

1.6(b)(7)

Bausch, Lisa

From: Tom Culbertson [tculbertson@lukins.com]
Sent: Friday, April 29, 2005 1:16 PM
To: Bausch, Lisa
Cc: wa@actec.org
Subject: RPC 1.6(b)(6)

I am writing to respond to a draft letter circulated to Washington members of the American College of Trust and Estate Counsel from professors John Price, Tom Andrews and Karen Boxx concerning RPC 1.6(b)(6) (to be renumbered 1.6(b)(7)). I assume that their letter has been or will be delivered to the Court.

By way of introduction, let me say that I am a member of ACTEC and I am immediate past chair of the Real Property Probate and Trust Section of the WSBA. I write this letter as an individual and not on behalf of either organization.

The Ethics 2003 task force proposed no substantive changes to RPC 1.6(b)(6), which presently permits attorneys to disclose breaches of fiduciary duty by court-appointed fiduciaries to the tribunal. The professors recommend extending the rule to apply to all fiduciaries, and at first blush there appears to be little rationale for distinguishing between court appointed fiduciaries and other fiduciaries. However, I fear that extending the scope of the rule will lead to a serious and unwarranted erosion of the attorney client privilege.

The real issue here, I fear, is whether we are going to undermine and perhaps effectively reverse the Court's decision in *Trask v Butler*, 123 Wn. 2d 835 (1994), holding that the attorney's client is the fiduciary, not the trust or the estate. In support of their position, the professors cite and quote with approval a New York case which says that "the privilege does not attach at all" when disclosure is sought from a fiduciary's attorney by a beneficiary. I find that concept to be very troubling. Why should a fiduciary have no right to an attorney client privilege when every other client has that protection?

While the proposed rule change still refers to voluntary disclosure of breaches of fiduciary duty to "a tribunal", my concern is that we end up with an obligation to disclose to beneficiaries anything they feel may be in their best interests (or at least that is the way beneficiaries will look at it). Almost anything a fiduciary may be accused of doing wrong can be characterized as a breach of fiduciary duty, and if a beneficiary believes such a breach has occurred, the beneficiary's first question will be whether the fiduciary's attorney disclosed the breach to a tribunal.

Until the fiduciary says "I did it because my attorney told me to," in which case the privilege is waived, I do not see that the attorney's advice is relevant. In an action against the fiduciary for breach of duty, the relevant issue is the conduct of the fiduciary, not the advice of his or her attorney. But if there is no privilege, it does not take much imagination to figure out what will become the focus of the inquiry.

The professors state that fiduciaries are qualitatively different from all other clients because the fiduciary's personal interests are not involved at all. Even in the case of a disinterested fiduciary, in a contentious situation what fiduciary hasn't asked his or her attorney "Will I get sued if I do this?" Does the attorney have to say "If you want the answer to be confidential, you'll have to hire a second attorney and ask her." In the real world, most fiduciaries are lay people who are also beneficiaries, and there is a great deal of overlap between what is in the fiduciary's best interests and what is within the reasonable exercise of the fiduciary's discretion. At first blush that widespread conflict of interest would suggest that beneficiaries need the protection that is being proposed, but more often than not the conflict of interest was knowingly created and intended by the decedent/settlor.

I do not think we are going in the right direction if I must begin my representation of my widow client with the warning that anything I say is disclosable to her children and step children and that if she wants protected communication, she must hire a second attorney. In theory and in a perfect world, that may make some sense, but in the day to day practice and with regard to the vast majority of our clients, it is not practical. To the extent beneficiaries are in need of greater protection, it should come in the form of greater disclosure/accounting responsibilities on the part of the fiduciary, not in the form of erosion of the fiduciary's attorney/client privilege, and not in the form of extension of the limited duties attorneys owe to beneficiaries.

I would urge that consideration be given to eliminating present RPC 1.6(b)(6) altogether. In the absence of complete elimination, I would certainly urge that the rule's scope not be enlarged.

Thank you for your consideration.

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