

# WASHINGTON STATE BAR ASSOCIATION

## COMMITTEE ON PROFESSIONAL ETHICS

### Meeting Minutes

June 7, 2019

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, Pam Anderson, Jeffrey Kestle, Anne Seidel, Vince Lombardi, Mark Fucile, and Lucinda Fernald. Brooks Holland and Kyle Sciuchetti (BOG Liaison) were excused. Also present were Jeanne Marie Clavere (staff liaison), Doug Ende, Office of Disciplinary Counsel, and Darlene Neumann, paralegal.

The meeting was called to order at 10:00 a.m.

#### **1. Minutes**

The minutes of April 5, 2019, were approved by a vote of 6-0-2.

#### **2. Updates**

- The staff liaison discussed the Open Public Meetings Act and its application to the committee, notice and meeting requirements.
- The chair announced that members interested in serving as chair for the next term should apply by June 14, 2019. He will email additional information to members following the meeting.
- The staff liaison reported on changes to the lawyer RPC as a result of amendments to APR 28 and the LLLT RPC approved by the Court on May 1, 2019, effective June 4, 2019.
- The BOG approved the committee's recommendation to correct a typographical error to RPC 6.1(a)(2).
- Anne Seidel reported on her presentation to the BOG for RPC 1.15A(h)(9) (trust account signatory rule) which was on for first reading. The BOG is expected to vote on the proposal at its July meeting.
- The staff liaison discussed the suggested amendments to GR 24 (definition of practice of law) by the Practice of Law Board which the Court has published for comment. Individual members of the committee may submit comments to the POLB proposal. The comment period expires August 30, 2019.

### **3. Advisory Opinion 2223**

The subcommittee recommended amending RPC 2.4 to allow lawyer-mediators to draft and file pleadings and other court documents on behalf of unrepresented parties. They also suggested making further revisions to the proposed draft advisory opinion.

For purposes of discussion, a motion was made to adopt the proposed changes to RPC 2.4. Members discussed the subcommittee's decision to model the amendments on Wisconsin's RPC 2.4 which has not been adopted in many jurisdictions. The primary beneficiaries of the proposed rule would be parties who cannot afford mediation and whose cases are uncomplicated. Members had concerns that parties with complex matters may not receive adequate representation under the proposal. The committee also noted the rule could apply to other practice areas beyond family law. Discussion followed on risks of the proposed rule, conflicts of interest, referencing certain provisions of RPC 1.7 in section (c) of the proposed rule, whether RPC 1.12 would be a better fit, Utah's comparatively simple rule, and concerns that the proposed changes would move Washington further away from the ABA Model Rules.

The committee requested the subcommittee prepare a redline draft of Washington's RPC 2.4 before taking action. The subcommittee will return with revised materials for the next meeting. Jeffrey Kestle volunteered to join the AO 2223 subcommittee.

### **4. Lawyer Referral Services**

The subcommittee recommended relocating RPC 1.5(e) and amending RPC 7.2 to allow fee sharing with qualified nonprofit lawyer referral services, including bar associations. Members discussed whether the language should include county bars and 501(c) organizations or use a general term such as nonprofit service provider. It was suggested the language needs to accommodate out of state lawyer referral services and some criteria would be helpful. However, some cautioned against getting too specific and noted the burden falls on the lawyer who engages the referral services. Discussion followed on placing the provision in RPC 7.2 and adding a cross-reference to RPC 5.4. The subcommittee will prepare a redline draft of the proposed amendments for the committee's review.

### **5. Ghostwriting**

The subcommittee discussed the various local, state, and federal court rules on ghostwriting in civil litigation and pointed out that at least one federal opinion disapproved of the practice. Because the rules on ghostwriting are spread out between the RPCs and the civil rules, the subcommittee recommended the CPE provide guidance in the form of an advisory opinion for bar members. Discussion followed on the scope of the opinion. The committee by unanimous consent approved of further work by the subcommittee.

### **6. SAAG Subcommittee**

The subcommittee discussed their analysis regarding conflict issues for contract attorneys retained by a certain state agency. The subcommittee noted that legal issues are beyond the CPE's scope, questions of attorney/client representation must be analyzed on a case-by-case basis, and duty to the injured worker depended on subrogation. Members discussed the fiduciary duty to the department and the injured worker, the language of the contract, and RPC 4.3 issues (risk of misunderstanding by the worker). There was little interest in issuing a general opinion on the topic. A motion was made to adopt a proposed

response to the inquiry, and the subcommittee offered to draft a response guided by feedback from the committee to present at the next meeting.

#### **7. Retired Lawyer Trust Account**

The committee discussed different arrangements to receive periodic payments for clients resulting from settled cases after retiring from practice. The subcommittee examined whether a different status might change the answer, and discussion followed on inactive and voluntary resignations. The committee identified that the main issue continues to be references in the RPC, ELC, and the Bar's Bylaws to a lawyer "admitted to practice." The subcommittee presented several options to answer the current inquiry. Following this feedback from the committee, the subcommittee will continue to work on the issue.

#### **8. New Inquiry: Multi-Client Representation in Wrong Death Civil Cases**

The committee reviewed a new inquiry on the issue of multi-client representation in wrongful death civil suits. Several members commented that this seemed to be a common issue and the committee considered whether an advisory opinion might be useful. Two members recused themselves from discussion because of on-going litigation on the same general topic. The remaining members discussed whether an opinion could be drafted without impinging on issues in litigation given recent changes to the wrongful death statutes. Due to time constraints, the committee voted to table to further discussion until the next meeting in August. The motion passed unanimously.

#### **9. Potential Future Topics**

No topics were raised.

The meeting adjourned at 2 p.m.