

OPD Appellate Webinar Series

Appellate Ethics

with

Jeanne Marie Clavere
and Gideon Newmark

3.20.19

3:00 PM



Hypotheticals

Hypothetical 1: What are your options if your client threatens you?

Hypothetical 2: What are your obligations if your client's communications clearly indicate mental illness?

Hypothetical 3: Can you argue issues requested by the client which run contrary to established case law?

Hypothetical 4: What are your obligations if your client never responds to your initial letter?

Hypothetical 5: Must you follow the client's instructions regarding communication?

Hypothetical 6: Must you correct inadvertent misstatements at oral argument?

Hypothetical 7: Can you summarize your client's misdeeds?

Hypothetical 8: Must you correct a cost bill that errs in your client's favor?

Hypothetical 9: Can you omit the basis for a dependency petition?

Hypothetical 10: Can you omit a key piece of evidence when arguing sufficiency?

Hypothetical 11: Can you omit your client's bad behavior at trial?

RPCs and Advisory Opinions

[RPC 3.1: Meritorious Claims and Contentions](#)

[RPC 3.2: Expediting Litigation](#)

[RPC 3.3: Candor Toward the Tribunal](#)

[RPC 3.4: Fairness to Opposing Party](#)

[RPC 3.5: Impartiality and Decorum to the Tribunal](#)

[RPC 3.6: Trial Publicity](#)

[RPC 3.7: Lawyer as Witness](#)

[RPC 4.1: Truthfulness in Statements to Others](#)

[RPC 4.4: Respect for Rights of Third Persons](#)

[RPC 8.4: Misconduct](#)

[Advisory Opinion 1123: Client confidences and secrets; disclosure of false testimony](#)

[Advisory Opinion 1169: Withdrawal; refusal of judge to permit withdrawal](#)

[Advisory Opinion 1415: Use of actor posing as client to impeach expert witness; misrepresentation](#)

[Advisory Opinion 2204: Post verdict communication with jurors](#)

[Advisory Opinion 2225: Attorney withdrawal in immigration matters](#)

[Advisory Opinion 201701: Lawyer withdrawal; disclosure of confidential client information in motion to withdraw](#)

[WSBA Professional Responsibility Program 2017 WSBA Discipline System Snapshot](#)

Hypothetical 1

Your client, who is not incarcerated, threatens you with physical harm. May you seek to withdraw from the representation? What can you disclose to the Court of Appeals in your motion to withdraw? Is there a difference if the client is incarcerated?

Hypothetical 2

You receive several highly delusional letters from your client, indicating that the President of the United States is involved in a conspiracy to kill him, and that the appellate process is a sham to distract him from his imminent assassination. It is questionable whether the client understands the proceedings and he clearly is not competent to assist you with the appeal. What is your ethical obligation?

Hypothetical 3

Your client wants you to raise an issue with virtually no chance of success. The client's position is directly contrary to established precedent.

- Can you raise it?
- If you can raise it, must you? Does it matter whether or not including the issue would dilute the impact of other, stronger issues in the brief?

Hypothetical 4

Your client never responds to your initial letter. Are you obligated to do anything further to attempt to communicate with the client?

- Does your obligation change if the client had an interpreter at trial? What if the client merely has an apparently foreign name, but there's no record of an interpreter being used at trial?
- Does your obligation change if the client has a documented history of mental health problems or intellectual disability? What is your obligation to investigate your client's potential mental health problems or intellectual disability?

Hypothetical 5

Your client demands weekly updates on the progress of her appeal. You assure the client that there will be nothing to report for months on end because of how slow the appellate process is. The client is unmoved by this argument. What is your obligation?

Hypothetical 6

You make an inadvertent misstatement of fact at oral argument. You do not realize this until after oral argument when you consult the record. What is your obligation? What is your obligation if you're aware of an inadvertent misstatement of fact by the prosecutor which is favorable to your client?

Hypothetical 7

Your client was convicted of six counts of first degree rape of a child and nine counts of first degree child molestation for a pattern of sexual assault lasting many years. The meritorious issues on appeal, however, focus on how the prosecutor led witnesses on direct examination and expressed a personal opinion of your client's guilt.

- In your Statement of Facts, can you simply summarize the client's convictions as "14 counts related to an alleged pattern of sexual misconduct against the victim?"
- Could you summarize the convictions as "a number of counts related to an alleged pattern of sexual misconduct against the victim?"
- Could you summarize the convictions as "sexual misconduct against the victim?"

Hypothetical 8

You are representing a client with a well-documented future ability to pay LFOs. The prosecutor's office contacts OPD and requests a summary of OPD's costs for representing the client. OPD makes a clerical error and indicates that the transcript cost only \$500. Based on the length of the voluminous transcript, this is off by a factor of 10. The prosecutor's office, via a staff member who lacks sufficient background in appellate law to realize this error, uncritically submits the cost bill with the erroneous transcript cost. What is your obligation?

Hypothetical 9

In a dependency case, the basis for the Department removing the child and filing its dependency petition against the mother appears plainly in the record. Can you begin your Statement of Facts with the filing of the petition, and omit the basis for the petition entirely?

Hypothetical 10

In a possession of stolen property case, your client's defense was lack of knowledge that the property was stolen. The best piece of evidence against your client was the fact that a label bearing the owner's had been peeled off of one stolen item, and had been found in the trash in the client's home. In attacking the sufficiency of the evidence, must you mention this fact? [is failing to mention it unethical, or merely unwise?]

Hypothetical 11

At trial, your client was rude and disruptive, and the judge instructed him to limit his outbursts and stop making faces at witnesses. The primary issue on appeal is sufficiency of the evidence. Must you mention your client's behavior at all? Can the prosecutor mention your client's behavior in the respondent's brief, even though it lacks relevance to the issues?

RPC 3.1 MERITORIOUS CLAIMS AND CONTENTIONS

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

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

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

[3] [Washington revision] The lawyer's obligations under this Rule are subordinate to federal or state constitutional law that entitles a defendant in a criminal matter to the assistance of counsel in presenting a claim or contention that otherwise would be prohibited by this Rule. For an explanation of the term "counsel" in the criminal context, see Washington Comment [10] to Rule 3.8.

RPC 3.2 EXPEDITING LITIGATION

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

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

RPC 3.3 CANDOR TOWARD THE TRIBUNAL

- a) A lawyer shall not knowingly:
 - (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
 - (2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client unless such disclosure is prohibited by Rule 1.6;
 - (3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by the opposing party;
 - (4) offer evidence that the lawyer knows to be false.
- b) (b) The duties stated in paragraph (a) continue to the conclusion of the proceeding.
- c) [...continued](#)

RPC 3.4 CANDOR TOWARD THE TRIBUNAL

A lawyer shall not:

- (a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;
- (b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;
- (c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;
- (d) [...continued](#)

RPC 3.5 IMPARTIALITY AND DECORUM OF THE TRIBUNAL

A lawyer shall not:

- (a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;
- (b) communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order;
- (c) communicate with a juror or prospective juror after discharge of the jury if:
 - (1) the communication is prohibited by law or court order;
 - (2) the juror has made known to the lawyer a desire not to communicate; or
 - (3) the communication involves misrepresentation, coercion, duress or harassment; or
- (d) engage in conduct intended to disrupt a tribunal.

[...comments](#)

RPC 3.6 TRIAL PUBLICITY

- (a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.
- (b) Notwithstanding paragraph (a), a lawyer may state:
 - (1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;
 - (2) information contained in a public record;
 - (3) that an investigation of a matter is in progress;
 - (4) the scheduling or result of any step in litigation;
 - (5) [...continued](#)

RPC 3.7 LAWYER AS WITNESS

- (a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:
- (1) the testimony relates to an uncontested issue;
 - (2) the testimony relates to the nature and value of legal services rendered in the case;
 - (3) disqualification of the lawyer would work substantial hardship on the client; or
 - (4) the lawyer has been called by the opposing party and the court rules that the lawyer may continue to act as an advocate.
- (b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

[...comments](#)

RPC 4.1 TRUTHFULNESS IN STATEMENTS TO OTHERS

In the course of representing a client a lawyer shall not knowingly:

- (a) make a false statement of material fact or law to a third person; or
- (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

[...comments](#)

RPC 4.4 RESPECT FOR RIGHTS OF THIRD PERSON

- (a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.
- (b) A lawyer who receives a document or electronically stored information relating to the representation of the lawyer's client and knows or reasonably should know that the document or electronically stored information was inadvertently sent shall promptly notify the sender.

[...comments](#)

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) [...continued](#)

Advisory Opinion 1123: Client confidences and secrets; disclosure of false testimony

The Committee considered your inquiry asking what you should do when you discovered your client in a dissolution trial had given false testimony regarding the amount received from the sale of a car. The Committee understood that no findings or decree have yet been entered. The Committee was of the opinion that, pursuant to [RPC 3.3\(c\)](#) and [1.6](#), you would not be permitted to disclose that information, but that you should seek the consent of your client to disclose it, and if that consent is denied, you should withdraw.

Advisory Opinion 1169: Withdrawal; refusal of judge to permit withdrawal

The Committee reviewed your inquiry concerning the conduct you should pursue in a situation where you had sought to withdraw from representation of a client on the eve of trial, and trial judge refused to allow your withdrawal. The Committee was of the opinion that you were obliged to follow the order of the Court and that nothing in the [RPC 1.15\(c\)](#) would permit you to withdraw under those circumstances.

Advisory Opinion 1415: Use of actor posing as client to impeach expert witness; misrepresentation

The Committee reviewed your inquiry concerning use of an actor to pose as a client for an evaluation by a psychologist, with the intent to use that situation for impeachment of the psychologist's testimony at trial. The Committee was of the opinion that this would be a fraudulent scheme and sharp practice in violation of [RPC 4.1\(a\)](#) and [RPC 8.4\(a\) and \(c\)](#).

Advisory Opinion 2204: Post Verdict Communication with Jurors

I. QUESTION PRESENTED

Four public defender organizations jointly request a formal opinion on the following issue: Informal Ethics Opinion 1030 and 2133 “agree that Rules of Professional Conduct (“RPC”) 3.5 and 8.4(d) advise lawyers not to disclose to jurors, post-verdict, information that was excluded from evidence.”

II. BRIEF ANSWER

The Rules of Professional Conduct Committee issued the following informal opinion:

Post verdict disclosure to jurors of evidence that was excluded at trial would violate RPC 3.5(c) if the communication with the juror involves misrepresentation, coercion, duress or harassment. Post verdict disclosure of excluded evidence is not a per se violation of RPC 8.4(d); however, disclosure could constitute a violation in certain circumstances.

[...continued](#)

[Hypotheticals](#) [RPCS](#)

Advisory Opinion 2225: Attorney Withdrawal in Immigration Matters

The Committee received an inquiry concerning a lawyer's rights and duties to withdraw from representation in the context of representing clients in immigration matters. To facilitate a comprehensive analysis, the Committee modified the inquiry to the following:

It is standard practice in most offices for the lawyer to set deadlines for immigration clients for the return of information necessary to properly complete forms and supporting documents. The lawyer is unable to complete the forms and gather supporting documents without the client's assistance. If the lawyer does not comply with the Immigration Court's deadline, then the lawyer risks discipline by the Immigration Judge (who has the authority to file a formal complaint with EOIR against the lawyer).

In other situations, an immigration client has failed to pay the lawyer, but has not formally discharged the lawyer or responded to the lawyer's demands for payment.

[...continued](#)

Advisory Opinion 201701: Lawyer Withdrawal; Disclosure of Confidential Client Information in Motion to Withdraw

Facts:

Lawyer, who has been representing Client in litigation pending in Washington Superior Court, decides that there is a mandatory or permissive basis for withdrawal from the representation under RPC 1.16(a) and (b). [n.1] The basis for withdrawal does not involve a situation in which there is an imminent risk of death or serious bodily injury under RPC 1.6(b)(1), [n.2] permissible “up the ladder” reporting out under RPC 1.13(c) through (e), [n.3] the realization by Lawyer that Lawyer has offered false testimony or evidence under RPC 3.3(c) or (d), [n.4] or any other situation in which Lawyer is required by substantive law or by the RPCs to disclose the reasons for Lawyer’s withdrawal. [n.5]

Client is either unwilling or unable to make arrangements for a substitution of counsel. Lawyer understands that pursuant to RPC 1.16(c) and (d), [n.6] as well as Superior Court Civil Rule 71 [n.7] or Superior Court Criminal Rule 3.1(e), [n.8] Lawyer must file a motion for leave to withdraw with the trial court and that if the trial court denies the motion to withdraw, Lawyer must either remain in the case, seek reconsideration by the trial court or seek appellate relief.

Question:

Without violating RPC 1.6, what information about Client may Lawyer provide when filing the motion to withdraw?

[...continued](#)