



WSBA

RULES OF PROFESSIONAL CONDUCT COMMITTEE MEETING MINUTES

October 28, 2011

Washington State Bar Association
Seattle, Washington

Members Present	10/28/11	12/16/11	3/16/12	4/20/12	6/22/12	8/24/12
Don Curran (C)	P					
Mark Arend	T					
Stephanie Bloomfield	T					
Karen Boxx	EA					
David Byers	P					
Mario Cava	P					
Mark Fucile	P					
Paul Gill	T					
William Jaquette	P					
Michelle Jensen	P					
Kathleen Kindred	T					
Sophia Palmer	EA					
Lorna Randall	P					
Christopher Rounds	T					
Beau Ruff	T					
Anne Seidel	P					
Dean Swanson	P					
Noah Weil	P					

In Attendance

Marc Silverman (BOG)	EA					
Jeanne Marie Clavere (SL)	P					
Darlene Neumann	P					

Interested Party

Kevin Bank, ODC

Attendance Codes

P = Present	V = Video	UA = Unexcused Absence
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T = Telephone	EA = Excused Absence	
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If a member has two unexcused absences from Committee meetings during one year, a recommendation that the member be removed from the Committee shall be made to the Board of Governors. (Rule 12, Committee Rules of Procedure)

INTRODUCTION AND PRELIMINARY MATTERS

The meeting was called to order at 10:06 a.m. The Chair welcomed the committee and introduced himself, the committee liaisons, Kevin Bank of ODC, and the ethics program coordinator. Introductions by individual members followed around the table and over the telephone.

Anne Seidel raised a procedural question regarding the confidentiality of committee materials and the distribution of those materials to an Office of Disciplinary Counsel (ODC) representative, who is not a member of the committee, but rather an interested party. Ms. Seidel cited Rule 13, Rules of Procedure. It was suggested that a possible solution would be to redact the names of inquirers in committee materials.

The Chair proposed the issue be deferred until the next meeting, at which time, he will have a draft policy statement for the committee's consideration.

The Chair reviewed the dates of future meetings, discussed his role, and explained the purpose and scope of the committee. He spoke briefly on the change from Formal and Informal Opinions to Advisory Opinions, which occurred a year ago, and the importance of Advisory Opinions in the committee's work. He described how inquiries are handled administratively when received from bar members. The Chair noted that committee members may also submit an inquiry to the committee, with full disclosure, under Rule 15, Rules of Procedure.

Staff Liaison Jeanne Marie Clavere discussed ways of improving committee discussions to keep the debate on track and avoid the tendency to get bogged down in re-drafting. She recommended that drafting be assigned to the moving party while the meeting continues, and the committee return to the item later for discussion and vote. She reminded members that clear and concise motions and amendments will help the minute taker to accurately memorialize the committee's actions and prevent confusion during voting.

MINUTES

The minutes of August 12, 2011 were approved.

COMMITTEE RESPONSE LETTERS/ UPDATES

Suggested Amendment to RPC 1.15A, Comment [21]

The suggested comment has gone to the Supreme Court. Subcommittee Chair Mario Cava thanked the subcommittee members, the WSBA auditor, and Doug Ende for their collaborative efforts on the amendment. The Chair also thanked the subcommittee for their excellent work.

Inquiry 2212

The inquiry was withdrawn by the Chair due to a lack of response from the inquirer to requests for additional information. The Chair is expecting the same question to be submitted by a new inquirer in the near future.

Mario Cava suggested that in the meantime the committee move forward with an analysis of the fee question which had been debated over the last two meetings. The committee discussed whether this could be done without an actual inquiry and lacking in specific facts.

Mr. Cava moved, seconded by David Byers, to have a group of members answer the question and research whether it is considered a fee for a lawyer to take out an insurance policy on the life of a client.

The committee clarified the scope of the group's work as being limited to: a) research, and b) not issuing an opinion.

The motion passed unanimously. Members of the subcommittee are Mario Cava, David Byers, Anne Seidel, and Kathleen Kindred.

OLD BUSINESS

Item 2213. Lawyer's Obligation When Instructed Not to Pay PIP Insurer (Byers/Curran)

The Chair reviewed the past action on 2213, which is now a published advisory opinion. The inquirer sent a follow-up letter and requested the committee review its opinion in light of new information which was withheld due to an "oversight".

Discussion ensued on whether to re-consider the opinion, under Rule 14, Rules of Procedure. The Chair suggested the committee re-consider the opinion, at its own motion, as a service to the Bar. He explained that it is a recurring issue among PI lawyers and this would be an opportunity for the committee to clarify the duty of a lawyer when he becomes aware of a contractual subrogation claim

against the client. In addition, the opinion could address other frivolous and non-frivolous contractual claims against the lawyer's trust account.

Anne Seidel commented that the opinion is correct and helpful and recommended it be retained. She suggested the committee prepare a new opinion and/or incorporate both to include the present intermediate scenario and a third scenario, i.e., lawyer's knowledge of a formal lien. She stated that addressing all 3 issues would provide the most guidance to bar members.

Mark Fucile described another lien issue under Medicare, where federal law obligates plaintiffs and defense counsel to reimburse Medicare funds before settlement proceeds are disbursed. The regulations do not require the filing of a lien to be in effect.

Discussion ensued concerning the committee's response to the inquirer. *The staff liaison was directed to write the inquirer to remind him of the duties under RPC 1.15A(g), and to advise that the committee will re-consider its opinion in light of the new information received.*

In the meantime, the Chair will send a memo to plaintiffs and defense bar organizations about the committee's consideration of an opinion and request their input. A subcommittee was appointed consisting of the Chair, David Byers, Michelle Jensen, Mark Fucile, and Dean Swanson.

Mr. Byers moved, seconded by Michelle Jensen, to keep Advisory Opinion 2213 as published. The motion passed unanimously.

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

Anne Seidel briefly reported that she and Doug Ende have completed their revisions and were awaiting comments from Sophia Palmer, before final presentation to the committee.

Electronic Banking & Trust Accounts Subcommittee

Subcommittee Chair Mario Cava stated that the subcommittee will take up the issue of credit card fee transactions. Former member, Noah Davis, who was the lead on the issue, was to report back from an ABA subcommittee examining chargeback situations. Mr. Cava will follow up with him. The subcommittee will also find out if there might be other relevant ABA opinions.

Mr. Cava discussed the California rule on chargebacks and found that the comments do not support the rule, making it somewhat contradictory. The California rule is similar to ABA Model Rule 1.15B. Washington has similar provisions to the MR, but is unclear on fees associated with credit cards.

The committee discussed several issues: whether credit card fees can be considered bank charges under the rules, charging credit card fees to clients, and placing the lawyer's funds in the trust account to pay credit card fees. Mr. Cava concluded that the subcommittee needed more information on how credit card fees are applied before they can determine whether it would be better to do a comment, a rule or an opinion.

Anne Seidel noted the clawback provision in credit card agreements can remain in effect for a long time and cause major concern for lawyers' trust accounts. Due to the many issues involved, she recommended the subcommittee ask the WSBA auditor to clarify the issues and provide input.

The Chair appointed Anne Seidel to the subcommittee which consists of Mario Cava (Chair), Stephanie Bloomfield, and Beau Ruff. The subcommittee will provide a status report to the committee at the next meeting.

NEW BUSINESS

Lawyer Advertisement. (Curran)

Before discussion began, Anne Seidel recused herself. The Chair stated this was not an inquiry to the committee, but rather a question posed by a nonlawyer. As this issue seems to be occurring more often, he wanted to get a sense of the committee's interest in revisiting the issue of advertising and client testimonials.

The committee discussed Advisory Opinion 2206 issued in 2010, which provided a general overview of advertising. Although not exactly on point with the examples provided by the questioner, the committee felt the opinion gave sufficient information on existing rules and comments regarding lawyer advertising.

Members pointed out that the committee rules do not allow an inquiry from a non-member and the committee does not comment on existing advertising. The Chair agreed with the member comments and stated the issue could be amended. After further discussion, the committee declined to take up the issue and directed the staff liaison to refer the questioner to the Rules of Professional Conduct.

ADJOURNMENT

The meeting adjourned at 11:45 a.m.

The next meeting will be 10:00 a.m., December 16, 2011, at the offices of the Washington State Bar Association, 1325 4th Avenue, Seattle, Washington.

Dated this 28th day of October, 2011.

Respectfully submitted,

Jeanne Marie Clavere, WSBA Bar #18495
Secretary to the Committee