

WASHINGTON STATE BAR ASSOCIATION

Committee on Professional Ethics

Meeting Minutes

August 23, 2019

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

Members present were Don Curran (Chair), Tom Andrews (phone), Pam Anderson, Brooks Holland, Anne Seidel, Mark Fucile, and Lucinda Fernald. Excused were Jeffrey Kestle, Vince Lombardi, and Kyle Sciuchetti (BOG Liaison). Also present were Jeanne Marie Clavere (staff liaison), Doug Ende, Office of Disciplinary Counsel, and Darlene Neumann, paralegal.

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

1. Minutes

The committee approved the minutes of June 7, 2019, by a vote of 7-0.

2. Updates/Announcements:

- The staff liaison announced the October meeting will be on the 23rd and staff will notify members of the other dates once the arrangements are finalized.
- The Board of Governors (BOG) approved the proposed amendment to RPC 1.15A(h)(9) (signatory rule) at the July meeting. Staff will send the rule along with the technical correction to RPC 6.1(a)(2) approved by the BOG in May to the Supreme Court.
- The staff liaison, on behalf of the committee and the Bar, thanked outgoing members Mark Fucile, Tom Andrews, and Anne Seidel for their contributions and years of service on the CPE.

3. Advisory Opinion 2223 Subcommittee

The subcommittee presented a revised draft of the proposed draft opinion which incorporated the analysis that RPC 1.7(b)(3) takes precedent over RPC 1.12 to preclude common representation by the mediator despite the parties' belief that all issues have been resolved. The committee unanimously approved the latest version of the revised draft opinion and to withdraw the old opinion upon publication of the new replacement opinion.

The subcommittee presented and discussed proposed amendments to RPC 1.12 to permit joint representation of parties to mediation. The subcommittee proposed the rule change through the lens of access to justice. The committee discussed sharing of material information (“flow back”) issue, the issues of impartial joint representation when parties’ interests are not truly aligned, treatment by other jurisdictions, and putting the changes in RPC 1.7(b)(3) instead of RPC 1.12. The motion to approve the proposed amended rule failed for lack of a second. The committee recommended further work on the proposal, specifically on defined consensus and limited scope representation. Another member volunteered to assist the subcommittee with the drafting. The committee tabled the item along with proposed changes to RPC 2.4 to the next meeting.

4. Lawyer Referral Services Subcommittee

The subcommittee presented proposed amendments to RPC 1.5, 7.2(b)(2), and changes to comment 6 to RPC 7.2. Discussion followed on fee sharing by county bars, whether they were 501 organizations, revisions to the proposed language to 7.2(b)(2), adding a reference in RPC 5.4(a)(4) regarding sharing fees with nonlawyers, and citing to language in Washington’s nonprofit act. The subcommittee will prepare a revised draft.

5. Ghostwriting Subcommittee

The committee reviewed notes from the subcommittee on a proposed draft opinion. The subcommittee hopes to have a draft prepared by the October meeting.

6. SAAG Subcommittee

The subcommittee discussed a proposed response to the inquirer. Following discussion, the committee decided a short advisory opinion that includes a set of hypothetical facts would be more helpful to bar members rather than an informal analysis letter to the inquirer only. The subcommittee will work on a draft opinion for the committee’s review.

7. Retired Lawyer Trust Account Subcommittee

The subcommittee deleted a reference to retired lawyers in their last memo and focused their analysis on lawyer inactive status. They concluded that a lawyer once admitted to bar membership with a license to practice is still subject to the ELC, RPC, and all relevant rules even if inactive status. Members discussed whether it is still a trust account if the lawyer is inactive, if an inactive lawyer is “admitted to practice,” ELC 1.2 reference to “any lawyer admitted to practice,” and RPC 1.15A “admitted to practice” which is unclear whether it excludes inactive lawyers. The committee discussed several possible alternatives for an inactive lawyer still receiving checks in connection with a representation, various banking procedures, and legal issues.

Following discussion, the committee suggested that an advisory opinion would be more useful to the membership than an individual response and directed the subcommittee to work on a draft for the next meeting.

8. Discretionary Items

a. Attorney Administrator Compensation

The committee reported on their research into the questions posed by an inquirer. There were no opinions regarding an attorney serving as an administrator of an estate who also serves as the attorney for the administrator; moreover, this type of dual capacity representation appears to be an established practice. The first question concerned whether there is a conflict of interest, and secondly if not, whether there is a conflict for the administrator to be compensated by the creditor firm with a claim against the estate. The creditor firm had retained the attorney to serve as administrator. It was determined that the first issue was a legal question beyond the scope of the committee and the second issue involved the ethical rules. Members discussed the application of RPC 1.8, 1.7, fiduciary and statutory issues, and the court's plenary authority in such matters which further complicated a potential advisory opinion. By a vote of 6-0-1, the committee voted to decline the inquiry.

b. Multi-Client Representation in Wrongful Death Cases

The chair reflected on the committee's Rules of Procedure against opining on matters in litigation. Discussion followed on issuing a general opinion to provide guidance to the membership as opposed to addressing the inquirer's specific questions, which the committee agreed. The chair will prepare a hypothetical for the next meeting.

c. *Karstetter v. King Cty Corrections Guild, No. 95531-0*

A committee member brought the Supreme Court case to the committee's attention and noted the court's decision may affect the practice of lawyers in Washington. After a brief discussion, the committee agreed to table further discussion to the October meeting when the new committee members are able to participate fully.

9. Potential Future Topics

No additional topics raised by members.

The meeting adjourned at 2:05 p.m.