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STRITMATTER KESSLER



WHELAN WITHEY COLUCCIO

April 15, 2005

Clerk of the Court  
Washington Supreme Court  
PO Box 40929  
Olympia, WA 98504-0929

OFFICE OF THE CLERK OF THE COURT  
STATE OF WASHINGTON  
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ST. CL. SECRET

Re: Proposed Comments to RPC 1.5

Dear Clerk:

I am writing to comment on the proposed new comments to RPC 1.5. The Supreme Court should be aware that the proposed comment to RPC 1.5, published at 153 Wn.2d Proposed-33, has already been cited in briefing at the trial court level to suggest that the Supreme Court has ceded its exclusive and inviolate power to regulate the practice of law to the Legislature.

The portion of the comment italicized below has been cited for this proposition:

[3] [Washington revision] Contingent fees, like any other fees, are subject to the reasonableness standard of paragraph (a) of this Rule. In determining whether a particular contingent fee is reasonable, or whether it is reasonable to charge any form of contingent fee, a lawyer must consider the factors that are relevant under the circumstances. *Applicable law may impose limitations on contingent fees, such as a ceiling on the percentage allowable*, or may require a lawyer to offer clients an alternative basis for the fee. Applicable law also may apply to situations other than a contingent fee, for example, government regulations regarding fees in certain tax matters. See, e.g., RCW 4.24.005.

I would suggest that the Court remove the italicized sentence or clarify that by "applicable law," the Court is referring to rules promulgated by the Court, and that this language in the comment should not be interpreted to mean that the Legislature has the power to regulate attorney fees and to enact laws setting limits on contingent fees.

The manner in which the italicized language in the proposed comment has been used at the trial court level would undermine decades of this Court's case law holding that the Supreme Court has the exclusive and inviolate power to regulate the practice of law. Under Art. 4, Sec. 1 of the Washington Constitution, the judicial branch of government has exclusive, inviolate authority to regulate the practice of law:

ATTORNEYS  
Paul L. Stritmatter  
Keith L. Kessler  
Paul W. Whelan  
Michael E. Withey  
Kevin Coluccio  
Brad J. Moore  
Garth L. Jones  
Ray W. Kahler  
Peter O'Neil  
Reed P. Schifferman  
Amy E. Wood

OF COUNSEL  
Leonard W. Schroeter  
J. Murray Kleist

HOQUIAM  
413 Eighth Street  
Hoquiam, WA 98550  
(360) 533-2710  
Fax (360) 532-8032

SEATTLE  
200 Second Ave. W.  
Seattle, WA 98119  
(206) 448-1777  
Fax (206) 728-2131

www.skwwc.com

Reply to:  
Hoquiam Office

## Wa. Const. Art IV, §1. Judicial Power, Where Vested

The judicial power of the state shall be vested in a supreme court, superior courts, justices of the peace, and such inferior courts as the legislature may provide.

In *Kommavongsa v. Haskell*, 149 Wn.2d 288, 311-312, 67 P.3d 1068 (2003), the Supreme Court affirmed that its power to regulate the practice of law is inviolate:

[O]ur state constitution vests the judicial power of the State in this court. Const. art. IV, § 1. Under this provision *the power of the Supreme Court to regulate the practice of law is inviolate*. *City of Seattle v. Ratliff*, 100 Wn.2d 212, 215, 667 P.2d 630 (1983).

(Emphasis added).

In *In re Disciplinary Proceedings Against Brothers*, 149 Wn.2d 575, 582, 70 P.3d 940 (2003), the Supreme Court held in a disciplinary case involving the reasonableness of attorney fees that it has “plenary authority in all matters of attorney discipline.” In *Holmes v. Loveless*, 122 Wn. App. 470, 478, 94 P.3d 338 (2004), the Supreme Court ruled that its plenary disciplinary authority applies to the reasonableness of contingency fees and specifically includes supervisory authority “to hold lawyers to a standard of continued adherence to the rules prohibiting excessive fees.”

In *Washington State Bar Assn. v. State*, 125 Wn.2d 901, 890 P.2d 1047 (1995), the Supreme Court considered the constitutionality of a statute that required the Washington State Bar Association to offer collective bargaining to its employees. The statute conflicted with the Supreme Court’s General Rule 12, which gave the WSBA *discretionary* authority to adopt collective bargaining.

In deciding whether the statute violated the separation of powers, the Supreme Court initially noted that the Bar Association was part of the judicial branch of government. “The Bar Association is *sui generis* and many of its functions are directly related to and in aid of the judicial branch of government.” *Id.* at 907. It concluded that even though GR 12 only related to WSBA’s “ancillary administrative functions” as an employer, rather than to its core functions of “admissions and discipline of lawyers”, the court rule still was intimately connected with the right of the judicial branch to “define and regulate the practice” of law:

The practice of law is so intimately connected with the exercise of judicial power in the administration of justice that the right to define and regulate the practice naturally and logically belongs to the judicial department of the state government. *Under the doctrine of separation of powers the courts have inherent power to regulate admission to the practice of law, to oversee the conduct of attorneys as*

*officers of the court, and to control and supervise the practice of law generally, whether in or out of court. It is the prerogative of the judicial department to regulate the practice of law.*

*Id.* at 907-908 (emphasis added).

The Supreme Court held the Legislature's enactment of a statute that conflicted with GR 12 violated the separation of powers doctrine and unconstitutionally infringed upon the Supreme Court's exclusive authority to regulate the practice of law:

Legislation which directly and unavoidably conflicts with a rule of court governing Bar Association powers and responsibilities is unconstitutional as it violates the separation of powers doctrine; such legislation is therefore void.... The ultimate power to regulate court-related functions, including the administration of the Bar Association, belongs exclusively to this court.... Once this court has adopted a rule concerning a matter related to the exercise of its inherent power to control the bar, the Legislature may not thereafter reverse or override the court's rule.

*Id.* at 906, 909.<sup>8</sup>

In *Kommavongsa v. Haskell*, the Supreme Court noted that the attorney-client relationship is "intimately intertwined with the very fabric of our adversary system of justice" and quoted approvingly from an Indiana case:

In order to operate within this system, the relationship must do more than bind together a client and a lawyer. It must also work to repel attacks from legal adversaries. Those who are not privy to the relationship are often purposefully excluded because they are pursuing interests adverse to the client's interests.

149 Wn.2d at 312 (quoting *Picadilly, Inc. v. Raikos*, 582 N.E.2d 338, 343-44 (Ind. 1991)).

Currently, RPC 1.5 sets forth a number of factors to consider in determining the reasonableness of contingency fees. RPC 1.5 is flexible and allows the circumstances of particular cases to be taken into account. Hard and fast limits on contingency fees would be contrary to RPC 1.5 and would strike at the heart of our legal system by interfering with

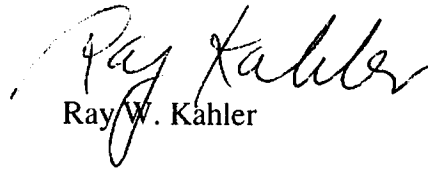
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<sup>8</sup> See also *Marine Power & Equip. Co. v. Industrial Indem. Co.*, 102 Wn.2d 457, 461, 687 P.2d 202 (1984) ("It is within the power of this court to dictate, under the constitutional separation of powers, its own court rules, even if they contradict rules established by the Legislature."), and *Bennion, et al. v. Kassler Escrow, Inc.*, 96 Wn.2d 443, 453, 635 P.2d 730 (1981) ("The power to regulate the practice of law is solely within the province of the judiciary and this court will protect against any improper encroachment on such power by the legislative or executive branches.")

the attorney-client relationships of many personal injury plaintiffs and impeding access to justice for people who cannot afford to pay an hourly attorney fee. This would put personal injury plaintiffs at a disadvantage vis-a-vis personal injury defendants whose attorneys are generally not paid on a contingency basis and not subject to any hard and fast limitation.

The Supreme Court should not adopt the proposed comment to RPC 1.5 as written. The Court should not undermine its constitutional authority and decades of its own case law through an ill-advised comment to an ethical rule.

Very truly yours,

  
Ray W. Kahler