

# WASHINGTON STATE BAR ASSOCIATION

## Committee on Professional Ethics

### Meeting Minutes

April 17, 2020

The committee met remotely via video teleconference due to the COVID-19 health emergency and the Washington state Governor's Stay Healthy, Stay Home Order, and Proclamation 20-28.

Members present were Don Curran (Chair), Pam Anderson, Lucinda Fernald, Brooks Holland, Jeffrey Kestle, Vince Lombardi, Hugh Spitzer, Monte Jewell, and Asel Neutze. Kyle Sciuchetti (BOG Liaison) was excused. Also present were Jeanne Marie Clavere (staff liaison), Kirsten Schimpff, Office of Disciplinary Counsel, and Darlene Neumann, (paralegal).

The chair called the meeting to order at 10:03 a.m.

#### Updates:

- The Supreme Court ordered an extension of the comment period for all rule amendments to September 30, 2020, due to the COVID-19 emergency. The order impacts proposed amendments to RPC 1.15A(h)(9) and proposed revisions to Title 7.
- The Court adopted amendments to RPC 4.4, Comment 4, effective upon publication in the Washington Reports. The version adopted was the not the full CPE recommendation as stated in the original proposal and included edits from the proponents and the BOG.

#### Lawyer Referral Services Subcommittee

The committee reviewed a draft GR 9 prepared by the subcommittee. The staff liaison noted "lawyer" which had been stricken on the draft should be added back. Staff will forward the completed proposed amendment to the BOG for the regular June meeting.

#### Ghostwriting Subcommittee

The subcommittee reported they have not received responses from the judges' associations (Superior, District, Municipal) on their draft opinion, because the courts have been busy with emergency orders during the COVID-19 shut down. They will follow up again. The efforts also include federal judges.

#### Lawyer Mediator Subcommittee

Following meetings with a family law mediator and a domestic violence advocate, the subcommittee recommended the committee propose a comment to RPC 2.4 specific to family law matters. The subcommittee posed three questions a potential comment could address: 1) the lawyer mediator's obligation to conduct an adequate evaluation of all the issues and potential risks to the parties to

determine if a mediation should proceed; 2) If so, whether the mediator has adequate training and experience and can structure the mediation appropriately; and 3) whether the mediator can include guidance on drafting and preparing documents and ensure neutrality. The committee noted the proposed comment would garner high interest by the lawyer mediator and family law groups. Other suggestions were to review information from the National Judicial Institute on Domestic Violence as a possible guide and supplement the comment with an advisory opinion to address conflict of interest and RPC 4.3 issues. After receiving support from the committee for a comment proposal, the subcommittee will continue its work. This matter was tabled to the June meeting.

### **Multi-Client Representation Subcommittee**

The subcommittee shared a late revised draft of the opinion, which the subcommittee had not yet formally reviewed. The revised draft concludes that the attorney can represent the spouse, as an individual and in the capacity as PR, in a wrongful death and survival matter if the attorney provides a clear explanation to the client of the scope and limitations of the dual representation. The hypothetical also permits limited representation of the children. The committee discussed whether the analysis would change if the insurance is inadequate to pay all of the claims. The subcommittee acknowledged that an analysis is easier if enough funds exist, but agreed to address the insufficiency of funds or unknown insurance limits in the next iteration of the draft. Otherwise, the committee acknowledged that the advisory opinion will be very narrow. This matter was tabled to June meeting.

### **Competency Disclosure Subcommittee**

The subcommittee noted they hope to have a draft opinion for the June meeting. Discussion followed on two existing ethics opinions involving disclosure of competency issues in criminal proceedings, various competency disclosure issues faced by public defenders, including representing clients in civil commitment proceedings, and that each case is fact-specific. The subcommittee discussed ideas on what might be included in an opinion, such as a checklist, RPC 1.6 and 1.14 analyses, and a practice guide for public defenders.

### **State v. Nickels**

Following discussion of the court's opinion and the committee's view that the decision created an exception to RPC 1.11, the committee formed a subcommittee with Pam and Brooks as members to prepare a proposed comment change similar to the manner of the proposed comment changes precipitated by the *Karstetter* case. The subcommittee is seeking one more volunteer to assist.

### **Other**

The chair discussed a letter he received from a lawyer inviting the CPE to review a proposed boilerplate special legal services power of attorney and personal representative designation for sole practitioners who are sole signatories on their IOLTA trust account, and to provide guidance on dealing with client files following a lawyer's death. The chair noted the inquirer's request to provide editorial suggestions on the POA and personal representative designation falls outside of the CPE's scope. Members recommended the chair point the inquirer to resources offered by the Bar (online Planning Ahead guide and the Practice Management Assistance program), including the Solo and Small Practice Section.

The meeting adjourned at 11:12 a.m.