

**Committee on Professional Ethics**

Meeting Minutes

February 5, 2021

The meeting was held virtually.

Members present: Pam Anderson (Chair), Don Curran, Lucinda Fernald, Brooks Holland, Jeffrey Kestle, Vince Lombardi, Hugh Spitzer, Monte Jewell, Asel Neutze, and Brett Purtzer (BOG Liaison). Also present: Jeanne Marie Clavere (staff liaison), Kirsten Schimpff, Office of Disciplinary Counsel, and Darlene Neumann, (paralegal).

The chair called the meeting to order at 10:06 a.m.

The December 11, 2020, minutes were approved.

**Updates and Announcements:**

- Monte reported on the CPE's presentation at the Jan. 15, 2021, BOG meeting. The BOG approved the Pro Bono Council proposal to amend RPC 6.5 and will submit a Comment to the Supreme Court in support thereof. Pam, who was also present at the BOG meeting, thanked the subcommittee members, Monte, Brooks, and Hugh, for their hard work on the issue.
- The staff liaison updated the committee on amendments to RPC Title 7 and RPC 5.5 adopted by the Court, effective Jan. 26, 2021, and other proposed RPC amendments published for comment.
- The staff liaison announced there will be three open positions on the committee starting on Oct. 1, 2021. The online application opens in spring and those members whose terms are expiring are eligible for a second term. The chair encouraged committee members to also reach out to other bar members who may be interested in serving on the CPE.

**Disclosure of Civil Commitment Draft Advisory Opinion**

The committee reviewed the reformatted draft from the subcommittee. The chair noticed RPC 1.14 was left out in the list of rules. Following discussion, it was moved and seconded to approve the final draft advisory opinion with the suggested edit. The motion passed unanimously. The chair thanked the subcommittee for its hard work and outreach efforts over a long process.

**Lawyer Mediator Subcommittee Draft Opinion**

The subcommittee presented a revised draft opinion, which included a stronger emphasis on the RPCs, an analysis of RPC 2.4(b) and comment [3], and additional notice requirements for situations where domestic abuse of a party or child of a party is suspected. Members discussed the extensive footnotes and resources included in the opinion, the tone of the opinion, and made suggestions to include more RPC requirements, such as RPC 1.1, to further ground the opinion. For example, the subcommittee noted RPC 2.4(a) defines a lawyer acting as third party neutral, but does not provide guidance on whether the mediator is actually doing harm or good in their role. The CPE suggested that examples or hypotheticals be used to illustrate the ethical complexity of the role of a third party neutral in domestic relations matters that involve risk of domestic abuse<sup>[pa1]</sup>.

### **RPC 1.8(e) Financial Assistance Exception Subcommittee**

The subcommittee presented a memo of additional research on the proposed exception RPC 1.8(e). The subcommittee suggested two options: 1) restart discussions to adopt subsections of the ABA Model Rule that Washington previously rejected, or 2) amend Washington's rule to allow pro bono lawyers to pay for an indigent client's litigation costs, including making modest gifts to clients. The subcommittee noted that private attorneys and staff attorneys working for civil legal aid providers also represent indigent clients, but are not mentioned in the Model Rule. The committee suggested the subcommittee seek comment from stakeholders if the CPE opts to clarify the WA rule. Other comments included a suggestion to modify the rule to apply to all lawyers, not just litigators, and a concern that a lawyer could use the financial assistance as an inducement to influence the client's judgment or preferred outcome. More discussion followed on Model Rule 1.8(e) (2) and (3), adopting a limited prohibition, and news that the Pro Bono Council is also working on proposing a similar rule change. The CPE subcommittee will reach out to the Pro Bono Council.

### **RPC 1.15A Legal Foundation of Washington (LFW) Proposal Subcommittee**

The subcommittee discussed its research on other jurisdictions that allow unidentified trust account funds to be remitted to the states' legal foundations. The subcommittee sought the committee's opinion on the time period in which such funds may be remitted. Under the RCW, the time period is three years before unidentified property may be sent to the unclaimed property division of the DOR, whereas the LFW proposal recommends 12 months as in the Illinois RPC rule. The committee agreed with the subcommittee's request to consult with the Department of Revenue and a representative of the state Treasurer on the LFW proposal. The Office of Disciplinary Counsel indicated it will also provide a report from the bar audit managers to the subcommittee.

### **RPC 4.2 Email Communications**

The committee received a request for a written opinion from a bar member regarding email communications and the Reply All trap. Following discussion, the committee formed a subcommittee with Vince, Jeff, and Hugh, as members to study the issue.

### **Review of Advisory Opinion 201601**

The request originated from the WSBA's Professional Responsibility program and concerns RPC 5.5 and remote work that has increased exponentially in the last year due to the COVID-19 pandemic. Currently,

AO 201601 does not address UPL or multijurisdictional practice issues. The staff liaison discussed the recent ABA Formal Opinion 495 about lawyers working in states where they are not licensed to practice. The committee formed a subcommittee with Jeff, Brooks, and Vince to work on reviewing the existing opinion.

The meeting adjourned at 12:33 p.m.