

September 2, 2005

The Honorable Charles W. Johnson, Chair Supreme Court Rules Committee The Supreme Court of the State of Washington Temple of Justice Olympia, Washington 98504-0511

Dear Justice Johnson:

The Ethics 2003 Committee has reviewed the questions posed in your letter of July 12, 2005. We understand the overarching inquiry of the Rules Committee to be whether adoption of the proposed comments to the Rules of Professional Conduct is advisable, and, if so, in what form. In summary, the Committee has unanimously concluded that (1) the comments are appropriate and important, (2) as proposed, the comments are inextricable from the rules, and (3) the comments, together with the rules, should be formally adopted in their present form. In the remainder of this letter, I will briefly recount the process by which we reached this conclusion and explain the reasons for it.

Following our receipt of the Rules Committee's July 12 letter, I presented the issue to and sought the guidance of the WSBA Board of Governors at its July 2005 meeting. After discussion, the Board unanimously voted to support the inclusion of the comments with the Rules of Professional Conduct. In a letter dated August 1, 2005, WSBA President Ronald R. Ward advised the Ethics 2003 Committee of the Board's position. That letter, which summarizes the Board's rationale, is enclosed.

On August 22, 2005, the Ethics 2003 Committee was reconvened for a special meeting to address the questions posed in your July 12 letter. The Committee's Supreme Court Liaison, Justice Mary Fairhurst, and the Committee's Supreme Court Staff Liaison, Nan Sullins, were present. The meeting was open to the public; lawyer Douglas Schafer and Professor Thomas Andrews were in attendance. In addition to the July 12 letter itself, the Committee had available to it copies of the public comments received by the Court relating to the proposed RPCs, together with the two summaries of those public comments prepared by Nan Sullins.

The Committee met for more than three hours to discuss the concerns raised in the July 12 letter. The Committee was assisted in its endeavor by Justice Fairhurst, who explained the Court's concerns in greater detail. Throughout the process, the members of the Committee, together with the nonmember lawyers in attendance, were univocal and emphatic that the comments are well crafted and prudent, will be viewed as a useful interpretive resource by Washington lawyers, and are integral to and ought not to be uncoupled from the rules themselves.

Before turning to the reasons for the Committee's conclusions, I will reiterate, for the sake of clarity, the Court's specific questions, followed by the Committee's responses.

Questions from Court

- 1. Whether the Committee would have endorsed the adoption of the Model RPC comments if it were not given that direction by the Court.
- 2. Are there rules which would need further study and possible modification if the rules were adopted without the comments?
- 3. Would the Committee support the uncoupling of the comments from the rules in such a way that they would provide guidance for the application of the rules but be detached from the rules themselves?

Committee's Unanimous Responses

- 1. Although the Committee was aware that the Court had encouraged consideration of the Model Rule comments, it did not perceive the Court as having directed the Committee to endorse their adoption. During the Ethics 2003 process, the Committee independently considered the advisability of adoption of the comments as a whole, as well as the appropriateness of Washington's adoption of each individual comment and, where warranted, special Washington comments. Because the Committee did not believe it was directed, it is the Committee's recommendation that the proposed comments be adopted.
- 2. Were rules to be adopted without comments, the proposed rules would need to be reviewed thoroughly and would likely require significant modification. The relationship of the text of each rule to its associated comment was painstakingly evaluated by the Committee and its subcommittees in its initial work; the Committee faced many decisions about whether a concept was appropriately included as a part of the mandatory rule itself, or as guidance to interpretation to be included in a rule's comment. In many cases, for example, the Committee felt that the language of the Model Rule was acceptable, but that the special overlay of Washington history and case law needed to be captured in a special Washington comment. In others, the Committee felt that a rule needed clarification, but determined that the clarifying information belonged more appropriately in a comment rather than in the text of the rule itself and that an attempt to integrate the additional information would greatly detract from the clarity of the rule. The rules as proposed, then, are premised on the assumption that both rules and comments would be adopted as a package. Had the comments not been included in the proposal, the Committee would not have endorsed the text of the rules in the current form. If the Court concludes that comments ought not to be adopted, we urge that the rules be re-evaluated in their entirety.

3. The rules and comments as proposed are decoupled *conceptually*, as reflected in Paragraph [21] of the Preamble and Scope section of the proposed RPCs, which distinguishes between the rules (authoritative) and the comments (interpretive), as follows: "The Comment accompanying each Rule explains and illustrates the meaning and purpose of the Rule. . . . The Comments are intended as guides to interpretation, but the text of each Rule is authoritative." It is important, however, that the Court officially endorse the comments, so that their status as a definitive source of guidance is not ambiguous. The Committee further believes that physically decoupling the rules from the comments (by publishing them separately, for example) would do a disservice to lawyers by creating a needless and artificial barrier to those seeking ready access to the pertinent commentary.

Although many reasons were given in support of enactment of the rules and comments together as proposed, a number of key factors emerged during the Committee's deliberations on your questions. The following summaries are representative of the Committee's views as a whole:

Uniformity. It was the hope of the ABA Ethics 2000 Commission that as state supreme courts considered implementation of the revised Model Rules, uniformity would be the "guiding beacon." The Conference of Chief Justices has also urged cooperation "to ensure consistency among jurisdictions concerning lawyer regulation and professionalism." As recognized in the Ethics 2003 Committee's Final Report and Recommendation, uniformity in the rules of lawyer ethics will assist Washington lawyers in complying with the rules in force in other jurisdictions when they are practicing elsewhere, and will guide lawyers from other jurisdictions, when practicing here on a limited basis, in conforming their conduct to the standards applicable in Washington. The body of law developed in jurisdictions with uniform rules will also provide Washington lawyers and judges with additional interpretive guidance when applying Washington's Rules of Professional Conduct. The Model Rule comments are an element of such uniformity. As mentioned in the Committee Reporter's August 11, 2005 memo (enclosed), of the 47 jurisdictions that have adopted a Model Rules–based system, 41 have adopted comments based in whole or in substantial part on the Model Rules comments. One of the central purposes of the "Washington Comments," proposed as an adjunct to the modified Model Rules commentary, is to identify when and how Washington's RPCs differ from the Model Rules. This guidance will assist lawyers in comparing and evaluating ethics rules and decisions in other states. Law students in professional responsibility classes, in Washington and throughout the country, study legal ethics as defined by the Model Rules and elucidated by the accompanying Model Rule comments, and Washington lawyers seeking ethics credits attend CLE programs sponsored by organizations with a nationwide presence where the Model Rules provide the touchstone for discussion. Consistency in this regard will improve the ability of both new and experienced lawyers to comply with the RPCs.

Clarity. A fundamental objective of all legal research is to determine what the law is with the greatest possible clarity. The proposed RPC comments serve the sole purpose of providing specificity and clarity in applying the general RPC principles. Shortly after adoption of Washington's Rules of Professional Conduct in 1985, Professor Robert Aronson lamented the decision to dispense with the Model Rule comments, writing, "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." 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). Every stakeholder in Washington's system of lawyer regulation will benefit from the increase in clarity provided by the guidance to be found in the comments. WSBA Professional Responsibility Counsel have noted that they already rely on the Model Rule commentary in providing Ethics Line advice to Washington lawyers. Lawyers in the WSBA Office of Disciplinary Counsel have emphasized that, from the enforcement perspective, clarity of the RPCs is paramount; the comments will provide needed guidance in defining what is and is not ethical. Judges applying the rules will have a widely accepted interpretive resource readily available to them without the need to resolve in each individual case whether a particular Model Rule comment is consistent with Washington law. And the lawyers subject to Washington's RPCs will have a ready source of guidance in making decisions consistent with the requirements of Washington's rules of legal ethics, thus assuring that clients receive the services of a well-regulated profession and assisting the lawyers in assuring themselves that their conduct will not subject them to disciplinary action.

Fairness. Because Washington's RPCs are based on the ABA Model Rules, our courts have repeatedly looked to Model Rule comments when interpreting the RPCs. As mentioned in the Committee Reporter's August 11 memo (enclosed), Washington appellate courts have expressly relied on or cited the Model Rule comments in 15 published decisions. Additionally, the WSBA Rules of Professional Conduct Committee, which issues written ethics opinions in response to ethics inquiries submitted by Washington lawyers, regularly cites the Model Rule comments as instructive. *See* WSBA Formal Ethics Opinion No. 190 (1993); WSBA Published Informal Opinion Nos. 86-1 and 97-1; WSBA Unpublished Informal Ethics Opinion Nos. 802, 946, 1668, 1675, 1726, 1754, 1816, and 2044. (WSBA Ethics Opinions are available at http://www.wsba.org/lawyers/ethics/default.htm.) To provide fair notice to the profession, the Court should formally and officially endorse the comments to the rules, thereby designating antecedently the principles upon which the conduct of Washington lawyers will be evaluated.

Accessibility. At present, although the ABA Model Rule comments are relied on in Washington for their interpretive guidance (*see* Fairness, above), the text of the comments is not conveniently and readily available to every Washington lawyer. (The full set of Model Rules of Professional Conduct can be purchased from the ABA Center for Professional Responsibility for \$19.95, the comments can be found in published treatises such as the ABA/BNA Lawyer's Manual on Professional Conduct, and the individual comments can be accessed at the ABA Center for Professional Responsibility website.) This puts Washington lawyers — particularly those who do not routinely research legal ethics issues — at a disadvantage. The Court's official adoption of the RPC comments (as modified for consistency with Washington law), would remedy this obstacle, as the comments would of necessity be included with the sources of law used by Washington lawyers daily: in compilations of Washington court rules, in Washington-specific treatises (such as West's Washington Practice Series), and on the Washington Courts (AOC) website. Moreover, if the proposed rules and comments are adopted jointly, rather than decoupled in some fashion, each comment will be published together with its associated rule, eliminating any impediment and making this highly relevant guidance accessible to all.

Approval. The modest number of critical remarks received by the Court during the public comment period notwithstanding, the impression of the Committee is that the proposed comments have been well received and are supported by most lawyers. A number of Ethics 2003 Committee members, including myself, Committee Reporter Douglas Ende, and WSBA Professional Responsibility Counsel Christopher Sutton, have done a great deal of speaking to lawyers around the state about the proposed Ethics 2003 changes to the Rules of Professional Conduct. In our experience, despite the increase in the total size of the rules set, lawyers perceive the comments as a welcome source of pertinent information. You have already received letters supporting adoption of the comments from the Legal Foundation of Washington and from the WSBA Director of Lawyer Discipline. We expect that the Court will receive more letters of support from individual lawyers, firms, and legal organizations. It is the Committee's hope that the Court will take these views into account during its continuing consideration of the WSBA Board of Governors' Ethics 2003 recommendations.

Finally, you inquired whether the Committee would have time to evaluate and respond to the substance of the public comments received by the Court. The Committee has reviewed those public comments, and it is the Committee's belief that the great majority of them relate to matters that were fully evaluated and addressed in the Ethics 2003 Committee's Report and Recommendation. The Committee would be glad, however, to respond in greater detail on any issue that the Court might identify as benefiting from further evaluation and/or supplemental recommendations. And, as I mentioned in my August 2 letter, Douglas Ende and I would be glad to meet with the Rules Committee if it would help to resolve any of the Court's concerns.

On behalf of the entire Committee, I thank you for this opportunity to address the Court's preliminary questions.

Very truly yours,

Ellen Conedera Dial, Chair

Ethics 2003 Committee

Enclosures (2):

- August 1, 2005 Letter from Ronald R. Ward to Ethics 2003 Committee
- August 11, 2005 Memorandum from Reporter Douglas Ende to Ethics 2003 Committee

cc: WSBA President Ronald R. Ward WSBA President-elect S. Brooke Taylor WSBA Board of Governors Members of the Ethics 2003 Committee