

**The New Rules:
Litigation Ethics under the New Washington RPCs**

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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 in late April 2005. Following additional review, the Supreme Court adopted the new Washington RPCs in July 2006 and they became effective on September 1.

The Ethics 2003 Committee and the Board of Governors also proposed that Washington adopt official comments to the rules. The comments included in the Ethics 2003 recommendations were modified versions of the comments to the ABA's Model Rules supplemented by some Washington-specific variants. The Supreme Court adopted the comments (with some variations of its own) as well.

For more information on the Ethics 2003 Committee, a complete copy of its report and the new rules and comments (in both direct text and "redlined" versions), 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 rule changes in six litigation-oriented areas:

- Conflicts
- Confidentiality
- The "no contact" rule
- Multijurisdictional practice
- Inadvertent production
- The lawyer-witness rule

Conflicts

Although the conflict rules have been restructured somewhat, the substance of the current (RPC 1.7) and former (RPC 1.9) client conflict rules remain the same in practical effect. In other words, a conflict under the "old" rules will remain a conflict under the "new" rules. The key terminology, however,

has changed in several respects. The old rules, for example, framed waivers in terms of “consultation” and “full disclosure”; the operative phrase under the new rules is “informed consent.” In a potentially useful technical change, the definition of “writing” now specifically includes email. That should allow most conflict waivers to be confirmed by email (those involving business transactions with clients still require client signatures). The Supreme Court considered, but did not adopt, a proposed comment (Comment 22 to RPC 1.7) dealing with advance waivers. Its rejection of the comment, however, should not preclude the use of advance waivers in appropriate circumstances such as those executed by sophisticated corporate clients with in-house legal advice available.

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 had a duty to keep two categories of material confidential: “confidences,” which were communications protected by the attorney-client privilege; and “secrets,” which were “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.” Comment 19 to RPC 1.6 notes that this phrase “should be interpreted broadly” and includes information “protected by . . . but not necessarily limited to, confidences and secrets.” In some circumstances, therefore, the new rule will 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 four 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; (3) to comply with a court order; and (4) 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 three new exceptions are added: (1) to prevent “reasonably certain death or substantial bodily harm”; (2) to prevent, mitigate or rectify a financial fraud that would result in substantial financial harm and in which the client has used the lawyer’s services; and (3) to secure advice about compliance with the RPCs. Except for disclosures to prevent death or substantial bodily harm (where disclosure is mandatory), disclosure under the other exceptions remains permissive rather than mandatory.

The “No Contact ” Rule

The changes to the “no contact” rule, 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 dealt 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 to include court orders. Comment 10 to RPC 4.2 specifically notes that the leading case in Washington on the “no contact” rule in the corporate context, *Wright v. Group Health Hospital*, 103 Wn.2d 192, 691 P.2d 564 (1984), remains the guiding standard.

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 and www.frlp.com), “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 too, but also creates six categories of authorized temporary practice: (1) “out-of-state” lawyers are 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 is 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 are also recognized as authorized temporary practice; (4) “out-of-state” lawyers are 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 are allowed to provide services to their corporate employers; 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 was also 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.

For more on new RPC 5.5 and related lawyer licensing issues, see my July 2006 Ethics & the Law column in the WSBA Bar News (available at www.wsba.org and www.frllp.com), "Have License, Will Travel: A Guide to Lawyer Licensing Around the Northwest."

Inadvertent Production

New RPC 4.4(b), which is drawn from its ABA Model Rule counterpart, turns inadvertent production primarily into an evidentiary issue of waiver rather than a matter of ethics:

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

At the same time, the new rule doesn't leave inadvertent production *exclusively* a question of substantive evidence law. A companion provision, RPC 4.4(a), prohibits lawyers from using "methods of obtaining evidence that violate the legal rights [of a third person] . . ." Therefore, a lawyer who obtains a litigation opponent's attorney-client privilege material and uses that material without first litigating the issue of waiver remains at disqualification risk. See *Richards v. Jain*, 168 F. Supp.2d 1195 (W.D. Wash. 2001) (disqualifying plaintiffs' counsel for improperly obtaining and using the defendant's confidential attorney-client communications).

For more on RPC 4.4(b) and continuing disqualification risk in situations like *Richards*, see my May 2005 and May 2006 Ethics & the Law columns in the WSBA Bar News (available at www.wsba.org and www.frllp.com), respectively, "Inadvertent Production: Gold Nugget or Rotten Egg?" and "Discovery Ethics: Playing Fair While Playing Hard."

The Lawyer-Witness Rule

The lawyer-witness rule, RPC 3.7, has not changed markedly in its impact on individual attorneys. Like the "old" rule, new RPC 3.7(a) generally prohibits a lawyer from acting as trial counsel if the lawyer will be a necessary witness.

In a significant change, however, RPC 3.7(b) no longer imputes an individual lawyer's disqualification to the lawyer's firm. Therefore, as long as the lawyer-witness' testimony is consistent with the client's position, another lawyer at the firm can try the case even if one of the firm's lawyers will be a witness at trial.