THE “BULLY”/UNETHICAL CLIENT

RULE: RPC 3.1 – MERITORIOUS CLAIMS AND CONTENTIONS

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

Case Law:

- *Matter of Personal Restraint of Lord*, 123 Wn.2d 296, 868 P.2d 835 (Wash. 1994) (the parties filed more than 1,200 pages of briefing filed in connection with personal restraint petition (PRP) challenging a murder conviction and death sentence far exceeded zealous advocacy and bordered on abuse of process, and such behavior would not be tolerated by Washington Supreme Court in future, where PRP was 387 pages with 430 page appendix, state's response brief was 333 pages with 400 page appendix, and petitioner's reply brief was 50 pages long.)

- *United States v. Vaksman*, 2009 WL 4722248 (E.D. Wash. Dec. 4, 2009) (client convicted of threatening to kill city official moved for postrial mistrial motion claiming his court-appointed attorney violated RPC 1.2(a) requiring a lawyer to abide by client’s objections when attorney did not call a psychiatric expert who would testify that “murder” and “murdering” were used metaphorically and cannot constitute a “threat”; court rejected mistrial motion noting court-appointed counsel obligated by 3.1 to not pursue such testimony).

- *Hernandez v. Gil*, 998 So.2d 651 (Fla. 3d DCA 2008) (In a case involving Florida’s similarly worded rule, the client and his attorney advanced arguments that a reasonable lawyer would know are not well-grounded in fact and are not supported by existing law. The attorney advanced arguments that were previously adjudicated and barred by a release contained in a global settlement agreement. The Florida oath of attorney also prohibits an attorney from counseling or maintaining any suit or proceeding that is unjust, and from raising a defense that is not “honestly debatable under the law of the land.”).

RULE: RPC 3.2 – EXPEDITING LITIGATION

A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.

Case Law:

- *Visoly v. Sec. Pac. Credit Corp.*, 768 So. 2d 482 (Fla. 3d DCA 2000) (Attorney jointly liable for unnecessary litigation costs for filing voluminous pleadings, several notices of appeal, false and sham affidavits, and mounting a “massive legal offensive,” which
included attempting to sue opposing counsel, attacking the trial judge with motions to recuse—essentially turning legal proceedings into a circus that lasted over nine years. Court warned counsel to adhere to dictates of Florida RCP 4-3.2 and avoid delay intended to frustrate an opposing party’s attempt to obtain rightful redress or repose).

- *In re Boone, 7 P.3d 270* (Kan. 2000) (upholding sanctions where lawyer filed requests to extend time for discovery without plans to conduct discovery, asserting that requests were precautionary measures in case informal discovery revealed areas where formal discovery was needed; in another matter, lawyer also requested extension of time to respond to summary judgment “in the hope that case law would develop to support the case”)

**WSBA Ethics Opinions:**

- WSBA Advisory Op. 1395 (1991), *available at* [http://mcle.mywsba.org/io/print.aspx?ID=475](http://mcle.mywsba.org/io/print.aspx?ID=475) (“duty to expedite criminal case against client’s wishes”; the client-defendant was found guilty at trial, but remained free pending entry of judgment and appeal. Lawyer contacted prosecutor about status of entry. Eighteen months later, the documents still had not been entered and the client did not want the lawyer to contact the prosecutor about the status. WSBA issued lawyer advisory opinion stating lawyer had made reasonable efforts to expedite).

**RULE: RPC 3.4 FAIRNESS TO OPPOSING PARTY AND COUNSEL**

A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

(c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;

(d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party; or

(e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused.

**Case Law:**

DWT 20835625v1 0085000-001928
• RPC 3.4(b): In re Feld, 737 A.2d 656 (N.H. 1999) (lawyer stood by as clients testified inaccurately at deposition and then failed to correct record in violation of New Hampshire RPC 3.4(b)).

• RPC 3.4(b) (inducing testimony). In re Disciplinary Proceedings Against Bonet, 144 Wn.2d 502, 29 P.3d 1242 (2001) (“a public or private attorney may not offer an inducement to a witness or order to influence them not to testify at a trial…regardless of whether the offer or inducement influenced the witness’s decision to testify or not testify”; prosecutor’s act of offering to dismiss or withhold a charge a person in order to influence that person’s decision about testifying for another person was “highly unethical” and equivalent to a “bribe”); see also Golden Door Jewelry Creations, Inc. v. Lloyd’s Underwriters Non-Marine Ass’n, 865 F. Supp. 1516 (S.D. Fla. 1994) (finding that payment of $120,000 violated FRPC regardless of whether fact witness’ testimony was true)

• RPC 3.4(d): The Florida Bar v. Forrester, 818 So.2d 477 (Fla. 2002) (attorney violated Florida RPC where client removed original copy of a document while opposing counsel was not looking and handed it to her attorney under the table at a deposition and attorney concealed document for short time before disclosing it); Life Care Ctrs. of Am. v. Reese, 948 So. 2d 830 (Fla. 5th DCA 2007) (warning counsel of ethical obligations where counsel propounded 65 RFPs all expansive I nature and seeking documentation unlimited in subject matter, scope, or time); Meier v. Meier, 835 So. 2d 379 (Fla. 3d DCA 2003) (attorney for former husband was required to release discoverable documentation in his possession against client’s will where former husband and failed to comply with several discovery orders).

• RPC 3.4(e): State v. Monday, 171 Wn.2d 667, 257 P.3d 551 (Wash. 2011) (Prosecutor in murder prosecution referred to an alleged African-American anti-snitch code to discount credibility of his own witnesses in closing argument and used term “po-leese” to refer to police when conducting direction examination of witnesses; such conduct improperly injected racial prejudice into trial in violation of defendant’s right to an impartial jury and was not harmless error. Such conduct also violated RPC 3.4(e)); State v. Christensen, 2011 WL 4928954, at *8 (Wash. Ct. App. Oct. 18, 2011) (Prosecutor’s description of family as “dysfunctional” not an improper personal opinion under RPC 3.4(e); context of closing argument made clear that prosecutor was encouraging jury to convict defendant on sex-abuse charges only if State had proved elements of the charged crimes).

WSBA Ethics Opinions:

• RPC 3.4(a): WSBA Advisory Op. 2216 (2012), available at http://mcle.mywsba.org/io/print.aspx?ID=1664 (addressing certain ethical obligations related to the transmission and receipt of electronic documents containing “metadata” in the course of litigation; observing that lawyers have duty to protect against disclosure of confidential client information, but that, in context of discovery production, RPC 3.4(a) may also prohibit scrubbing metadata that has potential evidentiary value).

RULE: RPC 3.3 CANDOR TOWARD THE TRIBUNAL (excerpted)
(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

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

…

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

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

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

(d) If the lawyer has offered material evidence and comes to know of its falsity, and disclosure of this fact is prohibited by Rule 1.6, the lawyer shall promptly make reasonable efforts to convince the client to consent to disclosure. If the client refuses to consent to disclosure, the lawyer may seek to withdraw from the representation in accordance with Rule 1.16.

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

…

Case Law:

- **State v. Berrysmith**, 87 Wn. App. 268, 944 P.2d 397 (1997) (trial court acted properly in allowing court-appointed defense counsel to withdraw the day the client’s jury trial for cocaine delivery was to begin; counsel could not dissuade client from perjuring himself on witness stand)

- **State v. Tarape**, 2011 WL 3332044 (Wash. Ct. App. Aug. 3, 2011) (trial court acted properly in denying criminal defendant’s motion to substitute counsel when his court appointed attorney, against client’s wishes, refused to call the client’s father as a witness believing the father would commit perjury)

- **Patsy’s Brand, Inc. v. I.O.B. Realty, Inc.**, 2002 WL 59434 (S.D.N.Y. Jan. 16, 2002) (court sanctioned firm for allowing client to submit false affidavit where, although client insisted affidavit was true, no reasonable lawyer could believe it in the face of other evidence known to the firm).

WSBA Ethics Opinion:

client’s substance abuse history as relevant disqualifying client from Social Security benefits and obligation to protect client confidences).

THE “NEEEDY” CLIENT

RULE: RPC 1.8(e) CONFLICT OF INTEREST: CURRENT CLIENTS – Excerpt re: Financial Assistance to Clients

(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.

Case Law:

• State v. Sanchez, 288 P.3d 353, 363 n.4 (Wash. Ct. App. Oct. 30, 2012) (noting that trial court below found that indigent defense counsel violated RPC 1.8(e) by paying for airfare of client’s children who were also material witnesses; lawyers claimed that children were in danger but did not contact child protective services).

• Copp v. Breskin, 56 Wn. App. 229, 782 P.2d 1104 (1989) (law firm liable for expert witness fees after client refused to pay entire bill; although firm told witness that fees would be paid by client, witness relied upon custom in which experts looked to attorneys for payment, law firm aware of custom, and firm paid bills assuring that future charges would be paid in 30 days).

• Compare Fla. R. of Prof. Conduct 4-1.8(e)(2) (permitting payment of court costs and expenses of litigation on behalf of indigent client).

WSBA Ethics Opinion:


RULE & COMMENTS: RPC 1.2 SCOPE OF REPRESENTATION AND ALLOCATION OF AUTHORITY BETWEEN CLIENT AND LAWYER (excerpted)

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the
means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

…

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

(d) 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.

…

Comments:

Cmt. [1] Paragraph (a) confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. The decisions specified in paragraph (a), such as whether to settle a civil matter, must also be made by the client. See Rule 1.4(a)(1) for the lawyer's duty to communicate with the client about such decisions. With respect to the means by which the client's objectives are to be pursued, the lawyer shall consult with the client as required by Rule 1.4(a)(2) and may take such action as is impliedly authorized to carry out the representation.

Cmt. [2] On occasion, however, a lawyer and a client may disagree about the means to be used to accomplish the client's objectives. Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters. Conversely, lawyers usually defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. Because of the varied nature of the matters about which a lawyer and client might disagree and because the actions in question may implicate the interests of a tribunal or other persons, this Rule does not prescribe how such disagreements are to be resolved. Other law, however, may be applicable and should be consulted by the lawyer. The lawyer should also consult with the client and seek a mutually acceptable resolution of the disagreement. If such efforts are unavailing and the lawyer has a fundamental disagreement with the client, the lawyer may withdraw from the representation. See Rule 1.16(b)(4). Conversely, the client may resolve the disagreement by discharging the lawyer. See Rule 1.16(a)(3).

Ethics Opinions:
ABA Formal Ethics Op. 08-451 (2008), available at http://www.aapipara.org/File/Main%20Page/ABA%20Outsourcing%20Opinion.pdf (suggesting that “means” by which representation or objectives will be accomplished includes legal or other services outside the firm (e.g. experts) and that clients should be informed of such outsourcing)

**RULE & COMMENTS: RPC 1.4 COMMUNICATION**

(a) A lawyer shall;

(1) promptly inform the client of any decision of circumstance with respect to which the client’s informed consent, as defined in Rule 1.0(e), is required by these Rules;

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Comments:

Cmt. [1] Reasonable communication between the lawyer and the client is necessary for the client effectively to participate in the representation.

Cmt. [3] Paragraph (a)(2) requires the lawyer to reasonably consult with the client about the means to be used to accomplish the client's objectives. In some situations - depending on both the importance of the action under consideration and the feasibility of consulting with the client - this duty will require consultation prior to taking action. In other circumstances, such as during a trial when an immediate decision must be made, the exigency of the situation may require the lawyer to act without prior consultation. In such cases the lawyer must nonetheless act reasonably to inform the client of actions the lawyer has taken on the client's behalf. Additionally, 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.

Explaining Matters

[5] The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. Adequacy of communication depends in part on
the kind of advice or assistance that is involved. For example, when there is time to explain a proposal made in a negotiation, the lawyer should review all important provisions with the client before proceeding to an agreement. In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that are likely to result in significant expense or to injure or coerce others. On the other hand, a lawyer ordinarily will not be expected to describe trial or negotiation strategy in detail. 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 representation. In certain circumstances, such as when a lawyer asks a client to consent to a representation affected by a conflict of interest, the client must give informed consent, as defined in Rule 1.0(e).

Case Law:

- *In re Rosenthal*, 446 A.2d 1198 (N.J. 1982) (“Even if a client tells her attorney that she no longer intends to prosecute a claim, the attorney should inform the client of an imminent dismissal. It is always possible for a client to change her mind. Even if such a possibility is remote, clients have a right to be informed of the progress of the case.”)
- *Cf. Att’y Grievance Comm’n v. Lee*, 890 A.2d 273 (Md. 2006) (attorney who had difficulty communicating directly with imprisoned client, and who had previously communicated with client’s mother, violated Maryland RPC 1.4 when attorney failed to continue communicating through mother).

Ethics Opinions:


**RULE & COMMENT: RPC 1.5 FEES (excerpted)**

(b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client. Upon the request of the client in any matter, the lawyer shall communicate to the client in writing the basis or rate of the fee.

Comments:

Basis or Rate of Fee

[2] When the lawyer has regularly represented a client, they ordinarily will have evolved an understanding concerning the basis or rate of the fee and the expenses for which the client will be responsible. In a new client-lawyer relationship, however, an understanding as to fees and expenses must be promptly established. Generally, it is desirable to furnish the client with at least a simple memorandum or copy of the lawyer's customary fee arrangements that states the general nature of the legal services to be provided, the basis, rate or total amount of the fee and
whether and to what extent the client will be responsible for any costs, expenses or disbursements in the course of the representation. A written statement concerning the terms of the engagement reduces the possibility of misunderstanding.

**RULE: RPC 1.13 ORGANIZATION AS CLIENT (excerpts)**

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

…

(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.

**RULE & COMMENTS: RPC 1.8(f) CONFLICT OF INTEREST: CURRENT CLIENTS – Excerpt re: Compensation from a Person Other than Client**

(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.

**Comments:**

Person Paying for a Lawyer's Services

Cmt. [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).

Cmt. [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.

**RULE & COMMENT: 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).

**Comments:**

Interest of Person Paying for a Lawyer's Service
Cmt. [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.