

**Complying With The RPCs, and What Happens When You Don't ©**

**By**

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## 100 Years of Lawyer Ethics

This year we celebrate a century of formalized lawyer ethics. In 1908 the American Bar Association (ABA) published the first code of lawyer ethics known as the Canons. At the time, there was no enforceable code relating to ethics and how lawyers should conduct themselves. Since that time, the ABA has remained as the principal source of guidance in regard to lawyer and judicial ethics.

Over the past 100 years, the ABA has adopted various versions of ethical codes for lawyers, known as the Model Code. Sometimes the ABA does a wholesale revision of the entire code, as it did earlier in this decade. Usually a special commission of the ABA conducts a review and a rewrite of the entire code. The ABA also considers various amendments to the code in the intervening years. The Ethics Committee is charged with the responsibility of drafting various proposed amendments and submitting them through the ABA political process for adoption.

Once the ABA has acted, the states usually consider what the ABA has done and propose changes to the applicable code in the respective state. The final authority on the practice of law, usually the supreme court of the state, adopts the ethical code which is used as the basis for disciplinary action. In the process, the states often change what has been proposed by the ABA. Although ethical codes in all the states have basic principles in common, there is wide variation in what is contained in the codes of various states. Lawyers admitted in more than one jurisdiction need to be knowledgeable about the differences in ethics in the various jurisdictions in which they practice.

### Hortatory or Mandatory

The original Canons were aspirational in nature. Over the years, the ethical code evolved to have a mandatory rule component. A violation of the rule would result in professional discipline. This was the structure of the Code of Professional Responsibility (CPR) that was used into the 1980s by most states, although some still use the format of the CPR. The CPR had general Canons, each embodying a broad ethical proposition, followed by a hortatory section of what lawyers should do, known as the Ethical Consideration. This was then followed by the mandatory standard for discipline known as the Disciplinary Rule.

In the 1970s, lawyers began to question the hortatory aspect of the CPR. Since the ethical code had become primarily a basis for professional discipline, commentators suggested it should be drafted with that purpose in mind. In 1977 the ABA created a Commission to review the CPR, later known as the Kutak Commission, named for its chair Robert Kutak of Nebraska. The Kutak Commission recommended using exclusively a rule based approach and eliminated the hortatory aspects of the CPR. It was adopted by the ABA and became known as the Model Rules of Professional Conduct. Most states adopted the new format, with Washington adopting its first version of the RPCs in 1985.

In the intervening years, the desire to include hortatory principles in the RPCs has remained. Although most proposals have not been adopted, some states have adopted provisions of the RPCs embodying aspirational goals. For instance, Washington adopted RPC 6.1 encouraging, but not requiring, pro bono efforts by lawyers.

The general principles of statutory construction apply in regard to the RPCs. As the Scope section makes clear, if the Rule uses the terms “shall” or “shall not,” it is a legal imperative. A violation of the duty imposed by the Rule is a basis of professional discipline. If the terms “should” or “may” are used, the Rule does not state a mandatory obligation from which professional discipline can arise.

The language of the Rule creates the professional imperative. With the new version of the RPCs adopted by the Washington Supreme Court in 2006, the Court for the first time adopted “commentary” to the Rules. The Comments do not add or create ethical obligations. They are there to provide guidance to lawyers about the requirements of the Rules and how to comply with them. Similarly, ethics opinions help explain the Rules and provide guidance to practitioners. They do not, and cannot since they have not been adopted by the Supreme Court, create ethical obligations above those imposed by mandatory language contained in any Rule.

Note: The customary rules of statutory construction and the distinction between “shall” and “should,” do not apply in regard to the Code of Judicial Conduct (“CJC”) in Washington. The Supreme Court is in the process of forming a committee to revise the Washington CJC that will consider the ABA’s new Model Code of Judicial Conduct. The author hopes the new version will clarify what is mandatory and what is hortatory.

### **Consequences for Violation of Ethical Rules**

Many lawyers believe that the obligations imposed by the RPCs relate exclusively to professional discipline. Although this is the primary effect of the Rules, there are other consequences for a lawyer that may follow from a violation of the Rules in addition to professional discipline. A lawyer may be disqualified from a representation depending on the ethical rule that has been violated. Disqualification is often a remedy sought if the representation is tainted by a conflict of interest or when a lawyer has protected confidential information which could be used to the detriment of a former client or other person protected by the RPCs.

In addition, a lawyer may have a fee reduced, or fees disgorged or forfeited by unethical conduct that is deemed a breach of fiduciary duty by the lawyer to the client. *See, Cotton vs. Kronenberg*, 111 Wn. App. 258, 44 P.3d 878 (2002), *review denied*, 148 Wn.2d 1011 (2003).

In addition, a lawyer may be subject to civil liability for malpractice from conduct flowing from a breach of ethics. However, this is not direct in Washington. Under *Hizey v. Carpenter*, 119 Wn.2d 251, 830 P.2d 646 (1992), violation of an ethical obligation does not directly translate into a breach of duty by the lawyer for purposes of civil liability. Nor can evidence be introduced to the effect that a lawyer has acted unethically. Rather, a standard of care expert must testify to the standard of care applicable to the lawyer. If it involves conduct controlled by the ethical rules, the expert generally testifies to the effect that what is contained in the Rules is the general standard of care that the lawyer must meet without mentioning it is controlled by an RPC. This does allow for experts to disagree about the standard of care, even if the conduct is covered by specific provisions of the RPCs. For instance, the expert might testify the lawyer is held to a higher standard than what is contained in the provisions of an RPC. Surprisingly, some experts have testified that the standard of care is less than what is required by the RPCs.

## **The RPCs and Professional Discipline**

The RPCs provide the basis for professional discipline. However, every breach of an ethical rule does not necessarily rise to the level of requiring professional discipline. As the Scope section notes, the RPCs are “rules of reason.” The Scope section also states: “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...Moreover, the Rule presuppose that whether or not discipline should be imposed for a violation, and whether the severity of a sanction, depend on all the circumstances.” These include the willfulness and seriousness of the violation, any extenuating circumstances, and a prior history of discipline.

In addition, the disciplinary authority has to consider what it can prove under its applicable burden of proof. In Washington, the WSBA is the disciplinary agency, acting on behalf of the Washington Supreme Court. The Rules for Enforcement of Lawyer Conduct (ELCs) prescribe how the disciplinary process works. Under ELC 10.14(b), the WSBA has the burden of establishing misconduct “by a clear preponderance of the evidence.”

### **Highlights and Low Lights of the Disciplinary Process**

It is beyond the scope of this paper to provide an extensive review of the disciplinary process. Most of that information can be obtained by a detailed review of the ELCs. However, the following should be kept in mind.

Who May Bring a Grievance? Generally the disciplinary process is a reactive one, in which an individual files a grievance with the disciplinary authority. Often the grievant is the client, the opposing client, or sometimes opposing counsel. Judges are encouraged to refer ethical misconduct for investigation. In Washington, the WSBA can open a grievance on its own if it receives information regarding potential misconduct, either from a judicial opinion or public information such as a newspaper article.

Immunity. In Washington, grievants have absolute immunity in regard to filing a disciplinary grievance. ELC 2.12.

No Statute of Limitations. In Washington, there is no statute of limitations in regard to allegations of ethical misconduct. ELC 1.4.

Duty to Cooperate. A respondent lawyer has a duty to cooperate with the disciplinary authority investigating the lawyer’s conduct. ELC 2.13(d) and 5.3(e). Failure to do so can be an independent basis for discipline. ELC 5.3(f)(3); RPCs 8.1 and 8.4(1).

No Attorney-Client Privilege. A lawyer cannot assert the attorney-client privilege as a basis for not revealing information in response to a disciplinary investigation. ELC 5.4(b). A lawyer is entitled to be represented in a disciplinary proceeding and the attorney-client privilege does apply in regard to communications with counsel for the respondent.

Grievant Right to Appeal Dismissal. If the WSBA dismisses a grievance, the grievant has the right to appeal such dismissal to a Review Committee (a subcommittee) of the Disciplinary Board. The grievant has 45 days from dismissal to do so. ELC 5.6(b).

No Finality. One of the problems with the Washington ELCs is the lack of finality. If a grievant brings the same grievance again, after it has been dismissed, there is a new appeal allowed for another dismissal under ELC 5.6(b).

Confidentiality. Under ELC 3.4, the WSBA is generally required to keep confidential any information about a bar grievance until such time as formal charges are brought. However, the grievant and the respondent lawyer can make the information public under RLC 3.4(a).

Deferral. If there is pending litigation from which the bar complaint derives or is related to it, the respondent lawyer may request disciplinary counsel to defer the processing of the bar grievance under ELC 5.3(c). If disciplinary counsel agrees to defer, the grievant may appeal this decision to a Review Committee.

Attorney's Fees. If you lose a bar disciplinary proceeding, you are liable for the WSBA's costs which includes attorney's fees for the time of disciplinary counsel. If you prevail, you do not recover, except for regular costs on appeal if the matter has gone to the Supreme Court.

### **What to Do if You Receive a Bar Complaint**

If a bar complaint is filed against you, take it seriously. It can affect your professional license, livelihood, and reputation. When you receive notice that a grievance has been filed against you, generally there is a very short time to respond. If the WSBA requests a response, the usual period is two weeks. Pay attention to the time period to respond. If you need more time, make a documented request for more time to disciplinary counsel. Failure to make a timely response can subject the respondent to an allegation of failure to cooperate. Failing to respond in a timely fashion can also result in the WSBA taking formal action allowed under the ELCs to conduct the investigation, such as subpoenaing documents or taking your deposition. In making a response, be sure that what you say is accurate. Providing inaccurate information can also be failure to cooperate and can be an independent basis for discipline under RPC 8.1. It can also result in enhancement of the sanction to be imposed.

If you are not comfortable with responding on your own behalf, you may consult with counsel to obtain professional responsibility advice about what should be done. If you seek such a consultation, you are free to disclose confidential client information with your counsel. RPC 1.6(4) specifically allows this.

Generally the WSBA will simply provide a copy of the grievance and ask for a response. Often the grievance is written by a non-lawyer who is not familiar with the RPCs. Accordingly, many grievances do not reference RPC Rules. They often include allegations that, even if true, do not constitute an ethical violation. An example of this might be a grievance from a person who was represented by counsel, who decided to call you directly, and then is upset when you, properly, refuse to talk to him because he has a lawyer.

In fashioning a response, try to put the grievance into the proper context by discussing the applicable RPCs and what your position is in regard to a violation. In other words, give disciplinary counsel a context for making a determination of whether the grievance should proceed further. If it is a case of he said, she said, point out that it will be difficult for the bar to meet its burden of proof in such a case. Although the grievant will likely see your response, unless it is privileged and you request that the WSBA not provide such information, feel free to candidly discuss the grievant and question the credibility of the submission if it is appropriate.

A respondent lawyer has a duty to preserve the files and records relating to the matter. However, do not inundate disciplinary counsel with documents and provide billings unless requested to do so. It will only slow the process of review, and you may inadvertently provide other information that intrigues disciplinary counsel and expands the scope of the investigation or provides disciplinary counsel with information that hurts your case. This is really a case where less is more. Provide the relevant documents which substantiate your position in the matter. If disciplinary counsel needs more, it can be requested or obtained it under the provisions of the ELCs.

### **Diversion**

The ELCs provide for diversion for violations constituting minor misconduct. This diverts the grievance out of the disciplinary system. Although the grievant is informed of the decision to divert the matter, the grievant has no ability to object or to control this disposition.

However, diversion requires a contract between the disciplinary authority and the respondent lawyer. The contract is entered into after the respondent is interviewed by the psychiatrist/psychologist for the WSBA. The recommendation may include medical and mental health therapy and other conditions, such as attending continuing education. The contract runs for a certain period of time. The respondent has the obligation during that time period to meet the requirements of the contract and keep the WSBA informed about what is being done. If the respondent fails to meet the commitments, the diversion is revoked and the original grievance can then be processed in the disciplinary process. If the respondent is the subject of another grievance that is found to be meritorious during the contract period, the original grievance that led to the diversion can then return to the disciplinary process.

### **Conclusion**

Violation of ethical rules may have immense ramifications to a lawyer. Depending on the violation, consequences can include public disgrace, suspension from practice, disbarment, loss of fee, and civil liability. Lawyers should therefore take their ethical responsibilities seriously and avoid situations where they could be put into ethical jeopardy.

But lawyers should care about their ethical responsibilities not because of the sanctions which might result from a violation, but because ethical practice enhances the lawyer and the legal system. Ethical practice is the foundation of public respect for the legal system. Our system of justice depends on it.