

Supreme Court Adopts “Ethics 2003” Amendments to Rules of Professional Conduct

In the March 2005 Bar News,¹ we reported that the Washington State Supreme Court had published 185 pages of proposed changes to Washington’s Rules of Professional Conduct (RPCs).² After a public comment period that expired on April 29, 2005, the Supreme Court Rules Committee began the ponderous task of scrutinizing those proposed changes, evaluating the comments received, and crafting the amendments that the Court ultimately adopted en banc (by a 7-2 vote) on July 10, 2006. The effective date of these amendments is September 1, 2006. A complete set of the amended rules is available on the Administrative Office of the Courts website:

http://www.courts.wa.gov/court_rules/?fa=court_rules.adopted.³

WHAT DO I NEED TO KNOW?

Many of the RPCs remain essentially the same. For example, RPC 1.1 (Competence), is identical to the rule originally adopted in 1985. In other cases, the text of a rule has been reorganized or clarified, but there is no substantive change to a lawyer’s ethical obligations. For example, RPC 1.7 (Conflict of Interest) has been streamlined and simplified, but its principles and the manner in which it applies will remain the same. In other instances, the amended rules do alter the nature of an ethical duty or impose new obligations. And in a few areas, entirely new rules have been adopted.

One change that will be unmistakable to any lawyer reviewing the amended rules is the inclusion throughout of official comments. These comments are based on the comments to the Model Rules (and the numbering of the comments in Washington’s RPCs corresponds to the numbering of the Model Rule comments). The comments are intended to explain and illustrate the meaning and purpose of the rules. As indicated in paragraph [21] of the “Preamble and Scope,” though the comments are intended as guides to interpretation, the text of each rule is authoritative. In situations where Washington’s version of a rule is significantly different from the Model Rule or subject to an established interpretation in our state, additional “Washington Comments” are appended to the official comments to provide customized guidance and information.

Owing to the scope and magnitude of the revisions to the RPCs, it would be prudent for every Washington lawyer to devote adequate time to the study of the amended rules and the comments. To whet your appetite for the task, this month’s column features a sampling of items of interest and significance in the new rules. As you review the amended RPCs, watch for the following:

¹ See “Ethics and the Law: Supreme Court Publishes Proposed Amendments to Rules of Professional Conduct for Public Comment,” Washington State Bar News (March 2005), at <http://www.wsba.org/media/publications/barnews/2005/mar-05-supreme.htm>.

² These proposed amendments were published in the January 18, 2005 Washington Reports official advance sheets. See 153 Wn.2d No. 1.

³ A link is also available on the WSBA homepage, www.wsba.org, as well as on the Ethics 2003 Committee web page on the WSBA website: www.wsba.org/lawyers/groups/ethics2003/default.htm.

- Inclusion of new exceptions to RPC 1.6 (Confidentiality of Information), including an exception (identical to its Model Rule counterpart) that permits disclosure “to prevent, mitigate, or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client’s commission of a crime or fraud in furtherance of which the client has used or is using the lawyer’s services.” RPC 1.6(b)(3).
- A new mandatory duty to disclose otherwise confidential information of a client “to prevent reasonably certain death or substantial bodily injury.” RPC 1.6(b)(1). This revision was made by the Court following the public comment period. By contrast, the counterpart Model Rule designates this as a permissive rather than a mandatory disclosure. The *Ethics and the Law* column in this issue of the Bar News addresses the changes to RPC 1.6 in more detail.
- A substantial number of clarifications to the rules governing conflicts of interest. See RPC 1.7, 1.8, 1.9, 1.10, 1.11 & 1.12. Note further that the former rule governing “Intermediaries,” RPC 2.2, has been deleted. Representation of multiple clients in the same matter is now governed exclusively by RPC 1.7, with additional guidance provided by Comments [29] – [33] of that rule.
- Advanced costs and expenses of litigation may be contingent on the outcome of a matter. RPC 1.8(e)(1). This is consistent with the Model Rule but represents a conspicuous change from Washington’s former rule, which required that a client remain ultimately liable for advanced court costs and litigation expenses. Though the WSBA Board of Governors recommended retaining the existing rule, the Supreme Court opted to conform this provision to the Model Rule. In addition, a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client. RPC 1.8(e)(2).
- Adoption of RPC 1.13 (Organization as Client), clarifying the lawyer’s role when representing an organization, and defining the lawyer’s obligation upon learning that an officer, employee, or other constituent is violating or intends to violate the law. Previously, the omission of Rule 1.13 was a substantial nonconformity between Washington’s RPCs and the Model Rules.
- Clarifications and amendments to the rule governing trust accounts, and addition of a new rule governing trust-account recordkeeping. See RPC 1.15A & 1.15B. Unlike the current trust account rule (RPC 1.14), RPC 1.15 expressly applies to both the property of clients and the property of third persons in the lawyer’s possession. It specifies that only a lawyer admitted to practice may be an authorized signatory on the account. And it regulates the withdrawal and disbursement of trust account funds and the reconciliation of records with greater specificity.

- New RPC 1.15B, governing trust account recordkeeping, specifies the types of records that a lawyer must maintain and requires that trust account records must be retained for at least seven years after the events they record.
- Addition of new RPC 1.17, governing the sale of a law practice. Unlike the Model Rule counterpart, Washington's version does not require that a seller of a law practice cease to engage in the private practice of law or in the area of practice that has been sold.
- Addition of new RPC 1.18, governing a lawyer's duties to a prospective client. A prospective client is defined by the rule as "[a] person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter." A lawyer is under a duty to maintain the confidentiality of information learned in a consultation with a prospective client. RPC 1.18(b). Additionally, a lawyer may, unless specified precautions were taken, be disqualified from a representation of another person if the lawyer received significantly harmful information from a prospective client. RPC 1.18(c). Because the rule provides for screening of an individually disqualified lawyer, such disqualification will not in all cases be imputed to an entire firm. *See* RPC 1.18(d)(2).
- Addition of new RPC 2.4, governing a lawyer's duties when serving as a third-party neutral. The rule requires a lawyer serving as a third-party neutral, such as a mediator, arbitrator, or conciliator, to explain the lawyer's role in the matter to unrepresented parties.
- Retention of existing RPC 3.3 (Candor to the Tribunal), which governs a lawyer's duty of truthfulness to a court or other tribunal. The Board of Governors had recommended adoption of the Model Rule, requiring a lawyer who gains actual knowledge of an offer of false material evidence by a client to take remedial measures, up to and including disclosure of otherwise confidential information to the tribunal. The Supreme Court opted to retain Washington's variant approach, which prohibits any disclosure to the tribunal that is not permitted by RPC 1.6.
- Addition of a new provision, identical to the Model Rule, governing the circumstances in which a lawyer is prohibited from communicating with jurors after discharge of the jury. *See* RPC 3.5(c).
- A change in the scope of the disqualification when a lawyer is likely to be a necessary witness. Washington's existing RPC 3.7 imputes such a disqualification to other lawyers in the same firm. The amended rule, which is identical to the counterpart Model Rule, dispenses with such imputed disqualification, unless there is an actual conflict of interest under RPC 1.7 or 1.9. *See* RPC 3.7(b).
- Addition of a new provision in RPC 3.8 (Special Responsibilities of a Prosecutor), which prohibits a prosecutor from subpoenaing a lawyer in a criminal proceeding

to present evidence about a past or present client, except in limited circumstances. *See* RPC 3.8(e). This is identical to the Model Rule.

- Addition of a new provision governing a lawyer’s duty to notify the sender upon receipt of a document that the lawyer knows or reasonably should know was inadvertently sent. *See* RPC 4.4(b). This is identical to the Model Rule.
- Significant revisions to RPC 5.5 relating to the multijurisdictional practice of law. Under amended RPC 5.5, in defined circumstances a lawyer admitted only in another state may practice law in Washington on a temporary basis in connection with a matter arising in another jurisdiction, as long as such a lawyer does not establish a continuous and systematic presence in Washington. Such a lawyer will, however, be subject to the disciplinary jurisdiction of Washington under amended RPC 8.5 (Disciplinary Authority; Choice of Law). Note that under RPC 5.5(d)(1), a lawyer providing legal services to the lawyer’s employer or its organizational affiliates (for example, an in-house corporate lawyer) may provide those legal services in Washington without being admitted to practice here, as long as the services are not those for which pro hac vice admission is required. Because of the adoption of this provision, it is no longer necessary for most “house counsel” to be specially admitted to practice in Washington. The existing special admission rule for “house counsel,” APR 8(f), has been amended to apply only to “foreign house counsel,” i.e., a lawyer admitted to practice law in other than a United States jurisdiction.
- Retention of the existing discretionary rule on reporting the professional misconduct of another lawyer or a judge. *See* Rule 8.3. Though the Board of Governors had recommended adoption of the Model Rule, which requires a lawyer to report serious professional misconduct to the appropriate authority, the Supreme Court opted to retain Washington’s longstanding approach, which encourages but does not require such reporting.

HOW DID WE GET HERE?

The process leading to these changes began in late 2002, when the WSBA Board of Governors established the Special Committee for the Evaluation of the Rules of Professional Conduct (Ethics 2003 Committee) to review Washington’s RPCs in light of substantial changes made by the ABA to the Model Rules of Professional Conduct.

The Ethics 2003 Committee, chaired by Ellen Conedera Dial, conducted an extensive process of review and analysis over a 13-month period and issued a report with its recommendations in March 2004.⁴ Recognizing the importance of consistency and uniformity in rules regulating lawyer conduct, the Ethics 2003 Committee recommended adoption of the Model Rules, together with associated commentary, unless there was a compelling and articulable reason for deviation. In general, the content of the

⁴ A copy of the Committee’s report, along with a detailed discussion of the various recommended changes, is available on the Ethics 2003 web page: www.wsba.org/lawyers/groups/ethics2003/default.htm.

amendments suggested by the Ethics 2003 Committee substantially paralleled the ABA Model Rules in form and substance. In some instances the Committee recommended that existing RPC provisions be retained or that new Washington-specific provisions be adopted. The great majority of the Committee's recommendations were approved and adopted by the Board of Governors.⁵

In October 2004, the WSBA submitted the recommendation as a whole to the Washington State Supreme Court as a set of suggested amendments under GR 9. After publication as proposed amendments in January 2005 and a public comment period, the Court adopted most of the Ethics 2003 amendments as proposed, though the Court did make a number of significant changes.

WHAT SHOULD I DO NEXT?

As Washington lawyers begin to adapt to the revised rules, on the horizon are a number of CLE programs designed to assist practitioners in making the transition. On September 18, 2006, WSBA-CLE will present The New Rules of Professional Conduct seminar at the Red Lion Hotel in Seattle. The seminar, co-chaired by Gail McMonagle, professional standards counsel, Perkins Coie LLP and vice chair, WSBA Disciplinary Board, and Chris Sutton, WSBA professional responsibility counsel, will highlight the significant changes to the rules and emerging ethics issues created by the RPC amendments. This half-day seminar will be provided in the morning and repeated in the afternoon; it will also be videotaped and available later to be viewed online. In addition, all WSBA-CLE seminars this fall that have an ethics session will emphasize the relevant RPC changes. On December 13 and 14, the fourth annual WSBA Conference on the Law of Lawyering, co-chaired by Mark Johnson and J. Donald Curran, will include sessions focusing on the practical effects of the amended rules, including the impact of the Supreme Court's decision to adopt official comments. Watch for brochures and information about both programs on the WSBA-CLE website.⁶

The Law Office Management Assistance Program (LOMAP) will be featuring sessions on important changes to the RPCs in its 2006 Traveling Seminar ("LOMAP & Ethics . . . On the Road"), held at multiple locations throughout the state. And on September 22, LOMAP Advisor Pete Roberts will be presenting a session titled "Fraud in the Law Office & Update on (New) RPC 1.15A&B for Trust Accounts" at the 12th annual Tacoma Pierce-County Bar Association Convention at the Semiahmoo Resort in Blaine. More information about these events and other LOMAP programs is available on the WSBA website,⁷ or call the LOMAP Coordinator at 206-733-5914.

⁵ Instances in which the Board revised the Committee's recommendations are noted in a supplement to the Ethics 2003 Committee Report, also available on the WSBA website. *See* Board of Governors' Revisions to Ethics 2003 Committee Recommendations, at

<http://www.wsba.org/lawyers/groups/ethics2003/boardofgovernorsrevisionswithcomments.doc>.

⁶ *See* <http://www.wsba.org/cle/default.htm>.

⁷ *See* <http://www.wsba.org/lawyers/services/lomap.htm>.

Those interested in the implications of the changes to the trust account rules may want to attend a September 8 program sponsored by the Spokane County Bar Association titled "Running a Law Practice 1: Tips and Tools." For more info, call SCBA at 509-477-6032. A program sponsored by the Solo/Small Firms Law Section of the King County Bar Association is planned for September 15. For more information about this session, call KCBA at 206-267-7100. Also watch for the *Ask the Auditor* column in the October 2006 *Bar News*, in which the WSBA audit manager will discuss the changes to the trust account rules.

One of the purposes of the Ethics 2003 amendments was to clarify the rules of ethics governing the conduct of Washington lawyers. But ethical dilemmas will inevitably arise. The WSBA Ethics Line is available help members analyze ethical issues, apply the proper rules, and make an ethically sound decision. Professional Responsibility Counsel Christopher Sutton and Douglas Ende were both involved in the process that led to the Ethics 2003 revisions. You can speak to them directly on the Ethics Line at 800-945-9722, ext. 8284, or 206-727-8284.