



WSBA

RULES OF PROFESSIONAL CONDUCT COMMITTEE

MEETING MINUTES August 24, 2012

Washington State Bar Association Seattle, Washington

Members Present	10/28/11	12/16/11	3/16/12	4/20/12	6/22/12	8/24/12
Don Curran (C)	P	P	P	P	P	P
Mark Arend	T	P	EA	EA	T	P
Stephanie Bloomfield	T	EA	EA	P	P	P
Karen Boxx	EA	P	P	EA	EA	T
David Byers	P	P	P	P	P	P
Mario Cava	P	T	EA	P	P	P
Mark Fucile	P	T	P	P	P	P
Paul Gill	T	P	P	EA	T	T
William Jaquette	P	P	P	P	P	P
Michelle Jensen	P	P	P	P	EA	P
Kathleen Kindred	T	EA	EA	EA	EA	EA
Sophia Palmer	EA	UA	EA	P	EA	EA
Lorna Randall	P	P	T	P	P	P
Christopher Rounds	T	P	T	T	P	P
Beau Ruff	T	T	T	P	T	T
Anne Seidel	P	P	P	P	P	P
Dean Swanson	P	P	P	EA	P	P
Noah Weil	P	P	P	P	P	P

In Attendance

Marc Silverman (BOG)	EA	P	P	EA	P	P
Jeanne Marie Clavere (SL)	P	P	P	P	P	P
Darlene Neumann, paralegal	P	P	P	P	P	P

Interested Parties

Doug Ende, ODC
Rita Swanson, WSBA Auditor
Thea Jennings, ODC paralegal

P = Present
T = Telephone

V = Video
EA = Excused Absence

UA = Unexcused Absence

If a member has two unexcused absences from Committee meetings during one year, a recommendation that the member be removed from the Committee shall be made to the Board of Governors. (Rule 12, Committee Rules of Procedure)

The meeting was called to order at 10 a.m.

MINUTES

The minutes of June 22, 2012 were approved.

BOG Recommendation to Sunset the RPC Committee

BOG Liaison Marc Silverman answered questions from the committee on whether the RPC Committee might be allowed to continue while the Review Committee studied the restructuring of the committee and what ideas it had for restructuring.

Mr. Silverman responded that no specific ideas have been discussed yet. He noted the concept to restructure the committee began before the license-fee referendum when the BOG had conducted a review of all WSBA committees. A survey of other states found different methods used to develop ethics opinions from courts and legislatively-appointed committees to configurations similar to the RPC Committee. Because of the substantive function of the RPC Committee and the quasi-judicial nature of advisory opinions, Mr. Silverman stated the intention of the Review Committee is to find the best method for Washington. The review is expected to take several months.

(In the latter part of the meeting, after further discussion, Mr. Silverman offered to propose a motion at the September BOG meeting to reconstitute the RPC Committee after it's term expires for the sole purpose of continuing work on written requests from bar members received by September 30, 2012. The re-convened committee may not issue advisory opinions formulated from their own hypothetical facts.)

2222. Deposit of Flat Fees and Costs

Stephanie Bloomfield presented a revised memo which incorporated comments from Doug Ende of ODC and WSBA Auditor, Rita Swanson, to address the distinction between fees and expenses. The draft clarified that flat fees apply to legal services only, while advanced payments to cover costs should be excluded

from the lawyer's portion of the fee. Part of the auditor's concern was the inability to account for costs in flat fee arrangements.

The committee discussed how both views on flat fees may be correct depending on how the fee agreement is drafted. There was some doubt over whether the opinion would solve the problem or effectively clarify the ambiguity in the rule. However, it was noted that the opinion did answer the narrow question. The committee discussed several changes to the draft.

Anne Seidel moved, seconded by Ms. Bloomfield, to adopt the revised draft with the following changes:

- *Revise second sentence of the hypothetical to indicate that \$300 is for government filing fees and educational counseling and \$1,200 is the lawyer's fee.*
- *Add an exception that states the opinion does not address fee agreements where costs are not specifically determined or are variable.*
- *Noah Weil made a friendly amendment, which was accepted, to delete the bracketed language at the end of the opinion, and to include language which directs the lawyer upon receipt of single check or payment from the client, to deposit the entire amount into the trust account and immediately withdraw the lawyer's portion of the funds and keep the remaining funds in the trust account.*

The vote was deferred until the memo is revised with the changes suggested by the committee.

Trust Account Subcommittee

Subcommittee Chair Mario Cava recommended the committee adopt two proposed changes to RPC 1.15A(h)(5) and (a)(2). The committee discussed adopting comment 10 to RPC 1.15A(h)(5) from the Model Rules, but set aside the idea due to insufficient time to revise the comment.

It was moved, seconded by the committee, to adopt a revision to RPC 1.15A(h)(5) to delete "bank" transfer and replace with "electronic" transfer. The motion passed unanimously.

The committee discussed a revision to RPC 1.15A(a)(2) drafted by Randy Beitel of ODC which moved the LPO language to new subsection (j) and streamlined the language to make it more understandable. Members briefly discussed placement of the LPO rule, i.e., remove it from the RPC and put into a different rule.

It was moved, seconded by David Byers, to delete and move RPC 1.15A(a)(2) starting with the sentence, “Additionally...” to new subsection (j). Motion carried, with 1 opposed.

It was moved, seconded by Chris Rounds, to adopt subsection (j) drafted by Randy Beitel. A friendly amendment was made and accepted by the committee, to adopt the Beitel language subject to approval by the LPO group. The motion passed unanimously.

Mr. Cava moved, seconded by Anne Seidel, to adopt amendments to Comments 16 and 17 consistent with new subsection (j). The motion carried, with one abstention.

Mr. Cava introduced a suggestion by Ms. Swanson to revise RPC 1.15B(a)(8) to close a loophole and require a lawyer to maintain bank reconciliations.

Mr. Cava moved, seconded by Ms. Seidel, to amend RPC 1.15B(a)(8) as “copies of all trust account bank and client ledger reconciliations”. The motion carried with two abstentions.

2217. Email Security

Anne Seidel discussed changes to the draft, which included more authority to the RPCs and reference to the ABA opinion. Discussion followed on concerns the opinion may set a precedent to affirmatively advise clients whenever lawyers observe something potentially adverse to clients. The drafters attempted to limit the obligation by stating that it applies only if there is a significant risk. A suggestion was made to insert language similar to the ABA opinion that discusses when a lawyer’s obligation is triggered.

Ms. Seidel moved, seconded by Stephanie Bloomfield, to adopt memo #2217 with the following revisions.

- *A friendly amendment was made and accepted to incorporate language similar to the one in ABA Opinion 11-459, page 3, third paragraph, second sentence which discussed when a lawyer’s obligation arises.*
- *A friendly amendment was made and accepted to insert “See” before the ABA reference in the opinion and insert a colon after “Conclusion”.*

The draft was revised during the meeting and then voted on. The motion carried, with 3 opposed.

2223. Lawyer Mediator Preparing Legal Documents for Unrepresented Parties

In accord with the committee's request from the last meeting, the subcommittee drafted two opposing opinions on lawyer-mediators preparing legal documents for unrepresented parties in the context of family law. One opinion prohibited attorney-mediators from drafting pleadings, but distinguished between CR2A stipulated agreements and pleadings. The other opinion allowed the preparation of legal documents by attorney-mediators so long as the actions did not stray into the practice of law.

Discussion followed on both opinions. The committee acknowledged that it was a complex issue affecting the family law area and an access to justice issue, but given a strict interpretation of RPC 1.7, it concluded that the practice of allowing lawyer-mediators to draft agreements and adversarial pleadings would place the lawyer-mediator in a position of potential conflict.

Mario Cava moved, seconded by Noah Weil, to adopt the memo prohibiting lawyer-mediators from drafting legal documents for unrepresented parties. The motion carried with two abstentions.

2225. Attorney Withdrawal in Immigration Matters

David Byers reviewed changes made to the draft, then moved, seconded by Chris Rounds, to adopt memo #2225.

Discussion followed on Question 4 regarding the issue of arrested/detained when the action is related or unrelated to the underlying matter. In addition, the committee discussed the lawyer's obligation to continue to represent the client in the interim pending the withdrawal motion and the court's action. A suggestion was also made to revise Question 2 to reflect language in the RPC 1.16(b)(5) which refers to a "reasonable warning."

Mr. Byers revised the memo during the course of the meeting and presented the committee with an amended draft.

Mr. Byers moved, seconded by Stephanie Bloomfield, to adopt revised memo #2225 with the following changes:

- *Under question 2, page 3, delete "repeated demands" and replace with "reasonable warning" language used in RPC 1.16(b)(5).*
- *Under question 4, third paragraph, delete "pending motion" and replace with "underlying action"; delete "remain counsel of record in the pending action" and replace with "continue to represent the client".*

The motion carried, with one abstention.

2226. Marketing Legal Services on Social Media Discount Websites

Michelle Jensen discussed research comparing how other states dealt with the issue of social media coupon advertisements such as Groupon™. The question turned on whether these companies acted as referral services. The memo did not characterize Groupon™ and similar social media companies as referral services, but rather as advertising companies and flagged the potential ethical issues involved.

Michelle Jensen moved to adopt memo #2226 with a minor correction to insert “by” in the third paragraph, last sentence.

Discussion followed on the reasonable cost of advertising, the percentage of fee paid to the coupon issuer, and whether it was considered fee-splitting. Members questioned how fees are shared between the companies and consumers, and what portion the attorney receives. The opinion did not delve into those specifics and only advised the attorney to carefully evaluate the business contract with the advertising company. The committee also considered whether the issue was important enough to publish an opinion, with the general consensus that it lacked sufficient context for an opinion at this time.

It was moved, seconded by the committee, to table the motion indefinitely. The motion carried, with three opposed.

2227. Lawyer Advertising and Referrals with a National Bar Association

Stephanie Bloomfield presented a memo on lawyer advertising and referrals with a national bar association, concluding that the arrangement amounted to an impermissible fee-sharing arrangement. In addition, they found the referring organization did not fall within the limited exceptions which allow fee-sharing with nonprofit referral services. The memo also declined to opine on the question of a duly authorized lawyer referral service as it was beyond the purview of the committee.

Discussion followed on Model Rule 5.4, which did not apply in this case, and why the proposed fee percentage by the national bar association did not qualify as a “usual charge” of a nonprofit lawyer referral service.

David Byers moved, seconded by Noah Weil, to adopt memo #2227. A friendly amendment was made and accepted to add subsection (b)(2) to references citing RPC 7.2 on pages 1 and 2. The motion passed unanimously.

2228. Dual Representation in Employment Immigration Cases

Bill Jaquette introduced a memo in response to the second part of a multi-part inquiry. (The first part was addressed by #2225.) Under the joint representation hypothetical involving an employer and employee, the subcommittee found that the lawyer faced an unresolvable conflict between client confidences (RPC 1.6)

and the duty to communicate (RPC 1.4) decisions or circumstances to the client in a matter that affects him/her. Under this dilemma, the RPCs provided no guidance and therefore, the subcommittee recommended the committee decline to opine.

Members discussed attorney withdrawal under the circumstances, but determined the lawyer still owes an obligation to the employee client because of the immigration context. Discussion followed on Comments 30 and 31 of RPC 1.7. Based on the facts as presented, the hypothetical also provided no indication as to whether there had been any understanding at the outset regarding potential conflicts in a joint representation arrangement.

Anne Seidel moved, seconded by David Byers, to table memo #2228. The motion carried, with 1 opposed and 1 abstention.

2229. Reporting Client to Authorities and Client Confidentiality

The Chair presented a memo drafted with the assistance of Michelle Jensen. The question was whether a lawyer may ethically report his client to authorities when he learns of the client's involvement in an on-going financial scam.

It was moved and seconded to adopt memo #2229.

Discussion followed on the obligation to disclose and the amount of disclosure may be more restricted if the crime is continual and not future crime. It was suggested the memo include RPC 1.16(a)(1) (withdrawal) since the attorney/client relationship would likely to be destroyed after the lawyer volunteers the information to authorities.

A friendly amendment was made and accepted to incorporate RPC 1.16(a)(1) regarding attorney withdrawal. The motion carried with one abstention.

2230. Contingency Fee Agreements in Probate Matters

The Chair presented a memo on appropriate fee arrangements in a probate matter, specifically emphasizing that fees must be reasonable since any ambiguity in the agreement would likely be resolved against the lawyer.

Discussion followed on suggestions to include more explanation in the conclusion, to clarify that the contingency fee applies to the amount above what the client is already entitled, and other minor language modifications.

The Chair moved, seconded by David Byers and Chris Rounds, to adopt memo #2230. Mr. Byers made a friendly amendment to expand the memo's conclusion. Mr. Rounds made a friendly amendment, seconded by Anne Seidel, to delete "x initials" in the discussion which quoted the fee agreement. She also suggested

deleting “not honest” in the first paragraph and replace with “mishandling the estate”.

The motion carried. The Chair will make the necessary changes and circulate the revised memo for comment and electronic vote.

2231. Advertising by Law Firm with No Physical Address

David Byers discussed the subcommittee’s research into the legislative history of “office address”, including the ABA Model Rules. The analysis implied there was a belief in the importance of disclosing the physical location of lawyers because of the increased mobility of law practices and lawyers.

Mr. Byers moved, seconded by Stephanie Bloomfield, to adopt memo #2231.

Discussion ensued on the harm to solo practitioners and others with low-cost law practices if a strict interpretation of office address was adopted. Further discussion followed on the different standards in other rules, e.g., APR 13 references “mailing address”, and whether street addresses are considered relevant today. Finally, it was noted that “office address” is not defined in the RPCs. Another concern was that it might be harder to serve attorneys within certain time constraints if no physical office exists. The committee discussed whether the time had come for a rule change or amendment.

The question was called. The motion failed: 4-8-1 (abstain).

The Chair noted that any member may move to reconsider the committee’s action and propose a new memo, which would then be circulated for comment and vote. Absent that action, the committee’s response would be decline to opine.

Chair’s Closing Remarks

The Chair stated that it was a pleasure to work with the members and very much appreciated their time and commitment to volunteer on the Committee. The members, in turn, thanked the Chair and expressed praise for his leadership of the Committee.

The meeting adjourned at 3:10 p.m.

Dated this 24th day of August, 2012.

Respectfully submitted,

Jeanne Marie Clavere, WSBA Bar 18495
Secretary to the Committee