

**Committee on Professional Ethics**

**Meeting Minutes**

**June 4, 2021**

The committee met via Zoom video conference. After technical difficulties were resolved, the meeting began at 10:18 a.m.

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

The minutes of April 9, 2021 were approved.

**Announcements/Updates:**

- The chair discussed results of the Bar Volunteer Remote Work Survey. Most members indicated a preference for a hybrid approach of remote participation with in-person meetings.
- The chair reported on a recent inquiry from a bar member seeking an advisory opinion about a matter in an ongoing dispute. The chair explained the CPE's rules of procedure prohibit the committee from opining on matters in litigation or pending disputes. The chair will advise the inquirer of the committee's decision to decline the request.

**RPC 1.8(e) Proposed Financial Assistance Exception**

The subcommittee reported on feedback received from bar discipline counsel regarding substituting the term "income-eligible" for "indigent" in proposed amendments to RPC 1.8(e). After considering the input, the subcommittee decided to keep the term "indigent" to avoid creating confusion among law firms and other legal aid providers assisting lower income clients, and added new comment [32] which advises following the ordinary meaning of indigent, and incorporated other suggestions. The subcommittee included comments [11]-[13] from the ABA Model Rules and renumbered them as comments [33]-[35] in the draft proposal. Several members suggested making them more succinct by removing redundant language and to clarify comment [35] further. It was noted the comments were taken directly from the MR, and any significant changes would make the comments "Washington revision." A member noticed that comment [34] also appears to expand the rule to include administrative proceedings. These additional Washington revisions would be placed under the "Financial Assistance" category, after

current Comment 21. The subcommittee will return with a revised final draft at the next meeting. The chair commented the committee may vote on the proposal at the next meeting, and therefore the subcommittee should include a draft BOG memo for review by the committee.

Regarding the second related issue of representing a client in a contemplated or pending litigation, the committee determined that no further work to modify the rule's language was necessary. Discussion followed on deleting or revising the reference to administrative proceedings in comment [34]. The subcommittee noted that a majority of civil legal matters are administrative proceedings, which are adversarial. The subcommittee will tweak the language in its next draft.

#### **RPC 4.2 Responding to Opposing Counsel Email where Opposing Party is cc'd**

The subcommittee analyzed a number of ethics opinions from different jurisdictions and distilled them down to three separate approaches for presentation to the committee. The first approach is a formal one and places the burden on the replying attorney to check email recipient addresses before responding. The second approach is based on a New Jersey opinion and assumes implied consent if the opposing client is copied on the email; and the third approach follows a California opinion that uses a multi-factor analysis and distinguishes between litigation and transactional situations. The subcommittee noted a majority of states follow the more nuanced CA approach that assumes implied consent from the other lawyer when the communication was sent, but considers various factors and circumstances in addition.

The committee discussed the NJ and CA approaches, and other RPCs that might be applicable or helpful. Members commented the reply communication should keep to the same subject matter and not enlarge it, and suggested an opinion should avoid creating a long list of factors that complicate the guidance; although one member noted the structure of RPC 1.6 could offer a possible model.

#### **RPC 1.15A Unidentified Trust Account Funds**

The subcommittee reported on their meeting with the Assistant Attorney General (AAG) counsel to the Department of Revenue (DOR). Their impression from the meeting is that the AAG considered the issue to be an important policy decision and they intend to circulate the subcommittee's draft proposal to lawyers in the department who are key decision-makers. The committee discussed possible routes the proposal could take—if the AGO and DOR agreed with it—that would progress through the Supreme Court, or the state legislature to enact a provision in the statute to allow unidentified trust account funds to be remitted to the Legal Foundation of Washington (LFW) instead of the Unclaimed Property Division of the DOR. One member commented that the statute approach may be more successful due to the complications of state law and other collateral laws. Either way, the RPC would require amending by the Court. The subcommittee added the AAG counsel intends to request a memo from the DOR analyzing the issue and a separate memo from the AGO.

The subcommittee will provide another update at the next meeting, including a draft memo to the BOG. In the meantime, Don Curran will update the LFW executive director on the recent AAG counsel meeting and Pam Anderson will provide a status update to the BOG at their August 20-21, 2021 meeting.

### **Remote Work by Washington Lawyers (amending AO 201601)**

The subcommittee is working on a draft that would fit within and expand the existing advisory opinion rather than creating a separate opinion on the topic. Discussion followed on the issue of jurisdiction of disciplinary authority. The subcommittee reported they had consulted with the Practice of Law Board regarding putting in guidance in the opinion and they plan to share a draft with the PLB after the committee approves a discussion draft. Overall, the committee supported the direction taken by the subcommittee. Comments included adding a general statement that lawyers should be mindful of tax implications, insurance, including medical coverage, and local and/or state employment laws when working remotely. References to RPC 7.2 would also need updating, and it was suggested they consider replacing the term “home” with “from a place” so as not to assume a person is working from home, and tweaking the heading of Section II.B.

### **RPC 1.6 Technical Corrections**

The subcommittee explained that cross-references in comments [15] and [17] were not revised when amendments to the Rule 1.6 were proposed in 2015. The subcommittee recommended a technical fix, which the committee unanimously approved. Staff will prepare the materials for the July 16-17, 2021, BOG meeting.

### **RPC 7.2, 1.5(e), 5.4 Revision of Proposed Amendments**

Chair Anderson discussed the background of the proposed amendments on lawyer referral services and fee sharing; the BOG’s request to withdraw the proposals and referral back to the CPE in light of recent amendments to Title 7, which the Court agreed. The chair joined the subcommittee and offered to work on the first draft of the revision.

The meeting adjourned at 12:40 p.m.