

July 13, 2004

Mr. David W. Savage, President Mr. Ronald R. Ward, President-Elect WSBA Board of Governors Washington State Bar Association 2101 Fourth Avenue – Suite 400 Seattle, Washington 98121

Re: Matters left open by Ethics 2003 Committee

Dear President Savage, President-Elect Ward, and Members of the Board of Governors:

As you know, in April 2004 the Ethics 2003 Committee delivered its Final Report and Recommendation to the Board of Governors. During the preceding 14-month process of Committee review of Washington's Rules of Professional Conduct, a number of significant issues came to the Committee's attention that were not addressed because the issues: (1) were beyond the scope of the Committee's charter, (2) could not be adequately addressed within the timeline allotted for the Committee's work, or (3) will need to be taken up once proposed rules are adopted by the Supreme Court. Because completion of the Board's review of the Ethics 2003 Committee's work is imminent, we wish to bring those matters to the Board's attention at this time.

These unresolved Ethics 2003-related issues are (not necessarily in order of importance) as follows:

- Necessary changes to Formal and Informal Ethics Opinions. If the Ethics 2003 recommended revisions to the Rules of Professional Conduct are adopted by the Supreme Court, the scope and magnitude of the changes are such that certain Formal Opinions may no longer be valid or may retain only de minimis value to Washington lawyers. For example, the adoption of proposed Rule 1.17 (Sale of Law Practice) would effectively supersede Formal Opinion No. 192 (Sale of Law Practice). Similar issues will exist with respect to the published and unpublished (but available on the WSBA website) informal opinions. The Board may wish to ask the Rules of Professional Conduct Committee to commence a comprehensive evaluation of the continuing soundness of existing WSBA ethics opinions.
- Protecting client interests in the event of a lawyer's death or disability.
 Comment [5] to Proposed Rule 1.3—which is based on the ABA Model Rule counterpart—states that the duty of diligence "may require" that each sole

practitioner prepare a plan that will prevent neglect of client matters in the event of the practitioner's death or disability. A number of Committee members strongly believed that the risk of harm to clients is so great in these circumstances that such planning should be made mandatory in Rule 1.3 or elsewhere. A majority, however, concluded that the underpinnings and components of such a duty would need to be thoroughly explored before a meaningful and salutary rule could be drafted. The Board may wish to ask the Rules of Professional Conduct Committee and/or the Law Office Management and Practice Committee to investigate this issue, or appoint a task force for that purpose.

- Disclosure of malpractice insurance. A member of the Committee proposed a draft rule designed to require lawyers to disclose to clients whether they carry malpractice insurance. Professional liability-disclosure rules of various types are in place in ten other states (and Oregon requires lawyers to have malpractice insurance). The Committee tabled the matter indefinitely, in part because the issue was then being reviewed by the ABA Standing Committee on Client Protection (chaired by Bob Welden). The ABA House of Delegates will be asked to approve the Standing Committee's proposed Model Court Rule on Insurance Disclosure in August 2004, and we understand that the WSBA Rules of Professional Conduct Committee is prepared to review this issue but has tabled it pending ABA consideration of the proposed Model Rule. The Committee encourages ongoing efforts in this regard.
- Written fee agreements. The ABA Ethics 2000 Commission proposed revising Model Rule 1.5 to require that fee agreements, with certain exceptions, be in writing. The proposal was not adopted by the ABA House of Delegates in 2002. A number of nonmember observers at the Ethics 2003 meetings urged the Committee to adopt a rule requiring written fee agreements. Because there was insufficient support within the Committee to make such a significant change to Washington's rules, and because the Model Rule does not require written agreements, the suggestion was not pursued by the Committee. But the Committee does recognize the significance of the issues at stake and encourages the Board to refer the matter to the Rules of Professional Conduct or appoint a task force to study the fee-agreement issue further.
- Lawyers' responses to financial auditors' requests for information. Comment [6] to proposed Rule 2.3—which is based on the ABA Model Rule counterpart—suggests that when a financial auditor has a question concerning the legal situation of a client, the lawyer's response may be made in accordance with the procedures set forth in the ABA Statement of Policy Regarding Lawyers' Responses to Auditors' Requests for Information, adopted in 1975. Time constraints prevented a comprehensive inquiry into the procedures set forth in the ABA Statement of Policy and their compatibility with Washington law. In light of recent nationwide developments regarding the role of lawyers in corporate governance, the Committee believes that an evaluation of a Washington

practitioner's obligations in such situations is warranted. The Committee encourages the Board to study the matter further through appropriate channels.

Sincerely,

Ellen Conedera Dial, Chair Ethics 2003 Committee

cc: Members, Ethics 2003 Committee Doug Ende