No. 98596-1

IN THE SUPREME COURT OF WASHINGTON

In Re the Dependency of E.M, a Minor Child,

State of Washington/Department of Children, Youth, and Families,
Respondent,

v.

J.M.,
Petitioner.

BRIEF OF *AMICI CURIAE*, WASHINGTON DEFENDER ASSOCIATION, ACLU OF WASHINGTON, UNIVERSITY OF WASHINGTON SCHOOL OF LAW CHILDREN & YOUTH ADVOCACY CLINIC, & WASHINGTON CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER

ON DISCRETIONARY REVIEW FROM THE
COURT OF APPEALS, DIVISION ONE

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> *Lawyering for children does not lend itself to absolutes. Children of any age have significant deficits of cognition and experience that can make client-directed lawyering problematic. At the same time, a lawyer who disregards the expressed wishes of a juvenile client may unduly discount the child's knowledge, perspective, and need for voice. Moreover, other legal players in the child welfare system, including child welfare workers, legislators, courts, parents, and attorneys themselves, also have deficits and blind spots. Too often, these blind spots reinforce inequalities of race, culture, and class. The child's lawyer should acknowledge the local competence of all of the players, but also recognize the limits of that competence.*

Peter Margulies, *Race, Culture, Class, and Crisis in Child Welfare: Theory into Practice,* 81 St. John's L. Rev. 601-602 (2007).

I. IDENTITY AND INTEREST OF AMICUS CURIAE

Washington Defender Association ("WDA"), American Civil Liberties Union of Washington ("ACLU-WA"), and Lisa Kelly,[1] the Bobbe and Jon Bridge Professor of Child Advocacy and Director of the Children and Youth Advocacy Clinic (CAYAC) at the University Of Washington School Of Law filed on November 12, 2020 their identity and interests in of amicus statements under separate cover as agreed motion for leave to file

[1] Professor Kelly is the author of two books and several law review articles relating to the rights of children and youth in the child welfare system. Lisa Kelly was also the Chair of the Statewide Children's Representation Workgroup, charged by the Washington Supreme Court Commission on Children in Foster Care to develop standards of practice to govern children's representation in the state. These standards are now incorporated by statute as the governing standards for children who are appointed counsel pursuant to RCW 13.34.100 (6)(c)(i).

amicus briefing. The **Washington Association of Criminal Defense Lawyers (WACDL)** joins this brief and states its interests and identity here. WACDL is a statewide, nonprofit organization formed to improve the quality and administration of justice. A professional bar association founded in 1987, WACDL has over 800 members—private criminal defense lawyers, public defenders, and related professionals—committed to preserving fairness and promoting a rational and humane criminal justice system, including for juveniles and indigent people.

II. ISSUE TO BE ADDRESSED BY AMICUS

May the court interfere in an attorney-client relationship for children in dependency proceedings even if the attorney complies with the rules of professional conduct?

May the court interfere with an attorney-client relationship in a manner that prevents the child from obtaining meaningful access to the court?

III. STATEMENT OF THE CASE

Amicus adopts the facts as stated in Petitioner's brief and supplemental brief.

IV. ARGUMENT

A. In Washington, children in care routinely do not have counsel appointed at public expense to represent them.

In Washington State, children in care[2] have fundamental liberty interests at stake in dependency (and termination) proceedings. Matter of Dependency of E.H., 191 Wn.2d 872, 895, 427 P.3d 587, 597 (2018); *see also* In re Dependency of MSR, 174 Wn. 2d 1, 20, 271 P.3d 234, 244 (2012)("[W]e conclude that under the Fourteenth Amendment to the United States Constitution, children have fundamental liberty interests at stake in termination of parental rights proceedings."). These fundamental liberty interests include "being free from unreasonable risks of harm and a right to reasonable safety; in maintaining the integrity of the family relationships, including with the child's parents, siblings, and other familiar relationships; and in not being returned to (or placed into) an abusive environment over which they have little voice or control." In re Dependency of MSR, 174 Wn. 2d 1, 20, 271 P.3d 234, 244 (2012) (parenthetical in original).

Washington courts, however, have not found children in care to be categorically entitled to court appointed counsel at public expense at *every*

[2] "Children in care" refers to any child alleged to be dependent or found to be dependent under Chapter 13.34 RCW, who have been removed by court order and who have been placed in the custody of someone other than their parent or legal custodian.

stage of the dependency proceedings. In re Dependency of MSR, 174 Wn.2d 1, 22–23, 271 P.3d 234, 246 (2012) (upholding former statute's discretionary appointment of counsel at public expense for dependent children as sufficient due process protection); Matter of Dependency of E.H., 191 Wn.2d 872, 898, 427 P.3d 587, 598 (2018) (upholding current statute's discretionary appointment of counsel at public expense for dependent children as sufficient due process protection); *cf.* RCW 13.34.100(6)(a),(b)(state law providing categorical court appointed of counsel at public expense in dependency cases to *every* dependent child, *if* they are legally free for a minimum of six months, but not for appellate termination proceedings).

Despite having fundamental liberty interests, children in care have been left with few avenues to exercise their right to be heard[3] about those liberty interests. In re Dependency of M.S.R., 174 Wn.2d 1, 15, 271

[3] "The fundamental requisite of due process of law is the opportunity to be heard." Grannis v. Ordean, 234 U.S. 385, 394, 34 S.Ct. 779, 783, 58 L.Ed. 1363 (1914). "It is an opportunity which must be granted at a meaningful time and in a meaningful manner." Armstrong v. Manzo, 380 U.S. 545, 550, 85 S. Ct. 1187, 1190, 14 L. Ed. 2d 62 (1965)(holding constitutionally deficient notice of private involuntary adoption petition could not be cured by hearing subsequently afforded to nonconsenting father upon his motion to set aside adoption decree).

> Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.

Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 313, 70 S. Ct. 652, 656, 94 L. Ed. 865 (1950).

P.3d 234, 242 (2012)("The importance of family and familiar relationships to a natural and healthy childhood seems well established. In a dependency or termination proceeding, the parent is at risk of losing the parent-child relationship, but the child is at risk of not only losing a parent but also relationships with sibling(s), grandparents, aunts, uncles, and other extended family."). These liberty interests of a child in care are at issue at nearly every statutorily-required dependency hearing. *See* RCW 13.34.065; RCW 13.34.130; RCW 13.34.138; RCW 13.34.145. A child's right to be heard derives from her fundamental liberty interests at stake in the proceedings and should be at least the same as for indigent parents. *See* In re Dependency of MSR, 174 Wn.2d 1, 20, 271 P.3d 234, 245 (2012) ("[W]e hold that children have at least the same due process right to counsel as do indigent parents subject to dependency proceedings as recognized by the United States Supreme Court in Lassiter.").

The centrality of counsel to the protection of children's fundamental interests is more than an abstract principle. Research in Washington has demonstrated that without counsel, the children who are at the heart of these proceedings are frequently not mentioned in the hearings that govern their lives. The Washington State Court Observation Study conducted over six months in three counties, including King County, gathered data from 596 hearings involving 872 children. This

study found that children had no advocate at all in 23% of the observed hearings. Attorneys represented children's stated interests in 22% of the hearings. Guardians ad litem advocated for the best interests of the child in 61% of the cases. Alicia LeVezu, *Alone and Ignored: Children Without Advocacy in Child Abuse and Neglect Courts*, 14 Sta. J. C.R. & C.L. 125, 143 (2018). Whether and how the child was represented in court made a significant difference in the attention paid to children during hearings. Children were most likely to be mentioned, to have their well-being discussed, and to have their preferences relayed and argued for when they had an attorney. LeVezu, *supra*, at 146-149.[4] A child's ability to access the courts through an attorney is central to securing the child's fundamental interests in the process.

In this case, below, the lower courts interfered with not only the child's ability to access the dependency court in a meaningful way, but also to retain the attorney. The lower court ruled, among other things,

[4] Children were mentioned during the hearing 92% of the time when their attorney was present, in contrast to only being mentioned 67% of the time when there was no advocate and 79% when there was a GAL. Their actual well-being was discussed in 76% of the hearings when an attorney was present, in contrast to the 28% when there was no advocate and 64% when there was a GAL. The child's position was relayed to the court in 80% of the hearings when an attorney was present, 6% of the hearings when no advocate was present and 25% when a GAL was present. When an attorney for the child was present, the child's position was supported by legal argument in 68% of the hearings, in contrast to only 30% of the time when a GAL was present. LeVezu, supra, at 146-149.

that the *ethics* rules for lawyers prevent a dependent child from consenting to legal representation in a dependency case by *any* attorney, even a qualified attorney, who is not court appointed. The lower court further ruled that a dependent child's decision to retain counsel is presumptively improper. Matter of Dependency of E.M., 12 Wn.App.2d at 520 (dependent child's retention of private counsel must be ratified by court and must under three-part Mathews v. Eldridge test satisfy legal standard for when constitution mandates court appointment of counsel for dependent child at public expense). The lower court reasoned that because a dependent child is in the legal custody of the State of Washington through the Department of Child Youth and Families ("DCYF"), the child may not provide informed consent to their own legal representation, *and* implied by this ruling that DCYF could provide informed consent on behalf of dependent children.[5] E.M., 12 Wn.App.2d at 520. This broad ruling may prevent a child from retaining counsel to represent their interests in court in opposition to DCYF if DCYF simply withheld

[5] The lower court ruling specifically used the word "infant" to refer to the dependent children affected by its ruling. The use of the word "infant" is ambiguous. Either the lower court meant to use the plain language meaning of the word "infant" to refer to the almost four-year-old toddler in this case, or it used the word "infant" as a legal term, which refers to all minors, i.e. anyone under the age of 18 years. Matter of Dependency of E.M., 12 Wn.App.2d 510, 520, 458 P.3d 810, 816, review granted, 196 Wn. 2d 1009, 473 P.3d 256 (2020).

informed consent to the legal representation on the child's behalf. E.M., 12 Wn.App.2d at 520.

These rulings, taken together with existing jurisprudence regarding a dependent child's right to court appointed counsel at public expense, visit an injustice in Washington by creating a court procedure that wholly vitiates the child's right to access the courts in a meaningful way and to be heard in their own dependency proceedings. Children are not entitled to automatic appointment by statute in their dependency proceedings. *See* RCW 13.34.100(7). Only two counties automatically provide counsel for children in care under local rule, ordinance, or practice. [6] There is a

[6] Unrepresented children in care are children who are not provided court appointed counsel by local ordinance, local court rule, or local court practice. In practice, whether the dependency court appoints an attorney at public expense to represent a dependent child of any age in an open dependency case prior to termination depends upon the county in Washington, where the dependency case is heard. Court appointed counsel at public expense in dependency proceedings is categorically provided by local ordinance, local court rule in two counties: Benton-Franklin Counties and King County.

Benton-Franklin counties provide appointed counsel at pubic expense in dependency proceedings to all children 8 years of age and older. BFLJuCR 9.2 (A)(1)(e)-(h). In King County provide appointed counsel at pubic expense in dependency proceedings to all children 12 years of age and older. *See* KCC 2.60.010; KCLJuCR 2.4(a)(providing appointed counsel for all children 12 years and older at shelter care); KCLJuCR 4.3(a)(2)(providing appointed counsel for all children 12 years and older at TPR). Spokane County provides appointed counsel at public expense in dependency proceedings to children over the age of 12 upon request. *See* SCLJuCR 3.4 (e)(2).

It should also be noted that in 2017 the Washington State Legislature appropriated money to the Office of Civil Legal Aid (OCLA) to provide legal representation for all children in foster care in two counties (Grant and Lewis) at the initial shelter care hearing prior to termination of parental rights. The Legislature also directed OCLA to contract with the Washington state center for court research to compare impacts and outcomes for foster children who receive standards-based legal representation to those who are not represented by an

severe deficit in meaningful access to the courts for these children, a deficit exacerbated by the lower court rulings here. Without access to retained counsel, children in care who need and want the court's full consideration of their many significant interests in their dependency cases will be silenced. It is therefore imperative that this Court follow the jurisprudential framework surrounding legal representation[7] for dependent children and uphold the child's right to retain counsel.

B. The lower court erred in presuming that unrepresented children in care cannot retain counsel to represent them in an ethical manner.

1. Children in care who retain counsel should not have their counsel's notice of appearance stricken.

Children in care may privately retain counsel. RCW 13.34.100(7); JuCR 9.2(a)[8]. Children in care need not pay legal fees to retain lawyers to represent their interests. "An attorney-client relationship does not require

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attorney before termination of parental rights. Sec. 28, ch. 20, laws of 2017 3rd Sp. Session. The comparison counties in the study where no changes were made to the local practice regarding appointment of counsel for children at public expense are Whatcom and Douglas counties.

[7] *Amici* recognizes that there is more than one model of legal representation proposed for some young children and for very young children. However, because the lower court rulings here affect all children under the age of 18 years and because the holdings do no turn on distinctions between these legal representation models, we do not address the distinctions in this brief. *But see* Lisa Kelly & Alicia LeVezu, *Until the Client Speaks: Reviving the Legal Interest Model for Preverbal Children,* 50 Fam. L. Quarterly 383 (2016)

[8] A child's right to privately retain counsel includes having volunteer or *pro bono* counsel, which occurs regularly in dependency cases, as well as having a family member pay for counsel for the child, as in this case.

the payment of a fee or formal retainer but may be implied from the conduct of the parties." Matter of McGlothlen, 99 Wn.2d 515, 522, 663 P.2d 1330, 1334 (1983) (internal citations omitted). The scope of legal representation may not even include litigation, but rather might only focus on legal consultation, advice, and advocacy. Many legal services that children need are outside the scope of legal representation provided by court appointed counsel for children in dependency proceedings, or at times, they may be outside the area of competency for many providing those legal services. *See* RPC 1.1.

Said differently, neither state law, nor the juvenile court rules explicitly prohibit a child from retaining an attorney to represent their interests in a dependency proceeding. RCW 13.34.100(7); JuCR 9.2(a). The ethics rules for attorneys also contemplate that a client, even a minor child, may provide informed consent[9] to be represented by a lawyer retained by a third party as well as to the scope of the legal representation. RPC 1.8(f); RPC 1.2 (a), (f).

Some children in care are capable of providing informed consent to legal representation. JuCR 9.2(a); *see* RPC 1.14. However, sometimes a prospective client cannot provide informed consent to the legal

[9] The lawyer must clearly communicate to the client, preferably in writing, the terms of fee arrangement. RPC 1.4; RPC 1.5.

representation, but the attorney still believes that the representation may otherwise be ethically undertaken. *See* RPC 1.14; s*ee* RPC 1.1; RPC 1.4; RPC 1.15A(d); RPC 2.1. The ethics rules also provide that the attorney may seek, in appropriate cases, "reasonably necessary protective action" through appointment of a Guardian ad Litem ("GAL"). [10] RPC 1.14 Comment 4.

> *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*, the lawyer may 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 guardian.

RPC 1.14 (b)(emphasis added).

Either the child's parent or appointed GAL should be able to provide informed consent to the child's legal representation, as this act of informed consent is <u>not</u> an inherent conflict. *See* RPC 1.7 Comments 2, 4, 5; RPC 1.3, Comment 1; RPC 1.14 Comment 4. If an attorney encounters

[10] This GAL is likely also not the Title 13 GAL or Court Appointed Special Advocate ("CASA"). While CASAs are not bound by the rules of professional conduct, they do have their own minimum duties outlined by statute and statewide court rules. *See* RCW 13.34.105; GALR 1; GALR 2. Where these duties conflict with the duties of the protective GAL appointed under RPC 1.14, the Title 13 GAL or CASA may not be the appropriate person to fulfill this role (duty). *See* RCW 13.34.105; GALR 1; GALR 2.

a prospective (child) client, [11] under circumstances which, in the attorney's estimation, legal representation cannot be ethically performed; the ethics rules provide the attorney should decline the representation. RPC 1.16 (a)(1).[12]

The lower court's affirmation of a procedure of striking the retained lawyer's notice of appearance after presuming the attorney's behavior to be unethical and requiring said attorney to appear in open court to overcome that presumption is untenable.[13] When there is no question about the capacity of the child to engage in and direct the legal representation but there remains a question about the capacity of the child and/or their parent to provide informed consent and no GAL has yet been appointed, it is far more prudent to appoint a GAL for the purpose of protecting the child's interests.

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[11] "A person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client." RPC 1.18 (a).

[12] This ethics rule applies to all attorneys even those who are court appointed; however, a court appointed attorney must seek discharge by court motion. *See* CR 71(b); *cf.* GHLJuCR 1.6 (Grays Harbor county superior court requires an "attorney for parent or child, whether privately retained or appointed" to seek Court approval prior to their withdrawal).

[13] Attorneys owe duties to prospective clients. RPC 1.18 (a). In general, they cannot use or reveal information learned from a prospective client, even though no client-lawyer relationship ensues, unless otherwise mandated by the court, state law, or permitted by other rules of professional conduct. RPC 1.18(b). "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." RPC 1.6 Comment 2.

If, after informed consent has been given by the child and/or their parent or GAL and after the attorney has outlined the scope of the legal representation with the client, questions remain about the ethical behavior of the child's attorney based on the attorney's actions in the case, a bar complaint may be filed by anyone, including the court. RPC 8.3. But creating a special procedure mandating pre-representation court review and approval is inconsistent with other state laws and ethics rules prohibiting age discrimination and allowing minors to appear in civil proceedings. *See, e.g.* RPC 8.4 (g); RCW 4.08.050; RCW 26.28.015 (6). This Court should reverse the lower court's presumption that the mere appearance of an attorney retained by the child inherently raised an ethics problem.

2. Children in care should not be foreclosed from retaining counsel as through counsel they may provide essential information to the court, including specifics about how they are being harmed in care.

Washington courts should not prohibit children in care from retaining counsel even in cases where the court refuses appointment of counsel because that could well preclude or prevent the court becoming informed of harms the child faces while in care. Studies suggest that providing qualified, consistent, and effective legal representation for children and parents protects children and improves outcomes for families.

See, e.g., U.S. Dep't of Health & Hum. Svcs., Admin. for Child. and Fam., Children's Bureau. IM-17-02: *High Quality Legal Representation for All Parties in Child Welfare Proceedings*, 2 (January 17, 2017)("Despite the gravity of these cases and the rights and liabilities at stake, parents, children and youth do not always have legal representation[.] The absence of legal representation for any party at any stage of child welfare proceedings is a significant impediment to a well-functioning child welfare system.");[14] Oregon Task Force on Dependency Representation. *Task Force on Dependency Representation Final Report*, 14 (2016)(noting legal representation reduced use of foster care, increased use of kinship care, and decreased unnecessary removals).[15]

Removal from home and separation from parents, siblings and other loved ones is profoundly traumatic for children. Christian M. Connell, Jeffrey J. Vanderploeg, Paul Flaspohler, Karol H. Katz, Leon Saunders, and Jacob Kraemer Tebes, *Changes in Placement among Children in Foster Care: A Longitudinal Study of Child and Case Influences*, 80 (3) Soc. Serv. Rev. 398-418 (2006). Children generally

[14] Found online at: https://www.acf.hhs.gov/sites/default/files/cb/im1702.pdf. (as of 12/14/20).
[15] Found online at: https://www.oregon.gov/gov/policy/Documents/LRCD/Oregon_Dependency_Representation_TaskForce_Final_Report_072516.pdf. (as of 12/14/20).

fare better when they are allowed to remain with their parent in an alleged "marginal home" than when removed.[16]

The Washington State Legislature created a statutory framework that neither presumes nor requires any child to be removed from their parents' home when alleged to be or found to be dependent under Chapter 13.34 RCW. RCW 13.34.065 (4)(b), (5)(a); RCW 13.34.130(1)(a). When the dependency court does choose to remove a child from their parental home, the Legislature created a statutory preference that children will be placed with their own relatives whether at shelter care or at disposition. RCW 13.34.065(5)(b)(at shelter care); RCW 13.34.130 (5)(at disposition). These statutory protections are consistent with social science research that shows that parental and relative placements are safer, longer lasting, and

[16] Folman, Rosalind D., *"I Was Tooken": How Children Experience Removal from Their Parents Preliminary to Placement in Foster Care*, 2 Adoption Quarterly 2 (1998); Joseph P. Ryan & Mark F. Testa, *Child Maltreatment and Juvenile Delinquency: Investigating the Role of Placement and Placement Instability*, 27 Child. & Youth Servs. Rev. 227 (2005); Doyle, Jr., Joseph J., *Child Protection and Child Outcomes: Measuring the Effects of Foster Care*, 97 Am. Econ. Rev. 1583 (2007); Doyle, Jr., Joseph J., *Child Protection and Adult Crime: Using Investigator Assignment to Estimate Causal Effects of Foster Care*, 116 J. of Political Econ. 4 (2008);Doyle, Jr., Joseph J., *Causal Effects of Foster Care: An Instrumental-Variables Approach*, 35 Child. & Youth Servs. Rev. 1143 (2013); Lowenstein, Kate. *Shutting Down the Trauma to Prison Pipeline Early, Appropriate Care for Child-Welfare Involved Youth, 2018*. Citizens for Juvenile Justice (2018). Found online at: https://static1.squarespace.com/static/58ea378e414fb5fae5ba06c7/t/5b47615e6d2a733141a2d965/1531404642856/FINAL+TraumaToPrisonReport.pdf (as of 12/13/20).

more stable, than non-relative placements and that children fare better in the short and long term when they live with their own family.[17]

Just as when a child is removed from her or his home, intermittent moves to additional placements are harmful and negatively impact the child's developmental trajectories and well-being, including attachment difficulties, externalizing behavioral problems, and internalizing behavioral problems.[18] Moving a dependent child also negatively impacts their educational outcomes, including behavioral problems in school, academic skill delays, and school failure.[19] Moving dependent children multiple times is further associated with increased levels of mental health service use. Christian M. Connell, Jeffrey J. Vanderploeg, Paul Flaspohler, Karol H. Katz, Leon Saunders, and Jacob Kraemer Tebes,

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[17] Connell, et al., *supra*, at 398-39; Testa, Mark F., *The Quality of Permanence - Lasting or Binding - Subsidized Guardianship and Kinship Foster Care as Alternatives to Adoption*, 12 Va. J. Soc. Pol'y & L. 499 (2005); Marc Winokur et al., *Systematic review of kinship care effects on safety, permanency, and well-being outcomes*, 28.1 Research on Social Work Practice 19 (2018); Eileen Gambrill and Aron Shlonsky, *The need for comprehensive risk management systems in child welfare*, 23 (1) Child & Youth Svcs. Rev. 79-107 (2001); Bonnie T. Zima, Regina Bussing, Stephanny Freeman, Xiaowei Yang, Thomas R. Belin, Steven R. Forness, *Behavior Problems, Academic Skill Delays and School Failure among School-Aged Children in Foster Care: Their Relationship to Placement Characteristics*. 9(1) J. Child Fam Stud 87–103 (2000); Winokur, Marc & Crawford, Graig & Longobardi, Ralph & Valentine, Deborah. (2008). *Matched Comparison of Children in Kinship Care and Foster Care on Child Welfare Outcomes.* 89 (3) Fam. in Soc.: J. Cont. Soc. Svcs. (2008). *See also* Nat'l Conference of State Legislatures, "The Child Welfare Placement Continuum: What's Best for Children?" (Nov. 3, 2019), found online at: https://www.ncsl.org/research/human-services/the-child-welfare-placement-continuum-what-s-best-for-children.aspx (as of 12/13/20).

[18] See footnote 2, *supra*.

[19] See footnote 3, *supra*.

Changes in Placement among Children in Foster Care: A Longitudinal Study of Child and Case Influences, 80 (3) Soc. Serv. Rev. 398-399 (2006).

DCYF's use of placement exceptions[20] is one of the examples of harm children in care may face. Dowd, Patrick, Office of Family and Children's Ombuds (OFCO), 2019 Annual Report 8 (2020). The OFCO's 2019 annual report found the use of hotels was on the rise from 2018; specifically there was a 400+ increase in use of placement exceptions; 1,514 placement exceptions involving 282 different children, 91 of whom spent more than 5 nights in in a hotel.[21] Dowd, Patrick, Office of Family and Children's Ombuds (OFCO), 2019 Annual Report 8, 16 (2020). Nearly 90% of all placement exceptions spent in hotels

[20] "Placement exceptions" are the use of DCYF offices, hotels, or apartments as emergency placements for children placed in the custody of the DCYF. Dowd, Patrick, Office of Family and Children's Ombuds ("OFCO"), 2019 Annual Report 8 (2020) (internal quotations omitted) ("While Department policy specifically prohibits placement of a child in an institution not set up to receive foster children, a Regional Administrator may approve a placement exception at a DCYF office, apartment, or hotel if no appropriate licensed foster home or relative caregiver is available, as long as the child is adequately supervised."). OFCO tracks DCYF's use of this exception annually. Dowd, Patrick, Office of Family and Children's Ombuds ("OFCO"), 2019 Annual Report 1-16 (2020).

[21] The OFCO found that although over half (57.3%) of children in care in Washington last year were 5 to 17 years of age, they experienced 89.4% of all placement exceptions. It additionally found that nearly two-thirds (64.2%) of all placement exceptions experienced in the reporting year involved children aged 5 to 14 years, with 5 to 9 year olds spending an average of 5 days in hotels and 10 to 14 year olds spending nearly 7 days in hotels. Dowd, *supra*, at 16.

occurred in Region 3[22] and Region 4.[23] Finally, despite being less than ten percent (9.2%) of all children in care in Washington, one-fifth (20.7%) of the children who experienced placement exceptions were Black. Dowd, *supra*, at 19. Multiple moves are more likely to result in poorer outcomes for the child and increases the child's risk of being placed in institutionalized and restrictive settings, like group care. Connell, et al., *supra*, at 399; Dowd, *supra*, at 19-20. A child represented by a stated interest attorney could seek direct relief from the Court to interrupt DCYF's use of this harmful policy or other harms suffered while in care.

Other interests can also be advocated by retained counsel for children. Children in care often retain counsel while they are in DCYF custody to advocate and litigate on their behalf in a variety of settings.

> The essence of the attorney/client relationship is whether the attorney's advice or assistance is sought and received on legal matters. The relationship need not be formalized in a written contract, but rather may be implied from the parties' conduct.

Bohn v. Cody, 119 Wn.2d 357, 363, 832 P.2d 71, 75 (1992), amended on denial of reconsideration (June 22, 1992)(internal citations and quotations omitted). Children in care retain lawyers to litigate in the following

[22] DCYF Region 3 encompasses Whatcom, Skagit, Snohomish, Island and San Juan counties. Dowd, Patrick, Office of Family and Children's Ombuds ("OFCO"), 2019 Annual Report 16 (2020)

[23] DCYF Region 4 encompasses King County. Dowd, Patrick, Office of Family and Children's Ombuds ("OFCO"), 2019 Annual Report 16 (2020).

areas: criminal prosecutions; immigration proceedings; truancy proceedings; emancipation petitions; name change petitions; small claims and tort actions against former caregivers, including foster parents or DCYF; petitions for DVPO or SAPO orders on third parties; tort claims; parentage actions; involuntary treatment act proceedings; Title 11 conservatorships; Title 13 guardianships; petitions for expungement and restoration of rights; and petitions for relief from sex offender registration.

Children in care retain lawyers to advocate in administrative settings, such as social security benefits hearings; Individuals with Disabilities in Education Act matters; medical accommodations (§504 of the 1973 Rehabilitation Act) matters; and Medicaid insurance exceptions. A child in care may also retain a lawyer to litigate matters ancillary to the dependency proceeding, such as: discovery motions regarding forensic examination of the child, forensic interview of the child, deposition of the child, subpoenas for healthcare and/or educational records of the child, protective orders, and orders seeking immunity for the child.

Across Washington, a diverse community of legal professionals currently provides these much-needed legal services, whether on a *pro bono* basis by attorneys volunteering on their own in the community or at their local bar association; at no cost by civil legal services organizations with expertise in these areas of practice, or at no cost by the local public

defender office. For example, a child being investigated for damaging the wall(s) or breaking property at a foster home and being forced to move out because of that alleged behavior might need of several avenues of legal advocacy. They might need criminal legal advice (before charges are filed); assistance reclaiming their (the child's) belongings after the sudden move; finding and litigating in court for a new appropriate caregiver the child wants to live with; litigating whether to stay in or move to new school program that meets the child's specific educational needs; litigating in court and advocating outside of court for more family time with their parents and siblings during and after being suddenly moved; and advocating for social supports as needed. Foreclosing a vital path for children in care to access the courts so they can tell the judge making decisions about their most personal and important relationships undermines fundamental notions of fairness, and surely cannot be in support of justice.

V. CONCLUSION

Even when children in care, like E.M., are offered legal representation through retained counsel on account of the efforts of a loved one (his grandmother), the current legal framework and the court's interpretation thereof proves too difficult, too inconsistent, and too elusive to actually ensure that any child in care actually receives legal

representation when the child is still in a position to request to go home to her parent(s) or to live with her loved ones in their dependency case. This Court should reverse the lower court ruling insofar as it categorically denies access to retained counsel by *any* dependent child and it categorically prohibits parents and other loved ones from assisting the child in gaining meaningful access to the dependency court process.

Respectfully submitted this 16th day of December, 2020.

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VI. APPENDICES

JuCR 9.2
ADDITIONAL RIGHT TO REPRESENTATION BY LAWYER

(a) Retained Lawyer. Any party may be represented by a retained lawyer in any proceedings before the juvenile court.

(b) Child in Need of Services Proceedings. The court shall appoint a lawyer for indigent parents of a juvenile in a child in need of services proceeding.

(c) Dependency and Termination Proceedings. The court shall provide a lawyer at public expense in a dependency or termination proceeding as follows:

(1) Upon request of a party or on the court's own initiative, the court shall appoint a lawyer for a juvenile who has no guardian ad litem and who is financially unable to obtain a lawyer without causing substantial hardship to himself or herself or the juvenile's family. The ability to pay part of the cost of a lawyer shall not preclude assignment. A juvenile shall not be deprived of a lawyer because a parent, guardian, or custodian refuses to pay for a lawyer for the juvenile. If the court has appointed a guardian ad litem for the juvenile, the court may, but need not, appoint a lawyer for the juvenile.

(2) Upon request of the parent or parents, the court shall appoint a lawyer for a parent who is unable to obtain a lawyer without causing substantial hardship to himself or herself or the juvenile's family. The ability to pay part of the cost of a lawyer shall not preclude assignment.

(d) Juvenile Offense Proceedings. The court shall provide a lawyer at public expense in a juvenile offense proceeding when required by RCW 13.40.080(10), RCW 13.40.140(2), or rule 6.2.

Before appointing a lawyer for an indigent person or at the first appearance of the lawyer in the case, the court shall require the lawyer to certify to the court that he or she complies with the applicable Standards for Indigent Defense Services to be approved by the Supreme Court.

[Adopted effective July 1, 1978; Amended effective September 1, 1987; September 1, 1997; January 1, 2012; June 30, 2012].

CR 71
WITHDRAWAL BY ATTORNEY

(a) Withdrawal by Attorney. Service on an attorney who has appeared for a party in a civil proceeding shall be valid to the extent permitted by statute and rule 5(b) only until the attorney has withdrawn in the manner provided in sections (b), (c), and (d). Nothing in this rule defines the circumstances under which a withdrawal might be denied by the court.

(b) Withdrawal by Order. A court appointed attorney may not withdraw without an order of the court. The client of the withdrawing attorney must be given notice of the motion to withdraw and the date and place the motion will be heard.

(c) **Withdrawal by Notice.** Except as provided in sections (b) and (d), an attorney may withdraw by notice in the manner provided in this section.

(1) *Notice of Intent To Withdraw*. The attorney shall file and serve a Notice of Intent To Withdraw on all other parties in the proceeding. The notice shall specify a date when the attorney intends to withdraw, which date shall be at least 10 days after the service of the Notice of Intent To Withdraw. The notice shall include a statement that the withdrawal shall be effective without order of court unless an objection to the withdrawal is served upon the withdrawing attorney prior to the date set forth in the notice. If notice is given before trial, the notice shall include the date set for trial. The notice shall include the names and last known addresses of the persons represented by the withdrawing attorney, unless disclosure of the address would violate the Rules of Professional Conduct, in which case the address may be omitted. If the address is omitted, the notice must contain a statement that after the attorney withdraws, and so long as the address of the withdrawing attorney's client remains undisclosed and no new attorney is substituted, the client may be served by leaving papers with the clerk of the court pursuant to rule 5(b)(1).

(2) *Service on Client*. Prior to service on other parties, the Notice of Intent To Withdraw shall be served on the persons represented by the withdrawing attorney or sent to them by certified mail, postage prepaid, to their last known mailing addresses. Proof of service or mailing shall be filed, except that the address of the withdrawing attorney's client may be omitted under circumstances defined by subsection (c)(1) of this rule.

(3) *Withdrawal Without Objection*. The withdrawal shall be effective, without order of court and without the service and filing of any additional papers, on the date designated in the Notice of Intent To Withdraw, unless a written objection to the withdrawal is served by a party on the withdrawing attorney prior to the date specified as the day of withdrawal in the Notice of Intent To Withdraw.

(4) *Effect of Objection*. If a timely written objection is served, withdrawal may be obtained only by order of the court.

(d) Withdrawal and Substitution. Except as provided in section (b), an attorney may withdraw if a new attorney is substituted by filing and serving a Notice of Withdrawal and Substitution. The notice shall include a statement of the date on which the withdrawal and substitution are effective and shall include the name, address, Washington State Bar Association membership number, and signature of the withdrawing attorney and the substituted attorney. If an attorney changes firms or offices, but another attorney in the previous firm or office will become counsel of record, a Notice of Withdrawal and Substitution shall nevertheless be filed.

[Adopted effective July 1, 1967; Amended effective July 1, 1976; October 11, 1985; September 1, 1990.]

RPC 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.

[Adopted effective September 1, 1985; Amended effective September 1, 2006.]

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).

Retaining or Contracting With Other Lawyers

[6] Before a lawyer retains or contracts with other lawyers outside the lawyer's own firm to provide or assist in the provision of legal services to a client, the lawyer should ordinarily obtain informed consent from the client and must reasonably believe that the other lawyers' services will

RPC 1.2
SCOPE OF REPRESENTATION AND ALLOCATION OF AUTHORITY BETWEEN CLIENT AND LAWYER

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by RPC 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 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 gives informed consent.

(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) [Reserved.]

(f) A lawyer shall not purport to act as a lawyer for any person or organization if the lawyer knows or reasonably should know that the lawyer is acting without the authority of that person or organization, unless the lawyer is authorized or required to so act by law or a court order.

[Adopted effective September 1, 1985; Amended effective October 1, 2002; October 29, 2002; September 1, 2006; September 1, 2011.]

Comments

Allocation of Authority between Client and Lawyer

[1] **[Washington revision]** 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 RPC 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 RPC 1.4(a)(2) and may take such action as is impliedly authorized to carry out the representation. See also RPC 1.1, comments [6] and [10] as to decisions to associate other lawyers or LLLTs.

[Comment 1 amended effective September 1, 2016.]

[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

RULE 1.3
DILIGENCE

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

[Adopted effective September 1, 1985.]

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 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 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.]**

[Comments adopted effective September 1, 2006.]

RPC 1.4
COMMUNICATION

(a) A lawyer shall:

(1) promptly inform the client of any decision of circumstance with respect to which the client's informed consent, as defined in Rule 1.0A(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 the client reasonably informed about the status of the matter;

(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.

[Adopted effective September 1, 1985; Amended effective September 1, 2006; April 14, 2015.]

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] **[Washington revision]** 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 an opposing lawyer 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 that 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 RPC 1.2(a). See also RPC 1.1 comments [6] and [10] as to decisions to associate other lawyers or LLLTs.

[Comment [2] amended effective April 14, 2015; September 1, 2016.]

[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,

RPC 1.6
CONFIDENTIALITY OF INFORMATION

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

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

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

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

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

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

(5) may reveal information relating to the representation of a client 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;

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

(7) may reveal information relating to the representation to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client; or

(8) may reveal information relating to the representation of a client to inform a tribunal about any client's breach of fiduciary responsibility when the client is serving as a court appointed fiduciary such as a guardian, personal representative, or receiver.

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

[Adopted effective September 1, 1985; Amended effective September 1, 1990; September 1, 2006; September 1, 2016; September 1, 2018.]

Comments

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. 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] **[Washington revision]** 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 1.0A(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.

[Comment 2 amended effective April 14, 2015.]

[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. *See also* Scope.

[Comment 3 amended effective September 1, 2011.]

[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] **[Washington revision]** 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 information relating to a client of the firm to other lawyers or LLLTs within the firm, unless the client has instructed that particular information be confined to specified lawyers or LLLTs.

[Comment 5 amended effective April 14, 2015.]

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 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

RPC 1.7
CONFLICT OF INTEREST: CURRENT CLIENTS

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation 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; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(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).

[Adopted effective September 1, 1985; Amended effective September 1, 1995; September 1, 2006.]

Comments

General Principles

[1] **[Washington revision]** 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 1.0A(e) and (b).

[Comment 1 amended effective April 14, 2015.]

[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).

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

RPC 1.8
CONFLICT OF INTEREST: CURRENT CLIENTS: SPECIFIC RULES

(a) A lawyer 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) 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 in a manner that can be reasonably understood by the client;

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

(3) the client 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 shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, expect as permitted or required by these Rules.

(c) A lawyer 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 any substantial gift unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include spouse, child, grandchild, parent, grandparent or other relative or individual with who the lawyer or the client maintains a close, familial relationship.

(d) 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 shall not, while representing a client in connection with contemplated or pending litigation, advance or guarantee financial assistance to a client, except that:

(1) a 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 the client remains ultimately liable for such expenses; and

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

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

(1) the client gives informed consent;

(2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and

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

(g) 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 gives informed consent, confirmed in writing. The lawyer's disclosure shall include the existence and nature of all the

RPC 1.14
CLIENT WITH DIMINISHED CAPACITY

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental 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, the lawyer may 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 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.

[Former Rule 1.13 was amended effective July 1, 1988; July 14, 1989; March 1, 1991; October 1, 2002. Renumbered and amended effective September 1, 2006.]

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)(8).

RPC 1.15A
SAFEGUARDING PROPERTY

(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 transaction.

(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) Except as provided in Rule 1.5(f), and subject to the requirements of paragraph (h) of this Rule, a lawyer shall deposit into a trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred.

(3) 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 funds.

(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.

(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.

RPC 1.16
DECLINING OR TERMINATING REPRESENTATION

(a) Except as stated in 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) the representation will result in violation of the Rules of Professional Conduct or other law;

(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or

(3) the lawyer is discharged.

(b) Except as stated in 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;

(2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;

(3) the client has used the lawyer's services to perpetrate a crime or fraud;

(4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;

(5) 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;

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

(7) 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 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 another legal practitioner, 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.

[Former Rule 1.15 was renumbered and amended effective September 1, 2006; Amended effective April 14, 2015.]

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

RPC 1.18
DUTIES TO PROSPECTIVE CLIENT

(a) A person who consults with a lawyer about 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 learned information from a prospective client shall not use or reveal that information, 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 or LLLT is disqualified from representation under this paragraph or paragraph (c) of LLLT RPC 1.18, no lawyer in a firm with which that lawyer or LLLT 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 a consultation 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.

[Adopted effective September 1, 2006; Amended effective April 14, 2015; September 1, 2016.]

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 consultations 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]** A person becomes a prospective client by consulting with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter. Whether communications, including written, oral, or electronic communications, constitute a consultation depends on the circumstances. For example, a consultation is likely to have occurred if a lawyer, either in person or through the lawyer's communications in any medium, specifically requests or invites the submission of information about a potential representation without clear and reasonably understandable warnings and cautionary statements that limit the lawyer's obligations, and a person provides information in response. See also Comment [4]. In contrast, a

RPC 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.

[Adopted effective September 1, 1985.]

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.

[Comments adopted effective September 1, 2006.]

RPC 8.3
REPORTING PROFESSIONAL MISCONDUCT

(a) A lawyer who knows that another lawyer or LLLT has committed a violation of the applicable Rules of Professional Conduct that raises a substantial question as to that lawyer's or LLLT's honesty, trustworthiness or fitness as a lawyer or LLLT in other respects, should inform the appropriate professional authority.

(b) A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office should inform the appropriate authority.

(c) This Rule does not permit a lawyer to report the professional misconduct of another lawyer, judge, or LLLT to the appropriate authority if doing so would require the lawyer to disclose information otherwise protected by Rule 1.6.

[Adopted effective September 1, 1985; Amended effective September 1, 2006; April 14, 2015.]

Comment

[1] **[Washington revision]** Lawyers are not required to report the misconduct of other lawyers, LLLTs, 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 applicable 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.

[Comment 1 amended effective April 14, 2015.]

[2] **[Reserved.]**

[3] **[Washington revision]** While lawyers are not obliged to report every violation of the applicable Rules, the failure to report a serious violation may undermine the belief that the legal profession should be self-regulating. 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 or LLLT's conduct raises a serious question as to the honesty, trustworthiness or fitness to practice. Similar considerations apply to the reporting of judicial misconduct.

[Comment 3 amended effective April 14, 2015.]

[4] **[Washington revision]** This Rule does not apply to a lawyer retained to represent a lawyer, LLLT, or judge whose professional conduct is in question. Such a situation is governed by the Rules applicable to the client-lawyer relationship.

[Comment 4 amended effective April 14, 2015.]

[5] **[Washington revision]** Information about a lawyer's, LLLT'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.

[Comment 5 amended effective April 14, 2015.]

[Comments adopted effective September 1, 1985; Amended effective September 1, 2006.]

RPC 8.4
MISCONDUCT

It is professional misconduct for a lawyer to:

(a) 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) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

(e) 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) knowingly

(1) assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law, or

(2) assist or induce an LLLT in conduct that is a violation of the applicable rules of professional conduct or other law;

(g) commit a discriminatory act prohibited by state law on the basis of sex, race, age, creed, religion, color, national origin, disability, sexual orientation, honorably discharged veteran or military status, 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 Rule when committed on the basis of sex, race, age, creed, religion, color, national origin, disability, honorably discharged veteran or military status, or marital status. This Rule shall not limit the ability of a lawyer to accept, decline, or withdraw from the representation of a client in accordance with Rule 1.16;

(h) in representing a client, engage in conduct that is prejudicial to the administration of justice toward judges, lawyers, or LLLTs, other parties, witnesses, 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, honorably discharged veteran or military status, or marital status. This Rule does not restrict a lawyer from representing a client by advancing material factual or legal issues or arguments;

(i) 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) 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) violate his or her oath as an attorney;

(l) 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) violate the Code of Judicial Conduct; or

(n) engage in conduct demonstrating unfitness to practice law.

[Adopted effective September 1, 1985; Amended effective September 17, 1993; October 31, 2000; October 1, 2002; September 1, 2006; April 14, 2015; September 1, 2018.]

Comments

[1] **[Washington revision]** 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. Lawyers are also subject to discipline if they assist or induce an LLLT to violate the LLLT RPC. Paragraph (a), however, does not prohibit a lawyer from advising a client concerning action the client is legally entitled to take.

[Comment 1 amended effective April 14, 2015.]

[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 (6-8)

[6] Paragraphs (g) - (n) were taken from former Washington RPC 8.4 (as amended in 2002).

[7] Under paragraph (f)(2), lawyers are also subject to discipline if they assist or induce an LLLT to violate the LLLT RPC. See also Rule 4.3 Washington Comment [6].

[Comment 7 amended effective April 14, 2015.]

[8] A lawyer who counsels a client regarding Washington's marijuana laws or assists a client in conduct that the lawyer reasonably believes is permitted by those laws does not thereby violate RPC 8.4. *See also* RPC 1.2 Washington Comment [18].

[Comment 8 adopted effective September 25, 2018.]

[Comments adopted effective September 1, 2006.]

e. The desirability of trial and disposition of the entire offense in one court;

f. The sophistication and maturity of the juvenile as determined by consideration of his home, environmental situation, emotional attitude and pattern of living;

g. The record and previous history of the juvenile, including previous contacts with law enforcement agencies, juvenile courts and other jurisdictions, prior periods of probation/community supervision, or prior commitments to juvenile institutions;

h. The prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the juvenile (if he is found to have committed the alleged offense) by the use of procedures, services and facilities currently available to the juvenile court.

2. Address any other factors relevant to the motion; and

3. Make a recommendation to the court as to the motion.

(C) Hearing. The writer of the declination investigation report will be present at the declination hearing to testify, if so requested.

[Adopted effective April 1, 1988, September 1, 2013]

TITLE IX. RIGHT TO LAWYER AND EXPERTS IN ALL JUVENILE COURT PROCEEDINGS

Local Juvenile Court Rule 9.2
RIGHT TO COUNSEL

(A) Appointments. Legal counsel shall be provided at public expense in the following circumstances:

1. For a juvenile respondent:

a. Alleged to be a juvenile offender;

b. Alleged to have violated the terms of his/her community supervision;

c. Who may be a party to a diversion agreement who has not waived his right to counsel for the purpose of advising him as to whether he desires to participate in the diversion process or to decline to participate;

d. When the Prosecuting Attorney or diversion unit has filed a petition to terminate or modify a diversion agreement;

e. When a dependency petition has been filed alleging the child to be dependent pursuant to RCW 13.34.040, and the child is eight (8) years of age or older and a guardian

ad litem has not been appointed to represent the best interests of the child;

f. When a review hearing is to be held pursuant to RCW 13.32A or RCW 13.34, and the child is eight (8) years of age or older and a guardian ad litem has not been appointed to represent the best interests of the child;

g. When a petition to terminate the rights of the parent or parents of the juvenile has been filed and the child is eight (8) years of age or older and a guardian ad litem has not been appointed to represent the vest interests of the child;

h. When a petition asking for the creation of a guardianship over the child has been filed pursuant to RCW 13.36, and the child is eight (8) years of age or older and a guardian ad litem has not been appointed to represent the best interests of the child.

2. For a parent, guardian or custodian:

a. Who is a party to a:

(1) Dependency proceeding;

(2) Proceeding for the termination of the parent-child relationship;

(3) Proceeding pursuant to RCW 13.40 and a juvenile under the age of twelve for whom a parent, guardian or custodian is responsible is requesting to waive a right or object to a proceeding;

(4) Proceeding pursuant to RCW 13.36 requesting a guardianship be created;

(6) Proceeding and who requests that the court appoint counsel because of an inability to obtain counsel due to financial hardship and the court finds the party indigent.

3. Whenever ordered by the court.

(B) Retained counsel. Any party may be represented by retained counsel in any proceeding before the Juvenile Court.

(C) Procedure for Appointment of Counsel. Except as provided in Rule 9.2(A)(1), at or prior to the initial appearance of the parties, the court or a representative of the court may inquire as to the financial status of any party who requests counsel to be appointed. Upon the filing of a motion and affidavit for assignment of a lawyer by a party, the court may schedule a hearing on the subject of the parents, guardian, or custodian and/or the child's ability to pay all or part of the expense of counsel. Upon a finding that the party requesting appointment of counsel is indigent, the court shall appoint counsel. If it appears that the party can partially afford counsel, the court shall appoint counsel but may direct that the party pay an amount certain to the Clerk of the Court.

1. An appropriate form may be used to determine the financial status of a party.

(D) Notice of Appearance. Attorneys, representing parties in juvenile matters, except for appointed attorneys, must serve prompt written notice of their appearance upon all other parties or their counsel of record, the legal process unit of the court and file the same with the Clerk of the Court.

[Adopted effective April 1, 1988, Amended effective September 1, 2015, September 1, 2016]

Local Juvenile Court Rule 9.4
APPOINTMENT OF NON-LAWYER GUARDIAN AD LITEM

(A) Generally. It shall be the policy of the court to appoint a non-lawyer guardian ad litem for a juvenile in lieu of an attorney in all proceedings other than offender matters involving juveniles under the age of eight (8) years. The court may appoint a non-lawyer guardian ad litem in lieu of or in addition to an attorney in all proceedings other than offender matters involving juveniles who are eight (8) years of age or older.

(B) Procedure.

1. *Dependency/Guardianship/Termination Proceedings.* The court may appoint a guardian ad litem for a child after the court has entered a finding of dependency pursuant to RCW 13.34 or at any other appropriate stage of a proceeding. In cases involving more than one child from the same family unit, the court may appoint one guardian ad litem to represent the interests of all the children.
2. *Other Proceedings.* The court may appoint a guardian ad litem when it deems such an appointment necessary.

(C) Role. The guardian ad litem shall be an advocate on behalf of and in the best interests of the child. The guardian ad litem shall serve as a participant in court proceedings. A guardian ad litem shall be entitled to full access to all parties and relevant records and to receive notice as a party.

(D) Certification. No guardian ad litem shall be appointed to represent a child until he/she has successfully completed an approved training course supervised by the court and administered an oath of office by the court. A guardian ad litem shall be free of influence from anyone interested in the result of the proceeding.

(E) Reports. In all proceedings, the guardian ad litem shall submit a written report to the court addressing all relevant factors and making a recommendation to the court as to an appropriate disposition in the best interests of the child. All reports submitted by a guardian ad litem will be provided to the court and parties no later than ten (10) days prior to the

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EFFECTIVE
SEPTEMBER 1, 2020

(e) ***Notice to Attorneys of Record***. Where there is already a previously assigned or retained attorney of record for any party, including an attorney or CASA for the child, in a dependency proceeding presently pending in Juvenile Court, they shall be provided notice of the shelter care and fact finding hearings no later than 24 hours prior to the 72-hour shelter care hearing whenever reasonably possible.

(f) ***Courtesy Notice to Public Defender Agencies and CASA*****.** The petitioning party in a dependency and/or the moving party for an order to take a child into custody shall make available an electronic copy of the petition and any resultant order to DPD, the CASA program, and contracted defense agencies responsible for providing attorney-of-the-day services on the day the petition is filed. The public defender office and CASA program shall be responsible for obtaining said copies.

(g) ***Continuances of the 72-Hour Hearing*****.** Any person or agency entitled to such notice as set forth above may move for a continuance of the 72-hour hearing if it appears they did not receive timely notice of the hearing. A continuance may be granted by the Court under such conditions as shall ensure the safety and well-being of any child subject to the proceeding. If a child remains in the home of a parent, guardian or legal custodian, the Court may allow the parties to continue the initial shelter care hearing to a new date to be set no later than 14 days from the filing of the petition under such conditions as shall ensure the safety and well-being of any child subject to the proceedings.

(h) ***Subsequent Shelter Care Hearing for Unavailable Party*****.** Whenever it appears that a parent, guardian, or legal custodian was unable to attend the initial shelter care hearing, such person may request a hearing by written application to the Court showing good cause for their inability to attend the initial hearing. The hearing on the question of whether good cause exists may be set on an emergency basis pursuant to LJuCR 3.13.(a) on the appropriate dependency's calendar. Such subsequent hearing, if granted, shall be conducted within 72 hours of the request (excluding Saturdays, Sundays and holidays).

[Effective January 2, 1994; amended effective September 1, 2005; September 2, 2013; September 1, 2016.]

LJuCR 2.4 PROCEDURE AT INITIAL SHELTER CARE HEARING

(a) ***Inform Parties of Rights.*** The court shall inform parties of their rights as set forth in RCW 13.34.090. Any parent, guardian and/or legal custodian of the child, or child age 12 or older, who appears at the 72-hour hearing may be represented, at this hearing, by Court-appointed counsel regardless of financial status unless the party expressly waives this right or has retained counsel.

(b) ***Hearing and Decision.*** At the 72-hour hearing the Court shall:

(1) Determine whether those persons entitled to notice under RCW 13.34 and RCW 13.38 and these rules have received notice of custody and rights pursuant to RCW 13.34.060 and ensure that all parties are informed of their legal rights.

(2) Receive evidence from the petitioner regarding efforts made to notify the parties to this action, and the child's Tribe and determine whether additional service of process or publication of notice is necessary. Any party to this action who was personally served notice and summons of the fact finding hearing pursuant to RCW 13.34.070 or who is present at the 72-hour hearing shall be deemed to have received timely and proper notice of the fact finding hearing.

(3) Determine whether a CASA shall be appointed for the child.

(a) *Petition*. A Petition requesting the termination of a parent-child relationship may be filed in Juvenile Court. The petition shall conform to the requirements of LJuCR 3.2 and 3.3, shall be verified, and shall state the facts which underlie each of the allegations required by RCW 13.34.180.

(b) *Amendment of Petition*. A termination petition may be amended as provided in LJuCR 3.5.

(c) *Answer*. A parent shall file an answer to the petition as provided in LJuCR 3.6. A CASA for a child or a child aged twelve or older may file an answer to the petition, but shall not be required to do so. Answers shall be due not later than 65 days after the filing of the petition, or at such other time as may be set by the Court. In no event shall an answer be required less than 20 days after service of the Notice and Summons and Petition.

[Adopted effective January 2, 1994; amended effective August 20, 1998; September 1, 2005; September 2, 2013.]

LJuCR 4.3 NOTICE OF TERMINATION HEARINGS

(a) *Generally*. *Notice and Summons & Notice to Counsel.*

(1) Notice and Summons. A notice and summons of the preliminary hearing and termination fact finding hearing shall be issued by the Clerk of the Court or petitioner and served by the petitioner along with a copy of the termination petition and order setting case schedule on all parties, including a child who at the time of the scheduled termination fact finding hearing will be age 12 or over, in the manner defined by RCW 13.34.070 or published in the manner defined by RCW 13.34.080.

(2) *Notice to Counsel*. In all cases where a party is represented by counsel in the underlying dependency action, the petitioner shall also provide counsel with a copy of the petition, notice and summons, and order setting case schedule. If the youth is age twelve (12) or older and not represented by counsel, a copy shall be given to the Department of Public Defense for appointment of counsel for the youth.

(3) Advice to be contained in the Notice and Summons.

(A) The notice shall clearly state the date, time and place for the hearings and shall contain an advisement of rights substantially conforming to the requirements of RCW 13.34.180 for termination petitions, the requirements of RCW 13.36.030 for guardianship petitions, and RCW 13.34.062 and RCW 13.34.090 so as to inform the party of the right to a hearing before a Judge and to representation by a lawyer, including appointment of a lawyer to a party who cannot afford one.

(B) The notice and summons shall also advise the parties that failure to appear or otherwise plead or respond to the Petition shall be the basis for the Court to enter an Order of Default against that party.

(b) *Indian Children*. If the petitioner knows or has reason to know that the child involved is or may be an Indian child as defined in RCW 13.38, the petitioner shall notify the Tribe(s) in the manner required by RCW 13.34.070(10), 13.38.070 and 25 U.S.C. 1912.

(c) *Case Schedule*. Upon the filing of a termination petition, the Clerk of the Court will prepare and file an order setting case schedule and provide one copy to the petitioner. The petitioner shall serve a copy of the case schedule on all parties as provided in these rules. The case schedule shall be in a format set by the Court and shall set the termination fact finding hearing no more than 150 days after the filing of the termination petition. The case schedule will

LOCAL RULES OF THE SUPERIOR COURT FOR SPOKANE COUNTY

EFFECTIVE
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The petitioner shall provide the Clerk of the Court with the original petition along with sufficient copies of the petition for service of process. The party filing a petition shall also file a Request for Service notifying the Clerk of Court what type of service is being requested. The Clerk of Court shall notify the petitioner when personal service packets are completed. The petitioner is responsible for completing personal service and filing a declaration of service. The Clerk is responsible for service by publication and mail and for filing a declaration of service.

Amended effective 09/01/1999

LJuCR 3.3 CONTENT OF PETITION

(g) Other Information. A dependency, guardianship, or termination petition shall contain a statement whether either parent is under the age of 18.

Amended effective 09/01/1999

LJuCR 3.4 APPOINTMENT OF COUNSEL AND SCHEDULING OF DEPENDENCY FACT-FINDING HEARING

(c) Scheduling of Hearing. Any request for continuance of the fact-finding hearing shall identify the 75th day from the filing of the petition. A motion to continue beyond the 75th day shall be supported by a declaration of exceptional circumstances. The order continuing the hearing beyond 75 days shall identify the exceptional circumstances found by the Court.

(e) Appointment of Attorney or Guardian Ad Litem.

(1) Minor Parents. Juvenile Court staff shall review all dependency, guardianship and termination petitions to determine whether an attorney and/or guardian ad litem should be appointed for a parent under the age of 18. Juvenile Court staff shall apply to the court for an Order Assigning Lawyer or Guardian Ad Litem for a minor parent. Juvenile Court staff shall forward the dependency, guardianship, or termination petition to the appointed attorney.

(2) Attorney for Child. A child over the age of 12 may request the appointment of an attorney by informing the Guardian ad Litem or by written request to Juvenile Court staff. Juvenile Court staff shall apply to the Court for an Order Assigning Lawyer for the child.

(3) Request for Appointed Counsel by Parent/Guardian. A parent or guardian may request appointment of counsel in a dependency, guardianship or termination proceeding by completing a Motion and Declaration for Assignment of Lawyer. Juvenile Court staff will help the parent or guardian complete the requisite documents and will present the motion and Order Assigning Lawyer to the court. If the order is signed, a copy of the order along with the dependency, termination, or guardianship petition shall be delivered immediately to the assigned lawyer by Juvenile Court staff. Copies of the order shall be furnished to all parties.

(4) If the motion for counsel is denied, the parent or guardian may request the court to review its decision. The parent or guardian shall contact the Juvenile Court Coordinator to initiate the review process.

(f) Private Counsel. If private counsel is retained by any party to the proceedings, such counsel shall immediately file a notice of appearance with the Clerk of Court and provide a copy to Juvenile Court staff, the child's guardian ad litem, if any, the Attorney General's Office, other counsel, and the supervising agency. If the child's guardian ad litem is a CASA, providing a copy of the notice of appearance to the CASA Program is deemed notice to the guardian ad litem.

Amended effective 09/01/1999

LJuCR 3.9 REVIEW HEARING

(a) Proposed Order and Supervising Agency Report. The supervising agency shall prepare a proposed order and a written report containing the information required by RCW 13.34.120. The report shall be provided to the court and copies shall be furnished to Juvenile Court staff, the guardian ad litem, if any, and to the parties and their counsel 14 days before the review hearing.

(b) First Review and Permanent Planning Review Hearings in Open Court. All first review and permanent planning review hearings will be presented in open court. A party may request that any review hearing be held in open court.

Amended effective 01/01/2009

LJuCR 3.10 ASSIGNMENT TO COURT COMMISSIONER

Each dependency petition shall be assigned by the Juvenile Court to a Court Commissioner. The assigned commissioner shall hear every contested issue from fact-finding forward unless otherwise ordered by the court. Issues set on the motion calendar, except motions regarding placement or visitation, are not required to be heard by the assigned commissioner. However, a party may request the assigned commissioner to decide the issue and must schedule the motion accordingly.

Effective 09/01/1999

LJuCR 3.11 SETTING A CONTESTED HEARING

Prior to setting a contested hearing, a status conference shall be held with a judicial officer assigned to Juvenile Court. The parties shall contact the Juvenile Court Coordinator to schedule a status conference. At the status conference, the parties should be prepared to discuss witness and exhibit lists, contested issues, and estimated trial time. A Status Conference Report shall be completed at the conclusion of the status conference and filed with the Clerk of the Court.

SUPERIOR COURT FOR GRAYS HARBOR COUNTY
LOCAL COURT RULES

TABLE OF RULES

LOCAL JUVENILE COURT RULES (LJuCR)

LJuCR 1.0
COURT SCHEDULE

Juvenile Court proceedings are generally held at the Grays Harbor County Juvenile Facility located at 103 Hagara Street, Aberdeen, Washington, with calendars scheduled as follows:

The times and dates for Dependency, Truancy, CHINS & At-Risk-Youth calendar schedules will be posted on the Superior Court Website as well as the Superior Court Clerk's Office and the Juvenile Court facility bulletin board.

The time and place for Juvenile Criminal trials, Dependency and Termination of Parental Rights testimonial proceedings will be as set by the Court Administrator.

LJuCR 1.6
COUNSEL

Insofar as applicable, the rules relating to appointment of counsel, withdrawal, and fees in criminal cases shall likewise apply to juvenile cases. No attorney for parent or child, whether privately retained or appointed, shall be permitted to withdraw without Court approval.

LJuCR 9.2
ADDITIONAL RIGHT TO REPRESENTATION BY LAWYER

(d)(1)(a) Compliance With Standards for Indigent Defense and County Contracts. Attorneys appointed to provide indigent defense services under this Rule shall submit the required compliance certification to the Court Administrator each quarter and a caseload update and proof of insurance to the County Commissioners as required under the attorney contract for services. Failure of an attorney to submit the required compliance certifications will result in requests for payment being denied until compliance has been achieved.

LOCAL RULES FOR APPEAL OF DECISIONS OF COURTS OF LIMITED JURISDICTION (LRALJ)

LRALJ 7.1
GENERALLY

At the time of the filing of appellant's brief, the appellant shall also note the matter for hearing on the motion docket for a hearing date not less than 30 days from the date of filing of appellant's brief. The hearing should be set for no later than five months after the date the appeal is taken.

Title 2 Administration

If code section is not displaying below, you may access the text at: https://aqua.kingcounty.gov/council/clerk/code/05_Title_2.htm

2.60 PUBLIC DEFENSE

Sections:

2.60.010 Purpose. It is declared a public purpose that each citizen is entitled to equal justice under law without regard to the citizen's ability to pay. It is the intention of King County to make publicly financed legal services available to the indigent and the near indigent person in all matters when there may be some factual likelihood that the person may be deprived of the person's liberty pursuant to the laws of the state of Washington or King County. It is also the intention of King County to make such services available in an efficient manner which provides adequate representation at reasonable cost to the county. (Ord. 18618 § 49, 2017: Ord. 8257 § 1, 1987).

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that on December 16, 2020, I caused a true and correct copy of the Brief of *Amici curiae* in support of Petitioner of WDA, ACLU-WA, UW School of Law-CAYAC, and WACDL, to be served as follows:

Attorney for Petitioner: Jan Trasen WASHINGTON APPELLATE PROJECT 1511 Third Avenue, Suite 610 Seattle, Washington 98101 Tel: (206) 587-2711 E: jan@washapp.org	( ) By U.S. Mail (X) By E-mail ( ) By Facsimile ( ) By Messenger
Attorney for Respondent: Alicia O. Young, Deputy Solicitor General Kelly Taylor, Assistant Attorney General Office ID 91087 PO Box 40100 Olympia, WA 98504-0100 Tel: 360-753-6200 E: alicia.young@atg.wa.gov kelly.taylor@atg.wa.gov	( ) By U.S. Mail (X) By E-mail ( ) By Facsimile ( ) By Messenger
Attorney for CASA: Kathleen Martin 401 4th Avenue N, Ste. 3081 Kent, WA, 98032-4429 Phone: (206) 477-2768 kathleen.martin@kingcounty.gov	( ) By U.S. Mail (X) By E-mail ( ) By Facsimile ( ) By Messenger

DATED 16 December 2020.

Electronically Signed D'Adre Cunningham

WASHINGTON DEFENDER ASSOCIATION

December 16, 2020 - 2:10 PM

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Appellate Court Case Title:	In re the Dependency of E.M., a minor child.

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