



**BENTON-FRANKLIN COUNTY  
BAR ASSOCIATION'S**

**13<sup>TH</sup> ANNUAL FEDERAL CIVIL  
TRIAL PRACTICE SEMINAR**

**MAY 17, 2019**



## BFCBA Federal Civil Trial Practice Seminar

Friday, May 17, 2019

U.S. District Courthouse, Richland

Time	Topic	Speakers	Location	Introduction
8:00 a.m.	Check In		Lobby	Brian Doyle
8:30 a.m.	Welcome		Auditorium	Brian Doyle
8:35 a.m.	Cases and Rules Update	Judge Shea, Reina Almon, Aileen Kim, Maia Robbins, Michael Vander Giessen	Auditorium	Brian Doyle
9:45 a.m.	Trios Bankruptcy: History in our Backyard	Jack Cullen, Ragan Powers	Auditorium	Rob McMillen
10:30 a.m.	Break			
10:45 a.m.	Swearing in of New Attorneys	Judge Tallman	Courtroom 189	Brian Doyle
11:00 a.m.	Navigating Peremptory Challenges in Federal and State Courts	Judge Ekstrom, Judge Mendoza, Jr., Diana Ruff, Jeff Feldman	Courtroom 189	Bret Uhrich
12:00 p.m.	Lunch		Red Lion	
12:35 p.m.	Update as to Ninth Circuit, FBA, and Lawyer Reps	Erika Hartliep, Kammi Mencke Smith	Red Lion	Erika Hartliep
12:45 p.m.	Ethical Concerns: Social Media and Marketing	Brian Davis, Jeanne Marie Clavere	Red Lion	Brian Davis
1:45 p.m.	Return to Courthouse			
2:00 p.m.	Ask-the Judges Panel	Moderator: Erika Hartliep Senior Judge Nielsen, Senior Judge Tallman, Judge Eric Miller	Auditorium	Erika Hartliep
3:00 p.m.	Cookie Break			
3:15 p.m.	Mediation: from Start to Finish	Moderator: Brian Doyle Judge Dimke Gary Bloom, Chad Mitchell	Auditorium	Brian Doyle
4:15	Adjourn → Social			Brian Doyle



## Cases and Rules Update

8:35 a.m.  
(Auditorium)

**Speaker:**

**Reina Almon**

***Knighton v. Cedarville Rancheria of Northern Paiute Indians*, 2019 WL 1781404  
(9th Cir. 2019)**

**Subject Matter**

- Tribal jurisdiction

**Issue**

Did the Cedarville Rancheria Tribal Court (“the Tribe”) have jurisdiction over Duanna Knighton, a former employee of the Cedarville Rancheria Tribe who was not a member of the Tribe for a civil cause of action arising on tribal lands?

**Holding**

Yes. The Tribe has jurisdiction over Knighton pursuant to its inherent sovereign power to exclude nonmembers from tribal lands. Alternatively, the tribe has jurisdiction pursuant to its inherent power to promote tribal self-government and control internal relations.

**Summary**

Duanna Knighton was employed as a Tribal Administrator by the Tribe from 1996 until her resignation in March 2013. She is not a member of the Tribe. From 2009 to 2016, Knighton also served as an employee of RISE, a California non-profit organization. RISE is not affiliated with the Tribe. In 2009, Knighton, as Tribal Administrator, acted as the negotiator when the Tribe purchased a building in Alturas, California from RISE. Knighton did not disclose her employment with RISE, nor did she disclose that she had agreed to split the profits of the sale of the building with RISE. She allegedly represented to the Tribe that the building was listed at a bargain price, but the building was actually priced over its market value. Knighton also allegedly violated various other Tribal policies and procedures during her employment, including investing the Tribe’s money in high risk investments that subsequently lost significant value.

The Tribe filed a complaint in the Tribal Court against Knighton. The Tribal Court stayed the case to allow Knighton to contest jurisdiction in the United States District Court for the Eastern District of California. The district court concluded that the tribal court had jurisdiction according to its inherent power to exclude nonmembers from reservation lands.

The Ninth Circuit affirmed the district court’s conclusion that the tribal court had jurisdiction according to its inherent power to exclude. The Ninth Circuit stated that the Tribe’s exclusionary powers necessarily include the lesser power to adjudicate any regulations on conditions on entry, continued presence, and reservation conduct. The only exception to this, is if there are significant state interests in adjudicating the matter, which was not the case here. Therefore, the Tribal Court had adjudicatory authority to regulate Knighton’s conduct that occurred on tribal lands during her employment. In the alternative, the Ninth Circuit held that the Tribe had jurisdiction separately under its inherent powers to protect its self-government

and control internal relations because Knighton was an employee of the Tribe and had engaged in behavior that impacted the economic security of the tribe.

The Ninth Circuit recently approved Knighton's petition for rehearing.

**Takeaways:**

- Tribal jurisdiction over nonmembers on tribal lands stems from a tribes' inherent power to exclude nonmembers from tribal lands, as well as the tribes' inherent powers to protect self-government and control internal relations.
- The only exception to this is if there is a competing state interest in adjudication.
- Watch out for developments in this case from the Ninth Circuit, as Knighton's petition for rehearing was granted.

## ***Holzhauser v. Rhoades*, 899 F.3d 844 (9th Cir. 2018)**

### **Subject Matter**

- Negligence
- Personal injury

### **Issue**

If a boat owner allows a passenger to operate his or her boat, is the boat owner liable if the passenger negligently operates the boat?

### **Holding**

Once a boat owner entrusts the operation of his or her boat to a competent individual, the boat owner owes no duty to keep a lookout for the person operating the boat unless: (1) the boat owner knows the passenger is likely to be careless; or (2) the boat owner and passenger are “jointly operating” the boat immediately preceding any accident.

### **Summary**

A boat owner allowed his friend to drive his speedboat in the bays of San Francisco, California. At times, the boat owner assisted the friend. The friend crashed the speedboat into a ferry and died. The boat owner was severely injured. The friend’s estate sued the boat owner for negligence. The district court granted judgment as a matter of law in favor of the boat owner. The friend’s estate appealed.

The Ninth Circuit noted that in this case, where the boat owner essentially became a passenger in his own boat. The Ninth Circuit has recognized that a passenger has no duty to keep a lookout on behalf of the operator of the boat, except when (1) the passenger knows the boat operator is likely to be inattentive or careless; or (2) the passenger “jointly operated” the boat with the operator, meaning the passenger had active responsibility for and control over certain aspects of navigation of the boat. Here, the boat owner was both the owner and a passenger. The Ninth Circuit noted the tension between the general duty of a boat owner to use reasonable care under the circumstances and a passenger’s presumed lack of a duty to keep a lookout.

The Court held there is no material difference between an ordinary boat passenger and a passenger who owns the boat being used, so long as the boat owner entrusted the boat to a competent individual. Here, the boat owner entrusted the boat to his friend, who was a competent individual. Further, although the boat owner assisted the friend at various points during the trip, the Ninth Circuit held that “joint operation” is not viewed over the course of the entire trip, but immediately preceding the accident. Although the boat owner had assisted the friend earlier in the trip, the boat was not jointly operated immediately preceding the accident.

Therefore, the Ninth Circuit affirmed the district court's grant of judgment as a matter of law in favor of the boat owner.

**Takeaways:**

- A boat owner may avoid liability for his passenger's negligence in operating the boat by entrusting the boat to a competent individual.
- If a boat owner is actively responsible for and retains control over certain aspects of navigation immediately preceding a boating accident, he or she may open the door to liability.

## ***Mann v. County of San Diego*, 907 F.3d 1154 (9th Cir. 2018)**

### **Subject Matter**

- Fourteenth Amendment
- Fourth Amendment

### **Issue**

Was it unconstitutional for San Diego County to subject children to invasive medical examinations under suspicion of child abuse without a court order or parental consent?

### **Holdings**

Yes. San Diego County violated parents' Fourteenth Amendment rights and the childrens' Fourth Amendment rights when it subjected children to invasive medical examinations without a court order or parental consent.

### **Summary**

Mark and Melissa Mann's four children were removed by the San Diego County Health and Human Services Agency from their family home upon suspicion of child abuse. The County then filed a dependency action against the parents. The children were taken to a temporary shelter and subjected to an invasive medical examination, including a gynecological examination, without their parents' knowledge or a court order authorizing the exams. Months later, after a trial, the juvenile court dismissed the dependency petition, concluding it was unsupported by sufficient evidence. Mark and Melissa were never notified that their children had been examined and did not suspect that any medical examination had taken place until one of the children eventually told them.

The Manns brought suit in the U.S. District Court for the Southern District of California against the County alleging Fourth and Fourteenth Amendment violations. The district court granted in part the County's motion for summary judgment and the Mann's cross-motion for summary judgment, concluding that the Fourteenth Amendment required the County to notify Mark and Melissa of the examinations, but the County was not obligated to obtain parental consent or a court order.

On appeal, the Ninth Circuit panel affirmed in part and reversed in part the district court's summary judgment order because the County violated the childrens' Fourth Amendment rights and the parents' privacy rights, which are protected as a matter of substantive due process under the Fourteenth Amendment. Because the examinations were investigatory in part, the County was constitutionally required to obtain parental consent or a court order before performing the invasive exams. The panel stated that the County may only perform invasive medical procedures absent parental consent or a court order in a medical emergency or when there is reasonable concern that material physical evidence might dissipate. Neither exception

applied to the Mann's case because these examinations were routine, irrespective of any medical emergency or need to preserve evidence and the Manns were not suspected of sexually abusing their children.

**Takeaways:**

- The state is required to notify parents or obtain judicial approval before children are subjected to medical examinations.
- However, in cases where sexual abuse is suspected and the state may be concerned that evidence will be destroyed absent an immediate investigation, parental consent may not be necessary.

**Speaker:**

**Aileen Kim**

***NTCH-WA, Inc. v. ZTE Corp.*, No. 17-35833, 2019 WL 1810776  
(9th Cir. Apr. 25, 2019) (publication forthcoming).**

**Subject Matter**

- Choice-of-law
- Preclusion (issue or claim)
- Arbitration awards

**Issue (of first impression)**

Which law determines the preclusive effect of an arbitration award: (1) federal law, (2) the state law where the current federal court sits, or (3) the state law where the federal court confirming the arbitration award sat?

**Holding**

If a federal court sitting in diversity confirms an arbitration award, then the preclusion law of the state where that court sits determines the preclusive effect of the arbitration award.

**Summary**

Plaintiff previously arbitrated claims against ZTE USA, one of Defendant's subsidiaries. Defendant was not a party to that arbitration. The arbitrator denied Plaintiff's claims, the District Court for the Middle District of Florida (sitting in diversity) confirmed the award, and the Eleventh Circuit affirmed.

Plaintiff separately filed a diversity action against Defendant in the Eastern District of Washington. Once the Eleventh Circuit affirmed the arbitration award, the district court granted summary judgment in Defendant's favor and held that the arbitration award precluded Plaintiff from pursuing its current claims. Plaintiff appealed.

The Ninth Circuit affirmed, finding that Florida law applied because a district court in Florida confirmed the arbitration award, and Florida law precluded Plaintiff's claims.

**Lessons**

- Always determine choice-of-law as a threshold question when you deal with diversity jurisdiction.
- If you have the luxury of drafting or negotiating choice-of-law provisions in arbitration clauses, act wisely because there will be no subsequent forum shopping—you are stuck with the state where you arbitrated.

## ***Nutraceutical Corp. v. Lambert, 139 S. Ct. 710 (2019).***

### **Subject Matter**

- Class Actions
- Nonjurisdictional claim-processing rules
- Equitable tolling

To take an immediate appeal from a district court's order granting or denying class certification, a party must first seek permission from the relevant court of appeals "within 14 days after the order is entered." Fed. R. Civ. P. 23(f).

### **Issue**

Is Federal Rule of Civil Procedure 23(f) subject to equitable tolling?

### **Holding**

No. The 14-day deadline is not subject to equitable tolling, even if you act diligently.

### **Summary**

When Respondent's class was decertified by the district court, he informed the court that he wished to move for reconsideration. The court told him to file the motion for reconsideration no later than March 12, which was 20 days after the decertification order. He filed the motion on March 12, and the court denied the motion over a month later.

He then petitioned the Ninth Circuit Court of Appeals for permission to appeal the decertification order. Notwithstanding its untimeliness and over Appellant's objections, the court of appeals equitably tolled the Rule 23(f) deadline because the time limit is "nonjurisdictional." On the merits, the appellate court held that the district court had abused its discretion and reversed the decertification order.

The Supreme Court reversed. While the Court agreed that Rule 23(f) is nonjurisdictional, it noted that some nonjurisdictional claim-processing rules, when properly raised by an opposing party, are "mandatory" and thus, not susceptible to any equitable remedies such as tolling. Whether a rule precludes equitable tolling turns on the text of the applicable rule or rules, not whether it is jurisdictional or not. "Where the pertinent rule or rules invoked show a clear intent to preclude tolling, courts are without authority to make exceptions merely because a litigant appears to have been diligent, reasonably mistaken, or otherwise deserving."

Here, the rules make clear that the deadline for the precise type of filing at issue may not be extended—so equitable tolling is unavailable even where good cause exists.

### **Lessons**

- Look to the Federal Rules of Civil Procedure, Federal Rules of Appellate Procedure, and any other applicable rules that work in conjunction to determine whether tolling applies.
- Think twice before forfeiting or waiving an untimeliness argument.

***Robles v. Domino's Pizza, LLC, 913 F.3d 898 (9th Cir. 2019).***

**Subject Matter**

- Title III of the Americans with Disabilities Act ("ADA")
- Due process

**Issues**

- (1) Does the ADA apply to Domino's website and app?
- (2) If yes, does that violate Domino's due process rights?

**Holdings**

- (1) Yes, the ADA certainly covers Domino's website and app.
- (2) No, Domino's due process rights were not violated.

"No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation." 42 U.S.C. § 12182.

**Summary**

Domino's has a website and a mobile app that allows customers to locate stores, order food for delivery or carryout, and browse coupons for use. Appellant, a blind man, accesses the internet through screen-reading software. Appellant went to Domino's website to order a customized pizza, but it was not designed in a way where his software could read the text. Consequently, he was unable to order a customized pizza. This happened on at least two occasions.

So, he filed an action under Title III of the ADA. He alleged that Domino's failed to design, construct, maintain, and operate its website and app to be fully accessible for use by him and other visually-impaired people. When the district court granted Domino's motion to dismiss without prejudice, he appealed.

The Ninth Circuit reversed. First, the court noted that the ADA and corresponding Department of Justice ("DOJ") regulations require that a public accommodation furnish appropriate "auxiliary aids and services" including "accessible electronic and information technology" or "other effective methods of making visually delivered materials available to individuals who are blind or have low vision." 28 C.F.R. § 36.303(b)(2), (c)(1). Moreover, because the statute applies to the services of a place of public accommodation, as opposed to services in a place of public accommodation, the court held that the ADA's requirements may certainly extend to websites and apps.

However, there must be a nexus between the goods, services, facilities, privileges, advantages, or accommodations and the physical place of accommodation itself. Here, the alleged inaccessibility of Domino's website and app would impede access to the goods and services offered by the physical stores. Put differently, the website and app are connected to the physical stores because a customer must select a specific store that will make the pizza, deliver

it, or allow for carryout. Thus, the website and app facilitate access to the goods and services of the physical stores—and so, must comply with the ADA.

The court further held that Domino's had fair notice—through DOJ regulations and clarifications—that its website and app must comply with the ADA. Moreover, the fact that the DOJ did not issue regulations specifying technical standards for compliance (i.e., mandating that X, Y, and Z must occur) did not mean that Domino's lacked fair notice of what specifically the ADA requires to make websites and apps accessible. "The Constitution only requires that Domino's receive fair notice of its legal duties, not a blueprint for compliance with its statutory obligations." Thus, the court concluded that Domino's due process rights had not been violated.

Ultimately, the court reversed and remanded so the district court could decide in the first instance whether Domino's website and app comply with the ADA.

### **Lessons**

- A lack of specific agency regulations does not eliminate a statutory obligation.
- If your client utilizes a website and/or app with a plausible nexus to the goods and services offered at a physical place of accommodation, make sure that the website and/or app are ADA-compliant. An example of private guidelines one might look to is Web Content Accessibility Guidelines 2.0, which covers a wide range of recommendations for making web content accessible to people with disabilities.

**Speaker:**

**Maia Robbins**

## ***Stevens v. Jiffy Lube Int'l, Inc.*, 911 F.3d 1249 (9th Cir. 2018)**

### **Subject Matter**

- Federal Arbitration Act (FAA)
- Civil Procedure

### **Issue**

Does Federal Rule of Civil Procedure 6(a) or the FAA govern the calculation of the three-month deadline to petition to vacate an arbitration award?

### **Holding**

Federal Rule of Civil Procedure 6(a) governs.

### **Summary**

The Stevenses operated a service center as Jiffy Lube franchisees. In 2013, Jiffy Lube terminated the franchise agreement with the Stevenses because they lost the lease to their premises. The Stevenses sued Jiffy Lube in the U.S. District Court, but then stipulated to dismissal in favor of arbitration due to a binding arbitration provision. The arbitrator issued a final award in favor of Jiffy Lube on Wednesday, September 14, 2016. On Thursday, December 15, 2016, the Stevenses petitioned the U.S. District Court to vacate the arbitral award under the FAA. The U.S. District Court assumed the petition was timely and denied the petition on the merits. The Stevenses timely filed motions attacking the judgment under Fed. R. Civ. P. 59 and 60, which were denied. The Stevenses appealed. Jiffy Lube argued the petition to vacate the arbitral award was untimely.

The FAA requires notice of a petition to vacate an arbitral award to be “served upon the adverse party or his attorney within three months after the award is filed or delivered.” 9 U.S.C. § 12. The Ninth Circuit held that the Federal Rules of Civil Procedure governed how to calculate these three months because the FAA did not provide procedures for doing so. Because the Stevenses petitioned to vacate the award one day after the deadline calculated under Fed. R. Civ. P. 6(a), the Ninth Circuit affirmed the U.S. District Court’s denial of the petition.

### **Lesson**

Apply Federal Rule of Civil Procedure 6(a) when calculating deadlines for petitioning to vacate an arbitration award:

When the period is stated in days or a longer unit of time [such as months]: (A) exclude the day of the event that triggers the period; (B) count every day, including intermediate Saturdays, Sundays, and legal holidays; and (C) include the last day of the period, but if

the last day is a Saturday, Sunday, or legal holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday.

Fed R. Civ. P. 6(a)(1).

## ***Tunac v. United States*, 897 F.3d 1197 (9th Cir. 2018)**

### **Subject Matter**

- Federal Tort Claims Act (FTCA)
- Subject Matter Jurisdiction
- Statute of Limitations

### **Issues**

- (1) Do U.S. District Courts have jurisdiction over claims alleging (1) negligence by U.S. Department of Veterans Affairs (VA) healthcare employees; and (2) claims regarding negligence in VA operations?
- (2) When does a claim “accrue” for the purposes of filing a timely FTCA claim in the U.S. District Court?

### **Holdings**

- (1) U.S. District Courts have jurisdiction under the FTCA over claims alleging negligence by VA healthcare employees. However, claims brought alleging negligence in VA operations must be brought under the Veteran’s Judicial Review Act (VJRA) pathway.
- (2) A claim accrues when the claimant has knowledge of the injury and its cause, not when the claimant has knowledge of legal fault.

### **Summary**

Petitioner sued the United States in the U.S. District Court pursuant to the FTCA for the wrongful death of her husband and medical malpractice, alleging that the VA and its employees (1) failed to provide her husband with adequate follow-up care and treatment, monitor her husband’s condition, and identify any potential relapses or adverse changes to his health; and (2) failed to provide him with “timely, quality healthcare” by failing to schedule him promptly for an urgent appointment related to his kidney failure. The VA filed a motion to dismiss the complaint, arguing that all claims must be brought under VJRA because they relate to benefits decisions.

The VJRA bars the U.S. District Court from hearing claims relating to the provision of benefits to veterans. Decisions made by the VA Regional Offices and the Board of Veterans’ Appeals may only be reviewed in the U.S. Court of Appeals for Veterans Claims. However, the FTCA gives U.S. District Courts exclusive jurisdiction over “negligent or wrongful” acts by Government employees. The Ninth Circuit in *Tunac* accordingly held that, where as here, when a plaintiff brings an FTCA action against a VA health care employee (medical professionals and support staff) in the U.S. District Court alleging injury from a negligent medical decision, the action may proceed under the FTCA. The VJRA does not govern.

Applying this standard, the Ninth Circuit held that it had jurisdiction over Petitioner's claims that the VA failed to provide her husband with adequate follow-up care, monitor his condition, and identify potential relapses or adverse changes to his health, because these relate to claims of medical negligence by medical professionals. However, to the extent the complaint alleged failure to timely schedule appointments or treatment, the Ninth Circuit held it did not have jurisdiction and such claims must be channeled through the VJRA because they relate to the administration of benefits to veterans.

Finally, the Ninth Circuit held Petitioner's claims were untimely. A plaintiff may only bring a claim under the FTCA if the claim was presented to the appropriate federal agency within two years of the claim's accrual. The Ninth Circuit reiterated prior case law stating that a claim for medical malpractice accrues once the plaintiff has knowledge of the injury and its cause—not when the plaintiff has knowledge or reason to know of legal fault. The Ninth Circuit held that Petitioner's claim accrued, at the latest, when her husband received a letter from the VA urging him to seek treatment for his kidney condition—three weeks after his death. Because she filed her claim five years later, the Ninth Circuit held her claim was untimely.

### **Lessons**

- The U.S. District Court has jurisdiction over claims alleging injury resulting from a Government medical employee's negligent decision under the FTCA.
- The U.S. District Court does not have jurisdiction over claims related to the VA administration of benefits, including issues regarding scheduling.
- A claim accrues in an FTCA medical malpractice case when the claimant has knowledge of the injury and its cause. It does not accrue when the claimant knows or has reason to know of legal fault.

***Redlin v. United States*, No. 17-16963, 2019 WL 1770026  
(9th Cir. Apr. 23, 2019) (publication forthcoming)**

**Subject Matter**

- Federal Tort Claims Act (FTCA)
- Statute of Limitations

**Issues**

- 1) Did Petitioner’s “Supplemental Administrative Claim” qualify as a timely amendment or request for reconsideration of the U.S. Department of Veterans Affairs’ (VA) denial of his original claim?
- 2) Does a subsequent notice or denial of an untimely request for reconsideration from an agency after its final action alter or extend the 6-month deadline a claimant has to file an FTCA action in U.S. District Court?
- 3) Is Petitioner entitled to equitable tolling?

**Holdings**

- 1) **No.** Petitioner’s Supplemental Administrative Claim was not a timely amendment because it was presented to the agency after final denial. The Supplemental Administrative Claim was not a timely request for reconsideration because it was not presented to the agency within 6 months after the agency’s final denial.
- 2) **No.** Any notice or denial of an untimely request for reconsideration or amendment that is issued by the agency after the agency’s final denial does not restart the 6-month statute of limitations for filing the FTCA action in U.S. District Court.
- 3) **No.** Petitioner did not establish that (1) he had been pursuing his rights diligently, and (2) some extraordinary circumstance stood in his way of timely filing the suit.

**Summary**

Petitioner filed a claim with the VA alleging he received improper medical treatment on September 25, 2014. The VA denied this claim on July 14, 2015. Petitioner had until January 14, 2016 to present the VA with a timely request for reconsideration or file an FTCA suit in the U.S. District Court. On January 22, 2016, Petitioner presented the VA with a “Supplemental Administrative Claim” regarding the same incident. The VA responded on February 11, 2016, denying the Supplemental Administrative Claim as an untimely request for reconsideration of his original September 25, 2014 claim. Petitioner filed an FTCA suit in the U.S. District Court within 6 months of the VA’s denial of his untimely request for reconsideration.

The U.S. District Court dismissed the FTCA suit as untimely because, although he had submitted the claim to the federal agency within 2 years of the claim’s accrual, Petitioner failed to file the

suit in the U.S. District Court within 6 months of the VA's final denial of his claim, which occurred on July 14, 2015.

The Ninth Circuit first held that Petitioner's Supplemental Administrative Claim was not a timely amendment of his claim, nor was it a timely request for reconsideration of the VA's final denial. A claim may only be amended "prior to final agency action." Because Petitioner's Supplemental Administrative Claim was presented to the agency after it mailed its final denial, the amendment was not timely. Further, a claimant may only request reconsideration of an agency's final denial within 6 months of the denial. The agency was presented with Redlin's request almost a week after this deadline had passed.

The Ninth Circuit additionally held that the U.S. District Court did not err in dismissing Petitioner's claim as untimely. Once an agency issues its final denial, a claimant has 6 months to either file a request for reconsideration or challenge the denial in federal court. Petitioner argued he timely filed suit because he filed within 6 months of the VA's February 11, 2016 denial of his Supplemental Administrative Claim, despite the fact that he did not file within 6 months of the VA's original July 14, 2015 final denial. The Ninth Circuit disagreed with Petitioner that any subsequent denials of untimely filings after the agency issued its final denial restarted the 6-month statute of limitations for filing suit in the U.S. District Court. The Ninth Circuit therefore held that pursuing further review through an untimely amendment or request for reconsideration does not toll the statute of limitations on filing a claim in the U.S. District Court, reiterating that a claimant must do so within 6 months of the original final denial.

Finally, the Ninth Circuit held that Petitioner was not entitled to equitable tolling. Petitioner's pro se status when filing his original claim with the VA did not count as extraordinary circumstances because he was represented by counsel when his Supplemental Administrative Claim was filed.

### **Lessons**

- A claimant has 6 months after an agency's final denial to file suit in the U.S. District Court. Any subsequent notices or denials of untimely amendments or requests for reconsideration from an agency after its final denial do not restart the 6-month deadline.
- Be timely with amendments to claims and requests for reconsideration of an agency's final denial.
  - Ensure any amendments are received by the agency prior to the agency's final action.
  - Ensure any requests for reconsideration are received by the agency within 6 months of the final denial.
- If a claimant wishes to toll the 6-month statute of limitations for filing an FTCA suit in the U.S. District Court after an agency's final denial, the best course of action is to file a clearly-labeled and timely request for reconsideration. The agency then has 6 months

from the date a request for reconsideration is filed to make a final disposition of the claim, and the claimant has 6 months from the date of the mailing of that final disposition to file suit in the U.S. District Court.

**Speaker:**

**Michael Vander Giessen**

# *Booth v. United States*

914 F.3d 1199 (9th Cir. 2019)

Federal Tort Claims Act  
—  
Claims accruing during  
age of minority  
—  
Statute of limitations  
tolling

## Holding

The Federal Tort Claims Act's ("FTCA") statute of limitations does not toll during the minority of a would-be plaintiff because the FTCA does not provide for minority tolling and minority alone does not merit equitable tolling.

## Summary

The plaintiff claimed the United States negligently caused his father's death in a motor vehicle collision when the plaintiff was nearly age ten. Five years after the collision, the plaintiff's mother, acting as personal representative of the decedent's beneficiaries, filed a claim form with the Federal Highway Administration. When the agency denied the claim, the plaintiff's mother filed a lawsuit against the United States in federal district court. The FTCA's statute of limitations required the plaintiff to present the claim to the agency within two years of accrual and file the lawsuit within six months of the agency's denial of the claim. *See* 28 U.S.C. § 2401(b)

The district court granted the United States' motion to dismiss the case, ruling the plaintiff's claim was barred because it was not presented to the agency until five years after the collision and the FTCA's statute of limitations simply could not be tolled. The Ninth Circuit reversed the district court in light of its recent en banc precedent holding the FTCA's statute of limitations is not jurisdictional and, thus, is subject to equitable

## Practice Pointers

- ⇒ A tort claim against the United States is barred unless it is
  - (1) presented in writing to the appropriate federal agency within two years of the date the claim accrues, and
  - (2) filed in court within six months of the date the agency mails its final denial of the claim.
- ⇒ Neither limitations period tolls during the minority of a would-be plaintiff.
- ⇒ This is contrary to Washington's minority tolling rule. *See* Wash. Rev. Code § 4.16.190(1).

tolling. The Ninth Circuit remanded the equitable tolling issue to the district court.

The Supreme Court took both cases and affirmed the Ninth Circuit, ruling that both the two-year and six-month limitations periods under the FTCA are subject to equitable tolling because they are not jurisdictional. *United States v. Kwai Fun Wong*, 135 S. Ct. 1625 (2015).

On remand, the plaintiff substituted in place of his mother because he had become an adult. The district court then granted the United States' summary judgment motion, ruling the plaintiff's claim was barred because it was not presented to the agency until five years after the collision and no circumstances called for equitable tolling of the FTCA's statute of limitations.

The Ninth Circuit affirmed the district court. In doing so, the Ninth Circuit adhered to its earlier precedents despite the more recent development from the Supreme Court. While the Ninth Circuit acknowledged the new rule that the FTCA's statute of limitations is subject to equitable tolling, it categorically rejected the notion that the minority of a would-be plaintiff is, by itself, enough to trigger such relief.

The Ninth Circuit reasoned that, historically, minority tolling has been available only under express statutory provisions, not under equitable principles. And, as the Ninth Circuit concluded, the FTCA does not provide for minority tolling and state minority tolling statutes do not apply to tort claims against the United States. The Ninth Circuit also concluded the federal tolling provision applicable to non-tort claims against the United States does not apply to tort claims, even though the provision currently appears in the same statute as that establishing the FTCA's limitations periods.

While the Ninth Circuit noted some particular circumstances connected to minority *could* support equitable tolling, it emphasized that minority alone is not the type of extraordinary circumstance required.

⇒ Beware: do not rely on Washington's minority tolling rule in a tort claim against the United States. "State rules on minority tolling do not apply. A court must look to state law for the purpose of defining the actionable wrong for which the United States shall be liable, but to federal law for the limitations of time within which the action must be brought."

⇒ It remains to be seen what, if any, circumstances connected to minority will support equitable tolling. The Ninth Circuit suggested abandonment leaving the minor unprotected, having no personal representative or having one with interests adverse to the minor, or a lack of discoverability due to minority.

# *Anderson v. State Farm Mutual Automobile Insurance Co.*

917 F.3d 1126 (9th Cir. 2019)

28 U.S.C. § 1446(b)(1)

—

Removal to federal court

—

Service triggering thirty-day removal clock

## Holding

Addressing an issue of first impression in the Ninth Circuit, the court held that serving an initial pleading on a defendant's statutory agent for service of process does not trigger the thirty-day clock for removing a civil action to federal court. Instead, the removal clock begins when the defendant actually receives the pleading.

## Summary

The plaintiffs sued the defendant in Washington state court. Because the defendant was an out-of-state insurer, state law designated the Washington State Office of the Insurance Commissioner as its statutory agent for service of process. The plaintiffs served the complaint on the commissioner, who forwarded it to the defendant. The defendant received the complaint four days after the plaintiffs served it on the commissioner.

The defendant removed the case to federal court thirty-one days after receiving the complaint and thirty-five days after the plaintiffs served the complaint on the commissioner. Excluding the weekend on which the deadline fell, removal was timely under the first calculation but untimely under the second calculation.

The Ninth Circuit joined the Fourth Circuit in holding that the thirty-day clock for removing a civil action to federal court began when the defendant actually received the complaint rather than when the statutory agent received the complaint.

## Practice Pointers

- ⇒ In cases initiated by service on a defendant's statutory agent, determine when the defendant actually received the served document before calculating the deadline for filing a notice of removal.
- ⇒ If the law of your state provides that service on a defendant's statutory agent constitutes service on the defendant, this ruling effectively disregards such state law and determines the removal clock does not begin until the defendant actually receives the served document.

The removal statute, 28 U.S.C. § 1446(b)(1), requires that a notice of removal be filed within thirty days after “receipt by the defendant, through service or otherwise, of a copy of the initial pleading.”

The court noted that, as a practical matter, an entity cannot receive anything except through its agents and state law equates service upon the commissioner with service upon the out-of-state insurer. Indeed, this method of service is mandatory under state law.

But, as the court reasoned, the removal statute itself says nothing about service on a statutory agent. Further, a statutory agent fundamentally differs from an agent-in-fact because a defendant has no meaningful say in or control over an agent that the state legislature designates to receive service of process.

The court ultimately concluded that state law does not govern when the removal clock begins. Reviewing legislative history, the court found Congress unambiguously intended to avoid disparate application of the removal statute due to differences in state law. Intertwining the removal statute with state-specific idiosyncrasies would thwart Congress’s aim of ensuring uniform application.

⇒ This ruling applies to all state law “designat[ing] a statutory agent that foreign insurers must authorize to accept for service of process.”

⇒ It remains to be seen how this ruling impacts the law of “[o]ther states, such as California, [that] require foreign insurers to designate an agent, but do not designate who that agent is.”

⇒ It appears that service on a defendant’s statutory agent could constitute actual receipt by the defendant if the statutory agent was also the defendant’s agent-in-fact.

# *Weil v. Citizens Telecom Services Co., LLC*

No. 16-35813, 2019 WL 1891796  
(9th Cir. Apr. 29, 2019)  
(publication forthcoming)

## Holding

A statement by an opposing party's employee is not hearsay if it concerns a matter within the scope of employment and the declarant made it while he or she was still employed by that employer. The declarant need not be in the same position that resulted in the matter being within the scope of employment.

## Summary

The plaintiff sued the defendant for employment discrimination, claiming he was rejected for promotion because of his race and sex. The district court granted summary judgment to the defendant, ruling the plaintiff failed to show pretext because a key statement evidencing discriminatory motive was inadmissible.

The statement was about why the plaintiff was rejected for promotion: "You have three things going against you. You're a former Verizon employee, okay. You're not white. And you're not female." The person who made the statement was, at that time, the defendant's employee. But the statement concerned something that was no longer the declarant's job because she had been moved to a different position within the same company. Further, the declarant did not make the final promotion decision. The district court excluded the statement, reasoning the plaintiff failed to lay an adequate foundation showing it was on a matter within the scope of the declarant's current role.

The Ninth Circuit reversed, holding the plaintiff was not required to lay such a foundation. It was enough that the

Fed. R. Evid. 801(d)(2)(D)

—

Nonhearsay

—

Statement by opposing  
party's employee

## Practice Pointers

- ⇒ A statement is not hearsay and may be admitted against an opposing party if it "was made by the party's agent or employee on a matter within the scope of that relationship and while it existed." Fed. R. Evid. 801(d)(2)(D).
- ⇒ As long as the statement concerns something that was, at one point, within the scope of employment, and as long as the declarant was still employed by the same employer at the time of the statement, it does not matter that the declarant had taken a new position.

declarant made the statement on a matter within the scope of her prior role and while she was still employed by the same company.

The court noted Federal Rule of Evidence 801(d)(2)(D) has only three requirements: (1) a statement by an opposing party's employee or agent that (2) concerns a matter within the scope of the employment or agency relationship and (3) was made while the declarant was still employed by or an agent of the opposing party. "There is no additional requirement that the declarant must still be in the same scope of employment at the moment the statement is made." In other words, Rule 801(d)(2)(D) "does not require that the declarant still be in the same position that resulted in the matter being within the scope of the employment relationship."

As the court reasoned, "a statement may concern a matter within the scope of employment—even though the declarant is no longer involved with that particular matter when the statement is made—so long as the declarant was involved with that matter at some prior point in his or her employment." Further, "a matter may fall within the scope of a declarant's employment even though the declarant did not have final decision-making authority on that matter."

The court concluded Rule 801(d)(2)(D)'s legislative history and intent supports the above interpretation. Since its 1975 enactment through its 2011 amendment, the rule has "required that the declarant's statement be made while the employment relationship existed, not within a specific scope of that relationship."

The court also concluded general agency principles bolster the above interpretation. Neither an employee's knowledge nor loyalty disappears when his or her job description changes. Thus, so long as the employment relationship still exists, an employee's statement is fairly reliable even if he or she is no longer actively involved in the particular matter at issue.

- ⇒ Such a statement is still nonhearsay if offered against an opposing party.
- ⇒ In assessing the admissibility of an employee's statement, narrow your focus to (1) the timeframe the statement addresses; (2) the declarant's job description within that timeframe, even if it subsequently changed; and (3) whether the declarant was still employed at the time of the statement.
- ⇒ Regarding an employee's backward-looking statement, do not distract yourself with the fact that the statement concerns a matter outside the scope of the declarant's current job description.



# Trios Bankruptcy: History in Our Backyard

9:45 a.m.  
(Auditorium)



# Navigating Peremptory Challenges In Federal and State Courts

11:00 a.m.  
(Courtroom 189)



# NAVIGATING PEREMPTORY CHALLENGES IN FEDERAL AND STATE COURT

Hon. Salvador Mendoza; Hon. Alex Ekstrom;  
Prof. Jeffrey Feldman; Diana Ruff



# BATSON V. KENTUCKY

476 U.S. 79, 106 S.Ct. 1712 (1986)

## THREE PART ANALYSIS:

1. Defendant must establish a prima facie case that “gives rise to an inference of discriminatory purpose.”
2. Burden shifts to prosecutor to provide an adequate, race-neutral justification for the strike.
3. Court must then weigh all relevant circumstances and decide if strike was racially motivated.

*Batson*, 476 U.S. at 96-98.



## J.E.B. V. ALABAMA

511 U.S. 127, 114 S.C.T. 1419 (1994)

- Extended protection under *Batson* to peremptory strikes made based on gender
- “Discrimination in jury selection, whether based on race or on gender, causes harm to the litigants, the community, and the individual jurors who are wrongfully excluded from participation in the judicial process.” 511 U.S. at 140.



# SmithKline Beecham Corp. v. Abbott Labs.

740 F.3d 471 (9<sup>th</sup> Cir. 2014)

- Extends *Batson* protection to peremptory strikes made on the basis of sexual orientation
- Traditionally, gays and lesbians have been excluded from civic life and subjected to significant discrimination
- “To allow peremptory strikes because of assumptions based on sexual orientation is to revoke this civic responsibility, demeaning the dignity of the individual and threatening the impartiality of the judicial system.” 740 F.3d at 487.

**MILLER-EL V. DRETKE**  
**545 U.S. 231 (2005)**

**FOSTER V. CHATMAN**  
**\_\_\_ U.S. \_\_\_, 136 S.C.T. 1737**  
**(2016)**

- Both had to do with pretext/patterns of discrimination
- Takeaways:
  - Can't "go fishing" during voir dire with racial minorities to "find a reason" to strike them more than you question non-minorities
  - Evidence that reason(s) for striking a black prospective juror that could equally apply to a nonblack prospective juror who is allowed to serve tends to suggest purposeful discrimination
  - If you highlight/mark the names of only black prospective jurors on your paperwork and put only black jurors on a list of "Definite NOs," the Supreme Court won't believe you later when you offer race-neutral reasons for your strike(s)



# FLOWERS V. MISSISSIPPI

## USSC DOCKET 17-9572

- Oral argument made to the US Supreme Court on March 20, 2019
- Issue is whether lower court properly applied *Batson* during sixth re-trial of Flowers for murder when only one out of six African American potential jurors was allowed to serve, but there were also clear *Batson* violations in all five prior trials.
- Will a prior *Batson* violation stick with a prosecutor forever to give rise to inference in all future cases? Should the court only look at current trial or all prior trials when deciding a *Batson* challenge?



# STATE LAW REVIEW 2013- PRESENT



**STATE V. SAINTCALLE (2013)**  
**CITY OF SEATTLE V. ERICKSON (2017)**  
**GR 37 (2018)**  
**STATE V. JEFFERSON (2018)**

# STATE V. SAINTCALLE

## 178 WN.2D 34 (2013)

This case put practitioners on notice that the WA Supreme Court was (1) supremely unhappy with how *Batson* was working out (or not working out) in combating racial discrimination and (2) that the Supreme Court was itching for a case to change the state *Batson* analysis, but this case was not it.

Justice Gonzalez (concurrency) wants to do away with peremptory challenges entirely.





# CITY OF SEATTLE V. ERICKSON

188 Wn.2d 721 (2017)

- Supreme Court finds a case to amend its *Batson* analysis
- “We amend our *Batson* framework and hold that the peremptory strike of a juror who is the only member of a cognizable racial group constitutes a prima facie showing of racial discrimination requiring a full *Batson* analysis by the trial court.” *Erickson*, 188 Wn.2d at ¶ 2.
- Justice Yu concurs and now also says she wants to eliminate peremptories entirely

# CITY OF SEATTLE V. ERICKSON

“We now follow our signal in *Rhone* (168 Wn.2d 645 (2010)) and adopt a bright-line rule. The purpose of *Batson* is to ensure that jury selection proceedings are free from racial discrimination. To create a prima facie case of racial discrimination, a defendant must first demonstrate that the struck juror is a member of a ‘cognizable racial group.’” 188 Wn.2d at 732.

In Other Words: No pattern is needed (i.e. more than one strike), and does not matter if other racial groups are on the jury. Even one racially motivated strike is too many, and it does not matter who *did* make the jury – it matters who is struck and why.





# GR 37

- Adopted April 2018
- As indicated in *Saintcalle*, the Supreme Court wanted to find a fix to *Batson*, and GR 37 is the result
- GR 37 is the result of input from Justices, work groups, ACLU, prosecutors, defense bar, and individuals and was subject to public comment period

# STATE V. JEFFERSON

429 P.3D 467 (2018)

- Further modification of Washington State's *Batson* analysis
- “[W]e now modify our three-step *Batson* test by replacing *Batson*’s current inquiry at step three with a new inquiry. If a *Batson* challenge to a peremptory strike of a juror proceeds to that third step of *Batson*’s three-part inquiry, then the trial court must ask whether an objective observer could view race or ethnicity as a factor in the use of the peremptory strike. If so, then the strike must be denied and the challenge to the strike must be accepted.” 429 P.3d at 470.





## STATE V. JEFFERSON

- Supreme Court is concerned not with overt racial bias but with unconscious bias
- “Whether ‘an objective observer could view race as a factor in the use of the peremptory challenge ‘ is an objective inquiry. It is not a question of fact about whether a party intentionally used ‘purposeful discrimination,’ as step three of the prior *Batson* test was. It is an objective inquiry based on the average reasonable person – defined here as a person who is aware of the history of explicit race discrimination in America and is aware of how that impacts our current decision making in nonexplicit, or implicit, unstated, ways.” ¶ 62.



# GR 37 and *Jefferson*

- *Jefferson* used identical language from GR 37 to announce the new *Batson* analysis
- Did the WA Supreme Court constitutionalize all or part of GR 37?
- GR 37 was not in effect during *Jefferson*'s trial, but Court applied it anyway essentially
- Does *Jefferson* make GR 37 superfluous a month after it was adopted?

The background of the slide features a complex, abstract pattern of overlapping, curved, and layered shapes in various shades of gray, creating a sense of depth and movement. A prominent white rectangular border is positioned on the left side of the slide. A horizontal bar with a green-to-blue gradient is located at the bottom of the slide, partially overlapping the text area.

## **NAVIGATING PEREMPTORY CHALLENGES: HYPOTHETICALS**

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## General Rules

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### GR 37 JURY SELECTION

(a) Policy and Purpose. The purpose of this rule is to eliminate the unfair exclusion of potential jurors based on race or ethnicity.

(b) Scope. This rule applies in all jury trials.

(c) Objection. A party may object to the use of a peremptory challenge to raise the issue of improper bias. The court may also raise this objection on its own. The objection shall be made by simple citation to this rule, and any further discussion shall be conducted outside the presence of the panel. The objection must be made before the potential juror is excused, unless new information is discovered.

(d) Response. Upon objection to the exercise of a peremptory challenge pursuant to this rule, the party exercising the peremptory challenge shall articulate the reasons the peremptory challenge has been exercised.

(e) Determination. The court shall then evaluate the reasons given to justify the peremptory challenge in light of the totality of circumstances. If the court determines that an objective observer could view race or ethnicity as a factor in the use of the peremptory challenge, then the peremptory challenge shall be denied. The court need not find purposeful discrimination to deny the peremptory challenge. The court should explain its ruling on the record.

(f) Nature of Observer. For purposes of this rule, an objective observer is aware that implicit, institutional, and unconscious biases, in addition to purposeful discrimination, have resulted in the unfair exclusion of potential jurors in Washington State.

(g) Circumstances Considered. In making its determination, the circumstances the court should consider include, but are not limited to, the following:

(i) the number and types of questions posed to the prospective juror, which may include consideration of whether the party exercising the peremptory challenge failed to question the prospective juror about the alleged concern or the types of questions asked about it;

(ii) whether the party exercising the peremptory challenge asked significantly more questions or different questions of the potential juror against whom the peremptory challenge was used in contrast to other jurors;

(iii) whether other prospective jurors provided similar answers but were not the subject of a peremptory challenge by that party;

(iv) whether a reason might be disproportionately associated with a race or ethnicity; and

(v) whether the party has used peremptory challenges disproportionately against a given race or ethnicity, in the present case or in past cases.

(h) Reasons Presumptively Invalid. Because historically the following reasons for peremptory challenges have been associated with improper discrimination in jury selection in Washington State, the following are presumptively invalid reasons for a peremptory challenge:

(i) having prior contact with law enforcement officers;

(ii) expressing a distrust of law enforcement or a belief that law enforcement officers engage in racial profiling;

(iii) having a close relationship with people who have been stopped, arrested, or convicted of a crime;

(iv) living in a high-crime neighborhood;

(v) having a child outside of marriage;

(vi) receiving state benefits; and

(vii) not being a native English speaker.

(i) Reliance on Conduct. The following reasons for peremptory challenges also have historically been associated with improper discrimination in jury selection in Washington State: allegations that the prospective juror was sleeping, inattentive, or staring or failing to make eye contact; exhibited a problematic attitude, body language, or demeanor; or provided unintelligent or confused answers. If any party intends to offer one of these reasons or a similar reason as the justification for a peremptory challenge, that party must provide reasonable notice to the court and the other parties so the behavior can be verified and addressed in a timely manner. A lack of corroboration by the judge or opposing counsel verifying the behavior shall invalidate the given reason for the peremptory challenge.

[Adopted effective April 24, 2018.]

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## Update as to Ninth Circuit and Eastern District of Washington

12:35 p.m.  
(Red Lion)



## **Ethical Concerns: Social Media and Marketing**

**12:45 p.m.  
(Red Lion)**

# **Ethical Concerns: Social Media and Marketing**

**BFBA Federal Civil Trial Practice Seminar**  
**May 17, 2019**

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

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

While in private practice Jeanne Marie appeared before a wide range of courts and tribunals, ranging from Ex Parte hearings to trials on guardianship and criminal issues, and served for many years as a Settlement, Litigation, Adoption, Family Law, Incapacity and Probate Guardian ad Litem in King and Snohomish Counties. Jeanne Marie is Past President of the state Washington Women Lawyers, past Chair of the Washington State Bar Association Elder Law Section and served on the executive committee of the King County Bar Association Guardianship and Elder Law Section. She is a member of the American Bar Association 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 President-Elect of the National Conference of Women's Bar Associations.

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

## **Prudent Social Media Practices for Lawyers**

1. Set office guidelines.
2. Have a purpose.
3. No politics.
4. Keep it professional.
5. Keep it civil.
6. Don't post or write anything that you would not want your first grade teacher to read.
7. Pay attention to security settings.
8. Use it regularly.
9. Stay neutral or positive.
10. Use links.
11. Keep it short.
12. Absolutely never, under any circumstance, provide specific legal advice on social media.

# **ETHICAL CONCERNS: SOCIAL MEDIA AND MARKETING**

**BFBA FEDERAL CIVIL TRIAL PRACTICE SEMINAR  
MAY 17, 2019**

Jeanne Marie Clavere  
Professional Responsibility Counsel  
WSBA Office of General Counsel



# The Virtual World: Online Communications

- **RPC 1.6**
- **RPC 1.1, Comment 8**

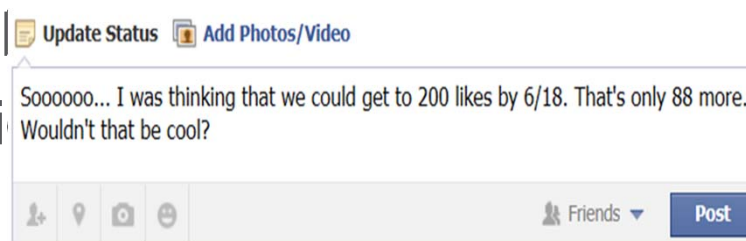
## SOCIAL MEDIA AND OUR CASES

- How much about our jobs can we share via our own social media?
- Can we tweet about our cases, or mention them on Facebook or LinkedIn? If so, what can we say?



## A REAL WORLD EXAMPLE

Facebook post |  
sheriff's campaign  
for reelection:



Judge likes the  
Post.



July 29, 2012

Kansas judge causes stir with Facebook 'like'


The Associated Press

**Was the judge's action ethical? Was it worth it?**


## ANOTHER EXAMPLE

After jury deliberations but before verdict, prosecutor posts a poem on Facebook to the tune of Gilligan's Island:

- Just sit right back and you'll hear a tale, a tale of a fateful trial that started from this court in St. Lucie County. The lead prosecutor was a good woman, the 2nd chair was totally awesome. Six jurors were ready for trial that day for a four hour trial, a four hour trial.
- The trial started easy enough by then became rough. The judge and jury confused, If not for the courage of the fearless prosecutors, the trial would be lost, the trial would be lost. The trial started Tuesday, continued til Wednesday and then Thursday With Robyn and Brandon too, the weasel face, the gang banger defendant, the Judge, clerk, and Ritzline here in St. Lucie.




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Attention Female Lawyers - Apply to the Worldwide Who's Who network for Success



**Jane Train**  
Attorney at Attorney at Attorney at Law Office 1 2 3  
Seattle, Washington | Law Practice

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Activity


Share an update...

Jane Train


Recent Verdict! In a case tried before Judge Smith, a jury awarded my client \$1,454,360 because her employer failed fully to accommodate her disability. This is the largest verdict awarded in King County in a case solely involving disability accommodation.

Like • Share • 4 days ago

Background




Search for people, jobs, companies, and more...




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Attention Female Lawyers - Apply to the Worldwide Who's Who network for Success



**Jane Train**  
Attorney at Attorney at Attorney at Law Office 1 2 3  
Seattle, Washington | Law Practice

Background



Summary


I represent employees in wide range of disputes with employers. I have a specialty in wage and hour claims, such as failure to calculate overtime properly. My practice also includes claims for failure to promote or for discipline (including termination) based on disability, gender, race or membership in other protected classes.

I get results! Some examples of my jury verdicts:


- \*Insurance company failed fully to accommodate employee with multiple sclerosis - \$1,454,360
- \*Company terminated sales person for questioning legality of commission formula and refused to pay earned commission - \$217,600
- \*Former employer refused to pay full amount of former employee's deferred salary - \$62,989.42
- \*Supervisors and officers discriminated against female volunteer firefighter and terminated her employment in retaliation for her complaints - \$61,000
- \*Sales associated assaulted manager and employee fired battered manager for insisting on medical attention - \$113,200

I represent employees working in a wide range of industries, from education to healthcare to manufacturing. My clients have included many prominent figures such as the marketing director of a leading internet retailer, the chief financial officer of a prominent outdoor retailer, and the athletic director of a university in the Pac-12.

WASHINGTON STATE  
BAR ASSOCIATION




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**Jane Train**  
Attorney at Attorney at Attorney at Law Office 1 2 3  
Seattle, Washington | Law Practice

Improve your profileEdit

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Honors & Awards

Avocado Rating – 9.1 out of 10

Kale Peer Review Rating – 4.2 out of 5


My expertise is greater than that of the average Washington lawyer.



Additional Info

**Advice for Contacting Jane**


If you are a prospective client, please note that contacting me through LinkedIn might not be confidential. Please call me at 206-123-4567.



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**Jane Train**  
Attorney at Attorney at Attorney at Law Office 1 2 3  
Seattle, Washington | Law Practice

Improve your profileEdit

1 connection

RecommendationsReceived (1)

**Attorney**  
Attorney at Attorney at Law Office 1 2 3



**Courtney Dann**  
Marketing and Business Development Specialist || Garvey Schubert Barer Law

“ Jane Train represented me in an age discrimination case against an employer that passed me over for promotion four times, each time promoting a younger and less capable person. The employer resisted providing documents, but Jane won every discovery motion and even got the judge to impose penalties on the employer! Once all the documents were produced, the employer caved. I got a great settlement (amount confidential) without going to trial! [less](#)”

September 27, 2013, Courtney was Jane's client

## “FRIENDS” AND “CONNECTIONS”

When is it appropriate, if ever, to “friend” the following on Facebook? Or “connect” on LinkedIn?

- Judge
- Opposing counsel
- Client representative
- Witness

**Linked** 



# **“FRIENDS” AND “CONNECTIONS”**

## **Pretexting**

An opposing party joins a listserv with false credentials and identification to gather information about cases in active litigation.

- RPC 8.4; 4.4; 4.2; 4.3; 5.3

# ENDORSEMENTS AND RECOMMENDATIONS

- Can attorneys endorse our colleagues on LinkedIn? What about judges?
- Can we “recommend” other attorneys (write something substantive)?



# RESPONDING TO NEGATIVE REVIEWS

- Review RPC 1.6
- Be proportionate and restrained. Do not exceed what is necessary to respond to the review.
- If the post is false or defamatory, consider other options.
- Don't get defensive. Think of future readers when writing the review, rather than the original reviewer.

# ETHICS OF EMAIL

- What are the risks of using email, texts, etc. to communicate with judges, opposing counsel, clients, prospective clients, and witnesses?
- Best practices to avoid misuse?



# The Real World of Communications

# COMMUNICATIONS WITH JUDGES

- What do we say if we run into a presiding judge outside of the courtroom?
- If we know a judge socially, what course of action should we take if the judge is assigned to one of our cases?
- How should we respond if a judge approaches us and begins talking about a case?



# COMMUNICATIONS WITH POTENTIAL CLIENTS

- How can we effectively advertise and market during our conversations with potential clients without running afoul of ethical rules?



# COMMUNICATIONS WITH OTHER ATTORNEYS

- What can we say or not say when we are interviewing to move to a competing law firm or company?
- What level of detail can we use when seeking advice from attorneys outside our own firm or company?



## LISTSERV TIPS

- Do not post anything that could reveal your client's identity.
- It doesn't matter if the information is already public.
- The more novel the issue, the more likely it is that it could be recognized.
- Remember that your post is permanent – and discoverable.
- Go offline.

# LISTSERV ISSUES

- Plaintiff/Petitioner's counsel sharing names and information about a case/issue being discussed on the listserv with the defense/respondent attorney on the matter.
- Defense counsel sharing identifying details about a case/issue where counsel for co-defendants on the case are online.

## THIRD PARTY REQUESTS FOR INFORMATION

- What if I am audited by the State Revenue Office or the Internal Revenue Service – do I have to protect any information before I provide my records?
- What if my former client's file is being subpoenaed in an ancillary action? Does it make any difference if the former client is deceased?



## WHEN CLIENT RELATIONSHIPS DETERIORATE

- If my client fires me and begins to state to the Court and to others mistruths about errors or misrepresentations I made during my representation, how much can I disclose to defend myself?
- If I withdraw because my client has stopped paying me, should I disclose this to the Court if I am questioned?



## COMMUNICATIONS ABOUT CRIME

- Who should I talk to and how much should I say if I learn my client has committed perjury during a proceeding or representation?
- What do I do when my client is incarcerated and they tell me they plan to kill or seriously injure a third party? What if they threaten me?



## ADVISORY OPINION REVIEW

- See <http://mcle.mywsba.org/IO/> for Advisory Opinions
- Ethics Line: 1-800-945-9722 ext. 8284



# **Washington Rules of Professional Conduct**

**RPC 1.1  
COMPETENCE**

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

**Comment**

*Legal Knowledge and Skill*

[1] In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.

[2] A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.

[3] In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation or association with another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances, for ill-considered action under emergency conditions can jeopardize the client's interest.

[4] A lawyer may accept representation where the requisite level of competence can be achieved by reasonable preparation. This applies as well to a lawyer who is appointed as counsel for an unrepresented person. See also Rule 6.2.

*Thoroughness and Preparation*

[5] Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity and consequence. An agreement between the lawyer and the client regarding the scope of the representation may limit the matters for which the lawyer is responsible. See Rule 1.2(c).

*Retaining or Contracting With Other Lawyers*

[6] Before a lawyer retains or contracts with other lawyers outside the lawyer's own firm to provide or assist in the provision of legal services to a client, the lawyer should ordinarily obtain informed consent from the client and must reasonably believe that the other lawyers' services will contribute to the competent and ethical representation of the client. See also Rules 1.2 (allocation of authority), 1.4 (communication with client), 1.5(e) (fee sharing), 1.6 (confidentiality), and 5.5(a) (unauthorized practice of law). The reasonableness of the decision to retain or contract with other lawyers outside the lawyer's own firm will depend upon the circumstances, including the education, experience and reputation of the nonfirm lawyers; the nature of the services assigned to the nonfirm lawyers; and the legal protections, professional conduct rules, and ethical environments of the jurisdictions in which the services will be performed, particularly relating to confidential information.

[7] [Washington revision] When lawyers or LLLTs from more than one law firm are providing legal services to the client on a particular matter, the lawyers and/or LLLTs ordinarily should consult with each other and the client about the scope of their respective representations and the allocation of responsibility among them. See Rule 1.2. When making allocations of responsibility in a matter pending before a tribunal, lawyers, LLLTs, and parties may have additional obligations that are a matter of law beyond the scope of these Rules.

*Maintaining Competence*

[8] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

Additional Washington Comments (9-10)

[9] This rule applies to lawyers only when they are providing legal services. Where a lawyer is providing nonlawyer services ("supporting lawyer") in support of a lawyer who is providing legal services ("supported lawyer"), the supported lawyer should treat the supporting lawyer as a nonlawyer assistant for purposes of this rule and Rule 5.3 (Responsibilities Regarding Nonlawyer Assistants).

[10] In some circumstances, a lawyer can also provide adequate representation by enlisting the assistance of an LLLT of established competence, within the scope of the LLLT's license and consistent with the provisions of the LLLT RPC. However, a lawyer may not enter into an arrangement for the division of the fee with an LLLT who is not in the same firm as the lawyer. See Comment [7] to Rule 1.5(c); LLLT RPC 1.5(e). Therefore, a lawyer may enlist the assistance of an LLLT who is not in the same firm only (1) after consultation with the client in accordance with Rules 1.2 and 1.4, and (2) by referring the client directly to the LLLT.

### RPC 1.6 CONFIDENTIALITY OF INFORMATION

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

#### Comment

See also Washington Comment [19].

[1] [Washington revision] This Rule governs the disclosure by a lawyer of information relating to the representation of a client. See Rule 1.18 for the lawyer's duties with respect to information provided to the lawyer by a prospective client, Rule 1.9(c)(2) for the lawyer's duty not to reveal information relating to the lawyer's prior representation of a former client and Rules 1.8(b) and 1.9(c)(1) for the lawyer's duties with respect to the use of such information to the disadvantage of clients and former clients.

[2] [Washington revision] A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. See Rule 1.0A(e) for the definition of informed consent. This contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

[3] The principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege, the work product doctrine and the rule of confidentiality established in professional ethics. The attorney-client privilege and work-product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct. See also Scope.

[4] Paragraph (a) prohibits a lawyer from revealing information relating to the representation of a client. This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but could

reasonably lead to the discovery of such information by a third person. A lawyer's use of a hypothetical to discuss issues relating to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.

#### *Authorized Disclosure*

[5] [Washington revision] Except to the extent that the client's instructions or special circumstances limit that authority, a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation. In some situations, for example, a lawyer may be impliedly authorized to admit a fact that cannot properly be disputed or to make a disclosure that facilitates a satisfactory conclusion to a matter. Lawyers in a firm may, in the course of the firm's practice, disclose information relating to a client of the firm to other lawyers or LLLTs within the firm, unless the client has instructed that particular information be confined to specified lawyers or LLLTs.

#### *Disclosure Adverse to Client*

[6] [Washington revision] Although the public interest is usually best served by a strict rule requiring lawyers to preserve the confidentiality of information relating to the representation of their clients, the confidentiality rule is subject to limited exceptions. Paragraph (b)(1) recognizes the overriding value of life and physical integrity and requires disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm. Such harm is reasonably certain to occur if it will be suffered imminently or if there is a present and substantial threat that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat. Thus, a lawyer who knows that a client has accidentally discharged toxic waste into a town's water supply must reveal this information to the authorities if there is a present and substantial risk that a person who drinks the water will contract a life-threatening or debilitating disease and the lawyer's disclosure is necessary to eliminate the threat or reduce the number of victims.

[7] [Reserved.]

[8] [Reserved.]

[9] A lawyer's confidentiality obligations do not preclude a lawyer from securing confidential legal advice about the lawyer's personal responsibility to comply with these Rules. In most situations, disclosing information to secure such advice will be impliedly authorized for the lawyer to carry out the representation. Even when the disclosure is not impliedly authorized, paragraph (b)(4) permits such disclosure because of the importance of a lawyer's compliance with the Rules of Professional Conduct.

[10] Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. Such a charge can arise in a civil, criminal, disciplinary or other proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person, for example, a person claiming to have been defrauded by the lawyer and client acting together. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (b)(5) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend also applies, of course, where a proceeding has been commenced.

[11] A lawyer entitled to a fee is permitted by paragraph (b)(5) to prove the services rendered in an action to collect it. This aspect of the Rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary.

[12] [Reserved.]

#### *Detection of Conflicts of Interest*

[13] [Washington revision] Paragraph (b)(7) recognizes that lawyers in different firms may need to disclose limited information to each other to detect and resolve conflicts of interest, such as when a lawyer is considering an association with another firm, two or more firms are considering a merger, or a lawyer is considering the purchase of a law practice. See Rule 1.17, comment [7]. Under these circumstances, lawyers and law firms are permitted to disclose limited information, but only once substantive discussions regarding the new relationship have occurred. Any such disclosure should ordinarily include no more than the identity of the persons and entities involved in a matter, a brief summary of the general issues involved, and information about whether the matter has terminated. Even this limited information, however, should be disclosed only to the extent reasonably necessary to detect and

resolve conflicts of interest that might arise from the possible new relationship. Moreover, the disclosure of any information is prohibited if it would compromise the attorney-client privilege or otherwise prejudice the client (e.g., the fact that a corporate client is seeking advice on a corporate takeover that has not been publicly announced; that a person has consulted a lawyer about the possibility of divorce before the person's intentions are known to the person's spouse; or that a person has consulted a lawyer about a criminal investigation that has not led to a public charge). Under those circumstances, paragraph (a) prohibits disclosure unless the client or former client gives informed consent. A lawyer's fiduciary duty to the lawyer's firm may also govern a lawyer's conduct when exploring an association with another firm and is beyond the scope of these Rules. See also Rule 1.1, comment [6], [7], and [10] as to decisions to associate other lawyers or LLLTs.

[14] Any information disclosed pursuant to paragraph (b)(7) may be used or further disclosed only to the extent necessary to detect and resolve conflicts of interest. Paragraph (b)(7) does not restrict the use of information acquired by means independent of any disclosure pursuant to paragraph (b)(7). Paragraph (b)(7) also does not affect the disclosure of information within a law firm when the disclosure is otherwise authorized, see Comment [5], such as when a lawyer in a firm discloses information to another lawyer in the same firm to detect and resolve conflicts of interest that could arise in connection with undertaking a new representation.

[15] [Washington revision] A lawyer may be ordered to reveal information relating to the representation of a client by a court. Absent informed consent of the client to do otherwise, the lawyer should assert on behalf of the client all nonfrivolous 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.

See also Washington Comment [24].

[16] Paragraph (b) permits disclosure only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified. Where practicable, the lawyer should first seek to persuade the client to take suitable action to obviate the need for disclosure. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose. If the disclosure will be made in connection with a judicial proceeding, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

[17] [Washington revision] Paragraphs (b)(2) through (b)(7) permit but do not require the disclosure of information relating to a client's representation to accomplish the purposes specified in those paragraphs. In exercising the discretion conferred by those paragraphs, the lawyer may consider such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction and factors that may extenuate the conduct in question. A lawyer's decision not to disclose as permitted by paragraph (b) does not violate this Rule. Disclosure may be required, however, by other Rules. Some Rules require disclosure only if such disclosure would be permitted by paragraph (b). See Rules 1.2(d), 3.3, 4.1(b), and 8.1. See also Rule 1.13(c), which permits disclosure in some circumstances whether or not Rule 1.6 permits the disclosure. See also Washington Comment [23].

#### *Acting Competently to Preserve Confidentiality*

[18] Paragraph (c) requires a lawyer to act competently to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3. The unauthorized access to, or the inadvertent or unauthorized disclosure of, information relating to the representation of a client does not constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to prevent the access or disclosure. Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use). A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to forgo security measures that would otherwise be required by this Rule. Whether a lawyer may be required to take additional steps to safeguard a client's information in order to comply with other law, such as state and federal laws that govern data privacy or that impose notification requirements upon the loss of, or unauthorized access to, electronic information, is beyond the scope of these Rules. For a lawyer's duties when sharing information with nonlawyers outside the lawyer's own firm, see Rule 5.3, Comments [3]-[4].

[19] When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule. Whether a lawyer may be required to take additional steps in order to comply with other law, such as state and federal laws that govern data privacy, is beyond the scope of these Rules.

#### *Former Client*

[20] The duty of confidentiality continues after the client-lawyer relationship has terminated. See Rule 1.9(c)(2). See Rule 1.9(c)(1) for the prohibition against using such information to the disadvantage of the former client.

#### Additional Washington Comments (21 - 28)

[21] The phrase "information relating to the representation" should be interpreted broadly. The "information" protected by this Rule includes, but is not necessarily limited to, confidences and secrets. "Confidence" refers to information protected by the attorney client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

#### *Disclosure Adverse to Client*

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

[23] [Reserved.]

[24] [Reserved.]

[25] The exceptions to the general rule prohibiting unauthorized disclosure of information relating to the representation "should not be carelessly invoked." *In re Boelter*, 139 Wn.2d 81, 91, 985 P.2d 328 (1999). A lawyer must make every effort practicable to avoid unnecessary disclosure of information relating to a representation, to limit disclosure to those having the need to know it, and to obtain protective orders or make other arrangements minimizing the risk of avoidable disclosure.

[26] Washington has not adopted that portion of Model Rule 1.6(b)(6) permitting a lawyer to reveal information related to the representation to comply with "other law." Washington's omission of this phrase arises from a concern that it would authorize the lawyer to decide whether a disclosure is required by "other law," even though the right to confidentiality and the right to waive confidentiality belong to the client. The decision to waive confidentiality should only be made by a fully informed client after consultation with the client's lawyer or by a court of competent jurisdiction. Limiting the exception to compliance with a court order protects the client's interest in maintaining confidentiality while insuring that any determination about the legal necessity of revealing confidential information will be made by a court. It is the need for a judicial resolution of such issues that necessitates the omission of "other law" from this Rule.

#### *Withdrawal*

[27] After withdrawal the lawyer is required to refrain from disclosing the client's confidences, except as otherwise permitted by Rules 1.6 or 1.9. A lawyer is not prohibited from giving notice of the fact of withdrawal by this Rule, Rule 1.8(b), or Rule 1.9(c). If the lawyer's services will be used by the client in furthering a course of criminal or fraudulent conduct, the lawyer must withdraw. See Rule 1.16(a)(1). Upon withdrawal from the representation in such circumstances, the lawyer may also disaffirm or withdraw any opinion, document, affirmation, or the like. If the client is an organization, the lawyer may be in doubt about whether contemplated conduct will actually be carried out by the organization. When a lawyer requires guidance about compliance with this Rule in connection with an organizational client, the lawyer may proceed under the provisions of Rule 1.13(b).

*Other*

[28] This Rule does not relieve a lawyer of his or her obligations under Rule 5.4(b) of the Rules for Enforcement of Lawyer Conduct.

### RPC 1.7 CONFLICT OF INTEREST: CURRENT CLIENTS

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

- (1) the representation of one client will be directly adverse to another client; or
- (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) the representation is not prohibited by law;
- (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
- (4) each affected client gives informed consent, confirmed in writing (following authorization from the other client to make any required disclosures).

#### Comment

##### ***General Principles***

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

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

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

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

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

### ***Identifying Conflicts of Interest: Directly Adverse***

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

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

### ***Identifying Conflicts of Interest: Material Limitation***

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

### ***Lawyer's Responsibilities to Former Clients and Other Third Persons***

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

### ***Personal Interest Conflicts***

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

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

client in a matter where that lawyer is representing another party, unless each client gives informed consent. The disqualification arising from such relationships is personal and ordinarily is not imputed to members of firms with whom the lawyers are associated. See Rules 1.8(k) and 1.10.

[12] [Reserved.]

#### ***Interest of Person Paying for a Lawyer's Service***

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

#### ***Prohibited Representations***

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

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

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

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

#### ***Informed Consent***

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

[19] Under some circumstances it may be impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent. In some cases the alternative to common representation can be that each party may have to obtain separate representation with the possibility of incurring additional costs. These costs, along with

the benefits of securing separate representation, are factors that may be considered by the affected client in determining whether common representation is in the client's interests. See also Washington Comment [39].

#### ***Consent Confirmed in Writing***

[20] [Washington revision] Paragraph (b) requires the lawyer to obtain the informed consent of the client, confirmed in writing. Such a writing may consist of a document executed by the client or one that the lawyer promptly records and transmits to the client following an oral consent. See Rule 1.0A(b). See also Rule 1.0A(n) (writing includes electronic transmission). If it is not feasible to obtain or transmit the writing at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. See Rule 1.0A(b). The requirement of a writing does not supplant the need in most cases for the lawyer to talk with the client, to explain the risks and advantages, if any, of representation burdened with a conflict of interest, as well as reasonably available alternatives, and to afford the client a reasonable opportunity to consider the risks and alternatives and to raise questions and concerns. Rather, the writing is required in order to impress upon clients the seriousness of the decision the client is being asked to make and to avoid disputes or ambiguities that might later occur in the absence of a writing.

#### ***Revoking Consent***

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

#### ***Consent to Future Conflict***

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

#### ***Conflicts in Litigation***

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

[24] Ordinarily a lawyer may take inconsistent legal positions in different tribunals at different times on behalf of different clients. The mere fact that advocating a legal position on behalf of one client might create precedent adverse to the interests of a client represented by the lawyer in an unrelated matter does not create a conflict of

interest. A conflict of interest exists, however, if there is a significant risk that a lawyer's action on behalf of one client will materially limit the lawyer's effectiveness in representing another client in a different case; for example, when a decision favoring one client will create a precedent likely to seriously weaken the position taken on behalf of the other client. Factors relevant in determining whether the clients need to be advised of the risk include: where the cases are pending, whether the issue is substantive or procedural, the temporal relationship between the matters, the significance of the issue to the immediate and long-term interests of the clients involved and the clients' reasonable expectations in retaining the lawyer. If there is significant risk of material limitation, then absent informed consent of the affected clients, the lawyer must refuse one of the representations or withdraw from one or both matters.

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

#### ***Nonlitigation Conflicts***

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

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

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

#### ***Special Considerations in Common Representation***

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

subsequently will represent both parties on a continuing basis and whether the situation involves creating or terminating a relationship between the parties.

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

[31] As to the duty of confidentiality, continued common representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation. This is so because the lawyer has an equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation that might affect that client's interests and the right to expect that the lawyer will use that information to that client's benefit. See Rule 1.4. The lawyer should, at the outset of the common representation and as part of the process of obtaining each client's informed consent, advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other. In limited circumstances, it may be appropriate for the lawyer to proceed with the representation when the clients have agreed, after being properly informed, that the lawyer will keep certain information confidential. For example, the lawyer may reasonably conclude that failure to disclose one client's trade secrets to another client will not adversely affect representation involving a joint venture between the clients and agree to keep that information confidential with the informed consent of both clients.

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

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

#### ***Organizational Clients***

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

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

#### **Additional Washington Comments (36 - 41)**

##### ***General Principles***

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

***Identifying Conflicts of Interest: Material Limitation***

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

***Prohibited Representations***

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

***Informed Consent***

[39] Paragraph (b)(4) of the Rule differs slightly from the Model Rule in that it expressly requires authorization from the other client before any required disclosure of information relating to that client can be made. Authorization to make a disclosure of information relating to the representation requires the client's informed consent. See Rule 1.6(a).

***Nonlitigation Conflicts***

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

***Special Considerations in Common Representation***

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

**RPC 1.18**  
**DUTIES TO PROSPECTIVE CLIENT**

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

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

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

(d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:

- (1) both the affected client and the prospective client have given informed consent, confirmed in writing, or:
- (2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and
- (i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and
- (ii) written notice is promptly given to the prospective client.

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

**Comment**

[1] Prospective clients, like clients, may disclose information to a lawyer, place documents or other property in the lawyer's custody, or rely on the lawyer's advice. A lawyer's consultations with a prospective client usually are limited in time and depth and leave both the prospective client and the lawyer free (and sometimes required) to proceed no further. Hence, prospective clients should receive some but not all of the protection afforded clients.

[2] [Washington revision] A person becomes a prospective client by consulting with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter. Whether communications, including written, oral, or electronic communications, constitute a consultation depends on the circumstances. For example, a consultation is likely to have occurred if a lawyer, either in person or through the lawyer's communications in any medium, specifically requests or invites the submission of information about a potential representation without clear and reasonably understandable warnings and cautionary statements that limit the lawyer's obligations, and a person provides information in response. See also Comment [4]. In contrast, a consultation does not occur if a person provides information to a lawyer in response to a communication that merely describes the lawyer's education, experience, areas of practice, and contact information, or provides legal information of general interest. Such a person communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, and is thus not a "prospective client." Moreover, a person who communicates with a lawyer for the purpose of disqualifying the lawyer is not a "prospective client." See also Washington Comment [10].

[3] It is often necessary for a prospective client to reveal information to the lawyer during an initial consultation prior to the decision about formation of a client-lawyer relationship. The lawyer often must learn such information to determine whether there is a conflict of interest with an existing client and whether the matter is one that the lawyer is willing to undertake. Paragraph (b) prohibits the lawyer from using or revealing that information, except as permitted by Rule 1.9, even if the client or lawyer decides not to proceed with the representation. The duty exists regardless of how brief the initial conference may be.

[4] In order to avoid acquiring disqualifying information from a prospective client, a lawyer considering whether or not to undertake a new matter should limit the initial consultation to only such information as reasonably

appears necessary for that purpose. Where the information indicates that a conflict of interest or other reason for non-representation exists, the lawyer should so inform the prospective client or decline the representation. If the prospective client wishes to retain the lawyer, and if consent is possible under Rule 1.7, then consent from all affected present or former clients must be obtained before accepting the representation.

[5] [Washington revision] [Reserved. Comment [5] to Model Rule 1.18 is codified, with minor modifications, as paragraph (e). See Rule 1.0A(e) for the definition of informed consent.]

[6] Even in the absence of an agreement, under paragraph (c), the lawyer is not prohibited from representing a client with interests adverse to those of the prospective client in the same or a substantially related matter unless the lawyer has received from the prospective client information that could be significantly harmful if used in the matter.

[7] [Washington revision] Under paragraph (c), the prohibition in this Rule is imputed to other lawyers as provided in Rule 1.10, but, under paragraph (d)(1), imputation may be avoided if the lawyer obtains the informed consent, confirmed in writing, of both the prospective and affected clients. In the alternative, imputation may be avoided if the conditions of paragraph (d)(2) are met and all disqualified lawyers are timely screened and written notice is promptly given to the prospective client. See Rule 1.0A(k) (requirements for screening procedures). Paragraph (d)(2)(i) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.

[8] Notice, including a general description of the subject matter about which the lawyer was consulted, and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.

[9] For the duty of competence of a lawyer who gives assistance on the merits of a matter to a prospective client, see Rule 1.1. For a lawyer's duties when a prospective client entrusts valuables or papers to the lawyer's care, see Rule 1.15A.

#### Additional Washington Comments (10 - 13)

[10] Unilateral communications from individuals seeking legal services do not generally create a relationship covered by this Rule, unless the lawyer invites unilateral confidential communications. The public dissemination of general information concerning a lawyer's name or firm name, practice area and types of clients served, and contact information, is not in itself, an invitation to convey unilateral confidential communications nor does it create a reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship.

[11] This Rule is not intended to modify existing case law defining when a client-lawyer relationship is formed. See *Bohn v. Cody*, 119 Wn.2d 357, 363, 832 P.2d 71 (1992); *In re McGlothen*, 99 Wn.2d 515, 522, 663 P.2d 1330 (1983). See also Scope [17].

[12] For purposes of this Rule, "significantly harmful" means more than de minimis harm.

[13] Pursuant to statute or other law, government officers and employees may be entitled to defense and indemnification by the government. In these circumstances, a government lawyer may find it necessary to obtain information from a government officer or employee to determine if he or she meets the criteria for representation and indemnification. In this situation, the government lawyer is acting on behalf of the government entity as the client, and this Rule would not apply. The government lawyer shall comply with Rule 4.3 in obtaining such information.

**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;
  - (4) offer evidence that the lawyer knows to be false.
- (b) The duties stated in paragraph (a) continue to the conclusion of the proceeding.
- (c) If the lawyer has offered material evidence and comes to know of its falsity, the lawyer shall promptly disclose this fact to the tribunal unless such disclosure is prohibited by Rule 1.6.
- (d) If the lawyer has offered material evidence and comes to know of its falsity, and disclosure of this fact is prohibited by Rule 1.6, the lawyer shall promptly make reasonable efforts to convince the client to consent to disclosure. If the client refuses to consent to disclosure, the lawyer may seek to withdraw from the representation in accordance with Rule 1.16.
- (e) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.
- (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.

**Comment**

[1] [Washington revision] This Rule governs the conduct of a lawyer who is representing a client in the proceedings of a tribunal. See Rule 1.0A(m) for the definition of "tribunal." It also applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition.

[2] This Rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client, however, is qualified by the advocate's duty of candor to the tribunal. Consequently, although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause, the lawyer must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false.

***Representations by a Lawyer***

[3] [Washington revision] An advocate is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of matters asserted therein, for litigation documents ordinarily present assertions by the client, or by someone on the client's behalf, and not assertions by the lawyer. Compare Rule 3.1. However, an assertion purporting to be on the lawyer's own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. The obligation prescribed in Rule 1.2(d) not to counsel a client to commit or assist the client in committing a fraud applies in litigation. Regarding compliance with Rule 1.2(d), see the Comment to that Rule. See also Comment [4] to Rule 8.4.

***Legal Argument***

[4] Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities. Furthermore, as stated in paragraph (a)(3), an advocate has a duty to disclose directly adverse authority in the controlling jurisdiction that has not been disclosed by the opposing party. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case.

### *Offering Evidence*

[5] [Reserved.]

[6] If a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce false evidence, the lawyer should seek to persuade the client that the evidence should not be offered. If the persuasion is ineffective and the lawyer continues to represent the client, the lawyer must refuse to offer the false evidence. If only a portion of a witness's testimony will be false, the lawyer may call the witness to testify but may not elicit or otherwise permit the witness to present the testimony that the lawyer knows is false.

[7] [Washington revision] The duties stated in paragraphs (a) apply to all lawyers, including defense counsel in criminal cases. In some jurisdictions other than Washington, however, courts have required counsel to present the accused as a witness or to give a narrative statement if the accused so desires, even if counsel knows that the testimony or statement will be false. The obligation of the advocate under the Rules of Professional Conduct is subordinate to such requirements. See *State v. Berry Smith*, 87 Wn. App. 268, 944 P.2d 397 (1997), review denied, 134 Wn.2d 1008, 954 P.2d 277 (1998). For an explanation of the term "counsel" in the criminal context, see Washington Comment [10] to Rule 3.8.

[8] [Washington revision] The prohibition against offering false evidence only applies if the lawyer knows that the evidence is false. A lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact. A lawyer's knowledge that evidence is false, however, can be inferred from the circumstances. See Rule 1.0A(f). Thus, although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood.

### *Remedial Measures*

[9] [Reserved.]

[10] [Reserved.]

[11] The disclosure of a client's false testimony can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. But the alternative is that the lawyer cooperate in deceiving the court, thereby subverting the truth-finding process which the adversary system is designed to implement. See Rule 1.2(d). Furthermore, unless it is clearly understood that the lawyer will act upon the duty to disclose the existence of false evidence, the client can simply reject the lawyer's advice to reveal the false evidence and insist that the lawyer keep silent. Thus the client could in effect coerce the lawyer into being a party to fraud on the court.

### *Preserving Integrity of Adjudicative Process*

[12] [Washington revision] Lawyers have a special obligation to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process, such as bribing, intimidating or otherwise unlawfully communicating with a witness, juror, court official or other participant in the proceeding, unlawfully destroying or concealing documents or other evidence or failing to disclose information to the tribunal when required by law to do so.

### *Duration of Obligation*

[13] A practical time limit on the obligation to rectify false evidence or false statements of law and fact has to be established. The conclusion of the proceeding is a reasonably definite point for the termination of the obligation. A proceeding has concluded within the meaning of this Rule when a final judgment in the proceeding has been affirmed on appeal or the time for review has passed.

### *Ex Parte Proceedings*

[14] Ordinarily, an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision; the conflicting position is expected to be presented by the opposing party. However, in any ex parte proceeding, such as an application for a temporary restraining order, there is no balance of presentation by opposing advocates. The object of an ex parte proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the absent party just consideration. The lawyer for the represented party has the correlative duty to make disclosures of material facts known to the lawyer and that the lawyer reasonably believes are necessary to an informed decision.

### *Withdrawal*

[15] [Washington revision] Normally, a lawyer's compliance with the duty of candor imposed by this Rule does not require that the lawyer withdraw from the representation of a client whose interests will be or have been adversely affected by the lawyer's disclosure. The lawyer may, however, be required by Rule 1.16(a) to seek permission of the tribunal to withdraw if the lawyer's compliance with this Rule's duty of candor results in such an extreme deterioration of the client-lawyer relationship that the lawyer can no longer competently represent the client. See also Rule 1.16(b) for the circumstances in which a lawyer will be permitted to seek a tribunal's permission to withdraw. In connection with a request for permission to withdraw that is premised on a client's misconduct, a lawyer may reveal information relating to the representation as permitted by Rule 1.6.

**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.

Comment

[1] [Washington revision] Many forms of improper influence upon a tribunal are proscribed by criminal law. Others are specified in the Washington Code of Judicial Conduct, with which an advocate should be familiar. A lawyer is required to avoid contributing to a violation of such provisions.

[2] During a proceeding a lawyer may not communicate ex parte with persons serving in an official capacity in the proceeding, such as judges, masters or jurors, unless authorized to do so by law or court order.

[3] A lawyer may on occasion want to communicate with a juror or prospective juror after the jury has been discharged. The lawyer may do so unless the communication is prohibited by law or a court order but must respect the desire of the juror not to talk with the lawyer. The lawyer may not engage in improper conduct during the communication.

[4] The advocate's function is to present evidence and argument so that the cause may be decided according to law. Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. A lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge's default is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.

[5] [Washington revision] The duty to refrain from disruptive conduct applies to any proceeding of a tribunal, including a deposition. See Rule 1.0A(m).

RPC 4.4  
RESPECT FOR RIGHTS OF THIRD PERSONS

(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

(b) A lawyer who receives a document or electronically stored information relating to the representation of the lawyer's client and knows or reasonably should know that the document or electronically stored information was inadvertently sent shall promptly notify the sender.

Comment

[1] Responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of third persons. It is impractical to catalogue all such rights, but they include legal restrictions on methods of obtaining evidence from third persons and unwarranted intrusions into privileged relationships, such as the client-lawyer relationship.

[2] Paragraph (b) recognizes that lawyers sometimes receive a document or electronically stored information that was mistakenly sent or produced by opposing parties or their lawyers. A document or electronically stored information is inadvertently sent when it is accidentally transmitted, such as when an email or letter is misaddressed or a document or electronically stored information is accidentally included with information that was intentionally transmitted. If a lawyer knows or reasonably should know that such a document or electronically stored information was sent inadvertently, then this Rule requires the lawyer to promptly notify the sender in order to permit that person to take protective measures. Whether the lawyer is required to take additional steps, such as returning the document or electronically stored information, is a matter of law beyond the scope of these Rules, as is the question of whether the privileged status of a document or electronically stored information has been waived. Similarly, this Rule does not address the legal duties of a lawyer who receives a document or electronically stored information that the lawyer knows or reasonably should know may have been inappropriately obtained by the sending person. For purposes of this Rule, "document or electronically stored information" includes in addition to paper documents, email and other forms of electronically stored information, including embedded data (commonly referred to as "metadata"), that is subject to being read or put into readable form. Metadata in electronic documents creates an obligation under this Rule only if the receiving lawyer knows or reasonably should know that the metadata was inadvertently sent to the receiving lawyer.

[3] Some lawyers may choose to return a document or delete electronically stored information unread, for example, when the lawyer learns before receiving it that it was inadvertently sent. Where a lawyer is not required by applicable law to do so, the decision to voluntarily return such a document or delete electronically stored information is a matter of professional judgment ordinarily reserved to the lawyer. See Rules 1.2 and 1.4.

Additional Washington Comment (4 -5)

[4] The duty imposed by paragraph (a) of this Rule includes a lawyer's assertion or inquiry about a third person's immigration status when the lawyer's purpose is to intimidate, coerce, or obstruct that person from participating in a civil matter. Issues involving immigration status carry a significant danger of interfering with the proper functioning of the justice system. See *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 230 P.3d 583 (2010). When a lawyer is representing a client in a civil matter, a lawyer's communication to a party or a witness that the lawyer will report that person to immigration authorities, or a lawyer's report of that person to immigration authorities, furthers no substantial purpose of the civil adjudicative system if the lawyer's purpose is to intimidate, coerce, or obstruct that person. A communication in violation of this Rule can also occur by an implied assertion that is the equivalent of an express assertion prohibited by paragraph (a). See also Rules 8.4(b) (prohibiting criminal acts that reflect adversely on a lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects), 8.4(d) (prohibiting conduct prejudicial to the administration of justice), and 8.4(h) (prohibiting conduct that is prejudicial to the administration of justice toward judges, lawyers, 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, or marital status).

[5] A risk of unwarranted intrusion into a privileged relationship may arise when a lawyer deals with a person who is assisted by an LLLT. Although a lawyer may communicate directly with a person who is assisted by an LLLT, see Rule 4.2 Comment [12], client-LLLT communications are privileged to the same extent as client-lawyer communications. See APR 28K(3). An LLLT's ethical duty of confidentiality further protects the LLLT client's

right to confidentiality in that professional relationship. See LLLT RPC 1.6(a). When dealing with a person who is assisted by an LLLT, a lawyer must respect these legal rights that protect the client-LLLT relationship.

**RPC 5.3**  
**RESPONSIBILITIES REGARDING NONLAWYER ASSISTANTS**

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

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

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

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

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

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

**Comment**

[1] Paragraph (a) requires lawyers with managerial authority within a law firm to make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that nonlawyers in the firm and nonlawyers outside the firm who work on firm matters act in a way compatible with the professional obligations of the lawyer. See Comment [6] to Rule 1.1 (retaining lawyers outside the firm) and Comment [1] to Rule 5.1 (responsibilities with respect to lawyers within a firm). Paragraph (b) applies to lawyers who have supervisory authority over such nonlawyers within or outside the firm. Paragraph (c) specifies the circumstances in which a lawyer is responsible for conduct of such nonlawyers within or outside the firm that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer.

***Nonlawyers Within the Firm***

[2] Lawyers generally employ assistants in their practice, including secretaries, investigators, law student interns, and paraprofessionals. Such assistants, whether employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services. A lawyer must give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client, and should be responsible for their work product. The measures employed in supervising nonlawyers should take account of the fact that they do not have legal training and are not subject to professional discipline.

***Nonlawyers Outside the Firm***

[3] [Washington revision] A lawyer may use nonlawyers outside the firm to assist the lawyer in rendering legal services to the client. Examples include the retention of an investigative or paraprofessional service, hiring a document management company to create and maintain a database for complex litigation, sending client documents to a third party for printing or scanning, and using an Internet-based service to store client information. When using such services outside the firm, a lawyer must make reasonable efforts to ensure that the services are provided in a manner that is compatible with the lawyer's professional obligations. The extent of this obligation will depend upon the circumstances, including the education, experience and reputation of the nonlawyer; the nature of the services involved; the terms of any arrangements concerning the protection of client information; and the legal and ethical environments of the jurisdictions in which the services will be performed, particularly with regard to confidentiality. See also Rules 1.1 (competence), 1.2 (allocation of authority), 1.4 (communications with client), 1.6 (confidentiality), 5.4(a) (professional independence of the lawyer), and 5.5(a) (unauthorized practice of law). When retaining or directing a nonlawyer outside the firm, a lawyer should communicate directions appropriate under the circumstances to give reasonable assurance that the nonlawyer's conduct is compatible with the professional obligations of the lawyer. Where an outside lawyer is retained to provide nonlegal services, the lawyer should be treated like a nonlawyer assistant. See also comment [9] to Rule 1.1.

[4] Where the client directs the selection of a particular nonlawyer service provider outside the firm, the lawyer ordinarily should agree with the client concerning the allocation of responsibility for monitoring as between the client and lawyer. See Rule 1.2. When making such an allocation in a matter pending before a tribunal, lawyers and parties may have additional obligations that are a matter of law beyond the scope of these Rules.

Additional Washington Comment (5)

[5] A nonlawyer for purposes of this Rule denotes an individual other than a lawyer or an LLLT acting as such. For responsibilities regarding an LLLT associated with a lawyer, see Rule 5.10. If a lawyer or an LLLT in a firm is providing services that do not require use of the lawyer's or the LLLT's license, then lawyers at the firm should treat such a lawyer or LLLT as a nonlawyer assistant under this Rule rather than as a subordinate lawyer under Rule 5.1 or as an LLLT under Rule 5.10. See also Additional Washington Comment [9] to Rule 1.1.

RPC 5.5

UNAUTHORIZED PRACTICE OF LAW; MULTIJURISDICTIONAL PRACTICE OF LAW

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

(b) A lawyer who is not admitted to practice in this jurisdiction shall not:

(1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

(c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

(2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or

(4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

(d) A lawyer admitted in another United States jurisdiction or in a foreign jurisdiction, and not disbarred or suspended from practice in any jurisdiction or the equivalent thereof, may provide legal services in this jurisdiction that:

(1) are provided to the lawyer's employer or its organizational affiliates and are (i) provided on a temporary basis and (ii) not services for which the forum requires pro hac vice admission; and, when performed by a foreign lawyer and requires advice on the law of this or another jurisdiction or of the United States, such advice shall be based upon the advice of a lawyer who is duly licensed and authorized by the jurisdiction to provide such advice; or

(2) are services that the lawyer is authorized by federal law or other law or rule to provide in this jurisdiction.

(e) For purposes of paragraph (d), the foreign lawyer must be a member in good standing of a recognized legal profession in a foreign jurisdiction, the members of which are admitted to practice as lawyers or counselors at law or the equivalent, and are subject to effective regulation and discipline by a duly constituted professional body or a public authority.

Comment

[1] A lawyer may practice law only in a jurisdiction in which the lawyer is authorized to practice. A lawyer may be admitted to practice law in a jurisdiction on a regular basis or may be authorized by court rule or order or by law to practice for a limited purpose or on a restricted basis. Paragraph (a) applies to unauthorized practice of law by a lawyer, whether through the lawyer's direct action or by the lawyer assisting another person. For example, a lawyer may not assist a person in practicing law in violation of the rules governing professional conduct in that person's jurisdiction.

[2] The definition of the practice of law is established by law and varies from one jurisdiction to another. Whatever the definition, limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons. This Rule does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work. See Rule 5.3.

[3] [Washington revision] A lawyer may provide professional advice and instruction to nonlawyers whose employment requires knowledge of the law; for example, claims adjusters, employees of financial or commercial institutions, social workers, accountants and persons employed in government agencies. Lawyers also may assist LLLTs and other independent nonlawyers, such as paraprofessionals, who are authorized by the law of a jurisdiction to provide particular law-related services. In addition, a lawyer may counsel nonlawyers who wish to proceed pro se.

[4] Other than as authorized by law or this Rule, a lawyer who is not admitted to practice generally in this jurisdiction violates paragraph (b) if the lawyer establishes an office or other systematic and continuous presence in this jurisdiction for the practice of law. Presence may be systematic and continuous even if the lawyer is not

physically present here. Such a lawyer must not hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction. See also Rules 7.1 and 7.5(b).

[5] There are occasions in which a lawyer admitted to practice in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction under circumstances that do not create an unreasonable risk to the interests of their clients, the public or the courts. Paragraph (c) identifies four such circumstances. The fact that conduct is not so identified does not imply that the conduct is or is not authorized. With the exception of paragraph (d)(2), this Rule does not authorize a U.S. or foreign lawyer to establish an office or other systematic and continuous presence in this jurisdiction without being admitted to practice generally or as house counsel under APR 8(f) here.

[6] There is no single test to determine whether a lawyer's services are provided on a "temporary basis" in this jurisdiction, and may therefore be permissible under paragraph (c). Services may be "temporary" even though the lawyer provides services in this jurisdiction on a recurring basis, or for an extended period of time, as when the lawyer is representing a client in a single lengthy negotiation or litigation.

[7] Paragraphs (c) and (d) apply to lawyers who are admitted to practice law in any United States jurisdiction, which includes the District of Columbia and any state, territory or commonwealth of the United States. Paragraph (d) also applies to lawyers admitted in a foreign jurisdiction. The word "admitted" in paragraphs (c), (d), and (e) contemplates that the lawyer is authorized to practice in the jurisdiction in which the lawyer is admitted and excludes a lawyer who while technically admitted is not authorized to practice, because, for example, the lawyer is on inactive status.

[8] [Washington revision] Paragraph (c)(1) recognizes that the interests of clients and the public are protected if a lawyer admitted only in another jurisdiction associates with a lawyer licensed to practice in this jurisdiction. For this paragraph to apply, however, the lawyer admitted to practice in this jurisdiction must actively participate in and share responsibility for the representation of the client. See also Rule 1.1, comment [6].

[9] Lawyers not admitted to practice generally in a jurisdiction may be authorized by law or order of a tribunal or an administrative agency to appear before the tribunal or agency. This authority may be granted pursuant to formal rules governing admission pro hac vice or pursuant to informal practice of the tribunal or agency. Under paragraph (c)(2), a lawyer does not violate this Rule when the lawyer appears before a tribunal or agency pursuant to such authority. To the extent that a court rule or other law of this jurisdiction requires a lawyer who is not admitted to practice in this jurisdiction to obtain admission pro hac vice before appearing before a tribunal or administrative agency, this Rule requires the lawyer to obtain that authority.

[10] Paragraph (c)(2) also provides that a lawyer rendering services in this jurisdiction on a temporary basis does not violate this Rule when the lawyer engages in conduct in anticipation of a proceeding or hearing in a jurisdiction in which the lawyer is authorized to practice law or in which the lawyer reasonably expects to be admitted pro hac vice. Examples of such conduct include meetings with the client, interviews of potential witnesses, and the review of documents. Similarly, a lawyer admitted only in another jurisdiction may engage in conduct temporarily in this jurisdiction in connection with pending litigation in another jurisdiction in which the lawyer is or reasonably expects to be authorized to appear, including taking depositions in this jurisdiction.

[11] When a lawyer has been or reasonably expects to be admitted to appear before a court or administrative agency, paragraph (c)(2) also permits conduct by lawyers who are associated with that lawyer in the matter, but who do not expect to appear before the court or administrative agency. For example, subordinate lawyers may conduct research, review documents, and attend meetings with witnesses in support of the lawyer responsible for the litigation.

[12] Paragraph (c)(3) permits a lawyer admitted to practice law in another jurisdiction to perform services on a temporary basis in this jurisdiction if those services are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice. The lawyer, however, must obtain admission pro hac vice in the case of a court-annexed arbitration or mediation or otherwise if court rules or law so require.

[13] Paragraph (c)(4) permits a lawyer admitted in another jurisdiction to provide certain legal services on a temporary basis in this jurisdiction that arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted but are not within paragraphs (c)(2) or (c)(3). These services include both legal services and services that nonlawyers may perform but that are considered the practice of law when performed by lawyers.

[14] Paragraphs (c)(3) and (c)(4) require that the services arise out of or be reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted. A variety of factors evidence such a relationship. The lawyer's client may have been previously represented by the lawyer, or may be resident in or have substantial

contacts with the jurisdiction in which the lawyer is admitted. The matter, although involving other jurisdictions, may have a significant connection with that jurisdiction. In other cases, significant aspects of the lawyer's work might be conducted in that jurisdiction or a significant aspect of the matter may involve the law of that jurisdiction. The necessary relationship might arise when the client's activities or the legal issues involve multiple jurisdictions, such as when the officers of a multinational corporation survey potential business sites and seek the services of their lawyer in assessing the relative merits of each. In addition, the services may draw on the lawyer's recognized expertise developed through the regular practice of law on behalf of clients in matters involving a particular body of federal, nationally-uniform, foreign, or international law. Lawyers desiring to provide pro bono legal services on a temporary basis in Washington following determination by the Supreme Court that an emergency affecting the justice system, as a result of a natural or other major disaster, has occurred, who are not otherwise authorized to practice law in Washington, as well as lawyers from another affected jurisdiction who seek to practice law temporarily in Washington, but who are not otherwise authorized to practice law in Washington, should consult Admission to Practice Rule 27 on Provision of Legal Services Following Determination of Major Disaster.

[15] [Washington revision] Paragraph (d)(1) identifies another circumstance in which a lawyer who is admitted to practice in another United States or a foreign jurisdiction, and is not disbarred or suspended from practice in any jurisdiction, or the equivalent thereof, may provide legal services on a temporary basis i.e. as "in-house counsel" for an employer. Paragraph (d)(2) identifies a circumstance in which such a lawyer may establish an office or other systematic and continuous presence in this jurisdiction for the practice of law. Except as provided in paragraphs (d)(2), a lawyer who is admitted to practice law in another United States or foreign jurisdiction and who establishes an office or other systematic or continuous presence in this jurisdiction must become admitted to practice law generally in this jurisdiction or as house counsel under APR 8(f). The Washington version of this comment has been amended to take account of the requirement that in-house counsel wishing to engage in non-temporary practice in Washington must either be generally admitted to practice under Admission and Practice Rule 3 or obtain a limited license to practice law as in-house counsel under Admission and Practice Rule 8(f).

[16] Paragraph (d)(1) applies to a U.S. or foreign lawyer who is employed by a client to provide legal services to the client or its organizational affiliates, i.e., entities that control, are controlled by, or are under common control with the employer. This paragraph does not authorize the provision of personal legal services to the employer's officers or employees. The paragraph applies to in-house corporate lawyers, government lawyers and others who are employed to render legal services to the employer. The lawyer's ability to represent the employer outside the jurisdiction in which the lawyer is licensed generally serves the interests of the employer and does not create an unreasonable risk to the client and others because the employer is well situated to assess the lawyer's qualifications and the quality of the lawyer's work. To further decrease any risk to the client, when advising on the domestic law of a United States jurisdiction or on the law of the United States, the foreign lawyer authorized to practice under paragraph (d)(1) of this Rule needs to base that advice on the advice of a lawyer licensed and authorized by the jurisdiction to provide it.

[17] [Washington revision] In Washington, paragraph (d)(1) applies to lawyers who are providing the services on a temporary basis only. If an employed lawyer establishes an office or other systematic presence in this jurisdiction for the purpose of rendering legal services to the employer, the lawyer must seek general admission through APR 3 or house counsel admission under APR 8(f).

[18] Paragraph (d)(2) recognizes that a U.S. or foreign lawyer may provide legal services in a jurisdiction in which the lawyer is not licensed when authorized to do so by federal or other law, which includes statute, court rule, executive regulation or judicial precedent.

[19] A lawyer who practices law in this jurisdiction pursuant to paragraphs (c) or (d) or otherwise is subject to the disciplinary authority of this jurisdiction. See Rule 8.5(a).

[20] In some circumstances, a lawyer who practices law in this jurisdiction pursuant to paragraphs (c) or (d) may have to inform the client that the lawyer is not licensed to practice law in this jurisdiction. For example, that may be required when the representation occurs primarily in this jurisdiction and requires knowledge of the law of this jurisdiction. See Rule 1.4(b).

[21] Paragraphs (c) and (d) do not authorize communications advertising legal services to prospective clients in this jurisdiction by lawyers who are admitted to practice in other jurisdictions. Whether and how lawyers may communicate the availability of their services to prospective clients in this jurisdiction is governed by Rules 7.1 to 7.5.

RPC 7.1  
COMMUNICATIONS CONCERNING A LAWYER'S SERVICES

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

Comment

[1] This Rule governs all communications about a lawyer's services, including advertising permitted by Rule 7.2. Whatever means are used to make known a lawyer's services, statements about them must be truthful.

[2] Truthful statements that are misleading are also prohibited by this Rule. A truthful statement is misleading if it omits a fact necessary to make the lawyer's communication considered as a whole not materially misleading. A truthful statement is also misleading if there is a substantial likelihood that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable factual foundation.

[3] An advertisement that truthfully reports a lawyer's achievements on behalf of clients or former clients may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client's case. Similarly, an unsubstantiated comparison of the lawyer's services or fees with the services or fees of other lawyers may be misleading if presented with such specificity as would lead a reasonable person to conclude that the comparison can be substantiated. The inclusion of an appropriate disclaimer or qualifying language may preclude a finding that a statement is likely to create unjustified expectations or otherwise mislead the public.

[4] See also Rule 8.4(e) for the prohibition against stating or implying 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.

**RPC 7.2  
ADVERTISING**

(a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through written, recorded or electronic communication, including public media.

(b) A lawyer shall not give anything of value to a person for recommending the lawyer's services, except that a lawyer may

- (1) pay the reasonable cost of advertisements or communications permitted by this Rule;
- (2) pay the usual charges of a legal service plan or a not-for-profit lawyer referral service;
- (3) pay for a law practice in accordance with Rule 1.17; and
- (4) refer clients to another lawyer or LLLT pursuant to an agreement not otherwise prohibited under these Rules that provides for the other person to refer clients or customers to the lawyer, if

(i) the reciprocal referral agreement is not exclusive, and

(ii) the client is informed of the existence and nature of the agreement.

(c) Any communication made pursuant to this Rule shall include the name and office address of at least one lawyer or law firm responsible for its content.

**Comment**

[1] To assist the public in learning about and obtaining legal services, lawyers should be allowed to make known their services not only through reputation but also through organized information campaigns in the form of advertising. Advertising involves an active quest for clients, contrary to the tradition that a lawyer should not seek clientele. However, the public's need to know about legal services can be fulfilled in part through advertising. This need is particularly acute in the case of persons of moderate means who have not made extensive use of legal services. The interest in expanding public information about legal services ought to prevail over considerations of tradition. Nevertheless, advertising by lawyers entails the risk of practices that are misleading or overreaching.

[2] This Rule permits public dissemination of information concerning a lawyer's name or firm name, address, email address, website, and telephone number; the kinds of services the lawyer will undertake; the basis on which the lawyer's fees are determined, including prices for specific services and payment and credit arrangements; a lawyer's foreign language ability; names of references and, with their consent, names of clients regularly represented; and other information that might invite the attention of those seeking legal assistance.

[3] Questions of effectiveness and taste in advertising are matters of speculation and subjective judgment. Some jurisdictions have had extensive prohibitions against television and other forms of advertising, against advertising going beyond specified facts about a lawyer, or against "undignified" advertising. Television, the Internet, and other forms of electronic communication are now among the most powerful media for getting information to the public, particularly persons of low and moderate income; prohibiting television, Internet, and other forms of electronic advertising, therefore, would impede the flow of information about legal services to many sectors of the public. Limiting the information that may be advertised has a similar effect and assumes that the bar can accurately forecast the kind of information that the public would regard as relevant. But see Rule 7.3(a) for the prohibition against a solicitation of a possible client through a real-time electronic exchange initiated by the lawyer.

[4] Neither this Rule nor Rule 7.3 prohibits communications authorized by law, such as notice to members of a class in class action litigation.

***Paying Others to Recommend a Lawyer***

[5] [Washington revision] Except as permitted under paragraphs (b)(1)-(b)(4), lawyers are not permitted to pay others for recommending the lawyer's services or for channeling professional work in a manner that violates Rule 7.3. A communication contains a recommendation if it endorses or vouches for a lawyer's credentials, abilities, competence, character, or other professional qualities. Paragraph (b)(1), however, allows a lawyer to pay for advertising and communications permitted by this Rule, including the costs of print directory listings, on-line directory listings, newspaper ads, television and radio airtime, domain-name registrations, sponsorship fees, Internet-based advertisements, and group advertising. A lawyer may compensate employees, agents and vendors who are engaged to provide marketing or client-development services, such as publicists, public-relations personnel, business-development staff and website designers. Moreover, a lawyer may pay others for generating client leads, such as Internet-based client leads, as long as the lead generator does not recommend the lawyer, any payment to the lead generator is consistent with Rules 1.5(e) (division of fees) and 5.4 (professional independence of the lawyer), and the lead generator's communications are consistent with Rule 7.1 (communications concerning a lawyer's

services). To comply with Rule 7.1, a lawyer must not pay a lead generator that states, implies, or creates a reasonable impression that it is recommending the lawyer, is making the referral without payment from the lawyer, or has analyzed a person's legal problems when determining which lawyer should receive the referral. See also Rule 5.3 (duties of lawyers and law firms with respect to the conduct of nonlawyers); Rule 8.4(a) (duty to avoid violating the Rules through the acts of another). For the definition of nonlawyer for the purposes of Rule 5.3, see Washington Comment [5] to Rule 5.3.

[6] [Washington revision] A lawyer may pay the usual charges of a legal service plan or a not-for-profit lawyer referral service. A legal service plan is a prepaid or group legal service plan or a similar delivery system that assists people who seek to secure legal representation. A lawyer referral service, on the other hand, is any organization that holds itself out to the public as a lawyer referral service. Such referral services are understood by the public to be consumer-oriented organizations that provide unbiased referrals to lawyers with appropriate experience in the subject matter of the representation and afford other client protections, such as complaint procedures or malpractice insurance requirements. Consequently, this Rule only permits a lawyer to pay the usual charges of a not-for-profit lawyer referral service.

[7] A lawyer who accepts assignments or referrals from a legal service plan or referrals from a lawyer referral service must act reasonably to assure that the activities of the plan or service are compatible with the lawyer's professional obligations. See Rule 5.3. Legal service plans and lawyer referral services may communicate with the public, but such communication must be in conformity with these Rules. Thus, advertising must not be false or misleading, as would be the case if the communications of a group advertising program or a group legal services plan would mislead the public to think that it was a lawyer referral service sponsored by a state agency or bar association. Nor could the lawyer allow in-person, telephonic, or real-time contacts that would violate Rule 7.3.

[8] [Washington revision] A lawyer also may agree to refer clients to another lawyer in return for the undertaking of that person to refer clients or customers to the lawyer. Such reciprocal referral arrangements must not interfere with the lawyer's professional judgment as to making referrals or as to providing substantive legal services. See Rules 2.1 and 5.4(c). Except as provided in Rule 1.5(e), a lawyer who receives referrals from a lawyer must not pay anything solely for the referral, but the lawyer does not violate paragraph (b) of this Rule by agreeing to refer clients to the other lawyer, so long as the reciprocal referral agreement is not exclusive and the client is informed of the referral agreement. Conflicts of interest created by such arrangements are governed by Rule 1.7. Reciprocal referral agreements should not be of indefinite duration and should be reviewed periodically to determine whether they comply with these Rules. This Rule does not restrict referrals or divisions of revenues or net income among lawyers within firms comprised of multiple entities.

Additional Washington Comment (9)

[9] That portion of Model Rule 7.2(b)(4) that allows lawyers to enter into reciprocal referral agreements with nonlawyer professionals was not adopted. A lawyer may agree to refer clients to an LLLT in return for the undertaking of that person to refer clients to the lawyer. The guidance provided in Comment [8] to this Rule is also applicable to reciprocal referral arrangements between lawyers and LLLTs. Under LLLT RPC 1.5(e), however, an LLLT may not enter into an arrangement for the division of a fee with a lawyer who is not in the same firm as the LLLT.

**RPC 7.3**  
**SOLICITATION OF CLIENTS**

(a) A lawyer shall not directly or through a third person, by in-person, live telephone, or real-time electronic contact solicit professional employment from a possible client when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain, unless the person contacted:

- (1) is a lawyer or an LLLT or;
- (2) has a family, close personal, or prior professional relationship with the lawyer or
- (3) has consented to the contact by requesting a referral from a not-for-profit lawyer referral service.

(b) A lawyer shall not solicit professional employment by written, recorded or electronic communication or by in-person, telephone or real-time electronic contact even when not otherwise prohibited by paragraph (a), if;

- (1) the target of the solicitation has made known to the lawyer a desire not to be solicited by the lawyer; or
- (2) the solicitation involves coercion, duress or harassment.

(c) [Reserved.]

(d) Notwithstanding the prohibitions in paragraph (a), a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer that uses in-person or telephone contact to solicit memberships or subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.

Comment

[1] A solicitation is a targeted communication initiated by the lawyer that is directed to a specific person and that offers to provide, or can reasonably be understood as offering to provide, legal services. In contrast, a lawyer's communication typically does not constitute a solicitation if it is directed to the general public, such as through a billboard, an Internet banner advertisement, a website or a television commercial, or if it is in response to a request for information or is automatically generated in response to Internet searches.

[2] There is a potential for abuse when a solicitation involves direct in-person, live telephone or real-time electronic contact by a lawyer with someone known to need legal services. These forms of contact subject a person to the private importuning of the trained advocate in a direct interpersonal encounter. The person, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult fully to evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer's presence and insistence upon being retained immediately. The situation is fraught with the possibility of undue influence, intimidation, and over-reaching.

[3] This potential for abuse inherent in direct in-person, live telephone or real-time electronic solicitation justifies its prohibition, particularly since lawyers have alternative means of conveying necessary information to those who may be in need of legal services. In particular, communications can be mailed or transmitted by email or other electronic means that do not involve real-time contact and do not violate other laws governing solicitations. These forms of communications and solicitations make it possible for the public to be informed about the need for legal services, and about the qualifications of available lawyers and law firms, without subjecting the public to direct in-person, telephone or real-time electronic persuasion that may overwhelm a person's judgment.

[4] The use of general advertising and written, recorded or electronic communications to transmit information from lawyer to the public, rather than direct in-person, live telephone or real-time electronic contact, will help to assure that the information flows cleanly as well as freely. The contents of advertisements and communications permitted under Rule 7.2 can be permanently recorded so that they cannot be disputed and may be shared with others who know the lawyer. This potential for informal review is itself likely to help guard against statements and claims that might constitute false and misleading communications, in violation of Rule 7.1. The contents of direct in-person, live telephone or real-time electronic contact can be disputed and may not be subject to third-party scrutiny. Consequently, they are much more likely to approach (and occasionally cross) the dividing line between accurate representations and those that are false and misleading.

[5] [Washington revision] There is far less likelihood that a lawyer would engage in abusive practices against a former client, or a person with whom the lawyer has close personal or family relationship, or in situations in which the lawyer is motivated by considerations other than the lawyer's pecuniary gain. Nor is there a serious potential for abuse when the person contacted is a lawyer or an LLLT. Consequently, the general prohibition in Rule 7.3(a) is not applicable in those situations. Also, paragraph (a) is not intended to prohibit a lawyer from participating in constitutionally protected activities of public or charitable legal-service organizations or bona fide political, social,

civic, fraternal, employee or trade organizations whose purposes include providing or recommending legal services to its members or beneficiaries.

[6] But even permitted forms of solicitation can be abused. Thus, any solicitation which contains information which is false or misleading within the meaning of Rule 7.1, which involves coercion, duress or harassment within the meaning of Rule 7.3(b)(2), or which involves contact with someone who has made known to the lawyer a desire not to be solicited by the lawyer within the meaning of Rule 7.3(b)(1) is prohibited. Moreover, if after sending a letter or other communication as permitted by Rule 7.2 the lawyer receives no response, any further effort to communicate with the recipient of the communication may violate the provisions of Rule 7.3(b).

[7] This Rule is not intended to prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a group or prepaid legal plan for their members, insureds, beneficiaries or other third parties for the purpose of informing such entities of the availability of and details concerning the plan or arrangement which the lawyer or lawyer's firm is willing to offer. This form of communication is not directed to people who are seeking legal services for themselves. Rather, it is usually addressed to an individual acting in a fiduciary capacity seeking a supplier of legal services for others who may, if they choose, become prospective clients of the lawyer. Under these circumstances, the activity which the lawyer undertakes in communicating with such representatives and the type of information transmitted to the individual are functionally similar to and serve the same purpose as advertising permitted under Rule 7.2.

[8] [Reserved.]

[9] Paragraph (d) of this Rule permits a lawyer to participate with an organization which uses personal contact to solicit members for its group or prepaid legal service plan, provided that the personal contact is not undertaken by any lawyer who would be a provider of legal services through the plan. The organization must not be owned by or directed (whether as manager or otherwise) by any lawyer or law firm that participates in the plan. For example, paragraph (d) would not permit a lawyer to create an organization controlled directly or indirectly by the lawyer and use the organization for the in-person or telephone solicitation of legal employment of the lawyer through memberships in the plan or otherwise. The communication permitted by these organizations also must not be directed to a person known to need legal services in a particular matter, but is to be designed to inform potential plan members generally of another means of affordable legal services. Lawyers who participate in a legal service plan must reasonably assure that the plan sponsors are in compliance with Rules 7.1, 7.2 and 7.3(b). See 8.4(a).

#### Additional Washington Comments (10 - 14)

[10] A lawyer who receives a referral from a third party should exercise caution in contacting the prospective client directly by in-person, live telephone, or real-time electronic contact. Such contact is generally prohibited by this Rule unless the prospective client has asked to be contacted by the lawyer. A prospective client may request such contact through a third party. Prior to initiating contact with the prospective client, however, the lawyer should confirm with the source of the referral that the prospective client has indeed made such a request. Similarly, when making referrals to other lawyers, the referring lawyer should discuss with the prospective client whether he or she wishes to be contacted directly.

[11] Those in need of legal representation often seek assistance in finding a lawyer through a lawyer referral service. Washington adopted paragraph (a)(3) in order to facilitate communication between lawyers and potential clients who have specifically requested a referral from a not-for-profit lawyer referral service. Under this paragraph, a lawyer receiving such a referral may contact the potential client directly by in-person, live telephone, or real-time electronic contact to discuss possible representation.

[12] Washington did not adopt paragraph (c) of the Model Rule relating to labeling of communications with prospective clients. A specific labeling requirement is unnecessary in light of the prohibition in Rule 7.1 against false or misleading communications.

[13] The phrase "directly or through a third person" in paragraph (a) was retained from former Washington RPC 7.3(a).

[14] The phrase "prospective client" in Rule 7.3(a) has been replaced with the phrase "possible client" because the phrase "prospective client" has become a defined phrase under Rule 1.18 with a different meaning. This is a departure from the ABA Model Rule which has dispensed altogether with the phrase "from a prospective client" in this rule. The rule is not intended to preclude lawyers from in-person conversations with friends, relatives or other professionals (i.e. intermediaries) about other friends, relatives, clients or patients who may need or benefit from the lawyer's services, so long as the lawyer is not asking or expecting the intermediary to engage in improper solicitation. See RPC 8.4(a) which prohibits improper solicitation "through the acts of another". Absent limitation of prohibited in-person communications to "possible clients" there is danger that lawyers might mistakenly infer that the kind of benign conversations with non-client intermediaries described above are precluded by this rule.

RPC 7.4

COMMUNICATION OF FIELDS OF PRACTICE AND SPECIALIZATION

- (a) A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law.
- (b) A lawyer admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation "Patent Attorney" or a substantially similar designation.
- (c) A lawyer engaged in Admiralty practice may use the designation "Admiralty," "Proctor in Admiralty" or substantially similar designation.
- (d) A lawyer shall not state or imply that a lawyer is a specialist in a particular field of law, except upon issuance of an identifying certificate, award, or recognition by a group, organization, or association, a lawyer may use the terms "certified", "specialist", "expert", or any other similar term to describe his or her qualifications as a lawyer or his or her qualifications in any subspecialty of the law. If the terms are used to identify any certificate, award, or recognition by any group, organization, or association, the reference must:
  - (1) be truthful and verifiable and otherwise comply with Rule 7.1;
  - (2) identify the certifying group, organization, or association; and
  - (3) the reference must state that the Supreme Court of Washington does not recognize certification of specialties in the practice of law and that the certificate, award, or recognition is not a requirement to practice law in the state of Washington.

Comment

[1] [Washington revision] Paragraph (a) of this Rule permits a lawyer to indicate areas of practice in communications about the lawyer's services. If a lawyer practices only in certain fields, or will not accept matters except in a specified field or fields, the lawyer is permitted to so indicate.

[2] Paragraph (b) recognizes the long-established policy of the Patent and Trademark Office for the designation of lawyers practicing before the Office. Paragraph (c) recognizes that designation of Admiralty practice has a long historical tradition associated with maritime commerce and the federal courts.

[3] [Reserved.]

Additional Washington Comment (4 -5)

[4] Statements indicating that the lawyer is a "specialist," practices a "specialty," "specializes in" particular fields, and the like, are subject to the limitations set forth in paragraph (d). The provisions of paragraph (d) were taken from former Washington RPC 7.4(b).

[5] In advertising concerning an LLLT's services, an LLLT is required to communicate the fact that the LLLT has a limited license in the particular fields of law for which the LLLT is licensed and must not state or imply that the LLLT has broader authority to practice than is in fact the case. See LLLT RPC 7.4(a); see also LLLT RPC 7.2(c) (advertisements must include the name and office address of at least one responsible LLLT or law firm). When lawyers and LLLTs are associated in a firm, lawyers with managerial or pertinent supervisory authority must take measures to assure that the firm's communications conform with these obligations. See Rule 5.10.

**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;
- (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;
- (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;
- (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.

Comment

[1] [Washington revision] Lawyers are subject to discipline when they 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, as when they request or instruct an agent to do so on the lawyer's behalf. Lawyers are also subject to discipline if they assist or induce an LLLT to violate the LLLT RPC. Paragraph (a), however, does not prohibit a lawyer from advising a client concerning action the client is legally entitled to take.

[2] [Reserved.]

[3] [Washington revision] Legitimate advocacy respecting the factors set forth in paragraph (h) does not violate paragraphs (d) or (h). A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this Rule.

[4] A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of Rule 1.2(d) concerning a good faith challenge to the validity, scope, meaning or application of the law apply to challenges of legal regulation of the practice of law.

[5] Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of lawyers. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization.

Additional Washington Comment (6-8)

[6] Paragraphs (g) - (n) were taken from former Washington RPC 8.4 (as amended in 2002).

[7] Under paragraph (f)(2), lawyers are also subject to discipline if they assist or induce an LLLT to violate the LLLT RPC. See also Rule 4.3 Washington Comment [6].

[8] A lawyer who counsels a client regarding Washington's marijuana laws or assists a client in conduct that the lawyer reasonably believes is permitted by those laws does not thereby violate RPC 8.4. See also Washington Comment [18] to RPC 1.2.

## **Washington Ethics Advisory Opinions**



# WSBA

**Opinion: 175**

**Year Issued: 1982**

**RPC(s): RPC 1.6**

**Subject: Confidentiality of Information Relating to the Representation After the Client's Death**

Under RPC 1.6(a), an attorney must maintain as confidential "information relating to the representation of the 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)." Informed consent "denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." RPC 1.0(e).

The RPC 1.6 confidentiality obligation continues after the client's death. See RPC 1.6, cmt. [18] ("The duty of confidentiality continues after the client-lawyer relationship has terminated."); RPC 1.9(c)(2) (prohibiting lawyer from revealing information relating to the representation of a former client); ABA/BNA Lawyers' Manual on Professional Conduct, at 55:107 ("The ethical duty of confidentiality survives the client's death," citing ethics opinions from other jurisdictions). After death, the lawyer may disclose confidential information if the client gave informed consent before death, or if the disclosure is impliedly authorized in order to carry out the representation. For example, depending on the specific facts, disclosure of confidential client information after the client's death to the personal representative of the client's estate may be impliedly authorized in order that the estate will be properly and thoroughly administered. Otherwise, disclosure of confidential information is authorized only as permitted or required by RPC 1.6(b), RPC 1.9(c)(2), RPC 3.3, or RPC 4.1(b).

The Committee's opinion is restricted to interpreting ethical duties under the Rules of Professional Conduct. We note that Washington appellate courts have long held that the statutory lawyer-client privilege, a subset of the broad information protected under RPC 1.6 (see RPC 1.6, cmt. [19]), precludes disclosure of confidential communications after the client has died. See, e.g., *Martin v. Shaen*, 22 Wn.2d 505, 156 P.2d 681(1945); *In re Thomas' Estate*, 165 Wash. 42, 4 P.2d 837 (1931).

[amended 2009]

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



# WSBA

**Opinion: 1192**

**Year Issued: 1988**

**RPC(s): RPC 7.1**

**Subject: Advertising; use of testimonials not from actual clients**

The Committee reviewed your inquiry concerning the propriety of running newspaper advertisements which purport to feature statements from "satisfied clients" which do not in fact feature any actual clients of the lawyer. The Committee was of the opinion that such a practice would be false and misleading unless the ad featured an actual client who had volunteered such statements as are used in the ad and in the context in which the ad portrays them, or otherwise identified the "testimonials" as a dramatization so as to avoid any deception.

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



# WSBA

**Opinion: 2080**

**Year Issued: 2006**

**RPC(s): RPCs 1.6, 1.7, 1.8, 1.9, 1.18 (proposed) and RPC title 7**

**Subject: Duty of confidentiality for inquiries through a law firm's web site**

## Facts

The inquiring lawyer presents a hypothetical scenario in which a law firm maintains a website that identifies the firm, each attorney, and each attorney's area of practice. The website also provides contact information and an email address for the firm and for the attorneys listed. The law firm's website informs the visitors that any information provided to the firm or to any of its attorneys would not be considered confidential by the law firm and that any information provided should be limited. The website also indicates that there is no guarantee that representation will be accepted.

The inquirer then asks this Committee to assume that the website "solicits" inquiries and also that a website visitor has submitted a legal inquiry providing detailed facts about a potential employment discrimination claim against an employer that happens to be a current client of the law firm. The inquirer then asks:

- What duty of confidentiality is owed to the website visitor contacting the law firm?
- What duty is owed to the current client?
- What conflict of interest issues are raised by this potential situation?
- Can the law firm act as defense counsel for the current client regarding the claims made by the website visitor?
- How can the firm protect its ability to represent its clients while still advertising online?
- What if the inquiry is unsolicited?

## Conflict rules involved

1.6, 1.7, 1.8, 1.9, 1.18 (proposed). Also, any advertising that a law firm does must comply with the rules for advertising under RPC Title 7.

## Background

The state of the law on this issue is currently in flux. The application of existing rules to the issues presented is murky. Guidance from other sources is instructive but untested under the laws of the state of Washington. Proposed amendments would provide additional guidance.

The Washington Supreme Court recently published for comments several new changes to the Rules of Professional Conduct. Among those changes is proposed RPC 1.18, Duties to Prospective Clients. We have reason to believe that the new rule and the corresponding comments will be adopted as submitted. However, the proposed RPC is not in effect at this time.

## Duty to prospective clients

It is the opinion of this Committee that even without adoption of proposed RPC 1.18, lawyers owe a duty to prospective clients. Proposed RPC 1.18 makes that duty more clear. Additionally, even though Washington State does not have a prospective client rule in effect, the ABA Model Rules Committee adopted 1.18 in 2002 to clarify its belief that a duty is owed to prospective clients. The ABA Model Rules are instructive to Washington lawyers when Washington law does not squarely deal with a similar issue.

Current RPCs 1.6 and 1.9 regarding former clients discuss the lawyer's duties and the circumstances under which a lawyer may breach confidentiality. RPC 1.9, the Former Client rule, does not allow (a) subsequent representations adverse to the former client in the same or in a substantially related matter unless informed consent is obtained or (b) the lawyer to use confidences or secrets relating to the representation to the disadvantage of the former client except as provided by RPC 1.6.

Under Informal Opinion 1411 (1991); a previous RPC Committee opined that:

"the attorney-client relationship exists when a reasonable client believes that there is such a relationship. The Committee has previously determined that information obtained during an initial interview with a prospective client would rise to the level of secrets or confidences and that that information could not be disclosed by the lawyer except in compliance with RPC 1.6.

If an individual interviewed a firm for purposes of representation and the lawyer or law firm were not retained, it would be a conflict of interest for the lawyer or a member of the law firm to subsequently undertake to represent a third party in a matter adverse to the original prospective client in a related matter or in a matter involving confidences or secrets of the prospective client. The Committee is of the opinion that RPC 1.9 would apply in such a situation." Wash. Informal Op. 1411.

Similarly, the ABA holds that:

"A duty to maintain the confidentiality of information relating to the prospective representation may arise under Rule 1.6 even though the lawyer performs no legal services for the would-be client and declines the representation. . . .

The legal basis for a lawyer's duty of confidentiality is derived from the law of agency and the law of evidence. See Rule 1.6, Comment. Under the law of agency, the agent ordinarily is prohibited from disclosing or using information revealed by the principal in confidence in connection with the agency relationship. Restatement (Second) of Agency §395 (1957). The obligation continues after the agency relationship has been concluded. Restatement (Second) of Agency §396 (1957). The attorney-client evidentiary privilege protects certain communications from the client against disclosure in judicial proceedings absent a waiver of the privilege or client consent. The privilege ordinarily attaches to communications when made to the lawyer by a prospective client for the purpose of securing legal advice or assistance even though the representation subsequently is declined." ABA Ethics Op. 90-358.

These rules also find expression in model Rule 1.8(b), which prohibits the use of information relating to the representation to the disadvantage of a current client, and in Model Rule 1.9(c), which prohibits the use of information relating to the representation to the disadvantage of a former client except when the information has become generally known. *Id.*

Proposed RPC 1.18 can actually be used to limit a lawyer's responsibilities under the rules to a certain extent. Proposed 1.18 defines "prospective client" as "[a] person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter." (However, it does not change the existing case law defining when a client-lawyer relationship is formed. Proposed RPC 1.18 Wash. cmt. 10 (citing, *Bohn v. Cody*, 119 Wn.2d

357, 363, 832 P.2d 71 (1992); *In re McGlothen*, 99 Wn.2d 515, 522, 663 P.2d 1330 (1983))). Further, proposed RPC 1.18 limits the prohibition on subsequent adverse representations to instances where the subsequent representation would be "significantly harmful to that person in the matter, except as provided in paragraphs (d) or (e)." Proposed RPC 1.18 (emphasis added).

Subsections (d) and (e) allow for subsequent representation, even if the subsequent representation will be significantly harmful, so long as informed consent is obtained, the lawyer took reasonable measures to avoid exposure to the prospective client's information and implemented a screen/notice, or the lawyer obtained consent from the prospective client through proper disclosures before the information was obtained.

#### Specific facts of this case

In this case, the inquirer provides a hypothetical regarding a proposed client who is an employee of a current firm client, and the employee is considering a suit against his employer.

Knowledge of the suit may be important under the circumstances provided in this scenario. ABA Opinion 90-358 discusses a situation in which even limited information (such as the names of the interested parties or the subject of the suit) may be of significance to the representation of the existing client. Additionally, the Washington RPC committee addressed a similar question in 1998 Informal Opinion 1835. The inquirer in that matter wanted to know what obligations a lawyer had when a prospective client phoned him/her and alleged that an existing firm estate planning client may be the subject of a contemplated paternity action.

"It is the opinion of the committee that you are precluded by RPC 1.6(a) from disclosure of the paternity allegation. You must also decline representation of the potential paternity action client under RPC 1.7(a). Finally, you may continue to represent the estate planning client provided you decline further representation of the other potential client." Wash. Informal Op. 1835.

If that analysis was applied to this matter, the potential discrimination suit against the firm's employer client could not be disclosed, and the firm could not represent the employee against the employer in the upcoming suit. Provided the employee did not become a client, the firm could continue to represent the employer in ongoing and in other unrelated matters.

According to the ABA Opn. 90-358, if, as indicated in the scenario above, the true secret is that there is a possibility of an employment case being filed, all of the confidential information should become "known" once the suit is filed. Under those circumstances, there should be no conflict with representing the employer adverse to the employee (unless further confidences affecting the case were divulged in the initial inquiry).

"Unless the would-be client is represented by the lawyer in other ongoing matters, however, the Model Rules do not prohibit the use to the disadvantage of the would-be client of information relating to the representation once the information becomes generally known." ABA Ethics Op. 90-358.

Under the current rules, if a reasonable expectation of confidentiality was created for the prospective client, the subsequent representation of the employer in the suit against the prospective client would be the same or a substantially related matter under RPC 1.9, and it could not be undertaken without informed consent. Under proposed 1.18, the subsequent representation of the employer against the employee could be undertaken unless the knowledge gained would be significantly harmful to the prospective client. In the event that it would be significantly harmful, the law firm can still undertake the subsequent representation if it receives the prospective client's informed consent, if it implements a screen (with required notice and a screen preventing subsequent sharing of fees), or if adequate disclosures/disclaimers prevent the prospective client from believing that a client-

lawyer relationship was being formed (disclosures informing the client that all information provided could be used against the prospective client).

Duty to current client / Can the firm still represent the current client (in unrelated/related matters)?

So long as the matter is not substantially related and no confidences and/or secrets are used to the disadvantage of the prospective client (RPC 1.9), the subsequent adverse representation is not prohibited.

The rules also require compliance with RPC 1.7 for current clients – meaning that representation of the existing client can only proceed if the lawyer's representation of that client will not be materially limited by the lawyer's responsibilities to another client or to a third person.

"The principal inquiry under Rule 1.7(b) is whether, as a result of the lawyer's duty to protect the information relating to the representation of the would-be client, the lawyer's representation of the existing client may be materially limited. Even if the lawyer reasonably believes that the representation of the existing client would not be adversely affected by a material limitation (such that the existing client's consent to the representation after consultation would permit the lawyer to represent the client), revelation of sufficient information for the existing client to appreciate the significance of the limitation on the representation ordinarily would require the lawyer to divulge information relating to the would-be client's representation. Since such a revelation can be made under Rule 1.6 only after consulting with the would-be client (which ordinarily also would be foreclosed), the lawyer in the typical case cannot practicably obtain the requisite consents to continue representing the existing client." ABA Ethics Op. 90-358.

If the work is not substantially related, and the lawyer is not materially limited by the information obtained from the prospective client, the representation may continue. If the representation may be limited, the lawyer can make a full disclosure (if doing so will not violate the confidences or secrets of the prospective client) and receive informed written consent from the current client to continue the representation. Otherwise, the lawyer must withdraw.

Solicited vs. unsolicited

Interestingly, Washington proposed RPC 1.18 differs from the ABA Model Rules in a number of respects, one of which is a clear differentiation between solicited and unsolicited information.

"Not all persons who communicate information to a lawyer are entitled to protection under this Rule. A person who communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, is not a "prospective client" within the meaning of paragraph (a). See also Washington Comment [10]." Proposed RPC 1.18 Wash. Cmt. 2.

"Unilateral communications from individuals seeking legal services do not generally create a relationship covered by this Rule, unless the lawyer invites unilateral confidential communications. The public dissemination of general information concerning a lawyer's name or firm name, practice area and types of clients served, and contact information, is not in itself, an invitation to convey unilateral confidential communications nor does it create a reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship." Proposed RPC 1.18 Wash. Cmt. 10.

Since proposed 1.18 is not currently the law in Washington, the law firm should look, in light of all the facts, to see whether the prospective client has a reasonable expectation that a lawyer-client relationship has been formed or whether his/her comments will be treated confidentially. It is instructive that Washington legal experts,

In drafting proposed 1.18, have determined that general information (of the kind provided in the hypothetical by the inquirer) is not enough to create a reasonable expectation that a relationship has been formed.

However, if we suppose, as the inquirer has requested, that information has been solicited from the prospective client, then that information must be kept confidential, unless specific and understandable disclaimers are also posted that would negate the prospective client's expectations.

What can the law firm do to protect itself?

There are a number of things that a law firm can do to help protect itself (none will guarantee avoidance of an unresolvable conflict, but all will help minimize the risk or the resultant effect of inadvertently obtained confidential information).

(1) Identify conflicts of interest before undertaking representation. ABA Ethics Op. 90-358.

(2) Do not solicit communication from prospective clients, especially over a website, email, or other communication that allows the prospective client to divulge an excessive amount of information. Washington Comment 10 provides that "[U]nilateral communications from individuals seeking legal services do not generally create a relationship covered by [1.18], unless the lawyer invites unilateral confidential communications." Proposed RPC 1.18 cmt. 10.

(3) Limit the amount of information you accept to the bare essentials needed to perform a conflict check. Proposed 1.18(d)(2) cmt. 4.

A California ethics opinion provides a good example,

"Another way in which Law Firm could have proceeded that would have avoided the confidentiality issue entirely would have been to request from website visitors only that information that would allow the firm to perform a conflict check."

The California board was not dealing with a matter where the mere knowledge of the parties' names could create a conflict (since the husband had already consulted the law firm for a divorce from his wife – knowledge that the wife was seeking legal help in the divorce was not new, secret information).

The language used should be easily understood by a lay person. A disclaimer stating that the lawyer and prospective client would not be forming a "confidential relationship" did not go far enough. Cal. Formal Op. Interim No. 03-0001.

"Lawyer's use of a disclaimer in non-Internet setting that stated 'I understand that my initial interview with this attorney does not create an attorney/client relationship and that no such relationship is formed unless I actually retain this attorney' is not effective in preventing the lawyer from incurring duty of confidentiality to prospective client." Id. (citing Va. Bar Ethics Op. 1794 (June 30, 2004)).

The California committee stated that, "had Wife agreed to the following, she would have had, in our opinion, no reasonable expectation of confidentiality with Law Firm: 'I understand and agree that Law Firm will have no duty to keep confidential the information I am now transmitting to Law Firm.'" Id.

The committee suggests that the law firm provide even stronger disclaimers (for example, that information obtained may be used adversely or that a waiver may be limited depending on the circumstances).

(4) Implement a timely screen for any individual who received confidential information so as to avoid imputed disqualification. Proposed RPC 1.18 (2)(i), cmts. 7, 8. There are additional requirements such as notice and restriction to the sharing of fees. ABA 1.18 (Model Rules); ABA Ethics Op. 90-358.

(5) Condition conversations with prospective clients, and obtain informed consent prior to disclosures, that information provided during the preliminary (hopefully restricted) consultation will not prohibit the lawyer from representing a different client in the same or a substantially related matter. Obtain prospective consent to subsequent use of the information received. Proposed RPC 1.18 (e); ABA Ethics Op. 90-358.

(6) Use conspicuous and easily understood disclaimers, including, where appropriate, disclaimers that the inquirers must click on to show their approval of the terms.

The California opinion cites D.C. Ethics Opinion 302: "[p]roviding tentative 'best practices' guidance on attorney communications over the Internet to avoid formation of attorney-client relationships, including the use of prominent 'click through' disclaimers)[.] We note that by suggesting a means for lawyers to avoid inadvertently taking on a duty of confidentiality to website visitors, we do not mean to suggest that this methodology is the only means for doing so."

(7) Implement procedures by which non-lawyer staff receive and review inquiries to screen for conflicts.

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



# WSBA

**Opinion: 2206**

**Year Issued: 2010**

**RPC(s): RPC 7.1, 1.6, 1.9, Informal Op. 1182, 802**

**Subject: testimonials in advertising**

## QUESTIONS PRESENTED:

1. Are testimonials that specifically mention the dollar figure of settlements or awards ethically proper?
2. Should a disclaimer be included?

## SHORT ANSWERS:

1. Yes, presuming that former client permission is obtained and client confidences are kept, and presuming that the testimonials and advertisement are not misleading.
2. Yes, if required to keep the advertisement from being misleading.

## DISCUSSION AND ANALYSIS:

The inquiring lawyer and firm are considering placing advertisements in yellow pages that include testimonials from former clients that specifically mention the dollar amount of settlements or awards. The inquiry provided examples of other firms' advertising as a sample of their intent, and noted that all but one of the samples included disclaimers such as "Results of your case depend on its merits." The inquiry asked whether such disclaimers were required to make the advertisement "ethical."

This question is largely governed by RPC 7.1, which prohibits "false or misleading" communications about the lawyer's services. RPC 7.1 specifically defines a communication as "false or misleading" if it omits a fact necessary to make the statement considered as a whole not materially misleading. Additionally, two previous Informal Opinions of the Washington Rules of Professional Conduct Committee—Wash. Rules of Prof'l. Conduct Comm., Informal Op. 1182 (1988) ("Op. 1182"); Wash. Rules of Prof'l. Conduct Comm., Informal Op. 802 (1997) ("Op. 802")—completely address the current inquiry. Although the RPCs were amended in 2006, the amendments to RPC 7.1 do not undermine the analysis or change the results of Op. 1182 or Op. 802.

The Comment adopted expressly in 2006 with the RPC revision further clarifies this analysis. The Comment states in part:

....

[2] Truthful statements that are misleading are also prohibited by this Rule. A truthful statement is misleading if it omits a fact necessary to make the lawyer's communication considered as a whole not materially misleading. A truthful statement is also misleading if there is a substantial likelihood that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable factual

foundation.

[3] An advertisement that truthfully reports a lawyer's achievements on behalf of clients or former clients can be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client's case. Similarly, an unsubstantiated comparison of the lawyer's services or fees with the services or fees of other lawyers may be misleading if presented with such specificity as would lead a reasonable person to conclude that the comparison can be substantiated. The inclusion of an appropriate disclaimer or qualifying language may preclude a finding that a statement is likely to create unjustified expectations or otherwise mislead a prospective client.

The prior Informal Opinions of the RPC Committee provide still further guidance. For example:

- Comparative Results claims ("largest award in ABC County") must be dated to establish the publication date to assess truthfulness.
- Font size of disclaimers must be equivalent to font size of claims themselves.
- Disclaimer cannot be minimized or obscured.
- Language that each case is different and prior results should not create expectation of results in new case would be helpful.
- Statements that do not convey meaningful information (e.g., "Attorneys who get results") are prohibited.

See Op. 1182 and Op. 802, *supra*. In the context of reporting testimonials, a lawyer should also be mindful of the requirements of RPC 1.6 and RPC 1.9, requiring lawyers not to reveal information relating to the representation of a client unless the client gives informed consent or except as the RPCs permit. Based upon the question posed here, however, this answer presumes client consent is obtained before the testimonial is published.

Finally, the RPC Committee notes that in formulating this answer, it has not reviewed or approved any proposed advertisement, and is not making any comment on the appropriateness of any current advertisements. Those determinations are factual in nature and are not before the Committee, nor within its purview. The lawyer and the lawyer's firm remain accountable to abide by the RPCs and to avoid false or misleading statements.

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



# WSBA

**Opinion: 2215**

**Year Issued: 2012**

**RPC(s): RPC 1.1, 1.6, 1.15A**

**Subject: Cloud Computing**

This opinion addresses certain ethical obligations related to the use of online data storage managed by third party vendors to store confidential client documents.

**Illustrative Facts:**

Law Firm contracts with third-party vendor to store client files and documents online on remote server so that Lawyer and Client could access the documents over the Internet from any remote location.

**Rules of Professional Conduct Implicated:**

**RPC 1.1, 1.6, 1.15A**

**Analysis:**

Various service providers are offering data storage systems on remote servers that can be accessed by subscribers from any location over the Internet. This is one aspect of so-called "cloud computing," and lawyers may be interested in using these services to store confidential client documents and other data. Use of these third party storage systems, however, means that confidential client information is outside of the direct control of the lawyer and raises particular ethical questions.

Under RPC 1.6, a lawyer owes a client the duty to keep all client information confidential, unless the information falls within a specified exception. The duty of confidentiality extends beyond deliberate revelations of client information and requires a lawyer to protect client information against all disclosure. Comment 16 to RPC 1.6 states: "A lawyer must act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3." In order to use online data storage, a lawyer is under a duty to ensure that the confidentiality of all client data will be maintained.

In addition to client confidentiality, the lawyer is also under a duty to protect client property, under RPC 1.15A. A lawyer using online data storage of client documents is therefore under a duty to ensure that the documents will not be lost.

It is impossible to give specific guidelines as to what security measures should be in place with a third party service provider of online data storage in order to provide adequate protection of client material, because the technology is changing too rapidly and any such advice would be quickly out of date. It is also impractical to

expect every lawyer who uses such services to be able to understand the technology sufficiently in order to evaluate a particular service provider's security systems. A lawyer using such a service must, however, conduct a due diligence investigation of the provider and its services and cannot rely on lack of technological sophistication to excuse the failure to do so. While some lawyers may be able to do more thorough evaluations of the services available, best practices for a lawyer without advanced technological knowledge could include:

1. Familiarization with the potential risks of online data storage and review of available general audience literature and literature directed at the legal profession, on cloud computing industry standards and desirable features.
2. Evaluation of the provider's practices, reputation and history.
3. Comparison of provisions in service provider agreements to the extent that the service provider recognizes the lawyer's duty of confidentiality and agrees to handle the information accordingly.
4. Comparison of provisions in service provider agreements to the extent that the agreement gives the lawyer methods for retrieving the data if the agreement is terminated or the service provider goes out of business.
5. Confirming provisions in the agreement that will give the lawyer prompt notice of any nonauthorized access to the lawyer's stored data.
6. Ensure secure and tightly controlled access to the storage system maintained by the service provider.
7. Ensure reasonable measures for secure backup of the data that is maintained by the service provider.

A lawyer has a general duty of competence under RPC 1.1, which includes the duty "to keep abreast of changes in the law and its practice." RPC 1.1 Comment 6. To the extent that a lawyer uses technology in his or her practice, the lawyer has a duty to keep informed about the risks associated with that technology and to take reasonable precautions. The lawyer's duties discussed in this opinion do not rise to the level of a guarantee by the lawyer that the information is secure from all unauthorized access. Security breaches are possible even in the physical world, and a lawyer has always been under a duty to make reasonable judgments when protecting client property and information. Specific practices regarding protection of client property and information have always been left up to individual lawyers' judgment, and that same approach applies to the use of online data storage. The lawyer must take reasonable steps, however, to evaluate the risks involved with that practice and to ensure that steps taken to protect the information are up to a reasonable standard of care.

Because the technology changes rapidly, and the security threats evolve equally rapidly, a lawyer using online data storage must not only perform initial due diligence when selecting a provider and entering into an agreement, but must also monitor and regularly review the security measures of the provider. Over time, a particular provider's security may become obsolete or become substandard to systems developed by other providers.

#### Conclusion

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

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



# WSBA

**Opinion: 2216****Year Issued: 2012****RPC(s): RPC 1.4(a)(2), 1.6(a), 3.4(a), 4.4(a), 4.4(b), 8.4(d), RCW 5.50.060(2)(a)****Subject: Metadata**

This opinion addresses certain ethical obligations related to the transmission and receipt, in the course of a legal representation, of electronic documents containing "metadata." Metadata is the "data about data" that is commonly embedded in electronic documents and may include the date on which a document was created, its author(s), date(s) of revision, any review comments inserted into the document, and any redlined changes made in the document [note 1]. Specifically, this opinion addresses: 1) an attorney's ethical obligation to protect metadata when disclosing documents; 2) an attorney's ethical obligation when receiving another party's documents in which metadata is readily accessible and has therefore been disclosed; and, 3) the ethical propriety of an attorney using special forensic software to recover – from another party's documents – metadata that is not otherwise readily accessible through standard word processing software.

#### Illustrative Facts:

1. Lawyer A is preparing a written agreement to settle a lawsuit. The electronic document containing the agreement is circulated amongst attorneys in Lawyer A's law firm for review and comment. In reviewing the agreement, the firm attorneys insert comments into the document about the terms of the agreement, as well as the factual and legal strengths and weaknesses of the client's position. A preliminary draft of the agreement is finalized internally, and Lawyer A sends the agreement electronically, for review and approval, to Lawyer B, who represents the opposing party. Lawyer A does not "scrub" the metadata from the document containing the agreement before sending it to Lawyer B. Using standard word processing features, Lawyer B is therefore able to view the changes that were made to, and comments that were inserted into, the document by attorneys at Lawyer A's firm (i.e., Lawyer B can readily access the metadata contained in the document).
2. Same facts as #1, except that shortly after opening the document and discovering the readily accessible metadata, Lawyer B receives an urgent email from Lawyer A stating that the metadata had been inadvertently disclosed and asking Lawyer B to immediately delete the document without reading it.
3. Same facts as #1, except that Lawyer A makes reasonable efforts to "scrub" the document and thereby eliminates any readily accessible metadata before sending the document to Lawyer B. Lawyer B possesses special forensic software designed to circumvent metadata removal tools and recover metadata Lawyer A believes has been "scrubbed" from the document. Lawyer B wants to use this software on Lawyer A's document to determine if it contains any metadata that may be useful in representing his own client.

#### Analysis:

1. Lawyer A's ethical obligations: Lawyer A has an ethical duty to "act competently" to protect from disclosure the confidential information that may be reflected in a document's metadata, including making reasonable efforts to "scrub" metadata reflecting any protected information from the document before sending it electronically to Lawyer B. Rule of Professional Conduct ("RPC") 1.6 (a) requires Lawyer A to "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 [explicitly] permitted by paragraph (b)" of RPC 1.6 (emphasis added). This rule of confidentiality applies to "all

information relating to the representation, whatever its source" and extends to disclosures that, although they may not "themselves reveal protected information ...[,] could reasonably lead to the discovery of [confidential] information by a third person." Comments 3 & 4 to RPC 1.6. Metadata embedded in electronic documents that reflects attorney-client communications, attorney work product and/or other confidential information related to a representation falls squarely within the protections of RPC 1.6 [note 2]. As such, a lawyer must "act competently" to safeguard such metadata "against inadvertent or unauthorized disclosure[.]" [note 3]. Comment 16 to RPC 1.6. Lawyer A, therefore, must make reasonable efforts to ensure that electronic metadata reflecting protected information is not disclosed in conjunction with the exchange of documents related to a representation – i.e., that it is not readily accessible to the receiving party. Lawyer A can do this by disclosing documents in formats that do not include metadata – e.g., in hard copy, via fax, or in Portable Document Format ("PDF") created by mechanically scanning hard copies – or by "scrubbing" the metadata from electronic documents using software utilities designed for that purpose [note 4]. Note, however, that in the context of discovery production, where certain metadata may have evidentiary value, RPC 3.4(a) specifically prohibits a lawyer from "alter[ing], destroy[ing] or conceal[ing] a document or other material having potential evidentiary value[.]" or assisting another person in doing so [note 5].

Lawyer B's ethical obligations: Upon discovery, Lawyer B has an ethical duty to "promptly notify" Lawyer A that the disclosed document contains readily accessible metadata. RPC 4.4(b) requires a "lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent ... [to] promptly notify the sender." For the purposes of the rule, "document" includes e-mail or other electronic modes of transmission subject to being read or put in readable form." Comment 2 to RPC 4.4. As metadata is embedded electronic documents – i.e., "electronic modes of transmission" – it falls within the protections RPC 4.4(b). Here, where the metadata disclosed by Lawyer A includes attorney work product otherwise protected in litigation, Lawyer B knows or reasonably should know the metadata was inadvertently disclosed. As such, Lawyer B's duty to notify Lawyer A is triggered here.

2. Lawyer B's ethical obligations: Under the ethical rules, Lawyer B is not required to refrain from reading the document, nor is Lawyer B required to return the document to Lawyer A. See Comments 2 & 3 to RPC 4.4. Lawyer B may, however, be under a legal duty separate and apart from the ethical rules to take additional steps with respect to the document [note 6]. See *id.* If Lawyer B is not under such a separate legal duty, the "decision to voluntarily return such a document is a matter of professional judgment ordinarily reserved to the lawyer[.]" in consultation with the client. Comment 3 to RPC 4.4; see also RPC 1.4(a)(2) (requiring an attorney to "reasonably consult with the client about the means by which the client's objectives are to be accomplished").

3. Lawyer B's ethical obligations: The ethical rules do not expressly prohibit Lawyer B from utilizing special forensic software to recover metadata that is not readily accessible or has otherwise been "scrubbed" from the document. Such efforts would, however, in the opinion of this committee, contravene the prohibition in RPC 4.4(a) against "us[ing] methods of obtaining evidence that violate the legal rights of [third persons]" and would constitute "conduct that is prejudicial to the administration of justice" in contravention of RPC 8.4(d). To the extent that efforts to mine metadata yield information that intrudes on the attorney-client relationship, such efforts would also violate the public policy of preserving confidentiality as the foundation of the attorney-client relationship. See RCW 5.60.060(2)(a), *Dietz v. Doe*, 131 Wn.2d 835, 842 (1997), and Comments 2 & 3 to RPC 1.6. As such, it is the opinion of this committee that the use of special software to recover, from electronic documents, metadata that is not readily accessible does violate the ethical rules.

#### Endnotes

1. See Joshua J. Poje, Metadata Ethics Opinions Around the U.S., American Bar Association, available at:

[http://www.americanbar.org/groups/departments\\_offices/legal\\_technology\\_resources/resources/charts\\_fyis/metadatalachart.html](http://www.americanbar.org/groups/departments_offices/legal_technology_resources/resources/charts_fyis/metadatalachart.html), last visited February 20, 2012. Note that Mr. Poje's chart does not reflect the opinion recently issued by the Oregon State Bar Association, Formal Opinion No. 2011-187 ("Competency: Disclosure of Metadata").

2. If the metadata reflects confidential information pertaining to a former client – as may occur when attorneys reuse template documents over time – it is protected by RPC 1.9(c)(2).

3. RPC 1.1, moreover, requires Lawyer A to provide competent representation to a client, which includes possessing "the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." The duty to competently represent a client includes the duty to possess, obtain or recruit sufficient skill to ensure that confidential information reflected in metadata is not inadvertently disclosed.

4. For a discussion of mechanical alternatives for protecting metadata in the disclosure process, see David Hricik and Chase Edward Scott, Metadata: The Ghosts Haunting e-Documents, Georgia Bar Journal, February 2008, available at <http://gabar.org/public/pdf/gbj/feb08.pdf>, last visited February 22, 2012, and Jembaa Cole, When Invisible Ink Leaves Red Faces: Tactical, Legal and Ethical Consequences of the Failure to Remove Metadata, 1 Shidler J. L. Com. & Tech. 8 (Feb. 2, 2005), available at: [http://digital.law.washington.edu/dspace-law/bitstream/handle/1773.1/360/vol1\\_no2\\_art8.pdf?sequence=1](http://digital.law.washington.edu/dspace-law/bitstream/handle/1773.1/360/vol1_no2_art8.pdf?sequence=1), last visited February 20, 2012. As technology evolves, of course, what constitutes "competent" representation in this context necessarily evolves.

5. See also *O'Neill v. City of Shoreline*, 170 Wn.2d 138 (2010) (holding metadata is subject to disclosure pursuant to the Public Records Act).

6. See e.g., Fed. R. Civ. P. 26(b)(5)(B) and Washington State Superior Court Civil Rule ("CR") 26(b)(6) (governing claims of privilege or protection for information produced in discovery), Fed. R. Civ. P. 45(d)(2)(B) and CR 45(d)(2)(B) (governing claims of privilege or protection for information produced pursuant to subpoena), and Fed. R. Evid. 502(b) and Washington State Rule of Evidence 502(e) (governing claims of privilege or protection and waiver of same). Where the parties have entered into an agreement, such as a protective order, that addresses inadvertent disclosures, that agreement may also place additional obligations on the attorney in these circumstances.

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# WSBA

**Opinion: 2218**

**Year Issued: 2012**

**RPC(s): RPC 1.6**

**Subject: Disclosure of Client Information during Department of Revenue (DOR) Audit**

An inquiring lawyer requested an opinion from the Committee regarding whether he may provide access to client files without the client's consent, including unredacted financial records, to comply with a demand from the Department of Revenue which is conducting an audit on his real estate and tax practice. The committee opined as follows:

"The Committee has reviewed your inquiry and has unanimously declined to issue an opinion based upon their determination that existing Advisory Opinions 194 and 195 are dispositive of your question. Rule of Professional Conduct 1.6 obligates you to keep confidential client files and unredacted client related financial records, even if demanded by the State of Washington Department of Revenue. Such information shall not be disclosed without clients' permission. No further opinion is necessary."

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



# WSBA

**Opinion: 201401**

**Year Issued: 2014**

**RPC(s): RPC 5.3(b), 5.3(c), 7.1, 7.2(b), 7.3(a), 7.3(b), 7.3(c), 7.4, 8.4(a)**

**Subject: Participation in online lead generation services**

**Facts:**

Lawyer participates in an Internet-based lead generation service that charges participating lawyers a flat monthly membership fee. Lawyer provides information about her experience, practice areas, and the types of cases that she accepts. Potential clients provide the service with information about the type of lawyer that they seek.

Based upon the information provided to it, the service then sends the potential clients' contact information to those member lawyers. The service does not send the lawyers' contact information to the respective potential clients.

**Questions:**

1. May Lawyer participate in the lead generation service as described?
2. If so, may Lawyer initiate contact to one or more of the potential client leads?

**Conclusions:**

1. See discussion below.
2. Yes, qualified.

**Discussion:**

1. A lawyer may pay the reasonable cost of advertisements or permitted communications. RPC 7.2(b)(1). [n.1] But "[a] lawyer shall not give anything of value to a person for recommending the lawyer's services...." RPC 7.2(b) (emphasis added). When a communication endorses or vouches for a lawyer's credentials, abilities, competence, character, or other professional qualities, such a communication is a recommendation of the kind contemplated by RPC 7.2(b). "Lawyers are not permitted to pay others for channeling professional work." RPC 7.2 cmt. 5.

A lawyer is permitted to publicly disseminate a variety of types of information, including but not limited to the following:

information concerning a lawyer's name or firm name, address and telephone number; the kinds of services the lawyer will undertake; the basis on which the lawyer's fees are determined, including prices for specific services

and payment and credit arrangements; a lawyer's foreign language ability; names of references and, with their consent, names of clients regularly represented; and other information that might invite the attention of those seeking legal assistance.

RPC 7.2 cmt. 2; see also ABA Formal Op. 10-457 (2010). Merely paying the reasonable cost of disseminating the information contemplated by RPC 7.2 cmt. 2 does not constitute a recommendation of a lawyer's services.

Therefore, Lawyer may pay others to disseminate such information, provided that the information is accurate. The payment can be calculated by a variety of methods, provided that the ultimate amount is reasonable. For example, the payment could be a flat fee, a monthly fee, or pay-per-click fee. [n.2]

"A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law." RPC 7.4(a). But a lawyer shall not state or imply that the lawyer is a specialist in a particular field of law, except as provided by RPC 7.4.[n.3] And a lawyer must be accurate when communicating about his or her services:

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading. RPC 7.1.

A lawyer may compensate others to provide marketing or client-development services. RPC 7.2 cmt. 5. But a lawyer shall be responsible for the conduct of a nonlawyer in certain circumstances; and it is professional misconduct for a lawyer to violate or attempt to violate the Rules of Professional Conduct through the acts of another. See RPC 5.3(c)(1);[n.4] RPC 8.4(a).[n.5]

When a lawyer utilizes the assistance of a nonlawyer and has direct supervisory authority over the nonlawyer, the lawyer shall make reasonable efforts to ensure that the nonlawyer's conduct is compatible with the lawyer's professional obligations. See RPC 5.3(b).

Lawyer may pay others for generating client leads, such as Internet-based client leads, as long as (1) the lead generator does not recommend, endorse, or vouch for Lawyer or Lawyer's services, (2) any payment to or communication by the lead generation service is otherwise consistent with the Rules of Professional Conduct, and (3) the lead generation service does not make misleading statements or material misrepresentations. Therefore, the lead generation service's matching criteria must be based on disclosed, objective criteria. When a website attempts to match lawyers and clients based on a purported evaluation of the client's needs, or when a website vouches for the qualifications of the participating lawyer, then the website is a referral service, and the lawyer must not pay to participate.[n.6]

If the lead generation service makes subjective decisions in order to match the client to the lawyer, then the lawyer's payment constitutes an impermissible giving of value for recommending the lawyer's services or channeling work.[n.7] If, instead, the service matches clients and lawyers simply based on objective information—such as geographic information akin to a directory service—and discloses the specific basis upon which it matches lawyers and clients, then the payment does not violate the rule.

Before participating in the lead generation service, Lawyer should reasonably research and evaluate the nature of the communications between the service and the prospective clients, as well as the basis of the lead generation's matching or references to the Lawyer. If the service will misrepresent the nature of its function, then Lawyer's participation could constitute professional misconduct.

Lawyers shall not participate in a lead generation service that is misleading, whether expressly or by implication.

See RPC 7.1 (providing that a statement can be misleading if it "omits a fact necessary to make the statement considered as a whole not materially misleading"). If the service were to represent, expressly or impliedly, to the prospective clients that it has made a subjective match based on judgment—when the match is based solely upon objective information—then this would be misleading, and Lawyer must not participate.

Because of the likelihood that prospective clients will infer that the lead generation service is making subjective matching decisions, Lawyer must not participate in the lead generation service unless the service clearly discloses, in plain and conspicuous language, that the match was made solely based on specified objective information (e.g., geographic information, years of practice, or practice areas as described by the lawyer). Moreover, Lawyer must not participate in a lead generation service that states, implies, or creates a reasonable impression that it is making the referral without payment from the lawyer or has analyzed a person's legal problems when determining which lawyer should receive the referral.

Also, if Lawyer participates in a permitted form of a lead generation service, then Lawyer must also confirm and ensure that communications by the lead generation service complies with RPC 7.3(c), which requires that every communication made pursuant to the rule contain the name and office address of at least one lawyer responsible for its content.

2. Lawyers are generally prohibited from real-time solicitations for professional employment from prospective clients:

A lawyer shall not directly or through a third person, by in-person, live telephone, or real-time electronic contact solicit professional employment from a prospective client when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain, unless the person contacted:

- (1) is a lawyer;
- (2) has a family, close personal, or prior professional relationship with the lawyer; or
- (3) has consented to the contact by requesting a referral from a not-for-profit lawyer referral service.

RPC 7.3(a).[n.8]

Unless the prospective client has asked to be contacted by Lawyer, then Lawyer must not initiate a solicitation by telephoning the prospective client, initiating a real-time Internet communication with the prospective client (e.g., video chat or audio communication), or doing so in person. RPC 7.3 cmt. 9. Lawyer may, however, send an email, text message, or other written correspondence to the prospective client, soliciting professional employment, provided that the solicitation (1) does not involve coercion, duress, or harassment and (2) otherwise complies with the Rules of Professional Conduct. RPC 7.3(b)(2).

Lawyer may send a follow-up message that otherwise complies with the Rules of Professional Conduct. If the prospective client does not respond to Lawyer's initial message or follow-up message, then additional communications from Lawyer might violate RPC 7.3(b). See RPC 7.3 cmt. 5.[n.9] If the prospective client has expressed a desire to not be solicited by Lawyer, then Lawyer must not send such an email, text message, or other written correspondence. RPC 7.3(b)(1).

Endnotes:

1. The rule provides as follows:

(b) A lawyer shall not give anything of value to a person for recommending the lawyer's services, except that a lawyer may

(1) pay the reasonable cost of advertisements or communications permitted by this Rule;

RPC 7.2(b)(1).

2. "Pay per click (PPC) (also called cost per click) is an internet advertising model used to direct traffic to websites, in which advertisers pay the publisher (typically a website owner) when the ad is clicked." Wikipedia.org, Pay per click, at [http://en.wikipedia.org/wiki/Pay\\_per\\_click](http://en.wikipedia.org/wiki/Pay_per_click) (last visited December 10, 2014; see also Supreme Court of New Jersey Committee on Attorney Advertising Op. 43 (2011) (concluding, Inter alia, that "attorneys are not flatly prohibited from paying 'per-lead' Internet advertising charges provided [that] the marketing scheme is advertising and not an impermissible referral service.").

3. The rule provides, Inter alia, as follows:

(d) A lawyer shall not state or imply that a lawyer is a specialist in a particular field of law, except upon issuance of an identifying certificate, award, or recognition by a group, organization, or association, a lawyer may use the terms "certified", "specialist", "expert", or any other similar term to describe his or her qualifications as a lawyer or his or her qualifications in any subspecialty of the law. If the terms are used to identify any certificate, award, or recognition by any group, organization, or association, the reference must:

- (1) be truthful and verifiable and otherwise comply with Rule 7.1;
- (2) identify the certifying group, organization, or association; and
- (3) state that the Supreme Court of Washington does not recognize certification of specialties in the practice of law and that the certificate, award, or recognition is not a requirement to practice law in the state of Washington.

RPC 7.4(d).

4. Rule 5.3 provides as follows:

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

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

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

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

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

RPC 5.3.

5. Rule 8.4(a) provides as follows:

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;

RPC 8.4(a).

6. See Supreme Court of New Jersey Cmte. on Attorney Advertising Op. 43 (2011) (citing Arizona Opinion 06-06 (2006), Wash. Adv. Op. 2106 (2006), and Kentucky Bar Assoc. Ethics Op. E-429 (2008)). Other jurisdiction have concluded that websites are advertising and not referral services when there is sufficient information provided to users and there are no assertions about the qualifications of the participating lawyers. Id. (citing Supreme Court of Texas Professional Ethics Cmte. Op. 573 (2006) and Ohio Board of Commissioners on Grievances and Discipline Op. 2001-2 (2001)).

7. See WASH. ADV. OP. 2106 (2006) (concluding that participation in legal marketing plan operated by an Internet company would be a violation where the company identified participants as "verified" attorneys," made "subjective judgments" that were more than "ministerial services," and charged participating lawyers an annual membership fee but would extend membership for up to half of the original membership term if a lawyer's resulting revenue did not exceed the paid membership fee); see also New York State Bar Assoc. Cmte. on Prof. Ethics Op. 799 (2006) (providing that "Lawyer may not participate in website that charges lawyer a fee to provide information about potential clients whom lawyer will then contact, where the website purports to analyze the prospective client's problem and selects which of its subscribing lawyers should respond, nor may the lawyer contact the prospective client by telephone unless the prospective client has expressly requested a telephone contact.").

8. This prohibition does not apply if the person contacted is a lawyer, has a family, close personal, or prior professional relationship with the lawyer, or has consented to the contact by requesting a referral from a not-for-profit lawyer referral service. RPC 7.3(a)(1)-(3).

9. The comment provides as follows:

But even permitted forms of solicitation can be abused. Thus, any solicitation which contains information which is false or misleading within the meaning of Rule 7.1, which involves coercion, duress or harassment within the meaning of Rule 7.3(b)(2), or which involves contact with a prospective client who has made known to the lawyer a desire not to be solicited by the lawyer within the meaning of Rule 7.3(b)(1) is prohibited. Moreover, if after sending a letter or other communication to a client as permitted by Rule 7.2 the lawyer receives no response, any further effort to communicate with the prospective client may violate the provisions of Rule 7.3(b).

**RPC 7.3 cmt. 5.**

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



# WSBA

**Opinion:** 201402

**Year Issued:** 2014

**RPC(s):** RPC 5.3(c)(1), 7.1, 7.2, 7.2(b), 7.2(b)(1), 7.4, 7.4(a), 8.4(a)

**Subject:** Participation in online social media profile websites

**Facts:**

Lawyer claims her "profile" on a social media website that is designed to provide personal and professional information about lawyers to nonlawyers and other lawyers. The website permits lawyers to post, inter alia, their contact information, education, practice areas, experience, and articles. It is not possible for Lawyer to disclaim her profile after claiming it.

The website also generates a numeric and descriptive rating for each lawyer who claims his or her profile, as well as for some lawyers who have not claimed their profiles. The numeric and descriptive rating are affected, at least in part, by the amount of information that a lawyer provides and the lawyer's participation on the website. The website does not disclose how it determines the numeric and descriptive rating. It is possible for a less experienced lawyer to obtain a much higher rating than a much more experienced lawyer by simply providing more information about the lawyer's practice.

Enrolled lawyers can also attach specific "peer endorsements" to another lawyer's profile. Visitors to the website can also attach publicly viewable "client ratings" to a lawyer's profile. Peer endorsements affect the rating, but client ratings do not.

**Question:**

1. May Lawyer claim the profile and provide personal and professional information, knowing that the website will generate a publicly viewable numeric and descriptive rating that is, at least in part, influenced by the amount of information that Lawyer provides?
2. May Lawyer claim the profile and participate in the website if other users attach to Lawyer's profile publicly viewable (1) client ratings or (2) peer endorsements about Lawyer's services?
3. May Lawyer endorse another lawyer in exchange for a reciprocal endorsement?

**Conclusion:**

1. See discussion below.
2. See discussion below.
3. No.

**Discussion:**

1. Lawyers are permitted to publicly disseminate a variety of types of information, including but not limited to the following:

Information concerning a lawyer's name or firm name, address and telephone number; the kinds of services the lawyer will undertake; the basis on which the lawyer's fees are determined, including prices for specific services and payment and credit arrangements; a lawyer's foreign language ability; names of references and, with their consent, names of clients regularly represented; and other information that might invite the attention of those seeking legal assistance.

RPC 7.2 cmt. 2; see also ABA Formal Op. 10-457 (2010). A lawyer may also pay the reasonable cost of advertisements or permitted communications. RPC 7.2(b)(1).[n.1] A lawyer must be accurate when communicating about his or her services:

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

RPC 7.1. "A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law." RPC 7.4(a). But a lawyer shall not state or imply that the lawyer is a specialist in a particular field of law, except as provided by RPC 7.4.[n.2]

A lawyer cannot cause a nonlawyer to do that which the lawyer is ethically prohibited from doing. See RPC 5.3(c)(1);[n.3] RPC 8.4(a).[n.4] Therefore, Lawyer also must not cause the website to make false or misleading communications about Lawyer's practice.

Before claiming her profile, Lawyer should take reasonable steps to ascertain the extent to which the website will make representations about Lawyer's practice, including the numeric and descriptive rating, in order to determine whether any such representations will be inaccurate or misleading. If Lawyer determines that the website's numeric and/or descriptive ratings of lawyers are not based upon the lawyer's performance or merit and the website does not disclose how the ratings are calculated, then the lawyer must not participate in the website. If after claiming her profile, Lawyer determines that the website's numeric and/or descriptive ratings of lawyers are not based upon the lawyer's performance or merit and the website does not disclose how the ratings are calculated, then the lawyer must limit participation to ensuring that information is accurate and should consider posting a disclaimer, if it is reasonably feasible to do so.[n.5]

A lawyer who claims, adopts, or endorses information on a website listing becomes responsible to ensure that the information in the listing conforms to the Rules for Professional Conduct.[n.6] If Lawyer claims her profile and inadvertently provides inaccurate information, then Lawyer must make a prompt correction. Lawyer must also update her information if it changes, in order to ensure that only accurate information is provided.

For example, if Lawyer posted her contact information but later moved to a different law firm, then Lawyer must update her contact information within a reasonable time. By way of further example, if Lawyer provided information about the kinds of services that she will undertake but later decided to narrow the kinds of services that she will undertake, then Lawyer must update that information within a reasonable time.

2. Accurate client ratings or peer endorsements may be attached to Lawyer's profile. If visitors or other lawyers

attach to Lawyer's account client ratings or peer endorsements that are false or misleading, then Lawyer must delete or disclaim the false or misleading comments or endorsements, if it is reasonably feasible to do so.

If Lawyer chooses to participate in the website, then Lawyer must periodically monitor her profile to reasonably ensure that inaccurate client ratings or peer endorsements are deleted or disclaimed in a reasonably prompt manner, if it is reasonably feasible to do so.

3. Lawyer may only endorse another lawyer if the endorsement is accurate. RPC 8.4(c) (prohibiting deceptive conduct). Lawyer must not endorse another lawyer unless she has sufficient knowledge about the other lawyer to provide an accurate statement.

Lawyer must not provide an endorsement to another lawyer simply because that lawyer agreed to endorse Lawyer. Doing so would be giving something of value (i.e., an endorsement) for recommending the Lawyer's services. RPC 7.2(b).

#### Endnotes:

1. "A lawyer shall not give anything of value to a person for recommending the lawyer's services...." RPC 7.2(b) (emphasis added). When a communication endorses or vouches for a lawyer's credentials, abilities, competence, character, or other professional qualities, such a communication is a recommendation of the kind contemplated by RPC 7.2(b). In this case, Lawyer's information might have value to the website, but the mere providing of information contemplated by RPC 7.2 cmt. 2 does not constitute the giving of a thing of value in exchange for recommending services, even if that information results in a recommendation of the lawyer's services. However, answering legal questions might constitute the giving of a thing of a value and would be prohibited if given to a person for recommending the lawyer's service.

2. The Rule provides, *inter alia*, as follows:

(d) A lawyer shall not state or imply that a lawyer is a specialist in a particular field of law, except upon issuance of an identifying certificate, award, or recognition by a group, organization, or association, a lawyer may use the terms "certified", "specialist", "expert", or any other similar term to describe his or her qualifications as a lawyer or his or her qualifications in any subspecialty of the law. If the terms are used to identify any certificate, award, or recognition by any group, organization, or association, the reference must:

- (1) be truthful and verifiable and otherwise comply with Rule 7.1;
- (2) identify the certifying group, organization, or association; and
- (3) state that the Supreme Court of Washington does not recognize certification of specialties in the practice of law and that the certificate, award, or recognition is not a requirement to practice law in the state of Washington.

RPC 7.4(d).

3. Rule 5.3 provides as follows:

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

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

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

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

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

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

4. Rule 8.4(a) provides as follows:

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;

RPC 8.4(a).

5. An express disclaimer should ordinarily be sufficient to notify users that the lawyer is no longer participating in the website.

6. See South Carolina Ethics Adv. Op. 09-10 (2009) (stating, inter alia, that "a lawyer who adopts or endorses information on any similar web site becomes responsible for conforming all information in the lawyer's listing to the Rules of Professional Conduct" and also "[b]y claiming a website listing, a lawyer takes responsibility for its content and is then ethically required to conform the listing to all applicable rules").

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



# WSBA

**Opinion:** 201601

**Year Issued:** 2016

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

**Subject:** Ethical Practices of the Virtual Law Office

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

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

## I. Requirement for Physical Office Address

### A. General Requirements

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

General Rule (GR) 30 permits courts to require service by email. If a lawyer is handling litigation in a jurisdiction that has not adopted such a requirement, the lawyer might wish to serve opposing counsel through hand delivery. The Civil Rules (CR) do not require that a lawyer provide an address for hand delivery. Rather, CR 5(b)(1) provides that if the person to be served has no office, service by delivery may be made by "leaving it at his dwelling house with a person of suitable age and discretion then residing therein." Service, of course, also may be made by mail. Particularly in jurisdictions where it is customary to serve pleadings by hand delivery, providing the opposing counsel with a physical address to do so (such as a business service center) may mean that the lawyer will get the pleadings considerably faster. If a lawyer does not want to provide opposing counsel with an address for hand delivery, we recommend that the lawyer seek an agreement to have pleadings served by email instead, as permitted under GR 30(b)(4).

## B. Address in Advertisements

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

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

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

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

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

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

### A. Supervision

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

### B. Confidentiality

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

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

- The lawyer shall be satisfied that the vendor understands, and agrees to maintain and secure stored data in conformity with, the lawyer's duty of confidentiality.
- The lawyer shall ensure that the confidentiality of all client data will be maintained, and that client documents stored online will not be lost, e.g., through the use of secure back-up storage maintained by the vendor.
- The storage agreement should give the lawyer prompt notice of non-authorized access to the stored data or other breach of security, and a means of retrieving the data if the agreement is terminated or the vendor goes out of business.
- Because data storage technology, and related threats to the security of such technology, change rapidly, the lawyer must monitor and review regularly the adequacy of the vendor's security systems.

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

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

#### C. Duty to Avoid Misrepresentation

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

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

#### D. Duty to Avoid Conflicts of Interest

A robust conflicts checking system is critical to any law office, physical or virtual, in order to avoid conflicts of interest under RPC 1.7 [n.10], 1.9 [n.11], and 1.18.[n.12]. A robust conflicts checking system will include information on current and former clients, prospective clients, related parties, and adverse parties. The conflicts checking system is particularly important in a law firm where an individual firm lawyer's conflicts of interest will be imputed to the rest of the lawyers in the firm. RPC 1.10. [n.13]. In the physical office setting, physical proximity can in some circumstances provide more reliable access to the conflicts checking system. Lawyers in a virtual law practice, who most likely do not have the advantage of physical proximity, must ensure that the conflicts

checking system is equally accessible to all members of the practice, lawyers and staff, and that such access is reliably maintained.

#### Endnotes

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

2. RPC 5.1 states:

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

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

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

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

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

3. RPC 5.2 states:

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

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

4. RPC 5.3 states:

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

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

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

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

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

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

5. RPC 5.10 states:

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

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

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

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

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

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

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

7. RPC 1.6 states:

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

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

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

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

(3) may reveal information relating to the representation of a client to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

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

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

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

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

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

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

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

10. RPC 1.7 provides:

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

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

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

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

11. RPC 1.9 provides:

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person

in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

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

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

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

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

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

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

12. RPC 1.18 states in part:

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

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

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

...

13. RPC 1.10 states, with certain exceptions:

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

Advisory Opinions are provided for the education of the Bar and reflect the opinion of the Committee on Professional Ethics (CPE) or its predecessor, the Rules of Professional Conduct Committee. Advisory Opinions issued by the CPE are distinguished from earlier RPC Committee opinions by a numbering format which includes the year followed by a sequential number. Advisory Opinions are provided pursuant to the authorization granted

by the Board of Governors, but are not individually approved by the Board and do not reflect the official position of the Bar association. Laws other than the Washington State Rules of Professional Conduct may apply to the inquiry. The Committee's answer does not include or opine about any other applicable law other than the meaning of the Rules of Professional Conduct.

# WASHINGTON STATE BAR ASSOCIATION

**Advisory Opinion: 201701**

**Year Issued: 2017**

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

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

**Facts:**

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

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

**Question:**

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

**Conclusion:**

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

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

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

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

- If Client expresses an intent to seek immediate appellate review or if Lawyer is willing to seek immediate appellate review on Client's behalf, Lawyer should not make any further disclosure until the process of appellate review has run its course unless the trial court has threatened to hold the lawyer in contempt for not providing the information or the failure to disclose would somehow violate another RPC.
- If Client does not express an intent to seek immediate appellate review or cannot be found, Lawyer may make additional disclosure on the public record if but only if Lawyer reasonably believes that doing so is required by the trial court in order to obtain permission to withdraw.

**Analysis:**

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

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

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

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

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

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

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

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

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

#### Endnotes:

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

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall, notwithstanding RCW 2.44.040, withdraw from the representation of a client if:

- (1) the representation will result in violation of the Rules of Professional Conduct or other law;
- (2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or
- (3) the lawyer is discharged.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

- (1) withdrawal can be accomplished without material adverse effect on the interests of the client;
- (2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;
- (3) the client has used the lawyer's services to perpetrate a crime or fraud;
- (4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;
- (5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;
- (6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(7) other good cause for withdrawal exists.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

7. Superior Court Civil Rule 71 states:

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

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

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

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

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

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

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

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

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

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

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

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

11. RPC 1.2(d) provides that:

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

\*\*\*

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

## **Various Jurisdictions Social Media Disciplinary Actions**

## Discipline Notice - Douglas Schafer

License Number: 8852  
Member Name: Douglas Schafer

### Discipline Detail

Action: Suspension  
Effective Date: 4/17/2003  
RPC: 1.6 - Confidentiality  
Discipline Notice:

**Description:** Douglas Schafer (WSBA No. 8852, admitted 1978), of Tacoma, was suspended for six months, effective April 17, 2003, by order of the Washington State Supreme Court following a hearing. Mr. Schafer has returned to active status. This discipline was based on his conduct during 1996 and 1998 disclosing a client's secrets and confidences. For further information please see *In re Schafer*, 149 Wn.2d 148, 68 P.3d 1038 (2003).

In August 1992, Mr. Schafer agreed to form a corporation for a client. The purpose of the corporation was to purchase a bowling alley from an estate. During a conversation the client told Mr. Schafer that Mr. X., the personal representative of the estate had been "milking" the estate for four years. The client also told Mr. Schafer that Mr. X was giving the client a "good deal" on the bowling alley and that he would repay Mr. X. "down the road."

Three years later, Mr. Schafer represented a client in a case before Mr. X, who had become a judge. In December 1995, Judge X ruled against Mr. Schafer's client, imposing sanction. On that same day, Mr. Schafer started investigating Mr. X's role in the H estate. On February 1, 1996, the client terminated Mr. Schafer's representation and told Mr. Schafer he had "no authority to disclose any privileged information, relating to your prior representation of me." The client retained new counsel who wrote to Mr. Schafer that any disclosure regarding Mr. X would be in violation of RPC 1.6.

During February 1996, Mr. Schafer prepared a document which revealed his conversations with his client. He met with and provided this document and others to the Pierce County Prosecutor's Office, the Federal Bureau of Investigation, the Internal Revenue Service, The Seattle Times, The Seattle Post-Intelligencer, The News Tribune and two other local newspapers. In April 1996, Mr. Schafer attached documents disclosing his client's statements to court pleadings without asking the court to protect their confidentiality.

In July 1999, Mr. X. was removed from judicial office. The Court found that Mr. Schafer could have made his allegations against Mr. X without revealing his client's secrets and confidences.

Mr. Schafer's conduct violated RPC 1.6(a), prohibiting lawyers from revealing a client's secrets or confidences unless the client consents after consultation. Christine Gray represented the Bar Association. Shawn Newman, Donald H. Mullins and Douglas Schafer represented Mr. Schafer. Lawrence R. Mills was the Hearing Officer.

*In some cases, discipline search results will not reveal all disciplinary action relating to a Washington licensed legal professional, and may not display links to the official decision documents.*

## Discipline Notice - Patrick Leahy

WSBA Bar#: 10912

Member Patrick Leahy

Name:

### Discipline Detail

Action: Reprimand

Effective 09/12/2007

Date:

RPC: 4.1 - Truthfulness in Statements to Others  
8.4 (c) - Dishonesty, Fraud, Deceit or Misrepresentation

### Discipline Notice:

Description: Patrick J. Leahy (WSBA No. 10912, admitted 1980), of Tacoma, was ordered to receive a reprimand on September 12, 2007, following a stipulation approved by a hearing officer. This discipline was based on conduct in 2006 involving deceptive conduct.

In July 2006, Mr. Leahy called the home of an individual (KB) who had been in an automobile accident while driving her parents' car. Mr. Leahy asked for KB, identified himself as Patrick Leahy, and said he was a representative of her parents' insurer. In fact, Mr. Leahy represented the driver of the other car involved in the accident. Mr. Leahy also told KB that he had some documents he wanted to deliver the next day and asked when would be a good time to have them delivered. The documents to which he was referring were a summons and complaint instituting a lawsuit against KB and her parents based on the accident. KB asked Mr. Leahy to hold on and got her mother. At that point, KB's mother knew Mr. Leahy was not an agent of the insurance company, that he represented the other driver in the auto accident involving her daughter, that negotiations had broken down, and that they might be sued. She questioned Mr. Leahy about his identity. He again identified himself as Patrick Leahy from their insurer and asked whether anyone would be home the next day to receive some documents. KB's mother asked Mr. Leahy about his relationship to the documents, to which he eventually answered by stating that he was working with a process server. When asked if he was a lawyer, Mr. Leahy said no. Mr. Leahy eventually hung up. KB and her parents were served with a summons and complaint by a process server in late August 2006.

Mr. Leahy's conduct violated RPC 4.1(a), prohibiting a lawyer, in the course of representing a client, from knowingly making a false statement of material fact or law to a third person; and RPC 8.4(c), prohibiting a lawyer from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation.

Joanne S. Abelton represented the Bar Association. Leland G. Ripley represented Mr. Leahy. William S. Bailey was the hearing officer.

*In some cases, discipline search results will not reveal all disciplinary action relating to a Washington licensed legal professional, and may not display links to the official decision documents.*

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## IN RE: Margrett A. SKINNER.

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## Supreme Court of Georgia.

## IN RE: Margrett A. SKINNER.

No. S14Y0661.

Decided: May 19, 2014

William H. Noland, Childs & Noland, Macon, Georgia, for Margrett A. Skinner.  
 The State Bar of Georgia made a formal complaint against respondent Margrett A. Skinner (State Bar No. 650748), alleging violations of Rules 1.3, 1.4, 1.6, and 1.16 of the Georgia Rules of Professional Conduct. Prior to an evidentiary hearing on the formal complaint, Skinner filed a petition for voluntary discipline, admitting that she violated Rule 1.6 by improperly disclosing confidential information about a former client, and in which she agreed to accept a Review Panel reprimand for the violation. The special master and the State Bar recommended that we accept the petition for voluntary discipline. We rejected the petition, however, noting that a Review Panel reprimand is "the mildest form of public discipline authorized . . . for the violation of Rule 1.6." In the Matter of Skinner, 292 Ga. 640, 642 (740 S.E.2d 171) (2013), and noting as well that the petition and accompanying record did not "reflect the nature of the disclosures (except that they concern [unspecified] personal and confidential information) or the actual or potential harm to the client as a result of the disclosures." Id. at 642, n. 6. Following our rejection of the petition, the special master conducted an evidentiary hearing, and he made his report and recommendation on December 18, 2013, in which he found that Skinner violated Rules 1.4 and 1.6 but not Rules 1.3 and 1.16. Neither party sought review of the report by the Review Panel, and the matter is again before this Court for decision.

In his report, the special master found that a client retained Skinner in July 2009 to represent her in an uncontested divorce, and she paid Skinner \$900, including \$150 for the filing fee. For six weeks, the client did not hear anything from Skinner, and after multiple attempts to contact Skinner, the client finally was able to reach Skinner again in October 2009. At that point, Skinner informed the client that Skinner had lost the paperwork that the client had given to Skinner in July. Skinner and the client then met again, and Skinner finally began to draft pleadings for the divorce. The initial drafts of the pleadings had multiple errors, and Skinner and the client exchanged several drafts and communicated by e-mail about the status of the case in October and early November 2009. Those communications concluded by mid-November, and Skinner and the client had no more communications until March 18, 2010, when the client reported to Skinner that her husband would not sign the divorce papers without changes. In April 2010, both the client and her husband signed the papers.

A disagreement developed about the fees and expenses of the divorce. Skinner asked the client for an additional \$185 for certain travel expenses and the filing fee. In April and early May 2010, Skinner and the client exchanged several e-mails about the request for additional money. Then, on May 18, the client informed Skinner that she had hired another lawyer to complete her divorce, and she asked Skinner to deliver her file to new counsel and to refund \$750. Skinner replied that she would not release the file unless she were paid. Although Skinner eventually refunded \$650 to the client, Skinner never delivered the file to new counsel, contending that it only contained her "work product." New counsel completed the divorce within three months of her engagement.

Around this time, the client posted negative reviews of Skinner on three consumer Internet pages. When Skinner learned of the negative reviews, she posted a response on the Internet, a response that contained personal and confidential information about her former client that Skinner had obtained in the course of her representation of the client. In particular, Skinner identified the client by name, identified the employer of the client, stated how much the client had paid Skinner, identified the county in which the divorce had been filed, and stated that the client had a boyfriend. The client filed a grievance against Skinner, and in response to the grievance, Skinner said in August 2011 that she would remove her posting from the Internet. It was not removed, however, until February 2012.

The special master found that Skinner violated Rule 1.4 when she failed between July and October 2010 to keep her client reasonably informed of the status of the divorce, and the special master found that Skinner violated Rule 1.6 when she disclosed confidential information about her client on the Internet. The special

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master found no violation of Rules 1.3 and 1.16.2 Turning to the appropriate discipline for these violations, the special master noted that Skinner had substantial experience as a practicing lawyer—she was admitted to the Bar in 1987—which is an aggravating circumstance. The special master also found, however, a number of mitigating circumstances, including that Skinner had no prior discipline, the absence of a dishonest or selfish motive for her improper conduct, that she refunded a substantial portion of her fee to the client even after doing work for the client, that she accepted responsibility for her misconduct by filing a petition for voluntary discipline, that she otherwise was cooperative in the disciplinary proceedings, and that she had expressed remorse for her misconduct. In addition, the special master found as mitigation that Skinner experienced a number of personal problems during her representation of the client and the subsequent time that she posted the confidential information about her client on the Internet, including colon surgery in April 2010, the diagnosis of both her mother and father with cancer (she was their primary caregiver), and the death of her father. For both violations, the special master recommended a public reprimand, with the additional condition that Skinner “be instructed to take advantage of the State Bar’s Law Practice Management services and recommendations with respect to internal office procedures, client files, and case tracking procedures.”

We have reviewed carefully the record and the very detailed report of the special master, and we agree with his recommendation of a public reprimand, as well as the additional condition that Skinner be instructed to take advantage of the State Bar’s Law Practice Management services and recommendations with respect to internal office procedures, client files and case tracking procedures. See *In the Matter of Adams*, 291 Ga. 173 (729 S.E.2d 313) (2012). Although other jurisdictions occasionally have disciplined lawyers more severely for improper disclosures of client confidences, we note that those cases involved numerous clients and violations of other rules, see *Office of Lawyer Regulation v. Peshek*, 334 Wis.2d 373 (798 NW2d 879 (2011) (60-day suspension), or the disclosure of especially sensitive information that posed serious harm or potential harm to the client, see *In re Quillinan*, 20 DS Rptr. 288 (Ore. Disp. Bd. 2006) (90-day suspension), available at [www.osbar.org/docs/dbreport/dbr20.pdf](http://www.osbar.org/docs/dbreport/dbr20.pdf). In this case, the improper disclosure of confidential information was isolated and limited to a single client, it does not appear that the information worked or threatened substantial harm to the interests of the client, and there are significant mitigating circumstances. Accordingly, we hereby order that Skinner receive a public reprimand in accordance with Bar Rules 4-102(b)(3) and 4-220(c), and we order that she consult with the Law Practice Management Program of the State Bar as set forth above and implement its suggestions in her law practice.

Public reprimand.

#### FOOTNOTES

1. Joseph A. Boone was appointed as special master in this matter.
2. About Rule 1.16, the special master reported his belief that Skinner technically violated the rule by failing to deliver the file of her client to successor counsel based on a mistaken belief that signed pleadings in the file belonged to her as “work product.” See Formal Advisory Opinion 87-3; *Swift, Currie, McChes & Hiers v. Henry*, 276 Ga. 571 (581 S.E.2d 37) (2003). But the special master did not actually find a violation nor recommend any discipline under Rule 1.16. The special master reported that he made no such finding or recommendation because there was no clear and convincing evidence of prejudice, insofar as the client already had the documents contained in the file. As to the retention of unearned fees, the special master found the issue moot in light of the refund of \$650 to the client.

PER CURIAM.

All the Justices concur.

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**BEFORE THE HEARING BOARD  
OF THE  
ILLINOIS ATTORNEY REGISTRATION  
AND  
DISCIPLINARY COMMISSION**

In the Matter of:

**KRISTINE ANN PESHEK,**

Commission No. 09 CH 89

Attorney-Respondent,

FILED - August 25, 2009

No. 6201779.

**COMPLAINT**

Jerome Larkin, Administrator of the Attorney Registration and Disciplinary Commission, by his attorney, Lea S. Black, pursuant to Supreme Court Rule 753(b), complains of Respondent Kristine Ann Peshek, who was licensed to practice law in Illinois on November 9, 1989, and alleges that Respondent has engaged in the following conduct which tends to defeat the administration of justice or to bring the courts or the legal profession into disrepute:

**Count I**

*(Publishing client confidences or secrets on the Internet)*

1. At all times alleged in this complaint, Respondent was an assistant public defender in Winnebago County, Illinois. In the course of her duties, she had access to information about clients that would otherwise be confidential or secret.
2. Between June 2007, and April 2008, Respondent wrote and published an Internet web log ("blog") entitled "The Bardd (sic) Before the Bar - Irreverant (sic) Adventures in Life, Law, and Indigent Defense." Approximately one-third of the blog was devoted to discussing Respondent's work at the public defender's office and her clients, and the remaining content of the blog concerned Respondent's health issues and her photography and bird-watching hobbies. In the work-related blogs, Respondent referred to her clients by either their first name, a derivative of their first name, or by their jail identification number.
3. Respondent's blog was open to the public and was not password-protected. Respondent knew or should have known that the contents of her blog were continuously available to anyone with access to the Internet, and she maintained a site meter on the blog that counted the number of visits to the blog. At some point, Respondent posted the following language on her blog:

Commentary is Both Invited and Appreciated. Let's Get Some Dialogue Going!

4. On or about March 14, 2008, Respondent represented a college student in relation to allegations that he possessed a controlled substance. On March 14, 2008, Respondent published the following entry on her blog:

#127409 (the client's jail identification number) This stupid kid is taking the rap for his drug-dealing dirtbag of an older brother because "he's no snitch." I managed to talk the prosecutor into treatment and deferred prosecution, since we both know the older brother from prior dealings involving drugs and guns. My client is in college. Just goes to show you that higher education does not imply that you have any sense.

5. Respondent knew or should have known that information contained in her March 14, 2008 blog, as described in paragraph four, above, was confidential, or that it had been gained in the professional relationship and the

revelation of it would be embarrassing or detrimental to her client.

6. On or about March 28, 2008, Respondent represented a diabetic client in relation to his drug charges. On March 28, 2008, Respondent published the following entry on her blog:

"Dennis," the diabetic whose case I mentioned in Wednesday's post, did drop as ordered, after his court appearance Tuesday and before allegedly going to the ER. Guess what? It was positive for cocaine. He was standing there in court stoned, right in front of the judge, probation officer, prosecutor and defense attorney, swearing he was clean and claiming ignorance as to why his blood sugar wasn't being managed well.

7. Respondent knew or should have known that the information contained in her March 28, 2008 blog was confidential, or that it had been gained in the professional relationship and its revelation would be embarrassing or detrimental to "Dennis."

8. On or about April 9, 2008, Respondent represented a woman in relation to allegations that she had violated the terms of a previous order of probation. On April 9, 2008, Respondent published the following entry on her blog:

"Laura" was a middle aged woman with 7 children, 2 of them still adolescents. She was a traditional housewife. Her husband, a recovering alcoholic, worked. She stayed at home, and home schooled her child who was handicapped and (sic) learning disabled. In her favor, her original offense was a matter of sheer stupidity. She had forged a doctor's name on a prescription form, in order to obtain Ultram from a pharmacy. Ultram is a painkiller with weak opiate effects and some effect of the serotonin system as well. It is prescription only, but it is not a controlled substance. It's a moderately decent painkiller, but after a day or 2, any opiate-type "high" is long gone - at least for most people I know. I've used it off and on for years and I've never noted any "craving" or any other significant effect when I stop. I can't imagine why someone would get "addicted" to the stuff. Further, from spam comments and e-mails, I gather that you can get the stuff over the Internet with ease and without a prescription at a not unreasonable price if you really want to, so why she would have forged a prescription form for that drug is beyond me. Still, that's what she did, and she got caught, and she claimed to have stopped using. She claimed, per her pre-sentence report, not to be using any drugs at this time. And she had not been rearrested for anything other than 1 ticket for driving without a license in the intervening 5 years. On the other hand, while sentenced to the diversionary program, she had been referred to two different agencies and had never attended or completed any treatment program, and she had not been in contact either with her case supervisor or her probation officer since 2005, despite reminders and letters. She swore up and down to me that she was clean, she was no longer addicted, she had gone through a period of depression and had fallen out of touch and not known how to rectify the situation without risking jail. She was scared, and not experienced in the system. It seemed plausible. Neither I nor the prosecutor had any information on hand that would contradict the PSI and her statement in allocution.

The judge was lenient, given her family situation, her relative lack of criminal history, her good behavior other than status violations of omission, and the lack of any evidence of a current drug problem (sic). He sentenced her to an additional term of 1 year probation, and ordered her to serve 90 days in jail, the first 5 immediately, and the balance held suspended. It was a gift. I felt I'd done my job well.

The bailiffs took her back to holding, pending transport to booking. In no more than 3 minutes, they came back. "Laura" wanted to talk to the judge. They advised her to talk to me first.

So I went back there to see what her concerns were. "But I'm on Methadone!" she tells me.

Huh? You want to go back and tell the judge that you lied to him, you lied to the pre-sentence investigator, you lied to me? And you expect *what* to happen if you do this? I'll tell you what would happen; the sentence just pronounced would be immediately vacated and you'd go to prison, that's what would happen.

"Can I get my methadone while I'm in jail?" she asks me.

No! Geez, what do you think jail is? Of course they're not going to give you narcotics up there. You'll be lucky to get Tylenol for a broken bone.

"What am I going to do," she asks me. "I can't go 5 days without methadone."

9. Respondent knew or should have known that the information contained in her March 28, 2008 blog was confidential, or that it had been gained in the professional relationship and its revelation would be embarrassing or detrimental to "Laura."

10. On or before April 18, 2008, Respondent's supervisor at the Winnebago County Public Defender's Office became aware that Respondent was publishing blogs containing information about Respondent's clients. On or about April 18, 2008, Respondent was terminated from her employment as an assistant public defender based upon the blogs that she had published.

11. In addition to the blog entries described in paragraphs four, six, and eight, above, in a blog entry dated February 5, 2008, Respondent referred to a judge as being "a total asshole," and in a blog entry dated March 11, 2008, Respondent referred to a judge as "Judge Clueless."

12. Respondent's blog entries as described in paragraphs four, six, eight, and 11, above, contained sufficient identifying information such that Respondent's co-workers, employees of the State's Attorney's Office, police, bailiffs, or other participants in the Winnebago Circuit Court system could determine the identity of the clients and judges to which Respondent's blog entries referred. The blog entries also contained sufficient information such that a motivated person who was not an employee of the Winnebago Circuit Court could, using other publicly-available information, determine the identity of the judges and clients referred to in Respondent's blog entries as described in paragraph 11, above.

13. By reason of the conduct described above, Respondent has engaged in the following misconduct:

- a. using or revealing a confidence or secret of the client known to the lawyer, in violation of Rule 1.6(a), of the Illinois Rules of Professional Conduct; and
- b. conduct which tends to defeat the administration of justice or to bring the courts or the legal profession into disrepute, in violation of Illinois Supreme Court Rule 770.

#### Count II

*(Failure to disclose to a tribunal information necessary to avoid assisting a client in a fraudulent act)*

14. The Administrator realleges paragraphs one through 12 in count I, above.

15. Though Respondent was aware that "Laura" had misinformed the court regarding her drug usage, at no time did Respondent call upon "Laura" to rectify her misstatement to the court, and at no time did Respondent inform the court that "Laura" had admitted to using methadone.

16. Respondent knew or should have known that she had a duty to inform the court that "Laura" had misrepresented that she was not using any drugs at that time, or that she had a duty to call upon "Laura" to correct her misstatement.

17. By reason of the conduct described above, Respondent has engaged in the following misconduct:

- a. failing to call upon a client to rectify a fraud that the client perpetrated on the court, in violation of Rule 1.2(g) of the Illinois Rules of Professional Conduct;
- b. failing to disclose to a tribunal a material fact known to the lawyer when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client, in violation of Rule 3.3(a)(2) of the Illinois Rules of Professional Conduct;
- c. conduct involving dishonesty, fraud, deceit or misrepresentation, in violation of Rule 8.4(a)(4) of the Illinois Rules of Professional Conduct;
- d. conduct that is prejudicial to the administration of justice, in violation of Rule 8.4(a)(5) of the Illinois Rules of Professional Conduct; and
- e. conduct which tends to defeat the administration of justice or to bring the courts or the legal profession into disrepute, in violation of Illinois Supreme Court Rule 770.

WHEREFORE, the Administrator requests that this matter be assigned to a panel of the Hearing Board, that a hearing be held, and that the panel make findings of fact, conclusions of fact and law, and a recommendation for such discipline as is warranted.

Respectfully submitted,

Jerome Larkin,  
Administrator  
Attorney Registration and  
Disciplinary Commission

By: Lea S. Black

Lea S. Black  
Counsel for the Administrator  
One Prudential Plaza  
130 East Randolph Drive, Suite 1500  
Chicago, Illinois 60601-6219  
Telephone: (312) 565-2600

BEFORE THE HEARING BOARD  
OF THE  
ILLINOIS ATTORNEY REGISTRATION  
AND  
DISCIPLINARY COMMISSION

In the Matter of:

BETTY TSAMIS,

Commission No. 2013PR00095

Attorney-Respondent,

No. 6288664.

JOINT STIPULATION AND RECOMMENDATION FOR  
A REPRIMAND BY THE HEARING BOARD

Jerome Larkin, Administrator of the Attorney Registration and Disciplinary Commission, by his attorney, Gina M. Abbatemarco, and Respondent Betty Tsamis, by her attorneys, George B. Collins and Kathryn Hayes, stipulate that Respondent violated Rules 1.6(a), 1.15(d), and 4.4 of the 2010 Illinois Rules of Professional Conduct and, as discipline, recommend that she be administered a reprimand by the Hearing Board, pursuant to Supreme Court Rule 770(h) and Commission Rule 282. In support of that recommendation, the Administrator and Respondent stipulate as follows:

I.

STIPULATED FINDINGS OF FACT

*A. Count I- Conversion of Klimek settlement*

The Administrator and Respondent stipulate that the evidence in Count I of the Administrator's complaint would establish the following facts:

1. In or about February 2008, Respondent agreed to represent Kris Klimek ("Klimek") in a personal injury claim for injuries Klimek sustained arising from a fall that took place on the premises of Malibu East Condominiums in Chicago, Illinois. In August 2011,

PAGE 2:

Respondent settled Klimek's claim for \$14,142.68. On or about August 22, 2011, Respondent received three settlement checks from Hartford Insurance Company. The first check was made payable to Respondent in the amount of \$4,713.75, and represented payment of her fees pursuant to the fee agreement she had with Klimek. The second check was made payable to Medicaid/Medicare and Klimek in the amount of \$3,942.68 for the purpose of paying claimed liens, with any remaining amount to go to Klimek after the liens had been satisfied. The third check, for \$5,486.25, was made payable to Klimek and represented her portion of the proceeds.

2. On September 7, 2011, Respondent deposited the check in the amount of \$3,942.68 (which represented the proceeds owed to Klimek and Klimek's medical providers) into her client trust account at PNC Bank. On December 30, 2011, Respondent disbursed \$197.24 to HFS Collections on behalf of Medicaid in satisfaction of its claimed lien. Between September 7, 2011 and February 14, 2012, prior to any disbursement of funds to Medicare or Klimek, Respondent failed to preserve the identity of those funds when she drew the balance in the client trust account below the amount of the check, thereby converting \$2,057.54 of the settlement proceeds for her own use. Respondent's bank records show that Respondent's overdraft was the result of her failure to account for credit card fees being charged on the account, and that she had disbursed costs on two client matters in amounts greater than what she had received from those clients. In addition, in January 2012 Respondent deposited a \$30,000 settlement check into the account for her client, Linda Griffis. However, on the Griffis settlement statement Respondent

incorrectly listed the total she had received as "\$33,000." She then disbursed \$22,110 to the client and \$10,890 to herself in fees, resulting in withdrawal of \$3,000 more than had been deposited in connection with that case.

PAGE 3:

3. On April 20, and 26, 2012, respectively, Respondent paid Medicare \$717.63 and Klimek the remaining \$3,027.81. Klimek's check for \$3,027.81 was later returned due to insufficient funds in Respondent's account. Respondent then deposited \$1,000 into the client trust account from her own funds and reissued payment to Klimek.

*Count II- Revealing client confidences*

4. On September 6, 2012, Respondent agreed to represent Richard Rinehart ("Rinehart") in matters related to Rinehart's securing unemployment benefits from his former employer, American Airlines. American Airlines had terminated Rinehart's employment as a flight attendant because Rinehart allegedly assaulted a fellow flight attendant during a flight. Rinehart paid Respondent \$1,500 towards her fee.

5. Between September 6, 2012 and January 16, 2013, Respondent met with Rinehart on at least two occasions and obtained information from Rinehart concerning both his employment history at American Airlines and the alleged incident involving the other flight attendant. Respondent also reviewed Rinehart's personnel file, which she had obtained from American Airlines.

7. On January 16, 2013, Respondent represented Rinehart at a telephonic hearing before the Illinois Department of Employment Security ("IDES"), at the conclusion of which the IDES determined to deny Rinehart unemployment benefits. Shortly thereafter, Rinehart terminated Respondent's representation of him.

8. On or about February 5, 2013, Rinehart posted a client review of Respondent's services on the legal referral website AVVO, in which he discussed his dissatisfaction with Respondent's services. On February 7, 2013 and February 8, 2013, Respondent contacted Rinehart by email and requested that Rinehart remove the February 5, 2013 posting about her

PAGE 4:

from the AVVO website. Rinehart responded that he refused to remove the posting unless he received a copy of his files and a full refund of the \$1,500 he had paid Respondent as fees.

9. Sometime between February 5, 2013 and April 10, 2013, AVVO removed Rinehart's posting from its online client reviews of Respondent.

10. On April 10, 2013, Rinehart posted a second negative client review of Respondent on AVVO. Respondent replied to his post and revealed confidential information about his case. Respondent's reply to Rinehart's second posting contained information relating to her representation of Rinehart and exceeded what was necessary to respond to Rinehart's accusations.

II. FACTORS IN MITIGATION

11. Respondent was admitted to practice law in Illinois on May 4, 2006 and practices in Chicago where she concentrates her practice in the area of employment and civil rights law. Respondent has no prior disciplinary history. Respondent understands the seriousness of her misconduct and has expressed remorse for it. She has taken steps to more carefully manage her recordkeeping in order to minimize the likelihood of future errors involving her client fund account, so that future overdrafts do not occur. Those steps include reviewing client ledgers and settlement statements with greater detail before issuing checks, and ensuring that she deposits money into the client trust account to account for credit card fees.

12. If this matter proceeded to a hearing, several lawyers and clients would have testified to Respondent's excellent reputation for truth and veracity.

## III. RECOMMENDED DISCIPLINE AND LEGAL DISCUSSION

13. The Administrator and Respondent agree and jointly recommend that a reprimand be administered by the Hearing Board pursuant to Supreme Court Rule 770(h) and Commission

## PAGE 5:

Rule 282, as the appropriate discipline in this matter. The following cases support that recommendation.

14. In *In re Nottage*, 2010 PR 00090 (July 20, 2011), the respondent represented a client in a divorce proceeding and negotiated a tentative settlement on behalf of her client. She withdrew while the proceeding was still pending and the client later filed a motion to set aside the settlement, in which she accused the respondent of coercing her to settle the matter. Attempting to defend herself, the respondent sent the opposing attorney over 500 pages of emails exchanged between herself and the client. The respondent did not seek a court order to release the emails, nor did she take any steps to redact the client's personal information. The hearing board reprimanded the respondent, finding that her conduct had been inconsistent with Rule 1.6. In the instant matter, Respondent also released confidential client information in a public forum in order to counter a client's accusations. Like *Nottage*, Respondent has expressed remorse for her actions and would present favorable character evidence.

15. In *In re Kreiter*, 95 CH 153 (November 22, 1995) the attorney prepared a personal injury settlement statement which did not disclose the full amount of the fee he was withholding from the settlement proceeds. The Hearing Board found that the statement was neither false nor intentionally misleading. The Board rejected the Administrator's allegation that the respondent had converted funds, but found that the attorney had failed to promptly deliver the funds and that a reprimand was the appropriate sanction for his misconduct. Respondent's conduct is similar to that in *Kreiter*, in that Respondent's errors in properly documenting the amounts of client money she received, as well as her failure to account for the credit card service charges, resulted in her failing to promptly deliver funds to her client. Respondent has also acknowledged her errors as was the case in *Kreiter*.

## PAGE 6:

16. Under the circumstances of this case, a reprimand is consistent with prior Hearing Board decisions and is appropriate under the facts and circumstances of this case.

WHEREFORE, the Administrator and Respondent jointly recommend that the Hearing Board issue a reprimand, pursuant to Supreme Court Rule 770(h) and Commission Rule 282.

Respectfully submitted,

Jerome Larkin, Administrator  
Attorney Registration and  
Disciplinary Commission

Betty Tsamis,  
Respondent

By: Gina M. Abbatemarco  
Counsel for Administrator  
130 E. Randolph Dr., Suite 1500  
Chicago, IL 60601  
Telephone: (312) 565-2600

By: George B. Collins  
Counsel  
for Respondent  
Collins,  
Bargione &  
Vuckovich  
1 N.  
LaSalle St.,  
Suite 300  
Chicago,  
IL 60602  
Telephone:

FILED SEPTEMBER 11, 2014

STATE BAR COURT OF CALIFORNIA  
HEARING DEPARTMENT – LOS ANGELES

In the Matter of	)	Case Nos.: 13-O-13838-DFM
	)	(13-O-14282); 13-O-17014 (Cons.)
SVITLANA E. SANGARY,	)	
	)	DECISION
Member No. 232282,	)	
	)	
A Member of the State Bar.	)	

INTRODUCTION

Respondent Svitlana E. Sangary (Respondent) is charged here with four counts of misconduct, involving three separate matters. It is alleged that Respondent willfully violated rule 1-400(D)(2) of the Rules of Professional Conduct<sup>1</sup> (deceptive advertising); rule 3-700(D)(1) (failing to promptly release a client file); and two counts of section 6068, subdivision (i) (failing to cooperate with a disciplinary investigation). The State Bar had the burden of proving the above charges by clear and convincing evidence. The court finds culpability and recommends discipline as set forth below.

PERTINENT PROCEDURAL HISTORY

The Office of the Chief Trial Counsel of the State Bar of California (State Bar) initiated this proceeding by filing a Notice of Disciplinary Charges (NDC) on November 21, 2013, in case Nos. 13-O-13838 and 13-O-14282. On January 21, 2014, a status conference was held in this

<sup>1</sup> Unless otherwise indicated, all references to rules refer to the State Bar Rules of Professional Conduct. Furthermore, all statutory references are to the Business and Professions Code, unless otherwise indicated.

matter. The State Bar was represented by Eli Morgenstern. Respondent did not appear.

Because the court had not received a response by Respondent to the NDC, the State Bar was ordered to file a motion for entry of Respondent's default by February 14, 2014, in the event that a response was not filed.

On January 27, 2014, Respondent, acting as her own counsel, filed a response to the NDC. In her response, Respondent denied the allegations contained in the NDC and then wrote a 16-page soliloquy with little to no rational connection to the charges at hand. In one portion of her response, Respondent wrote:

Also, with regard to false statements and misleading advertisement, none other than Natalie Portman comes to mind. The online media extensively covers the controversy surrounding Natalie Portman's performance in the film Black Swan. The ballet dancer who performed in the Black Swan, Sarah Lane, has come forward to reveal [*sic*] a "cover-up" and says that Natalie Portman's head was superimposed on to Sarah Lane's body, and that Natalie Portman lied. Please see Exhibit [*sic*] 21, 3 articles that appeared on [www.theguardian.com](http://www.theguardian.com), <http://news.softpedia.com> and [www.thehuffingtonpost.com](http://www.thehuffingtonpost.com).

Despite the foregoing, Natalie Portman has won an Oscar for her performance in Black Swan.

[Respondent's January 27, 2014 response, p. 12.]

Later in her response, Respondent concluded by stating:

There is a popular expression, 'sweet sixteen'. The foregoing 16 pages can be characterized as bitter-sweet sixteen, in SANGARY's view. It goes without saying as to why they are bitter. Can one envision the acts in the civil arena, more unseemly than the ones described above? But what SANGARY views as sweet is that this country, the United States of America, is truly the land of opportunity, where anything and everything is possible. SVITLANA SANGARY came to this country in her twenties, with nothing, and married another immigrant, who also had nothing. SANGARY passed LSAT [*sic*] without taking the preparation course, graduated *cum laude* from the Pepperdine University School of Law, and passed the bar without even taking the Barbri course. SANGARY's American dream has come true, as she has been able to achieve a point wherein now, in her thirties,

SANGARY is a prominent donor and philanthropist, supporting important social causes, who had recently received the email from President Obama, with the subject line 'I need your help today', asking SVITLANA SANGARY for an additional donation. Please see Exhibit 30.

God Bless America!

[Respondent's January 27, 2014 response, p. 17.]

Respondent attached 30 exhibits to her response, including an extensive write-up on Natalie Portman and an email from Barack Obama requesting that Respondent "[c]hip in \$3 or more" to help the Democratic Party. (Respondent's January 27, 2014 response, Exhibit 30.)

On January 28, 2014, this court issued a trial-setting order, setting a trial date of March 12, 2014.

On March 6, 2014, this court issued an order staying the proceeding based on the State Bar's pursuit of an interim appeal regarding portions of this court's case management order. On March 26, 2014, the Review Department ruled on the State Bar's interim appeal and the matter was remanded to this court with instructions to modify the case management order.

On April 15, 2014, this court issued an order lifting the existing stay and scheduling a status conference on May 5, 2014, for the purpose of setting new trial and pretrial dates. That status conference went forward as scheduled. Respondent did not appear at the status conference; instead, Frank Lincoln made a special appearance on her behalf. At the status conference, a new trial date of June 10, 2014 was scheduled.

On May 6, 2014, this court issued an order setting forth the new trial date, together with deadlines for the parties to comply with their pretrial obligations and to file a pretrial statement. In addition, the court ordered the parties to participate in a settlement conference with Judge Pro tem George Scott on May 19, 2014. A copy of that order was mailed to both Respondent and to attorney Frank Lincoln.

On May 22, 2014, the State Bar filed an NDC in case No. 13-O-17014. The NDC consists of a single count, alleging Respondent's failure to cooperate in the State Bar's investigation in that matter, including failing to appear for an investigative deposition on April 4, 2014. The new case was assigned to the undersigned.

A status conference was held on June 2, 2014. Respondent did not appear at the status conference; instead, Frank Lincoln made a special appearance on her behalf. At the status conference, the two proceedings were consolidated and a new trial date of July 8, 2014, was scheduled. On June 3, 2014, this court issued a new trial-setting order, providing new dates for the parties to comply with various pretrial disclosure obligations and file pretrial conference statements. In addition, the court ordered the parties to participate in a settlement conference with Judge Pro tem George Scott. The order was explicit in stating that unless excused by the court Respondent was obligated to attend the settlement conference, even if represented by counsel. A copy of that order was mailed to both Respondent and to attorney Frank Lincoln. Despite this order and the fact that Respondent was not excused by the court, Respondent did not attend the scheduled settlement conference, although attorney Lincoln was present. The assigned judge then issued an order stating, "Respondent did not appear. Settlement discussions would not be fruitful."

On June 30, 2014, Respondent, acting as her own counsel, filed her response to the NDC in case No. 13-O-17014. The response denied the alleged misconduct and included a lengthy presentation of various facts and documents that Respondent "finds highly disturbing, and that have caused and continue to cause [Respondent] a significant level of turbulence, dismay, and even shock." (Respondent's June 30, 2014 response, pp. 1-2.) Instead of focusing on the only allegation in the NDC, i.e. whether or not Respondent failed to cooperate with a State Bar

investigation, Respondent denied the allegation and proceeded to compose another bizarre soliloquy, at one point stating:

What is also unbelievable is that SVETLANA KONOVIATCH, a woman in her forties, living in the United States, is "milking" her mother, living in Ukraine, for money! SVETLANA KONOVIATCH's mother, as stated by SVETLANA KONOVIATCH herself in the said posting on [www.yelp.com](http://www.yelp.com), is "90% blind 73 year old lady". Can you imagine this?!!!!!! Can you believe this?!!!!!! Instead of a young daughter living in the United States supporting her elderly 90% blind mother living in the Ukraine, it is the mother, who is 73 years old and blind, living in the Ukraine, who supports her daughter, who is in her forties and lives in the United States. Wow!!! And, after all, having received her mother's money from SVITLANA SANGARY, the daughter SVETLANA KONOVIATCH has the audacity to make a posting on [www.yelp.com](http://www.yelp.com), explaining to the whole world that she is sucking the last dollars (or maybe even pennies) from her elderly disabled mother, and falsely claiming that SVITLANA SANGARY stole the money. If this is not perverse, sick and ridiculous, what is?!!!!

[Respondent's June 30, 2014 response, p. 6.]

Respondent ultimately concluded her response by writing:

SVITLANA SANGARY did not have to deal with lemon law. She is dealing with other type [sic] of "lemons", such as the ones revealed here. And a proverbial phrase comes to mind. "When life gives you lemons, make lemonade". Wikipedia says that it is a proverbial phrase used to encourage optimism and a can-do attitude in the face of adversity or misfortune.

Wikipedia describes it. SANGARY exemplifies it.

And, such lemonade tastes great. It may have blood, sweat, and tears in it, but it is so enjoyable. The more challenges, the more lemons – the more lemonade!

God bless America, the land of opportunity!!!

[Respondent's June 30, 2014 response, p. 12.]

On the same day, June 30, 2014, the pretrial conference in this consolidated matter was held, as previously scheduled in this court's trial-setting order of June 3, 2014. Neither

Respondent nor Frank Lincoln appeared for it. Respondent also did not file a pretrial conference statement, despite this court's prior order.

On July 1, 2014, this court issued an order noting (1) that no substitution of attorneys had been filed by Respondent or Frank Lincoln; (2) that Respondent must comply with the pretrial disclosure requirements or her evidence at trial will be excluded; and (3) that the trial would commence as previously scheduled.

On the morning of the scheduled trial, July 8, 2014, Respondent filed a motion to continue the trial, alleging that Frank Lincoln had terminated his legal services to her prior to the "4<sup>th</sup> of July holidays" and requesting a continuance so that she could hire new counsel. The State Bar made an oral objection to the requested continuance, and this court denied the motion.

Throughout the balance of the trial, Respondent refused to participate, other than stating that she wanted a continuance and was not prepared to try the case. When called as a witness by the State Bar, she took the same position and declined even to take the witness's oath until ordered to do so by this court. She then refused to answer any questions, claiming a First Amendment right to remain silent. This refusal continued despite this court's instruction to her that, subject to her Fifth Amendment right to refuse to answer specific questions that were potentially incriminating, she had an obligation to cooperate with the disciplinary proceeding and that an unjustified refusal by her to do so could be treated by this court as an aggravating factor in the event of a finding of culpability.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

The following findings of fact are based on Respondent's responses to the two NDCs and the documentary and testimonial evidence admitted at trial.

**Jurisdiction**

Respondent was admitted to the practice of law in California on November 24, 2004, and has been a member of the State Bar at all relevant times.

**Case No. 13-O-13838**

Respondent has a website that features a large number of "Publicity" photos. Each of these photos shows Respondent with at least one other celebrity or political figure, including Barack Obama, Bill Clinton, Hillary Clinton, Al Gore, Arnold Schwarzenegger, Antonio Villaraigosa, George Clooney, Paris Hilton, and Bill Maher, to name a few. At trial, the State Bar elicited credible and persuasive expert testimony, and this court finds, that many, and perhaps all, of these photos were created by taking original celebrity photos and then overlaying Respondent's image in order to make it appear as though Respondent was in the presence of that celebrity. These photographs were part of an advertisement and solicitation for future work, directed by Respondent to the general public through her website, and they were false, deceptive, and intended to confuse, deceive and mislead the public.

These "publicity" photos still remained on Respondent's website at the time of the trial of this matter, notwithstanding both the State Bar's ongoing inquiries to Respondent since December 2012 regarding the deceptive nature of these photos and the filing of the instant charges against Respondent under rule 1-400 in November 2013.

**Count One - Rule 1-400(D)(2) [Deceptive Advertising]**

Rule 1-400(D)(2) provides that attorney communications or solicitations shall not contain any matter in a manner or format which is false, deceptive, or which tends to confuse, deceive or mislead the public. By posting and maintaining several images on her website falsely depicting Respondent posing with various public figures, when in fact Respondent was not actually photographed in the company of those public figures, Respondent communicated an

advertisement or solicitation directed to the general public that was false and deceptive, in willful violation of rule 1-400(D)(2).

**Count Two - Section 6068, subd. (i) [Failure to Cooperate]**

A State Bar investigator sent Respondent a letter on August 20, 2014, informing Respondent that a previously closed investigation (12-21669) was being re-opened and re-numbered as 13-O-13838, and asking Respondent to provide a response to the allegations made by the complainant in that matter. Included within the listed allegations was the allegation that Respondent's website "depicts numerous photographs of [her] standing next to various public figures, including politicians, actors, musicians and other celebrities. It appears that many of these photos appear to be 'photo shopped.' The photos appear to be misleading [*sic*] and false advertisement." Respondent was directed to provide a written response, including providing specified documents, regarding the challenged "Publicity" photos, by September 3, 2013. The letter noted that "it is the duty of an attorney to cooperate and participate in any State Bar investigation."

On August 30, 2013, Respondent was given a one-week extension of the September 3, 2013 deadline. On September 11, 2013, Respondent requested, but was denied, an additional two-week extension of the deadline. Thereafter, on October 7, 2013, Respondent sent an email to the State Bar, indicating that she was "still working" on her response. Despite that assurance, no response was ever provided by Respondent to the State Bar's letter.

Section 6068, subdivision (i), of the Business and Professions Code, subject to constitutional and statutory privileges, requires attorneys to cooperate and participate in any disciplinary investigation or other regulatory or disciplinary proceeding pending against that attorney. Respondent's failure to respond to investigator's August 20, 2014 letter constituted a willful violation of her duties under section 6068, subdivision (i). (*In the Matter of Bach*

(Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 631, 644 [attorney may be found culpable of violating § 6068, subd. (i), for failing to respond to State Bar investigator's letter, even if attorney later appears and fully participates in formal disciplinary proceeding].)

**Case No. 13-O-14282**

Respondent represented Armando Soto (Soto) in seeking to set aside a significant default judgment against him. When Respondent was terminated as the attorney for Soto, Respondent declined to discuss with Soto the status of his case. Then, when Soto hired a new attorney, Respondent refused requests that Soto's file be transmitted to the new attorney. The first request was made in writing on March 7, 2013, and was followed by numerous telephone calls and voicemail messages by the new attorney's office. Respondent merely ignored these requests until after Soto complained to the State Bar. Finally, in late June 2013, Respondent sent a portion of the file to the new attorney, but withheld many pertinent documents. It was only on August 30, 2013, after the new attorney's office had again contacted the State Bar, that Respondent delivered the balance of the file. The effect of this delay was to cause additional expense to Soto in attorney's fees and to delay the filing of the motion to set aside the existing default judgment.

**Count Three - Rule 3-700(D)(1) [Failure to Release Client File]**

Respondent's response to the NDC makes clear that she was well aware of her obligation under rule 3-700(D)(1) to promptly release all client papers and property to the client upon termination of employment. In fact, as an attachment to that response, she included a letter she had sent to an attorney in June 2011, in which she provided a lengthy discourse on an attorney's obligations under rule 3-700(D)(1). That discourse included the following:

The California case law is also clear that upon discharge by the client, an attorney is required to return the client's case file or forwards [sic] the case file to a successor attorney, since the attorney's work product belongs absolutely to the client whether or

not the attorney has been paid for his or her services. *John F. Matull & Associates, Inc. v. Cloutier* (1987) 194 Cal. App. 3d 1049; *Kalen v. Delug* (1984) 157 Cal. App. 3d 940.

In other words, the requirement to return all client's papers and properties applies when the attorney ceases to provide legal services to the client. *Baker v. State Bar* (1989) 49 Cal. 3d 804.

An attorney may not withhold client's papers. *Academy of Cal. Optometrists, Inc. v. Superior Court* (1975) 51 Cal. App. 3d 999.

Furthermore, please be advised that unreasonable delay in releasing or refusal to turn over a client's file after being notified of the substitution is ground for disciplinary action. See CRPC 3-700(D) & 4-100(B)(4); Los Angeles Bar Ass'n. Form Opns. 48, 103, 197, 253 and 330 (1972); *Rosenthal v. State Bar* (1987) 43 C3d 612, 621-622 (attorney disciplined for (among other things) failing to return client files or provide access to records; *Bernstein v. State Bar* (1990) 50 Cal. 3d 221, 232 (discipline for failure to turn over client files and documents); *Matter of Phillips* (Rev. Dept 2001) 4 Cal. State Bar Ct. Rptr. 315, 325-326 (discipline for failure to release file documents after discharge by client).

[Respondent's January 27, 2014 response, Exhibit 29.]

Respondent's failure to respond promptly to the request for the transfer of her file to Soto's new attorney constituted a willful violation of rule 3-700(D)(1).

**Case No. 13-O-17014**

On January 16, 2014, a State Bar investigator sent Respondent a letter as a result of a complaint received from Hasmik Jasmine Ohanian, Esq. In that letter, the investigator informed Respondent that Ohanian had complained that Respondent had sued a former client for fees without first offering to arbitrate the matter. In addition, Ohanian had complained that Respondent's website, including the various "Publicity" photos and numerous purported testimonials, was false and misleading. Respondent was directed to provide a written response, including providing specified documents, regarding the Ohanian complaints by January 30, 2014. This letter also reminded Respondent that "it is the duty of an attorney to cooperate and participate in any State Bar investigation."

On January 29, 2014, Respondent requested and was subsequently granted a two-week extension. On February 17, 2014, after the extended deadline had passed, Respondent sent an email to the State Bar, indicating that she was "working" on her response and needed another extension. That request was denied, and Respondent was admonished to provide her response as soon as possible. Despite that admonition, no response was ever provided by Respondent to the State Bar's January 16, 2014 investigation letter.

**Count One - Section 6068, subd. (i) [Failure to Cooperate]**

Respondent's failure to respond to the investigator's letter in the Ohanian investigation constituted a willful violation of her duties under section 6068, subdivision (i).

**Aggravating Circumstances**

The State Bar bears the burden of proving aggravating circumstances by clear and convincing evidence. (Rules Proc. of State Bar, Stds. for Atty. Sanctions for Prof. Misconduct,<sup>2</sup> std. 1.5.) The court finds the following with respect to aggravating circumstances.

**Multiple Acts of Misconduct**

Respondent's multiple acts of misconduct is an aggravating factor. (Std. 1.5(b).)

**Lack of Insight**

Respondent has demonstrated a persistent lack of insight regarding her need to comply with her professional obligations and her ongoing failures to do so. Although charges were pending against her in January 2014 for her failure to respond to a State Bar's investigation letter regarding her website, she failed to respond to a new investigation launched by the State Bar as a result of another complaint against her by a different individual. Similarly, although she scolded another attorney in 2012 regarding that attorney's duty to turn over a former client's file to a successor attorney for the client, she then violated that duty the following year.

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<sup>2</sup> All further references to standard(s) or std. are to this source.

### **Contempt for Disciplinary Proceedings**

Respondent's conduct during the course of this proceeding demonstrated her contempt for these proceedings and further calls into question her fitness to practice law. (*Weber v. State Bar* (1988) 47 Cal.3d 492, 507 ["an attorney's contemptuous attitude toward the disciplinary proceedings is relevant to the determination of an appropriate sanction"].)

Respondent failed to appear for a court-ordered settlement conference; she failed to comply with her pretrial disclosure obligations; she filed her responses to the NDCs only after this court had directed the State Bar to file motions for entry of her default; and, although she was physically present during the trial of this matter, she refused to provide any functional participation in it, whether as a self-represented party or as a witness. Instead, she sat throughout the proceeding at counsel table, obviously engaged in some other activity (which she described at one point as writing her request for an interim appeal of this court's denial of her request for a continuance).

Respondent's disregard and disrespect for this disciplinary proceeding is a significant aggravating factor.

### **Mitigating Circumstances**

Respondent bears the burden of proving mitigating circumstances by clear and convincing evidence. (Std. 1.6.) The court finds the following with regard to mitigating circumstances.

#### **No Prior Record of Discipline**

Respondent had no prior record of discipline for approximately eight years prior to the misconduct in this case.<sup>3</sup> Respondent's discipline-free record warrants some consideration in

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<sup>3</sup> The court takes judicial notice of the fact that Respondent has no previous record of discipline.



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## ALLIED CONCRETE CO. v. LESTER

Record Nos. 120074, 120122.

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736 S.E.2d 699 (2013)

285 Va. 295

*ALLIED CONCRETE COMPANY, et al. v. Isaiah LESTER, Individually and as Administrator of the Estate of Jessica Lynn Scott Lester. Isaiah Lester, Individually and as Administrator of the Estate of Jessica Lynn Scott Lester v. Allied Concrete Company, et al.*

Supreme Court of Virginia.

January 10, 2013.

### Attorney(s) appearing for the Case

*John W. Zunka, Charlottesville (John M. Roche; Taylor Anderson; Zunka, Milnor & Carter, on briefs), for Allied Concrete Company, et al., for appellant.*

*Malcom P. McConnell, III (Nathan J.D. Veldhuis; Allen Allen Allen & Allen, Fredericksburg, on briefs), for Isaiah Lester, for appellee, for Record No. 120122.*

*Present: All the Justices.*

### Opinion by Justice CLEO E. POWELL.

In these combined appeals, we consider whether the trial court erred 1) in denying a motion for a new trial based on the undisputed misconduct by the plaintiff and his attorney; 2) in denying a motion for a mistrial based on juror misconduct; and 3) in remitting the jury verdict.

## I. BACKGROUND

On June 21, 2007, Isaiah Lester ("Lester") was driving his wife, Jessica, to work, traveling west on the Thomas Jefferson Parkway in Albemarle County, Virginia. At the same time, William Donald Sprouse ("Sprouse"), an employee of Allied Concrete Company ("Allied Concrete"), was operating a loaded concrete truck and traveling east on the Thomas Jefferson Parkway. Due to his speed, Sprouse lost control of his vehicle, causing it to cross the center line and tip over, landing on the vehicle occupied by Lester and Jessica. As a result Jessica suffered injuries that ultimately proved to be fatal. Sprouse subsequently pled guilty to manslaughter in the death of Jessica.

On May 16, 2008, Lester, as Administrator and beneficiary of Jessica's estate, filed a complaint against Allied Concrete and Sprouse, seeking compensatory damages for economic and noneconomic losses, including mental anguish, for the wrongful death of Jessica. Jessica's parents ("the Scotts") were also named as statutory beneficiaries. Lester also filed a separate complaint against Allied Concrete and Sprouse, seeking compensatory damages for his personal injuries. These actions were ultimately consolidated.

## A. TRIAL

Trial in this case commenced on December 7, 2010. After a three-day trial, the jury awarded Lester \$6,227,000, plus interest, on the wrongful death action, and \$2,350,000, plus interest, on his personal injury action. Similarly, the jury awarded each of the Scotts \$1,000,000, plus interest, on the wrongful death action.

Allied Concrete filed multiple post-trial motions, including motions for sanctions against Lester and the lead attorney on the case, Matthew B. Murray<sup>1</sup>

that Lester conspired with Murray to intentionally and improperly destroy evidence related to Lester's Facebook account and provided false information and testimony related to his Facebook page, his prior use of anti-depressants, his medical history, and the spoliation of Facebook evidence. Further, Allied Concrete contended that Murray engaged in deception, misconduct, and spoliation related to Lester's Facebook account. Allied Concrete also filed a motion seeking, alternatively, dismissal of Lester's claims, a new trial on liability and damages, a new trial on damages only, or a remittitur order, arguing that the misconduct of Lester and Murray precluded an impartial trial and verdict and resulted in an excessive verdict. Finally, the defendants filed a motion for mistrial due to newly discovered juror bias. (736 S.E.2d 702)

The trial court allowed extensive discovery on the post-trial motions, received written submissions, conducted an evidentiary hearing, received the parties' proposed findings of fact and conclusions of law, and entered a 32-page order detailing its findings of fact and conclusions of law.

## B. SPOILIATION OF FACEBOOK EVIDENCE

On January 9, 2009, during the pendency of the actions, Lester sent a message through Facebook to David Tafuri ("Tafari"), an attorney for Allied Concrete. As a result, Tafari was able to access Lester's Facebook page.

On March 25, 2009, Allied Concrete issued a discovery request to Murray, seeking production of "screen print copies on the day this request is signed of all pages from Isaiah Lester's Facebook page including, but not limited to, all pictures, his profile, his message board, status updates, and all messages sent or received." Attached to the discovery request was a copy of a photograph Tafari downloaded off of Lester's Facebook account. The photo depicts Lester accompanied by other individuals, holding a beer can while wearing a T-shirt emblazoned with "I ♥ hot moms." That evening, Murray notified Lester via email about the receipt of the discovery request and the related photo.

The next morning, on March 26, 2009, Murray instructed Marlina Smith ("Smith"), a paralegal, to tell Lester to "clean up" his Facebook page because "[w]e don't want any blow-ups of this stuff at trial." Smith emailed Lester requesting information about the photo. Smith also told Lester that there are "some other pics that should be deleted" from his Facebook page. In a follow-up email, Smith reiterated Murray's instructions to her, telling Lester to "clean up" his Facebook page because "[w]e do NOT want blow ups of other pics at trial so please, please clean up your facebook and myspace!"<sup>2</sup>

On April 14, 2009, Lester contacted Smith and informed her that he had deleted his Facebook page. The next day, Murray signed and served an answer to the discovery request, which stated "I do not have a Facebook page on the date this is signed, April 15, 2009." Allied Concrete subsequently filed a Motion to Compel Discovery. On May 11, 2009, Murray told Smith to obtain the information requested in the March 25, 2009 discovery request. Smith contacted Lester, who eventually reactivated his Facebook page. Smith was then able to access and print copies of Lester's Facebook page.<sup>3</sup> After Smith printed the Facebook page, consistent with the previous directive to "clean up" his Facebook account, Lester deleted 16 photos from his Facebook page. On May 14, 2009, Murray sent the copies of Lester's Facebook page to Allied Concrete. On October

12, 2009, Murray provided additional, updated copies of Lester's Facebook page to Allied Concrete. (736 S.E.2d 703)

At a deposition on December 16, 2009, Lester testified that he never deactivated his Facebook page. As a result, Allied Concrete had to subpoena Facebook to verify Lester's testimony. Allied Concrete also hired an expert, Joshua Scotson ("Scotson") to determine how many pictures Lester had deleted. Scotson determined that Lester had deleted 16 photos on May 11, 2009. This was later confirmed by an expert hired by Lester to examine Scotson's methodology. All 16 photos were ultimately produced to Allied Concrete.

On September 28, 2010, Allied Concrete served a subpoena *duces tecum* on Smith, seeking production of all emails between herself and Lester between March 25, 2009 and May 15, 2009. On November 17, 2010, the trial court ordered Lester to file a privilege log, listing everything he claimed was privileged and the basis for the claim. On November 28, 2010, Lester filed an enhanced privilege log. However, Murray intentionally omitted from the enhanced privilege log any reference to the March 26, 2009 email.<sup>4</sup>

Ultimately, the trial court decided that Allied Concrete was entitled to sanctions against Lester and Murray. After a further hearing on the matter, the trial court sanctioned Murray in the amount of \$542,000 and Lester in the amount of \$180,000 to cover Allied Concrete's attorney's fees and costs in addressing and defending against the misconduct.

## C. LESTER'S CREDIBILITY

In addition to lying about deleting his Facebook page, Lester made a number of representations throughout discovery that were ultimately determined to be untrue. Of particular note, it was determined that Lester lied about his history of depression and past use of anti-depressants, and he made false claims about doing certain volunteer work. As a result of these misrepresentations, specifically the deletion of his Facebook page, the trial court ordered that the following adverse inference jury instruction would be given:

The Court instructs the jury that the Plaintiff, Isaiah Lester, was asked in discovery in this case to provide information from his Facebook account. In violation of the rules of this Court, before responding to the discovery, he intentionally and improperly deleted certain photographs from his Facebook account, at least one of which cannot be recovered. You should presume that the photograph or photographs he deleted from his Facebook account were harmful to his case.

The Court further instructs the jury that the presumption from this inference should not affect any award due to the beneficiaries, Gary Scott and Jeanne Scott.

The trial court noted that Allied Concrete knew of the misrepresentations prior to trial. Thus, the trial court ruled that Lester's misrepresentations "related solely to the issue of damages and were mitigated, to the extent appropriate, by an adverse jury instruction, thus, they do not affect the validity of the verdict as to liability." The trial court read the jury instruction twice, once while Lester was testifying and again before the closing arguments.

**D. JUROR MISCONDUCT**

During *voir dire*, the trial court posed the following question to the prospective jurors:

Are any of you related by blood or marriage to any of the attorneys? Do you know them or have significant involvement with them or their law firms?

Only one potential juror, Thomas Hill, responded that he knew several of the attorneys and that he had retained at least one of them in the past. The rest of the potential jurors remained silent.

Post-trial it was discovered that the jury foreperson, Amanda Hoy ("Hoy"), was the former Executive Director of Meals on Wheels of Charlottesville/Albemarle ("Meals

on Wheels"). This was relevant because the Allen Firm sponsored the website of Meals on Wheels. Indeed, it was later revealed that Hoy had communicated frequently with representatives of the Allen Firm regarding its sponsorship of the website. Additionally, it was discovered that members of Murray's family volunteered for Meals on Wheels for more than 15 years and that Hoy knew some of those family members, specifically Murray's mother. Furthermore, in May 2010, Hoy had a brief email exchange with Murray regarding membership on the Meals on Wheels Board of Directors. Hoy invited Murray to join the board, but Murray declined. However, it was also revealed that Hoy had retired from Meals on Wheels approximately six months prior to trial. [736 S.E.2d 704]

The trial court ultimately denied Allied Concrete's motion for a mistrial, ruling that the evidence was "insufficient to prove that Murray had any knowledge of improper conduct by Hoy." The trial court further ruled that, because the meaning of the term "significant involvement" in the *voir dire* question was subjective, "Hoy could have honestly considered her involvement through Meals on Wheels with the Allen Firm to be insignificant at the time of trial."

**E. REMITTITUR**

On the issue of remittitur, the trial court examined Murray's conduct during trial, specifically noting "a number of actions designed to inflame the passions and play upon the sympathy of the jury." Specifically, the trial court took issue with Murray: weeping during opening statement and closing argument, stating that Sprouse "killed" Jessica,<sup>5</sup> invoking God and religion, and mentioning that Allied Concrete had, at one time, asserted that Lester was contributorily negligent.<sup>6</sup>

The trial court ordered remittitur of \$4,127,000 of Lester's \$6,227,000 wrongful death award, leaving him with an award of \$2,100,000. In making its ruling, the trial court stated that it "consider[ed] all of the evidence in the light most favorable to [Lester]." The trial court explained that the jury's award to Lester was "grossly disproportionate" to the \$1,000,000 awarded to the Scotts.

When compared to the award given to the decedent's parents, both of whom had a loving and long-lasting relationship with their daughter, it is clear that the award granted to Lester bears no reasonable relation to the damages proven by the evidence and that the award is so disproportionate to the injuries suffered that it is likely the product of an unfair and biased decision. The disproportionality of Lester's award is further highlighted when seen in light of the fact that Lester had been married less than two years before his wife's death ... and that his behavior in the tragic aftermath was characterized by extensive social activities and travelling, both in the United States and overseas.

Commenting on Murray's actions, the trial court further suggested that the jury award "was motivated by bias, sympathy, passion or prejudice, rather than by a fair and objective consideration of the evidence." However, the trial court also noted that

Murray injected passion and prejudice into the trial, shouting objections and breaking into tears when addressing the jury. Most of Murray's actions in this respect were suffered without objections from defense counsel, who focused their defense upon the denial of liability (despite Defendant Sprouse's admission to having pled guilty to manslaughter in connection with the accident ...) and upon aggressive, but obviously ineffectual, attacks upon Lester's credibility and character. This defense strategy produced the extreme opposite of its desired effect, serving to create additional passion and sympathy for Lester and anger towards the Defendants.

The court did not modify Lester's \$2,350,000 personal injury award or the Scotts' award of \$1,000,000 each. [736 S.E.2d 705]

Allied Concrete and Lester appeal.

**II. ANALYSIS**

On appeal, Allied Concrete argues that the trial court erred in denying its motion for retrial because of the misconduct committed by Lester and Murray. Allied Concrete further contends that the trial court erred in denying its motion for a mistrial due to juror misconduct on the part of Hoy. Lester, on the other hand, appeals the trial court's decision to grant remittitur.

**A. PARTY MISCONDUCT**

Allied Concrete argues that the trial court erred in denying its motion for a retrial because the entire trial was tainted by Lester's dishonest conduct and Murray's unethical conduct. Allied Concrete contends that the misconduct had a cumulative effect that could not be mitigated by anything short of a new trial. We disagree.<sup>7</sup>

A trial court generally exercises broad discretion in determining the appropriate sanction for failure to comply with an order relating to discovery. Consequently, we accord deference to the decision of the trial court in this case and will reverse that decision only if the court abused its discretion...

*Walsh v. Bennett*, 260 Va. 171, 175, 530 S.E.2d 904, 907 (2000) (citation omitted).

In its September 1, 2011 order, the trial court gave a detailed description of each instance of misconduct committed by either Lester or Murray. After discussing the extent of the misconduct, the trial court then explained the steps it took to mitigate any effects the misconduct may have had on the trial. It specifically noted that Allied Concrete was fully aware of the misconduct prior to trial. Furthermore, it allowed all of the spoliated evidence to be presented to the jury and gave a jury instruction relating to Lester's misconduct twice, once during his testimony and once before the case was turned over to the jury.<sup>8</sup>

Of the information Allied Concrete complained was withheld, the trial court found that Allied had everything prior to trial with the exception of the March 26, 2009 email, which was not revealed to Allied Concrete until after trial. We note, however, that the content of the March 26, 2009 email was limited to a description of the photograph Tafuri downloaded from Lester's Facebook account accompanied by instructions that Lester should "clean up [his] facebook and myspace." As this picture was eventually offered into evidence and the fact that Lester was told to delete pictures from his Facebook account was presented to the jury, this evidence is clearly duplicative.

When it plainly appears from the record and the evidence given at the trial that the parties have had a fair trial on the merits and substantial justice has been reached, we will affirm the judgment notwithstanding the potential for a defect or imperfection in the process by which the judgment was obtained.

*Centra Health, Inc. v. Mullins*, 277 Va. 59, 81, 670 S.E.2d 708, 719 (2009) (quoting Code § 8.01-678).

In the present case, the record demonstrates that Allied Concrete received a fair trial on the merits. There is ample evidence that the trial court mitigated any prejudice Allied Concrete may have suffered as a result of the misconduct of both Lester and Murray. Furthermore, the record demonstrates that the trial court carefully considered this misconduct in denying Allied Concrete's motion for a new trial. Accordingly, it cannot be said that the trial court abused its discretion in refusing to grant a retrial.<sup>9</sup>

[736 S.E.2d 706]

## B. JUROR MISCONDUCT

Allied Concrete next argues that the trial court erred in denying its motion for a mistrial on the grounds that Hoy failed to answer a *voir dire* question honestly. Allied Concrete contends that, had Hoy answered honestly, it is likely that she would have been stricken for cause. Allied Concrete further posits that, even if Hoy had misunderstood the question, Murray was fully aware of the relationship between Meals on Wheels and the Allen Firm. Relying on the Virginia Rules of Professional Conduct, Allied Concrete asserts that Murray had an affirmative duty to disclose the relationship.

"A trial court's ruling denying a motion for mistrial will be set aside on appellate review only if the ruling constituted an abuse of discretion." *Robert M. Seh Co. v. O'Donnell*, 277 Va. 599, 603, 675 S.E.2d 202, 205 (2009).

It has been recognized that, "[a litigant] is entitled to a fair trial but not a perfect one," for there are no perfect trials." *Brown v. United States*, 411 U.S. 223, 231-32, 93 S.Ct. 1565, 36 L.Ed.2d 208 (1973) (quoting *Bruton v. United States*, 391 U.S. 123, 135, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968)).

One touchstone of a fair trial is an impartial trier of fact — a jury capable and willing to decide the case solely on the evidence before it. *Smith v. Phillips*, 455 U.S. 209, 217 [102 S.Ct. 940, 71 L.Ed.2d 78] (1982). *Voir dire* examination serves to protect that right by exposing possible biases, both known and unknown, on the part of potential jurors.

*McDonough Power Equip. v. Greenwood*, 464 U.S. 548, 554, 104 S.Ct. 845, 78 L.Ed.2d 663 (1984).

Where a party seeks a new trial due to allegations of juror dishonesty during *voir dire*,

a litigant must first demonstrate that a juror failed to answer honestly a material question on *voir dire*, and then further show that a correct response would have provided a valid basis for a challenge for cause. The motives for concealing information may vary, but only those reasons that affect a juror's impartiality can truly be said to affect the fairness of a trial.

*Blevins v. Commonwealth*, 267 Va. 291, 296-97, 590 S.E.2d 365, 368 (2004), (citing *McDonough*, 464 U.S. at 556, 104 S.Ct. 845).

In the present case, the dispositive issue before this Court is whether Hoy's silence in response to the question about her relationship with the Allen Firm amounts to a dishonest response to a material question. Contrary to Allied Concrete's argument, Hoy's subjective interpretation of the question is the proper focus of the trial court's analysis on this issue. It has been recognized that there is a significant difference between a juror giving a honest but mistaken answer and giving a dishonest answer.

To invalidate the result of a ... trial because of a juror's mistaken, though honest, response to a question, is to insist on something closer to perfection than our judicial system can be expected to give. A trial represents an important investment of private and social resources, and it ill serves the important end of finality to wipe the slate clean simply to recreate the peremptory challenge process because counsel lacked an item of information which objectively he should have obtained from a juror on *voir dire* examination.

*McDonough*, 464 U.S. at 555, 104 S.Ct. 845.

In the present case, the trial court asked "Do you know [any of the attorneys] or have significant involvement with them or their law firms?" The record demonstrates that, while Hoy may have known of Murray, there is no evidence that she actually knew Murray. The only interaction between Hoy and Murray was one email exchange, initiated by Hoy, seven months before the trial. Furthermore, the email was not sent to Murray directly, but to the

Allen Firm website and then routed to Murray. Murray specifically

[736 S.E.2d 707]

testified that he had never met or spoken with Hoy and there is no evidence to the contrary. Similarly, a separate email exchange between Hoy and Emily Krause, the Allen Firm's marketing director, merely indicates that Hoy knew Murray's family; it does not indicate that she knew Murray himself. Thus, as the trial court found, the evidence was insufficient to prove that Hoy was dishonest with regard to knowing Murray.

Regarding the issue of Hoy's "significant involvement" with Murray or the Allen Firm, it is important to note that the question was asked in the present tense. As Hoy had retired from Meals on Wheels six months prior to the trial, her silence was not dishonest because, at the time of *voir dire*, Hoy did not have any involvement, much less significant involvement, with either Murray or the Allen Firm.<sup>10</sup> Furthermore, as the trial court noted, it is possible that Hoy did not believe that the Allen Firm's involvement with Meals on Wheels was significant, as the donations from the Allen Firm accounted for less than 1% of Meals on Wheels' annual budget. Thus, as the trial court found, there is insufficient evidence to "establish that Hoy's failure to respond ... to the question was dishonest." Indeed, there is clear evidence that, based on the specific question asked, Hoy's response was completely honest. Accordingly, we will affirm the decision of the trial court.<sup>11</sup>

### C. REMITTITUR

In his appeal, Lester argues that the trial court abused its discretion by failing to properly consider the evidence supporting the jury's award. Lester points to numerous unchallenged facts in this case that the trial court failed to consider in ordering remittitur, such as the fact that he was present when Jessica was injured, that he was the one legally responsible for deciding to remove Jessica from life support, and that he was diagnosed with depression and post-traumatic stress disorder as a result. Lester notes that, although the trial court claims it considered the evidence in the light most favorable to him, the record does not clearly establish that fact. According to Lester, the record actually demonstrates that the trial court only viewed the evidence that was most unfavorable to him. He further contends that the trial court's use of the jury's award to the Scotts as a benchmark for his award was erroneous because his relationship with Jessica was different from Jessica's relationship with her parents.

Where the attack upon ... a verdict is based upon its alleged excessiveness, if the amount awarded is so great as to shock the conscience of the court and to create the impression that the jury has been motivated by passion, corruption or prejudice, or has misconceived or misconstrued the facts or the law, or if the award is so out of proportion to the injuries suffered as to suggest that it is not the product of a fair and impartial decision, the court is empowered, and in fact obligated, to step in and correct the injustice.

*Edmiston v. Kupsenei*, 205 Va. 198, 202, 135 S.E.2d 777, 780 (1964).

Setting aside a verdict as excessive ... is an exercise of the inherent discretion of the trial court and, on appeal, the standard of review is whether the trial court abused its discretion.

*Poulston v. Rock*, 251 Va. 254, 258-59, 467 S.E.2d 479, 482 (1996) (citing *Bassett Furniture v. McReynolds*, 216 Va. 897, 911, 224 S.E.2d 323, 332 (1976)).

In determining whether a trial court has abused its discretion in granting remittitur, we apply a two-step analysis:

- (1) we must find in the record both the trial court's conclusion the verdict was excessive and its analysis demonstrating that it considered factors in evidence relevant to a reasoned evaluation of the damages when drawing that conclusion, and then
- (2) we must determine whether the remitted award is reasonably related to the damages disclosed by the evidence.

*Government Micro Res., Inc. v. Jackson*, 271 Va. 29, 44-45, 624 S.E.2d 63, 71 (2006) (alterations omitted) (quoting *Poulston*, 251 Va. at 259, 467 S.E.2d at 482).

Both of these steps require an evaluation of the evidence relevant to the issue of damages. In making that evaluation, the trial court, as well as this Court, is required to consider the evidence in the light most favorable to the party that received the jury verdict, in this case the plaintiff. If there is evidence, when viewed in that light, to sustain the jury verdict, then remitting the verdict is error.

*Shepard v. Capitol Foundry of Va.*, 262 Va. 715, 721, 554 S.E.2d 72, 75 (2001) (citation omitted).

In the present case, the trial court granted remittitur on two alternative grounds. The trial court initially relied upon its finding that the jury's award to Lester was disproportionate when compared to the jury's award to the Scotts. This was error. Although a trial court may grant remittitur on the grounds that the award is disproportionate to the injuries suffered, *Edmiston*, 205 Va. at 202, 135 S.E.2d at 780, we have specifically rejected comparing damage awards as a means of measuring excessiveness. *Rose v. Jaques*, 268 Va. 137, 159, 597 S.E.2d 64, 77 (2004).

The trial court also found that "the amount of the verdict in this case is so excessive on its face as to suggest that it was motivated by bias, sympathy, passion or prejudice, rather than by a fair and objective consideration of the evidence." In making this ruling, the trial court specifically found that Murray's actions at trial were "geared toward inflaming the jury," which contributed to the jury's excessive verdict. The trial court also noted that Allied Concrete's aggressive defense strategy further served "to create additional passion and sympathy for Lester and anger towards [Allied Concrete]." <sup>12</sup> However, assuming that the trial court correctly concluded that the jury verdict was improperly motivated by Murray's "theatrics" and Allied Concrete's failed litigation strategy, the trial court provided no basis for us to ascertain, nor can we independently ascertain, "whether the amount of recovery after remittitur bears a reasonable relation to the damages disclosed by the evidence." *Shepard*, 262 Va. at 721, 554 S.E.2d at 75 (internal quotation marks omitted). It is apparent that the trial court simply reduced Lester's award to match the Scotts' individual awards and then added the economic loss Lester suffered as a result of Jessica's death. Such an approach ignores the inherent differences in the two types of relationships and thereby the differences in damages.

It is axiomatic that the loss of a spouse is significantly different from the loss of a child. Clearly the relationship between Jessica and Lester was unique to them and different from the relationship between Jessica and her parents. Indeed, the trial court acknowledged as much. As such, the injuries suffered by Lester and the Scotts as a result of her death were necessarily different and, therefore, must result in different awards. However, with the exception of Lester's economic losses, nothing in the record indicates that the trial court examined the damages specific to Lester or the Scotts. Thus,

there

(736 S.E.2d 709)

is no evidence that the trial court made a reasoned evaluation of the damages. Accordingly, having determined that the trial court abused its discretion in granting remittitur, we will reinstate the jury's damage award and enter final judgment on the verdict. *See id.* at 723, 554 S.E.2d at 76-77; *Baldwin v. McConnell*, 273 Va. 650, 660, 643 S.E.2d 703, 708 (2007); *Government Micro Res.*, 271 Va. at 49, 624 S.E.2d at 74; *Poulston*, 251 Va. at 264, 467 S.E.2d at 485; *Edmiston*, 205 Va. at 204, 135 S.E.2d at 781.

### III. CONCLUSION

Allied Concrete was fully aware of the misconduct of Murray and Lester prior to trial and the trial court took significant steps to mitigate the effect of the misconduct. Therefore, it cannot be said that the trial court abused its discretion in refusing to grant a retrial on that basis. Furthermore, the evidence demonstrates that Hoy's failure to answer was not due to dishonesty on her part. Indeed, the evidence adduced at trial would tend to show that Hoy's lack of a response was, in fact, an honest answer to the questions asked. Accordingly, the trial court did not err in denying Allied Concrete's motion for a mistrial on alleged juror misconduct.

Regarding the issue of remittitur, it is apparent that the trial court based its decision to grant remittitur on an improper comparison of awards and failed to provide any way of ascertaining whether the remitted award bears a "reasonable relation" to the damages suffered by Lester. Accordingly, we will reverse the trial court's order of remittitur and reinstate the jury's verdict.

Record No. 120074 — *Affirmed*.

Record No. 120122 — *Reversed and final judgment*.

Justice McCLANAHAN, concurring in part and dissenting in part.

With this opinion, the Court has finally divested the trial courts of their power over jury verdicts, rejecting the

ancient and accepted doctrine of the common law, that judges have the power and are clearly charged with the duty of setting aside verdicts where the damages are either so excessive or so small as to shock the conscience and to create the impression that the jury has been influenced by passion or prejudice, or has in some [way] misconceived or misinterpreted the facts or the law which should guide them to a just conclusion.

*Bassett Furniture Indus., Inc. v. McReynolds*, 216 Va. 897, 912 n. \*, 224 S.E.2d 323, 332 n. \* (1976) (quoting *Chesapeake & Ohio Ry. Co. v. Arrington*, 126 Va. 194, 217, 101 S.E. 415, 423 (1919)).

What the Court refers to as a "two-step analysis" in fact consists of multiple hoops through which a trial court must now jump before it remits a jury verdict. Since this Court first articulated the "number of determinations" that must be made when a party challenges the trial court's exercise of discretion to remit a verdict, that number has steadily increased. <sup>1</sup> As each new factual scenario

(736 S.E.2d 710)

comes before the Court, a new determination, test, or restriction emerges from the Court, placing the trial courts in the unenviable position of having to speculate as to whether their remittitur will withstand this Court's next test. Meanwhile, the Court has chipped away at the trial court's "inherent discretion" to the extent that such discretion exists only in theory. <sup>2</sup>

Today the Court introduces yet another restriction on the trial court's power to remit a jury verdict. According to the majority, the trial court must provide a way for this Court to ascertain whether the amount of recovery after remittitur bears a reasonable relation to the damages. This determination can be made, and has previously been made by this Court, through "an evaluation of the evidence relevant to the issue of damages." *Shepard v. Capitol Foundry of Va.*, 262 Va. 715, 721, 554 S.E.2d 72, 75 (2001). Therefore, as the Court's opinion illustrates, whether a jury's verdict has been motivated by passion, corruption or prejudice, rather than the evidence before it, is no longer the predominant concern. Instead, the primary focus of the Court is ensuring compliance with the increasingly technical requirements it continues to impose on the language of the trial court's order of remittitur.

In this case, the trial court explained in detail both why it found the jury's verdict was motivated by passion, corruption, or prejudice as well as why the award was so out of proportion to the injuries suffered as to suggest it was not the product of a fair and impartial decision. The trial court stated three times that it was reviewing the evidence in the light most favorable to Lester while noting specifically the evidence regarding the length of his marriage and his behavior after his wife's death, demonstrating it "considered factors in evidence relevant to a reasoned evaluation of the damages." *Poulston*, 251 Va. at 259, 467 S.E.2d at 482 (internal quotation marks omitted). Evaluating its remitted award, the trial court took into account the "injuries actually suffered" by Lester, acknowledged that Lester suffered loss not sustained by the Scotts, and remitted the award to an amount a little over twice that awarded to each of the Scotts. Based on its analysis of the "injuries actually suffered" by Lester, the trial court determined that the remitted award bore "a reasonable relation to the damages disclosed by the evidence." *Id.* (internal quotation marks omitted). Accordingly, applying the "two-step analysis," I would conclude the trial court was well within its discretion to order the remittitur. <sup>3</sup>

In my view, the singular ability of the trial court to assess whether the jury has been motivated by passion or prejudice has been disregarded, and its inherent discretion to correct a verdict that it finds so excessive as to shock the conscience of the court has been discarded. Yet,

[a]s we have often noted, [t]here are many incidents which occur in the trial of a common law case which a trial judge observes but which cannot be reproduced in the cold printed page. *American Oil Co. v. Nicholas*, 156 Va. 1, 12, 157 S.E. 754, 758 (1931). We did not see or hear the [parties] as they testified. We do not know whether they appeared cooperative or defiant, responsive or evasive, candid or disingenuous. The trial judge was in a unique position to hear the tone and tenor of the dialogue, observe the demeanor of the witnesses, and assess the reaction of the jurors to what they saw and heard.

*Hogan v. Carter*, 226 Va. 361, 373-74, 310 S.E.2d 666, 673 (1983). *See also Richmond Newspapers, Inc. v. Lipscomb*, 234 Va. 277, 300, 362 S.E.2d 32, 45 (1987) ("We must necessarily accord the trial court a large measure of discretion in remitting excessive verdicts because it saw and heard the witnesses while we are confined to the printed record.").

With this Court's ever evolving limitations upon the power and duty of trial judges to order remittitur, for all practical purposes the last nail in the coffin of remittitur has been driven, sounding a death knell for the important safety-valve that remittitur has represented in operating the system of jury trials in Virginia.

I would, therefore, affirm the trial court's judgment in its entirety since I agree with the majority that the trial court did not abuse its discretion in refusing to grant a retrial on the basis of the misconduct by Lester and Murray or err in refusing to grant a mistrial due to juror misconduct.

## FootNotes

1. At that time, Murray was the managing partner for the Charlottesville office of Allen, Allen, Allen & Allen (the "Allen Firm").

2. Both of these emails were part of the same email thread (collectively referred to as the "March 26, 2009 email"). In a subsequent email, dated November 23, 2010, Murray referred to the March 26, 2009 email as a "stink bomb." Allied Concrete makes much of this fact, even though Murray clearly explains in the November 23, 2010 email that the March 26, 2009 email is a "stink bomb," not because of the content of the email, but because the email would probably upset the trial court.

3. Smith only printed screen shots of the Lester's Facebook page. These screenshots included small "thumbnail" versions of photographs Lester had uploaded to his Facebook page. Aside from the thumbnail versions, Smith did not print actual copies of any of the pictures Lester had uploaded to his Facebook page.

4. Post-trial, Murray initially claimed that the omission was a mistake on the part of a paralegal. However, Murray subsequently admitted he concealed the email out of fear that the trial court would grant a continuance.

5. In its final order, the trial court incorrectly asserted that Murray had stated that Sprouse "'killed' the plaintiff." However, the actual statement was that "Allied Concrete's employee killed a wonderful woman," which clearly referred to Jessica.

6. Of these actions, the only one to which Allied Concrete objected and moved for a mistrial was the mention of contributory negligence. The trial court overruled the motion and gave a limiting instruction on the matter.

7. While we recognize that Lester's conduct was dishonest and Murray's conduct was patently unethical, the role of this Court in the present case is limited to determining whether the litigants had a fair trial on the merits.

8. Additionally, the trial court awarded Allied Concrete the attorney's fees and costs it expended in addressing and defending against the misconduct.

9. Allied Concrete's argument relies heavily on Federal Rule of Civil Procedure Rule 60(b)(3), which provides for relief from judgment on the basis of fraud or misconduct. We note, however, that even if this rule was applicable, it requires the party seeking relief to "demonstrate that such misconduct prevented him from fully and fairly presenting his claim or defense." *Square Constr. Co. v. Washington Metro. Area Transit Auth.*, 657 F.2d 68, 71 (4th Cir.1981). Here, as previously noted, Allied Concrete has failed to make such a demonstration.

10. Similarly, Allied Concrete's argument that Hoy should have known to speak up based on the actions of other jurors is unavailing. It has been recognized that:

The varied responses to respondents' question on voir dire testify to the fact that jurors are not necessarily experts in English usage. Called as they are from all walks of life, many may be uncertain as to the meaning of terms which are relatively easily understood by lawyers and judges.

*McDonough*, 464 U.S. at 555, 104 S.Ct. 845.

The question, on its face, could be interpreted a number of different ways. Therefore, the fact that another juror may have interpreted the question in a different manner, without more, has no bearing on Hoy's interpretation of the question.

11. We further note that, even assuming that Murray knew of Hoy's past relationship to the Allen Firm and that his failure to inform the trial court violated a Rule of Professional Conduct, nothing in our jurisprudence requires that such a violation automatically result in a mistrial. *Cf., Spence v. Commonwealth*, 60 Va.App. 355, 369 n. 6, 727 S.E.2d 786, 793 n. 6 (2012) ("A violation of a particular rule of professional conduct does not *ipso facto* require reversal of a criminal conviction.").

12. It should be noted that Allied Concrete never sought remittitur on this basis. Nor could it, as it would be highly illogical to afford Allied Concrete relief on the basis of its own unsuccessful litigation strategy.

1. In *Poulston v. Rock*, 251 Va. 254, 259, 467 S.E.2d 479, 482 (1996), the Court stated that the standard by which the trial court's exercise of discretion must be tested by this Court "requires us to make a number of determinations." The Court must "find in the record both the trial court's conclusion that the verdict was excessive and a demonstration that, in reaching that conclusion, the trial court considered 'factors in evidence relevant to a reasoned evaluation of the damages'" and must then "determine whether the amount of the recovery after the remittitur bears a 'reasonable relation to the damages disclosed by the evidence.'" *Id.* (quoting *Bassett*, 216 Va. at 912, 224 S.E.2d at 332). In addition, the Court must evaluate the evidence in the light most favorable to "the party who received the jury verdict." *Poulston*, 251 Va. at 261, 467 S.E.2d at 483. In *Shepard v. Capitol Foundry of Va.*, 262 Va. 715, 723, 554 S.E.2d 72, 76 (2001), the Court went beyond a determination of whether the recovery after remittitur bore a reasonable relation to the evidence and included in its analysis a determination of whether the facts "demonstrate[d] that the verdict was not excessive." In *Government Micro Resources, Inc. v. Jackson*, 271 Va. 29, 49, 624 S.E.2d 63, 74 (2006), the Court determined whether there were "elements of recovery upon which the compensatory damage award could be based." In *Baldwin v. McConnell*, 273 Va. 650, 656, 643 S.E.2d 793, 796 (2007), the Court concluded the trial court failed to ascertain whether the amount of the recovery after remittitur bore a reasonable relation to the evidence of damages despite the fact that this duty had

previously been considered the second step of the review undertaken by our Court.

2. This Court has identified three circumstances that "compel setting aside a jury verdict." *Poulston*, 251 Va. at 258, 467 S.E.2d at 481. The first is a "damage award that is so excessive that it shocks the conscience of the court, creating the impression that the jury was influenced by passion, corruption, or prejudice." *Id.* The second is when the jury has "misconceived or misunderstood the facts or the law." *Id.* The third is an award that "is so out of proportion to the injuries suffered as to suggest that it is not the product of a fair and impartial decision." *Id.* Setting aside a verdict under any one of these circumstances "is an exercise of the inherent discretion of the trial court." *Id.* at 258-59, 467 S.E.2d at 482.

3. Although the majority finds it was error to compare the jury's award to Lester with its awards to the Scotts, I disagree. While we have rejected comparing statewide or nationwide jury verdicts to reach an "average verdict," this is not what the trial court did. *See Rose v. Jaques*, 268 Va. 137, 159, 597 S.E.2d 64, 77 (2004) (rejecting argument that jury's verdict was excessive when compared to other post-traumatic stress disorder (PTSD) cases statewide and nationally); *John Crane, Inc. v. Jones*, 274 Va. 581, 595, 650 S.E.2d 851, 858 (2007) (stating "average verdict rule" was rejected in *Rose*). The trial court did not look to statewide or nationwide verdicts in wrongful death cases to determine an "average verdict," but considered the injuries suffered by the Scotts and those suffered by Lester to support its finding that the award granted to Lester by the jury bore "no reasonable relation to the damages proven by the evidence." The trial court based its finding on the evidence at trial, which is precisely its charge.

## Comment

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Comments

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## **2017 Disciplinary Snapshot**

WSBA  
Discipline  
System  
Annual  
Report

# SNAPSHOT

**ANNUALLY, THE WASHINGTON STATE BAR ASSOCIATION** publishes a report on Washington's discipline system. This report summarizes the activities of the system's constituents, including the Office of Disciplinary Counsel (ODC), the WSBA's Office of General Counsel (OGC), the Disciplinary Board, hearing officers, and its Client Protection Fund. The report also provides statistical information about discipline for those licensed to practice law in Washington for the calendar year. These pages provide an informed overview of the 2017 Discipline System Annual Report, which is now available on the WSBA website at [www.wsba.org](http://www.wsba.org).



# STRUCTURE

### *of the Lawyer Discipline and Disability System*

**THE WASHINGTON SUPREME COURT** has exclusive responsibility and inherent authority over regulation of the practice of law in Washington. This authority includes administering the discipline and disability system. Many of the Court's disciplinary functions are delegated by court rule to the WSBA, which acts under the supervision and authority of the Court. Consistent with the Supreme Court's mandate in General Rule 12.1, the WSBA administers an effective system of discipline in order to fulfill its obligations to protect the public and ensure the integrity of the profession. The prosecutorial and investigative functions of the discipline system are discharged by ODC, while the adjudicative functions are handled by the disciplinary Board and hearing officers, which are administered by ODC.

## WSBA Office of

- Answers public inquiries and internally resolves disputes
- Receives, reviews and may investigate grievances
- Recommends disciplinary action or dismissal
- Disputes grievances involving just-cause misconduct
- Recommends feasible precedents
- Presents cases to discipline committee

## Hearing Officer (Adjudicator) (b)(6)

- Conduct evidentiary hearings and other proceedings
- Conduct settlement conferences
- Approve stipulations to admission and resumption

## Disciplinary Board (Administered by OGC)

- Reviews recommendations for proceedings and disputed dispossessions
- Serves as immediate appellate body
- Reviews hearing records and stipulations

## RESOURCES

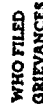
for more information on the discipline system and to read the full 2017 Discipline System Annual Report, go <http://bit.ly/Discipline-2017>

**Discipline by the  
NUMBERS**



**NUMBER AND NATURE  
OF 2017 GRIEVANCES**

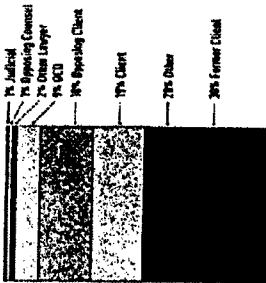
ODC's INTAKE STAFF receives all phone inquiries and written grievances and conducts the initial review of every grievance. After initial review, some grievances are dismissed, and others are referred for further investigation by ODC investigation/prosecution staff. Grievances that are not dismissed or diverted after investigation may be referred for disciplinary action. When warranted and authorized by a review committee of the Disciplinary Board, these matters are prosecuted by disciplinary counsel with the assistance of professional investigators and a support staff of paralegals and administrative assistants. In 2017, ODC received more than 1,450 grievances.



**WHO FILED  
GRIEVANCES**

**WHO FILED  
GRIEVANCES**

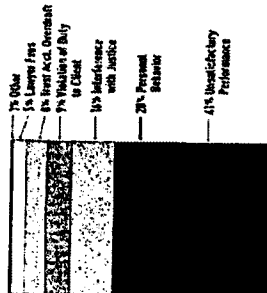
IN 2017, the majority of grievances against Washington lawyers originated from current and former clients, and opposing clients. Discipline files are also opened in the name of the Office of Disciplinary Counsel when potential ethical misconduct comes to the attention of a disciplinary counsel by means other than the submission of a grievance (e.g., news articles, notices of criminal conviction, trust account overdrafts, etc.) or through confidential sources.



### NATURE OF GRIEVANCES

**NATURE OF GRIEVANCES**

IN 2017, the most common grievance allegations against Washington lawyers related to unsatisfactory performance, personal behavior concerns, and interference with the administration of justice.



**2017 DISCIPLINARY GRIEVANCES,  
INFORMALLY RESOLVED MATTERS,  
AND PUBLIC INQUIRIES**

Disciplinary Grievances Resolved	1,894
Disciplinary Grievances Resolved	1,967
Non-Communication Matters Informally Resolved	154
File Disputes Informally Resolved	65
Public Inquiries, Phone Calls, Emails, & Interviews	5,044

## Discipline by the NUMBERS

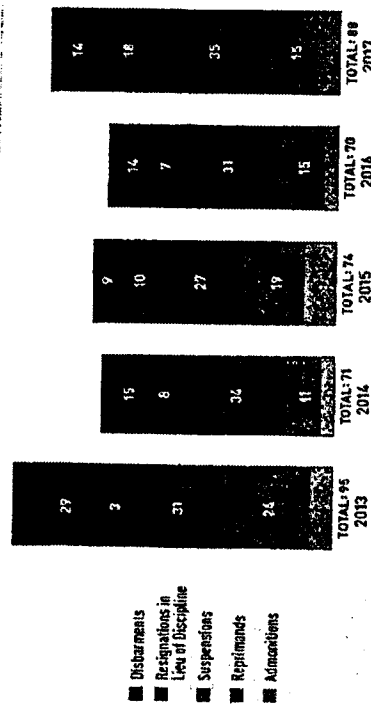
### PRACTICE AREA OF GRIEVANCES

MOST GRIEVANCES arise from criminal law, family law, and tort matters.

27% Criminal Law	4% Commercial Law	1% Guardianships
19% Family Law	4% Real Property	1% Foreclosures
10% Torts	2% Landlord/Tenant	1% Other
6% Estates/Probate/Wills	2% Workday/Unemployment Comp	1% Traction
5% Debtors	2% Bankruptcy	1% Traffic Offenses
5% Administrative Law	1% Labor Law	1% Contracts/Consumer Law
4% Immigration	1% Collections	

### DISCIPLINARY ACTIONS

INCLUDE BOTH public disciplinary sanctions and admonitions. Disciplinary sanctions are, in order of increasing severity, reprimands, suspensions, and disbarments. In Washington, admonitions are also a form of public discipline. Disciplinary Board committees also have authority to issue advisory letters cautioning a lawyer. An advisory letter is neither a sanction nor a disciplinary action and is not public information. For the last five reporting years.



## Discipline by the NUMBERS

### OTHER LICENSED PROFESSIONALS AND THE DISCIPLINE SYSTEM

The WSBA administers a discipline system for each of these licenses. At the end of 2017, there were 792 LPOs and 25 LLLTs actively licensed to practice. In 2017, the WSBA received two disciplinary grievances against LPOs with one LPO voluntarily suspending the practice in lieu of revocation. In 2017, the WSBA did not receive any grievances against LLLTs.

### LAWYER DISABILITY MATTERS

SPECIAL PROCEDURES APPLY when there is reasonable cause to believe that a lawyer is incapable of properly defending a disciplinary proceeding, or incapable of practice of law because of mental or physical incapacity. Such matters are handled under a distinct set of procedural rules. In some cases, the lawyer must have counsel appointed at the WSBA's expense. In disability cases, a determination that the lawyer does not have the capacity to practice law results in a transfer to disability inactive status. In 2017, three lawyers were transferred to disability inactive status based on an incapacity to practice law.

### COORDINATED DISCIPLINE & REGULATORY PROCEEDINGS SYSTEM INITIATIVE

IN LATE 2015, the WSBA Executive Management Team and the WSBA Board of Governors (BOG) initiated discussions about coordinating all regulatory and disciplinary systems for all licenses to practice law lawyer, limited practice officer, limited license legal technician, and other by the Court and administered by the WSBA. Among the motivations for coordinating the systems was the realization that administering three separate systems for three license types was neither an efficient nor an effective use of license fees. Subsequently, workgroups of WSBA staff from BOG, CDO, and the Regulatory Services Department (RS) convened to develop recommendations for a coordinated discipline system.

In late 2017, after seeking and incorporating input from various stakeholders, WSBA staff prepared and submitted for the Court's final consideration a proposed model for a coordinated disciplinary and regulatory proceedings system. In addition to consolidation of the three systems, a core concept of the initiative is the creation of a professionalized adjudicative system for all disciplinary and regulatory hearings. In July 2017, the Court approved in concept the proposed coordinated discipline system. After Court approval of the concept, WSBA staff began the process of drafting the coordinated disciplinary proceedings rules. In addition, these admissions and licensing processes that involve adjudicative proceedings are also part of this undertaking. When the final rules are finalized, WSBA staff will seek additional feedback in advance of review by the BOG and submit a submission of a set of suggested coordinated system rules to the Supreme Court under formal rule-making.

# WSBA Professional Responsibility Program

## ***ETHICAL BEHAVIOR is...***

*one of a legal practitioner's foremost concerns.*

*The WSBA Professional Responsibility Program helps  
bar members fulfill their obligations by providing  
**informal guidance and continuing education.***

### THE ETHICS LINE

The Professional Responsibility Counsel offers informal **phone consultations** through the **Ethics Line** to members who have questions regarding their prospective ethical conduct. The PRC helps members analyze a situation and apply the appropriate rules to make an ethically sound decision.



#### ETHICS LINE

(800) 945-9722, ext. 8284

### CLE PRESENTATIONS

The PRC is a frequent speaker on ethics topics at WSBA CLEs and other CLEs offered throughout the state. Contact the Professional Responsibility Counsel for presentations for your group.



#### EMAIL:

[jeannec@wsba.org](mailto:jeannec@wsba.org)

## *Which RPC?*

*The Rules of Professional Conduct (RPCs) are the rules that govern ethical conduct of legal practitioners. The RPCs are constantly changing. Stay on top of recent developments by visiting the Washington State Courts website at [www.courts.wa.gov](http://www.courts.wa.gov).*

### Helpful Links:

#### Lawyer RPC

[www.courts.wa.gov/  
court\\_rules/?fa=court\\_rules.  
list&group=ga&set=RPC](http://www.courts.wa.gov/court_rules/?fa=court_rules.list&group=ga&set=RPC)

#### LPO and LLLT PRCs

[www.courts.wa.gov/court\\_  
rules/?fa=court\\_rules.  
list&group=ga&set=APR](http://www.courts.wa.gov/court_rules/?fa=court_rules.list&group=ga&set=APR)

### ETHICS IN YOUR PRACTICE



**The Washington Supreme Court** is the highest authority for ethical guidance. Court decisions in lawyer discipline cases are instructive because they illustrate ethical misconduct. Search Opinions at [www.courts.wa.gov](http://www.courts.wa.gov)

**Advisory Opinions** issued by the WSBA Committee on Professional Ethics are published online and cover a wide range of ethical issues. The database is a popular resource for members in addition to the Ethics Line at [www.wsba.org/advisory-opinions](http://www.wsba.org/advisory-opinions)

**Ethics Articles** that appear in the *NWLawyer* or other bar publications are collected and featured on the Ethics page to bring together relevant information on ethical issues that are trending at [www.wsba.org/ethics](http://www.wsba.org/ethics)

**Ethics FAQs** are answers to common ethical questions such as file retention, unclaimed client funds, leaving a firm, or withdrawing from representation at [www.wsba.org/ethics-faqs](http://www.wsba.org/ethics-faqs)

For more information, please contact:

**Jeanne Marie Clavere**

*WSBA Professional Responsibility Counsel*



**WASHINGTON STATE  
BAR ASSOCIATION**



## “Ask the Judges” Panel

2:00 p.m.  
(Auditorium)



## **Mediation: from Start to Finish**

**3:15 p.m.  
(Auditorium)**

**Speaker:**

**Judge Mary Dimke**



## **MAGISTRATE JUDGE MARY K. DIMKE**

**William O. Douglas Federal Building  
25 South Third Street  
Yakima, WA 98901**

**Mailing: P.O. Box 2706  
Yakima, WA 98901**

**Courtroom 102  
Chambers Room 100  
[DimkeOrders@waed.uscourts.gov](mailto:DimkeOrders@waed.uscourts.gov)**

**Telephone: (509) 573-6670  
Fax: (509) 573-6671**

### **STANDING ORDER RE: SETTLEMENT CONFERENCE**

The Court believes the parties should fully explore and consider settlement at the earliest opportunity. Early consideration of settlement can prevent unnecessary litigation. This allows the parties to avoid the substantial cost, expenditure of time, and stress that are typically a part of the litigation process. Even for those cases that cannot be resolved through settlement, early consideration of settlement can allow the parties to better understand the factual and legal nature of their dispute and streamline the issues to be litigated. This Standing Order supplements LCivR 16(a)(5).

Consideration of settlement is a serious matter that requires thorough preparation prior to the settlement conference. Set forth below are the procedures the Court will require the parties to follow and the procedures the Court typically will employ in conducting the conference.

#### **A. FORMAT**

##### **1. PRE-SETTLEMENT CONFERENCE EXCHANGE OF DEMAND AND OFFER**

A settlement conference is more likely to be productive if, before the conference, the parties exchange written settlement proposals. Accordingly, on the date set forth in the settlement conference scheduling order, plaintiff's counsel shall submit a written itemization of damages and settlement demand to defense counsel with a brief explanation of why such a settlement is appropriate. On the deadline established in the scheduling order, defense counsel

shall submit a written response to plaintiff's counsel stating the defense settlement position and counter-offer. Sometimes this process will lead directly to a settlement. If settlement is not achieved, plaintiff's counsel shall attach copies of the parties' written demands to plaintiff's *in camera* letter.

## **2. SUBMISSION OF SETTLEMENT LETTER**

In preparation for the settlement conference, each party shall submit an *in camera* letter, labeled confidential, by the date set forth in the settlement conference scheduling order. Do not file copies of these letters on the court docket and do not serve these letters on the opposing party. The *in camera* letters shall not exceed ten (10) pages in length and shall set forth the following:

- Name and title of the client who will be present throughout the conference and will be authorized to enter into a settlement agreement, and the names and titles of any other persons who will attend the conference. If counsel becomes aware at any time that the settlement conference participants will differ from those listed in the *in camera* letter, counsel shall inform the Court in writing at [DimkeOrders@waed.uscourts.gov](mailto:DimkeOrders@waed.uscourts.gov);
- A brief analysis of key issues involved in the litigation;
- A description of the strongest and weakest points in the party's case, both legal and factual (the parties are invited to include as attachments key exhibits or deposition transcripts);
- A description of the strongest and weakest points in the opponent's case, both legal and factual;
- Itemization of damages, fees, and costs;
- Status of any settlement negotiations, including the last settlement proposal made by the party and opposing parties; and
- A settlement proposal the party believes to be fair

Failure to submit an *in camera* letter may result in cancellation or rescheduling of the settlement conference. All communications made in connection with the settlement conference are confidential and will not be disclosed. Fed. R. Evid. 408(a). Any documents requested and submitted for the settlement conference will be maintained in chambers and will be destroyed after the conference. Neither the settlement conference statements nor any communication occurring during the settlement conference can be used by any party with regard to any aspect of the litigation or trial of this case. *In camera* copies shall be emailed to [DimkeOrders@waed.uscourts.gov](mailto:DimkeOrders@waed.uscourts.gov).

Judge Dimke may contact the parties ex parte in advance of the settlement conference if there are questions or concerns.

## **3. ATTENDANCE OF PARTIES REQUIRED**

**Parties with full and complete settlement authority are required to personally attend the conference.** An insured party shall appear by a representative of the insurer who is

authorized to negotiate, and who has *authority to settle the matter up to the limits of the opposing parties' existing settlement demand*. An uninsured corporate party shall appear by a representative authorized to negotiate, and who has *authority to settle the matter up to the amount of the opposing parties' existing settlement demand or offer*. Having a client with authority available by telephone is *not* an acceptable alternative, except under the most extenuating circumstances, which must be approved by Judge Dimke in advance of the settlement conference. Because the Court generally sets aside at least four hours for each conference, it is impossible for a party who is not present to appreciate the process and the reasons which may justify a change in one's perspective towards settlement.

#### **4. MEDIATION FORMAT**

The Court will generally use a mediation format that consists of a joint session with an opening discussion by the Court, followed by private caucusing by the Court with each side. The Court expects both the lawyers and the party representatives to be fully to prepared to participate. The Court encourages all parties to keep an open mind in order to re-assess their previous positions and to consider creative means for resolving the dispute.

#### **5. STATEMENTS INADMISSIBLE**

The Court expects the parties to address each other with courtesy and respect. Parties are encouraged to be frank and open in their discussions. As a result, statements made by any party during the settlement conference are not to be used in discovery, are not to be used for any other litigation purpose, and will not be admissible at trial. Fed. R. Evid. 408(a).

### **B. ISSUES TO BE DISCUSSED**

Parties should be prepared to discuss the following at the settlement conference:

- What are your goals in the litigation and what problems would you like to address in the settlement conference? What do you understand the opposing side's goals to be?
- What issues (in and outside of this lawsuit) need to be resolved? What are the strengths and weaknesses of your case?
- Do you understand the opposing side's view of the case? What is wrong with their perception? What is right with their perception?
- What are the points of agreement and disagreement, both factual and legal, between the parties?
- Does settlement or further litigation better enable you to accomplish your goals?
- Are there possibilities for a creative resolution of the dispute?
- Do you have adequate information to discuss settlement? If not, how will you obtain sufficient information to make a meaningful settlement discussion possible?
- Are there outstanding lien holders or third parties who should be invited to participate in the settlement conference?

### **C. INVOLVEMENT OF CLIENTS**

Parties, lead counsel, and local counsel are **ORDERED TO APPEAR** on the date and time set for the settlement conference. For many clients, this will be the first time they will participate in a court-supervised settlement conference. Therefore, prior to the settlement conference, counsel shall provide a copy of the Standing Order to the client and shall discuss the points contained herein with the client.

### **D. PREPARE FOR SUCCESS**

In anticipation of a settlement, the parties should bring with them to the settlement conference a “Settlement Agreement” in a form acceptable to them for signature by all parties when a settlement is reached.

**ENTER:**

*s/Mary K. Dimke*

**MARY K. DIMKE**

**United States Magistrate Judge**

**Speaker:**

**Gary Bloom**

## I. MAXIMIZING YOUR CLIENTS' OUTCOME AT MEDIATION

### A. Prior to the Mediation

#### 1. Reputation.

As we move through our professional lives everything we do contributes to our reputation, good or bad. One of the most important factors in any mediation is the reputation you bring to it. You will maximize your clients' outcomes at mediation if you develop a reputation for being well prepared, reasonable though optimistic in your evaluations, respectful of all individuals and willing (plus being capable) to take a case to trial if you cannot reach a settlement that is in the best interests of your client. Even if you have not worked with the other side or the mediator before, your "reputation" can impact the negotiation. I have seen major "discounts" made by one side when they perceived the other side was not prepared or believed that they would never take the case to trial.

It is easy to underestimate how important it is to treat everyone you come into contact with during the work up of a case with respect. I have seen hard boiled insurance adjusters pay a little extra when they felt respectfully treated by a lawyer or are favorably impressed with a plaintiff. I have also seen them absolutely refuse to even offer their full authority when they have felt ill-treated by the opposing lawyer or felt the lawyer was rude to their client, a witness or the process.

## 2. Deciding to Mediate.

Which cases are good candidates for mediation and which are not? Unless the public court system is the only place where you can achieve your goals, such as a published opinion on an important area of law, the odds are that your case can benefit by mediation. Mediation is particularly beneficial in cases where there are communication issues between the parties or counsel, where emotions run high, where you believe either you, your client or the other side would benefit by having a mediator identify and exploit strengths and weaknesses of the respective cases, or where your client is finding the litigation extremely stressful.

However, if you do need a published opinion, need the enforcement powers of the court for injunctive purposes (though keep in mind that parties can voluntarily agree to injunctive relief), or your client would not consider anything other than the best possible outcome, mediation may be futile.

It is important not to make assumptions about your opponents' attitude toward settlement, even if strong statements have been made about a desire to try the case. So much of what goes on between counsel is posturing. If mediation is proposed and your opponent accepts, they are generally interested in resolving the case.

Do not let yourself be discouraged from mediating because you believe your opponent is taking an extreme position regarding settlement. Extreme positions coming into a mediation are quite common and do not preclude a successful mediation. Let the mediator worry about getting the parties off of unreasonable positions.

### 3. Timing the Mediation.

The time of the mediation can play a critical role in its success and several factors should be balanced. It is unwise to enter into any negotiation unless you have a good idea of what trial will look like. This generally entails completing a certain level of discovery. That said, in cases where there are a limited number of issues or where liability is reasonably clear, it is often possible to successfully mediate before a lawsuit is filed. Admitted liability auto cases and clear cut cases of medical negligence are examples of cases that often can be successfully mediated before the filing of a complaint.

In determining how much discovery is necessary before mediating, consider, as discovery increases, so do attorney fees and costs. Attorney fees can be a major stumbling block to settlement, particularly in cases where a party expects the other side to be paying their attorney fees, such as in employment discrimination cases or disputes under contracts that provide attorney fees to the prevailing party. Moreover, once a party (generally the plaintiff) is financially invested in the case by having incurred substantial costs, settlement can often be challenging.

Another factor is the emotional status of the parties. Sometimes emotions can run extremely high at the beginning of a claim and time is required to give the parties perspective. Other cases are just the opposite with the best opportunity for settlement is early, before the parties become entrenched by litigation. Counsel are in the best position to make this assessment.

Overall, I recommend early mediation. Even if the mediation is premature, it tends to identify issues, narrow the gap between the parties, increase communication and provide the

framework for a more realistic view of their case. Mediation is part of a process and though an early mediation may not always result in a signed settlement agreement, it will likely put you farther down the path toward a negotiated agreement.

A common reason for an early mediation to fail is differing perceptions as to what discovery is likely to reveal. Even here, a mediator can be of assistance. At times, I have negotiated a settlement contingent on the disclosure of certain documentation corroborating a representation of a party at the mediation. At other times, I have been able to assist in determining and narrowing what discovery is necessary to reasonably assess settlement and set up a time to conclude the mediation process in an expedited fashion, often telephonically.

#### 4. Selecting the Mediator.

The style, credibility and skills of a mediator are factors that must be considered in choosing an appropriate neutral. Experience in mediating in the particular area of law, while not essential, can certainly be beneficial in assisting the parties to assess risk and generate options.

It is important that the mediator have credibility with all parties. Ask yourself if the mediator has the skills to de-escalate emotions and generate a sense of trust and confidence in the process. Parties tend to value the mediation experience more when they have had an opportunity to speak and be heard. Consider whether the mediator is someone your client will be able to speak with easily.

#### B. Structuring the Mediation

##### 1. Format of the Mediation.

##### a. Joint or Separate Sessions

Most mediators have a format they consistently use. With some mediators, the format involves a joint session with the parties and their counsel followed by private caucuses. Other cases are better served by a different format. Often, counsel are in the best position to know if their matter is one in which a different format should be used.

In my experience, strong consideration should be given to a format that does not involve a joint session. Where the parties or counsel are extremely hostile to each other, adversarial joint sessions often make settlement far more difficult.

#### b. Bifurcated Mediations

A mediation can be in two parts – in an employment matter, the first part could be used to determine the conditions under which the employee may return to work and the second to determine the financial aspects of the litigation. Successful resolution on one issue tends to build momentum for successful resolution of the remaining ones.

Bifurcation can also work when there are multiple defendants with differing interests. At times, it can be most efficient to have a defense only mediation before the mediation with the plaintiff. Similarly if there are significant insurance coverage issues, these are sometimes best resolved pre-mediation. This can avoid having the entire mediation with the plaintiff wasted on disputes that must be resolved between the defendants before the matter can be successfully negotiated.

#### c. Structures that Increase Pressure Toward Settlement

Parties may want to consider structures that increase the pressure to reach agreement. One such structure is an agreement to arbitrate if the mediation fails. The arbitration can actually

take place right at the time of the mediation, with the mediator becoming the arbitrator.

Personally, I am not a fan of this approach as it makes it difficult for the mediator to remain in a true neutral role and tends to make the parties less likely to be candid with the mediator. If a back-up arbitration is built into the process, I generally recommend that the arbitration be scheduled with a different individual.

A less drastic approach is to ask the mediator to express a non-binding opinion as to the value of the matter if the mediation is unsuccessful. This approach can be quite helpful if the mediator has credibility with both parties. Because it is non-binding, it doesn't seem to create the same difficulties as the mediation/arbitration approach.

#### d. The Mediator Proposal

A variation on the above theme is to request the mediator to provide a written "mediator proposal." Here, the mediator, after exhausting the mediation process, sets forth a settlement proposal that the mediator feels has an equal chance of being accepted in both rooms. It may or may not reflect the mediator's personal evaluation of the case. The mediator then presents the proposal to each party separately and each party tells the mediator whether they would be willing to go along with the proposal. Only if both parties agree will they find out whether their opponent would have accepted the proposal. This way there need be no concern that one party will use the other's agreement to the proposal as a new base from which to negotiate. If one party does not agree, they will never find out whether their opponent would have agreed. I have often been surprised at how effective a mediator proposal can be in what appears to be an impossible case.

e. Advising the Mediator of Format Concerns

As mentioned, counsel is often in the best position to know which format is likely to be most successful in their case. Counsel will know how well the parties interact, if there are issues that are best treated separately, if defendants have substantial issues that must be resolved first, etc. If counsel determines that a format other than that typically used by the mediator would be best, counsel should contact the mediator in advance of the mediation to discuss the matter. If possible, both sides should participate in a discussion of the proper format. There are times, however, when involving the other side can be counterproductive. In such a case, send a confidential letter to the mediator expressing your concerns and suggestions. Let the mediator exercise his/her judgment as to the best way to proceed in light of the information that you have provided.

Finally, if you get to the mediation and have concerns about the format being used by the mediator, do not hesitate to raise these concerns with the mediator either in the joint sessions or in the private caucuses. Keep in mind, however, that you are paying the mediator for his/her expertise in structuring the process. Nevertheless, a seasoned mediator can make the best judgment with more information.

2. Who Should be Present for Mediation.

Getting the right people to the mediation is imperative to its success. A common source of aggravation to mediators and plaintiffs is the defense's failure to have the individual or individuals who have ultimate decision making power at the mediation. This is often a function of a decision making process that is by committee, such as with a large employer, certain insurance companies, or councils of cities and counties. At times, it simply is not possible to

have all necessary decision makers present and at others it is a clear tactical decision by the defense. The plaintiff can help circumvent this situation by making the presence of particular individuals a condition of proceeding with the mediation. If the plaintiff is unclear as to who has ultimate decision making power, investigation should be undertaken or the mediator should be contacted and asked to intervene prior to the mediation.

If attempts to get the key defense individuals to the mediation are ultimately unsuccessful, do not despair. Settlement can still occur. Frequently, key individuals are available by phone. If not, a meeting of the minds can be reached by those present at the mediation with final confirmation to take place after the mediation. Where, for example, city council approval is required, this may be the only way to proceed. Often, a contingent settlement agreement can be prepared that will be self-effectuating once the requisite settlement authority is obtained.

Consideration should be given as to who should not be at the mediation. Certain individuals may be unnecessary to the mediation process and may make the process more cumbersome for the mediator and more stressful for the parties. Examples include friends or relatives with no stake in the litigation but who have strong feelings, the alleged harasser in a hostile work environment case if the harasser is not a named defendant, the physician in a medical negligence case if the physician has already consented to settle.

C. Preparing for the Mediation.

1. Preparing Your Client for the Mediation.

A mediation is, of course, for the parties. It can be easy to forget that the case belongs to the litigants. Therefore, it is important that the parties are prepared for the mediation so that they will feel comfortable with the process and present themselves in the best possible light.

Prepare your client to tell his/her story. The impression that your client makes at the mediation is important even though the mediator will not be deciding the matter and may not even express his/her opinion as to the value of the case. If a joint session is conducted, it is often the first time that key people on the other side have seen your client. Even if they have met your client before, such as at a deposition, I have seen re-evaluations based on how the client presents him/herself at the mediation. Also, the mediator may be able to express a favorable reaction to your client and this may be advantageous to your client.

It is also important to prepare your client for the style of your mediator, for the concessions that will be inevitably required if settlement is to be achieved and for the likely risks and downsides of your client's case that the mediator will likely raise. The mediator's job will be greatly eased if you have set realistic expectations for your client. The more realistic the expectations you have set for your client early on, the better you will look at the conclusion of the mediation.

2. Preparing Yourself for the Mediation.

In order to reach a reasonable negotiated agreement at the mediation, you will have to be in a position to assess likely outcomes at trial or arbitration, should the matter fail to settle. Long

before the mediation, you should consider what information you will need to make an informed judgment about alternative outcomes.

As most cases are likely to settle before trial, it makes sense to do only that discovery early on that is critical to your ability to analyze the major strengths and weaknesses of your case. As each dollar spent on discovery is a dollar that may not be available to compensate the plaintiff, discovery planning is one that should be undertaken with great care. If it becomes clear that the case will not settle, additional discovery can be undertaken at the time.

One area where careful discovery is often critical is the area of special damages. Defendants are not likely to place much weight on a claim of special damages unless that claim is backed up with documentation and/or Declarations. Included in this category are medical/psychiatric expenses, lost profits or wages, lost earning capacity, retraining costs, etc.

If there are any third party liens or subrogated interests related to the claimed specials, that party must be contacted prior to the mediation. Alternatively, if you ensure that the individual capable of negotiating the third party interest is at the mediation or available by phone, the mediator can often be of assistance in compromising that interest.

Consideration might also be given to a structured settlement. This type of settlement should be explained to your client before the mediation. If the plaintiff is seeking to replace a lost income stream, or seeking to provide money for perceived future medical needs, a structured settlement can be appealing. Both sides should consider whether it would be useful to bring a structured settlement specialist to the mediation.

Sometimes overlooked is the necessity of truly understanding the goals and motivations of your client. These goals and motives are often completely unrelated to the merits of the case

or what can be achieved at trial. For example, if it is critical to your client that the defendant institute formal training on gender and race issues, you and your client must keep in mind that such an outcome can only be achieved through a negotiated agreement. If there are critical, nonmonetary settlement terms that will be discussed, make sure the mediator is advised well in advance.

If your client is looking primarily for monetary compensation, find out what financial goals your client is seeking to accomplish. Many plaintiffs feel strongly that they “need” a certain amount. While it is important to understand your client’s perception of need, it is also important for the client to understand that there may not be an alternative available to them that is likely to meet that need in full. If you are representing a defendant, the defendant’s ability to pay any judgment against them is clearly a matter that should be explored and understood before the mediation. If you are representing a plaintiff and have any reason to believe collectibility of a judgment will be an issue, try to obtain as much information about the defendant’s financial position as possible before the mediation.

### 3. Preparing the Mediator.

It is your job to provide the mediator with information and materials that will assist him or her in preparing for the mediation. Virtually all mediators will request and appreciate factual, concise pre-mediation materials.

Again, there are factors that must be balanced in deciding what and how much information should be submitted. Certainly, the mediator should be advised of the key facts and issues that will arise during the mediation. It is often helpful for the mediator to have a breakdown of claimed special damages as understood by both sides. While you want the mediator to

assist the parties to examine the strengths and weaknesses of their cases, you must remember that the mediator will bill for that preparation time. Often it is not the legal issues but emotional or practical financial issues that govern whether and how a case resolves. It can be helpful to advise the mediator of these types of issues in advance.

In general, I believe it is best to share the materials you send to the mediator with the other side. If you have confidential material that you would like the mediator to know without disclosing it to the other side, send a confidential letter under separate cover for this purpose.

As mentioned above, if you have ideas or concerns about the presence of certain parties, the format of the mediation or the agenda, do not hesitate to write or phone the mediator in advance of the mediation.

#### 4. Preparing Your Opponent.

Frequently overlooked on the path to mediation is the need to prepare your opponent. Unless your opponent is prepared, the odds of a successful mediation are low.

How do you prepare your opponent in a way that will be beneficial to the negotiations in your case? The number one way is to share key documentation and discovery. While lawyers tend to think in terms of tactical advantage at trial, the reality is that far more cases settle than try. Further, as it is likely that whatever information you are retaining will ultimately be disclosed in discovery, there is no real reason, in most instances, to refuse to share key evidence with your opponent, particularly when it is helpful to your case. For example, if you have a witness statement that is helpful, your willingness to share it may produce a higher settlement for your client.

It can also be helpful to advise your opponent of all of your agenda items before the mediation, so that he/she has an opportunity to consider avenues to settlement before the mediation. For example, in an employment matter, if the employer hears for the first time at the mediation that the plaintiff wants his/her job back, it will be quite difficult to work out the details even if the employer is open-minded to the idea.

A question often arises whether the materials submitted to the mediator should be shared with your opponent. I recommend that mediation materials be shared. Again, this is an opportunity to educate and prepare your opponent in a way that will increase the likelihood of a settlement. When materials are not shared, paranoia or doubt can be the result. As mentioned previously, you can always send the mediator a letter under separate cover for any confidential or sensitive issues.

D. Forming a Strategy for the Mediation.

1. Brainstorming.

Prior to the mediation, you and your client will want to have a general strategy for the mediation. Before the mediation, brainstorm with your client about all possible avenues of settlement. Attempt to discover all of your client's goals and all areas where your client may be willing to give or take. The more areas of potential negotiation, the greater the likelihood of generating a mutually agreeable resolution.

2. Bottom line?

Many individuals enter into a mediation with a preset bottom line. While this can be helpful in preventing the pressure of the mediation from causing you to enter into a settlement

that is not in your best interest, it can also prevent you from taking into account new information that surfaces during the mediation.

Mediation is usually an educational process for both parties. It tends to shed light on weaknesses in your case that you may have missed or undervalued. Surprising insights can occur in the mediation process if you and your client are open to them. Preset bottom lines can work against realistic re-evaluation of your case, and may result in your turning down a settlement proposal that would be in your client's best interest.

### 3. Agenda Setting.

The order in which issues are tackled can make a mediation go smoother or can slow down the process. In many cases, there are multiple issues. It is wise to consider the order in which issues are tackled. There are several basic approaches. Starting with the small issues on which agreement is likely to be readily achieved is one approach. The thought process is that reaching agreement on the small issues can build momentum that will make it easier to reach agreement on the large and difficult issues.

Another approach is to first tackle the large issues, believing that once the large issues are resolved the smaller issues tend to take care of themselves.

I recommend starting with the largest issue that has a reasonable chance of resolution. I have found that resolving the minor disputes doesn't tend to generate much momentum if major issues remain. Further, with major issues outstanding, reaching agreement on even the minor points can be difficult. A lot of time can be wasted on the minor issues if agreement cannot be achieved on the major ones.

#### 4. Opening Settlement Proposal.

Before you arrive at the mediation, you will want to have given some thought to what your opening position will be with regard to the issues on your agenda. Opening proposals have many impacts and can significantly affect the entire negotiation. They convey your negotiation style and set the outside stakes of the negotiating range. Finally, the opening positions affect an opponent's expectations about the outcome of the negotiation and affect whether the opponent will invest in the process.

There often is a relationship between the opening offer and the final outcome. Generally, higher aspirations tend to boost an opening number. Nevertheless, an opening position that is too extreme can shut down a mediation or cause an opponent to choose not to invest in the mediation. There must be a balance between having high aspirations and negotiating in a way that encourages realistic settlement discussions.

It is also important to understand that your opener will undoubtedly impact the opener of the other side. You will likely see your style and strategy being mimicked by your opponent. An extremely high opening demand is likely to be mirrored by an extremely low opening offer.

#### 5. Pre-Mediation Negotiation.

Engaging in the negotiation process before the mediation is most often helpful. Some use mediation as a last resort and only after traditional approaches have been tried and exhausted. Others walk into the mediation without having exchanged a single offer. Many make an initial attempt at negotiating outside of the mediation but move quickly into the mediation mode. Finally, some agree to mediate before negotiating but agree to exchange opening positions prior to the mediation.

Mediation tends to work best if the parties have not become too entrenched in their respective positions. That is one reason that I do not recommend that you exhaust traditional negotiations before entering the mediation. That said, if you find yourself as having exhausted traditional negotiations, a successful mediation can still result if both sides are open to the idea.

E. At the Mediation.

1. Approach If Joint Session is Conducted.

The goal of mediation is to reach a negotiated agreement, not to convince the other side of the merits of your case. While you certainly want the other side to understand the strengths of your case and the weaknesses of theirs, it is often best to let the mediator assist in this part of the process.

How counsel and their clients handle any joint session can set the entire mood of the mediation. If the joint session is confrontative and adversarial, the mediator may be required to consume a substantial amount of time de-escalating emotions and getting everyone back in a settlement frame of mind.

If you choose to make an opening statement outlining the facts and issues as you see them, stay away from addressing credibility issues and other issues that are likely to be a “hot button” for your opponent. Mediators can deal very directly with these issues in a way that is much more likely to be heard and processed than if it is raised by the opponent. This is true regardless of your people skills – to your opponent, you, unlike the mediator, are the “enemy.”

## 2. Approach in Private Caucuses.

### a. How Candid Should You be with the Mediator?

In private caucuses, you should confirm with your mediator that what is said is confidential. Even having established this, you must consider how candid you wish to be with the mediator. The more information that you provide the mediator, the greater the likelihood that the mediator will be able to assist you in reaching a settlement. On the other hand, mediators tend to take the path of least resistance. It is unlikely that the mediator will work hard to extract more concessions from your opponent than is necessary to settle the case.

I recommend being candid with the mediator about underlying motivations and goals such as a desire or lack of desire to return to work, need for an apology or letter of recommendation and so forth. You may not want to advise the mediator that you are dying to settle the case or how low or high you would really go to resolve the matter. However, if the mediation is failing to progress because you have caused the mediator to believe that it will require much more than it actually will to settle the case, you should reevaluate and be more candid with the mediator. You are there to settle the case after all and ultimately the mediator has no choice but to believe what the parties are insisting are their true bottom lines. Also consider that you may be mediating with this mediator in the future. A reputation for being truthful in your representations to the mediator will assist you in the future.

### b. The Role of the Client.

One of the most positive aspects of mediation is that it is an informal process and one in which your client has an opportunity to speak in an unstructured way. Many clients find this

ability to express themselves without the constraint of the question and answer format to be a very helpful if not therapeutic process.

Counsel vary in how much they try to control or restrict what is said by their clients. I firmly believe that clients value the process much more highly if they are able to express themselves as they see fit, at least in the private caucus. Frequently, the clients are unwilling to settle or to consider the comments of counsel or the mediator until they feel that they have had an opportunity to speak and be heard and understood. I have seen a number of extremely frustrated clients when counsel tries to control or speak for them. Admittedly, clients will often feel the need to discuss issues that are irrelevant from a legal perspective. Nevertheless, this is one area where counsel and the mediator need to "be patient." If the client is consuming lots of time on extraneous matters, a good mediator will gently redirect them.

When it comes to settlement positions, generally counsel will want to make these judgments after consulting with the client. Ultimately, of course, it is the client, not counsel who decides what is in his/her best interest. This should be made clear to the client.

F. Strategies Following a "Failed" Mediation.

If the mediation process has been exhausted and a settlement has not been reached, what are the next steps that should be taken? First, an assessment must be made as to why the mediation failed. Here are some typical reasons: (1) Unavailability of the individuals with ultimate decision making power; (2) Absence of third-party interests; (3) Parties lacked enough information to confidently assess their alternatives; (4) One or both parties had unrealistic expectations; (5) An unskilled mediator; or (6) The case requires a decision in the public tribunal. If the mediation failed because not all interested parties were present or because of an

unskilled mediator, consideration should be given to remediating the matter. Second mediations can be successful where first ones fail.

If the mediation failed because of insufficient information, the mediator can assist the parties in assessing what discovery should be undertaken and on what time frame with a continuation of the mediation scheduled for a specific date. The mediator can act as the discovery master during the time between the mediations.

If the mediation failed because one or both of the parties were unreasonable, consideration should be given as to whether another mediation with a different mediator or a settlement conference would be of assistance.

Keep in mind that mediation is part of a process. While it is highly successful in achieving settlement at the time of the mediation, even if settlement is not achieved, it can play a pivotal role in ultimate settlement. Do not hesitate to continue discussions with the mediator by phone after the mediation if the matter did not close at that time.



## **BARRIERS TO SETTLEMENT IN MEDIATION – HANDLING MEDICARE LIENS, SET ASIDES, ERISA-BASED SUBROGATION INTERESTS**

Recently, subrogation and lien interests involving ERISA-based insurers (post U.S. Airways v. McCutchen) and Medicare (liens for benefits paid and/or assertion of set-asides trusts for likely future benefits) are posing significant obstacles to settlement in mediation. Substantive and regulatory law governing Medicare liens, set-asides trusts and ERISA-based insurer's rights of recovery are topics of all-day seminars. The law in this arena is in a state of flux and a topic of great debate. That being said, competent counsel must take certain steps before coming into mediation. Too often, no such steps are taken and settlements that could have otherwise occurred are not consummated. The following is a list of practice tips, by no means comprehensive, that will aid the mediation process and the finalization of settlements.

### **I. MEDICARE LIENS – TASKS BEFORE MEDIATION**

#### **A. GENERAL RULES**

1. While matters have recently improved, Medicare is still slow in its response time for providing information necessary to the settlement of third-party claims. Competent counsel must initiate contact with Medicare as soon as representation of a Medicare client begins. Some tips:
  - a. Always fax or email documents to Medicare – CMS generally responds more quickly this way.

- b. Always be early – procrastination will increase your turn-around time.
  - c. Don't be confused by Medicare Advantage--Medicare Advantage plans are administered through private healthcare companies, much like employer health plans. There is no need to contact traditional Medicare when dealing solely with a Medicare Advantage repayment issue.
2. Promptly notify CMS of your client's injury claim and provide them with the necessary information.
  3. Make sure you ultimately obtain a current Conditional Payments letter.  
**This letter is a necessary requirement to any successful mediation.**  
With few exceptions, liability insurers **will not enter into a settlement** at mediation unless they are provided a Conditional Payments letter from Medicare. This letter itemizes all Medicare benefits for which Medicare will seek its lien repayment.
  4. Frequently, a Conditional Payment letter will include inappropriate/inaccurate claim-related treatment. These issues must be sorted out well in advance of mediation, as any liability insurer will treat the Conditional Letter itemization as gospel. Counsel must contact Medicare and provide it with medical records/other proof of unrelated/inaccurate claim-related treatment. Again, this process takes time, but its completion is crucial if a mediated settlement is the goal.
  5. Requests for waivers/reduction of Medicare liens: If a settlement will be a "deficiency" as a consequence of inadequate liability limits or significant

contributory negligence defenses, Medicare will rarely reduce its claim.

However, a Request for Waiver is available should there be unique circumstances by which your client can demonstrate that the injuring event has put them into great financial hardship.

6. Ignore Medicare liens at your peril. Litigation is being pursued by CMS against counsel, clients and third-party defendant insurers who ignore or do not repay Medicare liens.

## **II. MEDICARE—AT MEDIATION**

So why is all of the above-referenced time and toil necessary? With rare exceptions, no liability insurer will enter into any settlement at mediation unless or until it is provided with a Conditional Payment letter. Trying to "guesstimate" a Medicare lien from EOB's does not work and will only demonstrate that plaintiff's counsel lacks the necessary competence to effectuate settlement at mediation. This can be avoided by simply starting this process early to obtain an accurate Conditional Payments letter, well before mediation or settlement discussions commence.

### **A. RECENT INSISTENCE BY SOME LIABILITY INSURERS THAT MEDICARE BE NAMED AS A PAYEE ON THE SETTLEMENT CHECK**

Some insurers, especially when confronted with ill prepared plaintiff's counsel, will insist that Medicare be named as an additional payee on the settlement check or alternatively insist that a separate check be issued to Medicare. Some practice tips to circumvent this problem:

1. As an alternative, insert the following language into the mediation Settlement Agreement: "Plaintiff John Doe will execute a Hold Harmless Agreement

encompassing all legally enforceable Medicare liens or subrogation interests which arose as a consequence of this occurrence and plaintiff's counsel will discharge same out of settlement funds. Proof of Satisfaction of the Medicare lien will be provided to defense counsel upon receipt."

2. If listing Medicare as a payee is an insurmountable obstacle toward settlement, counsel can reluctantly agree to this request, as Medicare has recently shown the capacity to be contacted and arrangements made for its signature on the settlement check. However, this process, not surprisingly, takes time and can tie up disbursement of settlement monies.

#### **B. IF YOUR CLIENT IS NOT A MEDICARE BENEFICIARY**

Most liability insurers will have a form for your client's signature verifying that he/she is not a Medicare beneficiary and has not received any Medicare payments. Signature on this form will oftentimes circumvent the entire Medicare problem. However, if a client has applied for or has been awarded SSD benefits, this makes him/her Medicare eligible and this form will often not suffice.

### **III. FUTURE MEDICARE BENEFITS – MEDICARE SET ASIDE TRUSTS**

#### **A. WHY THE PANIC BY INSURERS?**

1. The SCHIP Extension Act of 2007 required all liability insurers to report a variety of information to CMS regarding any settlement or judgment where Medicare has made a payment or may pay benefits in the future. This act enacted stiff penalties for liability insurer's failure to report; \$1000 per day. These penalties got liability insurers' attention. As of October 1, 2010 all liability insurers became

Responsible Reporting Entities; i.e. RRE's. The response from liability insurers to this reporting requirement, in this mediator's view, has been one of panic. More troublesome, no two liability insurers are handling these reporting requirements the same. Some insurers are considerably more aggressive than others regarding the insistence on specific, settlement-chilling provisions in a Release. This is a concerted effort to protect the insurer from civil penalties/liability should a Medicare lien not be repaid or, more troublesome, should Medicare's interests not be protected as to future payment of benefits; i.e. requiring the establishment of a Medicare set aside trust.

Most counsel who work in this arena currently agree that there is no statutory or regulatory absolute requirement that funds recovered from liability settlements [contrasted from lump sum worker's compensation settlements] be put into a set aside trust or approved by CMS. Despite this state of the law, counsel (and the mediator) must sometimes cope with adhesive release provisions that can become insurmountable obstacles to settlement. As an example, a recently proposed Release contained the following provisions:

"Through the litigation process and mediation, I have discussed with my own counsel, the mediator, and counsel for the released parties how my future Medicare or private health insurance benefits might be affected by the settlement, as follows:

- (a) Because I received a personal injury settlement, by law, Medicare need not pay for my future medical expenses related to my injury.
- (b) Until otherwise agreed to by Medicare, the cost of any future medical treatment related to my injury will be my responsibility, and Medicare will not pay those expenses.

- (c) Until otherwise agreed to by Medicare, I understand that I may need to make appropriate arrangements to ensure that I will have funds available from the proceeds of the settlement to pay any future medical expenses that may arise as a result of the injuries alleged. Until such an arrangement is reached, I understand that it is the responsibility of my attorney and me to self-administer these funds, to only pay for Medicare-covered medical expenses from these funds, and to maintain written documentation of the amounts paid.

This proposed Release provision would contractually require the plaintiff to not only set up a Medicare set aside trust, but also would establish a contractual acknowledgement that Medicare is no longer responsible for future claim-related medical treatment expense. So what is one to do when faced with "Draconian," settlement-chilling Release language?

**B. SUGGESTIONS REGARDING UNACCEPTABLE RELEASE PROVISIONS  
REGARDING MEDICARE REPAYMENT OR MEDICARE SET-ASIDE  
TRUSTS**

1. Contact defense counsel early and attempt to iron out Release provisions so that they are consistent with existing law. It makes no sense to wait until mediation to address this issue.
2. Insert a "settlement czar" clause in the mediation Settlement Agreement. At the end of the mediation, a CR2A Agreement or Settlement Agreement is always prepared and signed. Prudent counsel often include a "settlement czar" provision which provides:

"To the extent that there are disputes concerning the form or substance of settlement documents, all such disputes shall be submitted to the mediator for final and binding arbitration thereof."

By use of such clause, to the extent that counsel has not been able to agree on appropriate Release provisions, they will have established an efficient and

cost-effective means by which to obtain a ruling regarding appropriate Release language.

3. Attached as Appendix A are some sample Release provisions and an edited Release addressing repayment of Medicare liens and the set aside issue. This mediator has often suggested this language and tailored it to a specific case as a means of avoiding an ultimate barrier to settlement posed by unacceptable Release language addressing Medicare's rights.

#### **IV. ERISA BARRIERS TO SETTLEMENT AT MEDIATION**

Like the topic of Medicare rights of recovery, ERISA-based first-party insurer rights of recovery are explored in daylong seminars. After the U. S. Supreme Court issued its decision in U.S. Airways, Inc. v. McCutchen, 133 S.Ct. 1537 (2013), ERISA-based insurers have become more emboldened when asserting "first dollar" recovery rights, before anyone else (including attorney's fees) are paid. Like Medicare, this issue can provide an insurmountable obstacle to settlement at mediation. Some practice tips to help avoid this problem:

- A. Exercise all due diligence to ascertain whether the plan is, indeed, governed by ERISA.
- B. Obtain all Plan documents and scrutinize them to determine whether the Plan provisions unambiguously afford the Plan Administrator the necessary discretion to seek first-dollar repayment out of any third-party settlement, whether pro rata attorney fee contributions are warranted, or whether state law; i.e. the "made whole" doctrine, has been contractually circumvented.

- C. Communicate frequently with the Plan decision-maker and provide all information by which any proposed compromise (whether for causation, contributory fault, or inadequate insurance limits) can be fully vetted and explored.
- D. Prior to any mediation, make sure that the Plan decision-maker is available to the mediator by telephone so as to explore a potential compromise. This recommendation cannot be overemphasized. It has been this mediator's experience that day-of-settlement compromises are spur of the moment decisions and are frequently achieved in telephone calls between a Plan decision-maker and the mediator. Sadly, failing to assure access to the Plan's decision-maker is a frequently overlooked necessity to a successfully mediated settlement.

# APPENDIX A

## Medicare Compliance Inserts to Settlement Agreement/General Release

Acknowledgment: (to be placed in the recitals section of agreements)

[Plaintiff and Defendant, (collectively, the "Settling Parties")] hereby acknowledges the following: (1) Under the Medicare Secondary Payer ("MSP") statute, 42 U.S.C. §1395y(b), and its accompanying regulations ("the MSP Provisions"), the Centers for Medicare and Medicaid Services (the "CMS") in certain circumstances may have an obligation to seek reimbursement of conditional payments made by the Medicare program (Title XVIII of the Social Security Act) (the "Medicare Program") on claims for items and services relating to injuries allegedly sustained by [Plaintiff]; (2) [Plaintiff] and [plaintiff's counsel] are in the best position to determine if any reimbursement obligation exists, based on [plaintiff's entitlement (or lack thereof) to Medicare Program benefits, [Plaintiffs]'s actual receipt of such benefits, and, if there is a reimbursement obligation, to ensure that the Medicare Program's interests are properly considered and discharged; (3) If there is a reimbursement obligation to the Medicare Program, [Plaintiff and [Plaintiffs counsel] are responsible under the MSP Provisions to verify, resolve and satisfy such obligation; and (4) If [Plaintiff] is now or in the past has been enrolled in the Medicare Program, [Defendant] will report the [Settlement] to the CMS pursuant to the MSP Provisions (even if [Defendant] does not agree that the evidence actually establishes liability for injuries allegedly sustained by [Plaintiff]).

### Plaintiff Statements:

[Plaintiff represents and warrants that [Plaintiff] and [Plaintiffs counsel] have reviewed the underlying facts and evidence of this case. [Plaintiff] understands and acknowledges that if Plaintiff is Medicare-enrolled at the time of settlement, [Defendant] is required to report this [Settlement] to the CMS but further acknowledges that by doing so, [Defendant] does not concede or admit that it necessarily agrees that [Defendant] is liable for [Plaintiffs] alleged injuries.

[Plaintiff] also represents and warrants that, if [plaintiff] has not already reimbursed or otherwise satisfied the Medicare Program for conditional payments made on claims for items and services relating to the injuries that are the subject of this action being resolved by this [Settlement], [Plaintiff] will do so in a timely manner as set forth in the MSP Provisions.

[Plaintiff] further represents and warrants that, to the extent any other government payer (including but not limited to Medicaid, Veteran's Administration, Tricare/CHAMPUS) has a right to be reimbursed for any payments made on claims for items and services relating to the alleged injuries that are the subject of this action being resolved by this [Settlement], [Plaintiff] has, or will, fully reimburse, resolve, otherwise satisfy, or properly consider, the rights of such payers.

[Plaintiff] acknowledges that in making payment to [plaintiff pursuant to this [Settlement], [Defendant] is reasonably relying on the representation and warranties made by [Plaintiff herein and these representations and warranties are a material inducement to [Defendant] to make payment as part of this Agreement.

### Plaintiff's Counsel Statements:

In addition to [Plaintiff]'s representations and warranties set forth above, [Plaintiff's counsel] represents and warrants that it has applied a formalized screening process to determine if

[plaintiff] is enrolled to Medicare Program benefits, and, if [Plaintiff is so enrolled, when [Plaintiff] became so enrolled to Medicare Program benefits. [plaintiff's counsel] has reviewed the relevant MSP Provisions regarding reporting of claims by [Defendants] to the CMS and reimbursement to the Medicare Program for conditional payments made, and has reviewed all relevant case-specific evidence, including but not limited to medical records, interrogatories, depositions, expert witness reports, affidavits, brochures and other reports, where available. [Plaintiff's counsel] understands and acknowledges that where Plaintiff is identified as Medicare-enrolled at the time of execution of this Agreement, [Defendant] is required to report this [Settlement] to the CMS but further acknowledges that by doing so [Defendant] does not concede or admit that it necessarily agrees that [Defendant] is liable for [Plaintiffs] alleged injuries.

[Plaintiffs counsel] also represents and warrants that it will hold or arrange to hold sufficient net settlement funds (defined as gross settlement funds less procurement costs following 42 C.F.R. §411.37) in trust, escrow, or other similar client trust account (should needs-based government benefits such as Medicaid require preserving), until such time as any obligation to reimburse the Medicare Program for conditional payments on claims for items and services relating to the injuries that are the subject of this action being resolved by this [Settlement] have been fully resolved or satisfied. [Plaintiffs counsel] further represents and warrants that it will take all reasonable and necessary actions to ensure that any such reimbursement obligation is in fact resolved or satisfied. Finally, [Plaintiff's counsel] represents and warrants that, as a material inducement to [Defendant] making payment under this [Settlement] before such reimbursement obligation is resolved or satisfied, and as a condition subsequent to this [Settlement], [plaintiff's counsel] will provide [Defendant] with proof of the Medicare Program's determination that such reimbursement obligation has been fully resolved or satisfied once such determination is received by [Plaintiff's counsel].

[Plaintiffs counsel] further represents and warrants that, to the extent any other government payer (including but not limited to Medicaid, Veteran's Administration, Tricare/CHAMPUS) has a right to be reimbursed for any payments made on claims for items and services relating to the alleged injuries that are the subject of this action being resolved by this [Settlement], [Plaintiff's Counsel] will take all necessary and reasonable actions to ensure that [Plaintiff] has, or will, fully reimburse, resolve, otherwise satisfy, or properly consider, the rights of such payers.

[Plaintiff's counsel] acknowledges that in making payment to [Plaintiff] pursuant to this [Settlement], [Defendant] is reasonably relying on the representation and warranties made by [Plaintiffs counsel] herein and these representations and warranties are a material inducement to [Defendant] to make payment under this Agreement.

#### **Tort Recovery or Similar Record**

Based on the warranties and representations made above, a tort recovery or similar record may need to be established by [Plaintiff's counsel] and a reporting event may be triggered, which would be the responsibility of the [Defendant], by and through its insurance carrier. In the case of a reportable event, [Defendant] will comply with the MSP Provisions. [Defendant] will determine whether the [Settlement] is reportable under the Act. If there is an obligation to establish a tort recovery or similar record with the CMS, [Plaintiffs counsel] shall provide [Defendant] appropriate information validating that such a record has been established with the CMS and/or its recovery contractor. The [Settling Parties] expressly agree that payment of

settlement proceeds is not conditioned upon Plaintiff providing proof that all Medicare reimbursement claims and obligations have been satisfied. Rather, [Defendant] agrees to forward the gross settlement proceeds within the time frame agreed between the [Settling Parties] at the time of settlement once [Plaintiff] has tendered an executed release, and [Plaintiff's counsel] has provided [Defendant] with appropriate information validating that a tort recovery or similar record has been established with the CMS and/or its recovery contractor.

### **Medicare's Potential Future Interests**

The [Settling Parties] do not intend to shift responsibility of future medical benefits to the Federal Government. [Plaintiff] and [Plaintiff's counsel] have been informed and acknowledge that Medicare cannot accept the terms of the [Settlement] as to an allocation of funds of any type if the [Settlement] does not adequately address Medicare's interests. If Medicare's interests are not reasonably considered and protected, Medicare will refuse to pay for services related to the alleged injury (and otherwise reimbursable by Medicare) until such expenses have exhausted the amount of the entire settlement. Medicare may also assert a recovery claim, if appropriate, based on conditional payments made by Medicare within the meaning of 42 U.S.C. § 1395y(b)(2). The CMS has a direct priority right of recovery against any entity, including a beneficiary, provider, supplier, physician, attorney, state agency, or private insurer, that has received any portion of a third party payment directly or indirectly. The CMS also has a subrogation right with respect to any such third party payment. *See*, for example, 42 C.F.R. §§411.24(b), (e), and (g) and 42 C.F.R. §411.26. Third party liability insurance proceeds are also primary to Medicare. To the extent that a liability settlement is made that relieves a liability carrier from any future medical expenses, based on an allocation of future medical expenses as part of a settlement or judgment, or where such damages otherwise comprise a significant part of total damages and are reasonably considered by the parties as being paid as a part of the gross settlement proceeds; and creates a permanent shift of the burden of paying and managing such future injury-related care over to Medicare within the meaning of 42 U.S.C. §1395y(b)(2) going forward, a Medicare Set-aside Arrangement ("MSA") may be appropriate. This MSA, if required, would need sufficient funds from the [Settlement] to cover future medical expenses incurred once the total third party liability settlement is exhausted.

Federal regulations provide that the liability for work-related injuries resulting in lifetime medical expenses should not be shifted to Medicare from the responsible party after settlement. Accordingly, a portion of a Medicare beneficiary's workers' compensation settlement in certain cases must be set aside to pay for the beneficiary's future work-related injury or illness resulting in medical expenses per 42 C.F.R. §411.46. However, because this [Settlement] does not involve a workers' compensation claim, and no Federal laws or regulations exist in mandating an MSA in a liability settlement, the [Settling Parties] agree that the manner in which Medicare's interests may be properly considered is not limited to establishing an MSA. Accordingly, [Plaintiff] agrees to take such actions as are considered legally necessary to ensure Medicare's interests are properly considered.

[Plaintiff] and [Plaintiff's counsel] represent and warrant that they have reviewed any applicable statutes and regulations, including, but not limited to, 42 U.S.C. §1395y(b)(2), 42 C.F.R. §§411.24(e) and (g-i), §411.26, §411.46 and §411.47.

Consequently, to comply with the applicable Federal regulations and to reasonably recognize Medicare's interests, [Plaintiff] and [plaintiff's counsel] represent that they agree to satisfy any and all Medicare subrogation interests, claims and/or liens; as may be finally determined and/or compromised, from the proceeds of the settlement funds as distributed to [Plaintiff's counsel].

[Plaintiff understands that it is [his] responsibility to properly consider Medicare's future interest. If Medicare's future interest is not properly considered, [Plaintiff] understands that the CMS may be entitled to recover its future interest from [Plaintiff], and that [Defendant] is not liable to the CMS for [Plaintiff's] failure to properly consider Medicare's future interest. Recovery of this future interest may include but may not be limited to the following: payment directly to the CMS out of the settlement proceeds and/or revoking/denying the [Plaintiff's] Medicare benefits for injury-related or non-injury related medical expenses for a certain amount of time to be determined by the CMS in its sole discretion.

RELEASE OF ALL CLAIMS

FOR AND IN CONSIDERATION of the payment of /

to (hereinafter the "Undersigned") and his attorney who shall deposit such settlement funds into said attorney client trust fund prior to disbursement as described below, receipt of which is hereby acknowledged, the undersigned does hereby release, acquit and forever discharge

, and their respective servants, agents, successors, employees, administrators, managers, officers, directors, assigns, parent or subsidiary companies or corporations, and all other persons and corporations, of and from any and all, known or unknown, claims, demands, damages, causes of action, causes of suit, commissions, fees, attorneys' fees or expenses, which the Undersigned may now have, ever had or hereafter may have on account of or in any way relating to arising out of an accident which occurred on or about , including but not limited to all claims asserted or which could have been asserted in that certain action entitled

The Release shall operate as and shall be a complete accord and satisfaction and is a full acquittance in consideration of a full and complete settlement of any and all claims for damages and injuries of every kind, character, or description sustained by the Undersigned, whether herein specifically described or not, which I may have now or hereafter have on account of or in any way connected with the above described occurrence as against Releasees.

By executing this Release the Undersigned does covenant to indemnify, defend and hold harmless Releasees from any and all claims for liability from any medical provider whatsoever, or dispenser and/or supplier of any medical services as a result of their treatment or care rendered, or for any lien asserted by, for, or on behalf of any attorney, representative,

plan, or insurer including but not limited to PIP, Medicare, Medicaid, private health care insurer or plan, or any other contractual, statutory or governmental lien holder relative to any care, services or treatment rendered or offered herein and for which demand could be made upon Releasees for discharge or payment by statute, contract, rule, or regulation.

The Releasees have sought to protect the future interests of Medicare, as required by federal law. Based on a thorough review of relevant facts and circumstances, the Undersigned acknowledges:

I have previously received Medicare health insurance or benefits and have assumed, as a part of this settlement, any obligation of the Releasees to pay Medicare for any past or future medical expenses related to my injuries which are the subject of this litigation. I agree, and hereby direct my attorney, that a sufficient portion of the proceeds of this settlement shall remain in my lawyer's client trust account to resolve any past or future Medicare claims, until such time as I have reached an agreement with Medicare that resolves these issues.

The Undersigned agrees to indemnify, defend and hold harmless Releasees for and from any and all claims, expenses, and attorneys' fees relating thereto or relating to any expenses covered or paid by Medicare, past or future, for treatment related to the injuries which are the subject of this litigation.

In the event of such demand, the Undersigned agrees to and shall defend and hold harmless Releasees from any and all such liability, including such an amount required for the defense of the Releasees, including their costs and attorneys' fees.

The Undersigned acknowledges and agrees that it is Releasees' obligation to report to Medicare the identity of a Medicare beneficiary whose illness, injury, incident, or accident was the subject of any settlement, judgment, award or other payment, as well as all other information required by the Secretary of Health and Human Services.

The Undersigned attests that his valid social security number is  
INFORMED CONSENT: Through the litigation process, I have discussed with my own counsel  
and counsel for the released parties how my future Medicare or private health insurance  
benefits might be affected by this settlement as follows:

A) The cost of any future medical treatment related to my injury may be my  
responsibility, and Medicare may not pay those expenses.

B) I understand that I may need to make appropriate arrangements to ensure that I will  
have funds available from the proceeds of the settlement to pay any future medical expenses  
that may arise as a result of the injuries alleged.

C) I understand that there is some risk involved and I elect to proceed and settle my  
personal injury claim, knowing of the possible adverse effect on my benefits.

The Undersigned hereby declares and represents that he fully understands the terms of  
this settlement and voluntarily accepts this agreement for the purpose of making a full  
compromise, adjustment and settlement of the claims and damages, known or unknown,  
alleged or that could be alleged in the above-mentioned case.

It is further understood and agreed that this settlement is the compromise of a disputed  
claim and that this agreement is not to be construed as an admission of liability of defendants.

**THE DOCUMENT YOU ARE BEING ASKED TO SIGN IS A BINDING CONTRACT THAT  
CONCLUDES YOUR CLAIM(S) AGAINST THE PARTIES IT IDENTIFIES. AFTER YOU SIGN  
IT YOU WILL NOT BE ABLE TO MAKE ANY FURTHER CLAIM(S) AGAINST THESE  
PARTIES.**

This Release, along with the memorandum prepared by mediator \_\_\_\_\_ at the  
successful conclusion of mediation, contains the entire agreement between the parties hereto  
and the terms of this Release are contractual and not a mere recital.

BY SIGNING THIS RELEASE, I ACKNOWLEDGE AND DECLARE THAT IT HAS BEEN  
FULLY AND CAREFULLY READ AND IS CLEARLY UNDERSTOOD TO BE A COMPLETE  
AND FINAL COMPROMISE SETTLEMENT AND FULL RELEASE, SATISFACTION AND

DISCHARGE OF ALL CLAIMS, AND THAT THE MEANING, PURPOSE AND INTENT OF EACH PROVISION IS CLEAR AND DEFINITE AND THOROUGHLY UNDERSTOOD.

DATED this \_\_\_\_\_ day of \_\_\_\_\_, 2010.

\_\_\_\_\_  
APPROVED AS TO FORM:

\_\_\_\_\_  
Attorney for Plaintiff

\_\_\_\_\_  
APPROVED AS TO FORM:

\_\_\_\_\_  
Attorney for Defendants

# EXHIBITS

## MEDIATION AGREEMENT (Sample)

The undersigned agree that \_\_\_\_\_ has been retained to mediate the matter of \_\_\_\_\_.

The parties agree that this mediation shall be governed by Chapter 7.07 RCW.

OR if federal or out of state case:

The parties and their counsel agree that this mediation will be performed in accordance with any governing statutory or case law which regulates this mediation.

Any settlement between the parties will be memorialized in a Settlement Agreement prepared by the mediator at the closure of the mediation. A copy of said Agreement will be provided to the settling parties. The parties and their counsel agree that this Settlement Agreement shall be admissible as evidence in any subsequent proceeding as written proof of the Agreement reached by the parties. It is further agreed that the mediator may testify concerning the terms and conditions of any settlement achieved pursuant to this mediation.

The parties understand and acknowledge that the mediator is not providing legal advice or counsel concerning any party's legal rights.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

\_\_\_\_\_

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\_\_\_\_\_

\_\_\_\_\_

**HARBAUGH and BLOOM, P.S.**  
**ATTORNEYS AT LAW**

DANIEL P. HARBAUGH  
GARY N. BLOOM

422 West Riverside Avenue  
1300 U.S. Bank Building  
Spokane, WA 99201

Phone: (509) 624-4727  
Fax: (509) 624-4978  
Email: garyb@hblaw2.com

\_\_\_\_\_, 2019

Attorney Address

Attorney Address

Re:

Counsel:

You have requested that I serve as a mediator in the above-referenced matter. This letter confirms that the mediation is scheduled for \_\_\_\_\_ day, \_\_\_\_\_, 2019, commencing at 9:00 a.m.

It will be held at my offices: 422 W Riverside Avenue, Suite 1300 in Spokane. My hourly rate for this mediation is \$\_\_\_\_. Unless I am informed to the contrary, I will assume that the cost of mediation will be shared by all parties equally. I request that the parties contact me immediately should this mediation require continuance or cancellation. If notice is not given more than ten days prior to the scheduled mediation date, I reserve the right to charge an appropriate cancellation fee if this time slot cannot be rebooked. If this mediation requires travel, please be advised that my office books nonrefundable airfare in order to obtain lower fares. Travel is generally booked approximately 30-45 days in advance of the mediation date. If a cancellation occurs after booking, the parties will be billed any cancellation fee charged by the airline (which is normally \$125 when flying Alaska).

I would like to receive, no later than three business days in advance of the mediation session, only those documents that you deem critical to this case. I do not wish to receive copies of pleadings, depositions, comprehensive settlement brochures or voluminous medical records. Rather, please summarize the liability and damage aspects of your case in a five to ten-page letter. [At counsel's discretion, this letter can be shared with all or some parties or, alternatively, confidentially directed solely to me.] If there have been demands or offers exchanged, I need to know the current status of any negotiations.

It has been my experience that it is counterproductive to a successful mediation if medical records, reports, critical documents or new issues are not disclosed until the time of mediation. All pertinent documents must be shared and reviewed by the parties well in advance of the mediation. This assures that the case is properly evaluated and will heighten the chances of a successful resolution.

On the day of the mediation, all parties must have a representative present with full authority to settle this case. Specifically, all defendants must have a representative present with settlement authority commensurate with the plaintiff's last known settlement demand. Any exceptions to this rule must be approved by the mediator and all other parties prior to commencement of mediation.

Cordially,

HARBAUGH & BLOOM, P.S.

***Sent without signature to avoid delay***

By: Gary N. Bloom

## CR2A SETTLEMENT AGREEMENT

### Case Name

On \_\_\_\_\_, following mediation, the above-referenced case settled in accordance with the following terms and conditions:

1. Defendants, collectively, will enter into a present value settlement with \_\_\_\_\_ (\_\_\_\_\_) in the amount of \$\_\_\_\_\_. The parties reserve the right to fund a portion of this present value settlement via future periodic payments, the terms and conditions of which to be agreed-upon. This present value settlement will be allocated between the defendants as follows:
  - a. \_\_\_\_\_: \$\_\_\_\_\_
  - b. \_\_\_\_\_: \$\_\_\_\_\_
  - c. \_\_\_\_\_: \$\_\_\_\_\_
2. \_\_\_\_\_ will execute a standard Hold Harmless Agreement encompassing all legally enforceable liens or subrogation interests, including but not limited to any \_\_\_\_\_ or \_\_\_\_\_ lien which arose as a consequence of this occurrence, and plaintiff's counsel will discharge same out of settlement funds. Proof of satisfaction of all liens will be provided by plaintiff's counsel to defense counsel upon receipt.
3. The parties to this settlement will execute a standard Confidentiality Agreement. Essentially, the Agreement will provide that no party or their counsel will publish or otherwise make known the amount terms or conditions of this settlement. If any party or counselor is contacted concerning the outcome of this litigation, they will state only that the matter was "resolved" and nothing more. The Agreement will provide standard exceptions for permitting disclosure, as necessary, to accountants, annuitants (or other like fiduciary entities) or by operation of law.
4. To consummate this settlement, appropriate release documents will be executed by the parties. The parties understand and

5. Defendants will fund the settlement described in Paragraph 1 above within 30 days of release documents being executed by the parties. Prospective release documents will be provided by defense counsel to plaintiff's counsel within five working days of plaintiff's counsel advising defense counsel the extent to which periodic payments may be utilized to fund a portion of this settlement.

[illegible]

## CONDITIONAL CR2A SETTLEMENT AGREEMENT

### Case Name

On \_\_\_\_\_, following mediation, a prospective settlement was reached in the above-referenced case in accordance with the following terms and conditions:

1. If offered by defendant \_\_\_\_\_ (\_\_\_\_\_), plaintiffs \_\_\_\_\_ (\_\_\_\_\_) will accept a lump sum cash payment in the amount of \$\_\_\_\_\_. To consummate this settlement, said offer must be made by defendant \_\_\_\_\_ on or before the close of business \_\_\_\_\_. Any offer in an amount less than \$\_\_\_\_\_ by \_\_\_\_\_ to plaintiffs will not be accepted.
2. The Department of Labor and Industries (DLI) has lien interests in this case. A representative from the DLI Third Party Recovery section participated telephonically in this mediation. Should defendant \_\_\_\_\_ timely agree to fund this settlement as set forth in Paragraph 1, a Compromise Agreement will be executed by plaintiffs \_\_\_\_\_ and DLI by which DLI's lien interests will be fully satisfied and discharged. A copy of the DLI Order satisfying/discharging the DLI lien will be provided by plaintiffs' counsel to the defense counsel.
3. \_\_\_\_\_ will execute a standard Hold Harmless Agreement encompassing all other legally enforceable liens or subrogation interests which arose as a consequence of this occurrence, and plaintiffs' counsel will discharge same out of settlement funds.
4. To consummate this settlement, appropriate release documents will be executed by the parties and a Stipulation and Order of Dismissal with Prejudice, encompassing all claims and parties, will be entered. The parties understand and agree that the release documents will be in the broadest form possible so as to assure a full and final release of any and all claims arising out of the \_\_\_\_\_ on \_\_\_\_\_, out of which this litigation arose.

Dated the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

_____	_____
_____	_____
_____	_____

## MEDIATION STATEMENT (Sample)

\_\_\_\_\_, 20\_\_\_\_

Re: Doe v. XYZ and RRR

Dear Mediator:

Thank you for agreeing to serve as a mediator in this case, which is currently scheduled for \_\_\_\_\_, 20\_\_\_\_ at \_\_\_\_\_ a.m. in \_\_\_\_\_.

### PARTIES/COUNSEL

Plaintiffs: Doe Counsel: \_\_\_\_\_

Defendant: XYZ Counsel: \_\_\_\_\_ Insurer: \_\_\_\_\_

Defendant: RRR Counsel: \_\_\_\_\_ Insurer: \_\_\_\_\_

Lien Holder: Department of Labor & Industries Counsel: \_\_\_\_\_

### FACTS RE: OCCURRENCE/INJURIES

#### Occurrence:

This is a construction site injury case. Our client, Doe, was employed as a journeyman electrician by ABC. Defendant XYZ was the owner/general contractor of a construction project whereby a new addition was being built onto XYZ's manufacturing plant. This construction site had other trades working on it at various times. For some of the new construction, XYZ utilized its own millwrights, mechanics, electricians and other employees during the course of construction. However, as needs arose, XYZ hired subcontractors and/or employees of other companies to work on this project as well. ABC had an ongoing relationship with XYZ by which ABC would supply journeyman electricians to work at XYZ as its needs required. Smith, Doe's coworker on the date of injury, recalls first working at XYZ in 2010 for approximately ten to eleven months. While temporarily working at XYZ, Smith remained an employee for ABC. Apparently, XYZ reimbursed ABC on an hourly basis for work performed by Smith. Smith thereafter worked at a couple of other job sites as an ABC employee, then went back to work at XYZ in 2013, where he worked continuously until the time of the incident. Approximately one month before the accident, ABC took plaintiff Doe off a different construction site and sent him to work with Smith at the XYZ construction site. [Doe's status as either an employee of ABC or a loaned servant to XYZ is discussed below.]

On 1/2/2014, Doe and Smith were working in the cabinet of a remanufactured Ampgard electrical starter switch. The Ampgard starter switch had been remanufactured and sold to XYZ by defendant RRR. This cabinet was not de-energized by XYZ before Doe and Smith began working on it. While in the process of terminating new electrical cable in the Ampgard cabinet, an arc occurred, causing the switch to blow up while the majority of Doe's upper body was within the cabinet. This explosion caused second and third-degree burns over a substantial portion of Doe's body. The nature and extent of his injuries required that he be transported to Seattle for treatment. The residuals of these injuries prevented Doe from returning to work as a journeyman electrician. Doe has been vocationally retrained into a job as an electrical estimator, with a commensurate loss of earning capacity.

This incident was investigated by WISHA. Pertinent copies of WISHA's investigative report are attached as Exhibit 1. Providing a "word picture" of exactly how this explosion occurred is difficult. At mediation, numerous pictures, diagrams and physical evidence will be available by which the sequence of events leading up to the explosion, as well as its likely cause, will be explained to you. By way of brief summary, when the cables were being pulled through the "raceway" behind the switch, a ground wire, which had been stripped and taped to the outside of the cable, arced to some exposed, energized buss. Subsequent investigation by WISHA, XYZ and us [through our retained expert, Sparky] has culminated in a conclusion that the likely cause of the arc was a 4"x6" notch that had been cut out of an insulator panel, thereby exposing the energized buss to cables being pulled through the raceway. A picture of this notched insulator panel, which was taken by defendant RRR after the switch had been remanufactured and immediately before its shipment to XYZ, is attached as Exhibit 2. It is significant that this picture is taken with the back panel of the switch removed, thereby making the cable raceway visible. On the day of the explosion, the raceway was not visible because the back panel was attached to the cabinet and XYZ had earlier installed and anchored the switch directly against a wall of the building. Hence, when Doe and Smith were pulling cable through the raceway, there was no way they could visualize the notched insulation panel exposing the energized buss. Rather, this defective, notched insulator panel was only discovered after the explosion, when it was found lying at the bottom of the switch cabinet. Unfortunately, it was thrown away by defendant XYZ's employees post-explosion. However, XYZ employees, as well as Smith, will verify its existence. Moreover, the picture [Exhibit 2] verifies that the insulation panel was, indeed, notched, thereby exposing energized buss in the cable raceway.

#### Injuries:

Doe sustained second and third-degree burns over almost forty percent (40%) of his body; the primary areas being both of his hands and arms, as well as his face. Attached as Exhibit 3 are pictures which demonstrate the nature and extent of these burns, in their acute and later stages. These injuries required a thirty day in-patient stay at a Seattle hospital. Upon returning, Doe's primary attending physician, plastic surgeon Dr. Welby, managed his care. Doe was required to wear garments over both of his hands and arms for a prolonged period of time to aid scar healing. He received psychological treatment for trauma and adjustment issues directly caused by these horrific injuries.

Doe was vocationally retrained under the auspices of the Department of Labor & Industries. After considerable effort and trial work settings, Doe ultimately found permanent work with BBB as an electrical estimator. Attached as Exhibit 4 is a preliminary report from Beancounter, CPA, which calculates Doe's past and future earning losses occasioned by this explosion.

A telephone call to DLI third party verified that the current Department lien is \$\_\_\_\_\_ and is broken down as follows:

Medical Treatment:	\$ _____
Time Loss:	\$ _____
C.O.L. on Time Loss:	\$ _____
Lost Earning Power:	\$ _____

Doe's claim remains open as of this time and he has yet to receive any award for his permanent partial disability associated with his injuries. DLI has advised that the future entitlement has been reserved at \$\_\_\_\_\_, broken down as follows:

Future Medical:	\$ _____
Future Time Loss:	\$ _____
PPD Award:	\$ _____

### STRENGTHS/WEAKNESSES/ISSUES

#### LIABILITY

AS TO DEFENDANT XYZ:

#### Strengths:

- Clear-cut WISHA violation – WAC 296-155-428(1)(a) "No employer shall permit an employee to work in such proximity to any part of an electric power circuit in the course of work, unless the employee is protected against electrical shock by de-energizing the circuit and grounding it or by guarding it effectively by insulation or other means." [See copy of WISHA citation issued to XYZ, Exhibit 1.]
- XYZ failed to appropriately sequence this construction project. Instead of working from the installation of new equipment backwards to the power source, XYZ selected a work sequence which necessitated that Doe work on an energized electrical switch. While XYZ could have de-energized this switch, given its work sequence, this would have required XYZ to cut power to other portions of its plant, thereby causing an economic disincentive to de-energize the switch.
- XYZ's lead electrician negligently assumed that Doe and Smith would perform work on the Ampgard switch in a certain manner, without instructing them to do the work in such a way as to avoid pulling cables through the raceway of the energized switch.
- XYZ did not utilize its previously-adopted "lockout-tagout" procedure, which would have required de-energizing the switch prior to any work being performed on it.
- Our expert, and other journeyman electricians, will testify that a journeyman electrician has a right to assume that raceways are fully insulated and are a safe means by which to pull cables through energized switches.

### Weaknesses:

- Doe and Smith knew that the electrical switch was energized when they were working on it. Arguably, they could have insisted that the switch be de-energized before commencing work, or requested specific instructions on how to perform the work without pulling cables through the raceway in a close proximity to energized buss. These and other similar arguments will be raised in an effort to prove contributory negligence on Doe's behalf.
- XYZ will assert that Doe and Smith were loaned servants. There are many harmful references in the WISHA investigation documents which provide certain indices of a loaned servant setting. [See Exhibit 1.] However, at the WISHA hearing challenging the issuance of the citation, XYZ's supervisors gave sworn testimony that contradicts an assertion that Doe was a borrowed servant. The determination of this legal issue will be a factual question for the jury, upon its review of all testimony and indices of defendant XYZ's control and right to control Doe and Smith while they were working on XYZ's job site. As you are probably aware, established case law provides a multi-factored test by which the trier of fact is to determine whether an employee is the loaned servant of another. This issue, if decided adversely to Doe, is outcome determinative as to defendant XYZ. [However, under RCW 4.22.070(1)(b), a finding that Doe was a loaned servant will be more problematic for defendant RRR than for plaintiffs. See analysis below.]

### AS TO DEFENDANT RRR:

### Strengths:

- RRR's own pictures prove that when the switch left its remanufacturing plant, it had an insulator panel that had been notched, which exposed buss that would foreseeably be energized. RRR cannot take issue with plaintiff's assertion that raceways are designed to be fully insulated pathways by which cables will foreseeably be pulled into and out of electrical switches during their installation and repair.
- RRR, as a remanufacturer, had a duty to remanufacture the switch to original manufacturer's specifications. Again, RRR's own picture distinctly proves that the notched insulation panel in the raceway was neither repaired nor replaced before being sent to XYZ.
- Post-explosion inspection of the switch reveals pitting/deformation on the energized buss in the same area as the notched insulation panel. Plaintiff's expert, Sparky, as well as XYZ's experts, will all testify that the arc occurred when the ground wire taped to the outside of the cable arced to the exposed, energized buss in the exact area where the insulation panel had been notched.
- RRR's quality control inspection reports, which allegedly verify the appropriate placement of all insulation panels, will be directly impeached by its picture of the notched insulator panel in the raceway taken immediately prior to shipment of the electrical switch to XYZ.

- The issue of whether Doe was the "borrowed servant" of XYZ at the time of the accident actually poses a greater risk for RRR than plaintiff. If XYZ prevails on this issue, XYZ will be granted immunity under Title 51 RCW, thereby preventing RRR from apportioning fault to XYZ. RCW 4.22.070(1)(b). The effect of a factual determination that Doe was XYZ's borrowed servant will be simply to remove XYZ from the verdict form, resulting in apportionment of fault only between Doe and RRR. *Edgar v. City of Tacoma*, 129 Wn.2d 621 (1996). [Important: Plaintiff's counsel have privately discussed this issue with counsel for RRR, but not with XYZ's counsel. While XYZ has raised the borrowed servant issue as a defense to plaintiff's claims, we do not believe XYZ's counsel has thought of the adverse effect of a borrowed servant finding on defendant RRR. Plaintiff asks that the mediator NOT discuss this issue with defendant XYZ, as XYZ will want to pay less and demand greater contribution from RRR toward settlement if XYZ is aware of the effect on RRR of a jury finding that plaintiff was a borrowed servant.]

#### Weaknesses:

- RRR will claim that XYZ had the duty and/or opportunity to examine the switch before putting it into use.
- More significantly, RRR will point to the WAC safety standards, as well as applicable standards of the industry, requiring that all such switches be de-energized before any work is performed.
- RRR will be critical of Doe and Smith concerning the manner and means by which they terminated the cables into the switch and by admittedly working on an energized switch.

#### DAMAGES

#### Strengths:

- Great Exhibit A -- Doe will make a very sympathetic and favorable witness. Any jury will like him. He has a pleasant wife, great kids, and will be an easy sell to a jury.
- This is a burn case. Juries have no difficulty appreciating the excruciating pain experienced with burns of this type. The pictures taken at various times in Doe's treatment process will drive this point home very effectively. [See Exhibit 3.]
- Past experience indicates that extremely explicit testimony can be obtained from Doe's physicians concerning the acute phases of burn injuries and the horrific effect on patients. Moreover, Dr. Welby is very supportive of Doe and will make an excellent witness. [Attached as Exhibit 5 is a memorandum that I dictated following my recent meeting with Dr. Welby which summarizes the doctor's current views.]
- Significant special damages have been incurred. Medical bills, past and future, have been paid/reserved by the Department of Labor & Industries at a total of \$\_\_\_\_\_. Lost earnings and future lost earning capacity total \$\_\_\_\_\_. [See Exhibit 4.] Total provable specials thus total \$\_\_\_\_\_.
- Doe was forced to leave his chosen trade, a trade that required five years of training and which would have allowed him great earning potential and latitude. He is now

vocationally limited to sedentary, inside-type work which lessens the risk of further breakdown of his skin/scars.

Weaknesses:

- Doe has been successfully vocationally trained. He currently earns very close to what he had previously made as a journeyman electrician. A jury may conclude that he has a better job than he had previously, in that he no longer has to work outside, exposed to the elements, nor work overtime/be away from his family to maximize his earnings potential.
- It remains unclear how a jury will evaluate Doe's residual scarring. Compared to the acute phases of his injury, his current appearance is quite favorable.

SETTLEMENT DISCUSSIONS

On \_\_\_\_\_, at defense counsels' request, a written settlement demand in the amount of \$\_\_\_\_\_ was made on both defendants. Neither defendant has made any offers to date. At XYZ's request, a lunch meeting recently occurred between Doe's counsel and Moneyman, the adjuster handling the case for XYZ. They acknowledged that this was a case that they wanted to get settled, recognized considerable exposure and recommended mediation. They expressed concern that they could not get RRR's defense counsel to sufficiently recognize RRR's exposure and contribute meaningful settlement monies to get the entire case settled. In private discussions I have had with RRR's counsel, I believe he realizes the significance of the picture of the switch taken just before it was shipped to XYZ. I do not know the relationship that he has with his liability carrier, or the extent to which he views RRR's exposure.

Last week, I met privately with RRR's counsel to discuss the effects of a finding that Doe was a borrowed servant of XYZ. We were quite sure that RRR's counsel had not thought this issue through, and we wanted him to fully discuss it with RRR's insurer in advance of the mediation. After our meeting, I believe that RRR's counsel now understands that RRR, rather than Doe, bears the risk of a jury finding that Doe was a borrowed servant. RRR's counsel does not believe XYZ has thought of this particular nuance under 4.22.070(1)(b), and shares our concern that XYZ would alter its settlement posture if it becomes aware of RRR's risk. Like plaintiffs, RRR does NOT want this issue discussed with XYZ at the mediation.

It is our goal to get the entire case settled, globally, rather than explore piecemeal settlements with either defendant. It is our current thinking that we will not entertain separate settlement offers from the individual defendants. To do so with XYZ would shift loaned servant risk back to us.

If one or the other defendant is not meaningfully recognizing its exposure, it is our recommendation that you attempt to convince the defendants that they would be better off settling the entire case with the plaintiff, rather than airing out their differences in front of the same jury that will be assessing Doe's damages. Frankly, we don't see how the defendants can get in bed together on this case and, if it doesn't settle, they will necessarily shoot arrows at one another. As you know, this can benefit a plaintiff greatly and tends to drive up a jury award. If the case can't settle globally, it is our recommendation that the defendants be convinced to settle the case with Doe, agree on a temporary allocation of the settlement monies, and then

submit to binding arbitration or a much shorter jury trial by which their respective fault can be allocated.

A DLI rep will appear at the mediation on behalf of the Department of Labor & Industries. I have provided him a copy of this letter with the express understanding that he keep its contents confidential. Based upon my conversations with defense counsel to date, it is my hope that we will receive settlement offers that will be sufficient to reimburse the Department's lien in accordance with the statutory formula. More than likely, we will be discussing with the DLI rep an Agreed Order that will reflect a compromise relating to the excess subject to offset created by any prospective settlement.

I hope this letter has been helpful and adequately prepares you to mediate this case to a successful conclusion. From my prior dealings with Doe, I believe that he has a sincere desire to resolve this case. Doe has been kept advised throughout the course of this litigation concerning the risks and benefits associated with settlement versus trial. I believe they will come to mediation with an open mind and will seriously consider meaningful settlement offers made by the defendants.

Should you have any questions or require any further information prior to the mediation, please give me a call.

Sincerely,

cc: Clients  
Co-counsel  
DLI