



WSBA

RULES OF PROFESSIONAL CONDUCT COMMITTEE MEETING MINUTES

August 12, 2011

**Washington State Bar Association
Seattle, Washington**

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

In attendance were David Powell, WSBA Staff Liaison, Doug Ende, WSBA ODC, Rita Swanson, WSBA Audit Manager, Jeanne Marie Clavere, WSBA Professional Responsibility Counsel, and Darlene Neumann, paralegal

Meeting called to order 10 a.m.

MINUTES

The minutes of the last meeting were approved.

CHAIR'S REPORT

The Chair reported on the July BOG meeting which he attended via conference call. At that meeting, the BOG voted to create a "work group" to formulate an advisory opinion on the use of immigration threats in a civil proceeding. The BOG's action effectively removed this issue from the agenda of the RPC Committee. Noah Davis expressed his disappointment at this outcome, and praised committee members for the progress and their great efforts on a difficult issue. Other committee members, and the Chair, echoed his comments.

OLD BUSINESS

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

The committee discussed a draft memo that included comments and changes by Anne Seidel and Doug Ende. Of concern to Ms. Seidel was whether RPC 1.8(a) applied to the initial fee agreement. She stated that best practices would be to follow RPC 1.8(a), even though compliance is not necessarily required. Ms. Seidel and Mr. Ende both disagreed with ABA opinion 02-427, which concluded that RPC 1.8(a) does not apply to a contractual security interest in property that is the subject of litigation for fees.

Ms. Seidel, who served on the Ethics 2003 Committee, recalled the discussions of the rule and stated the committee decided to adopt the ABA comment which applied to payment in the initial fee agreement, but not to a security interest. Members discussed whether the RPC Committee should take a position and opine that compliance with RPC 1.8(a) is strongly recommended, although it is not required. Sophia Palmer suggested the committee consider doing a comment to the rule. Mr. Ende recommended the committee issue an opinion, because proposing a comment would be a much longer process.

Further discussion followed regarding when the rule applies to a client, to a prospective client, and to the security interest but not the fee agreement. Ms. Seidel noted that lawyers must go by the rule and that a comment, alone, does not impose a violation.

Ms. Palmer moved, seconded by Ms. Seidel, to adopt the language by Ms. Seidel which states that although it is not clear RPC 1.8(a) applies, the recommended best practice is to follow RPC 1.8(a) when taking a contractual security interest in the property of a client that is the subject of litigation.

Ms. Seidel offered a friendly amendment requesting that Mr. Ende and Ms. Palmer work with her on a final draft to be circulated among the committee before the next meeting.

The Chair clarified that, subject to the action of the subcommittee, the Committee should abide by the subcommittee on approval of the memo. The motion passed unanimously.

Item 2212. Lawyer Obtaining Life Insurance Policy on Client to Guarantee Fees (Caron/Kindred)

Gideon Caron, on conference call, stated that he was unclear about the committee's concerns expressed at the last meeting. He explained the inquirer's specific question was limited to the intention to collect attorney fees beyond the actuarial life of the client. There was no attempt by the lawyer to re-negotiate the

fee agreement. Mr. Caron stated that an annuity policy on the life of the client would give the lawyer more than he is entitled to under the terms of the fee agreement. Furthermore, if a violation of RPC 1.5 was found, it may not be necessary to extend the analysis to include RPC 1.8.

The committee discussed whether the issue is about fees when the lawyer is the one who purchases the insurance policy, not the client. Bob Gould commented the money originates as a result of the attorney/client relationship and the policy would allow the attorney to receive more than he is entitled to, thus making it a fee. He added that RPC 1.8 was ancillary to the determination of improper fees. Mark Fucile pointed out the lawyer would also need to reveal information about the client to the insurance company, presumably without client consent, which may be seen as a violation of RPC 1.6.

It was suggested that more analysis was needed before action could be taken. Members raised additional questions about the fee contract, client consent, the policy issuer, and suggested that the inquirer be contacted.

Beau Ruff moved, seconded by Anne Seidel, to table the inquiry to allow for further analysis on the definition of fees and other questions posed by the committee. The motion passed 14 to 1, with 1 abstention.

The Chair confirmed that he will contact the inquirer regarding the fee contract and get clarification on the additional questions and then email the information to the assigned members.

Item 2213. Lawyer's Obligation When Instructed Not to Pay Bills from Proceeds of Settlement (Neate/Gould)

Rob Neate reported that together with Bob Gould, they analyzed issues raised by members at the last meeting. On the issue of when a lawyer knows of a dispute and must therefore act, Mr. Neate stated that under the facts presented, there is no dispute and recommended the committee stay with the memo, taking care to avoid misinterpretations. Mr. Gould found no controversy or claim upon the attorney by the PIP insurer and cited a recent ODC decision and his discussions with a member of WSTLA. Mr. Gould stated that if a lien was involved, the response would be different; however, on the exact issue of the inquirer, he concurred with the memo's analysis.

Mr. Ende had concerns about the last paragraph of the memo, citing to prior advisory opinions in particular Advisory Opinion 2166, which he opined was overbroad. He believed the memo could stand alone without the paragraph. The committee briefly discussed doing a review of the cited opinions.

Anne Seidel moved, seconded by Sophia Palmer, to adopt the memo with the last paragraph deleted. The motion passed unanimously.

ELECTRONIC BANKING & TRUST ACCOUNT SUBCOMMITTEE

The Chair welcomed Rita Swanson, WSBA Audit Manager. Subcommittee Chair Mario Cava explained the subcommittee had invited input from Ms. Swanson and Doug Ende on the proposed amendment to RPC 1.15A. Mr. Cava stated Ms. Swanson was not in complete support of a rule change, but rather preferred an ethics opinion. Mr. Ende provided the subcommittee with his feedback on the proposed rule and included a draft of comment [21] as an alternative to amending the rule. Due to the short notice, the subcommittee had yet to discuss the proposed comment before it was presented before the full committee.

Mr. Ende suggested a comment would be a compromise solution to a relatively obscure issue, reasoning that the trust account rules were already complicated enough. In addition, he raised the possibility that a rule might be misinterpreted or given an overly broad interpretation. The proposed comment attempts to address the auditor's concerns and takes into account the principle set out in the subcommittee's rule. If adopted, it would function as the official position of the Supreme Court. Mr. Ende stated the comment also addresses the issue of lawyer funds being deposited into the trust account which was not included in the initial GR 9 statement.

Ms. Swanson explained that the problem generally involves large firms whose clients overpay the invoice, causing the firms to be in a rule violation. She opined the proposed comment would be a good solution.

The committee discussed the use of "promptly" and "unilateral" in the language. Mr. Ende explained the term "immediate" was removed to remain consistent with the RPCs which refers to "promptly".

The committee discussed whether the proposed comment provided a safe harbor from a rule violation. Anne Seidel noted that a lawyer must still comply with the rules and that a comment is only guidance. Others members opined the comment clarifies the rule and when it applies.

Mr. Cava suggested the subcommittee review the language for possible loopholes or incorrect interpretation by members. The committee determined that if they wanted to meet the deadline for a GR 9 submission to the Supreme Court this year, the comment would have to be ready by the September BOG meeting for the BOG to take action.

Bob Gould moved, seconded by David Byers, to adopt proposed comment [21] to RPC 1.15A drafted by Doug Ende. Mr. Ende suggested the proposed comment be sent back to the Trust Accounts Subcommittee to be conformed with GR 9. The motion passed unanimously.

FINAL REMARKS

Noah Davis thanked the Chair for doing a great job chairing the Committee. He stated that he was leaving after having served four years and expressed his gratitude for the opportunity to be able to participate on the committee. He also thanked the outgoing staff liaison, David Powell, who is leaving WSBA, for his work on behalf of the committee. Likewise, the Chair thanked Mr. Davis, all the committee members, and Mr. Powell for their contributions to the work of the Committee.

ADJOURNMENT

The meeting adjourned at 11:40 a.m.

NEXT MEETING

The next meeting will be 10:00 a.m. October 28, 2011, at the offices of the Washington State Bar Association, 1325 4th Avenue, Seattle, Washington.

Dated this 12th day of August, 2011.

Respectfully submitted,

David Powell, WSBA Bar 23870
Secretary to the Committee