

1.8(e), 3.3(b), 8.3

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April 27, 2005

Clerk of the Supreme Court
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Re: Comments to Proposed Revisions to Washington's Rules of Professional Conduct

Ladies and Gentlemen:

I write to urge the Court to adopt in their entirety the proposed Rules of Professional Conduct ("RPCs"), but also request that the Court consider in three narrow instances adoption of the version of the rule and comments initially recommended by the Washington State Bar Association ("WSBA") Special Committee for the Evaluation of the Rules of Professional Conduct (the "Ethics 2003 Committee" or the "Committee").

It was my privilege to act as Chair of the Ethics 2003 Committee, which compared Washington's current rules to the ABA Model Rules. The Committee's report, which was presented to the WSBA Board of Governors in March, 2004, is included in the WSBA's Submission of Suggested Amendments dated October 13, 2004. The Board of Governors made very few changes to the Committee's recommendation; most of those changes are entirely consistent with the spirit and intent of the Committee's recommendations. The three changes made by the Board of Governors that are discussed below focus on some of the most difficult and controversial policy choices that are presented by the Model Rules. I believe it is important to note the different choices made by the two bodies, and to consider the reasons for those choices.

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Adoption of the Rules and Comments as a Whole

The proposed rules follow closely, but are not exactly the same as, the Model Rules. Indeed, many of Washington's rules that historically differ from the Model Rules are preserved in the revised RPCs. A few examples of special Washington rules that are preserved are Rule 1.6(b)(7), allowing disclosure to a tribunal of otherwise confidential information concerning a client's breach of fiduciary duty when the client is serving as a court-appointed fiduciary; Rule 1.10, allowing screening of lawyers who change law firms to avoid imputed disqualification of the new law firm as a result of the new employment; Rule 6.1, Washington's pro bono publico service rule that was significantly revised by the Court in 2003; and Rule 6.5, addressing conflict of interest issues in the context of Washington's programs for the delivery of civil legal services to low-income clients. Rules 1.15A and 1.15B concerning safeguarding property and client trust accounts, while modified from the existing rule, are nonetheless unique Washington rules that preserve Washington's trust account practices and procedures.

The proposed rules also include entirely new rules that address thorny issues for which there is currently inadequate guidance in the RPCs, such as Rule 1.18 (Duties to Prospective Client), Rule 2.4 (Lawyers Serving as Third Party Neutral), Rule 1.13 (Organization as Client) and Rule 5.5 (Multi-Jurisdictional Practice of Law).

The proposed revisions to the existing RPCs are extensive. The rules refer and relate to one another in complex ways. Any change to one rule is likely to affect many others as well. Adoption of some, but not all, of the rules and comments would likely lead to inconsistencies and gaps. For that reason, I believe it is important to adopt the rules and comments as whole, and urge the Court to do so.

Reconsidering Three Rules

As noted above, there are three revisions made by the Board of Governors to the Committee's recommendation that I bring to the Court's attention for special consideration. These are Rule 1.8(e) (Conflict of Interest: Current Clients: Specific Rules), 3.3(b) (Candor Toward the Tribunal) and 8.3 (Reporting Professional Misconduct).

1. Model Rule 1.8(e) allows a lawyer to advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter, and also to pay court costs and expenses of litigation on behalf of an indigent client.

Washington's current rule does not permit a lawyer to advance court costs that are contingent on the outcome of the matter except in class actions.

The Committee voted by a significant majority to recommend the Model Rule. The Committee recognized that in many contingent fee cases, clients of modest means are unlikely to be able to pay the expenses of litigation if the lawsuit is unsuccessful. Yet knowing whether he or she would have to pay those costs may make the difference to a potential plaintiff between bringing a lawsuit for recovery or not.

Lawyers have differing views on the extent to which, under the current rule, they may assure prospective clients that if the case is unsuccessful, and the client is not able to pay the expenses, the lawyer will not seek to collect from the client. Some lawyers believe it is unethical to even suggest to a prospective client that he or she will not have to pay the expenses if the case is lost, since under the rule the client must remain liable for the expenses. Others believe that they can give prospective clients oral assurances to the effect that the lawyer will bear the risk of litigation expenses, but cannot commit those assurances to writing. As described by members of the Committee who practice in this area, the inconsistency between the present rule - which prohibits a lawyer from agreeing to bear the costs - and the reality in cases where the client cannot afford to pay those costs - has led to a variety of subterfuges that attempt to avoid the direct prohibition of the rule.

The majority of the Committee felt that this behavior cheapens and demeans the importance of the ethical rules in the eyes of both lawyers and clients, and confuses clients who do not understand why some lawyers are willing to give more open assurances than others. It also suggests that lawyers who are willing to flout the ethical rule may have a better chance of gaining the representation, particularly where the prospective client cannot afford the costs of litigation, making a mockery of the rule itself.

The Committee considered evidence of how the Model Rule has operated in other states where it has been in force for years, and concluded that adopting the Model Rule would promote clarity in communicating ethical standards to lawyers and clients alike, and would promote access to justice by persons of limited means who can be assured that lawyers can ethically agree to bear the risk of litigation expenses in their contingency fee cases.

After extensive debate, the Board of Governors disagreed with this conclusion and rejected the Model Rule approach. The Board crafted its own version of the rule

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allowing a lawyer to pay court costs on behalf of economically disadvantaged or indigent clients in pro bono cases, but did not otherwise change the existing rule.

For the reasons stated above, I urge the Court to adopt Rule 1.8, and comments, as originally proposed by the Committee.

2. Rule 3.3 (Candor Toward the Tribunal), which conforms to the Model Rule, would result in an important shift in the balance between a lawyer's duty to a client and his or her duty as an officer of the court. Current Rule 3.3, unlike the Model Rule, does not allow a lawyer to correct a false statement that has been made to the tribunal if doing so would require disclosure of information that is otherwise protected by Rule 1.6 governing confidentiality. The Model Rule approach, which is recommended by both the Committee and the Board of Governors, changes that balance and requires a lawyer in certain instances to disclose otherwise confidential information when necessary to avoid perpetrating a crime or fraud on the court. The lawyer must take remedial measures, even if compliance requires disclosure of information that is otherwise protected by Rule 1.6.

After extensive debate by the Board of Governors, the words “, withdrawal or” were added to Rule 3.3(b), suggesting that in certain instances only withdrawal may constitute an appropriate remedial measure, whether or not the wrong done to the tribunal is effectively remedied. The comments to the Model Rule, however, which are included in the proposed rule revisions, make it clear that if withdrawal will not undo the effect of the false evidence or other crime or fraud on the tribunal, disclosure may nonetheless be needed. There appears, then, to be an inconsistency between the rule and the comment, leaving uncertainty whether or not withdrawal will be sufficient to satisfy the ethical rule under the circumstances described in Rule 3.3(b).

The intent of the Model Rule, and the intent of the Committee's recommendation, is that appropriate remedial measures must be taken, and that if withdrawal is not sufficient to remediate the wrong, disclosure may be the only effective course of action. This concept is preserved without question in proposed Rule 3.3(a), concerning evidence offered by the lawyer that the lawyer later learns to be false. The lawyer must “take reasonable remedial measures, including, if necessary, disclosure to the tribunal.” Rule 3.3(b) concerns criminal or fraudulent acts relating to the proceeding before the tribunal that are done by the client or another person. An example would be bribing a witness or juror. It is only in Rule 3.3(b) that the suggestion was introduced that withdrawal may be sufficient in and of itself to meet

the requirements of the rule. As the rules are currently proposed, it is only if the lawyer's own reputation is at stake that the rule unambiguously requires disclosure if needed to remedy the presentation of false evidence. If the conduct of another is known to the lawyer to criminally or fraudulently affect the proceedings, the rule is ambiguous whether disclosure may be required, even if disclosure is the only way to remedy the harm.

There is no rational reason to allow inconsistency and possible confusion to exist in Rule 3.3(b) given the clear intent of the rule as a whole. Accordingly, I urge the Court to adopt Rule 3.3(b) as proposed by the Committee, without the inserted words: “, withdrawal or,” in order to avoid confusion over the meaning and intent of the rule.

3. Rule 8.3 (Reporting Professional Misconduct) in Washington's current RPCs encourages a lawyer to inform the appropriate professional authority of a violation of the RPCs by another lawyer where that violation raises a substantial question as to the lawyer's honesty, trustworthiness or fitness as a lawyer. The Model Rule, however, makes reporting in these circumstances mandatory. The philosophy of the Model Rule, as described in the Reporter's Memorandum that is a part of the Committee's report, is that mandatory reporting would promote a high level of ethical behavior and professionalism consistent with public expectations, and would enhance the image and integrity of the profession. As noted in the Reporter's Memorandum, permissive reporting is a minority rule that exists only in Washington, California, Kentucky and Georgia.

In one of its closest votes, the Committee recommended retention of Washington's current, permissive rule. The reasoning of the majority was that, on balance, permissive reporting would better promote civility among lawyers, and would be more effective in encouraging lawyers to address underlying problems through appropriate assistance, such as the WSBA's Lawyers Assistance Program. The Board of Governors disagreed, and voted to recommend a change to Washington's existing rule and adoption of mandatory reporting.

I urge the Court to consider the approach recommended by the Committee to retain permissive reporting.

Conclusion

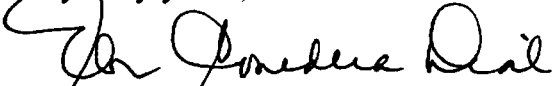
As a whole, the proposed rules represent a significant advance in the understanding and articulation of ethical rules governing lawyer conduct. They represent a

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thoughtful and well-reasoned approach to ethical issues, bearing in mind both the increasingly multi-jurisdictional nature of law practice today and those rules and standards of conduct that are special and unique to Washington. While I urge the three revisions I have described, I also urge that the rules and comments as a whole be adopted as Washington's Rules of Professional Conduct.

Thank you for considering these comments.

Very truly yours,



Ellen Conedera Dial

ECD:lkp

cc: Members of the Ethics 2003 Committee
Douglas Ende