

WASHINGTON STATE BAR ASSOCIATION

COMMITTEE ON PROFESSIONAL ETHICS

Meeting Minutes February 22, 2019

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

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

Interested Parties: (in person) Mark Weiss, Alan Kirtley, Linda Roubik, Donna Lurie, and Paul McVicker, with numerous others on the conference call.

The meeting was called to order at 10:11 a.m.

1. General Announcements

- Tom Andrews, Anne Seidel, and Mark Fucile are coming off the committee this year, leaving three open positions for next term. The deadline to apply for the committee is March 1, 2019.
- Former CPE member, Peter Jarvis, received the 2019 Michael Franck Professional Responsibility Award.
- The committee's recommendation to amend Title 7 and RPC 5.5 have been published for comment by the Court. The comment period expires April 30, 2019.

2. Minutes

The minutes of Dec. 21, 2018 were adopted.

3. Ghostwriting Subcommittee

The subcommittee continues to work and may have a report for the next meeting.

4. RPC 4.2/Government Employee Communication

The subcommittee is considering a possible rule amendment and had received comments from stakeholders. The subcommittee discussed the impact of a potential rule change on different practice areas and levels of government. Research into disciplinary cases found only one case directly on point. Given the amount of effort involved and the lengthy rule-making process, the subcommittee asked if there was a pressing need by the membership. A few members noted there is interest in the

committee's effort by specific stakeholders. The subcommittee will meet again and asked that CPE members with experience on the issue forward their comments to the subcommittee.

5. Special Assistant Attorney General (SAAG) Subcommittee

The item was tabled to the next meeting.

6. Proposed Draft Advisory Opinion 2223

The committee engaged in a 90 minute conversation with designated speakers and stakeholders over various concerns about the CPE proposed draft opinion to replace Advisory Opinion 2223. The committee heard primarily from family law mediators and a member representing the labor and employment perspective. The central issue was whether a lawyer-mediator may draft pleadings for unrepresented parties in a dissolution action. Proponents from various perspectives participated in the dialog with the committee.

Summary of main issues and points discussed:

- Whether any attendee favored the draft replacement opinion or thought it was on the right track.
- Clarifying the draft opinion to make it more translatable to family law practice.
- Constraints of the RPCs and GR 24 on lawyer-mediators.
- Many western states being more permissive than Washington. Of note: King County Superior Court employs professional mediators.
- Reconciling the mediator's drafting to be consistent with RPC 1.7(b), comments 7 and 28, and public policy concerns.
- Oregon RPC 2.4 and mediator rules in WI, UT, and AZ as possible models for Washington.
- Voluntary guidelines used by mediators (ABA standards and other professional codes), state licensing of mediators in Washington (none), discipline and enforcement process for mediators in Washington (none), court rules governing the training of mediators (none).
- Putting "clear protections" in mediation rules and information given to clients that would serve to protect clients and lawyers-mediators who draft agreements and how this would be implemented.
- Withdrawing Advisory Opinion 2223 in the interim while proposing a rule change, or drafting an opinion that parallels a suggested rule change as a temporary measure.

Following the question and answer session, the committee thanked the speakers and stakeholders for their participation.

7. Advisory Opinion 201501 (Marijuana) Subcommittee

The subcommittee recommended taking a wait and see approach after the recent appointment of William Barr as the new U.S. Attorney General and uncertainty over what direction Barr might take on enforcement policy following the last AG. The subcommittee reviewed RPC 8.4, and more specifically subsection (k) (attorney's oath). The committee discussed adding a comment that personal use would not violate the rule, or eliminating (k) altogether, and commented on Washington's list of 8.4 prohibitions that other jurisdictions have not included in their rule. The committee's general sense was that there was no immediate need for a fix right now and agreed with the subcommittee's recommendation to pause and monitor developments at the federal level.

8. Lawyer Referral Services Subcommittee

The subcommittee discussed a proposal to remove RPC 1.5(e)(2) and relocate it to RPC 5.4(4) to fix the fee sharing problem. They also proposed rolling RPC 7.2 (b)(2) and into RPC 7.3. The recommendations would be contingent upon the adoption of amendments to RPC 7.3 that are currently published for comment by the Court.

The committee discussed concerns about placing 1.5(e)(2) under rule 5.4 that would result in expanding fee sharing with nonlawyers and go beyond nonprofit lawyer referral services. Discussion followed on doing nothing, proposing a rule change that would be more explicit and uniform, clarifying or eliminating the authorized by WSBA language, and examining fee sharing rules of other jurisdictions. One member suggested the subcommittee research the 32 states that do not accredit or certify nonprofit organizations that collect referral fees noted by the inquirer. Other comments included whether county bars could continue to operate referral services and share fees if RPC 1.5(e)(2) was eliminated, and the application of the rule to specialty bars operating lawyer referral services. The subcommittee agreed to do further research and report back.

9. Attorney Administrator Compensation

The committee reviewed an inquiry regarding whether a conflict of interest exists when a tort litigation creditor or their attorney retains and compensates another attorney to act as administrator and attorney for a deceased person's probate in order for the tort litigation creditor to maintain an action against the administrator of the deceased tortfeasor's estate. The inquiry was previously submitted as an active litigation case and resubmitted as a hypothetical. The committee considered whether answering the inquiry would benefit the broader membership. Members briefly discussed RPC 1.8(f), the intersection between the creditor's claim and the duty of neutrality, and client consent (or lack thereof). Tom Andrews volunteered to do additional background research to see if an opinion is necessary.

10. Retired Lawyer and Trust Account

The committee reviewed an inquiry regarding a soon-to-be retired lawyer who wished to keep the trust account open to receive and disburse regular future payments to clients resulting from settled cases.

[Note: The committee examined this issue in 2017 and the investigating subcommittee proposed an amendment to RPC 1.15A(h)(9) that the committee by a narrow margin voted not to adopt. A second issue concerning the LLLT as a signatory to the trust account was referred to the LLLT Board which is moving forward with a proposed amendment to the LLLT RPC.]

The committee discussed nonactive lawyers keeping trust accounts, potential issues, and not being subject to random audits. The committee will review the past subcommittee materials before making a decision on the inquiry.

The meeting adjourned at 1:53 p.m.