The New Rules:
Conflicts, Confidentiality,
No Contact Rule and Multijurisdictional Practice

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Overview

Since the Washington Rules of Professional Conduct were adopted in 1985, the American Bar Association's influential Model Rules of Professional Conduct were updated significantly in 2002 and 2003. The Board of Governors of the Washington State Bar Association appointed a Special Committee for the Evaluation of the Rules of Professional Conduct ("the Ethics 2003 Committee") to review the Washington RPCs in light of the changes the ABA made to its Model Rules. The Ethics 2003 Committee met throughout 2003 and early 2004, forwarding its recommendation to the Board of Governors in the Spring of 2004. The Board approved the Ethics 2003 Committee's report in most respects and forwarded its recommendation on to the Supreme Court. The Supreme Court put the proposed rule changes out for public comment in late 2004 and the public comment period closed earlier this year. The Supreme Court now has the rules under review.

The Ethics 2003 Committee and the Board of Governors also proposed that Washington adopt official comments to the rules. The comments that are included in the Ethics 2003 recommendations are modified versions of the comments to the ABA's Model Rules supplemented by some Washington-specific variants. The Supreme Court has the comments under review as well. If those are also adopted, they should provide a very useful official interpretive guide to the rules.

For more information on the Ethics 2003 Committee, a complete copy of its report and other developments, see the Ethics 2003 Committee's page on the WSBA's web site at www.wsba.org/lawyers/groups/ethics2003.

This presentation will outline the proposed rule changes in four areas:

- Conflicts
- Confidentiality
- The "no contact" rule
- Multijurisdictional practice

Conflicts

Although the conflict rules have been restructured somewhat, the substance of the current and former client conflict rules under RPC 1.7 and 1.9 will remain the same in practical effect. In other words, a conflict under the "old" rules will remain a conflict under the "new" rules. In several areas, however, the terminology has changed. The "old" rules, for example, frame waivers as "consultation" and "full disclosure"; the operative term under the new rules is "informed consent."

In two potentially useful technical changes, the definition of "writing" for conflict waivers (and other use of that term in the new RPCs) will now specifically include e-mail and will also now specifically authorize (in appropriate circumstances) advance waivers (Comment 22 to "new" RPC 1.7).

Confidentiality

The structure and overall thrust of the confidentiality rule—RPC 1.6—remain the same. But the potential scope of both the material protected and the exceptions have broadened.

Under the "old" version of RPC 1.6, a lawyer has a duty to keep two categories of material confidential: "confidences," which are communications protected by the attorney-client privilege; and "secrets," which are "other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would likely be detrimental to the client." Under the "new" version of RPC 1.6, the scope of the rule expands to encompass "information relating to the representation of a client." The Washington comment [Comment 19] to the new rule notes that this phrase "should be interpreted broadly" and protects information "protected by . . . but not necessarily limited to, confidences and secrets." In some circumstances, therefore, the new rule would impose a duty of confidentiality on information that while technically "public" may not be widely known and was only learned by the lawyer as a result of the lawyer's representation of the client.

Under the "old" version of RPC 1.6, there were three primary exceptions to the rule which authorized, but did not require, a lawyer to reveal confidential information: (1) to prevent the client from committing a crime; (2) to establish a claim or defense by the lawyer in a dispute with the client; and (3) to inform a court of a breach of fiduciary duty by a court-appointed fiduciary such as a personal representative of an estate. Under the "new" version of RPC 1.6, the current exceptions are retained and four new exceptions are added: (1) to prevent "reasonably certain death or substantial bodily harm" from resulting; (2) to prevent a financial fraud that would result in substantial financial harm and in which the client has used the lawyer's services; (3) to secure advice about compliance with the RPCs; and (4) to comply with a court order. Disclosure remains permissive rather than mandatory under these exceptions.

In addition to RPC 1.6, RPC 4.1(b) also requires the disclosure of "a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6." Finally, new RPC 1.13(b)-(e) require a lawyer for an organization to report information that would likely result in substantial injury to the organization "up" the organization's chain of command if it has not been acted on below and permits the lawyer to reveal such information "out" of the organization if the highest levels of authority have not acted to prevent the injury.

The "No Contact " Rule

The changes in store for RPC 4.2 are threefold but comparatively minor. The first broadens the scope of the rule slightly by substituting represented *person* for *party*. The second deletes RPC 4.2(b), which deals with communications in limited-scope representations under RPC 1.2, and moves it to a comment instead. The third expands the "authorized by law" exception by including court orders. For a detailed portrait of RPC 4.2, see my July 2005 Ethics & the Law column in the WSBA Bar News (available at www.wsba.org), "Who's Fair Game? Who You Can and Can't Talk to on the Other Side."

Multijurisdictional Practice

The "old" version of RPC 5.5 prohibited the unauthorized practice of law. The "new" version does that and creates six categories of authorized temporary practice: (1) "out-of-state" lawyers will be allowed to handle "in state" matters in association with a local lawyer who participates actively in the representation; (2) the practical scope of *pro hac vice* admissions will be extended to work, such as pre-filing witness interviews, that occurs before formal *pro hac vice* admission is available; (3) alternative dispute resolution proceedings that do not have the equivalent of formal *pro hac vice* admission will also be recognized as authorized temporary practice; (4) "out-of-state" lawyers will be allowed to handle "in state" matters that arise out of or are reasonably related to the lawyer's practice in the lawyer's "home" state; (5) in-house counsel will be allowed to provide services to their corporate employers in transitory circumstances that do not otherwise warrant admission under available house counsel rules; and (6) legal work specifically permitted by federal law, such as that of federal prosecutors, will fall within the scope of "authorized practice" even if the lawyer involved is not admitted in the jurisdiction involved. RPC 8.5 will also be amended to include attorneys temporarily practicing in Washington within Washington's regulatory authority.

The "new" version of RPC 5.5 is patterned on the analogous new ABA Model Rule that is now being adopted by states around the country. Oregon and Idaho, for example, have recently adopted similar rules. Although the new approach to temporary multijurisdictional practice is not quite like relying on the reciprocity afforded by your driver's license on a cross-country trip, it promises a much more rational system of temporary admission than the old ad hoc approach.