



WSBA

Committee on Professional Ethics

Meeting Minutes

February 10, 2017

The committee met at the offices of the Washington State Bar Association, 1325 4th Avenue, Suite 600, Seattle, WA 98101.

Members present were Mark Fucile (Chair), Tom Andrews, Natalie Cain, Colin Folawn, Peter Jarvis, Anne Seidel, and Ted Stiles. Excused were Sumeer Singla and Mario Cava (BOG Liaison). Also present were Jeanne Marie Clavere (staff liaison), Doug Ende, Office of Disciplinary Counsel, and Darlene Neumann, paralegal.

The meeting began at 10:03 a.m. Anne Seidel chaired in place of Mark Fucile, who had to leave the meeting.

1. Minutes

The minutes were approved.

2. Updates and Information

- a. The proposed amendments to RPC 1.6, 7.3, and 8.4 were placed on the Consent calendar for the March 9-10, 2017 BOG meeting.
- b. The suggested amendments to RPC 1.10A, 1.10, 1.11 regarding public defenders are now at the Supreme Court.
- c. Advisory Opinions approved and adopted by the committee will be forwarded to the BOG to be included on their meeting agenda as information before publication on the Bar's website. This is done as a courtesy to the BOG.
- d. Jeanne Marie Clavere reported on the ABA mid-year meeting in Miami regarding comments to proposals to RPC Title 7 (Advertising). A link to the summary of comments is published on the ABA's website for interested committee members.

3. Pro se Lawyer Communication, Proposed Comment to RPC 4.2

(Tom Andrews – chair, Peter Jarvis, Colin Folawn)

Colin Folawn reported receiving five responses from committee members to the draft co-counsel language following the February 10th meeting. The majority of the responses indicated member reservations about including specific examples of co-

counsel in the proposed comment. The subcommittee noted that it will not be issuing a dissenting opinion as previously planned. Members discussed the problem of trying to define co-counsel and whether a definition was really necessary. Following discussion, Tom Andrews moved, seconded by Mr. Folawn, to approve the earlier August 2016 draft comment that included reference to co-counsel without the proposed examples. The motion passed 5-0. The subcommittee will re-circulate the draft at the next meeting.

4. Lawyer Mobility Subcommittee

(Ted Stiles – chair, Mark Fucile, Natalie Cain)

Tabled to the next meeting.

5. Lawyer Withdrawal and Revelation of Confidential Client Information

(Peter Jarvis – chair, Colin Folawn, Anne Seidel, Sumeer Singla)

Peter Jarvis presented a revised draft opinion which incorporated suggestions from the last meeting to delete perjury, self-defense claims in legal actions, and other scenarios. Mr. Jarvis noted the result is a much more simplified opinion. Discussion followed on referencing ABA Formal Opinion 476 (lawyer withdrawal over nonpayment of fees), whether to address issues raised by comment [15] of RPC 1.6, and the difficulties lawyers have with RPC 1.6(b)(5). Other comments included, replacing “mandatory or permissive” with “clear” in describing the basis for withdrawal and incorporating comment [3] of RPC 1.16. The subcommittee will consider the feedback from the committee in its next draft.

6. Communication with Client Represented by Government Agency

(Tom Andrews – chair, Sumeer Singla)

Tabled to the next meeting.

7. Advanced Waivers

(Peter Jarvis – chair, Ted Stiles, Colin Folawn)

Peter Jarvis explained that after attempting to draft a new comment on future conflict waivers (RPC 1.7, comment [22] currently Reserved), he concluded that the best approach would be to adopt the ABA Model Rule 1.7 comment [22]. Natalie Cain moved, seconded by Tom Andrews, to adopt the subcommittee’s recommendation and forward the proposed ABA MR Comment [22] to the BOG. The motion passed 5-0.

8. Retiring Lawyer and Trust Account

(Anne Seidel – chair, Ted Stiles, Colin Folawn)

Tabled to the next meeting.

9. Review of Advisory Opinion 2219

(Peter Jarvis – chair, Tom Andrews)

Peter Jarvis noted the revised opinion included analysis of RPC 5.1, a footnote addressing UPL, and clarified that lawyers in the legal department cannot aid and abet

the Other Lawyer. Other than one minor edit to remove an unnecessary clause, the members approved of the revised opinion. Tom Andrews moved, seconded by Natalie Cain, to adopt the revised draft opinion. Anne Seidel made a friendly amendment, which was accepted, to clarify that the Other Lawyer is engaged in Washington state. The motion as amended passed 5-0.

10. Review of Advisory Opinion 2223

(Natalie Cain – chair, Tom Andrews, Anne Seidel)

Natalie Cain reported the subcommittee met and discussed various issues and concerns with the current advisory opinion. There was discussion on whether to withdraw the opinion for now, however the general consensus of the committee did not favor withdrawal without a replacement or other alternative. The subcommittee suggested it would be helpful to gather feedback from stakeholders through a special public meeting and the committee agreed. Staff will assist the subcommittee to arrange the meeting at the Bar offices.

11. Review of Advisory Opinion 2158

(Tom Andrews – chair, Anne Seidel, Ted Stiles)

The committee reviewed and discussed proposed changes to comment [3] of RPC 1.15A prepared by the subcommittee. The changes identify situations external to the RPC and other rules beyond the RPC that govern fiduciary accounts. It notes that lawyers are permitted to use either the trust account or fiduciary account for deposit of funds and includes references to RPC 1.7 and 1.8 suggested by the WSBA auditors. Following discussion, the committee suggested ‘fiduciary’ be added to substantive law in the comment and to include a reference to *In re Disciplinary Proceeding Against McKean*. A motion was made to approve, seconded by Natalie Cain, the proposed changes to comment [3] with the two suggestions from the committee. The motion passed 5-0. Tom Andrews will prepare the revised comment. The committee also discussed a lawyer who acts in different capacities as a fiduciary and suggested this topic be added to the list for future advisory opinions.

12. Discretionary Review

e. Quadripartite Ethics Issues

The committee reviewed an inquiry submitted by a bar member concerning quadripartite ethical issues. Members noted there were very few advisory opinions that address tripartite relationships and briefly discussed WSBA opinions that referenced the Supreme Court’s decision in *Tank v. State Farm*. Following discussion of the committee’s current workload and the complexity of quadripartite relationships, the committee agreed, 4-2, to form a subcommittee to explore advisory opinions related to the RPC 1.6 and 1.9 issues raised in the inquiry. Subcommittee members are Colin Folawn – chair, Peter Jarvis, Natalie Cain, and Ted Stiles.

The meeting adjourned at 12:15 p.m.