

# WASHINGTON STATE BAR ASSOCIATION

## Committee on Professional Ethics

### Meeting Minutes

June 19, 2020

The meeting was held via Zoom video conference application. In-person meetings were suspended by the state Governor's proclamation 20-28.

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

The chair called the meeting to order at 10:02 a.m.

The April 17, 2020, minutes were approved.

#### **Updates/Announcements:**

- The Chair reported that on June 5, 2020, the Supreme Court voted 7-2 to sunset the Limited Licensed Legal Technician (LLLT) program due to budgetary reasons and limited participation.
- The Chair announced that he and Brooks will present a first reading at the June 27, 2020, BOG meeting of the committee's proposed amendments to RPC 1.13 and 1.16 (citing Karstetter), and RPC 7.2, 5.4, and 1.5 (lawyer referral services and fee sharing).

#### **Ghostwriting Draft Opinion**

The subcommittee reported they have not received a response yet from the judges' associations, probably due in part to the COVID-19 public health emergency affecting court operations. Discussion followed on the differing opinions between federal and state courts regarding ghostwriting. It was suggested the subcommittee reach out to WSBA Governor Tollefson, a former Superior Court judge and member of the Superior Court judges' association. Members discussed the lack of a uniform policy by the courts and if further work on the issue should continue. Several members noted that ghostwriting helps expand access to justice, particularly in state courts, and the development of any uniform policy will take a long time. It was suggested the opinion indicate the view of federal courts towards ghostwriting to alert readers, particularly those in federal practice. The subcommittee will prepare a revised draft for the next meeting.

#### **Draft Comment to RPC 2.4 (Lawyer Mediator Subcommittee)**

The subcommittee introduced a draft comment to RPC 2.4 that provides guidance for lawyer/mediators in family law. The committee suggested splitting the comment into two paragraphs or two comments for better clarity. It was suggested the draft comment use the term “all parties” similar to RPC 1.12(a). There was discussion as to how to continue to include stakeholders in the development of these proposed changes as well as a possible future advisory opinion if the Court ultimately approves proposed changes. The subcommittee will incorporate the committee’s suggestions in another revised draft.

### **Draft Opinion on Multi-Client Representation in Wrongful Death Claims**

The subcommittee discussed the revised draft opinion which included several statutes and a caveat that the analysis may change if the facts as outlined change. Discussion followed on whether it was necessary to cite parts of the statutes, the danger of the opinion becoming outdated if the statutes change, and putting more emphasis on interpreting and applying the RPCs. The subcommittee noted that the wrongful death statute was substantially overhauled last year, that very few people understand the complex interplay between the statutes, and that including them in the opinion would be helpful. The committee suggested adding a disclaimer which explains the opinion is based on current statutes in effect at the time. Other comments and suggestions concerned the layout of the opinion. The subcommittee will revise the draft for the next meeting.

### **Disclosure of Client Civil Commitment**

The subcommittee presented a draft memo on disclosure of a client’s civil commitment in court proceedings if the client fails to appear. The memo recommended that if possible, the lawyer hold early discussions with the client if mental health issues are anticipated and describe various systematic approaches. The subcommittee discussed RPC 1.6 (informed consent and impliedly authorized consent), RPC 1.14(b) (risk of other harm and taking protective action), and the tension between the rules. The subcommittee noted prior advisory opinions on disclosure of client competence did not address civil commitments. Discussion followed on the vague meaning of other harm and protective action described in the comments to Rule 1.14. Another suggestion was to add a reference to comment [15] to RPC 1.6. The inquiry also referenced a statute, which the subcommittee noted was beyond the scope of the CPE. Discussion followed regarding the treatment of statutes in advisory opinions. The subcommittee will continue work on the memo.

### **State v. Nickels Subcommittee**

The subcommittee discussed the court’s decision regarding the disqualification of an entire elected prosecuting attorney’s office where the prosecutor had previously represented the defendant. In the subcommittee’s view, the decision appeared to create an exception to comment [2] to RPC 1.11. They noted that prosecutors are probably already aware of the ruling and recommended a case cite be added in the comment to alert defense counsel to the issue. The subcommittee will present draft language at the next meeting in August.

The meeting adjourned at 11:53 a.m.