

WASHINGTON STATE BAR ASSOCIATION

Committee on Professional Ethics

Meeting Minutes

February 7, 2020

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

Interested parties present by phone: Bonnie Aslagson, Thurston County Volunteer Legal Services, and Michael Heatherly, Executive Director, Law Advocates of Whatcom County

The chair called the meeting to order at 10:02 a.m. With consent of the committee, the chair revised the order of the agenda to move Item 8 to follow Item 2 (minutes).

Updates

- RPC 4.4, comment 4. The Board of Governors approved the CPE's proposed comment 4, which the BOG then submitted to the Court. The Court ordered a 30-day extension of the comment period to March 3, 2020. The chair praised the subcommittee for their work on the proposed comment and an in-depth analysis to the BOG.
- The chair announced three positions will open on the committee and the expiring members may reapply for a second consecutive term. The deadline to submit an application on MyWSBA is Feb. 28, 2020. Members whose terms expire are: Don, Cinda, and Brooks.

Minutes

The minutes of December 5, 2019, December 20, 2019 (special meeting), and January 23, 2020 (special meeting) were approved.

RPC 6.5, New Comment 8 Subcommittee

In November 2019, the Bar's interim executive director requested the CPE review a proposed amendment to RPC 6.5 submitted to the Supreme Court by the Pro Bono Council.

The subcommittee reviewed the proponent's proposal and agreed with the rationale to amend RPC 6.5, but not with the proposed new comment since it would change the notice requirement by making the comment inconsistent with the rule itself. Instead, the subcommittee recommended amending the rule and adding an explanatory comment regarding prospective, general notice. Discussion followed on the

potential confusion for lawyers if changes to the notice requirement are not identified in the rule even though generally proposing a rule change is more difficult. The proponents who attended the meeting were not opposed the committee's suggestion to amend the rule. Following discussion, the subcommittee agreed to provide guidance to the proponents who will draft a proposed rule in consultation with the subcommittee. To meet the BOG's tight deadline of March 4, the CPE will hold a special telephonic meeting on February 24, 2020 at 9:00 a.m., and on February 27, 2020 at 1:00 p.m., if a second meeting becomes necessary.

Karstetter Comment

The subcommittee reported that it made the final edits to the proposed comment adopted at the last committee meeting. The item will be placed on the Feb. 24 special meeting agenda. The subcommittee will also draft a GR 9 for the comment.

Lawyer Referral Services Subcommittee

The subcommittee reported on a survey emailed to all county bar associations seeking comment on the proposed changes to RPC 7.2 comment 6, and other rules. Only two counties responded: Spokane and Skagit. Both reported the proposed changes would not negatively impact their lawyer referral programs. Following discussion, the committee unanimously approved the proposed amendments to RPC 7.2(b), amendments to comment 6 to RPC 7.2, and new Additional Washington Comment 5 to RPC 5.4 as recommended in the Dec. 5, 2019 subcommittee memo. The only minor change was to reject the strikeout of "lawyer" in comment 6. The subcommittee will prepare a GR 9 for the proposed rules. The committee will review the entire package of materials at the April 17, 2020 meeting.

Ghostwriting Subcommittee

The subcommittee discussed the November 26, 2019 draft opinion and commented that it accurately reflects the meaning of the court rules cited in the opinion. The subcommittee did not find any authority in case law or in the court rules that a lawyer is required to disclose that she has ghostwritten legal documents for a pro se client. The committee discussed the meaning of "certify" in CR 11(b) with a suggestion to revise the draft advisory opinion to indicate that it is the committee's interpretation of the court rule. Members suggested the subcommittee seek additional input on the draft opinion. After considering which groups to approach, the committee agreed the subcommittee should circulate the draft opinion to the superior court and district court judges associations. A member of the subcommittee also offered to check with federal judges regarding their thoughts on the subject.

Lawyer Mediator Subcommittee

The subcommittee reported they met with a domestic violence expert to learn more about domestic violence issues as a factor in the continuing conversation regarding certain practices by lawyer-mediators. The subcommittee plans to meet next with an experienced family law lawyer-mediator.

Multi-client Representation Subcommittee

The subcommittee reported it is working on an expanded hypothetical for an advisory opinion that will include all causes of action, including aggregate settlement issues. Members expressed concerns that the issues addressed may be too broad and discussed whether the scope can be limited. Discussion followed on the interplay between the different statutes (wrongful death, statutory beneficiaries, survivor) and

conflicts of interest. The subcommittee chair will contact the inquirer about the concerns of the committee and limiting the number of issues.

Competency Disclosure Subcommittee

The subcommittee briefly discussed client competency disclosure issues in civil and criminal court proceedings. The subcommittee reported on additional contact with the inquirer to clarify the issues in light of existing Washington advisory opinions.

State v. Nickels

The committee discussed a recent Washington Supreme Court decision concerning disqualification of elected county prosecutor's entire office where the county prosecutor had previously represented the defendant. Members discussed whether to recommend adding a cite to the case in RPC 1.11, comment 2. Further discussion tabled to the April meeting.

RPC 7.3 Revised Proposed Amendment

On February 3, 2020, the Bar president requested the CPE review a revised proposed amendment to RPC 7.3 from the Court. A number of lawyer advertising rule amendments originally submitted by the BOG has been pending at the Court since January 2019. The CPE recommended the amendments to the BOG in 2018.

The president requested the CPE's report by April 1, 2020. The chair formed a subcommittee to expedite the review process. Members discussed the Court's edits to include specific practice areas in the proposed rule, problems with defining practice areas, enforcement challenges for discipline, and discrepancies between the Court's version and the version originally submitted by the BOG. A member suggested the subcommittee contact the staff liaison to the Court's Rules Committee to ascertain if omissions in the court's version were intentional. The topic will be included on the committee's agenda for the Feb. 24 special meeting.

Other Business

The committee removed two items from its docket that had been inactive for some time.

- Advisory Opinion 201501 Review. Reason: The subcommittee observed no new developments by the federal government regarding marijuana enforcement.
- Notice to Former Clients of Material Errors. Reason: There has been little comment from the legal community regarding the ABA opinion on this subject.

The meeting adjourned at 12:41 p.m.