



# WSBA

## Committee on Professional Ethics

### Meeting Minutes

October 18, 2013

The committee met at the offices of the Washington State Bar Association, 1325 4<sup>th</sup> Avenue, Suite 600, Seattle, WA 98101.

Members present were Mark Fucile (Chair), Natalie Cain, Colin Folawn, Peter Jarvis, Kevin Michels, Anne Seidel, Sumeer Singla, and Ted Stiles. Excused were Tom Andrews and Robin Haynes (BOG liaison).

Also present were Jeanne Marie Clavere (staff liaison), Doug Ende, Office of Disciplinary Counsel, and Darlene Neumann, paralegal.

The meeting began at 10:05 a.m.

#### Introductions and Preliminary Matters

The Chair welcomed the new committee members and introductions were made around the table. The Chair discussed the former RPC Committee, which was the predecessor to the CPE, and the transition to the new ethics advisory committee with its focus on ethics opinions that serve the broader interests of Washington's lawyers today.

The staff liaison presented an overview of the WSBA bylaws on committees, open meetings, and the committee's procedures and policies.

The Chair explained the source of committee topics may come from requests by the Board of Governors, individual member inquiries, suggestions from committee members, or other sources. Except for BOG requests, the committee will have discretion to determine which topics to address or accept for consideration.

The Chair suggested an organizational structure of small subcommittees comprised of three persons to work collaboratively on the primary research and analysis and to prepare draft opinions. Meetings of the full committee will serve to provide feedback to the subcommittees.

#### ABA Commission on Ethics 20/20 Amendments

The Chair discussed the amendments to the ABA Model Rules adopted by the House of Delegates in August 2012 and additional revisions that were approved in February 2013. As a result of these changes, the ABA is encouraging all state supreme courts and state bars to review

their rules of professional conduct. The CPE has been asked to conduct the review in Washington and issue a report to the Board of Governors (BOG). Members Tom Andrews (chair), Ted Stiles, and Natalie Cain volunteered to serve on the subcommittee.

### I-502 Washington Marijuana Law

At the request of the BOG, the CPE has taken up the issue of lawyer practice in conflict with federal drug law. The Chair noted the committee can determine the type of response to issue, whether it be amendments to the RPC, developing a new rule, comments or issuing an advisory opinion.

The committee discussed the amendments to the RPC proposed by the King County Bar Association (KCBA) to the Supreme Court and KCBA's recent ethics opinion. KCBA has requested expedited consideration by the Court because of I-502's licensing and retail rules taking effect on December 1, 2013. The Executive Director of WSBA also informed the Court that the CPE will take up the issue when it convenes in October.

The issues raised by KCBA were 1) lawyers advising clients on the state recreational marijuana law in conflict with federal law and, 2) the lawyer's personal consumption of marijuana.

The committee discussed the two issues and whether to draft advisory opinions addressing one or both issues, commenting on the proposed KCBA amendments, and whether there was a need to take swift action to amend the RPCs in line with the I-502 deadlines. Further discussion followed on disciplinary policy in light of the conflict between state and federal laws, the state's other laws on medical marijuana and whether it had resulted in complaints against lawyers. The committee then considered various perspectives for a narrow opinion addressing the legal counsel issue. There was discussion on the longevity of a narrow opinion whose usefulness could be short-lived if the federal government were to change its policy of non-enforcement, and the need to provide an opinion that offers long term ethical guidance taking into account the impact of conflicts of federal policy with state laws.

Members who volunteered to work on this issue are Peter Jarvis (chair), Sumeer Singla, and Kevin Michels.

### Discretionary Items

- Potential Comment to RPC 1.8

A recent Court of Appeals opinion pointed out an ambiguity in the RPCs when a lawyer takes a security interest as fees when negotiating the fee agreement, and whether the action should invoke a higher level of disclosure under RPC 1.8(a). A concurring judge noted Washington Advisory Opinion 2209 (2012) suggested a best practice approach, but stopped short of issuing an affirmative statement. The judge indicated the Supreme Court might resolve the question and the case is currently pending Petition Review. The CPE may consider developing a comment to the rule.

Peter Jarvis moved, which was seconded, to table the item. The motion carried.

- Review of Government Attorney Files by State Archivist

The committee reviewed an inquiry concerning a proposed procedure to temporarily transfer government attorney files to the State Archivist, who reviews the records to determine which should be permanently retained. The inquirer was concerned the conduct could violate RPC 1.6 and attorney-client privilege if the materials were to be turned over as required by statute. The committee discussed whether this was a unique situation or a broader issue, confidentiality, waiver, practical access, and forced disclosure. After discussion, the committee unanimously agreed the question concerned the interpretation of statutory law and declined the inquiry, however it identified no issues with the solution proposed by the inquirer.

- Unencrypted Cell Phone and Email Communications

The committee considered an inquiry concerning the lawyer's use of unencrypted cell phone and email to communicate privileged information, the possibility of U.S. government agencies capturing the communications, and whether that would result in a violation of RPC 1.6. The committee reviewed the question and voted unanimously to decline to opine.

### Adjournment

The meeting adjourned at 1:20 p.m.