

Committee on Professional Ethics

Meeting Minutes (amended)

October 26, 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), Tom Andrews, Pam Anderson (phone), Jeffrey Kestle, Lucinda Fernald, Brooks Holland, Vince Lombardi, and Anne Seidel. Excused were Mark Fucile and Kyle Sciuchetti (BOG Liaison).

Also present were Natalie Cain, Robin Nussbaum, Jeanne Marie Clavere (staff liaison), Kirsten Schimpff, Office of Disciplinary Counsel, and Darlene Neumann, paralegal.

The meeting was called to order at 10:00 a.m.

Welcome and introductions were made around the table and over the telephone.

1. Diversity and Inclusion Training

Robin Nussbaum, WSBA Inclusion and Equity Specialist, guided the committee through a training on diversity and inclusion and best practices.

2. Advisory Opinion 2223 Subcommittee

The subcommittee suggested extending the comment period for proposed draft opinion 2223 after hearing from some bar members that the comment period (approx. 3 weeks) was too short. The committee discussed the idea of inviting stakeholders to a meeting of the subcommittee or the full committee to exchange viewpoints and address misunderstandings about the proposed draft. The committee reached a consensus to extend the comment period to January 15, 2019, and to hold a 90-minute Q&A session with stakeholders at its regular February 22, 2019 meeting. The committee discussed a suggestion to invite 5-6 presenters who could act as spokespersons on behalf of the stakeholders and to limit the 90-minute session to a discussion of the submitted comments. The chair agreed to draft a letter to notify stakeholders of the committee's plans. Staff will distribute the notice and also place it on the committee's webpage. In the interim, the subcommittee will summarize the comments and make a list of potential presenters to contact.

3. Minutes

The minutes were approved.

4. Updates and Announcements

The staff liaison reviewed information on tools for volunteers, the expense reporting procedure, and requirements for quorum.

5. Advisory Opinion 201501

Member Vince Lombardi recused himself from participating in the discussion. The committee discussed whether the advisory opinion should be revised following amendments to comment 18 of RPC 1.2 and new comment 8 of RPC 8.4 adopted by the Court in September. The committee noted the amendments did not extend to personal use of marijuana by lawyers or ownership of marijuana-related business by lawyers. After a brief discussion of the various options, the committee appointed a subcommittee comprised of Lucinda Fernald (chair), Anne Seidel, Jeffrey Kestle, and Brooks Holland to study the issue further and return to the committee with a recommendation.

6. LLLT Trust Account Rule

The staff liaison reported that the LLLT Board reviewed the issue raised by the CPE and agreed to draft language to amend the LLLT RPC trust account rule. The Board will align the proposed LLLT RPC rule with lawyer RPC 1.15A and present the proposed draft to the CPE possibly at the December 21 meeting. Vince Lombardi volunteered to join the Retired Lawyer Trust Account Subcommittee with existing subcommittee member Anne Seidel.

7. Lawyer Referral Services

The subcommittee presented a memo on the subject of lawyer referral services and fee sharing in Rules 1.5(e), 5.4(a), and 7.2(b)(2). The subcommittee explained how the issue came before the committee, and the committee's intention to clarify the issue, which may include amending RPC 1.5(e), or relocating it elsewhere in the rules. The subcommittee reviewed how other jurisdictions (Michigan and Oregon) dealt with the issue and the ABA Model Rule on fee sharing with nonprofit lawyer referral services. One subcommittee member noted that fee sharing with for-profit lawyer referral services should also be examined. The subcommittee proposed that it continue studying the issues and return to the next meeting with a recommendation. The committee agreed.

8. Clients and Notification of Material Errors

The committee reviewed the obligation of lawyers to inform current clients of material errors and whether the same duty should apply to former clients. The committee discussed the ABA's opposition to the idea, uncertainty over how far back the duty would extend, creating a substantial risk standard, fiduciary laws outside of the RPC, the burden on lawyers, statute of limitations claims, and a similar yet different responsibility imposed on prosecutors under RPC 3.8. The committee agreed to form a subcommittee to explore the issue further and report back at the December meeting. Volunteers on the subcommittee are Don Curran (chair), Brooks Holland, and Jeffrey Kestle.

9. Lawyer Well-Being

The staff liaison noted the materials included a report from the National Task Force on Lawyer Well-Being and discussed the ABA effort to address the issue in the legal profession and in the practice of ethics. One state that has proposed an amendment to RPC 1.1 (Competence) is Virginia State Bar. Following discussion, the committee elected not to take up the issue at this time, but requested the staff liaison track the Virginia proposal and report back if it is adopted by the Virginia Supreme Court.

10. RPC 4.2 Subcommittee on Government Contacts

The subcommittee summarized their work for the new committee members, including the resulting advisory opinion adopted in August 2018, and the dissenting opinion in the subcommittee's June 2018 Final Report. Part two of the subcommittee's work is to study the possibility of a rule amendment to clarify the unresolved issues noted in the dissenting opinion. New volunteers on the subcommittee are: Brooks Holland (chair), Pam Anderson, and Vince Lombardi. Tom Andrews is the remaining member from the first subcommittee. Staff will make sure the subcommittee's prior materials are made available in the active Subcommittees' folder in Box.

11. Adjournment

The meeting adjourned at 1:38 p.m.