

To: Ethics 2003 Committee From: Douglas J. Ende, Reporter

Date: August 11, 2005

Re: Miscellaneous Information regarding Model Rule comments

Here is some information I have compiled that may be relevant to the Committee's discussion of the role of the ABA Comments.

1. Shortly after adoption of Washington's Rules of Professional Conduct in 1985, University of Washington School of Law Professor Robert Aronson published a comprehensive analysis and critique of the RPCs. Regarding omission of the Model Rules commentary, Professor Aronson wrote:

The Washington Supreme Court, in adopting the recommendations of the State Bar Task Force, unfortunately neither adopted nor even published the Comments to the Model Rules. Although the Rules state the minimum level of ethical conduct, the intended interpretation and application of each Rule is not always self-evident. The Comments provide that necessary interpretation and application. The ABA and the states that have substantially adopted the Model Rules have also adopted the Comments. To the extent that the Washington courts and State Bar are aided by interpretation and application of identical rules by courts in other jurisdictions, the Comments will be used by those courts as legislative history and to resolve ambiguities. In fact, on a number of occasions, the Washington courts have relied on the legislative history and judicial interpretation of federal codes in construing and applying identical provisions in Washington codes. Since the Comments will be relied upon in other jurisdictions, they will inevitably be employed by Washington courts. They should be adopted by the Washington Supreme Court as part of the CPR to avoid any ambiguity or misunderstanding.

Robert H. Aronson, *An Overview of the Law of Professional Responsibility: The Rules of Professional Conduct Annotated and Analyzed*, 61 Wash. L. Rev. 823, 828 (1986) (footnote omitted).

2. Of the 47 jurisdictions that have adopted Rules of Professional Conduct based on the Model Rules, 41 have adopted comments based in whole or in part on the Model Rule comments. The six holdouts are Illinois, Louisiana, Montana, Nevada, New Jersey, and Oregon (though Nevada's rules expressly provide that the ABA Model Rule comments may be consulted for guidance if not inconsistent).

- 3. Washington's appellate courts have expressly relied on Comments to the Model Rules and/or cited them with approval in 15 published decisions:
 - *In re Discipline of Schafer*, 149 Wn.2d 148, 160, 66 P.3d 1036 (2003)
 - *In re Discipline of McKean*, 148 Wn.2d 849, 864 n.9, 867, 64 P.3d 1226 (2003)
 - *In re Discipline of Carmick*, 146 Wn.2d 582, 595-97, 599, 48 P.3d 311 (2002)
 - In re Discipline of Halverson, 140 Wn.2d 475, 511, 998 P.2d 833 (2000) (Sanders, J. concurring in part and dissenting in part)
 - State v. Stenson, 132 W.2d 668, 767, 940 P.2d 1238 (1997) (Sanders, J. dissenting)
 - Eriks v. Denver, 118 Wn.2d 451, 459, 824 P.2d 1207 (1992)
 - *In re Discipline of Curran*, 115 Wn.2d 747, 766, 801 P.2d 962 (1990)
 - Wright v. Group Health Hospital, 103 Wn.2d 192, 199, 691 P.2d 564 (1984)
 - Eugster v. City of Spokane, 110 Wn. App. 212, 388, 39 P.3d 380 (2002)
 - State v. Hunter, 100 Wn. App. 198, 207 n.5, 997 P.2d 393 (2000)
 - Simburg, Ketter, Sheppard & Purdy, L.L.P. v. Olshan, 109 Wn. App. 436, 33 P.2d 742 (1999)
 - *Hicks v. Edwards*, 75 Wn. App. 156, 165-66, 876 P.2d 953 (1994)
 - *State v. Hunsaker*, 74 Wn. App. 38, 46, 873 P.2d 540 (1994)
 - *Teja v. Saran*, 68 Wn. App. 793, 798, 800 n.8, 846 P.2d 1375 (1993)
 - State v. Hatfield, 51 Wn. App. 408, 412 n.1, 754 P.2d 136 (1988)