Legal Ethics for Port Lawyers

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REPRESENTED BY
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Objectives

- Identify certain ethical issues that easily arise when represent a port

- Discuss pertinent Rules of Professional Conduct

- Provide practical guidance for reducing risk

Caveats

- Not intended to
  - State a legal standard of care
  - Create a lawyer-client relationship

- Keep hypotheticals hypothetical

- Seek legal counsel for specific questions

Roadmap

- Organization as client

- Formation of the lawyer-client relationship

- Client identity

- Dealing with witnesses

- Reporting up the chain

- Confidentiality

- Artificial intelligence

Organization as Client

RPC 1.13

Litigation

- When a port is sued, who is the lawyer's client?

    a) The executive director of the port

    b) The port commissioners

    c) The port

    d) The port's employees

    e) It depends

    f) A, C, and D

    g) A, B, C, and D

Transactions

- In a business transaction, who is the lawyer's client?

    a) The executive director of the port

    b) The port commissioners

    c) The port

    d) It depends

    e) A and C

Advice work

- When providing legal advice to an organization, outside of litigation or a business transaction, who is the lawyer's client?

    a) The executive director of the port

    b) The port commissioners

    c) The port

    d) It depends on the circumstances of the engagement and the conduct of the lawyer

    e) We need more facts

Whom do you represent?

- The organization, through its duly authorized constituent or constituents

- But a lawyer can represent others within the organization

- This can occur intentionally, or by accident

Who is the client – RPC 1.13(a)

- A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents
  - Alaska, Oregon, and Washington

- A lawyer employed or retained by an organization shall conform his or her representation to the concept that the client is the organization itself, acting through its duly authorized directors, officers, employees, members, shareholders, or other constituents overseeing the particular engagement
  - California

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RPC 1.7 cmt. 34

- A lawyer who represents a corporation or other organization does not, by virtue of that representation, necessarily represent any constituent or affiliated organization, such as a parent or subsidiary

- Thus, the lawyer for an organization is not barred from accepting representation adverse to an affiliate in an unrelated matter, unless
  - The circumstances are such that the affiliate should also be considered a client of the lawyer,
  - There is an understanding between the lawyer and the organizational client that the lawyer will avoid representation adverse to the client's affiliates, or
  - The lawyer's obligations to either the organizational client or the new client are likely to limit materially the lawyer's representation of the other client

Inadvertent lawyer-client relationships

- The "essence of the attorney-client relationship is whether the attorney's assistance or advice is sought and received on legal matters"

- It "may be implied from the parties' conduct; it need not be memorialized in writing"

- It "turns largely on the client's subjective belief that it exists"

- The subjective belief must be reasonable under the circumstances, including the lawyer's words and actions

  - *In re Discipline of Egger*, 152 Wn.2d 393, 410–11, 98 P.3d 477 (2004)

Representing others – RPC 1.13(g)

- A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders, or other constituents, subject to the provisions of Rule 1.7

- If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders

Warning a non-client – RPC 1.13(f)

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

- Pro tip: explain the identity of the client as a routine aspect of your practice when dealing with organizational constituents

Identifying the client(s)

- Be explicit about whom you represent, and whom you don't

- If not representing all of them, then disclaim representation of the non-client(s) and urge retention of independent counsel by the non-client(s)

- Remind non-clients of the need to retain independent counsel if they want legal advice

Representing Us

- The Port is sued by Plaintiff, who alleges a retaliatory termination of employment

- Executive Director is also named in the suit, although Administrator was the person who terminated Plaintiff

- Administrator is not named in the lawsuit

Representing Us (cont'd)

- Once Executive Director asks Lawyer to appear and defend, Lawyer prepares an engagement letter that:

  - Is addressed to both the Port and Executive Director,

  - Notes the issues that can arise regarding the representation of multiple clients in the matter, and

  - Has signature blocks for each of the two clients

- Executive Director signs both signature blocks and returns the executed engagement letter to Lawyer

Representing Us (cont'd)

- Lawyer:
  - Appears in the lawsuit and begins to investigate the matter and
  - Meets with Administrator to get the facts

- Administrator says:
  - "I am a consummate professional;"
  - "Plaintiff had it coming, because I don't tolerate whistleblowers;" and
  - "I'm glad that you're defending me against this utter malarkey"

Issues?

- Executive should not have signed the consent to dual representation on both his behalf and the Port's behalf
  - RPC 1.13(g)

- Administrator appears to believe that Lawyer represents him, and Lawyer did not disclaim that representation
  - RPC 1.13(f)

The Interviews

- The Port asks Lawyer to investigate a slip-and-fall injury that occurred on the Port's property

- Lawyer recognizes the need to interview:

  - A Port employee (Manager)

  - Another Port employee (Assistant)

  - Eyewitness (who is not an employee)

- Lawyer schedules individual interviews with each of them

The Interviews (cont'd)

- Before each interview, Lawyer says:
  - "I am Lawyer"
  - "I represent the Port"
  - "Everything that you tell me will remain confidential"
  - "Would you be willing to answer some questions?"

The Interviews (cont'd)

- During her interview, Manager says:
  - "I'm so glad that you're representing us"
  - "This claim will be a real problem"
  - "We knew about the hazardous nature of the flooring weeks earlier"
  - "Clerk should have acted sooner to make it safe"

The Interviews (cont'd)

- During his interview, Assistant says:
  - "I'm so glad that you're representing us"
  - "This claim will be a real problem"
  - "Manager knew about the hazardous nature of the flooring weeks earlier"
  - "Manager should have acted sooner to make it safe"
  - "By the way, I think that Manager is discriminating against me based upon my being in a protected class; what should I do about that?"

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The Interviews (cont'd)

- During his interview, Eyewitness says:
  - "I saw the whole thing"
  - "This claim will be a real problem"
  - "I heard Manager and Assistant shouting at each other, blaming each other for the incident"
  - "Just between you and me, soon after Plaintiff fell, I heard him exclaim, 'I knew that was going to happen'"
  - "But Plaintiff is a friend of mine, and I don't want to him to know that I said that"

Good stuff?

- What did Lawyer do well?

    a) Lawyer identified themselves as a lawyer

    b) Lawyer identified their client

    c) Lawyer asked permission to interview, without coercion

    d) All of the above

Not so good stuff?

- What went wrong with the interviews?
    a) Lawyer did not require them to sign non-disclosure agreements before initiating the interviews

    b) Lawyer promised unqualified confidentiality

    c) Lawyer did not disclaim a lawyer-client relationship with each interviewee

    d) All of the above

    e) A and C

    f) B and C

Dealing with witnesses

- My name is [NAME]

- I am a lawyer at [FIRM]

- I represent [CLIENT] regarding [MATTER]

- I got your contact information from [CLIENT REPRESENTATIVE]

- I'd like to ask you some questions about [TOPIC]

- Although I am not your lawyer and you are not my client, I will keep what you tell me confidential, except that I will have to tell [CLIENT] everything that you say

- I will have to use or disclose what you tell me if [CLIENT] tells me to

- Would you be willing to answer some questions?

If the witness becomes confused or forgets your role, remind them that you are not their lawyer

The Bad Actor

- Lawyer serves as outside counsel for the Port on a number of matters, providing a wide variety of legal advice

- Lawyer receives instruction on those matters from CFO

- While assisting CFO in reviewing the Port's financials, Lawyer concludes that CFO's assistant has been "skimming," taking cash off of the top of certain transactions at the end of each month

The Bad Actor (cont'd)

- The next such set of transactions is scheduled to occur in 10 days

- Lawyer confronts CFO with this revelation

- CFO says:

  - "Don't worry, the Port can handle it"

  - "After all, she's way underpaid"

  - "I can cut you in on the action, if that would resolve your concern"

The Bad Actor (cont'd)

- Lawyer insists that CFO disclose this misconduct to the Executive Director and the Port commissioners

- CFO refuses and says:
  - "Forget about it; either you play ball or you're out of here"
  - "There are plenty of lawyers who would be happy to take your place"
  - "And by the way, you can't say anything to anyone"
  - "I'm your client, and our conversations are protected by RPC 1.6"
  - "So, how much can I cut you in for?"

Now what?

- What should Lawyer do?

  a) Report the embezzlement to law enforcement immediately

  b) Inform the local news media

  c) Refer the matter to higher authority within the Port

  d) Withdraw from representing Port

  e) All of the above

Moving up the chain: RPC 1.13(b)

- If lawyer knows that an officer, employee or other person associated with the organization is engaged in action, intends to act, or refuses to act in a matter that is related to the representation and

  - A violation of a legal obligation to the organization or

  - A violation of law that reasonably might be imputed to the organization,

- And is likely to result in substantial injury to the organization

- Then the lawyer shall proceed as is reasonably necessary in the best interest of the organization

- Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances, to the highest authority that can act on behalf of the organization as determined by applicable law

Moving further up the chain

RPC 1.13(c)

Termination / withdrawal

RPC 1.13(e)

Merely bad decisions

- Client organization's decisions must be followed, even if imprudent

- Make recommendations known, in writing

- Document the decision to not follow your legal advice

Coffee Talk

- Lawyer represents the Port on a variety of civil litigation matters

- Like Lawyer, Friend is a civil defense trial lawyer

- Lawyer and Friend meet for coffee, and Friend mentions a recent trial that Lawyer handled for the Port

Coffee Talk (cont'd)

- The trial involved a substantial verdict against one of the parties that Lawyer did not represent

- The Port was found not liable for any claims

- The case was thoroughly covered in the local and national news media over several weeks

- Following that news coverage, Lawyer's victory for the Port became the subject of several memes on Twitter and social media

Coffee Talk (cont'd)

- In response to Friend's comment, Lawyer says:

  - "It was a great win, but I sure didn't expect all of that attention"

  - "I have received several new clients as a result of the publicity"

  - "Between you and me, the Port almost admitted liability before trial"

- Friend is shocked and says:

  - "That's amazing"

  - "I can't believe that you kept that juicy tidbit from all of those reporters"

Was all of that okay?

Any RPC violations?

    A.   RPC 1.6 (confidentiality)

    B.   RPC 1.9 (duties to former clients)

    C.   RPC 3.6 (trial publicity)

    D.   All of the above

    E.   Both A and B

    F.   Both B and C

    G.   Both A and C

Client confidentiality

- Confidentiality of information – RPC 1.6
  - "Information related to the representation"

- Duties to former clients – RPC 1.9
  - "Generally known"

- Duties to prospective clients – RPC 1.18
  - Can be disclaimed

Client confidentiality (cont'd)

- Three confidentiality concepts within RPC 1.6:

  - Lawyer-client privileged communications

  - Information relating to the representation of a client

  - Confidences and secrets

Current clients

- Washington protects: "information related to the representation of a client"

- Alaska and Oregon narrow this to "confidences" and "secrets"

- California refers to Business and Professions Code 6068 (e)(1), which refers to "confidences" and "secrets"

- The source of information is irrelevant

Confidences & secrets

Includes

- Information protected by the attorney-client privilege

- Information gained in a current or former professional relationship that

  - The client has requested be held inviolate or

  - The disclosure of which would be embarrassing or detrimental to the client

Drawing a line

- "This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but <u>could reasonably lead to the discovery of such</u> 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 <u>no reasonable likelihood</u> that the listener will be able to ascertain the identity of the client or the situation involved."

  - Washington RPC 1.6, cmt. 4

How broad in Washington?

- "The phrase 'information relating to the representation' should be interpreted broadly"

- "The 'information' protected by this Rule includes, but is not necessarily limited to, confidences and secrets"

  - RPC 1.6, cmt. 21

ABA Guidance – Formal Ethics Opinion 479

- "The 'generally known' exception to the duty of former-client confidentiality is limited."

- "It applies (1) only to the use, and not the disclosure or revelation, of former-client information; and (2) only if the information has become (a) widely recognized by members of the public in the relevant geographic area; or (b) widely recognized in the former client's industry, profession, or trade."

- "Information is not 'generally known' simply because it has been discussed in open court, or is available in court records, in libraries, or in other public repositories of information."

TL;DR on client confidentiality

- All information learned during representation is confidential, regardless of the source

- Err on the side of nondisclosure, unless client consent is obtained

- Get consent to disclose in writing, to memorialize in the event of a future misunderstanding or memory gap

- Presume that the current or former client will not want you to disclose (or redisclose) to others that you are or were their lawyer

- If referring to a matter, anonymize it so that there is no reasonable likelihood that the audience will be able to identify the client or the matter

Trial publicity – RPC 3.6

- Applies to extra judicial statements that "will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter"

- Generally, it has to be close in time to trial

- Applies to lawyers associated in a firm or agency with a lawyer subject to paragraph (a)

- Oregon addition: "exercise reasonable care to prevent the lawyer's employees from making an extrajudicial statement that the lawyer would be prohibited from making under this rule."

Summarize This!

- Lawyer is working with In-House Counsel to defend the Port in a civil litigation matter

- The two have a great working relationship, and the case is going well

- Trial is coming up in three months, and is expected to last two weeks

- Lawyer plans to call 10 witnesses, and expects the other side to call even more

Summarize This! (cont'd)

- Lawyer calls In-House Counsel to discuss dividing and conquering on trial prep

- In-House Counsel offers to summarize the relevant depositions and draft witness outlines for trial

- In-House Counsel attended some, but not all, of the depositions

- Lawyer takes on drafting the trial brief and motions in limine

Summarize This! (cont'd)

- About 10 days after their meeting, In-House Counsel sends the deposition summaries and outlines for 20 witnesses to Lawyer

- In the email, In-House Counsel says:

  - "This went faster than I expected; we've got a great new tool that has been a huge help for things like this"

  - "If you need anything else on an expedited basis, just let me know and I can fire it up"

Summarize This! (cont'd)

- Lawyer glances through a few of the summaries and outlines right away

- They look standard, so Lawyer goes back to drafting and makes a mental note to take a closer look the next week

- Lawyer uses the summaries to quote and cite to testimony that is the basis for some of the motions in limine

- No one cite checks the deposition transcripts

Summarize This! (cont'd)

- Shortly before trial, Lawyer speeds through through the summaries and outlines at a record pace

- For both direct testimony and cross examinations, Lawyer directs a paralegal to excerpt and highlight the relevant portions of the deposition transcripts, and put everything into a binder to take to trial

- (Lawyer is not a fan of having laptops at trial)

- Lawyer does not review the excerpts, and paralegal does not cross check the outlines

Summarize This! (cont'd)

- The motions in limine go well; Lawyer wins most of them, including several based on deposition testimony

- When Lawyer attempts to use the highlighted excerpts to impeach an adverse witness with inconsistent testimony, the deposition excerpts do not contain the necessary testimony

- Lawyer asks for a short recess, quickly pages through the binder with the depo excerpts, and realizes that the citations in the summaries do not match the actual deposition testimony

Summarize This! (cont'd)

- Lawyer looks frantically at In-House Counsel, who says:
  - "It looks like my generative AI tool hallucinated the citations."
  - "I think I'm going to be sick..."

- As In-House Counsel runs out of the courtroom, Lawyer says, "What's generative AI? What's a hallucination?"

- As Lawyer scans the excerpt binder, he realizes that the necessary excerpt is not included any where, and he does not have his laptop with him

- The judge retakes the bench, and asks Lawyer to get started

Ethics issues?

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Unpacking the issues

- RPC 1.1 (competence)

- RPC 3.3 (candor to the tribunal)

- RPC 3.1 (meritorious claims and contentions)

Unpacking the issues (cont'd)

- RPC 1.6 (confidential information) and RPC 1.4 (communication with the client)

- RPC 5.1 and 5.3 (supervision of lawyers and staff)

Are we hardwired to blindly trust AI?

- "Researchers have described for decades a series of human biases with computerized recommendations, including what's sometimes called automation bias, or a tendency to defer to machines even when they contradict your common sense or professional training"

- "[R]esearch shows we treat machines like magical answer fairies"

  - Source: https://www.washingtonpost.com/technology/2025/06/03/dont-trust-ai-automation-bias/

Forbes

How Generative AI Will Change The Jobs Of Lawyers

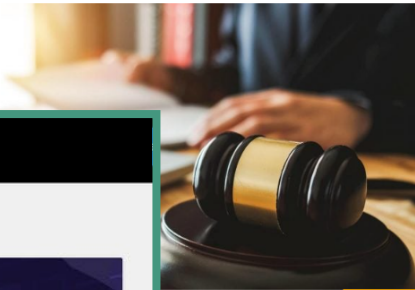Bernard Marr Contributor

Mar 14, 2024, 03:14am EDT

tech.co

US Supreme Court Warns Against AI Use Within the Legal System

Top concerns include false claims driven by AI hallucinations, biased data sets, and potential violations of confidentiality.

Written by Adam Rowe
Published on January 3, 2024

Reuters

Another NY lawyer faces discipline after AI chatbot invented case citation

By Sara Merken

January 30, 2024 1:42 PM MST · Updated 7 months ago

The Washington Post
Democracy Dies in Darkness

These lawyers used ChatGPT to save time. They got fired and fined.

Artificial intelligence is changing how law is practiced, but not always for the better

8 min   207

(Washington Post illustration; Shutterstock)

Bloomberg Law

Business & Practice

Jan. 12, 2024, 3:00 AM MST

Popular AI Chatbots Found to Give Error-Ridden Legal Answers

ABA Formal Opinion 512

- Competence – RPC 1.1

- Confidentiality – RPC 1.6

- Communication with clients – RPC 1.4

- Supervising of employees and agents – RPCs 5.1 and 5.3

- Advancing only meritorious claims and contentions – RPC 3.1

- Candor – RPCs 3.3 and 8.4(a)(3)

- Charging reasonable fees – RPC 1.5

Best practices

- Understand how artificial intelligence works

- Experiment with personal tasks and professional tasks that do not involve the delivery of legal services

- Read ethics opinions and articles to understand the ethics issues

- Read the providers' FAQs, documentation, and other materials

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Best practices (cont'd)

- Talk to those who really knows the tool

- Don't use it to learn; limit use to your expertise

- Review the terms and conditions, as well as the privacy disclosures

- Compare free and fee-based models
  - Consumer v. enterprise
  - If it's free, you and your data are the product

Best practices (cont'd)

- Use thoughtful prompts and exclude:

  - Client information

  - Personal information

  - Your secret sauce

- Training AI through prompts is not much different than how you would train a brand-new lawyer

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Best practices (cont'd)

- Scrutinize GenAI outputs, and consider them a mere starting point

- Evaluate for bias

- Verify accuracy

- Always add/use your own judgment

- Develop, follow, and update an AI policy (and share it with your team)

- Be aware of security issues

Don't trust AI

Verify

Questions

Thank you

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