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STATE OF WASHINGTON
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BY C. J. MERRITT
CLERK

April 25, 2005

C. J. Merritt, Supreme Court Clerk
Temple of Justice
P. O. Box 40929
Olympia WA 98504-0929

Re: Proposed Amendments to the Rules of Professional Conduct

Dear Mr. Merritt:

This letter comments on the proposed amendments to the Rules of Professional Conduct as set forth in the January 18, 2005 issue of the Official Advance Sheets of Washington Reports, 153 Wn.2d 1-101, at pages Proposed-3 through Proposed-190. My comments are merely my own and should not be viewed as those of any other person or organization with which I may be or have been associated.¹ My comments are set out in two parts. The first part has some general comments while the second part has rule-specific comments.

I. GENERAL COMMENTS

The Board of Governors of the Washington State Bar Association appointed the Special Committee for the Evaluation of the Rules of Professional Conduct ("Ethics 2003 Committee") to reconsider Washington's existing Rules of Professional Conduct in light of the numerous changes over the years to the American Bar Association's Model Rules of Professional Conduct, on which Washington's RPCs are based. The Ethics 2003 Committee reported its recommendations to the WSBA Board of Governors which largely adopted the Committee's recommendations, with some important changes. The WSBA Ethics 2003 Committee, its reporter, Douglas Ende, and the WSBA Board of

¹ I served as the initial reporter to the WSBA Ethics 2003 Committee. My comments should not be viewed, however, as those of that Committee, nor those of the Washington Commission on Judicial Conduct, of which I am currently the Executive Director, nor those of the Washington State Bar Association, of which I was formerly the Director of Lawyer Discipline and Chief Disciplinary Counsel and Professionalism Counsel.

Governors have done an excellent work in reviewing Washington's existing rules and proposing suggested changes. Except as noted in the second part of this letter, I support their proposals to amend the RPCs.

A guiding principle of the Ethics 2003 Committee was to adhere to the ABA's Model Rules of Professional Conduct except where unique Washington considerations required otherwise. I support that principle and believe it is reasonably based. As a member of the ABA's Ethics 2000 advisory committee, I closely observed the changes that were suggested to the ABA's Model RPCs and proposed by numerous persons before the ABA, and the proposed changes that were finally adopted by the ABA House of Delegates. The changes to the ABA Model RPCs, which led to the changes now being proposed to Washington's RPCs, were, I believe, all well-considered, well-debated, and are reasonable resolutions to often difficult ethical issues, even if I would not always resolve them the same way myself.

Comments to the Rules. When the Washington Supreme Court initially adopted the ABA Model Rules of Professional Conduct in 1985, it did not adopt the official ABA comments to the rules. The proposed revision to Washington's RPCs includes the ABA comments together with Washington-specific comments. The comments are almost always very helpful in understanding the rules. Over the years the Washington Supreme Court has frequently cited comments to the ABA Model RPCs. Many Washington lawyers, however, have been unaware of the ABA comments since Washington's RPCs have not in the past included them. I urge the Court this time to adopt the proposed comments to the rules.

Fundamental Principles of Professional Conduct. Although the ABA Model Rules of Professional Conduct does not have a counterpart to this section, I urge the court to adopt the proposed section. It retains language that has long been a part of Washington's legal ethics heritage, going back to the adoption, in Seattle in 1908, by the American Bar Association of its Canons of Ethics, a predecessor of the RPCs. Most of the language in the "Fundamental Principles" section appears in the current Preamble to the RPCs. I explored the meaning and context of the Preamble in my article, *The Preamble to the Rules of Professional Conduct: An Important Guide to Professionalism*, 53 WASHINGTON STATE BAR NEWS 42 (January 1999). I urge the Court to retain this heritage language as an important and appropriate statement of the fundamental principles underlying a lawyer's professional conduct by adopting this section as proposed.

II. SELECTED RULE-SPECIFIC COMMENTS

Proposed RPC 1.6 – Confidentiality of Information, and Proposed RPC 3.3 Candor Toward the Tribunal.

A lawyer's duty of confidentiality is generally considered a core value of the legal profession necessary to encourage clients to fully disclose all relevant information so that the lawyer, knowing all the facts, can provide competent legal representation. There is widespread public belief, however, that lawyer confidentiality is much too often used to enable clients to engage in misconduct or to shield them from the consequences of their misconduct, and that lawyers should not be able to remain passive when, by releasing confidential information about their client, they can prevent a reasonably certain death or substantial bodily harm, or prevent, rectify or mitigate a crime by the lawyer's client or significant harm by the client to others or their property. This public view is based on the belief that a lawyer, as an officer of the court, has a duty not only to the client, but also to society at large.

The American Bar Association's commission which examined the ABA's Model RPCs recommended to the ABA House of Delegates that lawyers be permitted (but not be required) to disclose confidential information to prevent future crimes and fraud and to prevent, mitigate or rectify consequences of past crime and fraud. The Conference of Chief Justices supported that recommendation. The ABA's Corporate Responsibility Task Force approved a similar approach. The ABA House of Delegates, however, rejected most of that recommendation and adopted a much more restrictive disclosure provision.

Requiring Disclosure. Washington's current RPC 1.6, and the proposed revision thereof, both *permit* the lawyer in certain cases to disclose confidential client information, but they do not, except in conjunction with RPC 3.3 (Candor toward the Tribunal, discussed below) *require* a lawyer to do so. I believe that in some cases, disclosure should not merely be permitted, it should be required.

How can we as a profession justify to the public valuing client confidentiality higher than a human life or higher than allowing substantial bodily injuries to a person? How can we justify to the public and ourselves withholding confidential information if disclosing it might be reasonably necessary to prevent that death or substantial bodily injury? How can we justify to the public and ourselves withholding confidential information if by disclosing it we could prevent the client from committing a crime, or prevent the client from committing a fraud that is reasonably certain to result in substantial injury to the financial interests or property of others? Lawyers, as human beings, have a higher duty to

society, to humanity, to protect others from such known and, by definition, preventable ills. Ethical rules should not be used as an excuse to permit a client to kill or seriously hurt another person or to defraud them when disclosure could prevent such acts. Lawyers should not merely be permitted to disclose the confidential information that could prevent such conduct, they should be required to do so.

The concept of requiring disclosure of confidential information to attain a greater societal good underlies the proposed change to *RPC 3.3, Candor towards the Tribunal*. Under current RPCs, a lawyer may not disclose confidential information to a tribunal even if the lawyer knows the client is lying to the court. The proposed change to *RPC 3.3* recognizes that confidentiality should not be used to allow a client to defraud a tribunal. I urge the Court to adopt the proposed changes to *RPC 3.3*. But, if we are to impose on lawyers a duty to disclose confidences to prevent fraud on a Court, under what possible justification can we not also require them to disclose information to prevent death, substantial bodily injury, or substantial frauds? Surely preventing the death of a human is of no less value than preventing fraud on a court.

Lawyers should not be required to choose between doing what is right under accepted morality and the common public understanding and doing what is “ethical” accordingly to legal ethics rules which in effect permit a course of preventable conduct that results in persons being killed, seriously hurt, or substantially defrauded. Instead, they should be required to comply with what the public expects of them. The public would say that no piece of confidential information is ever worth a human life, or worth substantial bodily harm, or worth allowing a crime to take place, or worth allowing a fraud that substantially injures the financial interests of others. We should say that also.

Permissive Disclosure. Washington has long permitted a lawyer to disclose confidential information to prevent the future commission of a crime by a client, and the proposed *RPC 1.6* continues that permission. Washington’s current *RPC 1.6* does not permit a lawyer to disclose confidential information to *prevent* a client from committing a fraud unless that fraud also constitutes a crime. Proposed *RPC 1.6(b)(3)* would permit such a disclosure. While I believe, as stated above, that lawyers should be required, and not merely permitted to make such disclosures, if the Court decides not to mandate such a disclosure, I urge the Court to at least permit such a disclosure by adopting proposed *RPC 1.6(b)(3)*.

Mitigating or Rectifying Fraudulent Conduct. Neither Washington’s current *RPC 1.6*, nor the proposed *RPC 1.6*, permit a lawyer to disclose confidential information to *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. While I believe lawyers should be required to disclose confidential information in such cases, if the Court decides not to mandate such disclosures, it should at the very least permit such disclosures. It could do so by substituting for the proposed RPC 1.6(b)(3) the following language recommended by the ABA Ethics 2000 Commission:

(3) 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.

Without such a rule a client can defraud the public and use the lawyer as a shield to hide the fraudulently obtained assets from the public. A lawyer knowing where secreted fraudulently obtained assets are hidden should at least be able to disclose that information.

Proposed RPC 1.8(j) [current RPC 1.8(k)]. Conflict of Interest – sex with clients. The changes proposed to this rule are basically administrative and should be adopted as proposed. I urge the Court, however, to consider a more substantive change, namely, substituting in the rule the term "contact" for the term "relations" in the phrase "have sexual relations."

Various Washington statutes governing professionals in Washington prohibit sexual "contact" between the professional and the client, and those statutes have been repeatedly upheld by the court. Washington's lawyers should be subject to the same conduct test as those other professions.

When the Court proposed adopting the existing rule in 1999, I submitted a comment letter (attached hereto) to the Court supporting adoption of the rule, but urging that the term "sexual contact" be substituted for the term "sexual relations." The intent of my suggestion was to avoid Clintonian definitional gyrations of what constitutes "sexual relations" which miss the point of the rule. A recent example of the problem is Justice Sanders' dissent in *In re Theresa A. Olson*, WSBA No. 16402, Supreme Court No. 200,230-7 (April 5, 2005) wherein he states that the conduct in question was not proven to meet a selected dictionary definition. Most people would understand the term "sexual relations", however, as much broader than the selected narrow dictionary definition. The intent of the rule is, I believe, more completely reflected by prohibiting "sexual contact" rather than "sexual relations," between lawyer and client. Thus, I urge the Court to adopt

the proposed amendments to the rule, but also to amend the rule by substituting the word “contact” for “relations” in the rule.²

Proposed RPC 1.13 Organization as a Client. This would be a new rule for Washington since Washington did not adopt the underlying ABA-based rule in 1985. At that time, the rule was thought to be unnecessary. However, experience has shown the need for this important rule which sets out basic concepts which are frequently misunderstood by lawyers when dealing with organizations as clients. I urge the Court to adopt the rule as proposed.

Proposed RPC 7.2 Advertising. The current RPCs prohibit false advertising but only very, very rarely are they ever enforced. Even the most cursory review of the yellow pages in any telephone directory, or review of late-night television advertising, will reveal a multitude of advertising violations by lawyers. The public, not recognizing the misleading nature of the advertisements, will rarely complain about them. Ethical lawyers who comply with the rule, however, are harmed by non-complying lawyers and yet, with no enforcement of the rule, they have no recourse and no incentive, other than doing the right thing, to themselves comply with the rule. The principal reason for non-enforcement of the rule is insufficient resources on the part of the Office of Disciplinary Counsel given its need to investigate and prosecute other RPC violations deemed more important. Either the Court should direct that resources be provided for enforcement of the rule, or the rule should be rescinded as meaningless.

Proposed RPC 7.4 – Communication of Fields of Practice and Specialization. The current and proposed rule both permit a lawyer to communicate that the lawyer does or does not practice in particular fields of law, and prohibit lawyers (with a few exceptions) from claiming to be specialists in a particular field.

The distinction, however, between a lawyer whose practice “is limited to real estate law,” for example, and a lawyer who “specializes in real estate law,” is a very fine one that the public is unlikely to appreciate. To the public, they are the same. The public concludes that if a lawyer limits his or her practice to one or a few areas of law, the lawyer in effect specializes in that or those areas of the law.

The result of the current rule, which the proposed rule would merely continue, is that lawyers engage in all sorts of word games to avoid using the prohibited term “specialist”

² My 1999 comment letter also suggested adding a 90-day “cool-off” period; for the reasons stated in that letter, I still recommend such a period be added to cover the conduct of unethical lawyers engaged in the types of abuses mentioned in that letter.

(or its even more prohibited cousin, “expert”), but still seek to have clients believe they are in fact specialists or experts. It is, of course, in the interests of both prospective clients and of lawyers for the prospective client to know that a lawyer practices or does not practice in a specific area. But the current and proposed rule leave lawyers who inform prospective clients of the nature of their practice vulnerable under the RPCs.

I would suggest another approach: (a) permit lawyers to state that they limit their practices to no more than four areas of law (and perhaps require them to file annually with the WSBA their list of areas of law), (b) permit the lawyers to claim to be specialists or even experts (if they are) in those limited areas of the law, (c) prohibit lawyers from claiming to limit their practice to more than four areas of the law, and (d) prohibit lawyers claiming to limit their practice to certain areas of the law from practicing in any other areas of the law. This could benefit both the public and the lawyer. If the lawyer wants the benefits of claimed limitation of practice, let the lawyer have them, but then hold the lawyer to his or her claims of limiting his or her practice to those areas and subject the lawyer to the higher “expert” standard for professional responsibility-liability claims. If a lawyer makes no claims of limiting his or her practice, the lawyer would be free to practice in any area, but could not claim to have a limited practice or to be a specialist. Of course, RPC 1.1 requires all lawyers to be competent in all matters they handle. If they are not competent, they need to gain competency, associate with a lawyer who is competent, or decline the representation.

The current and proposed rule merely continue a tension that should be resolved in ways that inform the public yet hold the lawyer accountable for his or her claimed practice-area limitations.

Proposed RPC 8.3 – Reporting Professional Misconduct. The current rule, stating that lawyers knowing of certain lawyer or judicial misconduct “should” report it, is merely aspirational. The proposed rule would make such reporting mandatory. I urge the court to adopt the proposed rule. The Bar has long claimed the privilege of policing and disciplining itself under the auspices of the Court. The Bar’s claims of operating an effective system of self-regulation, however, are undermined by the simple fact that a lawyer cannot be disciplined for not reporting known misconduct by lawyers or judges. This looks much too much like lawyers looking out for themselves and not looking out for the public. The public believes lawyers and judges look out for themselves and cover up for each other. Requiring lawyers to report known misconduct by other lawyers and judges tells the public that we as a legal profession will not tolerate or excuse unethical conduct by our colleagues, and that we truly believe in protecting the public as we so regularly proclaim. I urge the court to adopt the proposed amendment to this rule making disclosure of known misconduct mandatory.

CONCLUSION

The proposed revisions to the RPCs are to be commended. Except as otherwise stated in this letter, I urge the Court to adopt the proposed rules and also to commend the WSBA Ethics 2003 Committee, its reporter, Douglas Ende, and the Board of Governors of the Washington State Bar Association for having done a highly professional job in the proposals they have made to the Court to amend the RPCs.

Sincerely yours,



Barrie Althoff

Enclosure: June 28, 1999 Letter Commenting on Then Proposed RPC 1.8(k)

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June 28, 1999

C. J. Merritt, Supreme Court Clerk
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Re: Comments on Proposed RPC 1.8(k) [sex-with-clients]

Dear Mr. Merritt:

The Supreme Court invited comment on the proposed addition of a new Rule 1.8(k) to the Rules of Professional Conduct. This letter responds to that invitation.

This letter states my personal position and is not an official or unofficial position of the Washington State Bar Association, of which I am the Chief Disciplinary Counsel. I personally support the proposed rule for the reasons stated in the GR-9 statement submitted by the Washington State Bar Association, but I believe it could be improved in two minor ways.

First, the proposed rule several times uses the phrase "have sexual relations." I recommend that term be replaced by "engage in sexual contact with." The term "sexual contact with" is used in RCW 18.130.180(24) which covers the same topic as applied to other professions and occupations. (Alternatively, the term "have sexual relations" could be retained, but simply be defined in proposed rule 1.8(k)(3) as meaning "engaging in sexual contact with") Recent events at the national level, subsequent to the time the WSBA submitted its GR-9 statement to the Court, have suggested there may be some uncertainty as to the meaning of the phrase "sexual relations." If the term "engaged in sexual contact with" were used in the proposed rule, it could have the same meaning as used in RCW 18.130.180 and thus could take meaning from that section since its purpose, and that of the proposed rule, is the same. Essentially, they could be interpreted and rise or fall together. It also has the merit of subjecting lawyers to the same standard that the legislature found appropriate for those other professions and occupations.

Second, I suggest that consideration be given to adding to the proposed rule a "cool-off period" applying to the usual lawyer-client situation covered in proposed rule 1.8(k)(1), but not as to the representational situation covered by proposed rule 1.8(k)(2). For example, proposed Rule 1.8(k)(1) could be modified to read: "Shall not: (1) during the existence of a lawyer-client relationship, nor for a period of 90 days thereafter," The problem sought to be remedied by the cool-off period is the situation where the technical legal representation may be concluded and thus the "client" is no longer a client (but instead an ex-client), but the trusting emotional bonding created during that relationship lingers on. Those emotions, and the trust engendered by the lawyer-client relationship, do not simply end when the lawyer-client relationship ends. For example, where a lawyer is retained to assist a client obtain a marriage dissolution, the lawyer-

client relationship may end upon entry of a marriage dissolution decree, but the emotional and other bonding that formed during the representation will usually linger for quite some time. Yet in a number of situations lawyers have initiated a sexual relationship the same day the lawyer-client relationship technically terminated, but at a time that the trusting closeness created during the lawyer-client relationship continues. I do not believe a cool-off period is needed as to the representational situations envisioned by proposed rule 1.8(k)(2) because of the already built-in test of "damage or prejudice" and the fact that these situations are not likely ones of immediacy, but are instead ones more likely of agency for an entity; thus, the likelihood of the personal emotional involvement in the matter is significantly lessened.

Thus, I recommend that the proposed rule be modified to read as follows (with my proposed additions underlined, and my proposed deletions stricken through, compared to the text of the rule as published for comment):

PROPOSED AMENDMENT
RULES OF PROFESSIONAL CONDUCT (RPC)
RULE 1.8 Conflict of Interest; Prohibited Transactions; Current Client

A lawyer who is representing a client in a matter:

- a. [No change].
- b. [No change].
- c. [No change].
- d. [No change].
- e. [No change].
- f. [No change].
- g. [No change].
- h. [No change].
- i. [No change].
- j. [No change].
- k. Shall not:

(1) ~~have sexual relations~~ during the existence of a lawyer-client relationship, nor for a period of 90 days thereafter, ~~engage in sexual contact~~ with a current client of the lawyer unless a consensual sexual relationship existed between them at the time the lawyer/client relationship commenced; or

(2) ~~have sexual relations~~ engage in sexual contact with a representative of a current client if the sexual ~~relations~~ contact would, or would likely, damage or prejudice the client in the representation.

(3) For purposes of rule 1.8(k), "lawyer" means any lawyer who assists in the representation of the client, but does not include other firm members who provide no such assistance.

If the Court should determine not to adopt any of my proposed changes, I still support adoption of the rule as proposed by the WSBA. The proposed rule is needed both to inform lawyers and clients as to what is unacceptable professional conduct, and to assure that a lawyer's loyalty for the client's cause is not diluted by a conflict of interest with the lawyer's own interests in maintaining a sexual situation.

Sincerely yours,

/s/BA

Barrie Althoff