



# WSBA

## **RULES OF PROFESSIONAL CONDUCT COMMITTEE MEETING MINUTES**

**October 22, 2010**

The Rules of Professional Conduct Committee convened at 10:00 a.m. on Friday, October 22, 2010, at the Washington State Bar Association, Seattle, Washington.

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

In attendance: Lorena Gonzalez, Shroeter Goldmark & Bender, Jorge Barón, Executive Director NW Immigrants Rights Project, Marc Silverman, Board of Governer Liaison, David Powell, WSBA Staff Liaison, Jeanne Marie Clavere, WSBA Professional Responsibility Counsel, Darlene Neumann, paralegal.

### **PRELIMINARY MATTERS**

Meeting called to order 10 a.m. The Chair welcomed the new Committee Members. Introductions were made around the table and over the telephone.

### **COMMITTEE UPDATES/CHAIR'S REPORT**

The Chair briefly reviewed procedures and process of the Committee for the benefit of new members. He noted the purpose of the practice area information listed on the roster is to provide an additional resource for those working on committee matters to consult with fellow members who have expertise in specific areas.

The Chair reported on the September 24, 2010 BOG meeting where changes to the Committee's Rules of Procedure were approved. The Chair noted that the rules had not been amended since 1997. Several key changes include:

- Elimination of the distinction between Formal and Informal Opinions; all ethics opinions issued by the Committee and the BOG are now designated as "Advisory" Opinions
  - Previous language stating that Formal Opinions are binding upon members was removed
- A quorum formed at the beginning of the meeting continues throughout the meeting, even if there are fewer members present at the time of a vote.
- The proposed proxy rule was rejected by the BOG. Members may not give their proxy to another member.
- Question of law (rule 7): the BOG approved a broad statement allowing the Committee to use its discretion to determine whether to decline to opine on questions of law.
- Rule 15: Conflict of interest language was clarified.
- Communications with the inquirer (rule 8): The provision specifically authorizes communication with the inquirer by assigned committee members, including a requirement that the assigned members disclose the communication to the entire committee.

The Chair also reported the BOG unanimously approved proposed RPC 3.8 (g), (h), and (i) (Prosecutors rule) and a list of technical revisions to the RPCs. The suggested rule amendments have been sent up to the state Supreme Court for consideration in November.

### **Inquiry re Providing Copy of Redacted Discovery to Former Criminal Client.**

The inquiry concerns whether a defense attorney, under Advisory Opinion 181, is required to provide a copy of discovery, which has been redacted, to a former client upon the client's request. The client has been sentenced.

Members discussed Advisory Opinion 181, its limitation to civil cases, and the opinion's "gap" on criminal discovery materials. Several members commented that it was not an ethics question, but a criminal rule issue under CrR 4.7, and therefore beyond the Committee's purview. Others suggested it may be a case for judicial resolution instead of ethical opinion. David Byers noted CrR 4.7 makes providing the file permissive for defense lawyers, whereas Advisory Opinion 181 imposes an obligation on the lawyer to provide the file when a client requests it. Members discussed the legitimate need a client may have for the file if the client is acting as his/her own attorney. Karen Boxx opined it is an ethics issue because Advisory Opinion 181 interprets RPC 1.16(d), which presumes a client's need for the file and obligates the lawyer to turn over papers to which the client is entitled. If the committee issues an advisory opinion, several members suggested that prosecutors or the defense bar might have an interest.

The committee voted in favor (9 to 5) to accept the inquiry. Sophia Palmer and Michelle Jensen volunteered to work on the inquiry.

### **BOG Discipline Policy: Reliance on Ethics Opinions.**

The Committee discussed the BOG's discipline policy regarding members' reliance on ethics opinions (creating a rebuttal presumption) in disciplinary proceedings. Because of the recent change to the meaning of ethics opinions there was some concern that this policy creates an illusion of a safe harbor. The Chair requested that Marc Silverman, BOG Liaison, seek clarification on this issue at the next BOG meeting and report back to the Committee. Specifically, the Committee wished to know:

- How the policy should apply
- Whether it should apply
- Whether or not it is binding on Disciplinary Counsel

## **OLD BUSINESS**

### **Item 2209. Security Interest in Property of Client (Reconsideration of Advisory Opinion 2042) (Boxx/Palmer)**

Sophia Palmer recapped previous committee discussions on the issue. She stated the committee last focused on RPC 1.8(a) and the belief that it applies when a lawyer takes a security interest in client property under (i). Since then, she found other jurisdictions, who have adopted the Model Rule comment 16 like WA, had different interpretations of the rule. She noted a 2002 ABA formal opinion stated that RPC 1.8(a) applies in business transactions, but if the property is the subject of litigation and the lawyer has a security interest for fees only, then 1.8(a) does not apply. Since there is no clear answer, she suggested the opinion could identify interpretations by other jurisdictions, including the ABA's opinion, and point out that WA's Disciplinary Board will have to interpret the issue until the state Supreme Court issues an opinion.

Two other concerns in a dissolution context that were not addressed in any of the interpretations or opinion:

- fluctuating equity in property due to the current economy
- securing interest in property that ultimately may not belong to the client

Mark Fucile suggested the draft memo also clarify the distinction between payment and security as it is phrased in comment 1. He stated a client may barter for part of fee versus the lawyer getting security (stock or property) in anticipation of being paid in cash. Additional comment and discussion ensued on when security interests triggers 1.8(a), statutes governing property in divorce proceedings, timing of liens, fees dependant on outcome and becoming more like

contingency fees, volatile assets, and crafting an opinion against taking a security interest in any property until the court determines ownership.

The committee debated whether issuing an opinion, while not conclusive, may assist members by pointing out the dangers. Sophia opined it would be helpful guidance for the membership, even if not definitive, since it is a frequent issue for divorce lawyers and more common today because of the difficult economy. The item was tabled. A final draft is expected at the next meeting. Kevin Bank commented the memo should take into consideration a fee agreement that is changed mid-stream may violate 1.8(a) by becoming a business transaction.

### **Electronic Trust Account Issues.**

The Chair added Bob Gould and Noah Davis to the subcommittee which includes Rob Neate, Stephanie Bloomfield, and Mario Cava. Mario explained the subcommittee had not yet met and moved to table. The Chair suggested that instead of tabling, the subcommittee move ahead to solicit information from large firms who have expertise in electronic funds transfer. Upon the Chair's request, Stephanie agreed to make inquiries within her firm. The motion tabling was withdrawn. The subcommittee will meet to begin gathering information from attorneys with experience in the issue. The subcommittee may also call upon WSBA auditors for additional input. The Chair will also try to find an expert willing to speak to the subcommittee.

### **Informal Opinions Review.**

The Chair reviewed past discussions concerning informal opinions review. One issue he found was that many opinions reference multiple RPCs and reviewing one rule at a time may not work when there is an interplay of rules. Although going rule by rule would aid members in developing expertise in a specific rule, the Chair believed it could also lead to duplicative efforts. Members again reconsidered reviewing opinion by opinion. A suggestion was made to form four subcommittees and assign each a single opinion. The subcommittees could begin with the recent opinions and work back or start at the beginning of a pre-determined cut-off date. The subcommittees would report on their experience to the full committee. Mario Cava suggested one subcommittee triage and manage the review process by determining which opinions to withdraw or discard. The Committee agreed a cut-off date of post 2006 (when the RPCs were amended) was a good starting point.

Mark Fucile stated the recent opinions are unlikely to need much tweaking. The earlier opinions tend to be very brief and he suggested they could be placed in an accessible archive. Michelle Jensen suggested creating a concordance, a cross-reference index of old and current ethical rules that could also include brief explanations of the differences between the old and new rules.

Following the discussion, the Chair stated that he, Michelle Jensen, and David Powell will work together to develop a concordance of the RPC. The concordance could save hours of work for the review committees by eliminating the need for updating old opinions. Separately, the Chair proposed the committee conduct a pilot review using two subcommittees who will undertake the work and report back to the full committee.

The subcommittees will start with informal opinions dated 1/1/2006 and onwards.

- Subcommittee 1 will work on informal opinion 2106. Members are: Mark Fucile (chair), Gideon Caron, Mario Cava
- Subcommittee 2 will work on informal opinion 2114. Members are: Anne Seidel (chair), David Byers, Beau Ruff, Lorna Randall

## **MINUTES**

The minutes of the last meeting were approved.

## **NEW BUSINESS**

### **Inquiry re Employment of Suspended Lawyer.**

Before discussion started, Kevin Bank recused himself. The question concerned whether a suspended lawyer is subject to the RPC and what employment options are permissible, especially if those employers provide ancillary services to lawyers. The inquirer also sought clarification on Formal Opinion 184.

Since the inquiry was based on a hypothetical, the committee discussed whether or not to answer it. David Powell stated the committee could refuse to answer because the question also concerned the conduct of someone other than the inquirer. Several members commented the inquirer might use the opinion as a defense against possible ethical violations or to provide assurances to a prospective employer. Sophia Palmer stated the inquirer had a legitimate question and she favored opining instead of "punting" on the issue. The committee agreed that question 1 could be answered. Beau Ruff suggested the committee provide general guidance on questions 2 and 3, as they have done before in similar cases.

The committee voted unanimously to affirm that the RPCs apply to suspended lawyers. Discussion followed on whether the committee should accept the inquiry or issue an advisory letter to the inquirer. Sophia moved, seconded by Bill Jaquette, to instruct David Powell to write a letter to the inquirer stating that

the Committee believes the RPC apply to him as a suspended lawyer, that he may submit a query about a specific instance as to his conduct, and that the Committee may not opine on the conduct of other lawyers. The letter would further state that if the inquirer provided additional information, the committee may be willing to entertain the question.

Discussion followed on the wisdom of answering question 2 and concern the committee could become involved in disputes. Rob Neate suggested the committee answer question 1, but reply to the remaining questions with RPC 5.8(a), which is applicable to the inquirer's conduct, and state RPC 5.8(b) applies to the lawyer/employer considering hiring the inquirer. Rob also proposed the letter remain silent about asking the inquirer for more information, preferring instead to let him take the initiative. This was made as a friendly motion, accepted by Sophia, and seconded by David Byers.

The Committee voted unanimously to instruct staff liaison, David Powell, to send a letter to the inquirer stating the above. Anne Seidel commented the letter should indicate that the inquirer not only has to comply with the RPCs but also with other rules (e.g., ELC 14.2).

## **OTHER**

### **Proposed Advisory Opinion re Use of Immigration Status in Civil Matter**

Before discussion on immigration began, Michelle Jensen recused herself. The Chair presented the issue on the use of immigration status in a civil matter to gain an advantage and noted that it is considered a high priority matter from the BOG Diversity Committee.

The Chair turned discussion over to Marc Silverman, who introduced guests, Lorena Gonzalez of Schroeter Goldmark & Bender and Jorge Barón, Executive Director of the NW Immigrant Rights Project. Michelle Carney, AILA co-chair of Professional Responsibility Consumer Protection also attended. Marc commented the draft opinion before the committee was prepared by the ATJ community and should be treated as an inquiry, with the added benefit that it has been researched and vetted by the ATJ community who have worked on the issue for the past 2-3 years. He clarified that this was not a direct request from the BOG.

Mr. Barón answered questions on immigration status related to criminal conduct and federal immigration law. He explained that being in violation of immigration law (i.e., being here without valid immigration status) is not a criminal offense, but a civil offense and would not fall under the ABA opinion [92-363]. Regarding criminal provisions in federal immigration law, Mr. Barón acknowledged there may be situations where there is criminal liability, e.g., illegal entry/re-entry into

the country or failure to depart after deportation order. He explained that when a person is in detention proceedings, he/she is not accused of illegal entry, but for being in the country without status, which is a civil offense since a person can still obtain status after the initial entry. The vast majority are found to be out of status and are not going to be prosecuted or found guilty of criminal offense.

Karen Boxx questioned the proponent's view on the ABA's approach and including criminal reporting, noting that there is no equivalent WA opinion related to criminal reporting. Ms. Gonzalez stated they have no issue with the ABA's approach, but they are adamantly opposed to equating immigration status with criminal conduct. They believe it would be inaccurate to do so since there is no basis in law for declaring that being out of status is a criminal offense. Marc commented they strongly favor a separate opinion. Karen suggested the opinion could address two problems at once, given that a lawyer may choose between reporting a crime or immigration status, if the goal is to deter harassing tactics. Ms. Gonzalez emphasized they are only concerned with providing guidance to lawyers on the use of parties' or witnesses' immigration status in a civil litigation matter, not the issue of criminal reporting. She recalled the last effort to expand the opinion became unmanageable.

Members discussed whether, under their rules of procedure, they may opine on hypothetical questions and the need for broader input from other stakeholders, like INS attorneys, who may be affected by the committee's advisory opinion. Marc explained the questions are not being presented in a theoretical vacuum--that there are many fact-specific cases, including a 9<sup>th</sup> Circuit opinion. He discussed *Salas*, a recent state Supreme Court case where the lawyer's inquiry into a party's immigration status during cross-examination was intentional. Although the Court did not address the ethical aspects of delving into a party's immigration status, it gave strong guidance on the use of extreme prejudice versus relevance analysis on immigration status in a civil matter.

Additional discussion followed on immigration status being related or unrelated to the matter and the definition of unrelated. Mr. Barón stated they are more concerned about threats and actual reporting than prohibiting inquiry into status which is covered in the question [3] dealing with discovery.

The Chair appointed a subcommittee of Bill Jaquette, Mario Cava, Beau Ruff, Lorna Randall, and two immediate past RPC Committee members, Shannon Inglis and Etan Basseri, to work on the issue. The subcommittee will provide the committee with a definitive statement on the rationale for accepting/rejecting the inquiry concerning immigration threats, actual reporting of immigration status, and use in discovery. The statement is expected by the next meeting.

## **ADJOURNMENT**

The meeting adjourned at 2:20 p.m.

## **NEXT MEETING**

The next meeting will be 10:00 a.m. December 10, 2010, at the offices of the Washington State Bar Association, 1325 4th Avenue, Seattle, Washington.

Dated this 22nd day of October, 2010.

Respectfully submitted,

David Powell, WSBA Bar 23870  
Secretary to the Committee