WSR 06-15-055
RULES OF COURT
STATE SUPREME COURT
[July 10, 2006]

IN THE MATTER OF THE ADOPTION OF THE NEW SET OF THE RULES OF PROFESSIONAL CONDUCT AND NECESSARY COMPANION AMENDMENTS THERETO, APR 8, APR 15 PROCEDURAL RULE 5, GR 25 AND ELC 1.5, 5.1, 15.4 AND 15.5	)))))))	ORDER NO. 25700-A-851

The Washington State Bar Association having recommended the new set of the Rules of Professional Conduct and necessary companion amendments thereto APR 8, APR 15 Procedural Rule 5, GR 25 and ELC 1.5, 5.1, 15.4 and 15.5, and the Court having considered the new set of rules, necessary companion amendments and comments submitted thereto, and having determined that the proposed new set of Rules of Professional Conduct and necessary companion amendments APR 8, APR 15 Procedural Rule 5, GR 25 and ELC 1.5, 5.1, 15.4 and 15.5 will aid in the prompt and orderly administration of justice;

Now, therefore, it is hereby

ORDERED:

(a) That the new set of Rules of Professional Conduct and necessary companion amendments thereto, APR 8, APR 15 Procedural Rule 5, GR 25 and ELC 1.5, 5.1, 15.4 and 15.5 as attached hereto are adopted. The current set of the Rules of Professional Conduct are hereby rescinded as of August 31, 2006.

(b) That the new set of Rules of Professional Conduct and necessary companion amendments thereto APR 8, APR 15 Procedural Rule 5, GR 25 and ELC 1.5, 5.1, 15.4 and 15.5 will be published in the Washington Reports and will become effective September 1, 2006.

DATED at Olympia, Washington this 10th day of July, 2006.

Alexander, C. J.

C. Johnson, J. Chambers, J.

Madsen, J. Owens, J.

Fairhurst, J.

Bridge, J.

I dissent
Sanders, J.
Johnson, J.

RULES OF PROFESSIONAL CONDUCT (RPC)

Table of Rules

~~PREAMBLE~~ *FUNDAMENTAL PRINCIPLES OF PROFESSIONAL CONDUCT**

The continued existence of a free and democratic society depends upon recognition of the concept that justice is based upon the rule of law grounded in respect for the dignity of the individual and the capacity through reason for enlightened self-government. Law so grounded makes justice possible, for only through such law does the dignity of the individual attain respect and protection. Without it, individual rights become subject to unrestrained power, respect for law is destroyed, and rational self-government is impossible.

Lawyers, as guardians of the law, play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship with and function in our legal system. A consequent obligation of lawyers is to maintain the highest standards of ethical conduct.

In fulfilling professional responsibilities, a lawyer necessarily assumes various roles that require the performance of many difficult tasks. Not every situation which a lawyer may encounter can be foreseen, but fundamental ethical principles are always present as guidelines. Within the framework of these principles, a lawyer must with courage and foresight be able and ready to shape the body of the law to the ever-changing relationships of society.

The Rules of Professional Conduct point the way to the aspiring lawyer and provide standards by which to judge the transgressor. Each lawyer must find within his or her own conscience the touchstone against which to test the extent to which his or her actions should rise above minimum standards. But in the last analysis it is the desire for the respect and confidence of the members of the legal profession and the society which the lawyer serves that should provide to a lawyer the incentive for the highest possible degree of ethical conduct. The possible loss of that respect and confidence is the ultimate sanction. So long as its practitioners are guided by these principles, the law will continue to be a noble profession. This is its greatness and its strength, which permit of no compromise.

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* These *Fundamental Principles of the Rules of Professional Conduct* are taken from the former Preamble to the Rules of Professional Conduct as approved and adopted by the Supreme Court in 1985. Washington lawyers and judges have looked to the 1985 Preamble as a statement of our overarching aspiration to faithfully serve the best interests of the public, the legal system, and the efficient administration of justice. The former Preamble is preserved here to inspire lawyers to strive for the highest possible degree of ethical conduct, and these *Fundamental Principles* should inform many of our decisions as lawyers. The *Fundamental Principles* do not, however, alter any of the obligations expressly set forth in the Rules of Professional Conduct, nor are they intended to affect in any way the manner in which the Rules are to be interpreted or applied.

PREAMBLE AND SCOPE

PREAMBLE: A LAWYER'S RESPONSIBILITIES

[1] **[Washington revision]** A lawyer, as a member of the legal profession, is a representative of clients, an officer of the ~~legal system~~ court and a public citizen having special responsibility for the quality of justice.

[2] **[Washington revision]** As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer conscientiously and ardently asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealings with others. As an evaluator, a lawyer acts by examining a client's legal affairs and reporting about them to the client or to others.

[3] In addition to these representational functions, a lawyer may serve as a third-party neutral, a nonrepresentational role helping the parties to resolve a dispute or other matter. Some of these Rules apply directly to lawyers who are or have served as third-party neutrals. See, e.g., Rules 1.12 and 2.4. In addition, there are Rules that apply to lawyers who are not active in the practice of law or to practicing lawyers even when they are acting in a nonprofessional capacity. For example, a lawyer who commits fraud in the conduct of a

business is subject to discipline for engaging in conduct involving dishonesty, fraud, deceit or misrepresentation. See Rule 8.4.

[4] **[Washington revision]** In all professional functions a lawyer should be competent, prompt and diligent. A lawyer should maintain communication with a client concerning the representation. A lawyer should keep in confidence information relating to representation of a client except so far as disclosure is required or permitted by the Rules of Professional Conduct.

[5] A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs. A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process.

[6] As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education. In addition, a lawyer should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority. A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance. Therefore, all lawyers should devote professional time and resources and use civic influence to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest.

[7] Many of a lawyer's professional responsibilities are prescribed in the Rules of Professional Conduct, as well as substantive and procedural law. However, a lawyer is also guided by personal conscience and the approbation of professional peers. A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession and to exemplify the legal profession's ideals of public service.

[8] **[Washington revision]** A lawyer's responsibilities as a representative of clients, an officer of the legal system and a public citizen are usually harmonious. Thus, when an opposing party is well represented, a lawyer can be a conscientious and ardent advocate on behalf of a client and at the same time assume that justice is being done. So also, a lawyer can be sure that preserving client confidences ordinarily serves the public interest because people are more likely to seek legal advice, and thereby heed their legal obligations, when they know their communications will be private.

[9] **[Washington revision]** In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living. The Rules of Professional Conduct often prescribe terms for resolving such conflicts. Within the framework of these Rules, however, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules. These principles include the lawyer's obligation conscientiously and ardently to protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system.

[10] The legal profession is largely self-governing. Although other professions also have been granted powers of self-government, the legal profession is unique in this respect because of the close relationship between the profession and the processes of government and law enforcement. This connection is manifested in the fact that ultimate authority over the legal profession is vested largely in the courts.

[11] To the extent that lawyers meet the obligations of their professional calling, the occasion for government regulation is obviated. Self-regulation also helps maintain the legal profession's independence from government domination. An independent legal profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice.

[12] The legal profession's relative autonomy carries with it special responsibilities of self-government. The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar. Every lawyer is responsible for observance of the Rules of Professional Conduct. A lawyer should also aid in securing their observance by other lawyers. Neglect of these responsibilities compromises the independence of the profession and the public interest which it serves.

[13] Lawyers play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship to our legal system. The Rules of Professional Conduct, when properly applied, serve to define that relationship.

~~PRELIMINARY STATEMENT~~ SCOPE

~~The Rules of Professional Conduct are mandatory in character. The rules state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action. Within the framework of fair trial, the rules should be uniformly applied to all lawyers, regardless of the nature of their professional activities. The rules make no attempt to prescribe either disciplinary procedures or penalties for violation of a rule, nor do they undertake to define standards for civil liability of lawyers for professional conduct. The severity of judgment against one found guilty of violating a rule should be determined by the character of the offense and the attendant circumstances.~~

[14] The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the pur-

poses of legal representation and of the law itself. Some of the Rules are imperatives, cast in the terms "shall" or "shall not." These define proper conduct for purposes of professional discipline. Others, generally cast in the term "may," are permissive and define areas under the Rules in which the lawyer has discretion to exercise professional judgment. No disciplinary action should be taken when the lawyer chooses not to act or acts within the bounds of such discretion. Other Rules define the nature of relationships between the lawyer and others. The Rules are thus partly obligatory and disciplinary and partly constitutive and descriptive in that they define a lawyer's professional role. Many of the Comments use the term "should." Comments do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules.

[15] The Rules presuppose a larger legal context shaping the lawyer's role. That context includes court rules and statutes relating to matters of licensure, laws defining specific obligations of lawyers and substantive and procedural law in general. The Comments are sometimes used to alert lawyers to their responsibilities under such other law.

[16] Compliance with the Rules, as with all law in an open society, depends primarily upon understanding and voluntary compliance, secondarily upon reinforcement by peer and public opinion and finally, when necessary, upon enforcement through disciplinary proceedings. The Rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. The Rules simply provide a framework for the ethical practice of law.

[17] **[Washington revision]** For purposes of determining the lawyer's authority and responsibility, principles of substantive law external to these Rules determine whether a client-lawyer relationship exists. Most of the duties flowing from the client-lawyer relationship attach only after the client-lawyer relationship is formed. But there are some duties, such as that of confidentiality under Rule 1.6, that may attach when the lawyer agrees to consider whether a client-lawyer relationship shall be established. See Rule 1.18 and Washington Comment [11] thereto. Whether a client-lawyer relationship exists for any specific purpose can depend on the circumstances and is a question of fact.

[18] Under various legal provisions, including constitutional, statutory and common law, the responsibilities of government lawyers may include authority concerning legal matters that ordinarily reposes in the client in private client-lawyer relationships. For example, a lawyer for a government agency may have authority on behalf of the government to decide upon settlement or whether to appeal from an adverse judgment. Such authority in various respects is generally vested in the attorney general and the state's attorney in state government, and their federal counterparts, and the same may be true of other government law officers. Also, lawyers under the supervision of these officers may be authorized to represent several government agencies in intragovernmental legal controversies in circumstances where a private lawyer could not represent multiple private clients. These Rules do not abrogate any such authority.

[19] Failure to comply with an obligation or prohibition imposed by a Rule is a basis for invoking the disciplinary process. The Rules presuppose that disciplinary assessment of a lawyer's conduct will be made on the basis of the facts and circumstances as they existed at the time of the conduct in question and in recognition of the fact that a lawyer often has to act upon uncertain or incomplete evidence of the situation. Moreover, the Rules presuppose that whether or not discipline should be imposed for a violation, and the severity of a sanction, depend on all the circumstances, such as the willfulness and seriousness of the violation, extenuating factors and whether there have been previous violations.

[20] Violation 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. In addition, violation of a Rule does not necessarily warrant any other nondisciplinary remedy, such as disqualification of a lawyer in pending litigation. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a Rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule. 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.

[21] The Comment accompanying each Rule explains and illustrates the meaning and purpose of the Rule. The Preamble and this note on Scope provide general orientation. The Comments are intended as guides to interpretation, but the text of each Rule is authoritative.

Additional Washington Comments (22 - 23)

[22] Nothing in these Rules is intended to change existing Washington law on the use of the Rules of Professional Conduct in a civil action. See *Hizey v. Carpenter*, 119 Wn.2d 251, 830 P.2d 646 (1992).

[23] The structure of these Rules generally parallels the structure of the American Bar Association's Model Rules of Professional Conduct. The exceptions to this approach are Rule 1.15A, which varies substantially from Model Rule 1.15, and Rules 1.15B and 5.8, neither of which is found in the Model Rules. In other cases, when a provision has been wholly deleted from the counterpart Model Rule, the deletion is signaled by the phrase "Reserved." When a provision has been added, it is generally appended at the end of the Rule or the paragraph in which the variation appears. Whenever the text of a Comment varies materially from the text of its counterpart Comment in the Model Rules, the alteration is signaled by the phrase "Washington revision." Comments that have no counterpart in the Model Rules are compiled at the end of each Comment section under the heading "Additional Washington Comment(s)" and are consecutively numbered. As used herein, the term "former Washington RPC" refers to Washington's Rules of Professional Conduct (adopted effective September 1, 1985, with amendments through September 1, 2003). The term "Model Rule(s)" refers to the 2004

Edition of the American Bar Association's Model Rules of Professional Conduct.

TITLE 1 ***CLIENT-LAWYER RELATIONSHIP***

RULE 1.0: TERMINOLOGY

(a) "Belief" or "believes" denotes that the person involved actually supposed the fact in question to be true. A person's belief may be inferred from circumstances.

~~"Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to 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 be likely to be detrimental to the client.~~

~~"Consents in writing" or "written consent" means either (a) a written consent executed by a client, or (b) oral consent given by a client which the lawyer confirms in writing in a manner which can be easily understood by the client and which is promptly transmitted to the client.~~

~~"Consult" or "Consultation" denotes commun-ication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question.~~

(b) "Confirmed in writing," when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. See paragraph (e) for the definition of "informed consent." If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.

(c) "Firm" or "law firm" denotes a lawyer or lawyers in a ~~private~~ law ~~firm~~ partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization ~~and lawyers employed in a legal services organization~~.

(d) "Fraud" or "fraudulent" denotes conduct ~~having~~ that has a purpose to deceive and is fraudulent under the substantive or procedural law of the applicable jurisdiction, except that it is not ~~merely negligent~~ necessary that anyone has suffered damages or relied on the misrepresentation or failure to ~~apprise another of relevant information~~ inform.

(e) "Informed 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.

(f) "Knowingly," "known," or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

(g) "Partner" denotes a member of a partnership, ~~and~~ a shareholder in a law firm organized as a professional corporation, or a member of an association authorized to practice law.

(h) "Reasonable" or "reasonably" when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.

(i) "Reasonable belief" or "reasonably believes" when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.

(j) "Reasonably should know" when used in reference to a lawyer denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.

~~"Secret" see "Confidence"~~

(k) "Screened" denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law.

(l) "Substantial" when used in reference to degree or extent denotes a material matter of clear and weighty importance.

(m) "Tribunal" denotes a court, an arbitrator in a binding arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party's interests in a particular matter.

(n) "Writing" or "written" denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or videorecording and e-mail. 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.

Comment

Confirmed in Writing

[1] If it is not feasible to obtain or transmit a written confirmation at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. If a lawyer has obtained a client's informed consent, the lawyer may act in reliance on that consent so long as it is confirmed in writing within a reasonable time thereafter.

~~Also see~~ See also Washington Comment [11].

Firm

[2] 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.

[3] **[Washington revision]** With respect to the law department of an organization, there is ordinarily no question that the members of the department constitute a firm within the meaning of the Rules of Professional Conduct. There can be uncertainty, however, as to the identity of the client. For example, it may not be clear whether the law department of a corporation represents a subsidiary or an affiliated corporation, as well as the corporation by which the members of the department are directly employed. A similar question can arise concerning an unincorporated association and its local affiliates.

[4] Similar questions can also arise with respect to lawyers in legal aid and legal services organizations. Depending upon the structure of the organization, the entire organization or different components of it may constitute a firm or firms for purposes of these Rules.

~~Also see~~ See also Washington Comment [12].

Fraud

[5] When used in these Rules, the terms "fraud" or "fraudulent" refer to conduct that is characterized as such under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive. This does not include merely negligent misrepresentation or negligent failure to apprise another of relevant information. For purposes of these Rules, it is not necessary that anyone has suffered damages or relied on the misrepresentation or failure to inform.

~~Also see~~ See also Washington Comment [13].

Informed Consent

[6] Many of the Rules of Professional Conduct require the lawyer to obtain the informed consent of a client or other person (e.g., a former client or, under certain circumstances, a prospective client) before accepting or continuing representation or pursuing a course of conduct. See, e.g., Rules 1.2(c), 1.6(a) and 1.7(b). 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. In some circumstances it may be appropriate for a lawyer to advise a client or other person to seek the advice of other counsel. A lawyer need not inform a client or other person of facts or implications already known to the client or other person; nevertheless, 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 determining whether the information and explanation provided are reasonably adequate, relevant factors include whether the client or other person is experienced in legal matters generally and in making decisions of the type involved, and whether the client or other person is independently represented by other counsel in giving the consent. Normally, such persons need less information and explanation than others, and generally a client or other person who is independently represented by other counsel in giving the consent should be assumed to have given informed consent.

[7] **[Washington revision]** Obtaining informed consent will usually require an affirmative response by the client or other person. In general, a lawyer may not assume consent from a client's or other person's silence. Consent may be inferred, however, from the conduct of a client or other person who has reasonably adequate information about the matter. A number of Rules require that a person's consent be confirmed in writing. See Rules 1.7(b) and 1.9(a). For a definition of "writing" and "confirmed in writing," see paragraphs (n) and (b). Rule 1.8(a) requires that a client's consent be obtained in a writing signed by the client. See also Rule 1.5 (c)(1) (requiring that a contingent fee agreement be "in a writing signed by the client"). For a definition of "signed," see paragraph (n).

~~Also see~~ See also Washington Comment [14].

Screened

[8] **[Washington revision]** This definition applies to situations where screening of a personally disqualified lawyer is permitted to remove imputation of a conflict of interest under Rules 1.10, 1.11, 1.12, 1.18, or 6.5.

[9] The purpose of screening is to assure the affected parties that confidential information known by the personally disqualified lawyer remains protected. The personally disqualified lawyer should acknowledge the obligation not to communicate with any of the other lawyers in the firm with respect to the matter. Similarly, other lawyers in the firm who are working on the matter should be informed that the screening is in place and that they may not communicate with the personally disqualified lawyer with respect to the matter. Additional screening measures that are appropriate for the particular matter will depend on the circumstances. To implement, reinforce and remind all affected lawyers of the presence of the screening, it may be appropriate for the firm to undertake such procedures as a written undertaking by the screened lawyer to avoid any communication with other firm personnel and any contact with any firm files or other materials relating to the matter, written notice and instructions to all other firm personnel forbidding any communication with the screened lawyer relating to the matter, denial of access by the screened lawyer to firm files or other materials relating to the matter and periodic reminders of the screen to the screened lawyer and all other firm personnel.

[10] In order to be effective, screening measures must be implemented as soon as practical after a lawyer or law firm knows or reasonably should know that there is a need for screening.

~~Also see~~ See also Washington Comment [15].

Additional Washington Comments (11 - 16)

Confirmed in Writing

[11] Informed consent requires that the writing be articulated in a manner that can be easily understood by the client.

Firm

[12] Although the definition of "firm" or "law firm" in Rule 1.0(c) differs from the definition set forth in the Terminology section of Washington's former Rules of Professional Conduct, there is no intent to change the scope of the definition or to alter existing Washington law on the application of the Rules of Professional Conduct to lawyers in a government office.

Fraud

[13] Model Rule 1.0(d) was modified to clarify that the terms "fraud" and "fraudulent" in the Rules of Professional Conduct do not include an element of damage or reliance.

Informed Consent

[14] In order for the communication to the client to be adequate it must be accomplished in a manner that can be easily understood by the client.

Screened

[15] See Rules 1.10 and 6.5 for specific screening requirements under the circumstances covered by those Rules.

Other

[16] For the scope of the phrase "information relating to the representation of a client," which is not defined in Rule 1.0, see Comment [19] to Rule 1.6.

RULE 1.1: COMPETENCE

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Comment

Legal Knowledge and Skill

[1] In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.

[2] A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.

[3] In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation or association with another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances, for ill-considered action under emergency conditions can jeopardize the client's interest.

[4] A lawyer may accept representation where the requisite level of competence can be achieved by reasonable preparation. This applies as well to a lawyer who is appointed as counsel for an unrepresented person. See also Rule 6.2.

Thoroughness and Preparation

[5] Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity and consequence. An agreement between the lawyer and the client regarding the scope of the representation may limit the matters for which the lawyer is responsible. See Rule 1.2(c).

Maintaining Competence

[6] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

RULE 1.2: SCOPE OF REPRESENTATION AND ALLOCATION OF AUTHORITY BETWEEN CLIENT AND LAWYER

(a) ~~A~~ Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, ~~subject to sections (c), (d) and (e), and~~ as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to ~~accept an offer of settlement of~~ settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client ~~consents after consultation~~ gives informed consent. ~~An~~

~~agreement limiting the scope of a representation shall consider the applicability of rule 4.2 to the representation.~~

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

~~(e) When a lawyer knows that a client expects assistance not permitted by the Rules of Professional Conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer's conduct.~~

~~(f) A lawyer shall not willfully purport to act as a lawyer for any person without the authority of that person.~~

Comment

Allocation of Authority between Client and Lawyer

[1] Paragraph (a) confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. The decisions specified in paragraph (a), such as whether to settle a civil matter, must also be made by the client. See Rule 1.4 (a)(1) for the lawyer's duty to communicate with the client about such decisions. With respect to the means by which the client's objectives are to be pursued, the lawyer shall consult with the client as required by Rule 1.4 (a)(2) and may take such action as is impliedly authorized to carry out the representation.

[2] On occasion, however, a lawyer and a client may disagree about the means to be used to accomplish the client's objectives. Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters. Conversely, lawyers usually defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. Because of the varied nature of the matters about which a lawyer and client might disagree and because the actions in question may implicate the interests of a tribunal or other persons, this Rule does not prescribe how such disagreements are to be resolved. Other law, however, may be applicable and should be consulted by the lawyer. The lawyer should also consult with the client and seek a mutually acceptable resolution of the disagreement. If such efforts are unavailing and the lawyer has a fundamental disagreement with the client, the lawyer may withdraw from the representation. See Rule 1.16 (b)(4). Conversely, the client may resolve the disagreement by discharging the lawyer. See Rule 1.16 (a)(3).

[3] At the outset of a representation, the client may authorize the lawyer to take specific action on the client's behalf without further consultation. Absent a material change in circumstances and subject to Rule 1.4, a lawyer may rely on such an advance authorization. The client may, however, revoke such authority at any time.

[4] In a case in which the client appears to be suffering diminished capacity, the lawyer's duty to abide by the client's decisions is to be guided by reference to Rule 1.14.

Independence from Client's Views or Activities

[5] Legal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial or the subject of popular disapproval. By the same token, representing a client does not constitute approval of the client's views or activities.

Agreements Limiting Scope of Representation

[6] The scope of services to be provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client. When a lawyer has been retained by an insurer to represent an insured, for example, the representation may be limited to matters related to the insurance coverage. A limited representation may be appropriate because the client has limited objectives for the representation. In addition, the terms upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the client's objectives. Such limitations may exclude actions that the client thinks are too costly or that the lawyer regards as repugnant or imprudent.

[7] Although this Rule affords the lawyer and client substantial latitude to limit the representation, the limitation must be reasonable under the circumstances. If, for example, a client's objective is limited to securing general information about the law the client needs in order to handle a common and typically uncomplicated legal problem, the lawyer and client may agree that the lawyer's services will be limited to a brief telephone consultation. Such a limitation, however, would not be reasonable if the time allotted was not sufficient to yield advice upon which the client could rely. Although an agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. See Rule 1.1.

[8] All agreements concerning a lawyer's representation of a client must accord with the Rules of Professional Conduct and other law. See, e.g., Rules 1.1, 1.8 and 5.6.

~~Also see~~ See also Washington Comment [14].

Criminal, Fraudulent and Prohibited Transactions

[9] Paragraph (d) prohibits a lawyer from knowingly counseling or assisting a client to commit a crime or fraud. This prohibition, however, does not preclude the lawyer from giving an honest opinion about the actual consequences that appear likely to result from a client's conduct. Nor does the fact that a client uses advice in a course of action that is criminal or fraudulent of itself make a lawyer a party to the course of action. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.

[10] When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is required to avoid assisting the client, for example, by drafting or delivering documents that the lawyer knows are fraudulent or by suggesting how the wrongdoing might be concealed. A lawyer may not continue

assisting a client in conduct that the lawyer originally supposed was legally proper but then discovers is criminal or fraudulent. The lawyer must, therefore, withdraw from the representation of the client in the matter. See Rule 1.16(a). In some cases, withdrawal alone might be insufficient. It may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation or the like. See Rule 4.1.

[11] Where the client is a fiduciary, the lawyer may be charged with special obligations in dealings with a beneficiary.

[12] Paragraph (d) applies whether or not the defrauded party is a party to the transaction. Hence, a lawyer must not participate in a transaction to effectuate criminal or fraudulent avoidance of tax liability. Paragraph (d) does not preclude undertaking a criminal defense incident to a general retainer for legal services to a lawful enterprise. The last clause of paragraph (d) recognizes that determining the validity or interpretation of a statute or regulation may require a course of action involving disobedience of the statute or regulation or of the interpretation placed upon it by governmental authorities.

[13] If a lawyer comes to know or reasonably should know that a client expects assistance not permitted by the Rules of Professional Conduct or other law or if the lawyer intends to act contrary to the client's instructions, the lawyer must consult with the client regarding the limitations on the lawyer's conduct. See Rule 1.4 (a)(5).

Additional Washington Comment (14)

Agreements Limiting Scope of Representation

[14] An agreement limiting the scope of a representation shall consider the applicability of Rule 4.2 to the representation. (The provisions of this Comment were taken from former Washington RPC 1.2(c).) See also Comment [11] to Rule 4.2 for specific considerations pertaining to contact with an otherwise represented person to whom limited representation is being or has been provided.

RULE 1.3: DILIGENCE

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

Comment

[1] **[Washington revision]** A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with ~~zeal~~ diligence in advocacy upon the client's behalf. A lawyer is not bound, however, to press for every advantage that might be realized for a client. For example, a lawyer may have authority to exercise professional discretion in determining the means by which a matter should be pursued. See Rule 1.2. The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.

[2] A lawyer's work load must be controlled so that each matter can be handled competently.

[3] Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness. A lawyer's duty to act with reasonable promptness, however, does not preclude the lawyer from agreeing to a reasonable request for a postponement that will not prejudice the lawyer's client.

[4] Unless the relationship is terminated as provided in Rule 1.16, a lawyer should carry through to conclusion all matters undertaken for a client. If a lawyer's employment is limited to a specific matter, the relationship terminates when the matter has been resolved. If a lawyer has served a client over a substantial period in a variety of matters, the client sometimes may assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice of withdrawal. Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so. For example, if a lawyer has handled a judicial or administrative proceeding that produced a result adverse to the client and the lawyer and the client have not agreed that the lawyer will handle the matter on appeal, the lawyer must consult with the client about the possibility of appeal before relinquishing responsibility for the matter. See Rule 1.4 (a)(2). Whether the lawyer is obligated to prosecute the appeal for the client depends on the scope of the representation the lawyer has agreed to provide to the client. See Rule 1.2.

[5] **[Reserved.]** ~~**[Washington revision]** To prevent neglect of client matters in the event of a sole practitioner's death or disability, the duty of diligence may require that each sole practitioner prepare a plan, in conformity with applicable rules, that designates another competent lawyer to review client files, notify each client of the lawyer's death or disability, and determine whether there is a need for immediate protective action. Cf. Rule for Enforcement of Lawyer Conduct 7.7 (authorizing appointment of a custodian to protect clients' interests in the event of a lawyer's death, disability, or disappearance).~~

RULE 1.4: COMMUNICATION

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep ~~a~~ the client reasonably informed about the status of ~~a~~ the matter; ~~and~~

(4) promptly comply with reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Comment

[1] Reasonable communication between the lawyer and the client is necessary for the client effectively to participate in the representation.

Communicating with Client

[2] If these Rules require that a particular decision about the representation be made by the client, paragraph (a)(1) requires that the lawyer promptly consult with and secure the client's consent prior to taking action unless prior discussions with the client have resolved what action the client wants the lawyer to take. For example, a lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case must promptly inform the client of its substance unless the client has previously indicated that the proposal will be acceptable or unacceptable or has authorized the lawyer to accept or to reject the offer. See Rule 1.2(a).

[3] Paragraph (a)(2) requires the lawyer to reasonably consult with the client about the means to be used to accomplish the client's objectives. In some situations - depending on both the importance of the action under consideration and the feasibility of consulting with the client - this duty will require consultation prior to taking action. In other circumstances, such as during a trial when an immediate decision must be made, the exigency of the situation may require the lawyer to act without prior consultation. In such cases the lawyer must nonetheless act reasonably to inform the client of actions the lawyer has taken on the client's behalf. Additionally, paragraph (a)(3) requires that the lawyer keep the client reasonably informed about the status of the matter, such as significant developments affecting the timing or the substance of the representation.

[4] A lawyer's regular communication with clients will minimize the occasions on which a client will need to request information concerning the representation. When a client makes a reasonable request for information, however, paragraph (a)(4) requires prompt compliance with the request, or if a prompt response is not feasible, that the lawyer, or a member of the lawyer's staff, acknowledge receipt of the request and advise the client when a response may be expected. Client telephone calls should be promptly returned or acknowledged.

Explaining Matters

[5] The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. Adequacy of communication depends in part on the kind of advice or assistance that is involved. For example, when there is time to explain a proposal made in a negotiation, the lawyer should review all important provisions with the client before proceeding to an agreement. In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that are likely to result in significant expense or to injure or coerce others. On the other hand, a lawyer ordinarily will not be expected to describe trial or negotiation strategy in detail. The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation. In certain circumstances, such as when a lawyer asks a client to consent to a representation affected by a conflict of interest, the client must give informed consent, as defined in Rule 1.0(e).

[6] Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impracticable, for example, where the client is a child or suffers from diminished capacity. See Rule 1.14. When the client is an organization or group, it is often impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily, the lawyer should address communications to the appropriate officials of the organization. See Rule 1.13. Where many routine matters are involved, a system of limited or occasional reporting may be arranged with the client.

Withholding Information

[7] In some circumstances, a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication. Thus, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. A lawyer may not withhold information to serve the lawyer's own interest or convenience or the interests or convenience of another person. Rules or court orders governing litigation may provide that information supplied to a lawyer may not be disclosed to the client. Rule 3.4(c) directs compliance with such rules or orders.

RULE 1.5: FEES

(a) A lawyer's fee shall be reasonable not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:

(1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly and the terms of the fee agreement between the lawyer and client;

(2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) The fee customarily charged in the locality for similar legal services;

(4) The amount involved in the matter on which legal services are rendered and the results obtained;

(5) The time limitations imposed by the client or by the circumstances;

(6) ~~T~~the nature and length of the professional relationship with the client;

(7) ~~T~~the experience, reputation, and ability of the lawyer or lawyers performing the services; ~~and~~

(8) whether the fee is fixed or contingent; and

(9) the terms of the fee agreement between the lawyer and the client, including ~~W~~whether the fee agreement or confirming writing demonstrates that the client had received a reasonable and fair disclosure of material elements of the fee agreement and of the lawyer's billing practices.

(b) ~~When the lawyer has not regularly represented the client, or if the fee agreement is substantially different than that previously used by the parties,~~ The scope of the representation and the basis or rate of the fee ~~or factors involved in determining the charges~~ and expenses for ~~legal services and the lawyer's billing practices~~ which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client. Upon the request of the client in any matter, the lawyer shall communicate to the client in writing the basis or rate of the fee.

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by ~~section~~ paragraph (d) or other law. If a fee is contingent on the outcome of a matter, a lawyer shall comply with the following:

(1) A contingent fee agreement shall be in a writing ~~and~~ signed by the client;

(2) A contingent fee agreement shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal~~,~~; litigation and other expenses to be deducted from the recovery~~,~~; and whether such expenses are to be deducted before or after the contingent fee is calculated. The agreement must clearly notify the client of any expenses for which the client will be liable, whether or not the client is the prevailing party;

(3) Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination~~.~~; and

(~~2~~4) A contingent fee consisting of a percentage of the monetary amount recovered for a claimant, in which all or part of the recovery is to be paid in the future, shall be paid only

(i) by applying the percentage to the amounts recovered as they are received by the client; or

(ii) by applying the percentage to the actual cost of the settlement or award to the defendant.

(d) A lawyer shall not enter into an arrangement for, charge, or collect:

(1) ~~A~~any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a dissolution or annulment of marriage or upon the amount of maintenance or support, or property settlement in lieu thereof ~~(except in post dissolution proceedings)~~; or

(2) ~~A~~a contingent fee for representing a defendant in a criminal case.

(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; or

(2) ~~T~~the division is between the lawyer and a duly authorized lawyer referral service of either the Washington State Bar Association or of one of the county bar associations of this state~~; or~~.

~~(2) The division is in proportion to the services provided by each lawyer or, by written agreement with the client, each lawyer assumes joint responsibility for the representation; the client is advised of and does not object to the participation of all the lawyers involved; and the total fee is reasonable.~~

Comment

Reasonableness of Fee and Expenses

[1] Paragraph (a) requires that lawyers charge fees that are reasonable under the circumstances. The factors specified in (1) through (9) are not exclusive. Nor will each factor be relevant in each instance. Paragraph (a) also requires that expenses for which the client will be charged must be reasonable. A lawyer may seek reimbursement for the cost of services performed in-house, such as copying, or for other expenses incurred in-house, such as telephone charges, either by charging a reasonable amount to which the client has agreed in advance or by charging an amount that reasonably reflects the cost incurred by the lawyer.

~~Also see~~ See also Washington Comment [10] and [11].

Basis or Rate of Fee

[2] When the lawyer has regularly represented a client, they ordinarily will have evolved an understanding concerning the basis or rate of the fee and the expenses for which the client will be responsible. In a new client-lawyer relationship, however, an understanding as to fees and expenses must be promptly established. Generally, it is desirable to furnish the client with at least a simple memorandum or copy of the lawyer's customary fee arrangements that states the general nature of the legal services to be provided, the basis, rate or total amount of the fee and whether and to what extent the client will be responsible for any costs, expenses or disbursements in the course of the representation. A written statement concerning the terms of the engagement reduces the possibility of misunderstanding.

[3] [**~~Washington revision~~** Reserved in part.] Contingent fees, like any other fees, are subject to the reasonableness standard of paragraph (a) of this Rule. In determining whether a particular contingent fee is reasonable, or whether it is reasonable to charge any form of contingent fee, a lawyer must consider the factors that are relevant under the circumstances. ~~Applicable law may impose limitations on contingent fees, such as a ceiling on the percentage allowable, or may require a lawyer to offer clients an alternative basis for~~

~~the fee. Applicable law also may apply to situations other than a contingent fee, for example, government regulations regarding fees in certain tax matters. See, e.g., RCW 4.24.005.~~

Terms of Payment

[4] A lawyer may require advance payment of a fee, but is obliged to return any unearned portion. See Rule 1.16(d). A lawyer may accept property in payment for services, such as an ownership interest in an enterprise, providing this does not involve acquisition of a proprietary interest in the cause of action or subject matter of the litigation contrary to Rule 1.8 (i). However, a fee paid in property instead of money may be subject to the requirements of Rule 1.8(a) because such fees often have the essential qualities of a business transaction with the client.

[5] An agreement may not be made whose terms might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interest. For example, a lawyer should not enter into an agreement whereby services are to be provided only up to a stated amount when it is foreseeable that more extensive services probably will be required, unless the situation is adequately explained to the client. Otherwise, the client might have to bargain for further assistance in the midst of a proceeding or transaction. However, it is proper to define the extent of services in light of the client's ability to pay. A lawyer should not exploit a fee arrangement based primarily on hourly charges by using wasteful procedures.

Prohibited Contingent Fees

[6] **[Washington revision]** Paragraph (d) prohibits a lawyer from charging a contingent fee in a domestic relations matter when payment is contingent upon the securing of a dissolution or annulment of marriage or upon the amount of maintenance or support or property settlement to be obtained. This provision does not preclude a contract for a contingent fee for legal representation in connection with the recovery of post-judgment balances due under support, maintenance or other financial orders because such contracts do not implicate the same policy concerns.

Division of Fee

[7] A division of fee is a single billing to a client covering the fee of two or more lawyers who are not in the same firm. A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well, and most often is used when the fee is contingent and the division is between a referring lawyer and a trial specialist. Paragraph (e) permits the lawyers to divide a fee either on the basis of the proportion of services they render or if each lawyer assumes responsibility for the representation as a whole. In addition, the client must agree to the arrangement, including the share that each lawyer is to receive, and the agreement must be confirmed in writing. Contingent fee agreements must be in a writing signed by the client and must otherwise comply with paragraph (c) of this Rule. Joint responsibility for the representation entails financial and ethical responsibility for the representation as if the lawyers were associated in a partnership. A lawyer should only refer a matter to a lawyer whom the referring lawyer reasonably believes is competent to handle the matter. See Rule 1.1.

[8] Paragraph (e) does not prohibit or regulate division of fees to be received in the future for work done when lawyers were previously associated in a law firm.

Disputes over Fees

[9] If a procedure has been established for resolution of fee disputes, such as an arbitration or mediation procedure established by the bar, the lawyer must comply with the procedure when it is mandatory, and, even when it is voluntary, the lawyer should conscientiously consider submitting to it. Law may prescribe a procedure for determining a lawyer's fee, for example, in representation of an executor or administrator, a class or a person entitled to a reasonable fee as part of the measure of damages. The lawyer entitled to such a fee and a lawyer representing another party concerned with the fee should comply with the prescribed procedure.

Additional Washington Comments (10 - 11)

Reasonableness of Fee and Expenses

[10] Every fee agreed to, charged, or collected, including a fee denominated as "nonrefundable" or "earned upon receipt," is subject to Rule 1.5(a) and may not be unreasonable.

[11] Under paragraph (a)(9), one factor in determining whether a fee is reasonable is whether the fee agreement or confirming writing demonstrates that the client received a reasonable and fair disclosure of material elements of the fee agreement. Lawyers are encouraged to use written fee agreements that fully and fairly disclose all material terms in a manner easily understood by the client.

RULE 1.6: CONFIDENTIALITY OF INFORMATION

(a) A lawyer shall not reveal ~~confidences or secrets~~ information relating to the representation of a client unless the client ~~consents after consultation~~ gives informed consent, ~~except for disclosures that are~~ the disclosure is impliedly authorized in order to carry out the representation~~, and except as stated in sections~~ or the disclosure is permitted by paragraph (b) ~~and (c)~~.

(b) A lawyer ~~may reveal such confidences or secrets information relating to the representation of a client~~ 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;

(~~1~~2) may reveal information relating to the representation of a client ~~T~~to prevent the client from committing a crime; ~~or~~

(3) ~~to prevent the client from committing a fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services; a~~ 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;

(4) may reveal information relating to the representation of a client to secure legal advice about the lawyer's compliance with these Rules;

(~~2~~5) may reveal information relating to the representation of a client ~~T~~to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; ~~or pursuant to~~

(6) may reveal information relating to the representation of a client to comply with a court order~~.~~; or

(~~e~~7) may reveal information relating to the representation of a client ~~A lawyer may reveal~~ to ~~the~~ inform a tribunal ~~confidences or secrets which disclose~~ about any client's breach of fiduciary responsibility ~~by~~ when ~~a~~ the client ~~who~~ is serving as a court-appointed fiduciary such as a guardian, personal representative, or receiver~~, or other court appointed fiduciary~~.

Comment

~~Also see~~ See also Washington Comment [19].

[1] **[Washington revision]** This Rule governs the disclosure by a lawyer of information relating to the representation of a client ~~during the lawyer's representation of the client~~. See Rule 1.18 for the lawyer's duties with respect to information provided to the lawyer by a prospective client, Rule 1.9 (c)(2) for the lawyer's duty not to reveal information relating to the lawyer's prior representation of a former client and Rules 1.8(b) and 1.9 (c)(1) for the lawyer's duties with respect to the use of such information to the disadvantage of clients and former clients.

[2] A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. See Rule 1.0(e) for the definition of informed consent. This contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

[3] The principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege, the work product doctrine and the rule of confidentiality established in professional ethics. The attorney-client privilege and work-product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law. See also Scope.

[4] Paragraph (a) prohibits a lawyer from revealing information relating to the representation of a client. This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person. A lawyer's use of a hypothetical to discuss issues relating to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.

Authorized Disclosure

[5] Except to the extent that the client's instructions or special circumstances limit that authority, a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation. In some situations, for example, a lawyer may be impliedly authorized to admit a fact that cannot properly be disputed or to make a disclosure that facilitates a satisfactory conclusion to a matter. Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

Disclosure Adverse to Client

[6] **[Washington revision]** Although the public interest is usually best served by a strict rule requiring lawyers to preserve the confidentiality of information relating to the representation of their clients, the confidentiality rule is subject to limited exceptions. Paragraph (b)(1) recognizes the overriding value of life and physical integrity and ~~permits~~ requires disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm. Such harm is reasonably certain to occur if it will be suffered imminently or if there is a present and substantial threat that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat. Thus, a lawyer who knows that a client has accidentally discharged toxic waste into a town's water supply ~~may~~ must reveal this information to the authorities if there is a present and substantial risk that a person who drinks the water will contract a life-threatening or debilitating disease and the lawyer's disclosure is necessary to eliminate the threat or reduce the number of victims.

[7] **[Reserved**. ~~See Washington Comments [20], & [21] & [22].~~**]**

[8] **[Reserved**. ~~See Washington Comments [20], & [21] & [22].~~**]**

[9] A lawyer's confidentiality obligations do not preclude a lawyer from securing confidential legal advice about the lawyer's personal responsibility to comply with these Rules. In most situations, disclosing information to secure such advice will be impliedly authorized for the lawyer to carry out the representation. Even when the disclosure is not impliedly authorized, paragraph (b)(4) permits such disclo-

sure because of the importance of a lawyer's compliance with the Rules of Professional Conduct.

[10] Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. Such a charge can arise in a civil, criminal, disciplinary or other proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person, for example, a person claiming to have been defrauded by the lawyer and client acting together. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (b)(5) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend also applies, of course, where a proceeding has been commenced.

[11] A lawyer entitled to a fee is permitted by paragraph (b)(5) to prove the services rendered in an action to collect it. This aspect of the Rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary.

[12] **[Reserved.]**

[13] **[Washington revision]** A lawyer may be ordered to reveal information relating to the representation of a client by a court. Absent informed consent of the client to do otherwise, the lawyer should assert on behalf of the client all nonfrivolous claims that the information sought is protected against disclosure by the attorney-client privilege or other applicable law. In the event of an adverse ruling, the lawyer must consult with the client about the possibility of appeal to the extent required by Rule 1.4. Unless review is sought, however, paragraph (b)(6) permits the lawyer to comply with the court's order.

~~Also see~~ See also Washington Comment [24].

[14] Paragraph (b) permits disclosure only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified. Where practicable, the lawyer should first seek to persuade the client to take suitable action to obviate the need for disclosure. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose. If the disclosure will be made in connection with a judicial proceeding, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

[15] **[Washington revision]** ~~Paragraph (b) permits but does~~ Paragraphs (b)(2) through (b)(7) permit but do not require the disclosure of information relating to a client's representation to accomplish the purposes specified in ~~(b)(1) through (b)(7)~~ those paragraphs. In exercising the discretion conferred by ~~this Rule~~ those paragraphs, the lawyer may consider such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction and factors that may extenuate the conduct in question. A lawyer's decision not to disclose as permitted by paragraph (b) does not violate this Rule. Disclosure may be required, however, by other Rules. Some Rules require disclosure only if such disclosure would be permitted by paragraph (b). See Rules 1.2(d), 3.3, 4.1(b), and 8.1. ~~Rule 3.3, on the other hand, requires disclosure in some circumstances regardless of whether such disclosure is permitted by this Rule.~~ See also Rule 1.13(c), which permits disclosure in some circumstances whether or not Rule 1.6 permits the disclosure.

~~Also see~~ See also Washington Comment [23].

Acting Competently to Preserve Confidentiality

[16] A lawyer must act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3.

[17] When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule.

Former Client

[18] The duty of confidentiality continues after the client-lawyer relationship has terminated. See Rule 1.9 (c)(2). See Rule 1.9 (c)(1) for the prohibition against using such information to the disadvantage of the former client.

Additional Washington Comments (19 - ~~25~~ 26)

[19] The phrase "information relating to the representation" should be interpreted broadly. The "information" protected by this Rule includes, but is not necessarily limited to, confidences and secrets. "Confidence" refers to information protected by the attorney client privilege under applicable law, and "secret" refers to 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 be likely to be detrimental to the client.

Disclosure Adverse to Client

[20] Washington's Rule 1.6 (b)(2), which authorizes disclosure to prevent a client from committing a crime, is significantly broader than the corresponding exception in the Model Rule. While the Model Rule permits a lawyer to reveal information relating to the representation to prevent

the client from "committing a crime … that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used the lawyer's services," Washington's Rule permits the lawyer to reveal such information to prevent the commission of any crime.

[21] ~~Washington's Rule 1.6 (b)(3) is identical to Model Rule 1.6 (b)(2) with respect to disclosure of fraud. This is a limited exception that permits the lawyer to reveal information to the extent necessary to enable affected persons or appropriate authorities to prevent the client from committing a fraud, as defined in Rule 1.0(d), that is reasonably certain to result in substantial injury to the financial or property interests of another and in furtherance of which the client has used or is using the lawyer's services. Similarly, paragraph (b)(2) is a limited exception that permits the lawyer to reveal information to the extent necessary to enable affected persons or appropriate authorities to prevent the client from committing a crime. In both instances, such a serious abuse of the client-lawyer relationship by the client forfeits the protection of this Rule. The client can, of course, prevent such disclosure by refraining from the wrongful conduct. Although paragraphs (b)(2) and (b)(3) do not require the lawyer to reveal the client's misconduct, the lawyer may not counsel or assist the client in conduct the lawyer knows is criminal or fraudulent. See Rule 1.2(d). See also Rule 1.16 with respect to the lawyer's obligation or right to withdraw from the representation of the client in such circumstances, and Rule 1.13(c), which permits the lawyer to reveal information relating to the representation of an organizational client in limited circumstances~~ **[Reserved.]**

[22] ~~Washington has not adopted Model Rule 1.6 (b)(3), which permits a lawyer to reveal information relating to the representation not only to prevent but also to "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." If a crime or fraud is still ongoing, a lawyer is permitted to disclose under Rule 1.6 (b)(2) or (b)(3). Once the crime or fraud has been completed, there is less of an urgent need for disclosure. If the crime or fraud has been completed, the crime-fraud exception to the attorney-client privilege may permit the lawyer to reveal the information, but only pursuant to a court order. This approach strikes an appropriate balance between the public interest in acquiring significant information and the need for judicial supervision over lawyer decisions about whether such information should be revealed.~~ **[Reserved.]**

[23] The exceptions to the general rule prohibiting unauthorized disclosure of information relating to the representation "should not be carelessly invoked." *In re Boelter*, 139 Wn.2d 81, 91, 985 P.2d 328 (1999). A lawyer must make every effort practicable to avoid unnecessary disclosure of information relating to a representation, to limit disclosure to those having the need to know it, and to obtain protective orders or make other arrangements minimizing the risk of avoidable disclosure.

[24] Washington has not adopted that portion of Model Rule 1.6 (b)(6) permitting a lawyer to reveal information related to the representation to comply with "other law." Washington's omission of this phrase arises from a concern that it would authorize the lawyer to decide whether a disclosure is required by "other law," even though the right to confidentiality and the right to waive confidentiality belong to the client. The decision to waive confidentiality should only be made by a fully informed client after consultation with the client's lawyer or by a court of competent jurisdiction. Limiting the exception to compliance with a court order protects the client's interest in maintaining confidentiality while insuring that any determination about the legal necessity of revealing confidential information will be made by a court. It is the need for a judicial resolution of such issues that necessitates the omission of "other law" from this Rule.

Withdrawal

[25] After withdrawal the lawyer is required to refrain from disclosing the client's confidences, except as otherwise permitted by Rules 1.6 or 1.9. A lawyer is not prohibited from giving notice of the fact of withdrawal by this Rule, Rule 1.8(b), or Rule 1.9(c). If the lawyer's services will be used by the client in furthering a course of criminal or fraudulent conduct, the lawyer must withdraw. See Rule 1.16 (a)(1). Upon withdrawal from the representation in such circumstances, the lawyer may also disaffirm or withdraw any opinion, document, affirmation, or the like. If the client is an organization, the lawyer may be in doubt about whether contemplated conduct will actually be carried out by the organization. When a lawyer requires guidance about compliance with this Rule in connection with an organizational client, the lawyer may proceed under the provisions of Rule 1.13(b).

Other

[26] This Rule does not relieve a lawyer of his or her obligations under Rule 5.4(b) of the Rules for Enforcement of Lawyer Conduct.

RULE 1.7: CONFLICT OF INTEREST~~: GENERAL RULE~~; CURRENT CLIENTS

(a) ~~A~~ Except as provided in paragraph (b), a lawyer shall not represent a client if the representation ~~of that~~ involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client~~, unless:~~; or

~~(1) The lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and (2) Each client consents in writing after consultation and a full disclosure of the material facts (following authorization from the other client to make such a disclosure).~~

(~~b~~2) ~~A lawyer shall not represent a client if the representation of that client~~ there is a significant risk that the representation of one or more clients ~~may~~ will be materially limited by the lawyer's responsibilities to another client, a former client or ~~to~~ a third person~~,~~ or by a personal interest of the lawyer~~'s own interests, unless:~~.

~~(1) The lawyer reasonably believes the representation will not be adversely affected; and~~

~~(2) The client consents in writing after consultation and a full disclosure of the material facts (following authorization~~

~~from the other client to make such a disclosure). When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.~~

~~(c) For purposes of this rule, when a lawyer who is not a public officer or employee represents a discrete governmental agency or unit that is part of a broader governmental entity, the lawyer's client is the particular governmental agency or unit represented, and not the broader governmental entity of which the agency or unit is a part, unless:~~

~~(1) Otherwise provided in a written agreement between the lawyer and the governmental agency or unit; or~~

~~(2) The broader governmental entity gives the lawyer timely written notice to the contrary, in which case the client shall be designated by such entity. Notice under this subsection shall be given by the person designated by law as the chief legal officer of the broader governmental entity, or in absence of such designation, by the chief executive officer of the entity.~~

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing (following authorization from the other client to make any required disclosures).

Comment

General Principles

[1] Loyalty and independent judgment are essential elements in the lawyer's relationship to a client. Concurrent conflicts of interest can arise from the lawyer's responsibilities to another client, a former client or a third person or from the lawyer's own interests. For specific Rules regarding certain concurrent conflicts of interest, see Rule 1.8. For former client conflicts of interest, see Rule 1.9. For conflicts of interest involving prospective clients, see Rule 1.18. For definitions of "informed consent" and "confirmed in writing," see Rule 1.0 (e) and (b).

[2] Resolution of a conflict of interest problem under this Rule requires the lawyer to: 1) clearly identify the client or clients; 2) determine whether a conflict of interest exists; 3) decide whether the representation may be undertaken despite the existence of a conflict, i.e., whether the conflict is consentable; and 4) if so, consult with the clients affected under paragraph (a) and obtain their informed consent, confirmed in writing. The clients affected under paragraph (a) include both of the clients referred to in paragraph (a)(1) and the one or more clients whose representation might be materially limited under paragraph (a)(2).

[3] A conflict of interest may exist before representation is undertaken, in which event the representation must be declined, unless the lawyer obtains the informed consent of each client under the conditions of paragraph (b). To determine whether a conflict of interest exists, a lawyer should adopt reasonable procedures, appropriate for the size and type of firm and practice, to determine in both litigation and non-litigation matters the persons and issues involved. See also Comment to Rule 5.1. Ignorance caused by a failure to institute such procedures will not excuse a lawyer's violation of this Rule. As to whether a client-lawyer relationship exists or, having once been established, is continuing, see Comment to Rule 1.3 and Scope.

[4] If a conflict arises after representation has been undertaken, the lawyer ordinarily must withdraw from the representation, unless the lawyer has obtained the informed consent of the client under the conditions of paragraph (b). See Rule 1.16. Where more than one client is involved, whether the lawyer may continue to represent any of the clients is determined both by the lawyer's ability to comply with duties owed to the former client and by the lawyer's ability to represent adequately the remaining client or clients, given the lawyer's duties to the former client. See Rule 1.9. See also Comments [5] and [29].

[5] Unforeseeable developments, such as changes in corporate and other organizational affiliations or the addition or realignment of parties in litigation, might create conflicts in the midst of a representation, as when a company sued by the lawyer on behalf of one client is bought by another client represented by the lawyer in an unrelated matter. Depending on the circumstances, the lawyer may have the option to withdraw from one of the representations in order to avoid the conflict. The lawyer must seek court approval where necessary and take steps to minimize harm to the clients. See Rule 1.16. The lawyer must continue to protect the confidences of the client from whose representation the lawyer has withdrawn. See Rule 1.9(c).

~~Also see~~ See Also Washington Comment [36].

Identifying Conflicts of Interest: Directly Adverse

[6] Loyalty to a current client prohibits undertaking representation directly adverse to that client without that client's informed consent. Thus, absent consent, a lawyer may not act as an advocate in one matter against a person the lawyer represents in some other matter, even when the matters are wholly unrelated. The client as to whom the representation is directly adverse is likely to feel betrayed, and the resulting damage to the client-lawyer relationship is likely to impair the lawyer's ability to represent the client effectively. In addition, the client on whose behalf the adverse representation is undertaken reasonably may fear that the lawyer will pursue that client's case less effectively out of deference to the other client, i.e., that the representation may be materially limited by the lawyer's interest in retaining the current client. Similarly, a directly adverse conflict may arise when a lawyer is required to cross-examine a client who appears as a witness in a lawsuit involving another client, as when the testimony will be damaging to the client who is represented in the lawsuit. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only economically adverse, such as representation of competing economic enterprises in unrelated litigation, does not ordinarily constitute a

conflict of interest and thus may not require consent of the respective clients.

[7] Directly adverse conflicts can also arise in transactional matters. For example, if a lawyer is asked to represent the seller of a business in negotiations with a buyer represented by the lawyer, not in the same transaction but in another, unrelated matter, the lawyer could not undertake the representation without the informed consent of each client.

Identifying Conflicts of Interest: Material Limitation

[8] Even where there is no direct adverseness, a conflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests. For example, a lawyer asked to represent several individuals seeking to form a joint venture is likely to be materially limited in the lawyer's ability to recommend or advocate all possible positions that each might take because of the lawyer's duty of loyalty to the others. The conflict in effect forecloses alternatives that would otherwise be available to the client. The mere possibility of subsequent harm does not itself require disclosure and consent. The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.

~~Also see~~ See also Washington Comment [37].

Lawyer's Responsibilities to Former Clients and Other Third Persons

[9] In addition to conflicts with other current clients, a lawyer's duties of loyalty and independence may be materially limited by responsibilities to former clients under Rule 1.9 or by the lawyer's responsibilities to other persons, such as fiduciary duties arising from a lawyer's service as a trustee, executor or corporate director.

Personal Interest Conflicts

[10] The lawyer's own interests should not be permitted to have an adverse effect on representation of a client. For example, if the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice. Similarly, when a lawyer has discussions concerning possible employment with an opponent of the lawyer's client, or with a law firm representing the opponent, such discussions could materially limit the lawyer's representation of the client. In addition, a lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed financial interest. See Rule 1.8 for specific Rules pertaining to a number of personal interest conflicts, including business transactions with clients. See also Rule 1.10 (personal interest conflicts under Rule 1.7 ordinarily are not imputed to other lawyers in a law firm).

[11] **[Washington revision]** When lawyers representing different clients in the same matter or in substantially related matters are related as parent, child, sibling, or spouse, or if the lawyers have some other close familial relationship or if the lawyers are in a personal intimate relationship with one another, there may be a significant risk that client confidences will be revealed and that the lawyer's family or other familial or intimate relationship will interfere with both loyalty and independent professional judgment. See Rule 1.8(l). As a result, each client is entitled to know of the existence and implications of the relationship between the lawyers before the lawyer agrees to undertake the representation. Thus, a lawyer so related to another lawyer ordinarily may not represent a client in a matter where that lawyer is representing another party, unless each client gives informed consent. The disqualification arising from such relationships is personal and ordinarily is not imputed to members of firms with whom the lawyers are associated. See Rules 1.8(k) and 1.10.

[12] ~~A lawyer is prohibited from engaging in sexual relationships with a client unless the sexual relationship predates the formation of the client-lawyer relationship. See Rule 1.8(j).~~ **[Reserved.]**

Interest of Person Paying for a Lawyer's Service

[13] A lawyer may be paid from a source other than the client, including a co-client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty or independent judgment to the client. See Rule 1.8(f). If acceptance of the payment from any other source presents a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in accommodating the person paying the lawyer's fee or by the lawyer's responsibilities to a payer who is also a co-client, then the lawyer must comply with the requirements of paragraph (b) before accepting the representation, including determining whether the conflict is consentable and, if so, that the client has adequate information about the material risks of the representation.

Prohibited Representations

[14] Ordinarily, clients may consent to representation notwithstanding a conflict. However, as indicated in paragraph (b), some conflicts are nonconsentable, meaning that the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent. When the lawyer is representing more than one client, the question of consentability must be resolved as to each client.

[15] Consentability is typically determined by considering whether the interests of the clients will be adequately protected if the clients are permitted to give their informed consent to representation burdened by a conflict of interest. Thus, under paragraph (b)(1), representation is prohibited if in the circumstances the lawyer cannot reasonably conclude that the lawyer will be able to provide competent and diligent representation.

See Rule 1.1 (Competence) and Rule 1.3 (Diligence).

[16] **[Washington revision]** Paragraph (b)(2) describes conflicts that are nonconsentable because the representation is prohibited by applicable law. For example, in some states substantive law provides that the same lawyer may not represent more than one defendant in a capital case, even with the consent of the clients, and under federal criminal statutes cer-

tain representations by a former government lawyer are prohibited, despite the informed consent of the former client. In addition, decisional law in some states other than Washington limits the ability of a governmental client, such as a municipality, to consent to a conflict of interest. See Washington Comment [38].

[17] Paragraph (b)(3) describes conflicts that are nonconsentable because of the institutional interest in vigorous development of each client's position when the clients are aligned directly against each other in the same litigation or other proceeding before a tribunal. Whether clients are aligned directly against each other within the meaning of this paragraph requires examination of the context of the proceeding. Although this paragraph does not preclude a lawyer's multiple representation of adverse parties to a mediation (because mediation is not a proceeding before a "tribunal" under Rule 1.0(m)), such representation may be precluded by paragraph (b)(1).

~~Also see~~ See also Washington Comment [38].

Informed Consent

[18] Informed consent requires that each affected client be aware of the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could have adverse effects on the interests of that client. See Rule 1.0(e) (informed consent). The information required depends on the nature of the conflict and the nature of the risks involved. When representation of multiple clients in a single matter is undertaken, the information must include the implications of the common representation, including possible effects on loyalty, confidentiality and the attorney-client privilege and the advantages and risks involved. See Comments [30] and [31] (effect of common representation on confidentiality).

[19] Under some circumstances it may be impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent. In some cases the alternative to common representation can be that each party may have to obtain separate representation with the possibility of incurring additional costs. These costs, along with the benefits of securing separate representation, are factors that may be considered by the affected client in determining whether common representation is in the client's interests.

~~Also see~~ See also Washington Comment [39].

Consent Confirmed in Writing

[20] Paragraph (b) requires the lawyer to obtain the informed consent of the client, confirmed in writing. Such a writing may consist of a document executed by the client or one that the lawyer promptly records and transmits to the client following an oral consent. See Rule 1.0(b). See also Rule 1.0(n) (writing includes electronic transmission). If it is not feasible to obtain or transmit the writing at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. See Rule 1.0(b). The requirement of a writing does not supplant the need in most cases for the lawyer to talk with the client, to explain the risks and advantages, if any, of representation burdened with a conflict of interest, as well as reasonably available alternatives, and to afford the client a reasonable opportunity to consider the risks and alternatives and to raise questions and concerns. Rather, the writing is required in order to impress upon clients the seriousness of the decision the client is being asked to make and to avoid disputes or ambiguities that might later occur in the absence of a writing.

Revoking Consent

[21] A client who has given consent to a conflict may revoke the consent and, like any other client, may terminate the lawyer's representation at any time. Whether revoking consent to the client's own representation precludes the lawyer from continuing to represent other clients depends on the circumstances, including the nature of the conflict, whether the client revoked consent because of a material change in circumstances, the reasonable expectations of the other client and whether material detriment to the other clients or the lawyer would result.

Consent to Future Conflict

[22] ~~Whether a lawyer may properly request a client to waive conflicts that might arise in the future is subject to the test of paragraph (b). The effectiveness of such waivers is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails. The more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences of those representations, the greater the likelihood that the client will have the requisite understanding. Thus, if the client agrees to consent to a particular type of conflict with which the client is already familiar, then the consent ordinarily will be effective with regard to that type of conflict. If the consent is general and open-ended, then the consent ordinarily will be ineffective, because it is not reasonably likely that the client will have understood the material risks involved. On the other hand, if the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise, such consent is more likely to be effective, particularly if, e.g., the client is independently represented by other counsel in giving consent and the consent is limited to future conflicts unrelated to the subject of the representation. In any case, advance consent cannot be effective if the circumstances that materialize in the future are such as would make the conflict nonconsentable under paragraph (b).~~ **[Reserved.]**

Conflicts in Litigation

[23] Paragraph (b)(3) prohibits representation of opposing parties in the same litigation, regardless of the clients' consent. On the other hand, simultaneous representation of parties whose interests in litigation may conflict, such as coplaintiffs or codefendants, is governed by paragraph (a)(2). A conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question. Such conflicts can arise in criminal cases as well

as civil. The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one codefendant. On the other hand, common representation of persons having similar interests in civil litigation is proper if the requirements of paragraph (b) are met.

[24] Ordinarily a lawyer may take inconsistent legal positions in different tribunals at different times on behalf of different clients. The mere fact that advocating a legal position on behalf of one client might create precedent adverse to the interests of a client represented by the lawyer in an unrelated matter does not create a conflict of interest. A conflict of interest exists, however, if there is a significant risk that a lawyer's action on behalf of one client will materially limit the lawyer's effectiveness in representing another client in a different case; for example, when a decision favoring one client will create a precedent likely to seriously weaken the position taken on behalf of the other client. Factors relevant in determining whether the clients need to be advised of the risk include: where the cases are pending, whether the issue is substantive or procedural, the temporal relationship between the matters, the significance of the issue to the immediate and long-term interests of the clients involved and the clients' reasonable expectations in retaining the lawyer. If there is significant risk of material limitation, then absent informed consent of the affected clients, the lawyer must refuse one of the representations or withdraw from one or both matters.

[25] When a lawyer represents or seeks to represent a class of plaintiffs or defendants in a class-action lawsuit, unnamed members of the class are ordinarily not considered to be clients of the lawyer for purposes of applying paragraph (a)(1) of this Rule. Thus, the lawyer does not typically need to get the consent of such a person before representing a client suing the person in an unrelated matter. Similarly, a lawyer seeking to represent an opponent in a class action does not typically need the consent of an unnamed member of the class whom the lawyer represents in an unrelated matter.

Nonlitigation Conflicts

[26] Conflicts of interest under paragraphs (a)(1) and (a)(2) arise in contexts other than litigation. For a discussion of directly adverse conflicts in transactional matters, see Comment [7]. Relevant factors in determining whether there is significant potential for material limitation include the duration and intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that disagreements will arise and the likely prejudice to the client from the conflict. The question is often one of proximity and degree. See Comment [8].

[27] For example, conflict questions may arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may be present. In estate administration the identity of the client may be unclear under the law of a particular jurisdiction. Under one view, the client is the fiduciary; under another view the client is the estate or trust, including its beneficiaries. In order to comply with conflict of interest rules, the lawyer should make clear the lawyer's relationship to the parties involved.

[28] Whether a conflict is consentable depends on the circumstances. For example, a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference in interest among them. Thus, a lawyer may seek to establish or adjust a relationship between clients on an amicable and mutually advantageous basis; for example, in helping to organize a business in which two or more clients are entrepreneurs, working out the financial reorganization of an enterprise in which two or more clients have an interest or arranging a property distribution in settlement of an estate. The lawyer seeks to resolve potentially adverse interests by developing the parties' mutual interests. Otherwise, each party might have to obtain separate representation, with the possibility of incurring additional cost, complication or even litigation. Given these and other relevant factors, the clients may prefer that the lawyer act for all of them.

~~Also see~~ See also Washington Comment [40].

Special Considerations in Common Representation

[29] In considering whether to represent multiple clients in the same matter, a lawyer should be mindful that if the common representation fails because the potentially adverse interests cannot be reconciled, the result can be additional cost, embarrassment and recrimination. Ordinarily, the lawyer will be forced to withdraw from representing all of the clients if the common representation fails. In some situations, the risk of failure is so great that multiple representation is plainly impossible. For example, a lawyer cannot undertake common representation of clients where contentious litigation or negotiations between them are imminent or contemplated. Moreover, because the lawyer is required to be impartial between commonly represented clients, representation of multiple clients is improper when it is unlikely that impartiality can be maintained. Generally, if the relationship between the parties has already assumed antagonism, the possibility that the clients' interests can be adequately served by common representation is not very good. Other relevant factors are whether the lawyer subsequently will represent both parties on a continuing basis and whether the situation involves creating or terminating a relationship between the parties.

[30] A particularly important factor in determining the appropriateness of common representation is the effect on client-lawyer confidentiality and the attorney-client privilege. With regard to the attorney-client privilege, the prevailing rule is that, as between commonly represented clients, the privilege does not attach. Hence, it must be assumed that if litigation eventuates between the clients, the privilege will not protect any such communications, and the clients should be so advised.

[31] As to the duty of confidentiality, continued common representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation. This is so because the lawyer has an equal duty of loyalty to each client,

and each client has the right to be informed of anything bearing on the representation that might affect that client's interests and the right to expect that the lawyer will use that information to that client's benefit. See Rule 1.4. The lawyer should, at the outset of the common representation and as part of the process of obtaining each client's informed consent, advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other. In limited circumstances, it may be appropriate for the lawyer to proceed with the representation when the clients have agreed, after being properly informed, that the lawyer will keep certain information confidential. For example, the lawyer may reasonably conclude that failure to disclose one client's trade secrets to another client will not adversely affect representation involving a joint venture between the clients and agree to keep that information confidential with the informed consent of both clients.

[32] When seeking to establish or adjust a relationship between clients, the lawyer should make clear that the lawyer's role is not that of partisanship normally expected in other circumstances and, thus, that the clients may be required to assume greater responsibility for decisions than when each client is separately represented. Any limitations on the scope of the representation made necessary as a result of the common representation should be fully explained to the clients at the outset of the representation. See Rule 1.2(c).

[33] Subject to the above limitations, each client in the common representation has the right to loyal and diligent representation and the protection of Rule 1.9 concerning the obligations to a former client. The client also has the right to discharge the lawyer as stated in Rule 1.16.

~~Also see~~ See also Washington Comment [41].

Organizational Clients

[34] A lawyer who represents a corporation or other organization does not, by virtue of that representation, necessarily represent any constituent or affiliated organization, such as a parent or subsidiary. See Rule 1.13(a). Thus, the lawyer for an organization is not barred from accepting representation adverse to an affiliate in an unrelated matter, unless the circumstances are such that the affiliate should also be considered a client of the lawyer, there is an understanding between the lawyer and the organizational client that the lawyer will avoid representation adverse to the client's affiliates, or the lawyer's obligations to either the organizational client or the new client are likely to limit materially the lawyer's representation of the other client.

[35] A lawyer for a corporation or other organization who is also a member of its board of directors should determine whether the responsibilities of the two roles may conflict. The lawyer may be called on to advise the corporation in matters involving actions of the directors. Consideration should be given to the frequency with which such situations may arise, the potential intensity of the conflict, the effect of the lawyer's resignation from the board and the possibility of the corporation's obtaining legal advice from another lawyer in such situations. If there is material risk that the dual role will compromise the lawyer's independence of professional judgment, the lawyer should not serve as a director or should cease to act as the corporation's lawyer when conflicts of interest arise. The lawyer should advise the other members of the board that in some circumstances matters discussed at board meetings while the lawyer is present in the capacity of director might not be protected by the attorney-client privilege and that conflict of interest considerations might require the lawyer's recusal as a director or might require the lawyer and the lawyer's firm to decline representation of the corporation in a matter.

Additional Washington Comments (36 - 41)

General Principles

[36] Notwithstanding Comment [3], lawyers providing short-term limited legal services to a client under the auspices of a program sponsored by a nonprofit organization or court are not normally required to systematically screen for conflicts of interest before undertaking a representation. See Comment [1] to Rule 6.5. See Rule 1.2(c) for requirements applicable to the provision of limited legal services.

Identifying Conflicts of Interest: Material Limitation

[37] Use of the term "significant risk" in paragraph (a)(2) is not intended to be a substantive change or diminishment in the standard required under former Washington RPC 1.7(b), i.e., that "the representation of the client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests."

Prohibited Representations

[38] In Washington, a governmental client is not prohibited from properly consenting to a representational conflict of interest.

Informed Consent

[39] Paragraph (b)(4) of the Rule differs slightly from the Model Rule in that it expressly requires authorization from the other client before any required disclosure of information relating to that client can be made. Authorization to make a disclosure of information relating to the representation requires the client's informed consent. See Rule 1.6(a).

Nonlitigation Conflicts

[40] Under Washington case law, in estate administration matters the client is the personal representative of the estate.

Special Considerations in Common Representation

[41] Various legal provisions, including constitutional, statutory and common law, may define the duties of government lawyers in representing public officers, employees, and agencies and should be considered in evaluating the nature and propriety of common representation.

RULE 1.8: CONFLICT OF INTEREST~~; PROHIBITED TRANSACTIONS~~: CURRENT CLIENTS: SPECIFIC RULES

~~A lawyer who is representing a client in a matter:~~

(a) A lawyer ~~S~~shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

(1) ~~T~~the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing ~~to the client~~ in a manner ~~which~~ that can be reasonably understood by the client;

(2) ~~T~~the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel ~~in~~ on the transaction; and

(3) ~~T~~the client ~~consents thereto~~ gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

(b) A lawyer ~~S~~shall not use information relating to representation of a client to the disadvantage of the client unless the client ~~consents in writing after consultation~~ gives informed consent, except as permitted or required by these Rules.

(c) A lawyer ~~S~~shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer ~~as parent, child, sibling, or spouse~~ any substantial gift ~~from a client, including a testamentary gift, except where the client~~ unless the lawyer or other recipient of the gift is related to the ~~donee~~ client. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.

(d) ~~Shall not,~~ ~~P~~prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

~~(e) A lawyer Sshall not, while representing a client in connection with contemplated or pending litigation, advance or guarantee financial assistance to his or her client, except that:~~

~~(1) Aa lawyer may advance or guarantee the expenses of litigation, including court costs, expenses of investigation, expenses of medical examination, and costs of obtaining and presenting evidence, provided that, except as provided in paragraphs (e)(2) and (e)(3), the client shall remains ultimately liable for such expenses; and~~

~~(2) a lawyer, law firm or provider of legal services for the ecomically disadvantaged or indigent, may pay court costs and expenses of litigation on behalf of such economically disadvantaged or indigent clients, where such services are provided without expectation of a fee from the client;~~

~~(3) Iin matters maintained as class actions only, repayment of expenses of litigation may be contingent on the outcome of the matter.~~

(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; and

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

(f) A lawyer ~~S~~shall not accept compensation for representing a client from one other than the client unless:

(1) ~~T~~the client ~~consents after consultation~~ gives informed consent;

(2) ~~T~~there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and

(3) ~~I~~information relating to representation of a client is protected as required by ~~r~~Rule 1.6.

(g) ~~Shall not, while representing~~ A lawyer who represents two or more clients~~,~~ shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client ~~consents after consultation~~ gives informed consent, ~~including~~ confirmed in writing. The lawyer's disclosure ~~of~~ shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

(h) A lawyer ~~S~~shall not:

(1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless permitted by law and the client is independently represented in making the agreement~~,~~; or

(2) settle a claim or potential claim for such liability with an unrepresented client or former client ~~without first advising~~ unless that person is advised in writing ~~that~~ of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent ~~representation is appropriate~~ legal counsel in connection therewith.

~~(i) Shall not, if related to another lawyer as parent, child, sibling or spouse, represent a client in a representation directly adverse to a person who the lawyer knows is represented by the other lawyer except upon consent by the client after consultation regarding the relationship.~~

(~~j~~i) A lawyer ~~S~~shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

(1) ~~A~~acquire a lien ~~granted~~ authorized by law to secure the lawyer's fee or expenses; and

(2) ~~C~~contract with a client for a reasonable contingent fee in a civil case.

(~~k~~j) A lawyer ~~S~~shall not:

(1) have sexual relations with a current client of the lawyer unless a consensual sexual relationship existed between them at the time the ~~lawyer/~~client-lawyer relationship commenced; or

(2) have sexual relations with a representative of a current client if the sexual relations would, or would likely, damage or prejudice the client in the representation.

(3) For purposes of ~~r~~Rule 1.8(~~k~~j), "lawyer" means any lawyer who assists in the representation of the client, but does not include other firm members who provide no such assistance.

(k) While lawyers are associated in a firm, a prohibition in the foregoing paragraphs (a) through (i) that applies to any one of them shall apply to all of them.

(l) A lawyer who is related to another lawyer as parent, child, sibling, or spouse, or who has any other close familial or intimate relationship with another lawyer, shall not repre-

sent a client in a matter directly adverse to a person who the lawyer knows is represented by the related lawyer unless:

(1) the client gives informed consent to the representation; and

(2) the representation is not otherwise prohibited by Rule 1.7.

Comment

Business Transactions Between Client and Lawyer

[1] A lawyer's legal skill and training, together with the relationship of trust and confidence between lawyer and client, create the possibility of overreaching when the lawyer participates in a business, property or financial transaction with a client, for example, a loan or sales transaction or a lawyer investment on behalf of a client. The requirements of paragraph (a) must be met even when the transaction is not closely related to the subject matter of the representation, as when a lawyer drafting a will for a client learns that the client needs money for unrelated expenses and offers to make a loan to the client. The Rule applies to lawyers engaged in the sale of goods or services related to the practice of law, for example, the sale of title insurance or investment services to existing clients of the lawyer's legal practice. See Rule 5.7. It also applies to lawyers purchasing property from estates they represent. It does not apply to ordinary fee arrangements between client and lawyer, which are governed by Rule 1.5, although its requirements must be met when the lawyer accepts an interest in the client's business or other nonmonetary property as payment of all or part of a fee. In addition, the Rule does not apply to standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others, for example, banking or brokerage services, medical services, products manufactured or distributed by the client, and utilities' services. In such transactions, the lawyer has no advantage in dealing with the client, and the restrictions in paragraph (a) are unnecessary and impracticable.

[2] Paragraph (a)(1) requires that the transaction itself be fair to the client and that its essential terms be communicated to the client, in writing, in a manner that can be reasonably understood. Paragraph (a)(2) requires that the client also be advised, in writing, of the desirability of seeking the advice of independent legal counsel. It also requires that the client be given a reasonable opportunity to obtain such advice. Paragraph (a)(3) requires that the lawyer obtain the client's informed consent, in a writing signed by the client, both to the essential terms of the transaction and to the lawyer's role. When necessary, the lawyer should discuss both the material risks of the proposed transaction, including any risk presented by the lawyer's involvement, and the existence of reasonably available alternatives and should explain why the advice of independent legal counsel is desirable. See Rule 1.0(e) (definition of informed consent).

[3] The risk to a client is greatest when the client expects the lawyer to represent the client in the transaction itself or when the lawyer's financial interest otherwise poses a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's financial interest in the transaction. Here the lawyer's role requires that the lawyer must comply, not only with the requirements of paragraph (a), but also with the requirements of Rule 1.7. Under that Rule, the lawyer must disclose the risks associated with the lawyer's dual role as both legal adviser and participant in the transaction, such as the risk that the lawyer will structure the transaction or give legal advice in a way that favors the lawyer's interests at the expense of the client. Moreover, the lawyer must obtain the client's informed consent. In some cases, the lawyer's interest may be such that Rule 1.7 will preclude the lawyer from seeking the client's consent to the transaction.

[4] If the client is independently represented in the transaction, paragraph (a)(2) of this Rule is inapplicable, and the paragraph (a)(1) requirement for full disclosure is satisfied either by a written disclosure by the lawyer involved in the transaction or by the client's independent counsel. The fact that the client was independently represented in the transaction is relevant in determining whether the agreement was fair and reasonable to the client as paragraph (a)(1) further requires.

Use of Information Related to Representation

[5] **[Washington revision]** Use of information relating to the representation to the disadvantage of the client violates the lawyer's duty of loyalty. Paragraph (b) applies when the information is used to benefit either the lawyer or a third person, such as another client or business associate of the lawyer. For example, if a lawyer learns that a client intends to purchase and develop several parcels of land, the lawyer may not use that information to purchase one of the parcels in competition with the client or to recommend that another client make such a purchase. The Rule does not prohibit uses that do not disadvantage the client. For example, a lawyer who learns a government agency's interpretation of trade legislation during the representation of one client may properly use that information to benefit other clients. Paragraph (b) prohibits disadvantageous use of client information unless the client gives informed consent, except as permitted or required by these Rules. See Rules 1.2(d), 1.6, 1.9(c), 3.3, 4.1(b), and 8.1.

Gifts to Lawyers

[6] A lawyer may accept a gift from a client, if the transaction meets general standards of fairness. For example, a simple gift such as a present given at a holiday or as a token of appreciation is permitted. If a client offers the lawyer a more substantial gift, paragraph (c) does not prohibit the lawyer from accepting it, although such a gift may be voidable by the client under the doctrine of undue influence, which treats client gifts as presumptively fraudulent. In any event, due to concerns about overreaching and imposition on clients, a lawyer may not suggest that a substantial gift be made to the lawyer or for the lawyer's benefit, except where the lawyer is related to the client as set forth in paragraph (c).

[7] If effectuation of a substantial gift requires preparing a legal instrument such as a will or conveyance the client should have the detached advice that another lawyer can provide. The sole exception to this Rule is where the client is a relative of the donee.

[8] This Rule does not prohibit a lawyer from seeking to have the lawyer or a partner or associate of the lawyer named

as executor of the client's estate or to another potentially lucrative fiduciary position. Nevertheless, such appointments will be subject to the general conflict of interest provision in Rule 1.7 when there is a significant risk that the lawyer's interest in obtaining the appointment will materially limit the lawyer's independent professional judgment in advising the client concerning the choice of an executor or other fiduciary. In obtaining the client's informed consent to the conflict, the lawyer should advise the client concerning the nature and extent of the lawyer's financial interest in the appointment, as well as the availability of alternative candidates for the position.

Literary Rights

[9] An agreement by which a lawyer acquires literary or media rights concerning the conduct of the representation creates a conflict between the interests of the client and the personal interests of the lawyer. Measures suitable in the representation of the client may detract from the publication value of an account of the representation. Paragraph (d) does not prohibit a lawyer representing a client in a transaction concerning literary property from agreeing that the lawyer's fee shall consist of a share in ownership in the property, if the arrangement conforms to Rule 1.5 and paragraphs (a) and (i).

Financial Assistance

~~[10] [Washington revision] Lawyers may not subsidize lawsuits or administrative proceedings brought on behalf of their clients, including making or guaranteeing loans to their clients for living expenses, because to do so would encourage clients to pursue lawsuits that might not otherwise be brought and because such assistance gives lawyers too great a financial stake in the litigation. See Washington Comments [21] & [22].~~

[10] Lawyers may not subsidize lawsuits or administrative proceedings brought on behalf of their clients, including making or guaranteeing loans to their clients for living expenses, because to do so would encourage clients to pursue lawsuits that might not otherwise be brought and because such assistance gives lawyers too great a financial stake in the litigation. These dangers do not warrant a prohibition on a lawyer lending a client court costs and litigation expenses, including the expenses of medical examination and the costs of obtaining and presenting evidence, because these advances are virtually indistinguishable from contingent fees and help ensure access to the courts. Similarly, an exception allowing lawyers representing indigent clients to pay court costs and litigation expenses regardless of whether these funds will be repaid is warranted.

Person Paying for a Lawyer's Services

[11] Lawyers are frequently asked to represent a client under circumstances in which a third person will compensate the lawyer, in whole or in part. The third person might be a relative or friend, an indemnitor (such as a liability insurance company) or a co-client (such as a corporation sued along with one or more of its employees). Because third-party payers frequently have interests that differ from those of the client, including interests in minimizing the amount spent on the representation and in learning how the representation is progressing, lawyers are prohibited from accepting or continuing such representations unless the lawyer determines that there will be no interference with the lawyer's independent professional judgment and there is informed consent from the client. See also Rule 5.4(c) (prohibiting interference with a lawyer's professional judgment by one who recommends, employs or pays the lawyer to render legal services for another).

[12] Sometimes, it will be sufficient for the lawyer to obtain the client's informed consent regarding the fact of the payment and the identity of the third-party payer. If, however, the fee arrangement creates a conflict of interest for the lawyer, then the lawyer must comply with Rule. 1.7. The lawyer must also conform to the requirements of Rule 1.6 concerning confidentiality. Under Rule 1.7(a), a conflict of interest exists if there is significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in the fee arrangement or by the lawyer's responsibilities to the third-party payer (for example, when the third-party payer is a co-client). Under Rule 1.7(b), the lawyer may accept or continue the representation with the informed consent of each affected client, unless the conflict is nonconsentable under that paragraph. Under Rule 1.7(b), the informed consent must be confirmed in writing.

Aggregate Settlements

[13] Differences in willingness to make or accept an offer of settlement are among the risks of common representation of multiple clients by a single lawyer. Under Rule 1.7, this is one of the risks that should be discussed before undertaking the representation, as part of the process of obtaining the clients' informed consent. In addition, Rule 1.2(a) protects each client's right to have the final say in deciding whether to accept or reject an offer of settlement and in deciding whether to enter a guilty or nolo contendere plea in a criminal case. The rule stated in this paragraph is a corollary of both these Rules and provides that, before any settlement offer or plea bargain is made or accepted on behalf of multiple clients, the lawyer must inform each of them about all the material terms of the settlement, including what the other clients will receive or pay if the settlement or plea offer is accepted. See also Rule 1.0(e) (definition of informed consent). Lawyers representing a class of plaintiffs or defendants, or those proceeding derivatively, may not have a full client-lawyer relationship with each member of the class; nevertheless, such lawyers must comply with applicable rules regulating notification of class members and other procedural requirements designed to ensure adequate protection of the entire class.

Limiting Liability and Settling Malpractice Claims

[14] **[Washington ~~R~~revision]** Agreements prospectively limiting a lawyer's liability for malpractice are prohibited unless permitted by law and the client is independently represented in making the agreement because they are likely to undermine competent and diligent representation. Also, many clients are unable to evaluate the desirability of making such an agreement before a dispute has arisen, particularly if they are then represented by the lawyer seeking the agreement. This paragraph does not, however, prohibit a lawyer

from entering into an agreement with the client to arbitrate legal malpractice claims, provided such agreements are enforceable and the client is fully informed of the scope and effect of the agreement. Nor does this paragraph limit the ability of lawyers to practice in the form of a limited-liability entity, where permitted by law, provided that each lawyer remains personally liable to the client for his or her own conduct and the firm complies with any conditions required by law, such as provisions requiring client notification or maintenance of adequate liability insurance. Nor does it prohibit an agreement in accordance with Rule 1.2 that defines the scope of the representation, although a definition of scope that makes the obligations of representation illusory will amount to an attempt to limit liability.

[15] Agreements settling a claim or a potential claim for malpractice are not prohibited by this Rule. Nevertheless, in view of the danger that a lawyer will take unfair advantage of an unrepresented client or former client, the lawyer must first advise such a person in writing of the appropriateness of independent representation in connection with such a settlement. In addition, the lawyer must give the client or former client a reasonable opportunity to find and consult independent counsel.

Acquiring Proprietary Interest in Litigation

[16] Paragraph (i) states the traditional general rule that lawyers are prohibited from acquiring a proprietary interest in litigation. Like paragraph (e), the general rule has its basis in common law champerty and maintenance and is designed to avoid giving the lawyer too great an interest in the representation. In addition, when the lawyer acquires an ownership interest in the subject of the representation, it will be more difficult for a client to discharge the lawyer if the client so desires. The Rule is subject to specific exceptions developed in decisional law and continued in these Rules. The exception for certain advances of the costs of litigation is set forth in paragraph (e). In addition, paragraph (i) sets forth exceptions for liens authorized by law to secure the lawyer's fees or expenses and contracts for reasonable contingent fees. The law of each jurisdiction determines which liens are authorized by law. These may include liens granted by statute, liens originating in common law and liens acquired by contract with the client. When a lawyer acquires by contract a security interest in property other than that recovered through the lawyer's efforts in the litigation, such an acquisition is a business or financial transaction with a client and is governed by the requirements of paragraph (a). Contracts for contingent fees in civil cases are governed by Rule 1.5.

Client-Lawyer Sexual Relationships

[17] The relationship between lawyer and client is a fiduciary one in which the lawyer occupies the highest position of trust and confidence. The relationship is almost always unequal; thus, a sexual relationship between lawyer and client can involve unfair exploitation of the lawyer's fiduciary role, in violation of the lawyer's basic ethical obligation not to use the trust of the client to the client's disadvantage. In addition, such a relationship presents a significant danger that, because of the lawyer's emotional involvement, the lawyer will be unable to represent the client without impairment of the exercise of independent professional judgment. Moreover, a blurred line between the professional and personal relationships may make it difficult to predict to what extent client confidences will be protected by the attorney-client evidentiary privilege, since client confidences are protected by privilege only when they are imparted in the context of the client-lawyer relationship. Because of the significant danger of harm to client interests and because the client's own emotional involvement renders it unlikely that the client could give adequate informed consent, this Rule prohibits the lawyer from having sexual relations with a client regardless of whether the relationship is consensual and regardless of the absence of prejudice to the client.

[18] Sexual relationships that predate the client-lawyer relationship are not prohibited. Issues relating to the exploitation of the fiduciary relationship and client dependency are diminished when the sexual relationship existed prior to the commencement of the client-lawyer relationship. However, before proceeding with the representation in these circumstances, the lawyer should consider whether the lawyer's ability to represent the client will be materially limited by the relationship. See Rule 1.7 (a)(2).

[19] **[Washington revision]** When the client is an organization, paragraph (j) of this Rule applies to a lawyer for the organization (whether inside or outside counsel). For purposes of this Rule, "representative of a current client" will generally be a constituent of the organization who supervises, directs or regularly consults with that lawyer on the organization's legal matters. See Comment [1] to Rule 1.13 (identifying the constituents of an organizational client).

~~Also see~~ See also Washington Comments [21] and [22].

Imputation of Prohibitions

[20] Under paragraph (k), a prohibition on conduct by an individual lawyer in paragraphs (a) through (i) also applies to all lawyers associated in a firm with the personally prohibited lawyer. For example, one lawyer in a firm may not enter into a business transaction with a client of another member of the firm without complying with paragraph (a), even if the first lawyer is not personally involved in the representation of the client. The prohibition set forth in paragraph (j) is personal and is not applied to associated lawyers.

Additional Washington Comments (21-~~25~~23)

~~Financial Assistance~~

~~[21] Paragraph (e) of Washington's Rule differs from the Model Rule. Paragraph (e) is a revised version of former Washington RPC 1.8(e). The Rule retains the general prohibition on advancing or guaranteeing financial assistance to a client, a practice that has historically been prohibited in Washington in order to preclude a detrimental shift in the allocation of authority between client and lawyer that may ensue when a client becomes indebted to the lawyer for financial support. See Rule 1.2(a) (describing allocation of authority between client and lawyer). Paragraph (e)(1) preserves the ability of a lawyer to advance or guarantee the expenses of litigation, provided that the client remains ultimately liable for such expenses. This approach, which ensures a proper degree of client accountability in the man-~~

~~agement of his or her case, strikes an appropriate balance between enhancing access to the courts and discouraging excessive economic entanglement between lawyer and client. Because the client must at all times remain "ultimately liable" for such expenses, no communication about the lawyer's services shall state or imply that the client has no obligation to pay expenses; such a communication would be misleading and therefore is not permitted under Rule 7.1. Nevertheless, under Washington law the lawyer has no affirmative duty to collect such expenses; at the conclusion of a matter, a lawyer may exercise his or her discretion to refrain from initiating collection proceedings against the client for unpaid advances. Former Washington RPC 1.8 (e)(2), the exception for contingent repayment of costs in class actions, is retained in paragraph (e)(3).~~

~~[22] Paragraph (e)(2), which is partly based on Model Rule 1.8 (e)(2), permits a lawyer to pay court costs and expenses of litigation on behalf of economically disadvantaged or indigent clients. Paragraph (e)(2) specifically limits application of the exception to situations in which the lawyer's services are provided "without expectation of a fee" from the client. This language is intended to minimize ambiguities inherent in the terms "indigent" and "economically disadvantaged" in order to confine the exception to its limited purpose of promoting access to justice through pro bono publico representation and nonprofit legal services programs by easing the financial burden of litigation borne by truly indigent and economically disadvantaged clients.~~

Client-Lawyer Sexual Relationships

[21~~3~~] Paragraph (j)(2) of Washington's Rule, which prohibits sexual relationships with a representative of an organizational client, differs from the Model Rule. Comment [19] to Model Rule 1.8 was revised to be consistent with the Washington Rule.

[22~~4~~] Paragraph (j)(3) of the Rule specifies that the prohibition applies with equal force to any lawyer who assists in the representation of the client, but the prohibition expressly does not apply to other members of a firm who have not assisted in the representation.

Personal Relationships

[23~~5~~] Model Rule 1.8 does not contain a provision equivalent to paragraph (l) of Washington's Rule. Paragraph (l) prohibits representations based on a lawyer's personal conflict arising from his or her relationship with another lawyer. Paragraph (l) is a revised version of former Washington RPC 1.8(i). See also Comment [11] to Rule 1.7.

RULE 1.9: ~~CONFLICT OF INTEREST;~~ DUTIES TO FORMER CLIENTS

(a) A lawyer who has formerly represented a client in a matter shall not thereafter~~: (a) R~~represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client ~~consents~~ gives informed consent, confirmed in writing~~, after consultation and a full disclosure of the material facts; or~~

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter;

unless the former client gives informed consent, confirmed in writing.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(~~b~~1) ~~U~~use ~~confidences or secrets~~ information relating to the representation to the disadvantage of the former client~~,~~ except as ~~rule 1.6~~ these Rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

Comment

[1] After termination of a client-lawyer relationship, a lawyer has certain continuing duties with respect to confidentiality and conflicts of interest and thus may not represent another client except in conformity with this Rule. Under this Rule, for example, a lawyer could not properly seek to rescind on behalf of a new client a contract drafted on behalf of the former client. So also a lawyer who has prosecuted an accused person could not properly represent the accused in a subsequent civil action against the government concerning the same transaction. Nor could a lawyer who has represented multiple clients in a matter represent one of the clients against the others in the same or a substantially related matter after a dispute arose among the clients in that matter, unless all affected clients give informed consent. See Comment [9]. Current and former government lawyers must comply with this Rule to the extent required by Rule 1.11.

[2] The scope of a "matter" for purposes of this Rule depends on the facts of a particular situation or transaction. The lawyer's involvement in a matter can also be a question of degree. When a lawyer has been directly involved in a specific transaction, subsequent representation of other clients with materially adverse interests in that transaction clearly is prohibited. On the other hand, a lawyer who recurrently handled a type of problem for a former client is not precluded from later representing another client in a factually distinct problem of that type even though the subsequent representation involves a position adverse to the prior client. Similar considerations can apply to the reassignment of military lawyers between defense and prosecution functions within the same military jurisdictions. The underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question.

[3] Matters are "substantially related" for purposes of this Rule if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's

position in the subsequent matter. For example, a lawyer who has represented a businessperson and learned extensive private financial information about that person may not then represent that person's spouse in seeking a divorce. Similarly, a lawyer who has previously represented a client in securing environmental permits to build a shopping center would be precluded from representing neighbors seeking to oppose rezoning of the property on the basis of environmental considerations; however, the lawyer would not be precluded, on the grounds of substantial relationship, from defending a tenant of the completed shopping center in resisting eviction for nonpayment of rent. Information that has been disclosed to the public or to other parties adverse to the former client ordinarily will not be disqualifying. Information acquired in a prior representation may have been rendered obsolete by the passage of time, a circumstance that may be relevant in determining whether two representations are substantially related. In the case of an organizational client, general knowledge of the client's policies and practices ordinarily will not preclude a subsequent representation; on the other hand, knowledge of specific facts gained in a prior representation that are relevant to the matter in question ordinarily will preclude such a representation. A former client is not required to reveal the confidential information learned by the lawyer in order to establish a substantial risk that the lawyer has confidential information to use in the subsequent matter. A conclusion about the possession of such information may be based on the nature of the services the lawyer provided the former client and information that would in ordinary practice be learned by a lawyer providing such services.

Lawyers Moving Between Firms

[4] When lawyers have been associated within a firm but then end their association, the question of whether a lawyer should undertake representation is more complicated. There are several competing considerations. First, the client previously represented by the former firm must be reasonably assured that the principle of loyalty to the client is not compromised. Second, the rule should not be so broadly cast as to preclude other persons from having reasonable choice of legal counsel. Third, the rule should not unreasonably hamper lawyers from forming new associations and taking on new clients after having left a previous association. In this connection, it should be recognized that today many lawyers practice in firms, that many lawyers to some degree limit their practice to one field or another, and that many move from one association to another several times in their careers. If the concept of imputation were applied with unqualified rigor, the result would be radical curtailment of the opportunity of lawyers to move from one practice setting to another and of the opportunity of clients to change counsel.

[5] **[Washington revision]** Paragraph (b) operates to disqualify the lawyer only when the lawyer involved has actual knowledge of information protected by Rules 1.6 and 1.9(c). Thus, if a lawyer while with one firm acquired no knowledge or information relating to a particular client of the firm, and that lawyer later joined another firm, neither the lawyer individually nor the second firm is disqualified from representing another client in the same or a related matter even though the interests of the two clients conflict. See Rule 1.10 (e) and (b) for the restrictions on a firm when a lawyer initiates an association with the firm or has terminated an association with the firm.

[6] Application of paragraph (b) depends on a situation's particular facts, aided by inferences, deductions or working presumptions that reasonably may be made about the way in which lawyers work together. A lawyer may have general access to files of all clients of a law firm and may regularly participate in discussions of their affairs; it should be inferred that such a lawyer in fact is privy to all information about all the firm's clients. In contrast, another lawyer may have access to the files of only a limited number of clients and participate in discussions of the affairs of no other clients; in the absence of information to the contrary, it should be inferred that such a lawyer in fact is privy to information about the clients actually served but not those of other clients. In such an inquiry, the burden of proof should rest upon the firm whose disqualification is sought.

[7] Independent of the question of disqualification of a firm, a lawyer changing professional association has a continuing duty to preserve confidentiality of information about a client formerly represented. See Rules 1.6 and 1.9(c).

[8] Paragraph (c) provides that information acquired by the lawyer in the course of representing a client may not subsequently be used or revealed by the lawyer to the disadvantage of the client. However, the fact that a lawyer has once served a client does not preclude the lawyer from using generally known information about that client when later representing another client.

[9] **[Washington revision]** The provisions of this Rule are for the protection of former clients and can be waived if the client gives informed consent, which consent must be confirmed in writing under paragraphs (a) and (b). See Rule 1.0(e). ~~With regard to the effectiveness of an advance waiver, see Comment [22] to Rule 1.7.~~ With regard to disqualification of a firm with which a lawyer is or was formerly associated, see Rule 1.10.

RULE 1.10; ~~IMPUTED DISQUALIFICATION;~~ IMPUTATION OF CONFLICTS OF INTEREST: GENERAL RULE

(a) Except as provided in ~~section~~ paragraph (~~b~~c), while lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by ~~r~~Rules 1.7~~, 1.8(c),~~ or 1.9, ~~or 2.2~~ unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.

~~(b) When a lawyer becomes associated with a firm, the firm may not knowingly represent a person in the same or a substantially related matter in which that lawyer ("the personally disqualified lawyer"), or a firm with which the lawyer was associated, had previously represented a client whose interests are materially adverse to that person and about whom the lawyer had acquired confidences or secrets protected by rules 1.6 and 1.9(b) that are material to the matter; provided that the prohibition on the firm shall not apply if:~~

~~(1) The personally disqualified lawyer is screened by effective means from participation in the matter and is apportioned no part of the fee therefrom;~~

~~(2) The former client of the personally disqualified lawyer receives notice of the conflict and the screening mechanism used to prohibit dissemination of confidential or secret information;~~

~~(3) The firm is able to demonstrate by convincing evidence that no confidences or secrets that are material were transmitted by the personally disqualified lawyer before implementation of the screening mechanism and notice to the former client.~~

~~Any presumption that confidences or secrets of the former client have been or will be transmitted may be rebutted if the personally disqualified lawyer serves on his or her former law firm and former client an affidavit attesting that the personally disqualified lawyer will not participate in the matter and will not discuss the matter or the representation with any other lawyer or employee of his or her current law firm, and attesting that during the period of the lawyer's personal disqualification those lawyers or employees who do participate in the matter will be apprised that the personally disqualified lawyer is screened from participating in or discussing the matter. Such affidavit shall describe the procedures being used effectively to screen the personally disqualified lawyer. Upon request of the former client, such affidavit shall be updated periodically to show actual compliance with the screening procedures. The law firm, the personally disqualified lawyer, or the former client may seek judicial review in a court of general jurisdiction of the screening mechanism used, or may seek court supervision to ensure that implementation of the screening procedures has occurred and that effective actual compliance has been achieved.~~

(~~e~~b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:

(1) ~~T~~the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) ~~A~~any lawyer remaining in the firm has ~~acquired confidences or secrets~~ information protected by ~~r~~Rules 1.6 and 1.9(~~b~~c) that ~~are~~ is material to the matter.

(~~d~~c) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in ~~r~~Rule 1.7.

(d) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11.

(e) When a lawyer becomes associated with a firm, no other lawyer in the firm shall knowingly represent a person in a matter in which that lawyer is disqualified under Rule 1.9 unless:

(1) the personally disqualified lawyer is screened by effective means from participation in the matter and is apportioned no part of the fee therefrom;

(2) the former client of the personally disqualified lawyer receives notice of the conflict and the screening mechanism used to prohibit dissemination of information relating to the former representation;

(3) the firm is able to demonstrate by convincing evidence that no material information relating to the former representation was transmitted by the personally disqualified lawyer before implementation of the screening mechanism and notice to the former client.

Any presumption that information protected by Rules 1.6 and 1.9(c) has been or will be transmitted may be rebutted if the personally disqualified lawyer serves on his or her former law firm and former client an affidavit attesting that the personally disqualified lawyer will not participate in the matter and will not discuss the matter or the representation with any other lawyer or employee of his or her current law firm, and attesting that during the period of the lawyer's personal disqualification those lawyers or employees who do participate in the matter will be apprised that the personally disqualified lawyer is screened from participating in or discussing the matter. Such affidavit shall describe the procedures being used effectively to screen the personally disqualified lawyer. Upon request of the former client, such affidavit shall be updated periodically to show actual compliance with the screening procedures. The law firm, the personally disqualified lawyer, or the former client may seek judicial review in a court of general jurisdiction of the screening mechanism used, or may seek court supervision to ensure that implementation of the screening procedures has occurred and that effective actual compliance has been achieved.

Comment

Definition of "Firm"

[1] For purposes of the Rules of Professional Conduct, the term "firm" denotes lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization. See Rule 1.0(c). Whether two or more lawyers constitute a firm within this definition can depend on the specific facts. See Rule 1.0, Comments [2] - [4].

Principles of Imputed Disqualification

[2] **[Washington revision]** The rule of imputed disqualification stated in paragraph (a) gives effect to the principle of loyalty to the client as it applies to lawyers who practice in a law firm. Such situations can be considered from the premise that a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client, or from the premise that each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer with whom the lawyer is associated. Paragraph (a) operates only among the lawyers currently associated in a firm. When a lawyer moves from one firm to another, the situation is governed by Rules 1.9(b) and 1.10 (b) and (e).

[3] The rule in paragraph (a) does not prohibit representation where neither questions of client loyalty nor protection of confidential information are presented. Where one lawyer in a firm could not effectively represent a given client because of strong political beliefs, for example, but that lawyer will do no work on the case and the personal beliefs of the lawyer will not materially limit the representation by others in the firm, the firm should not be disqualified. On the other hand, if an opposing party in a case were owned by a lawyer in the law firm, and others in the firm would be materially

limited in pursuing the matter because of loyalty to that lawyer, the personal disqualification of the lawyer would be imputed to all others in the firm.

[4] [**Reserved**. See Washington Comment [11].]

[5] Rule 1.10(b) operates to permit a law firm, under certain circumstances, to represent a person with interests directly adverse to those of a client represented by a lawyer who formerly was associated with the firm. The Rule applies regardless of when the formerly associated lawyer represented the client. However, the law firm may not represent a person with interests adverse to those of a present client of the firm, which would violate Rule 1.7. Moreover, the firm may not represent the person where the matter is the same or substantially related to that in which the formerly associated lawyer represented the client and any other lawyer currently in the firm has material information protected by Rules 1.6 and 1.9(c).

[6] **[Washington revision]** Rule 1.10(c) removes imputation with the informed consent of the affected client or former client under the conditions stated in Rule 1.7. The conditions stated in Rule 1.7 require the lawyer to determine that the representation is not prohibited by Rule 1.7(b) and that each affected client or former client has given informed consent to the representation, confirmed in writing. In some cases, the risk may be so severe that the conflict may not be cured by client consent. ~~For a discussion of the effectiveness of client waivers of conflicts that might arise in the future, see Rule 1.7, Comment [22].~~ For a definition of informed consent, see Rule 1.0(e).

[7] Where a lawyer has joined a private firm after having represented the government, imputation is governed by Rule 1.11 (b) and (c), not this Rule. Under Rule 1.11(d), where a lawyer represents the government after having served clients in private practice, nongovernmental employment or in another government agency, former-client conflicts are not imputed to government lawyers associated with the individually disqualified lawyer.

[8] Where a lawyer is prohibited from engaging in certain transactions under Rule 1.8, paragraph (k) of that Rule, and not this Rule, determines whether that prohibition also applies to other lawyers associated in a firm with the personally prohibited lawyer.

Additional Washington Comments (9 - 13)

Principles of Imputed Disqualification

[9] Former Washington RPC 1.10 differed significantly from the Model Rule. This difference was attributable in part to a 1989 amendment to Model Rule 1.10 that recodified conflicts based on a lawyer's former association with a firm into Model Rule 1.9, and in part to Washington's adoption of a screening rule in 1993. Washington's Rule has been restructured to make it and Rule 1.9 more consistent with the Model Rules. The conflicts that arise based on a lawyer's former association with a firm are now addressed in Rules 1.9 (a) and (b), while Rule 1.10 addresses solely imputation of that conflict. Under Rule 1.9(a), such a lawyer need not have actually acquired information protected by Rules 1.6 and 1.9 to be disqualified personally, but because acquisition of confidential information is presumed in Washington, see, e.g., *Teja v. Saran*, 68 Wn. App. 793, 846 P.2d 1375 (1993), *review denied*, 122 Wn.2d 1008, 859 P.2d 604 (1993); *Kurbitz v. Kurbitz*, 77 Wn.2d 943, 468 P.2d 673 (1970), the recodification does not represent a change in Washington law. The Rule preserves prior Washington practice with respect to screening by allowing a personally disqualified lawyer to be screened from a representation to be undertaken by other members of the firm under the circumstances set forth in paragraph (e). See Washington Comment [10].

[10] Washington's RPC 1.10 was amended in 1993 to permit representation with screening under certain circumstances. Model Rule 1.10 does not contain a screening mechanism. Rule 1.10(e) retains the screening mechanism adopted as Washington RPC 1.10(b) in 1993, thus allowing a firm to represent a client with whom a lawyer in the firm has a conflict based on his or her association with a prior firm if the lawyer is effectively screened from participation in the representation, is apportioned no part of the fee earned from the representation and the client of the former firm receives notice of the conflict and the screening mechanism. However, prior to undertaking the representation, non-disqualified firm members must evaluate the firm's ability to provide competent representation even if the disqualified member can be screened in accordance with this Rule. While Rule 1.10 does not specify the screening mechanism to be used, the law firm must be able to demonstrate that it is adequate to prevent the personally disqualified lawyer from receiving or transmitting any confidential information or from participating in the representation in any way. The screening mechanism must be in place over the life of the representation at issue and is subject to judicial review at the request of any of the affected clients, law firms, or lawyers. However, a lawyer or law firm may rebut the presumption that information relating to the representation has been transmitted by serving an affidavit describing the screening mechanism and affirming that the requirements of the Rule have been met.

[11] Under Rule 5.3, this Rule also applies to nonlawyer assistants and lawyers who previously worked as nonlawyers at a law firm. See *Daines v. Alcatel*, 194 F.R.D. 678 (E.D. Wash. 2000); *Richard v. Jain*, 168 F. Supp. 2d 1195 (W.D. Wash. 2001).

[12] In serving an affidavit permitted by paragraph (e), a lawyer may serve the affidavit on the former law firm alone (without simultaneously serving the former client directly) if the former law firm continues to represent the former client and the lawyer contemporaneously requests in writing that the former law firm provide a copy of the affidavit to the former client. If the former client is no longer represented by the former law firm or if the lawyer has reason to believe the former law firm will not promptly provide the former client with a copy of the affidavit, then the affidavit must be served directly on the former client also. Serving the affidavit on a represented former client does not violate Rule 4.2 because the communication with the former client is not about the "subject of the representation" and the notice is "authorized … by law," i.e., the Rules of Professional Conduct.

[13] Rule 1.8(l) conflicts are not imputed to other members of a firm under paragraph (a) of this Rule unless the relationship creates a conflict of interest for the individual lawyer under Rule 1.7 and also presents a significant risk of materi-

ally limiting the representation of the client by the remaining lawyers in the firm.

RULE 1.11: ~~SUCCESSIVE GOVERNMENT AND PRIVATE EMPLOYMENT~~ SPECIAL CONFLICTS OF INTEREST FOR FORMER AND CURRENT GOVERNMENT OFFICERS AND EMPLOYEES

(a) Except as law may otherwise expressly permit, a lawyer who has formerly served as a public officer or employee of the government:

(1) is subject to Rule 1.9(c); and

(2) shall not otherwise represent a ~~private~~ client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency ~~consents after consultation~~ gives its informed consent, confirmed in writing, to the representation.

(b) When a lawyer is disqualified from representation under paragraph (a), ~~N~~no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:

(1) ~~T~~the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) ~~W~~written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this ~~r~~Rule.

(~~b~~c) Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. As used in this Rule the term "confidential government information" means information that has been obtained under governmental authority and which, at the time this Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose and which is not otherwise available to the public. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom.

(~~c~~d) Except as law may otherwise expressly permit, a lawyer currently serving as a public officer or employee:

(1) is subject to Rules 1.7 and 1.9; and

(2) shall not:

(~~1~~i) ~~P~~participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless ~~under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyer's stead in the matter~~ the appropriate government agency gives its informed consent, confirmed writing; or

(~~2~~ii) ~~N~~negotiate for private employment with any person who is involved as a party or as ~~attorney~~ lawyer for a party in a matter in which the lawyer is participating personally and substantially, except that a lawyer serving as a law clerk to a judge, other adjudicative officer or arbitrator may negotiate for private employment as permitted by Rule 1.12(b) and subject to the conditions stated in Rule 1.12(b).

(~~d~~e) As used in this ~~r~~Rule, the term "matter" includes:

(1) ~~A~~any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties~~;~~, and

(2) ~~A~~any other matter covered by the conflict of interest rules of the appropriate government agency.

~~(e) As used in this rule, the term "confidential government information" means information which has been obtained under governmental authority and which, at the time this rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose, and which is not otherwise available to the public.~~

Comment

[1] A lawyer who has served or is currently serving as a public officer or employee is personally subject to the Rules of Professional Conduct, including the prohibition against concurrent conflicts of interest stated in Rule 1.7. In addition, such a lawyer may be subject to statutes and government regulations regarding conflict of interest. Such statutes and regulations may circumscribe the extent to which the government agency may give consent under this Rule. See Rule 1.0(e) for the definition of informed consent.

[2] Paragraphs (a)(1), (a)(2) and (d)(1) restate the obligations of an individual lawyer who has served or is currently serving as an officer or employee of the government toward a former government or private client. Rule 1.10 is not applicable to the conflicts of interest addressed by this Rule. Rather, paragraph (b) sets forth a special imputation rule for former government lawyers that provides for screening and notice. Because of the special problems raised by imputation within a government agency, paragraph (d) does not impute the conflicts of a lawyer currently serving as an officer or employee of the government to other associated government officers or employees, although ordinarily it will be prudent to screen such lawyers.

[3] Paragraphs (a)(2) and (d)(2) apply regardless of whether a lawyer is adverse to a former client and are thus designed not only to protect the former client, but also to prevent a lawyer from exploiting public office for the advantage of another client. For example, a lawyer who has pursued a claim on behalf of the government may not pursue the same claim on behalf of a later private client after the lawyer has left government service, except when authorized to do so by the government agency under paragraph (a). Similarly, a lawyer who has pursued a claim on behalf of a private client may not pursue the claim on behalf of the government, except when authorized to do so by paragraph (d). As with paragraphs (a)(1) and (d)(1), Rule 1.10 is not applicable to the conflicts of interest addressed by these paragraphs.

[4] This Rule represents a balancing of interests. On the one hand, where the successive clients are a government agency and another client, public or private, the risk exists that power or discretion vested in that agency might be used for the special benefit of the other client. A lawyer should not be in a position where benefit to the other client might affect performance of the lawyer's professional functions on behalf

of the government. Also, unfair advantage could accrue to the other client by reason of access to confidential government information about the client's adversary obtainable only through the lawyer's government service. On the other hand, the rules governing lawyers presently or formerly employed by a government agency should not be so restrictive as to inhibit transfer of employment to and from the government. The government has a legitimate need to attract qualified lawyers as well as to maintain high ethical standards. Thus a former government lawyer is disqualified only from particular matters in which the lawyer participated personally and substantially. The provisions for screening and waiver in paragraph (b) are necessary to prevent the disqualification rule from imposing too severe a deterrent against entering public service. The limitation of disqualification in paragraphs (a)(2) and (d)(2) to matters involving a specific party or parties, rather than extending disqualification to all substantive issues on which the lawyer worked, serves a similar function.

[5] When a lawyer has been employed by one government agency and then moves to a second government agency, it may be appropriate to treat that second agency as another client for purposes of this Rule, as when a lawyer is employed by a city and subsequently is employed by a federal agency. However, because the conflict of interest is governed by paragraph (d), the latter agency is not required to screen the lawyer as paragraph (b) requires a law firm to do. The question of whether two government agencies should be regarded as the same or different clients for conflict of interest purposes is beyond the scope of these Rules. See Rule 1.13, Comment [9].

[6] Paragraphs (b) and (c) contemplate a screening arrangement. See Rule 1.0(k) (requirements for screening procedures). These paragraphs do not prohibit a lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly relating the lawyer's compensation to the fee in the matter in which the lawyer is disqualified.

[7] Notice, including a description of the screened lawyer's prior representation and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.

[8] Paragraph (c) operates only when the lawyer in question has knowledge of the information, which means actual knowledge; it does not operate with respect to information that merely could be imputed to the lawyer.

[9] Paragraphs (a) and (d) do not prohibit a lawyer from jointly representing a private party and a government agency when doing so is permitted by Rule 1.7 and is not otherwise prohibited by law.

[10] For purposes of paragraph (e) of this Rule, a "matter" may continue in another form. In determining whether two particular matters are the same, the lawyer should consider the extent to which the matters involve the same basic facts, the same or related parties, and the time elapsed.

RULE 1.12: FORMER JUDGE, ARBITRATOR, ~~OR~~ MEDIATOR OR OTHER THIRD-PARTY NEUTRAL

(a) Except as stated in ~~section~~ paragraph (d), a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer~~, arbitrator, mediator~~ or law clerk to such a person or as an arbitrator, mediator or other third-party neutral, unless all parties to the proceeding give informed consent ~~after disclosure~~, confirmed in writing.

(b) A lawyer shall not negotiate for employment with any person who is involved as a party or as ~~attorney~~ lawyer for a party in a matter in which the lawyer is participating personally and substantially as a judge or other adjudicative officer~~,~~ or as an arbitrator, mediator or other third-party neutral. A lawyer serving as a law clerk to a judge~~,~~ or other adjudicative officer~~, arbitrator, or mediator~~ may negotiate for employment with a party or ~~attorney~~ lawyer involved in a matter in which the clerk is participating personally and substantially, but only after the lawyer has notified the judge~~,~~ or other adjudicative officer~~, arbitrator, or mediator~~.

(c) If a lawyer is disqualified by ~~section~~ paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in the matter unless:

(1) ~~T~~the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) ~~W~~written notice is promptly given to the parties and any appropriate tribunal to enable ~~it~~ them to ascertain compliance with the provisions of this ~~r~~Rule.

(d) An arbitrator selected as a partisan of a party in a ~~multi-member~~ multimember arbitration panel is not prohibited from subsequently representing that party.

Comment

[1] **[Washington revision]** This Rule generally parallels Rule 1.11. The term "personally and substantially" signifies that a judge who was a member of a multimember court, and thereafter left judicial office to practice law, is not prohibited from representing a client in a matter pending in the court, but in which the former judge did not participate. So also the fact that a former judge exercised administrative responsibility in a court does not prevent the former judge from acting as a lawyer in a matter where the judge had previously exercised remote or incidental administrative responsibility that did not affect the merits. Compare the Comment to Rule 1.11. The term "adjudicative officer" includes such officials as judges pro tempore, referees, special masters, hearing officers and other parajudicial officers, and also lawyers who serve as part-time judges. There are corresponding provisions in the Code of Judicial Conduct. See CJC paragraphs (A)(1)(b) and (2)(b) (application of the Code of Judicial Conduct to part-time and pro tempore judges).

[2] Like former judges, lawyers who have served as arbitrators, mediators or other third-party neutrals may be asked to represent a client in a matter in which the lawyer participated personally and substantially. This Rule forbids such representation unless all of the parties to the proceedings give their informed consent, confirmed in writing. See Rule 1.0 (e) and (b). Other law or codes of ethics governing third-party neutrals may impose more stringent standards of personal or imputed disqualification. See Rule 2.4.

[3] Although lawyers who serve as third-party neutrals do not have information concerning the parties that is pro-

tected under Rule 1.6, they typically owe the parties an obligation of confidentiality under law or codes of ethics governing third-party neutrals. Thus, paragraph (c) provides that conflicts of the personally disqualified lawyer will be imputed to other lawyers in a law firm unless the conditions of this paragraph are met.

[4] Requirements for screening procedures are stated in Rule 1.0(k). Paragraph (c)(1) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.

[5] Notice, including a description of the screened lawyer's prior representation and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.

RULE 1.13: ORGANIZATION AS CLIENT

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances, to the highest authority that can act on behalf of the organization as determined by applicable law.

(c) Except as provided in paragraph (d), if

(1) despite the lawyer's efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly a violation of law, and

(2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization, then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.

(d) Paragraph (c) shall not apply with respect to information relating to a lawyer's representation of an organization to investigate an alleged violation of law, or to defend the organization or an officer, employee or other constituent associated with the organization against a claim arising out of an alleged violation of law.

(e) A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraphs (b) and (c), or who withdraws under circumstances that require or permit the lawyer to take action under either of those paragraphs, shall proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

(f) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

(g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

(h) For purposes of this Rule, when a lawyer who is not a public officer or employee represents a discrete governmental agency or unit that is part of a broader governmental entity, the lawyer's client is the particular governmental agency or unit represented, and not the broader governmental entity of which the agency or unit is a part, unless:

(1) otherwise provided in a written agreement between the lawyer and the governmental agency or unit; or

(2) the broader governmental entity gives the lawyer timely written notice to the contrary, in which case the client shall be designated by such entity. Notice under this subsection shall be given by the person designated by law as the chief legal officer of the broader governmental entity, or in the absence of such designation, by the chief executive officer of the entity.

Comment

The Entity as the Client

[1] An organizational client is a legal entity, but it cannot act except through its officers, directors, employees, shareholders and other constituents. Officers, directors, employees and shareholders are the constituents of the corporate organizational client. The duties defined in this Comment apply equally to unincorporated associations. "Other constituents" as used in this Comment means the positions equivalent to officers, directors, employees and shareholders held by persons acting for organizational clients that are not corporations.

[2] When one of the constituents of an organizational client communicates with the organization's lawyer in that person's organizational capacity, the communication is protected by Rule 1.6. Thus, by way of example, if an organizational client requests its lawyer to investigate allegations of wrongdoing, interviews made in the course of that investigation between the lawyer and the client's employees or other constituents are covered by Rule 1.6. This does not mean, however, that constituents of an organizational client are the clients of the lawyer. The lawyer may not disclose to such constituents information relating to the representation except for disclosures explicitly or impliedly authorized by the organizational client in order to carry out the representation or as otherwise permitted by Rule 1.6.

[3] When constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. Decisions

concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province. Paragraph (b) makes clear, however, that when the lawyer knows that the organization is likely to be substantially injured by action of an officer or other constituent that violates a legal obligation to the organization or is in violation of law that might be imputed to the organization, the lawyer must proceed as is reasonably necessary in the best interest of the organization. As defined in Rule 1.0(f), knowledge can be inferred from circumstances, and a lawyer cannot ignore the obvious.

[4] In determining how to proceed under paragraph (b), the lawyer should give due consideration to the seriousness of the violation and its consequences, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters, and any other relevant considerations. Ordinarily, referral to a higher authority would be necessary. In some circumstances, however, it may be appropriate for the lawyer to ask the constituent to reconsider the matter; for example, if the circumstances involve a constituent's innocent misunderstanding of law and subsequent acceptance of the lawyer's advice, the lawyer may reasonably conclude that the best interest of the organization does not require that the matter be referred to a higher authority. If a constituent persists in conduct contrary to the lawyer's advice, it will be necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization. If the matter is of sufficient seriousness and importance or urgency to the organization, referral to higher authority in the organization may be necessary even if the lawyer has not communicated with the constituent. Any measures taken should, to the extent practicable, minimize the risk of revealing information relating to the representation to persons outside the organization. Even in circumstances where a lawyer is not obligated by Rule 1.13 to proceed, a lawyer may bring to the attention of an organizational client, including its highest authority, matters that the lawyer reasonably believes to be of sufficient importance to warrant doing so in the best interest of the organization.

[5] Paragraph (b) also makes clear that when it is reasonably necessary to enable the organization to address the matter in a timely and appropriate manner, the lawyer must refer the matter to higher authority, including, if warranted by the circumstances, the highest authority that can act on behalf of the organization under applicable law. The organization's highest authority to whom a matter may be referred ordinarily will be the board of directors or similar governing body. However, applicable law may prescribe that under certain conditions the highest authority reposes elsewhere, for example, in the independent directors of a corporation.

Relation to Other Rules

[6] The authority and responsibility provided in this Rule are concurrent with the authority and responsibility provided in other Rules. In particular, this Rule does not limit or expand the lawyer's responsibility under Rules 1.8, 1.16, 3.3 or 4.1. Paragraph (c) of this Rule supplements Rule 1.6(b) by providing an additional basis upon which the lawyer may reveal information relating to the representation, but does not modify, restrict, or limit the provisions of Rule 1.6 (b)(1)-(7). Under paragraph (c) the lawyer may reveal such information only when the organization's highest authority insists upon or fails to address threatened or ongoing action that is clearly a violation of law, and then only to the extent the lawyer reasonably believes necessary to prevent reasonably certain substantial injury to the organization. It is not necessary that the lawyer's services be used in furtherance of the violation, but it is required that the matter be related to the lawyer's representation of the organization. If the lawyer's services are being used by an organization to further a crime or fraud by the organization, Rules 1.6 (b)(2) and 1.6 (b)(3) may permit the lawyer to disclose confidential information. In such circumstances Rule 1.2(d) may also be applicable, in which event, withdrawal from the representation under Rule 1.16 (a)(1) may be required.

[7] Paragraph (d) makes clear that the authority of a lawyer to disclose information relating to a representation in circumstances described in paragraph (c) does not apply with respect to information relating to a lawyer's engagement by an organization to investigate an alleged violation of law or to defend the organization or an officer, employee or other person associated with the organization against a claim arising out of an alleged violation of law. This is necessary in order to enable organizational clients to enjoy the full benefits of legal counsel in conducting an investigation or defending against a claim.

[8] A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraph (b) or (c), or who withdraws in circumstances that require or permit the lawyer to take action under either of these paragraphs, must proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

Government Agency

[9] The duty defined in this Rule applies to governmental organizations. Defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context and is a matter beyond the scope of these Rules. See Scope [18]. Although in some circumstances the client may be a specific agency, it may also be a branch of government, such as the executive branch, or the government as a whole. For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the relevant branch of government may be the client for purposes of this Rule. Moreover, in a matter involving the conduct of government officials, a government lawyer may have authority under applicable law to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. Thus, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful act is prevented or rectified, for public business is involved. In addition, duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulation. This Rule does not limit that authority. See Scope.

Clarifying the Lawyer's Role

[10] There are times when the organization's interest may be or become adverse to those of one or more of its constituents. In such circumstances the lawyer should advise any constituent, whose interest the lawyer finds adverse to that of the organization of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation. Care must be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged.

[11] Whether such a warning should be given by the lawyer for the organization to any constituent individual may turn on the facts of each case.

Dual Representation

[12] Paragraph (g) recognizes that a lawyer for an organization may also represent a principal officer or major shareholder.

Derivative Actions

[13] Under generally prevailing law, the shareholders or members of a corporation may bring suit to compel the directors to perform their legal obligations in the supervision of the organization. Members of unincorporated associations have essentially the same right. Such an action may be brought nominally by the organization, but usually is, in fact, a legal controversy over management of the organization.

[14] The question can arise whether counsel for the organization may defend such an action. The proposition that the organization is the lawyer's client does not alone resolve the issue. Most derivative actions are a normal incident of an organization's affairs, to be defended by the organization's lawyer like any other suit. However, if the claim involves serious charges of wrongdoing by those in control of the organization, a conflict may arise between the lawyer's duty to the organization and the lawyer's relationship with the board. In those circumstances, Rule 1.7 governs who should represent the directors and the organization.

Additional Washington Comment (15)

[15] Paragraph (h) was taken from former Washington RPC 1.7(c); it addresses the obligations of a lawyer who is not a public officer or employee but is representing a discrete governmental agency or unit.

RULE 1.~~13~~14: CLIENT ~~UNDER A DISABILITY~~ WITH DIMINISHED CAPACITY

(a) When a client's ~~ability~~ capacity to make adequately considered decisions in connection with ~~the~~ a representation is ~~impaired~~ diminished, whether because of minority, mental ~~disability~~ impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, ~~a~~ the lawyer may ~~seek~~ take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or ~~take other protective action with respect to a client~~ guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

Comment

[1] The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. When the client is a minor or suffers from a diminished mental capacity, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects. In particular, a severely incapacitated person may have no power to make legally binding decisions. Nevertheless, a client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being. For example, children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody. So also, it is recognized that some persons of advanced age can be quite capable of handling routine financial matters while needing special legal protection concerning major transactions.

[2] The fact that a client suffers a disability does not diminish the lawyer's obligation to treat the client with attention and respect. Even if the person has a legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication.

[3] The client may wish to have family members or other persons participate in discussions with the lawyer. When necessary to assist in the representation, the presence of such persons generally does not affect the applicability of the attorney-client evidentiary privilege. Nevertheless, the lawyer must keep the client's interests foremost and, except for protective action authorized under paragraph (b), must to look to the client, and not family members, to make decisions on the client's behalf.

[4] **[Washington revision]** If a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client. In matters involving a minor, whether the lawyer should look to the parents as natural guardians may depend on the type of proceeding or matter in which the lawyer is representing the minor. If the lawyer represents the guardian as distinct from the ward, and is aware that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct. See Rules 1.2(d) and 1.6 (b)(7).

Taking Protective Action

[5] If a lawyer reasonably believes that a client is at risk of substantial physical, financial or other harm unless action is taken, and that a normal client-lawyer relationship cannot be maintained as provided in paragraph (a) because the client lacks sufficient capacity to communicate or to make adequately considered decisions in connection with the representation, then paragraph (b) permits the lawyer to take protective measures deemed necessary. Such measures could include: consulting with family members, using a reconsideration period to permit clarification or improvement of circumstances, using voluntary surrogate decisionmaking tools such as durable powers of attorney or consulting with support groups, professional services, adult-protective agencies or other individuals or entities that have the ability to protect the client. In taking any protective action, the lawyer should be guided by such factors as the wishes and values of the client to the extent known, the client's best interests and the goals of intruding into the client's decisionmaking autonomy to the least extent feasible, maximizing client capacities and respecting the client's family and social connections.

[6] In determining the extent of the client's diminished capacity, the lawyer should consider and balance such factors as: the client's ability to articulate reasoning leading to a decision, variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the known long-term commitments and values of the client. In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician.

[7] If a legal representative has not been appointed, the lawyer should consider whether appointment of a guardian ad litem, conservator or guardian is necessary to protect the client's interests. Thus, if a client with diminished capacity has substantial property that should be sold for the client's benefit, effective completion of the transaction may require appointment of a legal representative. In addition, rules of procedure in litigation sometimes provide that minors or persons with diminished capacity must be represented by a guardian or next friend if they do not have a general guardian. In many circumstances, however, appointment of a legal representative may be more expensive or traumatic for the client than circumstances in fact require. Evaluation of such circumstances is a matter entrusted to the professional judgment of the lawyer. In considering alternatives, however, the lawyer should be aware of any law that requires the lawyer to advocate the least restrictive action on behalf of the client.

Disclosure of the Client's Condition

[8] Disclosure of the client's diminished capacity could adversely affect the client's interests. For example, raising the question of diminished capacity could, in some circumstances, lead to proceedings for involuntary commitment. Information relating to the representation is protected by Rule 1.6. Therefore, unless authorized to do so, the lawyer may not disclose such information. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized to make the necessary disclosures, even when the client directs the lawyer to the contrary. Nevertheless, given the risks of disclosure, paragraph (c) limits what the lawyer may disclose in consulting with other individuals or entities or seeking the appointment of a legal representative. At the very least, the lawyer should determine whether it is likely that the person or entity consulted with will act adversely to the client's interests before discussing matters related to the client. The lawyer's position in such cases is an unavoidably difficult one.

Emergency Legal Assistance

[9] In an emergency where the health, safety or a financial interest of a person with seriously diminished capacity is threatened with imminent and irreparable harm, a lawyer may take legal action on behalf of such a person even though the person is unable to establish a client-lawyer relationship or to make or express considered judgments about the matter, when the person or another acting in good faith on that person's behalf has consulted with the lawyer. Even in such an emergency, however, the lawyer should not act unless the lawyer reasonably believes that the person has no other lawyer, agent or other representative available. The lawyer should take legal action on behalf of the person only to the extent reasonably necessary to maintain the status quo or otherwise avoid imminent and irreparable harm. A lawyer who undertakes to represent a person in such an exigent situation has the same duties under these Rules as the lawyer would with respect to a client.

[10] A lawyer who acts on behalf of a person with seriously diminished capacity in an emergency should keep the confidences of the person as if dealing with a client, disclosing them only to the extent necessary to accomplish the intended protective action. The lawyer should disclose to any tribunal involved and to any other counsel involved the nature of his or her relationship with the person. The lawyer should take steps to regularize the relationship or implement other protective solutions as soon as possible. Normally, a lawyer would not seek compensation for such emergency actions taken.

RULE 1.~~14~~15A: ~~PRESERVING IDENTITY OF FUNDS AND~~ SAFEGUARDING PROPERTY ~~OF A CLIENT~~

~~(a) All funds of clients paid to a lawyer or law firm, including advances for costs and expenses, shall be deposited in one or more identifiable interest-bearing trust accounts maintained as set forth in section (c), and no funds belonging to the lawyer or law firm shall be deposited therein except as follows:~~

~~(1) Funds reasonably sufficient to pay bank charges may be deposited therein;~~

~~(2) Funds belonging in part to a client and in part presently or potentially to the lawyer or law firm must be deposited therein, but the portion belonging to the lawyer or law firm may be withdrawn when due unless the right of the lawyer or law firm to receive it is disputed by the client, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved.~~

~~(b) A lawyer shall:~~

~~(1) Promptly notify a client of the receipt of his or her funds, securities, or other properties;~~

~~(2) Identify and label securities and properties of a client promptly upon receipt and place them in a safe deposit box or other place of safekeeping as soon as practicable;~~

~~(3) Maintain complete records of all funds, securities, and other properties of a client coming into the possession of the lawyer and render appropriate accounts to his or her client regarding them;~~

~~(4) Promptly pay or deliver to the client as requested by a client the funds, securities, or other properties in the possession of the lawyer which the client is entitled to receive.~~

(a) This Rule applies to (1) property of clients or third persons in a lawyer's possession in connection with a representation and (2) escrow and other funds held by a lawyer incident to the closing of any real estate or personal property.

(b) A lawyer must not use, convert, borrow or pledge client or third person property for the lawyer's own use.

(c) A lawyer must hold property of clients and third persons separate from the lawyer's own property.

(1) A lawyer must deposit and hold in a trust account funds subject to this Rule pursuant to paragraph (h) of this Rule.

(2) A lawyer must identify, label and appropriately safeguard any property of clients or third persons other than funds. The lawyer must keep records of such property that identify the property, the client or third person, the date of receipt and the location of safekeeping. The lawyer must preserve the records for seven years after return of the property.

(d) A lawyer must promptly notify a client or third person of receipt of the client or third person's property.

(e) A lawyer must promptly provide a written accounting to a client or third person after distribution of property or upon request. A lawyer must provide at least annually a written accounting to a client or third person for whom the lawyer is holding property.

(f) Except as stated in this Rule, a lawyer must promptly pay or deliver to the client or third person the property which the client or third person is entitled to receive.

(g) If a lawyer possesses property in which two or more persons (one of which may be the lawyer) claim interests, the lawyer must maintain the property in trust until the dispute is resolved. The lawyer must promptly distribute all undisputed portions of the property. The lawyer must take reasonable action to resolve the dispute, including, when appropriate, interpleading the disputed funds.

~~(c) Each trust account referred to in section (a) shall be an interest-bearing trust account in any bank, credit union or savings and loan association, selected by a lawyer in the exercise of ordinary prudence, authorized by federal or state law to do business in Washington and insured by the Federal Deposit Insurance Corporation, the National Credit Union Share Insurance Fund, the Washington Credit Union Share Guaranty Association, or the Federal Savings and Loan Insurance Corporation, or which is a qualified public depository as defined in RCW 39.58.010(2), which bank, credit union, savings and loan association or qualified public depository has filed an agreement with the Disciplinary Board pursuant to rule 15.4 of the Rules for Enforcement of Lawyer Conduct. Interest-bearing trust funds shall be placed in accounts in which withdrawals or transfers can be made without delay when such funds are required, subject only to any notice period which the depository institution is required to reserve by law or regulation.~~

~~(1) A lawyer who receives client funds shall maintain a pooled interest-bearing trust account for deposit of client funds that are nominal in amount or expected to be held for a short period of time. The interest accruing on this account, net of reasonable check and deposit processing charges which shall only include items deposited charge, monthly maintenance fee, per item check charge, and per deposit charge, shall be paid to The Legal Foundation of Washington, as established by the Supreme Court of Washington. All other fees and transaction costs shall be paid by the lawyer. A lawyer may, but shall not be required to, notify the client of the intended use of such funds.~~

~~(2) All client funds shall be deposited in the account specified in subsection (1) unless they are deposited in:~~

~~(i) a separate interest-bearing trust account for the particular client or client's matter on which the interest will be paid to the client; or~~

~~(ii) a pooled interest-bearing trust account with sub-accounting that will provide for computation of interest earned by each client's funds and the payment thereof to the client.~~

~~(3) In determining whether to use the account specified in subsection (1) or an account specified in subsection (2), a lawyer shall consider only whether the funds to be invested could be utilized to provide a positive net return to the client, as determined by taking into consideration the following factors:~~

~~(i) the amount of interest that the funds would earn during the period they are expected to be deposited;~~

~~(ii) the cost of establishing and administering the account, including the cost of the lawyer's services and the cost of preparing any tax reports required for interest accruing to a client's benefit; and~~

~~(iii) the capability of financial institutions to calculate and pay interest to individual clients.~~

~~(4) As to accounts created under subsection (c)(1), lawyers or law firms shall direct the depository institution:~~

~~(i) to remit interest or dividends, net of reasonable check and deposit processing charges which shall only include items deposited charge, monthly maintenance fee, per item check charge, and per deposit charge, on the average monthly balance in the account, or as otherwise computed in accordance with an institution's standard accounting practice, at least quarterly, to the Legal Foundation of Washington. Other fees and transaction costs will be directed to the lawyer;~~

~~(ii) to transmit with each remittance to the Foundation a statement showing the name of the lawyer or law firm for whom the remittance is sent, the rate of interest applied, and the amount of service charges deducted, if any, and the account balance(s) of the period in which the report is made, with a copy of such statement to be transmitted to the depositing lawyer or law firm.~~

~~(5) The Foundation shall prepare an annual report to the Supreme Court of Washington that summarizes the Foundation's income, grants and operating expenses, implementation of its corporate purposes, and any problems arising in the~~

~~administration of the program established by section (e) of this rule.~~

~~(6) The provisions of section (e) shall not relieve a lawyer or law firm from any obligation imposed by these rules with respect to safekeeping of clients' funds, including the requirements of section (b) that a lawyer shall promptly notify a client of the receipt of his or her funds and shall promptly pay or deliver to the client as requested all funds in the possession of the lawyer which the client is entitled to receive.~~

(h) A lawyer must comply with the following for all trust accounts:

(1) No funds belonging to the lawyer may be deposited or retained in a trust account except as follows:

(i) funds to pay bank charges, but only in an amount reasonably sufficient for that purpose;

(ii) funds belonging in part to a client or third person and in part presently or potentially to the lawyer must be deposited and retained in a trust account, but any portion belonging to the lawyer must be withdrawn at the earliest reasonable time; or

(iii) funds necessary to restore appropriate balances.

(2) A lawyer must keep complete records as required by Rule 1.15B.

(3) A lawyer may withdraw funds when necessary to pay client costs. The lawyer may withdraw earned fees only after giving reasonable notice to the client of the intent to do so, through a billing statement or other document.

(4) Receipts must be deposited intact.

(5) All withdrawals must be made only to a named payee and not to cash. Withdrawals must be made by check or by bank transfer.

(6) Trust account records must be reconciled as often as bank statements are generated or at least quarterly. The lawyer must reconcile the check register balance to the bank statement balance and reconcile the check register balance to the combined total of all client ledger records required by Rule 1.15B (a)(2).

(7) A lawyer must not disburse funds from a trust account until deposits have cleared the banking process and been collected, unless the lawyer and the bank have a written agreement by which the lawyer personally guarantees all disbursements from the account without recourse to the trust account.

(8) Disbursements on behalf of a client or third person may not exceed the funds of that person on deposit. The funds of a client or third person must not be used on behalf of anyone else.

(9) Only a lawyer admitted to practice law may be an authorized signatory on the account.

(i) Trust accounts must be interest-bearing and allow withdrawals or transfers without any delay other than notice periods that are required by law or regulation. In the exercise of ordinary prudence, a lawyer may select any bank, savings bank, credit union or savings and loan association that is insured by the Federal Deposit Insurance Corporation or National Credit Union Administration, is authorized by law to do business in Washington and has filed the agreement required by ELC 15.4. Trust account funds must not be placed in mutual funds, stocks, bonds, or similar investments.

(1) When client or third-person funds will not produce a positive net return to the client or third person because the funds are nominal in amount or expected to be held for a short period of time the funds must be placed in a pooled interest-bearing trust account known as an Interest on Lawyer's Trust Account or IOLTA. The interest accruing on the IOLTA account, net of reasonable check and deposit processing charges which may only include items deposited charge, monthly maintenance fee, per item check charge, and per deposit charge, must be paid to the Legal Foundation of Washington. Any other fees and transaction costs must be paid by the lawyer.

(2) Client or third-person funds that will produce a positive net return to the client or third person must be placed in one of the following unless the client or third person requests that the funds be deposited in an IOLTA account:

(i) a separate interest-bearing trust account for the particular client or third person with earned interest paid to the client or third person; or

(ii) a pooled interest-bearing trust account with subaccounting that allows for computation of interest earned by each client or third person's funds with the interest paid to the appropriate client or third person.

(3) In determining whether to use the account specified in paragraph (i)(1) or an account specified in paragraph (i)(2), a lawyer must consider only whether the funds will produce a positive net return to the client or third person, as determined by the following factors:

(i) the amount of interest the funds would earn based on the current rate of interest and the expected period of deposit;

(ii) the cost of establishing and administering the account, including the cost of the lawyer's services and the cost of preparing any tax reports required for interest accruing to a client or third person's benefit; and

(iii) the capability of financial institutions to calculate and pay interest to individual clients or third persons if the account in paragraph (i)(2)(ii) is used.

(4) As to IOLTA accounts created under paragraph (i)(1), lawyers or law firms must direct the depository institution:

(i) to remit interest or dividends, net of charges authorized by paragraph (i)(1), on the average monthly balance in the account, or as otherwise computed in accordance with an institution's standard accounting practice, monthly, to the Legal Foundation of Washington;

(ii) to transmit with each remittance to the Foundation a statement, on a form authorized by the Washington State Bar Association, showing details about the account, including but not limited to the name of the lawyer or law firm for whom the remittance is sent, the rate of interest applied, and the amount of service charges deducted, if any, and the balance used to compute the interest, with a copy of such statement to be transmitted to the depositing lawyer or law firm; and

(iii) to bill fees and transaction costs not authorized by paragraph (i)(1) to the lawyer or law firm.

(5) The provisions of paragraph (i) do not relieve a lawyer or law firm from any obligation imposed by these Rules.

(j) The Legal Foundation of Washington must prepare an annual report to the Supreme Court of Washington that summarizes the Foundation's income, grants and operating

expenses, implementation of its corporate purposes, and any problems arising in the administration of the program established by paragraph (i) of this Rule.

~~(d) Escrow and other funds held by a lawyer incident to the closing of any real estate or personal property transaction are client funds subject to this rule regardless of whether the lawyer, the law firm, or the parties view the funds as belonging to clients or non-clients.~~

~~COMMENT RPC 1.14~~

~~Escrow or other funds incident to the closing of real or personal property transactions are subject to this rule regardless of whether the lawyer views the funds as belonging to clients.~~

Washington Comments

[1] A lawyer must also comply with the recordkeeping rule for trust accounts, Rule 1.15B.

[2] Client funds include, but are not limited to, the following: legal fees and costs that have been paid in advance, funds received on behalf of a client, funds to be paid by a client to a third party through the lawyer, other funds subject to attorney and other liens, and payments received in excess of amounts billed for fees.

[3] This Rule applies to property held in any fiduciary capacity in connection with a representation, whether as trustee, agent, escrow agent, guardian, personal representative, executor, or otherwise.

[4] The inclusion of ethical obligations to third persons in the handling of trust funds and property is not intended to expand or otherwise affect existing law regarding a Washington lawyer's liability to third parties other than clients. See, e.g., *Trask v. Butler*, 123 Wn.2d 835, 872 P.2d 1080 (1994); *Hetzel v. Parks*, 93 Wn. App. 929, 971 P.2d 115 (1999).

[5] Property covered by this Rule includes original documents affecting legal rights such as wills or deeds.

[6] A lawyer has a duty to take reasonable steps to locate a client or third person for whom the lawyer is holding funds or property. If after taking reasonable steps, the lawyer is still unable to locate the client or third person, the lawyer should treat the funds as unclaimed property under the Uniform Unclaimed Property Act, RCW 63.29.

[7] A lawyer may not use as a trust account an account in which funds are periodically transferred by the bank between a trust account and an uninsured account or other account that would not qualify as a trust account under this Rule.

[8] If a lawyer accepts payment of an advanced fee deposit by credit card, the payment must be deposited directly into the trust account. It cannot be deposited into a general account and then transferred to the trust account. Similarly, credit card payments of earned fees cannot be deposited into the trust account and then transferred to another account.

[9] Under paragraph (g), the extent of the efforts that a lawyer is obligated to take to resolve a dispute depend on the amount in dispute, the availability of methods for alternative dispute resolution, and the likelihood of informal resolution.

[10] The requirement in paragraph (h)(4) that receipts must be deposited intact means that a lawyer cannot deposit one check or negotiable instrument into two or more accounts at the same time, commonly known as a split deposit.

[11] Paragraph (h)(7) permits Washington lawyers to enter into written agreements with the trust account financial institution to provide for disbursement of trust deposits prior to formal notice of dishonor or collection. In essence the trust account bank is agreeing to or has guaranteed a loan to the lawyer and the client for the amount of the trust deposit pending collection of that deposit from the institution upon which the instrument was written. A Washington lawyer may only enter into such an arrangement if 1) there is a formal written agreement between the attorney and the trust account institution, and 2) the trust account financial institution provides the lawyer with written assurance that in the event of dishonor of the deposited instrument or other difficulty in collecting the deposited funds, the financial institution will not have recourse to the trust account to obtain the funds to reimburse the financial institution. A lawyer must never use one client's money to pay for withdrawals from the trust account on behalf of another client who is paid subject to the lawyer's guarantee. The trust account financial institution must agree that the institution will not seek to fund the guaranteed withdrawal from the trust account, but will instead look to the lawyer for payment of uncollectible funds. Any such agreement must ensure that the trust account funds or deposits of any other client's or third person's money into the trust account would not be affected by the guarantee.

[12] The Legal Foundation of Washington was established by Order of the Supreme Court of Washington.

[13] A lawyer may, but is not required to, notify the client of the intended use of funds paid to the Foundation.

[14] If the client or third person requests that funds that would be deposited in a separate interest-bearing account instead be held in the IOLTA account, the lawyer should document this request in the lawyer's trust account records and preferably should confirm the request in writing to the client or third person.

[15] A lawyer may not receive from financial institutions earnings credits or any other benefit from the financial institution based on the balance maintained in a trust account.

RULE 1.15B: REQUIRED TRUST ACCOUNT RECORDS

(a) A lawyer must maintain current trust account records. They may be in electronic or manual form and must be retained for at least seven years after the events they record. At minimum, the records must include the following:

(1) Checkbook register or equivalent for each trust account, including entries for all receipts, disbursements, and transfers, and containing at least:

(i) identification of the client matter for which trust funds were received, disbursed, or transferred;

(ii) the date on which trust funds were received, disbursed, or transferred;

(iii) the check number for each disbursement;

(iv) the payor or payee for or from which trust funds were received, disbursed, or transferred; and

(v) the new trust account balance after each receipt, disbursement, or transfer;

(2) Individual client ledger records containing either a separate page for each client or an equivalent electronic

record showing all individual receipts, disbursements, or transfers, and also containing:

(i) identification of the purpose for which trust funds were received, disbursed, or transferred;

(ii) the date on which trust funds were received, disbursed or transferred;

(iii) the check number for each disbursement;

(iv) the payor or payee for or from which trust funds were received, disbursed, or transferred; and

(v) the new client fund balance after each receipt, disbursement, or transfer;

(3) Copies of any agreements pertaining to fees and costs;

(4) Copies of any statements or accountings to clients or third parties showing the disbursement of funds to them or on their behalf;

(5) Copies of bills for legal fees and expenses rendered to clients;

(6) Copies of invoices, bills or other documents supporting all disbursements or transfers from the trust account;

(7) Bank statements, copies of deposit slips, and cancelled checks or their equivalent;

(8) Copies of all trust account client ledger reconciliations; and

(9) Copies of those portions of clients' files that are reasonably necessary for a complete understanding of the financial transactions pertaining to them.

(b) Upon any change in the lawyer's practice affecting the trust account, including dissolution or sale of a law firm or suspension or other change in membership status, the lawyer must make appropriate arrangements for the maintenance of the records specified in this Rule.

Washington Comments

[1] Paragraph (a)(3) is not intended to require that fee agreements be in writing. That issue is governed by Rule 1.5.

[2] If trust records are computerized, a system of regular and frequent (preferably daily) back-up procedures is essential.

[3] Paragraph (a)(9) does not require a lawyer to retain the entire client file for a period of seven years, although many lawyers will choose to do so for other reasons. Rather, under this paragraph, the lawyer must retain only those portions of the file necessary for a complete understanding of the financial transactions. For example, if a lawyer received proceeds of a settlement on a client's behalf, the lawyer would need to retain a copy of the settlement agreement. In many cases, there will be nothing in the client file that needs to be retained other than the specific documents listed in paragraphs (a)(2)-(8).

RULE 1.~~15~~16: DECLINING OR TERMINATING REPRESENTATION

(a) Except as stated in ~~section~~ paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall, notwithstanding RCW 2.44.040, withdraw from the representation of a client if:

(1) ~~T~~the representation will result in violation of the Rules of Professional Conduct or other law;

(2) ~~T~~the lawyer's physical or mental condition materially impairs ~~his~~ the lawyer's ability to represent the client; or

(3) ~~T~~the lawyer is discharged.

(b) Except as stated in ~~section~~ paragraph (c), a lawyer may withdraw from representing a client if:

(1) withdrawal can be accomplished without material adverse effect on the interests of the client~~, or if:~~;

(~~1~~2) ~~T~~the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;

(~~2~~3) ~~T~~the client has used the lawyer's services to perpetrate a crime or fraud;

(~~3~~4) ~~T~~the client insists upon ~~pursuing an objective~~ taking action that the lawyer considers repugnant or ~~imprudent~~ with which the lawyer has a fundamental disagreement;

(~~4~~5) ~~T~~the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

(~~5~~6) ~~T~~the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(~~6~~7) ~~O~~other good cause for withdrawal exists.

(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, ~~A~~a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.

Comment

[1] A lawyer should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest and to completion. Ordinarily, a representation in a matter is completed when the agreed-upon assistance has been concluded. See Rules 1.2(c) and 6.5. See also Rule 1.3, Comment [4].

Mandatory Withdrawal

[2] A lawyer ordinarily must decline or withdraw from representation if the client demands that the lawyer engage in conduct that is illegal or violates the Rules of Professional Conduct or other law. The lawyer is not obliged to decline or withdraw simply because the client suggests such a course of conduct; a client may make such a suggestion in the hope that a lawyer will not be constrained by a professional obligation.

[3] When a lawyer has been appointed to represent a client, withdrawal ordinarily requires approval of the appointing authority. See also Rule 6.2. Similarly, court approval or notice to the court is often required by applicable law before a lawyer withdraws from pending litigation. Difficulty may be encountered if withdrawal is based on the client's demand that the lawyer engage in unprofessional conduct. The court

may request an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. The lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient. Lawyers should be mindful of their obligations to both clients and the court under Rules 1.6 and 3.3.

Discharge

[4] A client has a right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services. Where future dispute about the withdrawal may be anticipated, it may be advisable to prepare a written statement reciting the circumstances.

[5] Whether a client can discharge appointed counsel may depend on applicable law. A client seeking to do so should be given a full explanation of the consequences. These consequences may include a decision by the appointing authority that appointment of successor counsel is unjustified, thus requiring self-representation by the client.

[6] If the client has severely diminished capacity, the client may lack the legal capacity to discharge the lawyer, and in any event the discharge may be seriously adverse to the client's interests. The lawyer should make special effort to help the client consider the consequences and may take reasonably necessary protective action as provided in Rule 1.14.

Optional Withdrawal

[7] A lawyer may withdraw from representation in some circumstances. The lawyer has the option to withdraw if it can be accomplished without material adverse effect on the client's interests. Withdrawal is also justified if the client persists in a course of action that the lawyer reasonably believes is criminal or fraudulent, for a lawyer is not required to be associated with such conduct even if the lawyer does not further it. Withdrawal is also permitted if the lawyer's services were misused in the past even if that would materially prejudice the client. The lawyer may also withdraw where the client insists on taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement.

[8] A lawyer may withdraw if the client refuses to abide by the terms of an agreement relating to the representation, such as an agreement concerning fees or court costs or an agreement limiting the objectives of the representation.

Assisting the Client upon Withdrawal

[9] Even if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the consequences to the client. The lawyer may retain papers as security for a fee only to the extent permitted by law. See Rule 1.15A.

RULE 1.17: SALE OF LAW PRACTICE

A lawyer or a law firm may sell or purchase a law practice, or an area of law practice, including good will, if the following conditions are satisfied:

(a) ~~The seller ceases to engage in the private practice of law, or in the area of practice that has been sold, in the geographic area in which the practice has been conducted.~~ **[Reserved.]**

(b) The entire practice, or the entire area of practice, is sold to one or more lawyers or law firms;

(c) The seller gives written notice to each of the seller's clients regarding:

(1) the proposed sale;

(2) the client's right to retain other counsel or to take possession of the file; and

(3) the fact that the client's consent to the transfer of the client's files will be presumed if the client does not take any action or does not otherwise object within ninety (90) days of receipt of the notice.

If a client cannot be given notice, the representation of that client may be transferred to the purchaser only upon entry of an order so authorizing by a court having jurisdiction. The seller may disclose to the court in camera information relating to the representation only to the extent necessary to obtain an order authorizing the transfer of a file.

(d) The fees charged clients shall not be increased by reason of the sale.

Comment

[1] The practice of law is a profession, not merely a business. Clients are not commodities that can be purchased and sold at will. Pursuant to this Rule, when a lawyer or an entire firm ceases to practice, or ceases to practice in an area of law, and other lawyers or firms take over the representation, the selling lawyer or firm may obtain compensation for the reasonable value of the practice as may withdrawing partners of law firms. See Rules 5.4 and 5.6.

Termination of Practice by the Seller

[2] ~~The requirement that all of the private practice, or all of an area of practice, be sold is satisfied if the seller in good faith makes the entire practice, or the area of practice, available for sale to the purchasers. The fact that a number of the seller's clients decide not to be represented by the purchasers but take their matters elsewhere, therefore, does not result in a violation. Return to private practice as a result of an unanticipated change in circumstances does not necessarily result in a violation. For example, a lawyer who has sold the practice to accept an appointment to judicial office does not violate the requirement that the sale be attendant to cessation of practice if the lawyer later resumes private practice upon being defeated in a contested or a retention election for the office or resigns from a judiciary position.~~ **[Reserved.]**

[3] ~~The requirement that the seller cease to engage in the private practice of law does not prohibit employment as a lawyer on the staff of a public agency or a legal services entity that provides legal services to the poor, or as in-house counsel to a business.~~ **[Reserved.]**

[4] ~~**[Washington revision]** The Rule permits a sale of an entire practice attendant upon ceasing to engage in the private practice of law within a geographical area. This encompasses only a move from one locale in Washington to another that is tantamount to leaving the jurisdiction in which the lawyer has engaged in the practice of law.~~ **[Reserved.]**

[5] ~~This Rule also permits a lawyer or law firm to sell an area of practice. If an area of practice is sold and the lawyer~~

~~remains in the active practice of law, the lawyer must cease accepting any matters in the area of practice that has been sold, either as counsel or co-counsel or by assuming joint responsibility for a matter in connection with the division of a fee with another lawyer as would otherwise be permitted by Rule 1.5(e). For example, a lawyer with a substantial number of estate planning matters and a substantial number of probate administration cases may sell the estate planning portion of the practice but remain in the practice of law by concentrating on probate administration; however, that practitioner may not thereafter accept any estate planning matters. Although a lawyer who leaves a jurisdiction or geographical area typically would sell the entire practice, this Rule permits the lawyer to limit the sale to one or more areas of the practice, thereby preserving the lawyer's right to continue practice in the areas of the practice that were not sold.~~ **[Reserved.]**

Sale of Entire Practice or Entire Area of Practice

[6] The Rule requires that the seller's entire practice, or an entire area of practice, be sold. The prohibition against sale of less than an entire practice area protects those clients whose matters are less lucrative and who might find it difficult to secure other counsel if a sale could be limited to substantial fee-generating matters. The purchasers are required to undertake all client matters in the practice or practice area, subject to client consent. This requirement is satisfied, however, even if a purchaser is unable to undertake a particular client matter because of a conflict of interest.

Client Confidences, Consent and Notice

[7] Negotiations between seller and prospective purchaser prior to disclosure of information relating to a specific representation of an identifiable client no more violate the confidentiality provisions of Rule 1.6 than do preliminary discussions concerning the possible association of another lawyer or mergers between firms, with respect to which client consent is not required. Providing the purchaser access to client-specific information relating to the representation and to the file, however, requires client consent. The Rule provides that before such information can be disclosed by the seller to the purchaser the client must be given actual written notice of the contemplated sale, including the identity of the purchaser, and must be told that the decision to consent or make other arrangements must be made within 90 days. If nothing is heard from the client within that time, consent to the sale is presumed.

[8] **[Washington revision]** A lawyer or law firm ceasing to practice cannot be required to remain in practice because some clients cannot be given actual notice of the proposed purchase. Since these clients cannot themselves consent to the purchase or direct any other disposition of their files, the Rule requires an order from a court having jurisdiction authorizing their transfer or other disposition. The Court can be expected to determine whether reasonable efforts to locate the client have been exhausted, and whether the absent client's legitimate interests will be served by authorizing the transfer of the file so that the purchaser may continue the representation. Preservation of client confidences requires that the petition for a court order be considered in camera.

[9] All elements of client autonomy, including the client's absolute right to discharge a lawyer and transfer the representation to another, survive the sale of the practice or area of practice.

Fee Arrangements Between Client and Purchaser

[10] The sale may not be financed by increases in fees charged the clients of the practice. Existing arrangements between the seller and the client as to fees and the scope of the work must be honored by the purchaser.

Other Applicable Ethical Standards

[11] Lawyers participating in the sale of a law practice or a practice area are subject to the ethical standards applicable to involving another lawyer in the representation of a client. These include, for example, the seller's obligation to exercise competence in identifying a purchaser qualified to assume the practice and the purchaser's obligation to undertake the representation competently (see Rule 1.1); the obligation to avoid disqualifying conflicts, and to secure the client's informed consent for those conflicts that can be agreed to (see Rule 1.7 regarding conflicts and Rule 1.0(e) for the definition of informed consent); and the obligation to protect information relating to the representation (see Rules 1.6 and 1.9).

[12] If approval of the substitution of the purchasing lawyer for the selling lawyer is required by the rules of any tribunal in which a matter is pending, such approval must be obtained before the matter can be included in the sale (see Rule 1.16).

Applicability of the Rule

[13] This Rule applies to the sale of a law practice of a deceased, disabled or disappeared lawyer. Thus, the seller may be represented by a non-lawyer representative not subject to these Rules. Since, however, no lawyer may participate in a sale of a law practice which does not conform to the requirements of this Rule, the representatives of the seller as well as the purchasing lawyer can be expected to see to it that they are met.

[14] Admission to or retirement from a law partnership or professional association, retirement plans and similar arrangements, and a sale of tangible assets of a law practice, do not constitute a sale or purchase governed by this Rule.

[15] This Rule does not apply to the transfers of legal representation between lawyers when such transfers are unrelated to the sale of a practice or an area of practice.

Additional Washington Comment (16)

[16] If, at the time the notice under paragraph (c) is given, the buyer or seller knows of a conflict that would preclude the buyer from representing a client of the seller, the notice to that client should inform the client of the conflict and the need for the client to obtain substitute counsel or retrieve the file. When such a conflict exists, the notice described in paragraph (c)(3) cannot be given because there can be no presumption that the client's file will be transferred to the buyer.

RULE 1.18: DUTIES TO PROSPECTIVE CLIENT

(a) A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

(b) Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client or except as provided in paragraph (e).

(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraphs (d) or (e). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

(d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:

(1) both the affected client and the prospective client have given informed consent, confirmed in writing, or:

(2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and

(i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(ii) written notice is promptly given to the prospective client.

(e) A lawyer may condition conversations with a prospective client on the person's informed consent that no information disclosed during the consultation will prohibit the lawyer from representing a different client in the matter. The prospective client may also expressly consent to the lawyer's subsequent use of information received from the prospective client.

Comment

[1] Prospective clients, like clients, may disclose information to a lawyer, place documents or other property in the lawyer's custody, or rely on the lawyer's advice. A lawyer's discussions with a prospective client usually are limited in time and depth and leave both the prospective client and the lawyer free (and sometimes required) to proceed no further. Hence, prospective clients should receive some but not all of the protection afforded clients.

[2] **[Washington revision]** Not all persons who communicate information to a lawyer are entitled to protection under this Rule. A person who communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, is not a "prospective client" within the meaning of paragraph (a). See also Washington Comment [10].

[3] It is often necessary for a prospective client to reveal information to the lawyer during an initial consultation prior to the decision about formation of a client-lawyer relationship. The lawyer often must learn such information to determine whether there is a conflict of interest with an existing client and whether the matter is one that the lawyer is willing to undertake. Paragraph (b) prohibits the lawyer from using or revealing that information, except as permitted by Rule 1.9, even if the client or lawyer decides not to proceed with the representation. The duty exists regardless of how brief the initial conference may be.

[4] In order to avoid acquiring disqualifying information from a prospective client, a lawyer considering whether or not to undertake a new matter should limit the initial interview to only such information as reasonably appears necessary for that purpose. Where the information indicates that a conflict of interest or other reason for non-representation exists, the lawyer should so inform the prospective client or decline the representation. If the prospective client wishes to retain the lawyer, and if consent is possible under Rule 1.7, then consent from all affected present or former clients must be obtained before accepting the representation.

[5] [**Reserved**. Comment [5] to Model Rule 1.18 is codified, with minor modifications, as paragraph (e). See Rule 1.0(e) for the definition of informed consent.]

[6] Even in the absence of an agreement, under paragraph (c), the lawyer is not prohibited from representing a client with interests adverse to those of the prospective client in the same or a substantially related matter unless the lawyer has received from the prospective client information that could be significantly harmful if used in the matter.

[7] Under paragraph (c), the prohibition in this Rule is imputed to other lawyers as provided in Rule 1.10, but, under paragraph (d)(1), imputation may be avoided if the lawyer obtains the informed consent, confirmed in writing, of both the prospective and affected clients. In the alternative, imputation may be avoided if the conditions of paragraph (d)(2) are met and all disqualified lawyers are timely screened and written notice is promptly given to the prospective client. See Rule 1.0(k) (requirements for screening procedures). Paragraph (d)(2)(i) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.

[8] Notice, including a general description of the subject matter about which the lawyer was consulted, and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.

[9] For the duty of competence of a lawyer who gives assistance on the merits of a matter to a prospective client, see Rule 1.1. For a lawyer's duties when a prospective client entrusts valuables or papers to the lawyer's care, see Rule 1.15A.

Additional Washington Comments (10 - 13)

[10] Unilateral communications from individuals seeking legal services do not generally create a relationship covered by this Rule, unless the lawyer invites unilateral confi-

dential communications. The public dissemination of general information concerning a lawyer's name or firm name, practice area and types of clients served, and contact information, is not in itself, an invitation to convey unilateral confidential communications nor does it create a reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship.

[11] This Rule is not intended to modify existing case law defining when a client-lawyer relationship is formed. See *Bohn v. Cody*, 119 Wn.2d 357, 363, 832 P.2d 71 (1992); *In re McGlothen*, 99 Wn.2d 515, 522, 663 P.2d 1330 (1983). See also Scope [17].

[12] For purposes of this Rule, "significantly harmful" means more than de minimis harm.

[13] Pursuant to statute or other law, government officers and employees may be entitled to defense and indemnification by the government. In these circumstances, a government lawyer may find it necessary to obtain information from a government officer or employee to determine if he or she meets the criteria for representation and indemnification. In this situation, the government lawyer is acting on behalf of the government entity as the client, and this Rule would not apply. The government lawyer shall comply with Rule 4.3 in obtaining such information.

Title 2 COUNSELOR

RULE 2.1: ADVISOR

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.

Comment

Scope of Advice

[1] A client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.

[2] Advice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.

[3] A client may expressly or impliedly ask the lawyer for purely technical advice. When such a request is made by a client experienced in legal matters, the lawyer may accept it at face value. When such a request is made by a client inexperienced in legal matters, however, the lawyer's responsibility as advisor may include indicating that more may be involved than strictly legal considerations.

[4] Matters that go beyond strictly legal questions may also be in the domain of another profession. Family matters can involve problems within the professional competence of psychiatry, clinical psychology or social work; business matters can involve problems within the competence of the accounting profession or of financial specialists. Where consultation with a professional in another field is itself something a competent lawyer would recommend, the lawyer should make such a recommendation. At the same time, a lawyer's advice at its best often consists of recommending a course of action in the face of conflicting recommendations of experts.

Offering Advice

[5] In general, a lawyer is not expected to give advice until asked by the client. However, when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, the lawyer's duty to the client under Rule 1.4 may require that the lawyer offer advice if the client's course of action is related to the representation. Similarly, when a matter is likely to involve litigation, it may be necessary under Rule 1.4 to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation. A lawyer ordinarily has no duty to initiate investigation of a client's affairs or to give advice that the client has indicated is unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client's interest.

Rule 2.2 ~~INTERMEDIARY~~ (Deleted)

~~(a) A lawyer may act as intermediary between clients if:~~

~~(1) The lawyer consults with each client concerning the implications of the common representation, including the advantages and risks involved, and the effect on the attorney-client privileges, and obtains each client's written consent to the common representation;~~

~~(2) The lawyer reasonably believes that the matter can be resolved on terms compatible with the clients' best interests, that each client will be able to make adequately informed decisions in the matter and that there is little risk of material prejudice to the interests of any of the clients if the contemplated resolution is unsuccessful; and~~

~~(3) The lawyer reasonably believes that the common representation can be undertaken impartially and without improper effect on other responsibilities the lawyer has to any of the clients.~~

~~(b) While acting as intermediary, the lawyer shall consult with each client concerning the decisions to be made and the considerations relevant in making them, so that each client can make adequately informed decisions.~~

~~(c) A lawyer shall withdraw as intermediary if any of the clients so requests, or if any of the conditions stated in section (a) is no longer satisfied. Upon withdrawal, the lawyer shall not continue to represent any of the clients in the matter that was the subject of the intermediation.~~

Washington Comment

[1] Former Washington RPC 2.2 governed lawyers acting as intermediaries between clients. When representing multiple clients in the same matter, a lawyer must comply with Rule 1.7. A number of special considerations apply when a lawyer acts as an intermediary and represents multiple clients in the same matter. See Comments [29] - [33] to Rule 1.7.

RULE 2.3: EVALUATION FOR USE BY THIRD PERSONS

(a) A lawyer may ~~undertake~~ provide an evaluation of a matter affecting a client for the use of someone other than the client if: ~~(1)~~ the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer's relationship with the client~~; and~~.

~~(2) The client consents after consultation.~~

(b) When the lawyer knows or reasonably should know that the evaluation is likely to affect the client's interests materially and adversely, the lawyer shall not provide the evaluation unless the client gives informed consent.

(~~b~~c) Except as disclosure is ~~required~~ authorized in connection with a report of an evaluation, information relating to the evaluation is otherwise protected by ~~r~~Rule 1.6.

Comment

Definition

[1] An evaluation may be performed at the client's direction or when impliedly authorized in order to carry out the representation. See Rule 1.2. Such an evaluation may be for the primary purpose of establishing information for the benefit of third parties; for example, an opinion concerning the title of property rendered at the behest of a vendor for the information of a prospective purchaser, or at the behest of a borrower for the information of a prospective lender. In some situations, the evaluation may be required by a government agency; for example, an opinion concerning the legality of the securities registered for sale under the securities laws. In other instances, the evaluation may be required by a third person, such as a purchaser of a business.

[2] A legal evaluation should be distinguished from an investigation of a person with whom the lawyer does not have a client-lawyer relationship. For example, a lawyer retained by a purchaser to analyze a vendor's title to property does not have a client-lawyer relationship with the vendor. So also, an investigation into a person's affairs by a government lawyer, or by special counsel by a government lawyer, or by special counsel employed by the government, is not an evaluation as that term is used in this Rule. The question is whether the lawyer is retained by the person whose affairs are being examined. When the lawyer is retained by that person, the general rules concerning loyalty to client and preservation of confidences apply, which is not the case if the lawyer is retained by someone else. For this reason, it is essential to identify the person by whom the lawyer is retained. This should be made clear not only to the person under examination, but also to others to whom the results are to be made available.

Duties Owed to Third Person and Client

[3] When the evaluation is intended for the information or use of a third person, a legal duty to that person may or may not arise. That legal question is beyond the scope of this Rule. However, since such an evaluation involves a departure from the normal client-lawyer relationship, careful analysis of the situation is required. The lawyer must be satisfied as a matter of professional judgment that making the evaluation is compatible with other functions undertaken in behalf of the client. For example, if the lawyer is acting as advocate in defending the client against charges of fraud, it would normally be incompatible with that responsibility for the lawyer to perform an evaluation for others concerning the same or a related transaction. Assuming no such impediment is apparent, however, the lawyer should advise the client of the implications of the evaluation, particularly the lawyer's responsibilities to third persons and the duty to disseminate the findings.

Access to and Disclosure of Information

[4] The quality of an evaluation depends on the freedom and extent of the investigation upon which it is based. Ordinarily a lawyer should have whatever latitude of investigation seems necessary as a matter of professional judgment. Under some circumstances, however, the terms of the evaluation may be limited. For example, certain issues or sources may be categorically excluded, or the scope of search may be limited by time constraints or the noncooperation of persons having relevant information. Any such limitations that are material to the evaluation should be described in the report. If after a lawyer has commenced an evaluation, the client refuses to comply with the terms upon which it was understood the evaluation was to have been made, the lawyer's obligations are determined by law, having reference to the terms of the client's agreement and the surrounding circumstances. In no circumstances is the lawyer permitted to knowingly make a false statement of material fact or law in providing an evaluation under this Rule. See Rule 4.1.

Obtaining Client's Informed Consent

[5] Information relating to an evaluation is protected by Rule 1.6. In many situations, providing an evaluation to a third party poses no significant risk to the client; thus, the lawyer may be impliedly authorized to disclose information to carry out the representation. See Rule 1.6(a). Where, however, it is reasonably likely that providing the evaluation will affect the client's interests materially and adversely, the lawyer must first obtain the client's consent after the client has been adequately informed concerning the important possible effects on the client's interests. See Rules 1.6(a) and 1.0(e).

Financial Auditors' Requests for Information

[6] When a question concerning the legal situation of a client arises at the instance of the client's financial auditor and the question is referred to the lawyer, the lawyer's response may be made in accordance with procedures recognized in the legal profession. Such a procedure is set forth in the American Bar Association Statement of Policy Regarding

Lawyers' Responses to Auditors' Requests for Information, adopted in 1975.

RULE 2.4: LAWYER SERVING AS THIRD-PARTY NEUTRAL

(a) A lawyer serves as a third-party neutral when the lawyer assists two or more persons who are not clients of the lawyer to reach a resolution of a dispute or other matter that has arisen between them. Service as a third-party neutral may include service as an arbitrator, a mediator or in such other capacity as will enable the lawyer to assist the parties to resolve the matter.

(b) A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them. When the lawyer knows or reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client.

Comment

[1] Alternative dispute resolution has become a substantial part of the civil justice system. Aside from representing clients in dispute-resolution processes, lawyers often serve as third-party neutrals. A third-party neutral is a person, such as a mediator, arbitrator, conciliator or evaluator, who assists the parties, represented or unrepresented, in the resolution of a dispute or in the arrangement of a transaction. Whether a third-party neutral serves primarily as a facilitator, evaluator or decisionmaker depends on the particular process that is either selected by the parties or mandated by a court.

[2] The role of a third-party neutral is not unique to lawyers, although, in some court-connected contexts, only lawyers are allowed to serve in this role or to handle certain types of cases. In performing this role, the lawyer may be subject to court rules or other law that apply either to third-party neutrals generally or to lawyers serving as third-party neutrals. Lawyer-neutrals may also be subject to various codes of ethics, such as the Code of Ethics for Arbitration in Commercial Disputes prepared by a joint committee of the American Bar Association and the American Arbitration Association or the Model Standards of Conduct for Mediators jointly prepared by the American Bar Association, the American Arbitration Association and the Society of Professionals in Dispute Resolution.

[3] Unlike nonlawyers who serve as third-party neutrals, lawyers serving in this role may experience unique problems as a result of differences between the role of a third-party neutral and a lawyer's service as a client representative. The potential for confusion is significant when the parties are unrepresented in the process. Thus, paragraph (b) requires a lawyer-neutral to inform unrepresented parties that the lawyer is not representing them. For some parties, particularly parties who frequently use dispute-resolution processes, this information will be sufficient. For others, particularly those who are using the process for the first time, more information will be required. Where appropriate, the lawyer should inform unrepresented parties of the important differences between the lawyer's role as third-party neutral and a lawyer's role as a client representative, including the inapplicability of the attorney-client evidentiary privilege. The extent of disclosure required under this paragraph will depend on the particular parties involved and the subject matter of the proceeding, as well as the particular features of the dispute-resolution process selected.

[4] A lawyer who serves as a third-party neutral subsequently may be asked to serve as a lawyer representing a client in the same matter. The conflicts of interest that arise for both the individual lawyer and the lawyer's law firm are addressed in Rule 1.12.

[5] Lawyers who represent clients in alternative dispute-resolution processes are governed by the Rules of Professional Conduct. When the dispute-resolution process takes place before a tribunal, as in binding arbitration (see Rule 1.0(m)), the lawyer's duty of candor is governed by Rule 3.3. Otherwise, the lawyer's duty of candor toward both the third-party neutral and other parties is governed by Rule 4.1.

Title 3 *ADVOCATE*

RULE 3.1: MERITORIOUS CLAIMS AND CONTENTIONS

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. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

Comment

[1] The advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but also a duty not to abuse legal procedure. The law, both procedural and substantive, establishes the limits within which an advocate may proceed. However, the law is not always clear and never is static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change.

[2] The filing of an action or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery. What is required of lawyers, however, is that they inform themselves about the facts of their clients' cases and the applicable law and determine that they can make good faith arguments in support of their clients' positions. Such action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail. The action is frivolous, however, if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law.

[3] The lawyer's obligations under this Rule are subordinate to federal or state constitutional law that entitles a defendant in a criminal matter to the assistance of counsel in presenting a claim or contention that otherwise would be prohibited by this Rule.

RULE 3.2: EXPEDITING LITIGATION

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

Comment

[1] Dilatory practices bring the administration of justice into disrepute. Although there will be occasions when a lawyer may properly seek a postponement for personal reasons, it is not proper for a lawyer to routinely fail to expedite litigation solely for the convenience of the advocates. Nor will a failure to expedite be reasonable if done for the purpose of frustrating an opposing party's attempt to obtain rightful redress or repose. It is not a justification that similar conduct is often tolerated by the bench and bar. The question is whether a competent lawyer acting in good faith would regard the course of action as having some substantial purpose other than delay. Realizing financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client.

RULE 3.3: CANDOR TOWARD THE TRIBUNAL

(a) A lawyer shall not knowingly:

(1) ~~M~~make a false statement of ~~material~~ fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) ~~F~~fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client unless such disclosure is prohibited by ~~r~~Rule 1.6;

(3) ~~F~~fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(4) ~~O~~offer evidence that the lawyer knows to be false. ~~If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.~~

(b) The duties stated in ~~section~~

(a) continue to the conclusion of the proceeding.

~~(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, withdrawal or disclosure to the tribunal.~~

(c) If the lawyer has offered material evidence and comes to know of its falsity, the lawyer shall promptly disclose this fact to the tribunal unless such disclosure is prohibited by ~~r~~Rule 1.6.

~~(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.~~

(d) If the lawyer has offered material evidence and comes to know of its falsity, and disclosure of this fact is prohibited by ~~r~~Rule 1.6, the lawyer shall promptly make reasonable efforts to convince the client to consent to disclosure. If the client refuses to consent to disclosure, the lawyer may seek to withdraw from the representation in accordance with ~~r~~Rule 1.1~~5~~6.

(e) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

(f) In an ex parte proceeding, a lawyer shall inform the tribunal of all ~~relevant~~ material facts known to the lawyer that ~~should be disclosed to permit~~ will enable the tribunal to make an informed decision, whether or not the facts are adverse.

~~(g) Constitutional law defining the right to assistance of counsel in criminal cases may supersede the obligations stated in this rule.~~

Comment

[1] **[Washington ~~R~~revision]** This Rule governs the conduct of a lawyer who is representing a client in the proceedings of a tribunal. See Rule 1.0(m) for the definition of "tribunal." It also applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition~~. Thus, for example, paragraph (a)(3) requires a lawyer to take reasonable remedial measures if the lawyer comes to know that a client who is testifying in a deposition has offered evidence that is false.~~

[2] This Rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client, however, is qualified by the advocate's duty of candor to the tribunal. Consequently, although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause, the lawyer must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false.

Representations by a Lawyer

[3] **[Washington revision]** An advocate is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of matters asserted therein, for litigation documents ordinarily present assertions by the client, or by someone on the client's behalf, and not assertions by the lawyer. Compare Rule 3.1. However, an assertion purporting to be on the lawyer's own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. The obligation prescribed in Rule 1.2(d) not to counsel a client to commit or assist the client in committing a fraud applies in litigation. Regarding compliance with Rule 1.2(d), see the Comment to that Rule. See also Comment [4] to Rule 8.4.

Legal Argument

[4] Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities. Furthermore, as stated in paragraph (a)(3 ~~2~~), an advocate has a duty to disclose directly adverse authority in the controlling jurisdiction that has not been disclosed by the opposing party. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case.

Offering Evidence

[5] ~~Paragraph (a)(3) requires that the lawyer refuse to offer evidence that the lawyer knows to be false, regardless of the client's wishes. This duty is premised on the lawyer's obligation as an officer of the court to prevent the trier of fact from being misled by false evidence. A lawyer does not violate this Rule if the lawyer offers the evidence for the purpose of establishing its falsity.~~ **[Reserved]**.

[6] If a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce false evidence, the lawyer should seek to persuade the client that the evidence should not be offered. If the persuasion is ineffective and the lawyer continues to represent the client, the lawyer must refuse to offer the false evidence. If only a portion of a witness's testimony will be false, the lawyer may call the witness to testify but may not elicit or otherwise permit the witness to present the testimony that the lawyer knows is false.

[7] **[Washington revision]** The duties stated in paragraph~~s~~ (a) ~~and (b)~~ apply to all lawyers, including defense counsel in criminal cases. In some jurisdictions other than Washington, however, courts have required counsel to present the accused as a witness or to give a narrative statement if the accused so desires, even if counsel knows that the testimony or statement will be false. The obligation of the advocate under the Rules of Professional Conduct is subordinate to such requirements. See *State v. Berrysmith*, 87 Wn. App. 268, 944 P.2d 397 (1997), *review denied*, 134 Wn.2d 1008, 954 P.2d 277 (1998). ~~See also Comment [9].~~

[8] The prohibition against offering false evidence only applies if the lawyer knows that the evidence is false. A lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact. A lawyer's knowledge that evidence is false, however, can be inferred from the circumstances. See Rule 1.0(f). Thus, although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood.

[9] ~~Although paragraph (a)(3) only prohibits a lawyer from offering evidence the lawyer knows to be false, it permits the lawyer to refuse to offer testimony or other proof that the lawyer reasonably believes is false. Offering such proof may reflect adversely on the lawyer's ability to discriminate in the quality of evidence and thus impair the lawyer's effectiveness as an advocate. Because of the special protections historically provided criminal defendants, however, this Rule does not permit a lawyer to refuse to offer the testimony of such a client where the lawyer reasonably believes but does not know that the testimony will be false. Unless the lawyer knows the testimony will be false, the lawyer must honor the client's decision to testify. See also Comment [7].~~ **[Reserved]**.

Remedial Measures

[10] ~~Having offered material evidence in the belief that it was true, a lawyer may subsequently come to know that the evidence is false. Or, a lawyer may be surprised when the lawyer's client, or another witness called by the lawyer, offers testimony the lawyer knows to be false, either during the lawyer's direct examination or in response to cross-examination by the opposing lawyer. In such situations or if the lawyer knows of the falsity of testimony elicited from the client during a deposition, the lawyer must take reasonable remedial measures. In such situations, the advocate's proper course is to remonstrate with the client confidentially, advise the client of the lawyer's duty of candor to the tribunal and seek the client's cooperation with respect to the withdrawal or correction of the false statements or evidence. If that fails, the advocate must take further remedial action. If withdrawal from the representation is not permitted or will not undo the effect of the false evidence, the advocate must make such disclosure to the tribunal as is reasonably necessary to remedy the situation, even if doing so requires the lawyer to reveal information that otherwise would be protected by Rule 1.6. It is for the tribunal then to determine what should be done - making a statement about the matter to the trier of fact, ordering a mistrial or perhaps nothing.~~ **[Reserved.]**

[11] The disclosure of a client's false testimony can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. But the alternative is that the lawyer cooperate in deceiving the court, thereby subverting the truth-finding process which the adversary system is designed to implement. See Rule 1.2(d). Furthermore, unless it is clearly understood that the lawyer will act upon the duty to disclose the existence of false evidence, the client can simply reject the lawyer's advice to reveal the false evidence and insist that the lawyer keep silent. Thus the client could in effect coerce the lawyer into being a party to fraud on the court.

Preserving Integrity of Adjudicative Process

[12] **[Washington revision]** Lawyers have a special obligation to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process, such as bribing, intimidating or otherwise unlawfully communicating with a witness, juror, court official or other participant in the proceeding, unlawfully destroying or concealing documents or other evidence or failing to disclose information to the tribunal when required by law to do so. ~~Thus, paragraph (b) requires a lawyer to take reasonable remedial measures, including disclosure if necessary, whenever the lawyer knows that a person, including the lawyer's client, intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding.~~

Duration of Obligation

[13] A practical time limit on the obligation to rectify false evidence or false statements of law and fact has to be established. The conclusion of the proceeding is a reasonably

definite point for the termination of the obligation. A proceeding has concluded within the meaning of this Rule when a final judgment in the proceeding has been affirmed on appeal or the time for review has passed.

Ex Parte Proceedings

[14] Ordinarily, an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision; the conflicting position is expected to be presented by the opposing party. However, in any ex parte proceeding, such as an application for a temporary restraining order, there is no balance of presentation by opposing advocates. The object of an ex parte proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the absent party just consideration. The lawyer for the represented party has the correlative duty to make disclosures of material facts known to the lawyer and that the lawyer reasonably believes are necessary to an informed decision.

Withdrawal

[15] **[Washington revision]** Normally, a lawyer's compliance with the duty of candor imposed by this Rule does not require that the lawyer withdraw from the representation of a client whose interests will be or have been adversely affected by the lawyer's disclosure. The lawyer may, however, be required by Rule 1.16(a) to seek permission of the tribunal to withdraw if the lawyer's compliance with this Rule's duty of candor results in such an extreme deterioration of the client-lawyer relationship that the lawyer can no longer competently represent the client. See also Rule 1.16(b) for the circumstances in which a lawyer will be permitted to seek a tribunal's permission to withdraw. In connection with a request for permission to withdraw that is premised on a client's misconduct, a lawyer may reveal information relating to the representation ~~only to the extent reasonably necessary to comply with this Rule or~~ as ~~otherwise~~ permitted by Rule 1.6.

RULE 3.4: FAIRNESS TO OPPOSING PARTY AND COUNSEL

A lawyer shall not:

(a) ~~U~~unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

(b) ~~F~~falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

(c) ~~K~~knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;

(d) ~~I~~in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party; or

(e) ~~I~~in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, ~~or~~ assert personal knowledge of facts in issue except when testifying as a witness~~;~~, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused.

(f) ~~In trial, state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused, but the lawyer may argue, on his or her analysis of the evidence, for any position or conclusion with respect to the matters stated herein.~~ **[Reserved.]**

Comment

[1] The procedure of the adversary system contemplates that the evidence in a case is to be marshalled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like.

[2] Documents and other items of evidence are often essential to establish a claim or defense. Subject to evidentiary privileges, the right of an opposing party, including the government, to obtain evidence through discovery or subpoena is an important procedural right. The exercise of that right can be frustrated if relevant material is altered, concealed or destroyed. Applicable law in many jurisdictions makes it an offense to destroy material for purpose of impairing its availability in a pending proceeding or one whose commencement can be foreseen. Falsifying evidence is also generally a criminal offense. Paragraph (a) applies to evidentiary material generally, including computerized information. Applicable law may permit a lawyer to take temporary possession of physical evidence of client crimes for the purpose of conducting a limited examination that will not alter or destroy material characteristics of the evidence. In such a case, applicable law may require the lawyer to turn the evidence over to the police or other prosecuting authority, depending on the circumstances.

[3] With regard to paragraph (b), it is not improper to pay a witness's expenses or to compensate an expert witness on terms permitted by law. The common law rule in most jurisdictions is that it is improper to pay an occurrence witness any fee for testifying and that it is improper to pay an expert witness a contingent fee.

[4] **[Reserved.]**

Additional Washington Comment (5)

[5] Washington did not adopt Model Rule 3.4(f), which delineates circumstances in which a lawyer may request that a person other than a client refrain from voluntarily giving information to another party, because the Model Rule is inconsistent with Washington law. See *Wright v. Group Health Hospital*, 103 Wn.2d 192, 691 P.2d 564 (1994). Advising or requesting that a person other than a client refrain from voluntarily giving information to another party may violate other Rules. See, e.g., Rule 8.4(d).

RULE 3.5: IMPARTIALITY AND DECORUM OF THE TRIBUNAL

A lawyer shall not:

(a) ~~S~~seek to influence a judge, juror, prospective juror or other official by means prohibited by law;

(b) ~~C~~communicate ex parte with such a person ~~except as permitted~~ during the proceeding unless authorized to do so by law or court order; ~~or~~

(c) communicate with a juror or prospective juror after discharge of the jury if:

(1) the communication is prohibited by law or court order;

(2) the juror has made known to the lawyer a desire not to communicate; or

(3) the communication involves misrepresentation, coercion, duress or harassment; or

(d) ~~E~~engage in conduct intended to disrupt a tribunal.

Comment

[1] **[Washington revision]** Many forms of improper influence upon a tribunal are proscribed by criminal law. Others are specified in the Washington Code of Judicial Conduct, with which an advocate should be familiar. A lawyer is required to avoid contributing to a violation of such provisions.

[2] During a proceeding a lawyer may not communicate ex parte with persons serving in an official capacity in the proceeding, such as judges, masters or jurors, unless authorized to do so by law or court order.

[3] A lawyer may on occasion want to communicate with a juror or prospective juror after the jury has been discharged. The lawyer may do so unless the communication is prohibited by law or a court order but must respect the desire of the juror not to talk with the lawyer. The lawyer may not engage in improper conduct during the communication.

[4] The advocate's function is to present evidence and argument so that the cause may be decided according to law. Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. A lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge's default is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.

[5] The duty to refrain from disruptive conduct applies to any proceeding of a tribunal, including a deposition. See Rule 1.0(m).

RULE 3.6: TRIAL PUBLICITY

(a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that ~~a reasonable person would expect to~~ the lawyer knows or reasonably should know will be disseminated by means of public communication ~~if the lawyer knows or reasonably should know that it~~ and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

(b) Notwithstanding paragraph (a), a lawyer may state:

(1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;

(2) information contained in a public record;

(3) that an investigation of a matter is in progress;

(4) the scheduling or result of any step in litigation;

(5) a request for assistance in obtaining evidence and information necessary thereto;

(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and

(7) in a criminal case, in addition to subparagraphs (1) through (6):

(i) the identity, residence, occupation and family status of the accused;

(ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;

(iii) the fact, time and place of arrest; and

(iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

(c) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

(d) No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

~~**GUIDELINES FOR APPLYING RPC 3.6**~~

~~I. Criminal.~~

~~A. The kind of statement referred to in rule 3.6 which may potentially prejudice criminal proceedings is a statement which relates to:~~

~~(1) The character, credibility, reputation or criminal record of a suspect or defendant;~~

~~(2) The possibility of a plea of guilty to the offense or the existence or contents of a confession, admission or statement given by a suspect or defendant or that person's refusal or failure to make a statement;~~

~~(3) The performance or results of any investigative examination or test such as a polygraph examination or a laboratory test or the failure of a person to submit to an examination or test;~~

~~(4) Any opinion as to the guilt or innocence of any suspect or defendant;~~

~~(5) The credibility or anticipated testimony of a prospective witness; and~~

~~(6) Information the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial.~~

~~B. The public has a legitimate interest in the conduct of judicial proceedings and the administration of justice. Lawyers involved in the litigation of criminal matters may state without elaboration:~~

~~(1) The general nature of the charge or defense;~~

~~(2) The information contained in the public record; and~~

~~(3) The scheduling of any step in litigation, including a scheduled court hearing to enter a plea of guilty.~~

~~C. The public also has a right to know about threats to its safety and measures aimed at assuring its security. Toward that end a public prosecutor or other lawyer involved in the investigation of a criminal case may state:~~

~~(1) That an investigation is in progress, including the general scope of the investigation and, except when prohibited by law, the identity of the persons involved;~~

~~(2) A request for assistance in obtaining evidence and information;~~

~~(3) A warning of danger concerning the behavior of a person involved when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and~~

~~(4)(i) The identity, residence, occupation and family status of the accused;~~

~~(ii) information necessary to aid in apprehension of the accused;~~

~~(iii) the fact, time and place of arrest; and (iv) the identity of investigating and arresting officers or agencies and the length of the investigation.~~

~~II. Civil.~~

~~The kind of statement referred to in rule 3.6 which may potentially prejudice civil matters triable to a jury is a statement designed to influence the jury or to detract from the impartiality of the proceedings.~~

Comment

[1] It is difficult to strike a balance between protecting the right to a fair trial and safeguarding the right of free expression. Preserving the right to a fair trial necessarily entails some curtailment of the information that may be disseminated about a party prior to trial, particularly where trial by jury is involved. If there were no such limits, the result would be the practical nullification of the protective effect of the rules of forensic decorum and the exclusionary rules of evidence. On the other hand, there are vital social interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves. The public has a right to know about threats to its safety and measures aimed at assuring its security. It also has a legitimate interest in the conduct of judicial proceedings, particularly in matters of general public concern. Furthermore, the subject matter of legal proceedings is often of direct significance in debate and deliberation over questions of public policy.

[2] Special rules of confidentiality may validly govern proceedings in juvenile, domestic relations and mental disability proceedings, and perhaps other types of litigation. Rule 3.4(c) requires compliance with such rules.

[3] The Rule sets forth a basic general prohibition against a lawyer's making statements that the lawyer knows or should know will have a substantial likelihood of materially prejudicing an adjudicative proceeding. Recognizing that the public value of informed commentary is great and the likelihood of prejudice to a proceeding by the commentary of a lawyer who is not involved in the proceeding is small, the Rule applies only to lawyers who are, or who have been involved in the investigation or litigation of a case, and their associates.

[4] Paragraph (b) identifies specific matters about which a lawyer's statements would not ordinarily be considered to present a substantial likelihood of material prejudice, and should not in any event be considered prohibited by the general prohibition of paragraph (a). Paragraph (b) is not intended to be an exhaustive listing of the subjects upon which a lawyer may make a statement, but statements on other matters may be subject to paragraph (a).

[5] There are, on the other hand, certain subjects that are more likely than not to have a material prejudicial effect on a proceeding, particularly when they refer to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration. These subjects relate to:

(1) the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness, or the expected testimony of a party or witness;

(2) in a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant or suspect or that person's refusal or failure to make a statement;

(3) the performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;

(4) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration;

(5) information that the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and that would, if disclosed, create a substantial risk of prejudicing an impartial trial; or

(6) the fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.

[6] Another relevant factor in determining prejudice is the nature of the proceeding involved. Criminal jury trials will be most sensitive to extrajudicial speech. Civil trials may be less sensitive. Non-jury hearings and arbitration proceedings may be even less affected. The Rule will still place limitations on prejudicial comments in these cases, but the likelihood of prejudice may be different depending on the type of proceeding.

[7] Finally, extrajudicial statements that might otherwise raise a question under this Rule may be permissible when they are made in response to statements made publicly by another party, another party's lawyer, or third persons, where a reasonable lawyer would believe a public response is required in order to avoid prejudice to the lawyer's client. When prejudicial statements have been publicly made by others, responsive statements may have the salutary effect of lessening any resulting adverse impact on the adjudicative proceeding. Such responsive statements should be limited to contain only such information as is necessary to mitigate undue prejudice created by the statements made by others.

[8] See Rule 3.8(f) for additional duties of prosecutors in connection with extrajudicial statements about criminal proceedings.

Additional Washington Comment (9)

[9] For additional guidance in applying this Rule, see the Guidelines for Applying Rule 3.6, reproduced in the Appendix to the Rules of Professional Conduct.

RULE 3.7: LAWYER AS WITNESS

(a) A lawyer shall not act as advocate at a trial in which the lawyer ~~or another lawyer in the same law firm~~ is likely to be a necessary witness ~~except where~~ unless:

(~~a~~1) ~~T~~the testimony relates to an ~~issue that is either~~ uncontested ~~or a formality~~ issue;

(~~b~~2) ~~T~~the testimony relates to the nature and value of legal services rendered in the case;

(3) disqualification of the lawyer would work substantial hardship on the client; or

(~~c~~4) ~~T~~the lawyer has been called by the opposing party and the court rules that the lawyer may continue to act as an advocate~~; or~~.

~~(d) The trial judge finds that disqualification of the lawyer would work a substantial hardship on the client and that the likelihood of the lawyer being a necessary witness was not reasonably foreseeable before trial.~~

(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

Comment

[1] Combining the roles of advocate and witness can prejudice the tribunal and the opposing party and can also involve a conflict of interest between the lawyer and client.

Advocate-Witness Rule

[2] The tribunal has proper objection when the trier of fact may be confused or misled by a lawyer serving as both advocate and witness. The opposing party has proper objection where the combination of roles may prejudice that party's rights in the litigation. A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. It may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof.

[3] **[Washington revision]** To protect the tribunal, paragraph (a) prohibits a lawyer from simultaneously serving as advocate and necessary witness except in those circumstances specified in paragraphs (a)(1) through (a)(4). Paragraph (a)(1) recognizes that if the testimony will be uncontested, the ambiguities in the dual role are purely theoretical. Paragraph (a)(2) recognizes that where the testimony concerns the extent and value of legal services rendered in the action in which the testimony is offered, permitting the lawyers to testify avoids the need for a second trial with new counsel to resolve that issue. Moreover, in such a situation the judge has firsthand knowledge of the matter in issue; hence, there is less dependence on the adversary process to test the credibility of the testimony.

[4] Apart from these two exceptions, paragraph (a)(3) recognizes that a balancing is required between the interests of the client and those of the tribunal and the opposing party. Whether the tribunal is likely to be misled or the opposing party is likely to suffer prejudice depends on the nature of the case, the importance and probable tenor of the lawyer's testimony, and the probability that the lawyer's testimony will conflict with that of other witnesses. Even if there is risk of such prejudice, in determining whether the lawyer should be disqualified, due regard must be given to the effect of disqualification on the lawyer's client. It is relevant that one or both parties could reasonably foresee that the lawyer would probably be a witness. The conflict of interest principles stated in Rules 1.7, 1.9 and 1.10 have no application to this aspect of the problem.

[5] Because the tribunal is not likely to be misled when a lawyer acts as advocate in a trial in which another lawyer in the lawyer's firm will testify as a necessary witness, paragraph (b) permits the lawyer to do so except in situations involving a conflict of interest.

Conflict of Interest

[6] **[Washington revision]** In determining if it is permissible to act as advocate in a trial in which the lawyer will be a necessary witness, the lawyer must also consider that the dual role may give rise to a conflict of interest that will require compliance with Rules 1.7 or 1.9. For example, if there is likely to be substantial conflict between the testimony of the client and that of the lawyer, the representation involves a conflict of interest that requires compliance with Rule 1.7. This would be true even though the lawyer might not be prohibited by paragraph (a) from simultaneously serving as advocate and witness because the lawyer's disqualification would work a substantial hardship on the client. Similarly, a lawyer who might be permitted to simultaneously serve as an advocate and a witness by paragraph (a)(3) or (a)(4) might be precluded from doing so by Rule 1.9. The problem can arise whether the lawyer is called as a witness on behalf of the client or is called by the opposing party. Determining whether or not such a conflict exists is primarily the responsibility of the lawyer involved. If there is a conflict of interest, the lawyer must secure the client's informed consent, confirmed in writing. In some cases, the lawyer will be precluded from seeking the client's consent. See Rule 1.7. See Rule 1.0(b) for the definition of "confirmed in writing" and Rule 1.0(e) for the definition of "informed consent."

[7] Paragraph (b) provides that a lawyer is not disqualified from serving as an advocate because a lawyer with whom the lawyer is associated in a firm is precluded from doing so by paragraph (a). If, however, the testifying lawyer would also be disqualified by Rule 1.7 or Rule 1.9 from representing the client in the matter, other lawyers in the firm will be precluded from representing the client by Rule 1.10 unless the client gives informed consent under the conditions stated in Rule 1.7.

Additional Washington Comment (8)

[8] When a lawyer is called to testify as a witness by the adverse party, there is a risk that Rule 3.7 is being inappropriately used as a tactic to obtain disqualification of the lawyer. Paragraph (a)(4) is intended to confer discretion on the tribunal in determining whether disqualification is truly warranted

in such circumstances. The provisions of paragraph (a)(4) were taken from former Washington RPC 3.7(c).

RULE 3.8: SPECIAL RESPONSIBILITIES OF A PROSECUTOR

The prosecutor in a criminal case shall:

(a) ~~R~~refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;

(b) ~~M~~make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;

(c) ~~N~~not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;

(d) ~~M~~make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all ~~unprivileged~~ mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal; ~~and~~

(e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:

(1) the information sought is not protected from disclosure by any applicable privilege;

(2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and

(3) there is no other feasible alternative to obtain the information;

(~~e~~f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and ~~E~~exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.

Comment

[1] A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence. Precisely how far the prosecutor is required to go in this direction is a matter of debate and varies in different jurisdictions. Many jurisdictions have adopted the ABA Standards of Criminal Justice Relating to the Prosecution Function, which in turn are the product of prolonged and careful deliberation by lawyers experienced in both criminal prosecution and defense. Applicable law may require other measures by the prosecutor and knowing disregard of those obligations or a systematic abuse of prosecutorial discretion could constitute a violation of Rule 8.4.

[2] In some jurisdictions, a defendant may waive a preliminary hearing and thereby lose a valuable opportunity to challenge probable cause. Accordingly, prosecutors should not seek to obtain waivers of preliminary hearings or other important pretrial rights from unrepresented accused persons. Paragraph (c) does not apply, however, to an accused appearing pro se with the approval of the tribunal. Nor does it forbid the lawful questioning of an uncharged suspect who has knowingly waived the rights to counsel and silence.

[3] The exception in paragraph (d) recognizes that a prosecutor may seek an appropriate protective order from the tribunal if disclosure of information to the defense could result in substantial harm to an individual or to the public interest.

[4] Paragraph (e) is intended to limit the issuance of lawyer subpoenas in grand jury and other criminal proceedings to those situations in which there is a genuine need to intrude into the client-lawyer relationship.

[5] Paragraph (f) supplements Rule 3.6, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding. In the context of a criminal prosecution, a prosecutor's extrajudicial statement can create the additional problem of increasing public condemnation of the accused. Although the announcement of an indictment, for example, will necessarily have severe consequences for the accused, a prosecutor can, and should, avoid comments which have no legitimate law enforcement purpose and have a substantial likelihood of increasing public opprobrium of the accused. Nothing in this Comment is intended to restrict the statements which a prosecutor may make which comply with Rule 3.6(b) or 3.6(c).

[6] Like other lawyers, prosecutors are subject to Rules 5.1 and 5.3, which relate to responsibilities regarding lawyers and nonlawyers who work for or are associated with the lawyer's office. Paragraph (f) reminds the prosecutor of the importance of these obligations in connection with the unique dangers of improper extrajudicial statements in a criminal case. In addition, paragraph (f) requires a prosecutor to exercise reasonable care to prevent persons assisting or associated with the prosecutor from making improper extrajudicial statements, even when such persons are not under the direct supervision of the prosecutor. Ordinarily, the reasonable care standard will be satisfied if the prosecutor issues the appropriate cautions to law-enforcement personnel and other relevant individuals.

RULE 3.9: ADVOCATE IN NONADJUDICATIVE PROCEEDINGS

A lawyer representing a client before a legislative body or administrative ~~tribunal~~ agency in a nonadjudicative proceeding shall disclose that the appearance is in a representative capacity and shall conform to the provisions of Rules 3.3(a) through (e), 3.4(a) through (c), and 3.5.

Comment

[1] In representation before bodies such as legislatures, municipal councils, and executive and administrative agencies acting in a rule-making or policy-making capacity, lawyers present facts, formulate issues and advance argument in the matters under consideration. The decision-making body, like a court, should be able to rely on the integrity of the submissions made to it. A lawyer appearing before such a body must deal with it honestly and in conformity with applicable rules of procedure. See Rules 3.3(a) through (e), 3.4(a) through (c), and 3.5.

[2] Lawyers have no exclusive right to appear before nonadjudicative bodies, as they do before a court. The requirements of this Rule therefore may subject lawyers to regulations inapplicable to advocates who are not lawyers. However, legislatures and administrative agencies have a right to expect lawyers to deal with them as they deal with courts.

[3] This Rule only applies when a lawyer represents a client in connection with an official hearing or meeting of a governmental agency or a legislative body to which the lawyer or the lawyer's client is presenting evidence or argument. It does not apply to representation of a client in a negotiation or other bilateral transaction with a governmental agency or in connection with an application for a license or other privilege or the client's compliance with generally applicable reporting requirements, such as the filing of income-tax returns. Nor does it apply to the representation of a client in connection with an investigation or examination of the client's affairs conducted by government investigators or examiners. Representation in such matters is governed by Rules 4.1 through 4.4.

Title 4 *TRANSACTIONS WITH PERSONS OTHER THAN CLIENTS*

RULE 4.1: TRUTHFULNESS IN STATEMENTS TO OTHERS

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by ~~r~~Rule 1.6.

Comment

Misrepresentation

[1] A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements. For dishonest conduct that does not amount to a false statement or for misrepresentations by a lawyer other than in the course of representing a client, see Rule 8.4.

Statements of Fact

[2] This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud. Lawyers should be mindful of their obligations under applicable law to avoid criminal and tortious misrepresentation.

Crime or Fraud by Client

[3] Under Rule 1.2(d), a lawyer is prohibited from counseling or assisting a client in conduct that the lawyer knows is criminal or fraudulent. Paragraph (b) states a specific application of the principle set forth in Rule 1.2(d) and addresses the situation where a client's crime or fraud takes the form of a lie or misrepresentation. Ordinarily, a lawyer can avoid assisting a client's crime or fraud by withdrawing from the representation. Sometimes it may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm an opinion, document, affirmation or the like. In extreme cases, substantive law may require a lawyer to disclose information relating to the representation to avoid being deemed to have assisted the client's crime or fraud. If the lawyer can avoid assisting a client's crime or fraud only by disclosing this information, then under paragraph (b) the lawyer is required to do so, unless the disclosure is prohibited by Rule 1.6.

RULE 4.2: COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL

~~(a)~~ In representing a client, a lawyer shall not communicate about the subject of the representation with a ~~party~~ person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized ~~by law~~ to do so by law or a court order.

~~(b) An otherwise unrepresented person to whom limited representation is being provided or has been provided in accordance with rule 1.2 is considered to be unrepresented for purposes of this rule unless the opposing lawyer knows of, or has been provided with, a written notice of appearance under which, or a written notice of time period during which, he or she is to communicate only with the limited representation lawyer as to the subject matter within the limited scope of the representation.~~

Comment

[1] This Rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship and the uncounselled disclosure of information relating to the representation.

[2] This Rule applies to communications with any person who is represented by counsel concerning the matter to which the communication relates.

[3] The Rule applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this Rule.

[4] This Rule does not prohibit communication with a represented person, or an employee or agent of such a person, concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party, or between two organizations, does not

prohibit a lawyer for either from communicating with non-lawyer representatives of the other regarding a separate matter. Nor does this Rule preclude communication with a represented person who is seeking advice from a lawyer who is not otherwise representing a client in the matter. A lawyer may not make a communication prohibited by this Rule through the acts of another. See Rule 8.4(a). Parties to a matter may communicate directly with each other, and a lawyer is not prohibited from advising a client concerning a communication that the client is legally entitled to make. Also, a lawyer having independent justification or legal authorization for communicating with a represented person is permitted to do so.

[5] Communications authorized by law may include communications by a lawyer on behalf of a client who is exercising a constitutional or other legal right to communicate with the government. Communications authorized by law may also include investigative activities of lawyers representing governmental entities, directly or through investigative agents, prior to the commencement of criminal or civil enforcement proceedings. When communicating with the accused in a criminal matter, a government lawyer must comply with this Rule in addition to honoring the constitutional rights of the accused. The fact that a communication does not violate a state or federal constitutional right is insufficient to establish that the communication is permissible under this Rule.

[6] A lawyer who is uncertain whether a communication with a represented person is permissible may seek a court order. A lawyer may also seek a court order in exceptional circumstances to authorize a communication that would otherwise be prohibited by this Rule, for example, where communication with a person represented by counsel is necessary to avoid reasonably certain injury.

[7] **[Washington revision]** In the case of a represented organization, this Rule prohibits communications with a constituent of the organization who supervises, directs or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter. Consent of the organization's lawyer is not required for communication with a former constituent. If a constituent of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule. In communicating with a current or former constituent of an organization, a lawyer must not use methods of obtaining evidence that violate the legal rights of the organization. See Rule 4.4.

[8] The prohibition on communication with a represented person only applies in circumstances where the lawyer knows that the person is in fact represented in the matter to be discussed. This means that the lawyer has actual knowledge of the fact of the representation; but such actual knowledge may be inferred from the circumstances. See Rule 1.0(f). Thus, the lawyer cannot evade the requirement of obtaining the consent of counsel by closing eyes to the obvious.

[9] In the event the person with whom the lawyer communicates is not known to be represented by counsel in the matter, the lawyer's communications are subject to Rule 4.3.

Additional Washington Comments (10 - 11)

[10] Comment [7] to Model Rule 4.2 was revised to conform to Washington law. The phrase "or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability" and the reference to Model Rule 3.4(f) was deleted. Whether and how lawyers may communicate with employees of an adverse party is governed by *Wright v. Group Health Hospital*, 103 Wn.2d 192, 691 P.2d 564 (1984). See also Washington Comment [5] to Rule 3.4.

[11] An otherwise unrepresented person to whom limited representation is being provided or has been provided in accordance with Rule 1.2(c) is considered to be unrepresented for purposes of this Rule unless the opposing lawyer knows of, or has been provided with, a written notice of appearance under which, or a written notice of time period during which, he or she is to communicate only with the limited representation lawyer as to the subject matter within the limited scope of the representation. (The provisions of this Comment were taken from former Washington RPC 4.2(b)).

RULE 4.3: DEALING WITH UNREPRESENTED PERSON

~~(a)~~ In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

~~(b) An otherwise unrepresented person to whom limited representation is being provided or has been provided in accordance with rule 1.2 is considered to be unrepresented for purposes of this rule unless the opposing lawyer knows of, or has been provided with, a written notice of appearance under which, or a written notice of time period during which, he or she is to communicate only with the limited representation lawyer as to the subject matter within the limited scope of the representation.~~

Comment

[1] An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. In order to avoid a misunderstanding, a lawyer will typically need to identify the lawyer's client and, where necessary, explain that the client has interests opposed to those of the unrepresented person. For misunderstandings that sometimes arise when a lawyer for an organization deals with an unrepresented constituent, see Rule 1.13(~~d~~f).

[2] The Rule distinguishes between situations involving unrepresented persons whose interests may be adverse to those of the lawyer's client and those in which the person's interests are not in conflict with the client's. In the former situation, the possibility that the lawyer will compromise the

unrepresented person's interests is so great that the Rule prohibits the giving of any advice, apart from the advice to obtain counsel. Whether a lawyer is giving impermissible advice may depend on the experience and sophistication of the unrepresented person, as well as the setting in which the behavior and comments occur. This Rule does not prohibit a lawyer from negotiating the terms of a transaction or settling a dispute with an unrepresented person. So long as the lawyer has explained that the lawyer represents an adverse party and is not representing the person, the lawyer may inform the person of the terms on which the lawyer's client will enter into an agreement or settle a matter, prepare documents that require the person's signature and explain the lawyer's own view of the meaning of the document or the lawyer's view of the underlying legal obligations.

Additional Washington Comments (3 - 4)

[3] An otherwise unrepresented person to whom limited representation is being provided or has been provided in accordance with Rule 1.2(c) is considered to be unrepresented for purposes of this Rule unless the opposing lawyer knows of, or has been provided with, a written notice of appearance under which, or a written notice of time period during which, he or she is to communicate only with the limited representation lawyer as to the subject matter within the limited scope of the representation. (The provisions of this Comment were taken from former Washington RPC 4.3(b)).

[4] Government lawyers are frequently called upon by unrepresented persons, and in some instances by the courts, to provide general information on laws and procedures relating to claims against the government. The provision of such general information by government lawyers is not a violation of this Rule.

RULE 4.4: RESPECT FOR RIGHTS OF THIRD PERSONS

(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

(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.

Comment

[1] Responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of third persons. It is impractical to catalogue all such rights, but they include legal restrictions on methods of obtaining evidence from third persons and unwarranted intrusions into privileged relationships, such as the client-lawyer relationship.

[2] Paragraph (b) recognizes that lawyers sometimes receive documents that were mistakenly sent or produced by opposing parties or their lawyers. If a lawyer knows or reasonably should know that such a document was sent inadvertently, then this Rule requires the lawyer to promptly notify the sender in order to permit that person to take protective measures. Whether the lawyer is required to take additional steps, such as returning the original document, is a matter of law beyond the scope of these Rules, as is the question of whether the privileged status of a document has been waived. Similarly, this Rule does not address the legal duties of a lawyer who receives a document that the lawyer knows or reasonably should know may have been wrongfully obtained by the sending person. For purposes of this Rule, "document" includes e-mail or other electronic modes of transmission subject to being read or put into readable form.

[3] Some lawyers may choose to return a document unread, for example, when the lawyer learns before receiving the document that it was inadvertently sent to the wrong address. Where a lawyer is not required by applicable law to do so, the decision to voluntarily return such a document is a matter of professional judgment ordinarily reserved to the lawyer. See Rules 1.2 and 1.4.

Title 5 LAW FIRMS AND ASSOCIATIONS

RULE 5.1: RESPONSIBILITIES OF ~~A~~ PARTNERS, MANAGERS, AND ~~OR~~ SUPERVISORY LAWYERS

(a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

(c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Comment

[1] Paragraph (a) applies to lawyers who have managerial authority over the professional work of a firm. See Rule 1.0(c). This includes members of a partnership, the shareholders in a law firm organized as a professional corporation, and members of other associations authorized to practice law; lawyers having comparable managerial authority in a legal services organization or a law department of an enterprise or government agency; and lawyers who have intermediate managerial responsibilities in a firm. Paragraph (b) applies to lawyers who have supervisory authority over the work of other lawyers in a firm.

[2] Paragraph (a) requires lawyers with managerial authority within a firm to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that all lawyers in the firm will conform to the Rules of Professional Conduct. Such policies and procedures include those designed to detect and resolve conflicts of

interest, identify dates by which actions must be taken in pending matters, account for client funds and property and ensure that inexperienced lawyers are properly supervised.

[3] Other measures that may be required to fulfill the responsibility prescribed in paragraph (a) can depend on the firm's structure and the nature of its practice. In a small firm of experienced lawyers, informal supervision and periodic review of compliance with the required systems ordinarily will suffice. In a large firm, or in practice situations in which difficult ethical problems frequently arise, more elaborate measures may be necessary. Some firms, for example, have a procedure whereby junior lawyers can make confidential referral of ethical problems directly to a designated senior partner or special committee. See Rule 5.2. Firms, whether large or small, may also rely on continuing legal education in professional ethics. In any event, the ethical atmosphere of a firm can influence the conduct of all its members and the partners may not assume that all lawyers associated with the firm will inevitably conform to the Rules.

[4] Paragraph (c) expresses a general principle of personal responsibility for acts of another. See also Rule 8.4(a).

[5] Paragraph (c)(2) defines the duty of a partner or other lawyer having comparable managerial authority in a law firm, as well as a lawyer who has direct supervisory authority over performance of specific legal work by another lawyer. Whether a lawyer has supervisory authority in particular circumstances is a question of fact. Partners and lawyers with comparable authority have at least indirect responsibility for all work being done by the firm, while a partner or manager in charge of a particular matter ordinarily also has supervisory responsibility for the work of other firm lawyers engaged in the matter. Appropriate remedial action by a partner or managing lawyer would depend on the immediacy of that lawyer's involvement and the seriousness of the misconduct. A supervisor is required to intervene to prevent avoidable consequences of misconduct if the supervisor knows that the misconduct occurred. Thus, if a supervising lawyer knows that a subordinate misrepresented a matter to an opposing party in negotiation, the supervisor as well as the subordinate has a duty to correct the resulting misapprehension.

[6] Professional misconduct by a lawyer under supervision could reveal a violation of paragraph (b) on the part of the supervisory lawyer even though it does not entail a violation of paragraph (c) because there was no direction, ratification or knowledge of the violation.

[7] **[Washington revision]** Apart from this Rule and Rule 8.4(a), a lawyer does not have disciplinary liability for the conduct of a partner, associate or subordinate lawyer. Whether a lawyer may be liable civilly or criminally for another lawyer's conduct is a question of law beyond the scope of these Rules.

[8] The duties imposed by this Rule on managing and supervising lawyers do not alter the personal duty of each lawyer in a firm to abide by the Rules of Professional Conduct. See Rule 5.2(a).

RULE 5.2: RESPONSIBILITIES OF A SUBORDINATE LAWYER

(a) A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.

(b) A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

Comment

[1] Although a lawyer is not relieved of responsibility for a violation by the fact that the lawyer acted at the direction of a supervisor, that fact may be relevant in determining whether a lawyer had the knowledge required to render conduct a violation of the Rules. For example, if a subordinate filed a frivolous pleading at the direction of a supervisor, the subordinate would not be guilty of a professional violation unless the subordinate knew of the document's frivolous character.

[2] When lawyers in a supervisor-subordinate relationship encounter a matter involving professional judgment as to ethical duty, the supervisor may assume responsibility for making the judgment. Otherwise a consistent course of action or position could not be taken. If the question can reasonably be answered only one way, the duty of both lawyers is clear and they are equally responsible for fulfilling it. However, if the question is reasonably arguable, someone has to decide upon the course of action. That authority ordinarily reposes in the supervisor, and a subordinate may be guided accordingly. For example, if a question arises whether the interests of two clients conflict under Rule 1.7, the supervisor's reasonable resolution of the question should protect the subordinate professionally if the resolution is subsequently challenged.

RULE 5.3: RESPONSIBILITIES REGARDING NONLAWYER ASSISTANTS

With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be

avoided or mitigated but fails to take reasonable remedial action.

Comment

[1] Lawyers generally employ assistants in their practice, including secretaries, investigators, law student interns, and paraprofessionals. Such assistants, whether employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services. A lawyer must give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client, and should be responsible for their work product. The measures employed in supervising nonlawyers should take account of the fact that they do not have legal training and are not subject to professional discipline.

[2] Paragraph (a) requires lawyers with managerial authority within a law firm to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that nonlawyers in the firm will act in a way compatible with the Rules of Professional Conduct. See Comment [1] to Rule 5.1. Paragraph (b) applies to lawyers who have supervisory authority over the work of a nonlawyer. Paragraph (c) specifies the circumstances in which a lawyer is responsible for conduct of a nonlawyer that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer.

RULE 5.4: PROFESSIONAL INDEPENDENCE OF A LAWYER

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

(1) Aan agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;

(2) A lawyer who undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer that proportion of the total compensation which fairly represents the services rendered by the deceased lawyer; and a lawyer who purchases the practice of a deceased, disabled, or disappeared lawyer may, pursuant to the provisions of Rule 1.17, pay to the estate or other representative of that lawyer the agreed-upon purchase price;

(3) Aa lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement; and

(4) **[Reserved.]**

(5) a lawyer authorized to complete unfinished legal business of a deceased lawyer may pay to the estate or other representative of the deceased lawyer that proportion of the total compensation that fairly represents the services rendered by the deceased lawyer.

(b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.

(c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

(d) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:

(1) Aa nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;

(2) Aa nonlawyer is a corporate director or officer (other than as secretary or treasurer) thereof or occupies the position of similar responsibility in any form of association other than a corporation; or

(3) Aa nonlawyer has the right to direct or control the professional judgment of a lawyer.

Comment

[1] The provisions of this Rule express traditional limitations on sharing fees. These limitations are to protect the lawyer's professional independence of judgment. Where someone other than the client pays the lawyer's fee or salary, or recommends employment of the lawyer, that arrangement does not modify the lawyer's obligation to the client. As stated in paragraph (c), such arrangements should not interfere with the lawyer's professional judgment.

[2] This Rule also expresses traditional limitations on permitting a third party to direct or regulate the lawyer's professional judgment in rendering legal services to another. See also Rule 1.8(f) (lawyer may accept compensation from a third party as long as there is no interference with the lawyer's independent professional judgment and the client gives informed consent).

Additional Washington Comment (3)

[3] Paragraph (a)(5) was taken from former Washington RPC 5.4 (a)(2).

RULE 5.5: UNAUTHORIZED PRACTICE OF LAW; MULTIJURISDICTIONAL PRACTICE OF LAW

(a) A lawyer shall not: practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

(a) Practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction;

(b) Assist a person who is not a member of the Bar in the performance of activity that constitutes the unauthorized practice of law;

(c) permit his or her name to be used as a lawyer by another person who is not a lawyer authorized to practice law in the state of Washington;

(b) A lawyer who is not admitted to practice in this jurisdiction shall not:

(1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

(c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

(2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or

(4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

~~(d) engage in any of the following with an individual who is a disbarred or suspended lawyer or who has resigned in lieu of disbarment~~:

~~(1) practice law with or in cooperation with such an individual;~~

~~(2) maintain an office for the practice of law in a room or office occupied or used in whole or in part by such an individual;~~

~~(3) permit such an individual to use the lawyer's name for the practice of law;~~

~~(4) practice law for or on behalf of such an individual;~~

~~(5) practice law under any arrangement or understanding for division of fees or compensation of any kind with such an individual; or~~

~~(e) engage in the practice of law while on inactive status, or while suspended from the practice of law for any cause.~~

(d) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction that:

(1) are provided to the lawyer's employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission; or

(2) are services that the lawyer is authorized to provide by federal law or other law of this jurisdiction.

Comment

[1] A lawyer may practice law only in a jurisdiction in which the lawyer is authorized to practice. A lawyer may be admitted to practice law in a jurisdiction on a regular basis or may be authorized by court rule or order or by law to practice for a limited purpose or on a restricted basis. Paragraph (a) applies to unauthorized practice of law by a lawyer, whether through the lawyer's direct action or by the lawyer assisting another person.

[2] The definition of the practice of law is established by law and varies from one jurisdiction to another. Whatever the definition, limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons. This Rule does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work. See Rule 5.3.

[3] A lawyer may provide professional advice and instruction to nonlawyers whose employment requires knowledge of the law; for example, claims adjusters, employees of financial or commercial institutions, social workers, accountants and persons employed in government agencies. Lawyers also may assist independent nonlawyers, such as paraprofessionals, who are authorized by the law of a jurisdiction to provide particular law-related services. In addition, a lawyer may counsel nonlawyers who wish to proceed pro se.

[4] Other than as authorized by law or this Rule, a lawyer who is not admitted to practice generally in this jurisdiction violates paragraph (b) if the lawyer establishes an office or other systematic and continuous presence in this jurisdiction for the practice of law. Presence may be systematic and continuous even if the lawyer is not physically present here. Such a lawyer must not hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction. See also Rules 7.1 and 7.5(b).

[5] There are occasions in which a lawyer admitted to practice in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction under circumstances that do not create an unreasonable risk to the interests of their clients, the public or the courts. Paragraph (c) identifies four such circumstances. The fact that conduct is not so identified does not imply that the conduct is or is not authorized. With the exception of paragraphs (d)(1) and (d)(2), this Rule does not authorize a lawyer to establish an office or other systematic and continuous presence in this jurisdiction without being admitted to practice generally here.

[6] There is no single test to determine whether a lawyer's services are provided on a "temporary basis" in this jurisdiction, and may therefore be permissible under paragraph (c). Services may be "temporary" even though the lawyer provides services in this jurisdiction on a recurring basis, or for an extended period of time, as when the lawyer is representing a client in a single lengthy negotiation or litigation.

[7] Paragraphs (c) and (d) apply to lawyers who are admitted to practice law in any United States jurisdiction, which includes the District of Columbia and any state, territory or commonwealth of the United States. The word "admitted" in paragraph (c) contemplates that the lawyer is authorized to practice in the jurisdiction in which the lawyer is admitted and excludes a lawyer who while technically admitted is not authorized to practice, because, for example, the lawyer is on inactive status.

[8] Paragraph (c)(1) recognizes that the interests of clients and the public are protected if a lawyer admitted only in another jurisdiction associates with a lawyer licensed to practice in this jurisdiction. For this paragraph to apply, however, the lawyer admitted to practice in this jurisdiction must actively participate in and share responsibility for the representation of the client.

[9] Lawyers not admitted to practice generally in a jurisdiction may be authorized by law or order of a tribunal or an administrative agency to appear before the tribunal or

agency. This authority may be granted pursuant to formal rules governing admission pro hac vice or pursuant to informal practice of the tribunal or agency. Under paragraph (c)(2), a lawyer does not violate this Rule when the lawyer appears before a tribunal or agency pursuant to such authority. To the extent that a court rule or other law of this jurisdiction requires a lawyer who is not admitted to practice in this jurisdiction to obtain admission pro hac vice before appearing before a tribunal or administrative agency, this Rule requires the lawyer to obtain that authority.

[10] Paragraph (c)(2) also provides that a lawyer rendering services in this jurisdiction on a temporary basis does not violate this Rule when the lawyer engages in conduct in anticipation of a proceeding or hearing in a jurisdiction in which the lawyer is authorized to practice law or in which the lawyer reasonably expects to be admitted pro hac vice. Examples of such conduct include meetings with the client, interviews of potential witnesses, and the review of documents. Similarly, a lawyer admitted only in another jurisdiction may engage in conduct temporarily in this jurisdiction in connection with pending litigation in another jurisdiction in which the lawyer is or reasonably expects to be authorized to appear, including taking depositions in this jurisdiction.

[11] When a lawyer has been or reasonably expects to be admitted to appear before a court or administrative agency, paragraph (c)(2) also permits conduct by lawyers who are associated with that lawyer in the matter, but who do not expect to appear before the court or administrative agency. For example, subordinate lawyers may conduct research, review documents, and attend meetings with witnesses in support of the lawyer responsible for the litigation.

[12] Paragraph (c)(3) permits a lawyer admitted to practice law in another jurisdiction to perform services on a temporary basis in this jurisdiction if those services are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice. The lawyer, however, must obtain admission pro hac vice in the case of a court-annexed arbitration or mediation or otherwise if court rules or law so require.

[13] Paragraph (c)(4) permits a lawyer admitted in another jurisdiction to provide certain legal services on a temporary basis in this jurisdiction that arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted but are not within paragraphs (c)(2) or (c)(3). These services include both legal services and services that nonlawyers may perform but that are considered the practice of law when performed by lawyers.

[14] Paragraphs (c)(3) and (c)(4) require that the services arise out of or be reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted. A variety of factors evidence such a relationship. The lawyer's client may have been previously represented by the lawyer, or may be resident in or have substantial contacts with the jurisdiction in which the lawyer is admitted. The matter, although involving other jurisdictions, may have a significant connection with that jurisdiction. In other cases, significant aspects of the lawyer's work might be conducted in that jurisdiction or a significant aspect of the matter may involve the law of that jurisdiction. The necessary relationship might arise when the client's activities or the legal issues involve multiple jurisdictions, such as when the officers of a multinational corporation survey potential business sites and seek the services of their lawyer in assessing the relative merits of each. In addition, the services may draw on the lawyer's recognized expertise developed through the regular practice of law on behalf of clients in matters involving a particular body of federal, nationally-uniform, foreign, or international law.

[15] Paragraph (d) identifies two circumstances in which a lawyer who is admitted to practice in another United States jurisdiction, and is not disbarred or suspended from practice in any jurisdiction, may establish an office or other systematic and continuous presence in this jurisdiction for the practice of law as well as provide legal services on a temporary basis. Except as provided in paragraphs (d)(1) and (d)(2), a lawyer who is admitted to practice law in another jurisdiction and who establishes an office or other systematic or continuous presence in this jurisdiction must become admitted to practice law generally in this jurisdiction.

[16] Paragraph (d)(1) applies to a lawyer who is employed by a client to provide legal services to the client or its organizational affiliates, i.e., entities that control, are controlled by, or are under common control with the employer. This paragraph does not authorize the provision of personal legal services to the employer's officers or employees. The paragraph applies to in-house corporate lawyers, government lawyers and others who are employed to render legal services to the employer. The lawyer's ability to represent the employer outside the jurisdiction in which the lawyer is licensed generally serves the interests of the employer and does not create an unreasonable risk to the client and others because the employer is well situated to assess the lawyer's qualifications and the quality of the lawyer's work.

[17] If an employed lawyer establishes an office or other systematic presence in this jurisdiction for the purpose of rendering legal services to the employer, the lawyer may be subject to registration or other requirements, including assessments for client protection funds and mandatory continuing legal education.

[18] Paragraph (d)(2) recognizes that a lawyer may provide legal services in a jurisdiction in which the lawyer is not licensed when authorized to do so by federal or other law, which includes statute, court rule, executive regulation or judicial precedent.

[19] A lawyer who practices law in this jurisdiction pursuant to paragraphs (c) or (d) or otherwise is subject to the disciplinary authority of this jurisdiction. See Rule 8.5(a).

[20] In some circumstances, a lawyer who practices law in this jurisdiction pursuant to paragraphs (c) or (d) may have to inform the client that the lawyer is not licensed to practice law in this jurisdiction. For example, that may be required when the representation occurs primarily in this jurisdiction and requires knowledge of the law of this jurisdiction. See Rule 1.4(b).

[21] Paragraphs (c) and (d) do not authorize communications advertising legal services to prospective clients in this jurisdiction by lawyers who are admitted to practice in other jurisdictions. Whether and how lawyers may communicate

the availability of their services to prospective clients in this jurisdiction is governed by Rules 7.1 to 7.5.

RULE 5.6: RESTRICTIONS ON RIGHT TO PRACTICE

A lawyer shall not participate in offering or making:

(a) a partnership ~~or~~, shareholders, operating, employment, or other similar type of agreement that restricts the rights of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement; or

(b) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy ~~between private parties~~.

Comment

[1] An agreement restricting the right of lawyers to practice after leaving a firm not only limits their professional autonomy but also limits the freedom of clients to choose a lawyer. Paragraph (a) prohibits such agreements except for restrictions incident to provisions concerning retirement benefits for service with the firm.

[2] Paragraph (b) prohibits a lawyer from agreeing not to represent other persons in connection with settling a claim on behalf of a client.

[3] **[Washington revision]** This Rule does not prohibit restrictions that may be included in the terms of the sale of a law practice pursuant to Rule 1.17, a lawyer's plea agreement in a criminal matter, or a stipulation under the Rules for Enforcement of Lawyer Conduct.

RULE 5.7: RESPONSIBILITIES REGARDING LAW-RELATED SERVICES

(a) A lawyer shall be subject to the Rules of Professional Conduct with respect to the provision of law-related services, as defined in paragraph (b), if the law-related services are provided:

(1) by the lawyer in circumstances that are not distinct from the lawyer's provision of legal services to clients; or

(2) in other circumstances by an entity controlled by the lawyer individually or with others if the lawyer fails to take reasonable measures to assure that a person obtaining the law-related services knows that the services are not legal services and that the protections of the client-lawyer relationship do not exist.

(b) The term "law-related services" denotes services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a nonlawyer.

Comment

[1] When a lawyer performs law-related services or controls an organization that does so, there exists the potential for ethical problems. Principal among these is the possibility that the person for whom the law-related services are performed fails to understand that the services may not carry with them the protections normally afforded as part of the client-lawyer relationship. The recipient of the law-related services may expect, for example, that the protection of client confidences, prohibitions against representation of persons with conflicting interests, and obligations of a lawyer to maintain professional independence apply to the provision of law-related services when that may not be the case.

[2] Rule 5.7 applies to the provision of law-related services by a lawyer even when the lawyer does not provide any legal services to the person for whom the law-related services are performed and whether the law-related services are performed through a law firm or a separate entity. The Rule identifies the circumstances in which all of the Rules of Professional Conduct apply to the provision of law-related services. Even when those circumstances do not exist, however, the conduct of a lawyer involved in the provision of law-related services is subject to those Rules that apply generally to lawyer conduct, regardless of whether the conduct involves the provision of legal services. See, e.g., Rule 8.4.

[3] When law-related services are provided by a lawyer under circumstances that are not distinct from the lawyer's provision of legal services to clients, the lawyer in providing the law-related services must adhere to the requirements of the Rules of Professional Conduct as provided in paragraph (a)(1). Even when the law-related and legal services are provided in circumstances that are distinct from each other, for example through separate entities or different support staff within the law firm, the Rules of Professional Conduct apply to the lawyer as provided in paragraph (a)(2) unless the lawyer takes reasonable measures to assure that the recipient of the law-related services knows that the services are not legal services and that the protections of the client-lawyer relationship do not apply.

[4] Law-related services also may be provided through an entity that is distinct from that through which the lawyer provides legal services. If the lawyer individually or with others has control of such an entity's operations, the Rule requires the lawyer to take reasonable measures to assure that each person using the services of the entity knows that the services provided by the entity are not legal services and that the Rules of Professional Conduct that relate to the client-lawyer relationship do not apply. A lawyer's control of an entity extends to the ability to direct its operation. Whether a lawyer has such control will depend upon the circumstances of the particular case.

[5] When a client-lawyer relationship exists with a person who is referred by a lawyer to a separate law-related service entity controlled by the lawyer, individually or with others, the lawyer must comply with Rule 1.8(a).

[6] In taking the reasonable measures referred to in paragraph (a)(2) to assure that a person using law-related services understands the practical effect or significance of the inapplicability of the Rules of Professional Conduct, the lawyer should communicate to the person receiving the law-related services, in a manner sufficient to assure that the person understands the significance of the fact, that the relationship of the person to the business entity will not be a client-lawyer relationship. The communication should be made before entering into an agreement for provision of or providing law-related services, and preferably should be in writing.

[7] The burden is upon the lawyer to show that the lawyer has taken reasonable measures under the circumstances to communicate the desired understanding. For instance, a

sophisticated user of law-related services, such as a publicly held corporation, may require a lesser explanation than someone unaccustomed to making distinctions between legal services and law-related services, such as an individual seeking tax advice from a lawyer-accountant or investigative services in connection with a lawsuit.

[8] Regardless of the sophistication of potential recipients of law-related services, a lawyer should take special care to keep separate the provision of law-related and legal services in order to minimize the risk that the recipient will assume that the law-related services are legal services. The risk of such confusion is especially acute when the lawyer renders both types of services with respect to the same matter. Under some circumstances the legal and law-related services may be so closely entwined that they cannot be distinguished from each other, and the requirement of disclosure and consultation imposed by paragraph (a)(2) of the Rule cannot be met. In such a case a lawyer will be responsible for assuring that both the lawyer's conduct and, to the extent required by Rule 5.3, that of nonlawyer employees in the distinct entity that the lawyer controls complies in all respects with the Rules of Professional Conduct.

[9] A broad range of economic and other interests of clients may be served by lawyers' engaging in the delivery of law-related services. Examples of law-related services include providing title insurance, financial planning, accounting, trust services, real estate counseling, legislative lobbying, economic analysis, social work, psychological counseling, tax preparation, and patent, medical or environmental consulting.

[10] When a lawyer is obliged to accord the recipients of such services the protections of those Rules that apply to the client-lawyer relationship, the lawyer must take special care to heed the proscriptions of the Rules addressing conflict of interest (Rules 1.7 through 1.11, especially Rules 1.7 (a)(2) and 1.8 (a), (b) and (f)), and to scrupulously adhere to the requirements of Rule 1.6 relating to disclosure of confidential information. The promotion of the law-related services must also in all respects comply with Rules 7.1 through 7.3, dealing with advertising and solicitation. In that regard, lawyers should take special care to identify the obligations that may be imposed as a result of a jurisdiction's decisional law.

[11] When the full protections of all of the Rules of Professional Conduct do not apply to the provision of law-related services, principles of law external to the Rules, for example, the law of principal and agent, govern the legal duties owed to those receiving the services. Those other legal principles may establish a different degree of protection for the recipient with respect to confidentiality of information, conflicts of interest and permissible business relationships with clients. See also Rule 8.4 (Misconduct).

RULE 5.8: MISCONDUCT INVOLVING DISBARRED, SUSPENDED, RESIGNED, AND INACTIVE LAWYERS

(a) A lawyer shall not engage in the practice of law while on inactive status, or while suspended from the practice of law for any cause.

(b) A lawyer shall not engage in any of the following with an individual who is a disbarred or suspended lawyer or who has resigned in lieu of disbarment:

(1) practice law with or in cooperation with such an individual;

(2) maintain an office for the practice of law in a room or office occupied or used in whole or in part by such an individual;

(3) permit such an individual to use the lawyer's name for the practice of law;

(4) practice law for or on behalf of such an individual; or

(5) practice law under any arrangement or understanding for division of fees or compensation of any kind with such an individual.

Washington Comment

[1] The provisions of this Rule were taken from former Washington RPC 5.5 (d) and (e) (as amended in 2002).

Title 6 *PUBLIC SERVICE*

RULE 6.1: PRO BONO PUBLICO SERVICE

Every lawyer has a professional responsibility to assist in the provision of legal services to those unable to pay. A lawyer should aspire to render at least thirty (30) hours of pro bono publico service per year. In fulfilling this responsibility, the lawyers should:

(a) provide legal services without fee or expectation of fee to:

(1) persons of limited means or

(2) charitable, religious, civil, community, governmental and educational organizations in matters which are designed primarily to address the needs of persons of limited means; and

(b) provide pro bono publico service through:

(1) delivery of legal services at no fee or substantially reduced fee to individuals, groups or organizations seeking to secure or protect civil rights, or charitable, religious, civil, community, governmental and educational organizations in matters in furtherance of their organizational purposes, where the payment of standard legal fees would significantly deplete the organization's economic resources or would be otherwise inappropriate;

(2) delivery of legal services at a substantially reduced fee to persons of limited means; or

(3) participation in activities for improving the law, the legal system or the legal profession.

Pro bono publico service may be reported ~~on the annual fee statement furnished to the WSBA~~ annually on a form provided by the WSBA. ~~L~~ A lawyer~~s~~ rendering a minimum of fifty (50) hours of pro bono publico service shall receive ~~a recognition award~~ commendation for such service from the WSBA.

Comment

[1] **[Washington revision]** Every lawyer, regardless of professional prominence or professional work load, has a responsibility to provide legal services to those unable to pay, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer. It is recognized that in some years a lawyer may render greater or fewer hours than the annual standard specified, but during the course of his or her legal career, each law-

yer should render on average per year, at a minimum, the number of hours set forth in this Rule. Services can be performed in civil matters or in criminal or quasi-criminal matters for which there is no government obligation to provide funds for legal representation, such as post-conviction death penalty appeal cases.

[2] **[Washington revision]** Paragraphs (a)(1) and (2) recognize the critical need for legal services that exists among persons of limited means. Legal services under these paragraphs consist of a full range of activities, including individual and class representation, the provision of legal advice, legislative lobbying, administrative rule making and the provision of free training or mentoring to those who represent persons of limited means or organizations primarily representing such persons. The variety of these activities should facilitate participation by government lawyers, even when restrictions may exist on their engaging in the outside practice of law.

[3] **[Washington revision]** Persons eligible for legal services under paragraphs (a)(1) are those who qualify for services provided by a qualified legal services provider (see Washington Comment [14]) and those whose incomes and financial resources are slightly above the guidelines utilized by such programs but nevertheless, cannot afford counsel. Legal services under paragraphs (a)(1) and (2) include those rendered to individuals or to organizations such as homeless shelters, battered women's centers and food pantries that serve those of limited means. The term "governmental organizations" includes, but is not limited to, public protection programs and sections of governmental or public sector agencies.

[4] Because service must be provided without fee or expectation of fee, the intent of the lawyer to render free legal services is essential for the work performed to fall within the meaning of paragraphs (a)(1) and (2). Accordingly, services rendered cannot be considered pro bono if an anticipated fee is uncollected, but the award of statutory attorneys' fees in a case originally accepted as pro bono would not disqualify such services from inclusion under this section. Lawyers who do receive fees in such cases are encouraged to contribute an appropriate portion of such fees to organizations or projects that benefit persons of limited means.

[5] **[Washington revision]** A lawyer's responsibility under this Rule can be fulfilled either through the activities described in paragraph (a)(1) and (2) or in a variety of ways as set forth in paragraph (b).

[6] Paragraph (b)(1) includes the provision of certain types of legal services to those whose incomes and financial resources place them above limited means. It also permits the pro bono lawyer to accept a substantially reduced fee for services. Examples of the types of issues that may be addressed under this paragraph include First Amendment claims, Title VII claims and environmental protection claims. Additionally, a wide range of organizations may be represented, including social service, medical research, cultural and religious groups.

[7] Paragraph (b)(2) covers instances in which lawyers agree to and receive a modest fee for furnishing legal services to persons of limited means. Participation in judicare programs and acceptance of court appointments in which the fee is substantially below a lawyer's usual rate are encouraged under this section.

[8] **[Washington revision]** Paragraph (b)(3) recognizes the value of lawyers engaging in activities that improve the law, the legal system or the legal profession. Serving in a volunteer capacity on bar association committees or on boards of pro bono or legal services programs, taking part in Law Week activities, acting as an uncompensated continuing legal education instructor, an uncompensated mediator or arbitrator and engaging in uncompensated legislative lobbying to improve the law, the legal system or the profession are a few examples of the many activities that fall within this paragraph.

[9] Because the provision of pro bono services is a professional responsibility, it is the individual ethical commitment of each lawyer. Nevertheless, there may be times when it is not feasible for a lawyer to engage in pro bono services. At such times a lawyer may discharge the pro bono responsibility by providing financial support to organizations providing free legal services to persons of limited means. Such financial support should be reasonably equivalent to the value of the hours of service that would have otherwise been provided. In addition, at times it may be more feasible to satisfy the pro bono responsibility collectively, as by a firm's aggregate pro bono activities.

[10] **[Reserved.]** ~~Because the efforts of individual lawyers are not enough to meet the need for free legal services that exists among persons of limited means, the government and the profession have instituted additional programs to provide those services. Every lawyer should financially support such programs, in addition to either providing direct pro bono services or making financial contributions when pro bono service is not feasible.~~

[11] Law firms should act reasonably to enable and encourage all lawyers in the firm to provide the pro bono legal services called for by this Rule.

[12] The responsibility set forth in this Rule is not intended to be enforced through disciplinary process.

Additional Washington Comment (13 - 16)

[13] Washington's version of this Rule differs from the Model Rule. Washington's Rule 6.1 specifies an aspirational minimum of thirty hours of pro bono publico legal services per year rather than fifty, but provides for presentation of a service recognition award to those lawyers reporting to the WSBA a minimum of fifty hours. Unlike the Model Rule, paragraph (a) of Washington's Rule does not specify that the majority of the pro bono publico legal service hours should be provided without fee or expectation of fee. And Washington's Rule does not include the final paragraph of the Model Rule relating to voluntary contributions of financial support to legal services organizations. The provisions of Rule 6.1 were taken from former Washington RPC 6.1 (as amended in 2003).

[14] For purposes of this Rule, a "qualified legal services provider" is a not-for-profit legal services organization whose primary purpose is to provide legal services to low-income clients.

[15] Pro bono publico service does not include services rendered for wages or other compensation by lawyers

employed by qualified legal services providers (as that term is defined in Washington Comment [14]), government agencies, or other organizations as part of their employment.

[16] The amount of time spent rendering pro bono publico services should be calculated on the same basis that lawyers calculate their time on billable matters. For example, if time spent traveling to a client meeting or to a court hearing is considered to be part of the time for which a paying client would be billed, it is appropriate to include such time in calculating the number of pro bono publico service hours rendered under this Rule.

RULE 6.2: ACCEPTING APPOINTMENTS

A lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause, such as:

(a) ~~R~~representing the client is likely to result in violation of the Rules of Professional Conduct or other law;

(b) ~~R~~representing the client is likely to result in an unreasonable financial burden on the lawyer; or

(c) ~~T~~the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client.

Comment

[1] **[Washington revision]** A lawyer ordinarily is not obliged to accept a client whose character or cause the lawyer regards as repugnant. The lawyer's freedom to select clients is, however, qualified. A lawyer may be subject to appointment by a court to serve unpopular clients or persons unable to afford legal services.

Appointed Counsel

[2] For good cause a lawyer may seek to decline an appointment to represent a person who cannot afford to retain counsel or whose cause is unpopular. Good cause exists if the lawyer could not handle the matter competently, see Rule 1.1, or if undertaking the representation would result in an improper conflict of interest, for example, when the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client. A lawyer may also seek to decline an appointment if acceptance would be unreasonably burdensome, for example, when it would impose a financial sacrifice so great as to be unjust.

[3] An appointed lawyer has the same obligations to the client as retained counsel, including the obligations of loyalty and confidentiality, and is subject to the same limitations on the client-lawyer relationship, such as the obligation to refrain from assisting the client in violation of the Rules.

RULE 6.3: MEMBERSHIP IN LEGAL SERVICES ORGANIZATION

A lawyer may serve as a director, officer or member of a legal services organization, apart from the law firm in which the lawyer practices, notwithstanding that the organization serves persons having interests adverse to a client of the lawyer. The lawyer shall not knowingly participate in a decision or action of the organization:

(a) ~~I~~if participating in the decision or action would be incompatible with the lawyer's obligations to a client under ~~r~~Rule 1.7; or

(b) ~~W~~where the decision or action could have a material adverse effect on the representation of a client of the organization whose interests are adverse to a client of the lawyer.

Comment

[1] Lawyers should be encouraged to support and participate in legal service organizations. A lawyer who is an officer or a member of such an organization does not thereby have a client-lawyer relationship with persons served by the organization. However, there is potential conflict between the interests of such persons and the interests of the lawyer's clients. If the possibility of such conflict disqualified a lawyer from serving on the board of a legal services organization, the profession's involvement in such organizations would be severely curtailed.

[2] It may be necessary in appropriate cases to reassure a client of the organization that the representation will not be affected by conflicting loyalties of a member of the board. Established, written policies in this respect can enhance the credibility of such assurances.

RULE 6.4: LAW REFORM ACTIVITIES AFFECTING CLIENT INTERESTS

A lawyer may serve as a director, officer or member of an organization involved in reform of the law or its administration notwithstanding that the reform may affect the interests of a client of the lawyer. When the lawyer knows that the interests of a client may be materially benefitted by a decision in which the lawyer participates, the lawyer shall disclose that fact but need not identify the client.

Comment

[1] Lawyers involved in organizations seeking law reform generally do not have a client-lawyer relationship with the organization. Otherwise, it might follow that a lawyer could not be involved in a bar association law reform program that might indirectly affect a client. See also Rule 1.2(b). For example, a lawyer specializing in antitrust litigation might be regarded as disqualified from participating in drafting revisions of rules governing that subject. In determining the nature and scope of participation in such activities, a lawyer should be mindful of obligations to clients under other Rules, particularly Rule 1.7. A lawyer is professionally obligated to protect the integrity of the program by making an appropriate disclosure within the organization when the lawyer knows a private client might be materially benefitted.

RULE 6.5: NONPROFIT AND COURT-ANNEXED LIMITED LEGAL SERVICE PROGRAMS

(a) A lawyer who, under the auspices of a program sponsored by a nonprofit organization or court, provides short-term limited legal services to a client without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter and without expectation that the lawyer will receive a fee from the client for the services provided:

(1) is subject to Rules 1.7 ~~and~~, 1.9(a), and 1.18(c) only if the lawyer knows that the representation of the client involves a conflict of interest, except that those ~~r~~Rules shall not prohibit a lawyer from providing limited legal services sufficient only to determine eligibility of the client for assistance by the program and to make an appropriate referral of the client to another program; ~~and~~

(2) is subject to Rule 1.10 only if the lawyer knows that another lawyer associated with the lawyer in a law firm is disqualified by Rule 1.7 or 1.9(a) with respect to the matter; and~~,~~

(3) notwithstanding paragraphs (1) and (2), is not subject to Rules 1.7, 1.9(a), ~~or~~ 1.10, or 1.18(c) in providing limited legal services to a client if:

(~~a~~i) the program lawyers representing the opposing clients are screened by effective means from information ~~as~~ relating to the representation of the opposing client~~'s confidences, secrets, trial strategy and work product as to the matter at issue,~~;

(~~b~~ii) each client is notified of the conflict and the screening mechanism used to prohibit dissemination of ~~confidential or secret~~ information relating to the representation; and

(~~c~~iii) the program is able to demonstrate by convincing evidence that no ~~confidences or secrets that are~~ material ~~were~~ information relating to the representation of the opposing client was transmitted by the personally disqualified lawyers to the lawyer representing the conflicting client before implementation of the screening mechanism and notice to the opposing client.

(b) Except as provided in paragraph (a)(2), Rule 1.10 is inapplicable to a representation governed by this Rule.

Comment

[1] **[Washington revision]** Legal services organizations, courts and various nonprofit organizations have established programs through which lawyers provide short-term limited legal services — such as advice or the completion of legal forms — that will assist persons to address their legal problems without further representation by a lawyer. In these programs, such as legal-advice hotlines, advice-only clinics or pro se counseling programs, a client-lawyer relationship is established, but there is no expectation that the lawyer's representation of the client will continue beyond the limited consultation. Such programs are normally operated under circumstances in which it is not feasible for a lawyer to systematically screen for conflicts of interest as is generally required before undertaking a representation. See, e.g., Rules 1.7, 1.9, 1.10, and 1.18.

[2] A lawyer who provides short-term limited legal services pursuant to this Rule must secure the client's informed consent to the limited scope of the representation. See Rule 1.2(c). If a short-term limited representation would not be reasonable under the circumstances, the lawyer may offer advice to the client but must also advise the client of the need for further assistance of counsel. Except as provided in this Rule, the Rules of Professional Conduct, including Rules 1.6 and 1.9(c), are applicable to the limited representation.

[3] **[Washington revision]** Because a lawyer who is representing a client in the circumstances addressed by this Rule ordinarily is not able to check systematically for conflicts of interest, paragraph (a) requires compliance with Rules 1.7 or 1.9(a), or 1.18(c) only if the lawyer knows that the representation presents a conflict of interest for the lawyer, and with Rule 1.10 only if the lawyer knows that another lawyer in the lawyer's firm is disqualified by Rules 1.7 or 1.9(a) in the matter.

[4] Because the limited nature of the services significantly reduces the risk of conflicts of interest with other matters being handled by the lawyer's firm, paragraph (b) provides that Rule 1.10 is inapplicable to a representation governed by this Rule except as provided by paragraph (a)(2). Paragraph (a)(2) requires the participating lawyer to comply with Rule 1.10 when the lawyer knows that the lawyer's firm is disqualified by Rules 1.7 or 1.9(a). By virtue of paragraph (b), however, a lawyer's participation in a short-term limited legal services program will not preclude the lawyer's firm from undertaking or continuing the representation of a client with interests adverse to a client being represented under the program's auspices. Nor will the personal disqualification of a lawyer participating in the program be imputed to other lawyers participating in the program.

[5] If, after commencing a short-term limited representation in accordance with this Rule, a lawyer undertakes to represent the client in the matter on an ongoing basis, Rules 1.7, 1.9(a) and 1.10 become applicable.

Additional Washington Comments (6 - 7)

[6] Washington's version of this Rule differs from the Model Rule. The differences accommodate the unique civil legal services delivery system, which uses a statewide centralized telephone intake and referral system for low-income persons to access free civil legal services. The Rule recognizes that lawyers who provide intake and referral services such as these will necessarily at times receive confidential information from adverse parties. The risk that such information will be used against the material interests of either party is relatively low in comparison to the need for services, and when such a risk exists, protections of lawyer screening and notice to the client are required by the Rule.

[7] Paragraph (a)(3) was taken from former Washington RPC 6.5(a)(3) as enacted in 2002. The replacement of "confidences and secrets" in paragraph (a)(3) with "information relating to the representation" was necessary to conform the language of the Rule to a terminology change in Rule 1.6. No substantive change is intended. See Comment [19] to Rule 1.6.

Title 7 INFORMATION ABOUT LEGAL SERVICES

RULE 7.1: COMMUNICATIONS CONCERNING A LAWYER'S SERVICES

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it~~: (a) C~~contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading~~;~~.

~~(b) Is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the rules of professional conduct or other law; or~~

~~(c) Compares the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated.~~

Comment

[1] This Rule governs all communications about a lawyer's services, including advertising permitted by Rule 7.2. Whatever means are used to make known a lawyer's services, statements about them must be truthful.

[2] Truthful statements that are misleading are also prohibited by this Rule. A truthful statement is misleading if it omits a fact necessary to make the lawyer's communication considered as a whole not materially misleading. A truthful statement is also misleading if there is a substantial likelihood that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable factual foundation.

[3] An advertisement that truthfully reports a lawyer's achievements on behalf of clients or former clients may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client's case. Similarly, an unsubstantiated comparison of the lawyer's services or fees with the services or fees of other lawyers may be misleading if presented with such specificity as would lead a reasonable person to conclude that the comparison can be substantiated. The inclusion of an appropriate disclaimer or qualifying language may preclude a finding that a statement is likely to create unjustified expectations or otherwise mislead a prospective client.

[4] See also Rule 8.4(e) for the prohibition against stating or implying an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law.

RULE 7.2: ADVERTISING

(a) Subject to the requirements of ~~r~~Rules 7.1 and 7.3, a lawyer may advertise services through written, recorded or electronic communication, including public media~~, such as a telephone directory, legal directory, newspaper or other periodical, outdoor, radio or television, or through written communication.~~

~~(b) A copy or recording of an advertisement or written communication shall be kept by the lawyer for 2 years after its last dissemination along with a record of when and where it was used. Upon written request by the State Bar, either instigated by the State Bar or as the result of any inquiry from the public, the lawyer shall make any such copy or recording available to the State Bar, and shall provide to the State Bar evidence of any relevant professional qualifications and of the facts upon which any factual or objective claims contained in the advertisement or communication are based. The State Bar Association may provide the lawyer's response to any person making inquiry.~~

(~~e~~b) A lawyer shall not give anything of value to a person for recommending the lawyer's services, except that a lawyer may

(1) pay the reasonable costs of ~~advertising~~ advertisements or ~~written~~ communications permitted by this ~~r~~Rule ~~and may~~;

(2) pay the usual charges of a legal service plan or a not-for-profit lawyer referral service ~~or other legal service organization~~;

(3) pay for a law practice in accordance with Rule 1.17; and

(4) refer clients to another lawyer pursuant to an agreement not otherwise prohibited under these Rules that provides for the other person to refer clients or customers to the lawyer, if

(i) the reciprocal referral agreement is not exclusive, and

(ii) the client is informed of the existence and nature of the agreement.

(~~d~~c) Any communication made pursuant to this ~~r~~Rule shall include the name and office address of at least one lawyer or law firm responsible for its content.

Comment

[1] To assist the public in obtaining legal services, lawyers should be allowed to make known their services not only through reputation but also through organized information campaigns in the form of advertising. Advertising involves an active quest for clients, contrary to the tradition that a lawyer should not seek clientele. However, the public's need to know about legal services can be fulfilled in part through advertising. This need is particularly acute in the case of persons of moderate means who have not made extensive use of legal services. The interest in expanding public information about legal services ought to prevail over considerations of tradition. Nevertheless, advertising by lawyers entails the risk of practices that are misleading or overreaching.

[2] This Rule permits public dissemination of information concerning a lawyer's name or firm name, address and telephone number; the kinds of services the lawyer will undertake; the basis on which the lawyer's fees are determined, including prices for specific services and payment and credit arrangements; a lawyer's foreign language ability; names of references and, with their consent, names of clients regularly represented; and other information that might invite the attention of those seeking legal assistance.

[3] Questions of effectiveness and taste in advertising are matters of speculation and subjective judgment. Some jurisdictions have had extensive prohibitions against television advertising, against advertising going beyond specified facts about a lawyer, or against "undignified" advertising. Television is now one of the most powerful media for getting information to the public, particularly persons of low and moderate income; prohibiting television advertising, therefore, would impede the flow of information about legal services to many sectors of the public. Limiting the information that may be advertised has a similar effect and assumes that the bar can accurately forecast the kind of information that the public would regard as relevant. Similarly, electronic media, such as the Internet, can be an important source of information about legal services, and lawful communication by electronic mail is permitted by this Rule. But see Rule 7.3(a) for the prohibition against the solicitation of a prospective client

through a real-time electronic exchange that is not initiated by the prospective client.

[4] Neither this Rule nor Rule 7.3 prohibits communications authorized by law, such as notice to members of a class in class action litigation.

Paying Others to Recommend a Lawyer

[5] Lawyers are not permitted to pay others for channeling professional work. Paragraph (b)(1), however, allows a lawyer to pay for advertising and communications permitted by this Rule, including the costs of print directory listings, on-line directory listings, newspaper ads, television and radio airtime, domain-name registrations, sponsorship fees, banner ads, and group advertising. A lawyer may compensate employees, agents and vendors who are engaged to provide marketing or client-development services, such as publicists, public-relations personnel, business-development staff and website designers. See Rule 5.3 for the duties of lawyers and law firms with respect to the conduct of nonlawyers who prepare marketing materials for them.

[6] **[Washington revision]** A lawyer may pay the usual charges of a legal service plan or a not-for-profit lawyer referral service. A legal service plan is a prepaid or group legal service plan or a similar delivery system that assists prospective clients to secure legal representation. A lawyer referral service, on the other hand, is any organization that holds itself out to the public as a lawyer referral service. Such referral services are understood by laypersons to be consumer-oriented organizations that provide unbiased referrals to lawyers with appropriate experience in the subject matter of the representation and afford other client protections, such as complaint procedures or malpractice insurance requirements. Consequently, this Rule only permits a lawyer to pay the usual charges of a not-for-profit lawyer referral service.

[7] A lawyer who accepts assignments or referrals from a legal service plan or referrals from a lawyer referral service must act reasonably to assure that the activities of the plan or service are compatible with the lawyer's professional obligations. See Rule 5.3. Legal service plans and lawyer referral services may communicate with prospective clients, but such communication must be in conformity with these Rules. Thus, advertising must not be false or misleading, as would be the case if the communications of a group advertising program or a group legal services plan would mislead prospective clients to think that it was a lawyer referral service sponsored by a state agency or bar association. Nor could the lawyer allow in-person, telephonic, or real-time contacts that would violate Rule 7.3.

[8] **[Washington revision]** A lawyer also may agree to refer clients to another lawyer in return for the undertaking of that person to refer clients or customers to the lawyer. Such reciprocal referral arrangements must not interfere with the lawyer's professional judgment as to making referrals or as to providing substantive legal services. See Rules 2.1 and 5.4(c). Except as provided in Rule 1.5(e), a lawyer who receives referrals from a lawyer must not pay anything solely for the referral, but the lawyer does not violate paragraph (b) of this Rule by agreeing to refer clients to the other lawyer, so long as the reciprocal referral agreement is not exclusive and the client is informed of the referral agreement. Conflicts of interest created by such arrangements are governed by Rule 1.7. Reciprocal referral agreements should not be of indefinite duration and should be reviewed periodically to determine whether they comply with these Rules. This Rule does not restrict referrals or divisions of revenues or net income among lawyers within firms comprised of multiple entities.

Additional Washington Comment (9)

[9] That portion of Model Rule 7.2 (b)(4) that allows lawyers to enter into reciprocal referral agreements with nonlawyer professionals was not adopted.

RULE 7.3: DIRECT CONTACT WITH PROSPECTIVE CLIENTS

(a) A lawyer shall not, directly or through a third person, by in-person, live telephone or real-time electronic contact solicit professional employment from a prospective client ~~with whom the lawyer has no family or prior professional relationship in person or by telephone~~ when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain, unless the person contacted:

(1) is a lawyer;

(2) has a family, close personal, or prior professional relationship with the lawyer; or

(3) has consented to the contact by requesting a referral from a not-for-profit lawyer referral service.

(b) A lawyer shall not ~~send a written communication to a prospective client for the purpose of obtaining~~ solicit professional employment from a prospective client by written, recorded or electronic communication or by in-person, telephone or real-time electronic contact even when not otherwise prohibited by paragraph (a), if:

(1) the ~~person~~ prospective client has made known to the lawyer a desire not to ~~receive communications from~~ be solicited by the lawyer; or

(2) the solicitation involves coercion, duress or harassment.

(c) **[Reserved.]**

(d) Notwithstanding the prohibitions in paragraph (a), a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer that uses in-person or telephone contact to solicit memberships or subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.

Comment

[1] There is a potential for abuse inherent in direct in-person, live telephone or real-time electronic contact by a lawyer with a prospective client known to need legal services. These forms of contact between a lawyer and a prospective client subject the layperson to the private importuning of the trained advocate in a direct interpersonal encounter. The prospective client, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult fully to evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer's presence and insistence upon being retained immediately. The situation is

fraught with the possibility of undue influence, intimidation, and over-reaching.

[2] This potential for abuse inherent in direct in-person, live telephone or real-time electronic solicitation of prospective clients justifies its prohibition, particularly since lawyer advertising and written and recorded communication permitted under Rule 7.2 offer alternative means of conveying necessary information to those who may be in need of legal services. Advertising and written and recorded communications which may be mailed or autodialed make it possible for a prospective client to be informed about the need for legal services, and about the qualifications of available lawyers and law firms, without subjecting the prospective client to direct in-person, telephone or real-time electronic persuasion that may overwhelm the client's judgment.

[3] The use of general advertising and written, recorded or electronic communications to transmit information from lawyer to prospective client, rather than direct in-person, live telephone or real-time electronic contact, will help to assure that the information flows cleanly as well as freely. The contents of advertisements and communications permitted under Rule 7.2 can be permanently recorded so that they cannot be disputed and may be shared with others who know the lawyer. This potential for informal review is itself likely to help guard against statements and claims that might constitute false and misleading communications, in violation of Rule 7.1. The contents of direct in-person, live telephone or real-time electronic conversations between a lawyer and a prospective client can be disputed and may not be subject to third-party scrutiny. Consequently, they are much more likely to approach (and occasionally cross) the dividing line between accurate representations and those that are false and misleading.

[4] **[Washington revision]** There is far less likelihood that a lawyer would engage in abusive practices against an individual who is a former client, or with whom the lawyer has close personal or family relationship, or in situations in which the lawyer is motivated by considerations other than the lawyer's pecuniary gain. Nor is there a serious potential for abuse when the person contacted is a lawyer. Consequently, the general prohibition in Rule 7.3(a) is not applicable in those situations. Also, paragraph (a) is not intended to prohibit a lawyer from participating in constitutionally protected activities of public or charitable legal-service organizations or bona fide political, social, civic, fraternal, employee or trade organizations whose purposes include providing or recommending legal services to its members or beneficiaries.

[5] But even permitted forms of solicitation can be abused. Thus, any solicitation which contains information which is false or misleading within the meaning of Rule 7.1, which involves coercion, duress or harassment within the meaning of Rule 7.3 (b)(2), or which involves contact with a prospective client who has made known to the lawyer a desire not to be solicited by the lawyer within the meaning of Rule 7.3 (b)(1) is prohibited. Moreover, if after sending a letter or other communication to a client as permitted by Rule 7.2 the lawyer receives no response, any further effort to communicate with the prospective client may violate the provisions of Rule 7.3(b).

[6] This Rule is not intended to prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a group or prepaid legal plan for their members, insureds, beneficiaries or other third parties for the purpose of informing such entities of the availability of and details concerning the plan or arrangement which the lawyer or lawyer's firm is willing to offer. This form of communication is not directed to a prospective client. Rather, it is usually addressed to an individual acting in a fiduciary capacity seeking a supplier of legal services for others who may, if they choose, become prospective clients of the lawyer. Under these circumstances, the activity which the lawyer undertakes in communicating with such representatives and the type of information transmitted to the individual are functionally similar to and serve the same purpose as advertising permitted under Rule 7.2.

[7] **[Reserved.]**

[8] Paragraph (d) of this Rule permits a lawyer to participate with an organization which uses personal contact to solicit members for its group or prepaid legal service plan, provided that the personal contact is not undertaken by any lawyer who would be a provider of legal services through the plan. The organization must not be owned by or directed (whether as manager or otherwise) by any lawyer or law firm that participates in the plan. For example, paragraph (d) would not permit a lawyer to create an organization controlled directly or indirectly by the lawyer and use the organization for the in-person or telephone solicitation of legal employment of the lawyer through memberships in the plan or otherwise. The communication permitted by these organizations also must not be directed to a person known to need legal services in a particular matter, but is to be designed to inform potential plan members generally of another means of affordable legal services. Lawyers who participate in a legal service plan must reasonably assure that the plan sponsors are in compliance with Rules 7.1, 7.2 and 7.3(b). See 8.4(a).

Additional Washington Comments (9 - 12)

[9] A lawyer who receives a referral from a third party should exercise caution in contacting the prospective client directly by in-person, live telephone, or real-time electronic contact. Such contact is generally prohibited by this Rule unless the prospective client has asked to be contacted by the lawyer. A prospective client may request such contact through a third party. Prior to initiating contact with the prospective client, however, the lawyer should confirm with the source of the referral that the prospective client has indeed made such a request. Similarly, when making referrals to other lawyers, the referring lawyer should discuss with the prospective client whether he or she wishes to be contacted directly.

[10] Those in need of legal representation often seek assistance in finding a lawyer through a lawyer referral service. Washington adopted paragraph (a)(3) in order to facilitate communication between lawyers and potential clients who have specifically requested a referral from a not-for-profit lawyer referral service. Under this paragraph, a lawyer receiving such a referral may contact the potential client directly by in-person, live telephone, or real-time electronic contact to discuss possible representation.

[11] Washington did not adopt paragraph (c) of the Model Rule relating to labeling of communications with prospective clients. A specific labeling requirement is unnecessary in light of the prohibition in Rule 7.1 against false or misleading communications.

[12] The phrase "directly or through a third person" in paragraph (a) was retained from former Washington RPC 7.3(a).

RULE 7.4: COMMUNICATION OF FIELDS OF PRACTICE AND SPECIALIZATION

(a) A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law. ~~A lawyer shall not state or imply that the lawyer is a specialist except as follows:~~

(~~a~~b) A lawyer admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation "~~p~~Patent ~~a~~Attorney" or a substantially similar designation.

(c) A lawyer engaged in Admiralty practice may use the designation "Admiralty," "Proctor in Admiralty" or a substantially similar designation.

(~~b~~d) ~~Upon~~ 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 ~~meet the following requirements~~:

(1) ~~the reference must~~ be truthful and verifiable and ~~may not be misleading in violation of~~ otherwise comply with R~~r~~ule 7.1;

(2) ~~the reference must~~ identify the certifying group, organization, or association; and

(3) ~~the reference must~~ state that the Supreme Court of Washington does not recognize the 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.

Comment

[1] **[Washington revision]** Paragraph (a) of this Rule permits a lawyer to indicate areas of practice in communications about the lawyer's services. If a lawyer practices only in certain fields, or will not accept matters except in a specified field or fields, the lawyer is permitted to so indicate.

[2] Paragraph (b) recognizes the long-established policy of the Patent and Trademark Office for the designation of lawyers practicing before the Office. Paragraph (c) recognizes that designation of Admiralty practice has a long historical tradition associated with maritime commerce and the federal courts.

[3] **[Reserved.]**

Additional Washington Comment (4)

[4] Statements indicating that the lawyer is a "specialist," practices a "specialty," "specializes in" particular fields, and the like, are subject to the limitations set forth in paragraph (d). The provisions of paragraph (d) were taken from former Washington RPC 7.4(b).

RULE 7.5: FIRM NAMES AND ~~DESIGNATIONS~~ LETTERHEADS

(a) A lawyer shall not use a firm name, letterhead, or other professional designation that violates Rule 7.1 ~~or Rule 7.4~~. A trade name may be used by a lawyer in private practice if it does not imply a connection with a government agency or with a public or charitable legal services organization and is not otherwise in violation of Rule 7.1 ~~or Rule 7.4~~.

(b) A law firm with offices in more than one jurisdiction may use the same name or other professional designation in each jurisdiction, but identification of the lawyers in an office of the firm shall indicate the jurisdictional limitations on those not licensed to practice in the jurisdiction where the office is located.

(c) The name of a lawyer holding a public office shall not be used in the name of a law firm, or in communications on its behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.

(d) Lawyers may state or imply that they practice in a partnership or other organization only when that is the fact. ~~Lawyers practicing out of the same office who are not partners, shareholders of a professional corporation, or members of a professional limited liability company or partnership may not join their names together. Lawyers who are not (1) partners, shareholders of a professional corporation, or members of a professional limited liability company or partnership, or (2) employees of a sole proprietorship, partnership, professional corporation, or members of a professional limited liability company or partnership or other organization, or (3) in the relationship of being "Of Counsel" to a sole proprietorship, partnership, professional corporation, or members of a professional limited liability company or partnership or other organization, shall have separate letterheads, cards and pleading paper, and shall sign their names individually at the end of all pleadings and correspondence and not in conjunction with the names of other lawyers.~~

Comment

[1] A firm may be designated by the names of all or some of its members, by the names of deceased members where there has been a continuing succession in the firm's identity or by a trade name such as the "ABC Legal Clinic." A lawyer or law firm may also be designated by a distinctive website address or comparable professional designation. Although the United States Supreme Court has held that legislation may prohibit the use of trade names in professional practice, use of such names in law practice is acceptable so long as it is not misleading. If a private firm uses a trade name that includes a geographical name such as "Springfield Legal Clinic," an express disclaimer that it is a public legal aid agency may be required to avoid a misleading implication. It may be observed that any firm name including the name of a deceased partner is, strictly speaking, a trade name. The use of such names to designate law firms has proven a useful means of identification. However, it is misleading to use the name of a lawyer not associated with the firm or a predecessor of the firm, or the name of a nonlawyer.

[2] With regard to paragraph (d), lawyers sharing office facilities, but who are not in fact associated with each other in a law firm, may not denominate themselves as, for example, "Smith and Jones," for that title suggests that they are practicing law together in a firm.

Additional Washington Comment (3)

[3] Lawyers practicing out of the same office who are not partners, shareholders of a professional corporation, or members of a professional limited liability company or partnership may not join their names together. Lawyers who are not 1) partners, shareholders of a professional corporation, or members of a professional limited liability company or partnership, or 2) employees of a sole proprietorship, partnership, professional corporation, or members of a professional limited liability company or partnership or other organization, or 3) in the relationship of being "Of Counsel" to a sole proprietorship, partnership, professional corporation, or members of a professional limited liability company or partnership or other organization, must have separate letterheads, cards and pleading paper, and must sign their names individually at the end of all pleadings and correspondence and not in conjunction with the names of other lawyers. (The provisions of this Comment were taken from former Washington RPC 7.5(d).)

RULE 7.6: POLITICAL CONTRIBUTIONS TO OBTAIN GOVERNMENT LEGAL ENGAGEMENTS OR APPOINTMENTS BY JUDGES

A lawyer or law firm shall not accept a government legal engagement or an appointment by a judge if the lawyer or law firm makes a political contribution or solicits political contributions for the purpose of obtaining or being considered for that type of legal engagement or appointment.

Comment

[1] Lawyers have a right to participate fully in the political process, which includes making and soliciting political contributions to candidates for judicial and other public office. Nevertheless, when lawyers make or solicit political contributions in order to obtain an engagement for legal work awarded by a government agency, or to obtain appointment by a judge, the public may legitimately question whether the lawyers engaged to perform the work are selected on the basis of competence and merit. In such a circumstance, the integrity of the profession is undermined.

[2] The term "political contribution" denotes any gift, subscription, loan, advance or deposit of anything of value made directly or indirectly to a candidate, incumbent, political party or campaign committee to influence or provide financial support for election to or retention in judicial or other government office. Political contributions in initiative and referendum elections are not included. For purposes of this Rule, the term "political contribution" does not include uncompensated services.

[3] Subject to the exceptions below, (i) the term "government legal engagement" denotes any engagement to provide legal services that a public official has the direct or indirect power to award; and (ii) the term "appointment by a judge" denotes an appointment to a position such as referee, commissioner, special master, receiver, guardian or other similar position that is made by a judge. Those terms do not, however, include (a) substantially uncompensated services; (b) engagements or appointments made on the basis of experience, expertise, professional qualifications and cost following a request for proposal or other process that is free from influence based upon political contributions; and (c) engagements or appointments made on a rotational basis from a list compiled without regard to political contributions.

[4] The term "lawyer or law firm" includes a political action committee or other entity owned or controlled by a lawyer or law firm.

[5] Political contributions are for the purpose of obtaining or being considered for a government legal engagement or appointment by a judge if, but for the desire to be considered for the legal engagement or appointment, the lawyer or law firm would not have made or solicited the contributions. The purpose may be determined by an examination of the circumstances in which the contributions occur. For example, one or more contributions that in the aggregate are substantial in relation to other contributions by lawyers or law firms, made for the benefit of an official in a position to influence award of a government legal engagement, and followed by an award of the legal engagement to the contributing or soliciting lawyer or the lawyer's firm would support an inference that the purpose of the contributions was to obtain the engagement, absent other factors that weigh against existence of the proscribed purpose. Those factors may include among others that the contribution or solicitation was made to further a political, social, or economic interest or because of an existing personal, family, or professional relationship with a candidate.

[6] If a lawyer makes or solicits a political contribution under circumstances that constitute bribery or another crime, Rule 8.4(b) is implicated.

Title 8 **MAINTAINING THE INTEGRITY OF THE PROFESSION**

RULE 8.1: BAR ADMISSION AND DISCIPLINARY MATTERS

An applicant for admission to the ~~B~~bar, or a lawyer in connection with a bar admission or reinstatement application~~, or an application for reinstatement~~ or in connection with a disciplinary matter, shall not:

(a) knowingly make a false statement of material fact; or

(b) fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this ~~r~~Rule does not require disclosure of information otherwise protected by ~~r~~Rule 1.6.

Comment

[1] The duty imposed by this Rule extends to persons seeking admission to the bar as well as to lawyers. Hence, if a person makes a material false statement in connection with an application for admission, it may be the basis for subsequent disciplinary action if the person is admitted, and in any event may be relevant in a subsequent admission application. The duty imposed by this Rule applies to a lawyer's own admission or discipline as well as that of others. Thus, it is a separate professional offense for a lawyer to knowingly make

a misrepresentation or omission in connection with a disciplinary investigation of the lawyer's own conduct. Paragraph (b) of this Rule also requires correction of any prior misstatement in the matter that the applicant or lawyer may have made and affirmative clarification of any misunderstanding on the part of the admissions or disciplinary authority of which the person involved becomes aware.

[2] This Rule is subject to the provisions of the fifth amendment of the United States Constitution and corresponding provisions of state constitutions. A person relying on such a provision in response to a question, however, should do so openly and not use the right of nondisclosure as a justification for failure to comply with this Rule.

[3] A lawyer representing an applicant for admission to the bar, or representing a lawyer who is the subject of a disciplinary inquiry or proceeding, is governed by the rules applicable to the client-lawyer relationship, including Rule 1.6 and, in some cases, Rule 3.3.

Additional Washington Comment (4)

[4] A lawyer's obligations under this Rule are in addition to the lawyer's obligations under the Rules for Enforcement of Lawyer Conduct.

RULE 8.2: JUDICIAL AND LEGAL OFFICIALS

(a) A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications, integrity, or record of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.

(b) A lawyer who is a candidate for judicial office shall comply with the applicable provisions of the Code of Judicial Conduct.

~~(c) A lawyer, in order to assist in maintaining the fair and independent administration of justice, should support and continue traditional efforts to defend judges and courts from unjust criticism.~~

Comment

[1] Assessments by lawyers are relied on in evaluating the professional or personal fitness of persons being considered for election or appointment to judicial office and to public legal offices, such as attorney general, prosecuting attorney and public defender. Expressing honest and candid opinions on such matters contributes to improving the administration of justice. Conversely, false statements by a lawyer can unfairly undermine public confidence in the administration of justice.

[2] When a lawyer seeks judicial office, the lawyer should be bound by applicable limitations on political activity.

[3] To maintain the fair and independent administration of justice, lawyers are encouraged to continue traditional efforts to defend judges and courts unjustly criticized.

RULE 8.3: REPORTING PROFESSIONAL MISCONDUCT

(a) A lawyer ~~having knowledge~~ 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 ~~promptly shall~~ inform the appropriate professional authority.

(b) A lawyer ~~having knowledge~~ 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 ~~shall~~ inform the appropriate authority.

(c) This ~~r~~Rule does not permit a lawyer to report the professional misconduct of another lawyer or a judge to the appropriate authority if doing so would require ~~disclosure of~~ the lawyer to disclose information otherwise protected by ~~r~~Rule 1.6.

Comment

~~[1] **[Washington revision]** Self-regulation of the legal profession requires that members of the profession, when they know of a violation of the Rules of Professional Conduct, initiate disciplinary investigation by reporting lawyer misconduct to the appropriate disciplinary authority. Lawyers have a similar obligation with respect to judicial misconduct. An apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover. Reporting a violation is especially important where the victim is unlikely to discover the offense.~~

~~[2] **[Washington revision]** A report about misconduct is prohibited if it would involve violation of Rule 1.6. However, a lawyer should encourage a client to consent to disclosure where prosecution would not substantially prejudice the client's interests.~~

~~[3] **[Washington revision]** This Rule does not oblige a lawyer to report every violation of the Rules, but instead limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. A measure of judgment is, therefore, required in complying with the provisions of this Rule. The term "substantial" refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware. And reporting is required only when a lawyer knows about reportable misconduct. See Rule 1.0(f) for the definition of "knows"; see Rule 1.0(l) for the definition of "substantial." Similar considerations apply to the reporting of judicial misconduct.~~

~~[4] The duty to report professional misconduct does not apply to a lawyer retained to represent a lawyer whose professional conduct is in question. Such a situation is governed by the Rules applicable to the client-lawyer relationship.~~

~~[5] **[Washington revision]** Information about a lawyer's or judge's misconduct or fitness may be received by a lawyer in the course of that lawyer's participation in an approved lawyers or judges assistance program. In that circumstance, the reporting requirements of paragraphs (a) and (b) of this Rule do not apply. Lawyers and judges should not hesitate to seek assistance from these programs in order to prevent additional harm to their professional careers and additional injury to the welfare of clients and the public. Admission to Practice Rule 19(b) provides that confidential communications between lawyer-clients and staff or peer counselors of the Lawyers' Assistance Program (LAP) of the Washington State Bar Association are privileged. Likewise, Discipline Rule for Judges 14(e) provides that confidential communications between judges and peer counselors of the Judicial Assis-~~

~~tance Committees of the various judges associations or the LAP are privileged.~~

~~Washington Comments~~

[1] **[Washington revision]** Lawyers are not required to report the misconduct of other lawyers or judges. Self-regulation of the legal profession, however, creates an aspiration that members of the profession report misconduct to the appropriate disciplinary authority when they know of a serious violation of the Rules of Professional Conduct. Lawyers have a similar aspiration with respect to judicial misconduct. An apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover. Reporting a violation is especially important where the victim is unlikely to discover the offense.

[2] **[Reserved.]**

[~~2~~3] **[Washington revision]** While lawyers are not obliged to report every violation of the Rules, the failure to report a serious violation may undermine the belief that lawyers should be a self-regulating profession. A measure of judgment is, therefore, required in deciding whether to report a violation. The term "substantial" refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware. A report should be made whenever a lawyer's conduct raises a serious question as to the honesty, trustworthiness or fitness to practice. Similar considerations apply to the reporting of judicial misconduct.

[~~3~~4] **[Washington revision]** This Rule does not apply to a lawyer retained to represent a lawyer whose professional conduct is in question. Such a situation is governed by the Rules applicable to the client-lawyer relationship.

[~~4~~5] **[Washington revision]** Information about a lawyer's or judge's misconduct or fitness may be received by a lawyer in the course of that lawyer's participation in an approved lawyers or judges assistance program. In that circumstance, there is no requirement or aspiration of reporting. Admission to Practice Rule 19(b) makes confidential communications between lawyer-clients and staff or peer counselors of the Lawyers' Assistance Program (LAP) of the WSBA privileged. Likewise, Discipline Rule for Judges 14(e) makes confidential communications between judges and peer counselors and the Judicial Assistance Committees of the various judges associations or the LAP of the WSBA privileged. Lawyers and judges should not hesitate to seek assistance from these programs and to help prevent additional harm to their professional careers and additional injury to the welfare of clients and the public.

RULE 8.4: MISCONDUCT

It is professional misconduct for a lawyer to:

(a) ~~V~~violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) ~~C~~commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) ~~E~~engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) ~~E~~engage in conduct that is prejudicial to the administration of justice;

(e) ~~S~~state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law;

(f) ~~K~~knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law;

(g) ~~C~~commit a discriminatory act prohibited by state law on the basis of sex, race, age, creed, religion, color, national origin, disability, sexual orientation, or marital status, where the act of discrimination is committed in connection with the lawyer's professional activities. In addition, it is professional misconduct to commit a discriminatory act on the basis of sexual orientation if such an act would violate this ~~r~~Rule when committed on the basis of sex, race, age, creed, religion, color, national origin, disability or marital status. This ~~r~~Rule shall not limit the ability of a lawyer to accept, decline, or withdraw from the representation of a client in accordance with ~~RPC 1.15~~ Rule 1.16;

(h) ~~I~~in representing a client, engage in conduct that is prejudicial to the administration of justice toward judges, other parties and/or their counsel, witnesses and/or their counsel, jurors, or court personnel or officers, that a reasonable person would interpret as manifesting prejudice or bias on the basis of sex, race, age, creed, religion, color, national origin, disability, sexual orientation, or marital status~~, or socioeconomic status~~. This ~~r~~Rule does not restrict a lawyer from representing a client by advancing material factual or legal issues or arguments;

(i) ~~C~~commit any act involving moral turpitude, or corruption, or any unjustified act of assault or other act which reflects disregard for the rule of law, whether the same be committed in the course of his or her conduct as a lawyer, or otherwise, and whether the same constitutes a felony or misdemeanor or not; and if the act constitutes a felony or misdemeanor, conviction thereof in a criminal proceeding shall not be a condition precedent to disciplinary action, nor shall acquittal or dismissal thereof preclude the commencement of a disciplinary proceeding;

(j) ~~W~~willfully disobey or violate a court order directing him or her to do or cease doing an act which he or she ought in good faith to do or forbear;

(k) ~~V~~violate his or her oath as an attorney;

(l) ~~V~~violate a duty or sanction imposed by or under the Rules for Enforcement of Lawyer Conduct in connection with a disciplinary matter; including, but not limited to, the duties catalogued at ELC 1.5;

(m) ~~V~~violate the Code of Judicial Conduct; or

(n) ~~E~~engage in conduct demonstrating unfitness to practice law.

Comment

[1] Lawyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so or do so through the acts of another, as when they request or instruct an agent to do so on the lawyer's behalf. Paragraph (a), however, does not prohibit a lawyer from advising a client concerning action the client is legally entitled to take.

[2] **[Reserved.]**

[3] **[Washington revision]** Legitimate advocacy respecting the factors set forth in paragraph (h) does not violate paragraphs (d) or (h). A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this Rule.

[4] A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of Rule 1.2(d) concerning a good faith challenge to the validity, scope, meaning or application of the law apply to challenges of legal regulation of the practice of law.

[5] Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of lawyers. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization.

Additional Washington Comment (6)

[6] Paragraphs (g) - (n) were taken from former Washington RPC 8.4 (as amended in 2002).

RULE 8.5: ~~JURISDICTION~~ DISCIPLINARY AUTHORITY; CHOICE OF LAW

~~(a) A lawyer licensed or admitted for any purpose to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction although engaged in practice elsewhere.~~

~~(b) A lawyer may be subjected to disciplinary sanctions or actions in this jurisdiction on the basis of suspension, disbarment or other disciplinary sanction by competent authority in any other state, federal or foreign jurisdiction.~~

(a) Disciplinary Authority. A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs. A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct.

(b) Choice of Law. In any exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied shall be as follows:

(1) for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise; and

(2) for any other conduct, the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct. A lawyer shall not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur.

Comment

Disciplinary Authority

[1] It is longstanding law that the conduct of a lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction. Extension of the disciplinary authority of this jurisdiction to other lawyers who provide or offer to provide legal services in this jurisdiction is for the protection of the citizens of this jurisdiction. Reciprocal enforcement of a jurisdiction's disciplinary findings and sanctions will further advance the purposes of this Rule. See, Rules 6 and 22, ABA Model Rules for Lawyer Disciplinary Enforcement. A lawyer who is subject to the disciplinary authority of this jurisdiction under Rule 8.5(a) appoints an official to be designated by this Court to receive service of process in this jurisdiction. The fact that the lawyer is subject to the disciplinary authority of this jurisdiction may be a factor in determining whether personal jurisdiction may be asserted over the lawyer for civil matters.

Choice of Law

[2] A lawyer may be potentially subject to more than one set of rules of professional conduct which impose different obligations. The lawyer may be licensed to practice in more than one jurisdiction with differing rules, or may be admitted to practice before a particular court with rules that differ from those of the jurisdiction or jurisdictions in which the lawyer is licensed to practice. Additionally, the lawyer's conduct may involve significant contacts with more than one jurisdiction.

[3] Paragraph (b) seeks to resolve such potential conflicts. Its premise is that minimizing conflicts between rules, as well as uncertainty about which rules are applicable, is in the best interest of both clients and the profession (as well as the bodies having authority to regulate the profession). Accordingly, it takes the approach of (i) providing that any particular conduct of a lawyer shall be subject to only one set of rules of professional conduct, (ii) making the determination of which set of rules applies to particular conduct as straightforward as possible, consistent with recognition of appropriate regulatory interests of relevant jurisdictions, and (iii) providing protection from discipline for lawyers who act reasonably in the face of uncertainty.

[4] Paragraph (b)(1) provides that as to a lawyer's conduct relating to a proceeding pending before a tribunal, the lawyer shall be subject only to the rules of the jurisdiction in which the tribunal sits unless the rules of the tribunal, including its choice of law rule, provide otherwise. As to all other conduct, including conduct in anticipation of a proceeding not yet pending before a tribunal, paragraph (b)(2) provides that a lawyer shall be subject to the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in another jurisdiction, the rules of that jurisdiction shall be applied to the conduct. In the case of conduct in anticipation of a proceeding that is likely to be before a tribunal, the predominant effect of such conduct could be where the conduct occurred, where the tribunal sits or in another jurisdiction.

[5] When a lawyer's conduct involves significant contacts with more than one jurisdiction, it may not be clear whether the predominant effect of the lawyer's conduct will occur in a jurisdiction other than the one in which the conduct occurred. So long as the lawyer's conduct conforms to the

rules of a jurisdiction in which the lawyer reasonably believes the predominant effect will occur, the lawyer shall not be subject to discipline under this Rule.

[6] If two admitting jurisdictions were to proceed against a lawyer for the same conduct, they should, applying this Rule, identify the same governing ethics rules. They should take all appropriate steps to see that they do apply the same rule to the same conduct, and in all events should avoid proceeding against a lawyer on the basis of two inconsistent rules.

[7] The choice of law provision applies to lawyers engaged in transnational practice, unless international law, treaties or other agreements between competent regulatory authorities in the affected jurisdictions provide otherwise.

APPENDIX

GUIDELINES FOR APPLYING RULE OF PROFFESIONAL CONDUCT 3.6

I. Criminal

A. The kind of statement referred to in Rule 3.6 which may potentially prejudice criminal proceedings is a statement which relates to:

(1) The character, credibility, reputation or criminal record of a suspect or defendant;

(2) The possibility of a plea of guilty to the offense or the existence or contents of a confession, admission or statement given by a suspect or defendant or that persons refusal or failure to make a statement;

(3) The performance or results of any investigative examination or test such as a polygraph examination or a laboratory test or the failure of a person to submit to an examination or test;

(4) Any opinion as to the guilt or innocence of any suspect or defendant;

(5) The credibility or anticipated testimony of a prospective witness; and

(6) Information the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial.

B. The public has a legitimate interest in the conduct of judicial proceedings and the administration of justice. Lawyers involved in the litigation of criminal matters may state without elaboration:

(1) The general nature of the charge or defense;

(2) The information contained in the public record; and

(3) The scheduling of any step in litigation, including a scheduled court hearing to enter a plea of guilty.

C. The public also has a right to know about threats to its safety and measures aimed at assuring its security. Toward that end a public prosecutor or other lawyer involved in the investigation of a criminal case may state:

(1) That an investigation is in progress, including the general scope of the investigation and, except when prohibited by law, the identity of the persons involved;

(2) A request for assistance in obtaining evidence and information;

(3) A warning of danger concerning the behavior of a person involved when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and

(4)(i) The identity, residence, occupation and family status of the accused;

(ii) information necessary to aid in apprehension of the accused;

(iii) the fact, time and place of arrest; and

(iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

II. Civil

The kind of statement referred to in Rule 3.6 which may potentially prejudice civil matters triable to a jury is a statement designed to influence the jury or to detract from the impartiality of the proceedings.

Related Changes to the
GENERAL RULES (GR)

RULE 25. PRACTICE OF LAW BOARD

(a) - (b) [Unchanged.]

(c) **Powers of the Practice of Law Board.**

(1) *Advisory Opinions.* On request of any person, or in connection with the consideration of any complaint or any investigation made on its own initiative, the Board may render advisory opinions relating to the authority of non-lawyers to perform legal and law-related services and arrange for their publication. No opinion shall be rendered if, to the Board's knowledge, the subject matter either involves or might affect a case or controversy pending in any court. An advisory opinion shall be issued by the Board in writing and shall be transmitted to the person making the inquiry. At the direction of the Board, an opinion may be published in the Washington State Bar News. Published opinions shall not, insofar as practicable, identify the party or parties making an inquiry, or the complainant or respondent.

(2) *Complaints.* The Board shall have jurisdiction over and shall inquire into and consider complaints alleging the unauthorized practice of law by any person or entity in accordance with the procedures outlined in this rule.

(3) *Investigation.* The Board may, on its own initiative, and without any complaint being made to it, investigate any condition or situation of which it becomes aware that may involve the unauthorized practice of law.

(4) *Recommendations to the Supreme Court Regarding the Provision of Legal and Law-Related Services by Non-Lawyers.* On request of the Supreme Court or any person or organization, or on its own initiative, the Board may recommend that non-lawyers be authorized to engage in certain defined activities that otherwise constitute the practice of law as defined in GR 24. In forwarding a recommendation that non-lawyers be authorized to engage in certain legal or law-related activities that constitute the practice of law as defined in GR 24, the Board shall determine whether regulation under authority of the Supreme Court (including the establishment of minimum and uniform standards of competency, conduct, and continuing education) is necessary to protect the public interest. Any recommendation that non-lawyers be authorized to engage in the limited provision of legal or law-related services shall be accompanied by a determination:

(A) that access to affordable and reliable legal and law-related services consistent with protection of the public will be enhanced by permitting non-lawyers to engage in the defined activities set forth in the recommendation;

(B) that the defined activities outlined in the recommendation can be reasonably and competently provided by skilled and trained non-lawyers;

(C) if the public interest requires regulation under authority of the Supreme Court, such regulation is tailored to promote access to affordable legal and law-related services while ensuring that those whose important rights are at stake can reasonably rely on the quality, skill and ability of those non-lawyers who will provide such services;

(D) that, to the extent that the activities authorized will involve the handling of client trust funds, provision has been made to ensure that such funds are handled in a manner consistent with RPC ~~1.14~~ 1.15A and APR 12.1, including the requirement that such funds be placed in interest bearing accounts, with interest paid to the Legal Foundation of Washington; and

(E) that the costs of regulation, if any, can be effectively underwritten within the context of the proposed regulatory regime.

Recommendations to authorize non-lawyers to engage in the limited practice of law pursuant to this section shall be forwarded to the Washington State Board of Governors for consideration and comment before transmission to the Supreme Court. Upon approval of such recommendations by the Supreme Court pursuant to the procedures set out in GR 9, those who meet the requirements and comply with applicable regulatory and licensing provisions shall be deemed to be engaged in the authorized practice of law.

(d) - (j) [Unchanged.]

SUGGESTED AMENDMENT
ADMISSION TO PRACTICE RULES (APR)
APR 8
SPECIAL ADMISSIONS

(a) In General. Lawyers admitted to the practice of law in any state or territory of the United States or the District of Columbia or a foreign country, who do not meet the requirements of rule 1(b), may engage in the practice of law in this state only as provided in this rule.

(b) Exception for Particular Action or Proceeding. [No change.]

(c) Exception for Indigent Representation. [No change.]

(d) Exception for Educational Purposes. [No change.]

(e) Exception for Emeritus Membership. [No change.]

(f) Exception for Foreign House Counsel. A lawyer admitted to the practice of law in a jurisdiction other than a United States jurisdiction ~~state or territory of the United States or the District of Columbia~~ may apply to the Board of Governors for a limited license to practice law as in-house counsel in this state when the lawyer is employed in Washington as a lawyer exclusively for a profit or not for profit corporation, including its subsidiaries and affiliates, association, or other business entity, that is not a government entity, and whose lawful business consists of activities other than the practice of law or the provision of legal services. The lawyer shall apply by (i) filing an application in the form and manner that may be prescribed by the Board of Governors, (ii) presenting satisfactory proof of (I) admission by examination to the practice of law and current good standing in a jurisdiction other than United States jurisdiction ~~state or territory of the United States or the District of Columbia~~ and (II) good moral character, (iii) filing an affidavit from an officer, director, or general counsel of the applicant's employer in this state attesting to the fact the applicant is employed as a lawyer for the employer, including its subsidiaries and affiliates, and the nature of the employment conforms to the requirements of this rule, (iv) paying ~~such fee as may be set by the Board of Governors with approval of the Supreme Court~~ the application fees required of foreign lawyer applicants for admission under APR 3, and (v) furnishing whatever additional information or proof that may be required in the course of investigating the applicant. ~~The lawyer must also pass the Professional Responsibility portion of the Washington bar examination.~~

(1) Upon approval of the application by the Board of Governors, the lawyer shall take the Oath of Attorney, pay the current year's annual membership fee and the Board of Governors shall transmit its recommendation to the Supreme Court which may enter an order admitting the lawyer to the limited practice of law under this section.

(2) Subject to the exceptions contained in the following sentence pertaining to pro bono client representation, the practice of a lawyer admitted under this section shall be limited to practice exclusively for the employer, including its subsidiaries and affiliates, furnishing the affidavit required by this rule and shall not include (i) appearing before a court or tribunal as a person admitted to practice law in this state, ~~except in association with an active member of the Washington State Bar Association who shall be the lawyer of record therein, responsible for the conduct thereof and present at all proceedings,~~ (ii) offering legal services or advice to the public or (iii) holding oneself out to be so engaged or authorized. ~~Notwithstanding the above, the practice of a lawyer admitted under this section may include providing legal services for no fee through a qualified legal services provider, as that term is defined in part 8 (e)(2), including without limitation representation before a court or tribunal without associating with an active member of the Washington State Bar Association. The prohibition against compensation in the preceding sentence shall not prevent a qualified legal services provider from reimbursing an in-house counsel admitted under this section for actual expenses incurred while rendering legal services under this pro bono exception. In addition, a qualified legal services provider shall be entitled to receive all court awarded attorney's fees for pro bono representation rendered by the in-house counsel.~~

(3) All business cards and employer letterhead used by a lawyer admitted under this section shall state clearly that the lawyer is admitted to practice in Washington as in-house counsel.

(4) A lawyer admitted under this section shall pay to the Washington State Bar Association an annual license fee in the maximum amount required of active members.

(5) The practice of a lawyer admitted under this section shall be subject to the Rules of Professional Conduct, the Rules for Enforcement of Lawyer Conduct, and to all other laws and rules governing lawyers admitted to the active practice of law in this state. Jurisdiction shall continue whether or not the lawyer retains the limited license and irrespective of the residence of the lawyer.

(6) The lawyer shall promptly report to the Washington State Bar Association a change in employment, a change in membership status in ~~a state or territory of the United States or District of Columbia~~ any jurisdiction where the applicant has been admitted to the practice of law or the commencement of any formal disciplinary proceeding in ~~a state or territory of the United States or District of Columbia~~ any jurisdiction where the applicant has been admitted to the practice of law.

(7) The limited license granted under this section shall be automatically terminated when employment by the employer furnishing the affidavit required by this rule is terminated, the lawyer has been admitted to the practice of law pursuant to any other provision of the APR, the lawyer fails to comply with the terms of this rule, the lawyer fails to maintain current good standing in at least one ~~state or territory of the United States or District of Columbia~~ other jurisdiction where the lawyer has been admitted to the practice of law ~~upon passing the bar exam~~, or on suspension or disbarment for discipline in ~~a state or territory of the United States or District of Columbia~~ any jurisdiction where the lawyer has been admitted to the practice of law. If a lawyer's employment is terminated but the lawyer, within three months from the last day of employment is employed by an employer filing the affidavit required by (iii), the license shall be reinstated.

(g) Exception for Military Lawyers. [No change.]

LAWYERS' FUND FOR CLIENT PROTECTION (APR 15) PROCEDURAL RULES

RULE 5. ELIGIBLE CLAIMS

A. - B. [Unchanged.]

C. **Dishonest Conduct.** As used in these rules, "dishonest conduct" or "dishonesty" means wrongful acts committed by a lawyer in the nature of theft or embezzlement of money or the wrongful taking or conversion of money, property or other thing of value, including but not limited to refusal to refund unearned fees or expenses as required by ~~Rule 1.15 of~~ the Rules of Professional Conduct.

D. - F. [Unchanged.]

RULES FOR ENFORCEMENT OF LAWYER CONDUCT (ELC) ELC 1.5 VIOLATION OF DUTIES IMPOSED BY THESE RULES

A lawyer violates RPC 8.4(*l*) and may be disciplined under these rules for violating duties imposed by these rules, including but not limited to the following duties:

• respond to inquiries or requests about matters under investigation, rule 5.3(f);

• file an answer to a formal complaint or to an amendment to a formal complaint, rule 10.5;

• cooperate with discovery and comply with hearing orders, rules 10.11(g) and 5.5;

• attend a hearing and bring materials requested by disciplinary counsel, rule 10.13 (b) and (c);

• respond to subpoenas and comply with orders enforcing subpoenas, rule 10.13(e);

• notify clients and others of inability to act, rule 14.1;

• discontinue practice, rule 14.2;

• file an affidavit of compliance, rule 14.3;

• maintain confidentiality, rule 3.2(f);

• report being disciplined or transferred to disability inactive status in another jurisdiction, rule 9.2(a);

• cooperate with an examination of books and records, rule 15.2;

• notify the Association of a trust account overdraft, rule 15.4(d);

• file a declaration or questionnaire certifying compliance with RPC ~~1.14~~ 1.15A, rule 15.5;

• comply with conditions of probation, rule 13.8;

• comply with conditions of a stipulation, rule 9.1;

• pay restitution, rule 13.7; or

• pay costs, rule 5.3(f) or 13.9.

ELC 15.1 AUDIT AND INVESTIGATION OF BOOKS AND RECORDS

The Board and its Chair have the following authority to examine, investigate, and audit the books and records of any lawyer to ascertain and obtain reports on whether the lawyer has been and is complying with RPC ~~1.14~~ 1.15A:

(a) Random Examination. [Unchanged.]

(b) Particular Examination. Upon receipt of information that a particular lawyer or law firm may not be in compliance with RPC ~~1.14~~ 1.15A, the Chair may authorize an examination limited to the lawyer or law firm's books and records. Information may be presented to the Chair without notice to the lawyer or law firm. Disclosure of this information is subject to rules 3.1 – 3.4.

(c) Audit. [Unchanged.]

ELC 15.4 TRUST ACCOUNT OVERDRAFT NOTIFICATION

(a) Overdraft Notification Agreement Required. Every bank, credit union, savings bank, or savings and loan association~~, or qualified public depository~~ referred to in RPC ~~1.14(c)~~ 1.15A(i) will be approved as a depository for lawyer trust accounts if it files with the Disciplinary Board an agreement, in a form provided by the Board, to report to the Board if any properly payable instrument is presented against a lawyer trust account containing insufficient funds, whether or not the instrument is honored. The agreement must apply to all branches of the financial institution and cannot be canceled except on 30 days' notice in writing to the Board. The Board annually publishes a list of approved financial institutions.

(b) [Unchanged.]

(c) Costs. Nothing in these rules precludes a financial institution from charging a particular lawyer or law firm for the reasonable cost of producing the reports and records required by this rule, but those charges may not be a transaction cost charged against funds payable to the Legal Foundation of Washington under RPC ~~1.14 (c)(1)~~ 1.15A (i)(1).

(d) [Unchanged.]

ELC 15.5 DECLARATION OR QUESTIONNAIRE

(a) Questionnaire. The Association annually sends each active lawyer a written declaration or questionnaire designed to determine whether the lawyer is complying with RPC ~~1.14~~ 1.15A. Each active lawyer must complete, execute, and deliver to the Association this declaration or questionnaire by the date specified in the declaration or questionnaire.

(b) [Unchanged.]

Reviser's note: The spelling error in the above section occurred in the copy filed by the agency and appears in the Register pursuant to the requirements of RCW 34.08.040.

Reviser's note: The typographical errors in the above material occurred in the copy filed by the State Supreme Court and appear in the Register pursuant to the requirements of RCW 34.08.040.

Reviser's note: The brackets and enclosed material in the text of the above section occurred in the copy filed by the agency and appear in the Register pursuant to the requirements of RCW 34.08.040.

WSR 06-15-058
RULES OF COURT
STATE SUPREME COURT
[July 10, 2006]

IN THE MATTER OF THE ADOPTION OF THE AMENDMENTS TO APR 1, 2, 3, 7, 20, 20.1, 20.2, 20.3, 20.4, 20.5, 21, 22, 23, 24, 24.1, 24.2, 24.3, 24.4, 24.5, 25, 25.1, 25.2, 25.3, 25.4, 25.5 AND 25.6; RAP 1.1, 2.2, 5.2, 8.1, 9.6, 10.2, 10.3, 10.4, 10.5, 11.4, 12.3, 13.4, New RAP 13.5A, 13.7, 16.7, 16.9, 16.14, 16.16, 16.18, 17.4, 17.5, 18.1, 18.5, 18.6, 18.7, 18.13, 18.15, RAP FORMS 4, 6, 7, 12, 14, 17 AND NEW FORM 24; RALJ 4.1; NEW GR 3.1; CR 43 AND 66 AND CRLJ 43; AND ER (DELETION OF ALL COMMENTS TO THE ERS) INTRODUCTORY COMMENT, COMMENT 101, 102, 103, 104, 105, 106, 201, 301, 302, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 501, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 701, 702, 703, 704, 705, 706, 801, 802, 803, 804, 805, 806, 807, 901, 902, 903, 1001, 1002, 1003, 1004, 1005, 1006, 1007, 1008 AND 1101	)	ORDER NO. 25700-A-856

The Washington State Bar Association having recommended the adoption of the proposed amendments to APR 1, 2, 3, 7, 20, 20.1, 20.2, 20.3, 20.4, 20.5, 21, 22, 23, 24, 24.1, 24.2, 24.3, 24.4, 24.5, 25, 25.1, 25.2, 25.3, 25.4, 25.5 and 25.6, RAP 1.1, 2.2, 5.2, 8.1, 9.6, 10.2, 10.3, 10.4, 10.5, 11.4, 12.3, 13.4, New RAP 13.5A, 13.7, 16.7, 16.9, 16.14, 16.16, 16.18, 17.4, 17.5, 18.1, 18.5, 18.6, 18.7, 18.13, 18.15, RAP Forms 4, 6, 7, 12, 14, 17 and New Form 24; RALJ 4.1; New GR 3.1; CR 43 and 66 and CRLJ 43; and ER (deletion of all comments to the ERs) Introductory Comment, Comment 101, 102, 103, 104, 105, 106, 201, 301, 302, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 501, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 701, 702, 703, 704, 705, 706, 801, 802, 803, 804, 805, 806, 807, 901, 902, 903, 1001, 1002, 1003, 1004, 1005, 1006, 1007, 1008 and 1101, and the Court having considered the amendments, new rules and comments submitted thereto, and having determined that the proposed amendments and new rules will aid in the prompt and orderly administration of justice;

Now, therefore, it is hereby

ORDERED:

(a) That the amendments and new rules as attached hereto are adopted.

(b) That the amendments and new rules will be published in the Washington Reports and will become effective September 1, 2006.

DATED at Olympia, Washington this 10th day of July, 2006.

	Alexander, C. J.
C. Johnson, J.	Chambers, J.
Madsen, J.	Owens, J.
Sanders, J.	Fairhurst, J.
Bridge, J.	Johnson, J.

SUGGESTED AMENDMENT
ADMISSION TO PRACTICE RULES (APR)
RULE 1. IN GENERAL; SUPREME COURT; PREREQUISITES TO THE PRACTICE OF LAW; IMMUNITY

(a) Supreme Court. [No change].

(b) Prerequisites to the Practice of Law. [No change].

(c) Immunity. The Washington State Bar Association, its officers and agents (including but not limited to its staff, members of the Board of Governors, the Committee of Bar Examiners, the Character and Fitness ~~Committee~~ Board, the Law Clerk Committee, or any other individual acting under authority of these rules) are immune from all liability for conduct and communications occurring in the performance of their official duties relating to the examination, character and fitness qualifications, admission, and licensing of persons seeking to be admitted to the practice of law or for a limited license to practice law, provided only that the Bar Association, officer, or agent shall have acted in good faith. The burden of proving bad faith in this context shall be upon the person asserting it. The Bar Association shall provide defense to any action brought against an officer or agent of the Bar Association for actions taken in good faith under these rules and shall bear the costs of that defense and shall indemnify the officer or agent against any judgment taken therein. Communications to the Association, the Board of Governors, the Committee of Bar Examiners, the Character and Fitness ~~Committee~~ Board, the Law Clerk Committee, or any other individual acting under authority of these rules, are absolutely privileged, and no lawsuit may be predicated thereon.

SUGGESTED AMENDMENT
ADMISSION TO PRACTICE RULES (APR)
RULE 2. BOARD OF GOVERNORS

(a) Powers. In addition to any other power or authority in other rules, the Board of Governors of the Bar Association (referred to in these rules as the Board of Governors) shall have the power and authority to:

(1) Appoint a Committee of Bar Examiners (referred to in these rules as the Committee) from among the active members of the Bar Association for the purposes of assisting the Board of Governors in conducting the bar examination;

(2) Appoint a Law Clerk Committee from among the active members of the Bar Association for the purposes of assisting the Board of Governors in supervising the Law Clerk Program;

(3) Appoint a Character and Fitness Board pursuant to rule 20

(~~3~~ 4) Approve or deny applications for permission to take the bar examination, to enroll in the law clerk program, or to engage in the limited practice of law under pertinent provisions of rules 8 and 9;

(~~4~~ 5) Investigate all aspects of an applicants qualifications to take the bar examination, to be admitted to the practice of law, to engage in the limited practice of law under pertinent provisions of rules 8 and 9, or to enroll in the law clerk program;

(~~5~~ 6) Recommend to the Supreme Court the admission or rejection of each applicant who has passed the bar examination or who is applying to engage in the limited practice of law under pertinent provisions of rules 8 and 9;

(~~6~~ 7) Approve law schools for the purposes of these rules and maintain a list of such approved law schools on file with the Clerk of the Supreme Court;

(~~7~~ 8) Prescribe, with the approval of the Supreme Court, the amount of any fees required by these rules;

(~~8~~ 9) Prescribe the form and content of any application, certificate, or other document referred to in these rules; and

(~~9~~ 10) Perform any other functions and take any other actions provided for in these rules, or as may be delegated by the Supreme Court, or as may be necessary and proper to carry out its duties.

(b) Written Request. [No change].

SUGGESTED AMENDMENT
ADMISSION TO PRACTICE RULES (APR)
RULE 3. APPLICANTS TO TAKE THE BAR EXAMINATION

(a) Prerequisite for Admission. [No change].

(b) Qualification for Bar Examination. [No change].

(c) Exceptions. The Board of Governors may, in its discretion, withhold permission for an otherwise qualified person to sit for the bar examination, until completion of an inquiry into the applicants character and fitness, if the applicant (i) has ever been convicted of a "serious crime" as defined in ELC 7.1(a)(2), or (ii) has ever been disbarred or is presently suspended from the practice of law for disciplinary reasons in any jurisdiction, or (iii) has previously been denied admission to the Bar in this or any other jurisdiction for reasons other than failure to pass a bar examination. The Board of Governors may also withhold permission to sit for the bar examination where for any other reason there are serious and substantial questions regarding the present moral character or fitness of the applicant. The Board of Governors may refer such matters to the Character and Fitness ~~Committee~~ Board for investigation and hearing pursuant to ~~rule 7~~ these rules.

(d) Forms; Fees; Filing. [No change].

(e) Disclosure of Records. [No change].

SUGGESTED AMENDMENT
ADMISSION TO PRACTICE RULES (APR)
RULE 7. INVESTIGATIONS; DUTY OF APPLICANT

(a) Investigations. The Board of Governors may refer any application for permission to take the bar examination, to be admitted to the practice of law or to be admitted to the limited practice of law under pertinent provisions of rules 8 and 9, or to enroll in the law clerk program to state bar counsel or to ~~any existing or special committee of the Bar Association~~ the Character and Fitness Board for investigation pursuant to these rules. ~~In connection with any investigation, the Board of Governors shall have the power to:~~

~~(1) Direct the issuance of subpoenas by the Executive Director of the Bar Association in the name of the Board of Governors to compel the attendance of witnesses at depositions or hearings, or for the production of books, records, or other documents;~~

~~(2) Require additional proof or answers to interrogatories relating to any fact stated in an application; and~~

~~(3) Require an applicant, upon reasonable notice, to appear before the Board of Governors or any existing or special committee of the Bar Association for an examination regarding any matter deemed by the Board of Governors to be relevant to a proper consideration of the application.~~

(b) Duty of Applicant. It shall be the duty of every applicant to cooperate with any investigation required by the Board of Governors, by promptly furnishing written or oral explanations, documents, releases, authorizations, or anything else reasonably required by the investigator. Failure to appear as directed or to furnish additional proof or answers as required or to cooperate fully shall be sufficient reason for the Board of Governors to reject or to recommend the rejection of an application.

(c) Subpoenas: The chairperson of the Character and Fitness Board or Bar Counsel may issue subpoenas to compel attendance of an applicant or witness, or the production of books, documents, or other evidence, at a deposition or hearing. Subpoenas shall be served in the same manner as in civil cases in the superior court.

SUGGESTED AMENDMENT
ADMISSION TO PRACTICE RULES (APR)
APR 20 CHARACTER AND FITNESS ~~COMMITTEE~~ BOARD

~~(a) Membership.~~

~~(1)~~ **(a) Composition.** The ~~Committee~~ Board shall consist of not less than three nonlawyer members, appointed by the Supreme Court, and not less than one lawyer member

from each congressional district, appointed by the Board of Governors.

~~(2)~~ **(b) Qualifications.** Lawyer members must have been active members of the Bar Association for at least 7 years.

~~(3) Quorum. A majority of the Committee members shall constitute a quorum. Given a quorum, the concurrence of a majority of those present shall constitute action of the Committee.~~

~~(4) Disqualification. In the event a grievance is made to the Bar Association alleging an act of misconduct by a lawyer member of the committee, such member shall take a leave of absence from the Committee until the matter is resolved, unless otherwise directed by the Board of Governors.~~

~~(5) Voting. Each member, whether non-lawyer or lawyer, shall have one vote.~~

~~(b) Terms of Office. The term of office for a member of the Committee shall be 3 years. Newly created Committee positions may be filled by appointments of less than 3 years, as designated by the Supreme Court or the Board of Governors, to permit as equal a number of positions as possible to be filled each year. All terms of office begin October 1 and end September 30 or when a successor has been appointed, whichever occurs later. Members may not serve more than one term except as otherwise provided in these rules. Members heretofore appointed shall continue to serve until replaced.~~

(c) ~~Committee~~ Board Chair. The Board of Governors shall annually designate one lawyer member of the ~~Committee~~ Board to act as chair and another as vice-chair. The vice-chair shall serve in the absence of or at the request of the ~~Committee~~ Board chair.

(d) Vacancies. Vacancies in lawyer membership on the ~~Committee~~ Board and in the office of the ~~Committee~~ Board chair and the vice-chair shall be filled by the Board of Governors. Vacancies in nonlawyer membership shall be filled by the Supreme Court. A person appointed to fill a vacancy shall complete the unexpired term of the person he or she replaces, and if that unexpired term is less than 24 months he or she may be reappointed to a consecutive term.

~~(e) Pro Tempore Members. When a member of the Committee is disqualified or unable to function on a case for good cause, the chair of the Committee may, by written order, designate a member pro tempore to sit with the Committee to hear and determine the cause. A member pro tempore may be appointed from among those persons who have previously served as members of the Character and Fitness Committee, or from among lawyers appointed as alternate Board members by the Board of Governors and non-lawyers appointed as alternate Committee members by the Supreme Court. A lawyer shall be appointed to substitute for a lawyer member of the Committee, and a non-lawyer to substitute for a non-lawyer member of the Board.~~

(e) Quorum. A majority of the Board members shall constitute a quorum. Given a quorum, the concurrence of a majority of those present shall constitute action of the Board. In the event a quorum is not present, the Applicant or Petitioner may waive the requirement of a quorum.

(f) Disqualification. In the event a grievance is made to the Bar Association alleging an act of misconduct by a lawyer member of the Board the procedures specified in ELC 2.3(b)(5) shall apply.

(g) Pro Tempore Members. When a member of the Board is disqualified or unable to function on a case for good cause, the chair of the Board may, by written order, designate a member pro tempore to sit with the Board to hear and determine the cause. A member pro tempore may be appointed from among those persons who have previously served as members of the Character and Fitness Board (or its predecessor Character and Fitness Committee), or from among lawyers appointed as alternate Board members by the Board of Governors and nonlawyers appointed as alternate Board members by the Supreme Court. A lawyer shall be appointed to substitute for a lawyer member of the Board, and a nonlawyer to substitute for a nonlawyer member of the Board.

(h) Voting. Each member, whether nonlawyer or lawyer, shall have one vote.

(i) Terms of Office. The term of office for a member of the Board shall be 3 years. Newly created Board positions may be filled by appointments of less than 3 years, as designated by the Supreme Court or the Board of Governors, to permit as equal a number of positions as possible to be filled each year. All terms of office begin October 1 and end September 30 or when a successor has been appointed, whichever occurs later. Members may not serve more than one term except as otherwise provided in these rules. Members shall continue to serve until replaced.

(j) **Application of Rules.** These rules and any subsequent amendments will apply in their entirety, on the effective date as ordered by the Supreme Court, to any pending matter, except as would not be feasible or would work an injustice. The Chair may rule on the appropriate procedure with a view to insuring a fair and orderly proceeding.

~~(f)~~ RULE 20.1 AUTHORITY OF ~~COMMITTEE~~ BOARD

The ~~Committee~~ Board shall have the power and authority to:

~~(1)~~ **(a)** Accept referrals from ~~the Executive Director of the Bar Association~~ Bar Counsel ~~by~~ concerning ~~itself with~~ matters of character and fitness bearing upon the qualification of ~~a~~Applicants for Admission or Petitioners for ~~r~~Reinstatement.

~~(2)~~ **(b)** Review each Application for Admission or Petition for Reinstatement to practice law in the state of Washington.

~~(3)~~ **(c)** Investigate matters relevant to the admission or reinstatement of any ~~a~~Applicant or Petitioner and conduct hearings concerning such matters.

~~(4) The committee's recommendation to grant the application shall be forwarded to the Supreme Court. The Committee's recommendation to deny the application may be forwarded to the Disciplinary Board for review upon request of the applicant. All recommendations shall contain findings of fact, conclusions of law, and rationale for the recommendation.~~

~~(5)~~ **(d)** Perform such other functions and take such other actions as provided in these rules or as may be delegated to it by the Board of Governors or Supreme Court, or as may be necessary and proper to carry out its duties.

~~(g)~~ RULE 20.2 MEETINGS

The ~~Committee~~ Board shall hold meetings at such times and places as it may determine. Where the chair of the ~~Committee~~ Board determines that prompt action is necessary for protection of the public, and that circumstances do not permit a full meeting of the ~~Committee~~ Board, the ~~Committee~~ Board may vote on a matter otherwise ready for review without meeting together, through telephone, electronic or written communication.

RULE 20.3 BAR COUNSEL

The Bar Association shall be represented by a lawyer appointed by the Executive Director of the Bar Association, who shall act as counsel to the Board and who may make a recommendation in support of or in opposition to the admission or reinstatement of an Applicant or Petitioner.

~~(h)~~ RULE 20.4 CLERK

The Executive Director of the Bar Association~~, under the direction of the Board of Governors,~~ may appoint a suitable person or persons to act as Clerk to the ~~Committee~~ Board, and to assist the ~~Committee~~ Board in carrying out its functions under these rules.

RULE 20.5 SERVICE

Service of papers and documents shall be made by first class postage prepaid mail to the Applicant's or Petitioner's, or his or her counsel's, last known address on record with the Bar Association. If properly made, service by mail is deemed accomplished on the date of mailing. Any notice of change of address shall be submitted in writing to the Bar Association.

SUGGESTED AMENDMENT
ADMISSION TO PRACTICE RULES (APR)
APR 21 CHARACTER DEFINED
(NEW RULE)

Good moral character is a record of conduct manifesting the qualities of honesty, fairness, candor, trustworthiness, observance of fiduciary responsibilities, adherence to the law, and a respect for the rights of other persons and the judicial process.

SUGGESTED AMENDMENT
ADMISSION TO PRACTICE RULES (APR)
APR 22 FITNESS DEFINED; INDEPENDENT FITNESS EXAMINATION
(NEW RULE)

(a) Fitness - defined. Fitness is the absence of any current mental impairment or current drug or alcohol dependency or abuse which, if extant, would substantially impair the ability of the Applicant or Petitioner to practice law.

(b) Testimony and Evidence: If it appears that the Applicant or Petitioner has engaged in conduct that was or may have been caused in whole or in part by a mental impairment or drug or alcohol dependency or abuse, the Applicant or Petitioner may present testimony or evidence from a licensed or certified mental health professional (hereafter "examining professional").

(c) Independent Fitness Examination: If after reviewing such testimony or evidence the Board finds that further examination is necessary, the Board by majority vote may require an examination of the Applicant or Petitioner by an examining professional approved by the Lawyers' Assistance Program of the Washington State Bar Association.

(d) Failure to Comply: The failure of an Applicant or a Petitioner to agree or submit to a required independent fitness examination shall result in the Applicant's or Petitioner's application or petition being denied.

(e) Costs: The cost of any examination required by the Board shall be borne by the Bar Association.

(f) Report: The examining professional shall issue a written report of his or her findings which report shall be provided to the Applicant or Petitioner and his or her counsel, Bar Counsel and the Character and Fitness Board.

(g) Confidentiality: Any report and testimony of an examining professional may be admitted into evidence at a hearing on, or review of, the Applicant's or Petitioner's fitness and transmitted with the record on review by the Disciplinary Board or the Supreme Court. Reports and testimony regarding the Applicant's or Petitioner's fitness shall otherwise be kept confidential in all respects and neither the report nor the testimony of the examining professional shall be discoverable or admissible in any other proceeding or action.

SUGGESTED AMENDMENT
ADMISSION TO PRACTICE RULES (APR)
APR 23 - CHARACTER AND FITNESS BOARD - PREHEARING PROCEDURE - APPLICATIONS FOR ADMISSION
(NEW RULE)

(a) Admissions Staff Review. All applications for admission to practice law in Washington State shall be reviewed by the Bar Association Admissions staff for purposes of determining whether any of the factors set forth in rule 24.2(a) are present.

(b) Admissions Staff Review - Standard. All applications which reflect one or more of the factors set forth in rule 24.2(a) shall be referred to Bar Counsel for review.

(c) Review By Bar Counsel - Standard. Upon receiving a referral from the admissions staff, Bar Counsel may conduct such further investigation as he or she deems necessary and thereafter, applying the factors and considerations set forth in rule 24.2, and upon reviewing the material evidence in the light most favorable to the Bar Association's obligation to recommend the admission to the practice of law only those persons who possess good moral character and fitness, Bar Counsel shall refer to the Character and Fitness Board for hearing any Applicant about whom there is a substantial question whether the Applicant possesses the requisite good moral character and fitness to practice law.

SUGGESTED AMENDMENT
ADMISSION TO PRACTICE RULES (APR)
APR 24 APPLICATIONS FOR ADMISSION
(NEW RULE)

RULE 24.1 DUTY OF APPLICANT

It shall be the duty of every Applicant to cooperate in good faith with any investigation by promptly furnishing written or oral explanations, documents, releases, authorizations, or anything else reasonably required by the Board or Bar Counsel. Failure to appear as directed or to furnish additional proof or answers as required or to cooperate fully shall be sufficient reason for the Board to recommend the rejection of an application.

RULE 24.2 FACTORS CONSIDERED WHEN DETERMINING CHARACTER AND FITNESS

(a) Factors. The following factors shall be considered by the Admissions staff and Bar Counsel when determining whether an applicant shall be referred to the Character and Fitness Board for a determination of the applicant's character and/or fitness to practice law:

(1) unlawful conduct.

(2) academic misconduct.

(3) making of false statements or omitting material information in connection with an application to sit for a bar examination.

(4) misconduct in employment.

(5) acts involving dishonesty, making false statements, fraud, deceit or misrepresentation.

(6) abuse of legal process.

(7) neglect of financial responsibilities.

(8) disregard of professional obligations.

(9) violation of a court order.

(10) evidence of a current substantial mental impairment, including without limitation, drug or alcohol dependency or abuse.

(11) denial of admission to the bar in another jurisdiction on character and fitness grounds.

(12) disciplinary action by any professional disciplinary agency of any jurisdiction.

(13) any other conduct or condition which reflects adversely on moral character or fitness of the Applicant to practice law.

(b) Factors Considered by the Character and Fitness Board When Determining Good Moral Character. When determining whether past conduct disqualifies the Applicant from taking the Washington Bar Examination, or for admission to the Bar, the Character and Fitness Board shall consider those factors specified in rule 24.2(a) and the following factors in mitigation or aggravation:

(1) Applicant's age at the time of the conduct.

(2) Recency of the conduct.

(3) Reliability of the information concerning the conduct.

(4) Seriousness of the conduct.

(5) Factors or circumstances underlying the conduct.

(6) Cumulative nature of the conduct.

(7) Candor in the admissions process and before the Board.

(8) Materiality of any omissions or misrepresentations.

(9) Evidence of rehabilitation, which may include but is not limited to the following:

(i) absence of recent misconduct.

(ii) compliance with any disciplinary, judicial or administrative order arising out of the misconduct.

(iii) sufficiency of punishment.

(iv) restitution of funds or property, where applicable.

(v) Applicant's attitude toward the misconduct, including without limitation acceptance of responsibility and remorse.

(vi) personal assurances, supported by corroborating evidence, of a desire and intent to engage in exemplary conduct in the future;

(vii) constructive activities and accomplishments since the conduct in question.

(viii) the Applicant's understanding and acceptance of the factors leading to the misconduct and how similar misconduct may be avoided in the future.

(c) Factors Considered by the Character and Fitness Board in Fitness Cases Involving Drug or Alcohol Dependence or Abuse. When determining whether an Applicant is unfit to practice law due to drug or alcohol dependence or abuse, the Character and Fitness Board shall consider the following factors, no single one of which is determinative:

(1) Whether the Applicant is currently using drugs or alcohol.

(2) Whether the Applicant's drug or alcohol dependence or abuse is likely to cause or contribute to any of the conduct specified in rule 24.2(a).

(3) The nature, extent and duration of the Applicant's drug or alcohol dependence or abuse, and the Applicant's candor in the admissions process and before the Board when describing the problem.

(4) Whether the Applicant has been or is now in treatment and, if so:

(i) The nature and duration of the treatment.

(ii) Whether treatment was or is voluntary or involuntary.

(iii) Consistency of participation in or compliance with treatment.

(iv) Whether the treatment was effective.

(5) Whether the Applicant has undergone a drug or alcohol evaluation by a certified chemical dependency counselor or other professional with credentials acceptable to the Board and, if so, whether the substance of such person's opinion the findings have been made available to the Committee.

(6) The length of time the Applicant has been in recovery. In cases where the period of recovery is less than two years, the Applicant must demonstrate through appropriate expert opinion that there has been an adequate period of recovery.

(d) Factors Considered by the Character and Fitness Board in Fitness Cases Involving a Mental Impairment. When determining whether an Applicant is unfit to practice law due to a mental impairment, the Character and Fitness Board shall consider the following factors, no single one of which is determinative:

(1) Whether there is a current mental impairment.

(2) Whether the Applicant's mental impairment is likely to cause or contribute to any of the conduct specified in rule 24.2(a).

(3) The nature, extent and duration of the Applicant's mental impairment, and the Applicant's candor in the admissions process and before the Board when describing the impairment.

(4) Whether the Applicant's mental impairment is chronic or situational in nature.

(5) Whether the applicant has received or is receiving professional mental health treatment appropriate for the impairment, and if so:

(i) Whether the Applicant's impairment has been in remission for at least two years as verified by an appropriate mental health professional and, if not, whether the Applicant has demonstrated through appropriate expert opinion that the period of remission has been adequate.

(ii) Whether a mental health professional has identified any conditions, including without limitation further treatment, that must be complied with to continue the Applicant's state of remission and, if so, whether the Applicant is in compliance with those conditions.

(e) Factors Not Considered by the Character and Fitness Board. The following factors shall not be considered as evidence of an Applicant's character or fitness:

(1) Racial or ethnic identity.
(2) Sex.
(3) Sexual orientation.
(4) Marital status.
(5) Religious or spiritual beliefs or affiliation.
(6) Political beliefs or affiliation.
(7) Physical disability.
(8) National origin.
(9) Age.
(10) Learning disabilities.

RULE 24.3 HEARINGS

(a) Notice. The Character and Fitness Board may fix a time and place for a hearing on the application, and shall serve notice thereof not less than 30 days prior to the hearing upon the Applicant and upon such other persons as may be ordered by the Character and Fitness Board. This notice requirement may be waived by the Applicant.

(b) Right to Counsel. An Applicant may be represented by counsel.

(c) Burden of Proof. An Applicant must establish by clear and convincing evidence that he or she is of good moral character and possesses the requisite fitness to practice law.

(d) Proceedings Not Civil or Criminal. Hearings before the Character and Fitness Board are not civil nor criminal but are sui generis hearings to determine whether an Applicant possesses good moral character and fitness to be admitted to practice law.

(e) Rules of Evidence.

(1) Evidentiary rulings shall be made by the Board chairperson. A majority of Board members present may by vote overrule a ruling by the chairperson.

(2) Consistent with section (d) of this rule, evidence, including hearsay evidence, is admissible if in the chairperson's judgment it is the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their affairs. The chairperson may exclude evidence that is irrelevant, immaterial, or unduly repetitious.

(3) Witnesses shall testify under oath; all testimony shall be transcribed by a certified court reporter.

(4) Expert witnesses shall appear and testify in person before the Board, unless in the discretion of the Board their appearance before the Board is waived.

(5) Generally, all documentary evidence submitted to the Board for consideration must be delivered to Bar Counsel not less than 14 days prior to the hearing. Bar Counsel will provide copies of all documentary evidence, and any hearing briefs, memoranda, or other documentary material, to the Board members and to the Applicant prior to the hearing date.

(6) The Board may take notice of any judicially cognizable facts, or technical or scientific facts within a Board member's specialized knowledge.

(7) Questioning of the Applicant and the Applicant's witnesses shall be conducted by Bar Counsel or his or her designee and by two members of the Board designated by the chair.

(f) Confidentiality: All hearings and documents before the Character and Fitness Board on applications for admission to the bar are confidential.

RULE 24.4 DECISION AND RECOMMENDATION.

(a) Decision. Within 20 days after the proceedings are concluded, unless a greater or shorter period is directed by the Board chair, the Board will file with the Bar Association written findings of fact, conclusions of law, and a recommendation. Any Board member or members may file a written dissent within the same time period.

(b) Action on Board Recommendation. The recommendation of the Character and Fitness Board shall be served upon the Applicant pursuant to rule 20.5. If the Board recommends admission, the record, recommendation and all exhibits shall be transmitted to the Supreme Court for disposition. If the Board recommends against admission, the record and recommendation shall be retained in the office of the Bar Association unless the Applicant requests that it be submitted to the Supreme Court by filing a Notice of Appeal with the Board within 15 days of service of the recommendation of the Character and Fitness Board. If the Applicant so requests, the Board will transmit the record, including the transcript, exhibits, and recommendation to the Supreme Court for review and disposition. If the Applicant does not so request, the bar examination fee shall be refunded to the Applicant.

RULE 24.5 ACTION ON SUPREME COURT'S DETERMINATION

(a) Application Approved. If the application is approved by the Supreme Court, admission shall be subject to the Applicant's taking and passing the bar examination and complying with rule 5.

(b) Application Denied. If the application is denied, the bar examination fee shall be refunded to the Applicant.

SUGGESTED AMENDMENT
ADMISSION TO PRACTICE RULES (APR)
APR ~~21~~ 25 PETITIONS FOR REINSTATEMENT AFTER DISBARMENT

RULE ~~21.1~~ 25.1 RESTRICTIONS ON REINSTATEMENT

(a) Petitions For Reinstatement. All Petitions for Reinstatement after Disbarment shall be referred for hearing before the Character and Fitness Board.

~~(a)~~ (b) When Petition May Be Filed. No petition for reinstatement shall be filed within a period of 5 years after disbarment or within a period of 2 years after an adverse decision of the Supreme Court upon a former petition, or within a period of 1 year after an adverse recommendation of the Character and Fitness ~~Committee of the Washington State Bar Association~~ Board on a former petition when that recommendation is not submitted to the Supreme Court. If prior to disbarment the lawyer was suspended from the practice of law pursuant to the provisions of Title 7 of the Rules for Enforcement of Lawyer Conduct, or any comparable rule, the period of such suspension shall be credited toward the 5 years referred to above.

~~(b)~~ (c) When Reinstatement May Occur. No disbarred lawyer may be reinstated sooner than 6 years following disbarment. If prior to disbarment the lawyer was suspended from the practice of law pursuant to the provisions of Title 7 of the Rules for Enforcement of Lawyer Conduct, or any comparable rule, the period of such suspension shall be credited toward the 6 years referred to above.

~~(c)~~ (d) Payment of Obligations. No disbarred lawyer may file a petition for reinstatement until costs and expenses ~~assessed pursuant to these rules,~~ and restitution ordered ~~as provided herein,~~ by the Disciplinary Board or the Supreme Court have been paid and until amounts paid out of ~~any program maintained by the Bar Association to indemnify clients against~~ the Lawyers' Fund for Client Protection for losses caused by the conduct of the Petitioner have been repaid to the ~~Bar Association~~ client protection fund, or until periodic payment plans for costs and expenses, restitution and repayment to the ~~indemnity program~~ client protection fund have been entered into by agreement between the ~~respondent lawyer~~ Petitioner and disciplinary counsel. A ~~respondent lawyer~~ Petitioner may seek review by the Chair of the Disciplinary Board of an adverse determination by disciplinary counsel regarding the reasonableness of any such proposed periodic payment plan. Such review will proceed as directed by the Chair of the Disciplinary Board and the decision of the Chair of the Disciplinary Board is final unless the Chair of the Disciplinary Board determines that the matter should be reviewed by the Disciplinary Board, in which case the Disciplinary Board review will proceed as directed by the Chair and the decision of the Board will be final.

RULE ~~21.2~~ 25.2 REVERSAL OF CONVICTION

If a lawyer has been disbarred solely because of his or her conviction of a crime and the conviction is later reversed and the charges dismissed on their merits, the Supreme Court may in its discretion, upon direct application by the lawyer, enter an order reinstating the lawyer ~~to active status~~ upon such conditions as determined by the Supreme Court. At the time such direct application is filed with the court a copy shall be filed with the Bar Association. The Supreme Court may request a response to the application from the Bar Association.

RULE ~~21.3~~ 25.3 PETITIONS AND INVESTIGATIONS

(a) Form of Petition. A petition for reinstatement ~~as a member of the Bar Association~~ after disbarment shall be in writing in such form as the Character and Fitness ~~Committee~~ Board may prescribe. The petition shall be filed with the Character and Fitness ~~Committee~~ Board. The petition shall set forth the age, residence and address of the Petitioner, the date of disbarment, and a concise statement of facts claimed to justify reinstatement. The petition shall be accompanied by the total fees required of a lawyer Applicant under these rules.

(b) Investigations. ~~The Character and Fitness Committee may in its discretion refer the petition for reinstatement for investigation and report to the Character and Fitness Committee by disciplinary counsel, adjunct investigative counsel, or by such other person or persons as may be determined by the Character and Fitness Committee.~~ The petition for reinstatement shall be referred to the Character and Fitness Board.

(c) Duty to Cooperate. It shall be the duty of every Petitioner to cooperate in good faith with any investigation by promptly furnishing written or oral explanations, documents, releases, authorizations, or anything else reasonably required by the Board or Bar Counsel. Failure to appear as directed or to furnish additional proof or answers as required or to cooperate fully shall be sufficient reason for the Committee to recommend the rejection of a petition.

~~(c)~~ (d) Proceedings Public. A petition for reinstatement after disbarment shall be a public proceeding from the time the petition is filed.

(e) Protective Orders. To protect a compelling interest, a Petitioner may, on a showing of good cause, move for a protective order prohibiting the disclosure or release of specific information, documents, or pleadings, and directing that the proceedings be conducted so as to implement the order.

RULE ~~21.4~~ 25.4 HEARING BEFORE CHARACTER AND FITNESS ~~COMMITTEE~~ BOARD

(a) Notice. The Character and Fitness ~~Committee~~ Board may fix a time and place for a hearing on the petition, and shall serve notice thereof ~~10~~ not less than 30 days prior to the hearing upon the Petitioner and upon such other persons as may be determined by Bar Counsel or as ordered by the Character and Fitness ~~Committee~~ Board. Notice of the hearing shall also be published at least once in the Washington State Bar News ~~or~~ and such other newspaper or periodical as the Character and Fitness ~~Committee~~ Board may direct. Such published notice shall contain a statement that a petition for reinstatement has been filed and shall give the date fixed for the hearing.

(b) Statement in Support or Opposition. On or prior to the date of hearing, anyone wishing to do so may file with the Character and Fitness ~~Committee~~ Board a written statement for or against the petition, such statements to set forth

factual matters showing that the Petitioner does or does not meet the requirements ~~of rule 21.5(a)~~ for reinstatement as set forth in these rules.

(c) Hearings. Hearings shall be conducted pursuant to rule 24.3.

RULE ~~21.5~~ 25.5 ACTION BY CHARACTER AND FITNESS ~~COMMITTEE~~ BOARD

(a) Requirements for Favorable Recommendation. Reinstatement may be recommended by the Character and Fitness ~~Committee~~ Board only upon a showing ~~that the Petitioner~~, supported by clear and convincing proof, that the Petitioner possesses the qualifications and meets the requirements for reinstatement as set forth in these rules ~~for lawyer applicants, and that his or her reinstatement will not be detrimental to the integrity and standing of the judicial system or to the administration of justice, or be contrary to the public interest~~, and that the Petitioner has been rehabilitated.

(b) Factors Considered by the Character and Fitness Board. In reaching the decision of whether the Petitioner has been rehabilitated, the Board shall consider the factors set forth in Rule 24.2 (b), (c) and (d), where applicable, and the following factors:

(i) The Petitioner's character, standing, and professional reputation in the community in which the Petitioner resided and practiced prior to disbarment.

(ii) The ethical standards which the Petitioner observed in the practice of law.

(iii) The nature and character of the conduct for which the Petitioner was disbarred.

(iv) The sufficiency of the punishment undergone in connection therewith, and the making or failure to make restitution where required.

(v) The Petitioner's attitude, conduct, and reformation subsequent to disbarment.

(vi) The time that has elapsed since disbarment.

(vii) The Petitioner's current proficiency in the law; and

(viii) The sincerity, frankness, and truthfulness of the Petitioner in presenting and discussing the factors relating to the Petitioner's disbarment and reinstatement.

(c) Factors Not Considered by the Character and Fitness Board. The following factors shall not be considered as evidence of a Petitioner's character or fitness:

(1) Racial or ethnic identity.

(2) Sex.

(3) Sexual orientation.

(4) Marital status.

(5) Religious or spiritual beliefs or affiliation.

(6) Political beliefs or affiliation.

(7) Physical disability.

(8) National origin.

(9) Learning disabilities.

~~(b)~~ (d) Action on ~~Committee~~ Board Recommendation. The recommendation of the Character and Fitness ~~Committee~~ Board shall be served upon the Petitioner pursuant to rule 20.5. If the ~~Committee~~ Board recommends reinstatement, the record and recommendation shall be transmitted to the Supreme Court for disposition. If the ~~Committee~~ Board recommends against reinstatement, the record and recommendation shall be retained in the office of the Bar Association unless the Petitioner requests that it be submitted to the Disciplinary Board by filing with the Clerk of the Disciplinary Board a request for Disciplinary Board review within 15 days of service of the recommendation of the Character and Fitness ~~Committee~~ Board. If the Petitioner so requests, the record and recommendation shall be transmitted to the Disciplinary Board for disposition and the review will be conducted under the procedure of rules 11.9 and 11.12 of the Rules for Enforcement of Lawyer Conduct. If the Petitioner does not so request, the bar examination fee shall be refunded to the Petitioner, but the Petitioner shall still be responsible for payment of the costs incidental to the reinstatement proceeding as directed by the Character and Fitness ~~Committee~~ Board.

~~(c)~~ (e) Action on Disciplinary Board Recommendation. The recommendation of the Disciplinary Board shall be served upon the Petitioner. If the Disciplinary Board recommends reinstatement, the record and recommendation shall be transmitted to the Supreme Court for disposition. If the Disciplinary Board recommends against reinstatement, the record and recommendation shall be retained in the office of the Bar Association unless the Petitioner requests that it be submitted to the Supreme Court by filing with the Clerk of the Disciplinary Board a request for Supreme Court review within 30 days of service of the recommendation. If the Petitioner so requests, the record and recommendation shall be transmitted to the Supreme Court for disposition. If the Petitioner does not so request, the bar examination fee shall be refunded to the Petitioner, but the Petitioner shall still be responsible for payment of the costs incidental to the reinstatement proceeding as directed by the Disciplinary Board under the procedure of rule 13.9 of the Rules for Enforcement of Lawyer Conduct.

RULE ~~21.6~~ 25.6 ACTION ON SUPREME COURT'S DETERMINATION

(a) Petition Approved. If the petition for reinstatement is ~~granted~~ approved by the Supreme Court, the reinstatement shall be subject to the Petitioner's taking and passing the bar examination, paying to the Bar Association its membership fee for the current year and paying the costs incidental to the reinstatement proceeding as directed by the Supreme Court.

(b) Petition Denied. If the petition for reinstatement is denied, the bar examination fee shall be refunded to the Petitioner, but the Petitioner shall still be responsible for payment of the costs incidental to the reinstatement proceeding.

RULES OF APPELLATE PROCEDURE (RAP)
RULE 1.1 SCOPE OF RULES

(a) - (h) [Unchanged.]

(i) General Orders. The Court of Appeals, pursuant to RCW 2.06.040, may establish rules that are supplementary to and do not conflict with rules of the Supreme Court. These supplementary rules will be called General Orders. The General Orders for each division of the Court of Appeals can be obtained from the division's clerk's office or found at www.courts.wa.gov.

RULES OF APPELLATE PROCEDURE (RAP)
RULE 2.2 DECISIONS OF THE SUPERIOR COURT ~~WHICH~~ THAT MAY BE APPEALED

(a) Generally. Unless otherwise prohibited by statute or court rule and except as provided in sections (b) and (c), a party may appeal from only the following superior court decisions:

(1) - (2) [Unchanged.]

(3) *Decision Determining Action*. Any written decision affecting a substantial right in a civil case ~~which~~ that in effect determines the action and prevents a final judgment or discontinues the action.

(4) - (5) [Unchanged.]

(6) ~~*Deprivation*~~ *Termination of All Parental Rights.* A decision ~~depriving a person of all~~ terminating all of a person's parental rights with respect to a child.

(7) - (12) [Unchanged.]

(13) *Final Order After Judgment*. Any final order made after judgment ~~which~~ that affects a substantial right.

(b) Appeal by State or a Local Government in Criminal Case. Except as provided in section (c), the State or a local government may appeal in a criminal case only from the following superior court decisions and only if the appeal will not place the defendant in double jeopardy:

(1) *Final Decision, Except Not Guilty*. A decision ~~which~~ that in effect abates, discontinues, or determines the case other than by a judgment or verdict of not guilty, including but not limited to a decision setting aside, quashing, or dismissing an indictment or information.

(2) - (4) [Unchanged.]

(5) *Disposition in Juvenile Offense Proceeding*. A disposition in a juvenile offense proceeding ~~which~~ that is below the standard range of disposition for the offense or ~~which~~ that the state or local government believes involves a miscalculation of the standard range.

(6) *Sentence in Criminal Case*. A sentence in a criminal case ~~which~~ that is outside the standard range for the offense or ~~which~~ that the state or local government believes involves a miscalculation of the standard range.

(c) [Unchanged.]

(d) Multiple Parties or Multiple Claims or Counts. In any case with multiple parties or multiple claims for relief, or in a criminal case with multiple counts, an appeal may be taken from a final judgment ~~which~~ that does not dispose of all the claims or counts as to all the parties, but only after an express direction by the trial court for entry of judgment and an express determination in the judgment, supported by written findings, that there is no just reason for delay. The findings may be made at the time of entry of judgment or thereafter on the court's own motion or on motion of any party. The time for filing notice of appeal begins to run from the entry of the required findings. In the absence of the required findings, determination and direction, a judgment that adjudicates less than all the claims or counts, or adjudicates the rights and liabilities of less than all the parties, is subject only to discretionary review until the entry of a final judgment adjudicating all the claims, counts, rights, and liabilities of all the parties.

RULES OF APPELLATE PROCEDURE (RAP)
RULE 5.2 TIME ALLOWED TO FILE NOTICE

(a) - (d) [Unchanged.]

(e) Effect of Certain Motions Decided After Entry of Appealable Order. A notice of appeal of orders deciding certain timely motions designated in this section must be filed in the trial court within (1) 30 days after the entry of the order, or (2) if a statute provides that a notice of appeal, a petition for extraordinary writ, or a notice for discretionary review must be filed within a time period other than 30 days after entry of the decision to which the motion is directed, the number of days after the entry of the order deciding the motion established by the statute for initiating review. The motions to which this rule applies are a motion for arrest judgment under CrR 7.4, a motion for new trial under CrR 7.~~6~~5, a motion for judgment as a matter of law under CR 50(b), a motion to amend findings under CR 52(b), a motion for reconsideration or new trial under CR 59, and a motion for amendment of judgment under CR 59.

(f) - (g) [Unchanged.]

RULES OF APPELLATE PROCEDURE (RAP)
RULE 8.1 SUPERSEDEAS PROCEDURE

(a) [Unchanged.]

(b) Right to Stay Enforcement of Trial Court Decision. A trial court decision may be enforced pending appeal or review unless stayed pursuant to the provisions of this rule. Any party to a review proceeding has the right to stay enforcement of a money judgment, or a decision affecting real, personal or intellectual property, pending review. Stay of a decision in other civil cases is a matter of discretion.

(1) *Money Judgment*. Except when prohibited by statute, a party may stay enforcement of a money judgment by filing in the trial court a supersedeas bond or cash, or by alternate security approved by the trial court pursuant to subsection (b)(4)~~, below~~.

(2) *Decision Affecting Property*. Except where prohibited by statute, a party may obtain a stay of enforcement of a decision affecting rights to possession, ownership or use of real property, or of tangible personal property, or of intangible personal property, by filing in the trial court a supersedeas bond or cash, or by alternate security approved by the trial court pursuant to subsection (b)(4)~~, below~~. If the decision affects the rights to possession, ownership or use of a trademark, trade secret, patent, or other intellectual property, a party may obtain a stay in the trial court only if it is reasonably possible to quantify the loss ~~which~~ that would be incurred by the prevailing party in the trial court as a result of the party's inability to enforce the decision during review.

(3) [Unchanged.]

(4) *Alternate Security*. Upon motion of a party, or stipulation, the trial court or appellate court may authorize a party to post security other than a bond or cash, may authorize the establishment of an account consisting of cash or other assets held by a party, its counsel, or a non-party, or may authorize any other reasonable means of securing enforcement of a judgment. The effect of doing so is equivalent to the filing of a supersedeas bond or cash with the Superior Court.

(c) [Unchanged.]

(d) Form of Cash Supersedeas; Effect of Filing Bond or Other Security.

(1) A party superseding a judgment with cash deposited with the Superior Court should deposit the supersedes amount with the Superior Court Clerk, accompanied by a Notice of Cash Supersedeas. The Notice may direct the clerk to invest the funds, subject to the clerk's investment fee, as provided in RCW 36.48.090.

(2) Upon the filing of a supersedeas bond, cash or alternate security approved by the trial court pursuant to subsection (b)(4) ~~above~~, enforcement of a trial court decision against a party furnishing the bond, cash or alternate security is stayed. Unless otherwise ordered by the trial court or appellate court, upon the filing of a supersedeas bond, cash or alternate security any execution proceedings against a party furnishing the bond, cash or alternate security shall be of no further effect.

(e) - (h) [Unchanged.]

RULES OF APPELLATE PROCEDURE (RAP)
RULE 9.6 DESIGNATION OF CLERK'S PAPERS AND EXHIBITS

(a) [Unchanged.]

(b) Designation and Contents.

(1) The clerk's papers shall include, at a minimum:

(A) the notice of appeal;

(B) the indictment, information, or complaint in a criminal case;

(C) any written order or ruling not attached to the notice of appeal, of which a party seeks review;

(D) the final pretrial order, or the final complaint and answer or other pleadings setting out the issues to be tried if the final pretrial order does not set out those issues;

(E) any written opinion, findings of fact or conclusions of law; ~~and~~

(F) any jury instruction given or refused ~~which~~ that presents an issue on appeal~~.~~; and

(G) any order sealing documents if sealed documents have been designated.

(2) Each designation or supplement shall specify the full title of the pleading, the date filed, and, in counties where subnumbers are used, the clerk's subnumber.

(3) Each designation of exhibits shall include the trial court clerk's list of exhibits and shall specify the exhibit number and the description of the exhibit to be transmitted.

(c) [Unchanged.]

RULES OF APPELLATE PROCEDURE (RAP)
RULE 10.2 TIME FOR FILING BRIEFS

(a) - (b) [Unchanged.]

(c) Brief of Respondent in Criminal Case. The brief of respondent in a criminal case should be filed with the appellate court within 60 days after service of the brief of appellant or petitioner. ~~If a pro se supplemental brief is filed the state shall, within 30 days after receiving service, file a supplemental response addressing any of the issues raised in the pro se supplemental brief or stating that no response is necessary.~~

(d) - (e) [Unchanged.]

(f) Brief of Amicus Curiae. A brief of amicus curiae not requested by the appellate court should be received by the appellate court and counsel of record for the parties and any other amicus curiae not later than 30 days before oral argument ~~in the appellate court~~ or consideration on the merits, unless the court sets a later date or allows a later date upon a showing of particular justification by the applicant.

(g) - (i) [Unchanged.]

RULES OF APPELLATE PROCEDURE (RAP)
RULE 10.3 CONTENT OF BRIEF

(a) Brief of Appellant or Petitioner. The brief of the appellant or petitioner should contain under appropriate headings and in the order here indicated:

(1) *Title Page*. A title page, which is the cover.

(2) *Tables*. A table of contents, with page references, and a table of cases (alphabetically arranged), statutes and other authorities cited, with references to the pages of the brief where cited.

(3) *Introduction*. A concise introduction. This section is optional. The introduction need not contain citations to the record or authority.

(~~3~~4) *Assignments of Error*. A separate concise statement of each error a party contends was made by the trial court, together with the issues pertaining to the assignments of error.

(~~4~~5) *Statement of the Case*. A fair statement of the facts and procedure relevant to the issues presented for review, without argument. Reference to the record must be included for each factual statement.

(~~5~~6) *Argument*. The argument in support of the issues presented for review, together with citations to legal authority and references to relevant parts of the record. The argument may be preceded by a summary. The court ordinarily encourages a concise statement of the standard of review as to each issue.

(~~6~~7) *Conclusion*. A short conclusion stating the precise relief sought.

(~~7~~8) *Appendix*. An appendix to the brief if deemed appropriate by the party submitting the brief. An appendix may not include materials not contained in the record on review without permission from the appellate court, except as provided in rule 10.4(c).

(b) - (h) [Unchanged.]

RULES OF APPELLATE PROCEDURE (RAP)
RULE 10.4 PREPARATION AND FILING OF BRIEF BY PARTY

(a) [Unchanged.]

(b) Length of Brief. A brief of appellant, petitioner, or respondent~~, and a pro se brief in a criminal case~~ should not exceed 50 pages. Appellant's reply brief should not exceed 25 pages. An amicus curiae brief, or answer thereto, should not exceed 20 pages. In a cross-appeal, the brief of appellant, brief of respondent/cross appellant, and reply brief of appellant/cross respondent should not exceed 50 pages and the reply brief of the cross ~~respondent~~ appellant should not exceed 25 pages. For the purpose of determining compliance with this rule appendices, the title sheet, table of contents, and table of authorities are not included. For compelling reasons the court may grant a motion to file an over-length brief.

(c) - (f) [Unchanged.]

(g) ~~[Reserved. See GR 14(d).]~~ **Citation Format.** Citations should conform with the format prescribed by the

Reporter of Decisions pursuant to GR 14(d). The format requirements of GR 14(a) - (b) do not apply to briefs filed in an appellate court.

(h) [Unchanged.]

~~(i) The format requirements of GR 14 do not apply to briefs filed in an appellate court.~~

RULES OF APPELLATE PROCEDURE (RAP)
RULE 10.5 REPRODUCTION AND SERVICE OF BRIEFS ~~BY CLERK~~

(a) - (b) [Unchanged.]

(c) ~~Service and~~ Notice to Appellant in Criminal Case when Defendant is Appellant. In a criminal case, the clerk will, at the time of filing of defendant/appellant's brief, advise the defendant/appellant of the provisions of rule 10.10.

RULES OF APPELLATE PROCEDURE (RAP)
RULE 11.4 TIME ALLOWED, ORDER, AND CONDUCT OF ORAL ARGUMENT

(a) - (i) [Unchanged.]

(j) Submitting Case without Oral Argument. The appellate court may, on its own initiative or on motion of a ~~all~~ parties, decide a case without oral argument. If the appellate court decides that the case will be decided without oral argument, the clerk will advise the parties and others who have filed briefs of the date the case is set for consideration on the merits.

RULES OF APPELLATE PROCEDURE (RAP)
RULE 12.3 FORMS OF DECISION

(a) - (d) [Unchanged.]

(e) Motion to Publish. A motion requesting the Court of Appeals to publish an opinion that had been ordered filed for public record should be served and filed within 20 days after the opinion has been filed. The motion must be supported by addressing the following criteria: (1) if not a party, the applicant's interest and the person or group applicant represents; (2) applicant's reasons for believing that publication is necessary; (3) whether the decision determines an unsettled or new question of law or constitutional principle; (4) whether the decision modifies, clarifies or reverses an established principle of law; (5) whether the decision is of general public interest or importance; or (6) whether the decision is in conflict with a prior opinion of the Court of Appeals. ~~Rule 17.4 applies to motions to publish.~~ A party should not file an answer to a motion to publish or a reply to an answer unless requested by the appellate court. The court will not grant a motion to publish without requesting an answer.

RULES OF APPELLATE PROCEDURE (RAP)
RULE 13.4 DISCRETIONARY REVIEW OF DECISION TERMINATING REVIEW

(a) How to Seek Review. A party seeking discretionary review by the Supreme Court of a Court of Appeals decision terminating review must file a petition for review or an answer to the petition ~~which~~ that raises new issues. A petition for review should be filed in the Court of Appeals. If no motion to publish or motion to reconsider all or part of the Court of Appeals decision is timely made, a petition for review must be filed within 30 days after the decision is filed. If such a motion is made, the petition for review must be filed within 30 days after an order is filed denying a timely motion for reconsideration or determining a timely motion to publish. If the petition for review is filed prior to the Court of Appeals determination on the motion to reconsider or on a motion to publish, the petition will not be forwarded to the Supreme Court until the Court of Appeals files an order on all such motions. The first party to file a petition for review must, at the time the petition is filed, pay the statutory filing fee to the clerk of the Court of Appeals in which the petition is filed.

(b) - (c) [Unchanged.]

(d) Answer and Reply. A party may file an answer to a petition for review. If the party wants to seek review of any issue ~~which~~ that is not raised in the petition for review, including any issues that were raised but not decided in the Court of Appeals, ~~that~~ the party must raise ~~that~~ those new issues in an answer. Any answer should be filed within 30 days after the service on the party of the petition. A party may file a reply to an answer only if the answering party ~~raises a new issue~~ seeks review of issues not raised in the petition for review. A reply to an answer should be limited to addressing only the new issues raised in the answer. A reply to an answer should be filed within 15 days after the service on the party of the answer. An answer or reply should be filed in the Supreme Court. The Supreme Court may call for an answer or a reply to an answer.

(e) - (f) [Unchanged.]

(g) Service and Reproduction of Petition, Answer, and Reply. The clerk will arrange for the reproduction of copies of a petition for review, an answer, or a reply, and bill the appropriate party for the copies as provided in rule 10.5. The clerk will serve the petition, answer, or reply ~~as provided in rule 10.5(b)~~ if the party has not done so.

(h) - (i) [Unchanged.]

RULES OF APPELLATE PROCEDURE (RAP)
[NEW] RULE 13.5A. MOTIONS FOR DISCRETIONARY REVIEW OF SPECIFIED FINAL DECISIONS

(a) Scope of Rule. This rule governs motions for discretionary review by the Supreme Court of the following decisions of the Court of Appeals:

(1) Decisions dismissing or deciding personal restraint petitions, as provided in rule 16.14(c);

(2) Decisions dismissing or deciding post-sentence petitions, as provided in rule 16.18(g);

(3) Decisions on accelerated review that relate only to a juvenile offense disposition, juvenile dependency, or termination of parental rights, as provided in rule 18.13(e); and

(4) Decisions on accelerated review that relate only to an adult sentence, as provided in rule 18.15(g).

(b) Considerations Governing Acceptance of Review. In ruling on motions for discretionary review pursuant to this rule, the Supreme Court will apply the considerations set out in rule 13.4(b).

(c) Procedure. The procedure for motions pursuant to this rule shall be the same as specified in rule 13.5(a) and (c).

RULES OF APPELLATE PROCEDURE (RAP)
RULE 13.7 PROCEEDINGS AFTER ACCEPTANCE OF REVIEW

(a) - (c) [Unchanged.]

(d) Supplemental Briefs, Authorized. Within 30 days after ~~the acceptance by~~ the Supreme Court grants ~~of~~ a petition for review or a motion for discretionary review, any party may file and serve a supplemental brief in accordance with these rules. No response to a supplemental brief may be filed or served except by leave of the Supreme Court.

(e) [Unchanged.]

RULES OF APPELLATE PROCEDURE (RAP)
RULE 16.7 PERSONAL RESTRAINT PETITION—FORM OF PETITION

(a) Generally. Under the titles indicated, the petition should set forth:

(1) *Status of Petitioner*. The restraint on petitioner; the place where petitioner is held in custody, if confined; the judgment, sentence, or other order or authority upon which petitioner's restraint is based, identified by date of entry, court, and cause number; any appeals taken from that judgment, sentence or order; and a statement of each other petition or collateral attack as that term is defined in RCW 10.73.090, whether filed in federal court or state court, filed with regard to the same allegedly unlawful restraint, identified by the date filed, the court, the disposition made by the court, and the date of disposition.

(3) - (4) [Unchanged.]

(5) *Oath*. If a notary is available, the petition must be signed by the petitioner or his attorney and verified substantially as follows:

After being first duly sworn, on oath, I depose and say: That I am the petitioner, that I have read the petition, know its contents, and I believe the petition is true.

or

After being first duly sworn, on oath, I depose and say: That I am the attorney for the petitioner, that I have read the petition, know its contents, and I believe the petition is true.

_____
[Signature]

Subscribed and sworn to before me this ____ ~~day of~~ _____, ~~19~~____*[date]*.

_____
Notary Public in and for
the State
of Washington, residing
at _____

If a notary is not available, the petition must be subscribed by the petitioner or his attorney substantially as follows:

I declare that I have examined this petition and to the best of my knowledge and belief it is true and correct.

Dated this _____ ~~day of~~ _____, ~~19~~____*[date]*.

_____
[Signature]

If a notary is available and a petition is filed ~~which~~ that is not verified, the appellate court will return the petition for verified signature and advise the petitioners custodian to make a notary available.

(6) *Verification.* In all cases where the restraint is the result of a criminal proceeding and the petition is prepared by the petitioner's attorney, the petitioner must file with the court no later than 30 days after the petition was received by the court a document that substantially complies with the following form:

I declare that I have received a copy of the petition prepared by my attorney and that I consent to the petition being filed on my behalf.

Dated this ___ ~~day of~~ _____, ~~19~~ __*[date]*.

_____
[Signature]

If the petitioner has been declared incompetent, the verification may be filed by the guardian ad litem. If a petition has been filed to determine competency, the verification procedure shall be tolled until competency is determined.

(b) [Unchanged.]

RULES OF APPELLATE PROCEDURE (RAP)
RULE 16.9 PERSONAL RESTRAINT PETITION—RESPONSE TO PETITION

The respondent must serve and file a response within ~~30~~ 60 days after the petition is served, unless the time is extended by the commissioner or clerk for good cause shown, or unless the court can determine without requiring a response that the petition should be dismissed under RCW 10.73.090 or RCW 10.73.140. The response must answer the allegations in the petition. The response must state the authority for the restraint of petitioner by respondent and, if the authority is in writing, include a conformed copy of the writing. If an allegation in the petition can be answered by reference to a record of another proceeding, the response should so indicate and include a copy of those parts of the record ~~which~~ that are relevant. Respondent should also identify in the response all material disputed questions of fact.

RULES OF APPELLATE PROCEDURE (RAP)
RULE 16.14 PERSONAL RESTRAINT PETITION—APPELLATE REVIEW

(a) - (b) [Unchanged.]

(c) Other Decisions. If the petition is dismissed by the Chief Judge or decided by the Court of Appeals on the merits, the decision is subject to review by the Supreme Court only by a motion for discretionary review on the terms and in the manner provided in rule 13.5~~(a), (b), and (c)~~A.

RULES OF APPELLATE PROCEDURE (RAP)
RULE 16.16 QUESTION CERTIFIED BY FEDERAL COURT

(a) - (d) [Unchanged.]

(e) Briefs.

(1) *Procedure*. The federal court shall designate who will file the first brief. The first brief should be filed within 30 days after the record is filed in the Supreme Court. The opposing party should file the opposing brief within 20 days after receipt of the opening brief. A reply brief should be filed within 10 days after the opposing brief is served. The briefs should be served in accordance with rule 10.2. The time for filing the record, the supplemental record, or briefs may be extended for cause.

(2) *Form and Reproduction of Briefs*. Briefs should be in the form provided by rules 10.3 and 10.4. Briefs will be reproduced ~~and sent to the parties~~ by the clerk in accordance with rule 10.5.

(f) - (g) [Unchanged.]

RULES OF APPELLATE PROCEDURE (RAP)
RULE 16.18 POST-SENTENCE PETITIONS

(a) - (f) [Unchanged.]

(g) Review of Court of Appeals Decision. If the petition is dismissed by the Chief Judge or decided by the Court of Appeals on the merits, the decision is subject to review by the Supreme Court by a motion for discretionary review on the terms and in the manner provided in rule 13.5~~(a), (b), and (c)~~A.

RULES OF APPELLATE PROCEDURE (RAP)
RULE 17.4 FILING AND SERVICE OF MOTION—ANSWER TO MOTION

(a) - (f) [Unchanged.]

(g) Length of Motion, Response and Reply; Form of Papers and Number of Copies.

(1) A motion and response should not exceed 20 pages, not including supporting papers. A reply should not exceed 10 pages, not including supporting papers. For compelling reasons, the court may grant a motion to file an over-length motion, response, or reply.

(2) All papers relating to motions or responses should be filed in the form provided for briefs in rule 10.4(a), provided an original only and no copy should be filed. The appellate court commissioner or clerk will reproduce additional copies that may be necessary for the appellate court and charge the appropriate party as provided in rule 10.5(a).

RULES OF APPELLATE PROCEDURE (RAP)
RULE 17.5 ORAL ARGUMENT OF MOTION

(a) - (c) [Unchanged.]

(d) Time Allowed, Order, and Conduct of Oral Argument. The Supreme Court and each division of the Court of Appeals will define by general order the amount of time each side is allowed for oral argument. If there is more than one party to a side in a single review or in a consolidated review, the parties on that side will share the allotted time equally, unless the parties on that side agree to some other allocation. The appellate court may grant additional time for oral argument upon motion of a party. The moving party is entitled to open and conclude oral argument. ~~Rule 11.5 applies to the conduct of argument of motions.~~

(e) [Unchanged.]

RULES OF APPELLATE PROCEDURE (RAP)
RULE 18.1 ATTORNEY FEES AND EXPENSES

(a) [Unchanged.]

(b) Argument in Brief. The party must devote a section of its opening brief to the request for the fees or expenses. Requests made at the Court of Appeals will be considered as continuing requests at the Supreme Court. The request should not be made in the cost bill. In a motion on the merits pursuant to rule 18.14, the request and supporting argument must be included in the motion or response if the requesting party has not yet filed a brief.

(c) Affidavit of Financial Need. In any action where applicable law mandates consideration of the financial resources of one or more parties regarding an award of attorney fees and expenses, each party must serve upon the other and file a financial affidavit no later than 10 days prior to the date the case is set for ~~hearing or submitted for consideration~~ oral argument or consideration on the merits; however, in a motion on the merits pursuant to rule 18.14, each party must serve and file a financial affidavit along with its motion or response. Any answer to an affidavit of financial need must be filed and served within 7 days after service of the affidavit.

(d) [Unchanged.]

(e) Objection to Affidavit of Fees and Expenses; Reply. A party may object to a request for fees and expenses filed pursuant to section (d) by serving and filing an answer with appropriate documentation containing specific objections to the requested fee. The ~~response~~ answer must be served and filed within 10 days after service of the affidavit of fees and expenses upon the party. ~~In a rule 18.14 proceeding, an answer to an affidavit of financial need may be served and filed at any time before oral argument.~~ A party may reply to an answer by serving and filing the reply documents within 5 days after the service of the answer upon that party.

(f) - (j) [Unchanged.]

RULES OF APPELLATE PROCEDURE (RAP)
RULE 18.5 SERVICE AND FILING OF PAPERS

(a) Service. Except when a rule requires the appellate court commissioner or clerk or the trial court clerk to serve a particular paper, and except as provided in rule 9.5, a person filing a paper must, at or before the time of filing, serve a copy of the paper on all parties, amicus, and other persons who may be entitled to notice. If a person does not have an attorney of record, service should be made upon the person. Service must be made as provided in CR 5(b), (f), (g), and (h).

(b) Proof of Service. Proof of service should be made by an acknowledgment of service, or by an affidavit, or, if service is by mail, as provided in CR 5(b). Proof of service may appear on or be attached to the papers filed.

(c) Filing. Papers required or permitted to be filed in the appellate court must be filed with the clerk, except that an appellate court judge may permit papers to be filed with the judge, in which event the judge will note the filing date on the papers and promptly transmit them to the appellate court clerk.

(d) Filing by Facsimile. [Reserved. See GR 17—Facsimile Transmission.]

(e) Service and Filing by an Inmate Confined in an Institution. An inmate confined in an institution may file and serve papers by mail in accordance with GR 3.1.

RULES OF APPELLATE PROCEDURE (RAP)
RULE 18.6 COMPUTATION OF TIME

(a) [Unchanged.]

(b) Service by Mail. Except as ~~otherwise~~ provided in rule 17.4 or GR 3.1, if the time period in question applies to a party serving a paper by mail, the paper is timely served if mailed within the time permitted for service. Except as provided in GR 3.1, ~~I~~if the time period in question applies to the party upon whom service is made, the time begins to run 3 days after the paper is mailed to the party.

(c) Filing by Mail. Except as provided in GR 3.1, ~~A~~a brief authorized by Title 10 or Title 13 is timely filed if mailed to the appellate court within the time permitted for filing. Except as provided in rule 17.4 or GR 3.1, any other paper, including a petition for review, is timely filed only if it is received by the appellate court within the time permitted for filing.

RULES OF APPELLATE PROCEDURE (RAP)
RULE 18.7 SIGNING AND DATING PAPERS

Each paper filed pursuant to these rules should be dated and signed by an attorney (with the attorney's Washington State Bar Association membership number in the signature block) or party, except papers prepared by a judge, commissioner or clerk of court, bonds, papers comprising a record on review, papers ~~which~~ that are verified on oath or by certificate, and exhibits. ~~All briefs and motions signed by an attorney shall include the attorney's Washington State Bar Association membership number in the signature block.~~

RULES OF APPELLATE PROCEDURE (RAP)
RULE 18.13 ACCELERATED REVIEW OF DISPOSITIONS IN JUVENILE OFFENSE, JUVENILE DEPENDENCY AND TERMINATION OF PARENTAL RIGHTS PROCEEDINGS

(a) [Unchanged.]

(b) Accelerated Review by Motion. The accelerated review of the disposition shall be done by motion. The motion must include (1) the name of the party filing the motion; (2) the offense in a juvenile offense proceeding or the issues in a juvenile dependency or termination of parental rights; (3) the disposition of the trial court; (4) the standard range for the offense, as may be appropriate; (5) a statement of the disposition urged by the moving party; (6) copies of the clerk's papers and a written verbatim report of those portions of the disposition proceeding ~~which~~ that are material to the motion; (7) an argument for the relief the party seeks; and (8) a statement of any other issues to be decided in the review proceeding.

(c) - (d) [Unchanged.]

(e) Supreme Court Review. A decision by the Court of Appeals on accelerated review that relates only to a juvenile offense disposition, juvenile dependency and termination of parental rights is subject to review by the Supreme Court only by a motion for discretionary review on the terms and in the manner provided in rules 13.3(e) and 13.5~~(a), (b) and (c)~~A.

(g) Content of Motion and Response. In addition to the requirements of section (b) of this rule, a party appealing from the disposition decision following a finding of dependency by a juvenile court or a decision ~~depriving a person of all~~ terminating all of a person's parental rights with respect to a child should (1) append to the motion a copy of the trial court's finding of facts and conclusions of law and copies of all dependency review orders; (2) identify by specific assignments of error those findings and conclusions challenged on appeal; and (3) set forth the applicable standard of governing review of those issues. Counsel for the respondent should respond to each assignment of error and should provide citations to the record for any evidence supporting the trial court's findings.

RULES OF APPELLATE PROCEDURE (RAP)
RULE 18.15 ACCELERATED REVIEW OF ADULT SENTENCINGS

(a) Generally. A sentence ~~which~~ that is beyond the standard range may be reviewed on the merits in the manner provided in the rules for other decisions or by accelerated review as provided in this rule.

(b) - (f) [Unchanged.]

(g) Supreme Court Review. A decision by the Court of Appeals on accelerated review that relates only to an adult sentence is subject to review by the Supreme Court only by a motion for discretionary review on the terms and in the manner provided in rules 13.3(e) and 13.5~~(a), (b) and (c)~~A.

RULES OF APPELLATE PROCEDURE (RAP)
FORM 4. STATEMENT OF GROUNDS FOR DIRECT REVIEW

[Rule 4.2(b)]

No. [*Supreme Court*]

SUPREME COURT OF THE STATE OF WASHINGTON

(Title of trial court proceeding with parties designated as in rule 3.4)	)))	STATEMENT OF GROUNDS FOR DIRECT REVIEW BY THE SUPREME COURT

[*Name of party*] seeks direct review of the [*describe the decision or part of the decision ~~which~~ that the party wants reviewed*] entered by the [*name of court*] on [*date of entry*.] The issues presented in the review are:

[*State issues presented for review. See Part A of Form 6 for suggestions for framing issues presented for review.*]

The reasons for granting direct review are:

[*Briefly indicate and argue grounds for direct review. ~~State and argue briefly whether the case is one which the Supreme Court would probably review if decided by the Court of Appeals in the first instance.~~ See rule 4.2.*]

[*Date*]

Respectfully submitted,

Signature

[*Name, address, telephone number, and Washington State Bar Association membership number of attorney*]

RULES OF APPELLATE PROCEDURE (RAP) FORMS
FORM 6. BRIEF OF APPELLANT

[Rule 10.3(a)]

[See Form 5 for form of cover and title page. For useful discussions of appellate brief writing, see the latest edition of the Washington State Bar Association Appellate Practice Deskbook.]

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Table of Cases

[Here list cases, alphabetically arranged, with citations complying with rule 10.4(g), and page numbers where each case appears in the brief. Washington cases may be first listed alphabetically with other cases following and listed alphabetically.]

Constitutional Provisions

[Here list constitutional provisions in the order in which the provisions appear in the constitution with page numbers where each is referred to in the brief.]

Statutes

[Here list statutes in the order in which they appear in RCW, U.S.C., etc., with page numbers where each is referred to in the brief. Common names of statutes may be used in addition to code numbers.]

Regulations and Rules

[Here list regulations and court rules grouped in appropriate categories and listed in numerical order in each category with page numbers where each is referred to in the brief.]

Other Authorities

[Here list other authorities with page numbers where each is referred to in the brief.]

Note: For form of citations ~~generally~~, see ~~sections 71 through 76 of F. Wiener, Briefing and Arguing Federal Appeals (1967)~~ GR 14(d).

I. Introduction

[An introduction is optional and may be included as a separate section of the brief at the filing party's discretion. The introduction need not contain citations to the record or authority.]

~~A~~ II. Assignments of Error

Assignments of Error

[Here separately state and number each assignment of error as required by rule 10.3(a) and (g). For example:

"1. The trial court erred in entering the order of May 12, 1975, denying defendant's motion to vacate the judgment entered on May 1, 1975."

or

"2. The trial court erred in denying the defendant's motion to suppress evidence by order entered on March 10, 1975."]

Issues Pertaining to Assignments of Error

[Concisely define the legal issues in question form which the appellate court is asked to decide and number each issue. List after each issue the Assignments of Error which pertain to the issue. Proper phrasing of the issues is important. Each issue should be phrased in the terms and circumstances of the case, but without unnecessary detail. The court should be able to determine what the case is about and what specific issues the court will be called upon to decide by merely reading the issues presented for review. ~~For an excellent discussion of how to properly phrase issues, see sections 31 through 33 of F. Wiener, Briefing and Arguing Federal Appeals (1967).~~]

[Examples of issues presented for review are:

"Does an attorney, without express authority from his client, have implied authority to stipulate to the entry of judgment against his client as a part of a settlement which limits the satisfaction of the judgment to specific property of the client? (Assignment of Error 1.)"

or

"Defendant was arrested for a traffic offense and held in jail for 2 days because of outstanding traffic warrants. The police impounded defendant's car and conducted a warrantless 'inventory' search of defendant's car and seized stolen property in the trunk. The impound was not authorized by any ordinance. Did the search and seizure violate defendant's rights under the fourth and fourteenth amendments to the Constitution of the United States and under article I, section 7 of the Constitution of the State of Washington? (Assignment of Error 2.)"]

~~B~~ III. Statement of the Case

[Write a statement of the procedure below and the facts relevant to the issues presented for review. The statement should not be argumentative. Every factual statement should be supported by a reference to the record. See rule 10.4(f) for proper abbreviations for the record. ~~For a good discussion of this aspect of brief writing, see Wiener, supra, sections 23 through 28 and 42 through 45.~~]

~~C~~ IV. Summary of Argument

[This is optional. ~~For suggestions for preparing a summary of argument, see Wiener, supra, section 65.~~]

~~D~~ V. Argument

[The argument should ordinarily be separately stated under appropriate headings for each issue presented for review. Long arguments should be divided into subheadings. The argument should include citations to legal authority and references to relevant parts of the record. ~~See Wiener, supra, Sections 34 through 36, 38, and 46 through 64.~~ The court ordinarily encourages a concise statement of the standard of review as to each issue.]

~~E~~ VI. Conclusion

[Here state the precise relief sought.]

[Date]

Respectfully submitted,

Signature

[Name of Attorney]
Attorney for *[Appellant, Respondent, or Petitioner]*
Washington State Bar Association membership number

VII. APPENDIX

[Optional. See rule 10.3(a)(~~7~~8).]

RULES OF APPELLATE PROCEDURE (RAP)
FORM 7. NOTICE OF INTENT TO FILE PRO SE SUPPLEMENTAL BRIEF [DELETED]

~~[Rule 10.1(d)]~~

~~No. [*appellate court*]~~
~~[Supreme court or court of appeals, division ___]~~
~~of the state of washington~~

~~[Title of trial court proceeding with parties designated as in rule 3.4]~~	~~NOTICE OF INTENT TO FILE PRO SE SUPPLEMENTAL BRIEF~~

~~I intend to file a brief of my own in this case. I have received a copy of the brief prepared by my attorney. I must send my brief to the address below on or before [clerk inserts appropriate date] if I want my brief to be considered by the court.~~

~~I am sending this notice to the court on [today's date.]~~

~~Signature~~
~~[Name of Attorney]~~
~~Attorney for [Petitioner or Respondent]~~

~~Send brief to:~~
~~[Name and address of appellate court]~~

RULES OF APPELLATE PROCEDURE (RAP) FORMS
FORM 12. ORDER OF INDIGENCY

[Rule 15.2]
SUPERIOR COURT OF WASHINGTON
FOR [_____] COUNTY

[*Name of plaintiff*], Plaintiff,	)	No. [*trial court*]
v.	)	
[*Name of defendant*], Defendant.	)	ORDER OF INDIGENCY

[*Set forth finding of indigency and state that applicable law grants review wholly or partially at public expense. For example: "The court finds that the defendant lacks sufficient funds to prosecute an appeal and applicable law grants defendant a right to review at public expense to the extent defined in this order."*] The court orders as follows:

1. The filing fee is waived.

~~1~~ 2. [*Name of indigent*] is entitled to counsel for review wholly at public expense. When review is discretionary, counsel will be provided and the expenses detailed below will be paid if review is accepted or as applicable law permits.

~~2~~ 3. The appellate court shall appoint counsel for review pursuant to RAP 15.2 [*If applicable: "Trial counsel must assist appointed counsel for review in preparing the record."*]

~~3~~ 4. [*Name of indigent*] is entitled to the following at public expense:

(a) Those portions of the verbatim report of proceedings reasonably necessary for review as follows:

[*Designate parts of report*.]

(b) A copy of the following clerk's papers:

[*Designate papers by name and trial court clerk's sub-number*.]

(c) Preparation of original documents to be reproduced by the clerk as provided in rule 14.3(b).

(d) Reproduction of briefs and other papers on review ~~which~~ that are reproduced by the clerk of the appellate court.

(e) The cost of transmitting the following cumbersome exhibits:

[*Designate cumbersome exhibits needed for review. See rule 9.8(b)*.]

(f) Other items:

[*Designate items.*]

[*Date*]

Signature
[*Name of Judge*]
Judge of the Superior Court

Presented by:
[*Name of party and attorney for party presenting order; Washington State Bar Association membership number*]

RULES OF APPLICATE PROCEDURE (RAP)
FORM 14. INVOICE OF COURT REPORTER—INDIGENT CASE
[DELETED]

~~[Rule 15.4(d)]~~

~~No. [appellate court]~~
~~[supreme court or court of appeals, division ___]~~
~~of the state of washington~~

~~[Title of trial court proceeding with parties designated as in rule 3.4]~~	~~)~~ ~~)~~ ~~)~~	~~Invoice of court reporter—Indigent case~~

~~[Name of claimant court reporter] submits this invoice to be paid from public funds. An order authorizing the expenses claimed by this invoice was entered in [name of court] on [date of entry]. My Social Security number [or, my firm's IRS employer identification number] is ____.~~

~~I swear or affirm that I transcribed or caused to be transcribed the original and one copy of a verbatim report of proceedings in this case. The report was prepared in compliance with RAP 9.2(e) and (g). I transcribed _____ pages. The rate per page set by the Supreme Court is $_____. The total amount of this invoice is $_____.~~

~~Signature~~
~~[Name, address, telephone number, and Washington State Bar Association membership number of claimant]~~

~~SUBSCRIBED AND SWORN to before me this ____ day of _____, 19__.~~

~~Notary Public in and for the State of Washington, residing at _____~~

~~I hereby certify that the amount claimed in this invoice is for that portion of the verbatim report of proceedings ordered by the trial court; that the typing of the report is in accordance with rule 9.2(e) and (g); and that the bill is computed at the current rate per page set by the Supreme Court for the original and one copy, namely, $_____ per page.~~

~~[Date]~~

~~Signature~~
~~[Name of Superior Court Clerk]~~
~~Clerk of the Superior Court of Washington for [_____] County~~

RULES OF APPELLATE PROCEDURE (RAP)
FORM 17. PERSONAL RESTRAINT PETITION FOR PERSON CONFINED BY STATE OR LOCAL GOVERNMENT

[Rule 16.7]

No. [*appellate court*]
[*Put name of appellate court that you want to hear your case*.]
OF THE STATE OF WASHINGTON

[*Put your name here*.], Petitioner.	)))	PERSONAL RESTRAINT PETITION

If there is not enough room on this form, use the back of these pages or use other paper. Fill out all of this form and other papers you are attaching before you sign this form in front of a notary.

A. STATUS OF PETITIONER

I, (full name and address) apply for relief from confinement. I am ___ am not ___ now in custody serving a sentence upon conviction of a crime. (If not serving a sentence upon conviction of a crime) I am now in custody because of the following type of court order: (identify type of order).

1. - 2. [Unchanged.]

3. I was sentenced after trial ___, after plea of guilty ___ on (date of sentence) ~~, 19~~___. The judge who imposed sentence was (name of trial court judge).

4. - 8. [Unchanged.]

B. - D. [Unchanged.]

E. OATH OF PETITIONER

THE STATE OF WASHINGTON	)
	) ss.
County of _____	)

After being first duly sworn, on oath, I depose and say: That I am the petitioner, that I have read the petition, know its contents, and I believe the petition is true.

[*sign here*]

SUBSCRIBED AND SWORN to before me this ___ day of_____, ~~19__~~ _____.
[date]

Notary Public in and for the State of Washington, residing at _____

If a notary is not available, explain why none is available and indicate who can be contacted to help you find a notary:
_____
_____
_____

Then sign below:

I declare that I have examined this petition and to the best of my knowledge and belief it is true and correct.

~~DATED this _____ day of _____, 19____~~ _____[date].

_____

[*sign here*]

RULES OF APPELLATE PROCEDURE (RAP)
[NEW] FORM 24. NOTICE OF CASH SUPERSEDEAS

[Rule 8.1(d)]
SUPERIOR COURT OF WASHINGTON
FOR [_____] COUNTY

[*Name of plaintiff*],	)	No. [*trial court*]
Plaintiff,	)	
v.	)	Notice of Cash Supersedeas
[*Name of defendant*],	)	
Defendant.	)	

Submitted with this notice is a [*cashier's*] check totaling $_____ made payable to the _____ County Superior Court Clerk. The clerk is directed to hold the funds as a bond to supersede the judgment previously entered in this case against _____ plus interest likely to accrue during the pendency of the appeal and any costs that may be awarded to _____ on appeal.

[*Pursuant to RCW 36.48.090, the clerk is directed to invest the funds in an interest bearing trust account to accrue to the benefit of _____, subject to the clerk's investment service fee, all as provided in RCW 36.48.090.*] The funds shall be held pending return of the mandate in Court of Appeals Cause No. _____ and thereafter until disbursed pursuant to further order of court or by agreement of the parties.

DATED [*date*].

Signature

_____

Attorney for [*Plaintiff or Defendant*]

RULES FOR APPEAL OF DECISIONS OF COURTS OF LIMITED JURISDCTION (RALJ)
RULE 4.1 AUTHORITY OF COURTS PENDING APPEAL

(a) Superior Court. After a notice of appeal has been filed, the superior court has authority to perform all acts necessary to secure the fair and orderly review of the case.

(b) Court of Limited Jurisdiction. After a notice of appeal has been filed, and while the case is on appeal, the court of limited jurisdiction has authority to act in a case only to the extent provided in these rules, unless the superior court limits or expands that authority in a particular case.

(c) Questions Relating to Indigency. The court of limited jurisdiction has authority to decide questions relating to indigency.

(d) Attorney Fees and Costs. When a party is entitled to an award of attorney fees or costs, the court of limited jurisdiction has authority to determine such an award for a party's efforts in the court of limited jurisdiction. A party may obtain review of a court of limited jurisdiction's decision on attorney fees or costs in the same review proceeding as that challenging the judgment without filing a separate notice of appeal.

GENERAL RULES (GR)
[NEW] RULE 3.1. Service and Filing by an Inmate Confined in an Institution

(a) If an inmate confined in an institution files a document in any proceeding, the document is timely filed if deposited in the institution's internal mail system within the time permitted for filing.

(b) Whenever service of a document on a party is permitted to be made by mail, the document is deemed "mailed" at the time of deposit in the institution's internal mail system addressed to the parties on whom the document is being served.

(c) If an institution has a system designed for legal mail, the inmate must use that system to receive the benefit of this rule. Timely filing or mailing may be shown by a declaration or notarized affidavit in form substantially as follows:

DECLARATION

I, [*name of inmate*], declare that, on [*date*], I deposited the foregoing [*name of document*], or a copy thereof, in the internal mail system of [*name of institution*] and made arrangements for postage, addressed to:

[*name and address of court or other place of filing*];

[*name and address of parties or attorneys to be served*].

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED at [*city*, *state*] on [*date*].

_____

[*signature*]

(d) Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after filing or service of a document, and if an inmate files or serves the document under this rule, that period shall begin to run on the date the document is received by the party.

SUPERIOR COURT CIVIL RULES (CR)
RULE 43. TAKING OF TESTIMONY

(a) - (e) [Unchanged.]

(f) Adverse Party as Witness.

(1) *Party or Managing Agent as Adverse Witness*. A party, or anyone who at the time of the notice is an officer, director, or other managing agent (herein collectively referred to as "managing agent") of a public or private corporation, partnership or association ~~which~~ that is a party to an action or proceeding may be examined at the instance of any adverse party. Attendance of such deponent or witness may be compelled solely by notice (in lieu of a subpoena) given in the manner prescribed in rule 30~~(a)~~ (b)(1) to opposing counsel of record. Notices for the attendance of a party or of a

managing agent at the trial shall be given not less than 10 days before trial (exclusive of the day of service, Saturdays, Sundays, and court holidays). For good cause shown in the manner prescribed in rule ~~30(b)~~ 26(c), the court may make orders for the protection of the party or managing agent to be examined.

(2) *Effect of Discovery, etc*. A party who has served interrogatories to be answered by the adverse party or who has taken the deposition of an adverse party or of the managing agent of an adverse party shall not be precluded for that reason from examining such adverse party or managing agent at the trial. Matters admitted by the ~~The testimony of an~~ adverse party or managing agent ~~at the trial or on deposition or interrogatories shall not bind the adversary but~~ in interrogatory answers, deposition testimony, or trial testimony are not conclusively established and may be rebutted.

(3) *Refusal to Attend and Testify; Penalties*. If a party or a managing agent refuses to attend and testify before the officer designated to take his deposition or at the trial after notice served as prescribed in rule 30~~(a)~~(b)(1), the complaint, answer, or reply of the party may be stricken and judgment taken against the party, and the contumacious party or managing agent may also be proceeded against as in other cases of contempt. This rule shall not be construed:

(A) to compel any person to answer any question where such answer might tend to incriminate him;

(B) to prevent a party from using a subpoena to compel the attendance of any party or managing agent to give testimony by deposition or at the trial; nor

(C) to limit the applicability of any other sanctions or penalties provided in rule 37 or otherwise for failure to attend and give testimony.

(g) - (k) [Unchanged.]

SUPERIOR COURT CIVIL RULES (CR)
RULE 66. RECEIVERSHIP PROCEEDINGS [RESERVED. See RCW ch. 7.60.]

~~**(a) Generally.** Receivership proceedings shall be in accordance with the practice heretofore followed in the superior court or as provided by local rules. In all other respects, the action in which the receiver is sought or which is brought by or against a receiver is governed by these rules.~~

~~**(b) Dismissal.** An action wherein a receiver has been appointed shall not be dismissed except by order of the court.~~

~~**(c) Notice to Creditors.** A general receiver appointed to liquidate and wind up affairs shall, under the direction of the court, give notice to the creditors of the corporation, of the copartnership, or of the individual, by publication in a newspaper of general circulation in the county in which the action is pending, once each week for 3 weeks, requiring such creditors to file their claims, duly verified, with the receiver, his attorney, or the clerk of the court, within 30 days from the date of first publication of such notice. If necessary to afford proper notice to such creditors, the court may by order enlarge the time for such publication or direct publication of such notice in other counties. In addition to such publication, the receiver shall give actual notice by mail at their last known addresses to all persons and parties to him known to be or to claim to be creditors.~~

~~**(d) Request for Special Notices.** At any time after a receiver is appointed, any person interested in said receivership as a party, creditor, or otherwise, may serve upon the receiver (or upon the attorney for such receiver) and file with the clerk a written request stating that he desires special notice of any and all of the following named matters, steps or proceedings in the administration of said receivership, to wit:~~

~~(1) Filing of petitions for sales, leases, or mortgages of any property in the receivership;~~

~~(2) Filing of accounts;~~

~~(3) Filing of petitions for removal or discharge of receiver; or~~

~~(4) Such other matters as are officially requested and approved by the court.~~

~~Such request shall state the post office address of such person, or his attorney.~~

~~**(e) Notices and Hearings.** Notice of any of the proceedings set out in section (d) of this rule (except petitions for the sale of perishable property, or other personal property, the keeping of which will involve expense or loss) shall be addressed to such person, or his attorney, at his stated post office address and deposited in the United States Post Office, with the postage thereon prepaid, at least 5 days before the hearing on any of the matters above described; or personal service of such notice may be made on such person or his attorney not less than 5 days before such hearing; and proof of mailing or personal service must be filed with the clerk before the hearing. If upon the hearing it appears to the satisfaction of the court that the notice has been regularly given, the court shall so find in its order of judgment, and such judgment shall be final and conclusive.~~

RULES FOR APPEAL OF DECISIONS OF COURTS OF LIMITED JURISDICTION (CRLJ)
RULE 43. TAKING OF TESTIMONY

(a) - (e) [Unchanged.]

(f) Adverse Party as Witness.

(1) *Party or Managing Agent as Adverse Witness.* A party, or anyone who at the time of the notice is an officer, director, or other managing agent (herein collectively referred to as "managing agent") of a public or private corporation, partnership or association ~~which~~ that is a party to an action or proceeding may be examined at the instance of any adverse party. Attendance of such deponent or witness may be compelled solely by notice (in lieu of a subpoena) given in the manner prescribed in ~~rule 30(a)~~ CR 30(b)(1) to opposing counsel of record. Notices for the attendance of a party or of a managing agent at the trial shall be given not less than 10 days before trial (exclusive of the day of service, Saturdays, Sundays, and court holidays). For good cause shown in the manner prescribed in ~~rule 30(b)~~ CR 26(c), the court may make orders for the protection of the party or managing agent to be examined.

(2) *Effect of Discovery, etc.* A party who has ~~filed~~ served interrogatories to be answered by the adverse party or who has taken the deposition of an adverse party or of the managing agent of an adverse party shall not be precluded for that reason from examining such adverse party or managing agent at the trial. Matters admitted by ~~The testimony of~~ an adverse party or managing agent in interrogatory answers, deposition

testimony, or trial testimony are not conclusively established and ~~at the trial or on deposition or interrogatories shall not bind his adversary but~~ may be rebutted.

(3) *Refusal to Attend and Testify; Penalties*. If a party or a managing agent refuses to attend and testify before the officer designated to take his deposition or at the trial after notice served as prescribed in ~~rule 30(a)~~ CR 30(b)(1), the complaint, answer, or reply of the party may be stricken and judgment taken against the party, and the contumacious party or managing agent may also be proceeded against as in other cases of contempt. This rule shall not be construed:

(i) to compel any person to answer any question where such answer might tend to incriminate him;

(ii) to prevent a party from using a subpoena to compel the attendance of any party or managing agent to give testimony by deposition or at the trial; nor

(iii) to limit the applicability of any other sanctions or penalties provided in ~~rule~~ CR 37 or otherwise for failure to attend and give testimony.

(g) - (k) [Unchanged.]

SUGGESTED AMENDMENTS TO RULES OF EVIDENCE (ER) ~~INTRODUCTORY COMMENT~~

~~A comment prepared by the Judicial Council Task Force on Evidence appears after each rule. If the rule is identical to the corresponding rule in the Federal Rules of Evidence, no effort is made to reiterate the advisory committee's note to the federal rule. That information is readily available in works such as J. Weinstein, Evidence (1975), C. Wright & K. Graham, Federal Practice (1969), J. Moore, Federal Practice (1976), and D. Louisell & C. Mueller, Federal Evidence (1977). The rules are also discussed in Powell & Burns, A Discussion of the New Federal Rules of Evidence, 8 Gonz.L.Rev. 1 (1972).~~

~~The comments here focus on the intent of the drafters with respect to prior Washington law and on the reasons for departures from the federal rules. In these comments, the word "drafters" refers only to the Washington Judicial Council and its Task Force on Evidence. It does not refer to Congress, the Washington State Supreme Court, or to any other judicial or legislative body.~~

~~The rules do not purport to codify constitutional law. The application of a rule may be subject to constitutional restrictions or limitations which are not defined in the rule. See, for example, the comments to rules 104, 105, and 804.~~

TITLE I. GENERAL PROVISIONS
RULE 101. SCOPE

[Unchanged.]

~~Comment 101~~

~~Rule 1101 specifies in more detail the courts, proceedings, questions, and stages of proceedings to which the rules apply.~~

RULE 102. PURPOSE AND CONSTRUCTION

[Unchanged.]

~~Comment 102~~

~~The rule is the same as Federal Rule 102. This generalized statement of purpose is comparable to CR 1, CrR 1.2, and RAP 1.2. The Rules of Evidence, like other court rules, give the judge the authority to interpret the rules in a way which avoids an unjust result. See Petrarca v. Halligan, 83 Wn.2d 773, 522 P.2d 827 (1974).~~

~~"Following the rules is not an end in itself. Rather, the rules are carefully designed to enable judges, lawyers, litigants, and juries to achieve sound results. … Rule 102 recognizes the responsibility judges bear by enumerating goals which cannot be achieved mechanically, and which will compete with one another at times." 10 Moore's Federal Practice ¶ 102.02 (1976). See also United States v. Jackson, 405 F.Supp. 938 (1975).~~

~~This approach implies a considerable grant of discretion to the trial judge in situations not explicitly covered by the rules which may require differentiated treatment in the light of special factors. 1 J. Weinstein, Evidence ¶ 102[01] (1975). The rules place a burden on the lawyer to explain his position and the reasons for it at the trial level. It also places heavy burdens on the trial judge. J. Weinstein, supra.~~

~~"Judges should indicate which factors are significant and which goals paramount in a particular case and why, so that members of the Bar can adjust to changing nuances in the law in advising their clients and in conducting litigations. This process of accommodation to change will itself promote desirable change while preserving the sound fundamentals of the law of evidence." J. Weinstein, at 102-13.~~

RULE 103. RULINGS ON EVIDENCE

[Unchanged.]

~~Comment 103~~

~~Section (a). This section is the same as Federal Rule 103(a), except that the words "is made" are substituted for "appears of record" in subsection (a)(1). This change is necessary because the rules are applicable to courts, such as district courts, where testimony and argument are not recorded. Section (a) is consistent with prior Washington law. Harmless evidentiary errors are disregarded. Primm v. Wockner, 56 Wn.2d 215, 351 P.2d 933 (1960). A timely objection or motion to strike is ordinarily necessary to seek appellate review of the admission of evidence. State v. James, 63 Wn.2d 71, 385 P.2d 558 (1963). In order to obtain appellate review of the exclusion of evidence, an offer of proof must be made which fairly advises the trial court whether the evidence is admissible. Northern State Constr. Co. v. Robbins, 76 Wn.2d 357, 457 P.2d 187 (1969). The procedure for objecting is defined by CR 46 and CrR 8.7.~~

~~Section (b). This section is the same as Federal Rule 103(b) except that the word "It" in the second sentence is changed to "The court" to improve readability. As a practical matter, the section is consistent with prior Washington law. The previous Washington rule, CR 43(c), provided that the court's statements about the character of the evidence had to be made in the absence of the jury. Although this mandatory provision is not found in rule 103, section (c) encourages the statements to be made in the absence of the jury, and this pro-~~

~~cedure would ordinarily be required in order to conform to the state constitutional prohibition against a judge commenting on the evidence. Const. art. 4, § 16.~~

~~Section (c). This section is the same as Federal Rule 103(c) and differs slightly from prior Washington law. The previous rule, CR 43(c), distinguishes between offers of proof and statements by the court. Under that rule, the court could, in its discretion, direct that an offer of proof be made in the absence of the jury, but a statement by the court as to the character of the evidence had to be made in the absence of the jury. Under rule 103(c), inadmissible evidence is to be kept from the jury "to the extent practicable."~~

~~The court's discretion under rule 103(c) must be exercised cautiously in light of the state constitutional prohibition against a judge commenting on the evidence. Const. art. 4, § 16.~~

~~Section (d). Federal Rule 103(d), Plain error, is deleted. The Washington Supreme Court recently codified the extent to which an error may be asserted for the first time in an appellate court. See RAP 2.5(a). Rule 103(d) defers to the Rules of Appellate Procedure and the decisions construing them.~~

~~To be distinguished is the extent to which counsel may acquiesce in a trial court ruling and then move for a new trial on the ground that the ruling was in error. That determination is made by reference not to the appellate rules but to the rules of civil and criminal procedure and decisional law. See, e.g., CR 46; CrR 8.7; Sherman v. Mobbs, 55 Wn.2d 202, 347 P.2d 189 (1959).~~

RULE 104. PRELIMINARY QUESTIONS

[Unchanged.]

~~Comment 104~~

~~Section (a). This section is the same as Federal Rule 104(a) and is consistent with prior Washington law. See RCW 4.44.080. The statute does not expressly say, as the rule does, that preliminary determinations are not subject to the rules of evidence, but this is the generally prevailing view. The civil and criminal rules for superior court, for example, authorize many preliminary determinations to be made on the basis of affidavits. See, e.g., CR 43(e) and CrR 2.3(c). The law with respect to privileged communications does apply to preliminary determinations. See also Rule 1101. Thus, a privilege may not be violated even in a preliminary hearing to determine whether the privilege exists.~~

~~The proceedings to which the rules of evidence do, and do not, apply are discussed in more detail in the comment to rule 1101.~~

~~Section (b). This section is the same as Federal Rule 104(b) and defines a procedure for handling the situation in which a party wishes to prove fact A, but fact A is relevant only if fact B is established. The order of proof under this rule, as generally, is determined by the judge. Rule 611. The court, in its discretion, may decide whether to hear evidence of fact A or B first, taking into account the relative prejudice of having the jury hear one rather than the other if the proponent fails to offer evidence of one of them sufficient to warrant a finding of its truth. Because of this danger of prejudice, the rule should be used with caution, especially in criminal cases.~~

~~The rule is substantially in accord with previous Washington law. See State v. Whetstone, 30 Wn.2d 301, 191 P.2d 818, cert. denied, 335 U.S. 858 (1948); 5 R. Meisenholder, Wash.Prac. § 1 (1965 & Supp.).~~

~~Section (c). This section is the same as Federal Rule 104(c). In a criminal case, a hearing on the admissibility of a confession is constitutionally required to be conducted in the absence of the jury. Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908, 1 A.L.R.3d 1205 (1964). The rule further provides that the accused, as a witness, is entitled on request to have any preliminary hearing conducted in the absence of the jury. In other situations, and in civil cases, the judge has discretion to decide whether the interests of justice require preliminary matters to be considered in the absence of the jury. Accord, Gilcher v. Seattle Elec. Co., 82 Wash. 414, 144 P. 530 (1914).~~

~~Section (d). This section is the same as Federal Rule 104(d) and is consistent with prior Washington law. It is designed to encourage participation by the accused in the determination of preliminary matters. Portions of the subject matter of rule 104 are covered in superior court by CrR 3.5(b), a more detailed rule. CrR 3.5 is not superseded by rule 104. The rules are not in conflict, and both apply in superior court. Neither rule prevents cross examination of the accused as to credibility at a preliminary hearing. See 1 J. Weinstein, Evidence ¶ 104[10] (1975).~~

~~Rule 104 does not address itself to questions of the subsequent use of testimony given by an accused at a preliminary hearing. See Walder v. United States, 347 U.S. 62, 74 S.Ct. 354, 98 L.Ed. 503 (1954); Simmons v. United States, 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968); Harris v. New York, 401 U.S. 222, 91 S.Ct. 643, 28 L.Ed.2d 1 (1971). In superior court, CrR 3.5(b) restricts the use of preliminary testimony in some respects.~~

~~Section (e). This section is the same as Federal Rule 104(e) and is consistent with prior Washington law. See CrR 3.5, discussed above.~~

RULE 105. LIMITED ADMISSIBILITY

[Unchanged.]

~~Comment 105~~

~~This rule is the same as Federal Rule 105 and should be read together with rule 403, which provides that evidence may be excluded, although relevant, if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, undue delay, or the like. These rules are consistent with prior Washington law. See State v. Stevenson, 16 Wn.App. 341, 555 P.2d 1004 (1976); State v. Goebel, 36 Wn.2d 367, 218 P.2d 300 (1950).~~

~~The rules neither imply that limiting instructions are sufficient in all situations nor restrict the court's authority to order a severance in a multidefendant case. The availability and effectiveness of these practices must be taken into consideration in deciding whether to exclude evidence under rule 403. In Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968), the court ruled that a limiting instruc-~~

~~tion did not effectively protect the accused against the prejudicial effect of admitting in evidence the confession of a codefendant which implicated him.~~

RULE 106. REMAINDER OF OR RELATED WRITINGS OR RECORDED STATEMENTS

[Unchanged.]

~~Comment 106~~

~~This rule is substantially the same as Federal Rule 106. In the Washington rule, commas were added between the words "part" and "or" and between "statement" and "which". The added punctuation insures that the phrase "which ought in fairness" is read as modifying all of the nouns ("part . . . writing . . . statement") which precede it. The word "him" has been changed to "the party".~~

~~Existing Washington rules, CR 32(a) and 33(b), provide that the rules of evidence apply with respect to the admission of depositions and interrogatories. The drafters of Federal Rule 106 considered a number of suggestions to include language in the rule indicating that the other rules of evidence apply. The language was not included in the final draft, not because the other rules did not apply, but because the drafters thought such a provision would be surplusage. 1 J. Weinstein, Evidence ¶ 106[01] (1975). Thus, the rules of evidence apply to the admission of any additional evidence under rule 106, and irrelevant portions of documents remain inadmissible under this rule.~~

TITLE II. JUDICIAL NOTICE
RULE 201. JUDICIAL NOTICE OF ADJUDICATIVE FACTS

[Unchanged.]

~~Comment 201~~

~~The rule is the same as Federal Rule 201(a) through (f). Federal Rule 201(g), Instructing Jury, is deleted.~~

~~Prior Washington law has not offered a comprehensive theory of judicial notice. 5 R. Meisenholder, Wash.Prac. § 591 (1965 & Supp.) (hereinafter Meisenholder). Rule 201 establishes a coherent theoretical basis for the taking of judicial notice of adjudicative facts.~~

~~Section (a). The rule applies only to judicial notice of "adjudicative facts" as distinguished from "legislative facts". An adjudicative fact is the "what happened", "who did what and when" kind of question that normally goes to a jury. It seems reasonable to require, as the rule does, that a judicially noticed adjudicative fact must be one not subject to reasonable dispute. Legislative facts are those a court takes into account in determining the constitutionality or interpretation of a statute or the extension or restriction of a common law rule upon grounds of policy. They will often hinge on social, economic, or political facts not generally known by intelligent people or readily determinable by resort to sources of unquestioned accuracy. See 2 K. Davis, Administrative Law § 15.03 (1958). Section (a) excludes legislative facts from the operation of the rule.~~

~~The determination of foreign law is governed by CR 44.1 and RCW 5.24.~~

~~Section (b). This section requires that a judicially noticed fact must not be subject to reasonable dispute and that it must be either generally known in the area or readily found in noncontroversial references.~~

~~For purposes of judicial notice, no distinction between adjudicative and legislative facts has been recognized in prior Washington law. Washington opinions have stated that courts may take judicial notice of facts which are within the common knowledge of the community and facts which are capable of certain verification by reference to competent authoritative sources. Rogstad v. Rogstad, 74 Wn.2d 736, 446 P.2d 340 (1968). See Meisenholder §§ 592, 593. This is consistent with section (b) and adoption of the rule does little to change the kinds of adjudicative facts which may be judicially noticed in Washington. Judicial notice of legislative facts continues to be governed by previous Washington law.~~

~~Sections (c) and (d). Under section (c), the court has discretionary authority to take judicial notice, regardless of whether it is requested by a party. The taking of judicial notice is mandatory under section (d) only when a party requests it and the necessary information is supplied. No procedure is specified to determine what types of information may be considered, and from what sources; nor is the process of evaluation defined. These matters are, however, often defined by statute.~~

~~A number of statutes require the taking of judicial notice in specific instances. See, for example, RCW 4.36.090 (private statutes); RCW 4.36.110 (any ordinance of a city or town in Washington); RCW 5.24.010 (constitution, common law, and statutes of every state, territory, and other jurisdiction of the United States); RCW 28B.19.070 (rules for higher education); RCW 34.04.050(8) (rules of state agencies); RCW 35.03.050 (certain city charters); RCW 35.06.070 (existence of incorporated cities); RCW 35.22.110 (charters of first class cities); RCW 35A.08.120 (certain city charters); RCW 49.48.040 (seal of the Department of Labor and Industries of the State of Washington); RCW 49.60.080 (seal of state human rights commission); RCW 50.12.010 (seal of the employment security commissioner); RCW 51.52.010 (seal of the board of industrial insurance appeals); and RCW 61.12.060 (economic conditions -- discretionary with court).~~

~~The statutes cited are not in conflict with rule 201 and are not superseded. To the extent that a statute applies to legislative facts, the rule does not apply at all. To the extent that a statute applies to adjudicative facts, the statute states a more specific requirement than the more general process of broad applicability defined in the rule.~~

~~As a general rule, a court may take judicial notice of court records in the same case, but not records of a different case. This rule and certain exceptions are discussed in Meisenholder § 594.~~

~~Section (e). Basic considerations of procedural fairness require an opportunity to be heard on the propriety of taking judicial notice and the tenor of the matter noticed. The rule provides this opportunity on request. If a party has received no prior notification that judicial notice will be taken, a request to be heard may be made after judicial notice has been taken. No formal procedure for giving notice is defined.~~

~~There has been no prior Washington authority for the proposition stated in section (e), but an opportunity to be~~

~~heard may often have been accorded as a matter of practice. Meisenholder § 597.~~

~~Section (f). Section (f) appears to be consistent with prior Washington law. There are no decisions authorizing any particular practices or procedures for raising questions of whether particular facts should be judicially noticed. However, it seems beyond dispute that judicial notice may, under appropriate circumstances, be taken by appellate courts. See Meisenholder § 596.~~

~~Federal Rule 201(g), Instructing jury, is deleted. That rule provides:~~

~~(g) Instructing Jury. In a civil action or proceeding, the court shall instruct the jury to accept as conclusive any fact judicially noticed. In a criminal case, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed.~~

~~Article IV, Section 16 of the Washington Constitution prohibits the court from charging the jury with respect to disputed matters of fact. See Hansen v. Wightman, 14 Wn.App. 78, 538 P.2d 1238 (1975) for a recent discussion of this provision. The drafters of the Washington rules felt that a literal application of the Federal Rule may be unconstitutional in some circumstances. The State of Nevada, in promulgating rules of evidence based on the federal rules, felt bound by a similar provision in its constitution to omit Federal Rule 201(g).~~

~~The drafters of the Washington rules felt that the court must be given more discretion, both with respect to whether to receive evidence contrary to a judicially noticed fact, and with respect to the manner of instructing the jury. Recognizing the difficulty of codifying a procedure which would be constitutional in every case, the drafters felt that the constitutional requirement would be better served by deleting the rule and permitting the courts to fashion a constitutional procedure on a case-by-case basis.~~

TITLE III. PRESUMPTIONS IN CIVIL ACTIONS AND PROCEEDINGS

RULE 301. PRESUMPTIONS IN GENERAL IN CIVIL ACTIONS AND PROCEEDINGS [RESERVED]

[Unchanged.]

~~Comment 301~~

~~An earlier draft proposed by the task force and tentatively approved by the Judicial Council included rule 301, titled Presumptions in General in Civil Actions and Proceedings. The proposed rule was the same as Federal Rule 301 and read as follows:~~

~~In all civil actions and proceedings not otherwise provided for by statute or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.~~

~~On reconsideration, the Judicial Council decided to delete the proposed rule from its draft. This decision was based primarily on the fact that the federal courts have not yet developed a uniform practice under the rule, and that we would, in effect, be adopting a rule without knowing its intended application in practice. The Council was particularly concerned about the rule's effect upon "enhanced" presumptions which can be overcome only by clear, cogent, and convincing evidence. The commentators do not agree upon the intended effect of the federal rule in this regard. Some Judicial Council members also expressed the belief that presumptions were beyond the Supreme Court's rulemaking authority.~~

~~The Judicial Council recommends that this rule be reserved, and that it be the subject of further study.~~

RULE 302. APPLICABILITY OF STATE LAW IN CIVIL ACTIONS AND PROCEEDINGS [RESERVED]

[Unchanged.]

~~Comment 302~~

~~The drafters of the Washington rules deleted Federal Rule 302, Applicability of State Law in Civil Actions and Proceedings. That rule would not apply to proceedings in a state court. The converse of Federal Rule 302 – the extent to which federal law applies in state court – is determined by reference to the law of preemption and would not appropriately be defined by a state court rule.~~

TITLE IV. RELEVANCY AND ITS LIMITS

RULE 401. DEFINITION OF "RELEVANT EVIDENCE"

[Unchanged.]

~~Comment 401~~

~~Rule 401 is the same as Federal Rule 401. Although the terminology in some decisions differs from that of the rule, the Washington view of relevancy remains substantially unaltered by rule 401. See 5 R. Meisenholder, Wash. Prac. § 1 (1965 & Supp.).~~

RULE 402. RELEVANT EVIDENCE GENERALLY ADMISSIBLE; IRRELEVANT EVIDENCE INADMISSIBLE

[Unchanged.]

~~Comment 402~~

~~The rule is substantially the same as Federal Rule 402 and is consistent with previous Washington law. See 5 R. Meisenholder, Wash. Prac. § 1 (1965). Federal Rule 402 defers to the United States Constitution and Acts of Congress. Washington rule 402 defers generally to statutes, regulations, and rules which make relevant evidence inadmissible.~~

~~The rule's deference to other codified law making relevant evidence inadmissible applies generally throughout the rules in Title IV. For example, in rape cases, RCW 9A.44.020 defines detailed restrictions upon disclosure of the victim's past sexual behavior. The statute prevails over conflicting provisions in rule 404.~~

RULE 403. EXCLUSION OF RELEVANT EVIDENCE ON GROUNDS OF PREJUDICE, CONFUSION, OR WASTE OF TIME

[Unchanged.]

~~**Comment 403**~~

~~This rule is the same as Federal Rule 403 and is consistent with previous Washington law. See State v. Stevenson, 16 Wn.App. 341, 555 P.2d 1004 (1976).~~

~~It is recognized that certain circumstances call for the exclusion of evidence which is of unquestioned relevance. The rule lists six safeguards by which the trial judge may, in the exercise of discretion, exclude evidence even though it is relevant.~~

~~The rule does not specify surprise as a ground of exclusion, following Wigmore's view of the common law. 6 Wigmore § 1849. The advisory committee note to Federal Rule 403 observes that claims of unfair surprise may still be justified in some cases despite procedural requirements of notice and the availability of discovery, but that the granting of a continuance is a more appropriate remedy than exclusion of the evidence.~~

~~In deciding whether to exclude evidence on grounds of unfair prejudice, consideration should be given to the probable effectiveness or lack of effectiveness of a limiting instruction. The availability of other means of proof may also be an appropriate factor. These procedural factors may favor admission or exclusion, depending on the circumstances.~~

RULE 404. CHARACTER EVIDENCE NOT ADMISSIBLE TO PROVE CONDUCT; EXCEPTIONS; OTHER CRIMES

[Unchanged.]

~~**Comment 404**~~

~~This rule is the same as Federal Rule 404 and conforms substantially to previous Washington law.~~

~~Section (a). Section (a) deals with the question whether character evidence should be admitted to prove that a person acted in conformity therewith on a particular occasion. This use of character evidence is often called "circumstantial". The basic premise is that circumstantial character evidence is inadmissible unless it falls within one of the three exceptions. Once the admissibility of character evidence in some form is established under this rule, reference must then be made to Rule 405 in order to determine the appropriate method of proof. If the character is that of a witness, Rules 608 and 609 provide methods of proof.~~

~~To be distinguished are cases in which a person's character is "in issue". The admissibility of character evidence as proof of a material element is governed by rule 405, not rule 404.~~

~~Rule 404 does not permit the admission of circumstantial character evidence in civil cases. Under rules 404 and 405, evidence of character is admissible in a civil case only if the person's character is actually in issue. Previous Washington law is in accord. 5 R. Meisenholder, Wash. Prac. §§ 2, 3 (1965 & Supp.) (hereinafter Meisenholder).~~

~~Under rule 404(a)(1), the accused in a criminal case may introduce evidence of his good character. Accord, State v. Arine, 182 Wash. 697, 48 P.2d 249 (1935). The evidence must be directed toward a trait of character which is pertinent to rebut the nature of the charge against the defendant. State v. Schuman, 89 Wash. 9, 153 P. 1084 (1915). A character witness for the accused is limited by rule 405(a) to testimony as to the reputation of the accused. Neither rules 404 and 405 nor previous Washington law permit the accused to demonstrate his good character by having a witness testify as to specific instances of good conduct by the accused. 2 J. Weinstein, Evidence ¶ 405[04], at 405-39 (1976); Meisenholder § 4, at 21 n. 7.~~

~~If the accused introduces evidence of good character under rule 404(a)(1), the prosecution may rebut the evidence either by testimony from the prosecutor's own witnesses or by cross-examining the accused's witnesses. 2 J. Weinstein, Evidence ¶ 404[04], at 404-25 (1976). Rebuttal testimony by the prosecution's witnesses is limited under rule 405(a) to the reputation of the accused, but the prosecutor may inquire into specific instances of conduct on cross examination of the witnesses for the accused. 2 J. Weinstein, Evidence, at 405-20. Prior Washington law is in accord. Meisenholder § 4, at 22 n. 15, 23 n. 20.~~

~~Rule 404(a)(2) admits evidence of the character of the victim in a criminal case under certain circumstances. Previous Washington law is substantially in accord with the rule. Where there is an issue of self-defense, the accused may show the victim was the first aggressor by character evidence of the victim's reputation for violent disposition or for using deadly weapons in quarrels or fights. Meisenholder § 4, at 24. Evidence of specific acts or conduct is inadmissible to show the character of the victim, but it may be admissible for the limited purpose of showing whether the accused had a reasonable apprehension of danger from the victim. State v. Walker, 13 Wn.App. 545, 536 P.2d 657 (1975). In rebuttal, the prosecution may show the victim's good character for the pertinent trait, but only after the defendant has attacked that good reputation. Meisenholder § 4, at 25.~~

~~In rape cases, RCW 9A.44.020 defines detailed restrictions upon disclosure of the victim's past sexual behavior. By the terms of rule 402, the statute prevails over conflicting provisions in rule 404. See the comment to rule 402.~~

~~Section (b). Evidence of other crimes, wrongs, or acts is not admissible to prove character as a basis for suggesting that conduct on a particular occasion was in conformity with it. The evidence may, however, be offered for another purpose such as proof of motive or opportunity. The court must determine whether the danger of undue prejudice outweighs the probative value of the evidence, in view of the availability of other means of proof and other factors. Slough & Knightly, Other Vices, Other Crimes, 41 Iowa L.Rev. 325 (1956). Previous Washington law is in accord. See State v. Whalon, 1 Wn.App. 785, 464 P.2d 730 (1970).~~

~~The fact that section (b) uses the discretionary word "may" does not confer arbitrary discretion on the trial judge. Whether evidence is admissible under this section is determined by reference to the considerations set forth in rule 403. Federal Rule 404, Report of the House Committee on the Judiciary. Although the words "crimes, wrongs, or acts" are deliberately imprecise, a number of recent decisions indicate that evidence of this sort should be admitted with extreme caution to avoid prejudice against the defendant, particularly when admitting acts which are not unlawful but which may tend to disparage the defendant. In State v. Draper, 10 Wn.App. 802, 521 P.2d 53 (1974), the court held that in a prosecution for delivery of a controlled substance, it was~~

prejudicial error to admit evidence of a perhaps unusual amount of prescription drugs, lawfully in the defendant's possession. The error may be prejudicial even though the judge has instructed the jury to disregard the evidence of other conduct. State v. Miles, 73 Wn.2d 67, 436 P.2d 198 (1968). These and other decisions are collected and discussed in Meisenholder § 4 (Supp. 1975).

RULE 405. METHODS OF PROVING CHARACTER

[Unchanged.]

Comment 405

For a discussion of the relationship between this rule and rule 404, see the comment to rule 404.

Section (a). This section differs from Federal Rule 405 in that the Washington rule does not permit proof of character by testimony in the form of an opinion. Previous Washington law has not permitted the introduction of opinion testimony to prove a person's character. Thompson Cadillac Co. v. Matthews, 173 Wash. 353, 23 P.2d 399 (1933); Johansen v. Pioneer Mining Co., 77 Wash. 421, 137 P. 1019 (1914); 5 R. Meisenholder, Wash. Prac. § 4 (1965 & Supp.). The drafters of the Washington rule felt that the policy established by decisional law was preferable to that of the federal rule.

On a practical level, the drafters were convinced that weaknesses in such opinion testimony cannot be exposed except with difficulty by cross examination of the witness, and that challenges to the witness' answers on cross examination by extrinsic evidence may not be completely realistic and that it may in effect disguise the opinion of the witness who testifies to reputation. However, again on a practical level, it seems preferable to opinion testimony, because it can much more easily and clearly be tested by cross examination of the witness.

References to opinion testimony were similarly deleted from rule 608.

Section (b). This section is the same as Federal Rule 405(b) and appears to be consistent with existing Washington law. See Johansen v. Pioneer Mining Co., 77 Wash. 421, 137 P. 1019 (1914); Meisenholder §§ 2, 4.

In rape cases RCW 9A.44.020 defines in detail the extent to which the victim's past behavior is admissible and the procedure for seeking its admission. By the terms of rule 402, the statute prevails over inconsistent provisions in rule 405.

RULE 406. HABIT; ROUTINE PRACTICE

[Unchanged.]

Comment 406

This rule is the same as Federal Rule 406. The rule recognizes the relevancy of a person's habit or the routine practice of an organization in proving that conduct on a particular occasion was in conformity with the habit or routine practice. Rule 404 states the general rule that evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion. Why should habit be treated differently under rule 406? The rationale is that habit describes one's regular response to a repeated specific situation so that doing the habitual act becomes semi-automatic. It is the notion of the invariable regularity that gives habit evidence its probative force.

It is not clear to what extent the rule changes previous Washington law. There are cases contrary to the rule, particularly where the evidence bears on the issue of negligence. Rossier v. Payne, 125 Wash. 155, 215 P. 366 (1923); State v. Lewis, 37 Wn.2d 540, 225 P.2d 428 (1950). In a recent case arising out of an automobile accident, the defendant sought to introduce testimony to the effect that the plaintiff was always a fast driver and always drove recklessly. The Court of Appeals affirmed the trial judge's refusal to admit the testimony, saying that it was irrelevant to the issue of whether the recklessness or speed of the plaintiff was the cause of the particular accident in issue. Breimon v. General Motors Corp., 8 Wn.App. 747, 509 P.2d 398 (1973).

Rule 406, however, appears to clarify Washington law rather than to significantly change it. Despite the cases cited above, evidence of habit has been held properly admitted in a number of cases collected in 5 R. Meisenholder, Wash. Prac. § 6 (1965 & Supp.). Evidence offered under this rule could, of course, still be excluded if the court determined that the conduct sought to be shown did not reach the level of habit or routine practice.

RULE 407. SUBSEQUENT REMEDIAL MEASURES

[Unchanged.]

Comment 407

This rule is the same as Federal Rule 407 and is consistent with previous Washington law.

The rule of exclusion has been applied to evidence introduced on the question of liability. Cochran v. Harrison Mem. Hosp., 42 Wn.2d 264, 254 P.2d 752 (1953). Washington courts have justified the principle on the ground that such evidence is irrelevant, Aldread v. Northern Pac. Ry., 93 Wash. 209, 160 P. 429 (1916), and that it is contrary to the policy of encouraging safety measures to admit such evidence. Carter v. Seattle, 21 Wash. 585, 59 P. 500 (1899).

The rule bars evidence to prove "negligence or culpable conduct." It has been held that a virtually identical California statute is inapplicable to a products liability case in which the manufacturer is alleged to be strictly liable for placing a defective product on the market. Ault v. Int'l Harvester Co., 13 Cal.3d 113, 117 Cal.Rptr. 812, 528 P.2d 1148 (1975). But see Smyth v. Upjohn Co., 529 F.2d 803 (2d Cir. 1975) to the contrary.

The Washington cases are consistent with the rule in admitting evidence of subsequent remedial measures for purposes other than proving liability. The rule cites as examples proving ownership, control, or feasibility of precautionary measures, or impeachment. In Washington, see Hatcher v. Globe Union Mfg. Co., 170 Wash. 494, 16 P.2d 824 (1932), Brown v. Quick Mix Co., 75 Wn.2d 833, 454 P.2d 205 (1969) on feasibility of precautionary measures; Peterson v. King County, 41 Wn.2d 907, 252 P.2d 797 (1953) on nature of conditions existing at time of incident; Cochran v. Harri-

son Mem. Hosp., supra, dictum on issue of control of an instrumentality.

Under rule 407, the permissible "other purpose" must be controverted in order to avoid the introduction of evidence under false pretenses. The evidence must be relevant as proof upon the actual issues in the case. See 5 R. Meisenholder, Wash. Prac. § 10 (1965).

RULE 408. COMPROMISE AND OFFERS TO COMPROMISE

[Unchanged.]

Comment 408

This rule is the same as Federal Rule 408 and changes Washington case law only with respect to the admissibility of statements made in compromise negotiations.

The first sentence codifies the common law rule that evidence of an offer to compromise a claim is inadmissible to prove liability or lack thereof. It is consistent with previous Washington law. See Eagle Ins. Co. v. Albright, 3 Wn.App. 256, 474 P.2d 920 (1970). The foundation of the rule in Washington, as in the federal rules, is the policy favoring compromise and settlement of disputes. Berliner v. Greenberg, 37 Wn.2d 308, 223 P.2d 598 (1950).

The second sentence of the rule changed federal law by making evidence of conduct or statements made in compromise negotiations inadmissible. Cf. Factor v. Commissioner, 281 F.2d 100 (9th Cir. 1960). Similarly in Washington, the conduct or statements have been allowed in evidence as admissions of a party opponent, Romano Eng'g Corp. v. State, 8 Wn.2d 670, 113 P.2d 549 (1941), unless the statement of fact is expressly made without prejudice. Wagner v. Peshastin Lumber Co., 149 Wash. 328, 270 P. 1032 (1928).

By contrast, rule 408 makes the evidence inadmissible and is based on the policy of promoting complete freedom of communication in compromise negotiations. Parties are encouraged to make whatever admissions may lead to a successful compromise without sacrificing portions of their case in the event such efforts fail. The rule avoids the generation of controversy over whether a statement was within or without the area of compromise negotiations.

The rule also provides that the exclusionary rule applies only to claims disputed as to validity or amount. There has been no previous authority on this issue in Washington. 5 R. Meisenholder, Wash. Prac. § 9 (1965 & Supp.).

The third sentence, relating to evidence otherwise discoverable, was added by Congress to the Supreme Court draft of the federal rules. The sentence clarifies the dual objective of rule 408 to encourage compromise and to prevent immunization of evidence merely because it is presented in the course of compromise negotiations. 10 Moore's Federal Practice § 408.06 (1976). A party may not use rule 408 as a screen for curtailing the opposing party's rights to discovery. 2 J. Weinstein, Evidence ¶ 408[01] (1976). The Senate Report on rule 408 suggests, for example, that documents disclosed in compromise negotiations are not thereby insulated from discovery. The Conference Report makes it clear that this provision applies to factual evidence as well.

The fourth sentence is consistent with previous Washington law admitting evidence of compromise and offers of compromise when offered for some purpose other than liability. Meisenholder § 9. See Matteson v. Ziebarth, 40 Wn.2d 286, 242 P.2d 1025 (1952) (to prove lack of good faith where good faith in issue); Robinson v. Hill, 60 Wash. 615, 111 P. 871 (1910) (to prove employer-employee relationship). Settlement agreements may be introduced where breach is the issue, or to show bias or interest of witnesses. Meisenholder § 9. The word "negating" is substituted for "negativing," the word used in the federal rule. This is only an improvement in style. No substantive change is intended.

RULE 409. PAYMENT OF MEDICAL AND SIMILAR EXPENSES

[Unchanged.]

Comment 409

This rule is the same as Federal Rule 409 and is consistent with previous Washington law. See Libbee v. Handy, 163 Wash. 410, 1 P.2d 312 (1931). RCW 5.64.010 is consistent with the rule and is not superseded.

RULE 410. INADMISSIBILITY OF PLEAS, OFFERS OF PLEAS, AND RELATED STATEMENTS

[Unchanged.]

Comment 410

This rule is substantially the same as Federal Rule 410 and changes previous Washington law in some respects. Prior to rule 410, offers to compromise criminal actions have not been privileged against disclosure. State v. Bixby, 27 Wn.2d 144, 177 P.2d 689 (1947). Rule 410 makes withdrawn guilty pleas, pleas of nolo contendere, and statements made in connection with offers to compromise criminal actions inadmissible even for impeachment, in any proceeding against the person making the plea or statement. 8 Moore's Federal Practice § 11.08[2]. The only exception is that a statement may be used in a criminal proceeding for perjury or false statement, and then only if the statement was made by the defendant under oath and in the presence of counsel. A third requirement in the federal rule, that the statement be made on the record, is not included in the Washington rule. This omission is necessary because the rules apply in courts, such as district court, where no formal record of the proceedings is kept.

"Perjury" and "false statement" are used generically in the rule to refer to crimes of that nature, regardless of their designations in the criminal code or other applicable statutes.

To admit a withdrawn guilty plea into evidence would frustrate the purpose of allowing the withdrawal and would place the accused in a dilemma inconsistent with the decision to award him a trial. Withdrawn pleas of guilty have long been inadmissible in federal prosecutions. Kercheval v. United States, 274 U.S. 220, 47 S.Ct. 582, 71 L.Ed. 1009 (1927). Rule 410 conforms to this practice. The provisions making offers to compromise inadmissible are designed to encourage the disposition of criminal cases by compromise.

The rule similarly makes pleas of nolo contendere inadmissible. This plea is not recognized in Washington, and rule 410 does not create the right to a plea of nolo contendere. See CrR 4.2(a). The rule would apply only to a plea in a jurisdic-

tion which permits the plea, entered by a person later involved in proceedings in a Washington court.

The rule protects from disclosure only statements "made in connection with, and relevant to" the plea or offer. The rule should not be interpreted as barring admission of statements made to police officers during the early stages of investigation, before an indictment or information is filed. 2 J. Weinstein, Evidence ¶ 410[07] (1975). Nor are statements made as a result of a plea bargain necessarily inadmissible. In Hutto v. Ross, 429 U.S. 28, 97 S.Ct. 202, 50 L.Ed.2d 194 (1976), the defendant had entered into a plea bargain. Two weeks later he confessed to the crime charged. He subsequently withdrew from the bargain and demanded a trial. The Court held the confession admissible, so long as it was voluntary and the defendant knew he could have enforced the bargain whether he confessed or not.

Similarly, the rule probably does not bar the admission of evidence derived as a result of a statement which is inadmissible under rule 410. Suppose that the defendant accepts the prosecutor's offer to accept a guilty plea to a lesser offense if the defendant discloses the location of stolen property. The property is retrieved. The defendant later withdraws the plea and demands a trial. Although no cases directly in point have been found, rule 410 would not appear to bar the use of the property at trial as evidence of the defendant's guilt.

A final sentence was added to the federal rule to provide that the rule does not govern the admission or exclusion of evidence of a deferred sentence. That determination is made by reference to the statutes cited in the rule, the decisions construing them, and in some instances, constitutional principles. See also 5 R. Meisenholder, Wash. Prac., Evidence §§ 9, 300, 421, 423.

RULE 411. LIABILITY INSURANCE

[Unchanged.]

COMMENT 411

This rule is the same as Federal Rule 411 and is consistent with previous Washington law.

The rule is broadly drafted to include contributory and comparative negligence or other fault of the plaintiff as well as fault of a defendant. Like rules 407 and 408, rule 411 allows the evidence if offered for a purpose other than determining fault, such as proof of agency, ownership, or control, or bias or prejudice of a witness.

"It is undoubtedly the general rule in this state, in personal injury cases, that the fact that the defendant carries liability insurance is entirely immaterial on the main issue of liability …" Williams v. Hofer, 30 Wn.2d 253, 265, 191 P.2d 306 (1948).

Existing Washington law is consistent with the rule in admitting evidence of liability insurance for purposes other than a determination of liability. See Robinson v. Hill, 60 Wash. 615, 111 P. 871 (1910) on issue of agency; Jerdal v. Sinclair, 54 Wn.2d 565, 342 P.2d 585 (1959) on issue of ownership of automobile; Moy Quon v. Furuya Co., 81 Wash. 526, 143 P. 99 (1914) on issue of bias or prejudice of witness.

With respect to the plaintiff's insurance coverage, it seems probable that the fact that plaintiff is so covered is inadmissible. 5 R. Meisenholder, Wash. Prac. § 8 (1965 & Supp.), citing Rich v. Campbell, 164 Wash. 393, 2 P.2d 886 (1931). This is in accord with the rule, as is the prohibition against defendant's introduction of evidence that he does not have liability insurance. King v. Starr, 43 Wn.2d 115, 260 P.2d 351 (1953).

The rule does not affect the view that if the mention of insurance is inadvertent and it appears that neither the attorney nor the witness deliberately raised the subject, a mistrial will not be granted. See, e.g., Williams v. Hofer, 30 Wn.2d 253, 191 P.2d 306 (1948). The reference to insurance may, on motion, be stricken and the jury instructed to disregard it. Meisenholder § 8.

RULE 412. SEXUAL OFFENSES—VICTIM'S PAST BEHAVIOR

[Unchanged.]

Comment 412

[1988 Amendment]

In Washington, the admissibility of evidence of a sexual offense victim's past sexual behavior is covered by statute. RCW 9A.44.020, similar in approach to Federal Rule 412, provides that in any prosecution for rape, or for an attempt or assault with intent to commit such crime, evidence of the victim's past sexual behavior is inadmissible on the issue of credibility and may only be admitted on the issue of consent pursuant to the procedures prescribed in the statute.

Inclusion of a reserved ER 412 was intended to remind users of the rules to refer to the statute for guidance. It also recognized the Washington Supreme Court's continuing rule-making authority in this area (as the statute covers a subject within the court's purview) and thus preserved the court's flexibility should it decide at some future time to adopt a rule relating to a victim's past sexual conduct.

TITLE V. PRIVILEGES

RULE 501. GENERAL RULE

[Unchanged.]

Comment 501

[1988 Amendment]

This rule was initially left reserved. The 1988 amendment added references to statutory privileges for the guidance and convenience of both judges and practitioners.

Only the name of the privilege was given, with the text reserved and a statutory reference provided. The qualified journalist's privilege, though found in case law and based on common law rather than the constitution, was included as well. The amendment allowed ready reference to the more common privileges by the bench and bar without eliminating a less often used privilege by accidental omission from the list.

TITLE VI. WITNESSES

RULE 601. GENERAL RULE OF COMPETENCY

[Unchanged]

~~**Comment 601**~~

~~This rule differs significantly from Federal Rule 601. The federal rule eliminates all grounds of incompetency not specifically recognized in the succeeding rules in Title VI. Included among the grounds abolished are religious belief, conviction of a crime, and interest in the litigation. No mental or moral qualifications are specified. The drafters of the Washington rules felt that the subjects covered in Title VI are, in many cases, adequately covered by existing statutes and rules which have become familiar to the members of the bench and bar. Accordingly, rule 601 defers to other statutes and rules defining grounds for incompetence. The grounds for incompetence defined in Title VI supplement those found in existing statutes and rules.~~

~~Civil Cases. Washington statutory law is more restrictive than the federal rules. The basic statutory provision on competence is RCW 5.60.020: "Every person of sound mind, suitable age and discretion, except as hereinafter provided, may be a witness in any action, or proceeding." This statute is supplemented by RCW 5.60.050 which specifies those who are incompetent to testify: "[t]hose who are of unsound mind, or intoxicated at the time of their production for examination, and … [c]hildren under ten years of age, who appear incapable of receiving just impressions of the facts, respecting which they are examined, or of relating them truly."~~

~~The statutory provisions requiring that a witness be of sound mind have been interpreted as being a codification of the common law rule as to mental capacity. A person will be held competent to testify if he understands the nature of an oath and is capable of giving a correct account of what he has seen and heard. State v. Moorison, 43 Wn.2d 23, 259 P.2d 1105 (1953).~~

~~The trial judge has wide discretion in determining the competency of a child as a witness. There is a presumption that a child over ten years of age is competent to testify. For children under ten years of age the test is fairly explicit. "Where it appears that a child has sufficient intelligence to receive just impressions of the facts respecting which he is to testify, has sufficient capacity to relate them correctly and has received sufficient instruction to appreciate the nature and obligations of an oath, he should be permitted to testify no matter what his age." (Footnotes omitted.) Stafford, The Child as a Witness, 37 Wash.L.Rev. 303, 304-05 (1962). It is often appropriate to determine the competency of a child in the absence of the jury. This procedure is authorized by rule 104(c).~~

~~The competency of a person who has been convicted of a crime is the subject of several codified rules. The original Washington statute, RCW 5.60.040, provides that, "any person who shall have been convicted of the crime of perjury shall not be a competent witness in any case, unless such conviction shall have been reversed, or unless he shall have received a pardon." A later statute, RCW 10.52.030, provides that, "[e]very person convicted of a crime shall be a competent witness in any civil or criminal proceeding". This later statute contained no exception for those convicted of perjury. Mullin v. Builders Dev. & Fin. Serv., Inc., 62 Wn.2d 202, 381 P.2d 970 (1963) held that RCW 10.52.030 applied only to criminal cases, while RCW 5.60.040 applied only to civil cases. Thus, the Washington law appears to be that prior conviction of a crime does not make a witness incompetent to testify except, in a civil case, for a prior conviction of perjury.~~

~~Interest was abolished as a ground for disqualification by RCW 5.60.030, but that statute does contain an exception to that rule in the form of a dead man's statute.~~

~~As to religious beliefs, see the comment to rule 610.~~

~~Criminal Cases in Superior Court. Competency of witnesses in superior court criminal cases is governed by CrR 6.12. The language of the rule is quite broad. By its terms, interest is abolished as a basis for incompetency. As to age, the rule eliminates the ten-year-old standard and applies the test of competency to children generally.~~

~~By implication, the rule abolishes other bases of incompetency. Among those are conviction of crime and religious belief. The rule parallels the law in civil cases by retaining unsound mind and intoxication as grounds for a finding of incompetency.~~

~~The Supreme Court has not determined by written opinion whether the statutory grounds for incompetency apply in criminal cases after the adoption of CrR 6.12, and the issue appears to be debatable. See 5 R. Meisenholder, Wash. Prac. §§ 164, 165 (1975 Supp.). The drafters of the rules of evidence recommended that the law be clarified by incorporating the rules of evidence by reference into CrR 6.12(a). Because the rules of evidence incorporate the statutory grounds for incompetency, the statutes would also become clearly applicable to criminal cases.~~

~~[1991 Supplement to Comment]~~

~~The second paragraph of the original comment referred to RCW 5.60.050 as specifying among those who are incompetent to testify "[c]hildren under ten years of age, who appear incapable of receiving just impressions of the facts, respecting which they are examined, or of relating them truly." A 1986 amendment to RCW 5.60.050(2) eliminated the age limitation. The statute now reads "[t]hose who appear incapable of receiving just impressions …".~~

RULE 602. LACK OF PERSONAL KNOWLEDGE

[Unchanged.]

~~**Comment 602**~~

~~This rule is the same as Federal Rule 602 and is consistent with previous Washington law. The required personal knowledge need not be absolute. Testimony has been held competent although qualified by the following expressions: "according to his best impression", "to the best of his judgment and belief", "to the best of your knowledge", that the witness "thought" thus and so, to "your best recollection", in the "best judgment" of the witness, and "it is my belief". These qualifications were expressed in the question or the answer and were apparently interpreted as qualifications upon memory, observation, perception, or the reliance of the witness upon his memory or observation. 5 R. Meisenholder, Wash. Prac. § 331 (1965 & Supp.).~~

RULE 603. OATH OR AFFIRMATION

[Unchanged.]

~~Comment 603~~

~~This rule is the same as Federal Rule 603 and is substantially in accord with previous Washington law. The statutes relating to oaths, RCW 5.28.010 through 5.28.060, provide that different forms of the oath may be used as required by the special circumstances of the witness. The statutes are consistent with the rule and are not superseded. The use of an affirmation may be substituted for an oath if the witness so desires. While the form of the oath or affirmation may be varied, it has been held that some form of swearing in the witnesses is required. In re Ross, 45 Wn.2d 654, 277 P.2d 335 (1954).~~

RULE 604. INTERPRETERS

[Unchanged.]

~~Comment 604~~

~~This rule is the same as Federal Rule 604. Statutory law provides for interpreters for persons of impaired speech or hearing involved in legal proceedings. RCW 2.42.010 .050. It speaks of a "qualified interpreter" as "one who is able readily to translate spoken English to and for impaired persons and to translate statements of impaired persons into spoken and written English". RCW 2.42.020(2). The interpreter is required to take an oath that he will make a true interpretation to the person being examined of all the proceedings in a language which that person understands, and that he will repeat the statements of such person to the court or other agency conducting the proceedings, in the English language, to the best of his skill and judgment. RCW 2.42.050. Although the statute is more detailed than the rule, it in no way conflicts with the rule and is not superseded.~~

~~[1991 Supplement to Comment]~~

~~Legislation adopted in 1989 modified existing statutes governing the appointment of interpreters. Further amendments adopted in 1990 recodified portions of RCW 2.42 into a new chapter 2.43. Practitioners should also be aware of General Rule 11.1, adopted in 1989, which sets forth a code of conduct for interpreters.~~

RULE 605. COMPETENCY OF JUDGE AS WITNESS

[Unchanged.]

~~Comment 605~~

~~This rule is the same as Federal Rule 605 and is consistent with previous Washington law. Maitland v. Zanga, 14 Wash. 92, 44 P. 117 (1896). The rule is absolute; there are no limitations or qualifications.~~

~~The rule provides for automatic objection. This saves counsel from the predicament of choosing between remaining silent and thereby waiving objection, or objecting, which is apt to be considered an offensive attack on the judge's integrity.~~

~~The rule does not prevent the judge from testifying in collateral proceedings as to what occurred in an earlier trial. A judge is barred from testifying only at a trial over which he is presiding.~~

RULE 606. COMPETENCY OF JUROR AS WITNESS

[Unchanged.]

~~Comment 606~~

~~This rule is the same as section (a) of Federal Rule 606. Section (b), Inquiry into validity of verdict or indictment, is omitted.~~

~~This rule is contrary to RCW 5.60.010, which provides that a juror who is otherwise competent may testify at trial. Although rule 601 defers generally to statutes, it only defers to statutes which make a person incompetent to testify. It leaves open the possibility for subsequent court rules establishing other grounds for incompetency. Thus, rule 606 prevails over, and supersedes, RCW 5.60.010.~~

~~Section (b) of Federal Rule 606 concerns the extent to which testimony, affidavits, or statements of jurors may be received for the purpose of invalidating or supporting a verdict or indictment. Previous Washington law has defined the extent to which jurors' testimony and affidavits are admissible in terms of their being inadmissible if the evidence "inheres in the verdict." For a more complete discussion of this doctrine, see 2 L. Orland, Wash. Prac. § 294 (3d ed. 1972). Federal Rule 606(b) is omitted in deference to existing Washington law.~~

RULE 607. WHO MAY IMPEACH

[Unchanged.]

~~Comment 607~~

~~This rule is the same as Federal Rule 607 and reverses the traditional common law rule against impeaching one's own witness. The common law rule has been the subject of much criticism in that it is based on false premises. A party does not vouch for the credibility of witnesses because a party rarely has free choice in selecting them. Denial of the right to impeach would leave the party at the mercy of the witness as well as of the adversary. See Federal Rule 607 advisory committee note.~~

~~There is precedent for permitting impeachment of one's own witness. Rule 32(a)(1) of the Federal Rules of Civil Procedure allows any party to impeach a witness by means of a deposition, and rule 43(b) has allowed the calling and impeachment of an adverse party or of a person identified with an adverse party. Similar provisions are found in the corresponding civil rules in Washington.~~

~~Prior Washington law has allowed a party to impeach the party's own witness but only if the party was "taken by surprise by reason of affirmative testimony prejudicial to the interests of the party calling the witness". State v. Thomas, 1 Wn.2d 298, 303, 95 P.2d 1036 (1939). The two-part test required both the showing of surprise and testimony prejudicial to the party's interests. The requirement of prejudice was not met when the witness merely failed to testify as favorably as expected. Cole v. McGhie, 59 Wn.2d 436, 361 P.2d 938, 367 P.2d 844 (1961). Cf. State v. Calhoun, 13 Wn.App. 644, 536 P.2d 668 (1975).~~

RULE 608. EVIDENCE OF CHARACTER AND CONDUCT OF WITNESS

[Unchanged.]

~~Comment 608~~

~~Section (a). This rule differs from Federal Rule 608 in that it does not authorize the introduction of evidence of character in the form of an opinion. The rule thus parallels the approach taken in rule 405. The rule restricts the use of character evidence for impeachment to evidence of the witness' reputation for truthfulness, in accordance with existing Washington law. See State v. Swenson, 62 Wn.2d 259, 382 P.2d 614 (1963). The proper procedure for introducing evidence of character is described in 5 R. Meisenholder, Wash. Prac. § 301 (1965 & Supp.). The drafters of the Washington rule felt that impeachment by use of opinion is too prejudicial and on a practical level is not easily subject to testing by cross examination or contradiction.~~

~~By statute, a rape victim's reputation concerning sexual matters is inadmissible in proceedings against the accused. RCW 9A.44.020. The statute is consistent with the rule and is not superseded.~~

~~Section (b). This section is the same as Federal Rule 608(b) and gives the court discretion to allow inquiry on cross examination into specific instances of conduct bearing upon the credibility of the witness. The effect of rule 608(b) upon existing Washington law is not entirely clear. Although there is not total consistency in the Washington case law, the general rule appears to be that acts of misconduct not the subject of a prior conviction have not been admissible for impeachment purposes. "[A] witness may not be impeached by showing specific acts of misconduct. This is true whether the impeachment is attempted by means of extrinsic evidence or cross-examination." (Citations omitted.) State v. Emmanuel, 42 Wn.2d 1, 13, 253 P.2d 386 (1953). There are some cases written in terms of a discretionary power in the judge to admit evidence of acts of misconduct, but these appear to be early cases and probably do not represent the current rule. Meisenholder § 301. Prior to the adoption of RCW 9.79.150, in prosecutions involving sexual matters, the judge had the discretionary power to permit the prosecuting witness to be questioned about acts of unchastity. State v. Linton, 36 Wn.2d 67, 216 P.2d 761 (1950). The statute removes the judge's discretion by making sexual conduct inadmissible on the issue of credibility. The drafters of the Washington rules felt that the rule, restricted as it is to matters probative of truthfulness or untruthfulness, clarified the law and reflected a sound policy.~~

~~A third, unlettered section appears in Federal Rule 608. That section provides:~~

~~The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of his privilege against self incrimination when examined with respect to matters which relate only to credibility.~~

~~This section was omitted from the Washington rule, not because of any fundamental disagreement with the policy expressed, but because the drafters felt that the subject was more appropriately left to developing principles of constitutional law.~~

RULE 609. IMPEACHMENT BY EVIDENCE OF CONVICTION OF CRIME

[Unchanged.]

~~Comment 609~~

~~This rule is substantially the same as Federal Rule 609 and is more restrictive than previous Washington law.~~

~~Two Washington statutes provide that the credibility of a witness may be attacked by evidence that the witness had been previously convicted of a crime. RCW 5.60.040; 10.52.030. The statutes, and some limitations developed by decisional law, are discussed in 5 R. Meisenholder, Wash. Prac. § 300 (1965 & Supp.). The Washington Supreme Court has recently expressed some concern about the constitutionality of the statutes, but it has not invalidated them. State v. Murray, 86 Wn.2d 165, 543 P.2d 332 (1975) (Rosellini, J., concurring); State v. Hultenschmidt, 87 Wn.2d 212, 550 P.2d 1155 (1976). Justice Rosellini, concurring in State v. Murray, above, observed that, "These statutes, relating as they do to the judicial process, may be superseded by rule of court." 86 Wn.2d at 170. Rule 609 offers a balance between the right of the accused to testify freely in his own behalf and the desirability of allowing the State to attack the credibility of the accused who chooses to testify. The two statutes in point are superseded.~~

~~Section (a). This section narrows the scope of convictions which may be used to impeach the accused in a criminal case. RCW 10.52.030, which is superseded by the rule, did not contain the restrictions expressed in section (a). This portion of the rule will not cause a different result in most civil cases because misdemeanor convictions were not ordinarily admissible for impeachment in civil cases under prior law, and they remain excluded by the 1-year limitation defined by the rule. See Willey v. Hilltop Assocs., 13 Wn.App. 336, 535 P.2d 850 (1975); RCW 9A.04.040.~~

~~Section (b). This section narrows the scope of convictions which may be used for impeachment. No time limit was found in previous Washington law. See State v. Robinson, 75 Wn.2d 230, 450 P.2d 180 (1969).~~

~~Section (c). This section supersedes prior Washington law holding that a pardon has no effect upon the admissibility of a conviction for impeachment. See State v. Serfling, 131 Wash. 605, 230 P. 847 (1924); State v. Knott, 6 Wn.App. 436, 493 P.2d 1027 (1972).~~

~~Section (d). This section gives somewhat more discretion to the trial judge than prior Washington law holding juvenile adjudications inadmissible for impeachment. See State v. Temple, 5 Wn.App. 1, 485 P.2d 93 (1971). The federal term, "juvenile adjudication," is changed in the text of the rule to "finding of guilt in a juvenile offense proceeding". This change conforms to the Washington juvenile court act and makes it clear that adjudications of dependency remain inadmissible.~~

~~Section (e). The first sentence of this section is consistent with prior Washington law. State v. Robbins, 37 Wn.2d 492, 224 P.2d 1076 (1950). There appears to be no prior law directly bearing upon the second sentence.~~

~~In some situations a party may wish to use evidence of a prior conviction as substantive evidence of a fact alleged in~~

~~subsequent litigation. Rule 609 would not apply because it relates only to impeachment by evidence of a conviction. Criminal convictions as substantive evidence are governed by rule 803(a)(22).~~

~~[1988 Amendment]~~

~~[Section (a).] The 1988 amendment eliminated an ambiguity in the general rule governing impeachment by evidence of a prior conviction. Limitations on the use of felony convictions for impeachment, which under the earlier language of the rule appeared to apply only to criminal defendants or witnesses testifying on behalf of such defendants, were made applicable to all witnesses in both civil and criminal cases.~~

~~The drafters concluded that prior convictions for felonies not involving dishonesty or false statement can be highly prejudicial and that the restrictive test set forth in rule 609(a)(1) should apply evenhandedly to all witnesses in any kind of case to which these rules apply.~~

RULE 610. RELIGIOUS BELIEFS OR OPINIONS

[Unchanged.]

~~Comment 610~~

~~Although the rule is the same as Federal Rule 610, it is not intended to reflect any departure from a similar provision in the Washington Constitution. Const. art. 1, § 11 (amend. 34).~~

RULE 611. MODE AND ORDER OF INTERROGATION AND PRESENTATION

[Unchanged.]

~~Comment 611~~

~~This rule is the same as Federal Rule 611. Although the rule is primarily one of discretion, it is not intended to broaden the discretion permitted under previous law. As to the scope of cross examination, see State v. Robideau, 70 Wn.2d 994, 425 P.2d 880 (1967). As to leading questions, see State v. Scott, 20 Wn.2d 696, 149 P.2d 152 (1944).~~

RULE 612. WRITING USED TO REFRESH MEMORY

[Unchanged.]

~~Comment 612~~

~~This rule is substantially the same as Federal Rule 612. An introductory reference in the federal rule to the Jencks Act, 18 U.S.C. § 3500, is omitted from the Washington version because the statute would normally be inapplicable in state court. Also omitted from the Washington version is a clause at the end of the federal rule, providing: "except that in criminal cases when the prosecution elects not to comply, the order shall be one striking the testimony or, if the court in its discretion determines that the interests of justice so require, declaring a mistrial." Although this provision appears to be a restriction on the federal court's discretion, the advisory committee's note to Federal Rule 612 indicates that the provision is included only to parallel the Jencks Act, and that other alternatives such as contempt or dismissal remain available under the Federal Rules of Criminal Procedure. The drafters of the Washington rule felt that this approach was unduly confusing and that the clause could be eliminated without compromising the substance of the rule.~~

~~Under previous Washington law, there has been a distinction between memoranda used to refresh memory before trial and those used during the appearance of the witness in court. Under State v. Little, 57 Wn.2d 516, 358 P.2d 120 (1961), memoranda used in court are clearly subject to a right of inspection by opposing counsel, but there has been no similar right to inspect memoranda used to refresh memory before trial. State v. Paschall, 182 Wash. 304, 47 P.2d 15 (1935). The rule changes previous law to the extent that it gives the court discretion to permit inspection of memoranda used before trial.~~

RULE 613. PRIOR STATEMENTS OF WITNESSES

[Unchanged.]

~~Comment 613~~

~~This rule is a modification of Federal Rule 613 and conforms substantially to previous Washington law.~~

~~Section (a) of the federal rule abolishes the old English requirement that a witness be shown a prior written statement before opposing counsel can cross-examine the witness about the statement. Similarly, the federal rule provides that the contents of a prior oral statement need not be disclosed to the witness before cross examination.~~

~~In Washington, previous decisional law is not entirely clear but appears to be closer to the common law view. With reference to the prior oral statements, counsel must ask foundation questions which substantially repeat the prior inconsistent statement and direct the attention of the witness to the circumstances under which he purportedly made the statement. With reference to prior written statements, similar foundation questions are required, but there appears to be no decisional law requiring the written statement to actually be shown to the witness before cross examination. 5 R. Meisenholder, Wash. Prac., Evidence § 296 (1965 & Supp.).~~

~~The advisory committee's note to Federal Rule 613 indicates that the federal drafters considered the common law rule to be a "useless impediment to cross-examination." The drafters of the proposed Washington rule agreed to the extent that the common law requirement can be a useless impediment under some circumstances. The drafters felt, however, that the court should be given some measure of discretion to require that the prior statement be disclosed if it would be manifestly unfair to begin cross-examining the witness before disclosing the statement. Accordingly, section (a) of the rule provides that the court "may require" that the prior statement be shown or its contents disclosed to the witness before cross examination.~~

~~Both the federal rule and the Washington rule also provide that the prior statement must, on request, be shown or disclosed to the lawyer who originally called the witness. This provision, which is consistent with previous law, protects against unwarranted insinuations that a statement was made when in fact it was not. It also serves to prepare counsel for an effort to rehabilitate the witness on redirect exami-~~

nation. Butcher v. Seattle, 142 Wash. 588, 253 P. 1082 (1927).

Section (b) is the same as Federal Rule 613(b) and provides that extrinsic evidence of a prior inconsistent statement is not admissible unless the witness is given an opportunity to explain or deny the statement. Previous Washington law is in accord. Meisenholder § 296. The rule affords a measure of discretion in "the interests of justice" to allow for unusual circumstances such as a witness becoming unavailable by the time a prior inconsistent statement is discovered.

There are prior Washington decisions to the effect that if the witness responds to foundation questions by admitting making the prior inconsistent statement, then extrinsic evidence of the statement is inadmissible. It is felt that the additional extrinsic evidence would usually be of little value and would be a waste of time. Meisenholder § 296. Although rule 613 does not expressly bar the admission of extrinsic evidence under these circumstances, rule 403 gives the court broad discretion to exclude evidence on the grounds that it would cause undue delay, be a waste of time, or that it is a needless presentation of cumulative evidence.

It should be remembered that rule 613 relates to the admission of evidence for impeachment rather than as substantive evidence. Section (b) of rule 613 expressly disclaims any application to admissions of a party opponent as defined in rule 801(d)(2). The admissibility of hearsay statements as substantive evidence is governed by the rules in Title VIII.

RULE 614. CALLING AND INTERROGATION OF WITNESSES BY COURT

[Unchanged.]

Comment 614

Sections (a) and (b) are modifications of Federal Rule 614. Section (c) is the same as Federal Rule 614(c). As modified, the rule is consistent with previous Washington law.

Section (a). There is dictum to the effect that a trial judge may call witnesses in Washington. Ramsey v. Mading, 36 Wn.2d 303, 217 P.2d 1041 (1950). The phrase "where necessary in the interests of justice" has been added to the language of the federal rule to insure against unlimited, unreviewable discretion. If the court intends to call a witness, the judge, in fairness, should confer with counsel before calling the witness, and the conference should be on the record.

The federal rule provides that the court may also call a witness "at the suggestion of a party." The Washington rule substitutes the phrase "on motion of a party." The drafters of the Washington rule felt that the word "suggestion" was ambiguous and that "motion" was more precise in terms of established practice under the civil and criminal rules.

Section (b). A trial judge in Washington may question a witness so long as the questions do not violate the constitutional prohibition against a judge commenting on the evidence. Const. art. 4, § 16; State v. Brown, 31 Wn.2d 475, 197 P.2d 590, 202 P.2d 461 (1948); 5 R. Meisenholder, Wash. Prac. § 269 (1965 & Supp.).

Section (c). Counsel may object to the judge's questions on the basis of any of the rules of evidence. This section is designed to relieve counsel of the embarrassment of objecting to the judge's questions in front of the jury. The objection is not automatic, however, as it is under rule 605.

RULE 615. EXCLUSION OF WITNESSES

[Unchanged.]

Comment 615

This rule differs from Federal Rule 615 in that the word "may" has been substituted for "shall" in the first sentence, and the words "reasonably necessary" have been substituted for "essential" in the last sentence. The word "may" preserves the discretionary nature of the rule under previous Washington law. State v. Adams, 76 Wn.2d 650, 458 P.2d 558 (1969). The drafters of the Washington rule felt that the federal rule's use of the word "essential" in subsection (3) established an inordinately strict test which could force an unjustified reversal on appeal. The test of "reasonably necessary" offers more flexibility.

The rule modifies previous Washington law in that it delineates certain witnesses who may not be excluded. Under previous law, the judge was given more discretion in this regard. State v. Weaver, 60 Wn.2d 87, 371 P.2d 1006 (1962).

TITLE VII. OPINIONS AND EXPERT TESTIMONY
RULE 701. OPINION TESTIMONY BY LAY WITNESSES

[Unchanged.]

Comment 701

This rule is the same as Federal Rule 701. It is essentially a rule of discretion and differs from previous law more in form than substance. The rule requires the trial judge, on the basis of the posture of the particular case, to decide whether concreteness, abstraction or a combination of both will be most effective in enabling the jury to ascertain the truth and reach a just result. In applying the rule, it should be kept in mind that its purpose is to eliminate time-consuming quibbles over objections that would not affect the outcome regardless of how they were decided. The emphasis belongs on what the witness knows and not on how he is expressing himself. 3 J. Weinstein, Evidence paragraph 701(02) (1975).

In several recent cases the Washington Supreme Court has cited section 401 of the Model Code of Evidence as controlling the admission of a lay opinion testimony in Washington. See Church v. West, 75 Wn.2d 502, 452 P.2d 265 (1969); 5 R. Meisenholder, Wash. Prac. section 341 (1975 Supp.). Section 401 would usually yield the same result as decisional law predating it. Some examples of admissible opinion testimony are: the speed of a vehicle, the mental responsibility of another, whether another was "healthy", the value of one's own property, and the identification of a person. Meisenholder section 341 (1975 Supp.). The 2004 amendment is not intended to affect the typical examples of admissible opinion testimony cited in the preceding sentence.

Differences between existing Washington law and rule 701 are largely matters of form rather than substance. Although Model Code section 401 assumes that the witness may generally testify in terms of inference and opinion, the court may require the testimony to be stated in nonabstract

~~detail if it finds that the witness is capable of doing so satisfactorily and that the statement by the witness of his conclusory inferences might mislead the trier of fact. Rule 701 approaches the problem in reverse. It assumes that the witness will give his testimony by stating his observations in as raw a form as practicable, but permits him to resort to inferences and opinions when this form of testimony will be helpful. Both rules give the trial court a wide latitude of discretion. As a practical matter, rule 701 is unlikely to change Washington law. See Meisenholder section 343.~~

~~The subject matter of rule 701 is analyzed in greater detail in Powell & Burns, A Discussion of the New Federal Rules of Evidence, 8 Gonz. L. Rev. 1, 14 - 16 (1972).~~

RULE 702. TESTIMONY BY EXPERTS

[Unchanged.]

~~Comment 702~~

~~This rule is the same as Federal Rule 702 and is consistent with previous law giving the court broad discretion to determine whether a witness is qualified to express an expert opinion. See State v. Tatum, 58 Wn.2d 73, 360 P.2d 754 (1961).~~

~~The Washington Supreme Court has more recently cited section 401 of the Model Code of Evidence as governing the admissibility of expert testimony. See Church v. West, 75 Wn.2d 502, 452 P.2d 265 (1969). However, the results and language of these opinions indicate that in effect the court interprets section 401 in line with the prior general Washington case law. 5 R. Meisenholder, Wash. Prac. § 351 (Supp. 1975).~~

RULE 703. BASES OF OPINION TESTIMONY BY EXPERTS

[Unchanged.]

~~Comment 703~~

~~This rule is the same as Federal Rule 703. The first sentence codifies the universally accepted principle that an expert may base an opinion on (1) firsthand information or (2) facts or data presented to him at trial and is consistent with previous Washington law. See 5 R. Meisenholder, Wash.Prac. §§ 354, 355 (1965 & Supp.). The second sentence allows an expert to base an opinion on data which could not be admitted in evidence provided it is of the type reasonably relied upon by experts in forming opinions upon the subject in their particular field of competence. Before an expert will be permitted to testify upon the basis of facts not admissible in evidence, the court will have to find pursuant to rule 104(a) that the particular underlying data is of a kind that is reasonably relied upon by experts in the particular field in reaching conclusions. If there is a serious issue the trial judge will examine the expert outside the presence of the jury to determine whether these conditions are met. Since rule 703 is concerned with the trustworthiness of the resulting opinion, the judge should not allow the opinion if the expert can show only that he customarily relies upon such material or that it is relied upon only in preparing for litigation. The expert must establish that he as well as others would act upon the information for purposes other than testifying in a lawsuit. 3 J. Weinstein, Evidence ¶ 703[01] (1975).~~

~~The expert will ordinarily be in the best position to know what data can be reasonably relied upon, and the court will usually follow the expert's advice on the point. The court's decision will, to a large extent, be based on the degree of confidence it has in the professional caliber and ethics of the expert group involved. Physicians are likely to be given more leeway than accidentologists. 3 J. Weinstein, Evidence ¶ 703[01].~~

~~Several older Washington cases suggest that the opinion of an expert based solely upon hearsay reports or other hearsay is inadmissible. Meisenholder § 357. One case, however, held that a doctor could state his opinion that the eyesight of a person was normal when the doctor's opinion was based upon his office record of visual field charts prepared by a technician during the course of examination by the technician. Engler v. Woodman, 54 Wn.2d 360, 340 P.2d 563 (1959). And in State v. Wineberg, 74 Wn.2d 372, 444 P.2d 787 (1968), the court held that an expert could, in the trial court's discretion, be permitted to give an opinion as to the value of property even though some of the factors (e.g., comparable sales prices) would be inadmissible as hearsay, so long as the opinion was the product of the expert's own independent judgment. Rule 703 reflects the approach taken in the more recent cases.~~

RULE 704. OPINION ON ULTIMATE ISSUE

[Unchanged.]

~~Comment 704~~

~~This rule is the same as Federal Rule 704 and is consistent with previous Washington law. In rejecting challenges that opinions should have been excluded because they were opinions on ultimate facts, the court has permitted opinions to be voiced upon various matters: that the physical condition of prosecuting witness could not have been the result of ordinary normal sexual intercourse, the point of impact between vehicles based upon skidmarks, the sanity or insanity of a criminal defendant, the possibility of gainful employment, how a disease would be communicated, and other matters. 5 R. Meisenholder, Wash.Prac. § 356 (1965 & Supp.).~~

~~Except for testimony concerning foreign law, experts are not to state opinions of law or mixed fact and law. On this basis, questions such as whether X was negligent can be excluded. Meisenholder § 356.~~

~~The introduction of evidence under rule 704 is subject to the restrictions of rules 701 and 702, which require opinions to be helpful to the trier of fact, and rule 403, which authorizes the exclusion of time-wasting evidence.~~

RULE 705. DISCLOSURE OF FACTS OR DATA UNDERLYING EXPERT OPINION

[Unchanged.]

~~Comment 705~~

~~This rule is the same as Federal Rule 705. It clarifies Washington law by defining a procedure which cannot be determined by reference to decisional law. See 5 R. Meisen-~~

holder, Wash.Prac. § 354 (1965 & Supp.). The use of hypothetical questions, often criticized by the authorities, becomes an optional tactic rather than a requirement, unless otherwise ordered by the court.

Without preliminary disclosure at trial of underlying data, effective cross-examination is often impossible unless the information has been obtained through pretrial discovery. The court, therefore, should liberally grant permission for depositions and other discovery with respect to experts under CR 26(b)(4). Smith & Henley, Opinion Evidence: An Analysis of the New Federal Rules and Current Washington Law, 11 Gonz.L.Rev. 692, 697-98 (1976).

RULE 706. COURT APPOINTED EXPERTS

[Unchanged.]

Comment 706

This rule is the same as Federal Rule 706, except that a provision in section (b) for compensating experts from public funds was deleted. Rule 706 does not apply to the appointment of defense experts in indigent criminal cases. That practice is governed by a more specialized rule, CrR 3.1.

Legal writers and revisers have long favored reforming trial practice by implementing the trial judge's common law power to call experts. Their imprecations against the "battle of experts" led to the drafting of the Uniform Expert Testimony Act in 1937, which later formed the basis for rules 403-410 of the Model Code of Evidence, for rules 59, 60, and 61 of the Uniform Rules of Evidence, and Federal Rule of Evidence 706. 3 J. Weinstein, Evidence ¶ 706 [01] (1975).

There is dicta in the Washington cases suggesting that a judge may appoint an expert witness in nonjury cases. Ramsey v. Mading, 36 Wn.2d 303, 310-11, 217 P.2d 1041 (1950). (The dictum in Ramsey was inaccurately characterized as a holding in State v. Swenson, 62 Wn.2d 259, 277, 382 P.2d 614 (1963).) A relatively small number of rules and statutes relate to the appointment and compensation of experts in specific kinds of cases. Rule 706 codifies the common law power of the court to call an expert and defines a procedure applicable to all cases.

Expert witness fees in state condemnation proceedings are payable from public funds, as anticipated by Federal Rule 706, but only pursuant to a statutory scheme which imposes certain conditions and restrictions not found in the federal rule. See RCW 8.25.070. The statute does not mention the possibility of the expert being appointed by the court, and the statute does not authorize the disbursement of public funds for an appointed expert. The drafters of the Washington rule eliminated the language in Federal Rule 706 authorizing disbursement of public funds in deference to applicable statutes.

There is an obvious danger that the jury will be more impressed by an expert appointed by the court than by one called by a party. It has been argued that to disclose to the jury the fact that an expert was appointed by the court would violate the state constitutional prohibition against a judge commenting on the evidence. 5 R. Meisenholder, Wash.Prac. § 363 (1965); Const. art. 4, § 16. The court's discretion to make such a disclosure under section (c) should be used with extreme caution to avoid the possibility of commenting on the evidence.

TITLE VIII. HEARSAY

RULE 801. DEFINITIONS

[Unchanged.]

Comment 801

This rule is the same as Federal Rule 801, except that subsection (d)(2)(iv) has been modified with respect to the admissibility of statements by agents and servants.

Section (a). The definition of "statement" is consistent with previous Washington law. Oral assertions, written assertions, and assertive conduct all constitute statements, but acts of nonassertive conduct do not. 5 R. Meisenholder, Wash.Prac. § 387 (1965 & Supp.).

Section (b). Section (b) is self-explanatory.

Section (c). The definition of "hearsay" is substantially in accord with previous Washington law. See Moen v. Chestnut, 9 Wn.2d 93, 113 P.2d 1030 (1941).

Section (d). This section excludes from the definition of hearsay several types of statements which literally are within the definition. Statements excluded from the hearsay rule section (d) are admissible as substantive evidence. The rule does not affect the use of prior inconsistent statements to impeach a witness. The use of these statements for impeachment is governed by rule 613.

Subsection (d)(1) defines the extent to which prior out-of-court statements are admissible as substantive evidence if the declarant is presently available for cross-examination at trial. One Washington case is in accord with the theory expressed by the rule. State v. Simmons, 63 Wn.2d 17, 385 P.2d 389 (1963). Other cases, however, are to the contrary. Meisenholder § 381. The rule clarifies the law by detailing the circumstances under which the statements are admissible and conforms state law to federal practice.

Subsection (d)(1)(i) provides that a witness' prior inconsistent statement is admissible as substantive evidence if it was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition. The rule does not require the statement to have been subject to cross-examination at the time it was made. See 120 Cong. Rec. 2386 (1974), quoted in 4 J. Weinstein, Evidence 801-24 (1975). The rule would not, however, necessarily admit statements made in pretrial affidavits. The rule applies only to statements given in a trial, hearing, proceeding, or deposition. Although the meaning of "proceeding" is not yet clear, it has been observed that the words of limitation were designed in part to prevent the admission of affidavits given by a coerced or misinformed witness. 4 J. Weinstein, Evidence ¶¶ 801(d)(1)[01], 801(d)(1)(A)[01] (1975). The constitutionality of a California statute even less restrictive than rule 801(d)(1)(i) was upheld in California v. Green, 399 U.S. 149, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970).

Subsection (d)(1)(ii) makes statements admissible as substantive evidence which were previously admissible only to rehabilitate an impeached witness. See Meisenholder § 306.

~~Subsection (d)(1)(iii) is consistent with previous Washington law. See State v. Simmons, 63 Wn.2d 17, 385 P.2d 389 (1963).~~

~~Subsection (d)(2) differs from previous Washington law more in theory than in practice. Previous decisions have considered admissions by party-opponents to be hearsay but have admitted them as an exception to the hearsay rule. Meisenholder § 421. Rule 801 continues to admit the statements, not as an exception to the hearsay rule, but by excluding them from the definition of hearsay altogether.~~

~~Statements of others that are expressly adopted by a party have been held admissible as admissions. State v. McKenzie, 184 Wash. 32, 49 P.2d 1115 (1935). Statements by authorized persons have been similarly held to be admissions. State ex rel. Ledger Pub'g Co. v. Gloyd, 14 Wash. 5, 44 P. 103 (1896).~~

~~Federal Rule 801 provides in relevant part: "A statement is not hearsay if . . . [t]he statement is offered against a party and is . . . a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship. . . ." The Washington cases have not adopted the rule of broader admissibility expressed by the federal rule. The traditional rule, which was applied in early Washington decisions, was that, "the acts and declarations of the agent, when acting within the scope of his authority, having relations to, and connected with, and in the course of, the particular transaction in which he is engaged, are, in legal effect, the acts or declarations of his principal." Tacoma & E. Lumber Co. v. Field & Co., 100 Wash. 79, 86, 170 P. 360 (1918). This was known as the "res gestae" rule, and the admissibility of an agent's statement depended upon how closely the statement was related to the transaction in question. Meisenholder § 425(1).~~

~~Later decisions have phrased the rule not in terms of res gestae, but in terms of whether the agent was authorized to make the statement on behalf of the principal. Meisenholder § 425(1). This has become known as the "speaking agent" approach and has continued to be applied in relatively recent decisions. See, e.g., Kadiak Fisheries Co. v. Murphy Diesel Co., 70 Wn.2d 153, 422 P.2d 496 (1967). Accord, Restatement (Second) of Agency §§ 286-288 (1958). The drafters of the Washington rule felt that existing Washington law, as exemplified by the later cases, reflected the better policy and deleted the language in the federal rule which would have broadened the admissibility of statements by agents.~~

~~The provision concerning statements by coconspirators is consistent with previous Washington law. Meisenholder § 430.~~

RULE 802. HEARSAY RULE

[Unchanged.]

~~Comment 802~~

~~The language of Federal Rule 802 is modified to adapt the rule to state practice. The rule preserves other court rules such as CR 43(e), authorizing the admission of hearsay evidence under particular circumstances.~~

RULE 803. HEARSAY EXCEPTIONS; AVAILABILITY OF DECLARANT IMMATERIAL

[Unchanged.]

~~Comment 803~~

~~This rule is the same as Federal Rule 803, except that one addition is made in subsection (a)(13), a minor editorial improvement is made in subsection (a)(22), and subsection (a)(24) is omitted.~~

~~Subsection (a)(1). This subsection is consistent with previous Washington law. Beck v. Dye, 200 Wash. 1, 92 P.2d 1113, 127 A.L.R. 1022 (1939).~~

~~Subsection (a)(2). This subsection is consistent with previous Washington law. Beck v. Dye, supra.~~

~~Subsection (a)(3). This subsection is a specialized application of the rule expressed in subsection (a)(1). Under previous law it was not clear whether statements to a physician of the declarant's present pain and suffering were admissible. See 5 R. Meisenholder, Wash.Prac. § 472 (1965 & Supp.). The statements are admissible under rule 803.~~

~~Statements of the declarant's then existing state of mind have been admissible in Washington if there is need for their use and if there is circumstantial probability of their trustworthiness. Raborn v. Hayton, 34 Wn.2d 105, 208 P.2d 133 (1949). The rule is substantially in accord.~~

~~The provision relating to wills appears to change Washington law. Cf. Carey v. Powell, 32 Wn.2d 761, 204 P.2d 193 (1949). This portion of rule 803 is based on practical considerations of necessity and expediency and conforms Washington law to the practice followed in a majority of American jurisdictions. 4 J. Weinstein, Evidence ¶ 803(3)[05] (1975).~~

~~Subsection (a)(4). This subsection changes Washington law. Under previous cases, statements of past symptoms and statements relating to medical history, even though made to a treating physician, have been inadmissible as independent substantive evidence. Smith v. Ernst Hardware Co., 61 Wn.2d 75, 377 P.2d 258 (1962). Statements made to a treating or nontreating physician have been allowed into evidence, but only for the purpose of supporting the physician's medical conclusions. Kennedy v. Monroe, 15 Wn.App. 39, 547 P.2d 899 (1976). Rule 803 admits the statements for the purpose of proving the truth of the matter asserted. The justification for the rule, already followed in a number of states, is the patient's motivation to be truthful. Meisenholder § 472. Further, it is unrealistic to assume that a juror, instructed according to previous law, would be able to draw the distinction necessary to hear the statements in order to justify a medical conclusion but to disregard them as to the truth of the matter asserted.~~

~~The rule is subject to the restrictions imposed by the law of privileged communications.~~

~~Subsection (a)(5). This subsection codifies the familiar hearsay exception for past recollection recorded. Under previous Washington law, the exception only applied if the witness had no independent recollection of the facts. State v. Benson, 58 Wn.2d 490, 364 P.2d 220 (1961). Rule 803 is slightly broader in that it requires only that the witness must have insufficient recollection to testify fully and accurately.~~

Subsection (a)(6). Federal Rule 803(6) is deleted, not because of any fundamental disagreement with the rule, but because the drafters felt that the subject matter was adequately covered by statutes and decisions already familiar to the bench and bar. See Meisenholder, ch. 28.

Subsection (a)(7). Federal Rule 803(7) is modified to refer to RCW 5.45 rather than to subsection (a)(6). The rule resolves an issue which has not been addressed in this state's decisional law. Meisenholder § 516.

Subsection (a)(8). Federal Rule 803(8) is deleted, not because of any fundamental disagreement with the rule, but because the drafters felt that the subject matter was adequately covered by the statute and decisions already familiar to the bench and bar. See Meisenholder, ch. 29.

Subsection (a)(9). There do not appear to be any previous Washington cases or statutes directly bearing on the admissibility of vital statistics as a hearsay exception. RCW 5.44.040, preserved by subsection (a)(8), may be controlling in many instances.

Subsection (a)(10). A similar provision is found in CR 44(b). CR 44 is not superseded.

Subsection (a)(11). There do not appear to be any previous Washington cases or statutes directly in point, except to the extent that a religious organization may qualify as a "business" under RCW 5.45.010. Subsection (a)(11) clarifies the law by making specific records of religious organizations admissible as hearsay exceptions.

Subsection (a)(12). There do not appear to be any previous Washington cases or statutes directly in point, except to the extent that the statutes preserved by subsection (a)(6) and (8) may also cover the subject matter of subsection (a)(12).

Subsection (a)(13). This subsection conforms substantially to previous Washington law. Meisenholder § 542. Tattoos have been added to the items enumerated in the federal rule. The drafters felt that tattoos often reflect personal or family history and are apt to be as trustworthy as the other items listed in the rule.

Subsection (a)(14). The hearsay exception for records of documents affecting an interest in property has previously been recognized in Washington. Copies of all deeds which must be filed with the county auditor are admissible. RCW 5.44.070. Copies of city or town plats are admissible. RCW 58.10.020. "Whenever any deed, conveyance, bond, mortgage or other writing, shall have been recorded . . . in pursuance of law, copies of record of such deed, [etc.] . . . shall be received in evidence to all intents and purposes as the originals themselves." RCW 5.44.060. The rule does not conflict with the statutes. It supplements the statutes but does not supersede them.

Subsection (a)(15). There is little prior authority on the admissibility of evidence of statements in documents affecting an interest in property, but what little there is supports an exception to the hearsay rule in accord with the rule. In Adams v. Mignon, 197 Wash. 293, 303, 84 P.2d 1016 (1938), the court held that the trial court did not err when it admitted an abstract of title into evidence: "The abstract, while not conclusive as to facts shown by the record, was admissible for what it was worth."

Subsection (a)(16). The rule reduces the time limit from 30 to 20 years. Compare Spokane v. Catholic Bishop, 33 Wn.2d 496, 206 P.2d 277 (1949). Authentication is accomplished pursuant to rule 901(b)(8).

Subsection (a)(17). This subsection is substantially in accord with previous Washington law. See Nordstrom v. White Metal Rolling & Stamping Corp., 75 Wn.2d 629, 453 P.2d 619 (1969); Meyer Bros. Drug Co. v. Callison, 120 Wash. 378, 207 P. 683 (1922).

Subsection (a)(18). This subsection makes statements contained in treatises, periodicals, and pamphlets admissible as substantive evidence, but only when the expert is on the stand and available to explain and assist in the application of the information. Prior cases holding that treatises are not admissible to prove the truth of the statements contained therein are no longer controlling. Cf. Dabroe v. Rhodes Co., 64 Wn.2d 431, 392 P.2d 317 (1964). The traditional use of treatises on cross-examination is authorized by rules 611, 703, and 705.

Subsection (a)(19). Previous Washington law has authorized admission of evidence of reputation within the family or among close associates on matters of family history. Meisenholder § 542. Subsection (a)(19) clarifies the law by stating more specifically the scope of this hearsay exception. The rule does not require the declarant to be unavailable, nor does it require that the statements must be made prior to litigation with no motive to deceive. Cf. Carfa v. Albright, 39 Wn.2d 697, 237 P.2d 795, 31 A.L.R.2d 983 (1951); Armstrong v. Modern Woodmen of Am., 105 Wash. 356, 178 P. 1 (1919).

Subsection (a)(20). This subsection is substantially in accord with previous Washington law, except that the rule does not require the declarant to be unavailable before the hearsay exception applies. See Kay Corp. v. Anderson, 72 Wn.2d 879, 436 P.2d 459 (1967); Alverson v. Hooper, 108 Wash. 510, 185 P. 808 (1919).

Subsection (a)(21). Under previous law, the scope of this exception could not be stated definitively. Meisenholder § 544. The rule clarifies the law by establishing reputation as a general exception to the hearsay rule. The methods of proving character are defined by rule 405.

Subsection (a)(22). No similar exception to the hearsay rule is defined by previous Washington law. Meisenholder § 545. Admissibility is limited by the restrictions stated in the rule. The rule does not deal with the substantive effect of a judgment as res judicata, nor does it govern evidence of a conviction for impeachment. The latter is governed by rule 609. Even though the rule permits certain convictions to be used as substantive evidence in later litigation, the rule does not preclude the defendant from offering an explanation of the conviction based on newly acquired evidence. 4 J. Weinstein, Evidence ¶ 802(22)[01] (1975).

Subsection (a)(23). There do not appear to be any previous Washington statutes or cases directly in point. The leading case is Patterson v. Gaines, 47 U.S. (6 How.) 550, 12 L.Ed. 553 (1848).

Section (b). Federal Rule 803(24) is deleted. The drafters decided not to adopt any catchall provision. Despite purported safeguards, there is a serious risk that trial judges would differ greatly in applying the elastic standard of equivalent trustworthiness. The result would be a lack of uniformity which would make preparation for trial difficult. Nor

~~would it be likely that an appellate court could effectively apply corrective measures. There would be doubt whether an affirmance of an admission of evidence under the catchall provision amounted to the creation of a new exception with the force of precedent or merely a refusal to rule that the trial court had abused its discretion.~~

~~Flexibility in construction of the rules so as to promote growth and development of the law of evidence is called for by rule 102. Under this mandate there will be room to construe an existing hearsay exception broadly in the interest of ascertaining truth, as distinguished from creating an entirely new exception based upon the trial judge's determination of equivalent trustworthiness, a guideline which the most conscientious of judges would find extremely difficult to follow.~~

RULE 804. HEARSAY EXCEPTIONS: DECLARANT UNAVAILABLE

[Unchanged.]

~~Comment 804~~

~~This rule is the same as Federal Rule 804, except that a minor editorial change is made in subsection (b)(2), and subsection (b)(5) is omitted. The rule defines the hearsay exceptions which apply only if the declarant is unavailable.~~

~~Section (a). Previous Washington law has defined "unavailability" differently in various contexts. See State v. Ortego, 22 Wn.2d 552, 157 P.2d 320, 159 A.L.R. 1232 (1945); State v. Solomon, 5 Wn.App. 412, 487 P.2d 643 (1971); Allen v. Dillard, 15 Wn.2d 35, 129 P.2d 813 (1942). Rule 804 clarifies the law by establishing a general definition applicable to all cases.~~

~~The admissibility of hearsay against a defendant in a criminal case is also subject to overriding constitutional considerations. In Barber v. Page, 390 U.S. 719, 88 S.Ct. 1318, 20 L.Ed.2d 255 (1968), for example, the Supreme Court held that the confrontation clause of the Sixth Amendment requires the government to make stringent efforts to procure the attendance of a prosecution witness before the witness can be considered "unavailable". A lesser standard prevails in civil cases and in criminal cases where the statement is being offered on behalf of the accused. These and other constitutional restrictions on rules 801 and 804 are discussed in 4 J. Weinstein, Evidence ¶ 804(a)[01] (1975).~~

~~Read literally, subsection (a)(3) seems to require only that the declarant assert a lack of memory to be considered unavailable. The rule does not appear to require that the court believe that the declarant is telling the truth. The Report of the House Committee on the Judiciary, however, indicates that "the Committee intends no change in the existing federal law under which the court may choose to disbelieve the declarant's testimony as to a lack of memory." Federal Rules of Evidence for the United States Courts and Magistrates 140 (West 1975). Accord, 4 J. Weinstein, Evidence ¶ 804(a)[01] (1975).~~

~~Since the witness must testify to the lack of memory and is, therefore, subject to cross examination about his claim, the concern of some courts that the witness may make a perjured allegation of forgetfulness to avoid having to be cross-examined about his testimony is considerably lessened. Cross examination about the making of the statement and his present recollection gives the trial judge an opportunity for assessing the witness' credibility. 4 J. Weinstein, Evidence ¶ 804(a)[01].~~

~~Subsection (b)(1). This portion of the rule is substantially in accord with previous Washington law in civil cases. 5 R. Meisenholder, Wash.Prac. §§ 401-408 (1965 & Supp.). See also CR 43(h) and (j). In criminal cases, previous Washington law has imposed greater restrictions on the use of former testimony. The use of testimony at a former trial has been limited to proceedings on the same charge. State v. Lunsford, 163 Wash. 199, 300 P. 529 (1931). Rule 804 is less restrictive but is, of course, subject to constitutional limitations. For example, it has been held that under the state constitution, the defendant in criminal cases against whom the former testimony is introduced must have been present at the former trial and must have had the opportunity to confront and cross-examine witnesses. State v. Ortego, 22 Wn.2d 552, 157 P.2d 320, 159 A.L.R. 1232 (1945).~~

~~Subsection (b)(2). Previous Washington law has recognized a limited exception for dying declarations. It has applied only in criminal cases involving prosecution for homicide. Hobbs v. Great N. Ry., 80 Wash. 678, 142 P. 20 (1914). Death must have actually resulted from the injuries creating the belief in impending death. State v. Lewis, 80 Wash. 532, 141 P. 1025 (1914). Declarations containing conclusions or opinion have been inadmissible to that extent. State v. Swartz, 108 Wash. 21, 182 P. 953 (1919). Rule 804 broadens the scope of this exception. The rule substitutes the word "trial" for "prosecution" to avoid the unwarranted implication that the defendant might not be allowed to introduce a dying declaration.~~

~~Subsection (b)(3). Under previous Washington law, this exception has applied only to declarations against the declarant's pecuniary or proprietary interest. Allen v. Dillard, 15 Wn.2d 35, 129 P.2d 813 (1942). There has been no apparent authority concerning statements of matters which could furnish the basis for tort liability or invalidate a claim, nor has there been authority concerning statements furnishing the basis for criminal liability. Meisenholder § 441. Rule 804 expands and clarifies the scope of this exception.~~

~~Subsection (b)(4). Previous Washington law has recognized an exception for statements of personal or family history substantially in accord with rule 804, although the rule is much more detailed. The rule does not require the statement to have been made prior to the litigation and with no motive to deceive, a restriction apparently imposed by previous law. Meisenholder § 542.~~

~~Subsection (b)(5). Federal Rule 804(b)(5) is deleted for the same reasons that Federal Rule 803(24) is deleted. See the comment to rule 803(b).~~

RULE 805. HEARSAY WITHIN HEARSAY

[Unchanged.]

~~Comment 805~~

~~This rule is the same as Federal Rule 805. It accepts the trustworthiness of each hearsay statement once it has been deemed worthy of an exception. Thus, if a dying declaration~~

incorporated a declaration against interest by another out-of-court declarant, both statements would be admissible as exceptions to the hearsay rule. The statement of the second declarant is not admissible, however, if it does not fall within an exception. See, for example, Johnson v. Lutz, 253 N.Y. 124, 170 N.E. 517 (1930), holding information from a bystander incorporated in an admissible police report to be inadmissible as hearsay.

RULE 806. ATTACKING AND SUPPORTING CREDIBILITY OF DECLARANT

[Unchanged.]

Comment 806

This rule is the same as Federal Rule 806. The declarant of a hearsay statement which is admitted in evidence is in effect a witness. His credibility is subject to impeachment and support just as if he had testified.

The use of an inconsistent statement to impeach a hearsay declarant is not subject to the usual requirement that the witness have been afforded an opportunity to deny or explain it. Cf. rule 613. The foundation requirement is relaxed here because, as a practical matter, the declarant seldom will have been confronted with inconsistent statements when making an out-of-court statement later admitted as an exception to the hearsay rule. See 4 J. Weinstein, Evidence ¶ 806[01] (1975).

RULE 807. CHILD VICTIMS OR WITNESSES [RESERVED]

[Unchanged.]

Comment 807

Though not covered by the federal rules, hearsay statements made by a child victim or witness were the subject of a recent addition to the Uniform Rules of Evidence. In Washington, these statements are governed by RCW 9A.44.120, which allows a statement made by a child under the age of 10 describing sexual contact to be admissible in dependency and criminal proceedings under certain circumstances.

While the Washington statute is limited to statements describing "any act of sexual contact performed with or on the child by another, not otherwise admissible by statute or court rule," the Uniform Rule covers statements that describe "an act of sexual conduct or physical violence ...". The drafters of ER 807 elected to reserve the rule and refer to the statute, rather than supersede it by adopting the Uniform Rule.

The reserved rule again recognized that the admissibility of a child's statement is a proper area for the Washington Supreme Court's rulemaking authority.

TITLE IX. AUTHENTICATION, IDENTIFICATION AND ADMISSION OF EXHIBITS

RULE 901. REQUIREMENT OF AUTHENTICATION OR IDENTIFICATION

[Unchanged.]

Comment 901

Federal Rule 901 has been modified to restrict the application of subsection (b)(3), to delete subsection (b)(7), and to adapt subsection (b)(10) to state practice.

Section (a). The rule treats preliminary questions of authentication and identification as matters of conditional relevance under rule 104(b). The court should admit the evidence if sufficient proof is introduced to permit a reasonable juror to find in favor of its authenticity or identification. 5 J. Weinstein, Evidence ¶ 901(a)[01] (1975). There is no apparent conflict between section (a) and previous Washington law. See 5 R. Meisenholder, Wash.Prac. §§ 38, 61 (1965 & Supp.). The rule is concerned only with proving authenticity. It does not govern admissibility. An authentic document may still be inadmissible under another rule.

Example 1. This portion of the rule is consistent with previous Washington law. Allen v. Porter, 19 Wn.2d 503, 143 P.2d 328 (1943); State v. Cottrell, 56 Wash. 543, 106 P. 179 (1910). The rule does not require that the witness' testimony, alone, be sufficient for authentication. This is true for the other examples as well. Any combination of methods illustrated by rule 901(b)(1) through (10) will suffice so long as rule 901(a) is satisfied. 5 J. Weinstein, Evidence ¶ 901(b)(1)[01] (1975).

Example 2. This portion of the rule is consistent with previous Washington law. State v. Simmons, 52 Wash. 132, 100 P. 269 (1909); Meisenholder § 61.

Example 3. Federal Rule 901(b)(3) permits the comparison to be made by the "trier of fact." The Washington rule substitutes the word "court" to avoid any suggestion that the jury initially determines whether the requirement of authentication has been satisfied. It is the judge who determines whether the proponent of the evidence has made a prima facie demonstration that it is genuine. Once this demonstration is made, the document is sufficiently authenticated for admissibility. Meisenholder § 61. After the document is admitted, however, evidence challenging its authenticity is pertinent and authenticity ultimately becomes a factual issue for the jury. See, e.g., State v. Bogart, 21 Wn.2d 765, 153 P.2d 507 (1944); Mitchell v. Mitchell, 24 Wn.2d 701, 166 P.2d 938 (1946); State v. Haislip, 77 Wn.2d 838, 467 P.2d 284 (1970).

In a jury case, the initial comparison by the judge should probably be made in the absence of the jury. This procedure is authorized by rule 104(c).

Example 4. This portion of the rule reflects, for example, the reply letter technique. A letter is sufficiently authenticated by showing that a letter was sent to a person and that the letter to be introduced is in reply to the first letter. Conner v. Zanuzoski, 36 Wn.2d 458, 218 P.2d 879 (1950). Other examples of circumstantial proof are cited in Meisenholder § 63.

Example 5. This portion of the rule is substantially in accord with previous Washington law. State v. Williams, 49 Wn.2d 354, 301 P.2d 769 (1956). Proper identification and authentication do not assure admissibility. RCW 9.73.050, for example, makes sound recordings inadmissible under certain circumstances.

Example 6. This portion of the rule is substantially in accord with previous law in Washington and elsewhere. Meisenholder § 66. One Washington decision appears to

~~hold that self-identification by the answering party is insufficient for authentication. State v. Manos, 149 Wash. 60, 270 P. 132 (1928). Self-identification is sufficient under rule 901 so long as the call was made to the telephone number assigned to that particular person.~~

~~Example 7. Federal Rule 901(b)(7) is deleted, not because of any fundamental disagreement with its content, but because the subject matter is covered by existing statutes and rules which have become familiar to the bench and bar. CR 44 does not supersede the cited statute. Either procedure may be used. State v. Hodge, 11 Wn.App. 323, 523 P.2d 953 (1974). A common law procedure for authenticating original government documents is described in State v. Bolen, 142 Wash. 653, 254 P. 445 (1927).~~

~~Example 8. The rule reduces the time limit from 30 to 20 years. Cf. Spokane v. Catholic Bishop, 33 Wn.2d 496, 206 P.2d 277 (1949).~~

~~Example 9. This portion of the rule would apply, for example, to the authentication of photographs and X-rays. Meisenholder § 32. Authorities discussing computer printouts are cited in the Advisory Committee Note to Federal Rule 901. See also Seattle v. Heath, 10 Wn.App. 949, 520 P.2d 1392 (1974).~~

~~Example 10. Statutes and other court rules defining methods of authentication are not superseded by rule 901.~~

RULE 902. SELF-AUTHENTICATION

[Unchanged.]

~~Comment 902~~

~~This rule is the same as Federal Rule 902, except that sections (d) and (j) have been modified to adapt the rule to state practice. Unlike the ten subsections in rule 901, the ten sections in rule 902 are not set forth as examples. They comprise instead the scope of the rule. This rule does not preclude the opposite party from disputing the authenticity of a document listed in the rule. It should also be emphasized that the rule is concerned only with the authenticity of certain documents. It is not concerned with their admissibility. A document deemed authentic may still be inadmissible under another rule.~~

~~By the terms of rules 901(b)(10) and 902(j), statutory methods of authentication are preserved as alternative procedures. See, e.g., RCW 5.44. CR 44, Proof of Official Record, relates to some of the matters governed by rule 902. CR 44 is not superseded and remains as an alternative procedure. R. Meisenholder, 3 West's Federal Forms § 3926 (1976 Supp.).~~

~~Section (a). This section simplifies the procedure for determining the authenticity of a domestic public document bearing a seal. Forgeries are unlikely, and detection is relatively easy and certain.~~

~~Section (b). A document purporting to bear an official signature is more easily forged in the absence of a seal. The rule thus requires the additional safeguard of authentication by an officer who does have a seal.~~

~~Section (c). This section is substantially the same as CR 44(a)(2).~~

~~Section (d). This section reflects the familiar practice of recognizing certified copies of public records. The rule defers to statutes such as RCW 5.44 which address the procedure for certification in more detail.~~

~~Section (e). By statute, certain official publications are considered authentic. See, e.g., RCW 5.44.070, .080. The rule accepts all official publications as authentic. The rule does not confer authenticity upon statutes, rules, and court decisions reprinted by nongovernmental publishers. 5 J. Weinstein, Evidence ¶ 902(5)[01] (1975).~~

~~Section (f). Newspapers and periodicals are considered authentic because the risk of forgery is minimal. The rule could not be determined with certainty under previous Washington law. 5 R. Meisenholder, Wash.Prac. § 65 (1965 & Supp.).~~

~~Section (g). The laws protecting trade inscriptions minimize the risk of forgery. The rule generalizes upon a policy which has been previously implemented on a piece-meal basis. See, e.g., RCW 16.57.100 (brands as evidence of title to livestock); Kneeland Inv. Co. v. Berendes, 81 Wash. 372, 142 P. 869 (1914) (seal of corporation on stock certificate held sufficient authentication).~~

~~Section (h). The rule is consistent with RCW 64.08.050. The persons authorized to take acknowledgments are defined by RCW 64.08.010.~~

~~Section (i). The rule incorporates the provisions of the Uniform Commercial Code relating to authenticity. See RCW 62A.1-202 (certain documents deemed to be prima facie evidence of their own authenticity and genuineness); RCW 62A.3-307 (signatures presumed to be genuine); RCW 62A.3-510 (certain documents are admissible in evidence and create presumption of dishonor).~~

~~Section (j). Federal Rule 902(10) has been modified to refer to state law as well as to federal statutes. Statutory procedures such as those defined in RCW 5.44 are preserved. As to self-authenticating wills, see RCW 11.20.020. Some statutes provide that a document is presumptively authentic, but only after it has been certified or otherwise verified in a specified manner. See, e.g., RCW 77.04.090 (rules and regulations of state game commission). Section (j) does not eliminate these restrictions. Certified copies are governed by section (d). Other documents not falling within sections (a) through (i) but made presumptively authentic by statute are subject to any statutory conditions or restrictions on authenticity.~~

~~[1988 Amendment]~~

~~[Section (d).] The 1988 amendment removed a gap in the portion of this rule that allowed certified copies of public records to be self-authenticating. The prior rule permitted certification by compliance with "any law of the United States or of this state." The drafters agreed that "[t]he rationale underlying the notion of self-authentication is that the likelihood of fabrication or honest error is so slight in comparison with the time and expense involved in authentication that extrinsic evidence is not required. Evidence of nonauthenticity may, of course, be introduced." (Footnote omitted.) Graham, Federal Evidence § 902.0 (2d ed. 1986).~~

~~The amended rule expanded the certification provision to permit certification that complies with "the applicable law of a state or territory of the United States." While in most instances the "applicable law" will be that of the state from~~

which the record originated, including of course the state of Washington, there may be exceptional circumstances where this is not the case. The amendment defers to other choice of law principles in these situations.

The second portion of the amendment, adding the language "treaty or convention" to "law of the United States," acknowledged that international agreements may affect the admissibility of evidence in a state court. For example, the recently enacted notary statute recognized foreign notarial acts by providing that "[a]n 'apostille' in the form prescribed by the Hague Convention of October 5, 1961, conclusively establishes that the signature of the notarial officer is genuine and that the officer holds the designated office." RCW 42.44.150(2). See also RCW 42.44.180. While it may be that the term "law" encompasses treaties and conventions, the drafters concluded that no room should be left for debate.

RULE 903. SUBSCRIBING WITNESS' TESTIMONY UNNECESSARY

[Unchanged.]

Comment 903

This rule is the same as Federal Rule 903. It eliminates the traditional common law requirement of live testimony from a subscribing witness and reflects the prevailing modern view. E. Cleary, McCormick on Evidence § 220 (2d ed. 1972). The rule preserves statutes which require live testimony under particular circumstances.

RULE 904. ADMISSIBILITY OF DOCUMENTS

[Unchanged.]

TITLE X. CONTENTS OF WRITINGS, RECORDINGS, AND PHOTOGRAPHS
RULE 1001. DEFINITIONS

Comment 1001

This rule is the same as Federal Rule 1001 except that "sounds" has been added to section (a). This addition is also found in Uniform Rule 1001. The rule establishes definitions which apply throughout Title X. "Original" includes a counterpart intended to have the effect of an original. Thus, for example, an original and a photocopy of a contract, both bearing the original signatures of the parties and intended as originals, would both be originals under the rule. Previous Washington law is in accord. 5 R. Meisenholder, Wash.Prac. § 94 (1965 & Supp.). To qualify as a "duplicate", a copy must be produced by a method which virtually eliminates the possibility of error. Copies produced manually, whether handwritten or typed, are not within the definition.

The rules in Title X do not govern the authenticity of an "original". That determination is made by reference to the rules in Title IX. The authenticity of any piece of evidence, even documents which are self-authenticating under rule 902, may be disputed by the opposing party. Federal Rule 902 advisory committee note. Thus, for example, an opposing party may challenge the integrity of an electronic recording even though it qualifies as an "original" under Title X. See also Comments, ER 901 and 902. Similarly, the rules do not prevent a party from challenging the accuracy of data fed into a computer or the integrity of the computer's storage system, even though a printout qualifies as the "original".

RULE 1002. REQUIREMENT OF ORIGINAL

[Unchanged.]

Comment 1002

Federal Rule 1002 has been modified to refer to state rules and statutes instead of to federal statutes. Taken together, rules 1001 and 1002 extend the traditional best evidence rule from writings to photographs and recordings as well. Previous Washington law has applied the best evidence rule only to writings. 5 R. Meisenholder, Wash.Prac. § 99 (1965 & Supp.). Although the rule now requires original photographs, rule 1001(e) defines an original photograph broadly as the negative or any print therefrom. The rule defers to statutory exceptions to the normal rule of requiring the original. These statutes are cited and discussed in Meisenholder § 98.

RULE 1003. ADMISSIBILITY OF DUPLICATES

[Unchanged.]

Comment 1003

This rule is the same as Federal Rule 1003 and relaxes the best evidence rule with respect to duplicates. Under rule 1003, the admission of duplicates is not limited to situations where the original is unavailable. Cf. 5 R. Meisenholder, Wash.Prac. § 95 (1965 & Supp.). The rule applies only to duplicates as defined in rule 1001 and thus assures the admission of accurate reproductions. The rule changes the law more in theory than in practice. As a practical matter, photocopies are reliable reproductions and are widely used both in commercial transactions and in litigation. The rule reflects this reality and at the same time affords ample opportunity to challenge the authenticity of a duplicate.

RULE 1004. ADMISSIBILITY OF OTHER EVIDENCE OF CONTENTS

[Unchanged.]

Comment 1004

This rule is the same as Federal Rule 1004 and rejects any suggestion of a "second best" evidence rule. It is substantially in accord with previous Washington law. Although there is no case directly in point, the decisions appear to assume that there are no degrees of secondary evidence. 5 R. Meisenholder, Wash.Prac. §§ 95, 96 (1965 & Supp.).

Proof of a lost or destroyed will is governed by RCW 11.20.070. The statute defines "lost" and "destroyed" for purposes of probate and establishes the procedure to be followed. The statute is not in conflict with the rule and is not superseded.

Section (d), relating to collateral matters, reflects existing law in Washington and elsewhere. Meisenholder § 93.

The definition of "collateral" is elusive in the absence of specific facts. "In the final analysis the question of whether a

~~document's terms are collateral depends upon the importance of the terms to the issues in the case. Insistence upon proof by introduction of an original document to prove its terms is a waste of time when the terms are relatively unimportant and not the subject of an important factual issue." Meisenholder § 93. See also E. Cleary, McCormick on Evidence § 236 (2d ed. 1972).~~

~~Thus, for example, in State ex rel. Walton v. Superior Court, 18 Wn.2d 810, 140 P.2d 554 (1943), the principal issue was whether an easement over the land to be condemned was necessary in order to reach certain timber. The court held that oral testimony concerning ownership of the land to be benefited by the easement was admissible because ownership was a collateral question. In another case, oral testimony concerning a contract was held admissible to show the relationship between the plaintiffs and their right to sue jointly. Hull v. Seattle, R. & S. Ry., 60 Wash. 162, 110 P. 804 (1910).~~

RULE 1005. PUBLIC RECORDS

[Unchanged.]

~~Comment 1005~~

~~This rule is the same as Federal Rule 1005. It exempts public records from the requirement of producing the original under rule 1002 because their removal from public custody is often not feasible. Unlike rule 1002, which makes no distinction among degrees of secondary evidence, this rule expresses a preference for certified or compared copies over other forms of secondary evidence.~~

~~Various statutes authorize the use of certified copies. RCW 5.44.040 (certified copies of public records); RCW 5.44.060 (certified copies of recorded instruments); RCW 5.44.070 (certified copies of transcripts of county commissioners' proceedings); RCW 5.44.090 (certified copies of instruments restoring civil rights). The rule authorizes proof by certified copy of any public record.~~

~~The rule changes Washington law in the sense that no previous authority has been found which equates compared copies with certified copies.~~

~~The last sentence of the rule authorizes proof by other forms of secondary evidence if neither a certified nor a compared copy can be obtained with reasonable diligence. Although this approach has been authorized in a number of factual situations, no previous authority has been found which applies the rule generally to public records. See 5 R. Meisenholder, Wash.Prac. §§ 95, 96 (1965 & Supp.).~~

RULE 1006. SUMMARIES

[Unchanged.]

~~Comment 1006~~

~~This rule is the same as Federal Rule 1006 and is substantially in accord with previous Washington law. See Keen v. O'Rourke, 48 Wn.2d 1, 290 P.2d 976 (1955). The rule does not require that the summary be prepared by a person with special expertise, but as a practical matter, the summary would ordinarily be prepared by a qualified person in order to avoid a challenge to its accuracy under rule 1008. See 5 J. Weinstein, Evidence ¶ 1006[01] (1975).~~

RULE 1007. TESTIMONY OR WRITTEN ADMISSION OF PARTY

[Unchanged.]

~~Comment 1007~~

~~This rule is the same as Federal Rule 1007 and conforms to the view expressed in E. Cleary, McCormick on Evidence § 242 (2d ed. 1972). An adverse party's oral testimony, deposition, and writings are within the scope of the rule; oral admissions made out of court are not. Written responses to interrogatories and requests for admission are admissible under this rule. 5 J. Weinstein, Evidence ¶ 1007[05] (1975). There appears to be no previous Washington law on this point. 5 R. Meisenholder, Wash.Prac. § 97 (1965 & Supp.).~~

RULE 1008. FUNCTIONS OF COURT AND JURY

[Unchanged.]

~~Comment 1008~~

~~This rule is the same as Federal Rule 1008 and defines a specialized approach to determining questions under rule 104 for matters within the scope of Title X. RCW 4.44.080 and .090 allocate questions of law and fact to the court and jury, respectively. The rule is more specific than the statutes but does not conflict with them. The statutes are not superseded.~~

TITLE XI. MISCELLANEOUS RULES
RULE 1101. APPLICABILITY OF RULES

[Unchanged.]

~~Comment 1101~~

~~Federal Rule 1101 has been modified by deleting references to matters heard only in federal court and by adding references to certain proceedings heard in the state courts. The rule conforms substantially to previous Washington practice.~~

~~Section (a). The rules of evidence apply generally to civil and criminal proceedings, including mental commitment proceedings, reference hearings, and juvenile court factfinding and adjudicatory hearings. See RCW 71.05.250, RCW 71.05.310, MPR 3.4, RAP 16.12, JuCR 3.7, and JuCR 7.11. Juvenile court hearings on whether to decline jurisdiction are not excused from the operation of the rules. These hearings have a substantial impact upon the case and deserve the formality of evidentiary rules. Cf. In re Harbert, 85 Wn.2d 719, 538 P.2d 1212 (1975).~~

~~The words "judge" and "court" are used interchangeably throughout the rules and refer to a judge, judge pro tempore, commissioner, or any other person authorized to hold a hearing to which the rules apply.~~

~~Section (b). The law concerning privileged communications applies to all proceedings, including those listed in section (c).~~

~~Subsection (c)(1). This portion of the rule is a restatement of a similar provision in rule 104. The rules need not be applied, for example, at a hearing on a motion to suppress~~

~~evidence. United States v. Matlock, 415 U.S. 164, 39 L.Ed.2d 242, 94 S.Ct. 988 (1974); 32B Am.Jur.2d Federal Rules of Evidence (1982). The rule, like all of the other rules, does not attempt to specify the situations in which due process would require a full evidentiary hearing. That determination is made by reference to constitutional law.~~

~~In the absence of a constitutional requirement, the rule still does not prevent the court from requiring a certain measure of reliability with respect to the admission of evidence in the proceedings specified in section (e). The court should have the discretion to require an appropriate level of formality.~~

~~Subsection (e)(2). The statutes contain special evidentiary provisions for grand juries and inquiry judges. See RCW 10.27.120, .130, .140, .170. Although there are no Washington cases directly in point, the majority view is that the validity of a grand jury indictment may not be challenged on the basis of insufficient or incompetent evidence unless none of the witnesses was competent. Annot., 37 A.L.R.3d 612 (1971); Annot., 39 A.L.R.3d 1064 (1971).~~

~~Subsection (e)(3). Proceedings with respect to extradition, rendition, and detainers are essentially administrative matters, and the rules of evidence have traditionally not applied. Gibson v. Beall, 249 F.2d 489 (D.C.Cir.1957); United States v. Flood, 374 F.2d 554 (2d Cir.1967).~~

~~The view that the rules of evidence do not apply to preliminary determinations in criminal cases is consistent with the Superior Court Criminal Rules. See, e.g., CrR 3.2(k), relating to hearings on pretrial release. The rule refers to "determinations" rather than to "examinations," the federal rule's terminology. This change was made to clarify the intent to relax the rules of evidence with respect to all preliminary matters, not just at hearings in which the accused gives testimony.~~

~~The normal rules of evidence do not apply to hearings with respect to sentencing or probation. State v. Short, 12 Wn.App. 125, 528 P.2d 480 (1974); State v. Shannon, 60 Wn.2d 883, 376 P.2d 646 (1962); State v. Kuhn, 81 Wn.2d 648, 503 P.2d 1061 (1972). As to sentencing proceedings in cases involving the death penalty, see also RCW 10.95. As to search warrants, see CrR 2.3(e). The rules do not apply to hearings with respect to pretrial release. CrR 3.2(k).~~

~~The provision regarding contempt applies to contempt committed in the presence of the court as defined by RCW 7.20.030.~~

~~The rule clarifies the law with respect to habeas corpus hearings. A statute, RCW 7.36.120, directs the court to hear and determine the matter "in a summary way." The Supreme Court has held that the trial court may thus determine factual matters by reference to affidavits. Little v. Rhay, 68 Wn.2d 353, 413 P.2d 15, cert. denied, 385 U.S. 96 (1966). Later, a division of the Court of Appeals held that such affidavits should be considered only to assist in formulating the issues of fact and not in themselves to determine disputed questions of material fact. Little v. Rhay, 8 Wn.App. 725, 509 P.2d 92 (1973). A dissenting opinion argued that the majority opinion nullified the statute and disregarded earlier decisions of the Supreme Court. Rule 1101 adopts the approach taken by the earlier Supreme Court decisions. This is contrary to Federal Rule 1101, which makes the rules of evidence applicable to federal habeas corpus proceedings, but the underlying federal statute requires testimony to be taken. Walker v. Johnston, 312 U.S. 275, 61 S.Ct. 574, 85 L.Ed. 830 (1941).~~

~~The rules do not apply to small claims courts, supplemental proceedings, or to coroners' inquests, primarily because the purposes of these proceedings would be frustrated by strictly imposing rules of evidence. As a practical matter, the rules have not been applied to these proceedings in the past.~~

~~Factfinding and adjudicatory hearings in juvenile court are conducted in accordance with the rules of evidence. JuCR 3.7 and JuCR 7.11. Once the facts have been determined, however, the appropriate form of disposition is determined with less formality. The situation is analogous to the distinction between a criminal trial and sentencing. Rule 1101 thus authorizes a relaxation of the rules of evidence for disposition hearings in juvenile court. A corresponding relaxation of the rules is authorized for dispositional determinations under the Uniform Alcoholism and Intoxication Treatment Act, RCW 70.96A, and the Civil Commitment Act, RCW 71.05.~~

~~[1989 Amendment]~~

~~[Section (d).] The 1989 amendment reflected a contemporaneous amendment to the Mandatory Arbitration Rules, which in turn addressed the applicability of the Rules of Evidence to mandatory arbitration hearings. A new section (d) was added to ER 1101, providing simply that the admissibility of evidence in a mandatory arbitration proceeding "is governed by MAR 5.3." The cross reference was appropriate because, under mandatory arbitration, the Rules of Evidence cannot be said clearly to apply or not to apply. Rather, the extent of their applicability is left to the determination of the arbitrator under MAR 5.3.~~

RULE 1102. AMENDMENTS [RESERVED]

[Unchanged.]

RULE 1103. TITLE

[Unchanged.]

Reviser's note: The typographical errors in the above material occurred in the copy filed by the State Supreme Court and appear in the Register pursuant to the requirements of RCW 34.08.040.

Reviser's note: The brackets and enclosed material in the text of the above section occurred in the copy filed by the agency and appear in the Register pursuant to the requirements of RCW 34.08.040.

Reviser's note: The spelling errors in the above section occurred in the copy filed by the agency and appear in the Register pursuant to the requirements of RCW 34.08.040.

WSR 06-17-001
OFFICE OF INSURANCE COMMISSIONER

[Filed August 2, 2006, 1:53 p.m.]

TECHNICAL ASSISTANCE ADVISORY

T 06-02

TO: All casualty insurers.

SUBJECT: Underinsured motorist property damage coverage limits - RCW 48.22.030.
DATE: August 2, 2006.

During the 2006 legislative session the Washington state legislature passed HB 2406 (chapter 25, Laws of 2006). This act amends RCW 48.22.030(4) concerning underinsured motorist property damage coverage (UIMPD).

Beginning June 7, 2006, a signed request from the named insured or the named insured's spouse is not needed when the named insured selects UIMPD limits that are lower than third party property damage liability limits.

Insurers must still get a signed rejection of underinsured motorist (UIM) and UIMPD coverages from the named insured or the named insured's spouse. This rejection must be in writing and must be part of the insurer's records.

Insurers must still get a signed request for UIM limits that are lower than the third party liability limit from the named insured or the named insured's spouse. This request must be in writing and must be part of the insurer's records.

Other provisions of RCW 48.22.030 are not affected by HB 2406.

If you have additional questions please contact Leslie Krier, Chief Market Conduct Examiner at lesliek@oic.wa.gov.

WSR 06-17-002
OFFICE OF INSURANCE COMMISSIONER

[Filed August 2, 2006, 1:56 p.m.]

TECHNICAL ASSISTANCE ADVISORY

T 06-03

TO: All health carriers.
SUBJECT: Compliance with RCW 48.43.055 and WAC 284-43-322 regarding alternative dispute resolution provisions in provider contracts.
DATE: August 2, 2006.

The office of insurance commissioner (OIC) is issuing this technical assistance advisory ("TAA") to assist carriers in complying with RCW 48.43.055 and WAC 284-43-322 in light of the Washington Supreme Court's recent decision in *Kruger Clinic Orthopaedics v. Regence Blueshield,* (Docket No. 76719-0, filed 7/13/06) regarding alternative dispute resolution ("ADR") provisions in provider contracts. The supreme court confirmed that RCW 48.43.055 and WAC 284-43-322 prohibit carriers from requiring health care providers to enter into binding ADR, such as binding arbitration. Binding arbitration clauses or other forms of binding ADR clauses in provider contracts are not enforceable. While carriers may require providers to engage in some form of ADR prior to seeking a judicial remedy, carriers may not prohibit providers from seeking a judicial remedy such as a civil lawsuit.

The OIC is aware that there are provider contracts subject to OIC regulation that do not comply with RCW 48.43.055 and WAC 284-43-322. The OIC reviewed provider contracts on file and found that the ADR provisions that violate the law are worded in a variety of ways. Some clauses expressly require binding arbitration. Other clauses allow the carrier to file an arbitrator's award as a judgment in court, which has the effect of making the arbitration binding. Then again, other clauses imply that the arbitration is binding by referring to "nonbinding mediation" but remaining silent as to whether the arbitration option is binding.

Consequently, carriers must review all dispute resolution processes and procedures for review and adjudication of health care provider complaints to determine whether they could be interpreted as requiring binding ADR or prohibiting a judicial remedy. If they could be interpreted as such, they are not in compliance with the law and must be corrected and refiled in their entirety with the OIC. In order to make sure that the procedures are clear on this point, carriers may consider including an express statement, such as: "Alternative dispute resolution, such as mediation and arbitration, is not binding and is not required to the exclusion of judicial remedies."

In order for the OIC to determine compliance with RCW 48.43.055 and WAC 284-43-322, carriers must incorporate their entire dispute resolution process into the provider contract.

Carriers are required to refile provider contracts for any material changes. Per WAC 284-43-330, all changes to contracts must be indicated through strike outs for deletions and underlines (highlighted language is acceptable) for new material. A "clean" template must also be provided, as well as the copy of the amendment that will be sent to providers.

It is requested that carriers file new templates as soon as possible but no later than one hundred twenty days after the date of this TAA.

If you have questions concerning this technical assistance advisory you may contact Donna Dorris, Health and Disability Manager, at (360) 725-7119 or donnad@oic.wa.gov.

WSR 06-17-004
NOTICE OF PUBLIC MEETINGS
LIFE SCIENCES DISCOVERY FUND AUTHORITY

[Memorandum—August 1, 2006]

NOTICE OF PUBLIC MEETINGS

Below, in bold, are revisions to the 2006 board meeting dates and the new 2007 board meeting dates for the life sciences discovery fund authority (agency #3560).

2006 Board Meeting Dates		
Monday, September 25	**9:00 a.m. - 12:30 p.m.**	**Seattle World Trade Center 2200 Alaskan Way West Building 4th Floor**
Tuesday, November 14	10:00 a.m. - 3:00 p.m.	PNNL, Richland, Washington

2007 Board Meeting Dates		
Wednesday, January 3	10:00 a.m. - 3:00 p.m.	WSU West, Seattle
Tuesday, March 20	10:00 a.m. - 3:00 p.m.	WSU West, Seattle
Tuesday, May 8	10:00 a.m. - 3:00 p.m.	WSU West, Seattle
Tuesday, July 17	10:00 a.m. - 3:00 p.m.	WSU West, Seattle
Tuesday, September 18	10:00 a.m. - 3:00 p.m.	WSU West, Seattle
Tuesday, November 13	10:00 a.m. - 3:00 p.m.	WSU West, Seattle

WSR 06-17-006

INTERPRETIVE STATEMENT

DEPARTMENT OF REVENUE

[Filed August 3, 2006, 3:56 p.m.]

ISSUANCE OF INTERPRETIVE STATEMENT

The department of revenue has issued Excise Tax Advisory 2032.04.194 Cost Apportionment—Treatment of Costs Incurred for Multiple Purposes (ETA 2032).

WAC 458-20-194 Doing business inside and outside the state (Rule 194), specifies how multi-state businesses providing services subject to the "service and other activities" and certain other B&O tax classifications apportion their income. Businesses that apportion under RCW 82.04.460(1) must use separate accounting, if it is accurate. If separate accounting is not accurate, cost apportionment must be used.

As a general rule, costs of producing income not apportioned under RCW 82.04.460(1) are not relevant to the cost apportionment calculation provided in Rule 194. Rule 194 explains that shared costs (those supporting both apportionable and nonapportionable activities) must, however, be included in the cost apportionment formula without segregating the service portion of the costs. Rule 194 does provide for the limited use of alternative methods of allocating costs. The department has been asked whether it would consider an alternative apportionment method under Rule 194 (4)(i) if it can be demonstrated that including shared costs results in a cost apportionment calculation that does not fairly reflect the taxpayer's business activity in Washington. This ETA identifies a scenario where an alternative method of cost apportionment may be appropriate.

A copy of this document is available via the internet at http://www.dor.wa.gov/content/laws/eta/eta.aspx or a request for copies may be directed to Roseanna Hodson, Interpretations and Technical Advice Unit, P.O. Box 47453, Olympia, WA 98504-7453, phone (360) 570-6119, fax (360) 586-5543.

Alan R. Lynn

Rules Coordinator

WSR 06-17-008

NOTICE OF PUBLIC MEETINGS

EVERETT COMMUNITY COLLEGE

[Memorandum—August 4, 2006]

NOTIFICATION OF MEETING CANCELLATION

The board of trustees of Everett Community College has cancelled their regularly scheduled meeting of August 9, 2006. Please call (425) 388-9572 for information.

Board of Trustees
Board Meeting Schedule
2006-2007

August 9, 2006
September 13, 2006
October 11, 2006
November 8, 2006
December 13, 2006
January 10, 2007
February 14, 2007
March 14, 2007
April 11, 2007
May 9, 2007
June 13, 2007

WSR 06-17-009

NOTICE OF PUBLIC MEETINGS

COUNTY ROAD ADMINISTRATION BOARD

[Memorandum—August 3, 2006]

MEETING NOTICE: October 26, 2006
County Road Administration Board
2404 Chandler Court S.W.
Suite 240
Olympia, WA 98504
1:00 p.m. to 5:00 p.m.

MEETING NOTICE: October 27, 2006
County Road Administration Board
2404 Chandler Court S.W.
Suite 240
Olympia, WA 98504
8:30 a.m. - noon

Individuals requiring reasonable accommodation may request written materials in alternative formats, sign language interpreters, physical accessibility accommodations, or other reasonable accommodation, by contacting Karen Pendleton at (360) 753-5989, hearing and speech impaired persons can call 1-800-833-6384.

WSR 06-17-016

INTERPRETIVE OR POLICY STATEMENT

DEPARTMENT OF SOCIAL AND HEALTH SERVICES

[Filed August 4, 2006, 4:21 p.m.]

DESCRIPTION OF INTERPRETIVE OR POLICY STATEMENT

Document Title: Division of Child Support Administrative Policy 1.17.

Subject: Internet use.

Effective Date: July 19, 2006.

Document Description: This notice is a Sunset Review of Administrative Policy 1.17. The policy explains to the division of child support (DCS) staff the expectations for use of the internet and intranet.

To receive a copy of the interpretive or policy statement, contact Jeff Kildahl, Division of Child Support, P.O. Box 11520, Tacoma, WA 98411-5520, phone (360) 664-5278, TDD (360) 753-9122, fax (360) 586-3274, e-mail jkildahl@dshs.wa.gov.

August 3, 2006
Jeff Kildahl

WSR 06-17-018

NOTICE OF PUBLIC MEETINGS

BELLINGHAM TECHNICAL COLLEGE

[Memorandum—August 7, 2006]

The regularly scheduled meeting of the board of trustees of Bellingham Technical College will be held on Thursday, August 17, 2006, 9:00 - 11:00 a.m., in the College Services Board Room on the Bellingham Technical College campus. Call 752-8334 for information.

WSR 06-17-019

NOTICE OF PUBLIC MEETINGS

OFFICE OF THE INTERAGENCY COMMITTEE

(Governor's Forum on Monitoring)

[Memorandum—August 4, 2006]

The next public meeting of the governor's forum on monitoring (Executive Order #04-03) will be Monday, September 11, 2006, from 1:30 to 3:30 p.m. at the King Street Center Rainier Room, 201 South Jackson Street, in Seattle.

For further information, please contact Patty Dickason, interagency committee for outdoor recreation (IAC), (360) 902-3085.

The IAC schedules all public meetings at barrier free sites. Persons who need special assistance, such as large type materials, may contact Patty Dickason at the number listed above or by e-mail at pattyd@iac.wa.gov.

WSR 06-17-020

NOTICE OF PUBLIC MEETINGS

BATES TECHNICAL COLLEGE

[Memorandum—August 4, 2006]

Annual Meeting Schedule—Board of Trustees

Pursuant to RCW 42.30.075, following is Bates Technical College board of trustees' regularly scheduled meetings for the year 2006-2007.

The board of trustees of Bates Technical College regularly meets on the third Wednesday of each month except August. All meetings begin at 3 p.m.

Date (2006-07)	Location
September 20, 2006	Bates Technical College 1101 South Yakima Avenue Tacoma, WA 98405-4895 (Clyde Hupp Board Room)
October 18, 2006	Bates Technical College 1101 South Yakima Avenue Tacoma, WA 98405-4895 (Clyde Hupp Board Room)
November 15, 2006	Bates Technical College 1101 South Yakima Avenue Tacoma, WA 98405-4895 (Clyde Hupp Board Room)
December 20, 2006	Bates Technical College 2320 South 19th Street Tacoma, WA 98405-2946 (Mohler Campus)
January 17, 2007	Bates Technical College 1101 South Yakima Avenue Tacoma, WA 98405-4895 (Clyde Hupp Board Room)
February 21, 2007	Bates Technical College 1101 South Yakima Avenue Tacoma, WA 98405-4895 (Clyde Hupp Board Room)
March 21, 2007	Bates Technical College 1101 South Yakima Avenue Tacoma, WA 98405-4895 (Clyde Hupp Board Room)
April 18, 2007	Bates Technical College 2201 South 78th Tacoma, WA 98409 (South Campus)
May 16, 2007	Bates Technical College 1101 South Yakima Avenue Tacoma, WA 98405-4895 (Clyde Hupp Board Room)
June 20, 2007	Bates Technical College 1101 South Yakima Avenue Tacoma, WA 98405-4895 (Clyde Hupp Board Room)

Date (2006-07)	Location
July 18, 2007	Bates Technical College 1101 South Yakima Avenue Tacoma, WA 98405-4895 (Clyde Hupp Board Room)

WSR 06-17-040
NOTICE OF PUBLIC MEETINGS
PARKS AND RECREATION COMMISSION
[Memorandum—August 8, 2006]

Update and Revision of the 2006 Schedule of Regular Meetings

As required by RCW 42.30.075, Open Public Meetings Act, the following schedule is submitted for publishing in the Washington state register. The Washington state parks and recreation commission is providing updated information related to the remaining regularly scheduled meeting in 2006.

Date: August 24
Time: 9:00 a.m.
Place: Best Western Lakeside Lodge
2312 West Woodin Avenue
Chelan, WA 98816
(509) 682-4396

Date: October 19
Time: 9:00 a.m.
Place: Best Western/Friday Harbor Suites
680 Spring Street
Friday Harbor, WA 98250
(360) 378-3031
fax (360) 378-4228

Date: November 30
Time: 9:00 a.m.
Place: Rock Creek Recreation Center
715 Rock Creek Drive
Stevenson, WA 98648
(509) 427-3980
fax (509) 427-3975

The public meeting dates listed above fall on Thursdays. The commission will conduct a work session related to park issues including park lands, services and revenue on Wednesday, prior to each meeting in the same location from 1 p.m. through 5 p.m. There is no public testimony taken during the work session. A tour of nearby state parks or other recreational facilities may be held on the day following the meeting.

The public is welcome to attend all state parks and recreation commission meetings. Meeting sites will be barrier free to the greatest extent feasible. The commission will provide Braille or taped agenda items for the visually impaired and interpreters for those with hearing impairments if a request is received at the appropriate address shown above at least ten working days in advance of the scheduled meeting date.

WSR 06-17-049
NOTICE OF PUBLIC MEETINGS
DEPARTMENT OF NATURAL RESOURCES
(Natural Heritage Advisory Council)
[Memorandum—August 9, 2006]

CHANGE NOTICE OF MEETING

The natural heritage advisory council will meet in October as follows:

October 18, 2006 9:30 a.m. - 2:30 p.m.
Holiday Inn Spokane Airport
1616 South Windsor Drive
Spokane, WA

Regular council business generally includes consideration of proposals for new natural areas, additions to existing natural areas, and management activities within existing natural areas.

For further information contact the Department of Natural Resources, Natural Heritage Program, 1111 Washington Street S.E., Olympia, WA 98504-7014, (360) 902-1661.

WSR 06-17-055
OFFICE OF INSURANCE COMMISSIONER
[Filed August 10, 2006, 9:43 a.m.]

TECHNICAL ASSISTANCE ADVISORY
T 06-04

TO: All Washington licensed property and casualty brokers.
SUBJECT: Property and casualty broker compensation disclosure.
DATE: August 10, 2006.

A previous advisory issued on October 21, 2004, dealt with the duties and responsibilities of Washington-licensed property and casualty brokers concerning disclosure of compensation to customers. This office conducted an investigation of broker business practices since issuance of the advisory and it is apparent that additional guidance is necessary to assist brokers in understanding the regulatory requirements relating to disclosure of compensation.

RCW 48.17.270 limits the compensation that may be accepted by an insurance agent licensed as a broker in property and casualty insurance transactions, other than surplus line business, to (1) commissions paid by the insurer, (2) fees paid by the insured, or (3) a combination of both. In connection with placing surplus line business, a surplus line broker

may compensate an agent or broker. In addition, the full amount of the compensation received by an agent as a result of a property or casualty insurance transaction must be disclosed to the customer where the agent:

- Is also licensed as a broker; and
- Receives a fee; and
- Deals directly with the customer.

The disclosure must be in writing and signed by both the agent-broker and the customer and must be retained for not less than five years.

Disclosure must be provided to the customer before a final product decision is made. Disclosure after the purchase defeats the purpose of the requirements: To inform the customer of potential incentives to the agent-broker in recommending that the customer's business be placed with a particular carrier or include a particular coverage or coverages.

The term "full amount of the compensation" used by the legislature in RCW 48.17.270 includes contingent compensation arrangements, sometimes called "contingent commissions." Determining what to disclose may present a challenge where the amount of a contingent commission is not known at the time disclosure is required. Simply stated, the disclosure should make the customer aware of the factors and methodology used that affect the agent-broker's compensation. While it is not necessary to provide esoteric mathematical formulas, the appropriate disclosure is still required. If an agent-broker is unable to provide the amount of compensation on a particular placement, the agent-broker may be able to satisfy the requirement by describing the terms of the arrangement or by providing specific information about compensation from the past year and any anticipated changes or range of possible outcomes for the current period. For each company used in any proposal with which the agent-broker has an arrangement, the disclosure should include a description of the particular arrangement.

Compensation that may be affected by the transaction in question must be disclosed. That is, if a particular transaction may contribute in some way to triggering an award under a contingent compensation arrangement, disclosure is required. Compensation that has no relationship to the transaction is not required to be disclosed.

The requirements for disclosure of contingent commissions may be met by use of language substantially similar to the following illustration where "X" represents a variable number:

We have an agreement with [*insurance company*] that we are proposing for your insurance that may pay us future additional compensation. This type of compensation is in addition to any fees and/or commissions that we have agreed to accept for servicing your insurance needs. This compensation, generally known as profit-sharing, is based on formulas that consider the volume of business placed with the company, the profitability of that business, how much of the business is retained for the company's account each year, and other factors. The agreement considers total eligible coverage from all clients placed during a calendar year and any profit-sharing payment is usually received [*specify time period such as "in the second calendar quarter of the following year"*]. Because of variables in this program, we have no effective way at this time to determine the amount of any additional compensation that might be attributable to the coverage we are proposing for your insurance. Over the past several years, profit-sharing compensation received from [*insurance company*] has ranged from X% to X% of total premiums placed with [*insurance company*]. We will gladly furnish you any further specific information that you might require to assist you in making an informed decision about [*insurance company*] that we are proposing to provide your coverage.

Some examples of disclosures that without more do not satisfy the requirements for disclosure of contingent arrangements follow:

- We may also receive annual contingent compensation from one or more of the insurance companies we have used in this proposal. This is standard with most companies and requires us to have a good overall loss ratio with the company and meet certain other criteria.
- We receive a commission of __% from the insurance company. A year-end bonus may also be received from the insurance company if an acceptable loss ratio for all clients and certain other guidelines are met.
- In addition, there is a possibility that your account may contribute to contingent commissions received by us at a later date. Contingent commissions are based on contractual incentives we have with some insurance carriers and vary from company to company.

The standard to which agents that are also licensed as brokers should adhere is stated in T 04-05 and merits restatement here: "[A]ll compensation arrangements [*should be disclosed*] in a sufficiently complete and understandable form so the insured is able to understand and consider possible incentives to their broker in placing the business and the costs of coverage." To this should be added: "When in doubt, disclose."

If you have questions regarding this technical assistance advisory you may contact Mike Huske at (360) 725-7261 or MikeH@oic.wa.gov.

Reviser's note: The brackets and enclosed material in the text of the above section occurred in the copy filed by the agency and appear in the Register pursuant to the requirements of RCW 34.08.040.

WSR 06-17-059
NOTICE OF PUBLIC MEETINGS
DEPARTMENT OF AGRICULTURE
(Beef Commission)

[Memorandum—August 7, 2006]

Washington State Beef Commission Board Meeting Date Changes

The August board meeting of the Washington state beef commission was cancelled. The next board meeting is to be held Monday, September 25, and scheduled to be held in Pasco, Washington.

Should you have questions, please contact Rosalee Mohney at (206) 444-2902.

WSR 06-17-062
NOTICE OF PUBLIC MEETINGS
DEPARTMENT OF SERVICES FOR THE BLIND
[Memorandum—August 7, 2006]

Community Meeting
Friday, September 8, 2006
4:30 - 6:30 p.m.

Location:
Emerson Manor - Community Room
703 Simpson Avenue
Hoquiam, WA 98550

We Want To Hear From You!

Community meetings give us a chance to inform you about the latest changes at the department of services for the blind (DSB), and to discuss issues and challenges. We want to know about your experience with our services. What is working well in your community? What could we do better? What needs are not being met? We will use your comments to develop our state and strategic plans for the coming year.

Whether you are a past, present, or potential consumer of the DSB, a family member, a community service provider, a friend to someone who is blind, a member of a blind consumer organization, or an interested citizen, we want to hear from you. Please join us to talk to us in person at our upcoming Hoquiam community meeting.

Rehabilitation Council Meeting
Saturday, September 9, 2006
9 a.m. - 4 p.m.

Location:
The Guesthouse
701 East Heron Street
Aberdeen, WA 98520
(360) 537-7460

The state rehabilitation council (SRC) meets on a quarterly basis. The purpose of the council is to develop, analyze, make recommendations, and agree to state goals, the state plan, state policies, and state activities to insure that persons who are blind in Washington state receive the most effective and efficient services possible. **Public comment is scheduled from 10:45-11:15 a.m.**

The DSB is committed to providing a barrier free environment for everyone who attends the event. If you need a reasonable accommodation to attend the event, please make those requests at least two weeks in advance. We do not provide transportation to or from the event(s).

For more information on either event or to obtain an agenda for the SRC meeting visit DSB's web site at www.dsb.wa.gov and click on "Visit the State Rehabilitation Council" or "2006 Events Calendar" link. Or, you may contact Marla Oughton at (206) 721-6430, toll-free at 1-800-552-7103 or by e-mail maroughton@dsb.wa.gov.

WSR 06-17-063
NOTICE OF PUBLIC MEETINGS
ECONOMIC DEVELOPMENT FINANCE AUTHORITY
[Memorandum—August 9, 2006]

The Washington economic development finance authority (WEDFA) is an independent agency (#106) within the executive branch of the state government. The authority has four regular board meetings each year, one per quarter. The authority's meetings are open to the public, and access for persons with disabilities is provided at all meetings of the authority. We would like to have the board meeting schedule for our September 2006, board meeting, published in the next issue of the state register.

The meeting schedule for September 2006 is: **September 26, 2006, 10:00 a.m.** at the Shilo Inn, 101 Ocean Shores Boulevard N.W., Ocean Shores, WA.

Please call Jonathan A. Hayes at (206) 587-5634 if you have any questions.

WSR 06-17-064
NOTICE OF PUBLIC MEETINGS
DEPARTMENT OF SOCIAL AND HEALTH SERVICES
(Division of Alcohol and Substance Abuse)
[Memorandum—August 10, 2006]

The public is invited to review the federal fiscal year 2007 (FFY 2007) Washington state application for federal substance abuse prevention and treatment (SAPT) block grant funding. The application is submitted annually to the federal Centers for Substance Abuse Treatment and Substance Abuse Prevention. The 2007 application will result in approximately $35 million in federal funds being awarded to the state of Washington for substance abuse prevention and treatment.

A public hearing to review the application and consider questions or comments will be held September 8, 2006, at 10:00 a.m. **The location of the public hearing is Grays Harbor County Social Services Department, 2109 Sumner Avenue, Aberdeen, WA.** The hearing is sponsored by The Citizens Advisory Council on Alcoholism and Drug Addiction, a statutorily empowered body charged with the role of advising the department of social and health services on matters relating to the state substance abuse program.

The application is being prepared by the department of social and health services, division of alcohol and substance abuse. A summary of the SAPT block grant requirements and the plan for award allocation is available to anyone interested upon request.

If you have questions, or wish to request a copy of the review material, please contact Kathie Roberts, Federal Block Grant Administrator, Department of Social and Health Services, Division of Alcohol and Substance Abuse, P.O. Box 45330, Olympia, WA 98504-5330, (360) 725-3808, fax (360) 438-8078, roberkj@dshs.wa.gov.

WSR 06-17-077
NOTICE OF PUBLIC MEETINGS
GUARANTEED EDUCATION TUITION PROGRAM
[Memorandum—August 10, 2006]

In accordance with RCW 28B.95.020 and WAC 14-276-030, the advanced college tuition program, known as guaranteed education tuition program has adopted the following regular committee meeting schedule:

Date	Time	Place
Wednesday, November 8, 2006	2:00 - 4:00 p.m.	Olympia, State Investment Board (Board Room)
Wednesday, February 7, 2007	2:00 - 4:00 p.m.	Olympia, State Investment Board (Board Room)
Wednesday, April 18, 2007	2:00 - 4:00 p.m.	Olympia, State Investment Board (Board Room)
Tuesday, August 7, 2007	2:00 - 4:00 p.m.	Olympia, State Investment Board (Board Room)

If anyone wishes to request disability accommodations, notice should be given to the guaranteed education tuition program at least ten days in advance of the meeting in question. Notice may be given by any of the following methods: (360) 753-7860 (voice), (360) 753-7809 (TDD), or (360) 704-6260 (fax).

WSR 06-17-082
NOTICE OF PUBLIC MEETINGS
COMMUNITY ECONOMIC REVITALIZATION BOARD
[Memorandum—August 11, 2006]

The community economic revitalization board (CERB) will be having a special meeting August 15, 2006. The meeting location for the August meeting is the SeaTac International Airport, 17801 Pacific Highway South, Seattle, WA 98158. The CERB meeting will be held in the large auditorium. The meeting will begin at 9:00 a.m.

Please call (360) 725-4058 if you have any questions or require further clarification.

WSR 06-17-089
NOTICE OF PUBLIC MEETINGS
DEPARTMENT OF GENERAL ADMINISTRATION
(State Capitol Committee)
[Memorandum—August 15, 2006]

SPECIAL MEETING

WHEN: August 17, 2006
TIME: 10:00 a.m. to 12:00 p.m.
LOCATION: General Administration Building, Room 207

WSR 06-17-090
NOTICE OF PUBLIC MEETINGS
EASTERN WASHINGTON UNIVERSITY
[Memorandum—August 9, 2006]

The board of trustees of Eastern Washington University will hold their annual retreat from 8:00 a.m. to 5:00 p.m. on August 15 and 16, 2006, at Mukogawa Fort Wright Institute, 4000 Randolph Road, Building 11, Regents Room, Spokane, WA.

The board will convene into executive session in accordance with RCW 42.30.110 on August 16 from 12:00 - 1:30 p.m. and on August 16 from 4:30 - 5:45 p.m.

The board of trustees will hold their regular open meeting on Thursday, August 17, at 9:00 a.m. in Tawanka 215 at Eastern Washington University, Cheney, Washington.

WSR 06-17-091
NOTICE OF PUBLIC MEETINGS
SOUTH PUGET SOUND COMMUNITY COLLEGE
[Memorandum—August 11, 2006]

To ensure a quorum, the South Puget Sound Community College board of trustees has changed the date of their regular meeting in September. The meeting on Thursday, September 7, 2006, has been changed to Wednesday, September 6, 2006, 10:30 a.m. in Building 25-Boardroom on the campus of South Puget Sound Community College.

If you have any questions, please contact Diana Toledo at 596-5206.

WSR 06-17-092
NOTICE OF PUBLIC MEETINGS
EASTERN WASHINGTON UNIVERSITY
[Memorandum—August 15, 2006]

BOARD OF TRUSTEES

August 17, 2006 (Thursday)
Open Public Session - 9:00 a.m. (TAW 215 B&C)
Executive Session - August 16, 2006 - 12:00-1:30 p.m. and continuing August 16 - 4:30-5:30 p.m.

Eastern Washington University strives to satisfy all requests for special access needs for persons with disabilities. Requests for such accommodation are welcome and may be made by calling the president's office, (509) 359-6598.

WSR 06-17-100
NOTICE OF PUBLIC MEETINGS
COMMISSION ON JUDICIAL CONDUCT
[Memorandum—August 15, 2006]

NOTICE OF SPECIAL MEETING

The commission on judicial conduct will hold a special meeting commencing at 10:00 a.m. on Thursday, November 30, 2006, at the Holiday Inn Express Hotel & Suites, 19621 International Boulevard, Sea-Tac, WA 98188. The purpose of the meeting is to provide an education session for its members.

WSR 06-17-101
RULES COORDINATOR
DEPARTMENT OF NATURAL RESOURCES
[Filed August 16, 2006, 9:51 a.m.]

Pursuant to RCW 34.05.312, the department of natural resources designates Ms. Jamey Taylor as their rules coordinator. Jamey's contact information is as follows: Jamey Taylor, Department of Natural Resources, Asset Management and Protection Division, 1111 Washington Street S.E., P.O. Box 47015, Olympia, WA 98504-7015, phone (360) 902-1561, fax (360) 902-1789, e-mail Jamey.taylor@wadnr.gov.

Bonnie Bunning
Executive Director
Policy and Administration

WSR 06-17-105
OFFICE OF THE GOVERNOR
[Filed August 17, 2006, 9:02 a.m.]

NOTICE OF APPEAL
RCW 34.05.330(3)

Pursuant to RCW 34.05.330(3), you are hereby notified for publication in the Washington State Register that:

On May 5, 2006, the Governor received an appeal from Greg Devereux, Executive Director of the Washington Federation of State Employees (WFSE), relating to General Administration's denial of a petition to it to repeal and amend portions of the following rules:

WAC 236-51-005(3), WAC 236-51-006, WAC 236-51-010(11), WAC 236-51-110, WAC 236-51-115, WAC 236-51-120, WAC 236-51-200 and WAC 236-51-225

On May 30, 2006, the Governor received an appeal from Greg Devereux, Executive Director, WFSE, relating to Department of Personnel's denial of a petition to it to repeal the following rule:

WAC 357-43

On June 13, 2006, the Governor received three appeals from Greg Devereux, Executive Director, WFSE, relating to General Administration's denial of petitions to it to repeal and/or amend portions of the following rules:

WAC 236-51-100, WAC 236-51-215, WAC 236-51-306, and WAC 236-51-400

On June 12, 2006, Petitioner agreed to consolidate all five rules appeals and to extend the response deadline. On July 28, Petitioner agreed to further extend the deadline to August 7. The Governor denied WFSE's Petitions on August 7, 2006.

DATE: August 14, 2006

Richard E. Mitchell, General Counsel to the Governor

August 7, 2006

Greg Devereux, Executive Director
WFSE Council 28 AFSCME
121 Jefferson Street, Suite 300
Olympia, WA 98501-2332

RE: Review of the General Administration's and Department of Personnel's Denial of Washington Federation of State Employees (Federation) Petitions

Dear Mr. Devereux:

I have received and reviewed the Federation's five appeals to the General Administrations (GA) and the Department of Personnel (DOP) concerning the competitive contracting rules. In accordance with your letter dated June 12, 2006, agreeing to consolidate the petitions, I am addressing all five appeals in this response. I have kept in mind the judicial criteria by which rules are reviewed and have given due deference to the rulemaking process. After careful review of the original petitions from the Federation, the agency responses, and your petitions to me, I am denying four appeals and remanding one to DOP, as explained further below.

I understand from the agencies that the process for obtaining input from stakeholders was extensive and lengthy and that the Federation raised many of the same issues contained in the appeals during the rulemaking process. Some of the suggestions and changes the Federation recommended were included in the development of the rules; some were not. However, it is clear that the agencies weighed seriously all the suggestions brought forward and that each of the interpretive and substantive rules eventually promulgated and properly before me were well reasoned and consistent with state law.

In the broader context, I am concerned that the rules that the agencies have put forward regarding contracting out have never been used or tested. It troubles me that years after the landmark legislation that brought state employees collective bargaining, we are continuing to argue over the details of the implementation of the competitive contracting sections of that law. It is time to move forward with the process, and, if refinements need to be made, I am convinced that people of good will can sit down and make the necessary modifications so that the process works smoothly and fairly.

I believe we share a common goal of providing state services in the most efficient and effective manner possible. The

intent of the law was to do that through both collective bargaining and the competitive contracting provisions. The rules that the agencies developed provide a reasonable set of guidelines that will allow us to both move forward and at the same time to treat state employees fairly.

Sincerely,

Christine O. Gregoire
Governor

I will attempt to paraphrase the arguments generally presented because throughout the process most of the appeal letters to me were non-specific.

Petition I: Displaced Employees

I have reviewed the Federation's appeal of GA's denial of its petition. In that petition, the Federation requested the GA repeal or amend Washington Administrative Code (WAC) 236-51-005(3), WAC 236-51-006, WAC 236-51-010(11), WAC 236-51-110, WAC 236-51-115, WAC 236-51-120, WAC 236-51-200 and WAC 236-51-225. After careful consideration of the Federation's initial petition and GA's denial, I am denying the appeal.

GA's actions rest on three conclusions: 1) the above-noted rules are within GA's rulemaking authority; 2) the definition of "displaced employee" in the rule is consistent with the law; and 3) WAC 236-51-225 is also within GA's statutory authority and does not unfairly restrict state employees' rights to bid for work.

State law directs GA to establish procedures by rule to ensure that competitive contracts are properly submitted and fairly evaluated. The law further establishes the underlying authority for the processes and criteria by which a state agency may purchase services customarily and historically provided by employees in the classified service. GA's rules must and do address the process elements and criteria outlined by state law and therefore are within its rulemaking authority.

The boarder context of RCW 41.06.142 makes clear that the right to compete is necessarily limited to employees who can be readily identified as being displaced and considered for employment by an outside contractor. The term "potentially displaced employees" used in the WACs is consistent with this interpretation. As a practical matter, the repeal and amendment of certain WACs related to the displacement of employees would lead to considerable confusion and inefficiency in contracting and personnel processes and outcomes that are inconsistent with the full context of the law.

Finally, the purpose of WAC 236-51-225 is to ensure a fair bid submittal and evaluation process and therefore is within the rulemaking authority of GA. In addition, in order to properly manage state liability, costs and resources, state agencies must maintain control over the performance of additional services by an Employee Business Unit (EBU—including the authority to authorize or deny the bid or performance of those services.

For these reasons, I am denying the Federation's petition.

Petition 2: Creation of Separate Class of Public Employees and DOP's Authority to Adopt Rules Regarding Employee Business Units

I have reviewed the Federation's appeal of DOP's denial of the petition to repeal WAC chapter 357-43. After careful consideration of the review of the initial petition and the agency response, I am remanding to DOP.

The original appeal to the agency rests on the argument that DOP lacked the statutory authority to adopt the rules pertaining to employee business units. The appeal to me presents an entirely different and new argument—that the rules inappropriately create a separate class of public employees. In fact, the Federation admits in its appeal to me that that DOP does have the general authority to promulgate rules for state employees in employee business units, but then argues that the new rules are unnecessary since rules already exist for employees in the classified service.

Since the Federation has presented a new argument—one not presented in the original appeal to the agency—it is not properly before me under the Administrative Procedure Act. I am remanding to DOP the Federation's petition.

Petition 3: Placement of Cost Evaluation Criteria and the Consideration of the Performance Bond

I have reviewed the Federation's appeal GA's denial of its petition that asks GA to repeal WAC 236-51-305 regarding cost evaluation criteria and the performance bond and add certain provisions to the bid evaluation process in WAC 236-51-400. After careful consideration of the Federation's initial petition and GA's denial, I am denying the appeal.

The Federation's petition presents two arguments: 1) that "cost evaluation criteria" currently contained in the "bid solicitation" portion of the rule is better located in the "bid evaluation" portion; and 2) that the rule that exempts the cost of a performance bond from a non-employee business unit's bid gives an unfair advantage to the non-employee business unit in the competitive process by excluding real and actual costs.

The law requires that an agency in the context of competitive contracting make a determination that a contract results in "savings of efficiency improvements." Therefore, it is critical that the bid solicitation establish and make known how the state will evaluate bids received, including determination of the "savings." It follows, then, that the cost evaluation criteria are appropriately located in the bid solicitation portion of the rule as the agency contends. It is important also to understand the "cost evaluation criteria" will be used in the bid evaluation process as well.

The second issue revolves around the issue of the performance bond. In order to assure that bids are submitted and evaluated in a fair and objective manner, the state must treat risk costs for both employee business units and non-employee business units in an equitable fashion. Since the state assumes risk costs for employee business units and does not require a performance bond from these units, it is appropriate for the state to exclude the costs of performance bonds for non-employee business units in order to strike a fair balance.

For these reasons, I am denying the Federation's petition.

Petition 4: Establishment of a Competitive Market

I have reviewed the Federation's appeal of GA's denial of its petition requesting the repeal of WAC 236-51-100, regarding the determination of a competitive market. After careful consideration of the Federation's initial petition and GA's denial, I am denying the appeal.

The Federation's petition contends that GA has not meet the statutory requirement of establishing a competitive market before the agency solicits bids for contracting for services because the method GA is using is overly simplistic and fails to include certain factors that you believe should be included in the determination. Those factors include the requirement that the contractor must consider employment of state employees displaced by the contract, the determination of whether a potential bidder is a responsible bidder, the incorporation of elements of a DOT study on outsourcing and GA's requirements for establishing a competitive market in purchasing services.

The agency's denial is based on the fact that the determination of competitive market is a preliminary step that occurs prior to full development of the solicitation or contract and that potential service providers have yet to submit any information to the agency. WAC 236-51-100(2) provides that a competitive market exists when there are two more separate businesses, individuals, nonprofit organizations, or other entities capable of providing the services. The additional criteria that you wish to apply to the initial determination of a competitive market are impractical at this point in the process.

For example, to determine a whether potential vendor is a "responsible bidder" the agency must first have bidders. The same is true concerning the issue of whether the bidder will affirm their willingness to consider employment of state employees displaced by a particular contract. These criteria are appropriately included in the bid solicitation information and, of course, are used by the agency in the evaluation of the bid. The requirements that you are seeking are included in this latter stage of the process. To include them at the initial phase of determining a competitive market before the bid solicitation places an almost impossible burden on the agency and potentially wastes state resources to achieve an outcome that is already guaranteed by the processes outlined in the WAC's.

For these reasons, I am denying the Federation's petition.

Petition 5: Extending Cost Evaluation Criteria to All Bidders

I have reviewed the Federation's appeal of GA's denial of its request to repeal WAC 236-51-215, regarding extending bid criteria applied exclusively to Employee Business Units (EBU) to all bidders. After careful consideration of the Federation's initial petition and GA's denial, I am denying the appeal.

The argument presented by the Federation is that establishing bid criterion applicable only to employee business units does not create a fair and objective process to evaluate bids as required by state law. The rule put forward by GA recognizes that since EBUs remain state employees, the overhead costs of service performed by the EBU are born differently than if the contracted service provider was not comprised of state employees. This difference makes it necessary to have different cost criteria for EBUs than for non-employee bidders when soliciting and evaluating bids. The GA acted appropriately in promulgating WAC 236-51-215 which recognizes the different natures of the EBU and non-employee business unit.

For this reason, I am denying the Federation's petition.

WSR 06-17-106
NOTICE OF PUBLIC MEETINGS
OFFICE OF THE INTERAGENCY COMMITTEE
(Biodiversity Council)
[Memorandum—August 16, 2006]

The next public meeting of the biodiversity council will be Wednesday, September 27, 2006, from 9:00 a.m. to 3:00 p.m. and Thursday, September 28, 2006, from 9:00 a.m. to 3:00 p.m. at the Best Western Lakeside Lodge, 2312 West Woodin Avenue, Chelan, WA 98816. There will be a field trip from 3:00 p.m. to 9:00 p.m. on September 27, 2006.

For further information, please contact Kathleen M. Barkis, interagency committee for outdoor recreation (IAC), (360) 902-3012 or check the web page at http://www.iac.wa.gov and click on the link biodiversity council meetings.

The IAC schedules all public meetings at barrier free sites. Persons who need special assistance, such as large type materials, may contact Kathleen Barkis at the number listed above or by e-mail at KathleenB@iac.wa.gov.

WSR 06-17-111
NOTICE OF PUBLIC MEETINGS
DEPARTMENT OF FISH AND WILDLIFE
(Fish and Wildlife Commission)
[Memorandum—August 16, 2006]

CHANGE TO 2006 MEETING LIST

On its April 21, 2006, conference call, the commission voted to change the December 1-2, 2006, meeting to be held in Lynnwood to **December 8-9, 2006, to be held in Tumwater.**

WSR 06-17-112
NOTICE OF PUBLIC MEETINGS
SHORELINE COMMUNITY COLLEGE
[Memorandum—August 15, 2006]

The board of trustees of Shoreline Community College will hold a special meeting on Tuesday, August 22, 2006, from 4:00 p.m. to 6:00 p.m. for the purpose of apprising the

board and college administration about the "Washington Learns" report and other fall quarter activities. The meeting will take place in the Building 1000 Board Room.

Please call (206) 546-4552 or e-mail Michele Foley at mfoley@shoreline.edu if you need further information.

WSR 06-17-113
NOTICE OF PUBLIC MEETINGS
COMMISSION ON JUDICIAL CONDUCT
[Memorandum—August 16, 2006]

By direction of the commission on judicial conduct, the 11:00 a.m. business session, previously scheduled for Friday, October 6, 2006, at the Holiday Inn Express Hotel and Suites, 19621 International Boulevard, SeaTac, WA 98188 has been **canceled.**

WSR 06-17-115
INTERPRETIVE OR POLICY STATEMENT
DEPARTMENT OF SOCIAL AND HEALTH SERVICES
[Filed August 18, 2006, 10:01 a.m.]

DESCRIPTION OF INTERPRETIVE OR POLICY STATEMENT

Document Title: HRSA numbered memorandums.

Subject: 06-65, 06-67, 06-68, and 06-69.

Effective Date: 06-65 September 1, 2006; 06-67 August 4, 2006; 06-68 September 1, 2006; and 06-69 August 4, 2006.

Document Description: Numbered Memorandum 06-65, Significant changes to the general assistance unemployable (GAU) managed care program in King and Pierce counties; Numbered Memorandum 06-67, A new look to the medical identification (ID) card - effective August 4, 2006; Numbered Memorandum 06-68, Prescription drug program: Washington preferred drug list and expedited prior authorization changes; and Numbered Memorandum 06-69, Medical identification (ID) cards issued August 1, 2006, may have missing information.

To receive a copy of the interpretive or policy statement, contact Amelia Holl, Office of Rules and Publications, Department of Social and Health Services, Health and Recovery Services Administration, Division of Policy and Analysis, P.O. Box 45504, Olympia, WA 98504-5504, phone (360) 725-1349 or go to web site http://maa.dshs.wa.gov/download/publicationsfees.htm (click on "Numbered Memos," "Year 2005"), TDD (800) 848-5429, fax (360) 586-9727, e-mail hollag@dshs.wa.gov.

August 14, 2006
Amelia Holl
for Ann Myers, Manager
Rules and Publications Section

WSR 06-17-116
NOTICE OF PUBLIC MEETINGS
OFFICE OF CIVIL LEGAL AID
(Civil Legal Aid Oversight Committee)
[Memorandum—August 16, 2006]

The civil legal aid oversight committee established by section 4, chapter 105, Laws of 2005, will meet and conduct business on Friday, December 1, 2006.

What:	Quarterly Meeting of the Civil Legal Aid Oversight Committee
When:	Friday, December 1, 2006
Time:	10:00 a.m. - 3:00 p.m.
Where:	Radisson Hotel SeaTac 17001 Pacific Highway South Seattle, WA 98188

The agenda will include action on oversight committee business matters, receipt of the quarterly report from the director of the office of civil legal aid, discussion of the office of civil legal aid's proposed FY 2007-09 budget request and other matters within the charge of the oversight committee. A detailed agenda will be available at the meeting.

Accommodations: The civil legal aid oversight committee fully complies with applicable laws ensuring access for persons with disabilities. Upon request, the civil legal aid oversight committee will make reasonable accommodation to ensure full accessibility and meaningful opportunity for interested individuals to participate in the meeting, regardless of physical, mental, cognitive or other disabilities. Requests for translation services or assistive technology should be submitted at least forty-eight hours prior to the meeting in order to allow the oversight committee to accommodate.

For further information about this meeting and/or to request reasonable accommodation, please contact James A. Bamberger, Director, Office of Civil Legal Aid, 1112 Quince Street S.E., Mailstop 41183, Olympia, WA 98504, (360) 704-4135, jim.bamberger@ocla.wa.gov.

WSR 06-17-117
NOTICE OF PUBLIC MEETINGS
OFFICE OF CIVIL LEGAL AID
(Civil Legal Aid Oversight Committee)
[Memorandum—August 16, 2006]

The civil legal aid oversight committee established by section 4, chapter 105, Laws of 2005, will meet and conduct business on Friday, September 29, 2006.

What:	Quarterly Meeting of the Civil Legal Aid Oversight Committee
When:	Friday, September 29, 2006
Time:	10:00 a.m. - 3:00 p.m.

Where: Radisson Hotel SeaTac
17001 Pacific Highway South
Seattle, WA 98188

The agenda will include action on oversight committee business matters, receipt of the quarterly report from the director of the office of civil legal aid, discussion of the office of civil legal aid's proposed FY 2007-09 budget request and other matters within the charge of the oversight committee. A detailed agenda will be available at the meeting.

Accommodations: The civil legal aid oversight committee fully complies with applicable laws ensuring access for persons with disabilities. Upon request, the civil legal aid oversight committee will make reasonable accommodation to ensure full accessibility and meaningful opportunity for interested individuals to participate in the meeting, regardless of physical, mental, cognitive or other disabilities. Requests for translation services or assistive technology should be submitted at least forty-eight hours prior to the meeting in order to allow the oversight committee to accommodate.

For further information about this meeting and/or to request reasonable accommodation, please contact James A. Bamberger, Director, Office of Civil Legal Aid, 1112 Quince Street S.E., Mailstop 41183, Olympia, WA 98504, (360) 704-4135, jim.bamberger@ocla.wa.gov.

WSR 06-17-124
NOTICE OF PUBLIC MEETINGS
DEPARTMENT OF INFORMATION SERVICES
(Information Services Board)
[Memorandum—August 18, 2006]

The information services board will be holding a special meeting on August 30, 2006, from 12:00 p.m. to 1:00 p.m., in the Department of Information Services Boardroom, 605 East 11th Street, Olympia, WA 98504.

If you have any questions, please contact Laurel McMillan at (360) 902-3566.

WSR 06-17-135
NOTICE OF PUBLIC MEETINGS
DEPARTMENT OF LABOR AND INDUSTRIES
(Workers' Compensation Advisory Committee)
[Memorandum—August 15, 2006]

Per chapter 42.30 RCW, the Open Public Meetings Act, the workers' compensation advisory committee will be holding an additional meeting on:

DATE	TIME	LOCATION
October 16, 2006	10:00 a.m.	Department of Labor and Industries 7273 Linderson Way S.W. Tumwater, WA

Please call (360) 902-4425, if you have questions.

WSR 06-17-148
OFFICE OF FINANCIAL MANAGEMENT
(Governor's Executive Policy Office)
[Memorandum—August 22, 2006]

Prior to drafting a state petition to protect roadless areas in national forest lands, governor's staff and agency representatives are hosting two informal workshops to provide background information on Washington's roadless areas and to receive written public comment on how these areas should be managed. *No testimony will be taken at these workshops*; participants are encouraged to review the information presented and provide written comments to staff during the workshops.

Washington Roadless Areas Informational Workshops

Monday, September 18 **6:30 - 8:30 p.m.**	Legislative Building Columbia Room (First Floor) Capitol Campus Olympia, Washington 98501
Tuesday, September 19 **6:00 - 8:00 p.m.**	Spokane Falls Community College 3410 West Fort George Wright Drive Spokane, WA 99224-5288

If you have special accommodation needs or have questions regarding the workshops, please contact us at (360) 902-0648, no later than **one week before the workshops.** Persons with hearing loss can call 711 for Washington Relay Service. Persons with a speech disability can call (877) 833-6341.

WSR 06-17-149
ATTORNEY GENERAL'S OFFICE
[Filed August 22, 2006, 3:10 p.m.]

NOTICE OF REQUEST FOR ATTORNEY GENERAL'S OPINION WASHINGTON ATTORNEY GENERAL

The Washington attorney general issues formal published opinions in response to requests by the heads of state agencies, state legislators, and county prosecuting attorneys. When it appears that individuals outside the attorney general's office have information or expertise that will assist in the preparation of a particular opinion, a summary of that opinion request will be published in the state register. If you are interested in commenting on a request listed in this volume of the register, you should notify the attorney general's office of your interest by September 13, 2006. This is not the due date by which comments must be received. However, if you do not notify the attorney general's office of your interest in commenting on an opinion request by this date, the opinion may be issued before your comments have been received. You may notify the attorney general's office of your intention to comment by calling (360) 664-3027, or by writing to the Solicitor General, Office of the Attorney General, P.O. Box 40100, Olympia, WA 98504-0100. When you notify the office of your intention to comment, you will be provided with a copy of the opinion request in which you are interested; information about the attorney general's opinion pro-

cess; information on how to submit your comments; and a due date by which your comments must be received to ensure that they are fully considered.

The attorney general's office seeks public input on the following opinion request(s).

06-08-01 Request by Dawn Morrell
State Representative, 25th District

1. Are individuals in the business of purchasing scrap metal for the purpose of recycling the scrap metal required to abide by the provisions of RCW 19.60.020 and RCW 19.60.040 as they relate to the collection of information and the filing of reports to law enforcement

2. Are the existing definitions of "metal junk" and "second-hand property" sufficiently expansive to include scrap metal being purchased for further processing and recycling?

WSR 06-17-171
NOTICE OF PUBLIC MEETINGS
DEPARTMENT OF LABOR AND INDUSTRIES
(Electrical Board)
[Memorandum—August 22, 2006]

Per chapter 42.30 RCW, the Open Public Meetings Act, the time and place of the April meeting for the electrical board is:

DATE	TIME	LOCATION
September 26, 2006	9:30 a.m.	Department of Labor and Industries 950 Broadway Avenue Tacoma, Washington

Please call (360) 902-6411, if you have questions.

WSR 06-17-172
NOTICE OF PUBLIC MEETINGS
DEPARTMENT OF LABOR AND INDUSTRIES
(Advisory Board of Plumbers)
[Memorandum—August 22, 2006]

Per chapter 42.30 RCW, the Open Public Meetings Act, the advisory board of plumbers will be holding an additional meeting on:

DATE	TIME	LOCATION
September 26, 2006	9:30 a.m.	Department of Labor and Industries 950 Broadway Avenue Tacoma, Washington

Please call (360) 902-6411, if you have questions.

WSR 06-17-177
DEPARTMENT OF ECOLOGY
[Filed August 23, 2006, 9:49 a.m.]

CALL FOR DATA FOR THE 2006 WATER QUALITY ASSESSMENT

The water quality program of the department of ecology (ecology) is seeking public input of water quality data and information for updating Washington's water quality assessment, which includes the Section 303(d) list of impaired waters. This "call for data" will run for at least sixty days, from September 6 - November 7, 2006.

The federal Clean Water Act requires Washington state to periodically prepare a list of all surface waters in the state for which beneficial uses of the water such as for drinking, recreation, aquatic habitat, and industrial use are impaired by pollutants. This list was last prepared in 2004. Ecology is now preparing the 2006 assessment and 303(d) list. Ecology's 2006 assessment will be based on the most recent state water quality standards approved by EPA (WAC [173-]201A, 1997 version) and the state's recently updated assessment policies:

- Program Policy 1-11, Chapter 1, *Assessment of Water Quality for the Clean Water Act Sections 303(d) and 305(b) Integrated Report* and
- Program Policy 1-11, Chapter 2, *Ensuring Credible Data for Water Quality Management*

These revised guidance policies, including a response to comments, are available on ecology's web site at www.ecy.wa.gov/programs/wq/303d/index.html.

The 303(d) list is based on all readily available data from both public and private sources. In addition to data from federal, state, and local government agencies, ecology will also accept data collected by academic institutions, businesses, not-for-profit groups, tribes, quasi-governmental agencies (such as watershed planning councils), and private citizens.

Ecology is seeking new data during this sixty-day "call for data" period. If any data was submitted to ecology for previous 303(d) lists it does not need to be submitted again. Ecology will only use high quality data for the 303(d) assessment. All data submitted must have been collected in accordance with a quality assurance plan. The person submitting the data must document that such a plan was followed, and must provide ecology with a copy of the plan. Data must be representative of the ambient water quality conditions to be useful for assessing the segment.

Water quality data must be submitted into ecology's environmental information management (EIM) data base to be used for the assessment, unless alternate arrangements are made with ecology staff conducting the assessment. Information on EIM is available on ecology's web site at http://www.ecy.wa.gov/eim. Ecology is also providing training workshops to demonstrate the use of EIM for data submittal at the following dates and locations:

Date	Location	Address	Time
9/11	Lacey	Department of Ecology 300 Desmond Drive Headquarters Building Room 0S-14	9:00 a.m. - 12:00 p.m. or 1:00 p.m. - 4:00 p.m.

Date	Location	Address	Time
9/12	Seattle	North Seattle Community College 9600 College Way North Education Building Room 1841A	1:00 p.m. - 4:00 p.m.
9/13	Spokane	Spokane Falls Community College 3410 West Fort George Wright Drive Building 18 Room 218	1:00 p.m. - 4:00 p.m.
9/14	Yakima	Yakima Valley Community College 1015 South 16th Avenue Building C Room C230	1:00 p.m. - 4:00 p.m.

Because space is limited for the EIM training, please contact Sabrina Payne at (360) 407-6157 to reserve a place at your desired location, or send an e-mail to 303d@ecy.wa.gov.

More details about the water quality assessment process, including assistance with submitting data, quality assurance requirements, and training workshop information, can be found at www.ecy.wa.gov/programs/wq/303d/index.html.

The deadline for submitting data is 5:00 p.m., November 7, 2006. Data generated from sample events through June 30, 2006, will be assessed.

The segmentation system for the 2006 assessment will be the same one used in the 1998, 2002 and 2004 assessments. Rivers and streams are segmented by the township, range and section boundaries. Lakes and marine areas are defined by a rectangular grid sized at 45 seconds longitude by 45 seconds latitude (approximately 2,460 feet by 3,650 feet).

To ask any questions about the water quality assessment process or for further assistance in submitting data, please contact Ken Koch, Department of Ecology, P.O. Box 47600, Olympia, WA 98504-7600, phone (360) 407-6782, e-mail 303d@ecy.wa.gov.