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**Comments on Proposed Rule of Professional Conduct 1.6
Submitted by
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As academics who have taught courses in Professional Responsibility we respectfully recommend that the text of ABA Model Rule 1.6(b)(3) (the "rectification rule") be included in the version of Rule 1.6 that is adopted in Washington. As elaborated below, we also respectfully recommend that Rule 1.6(b)(7) (currently 1.6(c)), which allows disclosure of breaches of fiduciary responsibility by court appointed fiduciaries, be expanded to apply to all fiduciaries.

Rule 1.6(b)(3). The text of Rule 1.6(b)(3) that we believe should be restored to Rule 1.6 allows a lawyer to disclose information in order 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 the lawyer's services."

In this connection one should note that a rule similar to that of Rule 1.6(b)(3) was included in the Kutak Commission's final draft of the Model Rules and is in effect in approximately one-third of the states. The rule was applied in *A. v. B. v. Hill Wallack, 726 A.2d 924 (N.J. 1999)*, to allow a law firm that had assisted a husband and wife in estate planning, to disclose to the wife that the firm had learned that the husband was the defendant in a paternity action. The theory was that disclosure was necessary to protect the wife from the husband's fraud in concealing the paternity claim from his wife when their wills were prepared and executed.

Adoption of the rectification rule is supported by the important policy considerations enumerated below. Conversely, omission of the rule is inconsistent with those policies. In brief, adoption of the rectification rule:

1. Was recommended by the ABA Task Force on Corporate Responsibility (2003) ("Cheek Commission Report") that was created to investigate the role of lawyers in the Enron scandal and to recommend changes that would prevent such events in the future.

Consistently, the Securities and Exchange Commission has acted to permit such disclosures by securities lawyers, 17 C.F.R. 205.3(d)(2)(iii).

2. Would restore an ethics rule that was in effect in Washington from 1972 until 1986 (when the current RPCs were adopted). Former Washington Code of Professional Responsibility DR 7-102(B)(1) provided that a lawyer could disclose a fraud committed by a client on a third person in the course of a representation if the client refused to rectify the same.
3. Is consistent with the goal of achieving greater national uniformity in the law governing lawyers. Conversely, omission of the rule is inconsistent with this goal. In this regard, note that the rectification rule was adopted by the American Law Institute in the Restatement of the Law Governing Lawyers (1998), Section 67(2).
4. Would assist in protecting the interests of innocent parties who have, or would, otherwise suffer substantial economic injury as the result of actions in furtherance of which a lawyer's services were used. The positions taken by the Cheek Commission Report and the SEC are motivated in large measure by a concern for the interests of innocent parties.

Former Washington Law. Perhaps most important, the Code of Professional Responsibility, DR 7-102(B)(1), which was in effect from 1972 until the Model Rules were adopted in 1986, permitted a lawyer "who receives information clearly establishing that: (1) His client has, in the course of the representation, perpetrated a fraud upon a person . . . may reveal the fraud to the affected person" if the client refuses to rectify the same. The text of the provision is identical to that of the text of ABA Model Code of Professional Responsibility that was in effect in 1972. Although the ABA later changed the text of DR 7-102(B) to prohibit disclosures of confidential information Washington did not adopt the change. We are aware of no evidence that the permission contained in the rules during this period resulted in significant breaches of confidentiality, increased malpractice claims, or other problems. Indeed, we believe that the Washington version of DR 7-102(B)(1) was appropriate and served the interests of all constituencies. We also believe that the ABA's change of position in 2003 is highly significant in light of its earlier abandonment of the rectification rule.

Rule 1.6(b)(7). We also respectfully recommend that Rule 1.6(b)(7) (currently Rule 1.6(c)), which allows disclosure of breaches of fiduciary responsibility by court appointed fiduciaries, be expanded to apply to a number of non-court-appointed fiduciaries. Expansion of the duty serves several goals, the most important of which is to protect the interests of the beneficiaries of fiduciary estates. It also recognizes that the relationship between a lawyer and a fiduciary, which involves a client who serves in a representative capacity and whose personal interests are not at stake, is qualitatively different from the relationship of a lawyer to other clients, whose personal interests are at stake. At base we believe that information relating to the performance of a fiduciary client in his or her fiduciary capacity is not entitled to the same protection as information relating to the interests of a client who is represented in his or her personal capacity.

Although most courts treat the fiduciary who hires a lawyer as the lawyer's client, it is only realistic to recognize that the "estate" or, derivatively, its beneficiaries, are the affected parties—not the fiduciary. In this connection it is important to note that a person who serves as a fiduciary has voluntarily assumed the office—which carries the highest duties of loyalty to the beneficiaries of the fiduciary estate. The ethical rules should reinforce, not diminish, the protection that the legal system provides to the interests of the beneficiaries.

The personal interests of the beneficiaries of a fiduciary estate are involved when a lawyer represents a fiduciary client; the personal interests of the fiduciary are not usually involved at all. The difference is noted by many courts in the discovery context—when the fiduciary seeks to bar a beneficiary from discovering communications between the fiduciary and counsel for the fiduciary. For example, in *Hoopes v. Carota*, 531 N.Y.S.2d 407 (App. Div. 1988), *aff'd mem.*, 543 N.E.2d 73 (N.Y. 1989). the court allowed discovery of communications between the fiduciary and his counsel, stating that the evidentiary privilege does not attach in such cases. "Several courts have held that the privilege does not attach at all when a trustee solicits and obtains legal advice concerning matters impacting on the interests of the beneficiaries seeking disclosure, on the ground that the fiduciary has a duty to the beneficiaries whom he is obligated to serve in all his actions, and cannot subordinate the interests of the individual beneficiaries, directly affected by the advice sought, to his own private interests under the guise of the privilege." The court continued:

Plaintiffs may have been directly affected by any decision defendant made on his attorney's advice. The information sought is highly relevant to and may be the only evidence available on whether defendant's actions respecting the relevant transactions were in furtherance of the interests of the beneficiaries of the trust or primarily for his own interests in preserving and promoting the rewards and security of his position as a corporate officer. The communications apparently related to prospective actions by defendant, not past actions. Plaintiffs' claims of defendant's self-dealing and conflict of interests are at least colorable, and the information they seek is not only relevant, but specific. On the other hand, defendant made no showing, either at the EBT or in his opposition to the motion to compel disclosure before the Supreme Court, of any factors that would militate in favor of applying the privilege to the information sought. For example, defendant might have shown that he solicited advice from counsel solely in an individual capacity and at his own expense, as a defensive measure regarding potential litigation over his disputes with the trust beneficiaries.

We also think that it is useful, in this connection, to point out that the concept of a court-appointed fiduciary is unclear in an important respect that is unique in the state of Washington. Washington permits disputes between beneficiaries of probate and trust estates to be resolved by non-judicial agreements. RCW 11.96A.210-.250 (TEDRA). Such agreements can be used to remove one fiduciary and replace that fiduciary with

another. Such agreements may, but need not, be filed with the court and be treated as the equivalent of a binding court order. RCW 11.96A.220 & .230. If they are not filed, then a non-court-appointed fiduciary might be replacing a court-appointed one. There seems little sense in such a context to treat such fiduciary clients differently under proposed RPC 1.6(b)(7). Furthermore, if the agreement is filed with the court under RCW 11.96A.230, there is an interpretive question whether such a successor fiduciary would be court appointed. Suppose, for example, that a non-court appointed trustee is replaced under a TEDRA agreement that is filed with the court. Is the successor trustee court appointed by virtue of the filing and its effect? Again, it makes little sense to make the applicability of Proposed Rule 1.6(b)(7) depend on the resolution of that question.

For all these reasons we recommend that the scope of Rule 1.6(b)(7) be expanded to apply to non-court-appointed fiduciaries whose roles and responsibilities are analogous to those of court-appointed fiduciaries, including attorneys-in-fact under powers of attorney, trustees of revocable trusts, and custodians under the Washington Transfers to Minors Act. Our proposed revision would read as follows (with the addition underlined):

“1.6 (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary: ***
(7) to inform a tribunal about any clients breach of fiduciary responsibility when the client is serving as a court-appointed fiduciary such as a guardian, personal representative, or receiver or as a non-court-appointed fiduciary under a written instrument expressly creating such role and/or conferring fiduciary powers.”
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A comment should clarify that the rule is “intended to encompass the following non-court-appointed fiduciaries: trustees, attorneys in fact, custodians serving under the Washington Transfers to Minors Act, and other similar fiduciaries.”

Respectfully submitted,

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