

1.8(f)

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Clerk of the Court
Washington State Supreme Court
P.O. 40929
Olympia, WA 98504-0929

RECEIVED
MARCH 25 2005
CLERK OF THE COURT
WASHINGTON STATE SUPREME COURT
OLYMPIA, WA

Re: RPC 1.8 -- Proposed Changes

Dear Clerk:

Comment 11 to Proposed Amended RPC 1.8 should be clarified. Under one reading, the comment imposes obligations far broader than the Rule and imposes a profound change on the manner in which liability insurers do business and how insurance defense attorneys conduct their practice.¹

Proposed RPC 1.8(f) concerns third-party payment for legal services. There is no material change to the existing rule. The Reporter's Explanatory Memorandum states:

Other than replacing "consent after consultation" with "informed consent," as defined in Rule 1.0(e), there is no material change recommended to existing RPC 1.8(f). Paragraph (f) is identical to the Model Rule.

However, the model comment entitled "Person Paying for a Lawyer's Services" extends the requirement of informed consent to clients defended pursuant to their liability insurance coverage. Washington law does not impose this requirement on attorneys retained by liability insurers, and I am certain that insurance defense practitioners have not interpreted Rule 1.8 or its predecessors as applying to the "tripartite relationship" among liability insurers, insureds and defense attorneys.

The tripartite relationship has been studied and commented upon for years; the lawyer's ethical obligations are well-defined.² In my experience, insurance defense practitioners in the State of Washington are aware of and carefully observe their obligations as set forth in cases such as *Tank v. State Farm Insurance Company*, 105 Wn.2d 381, 715 P.2d 1133 (1986) and *Safeco Insurance Company of America v. Butler*, 118 Wn.2d 383, 823 P.2d 499 (1992). Conflict of interest in this area of practice is not a problem and is not in need of a change in the law.

¹ The comment has added importance in this instance. The Reporter's Explanatory Memorandum states: "Because there are no Comments to the existing Washington Rules, the proposed Comments in all cases will constitute an alteration, even if there is no recommended change to the rule itself."

² See, e.g. "Defense Counsel & Coverage Implications of the Tripartite Relationship," Section of Litigation: Vol. 13, Number 7 (Nov/Dec 2003), ABA Committee on Insurance. www.abanet.org/litigation/committee/articles.

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The duty to defend is almost universally assumed by the insurer in liability policies. In conjunction with that duty, the policy usually gives the liability insurer the right to control the defense, within the bounds of its good faith obligations, and the power to designate defense counsel. That contractual right will be substantially impaired if the comment to the proposed rule change is taken literally and requires an insured's written consent to appointment of defense counsel. By withholding consent, the insured will usurp the insurer's contractual right to designate defense counsel and control the defense. If liability insurance policies are to be altered in this respect, it should be through a deliberative process and not through a comment to a minor rule change.

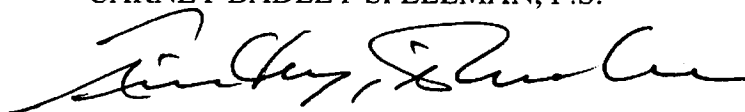
The "Washington revision" note to RPC 1.0(e) recognizes that "consent may be inferred" in some circumstances. Where the insurance policy states that the insurer will appoint counsel and the insured is advised in writing of the appointment, consent can reasonably be inferred. The comment should so state, for purposes of clarity.

In summary, Washington jurisprudence and the professional ethics of attorneys ensure that the insured's interests are safeguarded in the context of the liability insurance tripartite relationship. Without a finding that insured's interests are being compromised, the conflict rule should not be expanded to require an insured's consent to representation appointed by the insurer.

I cannot comment on the similar problems this comment will cause in other practice areas – such as the appointment of public defenders.

Sincerely,

CARNEY BADLEY SPELLMAN, P.S.

A handwritten signature in black ink, appearing to read "Timothy J. Parker", written in a cursive style.

Timothy J. Parker