

WASHINGTON STATE BAR ASSOCIATION

Committee on Professional Ethics

Meeting Minutes

October 2, 2020

The committee met via video conference due to restrictions on in-person meetings because of the current public health emergency (COVID-19).

Members present were: Pam Anderson (Chair), Don Curran, Lucinda Fernald, Brooks Holland, Jeffrey Kestle, Vince Lombardi, Monte Jewell, and Asel Neutze. Excused: Hugh Spitzer. Also present: Jeanne Marie Clavere (staff liaison), Kirsten Schimpff of the Office of Disciplinary Counsel, Doug Ende, Chief Disciplinary Counsel; Michael Heatherly of LAW Advocates, and Darlene Neumann, (paralegal).

The chair called the meeting to order at 10:03 a.m.

The minutes were approved as amended.

Proposed RPC 6.5 and New Comment [8] Subcommittee

Michael Heatherly, on behalf of the Pro Bono Council (PBC), presented a draft amendment to RPC 6.5 that would change the conflict notice requirements for clients using limited legal service programs. The subcommittee provided technical assistance to the PBC on their first proposal to the Supreme Court, which was withdrawn earlier this year due to circumstances related to the COVID-19 pandemic. Mr. Heatherly commented the current draft is essentially the same proposal as suggested by the CPE subcommittee in the spring of 2020. Other than minor edits related to punctuation, the committee made no suggested changes to the draft language.

Following the presentation, the committee discussed possible actions. It considered its previous obligation to the BOG to review the earlier PBC proposal as discharged. It was moved to advise the BOG that the CPE would take no action on the new proposal until it received further direction from the BOG, with a copy to Michael Heatherly. A friendly amendment to attach the current proposal to the BOG communication was not accepted. The motion was withdrawn. It was then moved to propose that if the PBC files the proposed rule amendment with the Supreme Court and the CPE receives notice of this, the CPE will alert the BOG, include the proposal and information session from today, including the background and the CPE's prior involvement, and suggest the committee provide a recommendation again to the BOG. The motion carried unanimously. The committee agreed to advise Michael Heatherly of its decision to pend further action until the proposed draft rule is filed with the Court.

RPC 1.8(e) Financial Assistance Exception

The subcommittee discussed their analysis of a question from the bar president about the need to amend RPC 1.8(e) to allow for limited financial assistance to clients impacted by the current health pandemic. The subcommittee opined the humanitarian exception is not necessary under Washington's rule, which is further supported by Advisory Opinion 1959 (2001). Nevertheless, the subcommittee prepared a draft proposal amending Comment [21] and adding new Comment [22] as an alternative to language in the ABA Model Rule and the version offered by the Northwest Justice Project (NJP). The committee discussed the different approaches taken by each proposal. Members furthered commented on: AO 1959 being overbroad, RPC 1.8(e) being limited to "representing a client in connection with contemplated or pending litigation ...", rule-making in a comment, defining financial assistance and perhaps broadening the application to non-litigation legal representation, humanitarian assistance, two-tiered treatment of law firms and civil legal aid programs, tying financial assistance closely to legal representation, and interference with the lawyer/client relationship. Following discussion, Monte offered to provide additional assistance to the subcommittee. Pam agreed to step down so that the subcommittee can be kept at the maximum of three members. As CPE chair, she will continue to update the BOG president on the status of the committee's work.

Ghostwriting Subcommittee

The subcommittee reported on the response from the Superior Court Judges Association (SCJA), whose rules committee reviewed the draft opinion and gave their support of the draft language. Overall, the SCJA indicated the opinion would be helpful. The subcommittee noted the federal district courts, which also received a copy of the draft opinion, offered no comment; however the opinion does include a disclaimer regarding the applicability of the opinion to federal cases. Following discussion, it was moved to adopt the draft. The committee suggested the subcommittee reformat the memo in a layout similar to Advisory Opinion 202001. The committee will vote on the reformatted opinion at the next meeting in December.

Lawyer Mediator Subcommittee

The subcommittee reported that upon further analysis, it has decided to pause work on a draft comment, and focus instead on a draft advisory opinion and then return to the draft comment, which will likely be more brief.

RPC 1.11 Subcommittee (State v. Nickels)

A motion was made to adopt the proposed draft language to Comment [2] to RPC 1.11 that would cite to the court opinion. There was a friendly amendment to use the signal "Cf." instead of "But see." A second friendly amendment proposed inserting a period after "lawyers" (or immediately preceding the proposed draft language). The motion carried unanimously. The subcommittee will prepare a GR 9 cover sheet and a redlined rule and forward to staff for inclusion in materials to the BOG.

Disclosure of Civil Commitment Subcommittee

The subcommittee reported they had received input from the inquirer on the draft and added a reference to RPC 3.3. The subcommittee is now prepared to circulate the draft opinion to stakeholders for a one-month comment period. Members suggested additional groups: federal public defenders (Western and Eastern), Solicitor General's Office/AGO Ethics Chair, and the Office of Civil Legal Services. Staff will assist the subcommittee in contacting specific groups, while the members of the subcommittee will communicate with its network of associates and copy bar staff in their communications.

Updates/Announcements

- RPC 1.4(c): The chair reported on a proposed amendment to RPC 1.4 new subsection (c) submitted to the Supreme Court by the BOG as a result of work by a BOG ad hoc committee on mandatory malpractice insurance in which she, CPE members Cinda and Hugh, and others had participated. The briefing included the BOG's previous work on the mandatory malpractice insurance issue.
- The staff liaison reported Advisory Opinion 202001 has been published in the advisory opinions database and featured on the CPE's webpage. She congratulated subcommittee members Don, Asel, and Jeff for their great work, and thanked the entire committee for providing a helpful opinion to the bar membership.
- The staff liaison reviewed the information and resources in the Volunteer Toolbox on the bar's website. A link to the Toolbox is also on the CPE's webpage.

The meeting adjourned at 12:44 p.m.