



WSBA

RULES OF PROFESSIONAL CONDUCT COMMITTEE MEETING MINUTES

April 29, 2011

**Washington State Bar Association
Seattle, Washington**

Members present were: Don Curran (Chair), David Byers, Gideon Caron (phone), Mario Cava, Noah Davis, Mark Fucile, Paul Gill, Robert Gould, Michelle Jensen, Kathleen Kindred (phone), Sophia Palmer, Lorna Randall, Beau Ruff (phone), and Anne Seidel. Karen Boxx, Bill Jaquette, and Rob Neate were excused. Stephanie Bloomfield was absent.

In attendance were: David Powell, (Staff Liaison), Jeanne Marie Clavere, Professional Responsibility Counsel, Darlene Neumann, paralegal. Mark Silverman (BOG Liaison) was unable to attend.

Interested parties included: Kevin Bank, ODC, Dan Ford, Columbia Legal Services, Lorena Gonzalez, Schroeter Goldmark & Bender

Meeting called to order at 10 a.m.

1. MINUTES

The minutes of the last meeting were amended and subsequently approved.

2. COMMITTEE RESPONSE LETTERS/ UPDATES

CRL # 2211 - After a short discussion, the committee agreed to have staff liaison, David Powell, telephone the inquirer with the committee's response to his follow-up question.

3. OLD BUSINESS

Item 2209. Security Interest in Client Property (Boxx/Palmer)

In the latest draft of the memo, Sophia Palmer included discussion on the issue of timing when taking a security interest agreement in the real property of a client during negotiations of the fee agreement. The committee discussed applying the same analysis to personal property of a client. Bob Gould had suggested the memo cite to *Wards v. Rossano*. Anne Seidel commented on the interplay between RPC 1.8(a) and 1.8(i) and the lawyer's own interest being affected by the litigation when taking a security interest in client property. Several members opined the memo was accurate and answered the narrow inquiry. The committee reviewed the second full paragraph, last page of the memo, and suggested the word "permissible" be changed to "ethical". In addition, it was suggested the paragraph should state the specific rule violation if a lawyer does not follow the steps outlined in the paragraph.

The item was tabled. Ms. Palmer will revise the section discussed and send a draft to Ms. Seidel for review before the next meeting.

4. ADVISORY OPINIONS REVIEW

Subcommittee Chair Anne Seidel reported the subcommittee is working on the concordance table and Mark Fucile has been added to the subcommittee. She discussed the possibility of using law school students to assist the subcommittee later in the project.

5. ELECTRONIC BANKING AND TRUST ACCOUNTS

Subcommittee Chair Mario Cava reported they are preparing a draft amendment to RPC 1.15A to include a 'safe harbor' exception. The WSBA auditors are expected to provide input and assistance before the final draft is presented before the Committee. Beau Ruff is currently working on the language of the amendment. Work has also begun on an advisory opinion concerning credit card transactions. Mr. Cava stated the subcommittee is not yet prepared to comment on the Model Rules for Client Trust Account Records.

6. ETHICS 20/20

The Chair reported that Executive Director Littlewood has invited the RPC Committee to comment on the ABA Commission on Ethics 20/20 proposed changes to the Model Rules on Multi-jurisdictional Practice. The Chair noted Model Rule 5.5 is similar to Washington's RPC 5.5. He inquired whether Washington received many disciplinary complaints since WA RPC 5.5 was adopted. Kevin Bank stated that he was unaware of any pro hac vice statistics.

The Committee considered the question posed by the Commission regarding further liberalization of MR 5.5 to make cross-border practice easier. Paul Gill discussed the Canadian model in detail, which liberalized inter-provincial practice 8 years ago and allowed lawyers to practice temporarily across different

jurisdictions without a permit. He noted that professional liability insurance is mandatory in Canada. Several members commented on the capability of lawyers to become competent in different jurisdictions and that increased liberalization would enhance the practice and provide greater service to clients. Mr. Gill reported that lawyers in Canada were initially opposed to liberalization out of fear of increased competition; however, it has not appeared to have created a spillover effect. Mr. Gill was not aware of many ethical or disciplinary issues as a result of Canada's liberalization agreement, but offered to find out more specifically if the committee wanted. The committee further discussed the purpose of further liberalization to ease representation of geographical clients and matters.

7. IMMIGRATION ADVISORY OPINION

Michelle Jensen recused herself before discussion began. The Chair welcomed guests, Lorena Gonzalez, of Schroeter Goldmark & Bender, and Dan Ford, Columbia Legal Services. The Chair reminded the committee that the draft opinion is a starting point and a work in progress. The committee reviewed the draft submitted by Beau Ruff, who explained the purpose of his revisions was to restrict the opinion to the facts presented.

In the first paragraph of the conclusion, it was suggested that RPC 8.4(h) be added to the last sentence and to remove RPC 8.4(d) since it already appears at the beginning of the paragraph. The committee discussed the need to include RPC 8.4(h), which applies to ethnicity and bias, if RPC 8.4(d) (conduct prejudicial to administration of justice) was deemed adequate.

The Chair moved to delete RPC 8.4(d) in the last sentence of the first paragraph and add RPC 8.4(h). A friendly amendment by Anne Seidel to adopt the first paragraph in its entirety was accepted by the Chair.

The committee discussed the concern that by restricting the analysis to "under the facts presented" the opinion may be construed as too narrow and of limited guidance.

It was moved to adopt the first sentence with the revision, "under the facts presented..." The motion carried 7 to 4, with 1 abstention.

It was moved to revise and adopt the last sentence of the paragraph as: "Depending upon the nature and circumstances of the threat, such conduct might also be a violation of RPCs 4.1(a), 8.4(d), 8.4(e), or 8.4(h)." The motion passed unanimously.

Mr. Ford supported the addition of RPC 8.4(h), but expressed concern about limiting the opinion to the facts of the hypothetical. Both Mr. Ford and Ms. Gonzalez emphasized that skillful lawyers will attempt to parse the language to

circumvent the prohibition. Committee members were invited to change their vote after hearing the comments. The vote remained unchanged.

The committee discussed the references in the draft to ABA Formal Opinion 92-363. Comments included: whether the ABA nexus test can be applied to immigration; framing the nexus test and applying it to the hypothetical; moving the ABA discussion up further in the memo; segregating the issues of immigration status and IRS reporting and applying a similar analysis to the IRS issue; applying the ABA analysis to both criminal and immigration contexts. Noah Davis opined that the conclusion adopted by the committee was not consistent with the standard applied in the ABA opinion.

The committee discussed the problem of “related” for which the ABA opinion provided no definition or example. Mr. Ford suggested the committee return to RPC 4.4(a) (“no substantial purpose other than to embarrass, delay, or burden”) since it would be clearer to demonstrate, places the burden on the lawyer, and would be easier to enforce. He stated the relatedness test is implicit in the rule.

The committee briefly discussed doing a comment to the existing rule rather than an advisory opinion. The Chair emphasized the need by the Board of Governors for a definitive statement to clarify that a lawyer may not make threats to gain an advantage. There was some concern about preparing a well-reasoned opinion in time before the July BOG meeting. The Chair requested Mr. Davis furnish the committee with his analysis of the conclusion relative to the second paragraph of the ABA discussion in the draft, and that it be disseminated via email to members before the next meeting.

Bob Gould moved, seconded by Mario Cava, to amend the last sentence on page 2 as: “Actions in violation of this criminal code ~~could~~ would constitute a violation of RPC 8.4(b).” The motion passed unanimously.

Mario Cava moved, seconded by David Byers, to adopt the ABA nexus test and apply it to the immigration context.

There was further discussion on using the ABA opinion in support of WA law and rules, referencing *Salas v. Hi-Tech*, leaving out administrative agencies, and providing an example of when a threat is related. Several members expressed uncertainty on whether to state that illegal status is considered criminal conduct. Ms. Gonzalez suggested the committee consider a clarifying sentence such as “not all undocumented status will be criminal in nature.”

Mr. Cava re-stated his motion to adopt the nexus test in ABA opinion 92-363 in both the criminal and immigration contexts and to apply the same test to the facts of the hypothetical. The question was called. The motion carried 8 to 4.

Mr. Cava volunteered to work on revising the draft opinion. Mr. Davis will prepare a minority opinion. When the drafts are finished, they will be circulated to Mr. Ford and Ms. Gonzalez for comment. Both drafts are expected to be completed before the next meeting.

The Chair announced that he will be taking over as chair for the subcommittee working on hypothetical #2, replacing Bill Jaquette. Mr. Jaquette, however, will continue to participate. David Byers was also added to the subcommittee.

The meeting adjourned at 2:35 p.m.

Dated this 29th day of April, 2011.

Respectfully submitted,

David Powell, WSBA Bar 23870
Secretary to the Committee