Common Ethical Dilemmas and Recent Advisory Opinions – An Overview

Spokane County Bar Association Indian Law CLE
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JEANNE MARIE CLAVERE is a 1987 graduate of the University of Puget Sound School of Law (now Seattle University School of Law). Prior to earning her law degree, she received a Master of Business Administration from DePaul University in Chicago. In February 2010, she joined the staff of the Washington State Bar Association as Professional Responsibility Counsel. After four years with a Seattle law firm, Jeanne Marie began her solo practice in 1992, focusing on estate planning, elder law (including complex guardianships, trusts, and guardian ad litem appointments), and contract based criminal prosecution. As Senior Professional Responsibility Counsel, Jeanne Marie serves as an advisor to members of the bar on the Rules of Professional Conduct as they apply to WSBA Advisory Ethics Opinions, the Rules for Enforcement of Lawyer Conduct, and the ABA Standards for Imposing Lawyer Sanctions. She has been invited to lecture on Professionalism, Civility, and Ethics at all three Washington law schools, for the American Bar Association, for the National Organization of Bar Counsel, and speaks at various local bar CLE's throughout the state. Jeanne Marie staffs 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 an Emeritus Member of the William L. Dwyer Inn of Court. Jeanne Marie also serves as the Past President of the National Conference of Women's Bar Associations and as their delegate to the American Bar Association. She is a past director on the board of the International Action Network for Gender Equity and Law.

COMMON ETHICAL DILEMMAS AND RECENT ADVISORY OPINIONS

SPOKANE COUNTY BAR ASSOCIATION INDIAN BAR CLE

MARCH 15, 2024

Jeanne Marie Clavere
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WSBA Advancement Department

Date

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LAWYERLY DISCLAIMER

This presentation highlights common ethical dilemmas presented to the WSBA ethics line by WSBA members as well as discusses recent WSBA advisory opinions. It does not cover rules presently under consideration or amended by the Washington State Supreme Court.

Your comments on proposed rules of court can be submitted to the clerk of the Washington Supreme Court by either U.S. mail (P.O. Box 40929, Olympia, WA 98504-0929), or email (supreme@courts.wa.gov).

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AN OVERVIEW OF COMMON ETHICAL DILEMMAS FROM THE WSBA ETHICS LINE

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Defining Boundaries and Scope
RPC 1.2; 1.16; 3.3; GR 24

Advertising
Title 7; RPC 1.6; 1.10; 5.3; 5.5

Reaching Out to Prospective Clients
Title 7; RPC 1.6; 5.4

Competence
RPC 1.1; 1.14; 1.15A

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Personal Responsibility
RPC 1.4; 1.16; 5.3; 5.4; 5.5

Fee Agreements
RPC 1.5

Conflicts
RPC 1.6; 1.7; 1.9; 1.10; 1.16; 5.3

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NEW WSBA ETHICS ADVISORYOPINIONS

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ADVISORY OPINION 202101
CONSIDERATIONS REGARDING DISCLOSURE OF CIVIL COMMITMENT PROCEEDINGS WHILE REPRESENTING A CRIMINAL DEFENDANT

Summary: A discussion of circumstances when a criminal defense lawyer may disclose a client's involvement in civil commitment proceedings to a court or prosecutor.

Considerations for a criminal defense lawyer if the client fails to appear in court due to civil commitment in a hospital under RCW 71.05.

- Under **RPC 1.6** a lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, or the consent is impliedly authorized. However, see **RPC 1.6(b)(6)** regarding disclosure to comply with a court order.
- When possible, a lawyer should get informed consent under **RPC 1.0A(e).**
- When possible, a lawyer should determine whether implied authorization was given because of the client's intent to avoid adverse consequences to their liberty.
- Compliance with a court order under **RPC 1.6 (b)(6)** should be only if necessary and only after asserting to the court that the information is protected by privilege or other applicable law.
- If a lawyer does not have informed or implied consent and is not subject to a court order, **RPC 1.14** may apply.
- If a lawyer discloses information to the court, whether pursuant to **RPC 1.6** or **RPC 1.14**, the lawyer must comply with **RPC 3.3**, governing candor toward the tribunal.

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ADVISORY OPINION 202102
LAWYER ACTING AS THIRD-PARTY NEUTRAL UNDER RPC 2.4 IN DOMESTIC RELATIONS MATTERS THAT MAY INVOLVE RISK OF DOMESTIC ABUSE

Summary: Considerations when a lawyer serves as a third-party neutral in a domestic relations matter that may present a risk of domestic abuse to an unrepresented party, or to a child or other member of the household.

A lawyer acting as a third-party neutral must be sensitive to, and adequately address, that an unrepresented party may not fully understand the lawyer's neutral role. This is particularly acute in a domestic relations matter where there may be risk of domestic abuse to an unrepresented party, or to a child or other household member.

- Under **RPC 2.4(b)** a lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them. The potential for confusion is significant. The extent of disclosure required is a fact and circumstance analysis.
- It may be difficult to detect a risk of domestic abuse. The lawyer may develop questions or concerns regarding an unrepresented party's comprehension of the neutral's role as the mediation progresses. Training in the area of domestic abuse can assist the lawyer in interviewing techniques or identifying behavioral cues.

If the ADR process results in an agreement, the third-party neutral may draft a written confirmation of that agreement. The neutral may not draft a pleading with customized provisions on behalf of both parties nor undertake a common representation of the parties pursuant to **RPC 1.12(a).**

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ADVISORY OPINION 202201
LAWYER'S EMAIL "REPLY ALL", INCLUDING ANOTHER LAWYER'S CLIENT

Summary: Considerations as to whether a lawyer may "reply all" when responding to an email in which the initiating lawyer has cc'd their own client.

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

- The purpose of **RPC 4.2** is to protect a client from overreaching by other lawyers who are participating in a matter, from interference by those lawyers with the client-lawyer relationship, and from the uncounseled disclosure of information.
- An opposing lawyer's consent to communication with her client may be implied rather than express. Whether "consent" may be "implied" in a particular situation requires an evaluation of all the facts and circumstances in the representation.
- Many factors should be considered before the second lawyer can reasonably rely on implied consent from the first lawyer. This advisory opinion suggests several factors.

Considering the intent of **RPC 4.2,** together with consideration of suggested factors and other relevant facts and circumstances, the second lawyer must make a good faith determination whether the first lawyer has provided implied consent to a "reply all" responsive electronic communication from the first lawyer. Electronic communications create a huge potential for interference with the client-lawyer relationship and the potential for inadvertent waiver by the client of the attorney-client privilege.

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ADVISORY OPINION 202202
MALPRACTICE INSURANCE DISCLOSURE REQUIREMENTS

Summary: The WSSC adopted a new RPC 1.4(c) which requires disclosure of a lawyer's malpractice insurance status to clients and prospective clients if the lawyer's professional liability insurance does not meet minimum levels. This opinion answers questions and provides additional clarity.

If a lawyer does not meet minimum levels the lawyer must promptly obtain written informed consent from each client, and within 30 days obtain similar consent from each client when the lawyer's malpractice insurance policy lapses or is terminated.

- RPC **1.4(c)** does not apply retroactively to an uninsured lawyer's clients whose representation commenced prior to the effective date of RPC 14(c), i.e., September 1, 2021.
- RPC **1.4(c)**'s reference to "lawyer professional liability insurance" generally means coverage under a malpractice policy offered through the private, competitive insurance marketplace.
- Based on the Oregon State Bar Professional Liability Fund malpractice coverage pursuant to Oregon state statute as a mandatory provider of primary malpractice coverage for Oregon lawyers, coverage by the PLF meets the requirements of the Rule.

Other questions are considered including lawyers only providing non-legal services; lawyers only representing one entity and other corporate or LLC entities controlled by the single entity; and Washington licensed lawyers not representing any clients within Washington State. See the advisory opinion for these analyses and answers.

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ADVISORY OPINION 201601 AND 2022 AMENDMENTS ETHICAL PRACTICES OF THE VIRTUAL OR HYBRID LAW OFFICE

Summary: Many lawyers are choosing to do some or all work remotely, from home or other remote locations. Advances in on-line resources and service as well as the COVID-19 pandemic accelerated this trend.

This Advisory Opinion underscores that the Rules of Professional Conduct apply no differently in the virtual office context. It also highlights some areas that warrant special consideration.

- There is no requirement that WSBA members have a physical office address.
- Under **RPC 7.1** an address for a law firm may be misleading if the public would wrongly assume that the lawyer will be available in a particular location or that there are no jurisdictional limits for lawyers not licensed to practice in a jurisdiction where the office is located.
- Washington licensed lawyers practicing remotely from outside their state of licensure may do so only if this is allowed by the other jurisdiction. See **RPC 5.5.** A remote Washington licensed layer cannot either explicitly or implicitly communicate that the lawyer is authorized to practice law in an outside jurisdiction. Lawyers licensed in another jurisdiction practicing remotely in Washington should consult the RPC from their state of licensure. See **RPC 8.5**
- Special challenges for virtual offices involve the duties of supervision, confidentiality, the duty to avoid misrepresentation and conflicts of interest. See **RPC 5.1; 5.2; 5.3; 5.10; 1.1; 1.6; 1.7; 1.9; and 1.18.**
- Virtual Lawyers must comply with all applicable trust account rules and all applicable state and local business and tax regulations. See **RPC 1.15A and 1.15B; 8.5** et al.

This AO agrees with the ABA Formal Opinion 495 view that a state does not have a substantial interest in prohibiting a lawyer from practicing the law of a jurisdiction in which the lawyer is authorized solely because the lawyer is practicing from a virtual office in another jurisdiction.

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THE FUTURE OF THE LEGAL PROFESSION IS BRIGHT!

- *Consider contributing to ethics resources for WSBA members. NWSidebar blogs, Washington State Bar News, etc.*
- *Consider "Getting the Word Out" through Professional Responsibility CLE presentations. Emphasize civility in ethics education and outreach.*
- *Remember the **Ethics Line: 206-727-8284***

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WSBA Ethics Advisory Opinions

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Advisory Opinion: 202101

Year Issued: 2021

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

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

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

A lawyer representing a criminal defendant faces a dilemma if the client fails to appear in court due to civil commitment in a hospital under RCW Ch. 71.05. If the lawyer fails to disclose the commitment, the court may issue a warrant for the client's arrest or take other action detrimental to the client's interests. However, disclosure of the commitment risks violating RPC 1.6. Advisory Opinions 2089 (2006) and 2190 (2009) address a similar issue—whether or how to disclose to the court a concern about the client's competence to stand trial—but they do not address disclosure of a civil commitment proceeding. This opinion reviews ethical considerations presented by that dilemma, which is particularly acute when the lawyer does not learn of the civil commitment in advance of the hearing.

RPC 1.6(a) provides: "A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b)." Paragraph (b) of the rule describes eight scenarios in which a lawyer may reveal information relating to the representation without the client's informed or implied consent. Of these, subparagraph (b)(6), authorizing disclosure to comply with a court order, is relevant to this discussion.

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

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

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

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

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

In some cases a court may order a lawyer to reveal information relating to the representation of a client. For example, if an issue has arisen concerning the competence of the client to stand trial, the court may order the lawyer to disclose information protected by RPC 1.6 related to that issue. Subparagraph (b)(8) authorizes a lawyer to disclose otherwise confidential information pursuant to court order. However, the introductory language of paragraph (b) cautions that the lawyer's disclosure should be limited in scope to information that the lawyer reasonably believes is necessary to disclose under the circumstances. Comment [16] provides this guidance regarding court-ordered disclosure: "Absent informed consent of the client to do otherwise, the lawyer should assert on behalf of the client all non-frivolous claims that the information sought is protected against disclosure by the attorney-client privilege or other applicable law. In the event of an adverse ruling, the lawyer must consult with the client about the possibility of appeal to the extent required by Rule 1.4. Unless review is sought, however, paragraph (b)(8) permits the lawyer to comply with the court's order." When complying with such an order, the lawyer may consider providing disclosure to the court in camera or in chambers and/or requesting that the record be sealed.

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

A client who is at risk of being arrested and jailed for failing to appear in court might conceivably face substantial physical harm in some circumstances. For example, mental health issues can sometimes cause an encounter with law enforcement to escalate quickly and unexpectedly, and confinement in jail during a pandemic can create increased risk of infection. In addition, a client who accumulates a series of arrest warrants has an increased risk of adverse rulings in court. The comments to RPC 1.14 do not discuss what types of harm might qualify as "other harm," meaning harm not considered physical or financial that could nevertheless merit protective action. Advisory Opinion 2160 observes: "Because [of] the broad language of [RPC 1.14(b)], it would not be unreasonable to assume that 'other harm' did constitute harm to a client's constitutionally protected interest [in

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

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

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

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

Footnotes

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

2. If a client lacks capacity to give informed consent at the outset of an engagement, there may be an issue as to whether the client is competent to stand trial. See Advisory Opinions 2069 and 2160 for guidance regarding disclosure.

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

WASHINGTON STATE BAR ASSOCIATION

Advisory Opinion: 202102

Year Issued: 2021

RPC(s): RPC 2.4 and 1.12

Subject: Lawyer acting as a third-party neutral under RPC 2.4 in domestic relations matters that may involve risk of domestic abuse

SUMMARY: When a lawyer serves as a third-party neutral in a domestic relations matter that may present a risk of domestic abuse to an unrepresented party, or to a child or other member of the household, the lawyer should provide an explanation of the role of the third-party neutral that is adequate to enable the unrepresented party to make an informed decision whether to participate. This communication is particularly important when the lawyer intends to draft a written confirmation if the alternative dispute resolution (ADR) process produces a resolution.

Issue presented:

May a lawyer act as a third-party neutral under RPC 2.4 in a domestic relations matter when a party is unrepresented and the matter potentially involves risk of domestic abuse to a party, child or other household member?

Short answer:

Yes, subject to important considerations.

Rules:

RPC 2.4 and 1.12

Discussion:

A lawyer acting as a third-party neutral under Rule 2.4 must be sensitive to, and adequately address, the possibility that an unrepresented party may not fully understand the lawyer's neutral role. Absent an adequate explanation, an unrepresented party may believe that the lawyer's assistance in resolving the matter includes assistance that is incompatible with the lawyer's role as a third-party neutral. This concern is particularly acute in a domestic relations matter where there may be risk of domestic abuse to an unrepresented party or to a child or other household member.[1].

As a threshold matter, ADR is ordinarily not an appropriate means of resolving matters that involve domestic abuse.[n2] Domestic relations cases are particularly common settings for abusive tactics by which an abuser can reestablish power and control over a former partner long after a relationship has ended.[n3] Nevertheless, subject to the requirements of RCW 26.09.016(2), a party at risk of domestic abuse may make an informed decision to proceed with ADR, if the lawyer provides adequate information about the limitations of the role of a third-party neutral and otherwise believes ADR is appropriate.[n4]

Rule 2.4(b) provides: "A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them. When the lawyer knows or reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client."

Comment [3] to the rule elaborates on the lawyer's duty to unrepresented parties because, "[u]nlike nonlawyers who serve as third-party neutrals, lawyers serving in this role may experience unique problems as a result of differences between the role of a third-party neutral and a lawyer's service as a client representative." It notes that the potential for confusion is "significant" when a party is unrepresented. A statement of non-representation might suffice in some situations, such as when an unrepresented party frequently uses ADR. However, the Comment provides that "more information will be required" in other circumstances, and in these instances "the lawyer should inform unrepresented parties of the important differences between the lawyer's role as third-party neutral and a lawyer's role as a client representative, including the inapplicability of the attorney-client evidentiary privilege." Comment [3] concludes: "The extent of disclosure required under this paragraph will depend on the particular parties involved and the subject matter of the proceeding, as well as the particular features of the dispute-resolution process selected."

In determining the extent of disclosure required before mediating a domestic relations matter, a lawyer should consider that it may be difficult to detect a risk of domestic abuse. Because an unrepresented party who has been a target of abuse might not volunteer that information, a lawyer may find it appropriate to develop questions to use in screening potential matters. In addition, such a party may have unrealistic expectations about the role of a neutral that would not be dispelled by a statement of nonrepresentation. A lawyer may wish to consider offering concrete examples, such as an explanation that the neutrality required of a mediator precludes giving any advice and precludes commenting on the reasonableness or unreasonableness of a party's proposal.[n5]

Although a lawyer typically has limited information about the sophistication of the parties at the outset, the lawyer may develop questions or concerns regarding an unrepresented party's comprehension of the neutral's role as the mediation progresses. Training in the area of domestic abuse can assist the lawyer in interviewing techniques or identifying behavioral cues that could be of value in assessing whether undisclosed abuse may be an issue that would merit supplemental explanations or disclaimers about the neutral's role.

If the ADR process results in an agreement, the third-party neutral may draft a written confirmation of that agreement with as much or as little specificity as appears warranted under the circumstances. However, the neutral may not draft a pleading with customized provisions on behalf of both parties nor undertake a common representation of the parties pursuant to Rule 1.12(a). WSBA Advisory Opinion 201801. When drafting a confirmation of a mediated agreement, the lawyer acting as a third-party neutral should consider the risk that a court may hold that the writing meets the standards for an enforceable agreement despite the lawyer's intention not to represent either party.[n6]

Footnotes

1. "Domestic abuse," as used in this opinion, refers to patterns of behavior that fit the definition of "domestic

violence" in RCW 26.50.010(3) as well as relevant conduct that may be described in other statutes, e.g., RCW Ch. 9A44, 26.44, and 26.51. In addition to harm inflicted directly by a party on a household member, the term includes indirect but very serious harm inflicted on children who witness domestic abuse and the fear of imminent harm to children. In re Marriage of Stewart, 133 Wn. App. 545, 551, 137 P3d 25 (2006) (children witnessing abuse); Rodriguez v. Zavala, 189 Wn.2d 95, 399-8, 398 P3d 1071 (2017) (fear of imminent harm to children).

2. RCW 26.09.016(1) ("Mediation is generally inappropriate in cases involving domestic violence and child abuse").

3. RCW 26.51.010.

4. The availability of independent support, such as that provided by a domestic violence advocate, is a factor that may weigh in favor of mediating a domestic relations dispute that presents a risk of domestic abuse. RCW 26.09.016(2).

5. A lawyer may also consider offering concrete examples pertinent to the issues in dispute in the particular case. For example, if one party's retirement accounts are a significant asset and the other party has limited experience with or understanding of such financial matters, a lawyer may wish to explain that the neutral role precludes offering information or guidance regarding the accounts.

6. The main points of a settlement between parties might be held enforceable even if the parties anticipate a more definitive agreement. See Marriage of Ferree, 71 Wn. App. 35, 856 P.2d 709 (1993) (agreement of parties and counsel reached with assistance of court commissioner was enforceable though it was not reduced to writing or entered in the court record). See also Morris v. Maio, 69 Wn. App. 865 (1993) (letters between counsel established a binding settlement agreement even though the parties contemplated a more formal written agreement).

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WASHINGTON STATE BAR ASSOCIATION

Advisory Opinion: 202201

Year Issued: 2022

RPC(s): 4.2

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

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

Advisory Opinion 202201

Year Issued: 2022

RPC: RPC 4.2

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

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

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

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

Rule:

RPC 4.2

Discussion:

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

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

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

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

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

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

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

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

- An important factor is the nature of the matter. It is common in some transactional fields of law for both lawyers and clients routinely to cc other lawyers and clients in certain communications related to a transaction, for example circulating revised documents among a transaction team comprised of multiple parties and their lawyers. Absent other circumstances, Lawyer B can rely on that past course of conduct among the lawyers and others involved in a transaction. Nevertheless, the best practice is to raise the issue early in the transaction and gain common consent among the lawyers and their clients—preferably confirmed in writing.
- Lawyers in adversarial matters should always avoid communicating with other lawyers' clients without express permission. Because of the contentious nature of adversarial proceedings, there is a greater risk that such communications could interfere with other lawyers' relationships with their clients and serve to harm those clients' interests. This is of special importance in criminal cases, and prosecutors should always seek express consent from defense counsel before knowingly ex-ing the defendant.

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

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

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

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WASHINGTON STATE BAR ASSOCIATION

Advisory Opinion: 202202

Year Issued: 2022

RPC(s): 1.4(c), 5.5(d)(1), 5.7, 8.5(b)

Subject: Malpractice Insurance Disclosure Requirments

Advisory Opinion: 202202
Year Issued: 2022
RPCs: 1.4(c), 5.5(d)(1), 5.7, 8.5(b)
Subject: Malpractice Insurance Disclosure Requirements

FACTS:

The Washington State Supreme Court recently adopted a new Rule 1.4(c) of the Rules of Professional Conduct. RPC 1.4 focuses on communication from a lawyer to a client so the client can make informed decisions regarding the representation. RPC 1.4(c) requires disclosure of a lawyer's malpractice insurance status to clients and prospective clients if the lawyer's professional liability insurance ("malpractice insurance") does not meet minimum levels. A lawyer must promptly obtain written informed consent from each client, and within 30 days obtain similar consent from each client when the lawyer's malpractice insurance policy lapses or is terminated. The minimum levels are $100,000 per occurrence and $300,000 in the aggregate. Affected lawyers include lawyers with an active status in the Washington State Bar Association ("WSBA"), emeritus pro bono status lawyers, and visiting lawyers permitted to engage in limited practice under APR 3(g). The disclosure requirements do not apply to judges, arbitrators, and mediators not otherwise engaged in the practice of law; in-house counsel for a single entity; government lawyers practicing in that capacity; and employee lawyers of nonprofit legal services organizations, or volunteer lawyers, when those lawyers are provided malpractice insurance coverage at the minimum levels. RPC 1.4(c) became effective September 1, 2021.

The WSBA has received several questions regarding the meaning and applicability of RPC 1.4(c). These questions are addressed below.

QUESTIONS:

1. Does RPC 1.4(c) apply retroactively to existing clients of uninsured lawyers, or to new clients only? If an insured lawyer's insurance policy lapses or is terminated, must the lawyer disclose that fact and obtain waivers from all existing clients, including those who had engaged the lawyer prior to the effective date of the new rule?

RPC 1.4(c) does not apply retroactively to an uninsured lawyer's clients whose representation commenced prior to the effective date of RPC 1.4(c), i.e., September 1, 2021. Indeed, RPC 1.4(c)(1) on its face requires an attorney to notify a client in writing of the absence of such insurance coverage only "before or at the time of commencing representation of a client," and thus the rule does not require notice of the absence of such insurance with respect to representation that commenced prior to September 1, 2021.

With respect to the lawyer who is insured as of September 1, 2021, whose insurance policy lapses or is terminated during the representation, the duties set forth in the second and third sentences of RPC 1.4(c)(1) will apply. There is no language in those sentences which exempts an insured lawyer from the termination-of-policy notice requirements, even if the representation had commenced prior to September 1, 2021.

2. If a lawyer or law firm is "self-insured" at or exceeding the minimum coverage levels through the accumulation of reserved amounts or retentions, or covered by a "captive insurer," is that sufficient coverage by lawyer professional liability insurance as defined in RPC 1.4(c)?

A lawyer or firm that decides to be wholly "self-insured" with personal or corporate assets and otherwise is without a malpractice policy issued by an insurance company, is "not covered by lawyer professional liability insurance" under RPC 1.4(c). Such an attorney or law firm essentially is "going bare," and therefore must comply with the notice and consent provisions of RPC 1.4(c).

RPC 1.4(c)'s reference to "lawyer professional liability insurance" generally means coverage under a malpractice policy offered through the private, competitive insurance marketplace. However, there is nothing in RPC 1.4(c) that precludes insurance coverage from a "captive insurer," "risk retention group," "insurance purchasing group," or some other insurance entity that is in good standing, chartered or licensed as an insurer in its domicile jurisdiction, has assets that exceed its liabilities, has the ability to pay claims, and complies with all applicable statutory and regulatory requirements. A lawyer or law firm insured by such an insurance entity generally does not violate RPC 1.4(c).

A liability insurance policy with a self-insured retention, reserve, or deductible, does not by itself violate RPC 1.4(c). However, as noted in Comment [9] of the rule, if the lawyer knows or has reason to know the deductible or self-insured retention cannot be paid by the lawyer or the law firm if a loss occurs, the attorney or firm's insurance coverage is insufficient to meet the minimum dollar amounts set forth in RPC 1.4(c).

3. Is coverage by a professional liability fund such as the Oregon State Bar Professional Liability Fund (PLF) "lawyer professional liability insurance" within the meaning of RPC 1.4(c)?

The PLF website describes the PLF as follows:

For over forty years, the Oregon State Bar Professional Liability Fund (PLF) has provided malpractice coverage to lawyers in private practice in the state of Oregon. The PLF is a unique organization within the United States. The Oregon State Bar Board of Governors created the PLF in 1977 pursuant to state statute (ORS 9.080) and with approval of the OSB membership. The PLF began operation on July 1, 1978, and has been the mandatory provider of primary malpractice coverage for Oregon lawyers since that date. Though a handful of other states in the U.S. require malpractice coverage for lawyers, Oregon is the only state that provides that coverage through a mandatory bar-related program.

www.osbplf.org/about/who-we-are.html 11/21/2021. Based on this description and the answer to Question 2 above, coverage by the PLF at or exceeding the minimum levels required by RPC 1.4(c) meets the requirements of the Rule.

4. Are lawyers who only provide non-legal services, or "law-related services" as defined RPC 5.7, subject to RPC 1.4(c)'s disclosure and waiver requirements?

A Washington licensed lawyer whose work is entirely unrelated to legal services would not be subject to the disclosure provisions of RPC 1.4(c). RPC 1.4(c)(4) implicitly establishes that the disclosure requirements apply to active members of the Washington State Bar Association who are engaged in the practice of law. A lawyer who provides no legal services and provides no legal advice, but instead only works, for example, as a commercial banker, an orchardist or a bartender, is not required to comply with the RPC 1.4(c) disclosure requirements.

RPC 5.7(b) denotes "law-related services" as services that "might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a nonlawyer." Typical law-related services include title insurance and real estate work, legislative lobbying, accounting, financial planning, and certain human resources work. RPC 5.7 Comment [9]. RPC 5.7(a) states that when a lawyer is providing "law-related services," the lawyer will be subject

to the RPCs unless those services are provided in circumstances that are clearly distinct from the lawyer's provision of legal services, or unless the lawyer makes it clear to recipients of the services that those are not legal services and that the protections of the client-lawyer relationship do not exist.
A lawyer who provides only law-related services, including but not limited to the examples in RPC 5.7 cmt. [9], is subject to the RPCs, including the disclosure requirements of RPC 1.4(c), unless that lawyer complies with the provisions of either RPC 5.7(a)(1) or RPC 5.7(a)(2), i.e., by providing the services in a manner clearly distinct from legal services, or by taking reasonable measures to assure that a person obtaining the law-related services knows that the services are not legal services and that the protections of the client-lawyer relationship do not exist.

5. Is a lawyer in private practice subject to RPC 1.4(c)'s disclosure and waiver requirements if the lawyer represents only one entity, or a group of corporate or LLC entities that are controlled by that single entity?
A lawyer in private practice must comply with RPC 1.4(c) whether the lawyer represents a single client or many clients.

6. If a lawyer employed by an entity as in-house counsel advises that entity and also advises other corporate or LLC entities that are controlled by the single entity, will that lawyer be subject to RPC 1.4(c)'s disclosure and waiver requirements?
RPC 1.4(c)(4)(ii) provides that the disclosure requirement of RPC 1.4(c)(1) does not apply to "in-house counsel for a single entity." It is not customary for an employee to purchase insurance to cover potential claims by the person's employer. If a lawyer's employer expects the lawyer also to represent its affiliates, such work would be considered within the scope of the lawyer's employment. In that situation, the lawyer must comply with applicable rules governing conflicts of interest, but the lawyer is not required by Rule 1.4(c) to notify the employer's affiliates of the absence of insurance meeting the requirements of this Rule. Cf. RPC 5.5(d)(1) and Comment [16] to RPC 5.5, permitting an in-house lawyer not admitted in Washington to represent the affiliates of the employer, as well as the employer, in circumstances meeting the requirements of that rule.

7. If a Washington licensed lawyer does not represent any clients within Washington State, will that lawyer be subject to RPC 1.4(c)'s disclosure and waiver requirements?
Yes. RPC 1.4(c) defines "lawyer" as an active member of the Washington State Bar Association, without regard to the lawyer's office location and without regard as to whether the lawyer's clients are in Washington, in another state, or in another country. With regard to exercise of the disciplinary authority, Comment [10] to RPC 1.4(c) observes that whether the disclosure and notice obligations of that Rule apply to a Washington-licensed lawyer practicing in another jurisdiction is determined by the choice of law provisions of Rule 8.5(b).

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WASHINGTON STATE BAR ASSOCIATION

Advisory Opinion: 201601

Year Issued: 2022

RPC(s): 1.1,1.6,1.7,1.9,1.10, 1.15A, 1.15B, 1.18, 5.1, 5.2, 5.3, 5.5, 5.10, 7.1, 8.4, 8.5

Subject: Ethical Practices of the Virtual or Hybrid Law Office

Advisory Opinion: 201601

Year Issued: 2016 and 2022 Amendments

RPC(s): RPC 1.1, 1.6, 1.7, 1.9, 1.10, 1.15A, 1.15B, 1.18, 5.1, 5.2, 5.3, 5.5, 5.10, 7.1, 8.4, 8.5

Subject: Ethical Practices of the Virtual or Hybrid Law Office [n.1]

Many lawyers are choosing to do some or all their work remotely, from home or other remote locations. Advances in the reliability and accessibility of on-line resources, cloud computing, video conferencing, and email services have allowed the development of the virtual law office, by which the lawyer does not maintain a physical office. The COVID-19 pandemic accelerated this trend, causing many lawyers to work remotely (virtually), or to split their time between a traditional office and a remote office (a hybrid office).[n.2]

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 considerations in the virtual law office.

Below we first address whether a Washington licensed lawyer needs a physical address. We then discuss ethical considerations for lawyers who practice remotely from outside of their state of licensure. 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(C)(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 Bylaws do not require that a principal office address be a physical address. However, Section III(C)(3) requires an active member residing out of Washington to file with the WSBA the name and physical street address of a designated resident agent within Washington State.

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 suggest that the lawyer seek an agreement to have pleadings served by email instead, as permitted under GR 30(b)(4). This opinion does not address opposing counsel's options in the event service by hand delivery is desired, but the Washington lawyer does not agree to a physical address or alternate means of delivery.

B. Address in Advertisements

Under RPC 7.1, "A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services." Therefore, a lawyer working virtually may use a post office box, private mailbox, or a business service center as an office address in advertisements, so long as that information is accurate and not misleading. See RPC 7.1 cmt. [6]. 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. 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 III-C below.

A law firm with offices in multiple jurisdictions may establish and maintain an office in Washington even if some of the firm's lawyers are not admitted in Washington. To avoid misleading the public, however, when identifying lawyers as practicing in a multi-jurisdictional office, the firm should indicate the jurisdictional limitations of lawyers not licensed to practice in a jurisdiction where the office is located. RPC 7.1 & cmt. [14]; RPC 5.5(f) & cmt. [22].

II. Remote Practice from Outside of State of Licensure

A. Washington-Licensed Lawyers Practicing Remotely

Lawyers increasingly are practicing law remotely not only from a physical office, but also from outside their state of licensure. For example, a lawyer who is licensed only in Washington may practice from a home office in Oregon, Idaho, or another jurisdiction. The COVID-19 pandemic amplified the need for and interest of lawyers to work from a home that may not be located in their state of licensure. Many lawyers may continue to pursue this practice model after the pandemic subsides.

This opinion is generally limited to Washington's interest in regulating Washington lawyers who practice remotely

in another jurisdiction. A Washington lawyer's practice that creates a professional footprint in more than one jurisdiction potentially may subject the lawyer to discipline in each jurisdiction. See RPC 8.5. Washington lawyers who practice remotely in another jurisdiction therefore should confirm that their presence in the other jurisdiction does not violate that jurisdiction's definition of the unauthorized practice of law. A Washington lawyer practicing remotely in another jurisdiction also should investigate and comply with local business and tax regulations and any other applicable laws, an issue that exceeds the scope of this opinion.

A lawyer licensed in Washington may practice remotely from a jurisdiction outside of Washington without committing an unauthorized practice of law violation, only if allowed by the other jurisdiction. RPC 5.5, which regulates the unauthorized practice of law, is largely adopted from American Bar Association ("A.B.A.") Model Rule of Professional Conduct 5.5, which most other states also have adopted. A lawyer's remote practice from a jurisdiction in which the lawyer is not licensed implicates Washington RPC and A.B.A. Model Rule 5.5(b), which both provide that a lawyer who is not admitted in a jurisdiction shall not "establish an office or other systematic and continuous presence in [the] jurisdiction for the practice of law," or "hold [the lawyer] out to the public or otherwise represent that the lawyer is admitted to practice in [the] jurisdiction."

In late 2020, the A.B.A. issued Formal Ethics Opinion 495 to address whether remote practice from a jurisdiction where a lawyer is not licensed violates Model Rule 5.5.[n.3] A.B.A. Opinion 495 takes the position that "a lawyer may practice law authorized by the lawyer's licensing jurisdiction for clients of that jurisdiction, while physically located in a jurisdiction where the lawyer is not licensed if the lawyer does not hold out the lawyer's presence or availability to perform legal services in the local jurisdiction or actually provide legal services for matters subject to the local jurisdiction, unless otherwise authorized."[n.4] A.B.A. Opinion 495 further clarifies activities that do not constitute unauthorized practice in a remote jurisdiction:

A local office is not "established" within the meaning of [RPC 5.5(b)] by the lawyer working in the local jurisdiction if the lawyer does not hold out to the public an address in the local jurisdiction as an office and a local jurisdiction address does not appear on letterhead, business cards, website, or other indicia of a lawyer's presence ... If the lawyer's website, letterhead, advertising, and the like clearly indicate the lawyer's jurisdictional limitations, do not provide an address in the local jurisdiction, and do not offer services in the local jurisdiction, the lawyer has not "held out" as prohibited by the rule.

A number of jurisdictions have issued ethics opinions that track or expressly adopt A.B.A. Opinion 495.[n.5] This Washington opinion agrees with this emerging but consensus view that a state does not have a substantial interest in prohibiting a lawyer from practicing the law of a jurisdiction in which the lawyer is authorized solely because the lawyer is practicing from a home office in another jurisdiction. A Washington-licensed lawyer therefore generally does not violate RPC 5.5 by practicing from a home that is remote from Washington if the lawyer adheres to the guidelines that are enumerated in A.B.A. Opinion 495.

A remote Washington-licensed lawyer, however, may not establish or advertise a physical presence outside of the home to practice law in the remote jurisdiction unless that physical presence is otherwise authorized by the remote jurisdiction. Nor may the remote Washington-licensed lawyer explicitly or implicitly communicate that the lawyer is authorized to practice law in that jurisdiction, such as by assisting a local client with a legal matter that is limited to the remote jurisdiction.]n.6]

A lawyer practicing remotely whose multi-jurisdiction law firm has an office in the remote jurisdiction should ensure that communications such as the firm website, advertising, and letterhead do not imply that the remote lawyer is authorized to practice law in that jurisdiction. The key principle for permissible remote practice is that "the lawyer is for all intents and purposes invisible as a lawyer to a local jurisdiction where the lawyer is physically located, but not licensed."[n.7] When a remote Washington-licensed lawyer complies with these

limitations, the lawyer's use of a virtual communication platform such as Zoom to hold meetings from home or to appear in a judicial proceeding in a jurisdiction in which the lawyer is authorized to practice presumptively does not establish a law practice in the remote jurisdiction.

A Washington lawyer further may be otherwise authorized to practice law in a remote jurisdiction by RPC 5.5(c) or 5.5(d). For example, a Washington lawyer may practice temporarily in a jurisdiction where the lawyer is practicing remotely to participate in an alternative dispute resolution proceeding that reasonably relates to the lawyer's practice in Washington. See RPC 5.5(c)(3). In addition, a Washington lawyer may establish an office or engage in systematic and continuous practice in a jurisdiction when that practice is authorized by federal law. See RPC 5.5(d)(2). But when practicing without a local license under any of these provisions, the lawyer must limit this practice to the scope that RPC 5.5 authorizes for these specified purposes.

B. Lawyers from Other Jurisdictions Practicing Remotely from Washington

Similarly, a lawyer who is licensed in another jurisdiction may practice law remotely from a location in Washington without engaging in the unauthorized or unlicensed practice of law, but only if the lawyer fully adheres to the same guidelines and restrictions on remote practice. Lawyers licensed in other jurisdictions who are considering practicing from a location in Washington should consult the rules of professional conduct from their state of licensure to determine whether such practice is allowed. See RPC 8.5. A lawyer from another jurisdiction who practices remotely from Washington further must comply with all applicable state and local business and tax regulations and any other applicable Washington laws, an issue that exceeds the scope of this opinion.

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

Lawyers practicing in a virtual law office are no less bound by their ethical duties 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, 5.2, 5.3 and 5.10, 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 his or her employ. A virtual law office often will employ services from vendors outside of the firm, such as computer cloud services, social media and other digital communication services, and document review services. A lawyer also must make reasonable efforts to ensure that these services are provided in a manner that is compatible with the lawyer's professional obligations. RPC 5.3 cmt. [3]. To ensure competent supervision of non-lawyer assistants, a lawyer should become and remain familiar with the necessary features of employed technologies, such as vendor privacy policies and security practices. RPC 1.1 cmt. [8].

Supervising lawyers must be mindful of lawyer employees' and nonlawyer assistants' use of electronic devices. Whether the devices are provided by the supervising lawyer or belong to a lawyer employee or nonlawyer staff, lawyers must take steps to ensure that the devices are securely managed, and that client information is kept confidential.

B. Confidentiality

RPC 1.6(c) requires a lawyer to make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating the representation of a client. 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 additional safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients. A client may require the lawyer to implement special security measures or may give informed consent to forego security measures. RPC 1.6 cmt. [18]. Similarly, an attorney must take reasonable precautions when transmitting information relating to the client's representation. RPC 1.6 cmt. [19]. Lawyers also are responsible for assessing whether additional security precautions are required to comply with other law, such as state and federal laws that govern data privacy. RPC 1.6 cmt. [19].

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, 1.6, and 1.15A. 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., that the vendor will maintain secure back-up storage.

- 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). As discussed above, 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, the lawyer 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. RPC 7.1 cmt. [13].

D. Duty to Avoid Conflicts of Interest

A robust conflict checking system is critical to any law office, physical or virtual, to avoid conflicts of interest under RPC 1.6, 1.7, 1.9, and 1.18. A robust conflict checking system will include information on current and former clients, prospective clients, related parties, and adverse parties. The conflict 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. In the physical office setting, physical proximity can in some circumstances provide more reliable access to the conflict checking system. Lawyers in a virtual law practice, who most likely do not have the advantage of physical proximity, must ensure that the conflict checking system is equally accessible to all members of the practice, lawyers, and staff, and that such access is reliably maintained.

Lawyers also should take care in the electronic transmission of client information to detect conflicts of interest when the 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. Any such disclosure should ordinarily include no more than the identity of the persons and entities involved, a brief summary of the general issues involved, and information about whether the matter has terminated, such disclosures made only after substantive discussions regarding the new relationship. RPC 1.6(b)(7) & cmt. [13].

IV Other Considerations Regarding the Virtual Law Office

Lawyers practicing virtually must comply with all applicable trust account rules. For example, Washington lawyers under RPC 1.15A cmt. [19] are required to keep trust accounts only with those financial institutions authorized by the Legal Foundation of Washington. A lawyer who holds property while acting solely in a fiduciary capacity, may be subject to the requirements of statute or other law outside of the State of Washington. See RPC 1.15A cmt. [3].

Another practical consideration is the Washington lawyer practicing virtually from outside of Washington, must maintain trust account records under RPC 1.15B, and be able to make records available for review or audit by the client or Office of Disciplinary Counsel. See, e.g., ELC 15.1 (random examination of books and records).

Lawyers practicing virtually still need to make and maintain a plan to process paper mail; docket correspondence and communications; and direct or redirect clients, prospective clients or other individuals who might attempt to

contact the lawyer at the lawyer's current or previous brick-and-mortar office, on how to contact the attorney. If a lawyer will not be available at a physical office address, there should be signage and/or online instructions that the lawyer is available by appointment only and/or that the posted physical office address is for mail deliveries only.

Finally, although e-filing systems have become more prevalent, attorneys who practice from a virtual office must still be able to file and receive pleadings and other court documents that are not in electronic form.

Endnotes:

N.1 This opinion has been updated from its previous version to reflect 2021 amendments to Title 7 of the Washington Rules of Professional Conduct, emerging considerations in virtual practice, and insight on remote legal practice from A.B.A. Formal Ethics Opinion 498 (March 10, 2021), available at https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba-formal-opinion-498.pdf (last visited November 18, 2021).
N.2 See Mark J. Fucile, New Normal: Risk Management for 'Hybrid' Offices, Washington State Bar News, Dec. 021/Jan. 2022 at 16, https://wabarnews.org/2021/12/07/new-normal-risk-management-for-hybrid-offices/
N.3 See A.B.A. Formal Ethics Opinion 495 (December 16, 2020) ("A.B.A. Opinion 495"), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba-formal-opinion-495.pdf (last visited March 10, 2021).
N.4 See A.B.A. Opinion 495, at 3-4.
N.5 See Pennsylvania Bar Association Committee on Legal Ethics and Professional Responsibility and Philadelphia Bar Association Professional Guidance Committee Joint Formal Opinion 2021-100, Ethical Considerations for Lawyers Practicing Law from Physical Locations Where They Are Not Licensed (March 2, 2021); The Florida Bar Standing Committee on the Unlicensed Practice of Law Advisory Opinion 2019-4, Out-of-State Attorney Working Remotely from Home (August 17, 2020); District of Columbia Court of Appeals, Committee on Unauthorized Practice of Law, Teleworking from Home and the COVID-19 Pandemic (March 23, 2020); see also Carole J. Buckner, Spotlight on Ethics: Rules of Remote Work, California Lawyer's Association, available at https://calawyers.org/california-lawyers-association/spotlight-on-ethics-rules-of-remote-work/ (last visited November 15, 2021).
N.6 Cf. e.g., In re Charges of Unprofessional Conduct in Panel File No. 39302, 884 N.W.2d 661 (Minn. 2016) (admonishing Colorado lawyer under Minnesota RPC 5.5(a) for the unauthorized practice of law even though the lawyer was never physically present in Minnesota, because the lawyer negotiated by email with a Minnesota lawyer about a Minnesota judgment on behalf of Minnesota clients).
N.7 A.B.A. Opinion 495, at 3.

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