

## COLORADO SUPREME COURT

### STANDING COMMITTEE ON THE RULES OF PROFESSIONAL CONDUCT

Approved Minutes of Meeting of the Full Committee

On

October 27, 2023

Sixty-Ninth Meeting of the Full Committee

The sixty-ninth meeting of the Colorado Supreme Court Standing Committee on the Rules of Professional Conduct was convened at 9:03 am on Friday, October 27, 2023, by Chair Judge Lino Lipinsky de Orlov.

Present at the meeting, in addition to Judge Lipinsky and liaison Justice Maria Berkenkotter, were Nancy Cohen, Cynthia Covell, Katayoun Donnelly, Thomas E. Downey, Jr., Judge Adam Espinosa, Erika Holmes, Matthew Kirsch, Madeline Leibin (guest), Marianne Luu-Chen, Stephen G. Masciocchi, Troy R. Rackham, David Stark, James S. Sudler, Jennifer Wallace, Judge John Webb, Frederick Yarger, and Jessica Yates.

Present for the meeting by virtual appearance were Julia Martinez, Cecil E. Morris, Jr., Henry R. Reeve, Alexander R. Rothrock, Marcus L. Squarrell, Robert Steinmetz, Eli Wald, and liaison Justice Monica Márquez. Committee members excused were Scott L. Evans, Margaret B. Funk, Marcy G. Glenn, April D. Jones, Judge Bryon M. Large, and Noah Patterson.

**1. CALL TO ORDER.** Judge Lipinsky called the meeting to order at 9:03 AM. He welcomed those attending in person or virtually. He reviewed the names of all attendees and noted those having excused absences.

**2. APPROVAL OF MINUTES FOR JULY 28, 2023 MEETING.** The Committee reviewed the minutes from the July 28, 2023 meeting. Judge Webb moved to approve the minutes without amendment. The motion was seconded. The Committee unanimously voted to approve the minutes.

**3. OLD BUSINESS.**

**a. REPORT ON THE PATENT HARMONIZATION INITIATIVE** [Judge Lipinsky]. Judge Lipinsky reported that a group presented this issue to the Colorado Supreme Court. The Justices indicated that the Court did not want Colorado to be the first to act in this action. The direction from the Court was to wait for the ABA to act first in this area and then Colorado can respond.

**b. REPORT ON THE PROPOSED AMENDMENTS TO RULE 1.4 AND THE COMMENTS THERETO** [Judge Lipinsky]. Judge Lipinsky reported that the proposed amendments were presented to the Court. The Court did not approve the amendments. Justice Berkenkotter thanked the members of the subcommittee for the significant and helpful work. She said that, although the Court ultimately decided not to adopt the proposal, the work of the subcommittee was very valuable and led to a very robust discussion amongst the justices.

**c. REPORT ON THE PROPOSED AMENDMENTS TO RULES 1.5 AND 1.8** [Judge Lipinsky]. Judge Lipinsky reported that the Colorado Supreme Court put the proposed rule up for comment. The comments will be due January 10, 2024. The Court has not set a hearing on the proposed amendments to Rules 1.5 and 1.8.

**d. REPORT ON THE PROPOSED AMENDMENTS TO COMMENT [14] TO RULE 1.2** [Judge Lipinsky]. Judge Lipinsky reported that the Court put the proposed amendments to comment [14] up for comments. Any comments must be submitted by December 21, 2023.

**e. REPORT FROM THE RULE 5.5 SUBCOMMITTEE** [Cecil Morris]. Mr. Morris explained that the subcommittee has been dutifully working. It has had two meetings and has another meeting coming up. The subcommittee discussed the framework of the proposed changes but has not yet drafted the proposed changes. The drafts will be done shortly before the next meeting of the subcommittee. Ms. Yates indicated that she was not on the email distribution list. Mr. Morris indicated that he would ensure that she is on the email chain going forward.

**f. REPORT FROM THE PALS II SUBCOMMITTEE** [Judge Espinosa]. Judge Espinosa presented on the proposed changes to the Rules of Professional Conduct to reflect the approval of licensed legal professionals (LLPs) in Colorado. Judge Espinosa explained that the subcommittee appreciated the feedback. The subcommittee met again and focused on Rule 5.3. The subcommittee decided to limit the edits to 5.3 and put a comment in to describe the responsibilities that a lawyer will have if the lawyer employs an LLP. The subcommittee created Rule 5.3A, which addresses the supervisory responsibilities of lawyers who employ LLPs. The subcommittee also added a provision to Rule 5.4(d)-(1), which clarifies that a lawyer or LLP shall not have the right to direct or control the professional judgment of a lawyer.

Ms. Cohen moved to adopt the proposed amendments. Ms. Covell seconded motion. Mr. Rothrock commented that he likes the proposed changes. He inquired whether something in the proposed Rules of Professional Conduct for LLPs (the LLP Rules) makes it clear that an LLP could provide paralegal services. Judge Espinosa believed that it was a good suggestion that perhaps should be put into a comment. The subcommittee has not yet got to the point of drafting the comments to the proposed LLP Rules. Ms. Yates explained that her office has been in discussion with Community College of Denver (CCD) about these issues and the students in the program will get training on the LLP Rules in addition to the substantive legal portion of the curriculum.

Mr. Stark indicated that there already are programs that provide the training required and there are already faculty signed up to teach the programs.

Mr. Sudler suggested amending comment [2A]. Mr. Sudler recommended that the sentence say “[i]n addition, lawyers may employ LLPs as assistants in their practice acting in a capacity outside the scope of the LLP’s licensure.” Mr. Sudler also suggested revising the sentence that begins with “[f]or example” to say “[f]or example, a lawyer may ask an LLP to perform paraprofessional services that are not within the LLPs’ scope of their licensure.” The third proposed change was to the sentence: “When employing an LLP outside the scope of the LLP’s

licensure, a lawyer must treat the LLP as a nonlawyer and make reasonable efforts to ensure that the LLP's services are provided in a manner that is compatible with the lawyer's professional obligations." Mr. Kirsch disagreed with the third proposed revision, suggesting that we should keep these rules simple. Judge Webb agreed. Mr. Sudler withdrew his third proposed change.

The first sentence of comment [2A] uses LLPs and LLPs', but in the rest of the comment, it refers to LLP or LLP's (the singular) rather than the plural. Other portions of the rule use the plural. A member suggested that the rules should be consistent and should use the singular LLP or LLP's rather than the plural, such as LLPs or LLPs'. Colo. RPC 5.3 currently uses the plural (assistants) and then uses both plural and singular without confusion. Ms. Yates suggested that there is no need for a revision because it would cause inconsistencies between the LLP Rules and the RPCs.

There were no other comments. The motion was to approve as amended with the two approved friendly amendments above. The first was revising the first the sentence to say "[i]n addition, lawyers may employ LLPs as assistants in their practice acting in a capacity outside the scope of the LLP's licensure." The second suggested revision was to the sentence that begins with "[f]or example" to say "[f]or example, a lawyer may ask an LLP to perform paraprofessional services that are not within the LLPs' scope of their licensure." The Committee voted on the motion to approve. The motion carried unanimously.

**g. REPORT FROM THE REPRODUCTIVE HEALTH SUBCOMMITTEE [Nancy Cohen].** Ms. Cohen explained the discussion the subcommittee has had relating to whether conduct may be illegal in one state but not in Colorado. The issue is whether lawyers in Colorado can advise clients who are residents of different states about conduct that may be illegal under the respective state law but would not be illegal in Colorado. The legislature passed a statute to afford medical professionals protection from discipline if they act consistent with Colorado law, but inconsistent with other state laws. As a result of the discussion, the subcommittee revised the proposed comment to make it broader. The first sentence has the breadth of the rule. The second sentence provides an example. Ms. Cohen explained the reasoning behind the last two sentences in the proposed comment. Ms. Cohen suggested that the Subcommittee needs guidance from the Committee as a whole about how to address. Ms. Cohen raised the issue of the proposed revision to RPC 1.4, which the Court ultimately rejected in part because there was not unanimity. Judge Lipinsky explained that we do not have to have unanimity to forward the issue to the Colorado Supreme Court, but if Committee members disagree, they should articulate the reasons for their disagreement and draft a dissenting opinion, so to speak. Judge Lipinsky asked whether the Committee should take a straw poll.

Judge Webb wondered whether the Committee should table the matter until the Court decides what to do about the proposed revisions to RPC 1.2 relating to mushrooms. If the Court rejects that proposed change, this proposal may be dead on arrival. Ms. Covell disagreed that the Committee should wait because lawyers are facing this issue now and time is of the essence.

Mr. Reeve asked whether OARC has ever encountered a situation with reciprocal discipline when the other state claimed extra-territorial jurisdiction and disciplined the lawyer. Ms. Yates explained that there are safety valves in the reciprocal discipline and she could not think of a

situation where reciprocal discipline imposed in Colorado for what another state did, even if Colorado's rules are different. A member asked Ms. Yates whether there would be a guidance memo regarding how to apply reciprocal discipline.

Judge Espinosa raised the question of whether comment [14] should be merged with comment [15] to simplify the matter. Ms. Cohen explained that this issue was discussed by the subcommittee, but the subcommittee elected not to have the two comments merged because the proposal to revise Rule 1.2 for the mushrooms already went the Court. The subcommittee wanted to keep the comments distinct as a result.

Ms. Covell suggested that the proposed comment [15] remove the sentence that starts "[f]or example." Ms. Cohen suggested this was friendly. If the sentence is removed, then perhaps there is a more compelling reason to merge proposed comment [14] and proposed comment [15] together. Ms. Donnelly suggested that we could make the proposed changes now, in terms of combining comment [14] and [15]. The difficulty with doing that is that comment [14] in its current form is before the Court and set for a comment period. This Committee would have to make a recommendation to the Court to withdraw the proposed revisions to comment [14], and then the Court would have to approve that suggestion. It probably is simpler just to keep the comments separate given the procedural status.

Mr. Downey wanted to steer the discussion to the larger issue, which focuses on the objective of the proposed revisions. Mr. Downey also asked, given that a year has passed, has this issue actualized for lawyers or has it calmed down. No Colorado lawyer has been disciplined for providing advice about compliance with other state laws compared to Colorado's laws.

Ms. Yates suggested keeping the divergent federal law in a distinct comment from a comment focused on divergent state laws. All Colorado lawyers are expected to have competence on federal law because the bar exam focuses on it, but state laws can be unique and are not part of the bar exam in Colorado. Ms. Cohen explained that she is not aware of any lawyer being disciplined or facing discipline in Colorado for giving advice about reproductive health services in other states, but there certainly is a valid fear by Colorado lawyers that providing some advice could expose the Colorado lawyer to discipline.

Judge Webb raised the fact that a previous director of OARC issued guidance that a lawyer who consumes marijuana would not be subject to discipline. Judge Webb wondered whether OARC could do something similar here. Ms. Yates explained that this was a possibility, but she would need to consult with the Advisory Committee on the Practice of Law before issuing the guidance. Several members on this Committee also are on the Advisory Committee on the Practice of Law.

Mr. Kirsch explained that the objective is to protect Colorado lawyers by giving clear guidance and a safe harbor. Mr. Kirsch did not believe this was the way to go. Mr. Kirsch advocated against any comment that would permit a lawyer to advise on illegal conduct or additional mischief. Mr. Kirsch explained that the comment is ambiguous too because there are differences in federal law as well. Mr. Kirsch suggested limiting the more restrictive proposal to

conflicts between different state laws rather than federal law. Mr. Kirsch explained that the reference to “jurisdiction” should instead be “state.”

Mr. Wald spoke in favor of the proposed comment. Mr. Wald explained that there is a precedent to provide guidance when the law is in the state of flux, as the Court did with respect to the marijuana changes. Mr. Wald explained that the previous guidance provided was interim guidance until the CBA Ethics Committee issued its opinion. Mr. Wald did not believe that there would be any similar resolution which would render guidance more permanent. If that is the case, we should put a comment in RPC 1.2 because this issue is not going to go away and Colorado lawyers are in need of guidance. Mr. Wald suggested the Committee should leave in the second sentence (beginning with “[f]or example”) because the second sentence is critical to provide guidance to Colorado lawyers. The purpose of the comment is to provide guidance and the second sentence is needed for that guidance.

Judge Lipinsky put the issue up for a straw vote to determine whether to move forward with wordsmithing the proposal – meaning, do Committee members want to propose to the Court revising the comments to RPC 1.2 as they relate to reproductive services? A clear majority of the Committee voted to continue the discussion regarding the language of the proposed revisions. Regarding the proposed comment [15], Ms. Cohen disagreed with changing the word “jurisdiction” to “state” because local municipalities or counties could also have jurisdiction. Mr. Masciocchi disagreed with changing “jurisdiction” to state because we have districts (like DC), counties, municipalities, and the like. Mr. Masciocchi explained that the practical effect of this proposed comment is likely quite limited anyway. It is just designed to protect Colorado lawyers, with limited impact. The General Assembly passed some statutes that provide more robust protection for other professionals.

Ms. Donnelly echoed the proposition that this proposal is designed to protect Colorado lawyers, but has a narrow reach. Ms. Donnelly thought this language was helpful to incentivize lawyers to provide advice where lawyers otherwise would not want to take the risk of providing advice to clients in need. Mr. Kirsch explained that the DOJ has not issued a policy with respect to mushrooms or with respect to reproductive rights. Mr. Kirsch advocated against a comment that incentivizes (or protects) lawyers to provide advice about conduct that is illegal “in another territorial, state, or local jurisdiction.” This would keep the federal piece separate.

Ms. Yates suggested that, if the Committee’s goal is to keep federal law distinct from state or local law, then we should parrot similar language from comment [14]. The proposal would say “a lawyer may assist a client who engages in conduct the lawyer reasonably believes is legal under federal or Colorado law even if the conduct may be illegal in another territory, state, or local jurisdiction.” Mr. Steinmetz raised the issue of whether the Committee would be highlighting the issue by recommending this comment because it may put a target on lawyers who provide advice in this arena to be disciplined in another jurisdiction. Ms. Cohen suggested that this proposed comment is for the benefit of clients primarily, not to protect lawyers. Rather, the comment removes a barrier to Colorado lawyers to providing advice to clients in need. Ms. Covell agreed that this is essentially an access to justice issue because there are clients who may have difficulty getting needed guidance without clear guidance to Colorado lawyers that they will not be disciplined if they provide advice to clients in these complicated areas.

Mr. Stark wondered if the Committee has any data suggesting that there are Colorado lawyers who are refusing to provide advice or guidance in this area because of a fear of violating the RPCs or being disciplined. Mr. Stark also referenced the previous guidance provided by James Coyle relating to a lawyer's consumption of marijuana. The memo was from 2006. Mr. Stark suggested removing the phrase "providing reproductive health care services" because the phrase might be provocative to other states that have very strong views on the issues.

Ms. Luu-Chen asked whether there was a deliberate decision to put this in a comment rather than changing the rule. Ms. Cohen explained the history of the discussion and the consensus was to keep the issue in the comments. Judge Lipinsky explained that when the marijuana issue came up, the initial proposal was to amend RPC 1.2(d) rather than putting it in the comment, but the Court decided to put it in the comment, essentially resolving the debate.

The Committee had a discussion about whether to review each sentence one by one or just consider what to do with the second sentence and then send the proposal back to the subcommittee for further wordsmithing and to address the "jurisdiction" versus "territory, district, or local jurisdiction." There are potentially other jurisdictions, like tribal courts. A straw vote was taken. The vote was evenly divided, so the subcommittee will take that into account when suggesting revisions in the next round.

**h. REPORT FROM THE AI SUBCOMMITTEE [Julia Martinez].** Ms. Martinez had to leave the meeting early. Judge Lipinsky explained that the subcommittee met once, divided tasks amongst subcommittees, and plans on meeting in the next few months.

#### **4. NEW BUSINESS.**

**a. COLORADO APPELLATE RULE 5.** Judge Lipinsky provided background of proposed changes to CAR 5. A person can get guidance from a lawyer who assists in the appellate clinic. Under CAR 5, if a lawyer enters his or her appearance in the appellate courts, that lawyer is doing a full-bundled representation. The appellate rules do not have an analog to CRCP 11(b) which allows for a limited appearance. For reasons that only former Justice Hobbs knows (because he drafted the rule), CAR 5(e)(2) allows a lawyer to assist only with some specific parts of an appellate representation – essentially, a lawyer cannot assist with a brief (Opening, Answer, Reply, etc.). The Committee does not know why a lawyer assisting a pro se litigant with an appeal cannot assist in drafting the brief. The proposal would allow limited representation in assisting with briefs and then a second category where there would be a little less work performed on behalf of the pro se litigant. In that instance, the attorney would need to execute a certification like a CRCP 11 certification.

Ms. Donnelly explained that there are two appellate clinics. One helps with general questions on appeals. The other helps with arguments in the briefs. The concern is that if the lawyer is assisting a pro se litigant with a brief, does the lawyer have exposure for violating the rules. Additionally, there is a question of what information needs to be disclosed when a lawyer is "ghostwriting" or providing assistance with drafting the briefs. The committee concluded that the appellate rule should have similar language to C.R.C.P. 11 but the rule should be broadened to

allow a lawyer to provide assistance in drafting briefs for pro se litigants. The proposal is in the materials. The proposal would allow limited assistance in preparing “drafting assistance to a self-represented party involved in a civil appellate proceeding without filing a notice of limited appearance.” The proposal is before the Rules Committee. Judge Lipinsky was not sure where the proposal was in the process but expects that there will be a recommendation made to the Colorado Supreme Court.

This proposal, if approved by the Court, would require amendments to RPC 1.2(c) and two of the comments to the Rule. Judge Lipinsky suggested that the Committee could form a subcommittee to look at the proposed amendments to RPC 1.2(c) and the comments thereto. A motion to adopt a subcommittee was made. It passed unanimously. Judge Lipinsky solicited members to serve on the subcommittee. Erica Holmes, Judge Espinosa, Judge Lipinsky, Robert Steinmetz, and Katayoun Donnelly volunteered for the subcommittee.

**b. INTENTIONAL MISGENDERING.** Judge Lipinsky explained a circumstance where there was a CLE about use of pronouns and several members at the CLE were disrespectful of attendees and would refuse to use the preferred pronouns of a person. The question is whether to consider whether an amendment to RPC 8.4 would be warranted to address a circumstance where a lawyer deliberately refuses to use a preferred pronoun of a person. Ms. Yates explained that although RPC 8.4(g) is tailored to conduct “in representing a client,” RPC 8.4(h) is not as restricted.

Ms. Donnelly indicated that a federal court has struck down Pennsylvania’s RPC 8.4(g). Ms. Yates explained that the federal district court’s decision was reversed by the Third Circuit. She also noted that Pennsylvania’s rule did not have the “in the course of representing a client” language, which Colorado has. Further, in the *Abrams* case, the Colorado Supreme Court already held that Colo. RPC 8.4(g) is constitutional.

Judge Lipinsky put up for a vote whether to form a subcommittee to investigate and make recommendations about whether RPC 8.4 needs to be revised to address intentional misgendering. Judge Webb, Mr. Stark, Ms. Yates, Mr. Kirsch, and Mr. Downey volunteered to serve on the subcommittee. Judge Lipinsky will appoint a chair for the subcommittee.

**c. ABA’S AMENDMENT TO RPC 1.16** [Stephen G. Masciocchi]. Mr. Masciocchi presented on the proposed rule amendment. The proposed amendment has a three-year history or more. Congress has imposed duties on lawyers to disclose information about suspicious transactions, like money laundering, human trafficking, drug trafficking, and terrorism financing. The genesis was not with the ABA. The issue started with the Department of Treasury, which essentially advised the ABA that it would act if the ABA did not act. After significant discussion in the ABA, the proposal was to revise Rule 1.16 to require mandatory withdrawal if a client is engaged in criminal or fraudulent activity. If the client continues to persist in the activities, then the lawyer must attempt to remonstrate with the client. If the remonstrations are unsuccessful, then the lawyer would be required to withdraw. After a lengthy process, the ABA made the recommendation to revise RPC 1.16, which is in the packet.

Mr. Masciocchi put together the information for the Committee. Mr. Masciocchi does not recommend the Committee adopt it. The proposal is not just a codification of current law but goes beyond that. CBA Formal Ethics Op. 142 describes when a lawyer has a duty to inquire. Essentially, the lawyer cannot be willfully blind to the true facts but must have actual knowledge, which can be inferred from the circumstances of the representation. A lawyer cannot willfully avoid knowledge. The business section of the ABA also thought this proposal was a very bad idea. The litigation section and the science and technology section also opposed the proposal. The ABA sent a letter to Ms. Yates (and probably all jurisdictions in the US) suggesting that the states should adopt the proposal recommended by the ABA.

Judge Lipinsky suggested that there are two pathways forward: (1) create a subcommittee; or (2) adopt a wait and see approach. Mr. Sudler moved to table the issue. There was a discussion on the motion to table. Mr. Wald asked whether we are depriving the Supreme Court of our insight on this issue, even if the issue is later considered through a formal amendment to the rule. Typically, when the ABA changes the rules, this Committee considers the revisions and then makes recommendations to the Court. The motion to table carried unanimously. The Committee instead will draft a letter to the Court to determine whether the Court wants us to act on the ABA's revisions to Model Rule 1.16.

Justice Berkenkotter noted that the Chief Justice and several other justices have the letter from the ABA. The Court may not need an additional letter from this Committee, but it would be receptive of getting such a letter if the Committee wants to put one together. Judge Lipinsky and Mr. Masciocchi will work together to submit that letter to the Court.

**d. GENDER NEUTRAL LANGUAGE IN THE RPCS** [Judge Lipinsky]. Judge Lipinsky explained that a few rules (e.g., RPC 1.13) use pronouns like “he or she” as do several of the comments to particular rules. Judge Lipinsky explained that the Court is looking into this and may task us with evaluating the rules to determine whether to revise non-gender neutral language used in the Rules and comments.

**5. ADJOURNMENT.** A motion to adjourn was made at 11:25 pm and was duly seconded. The motion carried. The next meeting of the Committee will be on January 26, 2024. The following meetings are April 26, 2024; July 26, 2024; September 27, 2024; and January 24, 2025.

Respectfully submitted,

Troy R. Rackham, Secretary