

WASHINGTON STATE BAR ASSOCIATION

Committee on Professional Ethics

Meeting Minutes

December 21, 2018

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), Jeffrey Kestle, Brooks Holland (phone), Anne Seidel (phone), Vincent Lombardi, Mark Fucile, and Lucinda Fernald. Excused were Tom Andrews and Pamela Anderson. Kyle Sciuchetti (BOG Liaison) was absent

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

The meeting began at 10:03 a.m.

1. Minutes

The minutes of October 26, 2018 were approved as amended.

2. Washington Supreme Court Requests:

Integration of ABA Model Rules in Proposed Amendments to Lawyer Advertising Rules

Members of the workgroup which drafted the proposed amendments to the lawyer advertising rules presented a brief history and explanation of the rule changes currently before the Court. The workgroup confirmed they had followed the APRL reports (on which the proposed amendments are based) and had monitored the changes to the ABA Model Rules (which were adopted in August 2018). The workgroup noted that the CPE proposal is a modified version of the APRL and MR proposals. After considering the Court's request to review the current proposal for integration with the MR, the workgroup recommended just one minor change to comment [12] of RPC 7.3. The change is not substantive.

Following discussion, the committee unanimously approved a proposed letter to the Bar's executive director in response to a request from the Supreme Court. The letter will confirm the committee's consideration of the changes to the ABA Model Rules, note the proposal from the CPE is a modified version of the APRL and MR proposals, and

recommend no further changes to the WSBA proposal except for one minor revision to comment [12] of RPC 7.3. Art Lachman will forward the comment language to the chair and staff liaison for inclusion in the letter.

Proposed Comment [13] to RPC 4.2

The committee discussed a comment forwarded by the Court regarding the possible application of comment [13] to transactional work by a lawyer not acting as a lawyer in a business matter. The commentator suggested the proposed comment should exempt transactional work. A subcommittee member who worked on the proposed comment noted that *Haley* made no distinction between litigation and transactional work, and in any case, the concerns would be no different in transactional matters. The committee acknowledged the commentator's issue as related, but it was not germane to the proposed comment and suggested the issue could be handled separately in an advisory opinion.

By a vote of 6-1, the committee approved a proposed letter to the Bar's executive director in response to a request from the Supreme Court that affirms the view of the committee that the proposed comment is aligned with *Haley* and the committee recommends no changes to the proposed comment. A small correction was made to the draft letter to clarify that the *Haley* action *did* occur in litigation.

3. Updates

The staff liaison discussed the Bar's public records policy and bylaws to that effect, updated the committee on the progress of the LLLT trust account rule, and reported on the VA Supreme Court adoption of comment [7] to RPC 1.1, concerning lawyer well-being.

4. Advisory Opinion 2223 Subcommittee

The subcommittee forwarded a list of potential speakers to the committee chair, who followed up with letters of invitation to those individuals. The subcommittee plans to summarize the issues from the public comments ahead of the February 22, 2019 meeting.

5. Advisory Opinion 201501 Subcommittee

Committee member Vincent Lombardi recused himself. The subcommittee reported they are looking at conduct that is not addressed by the amended comments to RPC 1.2 and 8.4. Research of other jurisdictions that have legalized marijuana found that they did not address the personal use issue. Members discussed the ambiguity in the RPCs, specifically the attorney's oath, RPC 8.4(k), and a suggestion to remove the reference to the Cole memo and include the Washington US AG memos. Other comments included whether it was prudent to base rules and opinions on policy decisions by the federal government which are subject to change, and consideration of other rules such as RPC 8.4(k).

6. RPC 4.2 Government Contacts Subcommittee

The subcommittee had no report.

7. Lawyer Referral Services Subcommittee

The subcommittee discussed a survey of county bars (Spokane, King, Thurston, Pierce-Tacoma) they contacted regarding authorized lawyer referral services. The responses included: they do not authorize lawyer referral services, never being asked about it, do not have a lawyer referral service, or no response. The subcommittee also discussed various ways to change RPC 1.5(e) and address the division of fees between a lawyer and lawyer referral service. One option was to delete the reference to WSBA in the rule and keep the authorized by county bar language. Another option was to follow the IRS approach cited by the D.C Court of Appeals to eliminate the authorization piece. Discussion ensued on whether the issue might be addressed in RPC 7.2(b)(2) (or 7.3(b)(2) if Title 7 is amended), striking 1.5(e)(2) altogether, and Oregon's rule. It was suggested the subcommittee get additional feedback from the county bars, especially from those who depend on referral fees. The committee also questioned whether anti-trust issues might exist. The staff liaison agreed to follow up with the Bar's general counsel on this concern.

8. Informing Former Clients of Material Errors

Noting the challenges of the issue and the current workload of members, the committee decided to suspend work on the topic for a year.

9. Contracted Special Assistant Attorney General and Worker's Comp Issues

Committee member Mark Fucile recused himself. The staff liaison reviewed the committee's rules of procedure regarding member recusal. The chair discussed the inquiry and request for an opinion and noted that he and committee member Pam Anderson are exploring the issue.

10. Ghostwriting

The committee reviewed a request for an ethics opinion on ghostwriting. Members discussed past and current opinions and literature addressing the topic, including CR 11(b). It was moved, and seconded, to take on the issue. The motion passed unanimously. Jeffrey Kestle will chair the subcommittee with Mark Fucile and Anne Seidel as members. Vince Lombardi volunteered to assist the subcommittee with inquiries to federal judges.

11. Adjournment

The meeting adjourned at 1:00 p.m.