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ASSOCIATION OF PROFESSIONAL RESPONSIBILITY LAWYERS

MINUTES OF THE MEETING

February 5, 1993
Boston, MA

The Association of Professional Responsibility Lawyers met at the Marriott Copley Place in Boston, Massachusetts on Friday, February 5, 1993. Mark Harrison convened the business meeting at 9:00 a.m.

Officers/Directors Present:

Mark Harrison, President
John Weiss, President-Elect
Seth Rosner, Secretary
David Rosenfeld, Treasurer
Diane Karpman, Director
Ellen Pansky, Director
Cornelia Tuite, Director

Absent:

Steven M. Smoot, Director

ABA Staff:

Cassie Dalla Santa, Assistant Regulation Counsel
Jeanne Gray, Director

1. Approval of Minutes

The minutes of the October 26, 1990 meeting of the Association of Professional Responsibility Lawyers were approved.

2. Business

Treasurer's report was accepted by the membership. President Harrison introduced each committee chair and had each report on the start up activities of his or her committee.

Cornelia Tuite, Chair of the Publications Committee agreed to write the Committee's first article for submission to the Professional Lawyer and solicited articles for each quarterly issue from others.

Ron Mallen, Chair of the Expert Witness Committee, reported that he had contacted Committee members and would provide a full report to the membership at the Annual Meeting.

Timothy Burke, Chair of the Law Firm Ethics Committee wrote to all interested members and received 14 responses. The Committee will study: (1) lawfirm compliance to Model Rule 5.1, (2) mechanisms to identify and resolve conflicts - ethics opinions on withdrawal, (3) loss prevention committees and their effect on malpractice coverage and premiums, (4) connection of legal and medical treatment.

George Overton, Chair of the Bylaws Committee, was absent.

Timothy Chinaris, Chair of the Ethics Opinions Committee, has begun contacting state, local and specialty bars for copies of recent ethics opinions.

Professor Howard Messing, Chair of the Admissions Committee will collect unpublished opinions and caselaw on the admissions area and disseminate the information as needed.

Professor Melvin Lewis was appointed Chair of the Amicus Brief Committee following the meeting and agreed to draft an amicus brief in the appeal of Douglas W. Snoeyenbos and Stephen T. Lyons in the Barnhill v US v Security Pacific Business Credit, Inc. case.

3. Advertising: The Status of Florida Litigation and Overview of Regulations Nationwide

John T. Berry, Staff Counsel for The Florida Bar, and William E. Hornsby, Jr., Counsel to the ABA Commission on Advertising discussed the status of lawyer advertising. Mr. Berry stated that advertising has gotten "better" since regulation has gotten more intense. Mr. Hornsby showed samples of real ads being used in different parts of the country and asked for Mr. Berry's comment as disciplinary counsel.

4. Current Developments and Problem Solving

Many cases and situations were shared among members of the group. There are two new Florida cases: Florida Bar v. Bosse, 609 So.2d 1320 (1992), costs of the defense were assessed against the Bar for successful defense; Florida Bar v. Vaughn, 608 So.2d 18 (1992), failure to cooperate is a charge alone even if respondent defends against all other charges. A New York Court of Appeals case, Wieder v. Skala, 61 USLW 2393, 1992 WL 379041 (NY Ct.App. 12/22/92), states that if Weider's dismissal from the firm was based on the reporting requirement, then the dismissal was wrongful. In Balla v. Gambro, 584 NE2d 104 (1991), the opposite resulted. In Prudential Life v. Dewey, Ballentine, 590 NYS2d 2374 (1992), liability was held for an opinion letter to third parties. In Illinois there is a new expungement rule for all dismissed complaints after three years. Stone v. Rosen, 348 So.2d 387 (1977), held that there esists an absolute privilege on the part of a citizen to make a complaint against a member of the integrated bar of Florida. With public proceedings there may no longer be room for immunity. Notice of potential suit may be more necessary. California and Oregon have sexual harassment rules and Florida and California have proposed rules on all areas of discrimination.

5. Ethics Compliance Audit

Robert E. O'Malley, Vice Chairman & Loss Prevention Counsel for Attorneys Liability Assurance Society, Inc., Washington, D.C., described what a typical audit might entail. He stated that ALAS generally spends 1 1/2 to 2 days in a firm and talks to all partners from the middle of the firm on up. The audit agenda has four subject areas from which 95% of claims come. These subject areas include: Trusts and Estates, Financial Institutions, Litigation and Insurance Defense, and Corporate and Securities. Mr. O'Malley predicted a dramatic change in the next ten years. He stated that partners would be less autonomous and have more institutional supervision.

George A. Kuhlman, Ethics Counsel, ABA Center for Professional Responsibility discussed ABA efforts in quality control, peer review, and competence. He discussed the 1980 ALI/ABA Model Peer Review study. The gray areas include responsibilities of supervisory lawyers and nonlawyer employees in law firms.

6. Diversion and Fast-Track Programs in Grievance Cases

The panel included John A. Weiss, respondents' counsel from Tallahassee, Florida, Ellen A. Pansky, respondent's counsel from Los Angeles, California and Harriet L. Turney, Chief Bar Counsel, Phoenix, Arizona. Ms. Turney reported that Arizona has had a diversion program since January 1992. Arizona developed its program by expanding the options of the probable cause panelist. There are two primary diversion tracks MAP (Membership Assistance Program) and LOMAP (Law Office Membership Assistance Program). A breach of MAP or LOMAP must be material to end probation. The weak link in the present system is the monitors. A rule providing civil immunity for monitors is being submitted to the Supreme Court.

Ms. Pansky stated while the whole California disciplinary system is supposed to be on a fast track, it still takes from 8 to 9 months for a trial. California has recently accepted a form stipulation. This stipulation is confidential and is considered a contract, a breach of the stipulation carries its own sanction. Ms. Pansky stated that agreements in lieu of discipline are difficult to negotiate. Respondents must admit culpability. Warning letters are issued although they are not in the procedural rules. Costs are mandatory for public reprovals and above. California has just started its second Ethics School.

Mr. Weiss stated that minor misconduct can be diverted without an admission of culpability. The failure to comply is treated as an aggravating factor in Florida. Probation is handled outside of the disciplinary system. A respondent cannot veto a recommended diversion contract.

7. Misdelivered Documents: Fair Game for Adverse Counsel?

James P. Ulwick, Baltimore, Maryland and James S. Bolan, Boston, Massachusetts discussed the balancing of rights and duties when documents are misdelivered. The guidelines on this issue are across the board.

Lawyers should take into account: (1) the type of document misdelivered - is it work product or opinion work product; (2) the quickness with which you reacted upon receipt; (3) precautions taken for proper delivery; and (4) method of delivery. Mr. Ulwick recited five factors used in analysis: (1) reasonableness, (2) number of inadvertent disclosures, (3) extent of disclosure, (4) rectification, and (5) if the overriding interest of justice would be served.

8. Selected Regulations for a New Century: The APRL Perspective

Mark Aultman, Columbus, Ohio and Gerald Markle, Los Angeles, California reported on selected regulations for which APRL might consider taking a proactive policy stance. These included: statute of limitations/laches, disclosure requirements for disciplinary counsel, and availability of reinstatement in all cases. Mr. Aultman suggested that disciplinary cases should have a statute of limitations period. Malpractice claims have a limitation period. Ms Diane Karpman stated that the local bar in Los Angeles has drafted a statute of limitations limiting a disciplinary action to three years from the date the misconduct was discovered or should have been discovered. There are presently 8 to 10 jurisdictions that have them.

Mr. Markle stated that a disciplinary counsel should be required to disclose under Model Rule 3.8, as criminal prosecutors must, all exculpatory information. This would lessen the need for many motions, interrogatories and other discovery and other civil procedures that will clog up the disciplinary system.

Mr. Markle stated that disciplinary cases are getting expensive to defend. California does not allow reimbursement for expenses (including attorney's fees) and costs of defense when charges are dismissed. There is a proposal in California which would allow the respondent to offer the prosecutor a reasonable sanction plea. If after the trial the respondent received that sanction or less, the respondent would get costs of defense.

Mr. Aultman discussed permanent disbarment. He proposed that APRL should encourage states to allow methods of reinstatement.

9. The Proper Use of Expert Witnesses in Legal Malpractice Cases

Ronald E. Mallen, San Francisco, California stated that consultant experts have problems. They must take neutral, accurate positions to survive as expert witnesses. It is best not to use your consultant as an expert because the consultant has usually been an advocate.

Mr. Mallen gave examples of "standard of conduct" defenses. For omissions, causation should be asked of the expert when there is something like a failure to file a cross-appeal. The lawyer should ask the expert what issues needed to be appealed so that the jury will understand the need. Experts should testify to what should have happened - conclusions are not sufficient.

Mr. Mallen suggested that the only case that does not need an expert is a missed statute of limitation. When hiring an expert, a decision must be made of well known versus less known and specialist versus non-specialist. He suggested that if the other side brings in a well-known expert then you should bring in a less known expert and argue that the extraordinary lawyer is not the standard. Local experts should be preferred. Lastly, Mr. Mallen states that law professors should be used as experts only if you will be allowed to bring in ethical rules to set the standard of care.

10. Kaye, Scholer -- Will It Affect Future Grievance Cases

Kenneth Guido, Office Thrift Supervision, Washington, D.C., and Charles W. Wolfram, Professor of Law, Cornell Law School, Ithaca, N.Y. discussed the Kaye, Scholer case from an ethics perspective.

Mr. Guido reviewed the facts of the case and stated the OTS' position that when a lawyer finds that the client is doing something illegal, it is the lawyer's responsibility to bring it to the clients attention and to withdraw from representation. OTS believes notice to the client means bringing the information up the chain to the Board of Directors. He stated when a lawyer documents the transactions, the lawyer is violating banking laws. If there is knowledge of the violation, then it becomes aiding and abetting.

Professor Wolfram identified three key ethics issues: (1) Importance of context. Kaye Scholer's mistake was treating this case as a litigation matter. Does a lawyer need to do things differently if its an administrative law case; (2) Lawyers obligation to truthfulness; (3) what should a lawyer do when faced with an illegality.

First, the difference in administrative and litigation representation. Is an administrative agency a tribunal under Model Rule 3.4 (candor)? Agencies like OTS are held to a Rule 10(B)(5) standard of no false statements A litigator would not readily know that they would be held to a 10(B)(5) standard before the agency. The litigators in the Kaye, Scholer case weren't specialized and did not understand the context.

Second, is truthfulness. What is a misrepresentation? Documents were put into the loan file after the fact. The lawyer admitted this but argues that the statements were adequate and appropriate for the purpose. They shifted from a statement of fact to a legal conclusion.

Lastly, furtherance of client illegality under Model Rule 1.13. In corporate representation, if the lawyer "knows of" client illegality, the lawyer has to take the appropriate steps. OTS's position is that Kaye Scholer did not take their known information to the Board of Directors. In this case Charles Keatings relatives were the Board.

The meeting was adjourned at 12:00 p.m. Saturday.

Respectfully Submitted,

Cassie Dalla Santa

Cassie Dalla Santa

DRAFT

ASSOCIATION OF PROFESSIONAL RESPONSIBILITY LAWYERS

Guidelines for Amicus Curiae Participation

STANDARDS

APRL will consider the filing of a brief amicus curiae when the following conditions are met:

a. The litigation is pending in a court which is likely to be the court of last resort for that case.

b. The case involves an unusually significant issue whose resolution is likely to affect the rights, privileges or status of the members of the legal profession.

c. The parties to the litigation are unlikely to advocate the broader interests of the profession at stake in the litigation.

d. The resources of the Association make the filing of a brief feasible, in light of its other commitments.

PROCEDURE

1. Any person who believes that under the foregoing standards APRL's organizational interests would be served by amicus participation in pending litigation, may furnish to the Amicus Chair or Co-Chair in writing:

a. The title and style of the case; the name, address and telephone number of the court in which it is pending; and the names, addresses and telephone numbers of counsel for all parties.

b. A short statement of the history of the case, including the contentions theretofore advanced by the several parties who have participated in the litigation.

c. The nature of APRL's perceived interest, and the reason why that interest will not be protected fully by the party proposed to be supported.