From: OFFICE RECEPTIONIST, CLERK
To: Martinez, Jacquelynn
Subject: FW: Comments Regarding the February 2024 Proposed Amendments
Date: Wednesday, February 21, 2024 8:08:55 AM

-----Original Message-----
From: C.E. Petit <cepetit@scrivenerserror.com>
Sent: Tuesday, February 20, 2024 7:31 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Subject: Comments Regarding the February 2024 Proposed Amendments

Regarding RPC 1.2 WA comm 18 and RPC 8.4 WA comm 8 (put forth for comment 20 February 2024):

(1) I suggest that the wording of the proposed RPC 1.2 WA comm 18 misleadingly misuses a term of art from another area of law and could be improved. Instead of referring to "conflicting laws," it should refer to "apparently inconsistent laws."

As a slightly-less-emotionally-charged example, the particular procedural requirements (especially as to timing, stay of discovery, and immediate
appealabiity) embedded in Cal. Code. Civ. Proc. § 425.16 are "apparently inconsistent" with Washington law -- and would matter to a Washington client defamed by a California author, especially since some (but not all) courts treat § 425.16 as a substantive and not merely procedural right of a defamation defendant despite its location in the Code of Civil Procedure.
This does not rise to the level of an "actual conflict" in a general sense; the laws are only "apparently inconsistent."

I approve the sentiment of the proposed change to the comment, but merely suggest a broadening of its rhetoric parallel to the broadening from "just cannabis."

(2) Conversely, I suggest that RPC 8.4 WA comm 8 provides too broad a protection because it presumes applicability of Washington law whenever a Washington attorney is involved. The least-intrusive change would be to add ", if reasonably believed applicable" before the parenthesized example.

One of the most frustrating aspects of multistate/multijurisdiction counsel, litigation, and contracting is the silent -- and often unwarranted -- assumption of "home state rules" in the face of significant indications that the home state's rules might not apply. It seems to me that failure to engage in a a conflict of law analysis (in ironic counterpoint to my comment
above) is precisely the kind of misconduct that implicates RPC 1.1. This is not to say that incorrect analysis of true conflicts of law violates RPCs
1.1 and 8.4; it is to say that failing to form the reasonable belief of applicability -- failing to do the analysis at all -- does.

Offering again a hopefully less-emotionally-charged example, consider a consumer financing arrangement made by a Washington state resident with an ostensibly Native American tribal entity (that is in reality funded and operationally controlled by an Alabama non-bank financial institution).
Under RCW 19.52.034, Washington's usury limits control; under the tribal rules and Alabama law (the latter for loans in excess of $2,000), there is no usury restriction. Under this suggested change to the proposal, failing to

analyze the conflict here at all would, or should, be treatable as misconduct; failing to accurately predict how a court (or arbitrator) that had never encountered this specific conflict before would rule would, and should, not.

Again, I approve the sentiment of the proposed change, but this time think it immunizes too much.

==========

C.E. Petit
http://www.scrivenerserror.com http://scrivenerserror.blogspot.com