Ethics For Litigators

Spokane County Bar Association – Indian Law Section
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JEANNE MARIE CLAVERE is a 1987 graduate of the University of Puget Sound School of Law (now Seattle University School of Law). Prior to earning her law degree, she received a Master of Business Administration from DePaul University in Chicago. In February 2010, she joined the staff of the Washington State Bar Association as Professional Responsibility Counsel. After four years with a Seattle law firm, Jeanne Marie began her solo practice in 1992, focusing on estate planning, elder law (including complex guardianships, trusts, and guardian ad litem appointments), and contract based criminal prosecution. As Senior 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, the American Bar Association, the National Conference of Bar Counsel and speaks at various local bar CLE's throughout the state. Jeanne Marie is the primary responder on the WSBA Ethics Line and wants every attendee to commit the number to memory and call her first, not after they run into an ethical dilemma.

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

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

ETHICS FOR LITIGATORS

SPOKANE COUNTY BAR ASSOCIATION – INDIAN LAW SECTION
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Jeanne Marie Clavere
Senior Professional Responsibility Counsel
WSBA Office of General Counsel Date

RPC 3.1
MERITORIOUS CLAIMS AND CONTENTIONS

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

[Originally effective September 1, 1985; amended effective September 1, 2006.]

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RPC 3.3
CANDOR TOWARD THE TRIBUNAL

(a) A lawyer shall not knowingly:

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

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

(3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by the opposing party; or

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

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

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RPC 3.3 (CONTINUED)
CANDOR TOWARD THE TRIBUNAL

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

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

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

(f) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

[Originally effective September 1, 1985; amended effective September 1, 2006; April 14, 2015.

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RPC 3.4
FAIRNESS TO OPPOSING PARTY

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

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

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

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

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

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RPC 3.5: IMPARTIALITY AND DECORUM OF THE TRIBUNAL

A lawyer shall not:

(a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;

(b) communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order;

(c) communicate with a juror or prospective juror after discharge of the jury if:

(1) the communication is prohibited by law or court order;

(2) the juror has made known to the lawyer a desire not to communicate; or

(3) the communication involves misrepresentation, coercion, duress or harassment; or

(d) engage in conduct intended to disrupt a tribunal.

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RPC 4.1: TRUTHFULNESS IN STATEMENTS TO OTHERS

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

[Adopted effective September 1, 1985.]

RPC 8.4 MISCONDUCT

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law;

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RPC 8.4 (CONTINUED) MISCONDUCT

(f) knowingly

(1) assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law, or

(2) assist or induce an LLLT in conduct that is a violation of the applicable rules of professional conduct or other law;

(g) commit a discriminatory act prohibited by state law on the basis of sex, race, age, creed, religion, color, national origin, disability, sexual orientation, honorably discharged veteran or military status, or marital status, where the act of discrimination is committed in connection with the lawyer's professional activities. In addition, it is professional misconduct to commit a discriminatory act on the basis of sexual orientation if such an act would violate this rule when committed on the basis of sex, race, age, creed, religion, color, national origin, disability, honorably discharged veteran or military status, or marital status. This Rule shall not limit the ability of a lawyer to accept, decline, or withdraw from the representation of a client in accordance with Rule 1.16;

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RPC 8.4 (CONTINUED) MISCONDUCT

(h) in representing a client, engage in conduct that is prejudicial to the administration of justice toward judges, lawyers, or LLLTs, other parties, witnesses, jurors, or court personnel or officers, that a reasonable person would interpret as manifesting prejudice or bias on the basis of sex, race, age, creed, religion, color, national origin, disability, sexual orientation, honorably discharged veteran or military status, or marital status. This Rule does not restrict a lawyer from representing a client by advancing material factual or legal issues or arguments.

(i) commit any act involving moral turpitude, or corruption, or any unjustified act of assault or other act which reflects disregard for the rule of law, whether the same be committed in the course of his or her conduct as a lawyer, or otherwise, and whether the same constitutes a felony or misdemeanor or not; and if the act constitutes a felony or misdemeanor, conviction thereof in a criminal proceeding shall not be a condition precedent to disciplinary action, nor shall acquittal or dismissal thereof preclude the commencement of a disciplinary proceeding;

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RPC 8.4 (CONTINUED) MISCONDUCT

(j) willfully disobey or violate a court order directing him or her to do or cease doing an act which he or she ought in good faith to do or forbear;

(k) violate his or her oath as an attorney;

(l) violate a duty or sanction imposed by or under the Rules for Enforcement of Lawyer Conduct in connection with a disciplinary matter; including, but not limited to, the duties catalogued at ELC 1.5;

(m) violate the Code of Judicial Conduct; or

(n) engage in conduct demonstrating unfitness to practice law.

[Originally effective September 1, 1985; amended effective September 17, 1993; October 31, 2000; October 1, 2002; September 1, 2006; April 14, 2015; September 1, 2018.]

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MORE RULES OF PROFESSIONAL CONDUCT TO CONSIDER

RPC 3.2 Expediting Litigation

RPC 3.6 Trial Publicity

RPC 3.7 Lawyer as Witness

RPC 4.4 Respect For Rights of Third Persons

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QUESTIONS & COMMENTS?

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Washington Advisory Ethics Opinions

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Advisory Opinion: 201701

Year Issued: 2017

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

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

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

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

Question:

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

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

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

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

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

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

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

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

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

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

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

"The Rules of Professional Conduct are rules of reason." Official Comment [14] to Scope section of Washington Rules of Professional Conduct. It would be unreasonable to construe RPC 1.6(a) to mean that when filing a

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

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

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

Endnotes:

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

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

unreasonably difficult by the client; or
(7) other good cause for withdrawal exists.

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

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

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

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

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

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

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

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

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

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

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

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

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of another legal

practitioner, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.

7. Superior Court Civil Rule 71 states:

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

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

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

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

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

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

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

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

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

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

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

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

11. RPC 1.2(d) provides that:

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

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

WASHINGTON STATE
BAR ASSOCIATION

Advisory Opinion: 201802

Year Issued: 2018

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

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

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

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

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

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

Facts:
Scenario 1:

Driver causes an automobile accident and is sued.

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

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

Scenario 2:

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

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

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

Scenario 3:

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

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

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

Scenario 4:

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

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

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

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

Questions:

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

Conclusion:

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

Discussion:

Traditionally, a lawyer who is retained by an insurer to represent and defend an insured against claims acts

within what is commonly referred to as a tripartite relationship. This relationship differs, depending on the jurisdiction. The tripartite relationship governs or describes how the lawyer, client, and insurer communicate and contribute to the defense.

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

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

Under RPC 1.6(a), a lawyer "shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b)." The term, "informed consent" refers to "the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." RPC 1.0A(e).

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

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

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

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

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

381, 388, 715 P.2d 1133 (1986) (stating that "[i]n a reservation of rights defense, RPC 5.4(c) demands that counsel understand that he or she represents only the insured, not the company"), Clark Co. Fire Dist. No. 5 v. Bullivant Houser Bailey, P.C., 180 Wn. App. 689, 699–700, (holding that insurer lacked standing to sue lawyer hired by insurer to defend the assured).

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

Endnotes

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

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WASHINGTON STATE BAR ASSOCIATION

Advisory Opinion: 201803

Year Issued: 2018

RPC(s): RPC 4.2, ABA Opinion 97-408

Subject: Communication with Represented Government Employee

Issue presented: May an attorney communicate directly with low-level government employees if the government entity is represented by counsel?

Discussion:

RPC 4.2 provides:
"In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order."

This inquiry raises two issues under RPC 4.2. First, is a low-level staff employee of a government entity a person represented by a lawyer for the entity? Second, does the First Amendment right to petition the government for redress mean that the contact is "authorized . . . by law"?

A. Contacts with employee of a represented entity

As comment [10] to RPC 4.2 indicates, "[w]hether and how lawyers may communicate with employees of an adverse party is governed by Wright v. Group Health Hospital, 103 Wn.2d 192, 691 P.2d 564 (1984)." In Wright, our Supreme Court held that Rule 4.2 only applies to communications with what has come to be called the entity "control group," which Wright more specifically defines to consist of "only those employees who have the legal authority to `bind' the corporation in a legal evidentiary sense, i.e., those employees who have `speaking authority' for the corporation." 103 Wn.2d at 200.

We find no reason to distinguish between employees who in fact witnessed an event and those whose act or omission caused the event leading to the action. It is not the purpose of the rule to protect a corporate party from the revelation of prejudicial facts. Accord, Coburn v. Seda, 101 Wash.2d 270, 276–77, 677 P.2d 173 (1984) (discovery immunity statute will be strictly construed; it does not grant an immunity to information available from original sources).
Rather, the rule's function is to preclude the interviewing of those corporate employees who have the authority to bind the corporation. H. Drinker, Legal Ethics 201 (1953).

We hold current Group Health employees should be considered "parties" for the purposes of the disciplinary rule if, under applicable Washington law, they have managing authority sufficient to give them the right to speak for, and bind, the corporation. Since former employees cannot possibly speak for the corporation, we hold that [the predecessor to RPC 4.2] CPR DR 7–104(A)(1) does not apply to them.

Id. 103 Wn.2d at 200-01. Thus, under Wright, contacts with government employees who are potential witnesses and/or those whose governmental acts or omissions caused an alleged injury are not subject to the rule unless either they (a) have retained their own attorney or are individually represented by counsel or (b) have "managing/speaking" authority for the agency.

Comment 7 to RPC 4.2 attempts to codify Wright by stating that the Rule only prohibits contact with an employee who "supervises, directs or regularly consults with the organization's lawyer concerning the matter or has the authority to obligate the organization with respect to the matter." Similarly, Comment 10 adds that the matter is governed by the Wright case. If an employee is not in that limited class of persons, RPC 4.2 does not apply to the communication.

A government lawyer may not instruct all agency employees not to have ex parte contacts with outside lawyers. The Wright case addressed this possibility and concluded it was improper for an entity to advise its employees not to speak with the opposing party's attorneys but that the employees were not required to meet ex parte with the opposing counsel. Id., 103 Wn.2d at 202-03. See also RPC 3.4, cmt [5] which explains that "Washington did not adopt Model Rule 3.4(f), which delineates circumstances in which a lawyer may request that a person other than a client refrain from voluntarily giving information to another party, because the Model Rule is inconsistent" with Wright.

However, an opposing counsel who knows that the government lawyer represents an individual government employee may not contact that employee. This does not mean that the government lawyer may prevent such contacts simply by asserting that the government lawyer represents every employee of the government. Rather, for RPC 4.2's prohibition on ex parte contacts to apply, the government lawyer has to have an attorney-client relationship with that specific employee. n.1 This advisory opinion cannot address whether an attorney-client relationship exists between the government lawyer and low-level agency employees because that determination would need to be made for each individual. "The essence of the attorney/client relationship is whether the attorney's advice or assistance is sought and received on legal matters. . . The existence of the relationship 'turns largely on the client's subjective belief that it exists.'" Bohn v. Cody, 119 Wn.2d 357, 363, (quoting In re McGlothlen, 99 Wn.2d 515, 522, 663 P.2d 1330 (1983)).

Thus, if the low-level government employees do not supervise, direct or regularly consult with the government lawyer concerning the matter, do not have the authority to obligate the government with respect to the matter, and are not individually represented by the government lawyer, the opposing lawyer may contact those employees directly.

B. "Authorized by law" exception

If RPC 4.2 applies to the government employee as discussed above, the opposing counsel may not contact the employee without the government lawyer's consent unless the contact is authorized by law or court order. Here, a key question is whether the constitutional right to petition for a redress of grievances, U.S. Con., amendment 1 and Washington Con., Art. 1, sec. 4, permits contact with such a government employee under the "authorized by law" exception to RPC 4.2. Like the rights to speech and assembly, the petition right "is subject to reasonable restraints and limitations as are other rights protected by the federal and state constitutions." State v. Gossett, 11 Wn. App. 864, 866, 527 P.2d 91, 93 (1974).

Unfortunately, there is limited legal precedent as to whether and to what extent the right to petition makes direct contact with a government employee "authorized by law" under RPC 4.2.

ABA Opinion 97-408 addresses this question, but its analysis is not entirely consistent with RPC 4.2. That opinion concludes that "Rule 4.2 does not prohibit a lawyer representing a private party in a controversy with the government from communicating directly with governmental officials who have authority to take or recommend action in the matter, provided the communication is solely for the purpose of addressing a policy issue, including settling the controversy." (Footnote omitted). However, that opinion was based on a comment that was later revised. In addition, the opinion also states that "the lawyer for the private party must always give government counsel advance notice that it intends to communicate with officials of the agency to afford such officials an opportunity to discuss with government counsel the advisability of entertaining the communication." This requirement has no basis in the text of RPC 4.2 or even its comments. For these reasons, we decline to adopt the reasoning of ABA Opinion 97-408.

There is little other authority and no controlling Washington precedent that addresses whether the constitutional right to petition authorizes direct contact with a government employee. While certain communications with a government employee would fall within the right to petition, RPC 4.2's requirement that such communications be directed to the government lawyer may be found to be a reasonable restriction.

The Committee therefore is unable to provide an opinion on whether the right to petition would permit opposing counsel to communicate directly with a government employee if that communication is otherwise prohibited by RPC 4.2.

Contacts with government employees may be "authorized by law" in specific kinds of cases, quite apart from any authority contained in the right to petition. For example, serving a summons and complaint directly on a represented opposing party is authorized by law. Advisory Opinion 201502. But identification or cataloguing of such legal authority is beyond the scope of this opinion.

Footnotes

1. RPC 1.13(g) and 1.7 governs whether the government lawyer may represent both the government and a government employee individually. That issue is beyond the scope of this opinion.

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WASHINGTON STATE BAR ASSOCIATION

Advisory Opinion: 201903

Year Issued: 2019

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

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

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

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

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

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

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

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

RPC 1.15A safeguards client funds and third parties by imposing procedural and substantive requirements upon the lawyer who holds client property in trust. For instance, a lawyer must provide the client with an annual

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

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

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

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

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

Footnotes:

1. Comment 9 to RPC 1.15A states:

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

2. RPC 1.3, Comment 4 states in part:

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

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

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

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WASHINGTON STATE BAR ASSOCIATION

Advisory Opinion: 202001

Year Issued: 2020

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

Subject: Multiple Client Representation in Wrongful Death Cases

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

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

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

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

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

Conclusion:

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

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

Other considerations:

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

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

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

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

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

Analysis:

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

Issue 2:
1. The Committee on Professional Ethics does not believe the facts present a concurrent conflict of interest under RPC 1.7(a). A concurrent conflict exists when the representation of one client will be directly adverse to another client or where there is a significant risk that the representation of one or more clients will be materially

limited by the lawyer's responsibilities to another client.

a. Will the representation of the children be directly adverse to the wife/personal representative? Under Washington's wrongful death and survival statutes, the personal representative brings claims for damages for the benefit of the decedent's statutory beneficiaries, including the children and the wife. The personal representative's duty is to maximize the total recovery for the statutory beneficiaries. The personal representative does not seek a certain amount of damages for the benefit of the wife, which would necessarily decrease what is left for the benefit of the children. As such, there does not appear to be a conflict between the interests of the wife/personal representative and the children for purposes of seeking such damages. How the damages recovered are apportioned amongst the wife and the children, or what other types of damages the personal representative seeks, is beyond the scope of this opinion.

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

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

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

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

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

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

Footnotes

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

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WASHINGTON STATE BAR ASSOCIATION

Advisory Opinion: 202002

Year Issued: 2020

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

Subject: Ghostwriting for pro se Parties in State Court Litigation

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

Analysis:

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

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

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

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

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

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

representations are false or materially insufficient, in which instance the attorney shall make an independent reasonable inquiry into the facts.

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

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

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

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WASHINGTON STATE BAR ASSOCIATION

Advisory Opinion: 202101

Year Issued: 2021

RPC(s): RPC 1.6(a), RPC 1.6(b)(6), RPC 1.14(b)

Subject: Considerations regarding disclosure of civil commitment proceedings while representing a criminal defendant

Summary: This opinion discusses circumstances under which a lawyer representing a criminal defendant may be able to disclose the client's involvement in civil commitment proceedings to a court or prosecutor. The opinion addresses express informed consent and implied consent under RPC 1.6(a), the exception contained in RPC 1.6(b)(6), and authorization under RPC 1.14(b).

A lawyer representing a criminal defendant faces a dilemma if the client fails to appear in court due to civil commitment in a hospital under RCW Ch. 71.05. If the lawyer fails to disclose the commitment, the court may issue a warrant for the client's arrest or take other action detrimental to the client's interests. However, disclosure of the commitment risks violating RPC 1.6. Advisory Opinions 2099 (2005) and 2190 (2009) address a similar issue – whether or how to disclose to the court a concern about the client's competence to stand trial – but they do not address disclosure of a civil commitment proceeding. This opinion reviews ethical considerations presented by that dilemma, which is particularly acute when the lawyer does not learn of the civil commitment in advance of the hearing.

RPC 1.6(a) provides: "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)." Paragraph (b) of the rule describes eight scenarios in which a lawyer may reveal information relating to the representation without the client's informed or implied consent. Of these, subparagraph (b)(6), authorizing disclosure to comply with a court order, is relevant to this discussion.

Although it is important to discuss a client's objectives early in any engagement *n1 and to review them periodically during the engagement, it can be particularly helpful to do so if the lawyer anticipates that mental health issues could complicate the client's defense. Should the client's condition subsequently deteriorate, it may become difficult for the client to make informed decisions about significant issues or, if the client is hospitalized, it may become difficult to communicate with the client at all.

Discussion about the relative importance of confidentiality and liberty may be not be feasible early in an engagement. However, if feasible, such discussions may in some cases lead to express, informed consent to

disclose information protected by RPC 1.6 to the court and/or the prosecutor. In other cases such discussions before circumstances become exigent may provide a basis for the lawyer to conclude later in the engagement that the client gave implied consent.

"Informed consent" means the client's "agreement . . . to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the propose course of conduct." RPC 1.0A(e). RPC 1.6(a) does not require that informed consent be confirmed in writing. However, it may be advisable for the lawyer to provide the client a written description of the information that the client has authorized to be disclosed and the circumstances under which disclosure is authorized, together with the information that the client may revoke consent at any time. To avoid misunderstanding, the lawyer may ask the client to sign the authorization and may note that any revocation should be provided in writing. The scope of a disclosure pursuant to express, informed consent should be limited to the scope of the authorization. *n2

If early discussions do not progress to the point where the client makes a decision to give or refuse express, informed consent, the discussions may nevertheless progress to the point where the lawyer reasonably believes that the client has impliedly authorized disclosure of information in some circumstances to avoid adverse consequences to the client's liberty. When making a disclosure pursuant to implied authorization, the lawyer should disclose no more information than is reasonably necessary to accomplish the client's objective in preserving personal liberty. See RPC 1.6(b) and Comment [5].

In some cases a court may order a lawyer to reveal information relating to the representation of a client. For example, if an issue has arisen concerning the competence of the client to stand trial, the court may order the lawyer to disclose information protected by RPC 1.6 related to that issue. Subparagraph (b)(6) authorizes a lawyer to disclose otherwise confidential information pursuant to court order. However, the introductory language of paragraph (b) cautions that the lawyer's disclosure should be limited in scope to information that the lawyer reasonably believes is necessary to disclose under the circumstances. Comment [15] provides this guidance regarding court-ordered disclosure: "Absent informed consent of the client to do otherwise, the lawyer should assert on behalf of the client all non-frivolous claims that the information sought is protected against disclosure by the attorney-client privilege or other applicable law. In the event of an adverse ruling, the lawyer must consult with the client about the possibility of appeal to the extent required by Rule 1.4. Unless review is sought, however, paragraph (b)(6) permits the lawyer to comply with the court's order." When complying with such an order, the lawyer may consider providing disclosure to the court in camera or in chambers and/or requesting that the record be sealed.

RPC 1.14 may come into play if the lawyer does not have informed or implied consent and is not subject to a court order. This rule governs representation of a client with diminished capacity. Paragraph (b) authorizes a lawyer to take reasonably necessary protective action "[w]hen the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest."

A client who is at risk of being arrested and jailed for failing to appear in court might conceivably face substantial physical harm in some circumstances. For example, mental health issues can sometimes cause an encounter with law enforcement to escalate quickly and unexpectedly, and confinement in jail during a pandemic can create increased risk of infection. In addition, a client who accumulates a series of arrest warrants has an increased risk of adverse rulings in court. The comments to RPC 1.14 do not discuss what types of harm might qualify as "other harm," meaning harm not considered physical or financial that could nevertheless merit protective action. Advisory Opinion 2190 observes: "Because [of] the broad language of [RPC 1.14(b)], it would not be unreasonable to assume that 'other harm' did constitute harm to a client's constitutionally protected interest [in

being competent to stand trial]." The same observation applies regarding a criminal defendant's liberty interest.

Comment [6] to RPC 1.14 provides guidance for making a determination whether the client has diminished capacity. If the lawyer concludes that the other requirements of RPC 1.14(b) are also satisfied, the next question is whether disclosure to the court is "reasonably necessary protective action." Although such disclosure is not listed among the examples in Comment [5], the comment states: "In taking any protective action, the lawyer should be guided by such factors as the wishes and values of the client to the extent known [and] the client's best interests . . ." Discussion about the client's objectives early in the engagement may provide a basis for concluding that disclosure to the court is an appropriate protective action under RPC 1.14. Comment [8] states: "When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized to make the necessary disclosures, even when the client directs the lawyer to the contrary."

If the lawyer discloses information to the court, whether pursuant to RPC 1.6(a), RPC 1.6(b)(6) or RPC 1.14, the lawyer must comply with RPC 3.3 governing candor toward the tribunal.

It is a separate question whether disclosure of the information that a client is in civil commitment may be prohibited by statute. The Committee does not opine on questions of law.

Footnotes

1. RPC 1.2(a) requires a lawyer to abide by a client's decisions concerning the objectives of the representation and notes that RPC 1.4 requires the lawyer to consult with the client as to the means by which the objectives are to be pursued.

2. If a client lacks capacity to give informed consent at the outset of an engagement, there may be an issue as to whether the client is competent to stand trial. See Advisory Opinions 2099 and 2190 for guidance regarding disclosure.

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WASHINGTON STATE BAR ASSOCIATION

Advisory Opinion: 202201

Year Issued: 2022

RPC(s): 4.2

Subject: Lawyer's Email "Reply All," Including Another Lawyer's Client

Opinion RPC 4.2
Lawyer's Email “Reply All,” Including Another Lawyer's Client

Advisory Opinion 202201

Year Issued: 2022

RPC: RPC 4.2

SUMMARY: If a lawyer emails a second lawyer with a copy to the first lawyer's own client, and if the second lawyer “replies all,” whether the second lawyer violates the prohibition against communications to another lawyer's client without that lawyer's consent depends on the relevant facts and circumstances. Based on various factors, the second lawyer must make a good faith determination as to whether the lawyer who sent the initial communication had provided implied consent to a “reply all” responsive electronic communication.

Facts: Lawyer A initiates communication and sends an email to Lawyer B with a copy (cc) to Lawyer A's own client. When responding, Lawyer B “replies all,” and in doing so simultaneously communicates with both Lawyer A and Lawyer A's client.

Issue presented: Does Lawyer B violate RPC 4.2 when Lawyer B “replies all” and includes Lawyer A's client in the communication without obtaining express prior consent from Lawyer A?

Short answer: It is the opinion of the Committee on Professional Ethics that “Reply All” may be allowed if consent can be implied by the facts and circumstances, but express consent is the prudent approach.

Rule:

RPC 4.2

Discussion:

RPC 4.2 prohibits a lawyer in the course of representing a client, from communicating about the subject matter of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the person's lawyer or is authorized to do so by law or court order. Accordingly, it would be inconsistent with RPC 4.2 for a lawyer to initiate an email to another lawyer and that lawyer's client without obtaining prior consent from that second lawyer.

The purpose of RPC 4.2 is to protect a client from overreaching by other lawyers who are participating in a matter, from interference by those lawyers with the client-lawyer relationship, and from the uncounseled disclosure of information relating to a representation. RPC 4.2 Comment [1]. Consent to communicate about a matter with a represented person can be expressly granted by a client's lawyer. It also can be implied by the prior course of conduct among the lawyers in a matter, it can be inferred from a client's lawyer's participation in relevant communications, and it can be inferred from other facts and circumstances.

It would be inconsistent with RPC 4.2 for Lawyer A to initiate an email to Lawyer B and Lawyer B's client without obtaining prior consent from Lawyer B. Accordingly, the fact that Lawyer A copies her own client on an electronic communication to which Lawyer B is replying does not by itself permit Lawyer B to "reply all" without Lawyer A's consent. Rule 4.2 does not state that the consent of the other lawyer must be "expressly" given, but the best practice is to obtain express consent.

Whether consent may be "implied" in a particular situation requires an evaluation of all the facts and circumstances surrounding the representation, including how the communication was initiated and by whom; the prior course of conduct between the lawyers involved; the nature of the matter and whether it is transactional or adversarial; the formality of the communications; and the extent to which a communication from Lawyer B to Lawyer A's client might interfere with the client-lawyer relationship.

The Restatement of the Law Governing Lawyers provides that an opposing lawyer's consent to communication with her client "may be implied rather than express." Restatement (Third) of the Law Governing Lawyers § 99 comment j. Several bar ethics committees have examined this issue and concluded that while consent to "reply to all" communications may sometimes be inferred from the facts and circumstances, it is prudent to secure express consent from opposing counsel. Opinions from other states that reflect this view include, South Carolina Bar Ethics Advisory Opinion 18-04; North Carolina State Bar 2012 Formal Ethics Opinion 7; California Standing Comm. on Prof'l Responsibility & Conduct, Formal Op. 2011-181; and Assn. of the Bar of the City of NY Comm. on Prof'l and Judicial Ethics, Formal Op. 2009-1.

There are situations where prior consent might be implied by the totality of the facts and circumstances. One relevant fact is whether Lawyer A, initiating an electronic communication, cc'd her own client. But other factors should be considered before Lawyer B can reasonably rely on implied consent from Lawyer A.

• One important factor is the prior course of conduct of the lawyers and their clients in the matter. If the lawyers involved have routinely cc'd their clients on communications, in most circumstances they should be able to rely on that past practice in future communications of a similar type. In particular, the responding Lawyer B should be able to rely on the past practice of Lawyer A.
• The type of communication is a related factor. Emails and texts are often used as a substitute for oral communications, and the context of an electronic communication is important. For example, if a series of emails and texts among lawyers and their clients takes the character of an active discussion among parties within a room, the "conversation" may not be different from a face-to-face conversation in which the lawyers are able to adequately protect the interests of their clients.
• A related factor is the number of persons Lawyer A cc'd on her initial communication. If Lawyer A sent an email

solely to Lawyer B, with a copy to Lawyer A's client, then Lawyer B should avoid "replying all" because the only other recipient other than Lawyer A is Lawyer A's client (who should be readily identifiable in the address bar). However, if Lawyer A sends an email to multiple recipients, including her client as a "cc" among others, Lawyer B may be unaware that Lawyer A's client is on the list and it may be unreasonable to expect Lawyer B to search through all the individuals on the cc list to determine if Lawyer A's client is present. Further, if the recipients of Lawyer A's cc's are not visible to Lawyer B, the latter will not be able to know that a person on a cc list is a client of Lawyer A; in answering the email, Lawyer B should not be treated as having communicated with a client of Lawyer A without express prior consent.

• An important factor is the nature of the matter. It is common in some transactional fields of law for both lawyers and clients routinely to cc other lawyers and clients in certain communications related to a transaction, for example circulating revised documents among a transaction team comprised of multiple parties and their lawyers. Absent other circumstances, Lawyer B can rely on that past course of conduct among the lawyers and others involved in a transaction. Nevertheless, the best practice is to raise the issue early in the transaction and gain common consent among the lawyers and their clients—preferably confirmed in writing.

• Lawyers in adversarial matters should always avoid communicating with other lawyers' clients without express permission. Because of the contentious nature of adversarial proceedings, there is a greater risk that such communications could interfere with other lawyers' relationships with their clients and serve to harm those clients' interests. This is of special importance in criminal cases, and prosecutors should always seek express consent from defense counsel before knowingly cc'ing the defendant.

Considering the intent of RPC 4.2, together with the above factors and other relevant facts and circumstances, Lawyer B must make a good faith determination whether Lawyer A has provided implied consent to a "reply all" responsive electronic communication from Lawyer A.
Under no circumstances may Lawyer B respond solely to Lawyer A's client without Lawyer A's prior consent.

Because of the ease with which "reply all" electronic communications may be sent, the potential for interference with the client-lawyer relationship, and the potential for inadvertent waiver by the client of the attorney-client privilege, it is advisable for a lawyer sending an electronic communication and who wants to ensure that her client does not receive any electronic communication responses from the receiving lawyer or parties, to forward the electronic communication separately to her client. Sending a blind copy to the client on the original electronic communication is a potential option; however, because of differences in how various email applications handle bcc commands and replies, it is prudent for a lawyer instead to separately forward an electronic communication to the client. A lawyer also may expressly state to the recipients of the electronic communication, including opposing counsel, that consent is not granted to copy the client on a responsive electronic communication.

To avoid a possible incorrect assumption of implied consent, the prudent practice is for all counsel involved in a matter to establish at the outset a procedure for determining under what circumstances the lawyers involved may "reply all" when a represented party is copied on an electronic communication.

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Discipline Cases

FILED

DEC 19 2013

DISCIPLINARY BOARD

BEFORE THE
DISCIPLINARY BOARD
OF THE
WASHINGTON STATE BAR ASSOCIATION

In re

KATHRYN B. ABELE,

Lawyer (Bar No. 32763).

Proceeding No. 12#00072

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND HEARING OFFICER'S RECOMMENDATION

In accordance with Rule 10.13 of the Rules for Enforcement of Lawyer Conduct (ELC), the undersigned Hearing Officer held the hearing on November 12–15, 2013. Respondent Kathryn B. Abele appeared at the hearing and was represented by Sam Franklin and Natalie Cain. Special Disciplinary Counsel Colin Folawn appeared for the Washington State Bar Association (the Association).

FORMAL COMPLAINT FILED BY DISCIPLINARY COUNSEL

The Amended Formal Complaint filed by Disciplinary Counsel charged Ms. Abele with the following counts of misconduct:

Count I - Engaging in the behavior that resulted in the court finding her in contempt, in violation of RPC 3.4(c), 3.5(d), 8.4(d), and/or RPC 8.4(j).

Count II - Knowingly making a false and/or misleading statement to an officer of the

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Seattle Police Department, in violation of RPC 8.4(b) (by violating RCW 9A.76.175), RPC 8.4(c) and/or 8.4(d).

Count III - Misrepresenting to the court clerk that Michelle King did not wish to pursue the petition for anti-harassment against her clients, in violation of RPC 8.4(c) and/or 8.4(d).

Based on the pleadings in the case, the testimony and exhibits at the hearing, the Hearing Officer makes the following:

FINDINGS OF FACT

1. Respondent was admitted to the practice of law in the State of Washington on November 4, 2002.

2. Respondent has not previously been disciplined.

3. Respondent is a solo practitioner, and her practice is focused exclusively in the area of family law.

4. Respondent represented the father, Frank Jonathan Miller, in *In re the De Facto Parentage and Custody of Mason Miller*, Snohomish County Superior Court Cause Number 09-3-02834-8. Janal Marie Rich represented the de facto father. Richard Llewelyn Jones represented the mother.

5. During pretrial matters, Respondent would slam objects and make loud comments when Judge Farris ruled against her.

6. During the trial, which took place in 2011, Respondent was disruptive during court proceedings, including blurting out remarks about testifying witnesses and other counsel, interrupting opposing counsel and the judge. These comments were not of a private nature made to her client, but rather so that the judge and the other lawyers would hear them. Respondent's pattern of conduct made it difficult for the attorneys representing other parties to examine

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1 witnesses.

2 7. Respondent repeatedly was admonished by the judge to stop interrupting other
3 counsel, but Respondent did not comply, doing this behavior even more. When warned by the
4 judge about making loud statements that interrupted the proceedings, Respondent would falsely
5 say, "I did not say anything." Respondent would refer to the judge's decisions as wrong and
6 stupid in front of court staff.

7 8. Judge Farris observed that Respondent was able to exercise complete control over
8 the volume of her speech, getting loud or soft at will. Respondent was able to say things to her
9 client in a soft tone that Judge Farris could not hear. Respondent got loud because she was
10 angry, not because she did not know that she was being loud.

11 9. During the time this matter was pending, Respondent was abusive to Ms. Rich's staff
12 over the phone. Ms. Rich implemented an office-wide policy of screening Ms. Abele's
13 telephone calls, having them put through to her voicemail,

14 10. In post-trial proceedings, Respondent generally exhibited good conduct until the end
15 of an August hearing that preceded the presentation hearing of September 28, 2011. At the
16 preceding hearing, after Judge Farris would not sign Respondent's proposed findings,
17 Respondent became angry, saying words to the effect of, "We have to take a break now."

18 11. After the judge left the bench, it is undisputed that Respondent made a loud
19 screaming noise that could be heard in other rooms of the courthouse. There was conflicting
20 testimony on the cause of this and it remains unclear. Judge Farris herself was not present in her
21 courtroom at the time and did not find the Respondent in contempt for this scream.

22 12. On September 28, 2011, a two-hour hearing was held to resolve the final parenting
23 plan in *In re the De Facto Parentage and Custody of Mason Miller*. Ms. Rich was present. Mr.

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1 Jones attended the hearing by phone. When Respondent interrupted the court, Judge Farris
2 asked Respondent not to. When Respondent persisted, Judge Farris stated on the record her
3 impressions of the scream Respondent made after the end of the August hearing. At this point,
4 Respondent interrupted at a high volume, further disrupting the proceeding.

5 13. A member of the Snohomish County Superior Court bench since March, 1994, Judge
6 Farris was concerned about Respondent's pattern of behavior and hoped that a warning would
7 prevent further transgressions. Respondent's interruptions prevented the judge from
8 accomplishing this or making the necessary changes in the parenting plan.

9 14. Sheralyn Barton was the court reporter that day. Unbeknownst to Respondent, a
10 backup system in Ms. Barton's court reporting equipment audio-recorded the proceedings.
11 Respondent did not learn of this until part way through her deposition in these disciplinary
12 proceedings.

13 15. Once Respondent began screaming at the hearing on September 28, 2011, Judge
14 Farris asked for security to be called. Respondent turned to face the courtroom door, began to
15 walk, and yelled, "I'm going to jail, I'm going to jail!" Respondent repeatedly placed her hands
16 above her head, crossed at the wrists or with her wrists close so as to reflect being handcuffed.
17 Respondent dramatically rocked her hands around, making occasional upward body thrusts with
18 a motion and speed similar to calisthenics. Respondent's later testimony was not credible that
19 she placed her hands in a prayerful position and said the words, "I'm going to jail," in the form
20 of a question,

21 16. While the court was still in session, Respondent abruptly exited the courtroom,
22 causing the proceedings to come to a halt. The court then took a recess. Respondent re-entered
23 the courtroom, told Ms. Rich that she was abstaining from further proceedings and then left
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1 again.

2 17. Security was asked to locate Respondent and bring her back to the courtroom. When
3 approached by Marshal Miles, Respondent was angry and stated that she would not do so.
4 Notwithstanding her words, Respondent voluntarily returned to the courtroom. Marshals Miles
5 and Hayes followed her in.

6 18. When the hearing reconvened, Respondent continued to talk in a loud voice,
7 interrupting the court multiple times, despite being requested to stop. Marshal Miles saw furtive
8 looks of concern on the faces of court staff, but did not take further action at that time.
9 Respondent yelled loudly to demonstrate what it sounded like when she really yells. Respondent
10 continued to display loud, disrespectful conduct, interrupting the judge, waving her arms around
11 in a histrionic and defiant manner. She defiantly invited being taken away in handcuffs.

12 19. An order was entered finding Respondent in contempt of court for her conduct on
13 September 28, 2011. Respondent was ordered to purge her contempt by contacting the Lawyers'
14 Assistance Program (LAP). While Respondent stated that she would not do this, she in fact did
15 comply with this order of Judge Farris in a timely manner.

16 20. Judge Farris's discipline of the Respondent in her courtroom was triggered by the
17 accumulation and continuation of prior problems during the trial of the same matter, primarily
18 Respondent's loud running commentary that disrupted the proceedings. Judge Farris never had
19 seen this kind of conduct from a lawyer before. In her nearly 20 years on the bench, Judge
20 Farris only has held two lawyers in contempt. Respondent's was the only one that remained
21 until it was purged by her contacting the LAP.

22 21. Respondent's conduct made the court staff ill at ease, unsure what to expect from
23 her. Court reporter Sheralyn Barton never had seen this kind of conduct in an attorney before.

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22. Respondent has represented many times that she has a hearing disability. However, throughout the trial and subsequent proceedings, Respondent demonstrated the ability to deliberately modulate the volume of her voice. She presented no medical evidence to support her claim of a hearing disability. She was observed during these disciplinary proceedings communicating with her counsel in low voices that could not be heard by others. Respondent had the ability to control the volume of her voice at the September 28, 2011, hearing and her testimony to the contrary is not credible.

23. Respondent's conduct adversely affected the proceedings before Judge Farris, requiring recess, security, and extensive colloquy that would not have otherwise been necessary. Her behavior was not necessitated in any way by the conduct of the court. Judge Farris spoke to the Respondent in a calm, low-key manner, trying to secure her compliance with basic decorum.

24. After the hearing, Respondent exited the courtroom and yelled, "that bitch!"

25. Ms. Rich, who had been present for the entirety of the hearing, requested an escort from one of the marshals, shaken by Respondent's conduct at this hearing.

26. Directly after the September 28th hearing, Respondent went to the Snohomish County Bar Association office, continuing to behave in an agitated, unprofessional manner, swearing at one of the marshals at one point.

27. Respondent timely purged the contempt by contacting the Lawyers' Assistance Program.

28. Respondent's conduct on September 28, 2011, was intentional. She decided to not obey the tribunal. She walked out of the courtroom during the proceedings. She repeatedly interrupted the judge during the hearing on or about September 28, 2011. In addition, the audio recording (Exhibit A-2) and the testimony of witnesses demonstrate that Respondent

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1 deliberately modulated the volume of her voice for effect. In addition to her voice, Respondent
2 made disruptive physical gestures during the hearing.
3 29. Respondent's conduct on September 28, 2011, caused injury to the legal proceeding
4 because it disrupted—rather forced the abrupt halt of—the proceeding itself. Respondent's
5 conduct also caused potential injury to Respondent's client, because she left the courtroom and
6 thereby potentially subjected her client to a lack of representation during ongoing proceedings
7 for the entry of final orders. Respondent's conduct inside the courtroom fell below the minimum
8 standards of professionalism expected of attorneys. Nothing occurred during the hearing that
9 justified this behavior.
10 30. On or about May 16, 2011, Respondent was representing a client at the King County
11 Courthouse. King County Sheriff's Court Marshal Samuel Copeland was dispatched to Room
12 W-278 for standby backup. Upon arriving, the bailiff pointed out the Respondent as a subject of
13 concern. Marshal Copeland observed at the back of the courtroom for about ten minutes. The
14 Respondent went in and out several times. When he heard a loud, agitated female voice in the
15 hallway, Marshal Copeland went out to investigate. He encountered Respondent and asked her
16 to quiet down. Respondent was angry at this, believing it infringed on her prerogatives as an
17 attorney.
18 31. Marshal Copeland told Respondent that she would be asked to leave if she continued
19 to be loud and disruptive. Marshal Copeland then decided to stop the exchange and leave the
20 area, in order to de-escalate the situation.
21 32. While Marshal Copeland was on his way to the 4th Avenue security checkpoint,
22 Respondent re-engaged him by the central elevator bank and yelled at him. Among other things,
23 Respondent said words to the effect of, "someone should fart in your face!" Marshal Copeland
24

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1 disengaged a second time from Respondent and walked down to the security checkpoint, where
2 Marshal Greg Webb was present. Marshal Webb had never met Respondent before. Respondent
3 then followed Marshal Copeland, over to where Marshal Webb was seated.

4 33. Respondent, seeing the stripes on Marshal Webb's uniform, believed that he was
5 Marshal Copeland's superior. When Respondent approached Marshal Webb, she was animated,
6 loud, and aggressive. Respondent conveyed that she was upset with Marshal Copeland. After
7 listening to Respondent for a short time, Marshal Webb told Respondent to go about her
8 business. Respondent told Marshal Webb that he had to speak with her, and he responded that
9 he did not have to.

10 34. During this conversation, Marshal Webb was seated with his back against the
11 hallway wall, and Marshal Copeland was facing him, standing about one foot away from
12 Marshal Webb. Marshal Webb is about 6'2" tall. The seat of the stool was about 30" from the
13 floor. The front of the podium was not touching the hallway wall and was about 1–2 inches
14 away.

15 35. Following Marshal Webb's statement to Respondent that she should go about her
16 business, despite the fact that there was ample room (about six to eight feet) in the hallway to
17 walk around them, Respondent deliberately pushed between them. Just before doing so,
18 Respondent yelled, "Are you going to get out of my way?"

19 36. Respondent's choice of aggressively coming in between the narrow space between
20 Marshall Webb and Marshall Copeland caused Respondent to brush Marshal Copeland's body
21 and Marshal Webb's knee. When Respondent's body pushed Marshal Copeland, she caused him
22 to move.

23 37. Immediately thereafter, Respondent turned counterclockwise to face Marshal
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1 Copeland. She then pointed at Marshal Webb and yelled at him, falsely accusing him of trying
2 to trip her.
3 38. Marshal Webb did not extend his leg or try to trip Respondent. Respondent did not
4 stumble or fall.
5 39. Respondent knew that Marshal Webb did not trip her, but was angry at him for
6 failing to take action on her complaints against Marshal Copeland after their interaction in the
7 hallway outside W-278.
8 40. The surveillance video from the courthouse (Exhibit A-6) does not support
9 Respondent's claim that she was tripped. Respondent's version of the incident is not credible.
10 Respondent's interactions and behavior with Marshal Copeland and Marshal Webb
11 demonstrates that Respondent was the aggressor, moving into them when there was ample room
12 to take another route in the hallway.
13 41. Soon thereafter, Respondent called 911 using her mobile phone. Seattle Police
14 Officer Ritter arrived, and Respondent reported that Marshal Webb intentionally tripped her.
15 This statement was false and misleading.
16 42. An internal investigation was conducted because of Respondent's false report.
17 Marshal Webb received a letter stating that Respondent's charge was unsubstantiated.
18 43. Respondent offered telephonic testimony from a man named Rakesh Pai, who
19 claimed to have witnessed Marshal Webb trip Respondent. Contrary to the surveillance video,
20 Mr. Pai testified that Ms. Abele got tripped "a little bit" and held onto the metal detector post or
21 the security bar. The surveillance video demonstrates that the metal detector and security station
22 were several feet from where the incident occurred and that Respondent could not have held
23 onto them. Mr. Pai's testimony was not credible.
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1 44. Respondent's conduct on May 16, 2011, was intentional. She knowingly gave a false
2 report to law enforcement personnel, falsely accusing Marshal Greg Webb of assault.
3 Respondent was not tripped, and she knew that she had not been tripped. In addition, the
4 surveillance video and testimony of witnesses demonstrates that Respondent deliberately sought
5 multiple exchanges with the Marshals in order to justify the filing of a complaint against one or
6 both of them.

7 45. Respondent's conduct on May 16, 2011, wasted law enforcement resources and
8 subjected Marshal Webb to an internal investigation that never should have taken place.

9 46. Respondent's conduct on May 16, 2011 also injured the image of the legal
10 profession. Respondent's conduct inside and outside of the courtroom was far afield from the
11 minimum standards of professionalism expected of attorneys. The image of the legal profession
12 is clearly damaged when lawyers are not truthful. Respondent's actions also adversely reflect on
13 her fitness to practice law.

14 47. Several aggravating factors apply in this matter. Respondent demonstrated a
15 dishonest or selfish motive by interrupting the judge, yelling in court, walking out of court, and
16 submitting a false police report. There are multiple offenses in this case. Respondent has
17 substantial experience in the practice of law (*i.e.*, between nine and ten years of practice at the
18 time of the misconduct). In addition, Respondent refused to acknowledge the wrongful nature of
19 conduct; Respondent's explanations of and excuses for her conduct were not credible.

20 48. One mitigating factor applies in this matter: Ms. Abele does not have a prior
21 disciplinary record. Respondent has the burden of proving mitigation. But Respondent did not
22 prove, with admissible evidence, any other basis for mitigation.

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61. Based on the ABA Standards and the applicable aggravating and mitigating factors, the Hearing Officer recommends that Respondent Kathryn B. Abele be suspended for a period of twelve months.

62. Additionally, the Hearing Officer recommends that, as a condition precedent to reinstatement, Respondent must undergo a fitness to practice evaluation and be deemed fit to practice law, and she also must bear all costs relating to the fitness to practice evaluation.

63. Additionally, the Hearing Officer recommends that Respondent must reimburse the Association's costs incurred in this matter.

Dated this 18th day of December, 2013.

William S. Bailey

William S. Bailey, WSBA No. 7307
Hearing Officer

CERTIFICATE OF SERVICE

I certify that I caused a copy of the FOF, COL & HO's Recommendation to be delivered to the Office of Disciplinary Counsel and to be mailed to [illegible] Respondent/Respondent's Counsel at [illegible] by Certified/first class mail postage prepaid on the 19th day of December, 2013

[illegible]

Clerk/Counsel to the Disciplinary Board

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NOV 02 2017

BEFORE THE
DISCIPLINARY BOARD
OF THE
WASHINGTON STATE BAR ASSOCIATION

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In re STEVEN W. KIM, Lawyer (Bar No. 31051).	Proceeding No. 17#00069 ODC File No. 16-01384 STIPULATION TO REPRIMAND

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Under Rule 9.1 of the Rules for Enforcement of Lawyer Conduct (ELC), the following Stipulation to reprimand is entered into by the Office of Disciplinary Counsel (ODC) of the Washington State Bar Association (Association) through disciplinary counsel Debra Slater and Respondent lawyer Steven W. Kim.

Respondent understands that he is entitled under the ELC to a hearing, to present exhibits and witnesses on his behalf, and to have a hearing officer determine the facts, misconduct and sanction in this case. Respondent further understands that he is entitled under the ELC to appeal the outcome of a hearing to the Disciplinary Board, and, in certain cases, the Supreme Court. Respondent further understands that a hearing and appeal could result in an outcome more favorable or less favorable to him. Respondent chooses to resolve this proceeding now by entering into the following stipulation to facts, misconduct and sanction to

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avoid the risk, time, and expense attendant to further proceedings.

I. ADMISSION TO PRACTICE

1. Respondent was admitted to practice law in the State of Washington on May 30, 2001.

II. STIPULATED FACTS

2. On Saturday, July 30, 2016, 19 year old Allen Ivanov shot and killed three people and wounded a fourth.

3. On the same date, Respondent met with Ivanov's parents and was hired to represent Ivanov in criminal proceedings in Snohomish County Superior Court.

4. Ivanov's mother gave Respondent a copy of a two page letter that had been written by Ivanov before the shootings. The letter identified family and friends, with a brief statement about each of them and appeared to be a "good-bye" letter that reflected that the shootings were premeditated. The letter also reflected that Ivanov was suicidal.

5. After being hired, Respondent met with Ivanov, who was in custody in the Snohomish County jail.

6. Respondent did not discuss the "good-bye" letter with Ivanov, nor did Ivanov give Respondent permission to provide the letter to the police or the press.

7. On July 31, 2016, Respondent spoke with Detective Walvatne of the Snohomish County Sheriff's office. Detective Walvatne told Respondent that the "good-bye" letter had to be turned over to investigators at the Mukilteo Police Department, the lead investigative agency on the case.

8. Shortly thereafter, Ivanov's parents decided to hire different lawyers and terminated Respondent.

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9. On Monday, August 1, 2016, Respondent went to the Snohomish County jail to again meet with Ivanov. Ivanov confirmed that Respondent had been terminated.

10. A KIRO 7 news reporter was outside the jail. Kim participated in an interview with the reporter and showed Ivanov's "good-bye" letter to the reporter. Respondent displayed the letter and allowed the reporter to photograph it.

11. On the same day, Respondent was interviewed in his home by a Q13 television reporter. The interview was broadcast on the 11:00 p.m. news that night. Respondent gave a copy of the "good-bye" letter to the reporter, who displayed the letter on camera. Respondent described the contents of the letter and the reporter read portions of the letter on camera.

12. After the interview aired, a Q13 in-studio reporter commented on the interview, saying that the victims' families "certainly believed there was premeditation."

13. Excerpts from the interview appeared on Q13's website. A copy of the "good-bye" letter was included on the website.

14. A copy of the "good-bye" letter also appeared on the King5 website.

15. On August 2, 2016, Respondent was interviewed by Dori Monson on KIRO radio.

16. During the Monson interview, Monson inquired about the "good-bye" letter. Respondent told Monson that the letter had been given to him by Ivanov's mother and that after reading it, he felt he needed to provide it to the police because it showed Ivanov was suicidal.

17. Respondent provided a copy of the letter to Monson, who then read excerpts to which Respondent responded.

18. Respondent also spoke with a Seattle Times newspaper reporter. He confirmed that he had received the "good-bye" letter from Ivanov's mother.

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1 19. On Tuesday, August 2, 2016, Respondent met with Detective Ernst of the
2 Mukilteo Police Department and provided the "good-bye" letter to the police. The letter did
3 become a public record

4 ## III. STIPULATION TO MISCONDUCT

5 20. By revealing information relating to his representation of Ivanov without Ivanov's
6 informed consent, Respondent violated RPC 1.6 and RPC 1.9

7 21. By participating in interviews and providing the "good-bye" letter to the media
8 when there was a likelihood that such disclosures would materially prejudice Ivanov's
9 criminal case, Respondent violated RPC 3.6.

10 ## IV. PRIOR DISCIPLINE

11 22. Respondent has no prior discipline.

12 ## V. APPLICATION OF ABA STANDARDS

13 23. The following American Bar Association Standards for Imposing Lawyer
14 Sanctions (1991 ed. & Feb. 1992 Supp.) apply to this case. Copies of the pertinent ABA
15 Standards are attached hereto as Exhibit A.

16 24. ABA Standard 4.2 applies to violations of RPC 1.6 and RPC 1.9.

17 25. Respondent acted knowingly when he revealed information about his
18 representation of Ivanov. There was potential injury to Ivanov in that the "good-bye" letter
19 could be construed as evidence of premeditation, which would harm Ivanov's case.

20 26. The presumptive sanction for Respondent's violations of RPC 1.6 and RPC 1.9 is
21 suspension.

22 27. ABA Standard 7.0 applies to violations of RPC 3.6. Respondent acted knowingly
23 when he participated in interviews with reporters and provided the "good-bye" letter to them.

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There was potential injury to Ivanov. However, there was no actual injury to Ivanov as he pleaded guilty to the charges.

28. The presumptive sanction for Respondent's violation of RPC 3.6 is suspension.

29. The following aggravating factors apply under ABA Standard 9.22:

(i) substantial experience in the practice of law [Respondent was admitted to practice in Washington in 2001].

30. The following mitigating factors apply under ABA Standard 9.32:

(a) absence of a prior disciplinary record;
(g) character or reputation [Respondent was invited by the South Korean government to teach Korean prosecutors trial practice skills and to lecture on the American Criminal Justice System in anticipation of South Korea's adoption of a grand jury system];
(l) remorse.

31. It is an additional mitigating factor that Respondent has agreed to resolve this matter at an early stage of the proceedings.

32. Based on the factors set forth above, the mitigators outweigh the aggravators and the presumptive sanction should be mitigated to reprimand.

VI. STIPULATED DISCIPLINE

33. The parties stipulate that Respondent shall receive a reprimand for his conduct.

VII. RESTITUTION

34. No restitution is indicated in this case.

VIII. COSTS AND EXPENSES

35. In light of Respondent's willingness to resolve this matter by stipulation at an early stage of the proceedings, Respondent shall pay attorney fees and administrative costs of $825 in accordance with ELC 13.9(i). The Association will seek a money judgment under ELC 13.9(l) if these costs are not paid within 30 days of approval of this stipulation.

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