

## **Ethical Issues in Land Use and Environmental Law**

**By**

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## **Development of the New RPCs**

On July 10, 2006, the Washington Supreme Court adopted *en banc* (by a 7-2 vote) a series of amendments to the Washington Rules of Professional Responsibility. The adoption of these amendments, and some new rules, is the culmination of nine years of public process which resulted in the new rules.

The process began in 1997 when ABA President Jerry Shestack created “Ethics 2000.” Traditionally the American Bar Association develops model codes of professional responsibility. After adoption by the ABA House of Delegates, the model code is considered by the various states. Ethics 2000 was an effort by the ABA to update the Model Rules of Professional Conduct for the new millennium. The impetus to do so was more than simply the dawning of a new century. Over twenty years passed since the RPC format was adopted. During that time, the practice of law dramatically changed. Corporate scandals focused public and legislative attention on the role of counsel. In an effort to respond to this changing legal environment, the ABA began a comprehensive review and rewrite of the Model Rules.

After final adoption by the ABA, the Washington State Bar Association created “Ethics 2003.” The committee, chaired by Ellen Conedera Dial, utilized the Model Rules and made a series of recommendations to the WSBA Board of Governors for changes in the Washington RPCs. Some followed the Model Rules. Others were unique to Washington. The Board of Governors made some changes to the Ethics 2003 proposals and submitted them to the Washington Supreme Court. In March 2005, the Supreme Court published 185 pages of proposed changes for public comment. The comment period closed in April 2005. The proposed changes were before the Washington Supreme Court until July 2006 when the court issued the final rules. The new rules were effective September 1, 2006.

## **Overview**

Although the changes to the RPCs are voluminous, the ethical landscape has not dramatically changed. Basic ethical precepts and the structure of the rules remain the same. One significant change is the rules now come with comments to explain them. Many of the comments are from the ABA Model Rules. In many instances, however, specific Washington comments are included reflecting Washington practice and law. Lawyers will already be familiar with the basic provisions of the rules, since they are carried over from the former rules.

## **Fundamental Principles**

The principal purpose of ethical rules is to establish minimum standards for acceptable conduct. Legal ethics does so in the context of the Anglo-American adversarial tradition of lawyering.

For lawyers to function effectively in an adversary system of justice, there are two overarching duties: confidentiality and loyalty. Clients need to be assured that what they tell the lawyer will not be used against them. If clients do not believe this, they will not be candid with counsel. Thus the need for confidentiality in the client-lawyer relationship arises. There is a constant tension to protect confidentiality, while at the same time recognizing the lawyer’s responsibility to society and the justice system.

Clients must also have confidence that the lawyer will act to serve their interests, not someone else. This implicates the concept of loyalty. The RPCs do not mandate a duty of loyalty. Rather, aspects of loyalty are implicit in the various duties imposed upon a lawyer through the RPCs.

While the RPCs impose minimum standards, aspiring to a higher standard of conduct is encouraged. The Washington Supreme Court emphasized this by retaining the “Fundamental Principles” section from the 1985 rules.

In addition, a special Washington revision to the Preamble eloquently summarizes the ethical approach that should be taken by Washington lawyers.

In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer’s responsibilities to clients, to the legal system and to the lawyer’s own interest in remaining an ethical person while earning a satisfactory living. The Rules of Professional Conduct often prescribe terms for resolving such conflicts. Within the framework of the Rules, however, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules. These principles include the lawyer’s obligation conscientiously and ardently to protect and pursue a client’s legitimate interests, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system.

### **Specialization and the RPCs**

Those practicing land use and environmental law do so in an increasingly specialized field. As a result, special consideration should be given to how specialization within the legal profession is dealt with from an ethical perspective. Approximately twenty five years ago, the legal profession had an extensive debate about whether to recognize specialties in the profession. Some states, such as California, adopted specialization certification for lawyers. No state requires specialty certification, but it is available on a voluntary basis for lawyers who desire specialty certification in the states which allow it.

While formalized state certification programs were being debated, and instituted in some jurisdictions, third party specialty certification programs began to spring up around the country such as the National Board of Trial Advocacy. In response to this growing trend, the ABA began to accredit organizations that certify specialty designations for lawyers. This helps to assure the public that those organizations meet certain standards in making specialty designations for lawyers.

When the ABA revised the Model Code based upon the recommendations of Ethics 2000, the ABA changed the Model code by separating the concept of claiming to be a specialist from being certified as one.

Under Model Rule 7.4(a), which is the same as the Washington provision cited below, a lawyer is generally permitted to state that the lawyer is a “specialist,” practices a “specialty,” or “specializes in” particular fields. However, that claim must be truthful, and is subject to the “false and misleading” standard contained in Model Rule 7.1 relating to communications concerning a lawyer’s services.

Like many other jurisdictions, Washington conducted an extensive debate in the eighties about specialization. The concept was firm rejected by the WSBA. Young lawyers were concerned about being disadvantaged because many of them would not be able to obtain certification because of time of practice requirements. Exactly what was to be done with general practitioners, or whether there should be a general practice specialist certification, was never fully resolved. With stiff opposition in the bar, the Washington Supreme Court weighed in by clearly indicating it did not favor specialty certification.

Our Supreme Court did that following the decision of the U.S. Supreme Court in *Peel v. Attorney Registration & Disciplinary Comm’n*, 496 U.S. 91 (1990). In that case, an Illinois lawyer identified himself on his letterhead as “Certified Trial Specialist by the National Board of Trial Advocacy.” Illinois had no certification or specialization plan of its own. The Disciplinary Commission charged Peel of violating ethical standards and argued consumers could be misled by his letterhead into believing he was certified by some formal state certification process. Peel was convicted, and appealed to the U.S. Supreme Court. That Court reversed his discipline and ruled that states may not ban statements of specialty certification that are only potentially, rather than inherently, misleading. Under that formulation, claims of specialty certification cannot be categorically banned.

The Washington Supreme Court reacted by adopting an amendment to the RPCs which essentially requires a lawyer communicating that he or she has been certified as a specialist by a certifying organization to include a statement that the Washington Supreme Court does not recognize certification of specialties and that the certification is not a requirement to practice law in Washington.

In revising the RPCs after the Washington Ethics 2003 process, little change was made to the then existing RPC 7.4. Commentary based upon the Model Code was adopted. However, the commentary from the ABA allowing a lawyer to claim he or she was specialist was specifically rejected in a Washington revision to Comment 1. In addition, comment 4 was added to make clear that anyone indicating he or she was a specialist had to include the provision that the Washington Supreme Court does not recognize it. Thus, the aversion to specialty certification, and even calling yourself a specialist, continues in the Washington version of the RPCs. The current version of RPC 7.4 is as follows:

#### Rule 7.4 Communication of Fields of Practice and Specialization

- (a) A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law.
- (b) A lawyer admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation “Patent Attorney” or a substantially similar designation.

- (c) A lawyer engaged in Admiralty practice may use the designation “Admiralty,” “Proctor in Admiralty” or a substantially similar designation.
- (d) A lawyer shall not state or imply that a lawyer is a specialist in a particular field of law, except upon issuance of an identifying certificate, award, or recognition by a group, organization, or association, a lawyer may use the terms “certified,” “specialist,” “expert” or any other similar term to describe his or her qualifications as a lawyer or his or her qualifications in any subspecialty of the law. If the terms are used to identify any certificate, award, or recognition by any group, organization, or association, the reference must:

- (1) be truthful and verifiable and otherwise comply with Rule 7.1;
- (2) identify the certifying group, organization, or association; and
- (3) state that the Supreme Court of Washington does not recognize the certification of specialties in the practice of law and that the certificate, award, or recognition is not a requirement to practice law in the state of Washington.

Although the latest revision of the ethical rules kept the long standing rules discouraging specialization, the bar should ask whether this approach really makes any sense. The legal profession is becoming more specialized every day. Since the last time this topic was seriously discussed, there has been a radical change in specialized practice. For instance, intellectual property was once the purview of a small number of lawyers. Now, intellectual property is practiced by thousands of lawyers nation wide. The law has become more complex, along with the complexity of our society. Land use, environmental practice and its subspecialty water law exemplify this. For instance, a few years ago, water law was a discrete area primarily dealing with water rights. Now it has immense consequences and new environmental dimensions, such as NPDES permits that affect thousands of our citizens. It clearly requires a great deal of expertise in the subject area to advise clients properly. The time has come to begin again a meaningful discussion in our profession about the role of specialization and what lawyers can communicate about it.

### **Specialization and Competence**

Although the RPCs inhibit discussing specialization with the public, it is one of the recognized factors relating to lawyer competence. RPC 1.1 requires a lawyer to provide competent representation to a client. New comment 1 to RPC 1.1 clearly recognizes specialization as a factor relating to competence. It provides in relevant part:

In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer’s general experience, the lawyer’s training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question.

The evaluation of a breach of competence for disciplinary purposes, or for civil liability, therefore includes the specialized nature of a matter and the lawyer's familiarity with that area of the law.

### **Limiting the Scope of Representation**

A lawyer does have the right to limit the scope of the lawyer's representation under the RPCs. Lawyers practicing in a specialized area may wish to formalize the limited nature of the representation, particularly in light of the fact that new RPC 1.13 places upon the lawyer the representation of an organization as a whole (discussed more fully below). Limiting the scope of representation has some limitations. RPC 1.2 (c) provides

(c) A lawyer may limit the scope of representation if the limitation is reasonable under the circumstances and the client gives informed consent.

"Informed consent" is a defined term under the RPC 1.0 (e). It provides:

"Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of action.

RPC 1.2 does not require client consent to be "confirmed in writing," another defined term. Good practice does have the consent memorialized in writing.

### **Organization as a Client**

The new rules include for the first time a rule relating to an organization as a client. RPC 1.13 provides that a lawyer employed by an organization represents the organization acting through its duly authorized constituents. If the lawyer knows (not believes) that a constituent of the organization (like an officer or employee) "is engaged in action, intends to act or refuses to act in a matter related to the organization that is a violation of a legal obligation of the organization or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as reasonably necessary in the best interests of the organization."

Rule 1.13 then provides essentially that the lawyer then should take the matter "up the ladder" of the chain of command, if warranted, to the "highest authority that can act on behalf of the organization as determined by applicable law." Counsel will have to analyze what is the highest authority in an organization. This is particularly true in government, where the highest authority may vary depending on applicable law. Under the RPCs, a lawyer employed by government represents the entire governmental entity. RPC 1.13 has a different provision for a private practitioner representing a governmental unit. Under RPC 1.13(h), only the actual unit of government being represented is the client, unless the written agreement provides to the contrary or the broader governmental unit gives the lawyer timely notice to the contrary.

After having taken the matter up the ladder, if the highest authority "insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly a

violation of law, and the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization” then the lawyer may (discretionary) reveal information whether or not is protected by RPC 1.6. The disclosure must be limited to the “extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.”

### **Conclusion**

Specialization is a common feature of modern legal practice. Legal specialization is an increasing phenomenon. Yet the ethical framework for the profession ignores this reality. It rejects certification of specialists, and prohibits using the term in communicating about legal services. On the other hand, it is a factor used in evaluating competence. Unless the lawyer has taken the care to limit the scope of the representation, the lawyer is deemed to represent an organization in its entirety, for all purposes. Lawyers specializing in a limited area should take greater care to limit the scope of their representation to that area with client informed consent. The role of specialization should be discussed within the profession, and with candidates for the Supreme Court, if we want our ethical structure to match the realities of the legal world in which lawyers practice.