Common Ethical Dilemmas and Recent Advisory Opinions and RPC Amendments

WSBA LLLT Board Meeting
May 9, 2022

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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 is the primary responder on the WSBA Ethics Line and wants every attendee to commit the number to memory and call her first, not after they run into an ethical dilemma.

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

COMMON ETHICAL DILEMMAS AND RECENT ADVISORY OPINIONS AND RPC AMENDMENTS

WSBA LLLT BOARD MEETING
MAY 9, 2022

Jeanne Marie Clavere
Senior Professional Responsibility Counsel
WSBA Advancement Department
Date

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 and recent amendments to the Rules of Professional Conduct. It does not cover all 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

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; 1.17; 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 – 2020, 2021, 2022

ADVISORY OPINION 202001
MULTIPLE CLIENT REPRESENTATION IN WRONGFUL DEATH CASES

Summary: Multiple client representations in wrongful death cases – representing the personal representative and the statutory beneficiaries concurrently.

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

- Under **RPC 1.7**, the lawyer may concurrently represent the wife in her individual and representative capacities if the attorney obtains a written waiver under **RPC 1.7(b)**

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

- These facts do not present a concurrent conflict of interest under **RPC 1.7(a)**; there is not a significant risk of material limitation in the lawyer's responsibilities to both the children and the wife/personal representative.
- Under **RPC 1.2(c)** a lawyer may limit the representation of a client if the limitation is reasonable under the circumstances and if the client gives informed consent.
- The only party asserting claims under the wrongful death and survival statutes is the personal representative. Thus, any settlement under these facts is not an aggregate settlement for purposes of **RPC 1.8(g)**

ADVISORY OPINION 202002
GHOSTWRITING FOR PRO SE PARTIES IN STATE COURT LITIGATION

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

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

- In 2002 the Washington Supreme Court made changes to the RPC, the Civil Rules and the Civil Rules for Courts of Limited Jurisdiction to permit limited scope representation in civil law practice. **RPC 1.2(c)** permits a lawyer to limit the scope of the representation if it is reasonable and the client gives informed consent.
- CR 11(b) and CRLJ 11(b) both provide that an attorney can help to draft a pleading, motion or document filed by an otherwise self-represented person within certain parameters.

A lawyer who ghostwrites for a pro se civil litigant must comply with the applicable Rule 11 and all RPCs, including the duty of Candor Toward the Tribunal (**RPC 3.3**).

The Advisory Opinion does not apply to criminal law practice or to a lawyer providing drafting assistance to a pro se client in federal civil practice.

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)**.

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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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RECENT RULE AMENDMENTS

- RPC 1.16 and 1.13
- RPC 6.5
- RPC 1.4
- RPC 1.15A
- Title 7
- RPC 5.5

Effective 2021

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RPC 1.16 AND RPC 1.13

Purpose

Alert lawyers to consult the holding of Washington Supreme Court case, Karstetter v. King County Corrections Guild (2019).

Lawyers employed as in-house counsel and lawyers with comparable employment relationships may retain the ability to bring contract and wrongful discharge actions if those actions can be brought without damaging the integrity of the client-lawyer relationship.

- **RPC 1.16, Comment 4** – In-house counsel employment in the context of the client's right to discharge a lawyer at any time.
- **RPC 1.13, Comment 16** – The responsibilities of lawyers for entities in the context of their unique employment expectations.

RPC 6.5

RPC 6.5

- Allows non-profit and court-annexed limited legal service programs to offer short term legal service to clients.
- There is no expectation of continuing representation or that the lawyer/LLLT will receive a fee.
- Conflicts checks are subject to RPC 1.7; 1.9(a); 1.10; and 1.18(c) only if the lawyer or LLLT *knows* that the representation of the client will involve a conflict of interest.
- If a conflict is found, the limited legal service program must use effective screening, give each client notice of the screening mechanism, and have convincing evidence that no material information was transmitted to the opposing counsel.

RPC 6.5 (CONT.)

The new language provides clarity for the notice requirement.

- The new language allows limited legal service programs to notify all actual and potential clients at the time the individual applies for legal assistance.
- The explanation will discuss the potential for conflicts and information about the screening mechanisms.
- Note that this information is in compliance with RPC 1.4 as an explanation and notice, RPC 6.5 does not require informed consent.

RPC 6.5, Comment 8 also discusses examples of where this prospective notice is appropriate.

RPC 1.4

Washington lawyers are not required to have professional liability insurance coverage.

A BOG ad hoc committee explored approaches to public protection other than mandating malpractice insurance

- **RPC 1.4(c) and new Comments 8 to 13** require a lawyer before or at the time of commencing representation to provide notice to the client in writing that the lawyer does not have professional liability insurance at specified minimum levels.
- The lawyer has to get written consent from that client.
- If a lawyer allows a malpractice insurance policy to lapse or terminate they must either obtain a new policy or obtain written consent from all existing clients.

RPC 1.4 (CONT.)

- RPC 1.4 requires disclosure if the lawyer does not have a specified level of lawyer professional liability insurance.
- The lawyer has to promptly obtain every client's acknowledgement and informed consent to uninsured or underinsured representation.
- The lawyer has to maintain the record of disclosures and consents for at least six years.
- Exclusions: judges, arbitrators and mediators, in-house lawyers for a single entity, and employees of governmental agencies; nonprofit legal services organization lawyers or volunteers where the nonprofit entity provides malpractice at the minimum levels.

Reasoning: Clients should have sufficient information about whether the lawyer maintains a minimum level of lawyer professional liability insurance so the client can determine whether they wish to engage, or continue to engage, that lawyer.

RPC 1.15A

Purpose is to address the limitation in RPC 1.15A(h)(9) of who can be a signatory on a lawyer trust account.

- Lawyers and LLLTs can practice together. The previous rule permitted the LLLT to be a signatory, however the RPC stated that if a lawyer was associated in a practice with one or more LLLTs, any instrument requiring a signature must be signed by a signatory lawyer in the firm.
- Historically, RPC 1.15A only allowed lawyers to be signatories to protect against theft by nonlawyers employed at law firms. However, LLLTs are different than nonlawyers.
- LLLTs are licensed legal professionals with their own RPC and are subject to discipline for IOLTA violations, among others.

RPC 1.15A (CONT.)

- This requirement for a second signature by a lawyer on any instrument signed by a LLLT restricted a LLLT to disburse funds from a trust account.
- In small firms, the LLLTs clients might be unnecessarily delayed in receiving checks if the firm's signatory lawyer is unavailable to authorize the check.
- Note that LLLTs not associated with a lawyer are authorized to sign trust account checks alone.

Solution?

Strike the sentence from RPC 1.15A(h)(9) "If a lawyer is associated in a practice with one or more LLLTs, any check or other instrument requiring a signature must be signed by a signatory lawyer in the firm."

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RPC 7.1

RPC 7.1 – Governs communications about a lawyer's services

- The benchmark of all communication about the lawyer or their services.
- Information cannot be false or misleading.
- This includes a material misrepresentation of fact or law, or the omission of a fact which taken as a whole, creates misleading communication.

Key Changes to RPC 7.1

1. The amendments move rules and comments involving fields of specialization and firm names from RPC 7.4 and 7.5 to RPC 7.1 comments.
2. Generally, comments from RPC 7.2 are moved to RPC 7.1 comments.
3. RPC 7.1, comment 8 now allows lawyers to generally state that the lawyer is a "specialist," practices a "specialty" or "specializes."
4. This is a broader and simpler application of RPC 7.1

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RPC 7.3

RPC 7.3 – Governs direct solicitation.

Key Changes to RPC 7.3

1. Direct contacts are now allowed as long they adhere to the RPC 7.1 standard and are not false or misleading.
2. Direct contacts are not allowed if the lawyer knows that the physical, emotional or mental state of the solicited person would not allow them to exercise reasonable judgement in employing the lawyer.
3. Direct contacts are also not allowed if the solicitation involves coercion, duress, or harassment, or the person has made it known to the lawyer that they do not want to be solicited.

Note RPC 7.3(b) does not allow compensation of any kind for the purpose of recommending or securing the services of the lawyer or law firm. The same limited exceptions hold.

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RPC – TITLE 7 RESERVED SECTIONS

What is Deleted?

Many comments from "reserved" rules have been moved to RPC 7.1 to provide guidance and direction to lawyers in how to avoid "false and misleading communication."

- RPC 7.2 (Reserved.)
- RPC 7.4 (Reserved.)
- RPC 7.5 (Reserved.)

What is Unchanged?

RPC 7.6 Political Contributions to Obtain Government Legal Engagements or Appointments By Judges

RPC 5.5

RPC 5.5 (f) and Comment 22.

- The technical amendments make it clear that law firms can continue to practice across state lines.
- Upholds previous RPC 7.5(b) (Firm Names and Letterheads) which explicitly stated that a law firm with offices in more than one jurisdiction may use the same name, etc. See also RPC 7.1, Comment 14.

THE FUTURE OF THE LEGAL PROFESSION IS BRIGHT!

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


THANK
YOU
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WSBA Ethics Advisory Opinions

WASHINGTON STATE BAR ASSOCIATION

Advisory Opinion: 202001

Year Issued: 2020

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

Subject: Multiple Client Representation in Wrongful Death Cases

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

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

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

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

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

Conclusion:

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

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

Other considerations:

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

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

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

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

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

Analysis:

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

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

limited by the lawyer's responsibilities to another client.

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

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

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

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

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

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

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

Footnotes

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

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WASHINGTON STATE BAR ASSOCIATION

Advisory Opinion: 202002

Year Issued: 2020

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

Subject: Ghostwriting for pro se Parties in State Court Litigation

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

Analysis:

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

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

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

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

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

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

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

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

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

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

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WASHINGTON STATE BAR ASSOCIATION

Advisory Opinion: 202101

Year Issued: 2021

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Footnotes

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

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

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WASHINGTON STATE BAR ASSOCIATION

Advisory Opinion: 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.*n1.

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 those 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 201901. 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, 188 Wn.2d 586, 596-8, 398 P.3d 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 706 (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. Maks, 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 uncounseled disclosure of information relating to a representation. RPC 4.2 Comment [1]. Consent to communicate about a matter with a represented person can be expressly granted by a client's lawyer. It also can be implied by the prior course of conduct among the lawyers in a matter, it can be inferred from a client's lawyer's participation in relevant communications, and it can be inferred from other facts and circumstances.

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

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

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

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

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

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

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

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

Considering the intent of RPC 4.2, together with the above factors and other relevant facts and circumstances, Lawyer B must make a good faith determination whether Lawyer A has provided implied consent to a "reply all" responsive electronic communication from Lawyer A.

Under no circumstances may Lawyer B respond solely to Lawyer A's client without Lawyer A's prior consent.

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

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

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Snapshot of WSBA Disciplinary System 2020

2020 SNAPSHOT

WSBA Discipline System Annual Report

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 the 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 informal overview of the 2020 Discipline System Annual Report, which is now available on the WSBA website at www.wsba.org.

MORE ONLINE

To view the full 2020 Discipline System Annual Report, go to **bit.ly/2020-Discipline-Report.**

BY THE NUMBERS PART I

32,949	21	3	47	1
Actively Licensed Lawyers	**Public Formal Complaints Filed**	**Disciplinary Hearings**	**Disciplinary Actions Imposed**	**Supreme Court Opinion**

STRUCTURE

How the Lawyer Discipline and Disability System Works

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. Under the Supreme Court's mandate in General Rule 12.2, the WSBA is committed to administering 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 OGC.

WSBA Office of Disciplinary Counsel (ODC)

- Answers public inquiries and informally resolves disputes
- Receives, reviews, and may investigate grievances
- Recommends disciplinary action or dismissal
- Diverts grievances involving less serious misconduct
- Recommends disability proceedings
- Presents cases to discipline-system adjudicators

Hearing Officers *(Administered by OGC)*

- Conduct evidentiary hearings and other proceedings
- Conduct settlement conferences
- Approve stipulations to admonition and reprimand

Disciplinary Board *(Administered by OGC)*

- Reviews recommendations for proceedings and disputed dismissals
- Serves as intermediate appellate body
- Reviews hearing records and stipulations

Washington Supreme Court

- Has exclusive governmental responsibility for the system
- Conducts final appellate review
- Orders sanctions, interim suspensions, and reciprocal discipline

BY THE NUMBERS PART II

1,417	1,331	95	68	2,198
Grievance Files Opened	**Disciplinary Grievances Resolved**	**Non-Communication Matters Informally Resolved**	**File Disputes Informally Resolved**	**Public Inquiries, Phone Calls, Emails, and Interviews**

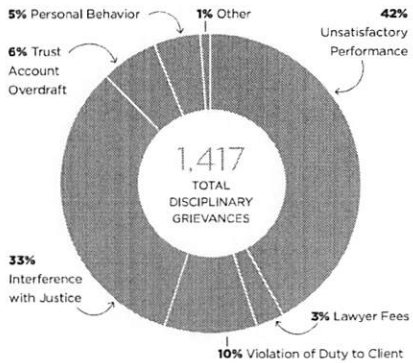
A CLOSER LOOK

Number and Nature of Grievances

ODC's intake staff receives all phone inquiries and written grievances and conducts the initial review of every grievance.[1] 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 2020, ODC received more than 1,400 grievances.

NOTE

1. Conflicts Review Officers perform this review when required by ELC 2.7.

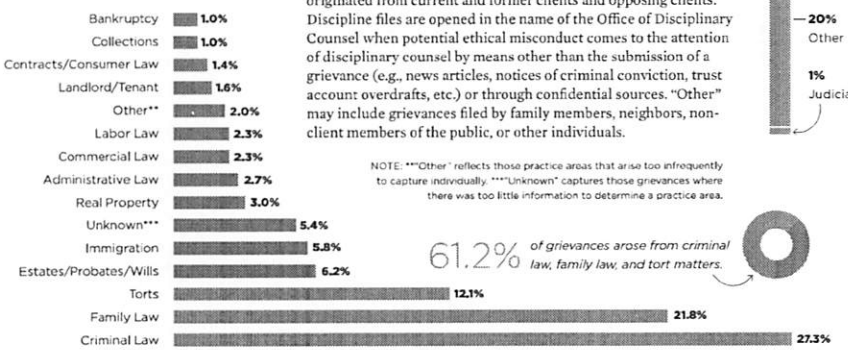


NATURE OF GRIEVANCES

In 2020, the most common grievance allegations against Washington lawyers related to unsatisfactory performance and interference with the administration of justice.

PRACTICE AREAS OF GRIEVANCES

Top 15 (by highest percentage)



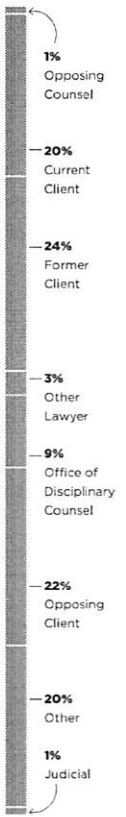
NOTE: **"Other" reflects those practice areas that arise too infrequently to capture individually. ***"Unknown" captures those grievances where there was too little information to determine a practice area.

Grievance Filings in Detail

In 2020, the majority of grievances against Washington lawyers originated from current and former clients and opposing clients. Discipline files are opened in the name of the Office of Disciplinary Counsel when potential ethical misconduct comes to the attention of 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. "Other" may include grievances filed by family members, neighbors, non-client members of the public, or other individuals.

61.2% *of grievances arose from criminal law, family law, and tort matters.*

SOURCES OF GRIEVANCES FILED



A CLOSER LOOK

Disciplinary Actions Taken

Disciplinary "actions," which include both disciplinary sanctions and admonitions, result in a permanent public disciplinary record. In order of increasing severity, disciplinary actions are admonitions, reprimands, suspensions, and disbarments. If a lawyer should be cautioned, review committees of the Disciplinary Board have authority to issue an advisory letter, which is neither a sanction nor a disciplinary action and is not public information. For less serious misconduct, ODC may divert a grievance from discipline if a lawyer agrees to a diversion contract, which if successfully completed results in dismissal of the grievance. In 2020, 18 matters were referred to diversion.

In 2020, 43 lawyers were disciplined and four lawyers had more than one disciplinary action, for a total of 47 disciplinary actions.

DISCIPLINARY ACTIONS: 47 TOTAL

Admonitions: **1**

Reprimands: **17**

Suspensions: **14**

Resignations in Lieu of Discipline: **9**

Disbarments: **6**

MORE ONLINE

For more information on the discipline system go to www.wsba.org. To view the full 2020 Discipline System Annual Report, go to **bit.ly/2020-Discipline-Report.**

PANDEMIC RESPONSE

COVID-19 and the Discipline System

The WSBA's physical office closed to the public in March 2020, at which time the vast majority of the WSBA staff began working 100 percent remotely, a situation that persisted through the end of the year. Shortly after the office closure, the Washington Supreme Court, as well as the chief hearing officer and disciplinary board chair, entered orders regarding modified procedures during the pendency of the COVID-19 public health emergency for matters in the licensed legal professional discipline and disability system. In April and May new grievance numbers dropped significantly, but rebounded to roughly pre-COVID-19 levels in June. Other developments included temporary suspension of the random trust account examination program and a series of hearing officer decisions to continue existing hearing dates or postpone the scheduling of new hearings. Although two default hearings were conducted, there were no adversarial disciplinary hearings held between April and December 2020.

OTHER COMPONENTS

LPO and LLLT Discipline System

Limited practice officers (LPOs) and limited license legal technicians (LLLTs) are also authorized to practice law in Washington, through regulatory systems administered by the WSBA. A Washington Supreme Court-mandated regulatory board oversees each limited license. Each licensee is subject to license-specific rules of professional conduct and disciplinary procedural rules. The WSBA administers a discipline system for each of these licenses. At the end of 2020, there were 823 LPOs and 47 LLLTs actively licensed to practice. In 2020, the WSBA received three disciplinary grievances against LPOs and no disciplinary 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 practicing law, because of mental or physical incapacity. Such matters are handled under a distinct set of procedural rules. In some cases, the lawyer must have counsel appointed at the WSBA's expense. In disability cases, a determination that the lawyer does not have the capacity to practice law results in a transfer to disability inactive status. In 2020, seven lawyers were transferred to disability inactive status based on an incapacity to practice law.