

# WASHINGTON STATE BAR ASSOCIATION

## Committee on Professional Ethics

### Meeting Minutes

August 24, 2018

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 Don Curran (Chair), Tom Andrews, Natalie Cain, Callie Castillo (phone), Lucinda Fernald, Colin Folawn, Mark Fucile, Brooks Holland (phone), Anne Seidel, and Kyle Sciuchetti (BOG Liaison). Also present were Jeanne Marie Clavere (staff liaison), Kirsten Schimpff, Office of Disciplinary Counsel, and Darlene Neumann, paralegal.

The meeting began at 10:01 a.m.

#### 1. Minutes

The minutes of June 22, 2018 were approved. The minutes of July 2, 2018 were approved as amended.

#### 2. Updates/Announcements

- The chair received a potential inquiry and will confer with the staff liaison to determine if it should go before the committee.
- Natalie Cain, Colin Folawn, and Callie Castillo are rotating off the CPE at the end of September. The Board of Governors approved Don Curran to serve as committee chair for another year. The staff liaison thanked the three members for their time, energy, and contributions to the committee. The committee members and the chair expressed their appreciation as well.
- There was no new information on the suggested amendments to the lawyer advertising rules that were forwarded to the Court in June.

#### 3. Retired Lawyers and Trust Accounts

The chair reported that the LLLT Board chair indicated the Board has taken no action yet on the LLLT trust account issue. Since this issue has been pending for a while, it was suggested the staff liaison reach out to the LLLT staff liaison to find out if any more information is available.

#### **4. Replacement opinion for Advisory Opinion 2223**

The subcommittee presented a draft opinion intended to be a replacement for current Advisory Opinion 2223. A member of the subcommittee also passed out copies of an alternate draft that included more discussion. The members discussed the subcommittee's view that a lawyer-mediator can draft detailed mediation agreements for unrepresented parties, but which stopped short of saying that a lawyer-mediator can draft pleadings. Further discussion followed on expanding informed consent in the draft, referencing the analysis of RPC 1.7(b)(3) and (4) in arguments for and against drafting pleadings, and about the fluid nature of family law cases which can create additional issues for lawyer-mediators.

The committee suggested it may be useful to include specific examples in the draft opinion, although the subcommittee cautioned that it would be very difficult to create a bright line. Other comments from members included clarifying certain points in the draft. After receiving the committee's feedback, the subcommittee will make revisions to the draft. The committee discussed approving the revised draft and circulating to sections for comment. The committee will review stakeholder comments at the next meeting.

#### **5. RPC 4.2 and Government Contacts Draft Opinion**

The subcommittee presented a draft opinion on communication with a government employee represented by the entity's counsel. RPC 4.2. There were two issues—one was the inquirer's question and the second issue referred to the right to redress.

##### *a. Issue 1*

The subcommittee chair explained the draft opinion is based on the subcommittee's memo and discusses the *Wright* case and the ABA opinion, and that both serve to further the dialog on the issue. The committee agreed the draft opinion answered the inquirer's primary question and captured the nuance of the issues, and therefore was helpful. It was suggested that a reference to RPC 1.13 be added to the footnote.

The committee unanimously approved the draft opinion with a citation to RPC 1.13 in footnote 1.

##### *b. Issue 2*

The committee discussed whether there was any interest in proposing a rule change to RPC 4.2, which had been suggested in a dissenting opinion in the subcommittee's June 14, 2018 memo. The committee discussed the lack of clarity on the issue, including the lack of court decisions, the constitutional issues involved, and the Washington, D.C. RPC which attempts to address the issue but does not satisfactorily resolve the issue. It was moved and seconded to explore the possibility of recommending a rule change or additional comment to RPC 4.2. The motion

passed unanimously. Volunteers on the subcommittee are Tom Andrews, Anne Seidel, and Brooks Holland.

#### **6. RPC 1.5(e)(2) and Lawyer Referral Service**

The committee received an inquiry by way of the Bar's executive director's office regarding lawyer referral services authorized by the WSBA or county bars under RPC 1.5(e)(2). Since there is presently no lawyer referral service authorized by the WSBA and the chances of the Bar administering such a referral service in the future is extremely unlikely, the committee discussed proposing changes to RPC 1.5(e)(2), 5.4(a), 6.5, and 7.2(b). Following a discussion of specific draft changes, the chair suggested he prepare a memo which identifies all of the issues and related concerns and present it at the next meeting in October. Brooks Holland volunteered to assist the chair in his efforts. In the meantime, the chair will respond to the inquirer as to the committee's intentions on the matter.

#### **7. RPC 1.2 and 8.4 re Marijuana and Advisory Opinion 201501**

Lucinda Fernald reported on her presentation to the Board of Governors meeting in Vancouver on July 27, 2018. Chair, Don Curran, and staff liaison, Jeanne Marie Clavere, were also present at the meeting via teleconference. The committee's proposal to amend Comment 18 to RPC 1.2, and add new Comment 8 to RPC 8.4 was unanimously approved by the Board and will be forwarded to the Court for further consideration.

The committee discussed revisions to Advisory Opinion 201501 but decided to defer any action until the Court makes a decision on the proposed rule amendments. It was suggested that the committee connect with the Cannabis Law Section when it begins work on updating the opinion.

#### **8. Technical Correction to RPC 1.12, Comment 1**

The committee reviewed the CJC reference in Comment 1 to RPC 1.12 and agreed that it should be updated. It was moved and seconded to amend the comment with the correct CJC cite. The motion passed unanimously. The committee asked the staff liaison to research and compare the prior and current versions of the CJC rule and submit an updated RPC to the BOG as a minor technical correction on the committee's behalf. If other discrepancies are found however, the matter should be referred back to the committee.

#### **9. Final Notes**

Colin Folawn and Natalie Cain expressed their appreciation and enjoyment about serving on the committee over the past two terms and again thanked everyone. The committee likewise expressed their thanks to the departing members for their service. The meeting adjourned at 12:03 p.m.