

WASHINGTON STATE BAR ASSOCIATION

Title: Informed Consent Required To Vacate Criminal Convictions

Year Issued: 202506

RPC(s): 1.0A, 1.1, 1.2, 1.3, 1.4

Summary:

This advisory opinion discusses whether a criminal defense attorney needs to have a lawyer-client relationship and informed consent to vacate a drug conviction.

Facts:

Under former RCW 69.50.4013, possession of a controlled substance – even if unintentional and unknowing – was a felony. The Washington Supreme Court in State v. Blake, 197 Wn.2d 170, 481 P.3d 521 (2021), held that this strict liability drug possession statute violated the due process clauses of the state and federal constitutions. As a result, such convictions are void or voidable, but orders of vacation are not automatic or self-executing. The defendant can file a motion to vacate a drug possession conviction that fell under the former drug possession law.

This advisory opinion discusses whether a criminal defense lawyer may file a motion to vacate on behalf of an individual with such drug convictions, without the defendant's specific knowledge and consent and in the absence of a current lawyer-client relationship if the defendant cannot be located. [n.1]

Short Answer:

A lawyer must have a current lawyer-client relationship in order to act on behalf of a criminal defendant. Without a client's informed consent, a lawyer lacks authority to seek to vacate a conviction.

Authority:

(1) A lawyer may not act on behalf of a client in the absence of a current attorney/client relationship.

The question presented acknowledges the lack of an existing lawyer-client relationship. [n.2] A lawyer cannot act where there is not a client relationship. *See In re Disciplinary Proceedings Against Stansfield*, 164 Wn.2d 108, 187 P.3d 254 (2008) (lawyer who requested permission to represent widow who lived in Guatemala but filed a claim before receiving authorization and widow's authorized representative hired other counsel, negligently violated former RPC 1.2(f)). Thus, a lawyer may not move to vacate a defendant's conviction without a lawyer-client relationship. [n.3]

(2) Even if a lawyer has a lawyer-client relationship, the lawyer cannot act on a client's behalf without authorization from the client.

The Washington Supreme Court has held that under RPC 1.2(f), [n.4] a lawyer must obtain client authority in order to act on the client's behalf. *In re Disciplinary Proceeding Against Marshall*, 160 Wn.2d 317, 157 P.3d 859 (2007) (finding a lawyer willfully violated former RPC 1.2(f) by filing an appeal without two clients' authorization). Accordingly, a lawyer must have the client's informed consent to seek vacatur. [n.5]

To be clear, regardless of how well-intentioned, a lawyer may not represent a client without authorization simply because the lawyer believes it is in the client's "best interest" to do so. *See Stansfield, supra*, 164 Wash. 2d at 115 (fact that attorney was "motivated by a desire to protect [widow and estate] from others who might take advantage of them" did not justify acting without specific authority).

Further, seeking to vacate a conviction is not without risk. For example, moving to vacate a conviction could undermine a plea agreement that allows the prosecutor to pursue other dismissed charges. Thus, representing a client

without direct communication and/or authorization also risks a violation of RPC 1.1 (competence), RPC 1.2(a) (client objectives), RPC 1.4(a) (client communication), and RPC 1.4(b) (duty to explain to allow client to make informed decisions). Without discussing the issue with the client in advance, the lawyer may be proceeding without complete information that may undermine their representation and lead to the lawyer failing to provide competent representation.

Analyzing these rules, a lawyer should not seek to vacate a conviction without a current lawyer-client relationship. Further, the lawyer should only seek a vacatur of a void or voidable conviction with the client's knowledge and consent. The lawyer who acts without client authority risks a violation of RPC 1.2(f). [n. 6]

Endnotes:

1. There may be judicial or legislative solutions available which are outside the scope of this advisory opinion.
2. In a criminal defense representation where the lawyer-client relationship may cease to exist where the lawyer represented the client at one point is a fact-specific determination beyond the scope of this opinion.
3. In rare circumstances, a lawyer may represent a client who cannot be located, consistent with the known objectives of the client, pursuant to the "law or a court order" exception in RPC 1.2(f). *See* WSBA AO 2225 (2012) (lawyer must continue to represent absent immigration client, consistent with the known objectives of the client, if a judge denies withdrawal motion); *see also* Comment [17] to RPC 1.2 (RPC 1.2(f) does not prohibit a lawyer from acting when ordered to continue representation by a tribunal). It is beyond the scope of this Advisory Opinion to comment on the extent to which a lawyer may act to vacate a criminal conviction on behalf of an absent former client under the "by law" or "court order" exceptions of RPC 1.2(f), where the client has not had an opportunity to communicate and give informed consent to the representation.
4. RPC 1.2(f) provides: 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. Comment [15] to RPC 1.2(f) notes:

Acting as a Lawyer Without Authority

[15] Paragraph (f) was taken from former Washington RPC 1.2(f), which was deleted from the RPC by amendment effective September 1, 2006. The mental state has been changed from

“willfully” to one of knowledge or constructive knowledge. See Rule 1.0A(f) & (j). Although the language and structure of paragraph (f) differ from the former version in a number of other respects, paragraph (f) does not otherwise represent a change in Washington law interpreting former RPC 1.2(f).

5. The ethics rules do not prohibit the State from moving to vacate a judgment affected by *Blake*. “[T]he State generally has the authority to move to vacate a judgment under CrR 7.8 (b).” *State v. Hall*, 162 Wash. 2d 901, 905, 177 P.3d 680, 682 (2008).
6. This opinion does not prevent lawyers or public defense agencies from contacting individuals impacted by the Blake decision to establish a lawyer-client relationship and obtain informed consent to move to vacate a judgment.