



WSBA

**RULES OF PROFESSIONAL CONDUCT COMMITTEE  
Amended MEETING MINUTES**

**March 16, 2012**

**Washington State Bar Association  
Seattle, Washington**

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

In attendance were Marc Silverman, (BOG Liaison), Jeanne Marie Clavere, WSBA Staff Liaison, Doug Ende of ODC, and Darlene Neumann, paralegal

Meeting called to order 10:05 a.m.

**MINUTES**

The minutes of the December 16, 2011 were approved.

**COMMITTEE RESPONSE LETTERS**

**CRL #2213.**

The Chair reminded members of the electronic vote taken on 2213 after the last meeting, and discussed the prior and amended version of the opinion.

**CRL #2218.**

The committee reviewed the response letter, with some members indicating disagreement with the conclusion. After a discussion about the committee's rules and procedure, the committee decided to reconsider the opinion under Rule 14, Rules of Procedure.

*The staff liaison was directed to contact the inquirer to determine if the issue was still unresolved. If so, the staff liaison will advise the inquirer the opinion is being reconsidered and to request the full DOR determination.*

## **OLD BUSINESS**

### **2210. Debit Card Transactions. (Trust Account Subcommittee)**

Anne Seidel presented the latest draft which included precautions for lawyers using debit cards in connection with the IOLTA and the addition of technical matters.

*Karen Boxx moved, seconded by Michelle Jensen, to adopt memo 2210.*

Doug Ende noted that “bank transfer” is not defined in the RPC, yet the opinion reasons that it is bank transfer and commented on the gap in the RPC which is still not resolved. Ms. Seidel stated this was not the final solution and the Subcommittee is working on a rule or comment to address the issue.

*The motion passed unanimously.*

### **2214. Credit Card Fees Charged to Client. (Trust Account Subcommittee)**

Beau Ruff presented the latest draft with revisions by member Stephanie Bloomfield and WSBA Auditor Rita Swanson.

*Karen Boxx moved, seconded by David Byers, to adopt memo 2214.*

The committee discussed the tension between credit card contracts which prohibit charging transaction fees to card holders and the opinion’s conclusion that it was not unethical. Members noted there are differences in credit card agreements and indicated the lawyer’s responsibility to verify the contract. Another pointed out that firms may view transactions fees as part of the normal contract for service expenses incurred by law firms. However, it was noted those contracts typically do not directly involve clients.

*The motion passed unanimously.*

### **ABA Ethics 20/20 Update. (Chair)**

The Chair discussed the topic of nonlawyer partial ownership of law firms currently under consideration by ABA Commission on Ethics 20/20. He noted a recent article about a lawsuit filed by a NY law firm in federal court challenging the NYBA ethics rule prohibiting nonlawyer ownership as unconstitutional and a

violation of the freedom of association. Although the case was dismissed, the Chair commented that had it been ruled unconstitutional, other NY laws forbid nonlawyer ownership. The easing of the prohibition is seen as one way to alleviate the high expenses of law firms. The issue will come before the ABA House of Delegates in 2013.

## **NEW BUSINESS**

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

Subcommittee chair Karen Boxx reported their initial research found several state opinions stating that storage of information in the cloud is acceptable, provided the lawyer takes reasonable care to ensure the information is protected, monitoring is continuous, etc. The subcommittee hopes to have a draft memo prepared by the next meeting.

### **2216. Metadata. (Jensen/Randall)**

Michelle Jensen presented the subcommittee's draft memo on metadata, detailing three hypothetical scenarios, and discussed various positions on metadata taken by other jurisdictions and the ABA. She stated the subcommittee's memo sided with the majority opinion.

*David Byers moved, seconded by Mark Fucile, to adopt memo 2216.*

Several members proposed taking a stronger position against forensic search of metadata. Anne Seidel suggested adding "protected information" to refer to the scrubbing of metadata in paragraph one of the analysis. The committee discussed subsections of RPC 8.4 concerning misconduct and RPC 4.4(a) regarding inadvertent disclosure. There was concern about the requirement to scrub since it could create a burden on the lawyer to invest in special software. The committee discussed the decision to scrub may also depend on the nature of the information, since not all information may be considered attorney/client privilege or attorney work product. Another concern was how enforcement could be achieved. Other members commented the opinion should only provide guidelines without reference to specific technology because of ongoing technological advancements. The subcommittee expressed some uncertainty about moving away from the technical aspects and shifting the burden from the transmitting attorney which would make the opinion out of sync with other jurisdictions.

*The vote was tabled to the next meeting. The subcommittee will take into the account the committee's suggestions and prepare a revised draft.*

### **2217. Email Security. (Arend/Seidel)**

Anne Seidel reported that they have finished work on drafting a hypothetical on email security.

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

Mark Fucile presented a draft memo regarding a general counsel's managerial responsibility for an in-house, non-WA licensed lawyer, who works outside of his legal department.

The committee discussed limiting the opinion to the licensing issue and the authorized practice of law, although several members pointed out the central issue involved the inquirer's obligation to the out of state lawyer. The committee discussed the ambiguity in the RPCs between "supervisory" and "managerial" responsibility and suggested the opinion clarify the general counsel's managerial responsibility. It was suggested to include the definition of a firm, RPC 1.0(c). The committee favored limiting the opinion to the question from the small PUD, noting that larger organizations with multiple legal departments and staff operate under different chains of command. Doug Ende suggested referencing Comment 7 of RPC 5.5(d)(1) to emphasize that authorized practice means the lawyer admitted in his/her jurisdiction must also be active.

*The subcommittee will revise memo 2219 and present a draft at the next meeting.*

### **2220. Garnishment of Client Trust Account. (Byers/Jensen/Fucile/Swanson)**

Subcommittee chair David Byers presented a draft memo regarding writs of garnishment on client trust accounts, noting that writs fall within RPC 1.15A(g) if a dispute exists between the client and the third party.

*Mr. Byers moved, seconded by the Chair, to adopt memo 2220.*

Discussion followed on the whether the last paragraph dealing with a law firm's debts was necessary, on the issue of confidentiality under RPC 1.6, and the problem of the lawyer's own interest in the funds if work is underway. Several members noted garnishment also affects the client's ability to pay for legal services. The committee withdrew its suggestion to delete the last paragraph, but agreed the opinion should be limited to the issue of RPC 1.15A(g), that it should address the lawyer's own interest in the funds when partial work has been performed, and to correct for RPC typos.

*It was moved to adopt opinion 2220 with the suggested changes. Mr. Byers will revise the memo and forward it to the Chair and staff. The motion passed unanimously.*

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

Bill Jaquette and the subcommittee sought input from the committee on an inquiry concerning ghost writing and plagiarism, explaining that the issues presented were hypothetical and not based on a particular case. The committee discussed concerns about the lack of a specific facts and whether it should answer the inquiry. The subcommittee also had concerns about the numerous variants to each hypothetical which would create a broad and complex opinion. After extended discussion, it was determined there were enough facts in the main hypotheticals to formulate an opinion without addressing the additional variants.

**2222. Flat Fees and Cost Payments. (Trust Account Subcommittee)**

Item deferred to the next meeting.

**2223. Lawyer-Mediator Preparing Legal Documents for Unrepresented Parties.**

The committee received a new inquiry and discussed the limitations on lawyer-mediators and the practice of drafting agreements for parties.

*David Byers moved, seconded by Anne Seidel, to assign inquiry #2223 to a subcommittee. The motion passed unanimously. The Chair appointed Noah Weil as subcommittee chair, with Paul Gill and Dean Swanson as subcommittee members.*

**MATTERS ARISING**

**Confidentiality of Committee Materials.**

*After receiving input from staff, the Chair moved, seconded by Bill Jaquette, to formalize the policy of redacting the inquirer's identity from materials distributed to the committee, except for members assigned to the inquiry, the Chair, and staff. The motion passed 12 to 1.*

**Amendment to Rules of Procedure.**

*The Chair made a motion to propose an amendment to the Rules of Procedure to bar subcommittees from disclosing their opinions before the Committee has had opportunity to hear the opinion.*

*Hearing no second, the Chair withdrew his motion and will defer the issue to the April meeting.*

### **ADJOURNMENT**

The meeting adjourned at 1:24 p.m.

### **NEXT MEETING**

The next meeting will be 10:00 a.m. April 20, 2012, at the offices of the Washington State Bar Association, 1325 4th Avenue, Seattle, Washington.

Dated this 16th day of March, 2012.

Respectfully submitted,

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