



WSBA

RULES OF PROFESSIONAL CONDUCT COMMITTEE MEETING MINUTES

June 24, 2011

Washington State Bar Association Seattle, Washington

Members present were Don Curran (Chair), Stephanie Bloomfield (phone), Karen Boxx, Mario Cava, Noah Davis, Mark Fucile, Paul Gill (phone), Robert Gould, Michelle Jensen, Kathleen Kindred (phone), Rob Neate, Sophia Palmer, Lorna Randall, Beau Ruff, and Anne Seidel. David Byers, Gideon Caron, Bill Jaquette were excused.

In attendance were Marc Silverman (BOG Liaison) (phone), Cathy Moore, BOG (a.m. session), Steve Toole, WSBA President (p.m. session), Kevin Bank, ODC, Dan Ford, Columbia Legal Services, Matt Adams, NWIRP, David Powell, WSBA Staff Liaison, Jeanne Marie Clavere, WSBA Professional Responsibility Counsel, and Darlene Neumann, WSBA paralegal

MINUTES

The minutes of April 29, 2011 were corrected and approved.

IMMIGRATION ADVISORY OPINION

Hypothetical 1

Mario Cava presented a revised draft opinion which separated the issues of IRS reporting and immigration status and applied a nexus test in both the criminal and immigration contexts. Prior to the meeting, Dan Ford, Columbia Legal Services, reviewed two separate drafts of hypothetical 1 and a draft of hypothetical 2, and subsequently provided written comments to the committee. Mr. Cava stated the comments were "well received" by the subcommittee and they will work through them and take into account the suggested changes.

The committee discussed the draft by Mr. Cava and made the following comments:

- It was suggested the opinion break down and separate “threat” from “reporting” because the analysis is different for each issue.
- In response to comments about applying the same test in both the immigration and criminal contexts, Mr. Cava stated the objective was to work through the logic first and then apply the nexus test. This resulted in the rules being stated and restated again later in the draft.
- Beau Ruff commented the conclusion on reporting seemed inconsistent and preferred the language on the last page of the memo.
- The committee discussed the dilemma of lawyers who hold a personal conviction or inclination to report crimes being accused of trying to gain an advantage when they report. Mark Fucile noted that “solely” then becomes a critical distinction.
- Lorna Randall discussed a law review article on the Kansas Supreme Court in which the court used the language, “substantial and legitimate interest”. Ms. Randall commented the use of both terms added a safeguard because “legitimate” brings objectivity while substantial is more of a subjective standard. The committee discussed whether to add “legitimate”, but decided to stick with “substantial” to stay consistent with the RPCs.
- Kevin Bank, ODC, presented comments from Doug Ende, who was unable to attend.
 - The opinion attempts to do too much and should focus on RPC 4.4 and 8.4(b). The other rules, RPC 3.1, 4.1, etc., are ancillary, but may be included in foot-notes.
 - Threat and actual reporting should be framed in separate paragraphs.
 - Page 3, last paragraph, line 3 seems overly broad and should be deleted.
 - Also recommended to be deleted: discussion on State v. Pauling and reference to comment 4 of RPC 8.4 (page 7) because this was taken from the North Carolina opinion and is not in Washington’s RPC.

Mr. Ford suggested the opinion modify the relatedness example to discuss the factual genesis of immigration status. He stated RPC 4.4 and 8.4 are the critical rules and suggested the opinion start with those, followed by the other rules.

Hypothetical 1 Minority Opinion

The committee discussed the draft minority opinion submitted by Noah Davis. The opinion focused on RPC 4.4(a) and affirmed the substantial purpose test followed by RPC 8.4. The issues of threat and reporting were separated and the nexus test removed. The draft simplified and shortened the opinion by removing cited cases and other rules, which Mr. Davis opined made the opinion overly complex and less instructive to members. He stated that without a relatedness factor, the focus shifts to substantial purpose. He also noted there are situations where reporting is not used as a threat. Mr. Davis offered to revise the second part of the draft, but also suggested the committee could adopt the North Carolina opinion which was simple and to the point.

The committee discussed whether or not to adopt the ABA nexus test to the fact pattern of the hypothesis.

Mr. Davis moved, seconded by Beau Ruff, to rescind the previous decision to adopt the ABA nexus test.

The committee discussed whether the Cava and Davis memos might be reconciled under a substantial purpose test, supported by the ABA rationale without stating that the ABA nexus test applies. Others were concerned about the minority opinion's conclusion that "it depends..." becoming a slippery slope.

The question was called. The motion failed 3 to 6, with 4 abstentions.

Mr. Cava will modify his draft memo to incorporate comments by Dan Ford and committee members. The Chair will present the draft to the Board of Governors at their July meeting with the caveat that it is subject to revision by the committee. Mr. Davis indicated a desire to submit a revised minority opinion to the BOG as well, but was counseled by the Chair and Marc Silverman against doing so.

Hypothetical 2

Dan Ford discussed his comments of Hypothetical 2.

- The focus on "Hispanic sounding names" in the first paragraph gives the impression that the practice is acceptable. An alternative might be to say foreign or national origin.
- On paragraph 2, replace "sole" with "substantial".
- On page 4, the opinion seems to indicate that it is acceptable practice to question the immigration status for the purpose of locating witnesses. Mr. Ford stated there are other ways to find out without questioning a person's status.

Members commented that the memo should emphasize the RPCs over the CR rules, be clearer on when it would be appropriate to inquire about immigration status, and exercise caution when trying to place limits on discovery if a substantial purpose exists or the inquiry is relevant. Mr. Ford stated that his primary concern was to avoid giving lawyers a free ride on discovery no matter what the rule.

Additional suggestions: have more application of the hypothetical and include RPC 8.4(h) (ethnic bias); focus on RPC 4.4(a), 8.4(d) and explain why the conduct violates the rules. Kevin Bank relayed Doug Ende's suggestion that the second paragraph which addressed the lawyer's mental state be deleted because it is unnecessary.

The item was tabled to the next meeting. The Chair will also present the committee's draft in a report to the BOG at their July meeting.

OLD BUSINESS

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

Sophia Palmer reported that she and Anne Seidel had worked together on a revised memo to the committee. A copy of the memo was forwarded to Doug Ende after he had expressed some concerns about the initial memo. Mr. Ende made several suggestions to the revised memo, but there was no agreement between Ms. Seidel and Mr. Ende on the position of the memo as it currently stands.

The item was tabled. The drafters stated it would be helpful if Mr. Ende could discuss his concerns at the next committee meeting.

NEW BUSINESS

Item 2212. Lawyer Obtaining Life Insurance Policy on Client to Guarantee Fees (Caron/Kindred)

Kathleen Kindred presented a draft memo regarding a lawyer contemplating taking out a life insurance policy on a client in order to guarantee the lawyer's fees in a contingency fee agreement. The other assigned member, Gideon Caron, was excused. Ms. Kindred stated the memo focused on the facts and language of the fee agreement, not the ethical propriety of the conduct. The committee discussed the analysis under RPC 1.5 and whether it was even possible to obtain such a policy. Some members commented that the conduct also violated the fiduciary relationship between attorney/client, RPC 1.6 (client

confidentiality), and may be a conflict under RPC 1.7 because of the lawyer's personal interest.

Other members commented the fee analysis did not apply since the lawyer can do with his payment what he wants. It was pointed out that the funds are paid by the insurance company, not the client, and therefore, would not be considered a fee.

Beau Ruff moved, seconded by Anne Seidel, to remove discussion of RPC 1.5(c)(4)(i) in the memo.

Ms. Kindred argued that RPC 1.5 is crucial to the analysis if the objective is to answer the question factually, noting that the other comments go beyond the facts. She stated that what the inquirer proposes is contrary to the written fee agreement and the contingency fee rule.

Noah Davis offered a friendly amendment to delete RPC 1.5(c)(4)(i) and replace with it with RPC 1.5(a). The friendly was not accepted. The question was called. The motion failed 4-8.

Bob Gould moved, seconded by Sophia Palmer, to adopt the opinion, change the citation from RPC 1.4 to 1.5 (because of miss-cite), delete the reference to RPC 1.8, and amend with Karen Boxx's suggestion to include consideration of RPC 1.7.

The Chair over-ruled the motion to allow members to consider each action separately.

It was moved and seconded to remove the reference to RPC 1.8. Further discussion ensued on fees, applying RPC 1.8(b), and RPC 1.6. The vote was 7 to 6. Because of confusion among committee members on whether the vote was to remove RPC 1.8 or to retain it, the chair allowed for the vote to be re-taken.

The chair restated the motion as a motion to retain RPC 1.8, with a friendly amendment by Mario Cava to include language on RPC 1.8(a) and an explanation as to why RPC 1.8 was relevant. Mr. Gould accepted the friendly. The motion passed.

It was moved, seconded by Mr. Cava, to correct the citation from RPC 1.4 to 1.5.

Additional discussion followed on whether this was a fee issue or a conflicts issue.

Sophia Palmer offered a friendly amendment to Mr. Gould's original motion to include a definition of what constitutes a fee and how the proposed payment qualifies as a fee. The friendly was accepted.

Because of numerous motions and comments raised, the committee was unable to reach consensus on the memo. *Mr. Davis moved, seconded by Mr. Cava, to table so that additional consideration may be given to the issues raised by members concerning fees and conflicts. The motion passed 9 to 2, with 1 abstention.*

Item 2213. Lawyer Directed by Client Not to Pay Bills From Settlement Proceeds. (Neate)

Rob Neate presented a draft memo on a lawyer's obligation to follow the client's directive not to repay the insurance carrier for PIP benefits from the settlement proceeds. The memo concluded that absent a dispute, the lawyer must obey the client's wishes and distribute funds to which the client is entitled. The committee discussed whether or not an actual dispute existed, and if so, the lawyer's duty to interplead the disputed funds. Members commented on the client's silence which enabled the client to skirt the insurance obligation, but left her exposed. The committee stated that without knowing additional details, there may be a potential risk of the lawyer assisting the client in the commission of fraud. The committee perceived that an opinion on this question could have a significant impact and anticipated there may be keen interest by the stakeholders.

The item was tabled. Bob Gould will work with Rob Neate on the inquiry. The committee suggested they solicit input from the Washington Association of Justice, lawyers on the plaintiff's side, and the defense bar.

RPC CONVERSION TABLE SUBCOMMITTEE

Subcommittee Chair Anne Seidel explained the review process taken by the subcommittee. She commented the Professional Responsibility Counsel is willing to do an additional review of the conversion table to see if anything had been missed. Ms. Seidel reported that she had spoken with law professors about the idea of using students to assist in reviewing the older opinions. The professors thought that students would be reluctant to help without pay or credit—in addition, they would probably require a lot of supervision.

The subcommittee suggested the conversion table be placed on the Bar's advisory opinions search page. Bob Gould also recommended it be published in the Resources directory.

The Chair commended the subcommittee for a great job on reviewing the rules and creating the conversion table.

Sophia Palmer moved, seconded by Bob Gould, to adopt the RPC Conversion Table. The motion passed unanimously.

ELECTRONIC BANKING & TRUST ACCOUNT SUBCOMMITTEE

Subcommittee Chair Mario Cava presented the committee with two options to deal with unilateral electronic banking transfers that cause inadvertent commingling of lawyer and client funds: a) amend RPC 1.15A; or b) issue an advisory opinion subject to a request for a formal opinion by the WSBA audit manager.

Bob Gould moved, seconded by Karen Boxx, to recommend to the Board of Governors that RPC 1.15A be amended, consistent with the red-line draft before the committee. A friendly amendment was offered and accepted by Mr. Gould to adopt the amended rule subject to minor revision of the language as previously discussed.

Although there was no formal action on the motion, there was general consensus to proceed with the rule change option and minor revisions as suggested.

Rita Swanson, WSBA auditor manager, will be invited to attend the next meeting of the full committee. Mr. Cava suggested the committee also solicit comment from bar members.

ADJOURNMENT

The meeting adjourned at 2:25 p.m.

Dated this 24th day of June, 2011.

Respectfully submitted,

David Powell, WSBA #23870
Secretary to the Committee