

COMMON ETHICAL DILEMMAS AND RECENT ADVISORY OPINIONS

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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).

AN OVERVIEW OF COMMON ETHICAL DILEMMAS FROM THE WSBA ETHICS LINE



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

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

NEW WSBA ETHICS ADVISORY OPINIONS



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.

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)**.

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.

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.

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 lawyer 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.

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***

