ANNE I. SEIDEL
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June 19, 2007

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

Re: Comment on Proposed Change to RPC 1.15A

To the Honorable Supreme Court:

I am writing to express my opposition to the proposed change to Rule 1.15A of the Rules of Professional Conduct. I am the former Chief Disciplinary Counsel of this state. In that capacity, following the Board of Governor's vote to submit the proposed rule change to the Court, I sent the chair of the Court's rules committee a letter dated January 23, 2007 outlining the Office of Disciplinary Counsel's concerns regarding the proposed rule change. Soon thereafter, I was instructed by the Bar to retract the letter. I believed that the Office of Disciplinary Counsel must be permitted to communicate concerns to the Supreme Court regarding the effect of proposed RPC changes on the public, particularly when the public has had no opportunity for input into such decisions. Given the Bar's contrary view, I did not believe I could effectively act as Chief Disciplinary Counsel and rather than retract my letter, I resigned. I do not know if previously submitted materials are circulated with the comments, so I am enclosing a copy of my January 23, 2007 letter. I continue to have the concerns expressed in that letter.

The privilege of self-regulation of a profession depends on a willingness of those who are regulated to take acts that are not in their own personal self-interest. Otherwise, self-regulation becomes self-protection. At the Board of Governors meeting where the proposed change to RPC 1.15A was discussed, one governor stated in effect, "When we are representing our clients, we have to look out for our clients' interests. But as governors, we must consider the members' interests." Other governors commented on the number of emails they received from members supporting a rule change, while neglecting to acknowledge that comments were only solicited from bar members.

There has been no study of the need for the proposed change to the rule. I have read the comments in support of the rule change that are posted on the Court's website. Many make statements that are simply inaccurate. For example, these lawyers claim that if lawyers do not hold clients' wills, the wills will be destroyed, doctored or lost. This claim ignores the relatively new procedure for filing wills under seal with the Superior Court. Yet comments like these were accepted at face value by the Board of Governors, without any consideration of the possible self-interest of the members making them. As a former member of Ethics 2003, I must wonder why

that Committee spent so much time and energy studying the RPCs and soliciting input to make recommendations to the Supreme Court, when the resulting rule changes can be undone with no corresponding process.

If the need for this rule change is as obvious as the Bar claims, why did it go to such extreme steps to prevent the Court from receiving a differing viewpoint?

Sincerely,

Anne I. Seidel

Enc.

WSBA
OFFICE OF DISCIPLINARY COUNSEL

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Chief Disciplinary Counsel

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January 23, 2007

Justice Charles W. Johnson
Supreme Court of Washington
PO Box 40929
Olympia WA 98504-0929

Re: RPC 1.15A(e)

Dear Justice Johnson:

By letter dated October 24, 2006, you asked Washington State Bar Association President Ellen Dial to direct discussions between the Real Property Probate and Trust Section and Bar representatives to come up with language in RPC 1.15A and/or the comments thereto addressing the Section's concerns. Despite several meetings and various alternative proposals, we were unable to come to an agreed resolution. At its January 11, 2007 meeting, a majority of the Board of Governors voted to request that the Court amend RPC 1.15A(e) to remove the requirement of an annual accounting for property other than funds.

I am writing to express both procedural and substantive concerns regarding this request. First, this request does not comply with GR 9. That rule requires that a proposed rule be received by October 15 if it is to take effect by September 1 of the following year. GR 9(i)(1). If the proponent requests expedited consideration, the proponent must state "whether the proponent believes exceptional circumstances justify expedited consideration of the suggested rule." GR 9(e)(2)(E). While the Court has the authority to deviate from these requirements if it "determines that exceptional circumstances justify more immediate action," GR 9(i)(5), doing so would run counter to the reasons for these procedures.

One such reason is to ensure that "all interested persons and groups receive notice and an opportunity to express views regarding proposed rules." GR 9(a)(2). We are troubled by the lack of any opportunity for the public to comment on a rule that is designed to protect an important client interest. While the Board of Governors and the Section have solicited and received feedback from lawyers who object to the annual accounting, no one to our knowledge has sought or received any input from nonlawyers.

By contrast, all interested parties had an opportunity to comment on the rule that the Section now seeks to change. RPC 1.15A(e) was adopted after a long review process by the Bar Association.

As the Ethics 2003 report detailed, there was a great amount of publicity surrounding the Ethics 2003 process and many opportunities for interested Sections and lawyers, as well as nonlawyers, to comment. (I have enclosed the Overview section of this report, which discusses this publicity at pages 7-8). Among the comments the Court received following its publication of the proposed rules for comments was a letter from a lawyer that raised the same concern that the Section now raises. See Letter from Laurel Smith dated February 3, 2005 (copy enclosed). The Section, however, did not submit any comments or raise any issues about the annual accounting requirement until August 2006, after the Court had adopted the new RPCs.

The lack of input from nonlawyers is particularly noteworthy here as the rule the Board of Governors seeks to amend is designed to provide clients with important information about their property. We often hear from clients who are unable to locate property held by lawyers, most frequently wills. Although property covered by RPC 1.15A includes physical property such as jewelry as well as valuable original documents other than wills, such as securities, promissory notes, and unrecorded deeds, the debate about this topic has focused on wills and other estate planning documents. We believe we receive inquiries primarily about wills because they are held for a long period of time, often decades, thereby greatly increasing the chance that the lawyer and client have lost touch. Such documents are also unusual in that a lawyer's possession of the original document increases the lawyer's chances of being retained for future, more lucrative work:

> An estate planning practitioner is also motivated to serve as custodian for a newly executed will because possession of the will undoubtedly enhances the chances of his or her employment after the testator's death. . . . [T]he chances of employment are increased because the attorney-draftsman has the original will; this provides a unique opportunity for an early face-to-face meeting with the executor or close relative during which the lawyer can explain the probate process, describe the legal services that will be necessary, and offer to provide those services. Under these circumstances, it would be difficult for the executor to hire another attorney, and the safekeeping has served its purpose. In practice, the process works so well that one commentator has described the employment of the draftsman-custodian as "almost automatic."
>
> . . . A client who has just executed a will and is advised by the draftsman of the advantages of leaving it at the attorney's office can hardly be expected to comprehend the consequences of this offer in terms of the attorney's desire to secure additional legal business in the future.

Gerald P. Johnston, An Ethical Analysis of Common Estate Planning Practices – Is Good Business Bad Ethics?, 45 Ohio St. L.J. 57, 127-28 (1984) (footnotes omitted); see also Washington Estate Planning Deskbook, §2.4(6) at 2-52 (Wash. State Bar Assoc. 2005) (noting concern over indirect solicitation of probate business by lawyers holding original wills).

We strongly disagree with the Section's assertion that "[t]he problems identified by the Office of Disciplinary Counsel in defending RPC 1.15A concern a very limited number of lawyers in sole

or very small practices." Letter dated January 8, 2007 from Pamela McClaran and Stephen R. Crossland, at 2. In fact, our office receives calls about wills held by firms of all sizes, including those previously held by a large law firm that dissolved. Currently, there is no requirement in the rules that a dissolving firm notify its former clients about the new location of their wills. There is also no requirement that firms stay in touch with their former clients for whom they are holding valuable property. Therefore, although some firms upon dissolution or death of a partner attempt to contact the clients for whom they are holding wills or other client property, they are often unable to find many of them as the clients have moved in the decades during which the wills were held. Moreover, as stated in our October 9, 2006 letter, the purpose of RPC 1.15A(e) is to make sure clients are aware of the location of their property. That purpose applies regardless of the size of the law firm.

While the Office of Disciplinary Counsel regularly receives complaints from clients or former clients about difficulties in obtaining property held by a lawyer, to the best of our knowledge, we have never received complaints that a lawyer has refused to hold a client's property.

The Section initially expressed concern over the definition of property contained in Comment [5] to RPC 1.15A. See August 14, 2006 letter from Ms. McClaran and Mr. Crossland. They now apparently agree that the definition of property expressed in that comment is consistent with property covered under RPC 1.15A's predecessor, former RPC 1.14, but want the annual accounting requirement alone to be limited to funds. See January 8, 2007 letter. We continue to believe, given the Section's initial interpretation of Comment [5], that clarification of that Comment would be beneficial. We recommend that the Comment be replaced with the following:

> [5] "Property" as used in this rule means all valuable objects, including cash, jewelry and other valuable tangible personal property. This Rule also applies to original documents that have inherent value, in other words, documents that a reasonably prudent lawyer would safeguard by placing in a safe deposit box or other similar place of safekeeping. These documents include negotiable instruments, unrecorded deeds, stock certificates, and wills, unless the document has no legal significance. This Rule does not apply to other documents often contained in the client file, such as correspondence, file copies of pleadings and conformed copies of recorded deeds. However, the client may be entitled to these documents under other rules. See Rule 1.16(d); Formal Opinion 181 (1987).

We believe a revised comment such as this proposal would eliminate the concern among practitioners that the rule requires an annual accounting for a large quantity of documents currently contained in client files. The proposed comment tracks the language of former RPC 1.14(b)(2) to make clear that only those documents previously subject to the former rule's safekeeping and recordkeeping requirements are covered by RPC 1.15A.

The second concern expressed by the Section is the burdensome nature of providing notice to the numerous clients whose wills they have acquired over many years of practice. As former RPC 1.14(b)(3) required lawyers to keep "complete records" of all client property, law firms should

already have an inventory of the wills, but as noted above, because of the absence of any requirement that the lawyer stay in touch with the client, it may be very difficult for firms to locate all of these former clients. Making the annual accounting requirement for documents apply only to those acquired after the effective date of the new rules would address this concern and would at least prevent firms from continuing to accumulate additional wills without staying in contact with the clients.

If the Court is inclined to make the rule prospective-only in this regard, we recommend the following amendment to RPC 1.15A(e):

> (e) A lawyer must promptly provide a written accounting to a client or third person after distribution of property or upon request. A lawyer must provide at least annually a written accounting to a client or third person for whom the lawyer is holding property. For documents subject to this rule, the requirement of an annual accounting applies only to documents received by the lawyer after September 1, 2006.

If the annual accounting requirement as applied to documents is effective only on a prospective basis, lawyers who wish to avoid the accounting requirement could choose not to keep wills or other valuable client property. See August 14, 2006 letter from Ms. McClaran and Mr. Crossland at 3 ("the anticipated harm would be mitigated if the Rule could be limited to apply prospectively only, i.e., to "property" received and retained by an attorney after September 1, 2006. In that case, attorneys and law firms could be more selective in deciding what should be retained . . . ."). As we noted in our October 9, 2006 letter, Washington now has a statute permitting wills to be filed under seal with the Superior Court, and lawyers who do not wish to retain wills can instead encourage their clients to take advantage of what is now the safest place to store wills. See Washington Estate Planning Deskbook, §2.4(6) at 2-52 (2005) ("Now that Washington has adopted a procedure for filing the original of a will before the death of the client, however, most of the arguments in favor of the lawyer safekeeping the original have disappeared.").

Please let me know if you or any of the other members of the Rules Committee would like any additional information from our office.

Sincerely,

Anne I. Seidel
Chief Disciplinary Counsel

Enc.
cc: M. Janice Michels
Robert D. Welden
Nan Sullins

Washington State Bar Association

WSBA

REPORT AND RECOMMENDATION OF THE SPECIAL COMMITTEE FOR EVALUATION OF THE RULES OF PROFESSIONAL CONDUCT (ETHICS 2003) TO THE BOARD OF GOVERNORS

March 2004

Ellen Conedera Dial, Chairperson

Douglas J. Ende, Reporter

Washington State Bar Association
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OVERVIEW

Creation and Purpose of the Ethics 2003 Committee

Approximately one year ago, the Board of Governors of the Washington State Bar Association established the Special Committee for the Evaluation of the Rules of Professional Conduct (Ethics 2003 Committee) to review the Washington Rules of Professional Conduct in light of the substantial changes made to the American Bar Association Model Rules of Professional Conduct as a result of the work of the ABA's Ethics 2000 Commission. Established in 1997, the Ethics 2000 Commission undertook a comprehensive evaluation of the Model Rules of Professional Conduct and proposed significant changes in 2001. After considering the Ethics 2000 proposals, the ABA House of Delegates approved a substantially revised version of the Model Rules in February of 2002. Further amendments—sponsored by the ABA Commission on Multijurisdictional Practice and the ABA Task Force on Corporate Responsibility—were adopted by the House of Delegates in August 2002 and August 2003.

The Board of Governors requested that the Ethics 2003 Committee review the ABA's Ethics 2000 revisions, undertake a comprehensive study and evaluation of the current ABA Model Rules as a whole, consider the suitability of adopting the ABA revisions in Washington, consider other appropriate changes to Washington's Rules of Professional Conduct, and submit its recommendations to the Board of Governors.

Reasons for the Ethics 2003 Project

- The Rules of Professional Conduct of forty-four states, including Washington, are based to some degree on the ABA Model Rules. Most or all of those states have undertaken a review of the ABA Ethics 2000 revisions to determine the extent to which their rules should be amended to conform more closely to the Model Rules. Other states, including Oregon and Iowa, are in the process of supplanting code-based structures with Model Rules–based systems. In view of these developments, it became important for the Washington Rules to be reviewed and amended as appropriate.

- Since Washington's adoption of the Rules of Professional Conduct (RPC) in 1985, there has not been a comprehensive evaluation of Washington's rules of lawyer ethics.

- There is value in aspiring to achieve uniformity in rules regulating lawyer conduct. Uniformity in the rules of lawyer ethics will assist Washington lawyers in complying with the rules in force in other jurisdictions when they are practicing elsewhere, and will guide lawyers from other jurisdictions, when practicing here on a limited basis, in conforming their conduct to the standards applicable in Washington. The body of law developed in jurisdictions with uniform rules will also provide Washington lawyers and judges with additional interpretive guidance when applying Washington's Rules of Professional Conduct.

Composition and Conduct of the Committee

The Committee appointed by the Board of Governors reflected a notable degree of diversity,

including diversity in location within (and outside of) the state, size of practice, nature of client/organizational representation, experience in the practice of law, gender, ethnicity, and age. Sixteen lawyer members and one nonlawyer member participated actively in the work of the Committee under the charge of Committee Chair Ellen Conedera Dial. Following Barrie Althoff's relinquishment of the position in February 2003, Douglas Ende served as reporter for the Committee. Members of the Committee were Frank Busichio (citizen member, Marysville), Gail McMonagle (Seattle), Jan Eric Peterson (Seattle), Leland Ripley (Lake Stevens), Mark Fucile (Portland, Oregon), J. Scott Miller (Spokane), Kenneth B. Howard (Coeur D' Alene, Idaho), Peter Ehrlichman (Seattle), Tito Rodriguez (Seattle), Deborah Perluss (Seattle), Dave Boerner (Professor, Seattle University), Ernest Rushing (Olympia), Thomas McBride (Olympia), Anne I. Seidel (Seattle), Christopher Sutton (Seattle), Thomas E. Kelly, Jr. (Seattle), and Peter R. Day (Mercer Island). Justice Mary Fairhurst participated as Supreme Court Liaison, and Joni Kerr (District 3, Vancouver) acted as the Board of Governors Liaison. Nanette Sullins served as the Supreme Court's Staff Liaison to the Committee. The Reporter and the Committee were assisted by University of Washington School of Law student Susan Carroll, who served as the Ethics 2003 Committee's Administrative Assistant.

Over the course of thirteen months, the full Committee met on sixteen occasions for up to six hours per meeting to review the Model Rules and recommend rule revisions. Every member also served on at least one of seventeen subcommittees, each of which spent substantial time and effort evaluating particular rules or segments of the rules and in formulating proposed drafts for consideration by the full Committee. Many additional hours were devoted to individual study and consideration of the proposed drafts, which were circulated in advance of or at each Committee meeting.

In discharging its task, the Committee looked not only to the Model Rules and the proposals of the ABA's Ethics 2000 Commission, but also to the existing Washington Rules of Professional Conduct for distinctive provisions that reflect well-established Washington practices and standards; to Washington Supreme Court decisions that shed light on ethical expectations applicable to lawyers in Washington; to WSBA formal and informal ethics opinions for standards that should be preserved or reinforced; to ethics rules in other states to determine the extent to which those states have adhered to or departed from the Model Rules, as well as to the enforcement experiences in those states; and to the comments and suggestions conveyed to the Committee by members of the Bar and nonlawyer citizens of Washington about how changes to the Rules would affect the profession and the public.

Considering the diversity of the Committee's composition, the complexity and magnitude of the task, and, in many instances, the importance of the competing values at stake, the extent of agreement among Committee members was noteworthy. On occasion, albeit infrequently, the Committee could not reach a consensus or there was a significant division of opinion about the appropriateness or prudence of a particular rule or provision. Such instances notwithstanding, the Committee believes that the Rules of Professional Conduct as proposed herein reflect a reasonable balance of interests, that each individual rule is carefully integrated with the others, and that the proposal as a whole had been conscientiously crafted to ensure broad acceptance by members of the Bar and the public.

Analytic Approach of the Committee

It was the hope of the ABA Ethics 2000 Commission that as state supreme courts considered implementation of the revised Model Rules, uniformity would be the "guiding beacon." The Conference of Chief Justices has also urged cooperation "to ensure consistency among jurisdictions concerning lawyer regulation and professionalism." Recognizing the importance of uniformity in rules regulating lawyer conduct, the Ethics 2003 Committee operated on the general principle that it would recommend adoption of the Model Rules, together with the associated commentary, unless there was a compelling and articulable reason for deviation.

With this in mind, the text of the Model Rules of Professional Conduct is the primary source of the framework for and content of the Rules proposed by the Ethics 2003 Committee in this Report. In some instances, however, the Committee concluded that the Model Rules are silent on a subject that has been traditionally and successfully regulated in Washington, or that an existing Washington rule is clearly more suited to the regulation of Washington lawyers than its Model Rule counterpart. In such cases the Committee has proposed retention of existing provisions in Washington's Rules of Professional Conduct or the addition of new Washington-specific provisions.

As set forth in paragraph [23] of the Scope section of the proposed Rules, the Committee has endeavored to parallel the structure of the Model Rules as closely as possible and to clearly indicate instances of material deviation. Omissions from the Model Rules are signaled by notation in the text of the rule. Other alterations of the Model Rules and Comments are accompanied by explanatory remarks in the form of "Washington Comments" annexed to the general Comment section of each modified rule. (In some cases, Washington-specific interpretive gloss is included among the Washington Comments even if the text of the Model Rule is unaltered.) Additional reasons for proposed deviations from the Model Rules are detailed in this Report.

What the Ethics 2003 Committee Did

- Commencing in February 2003, the Committee examined the Model Rules of Professional Conduct and other proposed revisions to the Washington Rules of Professional Conduct. With uniformity as its touchstone, the Committee sought to assure that twenty years after their adoption, Washington's Rules would integrate with technological and other changes that have affected the way law is being practiced, would harmonize with any pertinent changes in substantive law and legal procedure, and would provide better guidance to lawyers seeking to comply with ethical requirements. The Committee, through its open process, sought, received, and acted upon viewpoints from throughout the legal community and from the public.

- Shortly after it was convened, at the request of the Board of Governors, the Committee acted promptly to address ethical issues raised by the Security and Exchange Commission's adoption of regulations under the Sarbanes-Oxley Act. The Committee recommended that the Board of Governors adopt a formal ethics opinion discussing the effect of the regulations on the obligations of Washington lawyers under Rules of Professional Conduct. The

Committee's efforts culminated in adoption by the Board of Governors, on July 26, 2003, of the "Interim Formal Ethics Opinion Re: The Effect of the SEC's Sarbanes-Oxley Regulations On Washington Attorneys' Obligations Under the RPCs."

- The Committee repeatedly and widely solicited participation by and comments from the profession at large. It also encouraged comments from the public and provided opportunities for those comments. At the outset of the Committee's undertaking, leaders of all the county bar associations, WSBA sections, boards, and committees, and specialty and minority bar associations were contacted directly about the work of the Committee. The Committee invited members of these organizations to attend Ethics 2003 Committee meetings and urged each bar leader to canvass his or her membership about possible changes to the Rules of Professional Conduct and to have members direct comments and inquiries to the Committee. The Committee offered to send Committee members to each county bar association to discuss the Ethics 2003 project.

- As a result of the initial outreach efforts, members of the Committee spoke about the work of the Committee at thirty-three county bar meetings, continuing legal education programs, and other law-related roundtables and programs around the state of Washington. Over 1,985 individuals attended those sessions. Speakers invited the attendees to ask questions about the Ethics 2003 process, attend Committee meetings, and submit comments to the Committee.

- In October 2003, the Committee sponsored a public forum for nonlawyers on the issue of lawyer-client confidentiality. The public forum was an opportunity for members of the Ethics 2003 Committee to exchange views with interested nonlawyers about lawyer-client confidentiality and its significance to clients and to the public. The Committee presented information about significant distinctions between ABA Model Rule 1.6 and Washington's current confidentiality rule, as well as about the Ethics 2003 process in general, and elicited the views and recommendations of the participants about possible changes to Washington's rules.

- The Washington State Bar Association web site, the *Washington State Bar News*, the WSBA Executive Director's "News Flash," and WSBA Section Newsletters were used to publicize information about the meetings, the work of the Ethics 2003 Committee, and the rule changes under consideration. The activities of the Committee were highlighted in the July 2003 Executive's Report in the *Bar News*. The November 2003 Executive's Report, authored by Committee Member J. Scott Miller as guest columnist, was devoted exclusively to the Ethics 2003 process. Meeting agendas were made available on the Ethics 2003 Committee's web page in advance of each Committee meeting, and a summary of the Committee's actions was posted shortly following each meeting. Interested lawyers and nonlawyers were invited to attend the Ethics 2003 Committee meetings and directed to submit their comments via an Ethics 2003 email address or directly to the Committee Chair or Reporter. Over thirty-five individual emails were received via the Ethics 2003 email address and disseminated to Committee members. Comments were also received by direct mail and telephone.

- Meetings were frequently attended by nonmember guests, who were given an opportunity to address comments and proposals to the full Committee. Nonmember attendees included

representatives from the WSBA Board of Governors, WSBA Family Law Section, the WSBA Litigation Section, the WSBA Rules of Professional Conduct Committee, the Legal Foundation of Washington, the Washington Association of Criminal Defense Lawyers, the WSBA Office of Disciplinary Counsel, the WSBA Lawyer Services Department, and the faculty of the University of Washington School of Law, as well as a number of individual unaffiliated lawyers, law students, and nonlawyer citizens.

- In instances where specific organizational stakeholders had a known or apparent interest in the Committee's resolution of an imminent issue, the organizations were contacted directly and asked to participate in the Committee's work and/or to submit comments or recommendations. Organizations that participated in this fashion include the Legal Foundation of Washington, the Washington State Trial Lawyer's Association, the Washington Defense Trial Lawyers, the Washington Defender's Association, the Washington Association of Criminal Defense Lawyers, the WSBA Business Law Section, and the WSBA Family Law Section.

- As a result of Committee members' discussions with individual lawyers around the state, suggestions directed to the full Committee at meetings, comments received at the public forum, and recommendations or comments submitted via mail, telephone and e-mail, the Committee took into account a diverse aggregation of lawyer and nonlawyer viewpoints.

- Each proposed Rule, together with its accompanying Comments, has gone through five layers of consideration and examination by the Committee. First, each of the subcommittees was assigned a discrete Rule or segment of the Rules to evaluate and prepare. Each subcommittee performed initial drafting work, generally with one or more individual members preparing an initial draft of each Rule, and those drafts then being examined, revised, and approved by the subcommittee. Second, the subcommittee draft was presented by the subcommittee chair to the full Committee at one of its meetings, and then considered, debated, revised, and approved (in whole or in part). In some cases, the Committee resubmitted particular issues to a subcommittee to be presented again at a subsequent meeting. Third, the Committee draft was thoroughly reviewed by the Committee's Reporter, with the assistance of several members of the Committee, to ensure structural consistency, identify drafting problems, and resolve any substantive errors or omissions. Following that review, the Reporter proposed further revisions and circulated a revised draft for Committee members to study. Fourth, the Reporter's version of the Committee draft was considered by the full Committee at its March 10, 2004 meeting, and, after further revision, was given tentative approval. Fifth, and finally, the Committee considered a complete draft of all Rules and this Report and gave final approval to the proposed Rules that are submitted herein.

- While the Committee's work was underway, the Chair provided the Board of Governors with interim updates on the progress of the Ethics 2003 Committee at Board meetings in July 2003, October 2003, and February 2004.

- The Committee has endeavored to present its recommendation to the Board of Governors well in advance of the October 15 deadline for submission of suggested rules to the Supreme Court under General Rule 9.

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February 3, 2005

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

RE: Proposed Amendments to Rules of Professional Conduct

Dear Clerk:

Please consider my comments on the following proposed rules.

Rule 1.15A(e)

> A lawyer must promptly provide a written accounting to a client or third person after distribution of property or upon request. A lawyer must provide, at least annually, a written accounting to a client or a third person for whom the lawyer is holding property.

That is elaborated upon in comment [5]. Property covered by this rule includes original documents effecting legal rights such as wills or deeds.

I am aware that at some point the Bar adopted a rule suggesting that attorneys return original wills to clients. Although it has always been my practice to suggest to clients that they keep their own wills, over the 30 years I have been practicing I have acquired some original wills because the clients wanted to leave them with me. I have also lost touch with those clients and been unable to return the original wills to them in light of the Bar Association suggestions that the wills be returned. Similarly, I have some original (recorded) deeds in my 30 years worth of closed files for various reasons, including that the property was conveyed to another party and so the original deeds became of historic interest only. If this rule is adopted, it should be made effective prospectively only. Where the client does not maintain a current address with the attorney, this puts an insurmountable burden on the attorney to every year send out a notice which one knows will be returned because the client has moved, leaving no forwarding address. Although there is now a statute that permits a lawyer to file such unclaimed wills with the county

clerk, there is no such mechanism for deeds and in fact, since they are normally recorded, it does not seem any purpose is served in requiring ongoing notice. I recognize a different set of concerns would apply if the attorney is acting as a formal escrow agent and is holding a deed. Even then, however, I question the utility of having the attorney send notices every year reminding purchasers and sellers on a 20 or 30 year contract that the original documents are being held.

Rule 1.15A(h)(9)

> Only a lawyer admitted to practice law may be a signator on the [trust] account.

Although I currently have an associate, for many years I was a sole practitioner. I eventually found it necessary to put one of my non-lawyer staff on the trust account. My practice is primarily with worker's compensation clients, and I receive my client's time loss checks at least four days of every week and make them available to the client the same day. There needs to be a mechanism to have the checks signed if I am ill, on vacation, in court or otherwise unavailable to sign the checks which arrive each morning and which are picked up by the clients each afternoon. The solution is not necessarily to grant check signing authority to an associate, nor should the solution be to compel a sole practitioner to hire another attorney solely to process checks. The integrity of the trust account can only be maintained by the attorney in charge maintaining oversight. It is no guarantee of trust account integrity that only attorneys can sign on the accounts, as evidenced by the frequent disciplinary notices in the Bar News. This rule will put an insurmountable burden on small practitioners without any corresponding safeguard to the client.

Rule 1.15B(a) (required trust account records)

> A lawyer must maintain current trust account records. They may be in electronic or manual form and must be maintained for at least seven years after the event they record.....

This bright line for retention of trust records is an excellent idea. The current rule, which

requires one to keep trust checks and documentation for five years until the transaction is completed makes it very difficult to determine when trust accounting records can be destroyed. This is particularly true in long, ongoing cases such as workman's compensation cases.

Yours very truly,

Laurel Smith
Attorney at Law

LS:njh