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## **Beyond Discipline: The RPCs and the Law of Lawyering**

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At first blush, the “Scope” section of the Rules of Professional Conduct seems to imply that the RPCs are simply a disciplinary code. Paragraph 19, for example, notes that “[f]ailure to comply with an obligation or prohibition imposed by a Rule is a basis for invoking the disciplinary process.” Paragraph 20, in turn, states that “[v]iolation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached.” The Washington Supreme Court in *Hizey v. Carpenter*, 119 Wn.2d 251, 259, 830 P.2d 646 (1992), reinforced these twin points: “[B]reach of an ethics rule provides only a public, e.g., disciplinary, remedy and not a private remedy.”

At the same time, both the RPCs themselves and the Supreme Court have underscored the central role that the professional rules provide beyond their place as a disciplinary code. Paragraph 20 of the Scope, for example, closes with this notion: “Nevertheless, since the Rules do establish standards of conduct by lawyers, a lawyer’s violation of a Rule may be evidence of breach of the applicable standard of conduct.” Similarly, the Supreme Court in *Hizey*, 119 Wn.2d at 264, acknowledged: “We realize courts have relied on the . . . RPC for

reasons other than to find malpractice liability and our holding today does not alter or affect such use.”

Given their central role as standards of conduct, it should not be surprising that the RPCs significantly influence many aspects of the broader law of lawyering. In this column, we’ll look at three: disqualification; claims for breach of fiduciary duty; and fee disputes.

### ***Disqualification***

Disqualification is a blend of procedural and substantive law.

The procedural law of disqualification is largely court-made and addresses areas such as standing to seek disqualification, waiver through delay and the framework courts should use in analyzing motions linked to specific court rules. *FMC Technologies, Inc. v. Edwards*, 420 F. Supp.2d 1153 (W.D. Wash. 2006), for example, discusses both standing and waiver through delay. *Foss Maritime Co. v. Brandewiede*, 190 Wn. App. 186, 359 P.3d 905 (2015), in turn, outlines the analytical framework trial courts must use when imposing disqualification as a discovery sanction under CR 26(b).

The substantive law of disqualification, however, comes from the RPCs and addresses the conduct that may lead to disqualification. Most disqualification motions are based on asserted conflicts. In those instances,

courts generally use the RPCs in determining whether the lawyer or firm involved has a conflict. In *Oxford Systems, Inc. v. CellPro, Inc.*, 45 F. Supp.2d 1055 (W.D. Wash. 1999), for example, the federal court in Seattle used Washington’s current client conflict rule—RPC 1.7—in finding that a law firm was disqualified. Similarly, in *RWR Management, Inc. v. Citizens Realty Co.*, 133 Wn. App. 265, 135 P.3d 955 (2006), the Court of Appeals affirmed the disqualification of counsel under the former client conflict rule—RPC 1.9. Courts also use the RPCs in determining whether disqualification is appropriate in situations beyond conflicts. In *Kyko Global Inc. v. Prithvi Information Solutions Ltd.*, 2014 WL 2694236 (W.D. Wash. June 13, 2014) (unpublished), for example, the court in deciding a disqualification motion examined whether privilege had been improperly invaded under RPC 4.4. Similarly, the court in *Jones v. Rabonco*, 2006 WL 2401270 (W.D. Wash. Aug. 18, 2006) (unpublished), evaluated whether disqualification was appropriate under the “no contact” rule—RPC 4.2.

***Breach of Fiduciary Duty***

Washington’s state and federal courts have long recognized that many of our obligations under the RPCs are reflections of our underlying fiduciary duties to our clients. One of the most central is our duty of loyalty, which is expressed in the conflict rules and was discussed at length by the Washington Supreme

Court in *Eriks v. Denver*, 118 Wn.2d 451, 824 P.2d 1207 (1992). Other decisions examine our duties of communication (RPC 1.4) and confidentiality (RPC 1.6) in fiduciary terms, such as, respectively, *Global Enterprises, LLC v. Montgomery Purdue Blankenship & Austin PLLC*, 52 F. Supp.3d 1162 (W.D. Wash. 2014), and *3BA Properties LLC v. Claunch*, 2013 WL 6000065 (W.D. Wash. Nov. 12, 2013) (unpublished).

Legal malpractice and breach of fiduciary claims are not mutually exclusive and can be pled in the same case—with the former focusing on whether the services provided met the standard of care and the latter focusing on whether the lawyer’s conduct breached a fiduciary duty. *Eriks*, for example, involved claims for both deficient advice and conflicts against the backdrop of tax advice provided to clients who were investors in a tax shelter offered by promoters the lawyer also represented. In addition to any damages that may flow from the breach itself, a breach of fiduciary duty may also trigger another remedy: disgorgement of fees. The Court of Appeals in *Behnke v. Ahrens*, 172 Wn. App. 281, 298, 294 P.3d 729 (2012), noted that “[d]isgorgement of fees is a reasonable way to discipline specific breaches of professional responsibility, and to deter future misconduct of a similar type.” When applied to conflicts in

particular, *Eriks*, 118 Wn.2d at 462, relied on the unremarkable idea that a disloyal agent should not be entitled to collect fees from the principal.

### ***Fee Disputes***

Because fee agreements are contracts between lawyers and clients, disputes over them are often controlled by general principles of contract law. In *Ward v. Richards & Rossano, Inc.*, P.S., 51 Wn. App. 423, 432, 754 P.2d 120 (1988), for example, the Court of Appeals noted that “[a] fee agreement modified to increase an attorney’s compensation after the attorney is employed is unenforceable if it is not supported by new consideration.” Similarly, the Court of Appeals in *Luna v. Gillingham*, 57 Wn. App. 574, 581, 789 P.2d 801 (1990), reminded lawyers of a fundamental rule of contract construction applicable to fee agreements drafted by lawyers: “[A]mbiguous contract language . . . [is] . . . construed against the drafter.”

The RPCs, however, have also come to play an equally important role in two facets of fee disputes.

First, courts often use the “fee rule”—RPC 1.5—in gauging the appropriate *amount* of fees. RPC 1.5(a) prohibits making, charging or collecting an “unreasonable” fee and sets out a variety of factors to assess whether a fee is reasonable under the circumstances involved. Courts have frequently used the

factors set out in RPC 1.5(a) in association with any applicable statutes (such as RCW 4.24.005, which includes similar factors) and common law (such as “lodestar” methodology summarized comparatively recently in *Berryman v. Metcalf*, 177 Wn. App. 644, 312 P.3d 745 (2013)) in assessing whether a particular fee is reasonable. In *In re Settlement/Guardianship of AGM*, 154 Wn. App. 58, 223 P.3d 1276 (2010), for example, the Court of Appeals affirmed a trial court’s reduction in the fees sought using RPC 1.5(a) and associated statutory law where a \$100,000 “policy limits” settlement in an automobile accident case followed only 2.5 hours of attorney time.

Second, courts also look to the RPCs in determining whether a particular fee agreement is *enforceable*. The Supreme Court in *Valley/50th Ave., L.L.C. v. Stewart*, 159 Wn.2d 736, 743, 153 P.3d 186 (2007), summarized Washington law on this point: “Attorney fee agreements that violate the RPCs are against public policy and unenforceable.” In *LK Operating, LLC v. Collection Group, LLC*, 181 Wn.2d 48, 331 P.3d 1147 (2014), the Supreme Court elaborated that not every RPC violation touching on a contract renders the agreement unenforceable. Rather, the Supreme Court in *LK Operating* reasoned that (at 181 Wn.2d 87) “[t]he underlying inquiry in determining whether a contract is unenforceable because it violates public policy is whether the contract itself is injurious to the

public.” *LK Operating*, for example, concerned a business transaction with a client that the Supreme Court held was unenforceable for failing to meet the strict standards set out in RPC 1.8(a).

### ***Summing Up***

The prominent place that the RPCs have assumed outside the disciplinary context was anticipated in their Scope section, with Paragraph 15 noting: “The Rules presuppose a larger legal context shaping the lawyer’s role.” As standards of conduct, the RPCs have effectively been woven into the fabric of the broader law of lawyering.

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