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**Words Matter:
The Terminology Section of the RPCs**

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Roper: We don't need to know the wording—we know what it will mean!

**More: It will mean what the words say!
~A Man for All Seasons¹**

As lawyers, words are our stock in trade. Whether a business lawyer negotiating the finer points of a contract or a litigator parsing the nuances of a statute, words dominate our profession. It should not be surprising, therefore, that the wording of the Rules of Professional Conduct can mean the difference between a lawyer being disciplined or a law firm being disqualified.

The Washington Supreme Court has described its approach to interpreting the RPCs:

“When interpreting the meaning of any RPC, we apply settled principles of statutory construction. . . . Our goal is to give effect to the intent behind the rule, which we discern, where possible, from the plain language of the rule at issue in the context of the RPCs as a whole.”
LK Operating, LLC v. Collection Group, LLC, 181 Wn.2d 48, 75, 331 P.3d 1147 (2014) (citations omitted).

Notably, the RPCs themselves include a specific rule that defines the meaning of many key terms: RPC 1.0A, which is titled “Terminology.” A terminology rule was not part of either the original ABA Canons of Professional Ethics or the subsequent ABA Model Code of Professional Responsibility.² The

ABA Model Rules of Professional Conduct introduced the terminology rule in 1983 and Washington followed in 1985.³

In this column, we'll look at three important terms defined in RPC 1.0A: firm; informed consent; and writing.

Before we do, however, two qualifiers are in order.

First, by choosing these, it doesn't mean that the other 11 words listed in RPC 1.0A are not important.⁴ Rather, the three we'll discuss here are simply some of the more common that lawyers encounter in practice.

Second, although RPC 1.0A is the "terminology" rule, other portions of the RPCs and the accompanying comments also include important definitions. Comment 21 to RPC 1.6, for example, defines "information relating to the representation of a client" on which our duty of confidentiality is predicated. Comment 6 to RPC 1.7, in turn, discusses what it means to be "adverse" for conflict purposes.

Firm

What constitutes a "firm" is central to conflicts analysis. Under RPC 1.10(a), one law firm lawyer's conflict is generally imputed to the firm as a whole. Moreover, as law firms have grown in numerical size and geographic scope,

determining what constitutes the same “firm” has become considerably more difficult.

REC Solar Grade Silicon, LLC v. Shaw Group, Inc., 2010 WL 11561252 (E.D. Wash. Nov. 5, 2010) (unpublished), for example, involved construction claims by a manufacturer expanding its Moses Lake plant against a pipe supplier on the project involved. The plaintiff manufacturer’s lead counsel was the Houston office of a large law firm. The defendant supplier moved to disqualify the law firm—arguing that an international affiliate of the law firm based in London was representing it in litigation in India. The court’s analysis turned on whether the London-based affiliate was part of the same “firm.” The court looked primarily to the definition of “firm” under then-RPC 1.0(c). The court concluded that the two offices were part of the same firm and disqualified the law firm.

RPC 1.0A(c) defines the term “firm” broadly:

“Firm” or “law firm” denotes a lawyer, lawyers, an LLLT, LLLTs, or any combination thereof in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers or LLLTs employed in a legal services organization or the legal department of a corporation or other organization.

Comment 2 to RPC 1.0A⁵ elaborates, with an accent on distinguishing firms from office-sharing arrangements:

Whether two or more lawyers constitute a firm within paragraph (c) can depend on the specific facts. For example, two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm. However, if they present themselves to the public in a way that suggests that they are a firm or conduct themselves as a firm, they should be regarded as a firm for purposes of the Rules. The terms of any formal agreement between associated lawyers are relevant in determining whether they are a firm, as is the fact that they have mutual access to information concerning the clients they serve. Furthermore, it is relevant in doubtful cases to consider the underlying purpose of the Rule that is involved. A group of lawyers could be regarded as a firm for purposes of the Rule that the same lawyer should not represent opposing parties in litigation, while it might not be so regarded for purposes of the Rule that information acquired by one lawyer is attributed to another.

In an era where an increasing number of law firm lawyers are neither traditional owner-partners⁶ or employee-associates, Comment 2's focus on the practical relationships among lawyers who office together—physically or virtually—and how they present themselves to the public provides an important analytical lens for assessing conflicts. WSBA Advisory Opinion 2130 (2006), for example, concluded that a part-time “of counsel” should be considered part of the a “firm” for determining conflicts. WSBA Advisory Opinion 1243 (1988) earlier reached the same conclusion for contract lawyers.⁷

Informed Consent

When we hear the phrase “informed consent,”⁸ we often think of conflict waivers under, for example, RPCs 1.7(b) for current clients and 1.9(a) for former

clients.⁹ A variety of rules involving other common practice settings, however, also use that term,¹⁰ including RPCs 1.2(c) on limited scope representation,¹¹ 1.6(a) on confidential information,¹² 1.8(f) on accepting compensation from third parties,¹³ and Comment 31 to RPC 1.7 on joint representation.¹⁴

As defined by RPC 1.0A(e), “[i]nformed consent’ denotes the agreement by a person 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 proposed course of conduct.” Comment 6 to RPC 1.0A explains:

The communication necessary to obtain such consent will vary according to the Rule involved and the circumstances giving rise to the need to obtain informed consent. The lawyer must make reasonable efforts to ensure that the client or other person possesses information reasonably adequate to make an informed decision. Ordinarily, this will require communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct and a discussion of the client’s or other person’s options and alternatives.

Some rules, such as RPC 1.7 on current client conflicts, require that a client’s informed consent be confirmed in writing.¹⁵ Others, such as RPC 1.2(c) on limiting scope, do not. Comment 7 to RPC 1.0A notes that “a lawyer may not assume consent from a client’s or other person’s silence.” Therefore, even

where consent is not required to be confirmed in writing, prudent risk management suggests confirming it in writing anyway.

Comment 6 to RPC 1.0A also clarifies the outcome if “informed consent” isn’t addressed at all: “[A] lawyer who does not personally inform the client or other person assumes the risk that the client or other person is inadequately informed and the consent is invalid.” In *In re Hall*, 180 Wn.2d 821, 329 P.3d 870 (2014), for example, a conflict waiver was held inadequate where the elderly client had poor eyesight and the lawyer only read part—but not all—of the waiver to the client.

Writing

When the ABA Model Rules were adopted in 1983, they did not include a definition of “writing”—likely because in that era “writing” simply meant “paper.” By the time the Model Rules were updated in the early 2000s, however, electronic communications were rapidly supplanting their paper counterparts and the ABA introduced a broad definition of “writing” that encompassed both paper and electronic forms.¹⁶ Washington followed in 2006 for the same reason.¹⁷

RPC 1.0A(n) defines “writing” as “a tangible or electronic record of a communication or representation[.]” RPC 1.0A(n) also incorporates a broad companion definition of “signed” to include both traditional and electronic means:

“A ‘signed’ writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.”¹⁸ Depending on the circumstances, substantive law may impose different or additional standards for particular documents lawyers generate or encounter in their practices. At least for purposes of the RPCs, however, documents such as conflict waivers or engagement agreements can be in electronic form and can be “signed” by a corresponding electronic acceptance. By taking this practical approach, the RPCs effectively acknowledge the electronic environment that most lawyers practice in today.

ABOUT THE AUTHOR

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¹ Quoted in dissent in *Jiang v. Holder*, 754 F.3d 733, 744 n. 5 (9th Cir. 2014).

² See generally ABA, *A Legislative History: The Development of the ABA Model Rules of Professional Conduct, 1982-2013* 23-36 (2013) (ABA Legislative History) (outlining history of ABA Model Rule 1.0).

³ *Id.* (ABA Model Rules); see also Robert H. Aronson, *An Overview of the Law of Professional Responsibility: The Rules of Professional Conduct Annotated and Analyzed*, 61 Wash. L. Rev. 823 (1986) (discussing adoption of the Washington RPCs). As originally adopted, Washington's terminology rule was at RPC 1.0. *Id.* When the RPCs were amended in 2015 reflecting the development of Limited License Legal Technician (LLLT) license and adoption of the LLLT RPC, the original terminology rule became RPC 1.0A and RPC 1.0B was added to define a number of terms related to the advent of LLLTs.

⁴ See, e.g., *In re Cellcyte Genetic Corp. Securities Litigation*, 2008 WL 5000156 at *2 (W.D. Wash. Nov. 20, 2008) (unpublished) (discussing "reasonable belief" as defined by then-RPC 1.0(i)); *In re Pfefer*, 182 Wn.2d 716, 726, 344 P.3d 1200 (2015) (discussing "tribunal" as defined by RPC 1.0A(m)).

⁵ Comment 1 to RPC 1.10 essentially replicates and cross-references the definition in RPC 1.0A(c).

⁶ RPC 1.0A(g) defines "partner" as "a member of a partnership, a shareholder in a law firm organized as a professional corporation, or a member of an association authorized to practice law."

⁷ For similar conclusions from a national perspective, see ABA Formal Ops. 90-357 (1990) ("of counsel") and 88-356 (1988) (contract lawyers). Comments 3-4 and 12-13 to RPC 1.0A address, respectively, the term "firm" as applied to legal departments, legal aid organizations, government offices and public defender organizations.

⁸ Comment 19 to RPC 1.7 notes that in some situations confidentiality limitations on disclosure of material information may prevent obtaining necessary consent—and, therefore, preclude obtaining a waiver.

⁹ See, e.g., *Bird v. Metropolitan Cas. Ins. Co.*, 2011 WL 149861 (W.D. Wash. Jan. 18, 2011) (unpublished) (addressing waivers under RPC 1.7(b)); *Harris v. Griffith*, 2 Wn. App.2d 638, 413 P.3d 51 (2018) (discussing waivers under RPC 1.9(a)).

¹⁰ It is also important to remember that not all conflicts can be cured by client consent. See, e.g., *In re Gillingham*, 126 Wn.2d 454, 467, 896 P.2d 656 (1995) ("Unlike the other rules governing conflicts of interest, the prohibition on testamentary gifts which are drafted by the lawyer-beneficiary does not include an exception when the client gives informed consent.").

¹¹ See, e.g., *Global Enterprises, LLC v. Montgomery Purdue Blankenship & Austin PLLC*, 52 F. Supp.3d 1162, 1169 (W.D. Wash. 2014) (addressing informed consent under RPC 1.2(c)).

¹² See generally WSBA Advisory Op. 201802 (2018) at 3-4 (discussing informed consent under RPC 1.6(a)).

¹³ See, e.g., *In re Rodriguez*, 177 Wn.2d 872, 880, 306 P.3d 893 (2013) (addressing informed consent under RPC 1.8(f)).

¹⁴ See, e.g., *Rutherford v. McKissack*, 2011 WL 13156933 at 2 (W.D. Wash. Apr. 11, 2011) (unpublished) (discussing informed consent to joint representation). Comment 18 to RPC 1.7 notes that in the joint representation context that the discussion preceding client consent “must include the implications of common representation, including possible effects on loyalty, confidentiality and the attorney-client privilege and the advantages and risks involved.”

¹⁵ “Confirmed in writing” is itself defined by RPC 1.0A(b) as “informed consent that is given in a writing by the person or a writing that a lawyer transmits to the person confirming an oral informed consent.” Comment 11 to RPC 1.0A notes in this regard that “the writing be articulated in a manner that can be easily understood by the client.”

¹⁶ See ABA Legislative History at 30.

¹⁷ See WSBA, *Reporter’s Explanatory Memorandum to the Ethics 2003 Committee’s Proposed Rules of Professional Conduct* 139 (2004) (on file with author).

¹⁸ See, e.g., *Wilcox v. Swapp*, 360 F. Supp.3d 1140, 1144 (E.D. Wash. 2019) (discussing attorney signatures and citing RPC 1.0A(n)).