



WSBA

RULES OF PROFESSIONAL CONDUCT COMMITTEE MEETING MINUTES

June 22, 2012

Washington State Bar Association Seattle, Washington

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

In attendance were Doug Ende of ODC, Shannon Rieke, ODC law intern, Rita Swanson, WSBA Auditor, Marc Silverman, (BOG Liaison), Jeanne Marie Clavere, WSBA Staff Liaison, and Darlene Neumann, paralegal.

The meeting was called to order at 10:07 p.m.

MINUTES

The minutes of April 20, 2012 were approved.

COMMITTEE RESPONSE LETTERS/ UPDATES

Update on ABA Commission on Ethics 20/20

Doug Ende of ODC gave a brief powerpoint presentation highlighting the recommended proposals from the ABA Commission on Ethics 20/20 which have been submitted to the House of Delegates for consideration at the August meeting. The proposals addressed the transformational effects of technology and globalization in the practice of law.

OLD BUSINESS

Item 2217. Email Security (Arend/Seidel)

Anne Seidel presented the subcommittee's memo on email security, noting that the ABA had also issued an opinion concerning client confidentiality when using email communications.

Stephanie Bloomfield moved, seconded by Chris Rounds, to adopt memo #2217.

Discussion followed on the obligation to advise clients that electronic communications, especially workplace email accounts, may not be secure and shared email accounts (e.g. family email accounts) risks exposure of confidential communications and may result in loss of privilege. It was suggested that the subcommittee incorporate RPC 1.4, RPC 1.6, Comment 17, and also cite the ABA opinion.

The suggestions were accepted as friendly amendments. The subcommittee will prepare a revised memo for the next meeting.

Item 2222. Deposit of Flat Fees and Costs (Ruff/Bloomfield)

Stephanie Bloomfield discussed the subcommittee's memo on flat fees and the exception to the trust account rules under RPC 1.5(f) which allows the lawyer to deposit flat fees (including costs) into the operating account.

Discussion followed on the different approaches to handling costs and RPC 1.8(e) which allows lawyers to advance litigation costs so long as the client remains ultimately liable for such expenses. Additional discussion followed on the ethical practice of depositing funds as the lawyer's property when the costs are known and other scenarios, for example, criminal cases, where costs may be unclear at the outset of representation. The committee suggested more analysis was needed given the impact the opinion may have on the structure of fee agreements.

The item was returned to the subcommittee for additional drafting.

Item 2223. Lawyer-Mediator Preparing Legal Documents for Unrepresented Parties (Weil/Gill/Swanson)

Dean Swanson presented the subcommittee's memo on whether a lawyer-mediator for unrepresented parties may solely memorialize agreements reached by the parties or also draft substantive legal documents affecting the rights of the parties.

Chris Rounds moved, seconded by David Byers, to adopt memo #2223.

Discussion followed on deleting the last paragraph (#3), providing additional guidance to lawyer-mediators when their role shifts to the practice of law, including RPC 1.7 and comments on joint representation, and the interplay between RPC 1.7, 2.4, and GR 24. The committee agreed that lawyer-mediators could draft CR2A agreements, but not on the question of whether lawyer-mediators may draft limited pleadings for parties. The committee discussed the recent Limited License Legal Technician rule and the anticipated effect it may have on access to justice for low income persons.

The subcommittee agreed to draft two separate memos in support of each question for the committee to compare by the next meeting.

Trust Accounts Subcommittee

Mario Cava reported the subcommittee had met earlier and discussed three remaining issues: incorporating the new Model Rules on Client Trust Account Records into Washington's RPCs, restructuring RPC 1.15A(a), and whether there were any other issues the subcommittee needed to address. Mr. Cava noted the Model Rules dealt primarily with electronic funds transfers, while the subcommittee focused on the definition of electronic transfer.

WSBA Auditor Rita Swanson favored revising the current language in the RPC to "electronic" transfer and including a definition in a comment. Members also discussed revising RPC 1.15A(a) to make it less cumbersome and complicated for bar members to understand. Mr. Cava recommended the committee adopt MR 2(c) and suggested they seek input from stakeholders about restructuring the section of RPC 1.15A(a) dealing with LPOs and escrow funds. It was further suggested that the committee discuss the proposed revision with the WSBA General Counsel before seeking outside comment.

Ann Seidel moved and it was seconded, to incorporate MR 2(c) "electronic" transfer in RPC 1.15A, prepare a draft of revised RPC 1.15A(a), and consult the WSBA General Counsel on the revised paragraph. The motion passed unanimously.

NEW BUSINESS

Item 2224. Client Information Request by the Bureau of Consumer Financial Protection (CFPB) (Randall/Rounds/Palmer)

Lorna Randall discussed the subcommittee's determination that the question was similar to another inquiry recently answered by committee and recommended

they decline to opine based on RPC 1.6 and other existing opinions being dispositive.

David Byers moved, seconded by Ms. Randall, to adopt the recommendation of the subcommittee.

Discussion followed on a suggestion to do a general advisory opinion and post it on the website since the committee has received several similar inquiries over the last couple of years concerning the same issue involving different governmental agencies. The committee considered the current inquiry too general in which to frame an opinion or analyze under the exceptions in RPC 1.6.

The Chair moved, seconded by Chris Rounds and Ms. Randall, to adopt a response as follows:

Without a specific description of the confidential materials requested by the CFPB, the Committee must respectfully decline to opine. However, if the inquirer should wish to re-submit the inquiry to include detailed information about the client material being sought by the federal agency, the Committee may be willing to re-consider the question. The Committee suggests that, in the meantime, the inquirer consult Advisory Opinions 183, 194, and 195. The motion passed.

Item 2225. Attorney Withdrawal in Immigration Matters (Byers/Fucile)

David Byers reported the subcommittee had split the inquiry into two parts. The present memo concerned the issue of attorney withdrawal in client representation.

After introducing the memo, Mr. Byers moved, seconded by Bill Jaquette, to adopt memo #2225 with the foreign citations omitted.

Discussion followed on suggestions to delete the third paragraph under *Permissive Withdrawal* and include under *Mandatory Withdrawal* a discussion on the lawyer's obligation to diligence and competent client representation. Concerns were expressed about language that discussed how the court might rule in a motion. Discussion continued on the difficulty of providing adequate explanation to the court while maintaining the duty of client confidentiality under RPC 1.6. It was suggested that the motion could include an invitation for an *in camera* review by the court and the committee discussed the propriety of making such a motion.

Mario Cava made a friendly amendment, seconded by Chris Rounds, to delete the third paragraph (p. 334) under Permissive Withdrawal. The friendly was accepted and the motion passed with one abstention.

Mr. Byers moved, seconded by Mr. Cava, to combine the last paragraph, page 335, with the first paragraph on page 336.

It was suggested the memo include RPC 1.6, Comment 13, in the discussion under question three.

Ann Seidel offered a friendly amendment to replace “arrested” with “detained” in question four. Staff liaison Jeanne Marie Clavere suggested the committee include RPC 1.2 (scope of representation) in the last paragraph. Both the friendly and suggestion were accepted by Mr. Byers.

Due to the numerous comments and amendments to the original motion, Mr. Byers offered to revise the memo with the assistance of the subcommittee, and present a revised draft by the next meeting. No vote was taken on the amended motion.

Bill Jaquette, representing the other subcommittee, indicated a draft memo will be prepared by the next meeting on the issue of attorney withdrawal in dual representation of an employer and employee.

Item 2226. Marketing Legal Services on Groupon (Jensen/Curran)

The item was tabled to the next meeting.

Review of Advisory Opinion 2029 (Curran)

The Chair presented a memo on Advisory Opinion 2029 (2003) and proposed that it be amended after bar counsel recently reviewed the opinion while responding to an ethics question. The opinion stated that the lawyer may report his client to police after being a victim of a crime committed by the client. The opinion relied on the exceptions to RPC 1.6 and established a claim of defense.

The Chair moved, seconded by Noah Weil, to recommend that the opinion be modified with RPC 1.6, comment 23.

Discussion followed on the issue of crime and *scienter*, conflict of interest, the responsibility of the lawyer when victimized by his client, and timing of the conduct.

Mr. Cava moved and it was seconded to withdraw Advisory Opinion 2029 and formulate a new opinion based on a new set of hypothetical facts. The motion passed unanimously.

Item 2227. Lawyer Advertising and Referrals with National Bar Association Referral Service

The committee received a new inquiry. Stephanie Bloomfield and Chris Rounds both volunteered to work on the assignment.

ADJOURNMENT

The meeting adjourned at 2:40 p.m.

NEXT MEETING

The next meeting will be 10:00 a.m. August 24, 2012, at the offices of the Washington State Bar Association, 1325 4th Avenue, Seattle, Washington.

Dated this 22nd day of June, 2012.

Respectfully submitted,

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