

# WASHINGTON STATE BAR ASSOCIATION

## Committee on Professional Ethics

### Meeting Minutes

December 15, 2017

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

Members Present: Don Curran (chair), Tom Andrews, Natalie Cain, Colin Folawn, Brooks Holland, Anne Seidel, Callie Castillo, Lucinda Fernald, and Jeanne Marie Clavere (staff liaison). Mark Fucile and Kyle Sciuchetti (BOG) were excused.

Also in attendance: Doug Ende (Chief Disciplinary Counsel), Peter Jarvis (Holland Knight), Art Lachman (Attorney at Law), Renata de Carvalho (RSD Manager Innovative Licensing Programs), Jean McElroy (Chief Regulatory Counsel), Cheryl Heuett (Senior Auditor), and Darlene Neumann (paralegal).

The meeting was called to order at 10:02 a.m.

The minutes were approved as amended.

#### 1. Announcements/Updates

- Three positions will open on the committee next year due to term limits (of which 1 position may be re-appointed). Members were encouraged to reach out to those who might be interested in applying.
- Kyle Sciuchetti, Governor of District 3, is the committee's new BOG liaison.
- Amendments to RPC 1.0A, 1.10, and 1.11 proposed by the CPE regarding public defender imputation of conflicts were recently adopted by the Court and will become effective September 1, 2018.
- Suggested amendments to RPC 1.6, 1.7, 1.15A, 4.2, 7.3, and 8.4 recommended by the CPE and approved by the BOG were recently published for comment by the Court with the comment period ending April 30, 2018.
- Natalie Cain and Lucinda Fernald will represent the CPE at the WSBA's MentorMixer event on Jan. 25, 2018.

#### 2. Quadripartite Subcommittee

The subcommittee sought clarification from the committee on specific industries where the opinion could be applied and agreed to include several generic fact scenarios that may be helpful to readers in interpreting the opinion. The subcommittee will prepare a revised draft for the next meeting.

### **3. Advisory Opinion 2223 Subcommittee**

The subcommittee discussed their opinions on AO 2223, how it might be clarified or allowed to remain. The subcommittee conceded they have been unable to reach a consensus on any singular approach thus far. The committee suggested the subcommittee put together a memo of options for consideration at the next meeting.

### **4. RPC 4.2 Communication with Government Employee Client**

The subcommittee reported only a few comments were received from sections to their request for feedback. The committee discussed approaching the issue from a different angle, such as offering a concrete proposal or information memo that section members could focus and provide comment on. The subcommittee will consider various alternatives, including working with bar staff on supplemental outreach to sections.

### **5. Amendments to Lawyer RPC due to proposed changes to LLLT RPC**

Jean McElroy, Chief Regulatory Counsel, and Renata de Carvalho Garcia, Innovative Licensing Programs Manager, addressed the committee on specific changes to the lawyer RPC they plan to bring to the BOG in January because of the expansion in scope of practice for LLLTs. The changes would coordinate the lawyer RPC and the LLLT RPC.

The committee reviewed the lawyer RPC changes in detail. The most significant proposed change to the LLLT RPC, prompted by proposed changes to APR 28, would allow LLLTs to negotiate on behalf of their clients with lawyers representing parties, including limited court appearances by LLLTs. The committee discussed LLLT purchase of a law practice and suggested additional revisions to Comment [19] of RPC 1.17 to include general language regarding restrictions on the lawyer's ability to sell a law practice to a LLLT and references to see specific LLLT rules. The committee discussed the effect of the LLLT changes on the obligation of lawyers and the need to revisit Title 4 in the future to correct imbalances between the two sets of RPCs. Ms. McElroy and Ms. Garcia returned to the committee with revised Comment [19] and presented the draft. Following discussion, the committee voted to approve the proposed amendments to the lawyer RPC, including the revised draft of Comment [19] of RPC 1.17 suggested by the committee. The motion passed 7-1.

### **6. Lawyer Advertising Rules**

The subcommittee discussed additional proposed changes to RPC 7.1, 7.3, and 5.5 following the committee's input at the October meeting. Comments to RPC 7.3 were simplified to remove inconsistencies between the comments and the revised rule regarding in-person and real-time

solicitations. Changes to RPC 5.5 and 7.1 addressed the issue of multijurisdictional practice, UPL, and lawyers working in branch offices. The committee discussed a recommendation that Washington adopt the APRL proposal to move the referral rule from RPC 7.2 to RPC 7.3(b).

Following discussion, the committee voted unanimously to approve the additional changes to RPC 7.1, 7.3, and 5.5, including a friendly amendment to approve any technical/formatting changes by staff in the final version submitted to the BOG, and delete “in such circumstances” in revised Comment [2] of RPC 7.3. Staff will submit the committee’s memo and proposed rule amendments to the BOG for their January 18-19, 2018 meeting. The chair thanked the members of the subcommittee for their efforts and hard work.

## **7. Arlene’s Flowers**

The subcommittee presented several options to amend RPC 8.4(g) that included adopting the Model Rule and/or comments with changes to reflect Washington’s rule, or revising Washington’s rule, or adding a comment to clarify the last sentence in 8.4(g). Discussion followed on whether a rule change was necessary (e.g., a member confronting a specific situation), the long rule amendment process, and the likelihood of controversy that would follow. It was noted the adoption of the MR would not necessarily bridge the gap between (g) and (h) because the MR also includes the same reference to Rule 1.16. Further discussion followed on the ABA comments and two alternative comments drafted by members of the subcommittee.

Following discussion, the committee voted on the options presented.

- (a) The motion in favor of amending RPC 8.4(g) and to delete “solely” in the proposed language failed by a vote of 2-6.
- (b) The motion in favor of adding a comment to RPC 8.4(g) to address/clarify Rule 1.16 failed by a vote of 2-6.
- (c) The motion in favor of adopting Model Rule 8.4(g) and/or its comments with revisions to reflect WA specific rules failed by a vote of 3 to 5.
- (d) The committee expressed no inclination to issue an advisory opinion as an alternative option to proposing a rule change.

The staff liaison will inform the inquirer that the committee will take no further action.

## **8. Small Batch Subcommittee**

The committee voted unanimously to withdraw a number of old trust account advisory opinions recommended by the subcommittee. The subcommittee will also return to the full committee with recommendations to modify or revise other older trust account opinions as time permits.

## **9. Lawyer Mobility Subcommittee**

The subcommittee presented a revised draft opinion following comments received at the October meeting. Members discussed additional situations such as more than one primary lawyer or “principal handling attorney” working on a case; the leaving attorney or firm not wanting to continue representation of the client; the timing of notice to the firm and the clients; obtaining a client list for purposes of conflicts checking; and the issue of client files. Lucinda Fernald volunteered to help assist the subcommittee, which will prepare a revised draft.

#### **10. Retired Lawyer Trust Account**

The committee was joined by Cheryl Heuett, WSBA Senior Auditor, to discuss the proposed changes to RPC 1.15A(h)(9). Both Ms. Heuett and the Chief Disciplinary Counsel expressed concerns about amending the rule to remove “admitted to practice law”, which if adopted, would permit inactive lawyers to maintain trust accounts while not being subject to random audits. The subcommittee noted the changes are not applicable to L&I practice lawyers who must be active in order to receive L&I funds on behalf of their clients. The committee heard a suggestion that a comment could be added to the rule stating that a retiring lawyer should act within a reasonable amount of time to disburse trust account funds.

Following discussion, a motion was made to adopt the recommendation to remove “admitted to practice law” from RPC 1.15A(h)(9). The motion failed 3-4.

The committee discussed the second issue of LLLTs in a law firm being prohibited from signing trust account checks alone. The subcommittee had proposed removing the last sentence in RPC 1.15A(h)(9). The subcommittee had sent the proposal to the LLLT Board for feedback several months ago, but did not receive a substantive response. In an effort to engage the Board again, the subcommittee volunteered to send one of its members to address the Board in person. The committee chair agreed to contact the LLLT Board chair to request time before the Board to discuss the CPE concerns regarding the LLLT trust account issue.

#### **11. Discretionary Matters**

- Conflicts and Shelter Care Representation: Following discussion of the issue, the committee agreed to take on the inquiry. Don Curran volunteered to chair the subcommittee. Other volunteers were Lucinda Fernald and Brooks Holland. Mr. Curran will contact the inquirer to get additional details on the inquiry. *Update: Following the meeting, the chair learned from the inquirer that the situation had been resolved and an advisory opinion was no longer needed.*
- Negative Online Reviews: The committee decided to defer action pending a review of existing information on the topic published online by the Bar association.

The meeting adjourned at 2:18 p.m.