



WSBA

REPORT OF THE RPC COMMITTEE REVIEW WORK GROUP

Executive Summary

In September 2012, the BOG “sunsetted” the existing RPC Committee and appointed a Work Group to review how this function could be delivered most usefully to WSBA Members in today’s practice environment statewide. The BOG’s action reflected a number of trends affecting the RPC Committee that accelerated over the past decade, including decreased use by WSBA Members of its traditional function of responding to specific letter-form inquiries by individual members and an increased focus on issues of more general application to WSBA Members as a whole through advisory opinions posted in a searchable database on the WSBA web site. In light of these practice and technological trends that appear unlikely to abate, the Work Group surveyed how this function is currently handled by state bar associations nationally, examined past specially-appointed WSBA groups in this area and evaluated whether this function should remain at the WSBA.

The Work Group concluded unanimously that this function remains an integral and essential function of the WSBA. The Work Group also concluded, however, that changes in the role and composition of the committee were appropriate in view of the practice and technological trends noted. Because WSBA Members have access to the Ethics Line staffed by the WSBA Professional Responsibility Counsel to handle day-to-day questions, the Work Group concluded that the committee should focus on more detailed opinions addressing recurring and emerging issues faced by WSBA Members that would continue to be available in a searchable database on the WSBA web site. The opinions, like the issues involved, would embrace both the RPCs and the associated law of lawyering. The committee would also retain its role of evaluating and suggesting potential amendments to the RPCs, such as those recently adopted by the ABA in its “Ethics 20/20” review process. The Work Group contemplates that the committee’s primary focus would be on the areas noted that speak to WSBA Members as a whole, although the committee would continue to coordinate closely with WSBA Professional Responsibility Counsel in evaluating whether member-specific ethics inquiries are indicative of a need for written guidance from committee. In light of this broader contextual focus, the Work Group recommends that the committee be renamed the Ethics and Professional Conduct Advisory Committee. The Work Group believes the changes set forth below will enhance the WSBA’s ability to deliver the most current and in-depth ethics and professional conduct analysis and

advice to our members, and will place us at the cutting edge of leadership in delivery of these services to lawyers in Washington.

Because the committee's primary work each fiscal year would be generating a relatively small number of thorough yet practical advisory opinions, the Work Group concluded that a smaller group composed of members with demonstrated experience and expertise in the application of both the RPCs and the broader law of lawyering would provide the optimal mix for this function. Accordingly, the Work Group recommends that the committee be comprised of nine members (including the Chair) who have both the substantive expertise noted and strong analytical and writing skills. To assure continuity in the ongoing work of the committee, the Work Group recommends that terms for committee members be three years, with members eligible for reappointment to one consecutive three-year term and that terms be staggered so that three positions expire each year. The Chair would continue to be appointed annually by the WSBA President-elect. The Work Group recommends that WSBA Professional Responsibility Counsel continue to serve as the staff liaison so that the work of the committee would complement the Ethics Line.

I. INTRODUCTION

A. Background

The Rules of Professional Conduct Committee (RPC Committee) has existed as a Washington State Bar Association (WSBA) committee for over 25 years. During most of that period, the RPC Committee's work was comprised of two principal functions. First, the RPC Committee responded to letter-form (and, more recently, electronic-form) inquiries from WSBA Members through "informal" ethics opinions directed specifically to the Member involved. Second, from time to time, the RPC Committee prepared "published informal" and "formal" ethics opinions for guidance to the Membership as a whole. Of the two primary activities, the former historically comprised a much larger share of the RPC Committee's work than the latter. As noted, "informal" opinions generally addressed specific written questions from WSBA Members. "Published informal" and "formal" opinions, by contrast, generally addressed recurring issues of broader application. Members of the RPC Committee were selected through the annual volunteer interest solicitation process and no particular expertise in either legal ethics or the broader law of lawyering was required. The RPC Committee normally met six times per fiscal year at the WSBA office for day-long sessions. The WSBA Professional Responsibility Counsel was the staff liaison for the RPC Committee both due to the subject matter involved and to coordinate the advice provided by the Professional Responsibility Counsel over the telephone "Ethics Line" with the opinions provided by the RPC Committee.

In 2010, the BOG eliminated the distinction between "informal" and "formal" opinions and all opinions became "advisory" opinions. Beginning approximately 10 years ago, copies of all opinions (with identifying information redacted in the case of the former "informal" opinions) were placed in a searchable database on the WSBA web site.

Over the past decade, the nature of the RPC Committee's work began to change in several ways. First, the number of direct inquiries by either paper letter or email declined significantly. Anecdotal evidence suggests that this decline resulted from a variety of factors,

including the ready availability of the Ethics Line, the increased pace of practice today and the ability of WSBA Members to search prior opinions directly on the WSBA web site. Second, the RPC Committee increasingly took on issues of greater depth and scope, such as opinions issued in 2012 on “cloud computing” and “metadata.” Third, because the last round of general amendments to the RPCs was developed approximately 10 years ago, the RPC Committee also considered potential amendments to the RPCs, including most recently suggested changes to the trust accounting rules.

Due to the changing nature of the RPC Committee’s work, the BOG at its September 2012 meeting “sunsetted” the RPC Committee in its present form and appointed the RPC Committee Work Group (Work Group) to review how this function could be delivered most usefully to WSBA Members.

B. Work Group

The Work Group is chaired by former BOG Governor Marc L. Silverman, who was formerly the BOG liaison to the RPC Committee and includes current BOG Governor Jerry Moberg. All of the other Work Group members (Stephanie Bloomfield, Karen Boxx, David Byers, Don Curran, Mark Fucile, Art Lachman and Tom Waite) have served on the RPC Committee and four of the Work Group members chaired the RPC Committee in the past. WSBA Professional Responsibility Counsel Jeanne Marie Clavere and WSBA Chief Disciplinary Counsel Doug Ende serve as staff liaisons.

The Work Group began meeting in October 2012 and has held five meetings. After reviewing the operations of the RPC Committee historically and in the recent past, the Work Group surveyed how this function is currently handled by state bar associations nationally. The Work Group also considered past specially-appointed WSBA groups that addressed issues in this area, such as the “Ethics 2003” Committee and the Immigration Advisory Work Group. The Work Group then divided into two principal subcommittees. One subcommittee focused on “membership” issues, such as criteria for selection, the optimal number of committee members for efficient operation, and term length. The second subcommittee considered “operations” issues, such as the sources for opinions and review of potential amendments to the RPCs. The Work Group as a whole considered the fundamental role of this function in the practice environment faced statewide by WSBA Members today.

As a part of its review, the Work Group considered the question of whether the WSBA should continue to have a committee (or similar entity) that addressed issues of both legal ethics and the associated law of lawyering. Although, as is discussed in detail below, the Work Group concluded that changes to the committee are desirable, the Work Group concluded unanimously that this function remains an integral and essential function of the WSBA.

Also as a part of its review, the Work Group considered the legal effect of WSBA opinions. In *In re DeRuiz*, 152 Wn.2d 558, 99 P.3d 881 (2004), the Supreme Court emphasized that WSBA opinions are advisory only and it remained the final arbiter of the meaning of the Rules of Professional Conduct. Given the Supreme Court’s relatively recent and clear guidance, the Work Group concluded that the current description of WSBA opinions as “advisory” will remain appropriate regardless of how this function is reconfigured. Although advisory, WSBA

opinions will continue to offer unique guidance because they address a broader spectrum of professional responsibility issues facing the Members than the Supreme Court's body of disciplinary decisions.

II. RECOMMENDATIONS

A. Overview

The Work Group concluded that the changing focus of the RPC Committee discussed above suggests corresponding changes in the role and composition of the Committee.

As to the role, the Work Group concluded that the Committee—while remaining available to address specific Member inquiries—should focus primarily on issues of broader application. This focus acknowledges the practice trends that have already transformed its work. The ready availability of the Ethics Line staffed by the WSBA Professional Responsibility Counsel to handle day-to-day questions would allow the Committee to complement that function by focusing its work on more detailed opinions that address both recurring and emerging issues faced by WSBA Members. The Committee should also retain its role of evaluating and suggesting potential amendments to the RPCs, such as those recently adopted by the ABA to the Model Rules of Professional Conduct through its “Ethics 20/20” review process. This overall approach is generally similar to the one taken by the American Bar Association and the state bar organizations in, regionally, Alaska, California and Oregon.¹

As to its composition, the Work Group concluded that a smaller group composed of members with demonstrated experience and expertise in the application of both the RPCs and the broader law of lawyering would better fit a workload that annually focused on a small number of opinions that reflected both depth of treatment and breadth of application. The composition of the group also reflects that the easy and widespread availability of advisory opinions via the web makes it imperative that the guidance offered is clear, well-written, well-documented and authoritative.

Finally, the Work Group felt that this new focus would better reflect the fact that matters of professional ethics today are not painted solely against the backdrop of regulatory discipline but have great relevance to WSBA Members in a wide variety of practice contexts, including law firm risk management, fee agreements and collections and the daily operations of firms (and their corporate and governmental counterparts) both large and small. For example, the most recent (2012) WSBA publication on professional responsibility is called *The Law of Lawyering in Washington*. In light of that broader contextual focus, the Work Group recommends that the RPC Committee be renamed the Ethics and Professional Conduct Advisory Committee.

The Work Group's recommendations on membership, operations and implementation follow.

¹ See, e.g., ABA (www.americanbar.org/groups/professional_responsibility); Alaska (www.alaskabar.org/servlet/content/alaska_rules_of_professional_conduct); California (www.ethics.calbar.ca.gov/Committees/COPRAC); Oregon (www.osbar.org/ethics).

B. Membership

In light of the Committee's unique function and role, the Work Group makes four principal recommendations on membership:

- **Qualifications.** Due to both the technical nature of the subject matter and the public nature of the guidance (albeit advisory) being offered on behalf of the WSBA, the Committee should be composed of members with demonstrated knowledge and experience with legal ethics and strong analytical and writing skills. Additional criteria for selection would include time, energy and commitment to undertake the significant responsibility of Committee membership and the goals of the WSBA Committee and Boards Policy on Diversity. The Work Group recommends that full-time faculty of Washington law schools be eligible for membership even if they are not active members of the WSBA.
- **Size.** Because the focus of the Committee will be on a relatively small number of thoroughly researched written opinions, the Work Group concluded that the optimal size for the Committee would be nine members (including the Chair). Nine is large enough to efficiently allocate work yet small enough to foster close collaboration of all Committee members on all opinions and related work.
- **Term Length and Continuity.** Given the particular expertise that members will bring to the Committee, the Work Group recommends that terms be for three years, with one consecutive reappointment term possible. To assure continuity of on-going work, the Work Group also recommends that Committee terms be staggered so that three Committee positions will open at the end of every fiscal year. (See "Implementation" below for the initial Committee appointment process.)
- **Selection.** The Work Group recommends that applicants for the Committee submit their applications through the annual volunteer interest solicitation process. Due to the need noted above for members who have demonstrated expertise in this substantive area, the Work Group recommends that no later than June 15 each year the Chair recommend to the Board of Governors proposed Committee members meeting the membership criteria noted above. The Chair, in turn, would be nominated by the WSBA President-Elect as with other WSBA committees. (See "Implementation" below for the initial Committee appointment process.)

C. Operations

A proposed set of Rules of Procedure is attached at Tab A. These Rules of Procedure (a) are based generally on those that governed the RPC Committee and (b) incorporate the Work Group's recommendations on membership and responsibilities discussed above.

As with the RPC Committee, the Work Group recommends that the new Committee meet six times per fiscal year at the WSBA office for work sessions (with attendance by telephone/video permitted, again in keeping with existing WSBA policy).

As was the case with the RPC Committee, the Work Group recommends that the WSBA Professional Responsibility Counsel remain the staff liaison so that the work of the new Committee will be closely integrated with the Ethics Line.

The Work Group anticipates that the new Committee's meetings will be open in keeping with WSBA policy and that the new Committee would be able to draw on the expertise of the Office of Disciplinary Counsel, WSBA sections and other interested persons.

III. IMPLEMENTATION

Some of the Work Group's recommendations would require relatively modest changes to the WSBA Committee and Boards Policy and the By-Laws. Red-line versions of those documents reflecting the Work Group's recommendations are attached at Tab B.

To have the new Committee in place at the start of the 2014 fiscal year this October, the Work Group stands ready to assist the BOG by evaluating interested potential members and recommending initial Committee appointments to the BOG. As discussed above, because the Work Group recommends that terms be staggered, the Work Group recommends that the initial Committee terms be divided into three groups: three members for one-year terms; three members for two-year terms; and three members for three-year terms. As noted above, all members (regardless of initial term length) would be eligible for one consecutive three-year reappointment term.

To accomplish this within the time constraints of the remaining fiscal year, it will be necessary for the BOG to make initial committee appointments at its July 2013 meeting. Accordingly, the Work Group will request BOG authorization at the May 2013 meeting to work with WSBA staff to immediately solicit and review applications for service on the to-be-formed Ethics and Professional Conduct Advisory Committee, with the current Work Group chair and members (excepting those applying for appointment to the Committee) to serve as a nominating committee.

The recommended initial appointments would be presented to the BOG at the July 2013 meeting in conjunction with the BOG's anticipated action on the Work Group's final report and recommendation.

IV. CONCLUSION

Work Group Chair Marc L. Silverman, BOG Liaison Jerry Moberg and Staff Liaisons Jean Marie Clavere and Doug Ende anticipate being available to address the Work Group's proposals and any questions the BOG may have at the BOG's May 31 meeting.

May 15, 2013.

Respectfully submitted,

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