

1.6(b)(7)

Bausch, Lisa

From: George F. Velikanje [gfv@vmslaw.com]
Sent: Thursday, April 28, 2005 3:19 PM
To: Bausch, Lisa
Cc: Randy Grove; Tom Culbertson; tra@u.washington.edu; Karen Boxx; jprice@perkinscoie.com
Subject: Proposed Change to RPC 1.6

I offer the following comments regarding the proposed rule change referred to above:

1. My first concern relates to the identification of the "tribunal". I do not have the ABA Model Rules and my comments may therefore not make sense, but the Washington RPC 1.6(c) permits the attorney to reveal certain information to "the tribunal" which makes sense when a court appointed fiduciary is involved. The proposed rule reads that information may be revealed to "a tribunal". This change makes some sense if a non-court appointed fiduciary is involved, but I am concerned about the identity of the tribunal. Can a non-court-appointed fiduciary make the disclosure to any tribunal or are there some jurisdictional and venue issues involved? Can a court-appointed fiduciary now make a disclosure to any tribunal or only the appointing tribunal?
2. My bigger concern is the rational for the change. RPC 1.6 deals with confidentiality and limits the situations in which the lawyer is permitted to make disclosures of information transmitted to the lawyer by a client. The reasoning doesn't address this but rather uses such phrases as "...it is only realistic to recognize that the 'estate' or, derivatively, its beneficiaries, are the affected parties - not the fiduciary." "The personal interests of the beneficiaries of a fiduciary estate are involved when a lawyer represents a fiduciary client;...". "...the privilege does not attach at all when a trustee solicits and obtains legal advice concerning matters impacting on the interests of the beneficiaries seeking disclosure,...". I fail to understand how this reasoning relates to the specific issue of confidentiality and disclosure.

Will this rule have the effect of overruling Trask v. Butler and make the estate, heirs and beneficiaries the clients rather than only the fiduciary. If the answer is yes, are the beneficiaries now in privity with the lawyer for the purpose of pursuing a malpractice action. It seems that we now in the Bohn v. Cody area where people who do not retain the lawyer nor pay any of the fees are in a position to pursue a lawyer in a malpractice case as deemed clients.

I would like to see more dialogue on these issues before the rule is enacted. Not because the rule is bad as I am in favor of the lawyer having an outlet to disclose improper conduct by a client, but because the rational for the rule will undoubtedly surface to cause renewed efforts to expand the definition of a "client". I also think the "tribunal" needs to be more specifically designated.

I would respectfully request that enactment of the rule be postponed pending further discussion and debate.

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