



# WSBA

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

**December 16, 2011**

**Washington State Bar Association  
Seattle, Washington**

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

In attendance were Marc Silverman (BOG Liaison), Jeanne Marie Clavere, (Staff Liaison), Jean McElroy, WSBA Interim General Counsel, Doug Ende, WSBA Chief Disciplinary Counsel, Rita Swanson, WSBA Auditor, and Darlene Neumann, paralegal.

Meeting called to order 10 a.m.

### **MINUTES**

The minutes of October 28, 2011 were approved.

### **COMMITTEE RESPONSE LETTERS/ UPDATES**

#### **Confidentiality of Committee Materials.**

The committee discussed the confidentiality of committee materials and the concern about distributing materials to a representative of ODC. While ODC has no official capacity on the RPC Committee, they regularly attend the meetings, keep abreast of the committee's work, and serve as a resource to the committee. Presently, the committee's Rules of Procedure impose a duty of confidentiality only on committee members and liaisons. Interim General Counsel Jean McElroy discussed the WSBA Bylaws on records disclosure and the exemption

for the identity of inquirers or a party to the inquiry. If a person were to make a request for the committee's records pertaining to an inquiry, under the Bylaws the records would need to be redacted.

The committee discussed appointing ODC as an "ex-officio", non-voting member, amending the committee rules, redacting the names of inquirers at the front end of the process, or using a disclaimer to notify inquirers that an ODC representative receives a copy of the inquiry and may be present at committee meetings. Committee members expressed reservations about the effect the issue would have on the expectations of bar members seeking advice from the committee. Doug Ende of ODC stated that they have no interest in monitoring the identities of inquirers, but acknowledged the issue is one of appearance and favored the idea of receiving redacted materials.

Discussion ensued on the need to disclose the identities of inquirers beyond those who receive the inquiry and are directed to work on it. The committee reached a consensus that identifying information is not relevant and serves no purpose in the committee's deliberations.

*Chris Rounds moved, seconded by Michelle Jensen, to redact identifying information from ethics advisory opinions in the committee meeting materials distributed to members at large and ODC. The Chair clarified that this would be a trial period and the committee will revisit the matter at the next meeting. Motion passed 11 to 3.*

#### **Inquiry #2209.**

*The item was deferred until next meeting.*

#### **Inquiry #2212.**

The Chair reported lawyers involved with the inquiry have declined to pursue the matter, and therefore the inquiry is officially dropped.

### **OLD BUSINESS**

#### **Item 2213. Lawyer's Obligation When Instructed Not to Reimburse PIP Insurer (Curran/Byers/Jensen/Fucile, Swanson)**

The committee reviewed a draft of Advisory Opinion 2213 which is being reconsidered after new, material information was submitted by the inquirer. The draft included suggested changes by subcommittee member David Byers.

Mr. Byers noted that paragraph 16 may be contrary to Advisory Opinion 2166 (2007), which states that there is no "bona fide" or "reasonable basis" modifier for

the term “dispute”. The subcommittee found other jurisdictions had opined the claim must be well-founded to trigger an ethical duty by the lawyer. There was discussion on overruling Advisory Opinion 2166 or deleting part of paragraph 16.

Further discussion followed on concern that a lawyer may be obligated to evaluate and determine the validity of claims and in the process, become exposed to potential liability. Washington lawyers can avoid the situation by interpleading funds. However, practitioners of personal injury commented that it would be impractical to interplead all funds where there are competing claims since PI matters are generally not resolved very quickly. Similar concerns were raised about paragraph 19 and the difficulty for the lawyer to determine whether the client held a good faith basis to dispute a third party interest or the validity of liens.

*The Chair moved, seconded by Anne Seidel, to adopt the memo with changes suggested by Mr. Byers, delete paragraphs 19 and 15, strike “secured” in paragraph 18, delete the first 2 sentences in paragraph 16 (but retain the last sentence in quotes starting with “knows”), and delete paragraphs 21 and 22.*

Mr. Byers offered to revise and shorten the memo, given the comments by members.

*The Chair withdrew his motion. Mr. Byers moved to revise the memo, using the same facts (in paragraphs 1-5), shorten the analysis and conclusion to include language to the effect that, “communications from insurance companies constituting a claim triggers the duty under RPC 1.15A(g).” The motion was seconded by the Chair.*

The Chair suggested the committee adopt the memo, have Mr. Byers present a revised draft to the subcommittee and then circulate to the full committee for vote by email, according to Rule 6, Rules of Procedure.

Doug Ende commented that paragraph 16 is at the heart of the analysis by attempting to extend the scope of what constitutes a “qualified interest” that would trigger a lawyer’s duty. Rather than removing the paragraph, he suggested it might be helpful to be more specific. He also recommended the committee review Advisory Opinion 2166 and other similar opinions to make them more consistent with the committee’s opinion.

*The Chair restated the motion, seconded by Noah Weil. The memo will be condensed by Mr. Byers, submitted to the subcommittee and then circulated to the full committee for consideration and electronic vote. The motion passed 14-1.*

### **Electronic Trust Account Subcommittee**

## **Inquiry 2210. Use of Electronic Debit Cards**

Subcommittee chair Mario Cava, via phone, presented a memo regarding debit card transactions in connection with IOLTA accounts. The memo concluded that a debit card used only for purchase transactions (debit charge to a named payee) and not for cash withdrawals would be satisfactory under RPC 1.15A. The subcommittee noted that a long term approach would be to amend the trust account rule to define “bank transfer”. For now the memo would assist the membership by clarifying the use of debit card transactions. Mr. Cava also noted the ABA Model Rule for Client Trust Account Records uses the language, “electronic funds transfer” to describe to electronic deposits and withdrawals. Doug Ende discussed his concerns and suggested the committee add language to warn lawyers of the potential risks of using debit cards for trust accounts.

*Mr. Cava moved, seconded by David Byers, to adopt the draft with the suggestions by Mr. Ende to include a warning on using the debit card for transactions that are not approved by the client, are not on the client’s behalf, and without ensuring that sufficient client funds exist before initiating the transaction.*

Discussion followed on revisions to the draft, semantic differences between “purchase” and “transaction”, and including technical information on how debit cards operate in an IOLTA. Chris Rounds commented they should avoid language that would create a special obligation on lawyers to request client approval each time funds need to be withdrawn.

Mr. Cava withdrew his motion. It was agreed to send the draft back to the subcommittee for further revision.

*The Chair directed the subcommittee to revise the draft opinion and to circulate it via email to the committee for comment and electronic vote via email.*

## **Inquiry 2214. Credit Card Fees Charged to Client**

WSBA Auditor Rita Swanson distributed copies of a revised memo concerning credit card fees charged to a client. Ms. Swanson and Doug Ende of ODC, collaborated with the Trust Account Subcommittee in drafting the memo. She stated the proposed revisions were minor and both briefly discussed the basis of the changes. The TA subcommittee had yet to review the revised draft prior to its presentation to the full committee.

*Chris Rounds moved, seconded by the Chair, to vote by email after circulating the revised memo (containing Swanson edits) to all committee members for comment electronically.*

*David Byers offered a friendly amendment, accepted by Mr. Rounds, to adopt the memo, subject to the subcommittee's approval, and circulate the final draft to the full committee for consideration. The motion passed unanimously.*

## **NEW BUSINESS**

### **ABA Commission on Ethics 20/20**

Doug Ende discussed the ABA Commission on Ethics 20/20 preliminary draft proposals to the Model Rules. There are 10 proposals and it continues to be an on-going process. Mr. Ende stated the RPC Committee may wish to provide its opinion or guidance on the proposals to the BOG and the WSBA ABA delegation before the August meeting of the ABA House of Delegates next year.

- **Admission by Motion**  
Subcommittee chair Karen Boxx discussed the ABA proposal to amend the admission by motion rule to allow lawyers to qualify for admission after 3 years of 7 years of active practice instead of 5. She reported that Washington uses a reciprocity rule with no specific number of years for admission and tends to follow the policy of other jurisdictions. Thus, the ABA proposal is not relevant for Washington unless there is a desire to take a fresh look at Washington's reciprocity process. Doug Ende informed the committee of a WSBA task force and other groups who are currently reviewing the APRs, and the possibility that the RPC Committee may not need to address the issue.
- **Multi-jurisdictional Practice**  
Subcommittee chair David Byers discussed the ABA proposal to amend MR 5.5 that would allow lawyers to practice in another jurisdiction and concurrently seek admission if they establish a "systematic and continuous presence" in the jurisdiction by advertising in the state electronically or through other forms. The rule would set up a process and requirements by which temporary practice is allowed. The subcommittee discussed numerous concerns about the question of advertising not addressed by the rule's inherent ambiguity and the characteristics of "association with local counsel" requirement during the temporary period.
- **Duty of Confidentiality**  
Subcommittee chair Michelle Jensen discussed the ABA proposal to allow limited disclosure of client information (client names) for the purpose of doing conflicts checks when lawyers are changing firms. The subcommittee thought this was a good rule and reflects current practice. Ms. Jensen stated there are no Washington ethics opinions on the issue and Washington case law would be consistent with ABA revisions which hold that client identity has no attorney/client privilege unless the name

reveals client communication. Anne Seidel mentioned that RPC 1.17 addresses the issue somewhat in Comment 7.

- **Conflict of Interest**  
Subcommittee chair Bill Jaquette discussed the ABA proposal to add a comment to MR 1.7 that would allow a client and lawyer to select which particular jurisdiction to be governed by in a matter as a reasonable approach to handle the problems arising in matters involving multiple jurisdictions. The goal is to control choice of law in conflict of interest issues. Mr. Jaquette commented that Washington did not adopt Comment 22 (waiver of future conflicts) and the question is whether Washington would even want to adopt new Comment 23.

## **OTHER**

The Chair drew attention to several technology issues and inquired of the committee whether it would be beneficial to study the issues in more depth to provide guidance to the membership.

### **Cloud Computing**

Staff Liaison Jeanne Marie Clavere reported on a Oregon ethics opinion on cloud computing. Members agreed that it was an important issue and other states have already issued opinions on the subject.

*Chris Rounds moved that the committee draft an opinion on cloud computing. The Chair appointed a subcommittee chaired by Karen Boxx, Chris Rounds, Paul Gill, and Noah Weil.*

### **Metadata**

Staff Liaison Jeanne Marie Clavere also reported on an Oregon ethics opinion on metadata. Members discussed the issue and its significance in civil discovery.

*The Chair appointed a subcommittee chaired by Michelle Jensen and Lorna Randall to draft an opinion regarding metadata.*

### **Email Security**

The Chair discussed a November 2011 ABA Journal article about a lawyer's obligation to prevent email from getting into the wrong hands.

*The Chair appointed a subcommittee chaired by Mark Arend and Anne Seidel to draft an opinion on email security.*

### **WSBA Access to Justice (ATJ)**

The Chair announced ATJ is soliciting workshop proposals for a conference in June on the impact of decreased funding for the legal system under the current economic environment, and noted that any member may submit a proposal.

### **ADJOURNMENT**

The meeting adjourned at 1:37 p.m.

The next meeting will be 10:00 a.m. March 16, 2012, at the offices of the Washington State Bar Association, 1325 4th Avenue, Seattle, Washington.

Dated this 16th day of December, 2011.

Respectfully submitted,

Jeanne Marie Clavere, WSBA Bar 18495  
Secretary to the Committee