



WSBA

RULES OF PROFESSIONAL CONDUCT COMMITTEE MEETING MINUTES

April 20, 2012

Washington State Bar Association Seattle, Washington

Members present were Don Curran (Chair), Stephanie Bloomfield, David Byers, Mario Cava, Mark Fucile, Bill Jaquette, Michelle Jensen, Sophia Palmer, Lorna Randall, Christopher Rounds (phone), Beau Ruff, Anne Seidel, and Noah Weil. Mark Arend, Karen Boxx, Paul Gill, Kathleen Kindred, Dean Swanson, and Marc Silverman, (BOG Liaison) were excused.

In attendance were Doug Ende, ODC, Skylee Robinson, Stoel Rives LLP, Jeanne Marie Clavere, Staff Liaison, and Darlene Neumann, paralegal.

The meeting was called to order at 10 a.m.

MINUTES

The minutes of the March 16, 2012 were amended and approved.

COMMITTEE RESPONSE LETTERS/ UPDATES

The Chair discussed possibly amending the committee's Rules of Procedure to address communication of subcommittee decisions to inquirers. Under the existing rules, only the Committee may voice opinions, therefore no change was advised.

2220. Garnishment of Client Trust Account

David Byers presented a redline and clean copy of the opinion with changes adopted at the last meeting.

2209. Taking a Security Interest in Client Property

Sophia Palmer presented the final draft of the opinion that included revisions previously adopted at the August 12, 2011 meeting.

Bill Jaquette moved, seconded by Ms. Palmer, to approve memo #2209. The motion passed unanimously.

The Chair praised the efforts of Ms. Palmer, committee members Anne Seidel, and Karen Boxx, who also contributed to the writing of the opinion over the last two years.

OLD BUSINESS

2215. Cloud Computing (Boxx/Gill/Rounds/Weil)

Noah Weil reported on the subcommittee's draft memo, which focused on best practices, technology changes, and an examination of issues for users of cloud computing.

Chris Rounds moved, seconded by Mr. Weil, to adopt memo #2215.

The committee discussed the potential risks of unauthorized access to confidential information, loss of data by providers (including non-US jurisdiction providers), and suggestions to strengthen the discussion on protection of client property and ensuring best practices to back up data. Discussion followed on whether individual lawyers in large firms or organizations would have knowledge of data being stored in the cloud, on liability insurers who consider data loss to be a business issue, and the differences in technology which can prevent clients from accessing documents.

The question was called. The motion passed 10-2.

The committee briefly discussed whether the subcommittee should continue work on related issues such as competency of clients to access information, developing a comment to the rules, the relevancy of cloud computing and the need to educate bar members on the topic.

2216. Metadata (Jensen/Randall)

Subcommittee chair Michelle Jensen presented a revised draft, clarifying information considered protected and defining the committee's position on forensic mining of metadata.

Lorna Randall moved, seconded by Beau Ruff, to adopt memo #2216.

Discussion followed regarding the ethical use of special forensic software by the receiving lawyer, with some members expressing reservations about the memo's conclusion. It was suggested the language in paragraph two of the analysis ("reasonably assume") should be made consistent with language in RPC 4.4(b). Discussion ensued over whether the memo's conclusion that "efforts" alone could lead to RPC violations, with several members opining the term appropriately warns lawyers against attempting to use extraordinary techniques to mine for metadata.

Sophia Palmer offered a friendly amendment, seconded by Stephanie Bloomfield, to adopt the suggested change to paragraph two of page 193 to reflect language in RPC 4.4(b). The motion passed 11 to 1.

The committee also directed the staff liaison to draft a memo to the CLE department regarding the adoption of new Advisory Opinions 2215 (Cloud Computing) and 2216 (Metadata), and to encourage the presentation of these topics at CLE seminars.

2217. Email Security (Arend/Seidel)

This item was tabled to the next meeting.

2218. Disclosure of Client Information During DOR Audit (Ruff/Kindred/Swanson)

Subcommittee chair Beau Ruff discussed the inquiry which was reconsidered after additional materials were provided to the committee by the inquirer. The subcommittee determined for a second time that existing opinions answered the question and that no further opinion was necessary.

Mr. Ruff moved, seconded by Sophia Palmer, to adopt the subcommittee's opinion that Advisory Opinions 194 and 195 are dispositive of the inquirer's question.

There was general consensus among the members that the subcommittee's conclusion had been correct, despite that the inquirer's factual situation differed from those of the advisory opinions. Discussion followed on the specific response to the inquirer, with several members in favor of providing an answer to the question rather than simply declining to opine. Anne Seidel discussed Washington's decision not to adopt the part of Model Rule 1.6 which permitted disclosure under "other law" and, as a result, the strict prohibition against revealing information related the client's representation without client consent.

The committee agreed the response should state that existing opinions are dispositive of the question, provide the rationale of the decision, and reference Advisory Opinions 194 and 195.

The motion passed unanimously.

The committee directed the staff liaison to draft an advisory opinion letter by next week and circulate it to the members for comment and electronic vote.

2219. General Counsel Responsibility for In-house Lawyer (Jaquette/Fucile/Palmer)

Mark Fucile presented a revised draft which included suggestions by committee members proposed at the previous meeting.

David Byers moved, seconded by Stephanie Bloomfield, to adopt memo #2219. The motion passed unanimously.

2221. Ghost Writing/Plagiarism (Bloomfield/Kindred/Jaquette)

Bill Jaquette reported on the subcommittee's determination that the inquirer's hypotheticals involved legal and moral questions beyond the scope of the committee, noting that the only applicable ethical issue concerned competence and responsibilities of a supervisory lawyer. The subcommittee recommended the committee decline to opine.

Discussion ensued regarding plagiarism and copyright law, whether "works-for-hire" could be considered plagiarism, and the committee's procedural rules that prohibit the committee from opining on questions of law.

Sophia Palmer moved, seconded by Anne Seidel, to reference the committee's Rules of Procedure 1 in the response to the inquirer.

Further discussion followed on whether the hypotheticals give rise to ethical violations under the RPCs, which could prompt a response from the committee. The committee did not feel inclined to answer without a real scenario, but indicated a willingness to entertain the question if the facts reflected the inquirer's contemplative conduct.

Anne Seidel offered a friendly amendment to include in the response a sentence stating that if the inquirer had a specific question concerning his/her own contemplative conduct, the committee may consider it. The motion passed 10-2.

2222. Deposit of Costs in Flat Fee Agreements. (Ruff/Bloomfield)

Beau Ruff presented a draft memo regarding the deposit of flat fees which includes payment for filing fees and other costs. The question concerned whether all or only part of the fee should be deposited in the lawyer's trust account. The memo concluded that under the facts presented, RPC 1.5(f) applies and therefore the entire flat fee must be deposited into the operating account and not the trust account.

Discussion followed regarding changes made to the original hypothetical submitted by WSBA Auditor Rita Swanson and whether the opinion included expenses. It was noted that Ms. Swanson had not yet reviewed the draft.

The committee agreed to table the item until the next meeting.

2223. Lawyer-Mediator Preparing Legal Documents for Unrepresented Parties (Weil/Gill/Swanson)

Subcommittee chair Noah Weil updated the committee on the subcommittee's efforts thus far. They condensed the inquirer's questions to whether documents prepared by a lawyer-mediator constituted the practice of law and, if so, whether it was permissible. The subcommittee felt that if the documents were filed in court, it is considered the practice of law, leading to the second issue of whether it is permissible for the lawyer-mediator to prepare court documents for two unrepresented parties. Mr. Weil reported their initial research of other jurisdictions found that states were split on the issue.

Discussion followed on several Washington advisory opinions, RPC 2.4, the role of scrivener, the issue of conflicts, GR 24, and unrepresented parties seeking advice from the lawyer-mediator. Also discussed was the practice among lawyer-mediators to memorialize agreements by parties which can lead to conflicts under RPC 1.7 during the refining process. It was noted that comment 23 of the rule would resolve situations of simultaneous representation of parties, regardless of the clients' consent.

ADJOURNMENT

The meeting adjourned at 12:47 p.m.

NEXT MEETING

The next meeting will be 10:00 a.m. June 22, 2012, at the offices of the Washington State Bar Association, 1325 4th Avenue, Seattle, Washington.

Dated this 20th day of April, 2012.

Respectfully submitted,

Jeanne Marie Clavere, WSBA Bar No. 18495
Secretary to the Committee