Conflicts of Interest in Dual Representation

2018 NW Regional Immigration Law Conference - AILA
March 15, 2018

Jeanne Marie Clavere
Professional Responsibility Counsel
Washington State Bar Association
1325 - 4th Avenue, Suite 600
Seattle WA 98101-2539
Direct Line: (206) 727-8298
E-mail: jeannec@wsba.org

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; the ABA’s Center for Professional Responsibility, the ABA Law Practice Division, 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 on the board of the National Conference of Women’s Bar Associations.

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.
Rules of Professional Conduct
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 1.0(a)(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.]
Conflicts of Interests in Dual Representation

2018 NW Regional Immigration Law Conference

Conflicts of Interests in Dual Representation

Basics Track, Session 1

Conflicts of Interests in Dual Representation

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 the 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
Conflicts of Interests in Dual Representation

March 15-16, 2018

2018 NW Regional Immigration Law Conference

Basics Track, Session 1

Conflicts of Interests in Dual Representation

Page 6 of 63

2018 NW Regional Immigration Law Conference

Basics Track, Session 1

Conflicts of Interests in Dual Representation

Page 6 of 63

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] [Reserved.]

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 paragraphs (a)(1)-(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 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, expect 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:
   a. to bear the cost of providing conflict counsel; or
   b. 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 in 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
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).

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

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

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.

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

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(l). 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)(l)(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 (e), 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.

(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 - 14)

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 in 1993 and the screening provision recodified as paragraph (c) 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(c) 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.


[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).
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 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.
RPC 1.16
DECLINING OR TERMINATING REPRESENTATION

(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.

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

Comment

[1] A lawyer should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest and to completion. Ordinarily, a representation in a matter is completed when the agreed-upon assistance has been concluded. See Rules 1.2(c) and 6.5. See also Rule 1.3, Comment [4].

Mandatory Withdrawal

[2] A lawyer ordinarily must decline or withdraw from representation if the client demands that the lawyer engage in conduct that is illegal or violates the Rules of Professional Conduct or other law. The lawyer is not obliged to decline or withdraw simply because the client suggests such a course of conduct; a client may make such a suggestion in the hope that a lawyer will not be constrained by a professional obligation.

[3] When a lawyer has been appointed to represent a client, withdrawal ordinarily requires approval of the appointing authority. See also Rule 6.2. Similarly, court approval or notice to the court is often required by applicable law before a lawyer withdraws from pending litigation. Difficulty may be encountered if withdrawal is based on the client's demand that the lawyer engage in unprofessional conduct. The court may request an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. The lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient. Lawyers should be mindful of their obligations to both clients and the court under Rules 1.6 and 3.3.

Discharge

[4] A client has a right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services. Where future dispute about the withdrawal may be anticipated, it may be advisable to prepare a written statement reciting the circumstances.

[5] Whether a client can discharge appointed counsel may depend on applicable law. A client seeking to do so should be given a full explanation of the consequences. These consequences may include a decision by the
appointing authority that appointment of successor counsel is unjustified, thus requiring self-representation by the client.

[6] If the client has severely diminished capacity, the client may lack the legal capacity to discharge the lawyer, and in any event the discharge may be seriously adverse to the client's interests. The lawyer should make special effort to help the client consider the consequences and may take reasonably necessary protective action as provided in Rule 1.14.

Optional Withdrawal

[7] A lawyer may withdraw from representation in some circumstances. The lawyer has the option to withdraw if it can be accomplished without material adverse effect on the client's interests. Withdrawal is also justified if the client persists in a course of action that the lawyer reasonably believes is criminal or fraudulent, for a lawyer is not required to be associated with such conduct even if the lawyer does not further it. Withdrawal is also permitted if the lawyer's services were misused in the past even if that would materially prejudice the client. The lawyer may also withdraw where the client insists on taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement.

[8] A lawyer may withdraw if the client refuses to abide by the terms of an agreement relating to the representation, such as an agreement concerning fees or court costs or an agreement limiting the objectives of the representation.

Assisting the Client upon Withdrawal

[9] Even if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the consequences to the client. The lawyer may retain papers as security for a fee only to the extent permitted by law. See Rule 1.15A
Advisory Ethics Opinions
Opinion: 181  
Year Issued: 1987  
RPC(s): 1.16  
Subject: Asserting Possessory Lien Rights and Responding to Former Client's Request for Files

At the conclusion of the representation of a client, the client often requests a copy of the "file." If the lawyer's fees remain unpaid, the lawyer may want to assert lien rights. If no lien rights are claimed, a question often arises as to what parts of the file must be provided and whether the lawyer can charge the client for the expense of copying the file. The Rules of Professional Conduct shed light on both questions.

I. The attorney's possessory lien.

A. Issue: What are the ethical limitations on a lawyer's right to assert a lien on the papers or money of a client or former client?

B. Conclusion: A lawyer cannot exercise the right to assert a lien against files and papers when withholding these documents would materially interfere with the client's subsequent legal representation. Nor can the lien be asserted against monies held in trust by the lawyer for a specific purpose or subject to a valid claim by a third party.

C. Discussion: Attorneys have a "retaining" or a "possessory" lien under RCW 60.40.010 against papers or money in the lawyer's possession. In contrast to a "charging" lien under RCW 60.40.010(4) on a judgment obtained for a client, the retaining lien on papers or money cannot be foreclosed. Ross v. Scannell, 97 Wn.2d 598, 647 P.2d 1004 (1982). The lien "may merely be used to embarrass the client, or, as some cases express it to 'worry' him into the payment of the charges." Gottstein v. Harrington, 25 Wash. 508, 511, 65 P. 753 (1901).

The client, however, retains an absolute right, in civil cases at least, to terminate the lawyer at any time for any reason, or for no reason at all. RPC 1.16(a)(3); Belli v. Shaw, 98 Wn.2d 569, 657 P.2d 315 (1983). Upon termination of the relationship, RPC 1.16(d) requires that:

A lawyer shall 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. . . . The lawyer may retain papers relating to the client to the extent permitted by other law.

If 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.

A client's need for the files will almost always be presumed from the request for the files. But this need does not mean that in every case the assertion of a lien will prejudice the client. If there is no dispute about fees and the client has the ability to pay the outstanding charges, it is proper for the lawyer to assert the lien. In this situation, it is the former client's refusal to pay that will cause any injury. When, however, there is a dispute about the
amount owed, or the client does not have the ability to pay, the lawyer cannot assert lien rights if there is any possibility of interference with the former client’s effective self-representation or representation by a new lawyer.

The right to assert the lien against funds of the client in the lawyer’s control is also limited. For example, a lawyer may not assert a lien against monies which constitute, or which have been commingled with, child support payments. Fuqua v. Fuqua, 88 Wn.2d 100, 558 P.2d 801 (1977). Similarly, if a lawyer accepts funds from a client for a specific purpose, such as for posting a bond or paying a court imposed penalty, the failure to use the funds for the agreed purpose may constitute misrepresentation, failure to carry out a contract of employment, or failure to properly handle client funds. See, e.g., In re McMurray, 99 Wn.2d 920, 665 P.2d 1352 (1983). Funds held by a lawyer over which a third party has an enforceable lien may not be subject to the attorney’s possessory lien. See, e.g., Department of Labor and Industries v. Dillon, 28 Wn. App. 853, 626 P.2d 1004 (1981). When the funds are not held in trust for a specific purpose or subject to a valid claim by a third party, the lawyer may hold the funds subject to the lien even though the client may direct that the funds be transferred to a new attorney and claim that a refusal to transfer will prevent the client from obtaining effective representation.

If there is a dispute about the amount of fees owed, the prudent course would be for the lawyer to immediately institute court action to resolve the issue, to limit the lien to the undisputed amount, and to release the balance of funds.

Since the retaining or possessory lien cannot be foreclosed, any funds held pursuant to the lien must be held in the lawyer’s trust account. The lawyer can apply those funds against what is owed only by obtaining a judgment against the client and enforcing the judgment by the normal judgment enforcement processes.

II. Responding to a former client’s request for files

A. Issue: When a former client requests the file and no lien is asserted, what copying costs can a lawyer charge and what papers and files must be delivered?

B. Conclusion: At the conclusion of a representation, unless there is an express agreement to the contrary, the file generated in the course of representation, with limited exceptions, must be turned over to the client at the client’s request, and if the lawyer wishes to retain copies for the lawyer’s use, the copies must be made at the lawyer’s expense.

C. Discussion: In analyzing this question a lawyer’s file assembled in the course of representing a client can be broken down as follows:

(a) Client’s papers—the actual documents the client gave to the lawyer or papers, such as medical records, the lawyer has acquired at the client’s expense.

(b) Documents the disposition of which is controlled by a protective order or other obligation of confidentiality;

(c) Miscellaneous material that would be of no value to the client; and

(d) The balance of the file, including documents stored electronically.

Client’s papers—the actual documents the client caused to be delivered to the lawyer or papers, such as medical records that the lawyer has acquired at the client’s expense—must be returned to the client on the termination of the representation at the client’s request unless a lien is asserted. If the lawyer wants to retain copies, the lawyer must bear the copying expense, and would hold the copies subject to the duty of confidentiality imposed by RPC
Aside from principles of ownership, RPC 1.16(d) requires the lawyer, upon termination of representation, to take steps to the extent reasonably practical to protect a client's interests including surrendering papers and property to which the client is entitled. Subject to limited exceptions, this Rule obligates the lawyer to deliver the file to client. If the lawyer wants to retain copies for the lawyer's own use, the lawyer must pay for the copies.

While the client's interests must be the lawyer's foremost concern, if the lawyer can reasonably conclude that withholding certain papers will not prejudice the client, the lawyer may withhold those papers. Examples of papers the withholding of which would not prejudice the client would be drafts of papers, duplicate copies, photocopies of research material, and lawyers' personal notes containing subjective impressions such as comments about identifiable persons.

A protective order or confidentiality obligation that limits the distribution of documents or specifies the manner of their disposition may supersede a conflicting demand of a former client.

The lawyer and client can make an arrangement different from that outlined above. A lawyer and client could agree that the files to be generated or accumulated will belong to the lawyer and that the client will have to pay for all copies sent to the client. Similarly, if the client wishes the lawyer to retain copies it would be appropriate to charge the copying expense to the client.

[amended 2009]

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.
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.


10/12/2011

March 15-16, 2018
The Committee discussed your inquiry concerning whether a prosecuting attorney’s office, charged by statute with the obligation to bring support enforcement actions under the Uniform Reciprocal Enforcement of Support Act against non-custodial parents, could represent two parties attempt to collect child support from one common parent, wherein a conflict might exist if there were not sufficient funds to pay the entire claims of both claiming parents. After considerable discussion, the Committee determined by a 9-0 vote that a prosecutor could not undertake the representation unless the prosecutor reasonably believed the representation would not adversely affect the representation of the other client, and each client consents in writing after a full disclosure of the material facts relating to the common representation and the advantages and risks involved, as required by RPC 1.7(b). The Committee was further of the opinion that the proposed letters to clients submitted by you do not provide sufficient information for the client to give knowing consent to such multiple representation.

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.
Opinion: 934
Year Issued: 1987
RPC(s): RPC 1.7; 4.3; 1.15(d)
Subject: Conflict of interest; prosecutor in support enforcement/paternity proceedings

This committee has been asked to provide an opinion on conflicts of interest that appear in situations that may occur in support enforcement and paternity actions commenced by a county prosecutor. The committee has received comment from prosecutors and from public defender associations on the issues that exist. The committee is impressed by the apparently large number of cases routinely handled by prosecutors where one or more of the parties in the proceeding may be relying on the prosecutor's expertise in determining whether to accept negotiated terms of settlement. Likewise, the committee recognizes the significant public interest at stake in the proceedings to establish support obligations and secure payment in a practical and expedient manner.

It is the committee's feeling that issuance of strict opinions on the existence or lack of existence of conflicts in the hypothetical fact situations presented may lead to misapplication of the committee's opinion. The better response, in the opinion of the committee, is to set forth the applicable rules; the hypotheticals presented; and a description of the analysis that the committee believes should be made by the prosecutor involved in consideration of the potential conflicts.

The hypotheticals submitted are as follows:

Tracy is an unwed mother of two. She is currently receiving Public Assistance for her children. As a condition of receiving Public Assistance, she has assigned all her child support rights to the State of Washington (D.S.H.S.). She named Bob as the putative father of her children and D.S.H.S has sent the case to the prosecutor's office under a cooperative agreement, asking it to establish paternity and obtain court ordered child support.

Bob appears through his attorney. He admits paternity but denies owing any back support for Public Assistance already paid to Tracy for the children because he claims he, not Tracy, had physical custody of the children during most of the time Tracy received Public Assistance. He also claims he paid support money directly to Tracy while she was on Public Assistance. Tracy denies both of these allegations.

Tracy, in a panic, decides to meet with Bob's attorney in an attempt to "settle out of court." The Deputy Prosecuting Attorney advises her not to meet with Bob's attorney, but to hire her own attorney. She ignores the advice and confesses all to Bob's attorney. Bob's attorney then uses her confessions in responsive pleadings which are designed to convince the court that his client does not owe a duty of reimbursement for Public Assistance paid.

Shawna is an unwed mother of one. She received Public Assistance for her child from 1969 through 1984, and has been working at K-Mart since then, earning $4.25 per hour. The State filed a paternity suit in 1983 against Rick, whom she named as the putative father. Rick hired a lawyer and denied paternity. The case is set for trial in 1986. Shawna has signed up through D.S.H.S. for what the State calls "451 services." These services authorize...
D.S.H.S. to collect support on Shawna’s behalf. The D.S.H.S agreement does not authorize the Deputy Prosecuting Attorney to act as Shawna’s attorney. The Deputy Prosecuting Attorney’s authority derives from RCW 74.20.040 (2) as amended, which reads: “The [D.S.H.S.] secretary may accept applications for support services on behalf of persons who are not recipients of Public Assistance and may take action in appropriate cases to establish or enforce support obligations against the parent or other persons owing a duty to pay moneys.”

The issues at trial will be paternity, reimbursement for past support owed to the State and to Shawna, current support owed to Shawna, custody and visitation. The State is seeking arrears of over $10,000.00. Shawna wants the maximum current support.

Doris is a divorced mother of three. Her divorce decree gives her custody of the children and orders her ex-husband to pay $450.00 per month in child support. Doris is not on Public Assistance. Her ex-husband has not paid support. Both live in the county. The Office of Support Enforcement sends the case to the prosecutor for filing of criminal charges under RCW 26.20.030. Doris has signed an agreement with Support Enforcement which authorizes D.S.H.S. to collect support on Doris’s behalf. There is no agreement authorizing the Prosecutor to act as Doris’s attorney. The Prosecutor sends a letter to Doris’s ex-husband informing that he must begin paying current support and a lump sum of accrued support arrears or else criminal non-support charges will be filed against him.

Applicable rules of professional conduct are as follows:

Rule 4.3 Dealing with Unrepresented Person: In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer’s role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

Rule 1.7 Conflict of Interests: (a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless: (1) A lawyer presumably believes the representation will not adversely affect the relationship with the other client; and (2) Each client consents in writing after consultation and a full disclosure of the material facts (following authorization from the other client to make such a disclosure). (b) A lawyer shall not represent a client if the representation of that 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, unless: (1) The lawyer reasonably believes the representation will not be adversely affected; (2) The client consents in writing after consultation and a full disclosure of the material facts (following authorization from the other client to make such a disclosure). When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

The Rules of Professional Conduct do not define "Client." The definition in Black’s Law Dictionary is commonly accepted and provides: "Client. A person who employs or retains an attorney, or counsellor, to appear for him in courts, advise, assist, and defend him in legal proceedings, and to act for him in any legal business . . . . It should include one who disclosed confidential matters to attorney while seeking professional aid, whether attorney was employed or not.

In the context of a paternity action commenced at the request of the Department of Social and Health Services, the prosecutor’s first client is the State of Washington, Department of Social and Health Services. Clearly the prosecutor is "employed or retained" by D.S.H.S. when his office accepts (either voluntarily or by compulsion of the law) the responsibility to prosecute the action.
The prosecutor's second client may be the natural mother is the prosecutor agrees, impliedly or expressly, to appear for her in court; advise, assist or defend her in the proceedings; or act for her in the proceeding. Additionally the prosecutor may form an attorney/client relationship if he receives confidential information in the process of the initial interview with the natural mother.

If the prosecutor advises the natural mother from the onset that he will not represent her in the proceedings, he may avoid the analysis that follows. Otherwise, the committee recommends that in each of the above hypotheticals, at a minimum, the prosecutor should undertake the following analysis: (1) Will the representation of the mother be directly adverse to the attorney's representation of his other client (D.S.H.S., O.S.E., etc.). If so, then: (a) Will the representation of either the mother or the other client of the attorney be adversely affected by the joint representation by the attorney? If so, separate representation should be arranged. If not, then: (b) Has the mother been given a reasonable opportunity to seek advice of independent counsel? If not, the potential conflicts should be explained and such opportunity should be provided. The prosecutor should obtain authority, if not already received, to disclose the material facts and interests of his other clients. The mother should be fully advised of the attorney's other clients and their respective interests in the litigation.

(2) Will each of the clients consent in writing after consultation and a full disclosure of the material facts? If so, such consents should be obtained before the representation continues.

(3) Does the client have resources with which to retain independent counsel in the event consent is not obtained? If not, then the attorney should advise the client of the possible availability of private counsel appointed by the court and take such action as is reasonably practicable to assist the client in securing such counsel. (RPC 1.15 [d]).

Other issues remaining in the hypotheticals are in many cases a mixture of legal questions and ethical questions. This Committee is restricted from giving opinions as to legal questions.

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.
Opinion: 1072  
Year Issued: 1987  
RPC(s): RPC 1.5(e)(2)  
Subject: Division of fees; referral fee

The Committee considered your inquiry concerning the sharing of fees with lawyers who refer cases to other lawyers, but who otherwise do not participate in the case. The Committee noted that RPC 1.5(e)(2) does permit the division of fees between lawyers based upon grounds other than the proportion of services provided by each lawyer. The first requirement is that if such a fee splitting were to be undertaken, there be a written agreement with the client. Secondly, each lawyer must assume joint responsibility for the representation. Thirdly, the total fee must be reasonable. The Committee noted that this would require that the fee paid by the client be no greater than had there been only the one lawyer involved.

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.
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."

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.
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.
Opinion: 1528
Year Issued: 1993
RPC(s): RPC 1.6; 5.4; 5.5; 7.3 (a)
Subject: Ancillary business; assisting unauthorized practice of law; office sharing with nonlawyer

[The lawyer proposed setting up a business to provide immigration and passport photos and package and arrange immigration petitions for filing. The lawyer would share offices with the business and the business would refer potential clients to the lawyer.] The Committee was of the unanimous opinion that there was a potential for problems with assisting the unauthorized practice of law. If a person asked [an] employee [of the business] to refer that person to you, the Committee was concerned about a possible violation of RPC 7.3(a). The co-location of [the business] and [your] law offices could also present possible violations of RPC 7.3(a). In addition, the Committee was concerned about problems with preserving client confidences. The Committee feels that you would need separate offices, telephone numbers, and bank accounts. The Committee wanted to remind you that client files should not be accessible to [the business's] employees. The Committee was of the opinion that legal fees can be paid by credit card.

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.
Opinion: 1863
Year Issued: 1999
RPC(s): RPC 1.5; 1.8(f); 1.14; 3.1; 3.3; 3.4; 4.1; 8.4(c)
Subject: Trust account; fees paid by third party; client's spouse pays fees and costs and later requests refund

I have been instructed by the Rules of Professional Conduct Committee to respond to your ethics inquiry #1863 concerning monies held in trust account at conclusion of services.

The Committee has reviewed your inquiry and determined the following:

Facts:

You were retained to represent Husband in connection with his application for U. S. citizenship. Husband and Wife were recently married, and Wife was to be the sponsoring petitioner for Husband's citizenship petition. Your flat fee of $1,500 was paid by wife, and wife also paid $250 toward filing fees and copy costs, the latter amount having been deposited into your trust account. Wife was advised that Husband is your client and that any privileges belong only to him. There is a retainer agreement that says, inter alia, that upon conclusion of services, whether by withdrawal or otherwise, any funds other than earned fees will be returned to "Client."

Wife has subsequently advised you that she no longer wants to support Husband and also wants a full refund of amounts paid to date. You reminded Wife that Husband was the client, and indicated that you would speak with Husband about the funds. Client asked you to give him some time to work things out with Wife, and to hold all funds in the meantime, since the money could still be used towards the case if Wife changes her mind.

Questions:

1. How do you handle the $250 in the trust account? If Wife requests refund of unexpended funds, and Husband objects, whose desires control?

2. Are you obligated to return any of the flat fee that was paid up front if you have done substantially most of the work?

3. If Husband and Wife reconcile, do you have an ethical problem filing petition with INS indicating a valid marriage because you have personal knowledge that marriage was not stable to begin with?

Analysis:

Rules implicated: RPCs 1.5, 1.8(f), 1.14, 3.1, 3.3, 4.1 and 8.4(c).

At the outset, we note that your description of the problem implies that there is no attorney-client relationship between you and Wife, and we have accepted this premise for purposes of this analysis. Given that the
existence of such a relationship often depends upon the subjective perception of the putative client, this assumption may not be accurate as a factual matter. See, Bohn v. Cody, 119 Wn.2d 357, 832 P.2d 71 (1992). If there were an attorney-client relationship with wife, and Husband and Wife continue to disagree on the desired outcome, RPC 1.7 (conflict with current client) and possibly 2.2 (intermediary) may be pertinent as well.

RPC 1.5 requires that your fee be reasonable, and sets forth several factors to be considered in determining reasonability. Determining whether a flat fee of $1,500 for filing and pursuing a citizenship petition is reasonable, and whether the work performed by you prior to being advised that the petition may not proceed constituted "substantially most" of the work contemplated, is beyond the scope of this Committee.

RPC 1.5 also requires that the terms of the fee arrangement be clearly communicated to the client, preferably in writing. It appears that there was a written retainer agreement that presumably satisfied this requirement. It appears that both Husband and Wife signed the agreement. Subject to the reasonability requirement, the precise nature of the arrangement between you, Husband and Wife is not regulated by the RPCs, and any questions arising under that retainer agreement would be resolved by the application of general contract law, and those questions would be beyond the scope of this Committee.

RPC 1.8(f) prohibits accepting payment of fees from a third party unless the client consents and your independence is not thereby compromised. Although it appears from your representation that these conditions have been satisfied, a final determination would require a factual inquiry that is beyond the scope of this Committee. Your inquiry letter posits that the fees were paid by Wife and implies that these were her separate funds rather than community property under her control. Again whether that is accurate is beyond our ability to determine.

RPC 1.14 requires that funds belonging to the client must be deposited into an IOLTA trust account. Clearly this applies to the $250.00 paid for expenses. The status of the $1,500 is less clear. If it is indeed a flat fee that was due upon signing the retaining agreement, it became your funds upon payment and need not be deposited into the trust account. On the other hand, if it was in the form of a deposit for fees to be earned in the future, it could only be withdrawn as those fees are earned, with notice to the client, and could not be withdrawn so long as the client contests the right to withdraw. Again, how these general rules apply in this situation would require a factual determination that the committee is not in a position to make.

The third question that you posed requires us to speculate that Husband and Wife will report a reconciliation and request that you initiate the citizenship petition, and further to speculate about your state of knowledge at that time about the stability of the marriage and its implications for federal immigration law. Obviously, there are too many variables to determine exactly how this scenario might play out, but the following observations may be of assistance to you.

RPC 3.1 and 3.3 prohibit an attorney from making legal or factual arguments to a tribunal that are frivolous or false, and require that you disclose any previously undisclosed information the nondisclosure of which is necessary to avoid assisting a fraudulent action. RPC 4.1 similarly prohibits making statements to a third party that are false, and requires disclosure of facts the nondisclosure of which is necessary to avoid assisting a fraudulent or criminal act. Which rule is applicable depends on whether one views the Immigration and Naturalization Service as a "tribunal" or a "third party," but either way you must not prepare or submit documents that include statements that you knows to be false or misleading. Finally, RPC 8.4(c) prohibits you from engaging in conduct involving dishonesty, fraud, deceit or misrepresentation. Should Husband and Wife request that you initiate citizenship petitions in the future, your conduct should be guided by these general rules.

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.
Opinion: 1950
Year Issued: 2001
RPC(s): RPC1.2(c); 1.7; 1.9
Subject: Joint representation; advance waiver of conflict of interest

The inquirer asks two questions:

First, in the event a lawyer determines that joint representation is possible, may a lawyer seek engagement letters that provide that one client defers case control and strategy decisions to the client who is paying for the defense?

Second, in the event of joint representation, may one client enter into an advance waiver of a conflict if a conflict arises during the dual representation, such waiver allowing the lawyer to continue representation of the other client?

The committee opined that the Rules of Professional Conduct do not prevent a lawyer from joint representation of civil co-defendants. RPC 1.7 requires that, in the event of conflict, the joint representation will not adversely affect the relationship with either client and there is written consent to the representation after consultation and disclosure of material facts. In authorizing the joint representation, a lawyer may theoretically limit the objectives of the representation of one client under RPC 1.2(c) "if the client consents after consultation." However, the limitation on the representation of one client cannot adversely affect the relationship with that client. RPC 1.7(a) (1). In the event of an initial joint representation of civil co-defendants, the ability of a lawyer to withdraw from representation of only one client is governed by RPC 1.9.

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.
Opinion: 2007  
Year Issued: 2002  
RPC(s): RPC 1.7(b)  
Subject: conflict of interest, family relationship

The inquirer asks whether the existence of a family relationship between a lawyer and a material fact witness and an alleged co-conspirator constitutes or gives rise to a conflict of interest such that it would prohibit representation of another party in the same case.

The rule applicable to the issue raised by the inquirer is RPC 1.7(b) that states, “A lawyer shall not represent a client if the representation of that 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 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.”

The familial relationship between the lawyer, co-conspirator and material witness gives rise to a conflict of interest because it is likely that the lawyer’s representation of the client may be materially limited by the lawyer’s own interests or the lawyer’s responsibilities to third parties, namely his family members. The lawyer must assess whether or not it is reasonable to believe that the representation will not be adversely affected. The lawyer must immediately advise his client of the material facts including the existence and nature of the familial relationships and get the client’s consent to such representation in writing.

In this case, it is the opinion of the Committee that it is not reasonable to believe that the representation will not be adversely affected by the family relationship.

There is a potential that the lawyer will be compelled to look out for the interests of his family members. Consider the following examples: 1) The prosecutor offers the client a favorable plea bargain in exchange for testifying against or incriminating the lawyer’s co-conspirator family member; 2) the material witness, another family member of the lawyer must decide whether to comply with a subpoena requiring appearance, implicating their own penal interest; and, 3) the lawyer may feel pressure to steer away from developing avenues of investigation favorable to their client but unfavorable to their family member.

Since the Committee believes it is likely that representation would violate RPC 1.7(b), the attorney should advise the client that representation is not permitted by the Rules of Professional Conduct and withdraw.

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.
Opinion: 2064  
Year Issued: 2004  
RPC(s): RPC 1.7  
Subject: Advance waiver of conflicts of interest

Question Presented:
The inquirer has provided a copy of an “advance conflicts waiver” form and asks whether or not (1) the Bar has taken any position with regard to such advance waivers and (2) whether it would be appropriate to include the same in the firm’s standard fee agreement. The form provided reads as follows:

“As we have discussed, this firm represents many other companies and individuals. It is possible that during the time we are representing you, some of our current or future clients will have disputes or transactions with you... You agree that we may continue to represent, or undertake in the future to represent, existing or new clients in any matter, including litigation, even if the interests of such other clients in such other matters are directly adverse to yours, so long as those matters are not substantially related to our work for you.”

Response:
In regard to your inquiry, the Board of Governors has not taken any position with regard to promulgating a form related to advance waiver of conflicts.

With regard to the form you present, the Committee offers no opinion as to what you should or should not include in your standard fee agreement.

With regard to conflicts, RPC 1.7 provides in part as follows:

(b) A lawyer shall not represent a client if the representation of that 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, unless:
(1) The lawyer reasonably believes the representation will not be adversely affected; and
(2) The client consents in writing after consultation and a full disclosure of the material facts (following authorization from the other client to make such a disclosure). When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

While the “advance waiver of conflict” form you present would appear on its surface to encompass some of the provisions of RPC 1.7, the advance waiver is by no means dispositive of all potential conflicts. For example, under RPC 1.7, the lawyer must make a judgment that the representation being undertaken “will not be adversely affected”. This responsibility on the lawyer cannot be waived in advance and the lawyer must continuously assess his representation of clients with potentially conflicted interests.

Second, RPC 1.7 requires a written consent (which the advance conflict waiver seeks to address) but also requires that such waiver in writing be “after consultation and a full disclosure of the material facts”. Such an
While there is nothing to suggest that the use of such a form in a standard fee agreement is violative of the RPC's in any way, attorneys using such a form should be cautious and not be lulled into an assumption that such an advance waiver resolves all the potential issues under RPC 1.7. It should also be noted that some conflicts simply cannot be waived. We refer the inquirer to RPC 2.2 as well as 1.7. There is also valuable discussion on this point to be found in the WSBA Deskbook “Conflicts of Interest in Business Law” at §3.2.

Analysis:
There is a section in the “Deskbook” relating to ethics that comments on “advance waivers”. The reasoning therein is fairly clearly stated at §3.2(c):

“(c) Advance consent
“Lawyers should consider, in the proper circumstances, seeking advance consent from clients or prospective clients. “Advance consent” is consent to particular conflicts that do not exist at present but may arise in the future. For example, a lawyer might condition his willingness to serve as tax counsel on an isolated matter for Bank X to the agreement of Bank X that the lawyer and the lawyer’s firm may represent specific borrowers in lending transactions with Bank X in the future.

“There is some debate on the efficacy of advance consent. The ABA Committee, in Formal Opinion 93-372, concluded that advance consent was permitted under the Model Rules but expressed a “guarded view.” The Committee’s concern was whether the client was truly informed.

“Informal consent by the client is as necessary for effectiveness of a prospective waiver as for a contemporaneous waiver, but in the nature of things the consent is much less likely to be fully informed. Given the importance to the Model Rules place on the ability of the client to appreciate the significance of the waiver that is being sought, it would be unlikely that a prospective waiver which did not identify either the potential opposing party or at least a class of potentially conflicting clients would survive scrutiny. Even that information might not be enough if the nature of the likely matter and its potential effect on the client were not also appreciated by the client at the time the prospective waiver was sought.

“Keep in mind that an advance consent ideally should address both current client conflicts under rule 1.7 and potential former client conflicts under rule 1.9. Again, the level of sophistication of the client should have direct bearing on whether the consent sought was sufficiently informed.

“In addition, the nature and scope of the consent must be clearly set forth. As the ABA Opinion noted:

“For example, a prospective waiver from a client bank allowing its lawyer to represent future borrowers of the bank could not reasonably be viewed as permitting the lawyer to bring a lender-liability or a RICO action against the bank, unless the prospective waiver explicitly identified such drastic claims.” ABA Formal Opinion 93-372. See also OSB Legal Ethics Opinion 1991-122 (re efficacy of prospective waiver).

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.
The Committee received an inquiry concerning a lawyer’s rights and duties to withdraw from representation in the context of representing clients in immigration matters. To facilitate a comprehensive analysis, the Committee modified the inquiry to the following:

It is standard practice in most offices for the lawyer to set deadlines for immigration clients for the return of information necessary to properly complete forms and supporting documents. The lawyer is unable to complete the forms and gather supporting documents without the client’s assistance. If the lawyer does not comply with the Immigration Court’s deadline, then the lawyer risks discipline by the Immigration Judge (who has the authority to file a formal complaint with EOIR against the lawyer).

In other situations, an immigration client has failed to pay the lawyer, but has not formally discharged the lawyer or responded to the lawyer’s demands for payment.

In these circumstances:

1. When a client refuses to communicate with the lawyer sufficiently to permit effective representation, may the lawyer withdraw from representation, and is the lawyer required to withdraw?

2. When a client fails to respond to the lawyer’s demand for payments due for past services, may the lawyer withdraw from representation?

3. In supporting a motion to withdraw, may a lawyer disclose to the court that the basis for the lawyer’s motion is the client's failure to respond to requests for information or supporting documents, failure to pay fees for past services, or the lawyer’s inability to locate the client?

4. When a client discharges a lawyer but is subsequently arrested during the period that the lawyer’s withdrawal motion is pending, what are the lawyer’s ethical obligations with respect to the client’s post-discharge arrest?

5. What are a lawyer’s ethical obligations if a judge delays ruling on a withdrawal motion or denies the motion?

Analysis

1. When a client refuses to communicate with the lawyer sufficiently to permit effective representation, may the lawyer withdraw from representation, and is the lawyer required to withdraw?
When a client refuses to communicate with a lawyer sufficiently to permit effective representation, the lawyer is permitted to withdraw after making reasonable efforts to locate and communicate with the client. RPC 1.16(b)(5) allows withdrawal when a client fails substantially to fulfill an obligation to the lawyer regarding the lawyer’s services and the client has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled. The client’s disappearance or failure to communicate with the lawyer constitutes a failure to fulfill an obligation to the lawyer, and is therefore appropriate grounds for the lawyer’s withdrawal. See Advisory Opinions 1796, 1873.

In addition, under RPC 1.16(b)(6), a lawyer may withdraw if representation has been rendered unreasonably difficult by the client. The client’s disappearance and failure to communicate, in circumstances in which the lawyer needs to be in contact with the client to represent that client effectively, constitutes alternative grounds for withdrawal. See Advisory Opinions 1796, 1873.

Mandatory withdrawal
A lawyer must withdraw if either discharged by the client (RPC 1.16(a)(3)) or continued representation will result in violation of the Rules of Professional Conduct or other law (RPC 1.16(a)(1)). The determination of whether an attorney-client relationship has concluded on a particular matter is generally an issue of fact that is determined using common law standards rather than the RPCs. See Hipple v. McFadden, 161 Wn.App. 550, 558-59, 255 P.3d 730 (2011). Termination of an attorney-client relationship may be implied from the circumstances. Id. at 559. Under the test announced in Hipple, an attorney-client relationship on a particular matter is generally considered concluded when “the client has no reasonable expectation of continued representation.” Id. at 559.

RCW Chapter 2.44 governs attorney authority and generally requires an attorney to have client authority to proceed with a representation. If a client has disappeared or fails to communicate despite the lawyer’s reasonable efforts to locate and communicate with the client, then, depending on the particular circumstances involved, the lawyer may reasonably conclude that the lawyer no longer has the requisite authority to proceed on behalf of the client under RCW Chapter 2.44 and that mandatory withdrawal is triggered under RPC 1.16(a)(1). If so, the lawyer would still need to comply with any court requirements for seeking withdrawal in accord with RPC 1.16(c).

2. When a client fails to respond to the lawyer’s demand for payments due for past services, may the lawyer withdraw from representation?

Yes, the lawyer may withdraw if a client has failed to pay for services after the lawyer has given reasonable warning that the lawyer will withdraw absent payment. In those circumstances, the client’s failure to pay would constitute the client’s failure to fulfill an obligation to the lawyer under RPC 1.16(b)(5). See RPC 1.16, Comment [8]. Withdrawal is also permitted under RPC 1.16(b)(6) if the client’s failure to pay would make continued representation an unreasonable financial burden on the lawyer.

3. In supporting a motion to withdraw, may a lawyer disclose to the court that the basis for the lawyer’s motion is the client’s failure to respond to requests for information or supporting documents, failure to pay fees for past services, or the lawyer’s inability to locate the client?

A lawyer’s duty of confidentiality under RPC 1.6 remains in effect when seeking a court’s permission to withdraw. Even if information in the lawyer’s possession would support withdrawal and is necessary to provide a full explanation, the lawyer may not disclose that information if it is protected by RPC 1.6.

Although RPC 1.6 does not prohibit a lawyer from providing notice of withdrawal (RPC 1.6, Comment [25]), lawyers are cautioned that confidentiality obligations are broad, and apply “not only to matters communicated in
confidence by the client but also to all information relating to the representation, whatever its source." RPC 1.6, Comment [3]. The duty of confidentiality remains in effect after the lawyer-client relationship ends (RPC 1.6, Comment [18]), so even when the lawyer is seeking to withdraw based on actual or constructive discharge, the lawyer may not disclose information that is subject to RPC 1.6 protections to the tribunal.

The comments to the RPCs recognize the tension between confidentiality obligations and the practical necessity to provide the court with an adequate explanation for the basis for withdrawal: "The court may request an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. The lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient." RPC 1.16, Comment [3]. Thus, the rules anticipate a framework in which the court will render a decision, even if the lawyer has provided only a limited factual background. If the court deems it necessary to have additional information, then the court may order the lawyer to disclose that information, and the lawyer may then disclose under RPC 1.6(a)(6) (a lawyer "may reveal information relating to the representation of a client to comply with a court order"). Even then, however, the lawyer should limit disclosure to the extent reasonably possible. As Comment [14] to RPC 1.6 provides, "a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose. If the disclosure will be made in connection with a judicial proceeding, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable."

4. When a client discharges a lawyer but is subsequently arrested during the period that the lawyer's withdrawal motion is pending, what are the lawyer's ethical obligations with respect to the client's post-discharge arrest?

The client's discharge of the lawyer typically terminates the lawyer's right and obligation to speak or take any actions on the client's behalf, even for the purpose of furthering the client's perceived interests. RPC 1.16(a)(3); see also Advisory Opinion 954 (lawyer's inability to reach the client precludes the lawyer from taking any further action on the client's behalf); Advisory Opinion 1527 (lawyer's withdrawal precludes the lawyer from signing court order, even though the lawyer's representation was still in effect at the time of the underlying hearing); Advisory Opinion 1873 (when the client has disappeared, the lawyer may not settle the client's claim without specific authority from the client).

Here, the lawyer has been discharged by the client, but the lawyer's withdrawal motion has not yet been granted by the court. With respect to the underlying action, the lawyer must continue to represent the client until the court has granted the withdrawal motion, subject to the limitations on representation in light of that discharge (see further analysis below). If the arrest is on an unrelated matter, then even if that arrest would affect the matter in which the withdrawal motion is pending, the lawyer has no right or obligation to take further action absent a new engagement.

5. What are a lawyer's ethical obligations if a judge delays ruling on a withdrawal motion or denies the motion?

If a lawyer has moved to withdraw, the lawyer must continue to serve until the court grants that motion. Even when proper grounds for withdrawal exist, a lawyer must continue representation if ordered to do so by a tribunal. RPC 1.16(c); see also Advisory Opinion 1169; RPC 1.2(f) (prohibiting a lawyer from acting on behalf of a person or organization without authority "unless the lawyer is authorized or required to so act by law or a court order"); Comment [17] to that rule explicitly identifies a court's denial of a withdrawal motion under RPC 1.16(c) as grounds for a lawyer to continue acting on behalf of a client, even absent client authority).

Continued representation while a withdraw motion is pending presents obvious pitfalls, particularly if the client's
disappearance or refusal to communicate is the basis for withdrawal. Although a lawyer ordinarily may not take action without his or her client's direction and consent, he or she may be faced with the necessity to take action or make decisions, despite the absence of the client, if a court delays ruling on a withdrawal motion or denies the motion. In that event (and, in the case of a pending withdrawal motion, after diligently pursuing a ruling from the court), while the lawyer may not substitute his or her own objectives, the lawyer must continue representation consistent with the known objectives of the client. See RPC 1.2(a) and Comment [3] ("At the outset of a representation, the client may authorize the lawyer to take specific action on the client's behalf without further consultation. Absent a material change in circumstances and subject to Rule 1.4, a lawyer may rely on such an advance authorization").

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.
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). 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 the lawyer; 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 which a 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:

[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.

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.
2016 Discipline Report Snapshot
2016 Discipline Report Snapshot

2016 BY THE NUMBERS

Annually, the Washington State Bar Association (WSBA) 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 Lawyers’ Fund for Client Protection. 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 2016 Discipline System Annual Report, which is now available on the WSBA website at www.wsba.org.

ACTIVE LICENSED LAWYERS

31,549

GRIEVANCE FILES

OPENED: 1,830

44 Public Formal Complaints Filed

DISCIPLINARY Actions Imposed 70

17 DISCIPLINARY HEARINGS

1 Supreme Court Published Opinion

NUMBER AND NATURE OF 2016 GRIEVANCES

ODC’s intake staff receives all phone inquiries and written grievances and conducts the initial review of every grievance. 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 2016, ODC received more than 1,800 grievances.

<table>
<thead>
<tr>
<th>Disciplinary Grievances Received</th>
<th>1,830</th>
</tr>
</thead>
<tbody>
<tr>
<td>Disciplinary Grievances Resolved</td>
<td>1,902</td>
</tr>
<tr>
<td>Non-Communication Matters Mediated</td>
<td>100</td>
</tr>
<tr>
<td>File Disputes Mediated</td>
<td>57</td>
</tr>
<tr>
<td>Public Inquiries, Phone Calls, Emails &amp; Interviews</td>
<td>5,466</td>
</tr>
</tbody>
</table>

DISCIPLINARY GRIEVANCES, MEDIATED MATTERS, AND PUBLIC INQUIRIES
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. Consistent with the Supreme Court's mandate in General Rule 12.1, the WSBA administers 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 OPG, while the adjudicative functions are handled by the Disciplinary Board and hearing officers, which are administered by OGC.

**STRUCTURE OF THE LAWYER DISCIPLINE AND DISABILITY SYSTEM**

| **SUPREME COURT** | • Administers the system  
| | • Conducts final appellate review  
| | • Orders sanctions, interim suspensions, and re-proculation discipline  
| **DISCIPLINARY BOARD** (administered by OPG) | • Reviews recommendations for proceedings and disputed dismissals  
| | • Serves as intermediate appellate body  
| | • Reviews hearing records and stipulations  
| **HEARING OFFICERS** (administered by OGC) | • Conduct evidentiary hearings and other proceedings  
| | • Conduct settlement conferences  
| | • Approve stipulations to admonition and reprimand  
| **WSBA OFFICE OF DISCIPLINARY COUNSEL** | • 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  

**NATURE OF GRIEVANCES**

- **37%** Unsatisfactory Performance  
- **25%** Personal Behavior  
- **14%** Interference with Justice  
- **10%** Violation of a Duty to Client  
- **8%** Professionalism/Law Office Management  
- **1%** Other

In 2016, the most common grievance allegations against Washington lawyers related to unsatisfactory performance, personal behavior concerns, and interference with the administration of justice.

**WHO FILED GRIEVANCES**

- **24%** Former Client  
- **22%** Opposing Client  
- **21%** Client  
- **17%** Other  
- **10%** OSC  
- **3%** Other Lawyer  
- **2%** Opposing Counsel  
- **1%** Judicial

In 2016, 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 a 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.
PRACTICE AREA OF GRIEVANCES  
Most grievances arise from criminal law, family law, and tort matters.

<table>
<thead>
<tr>
<th>Practice Area</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Criminal Law</td>
<td>31%</td>
</tr>
<tr>
<td>Family Law</td>
<td>19%</td>
</tr>
<tr>
<td>Torts</td>
<td>9%</td>
</tr>
<tr>
<td>Unknown</td>
<td>6%</td>
</tr>
<tr>
<td>Estates/Probates/Wills</td>
<td>6%</td>
</tr>
<tr>
<td>Other</td>
<td>5%</td>
</tr>
<tr>
<td>Real Property</td>
<td>4%</td>
</tr>
<tr>
<td>Administrative Law</td>
<td>4%</td>
</tr>
<tr>
<td>Immigration</td>
<td>3%</td>
</tr>
<tr>
<td>Commercial Law</td>
<td>3%</td>
</tr>
<tr>
<td>Labor Law</td>
<td>2%</td>
</tr>
<tr>
<td>Landlord/Tenant</td>
<td>2%</td>
</tr>
<tr>
<td>Bankruptcy</td>
<td>2%</td>
</tr>
<tr>
<td>Juvenile Matters</td>
<td>1%</td>
</tr>
<tr>
<td>Contracts/Consumer Law</td>
<td>1%</td>
</tr>
<tr>
<td>Foreclosures</td>
<td>1%</td>
</tr>
<tr>
<td>Collections</td>
<td>1%</td>
</tr>
</tbody>
</table>

DISCIPLINARY ACTIONS

Disciplinary “actions” include both public disciplinary “sanctions” and admonitions. Disciplinary sanctions are, in order of increasing severity: reprimands, suspensions, and disbarments. In Washington, admonitions are also a form of public discipline. Lawyers may also resign in lieu of discipline if they do not wish to defend against allegations of misconduct. Review committees of the Disciplinary Board also have authority to issue advisory letters if a lawyer should be cautioned. An advisory letter 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 2016, 15 matters were referred to diversion.

In 2016, 70 lawyers were disciplined. The chart below tracks the number of disciplinary actions imposed over the last five reporting years.

<table>
<thead>
<tr>
<th>Year</th>
<th>Disbarments</th>
<th>Resignations in Lieu of Discipline</th>
<th>Suspensions</th>
<th>Reprimands</th>
<th>Admonitions</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>2012</td>
<td>26</td>
<td>6</td>
<td>21</td>
<td>22</td>
<td>10</td>
<td>85</td>
</tr>
<tr>
<td>2013</td>
<td>29</td>
<td>3</td>
<td>31</td>
<td>26</td>
<td>6</td>
<td>95</td>
</tr>
<tr>
<td>2014</td>
<td>15</td>
<td>8</td>
<td>34</td>
<td>11</td>
<td>3</td>
<td>71</td>
</tr>
<tr>
<td>2015</td>
<td>9</td>
<td>10</td>
<td>27</td>
<td>19</td>
<td>9</td>
<td>74</td>
</tr>
<tr>
<td>2016</td>
<td>14</td>
<td>7</td>
<td>31</td>
<td>15</td>
<td>3</td>
<td>70</td>
</tr>
</tbody>
</table>
LAWYER DISABILITY MATTERS

Special procedures apply when there is 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 recent years, the number of transfers to disability-inactive status has increased. In 2016, eight lawyers were transferred to disability-inactive status based on an incapacity to practice law.

OTHER LICENSED PROFESSIONALS AND THE 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 admission and practice rules, rules of professional conduct, and disciplinary procedural rules. The WSBA administers a discipline system for each of these licenses. At the end of 2016, there were 766 LPOs and 19 LLLTs actively licensed to practice. In 2016, the WSBA received three disciplinary grievances against LPOs with no disciplinary action imposed against LPOs. In 2016, the WSBA did not receive any grievances against LLLTs.

RESOURCES