

**COMMITTEE ON PROFESSIONAL ETHICS**

Amended Meeting Minutes

October 20, 2017

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

Members present were Don Curran (Chair), Tom Andrews, Natalie Cain, Callie Castillo, Lucinda Fernald, and Brooks Holland. Excused were Mark Fucile, Colin Folawn, and Anne Seidel.

Also present were Jeanne Marie Clavere (staff liaison), Doug Ende, Chief Disciplinary Counsel, Jean McElroy Chief Regulatory Counsel, Art Lachman, Bruce Johnson, Peter Jarvis, and Darlene Neumann, paralegal.

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

Introductions by members and guests were made around the table and over the phone.

**I. Updates & Information**

The new chair briefly discussed his style for moderating committee meetings going forward. The staff liaison reviewed administrative matters, expense reports, and responsibility of subcommittees to prepare memoranda, GR 9 cover sheets, clean and redline versions of proposed RPC rule changes, and other requisite materials that go to the Board of Governors and the Supreme Court.

**II. Minutes**

The minutes were approved.

**III. Lawyer Advertising Workgroup**

The workgroup, which has been reviewing the 2015-2016 APRL proposals to amend the lawyer advertising rules, presented its report and recommendations to the committee.

The workgroup recommended RPC 7.1 remain unchanged, but add the comments from MR 7.2 and 7.4, and merge the Washington comments from RPC 7.5 regarding firm names and LLLTs. They also recommended eliminating RPC 7.2, 7.4, and 7.5. The referral rule in RPC 7.2 would be revised and moved to RPC 7.3. The workgroup pointed out that the proposed amendments would affect RPC 5.5 (UPL; multijurisdictional practice of law) and therefore require changes to that rule, which is beyond the workgroup's current scope.

A motion was made to approve the recommendation to amend RPC 7.1, 7.2, 7.3, 7.4, and 7.5, and forward the recommendation to the BOG.

Discussion followed on the issue of solicitation of vulnerable clients or their family members in or near the courthouse. A friendly amendment was made to incorporate RPC 7.3(b) into the revised rule. Several members agreed that a comment should be included to highlight the concern. The committee decided to proceed on the first motion and consider the friendly in a separate motion. The first motion passed unanimously.

A workgroup member suggested RPC 7.3(b) be included in comment [3] of the revised rule. Following discussion, the committee voted unanimously to approve the additional comment to Comment [3].

The committee discussed regulatory concerns about law firms that practice in multiple jurisdictions and the potential for misleading clients on who could or could not represent them in a particular state. The committee agreed that a comment should be added in 7.1 and suggested that another committee member draft the language.

Finally, the workgroup commented that they decided to leave the referral rule unchanged and that there are issues related to it beyond the workgroup's scope.

The committee discussed a timeline for submitting the proposal to the BOG. The workgroup will prepare a draft BOG memo and redline and clean copies of the proposed rules for review for the next CPE meeting in December.

#### **IV. Lawyer Mobility Subcommittee**

The subcommittee presented a draft advisory opinion providing practical guidance for lawyers who change firms and ethical duties to clients who are affected by the lawyer movement.

The committee discussed various scenarios of lawyers departing firms, the ensuing conflicts over ownership and access to client files, and the fiduciary duties of lawyers. It was suggested that a separate opinion could address the related issue of client files. The subcommittee noted that many lawyer mobility scenarios are fact-specific and including more information may result in uncertainty. The subcommittee will consider the committee's feedback and return with a revised draft for the next meeting.

#### **V. RPC 4.2 Communication With Client Represented by Government Agency**

The subcommittee reported they had contacted government attorneys and private practice attorneys who represent government employees and for feedback and set a 30 day comment period. They had not yet received any comments from municipal attorneys. The chair reported he received an email from a member of the environmental and land-use section who expressed interest in providing input on the issue. The chair will forward the email to the subcommittee. The subcommittee discussed casting a broader net to get more feedback from other sections. Bar staff will assist the subcommittee to communicate their request to sections.

## **VI. Arlene's Flowers Subcommittee**

The subcommittee discussed different interpretations of RPC 8.4(g) and (h) regarding whether lawyers can decline representation based on the clients' sexual orientation following a general inquiry to the committee on the ethical impact of the *Arlene's Flowers* decision. The subcommittee came up with four different options and sought the committee's direction. They were: 1) whether the CPE should address the controversial subject; 2) if the committee addresses it, whether it should be as an advisory opinion or a comment; 3) if as an advisory opinion, what position should the CPE should take on RPC 8.4(g); and 4) if as a comment, whether to interpret the last sentence of RPC 8.4 (g), or propose a new comment which will cause the Court to decide. Lastly, the subcommittee sought the committee's direction on whether to recommend the adoption of the ABA MR comments to 8.4(g) related to anti-discrimination.

Discussion followed on trying to regulate lawyer motivation, the constitutional issues involved (which are beyond the scope of the CPE), and whether to create a comment to clarify the state anti-discrimination law and violations of RPC 8.4.

The consensus among the committee was that a draft comment would help in analyzing the issue further. Brooks Holland offered to work with the subcommittee. The subcommittee will draft a comment to RPC 8.4(g) and a recommendation regarding ABA MR 8.4 comments.

## **VII. Retired Lawyer Trust Account**

The subcommittee reported they were waiting on feedback from the LLLT Board regarding the CPE proposed amendment to RPC 1.15A(h)(9).

## **VIII. Advisory Opinion 2223 Subcommittee**

No report. The subcommittee hopes to have a report by the next meeting.

## **IX. Quadripartite Subcommittee**

The subcommittee presented a revised draft opinion. It was suggested the draft opinion be broadened to provide guidance in other industries beyond the hospital setting. The subcommittee explained that many of the inquirer's questions went beyond the RPCs and touched upon broader legal questions, and therefore they chose to draft a more narrow opinion. The subcommittee will consider the committee's comments in their next draft.

## **X. Small Batch Subcommittee**

The subcommittee noted they will have a report on the treatment of older trust account advisory opinions for the next meeting.

## **XI. Discretionary Matters**

The chair asked whether the committee wanted take up two new topics: 1) lawyers responding to negative social media reviews, and 2) duty of a lawyer to disclose information that may rectify a defendant's wrongful conviction. On the first topic, the committee elected to defer

action until they are finished with the lawyer advertising rules. On the second topic, the committee agreed to defer action until the current backlog of work is reduced.

The meeting adjourned at 1:54 p.m.