

WASHINGTON STATE

BAR ASSOCIATION

Committee on Professional Ethics

Meeting Minutes

December 5, 2019

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

Meeting called to order at 10:13 a.m.

1. Committee Training

The committee participated in a diversity, equity and inclusion training given by the Bar's DEI and Public Services Specialists, Dana Barnett and Paige Hardy.

2. Minutes

The minutes were approved as amended.

3. Updates/Announcements

The staff liaison announced Advisory Opinions 201902 and 201903 were published online following the November 22-23, 2019, Board of Governors meeting.

The Supreme Court adopted the technical correction to RPC 6.1(a)(2) and published for comment the suggested amendment to RPC 1.15A(h)(9) regarding LLLTs as signatories on trust accounts. The comment period expires April 30, 2020.

4. Ghostwriting Subcommittee

The committee provided feedback on the draft opinion, including use of transitions and more discussion of the referenced RPCs and court rules. The subcommittee noted the opinion will be limited to pleadings filed in court and will not apply to criminal practice or representation of pro

se clients in federal court. Discussion followed on criminal practice and the Westlaw case cited in the opinion, application to business documents, civil legal aid and access to justice, the modern trend towards ghostwriting, and lawyer accountability. The subcommittee will prepare a revised draft for the next meeting. Monte Jewell offered to assist the subcommittee with its work.

5. Lawyer Mediator Subcommittee

The new subcommittee reported they met with the previous subcommittee to learn more about the issues and background. For additional insights, they plan to meet with family law and domestic violence stakeholders. The subcommittee believes the additional outreach would aid any determination on whether to recommend a rule amendment.

6. Subcommittee Size Discussion

The committee discussed the optimal size for subcommittees and agreed that no more than three members should serve on a subcommittee. The committee decided against formalizing the policy into a hard rule to allow discretion by the chair to increase the number of members when the issues presented are more complex.

7. Multi-client Representation Subcommittee

The committee considered a hypothetical based partially on an inquirer's original question. The draft opinion concluded that under the RPC and RCW a lawyer may represent the mother (the client and personal representative) and the children for damages in a wrongful death action. The limited scope representation presented no inherent conflict between the PR and the children and obtaining consent from the minor child through the mother would not be problematic either since their interests are unlikely to be adverse. The opinion noted that if the facts should change the lawyer must be mindful of any potential concurrent conflicts.

The committee suggested additional language be included to explain that claims flow to the decedent's estate and separate action for loss of consortium. Discussion followed on splitting the cause of action in a proceeding (not generally favored by courts), addressing non-economic damages, and issues arising with aggregate settlements. The committee suggested broadening the opinion to include all damages and settlements. Jeff Kestle volunteered to assist the subcommittee.

8. RPC 4.4 Comment 4 Subcommittee

The committee reviewed a proposed amendment to comment 4 to RPC 4.4 at the request of the interim executive director, who received the information from the Court. The proposal originated from the Northwest Justice Project, the ACLU of Washington, and others. The proposed amendment addresses the problem of warrantless civil arrests of persons by federal immigration enforcement authorities in and around courthouses. The committee researched

whether other states had passed or amended their court rules and found that Oregon, New York, and Massachusetts had passed rules prohibiting such arrests. The subcommittee noted they did not find any data that suggested Washington lawyers were the source of reporting to ICE.

The subcommittee presented a detailed analysis of the proposed amendments and discussed each rule change line by line. In sum, the subcommittee disagreed with all but two of the proposed amendments and recommended the committee reject the other amendments. The subcommittee recommended the committee put forth an alternative version of the comment that they believe would address the concerns of the proponents. In addition, the subcommittee urged more time for comment from primary stakeholders such as prosecutors, immigration lawyers, and other public lawyer officials. Following a lengthy discussion, the committee agreed to meet telephonically two more times in the next two weeks to hold a final vote on the recommendation before forwarding the material to the Board of Governors for the January 2020 BOG meeting.

- **GR 38**

The subcommittee also analyzed proposed changes to GR 38, proposed in conjunction with the proposed amendments to RPC 4.4. The subcommittee concluded the changes do not conflict or overlap with those proposed for RPC 4.4. The subcommittee noted that notwithstanding the proposed amendments to GR 38 it would be a violation of RPC 8.4(h) and (j) to facilitate a process that results in the arrest of a person engaged in judicial business at the courthouse without a judicial arrest warrant or order.

9. RPC 6.5 New Comment 8 Subcommittee

As with the proposed amendment to comment 4 to RPC 4.4, the committee formed a subcommittee to review a proposed new comment 8 to RPC 6.5 which originated from the Pro Bono Council. The proposed new comment would allow lawyers operating under RPC 6.5 to issue general, prospective notice of conflict screening procedures to clients rather than provide actual notice in individual cases. The amendment addresses the safety concerns of domestic violence survivors who seek legal aid services, which the proponents argue would protect confidentiality and accessibility of legal aid services to parties in DV matters. See proponent's GR 9 coversheet published on the Court's website.

The subcommittee reached out to the proponents and others and discussed their analysis with the committee. The subcommittee outlined three questions for the committee: 1) whether the proposed comment would accomplish the policy goals of the proponents; 2) whether the proposed comment should be in the rule itself to avoid internal inconsistencies; and 3) whether the language in the proposed comment should be clarified since it is unclear what is being authorized. The committee discussed several possible responses to the proposal. The subcommittee was not yet prepared to offer a recommendation and asked that it return with a

final report for the next meeting. The CPE's report will go to the Board of Governors for their March 19-20, 2020, meeting. The Court's public comment deadline is April 30, 2020.

10. Lawyer Referral Services Subcommittee

The subcommittee reported it had emailed 29 county bars to seek input regarding the proposed changes to comment 6 to RPC 7.2. They received one response and advised more time for the counties to respond. In addition, the subcommittee noted the proposed language tracks with the suggested amendments to Title 7 currently pending before the Court.

11. Karstetter Subcommittee

The subcommittee recommended adding a reference to the *Karstetter* case in RPC 1.16, comment 4 and in RPC 1.13 as Additional Washington comment 16. The subcommittee noted that adding a clear, stand-alone comment in RPC 1.13 would highlight the decision for lawyers. Discussion followed on the proposed language in comment 4 and members suggested including just a signal to the decision without actually quoting from the case. The subcommittee will do the final wordsmithing. There was a motion to approve the addition of *Karstetter* to the comments, which was seconded; the motion passed unanimously.

12. Potential Future Topics

The chair received a request for an opinion from a criminal defense lawyer concerning disclosure of confidential client information in criminal cases where competency is at issue. The inquirer requested the committee clarify or expand on Advisory Opinions 2099 (2005) and 2190 (2009). The chair formed a subcommittee consisting of Brooks Holland, Vince Lombardi, and Cinda Fernald to consider the issue and report to the committee.

The meeting adjourned at 3:03 p.m.