

Ethical Issues in Eviction Prevention Defense Part I

General Overview of Tenant Right to Counsel

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Basic Structure of Eviction Right to Counsel

- Statutory Right to Eviction Defense Counsel in Washington – RCW 59.18.640
- Not a constitutional right to counsel
- What is the difference?
 - Subject to conditions – not entitled per se
 - Case can proceed if a tenant is *involuntarily* pro se due to waiver or lack of resources
 - RPCs provide some exceptions/limitation for constitutionally required counsel

RCW 59.18.640

- When is counsel available for an eviction defendant?
 - Unlawful detainer proceedings under RCW 59.18, 59.12, and 59.20
 - Applies to any alleged basis defining unlawful detainer under RCW 59.12.030 – not limited to non-payment of rent
 - Applies to Mobile Home Park evictions
 - Applies to all stages of the eviction proceeding – query whether it applies to appeals?

RCW 59.18.640

- What are the statutory limits to representation?
 - N/A to non-eviction proceedings – e.g. mediation, ejectment
 - N/A to counter-claims unrelated to possession (affirmative defenses ok)
 - N/A to collateral affirmative claims – unrelated torts or habitability
 - N/A to collateral debt collection arising from unlawful detainer proceeding, e.g. damages, attorney fees
 - Is defendant a “tenant”? (RCW 59.18.030) (what about “at will” or “squatter/trespasser”?)
 - Is tenant indigent as defined?

RCW 59.18.640

- Is representation under statute an enforceable right and, if so, to what extent?
 - Impact of “subject to available funds” – query is RTC an “entitlement”?
 - Prioritizes counties where most evictions occur
 - Tenants disproportionately “at risk” of eviction
 - Available for an appeal? Collateral criminal charges? Subsidy termination proceedings? Collateral debt collection proceedings?
- *In re J.R.U.S.*, 126 Wn. App. 786 (2005) – court has discretion to allow counsel to be present at court-ordered psychological evaluation of parent in dependency proceeding to protect 5th Amendment right
 - Court-ordered psych evaluation is not a “stage” in the proceeding – hence no statutory RTC attaches. Query re inspection of tenant’s unit, valuation of mobile home, etc. are “stages” of the proceeding?

Waiver of Right to Representation

- Can the statutory right to representation be waived?
 - Experience of RTC in Child Dependency Cases (RCW 13.34.090(2))
 - *In re G. E.*, 116 Wn. App. 326, 334 (2003) waiver of right to counsel must be expressed on the record; knowingly and voluntarily made.
 - Voluntary relinquishment indicated by *an affirmative, verbal request and evidence of the intent to proceed pro se.*
 - Valid waiver requires court to ensure on the record that [defendant] is aware of the risks and disadvantages of self-representation.
 - Failure to create record documenting that the waiver was knowingly and voluntarily made may be reversed on appeal.
 - Defendant's discharge of appointed counsel does not automatically compel appointment of substitute counsel—See RPC 1.16,C [6]

RPC 1.16 Comments

- [6] Whether client can discharge appointed counsel may depend on applicable law. Client should be given a full explanation of the consequences, including possible decision that appointment of successor counsel is unjustified, thus requiring client to proceed pro se.
- [7] If client has severely diminished capacity, they may lack legal capacity to discharge lawyer, and discharge may be seriously adverse to the client's interests. The lawyer should make *special effort* to help the client consider the consequences and may take reasonably necessary protective action as provided in Rule 1.14.



Voluntary Waiver

- Voluntary Waiver of Right to Counsel must be:
 - Based on informed consent
 - After judicial inquiry
 - On the record
- Does a tenant have a right to counsel to be advised prior to waiver?
 - Yes, waiver of the right to counsel is a stage in the eviction proceeding

Waiver by Conduct

- Can a waiver be imputed to a tenant by conduct?
 - *City of Tacoma v. Bishop*, 82 Wn. App. 850, 859 (1996): A defendant may lose their right to an attorney if they engage in dilatory tactics or other misconduct that affects the reasonable progression of the proceedings.
 - Defendant *must be warned* about the consequences of the conduct
 - Expressly warned of risk and disadvantages of losing counsel.
 - Conduct is such that intent to waive is imputed
 - *Hybrid* – between voluntary waiver and waiver by “forfeiture”
 - Defendant does not have license to use RTC or waiver right to manipulate proceedings or to delay and disrupt effective administration of justice. *State v. Johnson*, 33 Wn. App. 15, 22 (1982)

Waiver by Conduct, cont'd

- What conduct can result in imputed waiver?
 - Repeated failure to arrange for counsel after repeated instructions – *State v. Johnson*
 - Repeated requests for continuances due to other delayed actions, including failure to maintain contact with counsel - if warned to do so and efforts made to contact client. Notice of intent to withdraw not enough warning of consequences. *See In re Dependency of E.P.*, 136 Wn. App. 401, 409 (2006) (*dissenting opinion*)
 - Other failure to cooperate with reasonable and necessary requests, including failure to appear for trial.
 - Risk of error may not be relevant.

Waiver by Forfeiture

- Waiver even without defendant's knowledge of consequences or intent.
- Conduct must be *more severe* than waiver by conduct, e.g.
 - “Extremely dilatory.” *City of Tacoma v. Bishop*, 82 Wn. App. At 859.
 - Abuse toward attorney, threats to sue, *and/or demands that counsel engage in unethical conduct.* *United States v. McLeod*, 53 F.3d 322, 325 (11th Cir. 1995).
 - Failure to attend court proceedings and communicate with attorney preventing effective or ethical representation. *In re A.G.*, 93 Wn. App. 268 (1998).
 - Need for repeated appointments, withdrawals by counsel and continuances. *In re G.E.*, 116 Wn. App. at 331-32.

Waiver by Forfeiture, con't

- BUT, failure to appear for trial alone or last minute request for counsel necessitating a continuance does not warrant forfeiture of the right to counsel.
 - *In re V.R.R.*, 134 Wn. App. 573 (2206) (defendant missed bus and did not appear on day of trial when newly appointed attorney sought continuance, which was denied and judgment entered by default). Court held that forcing a newly appointed attorney to proceed to termination of parental rights trial without adequate opportunity to prepare defense would result in ineffective assistance of counsel.

Ethical Duties On Waiver

- Request for relief from representation responsibility
 - Relief of responsibility due to *voluntary* waiver – defendant seeks new attorney or no attorney
 - Defendant must affirmatively ask – attorney should assist in the request and advise of consequences, as well as insure court engages in appropriate inquiry
 - Court may assign attorney to perform as “stand-by” counsel – not required (no constitutional/statutory right)
 - Normal duties of RPC 1.16 remain, provide file, maintain confidences
 - Opposing counsel may communicate directly with defendant – RPC 4.2, 4.3

Ethical Duties On Waiver, cont'd

- Relief of responsibility of waiver by *conduct or forfeiture*
 - Attorney must affirmatively ask to be relieved of appointment
 - Court can deny if insufficient grounds established; waiver by conduct requires affirmative warning of consequences (best practice - in writing)
 - Attorney must seek to withdraw if continuing representation will result in violations of RPCs or other law – RPC 1.16(a)(1)
 - Client insists on actions attorney finds repugnant or fundamental disagreements may not support withdrawal – RPC 1.16(4) – permissive
 - Same re client's action that may use lawyer services for fraudulent means or other good cause – RPC 1.16(b), but see RPC 1.16(c) (court may order continued representation n/w/s good cause)

Ethical Duties on Withdrawal

- **RPC 1.16(c):** Lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation.
 - Formal motion to withdraw (CR 70)
 - Protecting confidences required – RPC 1.6
 - The lawyer’s statement that “professional considerations require termination of the representation” ordinarily should be accepted as sufficient. (RPC 1.16, C [3])
 - RPC 6.2 – specifically addresses obligations of appointed counsel
 - CR 71((b) - A court appointed attorney may not withdraw without an order of the court. The client of the withdrawing attorney must be given notice of the motion to withdraw and the date and place the motion will be heard.

Withdrawal, cont'd

- RPC 1.16
- (d) Upon termination of representation, a lawyer shall take steps to the *extent reasonably practicable* to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled ... The lawyer may retain papers relating to the client to the extent permitted by other law.
- Maintain confidences
- Abide by other rules, e.g. former client conflicts

Withdrawal, cont'd

- RPC 6.2:
 - Relieves lawyer appointment for good cause, e.g. representation is likely to violate RPCs or other law.
 - C [3] Reiterates that an appointed lawyer has the same obligations as retained counsel and is subject to the same limitations (incl. to refrain violation of the Rules.)
 - Other limitations: Competence RPC 1.1, Meritorious Claims and Defenses RPC 3.1, Expediting Litigation RPC 3.2, Misconduct (catch all!) RPC 8.4

Specific Rules

- Scope of Representation under RCW 59.18 and RPC 1.2
 - Communication of scope of representation
 - Ethical concerns re limiting scope of representation
 - Who is client?
 - Impacts re RPCs 4.2, 4.3 and 4.4

Scope of Representation

- RCW 59.18.640
 - Unlawful detainer proceedings under RCW 59.18, 59.12, and 59.20
 - Applies to any alleged basis defining unlawful detainer under RCW 59.12.030
 - Mobile Home Park evictions
 - All stages of the eviction proceeding – appeals??
- Doesn't apply to:
 - Non-eviction proceedings
 - Counter-claims unrelated to possession
 - Collateral affirmative claims
 - Debt collection arising from unlawful detainer proceeding??

Scope of Representation, cont'd

- RPC 1.2: A lawyer shall:
 - Abide by a client's decisions re objectives
 - Consult with the client as to means to pursue objectives
 - Take action *impliedly authorized* to carry out representation
 - Abide by a client's decision whether to settle a matter.

Scope of Representation, cont'd

- Limited scope allowed by agreement or terms under which lawyer's services are made available.
- Communicating scope expressly required-RPC 1.2(c)
- Preferably in writing
- Lays groundwork for relationship/expectations

Scope of Representation, cont'd

- Client has “ultimate authority” to determine purposes
- Within limits imposed by law or professional duties
- Rule does not prescribe how disagreements are to be resolved
- Cannot act if lawyer knows or reasonably should know they lack authority – RPC 1.2(f)

Scope of Representation, cont'd

- Fundamental disagreement-lawyer may withdraw
- Violates RPCs - lawyer must withdraw
- Client suffers from diminished capacity – RPC 1.14- lawyer's duty is to abide by the client's decisions
- If unsure of extent of their authority due to diminished capacity, lawyer may protect person's interests
- Protective action taken in conformity with Rule 1.14 does not violate RPC 1.2.

Scope and Merit

- Meritorious claims and defenses, RPC 3.1
 - Applying RPC 3.1 to Right to Counsel in Eviction Proceedings
 - Who decides merit , see esp. RPC 1.2 C [13], 3.1 C [3]
 - Implications for appointed counsel, see RPC 6.2

Scope and Merit

- RPC 3.1(a) A lawyer shall not
 - Bring or defend a proceeding/assert or controvert an issue therein:
 - Unless basis in law and fact
 - That is not frivolous or
 - Includes good faith argument for an extension, modification or reversal of existing law.



Scope and Merit, cont'd

- Duty to use process for fullest benefit
- Duty not to abuse process
- The law establishes the limits within which an advocate may proceed.
- Law is not always clear and never is static.
- Rule takes account law's ambiguities and potential to change.

Scope and Merit, cont'd

- Frivolous - No factual basis or *possible* interpretation of law to support argument
- Not frivolous if facts have yet to be substantiated
- Lawyer believes client's position will not prevail??
- Lawyer must be informed of facts and law to determine good faith arguments

Scope and Merits

- BUT rule is subordinate to constitutional right to assistance of counsel (C [3]) – allows presenting claim or contention *otherwise prohibited* by Rule
- Difference between statutory and constitutional right?? Recall notion of implied/involuntary waiver.
- Extreme, fundamental, violates RPCs
- Ask to be allowed to withdraw – up to court to reappoint
- Serve as stand by counsel - client presents w/o lawyer presenting false testimony/evidence or making legal argument in support

Clients with Diminished Capacity

- RPC 1.14 - Representing Persons with Diminished Capacity Maintaining Attorney-client Relationship
 - Assessing client's ability to participate in representation
 - Protective action and substitute decision-makers
 - Emergency representation and scope, see RPC 1.2

END PART I

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Ethical Issues in Eviction Prevention Defense

PART II

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Specific Rules, Conflicts

- Mandatory denial or termination of representation
 - Conflicts under RPC 1.7 or 1.9
 - Conflicts under RPC 1.10
 - Personal or Special Conflicts under RPC 1.8
 - Relief from conflict under RPC 6.5

Specific Eviction Defense Problems

- Accommodating conflicts between room-mates facing eviction.
- Eviction due to violence against other household members
- Eviction due to criminal activity of household member
- Internal v. outside counsel representation of conflicted clients – can staff attorney of same program represent conflicted clients? Imputed conflicts and RPC 6.5.



Conflict's cont'd

- RPC 1.7 – Concurrent Conflicts
 - Directly adverse interests – How do you know?
 - Competing goals or purposes of the representation – may change at different stages of case, e.g. settlement position
 - Evidence from one person will be used against the other
 - Confidential information from one may disadvantage other
 - Confidential information from one influences or impairs the lawyer's representation of either
 - Same case or litigation v. separate case or litigation

Conflicts, cont'd

- Determining whether interests are adverse
 - Do potential clients have the same goal?
 - Even if not same goal, are the goals mutually shared or able to be aligned?
 - Are the goals competing? (Can both be pursued without adversely impacting the other?)
 - Are the goals, evidence and interests aligned on the substantively *material* issues? (E.g. is the difference on objective or strategy? Dispute resolvable or not?)

Conflicts, cont'd

- Representation of one client is *materially limited* by duties to another client:
 - C [8]: Is there a *significant risk* to lawyer's ability to consider, recommend or carry out an appropriate course of action as a result of other responsibilities or interests, e.g. inability to share confidential information.
 - Can be substantive, strategic, or personal
 - Will the differences "*materially interfere*" with lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued?

ROOMMATES



Conflict's cont'd

- Can parties consent to representation even with a potential or actual conflict?
 - C [15]: Consent allowed when interests of the clients will be adequately protected
 - Not allowed if in the circumstances the lawyer cannot reasonably conclude that the lawyer will be able to provide competent and diligent representation.
 - No clear lines or examples.
 - Lawyer must decide based on their own judgment, experience, and communications with the parties

Common Representation

- C [29]-[33]: Common Representation:
 - Ok if parties' interests align
 - Fails if adverse interests can't be reconciled lawyer is forced to withdraw
 - Limited potential to represent parties separately if ok under RPCs (e.g. separate litigation or negotiation)
 - Common rep fails if one decides confidential information can't be shared
 - In limited circumstances, lawyer may continue if clients agree lawyer will keep information confidential
 - May limit scope of representation of either with consent

Conflicts, cont'd

- Informed consent to conflict – See C [18]-[22]
 - Each affected client must be aware of the relevant circumstances and the ways that the conflict could have adverse effects that client.
 - The information depends on the nature of conflict and risks (and advantages).
 - Implications of common representation
 - Possible effects on loyalty, confidentiality and the attorney-client privilege
 - Potential impact if direct conflict arises
 - Must be in writing (electronic is fine)

Informed Consent, cont'd

- Informing of risks and advantages
 - Prohibited to share confidential information to obtain informed consent
 - Ensure lack of influence of one person on the other(s)
 - Attorney-client privilege – not a shared privilege
 - Clear assessment of mutually beneficial interests/risks
 - Aggregate settlements – RPC 1.8(g)
 - Requires informed consent of each
 - Disclosure must reflect the existence and nature of all the claims involved and what each person will receive

Informed Consent, cont'd

- Must be obtained and *confirmed* in writing
- If unfeasible prior to representation, w/i reasonable time
- Does not supplant explanation of risks and concerns
- Intended to avoid disputes and ambiguities in future
- May include decision-making, settlement structure, waiver of confidentiality as between parties
- Inform what happens if one client revokes consent, e.g. withdraw from both, or waive future conflict if allowed.



Imputed Conflicts

- RPC 1.10/6.5: Lawyers acting under the auspices of a non-profit or court annexed no fee legal services program are subject to RPC 1.10 only when
 - Personal knowledge or others in firm are disqualified, AND
 - Notwithstanding RPC 1.7, 1.9, and 1.10, providing limited legal services are not subject to rules if:
 - Screened from access to information
 - Notice to clients

RPC 6.5, cont'd

- Application to limited legal assistance
- Can speak to conflicted parties about eligibility, need and referral for legal assistance in any event.
- Can provide full representation to conflicted client if former client received only limited legal assistance.
- Both parties can be represented by different counsel connected to program, e.g. pro bono services program appointed to represent tenants, but not if both staffed.
- Notice of prospective conflict suffices

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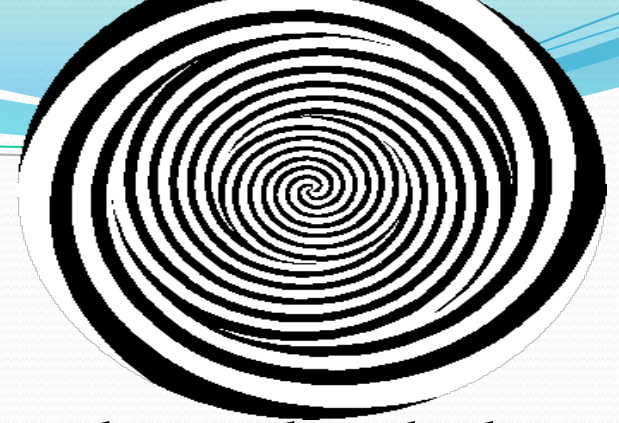
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PART III

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Eviction Defense Problems



- Clients who want to pursue arguments or claims that lack merit or are prevented by “other law”, e.g. federal public housing law – See *State v. Ellwell*, WA Supreme Court No. 99546-0, March 3, 2022.
- Advising clients on legal issues outside scope of eviction representation.
- Participating as “friend of the court” to obtain counsel for tenant – how to advise court of duty to appoint counsel for unrepresented tenant.
- Loss of contact with client or client dies (RPC 1.2, 1.4, 1.16, 6.2).
- Clients with diminished capacity

Specific Rules, cont'd

- Addressing ethical dilemmas to the court
 - Maintaining confidentiality – RPC 1.6
 - Preserving representation relationship – RPCs 1.2, 2.1, esp. Comment (5)
 - Communication with client, see esp. RPC 1.4, Comments 5-7
 - Candor to Court, RPC 3.3 and to Fairness to Opposing Party, RPC 3.4

Hypotheticals

- You are appointed to represent domestic partners who are defendants in eviction proceeding. LL alleges non-payment of rent and damages to unit in the amount of \$10,000. Both partners agree that paying rent is a shared obligation between them and they each explain that the rent non-payment resulted from one partner being unemployed due to COVID related closure of the restaurant they worked for. The other partner paid the full rent for 3 months and half the rent for the immediate past 3 months. The damage occurred when the partner who paid the rent got angry at having to pay the rent and struck holes in the wall and broke a fixture. Ethical concerns?

Hypothetical 2

- Partners disagree about who is responsible for paying rent and how the damage occurred. Partner A says that Partner B agreed to pay the full rent in exchange for Partner A taking care of household chores and other daily needs. Partner B explains that the wall and fixture damage occurred as a result of moving a heavy piece of furniture because A wanted it moved to create more space in the living room.
- B is interested in moving “out of that dump.” A wants to stay because better housing at the same or lower price in the same convenient location “is not possible to find.” You have been appointed to represent both.

Hypothetical 3

- After agreeing to represent both A and B you learn that A has obtained a domestic violence protection order against B. Without B, A cannot make up the back rent. B has agreed to pay the back rent and to continue paying the full rent if A and B are able to get back together. B also admits that the damage was caused during the incident that led to the DVPO. A wishes to remain the unit and is unsure what to do. What is your authority to advise A and what is your ethical duty to both A and B?

Hypothetical 4

- Based on the above facts, you determine that you must withdraw from representing both parties. How do you withdraw and what do you disclose to the court, landlord, and each partner in support of your withdrawal?
- What obligations do you have to each partner upon withdrawal?
- Does it matter if they are room-mates instead of domestic partners?
- Does it matter who is on the lease with the LL?

Hypothetical 5

- The court allows you to withdraw but then re-appoints your organization to represent A. B is denied re-appointment. B asks another lawyer in your program to seek reconsideration of the denied counsel. Your program believes the court should have appointed new counsel to B and believes it is important to impress on this judge and others statewide that reappointment is required when a conflict between tenants exists. Can your program undertake representation of B for this purpose?

Hypothetical 6

- You have been appointed to represent a tenant in a UDA. The complaint alleges the tenant's behavior is disruptive of other tenants, that the property manager has repeatedly warned the tenant to not play loud music and to not play music past 10:00 pm. The complaint also says that the tenant has yelled at neighbors and they feel threatened by this. The tenant is also two months behind in rent. The tenant, who has Native American heritage, claims that the landlord is discriminating because they know of other tenants behind in rent who are not being evicted. Other persons of color live in the complex. Tenant wants you to assert this claim and get relief from back due rent payment as compensation. Ethical concerns?

Hypothetical 7

- The complex in the above scenario has been known to disproportionately reject applications from single parents of young children. Client insists on asserting a discrimination counter-claim and asks for testing by the local office housing office.
- Even without testing, the client insists on asserting a discrimination affirmative defense. You believe this is completely without merit and ask the court to relieve you of the appointment. Court denies your request. What do you do?

Hypothetical 8

- You formally assert the affirmative defense of discrimination and a trial date is set. The landlord's attorney wants to depose the client. You make several attempts to contact the client to set a deposition date but get no response. You go to the client's apartment and learn no one has seen them for a few days. You leave a note under the door. The landlord's lawyer has sent several emails during the past two weeks asking about a deposition date. You contact the client by phone and leave several voicemails. What now?

Hypothetical 9

- You are appointed to represent a formerly homeless client who is being evicted after threatening the property manager. You believe the best defense is to ask for a reasonable accommodation due to the client's apparent mental illness. The client denies they have a mental disability. The client also denies that they threatened the landlord, explaining that it was another tenant who made the threat and the client just happened to be standing nearby. The client believes you are part of the conspiracy to evict them. What are your options?

Hypothetical 10

- The same client begins to see things are hopeless and threatens to commit suicide if they lose their housing. The client has attempted suicide in the past and was previously on medication that you understand is normally used to treat depression. The client stopped taking the medication because the local community clinic was understaffed and the client could not get an appointment. The client says they will throw themselves off a bridge over the nearby train track. What can you do?

Hypothetical 11

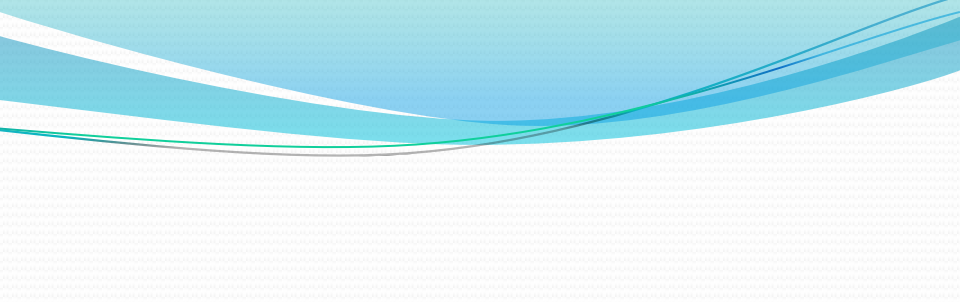
- The same client has a violent criminal history. The client has obtained a gun illegally and has brandished it about at the housing complex. The client has told you that if evicted, they will “make it impossible for anyone to live there.” When you ask what this means, the clients says “well, you know that gun I have, I plan to use it.” You do not see a good legal strategy to avoid eviction. What are your next steps?

Hypothetical 12

- You were unable to prevail for the client in the above scenario and a writ of restitution has issued. When you explain to client what will happen when the writ is enforced, the client says “that [expletive] will not live to see the day when my stuff is out on the street!” You understand the client to be referring to the property manager at the apartment complex. You immediately file a notice of intent to withdraw. What, if any, are your ethical obligations?

Hypothetical 13

- A judge reviewed a UDA complaint and determined to appoint you to represent T. T told the court that they do not need a lawyer because the case is “bogus.” The court tells T “a lawyer will help you figure it out.” T says “I do not trust lawyers and do not want one.” The court explains its obligation to appoint. You set an appointment to meet with T. At the meeting, T again states that a lawyer is not needed or desired. Your review of the pleadings reveals a jurisdictional defense and the case could be resolved with a motion to dismiss. It is apparent to you that T does not understand “jurisdiction” and wants to file an answer that denies any rent is owed. T insists you are not T’s attorney. What should you do?



END PART III

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