaries, lawyers seeking to represent multiple parties must be extremely cautious in evaluating existing and potential conflicts of interest, apprising all clients of such existing and potential conflicts of interest, and obtaining all necessary consents.

This opinion is limited to the facts stated here. Different facts may lead to a different analysis. For example, if the insurance limits were inadequate, or if there was an aggregate settlement, the opinion would need revision. Oregon Formal Opinion No. 2005-158 [Revised 2015], entitled Conflicts of Interest, Current Clients: Representing Driver and Passengers in Personal Injury/Property-Damage Claims, analyzes some of the ethical issues that may arise in cases where insurance limits are inadequate and/or the parties enter into an aggregate settlement.

Applicable Rules and Statutes (in effect as of the date of this opinion):

RCW 4.20.010 (Wrongful death—Right of action)
RCW 4.20.020 (Wrongful death—Beneficiaries of action)
RCW 4.20.046 (Survival of actions)
RCW 4.20.060 (Action for personal injury survives)

RPC 1.2(c)
RPC 1.7
RPC 1.8(g)

Analysis:

Issue 1:
Under RPC 1.7, the lawyer under these facts may concurrently represent the wife in her individual and representative capacities if the attorney obtains a written waiver under RPC 1.7(b). ACTEC (footnote 1) COMMENTARIES ON MODEL RULES OF PROFESSIONAL CONDUCT, at 107 (5th ed. 2016) (given the potential for conflicts where a person wears multiple hats, e.g., where the lawyer represents a person in both an individual and fiduciary capacity, "a lawyer asked to undertake such a dual capacity representation should explain to the client the nature of the fiduciary role and insist that the client execute an informed waiver of any right to have the lawyer advocate for the client's personal interest in a way that is inconsistent with the client's fiduciary duty.")

Issue 2:
1. The Committee on Professional Ethics does not believe the facts present a concurrent conflict of interest under RPC 1.7(a). A concurrent conflict exists when the representation of one client will be directly adverse to another client or where 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. Will the representation of the children be directly adverse to the wife/personal representative? Under Washington's wrongful death and survival statutes, the personal representative brings claims for damages for the benefit of the decedent's statutory beneficiaries, including the children and the wife. The personal representative's duty is to maximize the total recovery for the statutory beneficiaries. The personal representative does not seek a certain amount of damages for the benefit of the wife, which would necessarily decrease what is left for the benefit of the children. As such, there does not appear to be a conflict between the interests of the wife/personal representative and the children for purposes of seeking such damages. How the damages recovered are apportioned amongst the wife and the children, or what other types of damages the personal representative seeks, is beyond the scope of this opinion.

b. Is there a significant risk that the representation of the personal representative will be materially limited by the lawyer's responsibilities to the children and vice versa? Given the facts presented, the committee does not believe there is a significant risk of material limitation in the lawyer's responsibilities to both the children and the wife/personal representative.

2. Under RPC 1.2(c), a lawyer may limit the representation of a client if the limitation is reasonable under the circumstances and the client gives informed consent.

a. Reasonableness: In the facts presented here, the limitation on the lawyer's representation of the children appears reasonable under the circumstances, given that the claims for damages are for their and their mother's benefit and the contemplated litigation will not pit the interests of the children against the mother in her individual or representative capacity.

b. Informed consent: Obtaining informed consent from the 21-year-old child is straightforward. Obtaining informed consent from the 15-year-old child is more complicated. The natural guardian of an underage child is his or her parent. Here, the mother is both the personal representative and a statutory beneficiary. However, as explained above, the nature of the damages sought does not lend itself to a conflict of the mother's interests on one side and the children's interests on the other. As such, the committee does not see an issue in getting the 15-year-old child's consent through his or her mother.

3. RPC 1.8(g) prohibits a lawyer from "participat[ing] in making an aggregate settlement of the claims of . . . the clients. . ." Here, the only party asserting claims under the wrongful death and survival statutes is the personal representative. Thus, any settlement under these facts is not an aggregate settlement for purposes of RPC 1.8(g).

4. Facts may emerge that would create a concurrent conflict of interest in the course of a lawyer's representation of both the children and the wife/personal representative. It is incumbent upon the lawyer to be cognizant of this and to remediate the conflict, if possible, if it arises, per RPC 1.7(b). In the event of a conflict, obtaining informed consent from the 15-year old child in writing as per RPC 1.7(b)(4) may require the appointment of a guardian ad litem.

Footnotes

1. ACTEC is the American College of Trust and Estate Counsel Foundation.

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WASHINGTON STATE BAR ASSOCIATION

Advisory Opinion: 202002

Year Issued: 2020

RPC(s): RPC 1.2(c), RPC 3.3, CR11(b), CRLJ 11(b)

Subject: Ghostwriting for pro se Parties in State Court Litigation

Summary: Washington lawyers may ghostwrite for pro se parties in state court civil litigation.

Analysis:

"Ghostwriting" is the undisclosed drafting of pleadings, motions, or other documents for pro se litigants.

In 2002, the Washington Supreme Court made changes to the Rules of Professional Conduct (RPC), Civil Rules (CR), and Civil Rules for Courts of Limited Jurisdiction (CRLJ) to permit limited-scope representation in civil law practice. "Those rules originated in a deep concern by the bench and bar and public over widespread lack of public access to legal services and thereby the public's lack of access to justice." Barrie Althoff, Ethical Issues Posed by Limited-Scope Representation: The Washington Experience, 2004 Prof. Law. 67, 77 (2004). The amended rules allow Washington lawyers to ghostwrite for pro se civil litigants.

RPC 1.2(c) permits a lawyer to "limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent."

CR 11(b) and CRLJ 11(b) both provide as follows:

In helping to draft a pleading, motion, or document filed by the otherwise self-represented person, the attorney certifies that the attorney has read the pleading, motion, or legal memorandum, and that to the best of the attorney's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

(1) it is well grounded in fact,
(2) it is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law,
(3) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation, and
(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief. The attorney in providing such drafting assistance may rely on the otherwise self-represented person's representation of facts, unless the attorney has reason to believe that such representations are false or materially insufficient, in which instance the attorney shall make an independent

reasonable inquiry into the facts.

A lawyer who ghostwrites for a pro se civil litigant must comply with the applicable Rule 11 and all RPCs, including but not limited to RPC 3.3 (Candor Toward the Tribunal).

This Advisory Opinion is consistent with ABA Formal Opinion 07-446 (2007), and similarly concludes that "[a] lawyer may provide legal assistance to litigants appearing before tribunals 'pro se' and help them prepare written submissions without disclosing or ensuring the disclosure of the nature or extent of such assistance." The ABA Standing Committee on Ethics and Professional Responsibility rejected concerns about ghostwriting expressed by certain state and local ethics committees. The ABA Standing Committee concluded that the fact of undisclosed legal assistance "is not material to the merits of the litigation"; "there is no reasonable concern that a litigant appearing pro se will receive an unfair benefit from a tribunal as a result of behind-the-scenes legal assistance"; and "we do not believe that nondisclosure of the fact of legal assistance is dishonest."

This Advisory Opinion does not apply to criminal law practice. In addition, it may not apply to a lawyer providing drafting assistance to a pro se client in federal civil practice. See, e.g., Tift v. Ball, No. C07-0276-RSM, 2008 WL 701979, at *1 (W.D. Wash. Mar. 12, 2008) ("It is therefore a violation for attorneys to assist pro se litigants by preparing their briefs, and thereby escape the obligations imposed on them under Rule 11.").

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Snapshot of WSBA Disciplinary System 2020

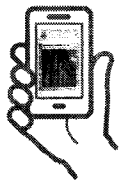
2020 SNAPSHOT

WSBA Discipline System Annual Report

Annually, the Washington State Bar Association publishes a report on Washington's discipline system. This report summarizes the activities of the system's constituents, including the Office of Disciplinary Counsel (ODC), the WSBA's Office of General Counsel (OGC), the Disciplinary Board, hearing officers, and the Client Protection Fund. The report also provides statistical information about discipline for those licensed to practice law in Washington for the calendar year. These pages provide an informal overview of the 2020 Discipline System Annual Report, which is now available on the WSBA website at www.wsba.org.

MORE ONLINE

To view the full 2020 Discipline System Annual Report, go to **bit.ly/2020-Discipline-Report.**



BY THE NUMBERS PART I

32,949 Actively Licensed Lawyers

21 Public Formal Complaints Filed

3 Disciplinary Hearings

47 Disciplinary Actions Imposed

1 Supreme Court Opinion

STRUCTURE

How the Lawyer Discipline and Disability System Works

The Washington Supreme Court has exclusive responsibility and inherent authority over regulation of the practice of law in Washington. This authority includes administering the discipline and disability system. Many of the court's disciplinary functions are delegated by court rule to the WSBA, which acts under the supervision and authority of the court. Under the Supreme Court's mandate in General Rule 12.2, the WSBA is committed to administering an effective system of discipline in order to fulfill its obligations to protect the public and ensure the integrity of the profession. The prosecutorial and investigative functions of the discipline system are discharged by ODC, while the adjudicative functions are handled by the Disciplinary Board and hearing officers, which are administered by OGC.

WSBA Office of Disciplinary Counsel (ODC)

- Answers public inquiries and informally resolves disputes
- Receives, reviews, and may investigate grievances
- Recommends disciplinary action or dismissal
- Diverts grievances involving less serious misconduct
- Recommends disability proceedings
- Presents cases to discipline-system adjudicators

Hearing Officers *(Administered by OGC)*

- Conduct evidentiary hearings and other proceedings
- Conduct settlement conferences
- Approve stipulations to admonition and reprimand

Disciplinary Board *(Administered by OGC)*

- Reviews recommendations for proceedings and disputed dismissals
- Serves as intermediate appellate body
- Reviews hearing records and stipulations

Washington Supreme Court

- Has exclusive governmental responsibility for the system
- Conducts final appellate review
- Orders sanctions, interim suspensions, and reciprocal discipline

BY THE NUMBERS PART II

1,417 Grievance Files Opened

1,331 Disciplinary Grievances Resolved

95 Non-Communication Matters Informally Resolved

68 File Disputes Informally Resolved

2,198 Public Inquiries, Phone Calls, Emails, and Interviews

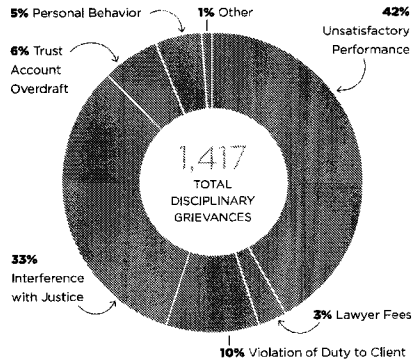
A CLOSER LOOK

Number and Nature of Grievances

ODC's intake staff receives all phone inquiries and written grievances and conducts the initial review of every grievance.[1] After initial review, some grievances are dismissed, and others are referred for further investigation by ODC investigation/prosecution staff. Grievances that are not dismissed or diverted after investigation may be referred for disciplinary action. When warranted and authorized by a review committee of the Disciplinary Board, these matters are prosecuted by disciplinary counsel with the assistance of professional investigators and a support staff of paralegals and administrative assistants. In 2020, ODC received more than 1,400 grievances.

NOTE

1. Conflicts Review Officers perform this review when required by ELC 2.7.

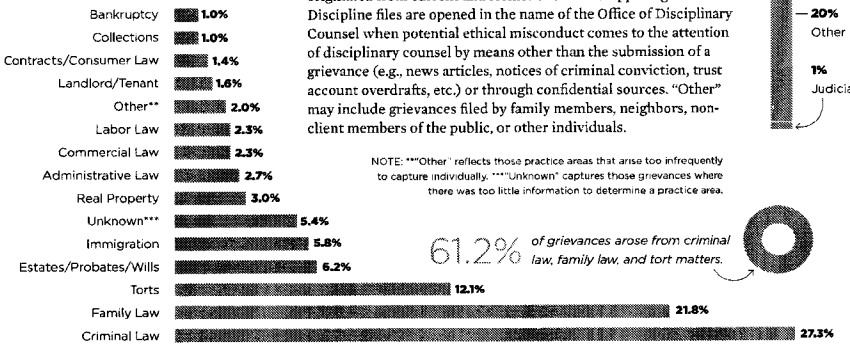


NATURE OF GRIEVANCES

In 2020, the most common grievance allegations against Washington lawyers related to unsatisfactory performance and interference with the administration of justice.

PRACTICE AREAS OF GRIEVANCES

Top 15 (by highest percentage)



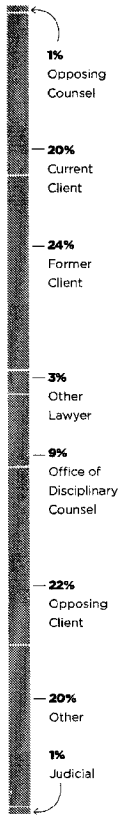
NOTE: **"Other" reflects those practice areas that arise too infrequently to capture individually. ***"Unknown" captures those grievances where there was too little information to determine a practice area.

Grievance Filings in Detail

In 2020, the majority of grievances against Washington lawyers originated from current and former clients and opposing clients. Discipline files are opened in the name of the Office of Disciplinary Counsel when potential ethical misconduct comes to the attention of disciplinary counsel by means other than the submission of a grievance (e.g., news articles, notices of criminal conviction, trust account overdrafts, etc.) or through confidential sources. "Other" may include grievances filed by family members, neighbors, non-client members of the public, or other individuals.

61.2% *of grievances arose from criminal law, family law, and tort matters.*

SOURCES OF GRIEVANCES FILED



A CLOSER LOOK

Disciplinary Actions Taken

Disciplinary "actions," which include both disciplinary sanctions and admonitions, result in a permanent public disciplinary record. In order of increasing severity, disciplinary actions are admonitions, reprimands, suspensions, and disbarments. If a lawyer should be cautioned, review committees of the Disciplinary Board have authority to issue an advisory letter, which is neither a sanction nor a disciplinary action and is not public information. For less serious misconduct, ODC may divert a grievance from discipline if a lawyer agrees to a diversion contract, which if successfully completed results in dismissal of the grievance. In 2020, 18 matters were referred to diversion.

In 2020, 43 lawyers were disciplined and four lawyers had more than one disciplinary action, for a total of 47 disciplinary actions.

DISCIPLINARY ACTIONS: 47 TOTAL

Admonitions: **1**

Reprimands: **17**

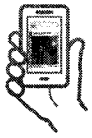
Suspensions: **14**

Resignations in Lieu of Discipline: **9**

Disbarments: **6**

MORE ONLINE

For more information on the discipline system go to www.wsba.org. To view the full 2020 Discipline System Annual Report, go to **bit.ly/2020-Discipline-Report.**



PANDEMIC RESPONSE

COVID-19 and the Discipline System

The WSBA's physical office closed to the public in March 2020, at which time the vast majority of the WSBA staff began working 100 percent remotely, a situation that persisted through the end of the year. Shortly after the office closure, the Washington Supreme Court, as well as the chief hearing officer and disciplinary board chair, entered orders regarding modified procedures during the pendency of the COVID-19 public health emergency for matters in the licensed legal professional discipline and disability system. In April and May new grievance numbers dropped significantly, but rebounded to roughly pre-COVID-19 levels in June. Other developments included temporary suspension of the random trust account examination program and a series of hearing officer decisions to continue existing hearing dates or postpone the scheduling of new hearings. Although two default hearings were conducted, there were no adversarial disciplinary hearings held between April and December 2020.

OTHER COMPONENTS

LPO and LLLT Discipline System

Limited practice officers (LPOs) and limited license legal technicians (LLLTs) are also authorized to practice law in Washington, through regulatory systems administered by the WSBA. A Washington Supreme Court-mandated regulatory board oversees each limited license. Each licensee is subject to license-specific rules of professional conduct and disciplinary procedural rules. The WSBA administers a discipline system for each of these licenses. At the end of 2020, there were 823 LPOs and 47 LLLTs actively licensed to practice. In 2020, the WSBA received three disciplinary grievances against LPOs and no disciplinary grievances against LLLTs.

Lawyer Disability Matters

Special procedures apply when there is reasonable cause to believe that a lawyer is incapable of properly defending a disciplinary proceeding, or incapable of practicing law, because of mental or physical incapacity. Such matters are handled under a distinct set of procedural rules. In some cases, the lawyer must have counsel appointed at the WSBA's expense. In disability cases, a determination that the lawyer does not have the capacity to practice law results in a transfer to disability inactive status. In 2020, seven lawyers were transferred to disability inactive status based on an incapacity to practice law.