

Committee on Professional Ethics

Meeting Minutes

April 9, 2021

The meeting was held via Zoom video conferencing.

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

The chair called the meeting to order at 10:09 a.m.

The February 5, 2021, minutes were approved.

RPC 4.2 Email Communications

The subcommittee discussed the issue of a lawyer responding to an email from opposing counsel using Reply All where the opposing party is also cc'd on the email chain. At times, the responding lawyer is not alert to the fact that the opposing client was included in the email communication. The conduct implicates RPC 4.2, prohibiting communication with a represented person without consent from that client's lawyer. The subcommittee reviewed several ethics opinions on the subject and will prepare alternative approaches for discussion at the next committee meeting.

Updates/Announcements

- Members were reminded of the April 16, 2021, deadline to submit their applications for committees, boards, and panels. Eligible CPE members who wish to serve a second term must re-apply. New members were also encouraged to apply to the CPE.
- The Supreme Court adopted an amendment to Comment [2] to RPC 1.11, effective May 4, 2021. The amendment adds a citation to *State v. Nickels* (2020). The chair and staff liaison thanked the subcommittee and the committee for their efforts.

Lawyer Mediator Draft Opinion

The subcommittee presented a re-constructed draft opinion more focused and grounded in the RPC. Following a review of the primary changes, the only suggestions were to add a missing adjective to the last sentence in the summary paragraph, and to conform the opinion to the style of previous committee opinions. It was moved, and seconded to approve the draft opinion with the suggested edits.

Discussion followed on whether another round of outreach to stakeholders was necessary before voting on the draft. Several members commented outreach was accomplished, thus this issue is unlikely to raise concerns by the BOG and that a vote should proceed. The motion passed unanimously. The chair thanked the subcommittee for their long and diligent work on a complex and difficult topic. Staff will prepare the new advisory opinion as information for the Board of Governors.

RPC 1.15A Unidentified Trust Account Funds

The subcommittee reported that the executive director of the Legal Foundation of Washington is in support of the proposed draft rule. The subcommittee also sought input from the WSBA Chief Disciplinary Counsel on the discipline aspects of the draft rule and he responded with several questions and suggestions as reflected in the subcommittee's materials. Input from the ODC auditors was also included in the Chief's analysis. The subcommittee agreed with two of the points. They divided the remaining issues among individual subcommittee members to evaluate further. The subcommittee chair noted the rules for LPOs and LLLTs would also need to be conformed. Discussion followed on the strategy outlined by the subcommittee chair to gain initial feedback and support for the proposal from LFW, ODC, and state agencies before presenting it to the BOG.

201601 Advisory Opinion Review

The subcommittee discussed recommending a possible amendment to AO 201601, or drafting a separate opinion on virtual law offices and remote practice to reflect ABA Formal Opinions 495 and 498. They reviewed opinions from other jurisdictions consistent with the ABA opinion, began outreach to WSBA regulatory stakeholders and have begun a first draft related to RPC 5.5 issues. The committee debated whether to focus the opinion only on Washington-licensed lawyers and/or include lawyers who reside in Washington, but not licensed to practice in the state.

RPC 1.6 Technical Corrections

The committee reviewed a potential correction to RPC 1.6, Comments [15] and [17], which references comments that are reserved. The chair noted this should be simple technical fix and appointed a small subcommittee to work on it. Cinda and Brooks volunteered.

RPC 1.8(e) Financial Assistance Exception

In part one of the discussion, the subcommittee reviewed changes to the draft rule and conforming comments based on input from public legal aid organizations and additional research. The current draft is more aligned with ABA Model Rule 1.8(e). The committee discussed substitution of the term "indigent" client to "income-eligible" which is a term used and understood by legal aid service organizations, but could be ambiguous to private law firms. It was noted there is no definition for indigent in the ABA Model Rules. Among the possible ideas discussed: add an explanatory note, reference federal poverty guidelines, use the financial baseline established by legal aid service providers, review the language in RPC 6.1(a)(1) and Cmt. [3], or come up with a new definition under RPC 1.0A Terminology. The subcommittee will also consult with discipline staff for their views on a term. Finally, it was discussed that note 4 of the subcommittee memo concerning public interest could be added to Cmt. [10], although it would track away from the MR.

In the part two of the discussion, the subcommittee drew attention to the rule that applies to “representing a client in connection with a contemplated or pending litigation.” The subcommittee commented that this language was not addressed in their preliminary research. In analyzing whether to broaden the rule, the subcommittee noted there are nonlitigation situations where clients lack sufficient funds to pay for legal services. The subcommittee chair discussed a hypothetical probate case where the lawyer is paid out of the proceeds from the sale of real property. Members discussed deleting the language, or creating a new rule for nonlitigation practice attorneys. Others suggested the rule was silent, and therefore not a prohibition to nonlitigation attorneys. The subcommittee will continue to work on the draft for the next meeting.

The meeting adjourned at 12:45 p.m.