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Hard at Work:
Diligence under RPC 1.3

> **"Perhaps no professional shortcoming is more widely resented than procrastination."**
> **~RPC 1.3, Comment 3**

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Most Washington RPCs and their ABA Model Rule counterparts don't include wide-ranging introspection like our opening quote from Comment 3 to RPC 1.3. For a one-line rule, however, RPC 1.3 on diligence produces a disproportionate share of professional discipline. Last year's annual report on lawyer discipline in Washington, for example, reflects that nine percent of disciplinary cases included violations of RPC 1.3.[1] 2023 was not an outlier; prior year reports include similar statistics and post-Pandemic percentages track pre-Pandemic numbers.[2] Washington is not an outlier either, with Oregon, for example, reporting similar statistics over the same period.[3] These disciplinary statistics are mirrored generally in national numbers on malpractice. The ABA Profile of Legal Malpractice Claims series—which goes back to 1985—has consistently reported that "administrative errors" that include subcategories like "failure to file," "procrastination in performance," and "failure to react to calendar," typically comprise 20 percent of malpractice claims.[4]

In this column, we'll survey RPC 1.3 on diligence. For context, we'll begin with the history and component parts of the rule. We'll then turn to practical

steps lawyers and their firms can take to lessen the risk of professional discipline and civil claims in this area.

Before we do, however, three qualifiers are in order.

First, although we will focus on RPC 1.3, violations of the rule usually do not occur in isolation. Many disciplinary cases involving RPC 1.3 also include violations of RPC 1.4 for related communication failures.[5] Others include violations of RPC 3.2 for failing to expedite litigation.[6] Still others involve violations of RPC 1.5 for fees not earned when work was not completed.[7] If court deadlines are missed, violations of RPC 1.1 on competence can also enter the mix.[8] This is by no means an exhaustive list of the interplay between RPC 1.3 and other rule violations.[9]

Second, we'll focus on civil litigation. That said, issues surrounding diligence can surface in criminal practice in both individual cases[10] and overall dockets.[11]

Third, diligence failures occasionally occur against the backdrop of very difficult lawyer health, financial, or other personal circumstances.[12] In this column, we will survey more mundane scenarios and ways to address them.

Context and Components

RPC 1.3 is a single sentence:

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

The rule does not contain a precise definition of "diligence." The comments, however, use the phrase "unreasonable delay" in handling client work—suggesting that the phrase "diligence and promptness" effectively means moving a particular matter along at a pace appropriate to the circumstances.[13] The comments also underscore the modifier "reasonable" and note that the duty of diligence should ordinarily co-exist with common professional courtesies such as brief extensions for filings.[14]

The Washington rule is patterned on its ABA Model Rule counterpart. The latter was adopted as part of the original ABA Model Rules in 1983.[15] The text of the rule has not changed since and the accompanying comments have not changed markedly since then either.[16] The ABA Model Rule was based generally on a provision of the former ABA Model Code of Professional Responsibility that proscribed "neglect of a legal matter entrusted" to a lawyer.[17] Still earlier, the ABA Canons of Professional Ethics adopted in 1908 counseled lawyers to be "punctual."[18]

Washington's rule followed a roughly similar arc. The text of Washington RPC 1.3 is identical to the ABA Model Rule and was adopted when Washington moved to the ABA Model Rules in 1985.[19] It has since remained unchanged. Official comments generally paralleling their ABA Model Rule counterparts were added in 2006.[20] Those, too, have since remained unchanged.

RPC 1.3 weaves together two broad, but related, concepts.

First, Comment 2 to RPC 1.3 counsels not to take on so much work that it cannot be performed competently:

> A lawyer's work load must be controlled so that each matter can be handled competently.

In re Anschell, 141 Wn.2d 593, 9 P.3d 193 (2000), for example, involved a solo practitioner disciplined under RPC 1.3 when he couldn't keep up with "200 open cases at any given time, review[ing] 10 files per day, and receiv[ing] 30 telephone calls per day."[21]

Second, Comment 4 to RPC 1.3 reminds lawyers that ordinarily they must complete what they have taken on:

> Unless the relationship is terminated as provided in Rule 1.16 [withdrawal], a lawyer should carry through to conclusion all matters undertaken for a client.

In re Van Camp, 171 Wn.2d 781, 257 P.3d 599 (2011), for example, involved a lawyer disciplined for failing to complete agreed work on a single case.

Addressing Risks

Given its prominent role in lawyer discipline, a fair question to ask at this point is: how does a one-line rule that hasn't changed in nearly 40 years cause so much trouble?

The twin threads just noted suggest both the reasons and how to address them. While internal controls alone won't change a person's nature,[22] controlling intake and establishing internal systems to encourage timely completion of work can meaningfully reduce risk if approached systematically.

Controlling intake is admittedly easier said than done. Lawyers by nature want to use their legal skills to help clients. Economic pressures, too, seldom ease in private practice. At the same time, lawyers—especially those who are solos or at small firms where getting assistance from others may not be an option[23]—need to realistically assess their capacity before taking on the next matter. That is not a static exercise: a lawyer who was working 16 hour-days preparing for trial may have sufficient capacity to take on new work when the trial unexpectedly resolves. It is, however, a question that must be asked.[24]

Comment 3 to RPC 1.3 notes that while not all diligence failures result in

catastrophic client harm, almost all "cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness."[25] The principal defense the lawyer offered in *Anschell* was that his practice was so busy that inevitably some "cases 'fell through the cracks.'"[26] The Supreme Court suspended the lawyer.[27]

Following through on matters to completion can also be easier said than done. Yesterday's "great case" on intake may turn out to be "not so great" after initial investigation. Lawyers need to remember, however, that even the "not so great" case remains important to the client involved. As the Washington Supreme Court put it in a case disciplining a lawyer for lack of diligence: "Of necessity . . . [clients] . . . look to the legal profession for advice and resolution of their problems and ultimately for the satisfactory as possible end to the tempest and turmoil in which they are embroiled."[28] Even if yesterday's "great case" remains that way going forward, it may still be competing for attention with others that, for a variety of reasons, seem more pressing at the moment. Beyond calendaring court deadlines, lawyers should establish internal law firm reminders to schedule adequate time to accomplish particular tasks. In other words, although it is important to calendar a summary judgment deadline, an additional reminder two weeks earlier will help a lawyer actually meet the deadline. Both

general calendaring programs common in law practice and tailored practice management software are well-tuned to add systematic reminders and deadlines. Having more than one person monitor those deadlines can be equally important. A calendar reminder might be quickly deleted, but a trusted assistant standing in the lawyer's office door (or the electronic equivalent) saying "What about the motion that is due on Friday?" is more difficult to ignore.

Summing Up

Over 50 years ago, the Washington Supreme Court observed that "[p]rocrastination and delay in handling of legal affairs not only induces a client to lose confidence in his attorney but reflects badly on the profession and the courts, and may foster the impression in the public mind that the highly-vaunted standards of professional ethics are no more than a sham."[29] Although many things have changed in law practice since then, the importance of diligently handling client work is not one of them.

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[1] 2023 Washington Discipline System Annual Report at 18 (2024), available on the WSBA website at www.wsba.org.

[2] In 2018, for example, nine percent of cases imposing discipline included violations of RPC 1.3. 2018 Washington Discipline System Annual Report at 15 (2019).

[3] *See* Oregon State Bar Disciplinary Counsel Annual Reports, available at www.osbar.org.

[4] *See, e.g.,* ABA, *Profile of Legal Malpractice Claims* 2016-2019 at 22-23 (2020); *see, e.g., Shoemake ex rel. Guardian v. Ferrer*, 168 Wn.2d 193, 225 P.3d 990 (2010) (legal malpractice claim arising from multiple failures to file required documents or appear at trial).

[5] *See, e.g., In re Cohen*, 149 Wn.2d 323, 67 P.3d 1086 (2003).

[6] *See, e.g., In re Lopez*, 153 Wn.2d 570, 106 P.3d 221 (2005).

[7] *See, e.g., In re DeRuiz*, 152 Wn.2d 558, 99 P.3d 881 (2004).

[8] *See, e.g., In re Conteh*, 187 Wn.2d 793, 389 P.3d 591 (2017).

[9] For a national compilation of cases addressing violations of state versions of ABA Model Rule 1.3 often occurring within the context of multiple rule violations, *see* ABA, *Annotated Model Rules of Professional Conduct* at 64-72 (10th ed. 2023).

[10] *See, e.g., In re Longacre*, 155 Wn.2d 723, 122 P.3d 710 (2005) (lawyer disciplined for, among other things, violation of RPC 1.3 in the context of a criminal case that also involved a finding of ineffective assistance).

[11] *See, e.g.,* WSBA Advisory Op. 1336 (1990) (addressing intersection of public defender caseloads and effective representation); ABA Formal Op. 06-441 (2006) (same).

[12] *See, e.g., In re Wickersham*, 178 Wn.2d 653, 310 P.3d 1237 (2013) (health problems); *In re Starczewski*, 177 Wn.2d 771, 306 P.3d 905 (2013) (financial problems); *In re Whitt*, 149 Wn.2d 707, 72 P.3d 173 (2003) (difficult personal circumstances). *See also* ABA Formal Ops. 03-429 (2003) (impaired lawyers within firm), 03-431 (2003) (impaired lawyers outside firm).

[13] RPC 1.3, cmt. 3. *See also* Black's Law Dictionary (11th ed. 2019) (defining "diligence" as the "[s]teady application to one's business or duty"); *Restatement of the Law Governing Lawyers* § 16, cmt. d (2000) ("The lawyer must use those capacities diligently, not letting the matter languish but proceeding to perform the services called for by the client's objectives[.]").

[14] RPC 1.3, cmts. 1, 3.

[15] ABA, *A Legislative History: The Development of the ABA Model Rules of Professional Conduct, 1982-2013* (ABA Legislative History) at 65-66 (2013).

[16] *Id*. at 67-70. In 2002, the ABA adopted Comment 5 to Model Rule 1.3 recommending that solo practitioners prepare a plan designating another lawyer to handle the solo's files in the event of the solo's death or disability. Washington did not adopt that comment, with Comment 5 to Washington RPC 1.3 listed as "Reserved."

[17] *See* ABA Legislative History at 66, speaking to former DR 6-101(A)(3). *See also* Thomas R. Andrews and Robert H. Aronson, *The Law of Lawyering in Washington* at 5-5 (2012) (Andrews and Aronson) (discussing the change from "neglect" to "diligence"). Comment 1 to ABA Model Rule 1.3 includes the word "zeal" (along with variants of that word in three places in the Preamble). Although "zeal" made its initial appearance in the ABA Canons in 1908 in the positive sense of being dedicated to clients' interests, over time it took on a negative connotation as an excuse for bad behavior by lawyers ostensibly in the service of their clients. As a result, the prominence of the word "zeal" has been diminished as noted in the ABA Model Rules and eliminated altogether in the Washington RPCs (and the accompanying comments). *See generally* Andrews and Aronson, *supra*, at 5-6.

[18] ABA Canon 21.

[19] *See* Robert H. Aronson, *An Overview of the Law of Professional Responsibility: The Rules of Professional Conduct Annotated and Analyzed*, 61 Wash. L. Rev. 823, 837 (1986) (surveying the then-newly adopted Washington RPCs, including RPC 1.3).

[20] *See* Washington Supreme Court Order 25700-A-851, July 10, 2006 (adopting changes to the Washington RPCs—including official comments—recommended by the WSBA's "Ethics 2003" Committee); *see also Reporter's Explanatory Memorandum to the Ethics 2003 Committee's Proposed Rules of Professional Conduct* at 6 (2004) (on file with author). As discussed earlier, the Washington Supreme Court did not adopt Comment 5 to ABA Model Rule 1.3.

[21] 141 Wn.2d at 598.

[22] For example, the Washington Supreme Court in *Matter of McGough*, 115 Wn.2d 1, 6, 793 P.2d 430 (1990), described the lawyer involved as having a "chronic procrastination problem."

[23] RPC 1.3 violations are not the exclusive province of solo or small firm lawyers. *In re Petranovich*, 26 DB Rptr. 1 (Or. 2012), for example, involved a large firm lawyer who took on a *pro bono* case and then ignored it. He was disciplined under Oregon RPC 1.3.

[24] This assumes the lawyer is competent to handle the matters involved. *See* RPC 1.1, cmts. 1-2 (addressing competence or gaining competence to handle a new matter); *see, e.g., In re Pfefer*, 182 Wn.2d 716, 727, 344 P.3d 1200 (2015) (rejecting defense that lack of diligence was caused by "confusion" about applicable local court rules).

[25] In the regulatory context, proof of actual harm is not required to establish a violation of RPC 1.3. *See In re Burtch*, 112 Wn.2d 19, 26-27, 770 P.2d 174 (1989).

[26] 141 Wn.2d at 610.

[27] *Id*. at 620. The lawyer was later disbarred for similar conduct. *See In re Anschell*, 149 Wn.2d 484, 69 P.3d 844 (2003).

[28] *In re Burtch*, *supra*, 112 Wn.2d at 27.

[29] *In re Vandercook*, 78 Wn.2d 301, 304, 474 P.2d 106 (1970) (decided under the former Canons of Professional Ethics).