WDTL
WASHINGTON DEFENSE TRIAL LAWYERS
Fighting for Justice and Balance in Civil Courts

WASHINGTON DEFENSE TRIAL LAWYERS

Tel 206.749.0319 Fax 206.749.0321 | 601 Union St., Suite 4100 | Seattle, Washington 98101 | www.wdtl.org

RECEIVED
SUPREME COURT
STATE OF WASHINGTON

05 APR 29 AM 8:13

BY C. J. KERRUTT

1.8(f)

PRESIDENT
Jeffrey Frank, Seattle
Bullivant Houser Bailey
(206) 292-8930
jeff.frank@bullivant.com

PRESIDENT-ELECT
Jill Haavig Stone, Tacoma
Burgess Fitzer
(253) 572-5324
jills@burgessfitzer.com

SECRETARY
Michelle Menely, Seattle
Gordon Thomas Honeywell
(206) 676-7500
mmenely@gth-law.com

TREASURER
Steve Stocker, Spokane
Stamper, Rubens, Stocker & Smith, P.S.
(509) 326-4800
sstocker@stamperlaw.com

TRUSTEES
Tim Ashcraft, Tacoma
Jillian Barron, Bellevue
Anne Bremner, Seattle
Ted Buck, Seattle
Jeffrey Downer, Seattle
Jesse Franklin, Seattle
Sue Holm, Seattle
Carin Marney, Seattle
Rick Roberts, Seattle
Mark Scheer, Seattle
Emilia Sweeney, Seattle
Craig Watson, Seattle

DRI State Representative

Board Advisor
Jeff Tilden, Seattle

Executive Director
Kristin Baldwin, Seattle
(206)749-0319
kristin@wdtl.org

Past Presidents
Joanne T. Blackburn • James S. Berg • Bradley A. Maxa • Roy A. Umlauf • Andrew G. Cooley • James E. Macpherson • Laurie D. Kohli • Peter J. Johnson • William R. Phillips • Mary H. Spillane • Jeffery I. Tilden Michael H. Runyan • Palmer Robinson J. Richard Crockett • Ronald B. Leighton William J. Leedom • Robert L. Israel John J. Soltys • F. Ross Burgess Robert C. Keating • H. Graham Gaiser William H. Mays • Daniel E. Tolfree Richard B. Johnson • Charles A. Kimbrough Frederick V. Betts • R. Jack Stephenson John G. Bergmann • Harold C. Fosso Martin T. Crowder • Gene H. Knapp, Jr. William L. Parker • Michael Mines Fred R. Butterworth • Frank H. Roberts Charles E. Peery • Arthur R. Hart Robert P. Piper • Roy J. Moceri F. Lee Campbell • Hoyt Wilbanks Jack P. Scholfield

April 27, 2005

Clerk of Court
Washington State Supreme Court
P.O. Box 40929
Olympia, WA 98504-0929

RE: RPC 1.8 - Proposed Changes

Dear Clerk:

I am the current President of the Washington Defense Trial Lawyers ("WDTL") and write to express concern with regard to proposed changes to RPC 1.8. As you may know, WDTL is a non-profit organization with nearly 700 members. Our mission is—"To promote the highest professional and ethical standards for Washington civil defense attorneys and to serve our members through education, recognition, collegiality, professional development and advocacy." It is with that mission in mind that our Board of Trustees reviewed the proposed changes and concluded that RPC 1.8(f) should ***not*** be changed. We offer the following comments as an explanation for our position.

Proposed Rule 1.8 is of special concern to WDTL members, who routinely represent individual clients pursuant to a third party's obligation to defend. The most common examples of third party defense obligations arise through operation of an insurance policy and through representation provided to governmental entities or agents by operation of statute or ordinance. These obligations result in an attorney being paid by a third party (i.e. insurer or government agency) to represent a client. This type of relationship is considered a conflict of interest and is governed by Rule of Professional Conduct (RPC) 1.8(f).

The only substantive change between the current and proposed rule is that a client must give "informed consent" under the proposed new rule instead of only consent "after consultation" under the existing rule.

There are several problems with the proposed new rule that warrant clarification by the court:

1. Can an attorney appointed by a third-party act to protect the interests of the client in the absence of express client authorization?

2. Can an attorney appointed by a third-party act on behalf of a client who is incapable of giving express client authorization? (i.e. incapacitated person, dissolved corporation, etc.)

3. What constitutes "informed consent" as specified in this rule?

1. Can an attorney appointed by a third-party act to protect the interests of the client in the absence of express client authorization?

The proposed rule does not specify what, if any, action an attorney may take to protect a client's interests prior to initial communication between the attorney and the client.

Often in insurance defense settings, the insurer will forward to the appointed insurance defense counsel a copy of a Summons and Complaint that was purportedly served upon the insured several days or weeks earlier. In order to shield the insured from a "no-notice" default and to block attempts by a plaintiff's attorney to directly communicate with an unrepresented defendant, the insurance defense attorney will routinely file a Notice of Appearance on behalf of the insured party even if the insurance defense attorney has not yet had the opportunity to communicate with the insured party.

Although this situation is not addressed in any of the official comments to the proposed rules, it is envisioned in the Restatement (Third) of the Law Governing Lawyers, §134, Comment b, which states (in pertinent part):

> In an emergency situation in which the lawyer must take action to protect the interests of the client, as in filing an answer to avoid default, the lawyer may take such action even if a conflict appears to exist, but must also promptly take action to address the conflict.

The unique character of the insurance defense setting is further addressed in Restatement (Third) of the Law Governing Lawyers, §134, Comment f, which states:

> A lawyer might be designated by an insurer to represent the insured under a liability-insurance policy in which the insurer undertakes to indemnify the insured and to provide a defense. . . . Certain practices of designated insurance-defense counsel have become customary and, in any event, involved primarily standardized protection afforded by a regulated entity in recurring situations. Thus a particular practice permissible for counsel representing an insured may not be permissible under this Section for a lawyer in noninsurance arrangements with significantly different characteristics. . . .

Taken together, these two comments ratify the above-mentioned customary practice of insurance defense attorneys in acting to protect the interests of insured party clients with whom they have not yet communicated. The typical insurance policy holder has a contractual right to legal

defense furnished by the insurer and would reasonably expect that their interests would be protected. This practice protects the insured party client's interest and does not create any significant risk of harm arising out of a conflict of interest.

2. Can an attorney appointed by a third-party act on behalf of a client who is incapable of giving express client authorization? (i.e. incapacitated person, dissolved corporation, etc.)

As stated above, it is a customary practice for insurance defense attorney to take initial steps to protect a client even if the insurance defense attorney has not yet had the opportunity to communicate with the client.

Although rare, sometimes the insurance defense attorney later discovers that the insured party cannot be located or is incapable of giving informed consent. An illustrative example is that of the individual who is incapacitated. If no guardian has been appointed for the person, the insurance defense attorney has no person to grant "informed consent" for the attorney to represent pursuant to the insurance policy.

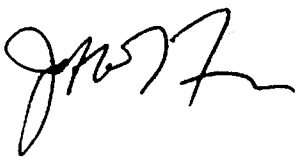
3. What constitutes "informed consent"?

The term "informed consent" is not specifically defined in proposed rule 1.8. Comment 20 to proposed Rule 1.7 suggest that "informed consent" requires written confirmation. A review of the Annotated Model Rules of Professional Conduct (Fifth Edition) produced no case law discussing the concept "informed consent." Presumably, an attorney is to be guided by his or her own interpretation.

If "informed consent' will be a requirement for an attorney to avoid a conflict of interest, then the court should adopt some guidelines to assist attorneys in determining whether the communication they have had with their client rises to the level of "informed consent."

Please contact me if you have further questions regarding these comments, or would like our assistance in further revisions to the proposed rule changes and comments.

Sincerely,



Jeffrey G. Frank

Enclosure

cc: WDTL Board *(Via E-mail)*
Kristin Baldwin *(Via E-mail)*

==========

SELECTED CITATIONS FROM LEGAL SOURCES.

==========

Restatement (Third) of the Law Governing Lawyers

§121 - The Basic Prohibition of Conflicts of Interest

Unless all affected clients and other necessary persons consent to the representation under the limitations and conditions provided in § 122, a lawyer may not represent a client if the representation would involve a conflict of interest. A conflict of interest is involved if there is a substantial risk that the lawyer's representation of the client would be materially and adversely affected by the lawyer's own interests or by the lawyer's duties to another current client, a former client, or a third person.

. . . .

§134 - Compensation or Direction of a Lawyer by a Third Person

(1) A lawyer may not represent a client if someone other than the client will wholly or partly compensate the lawyer for the representation, unless the client consents under the limitations and conditions provided in § 122 and knows of the circumstances and conditions of the payment.

(2) A lawyer's professional conduct on the half of a client may be directed by someone other than the client if:

> (a) the direction does not interfere with the lawyer's independence of professional judgment;
>
> (b) the direction is reasonable in scope and character, such as by reflecting obligations borne by the person directing the lawyer; and
>
> (c) the client consents to the direction under the limitations and conditions provided in §122

==========

Comment *b*. *Initial client consent.* As stated in the section, under §122 a client must consent to a lawyer's accepting either a third persons payment of the fee for a client or a third person's direction in a matter. In particular, the client must have knowledge of the circumstances and conditions under which the fee payment or direction is to be provided and any substantial risk to the client thereby created (see §122, comment *c*). On consent in insurance-defense representations, see Comment *f* hereto. In an emergency situation in which the lawyer must take action to protect the interests of the client, has and filing an answer to avoid default, the lawyer may take such action even if a conflict appears to exist, a must also promptly take action to address the conflict.

==========

Comment *f*. *Representing an insured.* A lawyer might be designated by an insurer to represent the insured under a liability-insurance policy in which the insurer undertakes to indemnify the insured and to provide a defense. The law governing the relationship between the insured and the insurer is, as stated in Comment *a*, beyond the scope of the Restatement. Certain practices of designated insurance-defense counsel have become customary and, in any event, involved primarily standardized protection afforded by a regulated entity in recurring situations. Thus a particular practice permissible for counsel representing an insured may not be permissible under this Section for a lawyer in noninsurance arrangements with significantly different characteristics. . . .

==========

Official comments to Proposed Rules of Professional Conduct

==========

Comment 11 to proposed Rule 1.8

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

==========

Comment 12 to proposed Rule 1.8

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

==========

Comment 20 to proposed Rule 1.7.

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