CHAPTER 4C

COMMENTARY ON THE COMMENTS: THE PRACTICAL PRACTICE EFFECTS OF THE SUPREME COURT'S ADOPTION OF COMMENTS TO THE RPCS

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WSBA 4th Annual Conference on the Law of Lawyering
December 13, 2006
Seattle

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I. Introduction

Most of the comments to the new Washington Rules of Professional Conduct are drawn from their counterparts in the American Bar Association's Model Rules of Professional Conduct.[1] Some of the new comments, however, are Washington-specific, pointing out where Washington has taken a different approach with its RPCs as either a policy decision or in recognition of existing practice or case law. This chapter focuses on Washington-specific comments.

For discussion purposes during the panel presentation, I have chosen 10 notable Washington comments.[2] The 10 chosen were selected as illustrations and as discussion topics and are not the only Washington-specific comments which accompany the new rules. They are arranged in numerical sequence by the preliminary section or rule they accompany. With each, the comment as adopted by the Washington Supreme Court from the "redline" version released by the Court in July 2006 is reproduced along with a brief explanation of its significance.

Finally, a cautionary note is in order at the outset. Although the Washington-specific comments may have a singular relevance, they need to be read against the broader commentary that accompanies each rule and, of course, the text of the rule itself.

[1] The ABA Model Rules, together with the accompanying comments, are available on the ABA Center for Professional Responsibility's web site at www.abanet.org/cpr.

[2] In two instances, advancing costs under RPC 1.8 and the lawyer-witness rule under RPC 3.7, I have chosen ABA-based comments that reflect important changes from the "old" versions of the Washington rules.

II. Mark's Top 10 New Washington Comments

1. Scope/Comment 22: The Continuing Relevance of *Hizey v. Carpenter*

Comment 22:

[22] Nothing in these Rules is intended to change existing Washington law on the use of the Rules of Professional Conduct in a civil action. See *Hizey v. Carpenter*, 119 Wn.2d 251, 830 P.2d 646 (1992).

Comment on the Comment:

In *Hizey*, the Supreme Court held that an asserted violation of the professional rules cannot be cited verbatim as evidence of the failure to meet the standard of care in a legal malpractice case. Instead, they can be taken into account by an expert in formulating an opinion on the standard of care and its asserted violation. For example, under *Hizey* an expert in a legal malpractice case could not say "this lawyer violated RPC 1.1 on competence," but could instead say "lawyers have a duty to competently represent their clients and, in my opinion on the facts of this case, the lawyer here did not meet that standard of care." Comment 22 does not mention a parallel case, *Eriks v. Denver*, 118 Wn.2d 451, 456-461, 824 P.2d 1207 (1992), where the Supreme Court held that the RPCs could be both cited and used as specific evidence in determining whether a lawyer has breached a fiduciary duty.

2. RPC 1.5/Comment 10: "Nonrefundable" Fees

Comment 10:

[10] Every fee agreed to, charged, or collected, including a fee denominated as "nonrefundable" or "earned upon receipt," is subject to Rule 1.5(a) and may not be unreasonable.

Comment on the Comment:

The question of whether a fee can truly be "nonrefundable" is a source of active debate and review. Following in the wake of *In re DeRuiz*, 152 Wn.2d 558, 574, 99 P.3d 881 (2004), and *In re Kagele*, 149 Wn.2d 793, 814-16, 72 P.3d 1067 (2003), which dealt with "nonrefundable" fees, the WSBA Board of Governors withdrew Formal Ethics Opinion 186, which also dealt with retainers and advance fee deposits, late last year on the recommendation of the Rules of Professional Conduct Committee. The Board did not adopt a proposed substitute opinion developed by the RPC Committee and, instead, appointed a special committee to review this area. Regardless of the outcome of the review, Comment 10 reinforces the point that all fees, however denominated, must still be reasonable under the criteria set out in RPC 1.5(a).

3. RPC 1.6/Comment 19: "Information Relating to the Representation"

Comment 19**:**

[19] The phrase "information relating to the representation" should be interpreted broadly. The "information" protected by this Rule includes, but is not necessarily limited to, confidences and secrets. "Confidence" refers to information protected by the attorney client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

Comment on the Comment:

Under the "old" version of the lawyer confidentiality rule, RPC 1.6, the information protected was defined in terms of "confidences" and "secrets" as outlined in Comment 19. The term of art under the new rule is "information relating to the representation of the client." Whether this semantic difference will make a practical difference will ultimately turn on how the Supreme Court interprets the phrase in relation to its predecessor. In most instances, the new and old formulations should overlap. It is conceivable, however, that instances might arise where the duty is broader under the new formulation than the old.

4. RPC 1.7/Comment 22: Advance Waivers of Future Conflicts

Comment 22 (including the Supreme Court's deletions):

[22] ~~Whether a lawyer may properly request a client to waive conflicts that might arise in the future is subject to the test of paragraph (b). The effectiveness of such waivers is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails. The more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences of those representations, the greater the likelihood that the client will have the requisite understanding. Thus, if the client agrees to consent to a particular type of conflict with which the client is already familiar, then the consent ordinarily will be effective with regard to that type of conflict. If the consent is general and open-ended, then the consent ordinarily will be ineffective, because it is not reasonably likely that the client will have understood the material risks involved. On the other hand, if the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise, such consent is more likely to be effective, particularly if, e.g., the client is independently represented by other counsel in giving consent and the consent is limited to future conflicts unrelated to the subject of the representation. In any case, advance consent cannot be~~

~~effective if the circumstances that materialize in the future are such as would make the conflict nonconsentable under paragraph (b).~~ Reserved.

Comment on the Comment:

It is not clear what message the Supreme Court was sending when it deleted proposed Comment 22. The Court inserted its own language in many instances in both the rules and the comments. Therefore, if it meant to prohibit advance waivers, it could certainly have done so. On balance, it appears that, at least when used with sophisticated clients, advance waivers remain a viable conflict management tool in Washington.

5. RPC 1.8/Comment 10: Advancing Costs Contingent on the Outcome

Comment 10 (including the Supreme Court's deletions):

~~[10] [**Washington revision**] Lawyers may not subsidize lawsuits or administrative proceedings brought on behalf of their clients, including making or guaranteeing loans to their clients for living expenses, because to do so would encourage clients to pursue lawsuits that might not otherwise be brought and because such assistance gives lawyers too great a financial stake in the litigation. See Washington Comments [21] & [22].~~

[10] Lawyers may not subsidize lawsuits or administrative proceedings brought on behalf of their clients, including making or guaranteeing loans to their clients for living expenses, because to do so would encourage clients to pursue lawsuits that might not otherwise be brought and because such assistance gives lawyers too great a financial stake in the litigation. These dangers do not warrant a prohibition on a lawyer lending a client court costs and litigation expenses, including the expenses of medical examination and the costs of obtaining and presenting evidence, because these advances are virtually indistinguishable from contingent fees and help ensure access to the courts. Similarly, an exception allowing lawyers representing indigent clients to pay court costs and litigation expenses regardless of whether these funds will be repaid is warranted.

Comment on the Comment:

The WSBA Board of Governors recommended retaining the "old" rule that client responsibility for costs could not be contingent on the outcome of a case. The Supreme Court, however, adopted the ABA Model Rule approach in RPC 1.8(e)(1) and Comment 10 that allows a lawyer to advance court costs and related litigation expenses, the repayment of which is contingent on the outcome of the case.

6. RPC 1.10/Comments 10 & 11: Lateral-Hire Screening & Imputed Conflicts

Comments 10 and 11:

[10] Washington's RPC 1.10 was amended in 1993 to permit representation with screening under certain circumstances. Model Rule 1.10 does not contain a screening mechanism. Rule 1.10(e) retains the screening mechanism adopted as Washington RPC 1.10(b) in 1993, thus allowing a firm to represent a client with whom a lawyer in the firm has a conflict based on his or her association with a prior firm if the lawyer is effectively screened from participation in the representation, is apportioned no part of the fee earned from the representation and the client of the former firm receives notice of the conflict and the screening mechanism. However, prior to undertaking the representation, non-disqualified firm members must evaluate the firm's ability to provide competent representation even if the disqualified member can be screened in accordance with this Rule. While Rule 1.10 does not specify the screening mechanism to be used, the law firm must be able to demonstrate that it is adequate to prevent the personally disqualified lawyer from receiving or transmitting any confidential information or from participating in the representation in any way. The screening mechanism must be in place over the life of the representation at issue and is subject to judicial review at the request of any of the affected clients, law firms, or lawyers. However, a lawyer or law firm may rebut the presumption that information relating to the representation has been transmitted by serving an affidavit describing the screening mechanism and affirming that the requirements of the Rule have been met.

[11] Under Rule 5.3, this Rule also applies to nonlawyer assistants and lawyers who previously worked as nonlawyers at a law firm. See *Daines v. Alcatel,* 194 F.R.D. 678 (E.D. Wash. 2000); *Richard v. Jain,* 168 F. Supp. 2d 1195 (W.D. Wash. 2001).

Comment on the Comments:

Comment 10 notes that Washington's lateral-hire screening rule is preserved and Comment 11 incorporates Washington case law applying the imputed conflict rule to nonlawyer assistants at law firms.

7. RPC 1.18/Comments 10 & 11: Prospective Clients

Comments 10 and 11:

[10] Unilateral communications from individuals seeking legal services do not generally create a relationship covered by this Rule, unless the lawyer invites unilateral confidential communications. The public dissemination of general information concerning a lawyer's name or firm name, practice area and types of clients served, and contact information, is not in itself, an invitation to convey

unilateral confidential communications nor does it create a reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship.

[11] This Rule is not intended to modify existing case law defining when a client-lawyer relationship is formed. See *Bohn v. Cody*, 119 Wn.2d 357, 363, 832 P.2d 71 (1992); *In re McGlothen*, 99 Wn.2d 515, 522, 663 P.2d 1330 (1983). See also Scope [17].

Comment on the Comments:

RPC 1.18 outlining duties to prospective clients is new to both the Washington RPCs and the ABA Model Rules. Comment 10 emphasizes that unilateral communications do not generally create the duties of confidentiality recognized by this rule. Comment 11 emphasizes that the question of whether an attorney-client relationship is formed remains governed by case law, not the RPCs.

8. RPC 3.7/Comment 7: The Lawyer-Witness Rule

Comment 7:

[7] Paragraph (b) provides that a lawyer is not disqualified from serving as an advocate because a lawyer with whom the lawyer is associated in a firm is precluded from doing so by paragraph (a). If, however, the testifying lawyer would also be disqualified by Rule 1.7 or Rule 1.9 from representing the client in the matter, other lawyers in the firm will be precluded from representing the client by Rule 1.10 unless the client gives informed consent under the conditions stated in Rule 1.7.

Comment on the Comment:

Comment 7 is drawn directly from the ABA Model Rules. RPC 3.7(b) and Comment 7, though, represent an important change to the lawyer-witness rule in Washington. Under the "old" rules, a law firm was generally disqualified from acting as trial counsel if one of its lawyers was a necessary witness at the trial. The new rule and comment now generally (subject to the qualifiers noted in the rule and Comment 7) allow another lawyer from a firm be trial counsel even if one the firm's lawyers will be a witness.

9. RPC 4.2/Comment 10: The "No Contact" Rule in the Entity Context

Comment 10:

[10] Comment [7] to Model Rule 4.2 was revised to conform to Washington law. The phrase "or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability" and the

reference to Model Rule 3.4(f) was deleted. Whether and how lawyers may communicate with employees of an adverse party is governed by *Wright v. Group Health Hospital*, 103 Wn.2d 192, 691 P.2d 564 (1984). See also Washington Comment [5] to Rule 3.4.

Comment on the Comment:

Comment 10 emphasizes that *Wright v. Group Health Hospital* remains the touchstone for applying the "no contact" rule in the entity context. Under *Wright*, officers, directors, high level managers and other employees whose statements would constitute evidentiary admissions generally fall within the scope of the representation by the entity's counsel and cannot generally be contacted directly. Others lacking that ability within the entity and former employees, however, do not and may generally be contacted directly.

10. RPC 8.3/Comment 1: Reporting Professional Misconduct

Comment 1:

[1] Lawyers are not required to report the misconduct of other lawyers or judges. Self-regulation of the legal profession, however, creates an aspiration that members of the profession report misconduct to the appropriate disciplinary authority when they know of a serious violation of the Rules of Professional Conduct. Lawyers have a similar aspiration with respect to judicial misconduct. An apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover. Reporting a violation is especially important where the victim is unlikely to discover the offense.

Comment on the Comment:

The Supreme Court rejected mandatory reporting of professional misconduct proposed by the WSBA Board of Governors and retained the "old" Washington rule under which reporting is voluntarily.