

ETHICS – IT’S LEGAL, BUT IS IT RIGHT?

or

IF YOU HAVE TO ASK ...

Introduction

There are major new changes and revisions to Washington’s Rules of Professional Conduct (RPCs). The changes became effective on September 1, 2006. The reader of the new RPCs will find substantive rule changes (more rules, longer rules), and also lengthy “comments” designed to aid the lawyer in his or her interpretation and application of the rules. It is important to remember that the comments are not rules, and that the rules are authoritative.

Noteworthy Changes

RPC 1.6 (Confidentiality of Information) – permissive and mandatory disclosure of privileged and confidential information

RPC 1.6 contains new exceptions to the rule against disclosure of privileged and confidential information.

RPC 1.6(a) and (b)(1)-(3)

(a) 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).

(b) A lawyer to the extent the lawyer reasonably believes necessary:

(1) shall reveal information relating to the representation of a client to prevent reasonably certain death or substantial bodily harm;

(2) may reveal information relating to the representation of a client to prevent the client from committing a crime;

(3) may reveal information relating to the representation of a client to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

Permissive: Under RPC 1.6(b)(2) disclosure of otherwise confidential information *is permitted* "to prevent the client from committing a crime".

Permissive: Under RPC 1.6(b)(3) disclosure of otherwise confidential information *is permitted* "to prevent, mitigate, or rectify a substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used or is using the client's services".

Mandatory: Under RPC 1.6(b)(1) disclosure of otherwise confidential information is *mandatory* "to prevent reasonably certain death or substantial bodily injury".

RPC 1.8 (Conflict of Interest: Current Clients: Specific Rules) – contingent nature of advanced costs and expenses

RPC 1.8(e)(1)

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that;

(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter;

RPC 1.8(e)(1) now allows for advanced costs and expenses of litigation to be contingent on case outcome. This is *a departure from the earlier rule* that required a client to remain ultimately liable for such advanced costs and expenses of litigation.

RPC 3.3 (Candor to the Tribunal) – honesty is not just the best policy, it’s the only policy

RPC 3.3 should be carefully read and appreciated. As lawyers, we are officers of the court. Any false statement, failure to disclose a material fact, or other fraudulent representation diminishes your credibility and that of the court, the Bar, the system, and the public’s perception of lawyers.

RPC 4.4 (Respect for Rights of Third Person) – inadvertent receipt of information

RPC 4.4(b)

(b) 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.

RPC 4.4(b) is a new provision that governs the duty to notify a sender upon receipt of privileged or confidential communication that the lawyer knows or reasonably should know was inadvertently sent.

RPC 8.3 (Reporting Professional Misconduct) – permissive and encouraged reporting of professional misconduct

RPC 8.3

- (a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects, should inform the appropriate professional authority.
- (b) A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office should inform the appropriate authority.
- (c) This rule does not permit a lawyer to report the professional misconduct of another lawyer or judge to the appropriate authority if doing so would require the lawyer to disclose information protected by Rule 1.6.

RPC 8.3 is permissive (“should”), and encourages a lawyer to report serious professional misconduct to the appropriate authority.

Noteworthy Rules

RPC 1.3 (Diligence)

A lawyer shall act with reasonable diligence and promptness in representing a client.

RPC 1.3 is included for discussion here because it is a simple and basic rule, and because failure to abide by the rule is one of the most common causes of client complaint.

RPC 1.5 (Fees) – reasonableness, scope, and contingent fee agreements

RPC 1.5 is a very long rule. It is also a very important rule for attorneys, especially for attorneys representing plaintiffs in medical negligence cases.

RPC 1.5(a) is the general rule that fees and expenses shall be reasonable.

What constitutes “reasonable” can be gleaned from RPC 1.5(a)(1)-(9) and include considerations such as:

- time and labor involved;
- novelty and difficulty;
- skill required;
- the going-rate;
- the amount at stake;
- results;
- time limitations;
- relationship with client;
- experience, reputation and ability of the lawyer(s);
- whether the fee is fixed or contingent; and
- reasonable and fair disclosure.

RPC 1.5(c)(1)-(4) is specific to contingent fees. Contingent fee agreements shall:

- be in writing;
- be signed by the client; and
- state the method of computation.

Further, at conclusion, the lawyer shall:

- provide a written statement and accounting.

It is not unusual for plaintiff attorneys in medical negligence cases to charge more than 33%. These cases can be very difficult to win (especially if chosen poorly);

can require exceptional effort and skill; and typically require substantial sums in out-of-pocket costs.

This author recommends the novice attorney obtain examples of contingent fee agreements from established practitioners in the area as examples.

RPC 1.5(e) applies to division of fees between lawyers. It is quite common for attorneys to joint-venture, or associate in complex cases. Medical negligence cases can be well-suited to associations among lawyers who, for example, may agree to split work along liability and damages lines. Also, the costs to develop medical negligence cases can be shared among venturing lawyers, and this can be beneficial because it spreads risks.

RPC 1.5(e)(1)(i)-(iii)

(e) A division of a fee between lawyers who are not in the same firm may be made only if:

- (1)(i) the division is in proportion to the services provided by each lawyer or each lawyer assumes joint responsibility for the representation;
- (ii) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and
- (iii) the total fee is reasonable;

RPC 3.1 (Meritorious Claims and Contentions)

RPC 3.1

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue, therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.

RPC 3.1 is included here for mention to alert the attorney advancing medical negligence cases to both the ethical obligation to advance non-frivolous cases and the new statutory requirements that require certificate of merit in advance of suit.

RPC 3.2 (Expediting Litigation)

RPC 3.2

A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.

RPC 7.4 (Communication of Fields of Practice and Specialization)

RPC 7.4(d)(1)-(3)

(d) A lawyer shall not state or imply that a lawyer is a specialist in a particular field of law, except upon issuance of an identifying certificate, award, or recognition by a group, organization, or association, a lawyer may use the terms “certified”, “specialist”, “expert”, or any other similar term to describe his or her qualifications as a lawyer or his or her qualifications in any subspecialty of the law. If the terms are used to identify any certificate, award, or recognition by any group, organization, or association, the reference must:

- (1) be truthful and verifiable and otherwise comply with Rule 7.1;
- (2) identify the certifying group, organization, or association; and
- (3) state that the Supreme Court of Washington does not recognize certification of specialties in the practice of law and that the certificate, award, or recognition is not a requirement to practice law in the State of Washington.

RPC 8.4 (Misconduct)

This is a long rule, a catch-all rule, and should be carefully read. I urge everyone to reflect carefully on their own choices, behaviors and actions in the past, and situations that may be presenting now or in the future.

WSBA Ethics Line

The Washington State Bar Association sponsors an Ethics / Professional Responsibility Program Ethics Line.

The Ethics Line is available to serve Washington lawyers who have questions about ethical issues and application of the Rules of Professional Conduct. It is there to help Washington Bar members analyze ethical issues, apply the proper rules and make ethically sound decisions.

Calls to the Ethics Line are confidential and are *not* recorded.

Also, it is important to understand that opinions rendered are personal opinions of the Professional Responsibility Counsel and *not binding*. However, for anyone with questions about a real or potential ethics issue, an early call is probably a very good idea.

The numbers for the WSBA Ethics Line are:

(206) 727-8284; or

(800) 945-WSBA ext. 8284

WSBA Ethics Opinions

The WSBA also assists Washington Bar members by issuing written opinions about various specific issues. These written opinions are designed to assist member's interpretations of their ethical obligations.

The Ethics Opinions are posted online at the WSBA's website, in a searchable database.

Ethics and Codes of Ethics of Other Professions

This author is obviously not qualified to speak substantively about ethics and codes of ethics of professions other than law.

Still, as an attorney handling medical negligence cases (or any cases involving expert testimony), it is often helpful to review the ethical codes of the various disciplines the parties or their experts are qualified in.

For example, before taking the deposition of a defendant in an orthopedic surgery malpractice case, I find it helpful to review the ethical codes of the American Medical Association (AMA) and the American Academy of Orthopaedic Surgeons.

A good resource I have found searching (where else?) the Internet is the Center for the Study of Ethics in the Professions (CSEP) at the Illinois Institute of Technology.

The CSEP has an extensive collection of online professional codes of ethics, indexed by professional category and sub-indexed by specialty.

The link for the CSEP is *<http://ethics.iit.edu/index.html>*.

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