

Committee on Professional Ethics

Meeting Minutes

August 27, 2021

The meeting was held virtually.

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

The chair called the meeting to order at 10:04 a.m.

Announcements/Updates

- The chair thanked member Jeff Kestle, who is rolling off the committee in September, for his work and contributions on the committee. The committee will have a new member in October.
- Pam will continue to serve as chair. She thanked all members for their services this past year.
- Members and bar staff provided input to the chair regarding future meetings at the bar offices and keeping Friday as the meeting date. The majority agreed with the idea of having a couple of hybrid meetings (in-person + Zoom) next term, contingent upon WSBA's policy for in-person meetings and public health considerations. Zoom will continue to be an option for all meetings.
- The staff liaison announced a change to the MCLE requirements in APR 11, which amended the ethics requirement for equity, inclusion, implicit and explicit bias, effective October 1, 2021.

The June 4, 2021 minutes were approved.

New Proposed RPC 8.6 (Dress code rule)

WYLC Immediate Past President (and incoming board of governor), Jordan Couch, discussed proposed new RPC 8.6 that would establish a broad dress code standard for lawyers in judicial proceedings. The WYLC also proposed a comment to the judicial conduct rules. Mr. Couch explained the reasons for the new rule are the gender-specific dress codes for lawyers, current attitudes towards non-gender conformity, and the different local rules governing courtroom attire, which has affected WYLC members and created issues in the courtroom. The committee suggested the proposed rule might be better situated in the court rules, the general rules, or the Canons for Judicial Conduct (CJC). Mr. Couch stated WYLC chose the RPC because they believe it would supersede the various local court rules. Discussion followed on lawyer discipline and RPC 8.4 Misconduct, the fiscal impact to the Office of Disciplinary Counsel and hearing officers who hear discipline matters, and the awkwardness of having to evaluate grievances filed for dress attire. The committee suggested that a comment in RPC 8.4(g) or (h) to address the issue of opposing counsel commenting on another lawyer's courtroom attire might be considered. Mr. Couch will

convey the committee's comments to WYLC and other constituents and meet with discipline counsel about suggestions to the draft rule.

RPC 1.8(e) Financial Aid Exception

The subcommittee noted that changes to the draft rule mirrors the ABA Model Rules and Comments and incorporates comments from ODC and other entities. The subcommittee's memo included five explanatory notes regarding the differences between the revised Washington rule and the ABA MR. Committee members suggested several technical modifications and was not opposed to leaving in Cmt [12] even though it is redundant because it aligns with the MR. The subcommittee agreed with the committee's suggestion to narrow language in Cmt [12] regarding paying for court costs and investigation. The committee also suggested the subcommittee review the entire RPC rule set for cross-references to the proposed comments which may need to be updated. Members noted there was a risk the proposed rule could raise concerns from the Department of Revenue. Also, a subcommittee of the Pro Bono Service Committee is looking into the same issue and the subcommittee should reach out to them.

RPC 1.8(e), Comment [10]

Following a brief discussion regarding the broadness of the proposed rule, it was moved, and seconded that the subcommittee take no action with respect to the language of Cmt [10] concerning subsidizing lawsuits or administrative proceedings brought on behalf of their clients. The motion carried. The subcommittee will revise the draft rule and circulate it to the Pro Bono subcommittee, and report back to the committee at the next meeting.

RPC 4.2 Reply All Email to Opposing Counsel with Opposing Client cc'd

The subcommittee presented a draft opinion that considers multiple factors in determining implied consent in Reply All email communications between lawyers where the opposing lawyer's client is included (cc'd) on the email. The committee agreed with the approach of the opinion, including the guidance to copy the client in a separate email to avoid the problem altogether. They also discussed the problem of other recipients on the email chain and weird email addresses that make it difficult to identify persons. The subcommittee will continue to work on the draft for the next meeting.

RPC 1.15A Lawyer's Unidentified Trust Account Funds (LFW proposal)

The subcommittee reported they are waiting for a memorandum from the AAG following conversations held with representatives of the DOR and AAG. The conversations underscored two issues: 1) DOR's statutory construction interpreting the Unclaimed Property Act as applicable to lawyer's unidentified trust account funds, which is further supported by the WSBA's own guidance to remit unidentified trust account funds as unclaimed property pursuant to RCW 63.29, and 2) a separation of powers issue between the judicial and legislative branches of government. The subcommittee discussed rules adopted by Illinois and Louisiana, and the Massachusetts Supreme Court opinion and dissenting opinion. Several members expressed concern about the risk of proceeding with a court rule that could bring potential litigation upon the Bar. The subcommittee pointed out that DOR indicated a willingness to assist in efforts to draft an amendment to the statute if the Bar decides to go that route. The subcommittee commented that the issues are legal in nature. Others commented the legislative solutions are also beyond the scope of the committee. The committee discussed options available to the BOG and what the committee may be able to do. It was noted the LFW, which is the proponent of the rule change, did not propose a draft rule. Further discussion ensued on the committee's report to the BOG for the September meeting. It was moved, and

seconded that the subcommittee should prepare a BOG memorandum laying out the options identified by the committee, and that the committee not make any recommendation, or take a position in support of, or opposed to the options presented. The motion passed unanimously.

Remote Work Advisory Draft Opinion

Tabled. The subcommittee expects to have a final report for the next meeting.

RPC 7.2, 1.5(e), 5.4 Revised Proposed Amendments

The subcommittee reported the earlier proposed amendments did not address the percentage of shared fees and added new language in Cmt [15] to RPC 7.3. They asked the committee to approve the recommendation, which included a technical revision to RPC 5.4. Discussion followed on a suggestion to add the new language to the rule itself so that it would be more distinct. The subcommittee withdrew its request and will return with a revised draft.

RPC 1.4(c) Insurance Malpractice Disclosure Requirement

The committee formed a subcommittee to draft an advisory opinion to clarify the new rule following numerous questions received by the Bar from the membership. Members of the subcommittee are Hugh, Janice, and Cinda. Doug Ende also offered to provide assistance to the subcommittee.

The meeting adjourned 1:11 p.m.