

1.8(e), 8.3

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Clerk

Supreme Court of the State of Washington

PO Box 40929

Olympia, WA 98504-0929

RE: Comments Regarding Proposed Rules of Professional Conduct

Dear Members of the Court:

I was an appointed member of the WSBA's Ethics 2003 Committee which reported to the Board of Governors. The Board of Governors modified the Committee's recommendations. I believe that two of the Board of Governor's modifications are bad policy and respectfully request that the Court if the RPC are enacted, modify two RPC 1.8(e)(1) and 8.3 so that they are consistent with the Committee's recommendations.

RPC 1.8(e)(1)

As proposed, RPC 1.8(e)(1) retains the current requirement that the client remains ultimately liable for the costs of litigation regardless of the outcome. The Committee recommended that Washington adopt the ABA's language: "a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter."

The Committee's recommendation was based in large part upon the realization that lawyers that represent clients on contingent fee cases are unlikely to insist upon a client whose case is unsuccessful repaying the costs of the litigation. The Committee also believed that the current practice was most likely that the lawyer's fee agreement would state that the client is ultimately liable for the costs. However, the lawyer would assure the client: "this firm has never sued a client to recover costs." It is more above board to enact the ABA language to permit the current practice rather than continue the practice of paying lip service to a rule while both the lawyer and the client know the client will not actually remain liable for the costs.

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The argument has been advanced by both the plaintiffs and defense bar that this will result in lawyers "buying litigation." I believe this is a false problem. As far as I know the experience of other states which permit contingent recovery of costs has not shown any increased ethical impropriety.¹ Now a Washington lawyer, who enters a contingent fee agreement with a client, but who cannot fund the cost of litigation, will associate with counsel who can provide adequate financial resources. Such an association cannot, without violating the RPC, result in a higher fee payment than if a single lawyer handled the case.

I have also heard the argument that clients who do not have a "financial interest" in paying off the cost of litigation will not be willing to settle because they have no economic stake in the outcome. This argument appears to ignore the client's absolute right to accept or decline any settlement offer regardless of the lawyer's advice. Clients are interested in recovering damages and that is an adequate economic stake in the outcome of their case.

I urge the Court to acknowledge the current practice and amend this rule to permit the contingent recovery of costs.

RPC 8.3

I was a member of the subcommittee dealing with this rule. I was one of the two out of three subcommittee members who voted in favor of retaining the current precatory "should" rather than imposing a mandatory obligation to report misconduct when a lawyer knows that another lawyer has committed a violation of the Rules of Professional Conduct that "raises a substantial question as to the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects." By a close vote, the Committee voted in favor of retaining our current language. The Board of Governors disagreed and amended the proposed rule to require reporting. This is an unwise policy.

First, mandatory reporting will become another weapon in the lawyer's arsenal. This raises the same type of issue that the Court has discussed in CR 11 sanction cases: "We share the federal court's concern that sanctions be reserved for egregious conduct and not be viewed as simply another weapon in a litigator's arsenal." *Biggs v. Vail*, 124 Wn.2d 193, 198, n.2, 876 P.2d 448 (1994).

¹ E.g. Annual Report of the Minnesota Professional Responsibility Board & Office of Lawyers Professional Responsibility. www.courts.state.mn.us/lprb/olpr04.htm.

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Making reporting mandatory also creates issues such as what is a lawyer's duty to report a lawyer spouse, or sibling? If a firm fails to report a partner or associate and instead tries to obtain help for the offending lawyer and repair any damage to the client's interests, is that a disciplinary offense? Under the ABA formulation, lawyers in firms who believe that another lawyer in the same firm is mentally impaired may have an obligation to report that impairment to disciplinary authorities. ABA Formal Opinion #03-429.

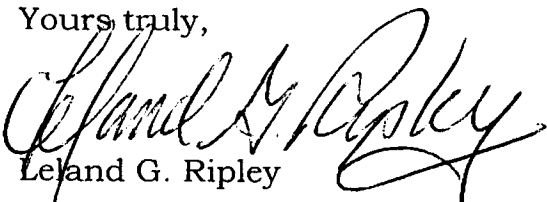
Our RPC has contained "should" for twenty years without serious adverse consequences for lawyer discipline or the public.

After almost thirty years of involvement with the Washington lawyer discipline system, I am convinced that lawyers who believe misconduct should be reported will do so regardless of whether there is a rule requiring reporting. I doubt that making reporting mandatory will cause lawyers who are adverse to reporting misconduct to do so.

Our current rule is satisfactory and the disadvantages of mandatory reporting outweigh the advantages. The current language should be maintained.

Thank you for considering these comments.

Yours truly,


Leland G. Ripley