COLORADO SUPREME COURT

STANDING COMMITTEE ON THE RULES OF PROFESSIONAL CONDUCT

Approved Minutes of Meeting of the Full Committee
on
July 28, 2023
Sixty-Eighth Meeting of the Full Committee

The sixty-eighth meeting of the Colorado Supreme Court Standing Committee on the Rules of Professional Conduct was convened at 9:03 a.m. on Friday, July 28, 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, Katyoun Donnelly, Judge Adam Espinosa, Scott L. Evans, Margaret Funk, Erika Holmes, April Jones, Judge Bryon M. Large, Julia Martinez, Stephen G. Masciocchi, Noah Patterson, Henry R. Reeve, Libby Truitt (guest), Jennifer Wallace, Frederick Yarger, and Jessica Yates.

Present for the meeting by virtual appearance were Christy DiMaria (guest), Thomas E. Downey, Jr., Marcy Glenn, April Jones, Matthew Kirsch, Molly Kocialski (guest), Cecil E. Morris, Jr., Troy R. Rackham, Alexander R. Rothrock, Marcus L. Squarrell, and Judge John Webb. Committee members excused were Marianne Luu-Chen, Justice Monica Márquez, David Stark, Robert Steinmetz, James Sudler, and Eli Wald.

1. CALL TO ORDER. Judge Lipinsky called the meeting to order at 9:03 a.m. He welcomed those attending in person or virtually. He reviewed the names of all attendees and noted those having excused absences. Judge Lipinsky also welcomed the three new members to the Committee — Ms. Donnelly, Mr. Evans, and Mr. Masciocchi.

2. APPROVAL OF MINUTES FOR APRIL 14, 2023, MEETING. The Committee reviewed the minutes from the April 14, 2023, meeting. Mr. Reeve moved to approve the minutes without amendment. The Committee unanimously voted to approve the minutes.

3. REPORT FROM THE PALS II COMMITTEE. Judge Espinosa reported on the PALS II subcommittee's work. The subcommittee provided a nine-page memorandum regarding recommendations of rule changes. There is a redlined version, as well. The subcommittee believes that it has addressed all of the concerns previously expressed. The majority of the changes were to the 5 series Rules, although there were also some others. Judge Espinosa suggested that it would be most efficient to focus on the Rule 5 series first. Judge Lipinsky agreed.

Mr. Reeve asked whether the proposed amendments address a lawyer (or firm) employing licensed legal paraprofessionals (LLPs) compared to LLPs practicing independently outside of a law firm. The committee discussed the issue of whether the LLPs likely will be working in a firm or working in their own firm. The intent of these Rules is to make sure that LLPs will comply with their own Rules and that lawyers would still work under the Rules of Professional Conduct.

Lawyers need to be cognizant of the fact that LLPs will have a limited scope of practice. A lawyer could not ask an LLP to take an expert deposition, for example. A member suggested, however, that an LLP could provide some administrative supervision of a lawyer. The Rules do not get into administrative supervision. As a result, a member suggested that the Rules need to be clear that an LLP could be subordinate for some issues but a supervisor for other issues (e.g., administrative issues). For example, if an LLP owned the firm, the firm could hire an attorney and the LLP could provide the administrative supervision in terms of approving time off, handling administrative matters, etc. The LLP could not supervise the actual practice of law, such as taking expert depositions, making final decisions on a case, or developing strategy. The key is that the lawyer needs to have the independent judgment.

Judge Espinosa noted that there is a link to all of the Rules being discussed at the end of the materials from the PALS II subcommittee circulated together with the meeting agenda. Judge Lipinsky displayed the Rules on the screen. Rule 5.1(b) of the LLP Rules clarifies that an LLP shall not have direct supervisory responsibilities over a lawyer. The LLP Rules are outside of the scope of what this Committee is doing. We are trying to harmonize the Rules of Professional Conduct with the LLP Rules to ensure that they work consistently and together. One member suggested that the Rule 5.0 series changes are appropriate and work in harmony with the LLP Rules.

One member raised a concern about Rule 5.4(f). Rule 5.4(f) provides, in part, that a lawyer cannot hire and use an LLP who has been suspended or disbarred. The member wanted to make sure that the Rules synchronize with the LLP to make sure that the cross-references are correct. The Committee compared the Rules of Professional Conduct with the LLP Rules. They appear to harmonize.

One member suggested that it would be important to state in the Rules of Professional Conduct that lawyers cannot be supervised in the practice of law by a nonlawyer. One member suggested that this is covered by 5.4(c), which provides "[a] lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services."

A member suggested that the Rules of Professional Conduct should be clear in Rule 5.1(b) that LLPs are always subordinates and cannot supervise lawyers in the practice of law. A lawyer should always have to supervise LLPs or take responsibility for the conduct of LLPs. Another member suggested that the Supreme Court's idea behind the LLPs is that they practice independently, in a limited fashion, like nurse practitioners or physician assistants. The Court explicitly rejected the model that LLPs would have to be supervised by lawyers in every circumstance. The policy reasons for that decision included the need to provide legal services in rural areas and other areas where the supply of legal services is scarce. The Court acted intentionally to allow LLPs to practice independently for these reasons. It is not this Committee's prerogative to change that fundamental policy choice. Although we are likely to see LLPs practicing in firms, the Court made an independent decision to allow LLPs to practice independently in areas where they would need to do so.

A member suggested that the current draft treats LLPs as lawyers in some Rules and nonlawyers in other parts of the Rules. It is important to define LLPs in the same way. They are nonlawyers. Rule 5.1 requires an LLP to act consistent with the LLP Rules. The Committee discussed the potential for confusion from Rule 5.3(b) because the rule suggests that, in all cases, a lawyer has the responsibility to ensure that the LLP conforms his or her conduct to an LLPs professional obligations. That would not be accurate or applicable to an LLP practicing independently. The member suggested that Rule 5.3(b) should say something like, "[a] lawyer having direct supervisory authority over the nonlawyer or LLP ***if the LLP is acting outside the scope of an LLP's practice*** shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer."[1]

A member suggested that there are two concepts. The first is whether a lawyer has direct supervisory authority over an LLP, which would require the lawyer to supervise the LLP to ensure that the LLP conforms his conduct to the LLP Rules. The second is whether a lawyer has direct supervisory authority over an LLP to ensure that the lawyer conforms his conduct to the Rules of Professional Conduct. Judge Lipinsky suggested that perhaps a change to the title of Rule 5.1 could address the issue.

Another member suggested that, if we took the reference to LLPs out of Rule 5.1, it could address the issue because Rule 5.3(c) directly addresses it. It is perhaps the redundancy that gives rise to the confusion. Another member suggested that it would help to remove the redundancy between Rule 5.1 and Rule 5.3. Members suggested that the potential for confusion could perhaps be avoided if Rule 5.3 provided that there are instances where a lawyer needs to ensure that subordinate lawyers adhere to the Rules of Professional Conduct and there are instances where a lawyer needs to ensure that LLPs conform their conduct to the LLP Rules.

Another member suggested that the simplicity and clarity of Rule 5.3 is beneficial. It makes it clear that a lawyer with supervisory responsibility must supervise all nonlawyers within that ambit of supervisory responsibility. LLPs are simply a subset of nonlawyer staff. The simplicity works. Another member noted that Rule 1 specifically defines an LLP and the roles and responsibilities of an LLP. That definition then is incorporated into all of the proposed LLP Rules, so the definition should resolve the issues. The objective of the subcommittee was to make minimal changes to the Rules of Professional Conduct and keep them largely in the condition that they were in. Judge Espinosa thought it would be helpful to the subcommittee to identify a few Rules.

A member moved to: (1) remove all of the references to LLPs in the proposed Rule 5.1; (2) amend proposed Rule 5.3(b) to state a lawyer having direct supervisory authority over the nonlawyer or LLP ***that is compatible with the practice of an LLP*** shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and (3) remove the phrase "in addition to the lawyer's responsibilities for an LLP's conduct under Rule 5.1(c)" contained in draft Rule 5.3(c). The motion was seconded. A discussion ensued.

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[1] The proposed revisions are in bold and italic font to delineate the difference.

Another member suggested that the current proposal, particularly Rule 5.1, is clear and provides appropriate guidance. Another member questioned what would be lost if the term LLPs is eliminated from Rule 5.1. The member explained that the only concept that would be lost is the idea that lawyers are responsible for requiring LLPs to comply with the LLP Rules of Professional Conduct.

Another member suggested that revisions need to be made to clarify that an LLP cannot supervise a lawyer over the practice of law. The member suggested that we should add a second sentence to Rule 5.4(b) that says "A lawyer shall not be supervised by an LLP." Another member suggested revising Rule 5.4(d)(1) to remove the phrase "other than an LLP." The Committee discussed the fact that this phrase is contained in proposed Rule 5.4(f) and is needed because the two subsections work together in the proposed Rules to avoid confusion.

Judge Lipinsky asked whether there are any comments to the Rule 8 series of the proposed changes. A member suggested that the proposed Rule 8.3 contains confusing language because if references "the Lawyer Rules of Professional Conduct." The member suggested that the proposed Rule should delete the term "Lawyer" immediately preceding the term "Rules of Professional Conduct." That proposed change would also apply to 5.4(d)(2), which would not permit an LLP to direct or control the professional independence of a lawyer.

A member suggested that we create a new subsection to proposed Rule 5.3 (e.g., Rule 5.3(d.1)) that breaks out the language to make it clear that a lawyer shall not be supervised by a nonlawyer. It is important to break out that language in a different section so it is clear that this is a departure from the Model Rules and unique to Colorado.

Another member suggested that C.R.C.P. 265 needs to be revised as well. The Committee discussed whether this Committee had that authority. Several members suggested that this Committee does not have jurisdiction over C.R.C.P. 265, but supported the proposition that this Committee should make a suggestion to the Standing Rules Committee because that Committee has jurisdiction over the Rules of Civil Procedure.

Regarding Rule 3.4, a member suggested that the title of the Rule be changed. The current title in the proposed Rules is "Fairness to Opposing Party, Counsel or LLPs." The member suggested changing the word "or" should be "and" so that the proposed Rule includes situations where an LLP supervises another LLP and situations where a lawyer supervises an LLP.

Another member suggested that we are rushing through this, so perhaps we should table the discussion. The Committee has covered a lot of great topics and there are a lot of good revisions in these proposed Rules, but the Committee needs to review and evaluate some of the details and not rush through them. This member's comment raised the question of when this Committee has to provide the proposed amendments to the Court for review and revision so that the amendments can be implemented sufficiently before LLPs become licensed. Ms. Yates explained that the first LLP bar exam will be in April 2024, so the amendments would need to be in place by June 1, 2024.

Judge Lipinsky steered the Committee back to the motion, which was to approve certain amendments to the draft LLP Rules. The first proposed amendment was to remove all references to LLPs in Rule 5.1. The second proposed amendment would revise Rule 5.3(b) to include the phrase "is compatible with the professional obligations of a lawyer or is compatible with the professional obligations of an LLP." The Committee took a straw vote. Eleven members voted in favor of this. Eight members voted against the proposal. The motion carried.

The third proposed amendment would be to have a new subsection under Rule 5.4 that would mirror Rule 5.4(d) but makes it clear that an LLP "shall not direct or control the independent judgment of a lawyer." This would be Rule 5.4(d-1). The Committee took a straw vote on the proposed amendment. A majority of the members voted in favor of the proposed amendment.

The fourth proposed amendment was to remove the phrase "in addition to the lawyer's responsibilities for an LLP's conduct under Rule 5.1(c)" contained in the proposed draft Rule 5.3(c) to remove the same phrase in proposed Rule 8.4(1). A majority of the members voted in favor of the proposed amendment.

4. REPORT FROM THE COMMENT [14] TO RULE 1.2 SUBCOMMITTEE. Mr. Patterson presented the proposed amendment to comment [14] of Rule 1.2. The subcommittee recommends revising comment [14] as follows (proposed revisions in red):

> A lawyer may counsel a client regarding the validity, scope, and meaning of Colorado constitution article XVIII, secs. 14 & 16, and Proposition 122, which established the Colorado Natural Medicine Act of 2022, and may assist a client in conduct that the lawyer reasonably believes is permitted by these constitutional provisions and statutes, and the statutes, regulations, orders, and other state or local provisions implementing them (including amendments to these statutes, regulations, orders and provisions). In these circumstances, the lawyer ~~shall~~ should also advise the client regarding related federal law and policy.

Mr. Patterson and others on the subcommittee explained that some of the substances approved by the Colorado Natural Medicine Act of 2022 are, like marijuana, illegal under federal law. The intention of the proposed comment is to follow a similar pattern as to the revisions to Rule 1.2 to align them with the comments relating to marijuana. A motion was made to approve these proposed revisions. The motion was seconded. A discussion ensued.

One member suggested that the comment is inconsistent with Rule 1.2(d), so the proposed comment should be a rule rather than a comment. The member suggested that this was a flaw in comment [14] to begin with. It should have been a new rule from the start. A member also suggested that the term "reasonably believes" is confusing because that standard is not applied in other portions of the Rules of Professional Conduct.

Another member inquired as to whether there would be a limiting principle to the proposed comment revisions. There are many circumstances where state law conflicts with federal law. What is the principle that allows the Committee to draw a line and make it clear when Colorado lawyers can advise and assist clients on crimes. What if Colorado law permitted carjacking while

federal law did not? It would be a problem to allow a lawyer to assist a client in carjacking even if state law did not criminalize the conduct.

Judge Lipinsky noted the history behind comment [14]. The Court insisted, as a compromise, on placing the cannabis language in a comment rather than in a black letter Rule. The Court did not appear comfortable with having an independent rule. The Court ultimately adopted the comment as a practical compromise. Given this history, it may be prudent to leave the comment as a comment because that is likely the only way the Court would approve it. Other members of the Committee noted that the composition of the Court has changed since the marijuana revisions, so the Court may now have an appetite to put the permission in a Rule rather than in a comment.

Several members noted that another subcommittee is considering revisions to Rule 1.2 relating to reproductive health. The Committee discussed whether it was reasonable to consider the proposals together. Ultimately the Committee elected to consider the proposals differently. A vote was taken on the proposed amendment to comment [14] of Rule 1.2, as reflected on page 17 of the materials circulated together with the meeting agenda. The motion carried. Judge Lipinsky will send a letter to the Court along with the proposed revisions to comment [14] to Rule 1.2.

5. REPORT ON THE STATUS OF THE PROPOSED AMENDMENTS TO RULE 1.4 AND THE COMMENTS THERETO. Judge Lipinsky noted that the Court has set a hearing date on the proposed changes to Rule 1.4 of the Colorado Rules of Professional Conduct. The hearing will be on September 20, 2023, at 3:30 p.m. Any person wishing to submit a comment on the proposed rule should submit it in writing on or before September 4, 2023, at 4:00 p.m. Comments and speaking requests may be emailed to supremecourtrules@judicial.state.co.us. More information about the hearing, the deadline to submit comments, and the format of comments can be found at the Court's website: https://www.courts.state.co.us/Courts/Supreme_Court/Rule_Changes.cfm.

6. REPORT FROM THE PATENT PRACTITIONER HARMONIZATION SUBCOMMITTEE. Mr. Rothrock reported on the patent practitioner harmonization subcommittee. The ultimate question is whether the Court wants to broaden the proposal beyond patent practitioners. The Committee needs an answer on this question to determine next steps. Mr. Rothrock will prepare a letter that Judge Lipinsky can send to the Court to gauge the Court's interest on whether it desires expansion of the Rule beyond patent practitioners.

7. REPORT FROM THE REPRODUCTIVE HEALTH SUBCOMMITTEE. Ms. Cohen reported on the proposed revision to Rule 1.2 relating to reproductive rights. The subcommittee has not formed a consensus about whether to revise the rule and if so, how to revise it. Mr. Masciocchi commented that this issue is different from the marijuana and mushroom issue because it involves opining on conduct in another state. A discussion ensued as to whether the rule needs to be revised at all given the differences in issues between reproductive rights and the marijuana/mushrooms issue.

Ms. Cohen suggested that this issue is more nuanced and that the conduct often would be in Colorado, even if the actions are taken by another state. Judge Lipinsky framed the issue as a

Colorado lawyer being exposed to criminal charges or discipline charges in another state that has more restrictive laws on reproductive rights. The objective is to provide guidance to Colorado lawyers to ensure that they would not be subject to reciprocal discipline in Colorado for providing advice to a client who goes to a different state where the conduct would be illegal. Mr. Masciocchi and Mr. Evans volunteered to join the subcommittee.

8. REPORT FROM THE RULE 1.5(E) SUBCOMMITTEE. Mr. Rothrock presented on Rule 1.5(e). Those present at prior meetings approved removing Rule 1.5(e) regarding referral fees because it conflicts with Rule 7.2(b). The proposed rule and comment would be limited to a lawyer's receipt of referral fees, rather than payment of referral fees. A lawyer cannot receive a referral fee from a nonlawyer when the referral is for nonlegal services for a client. A lawyer could receive a referral fee from a vendor for a referral of a former client or nonclient to the vendor. The question was where to put the revisions.

Mr. Rothrock noted that his memo describing the issue is included in the materials circulated together with the meeting agenda. The Memo starts on page 66 of the meeting materials. The main substantive issue is whether the conflict of interest represented by this Rule should be imputed to other lawyers in the firm. The subcommittee believes that the conflict should be imputed – e.g., if one partner in a firm cannot receive a referral fee from a vendor for referring a client to the vendor, no other partners in the firm ought to be able to receive a referral fee for the same conduct. Members discussed where the proposed rule should be placed.

A member took a straw poll from lawyers involved with providing ethical advice or representing lawyers relating to ethics issues. Seventy five percent of the lawyers who responded believed that the revisions should be in Rule 1.5 because that is the intuitive place where the lawyers would look for guidance on this issue. A member suggested that this data may not be aligned with what we are discussing because a referral fee is not an attorney fee. So while it may make sense to put a revision to any Rules relating to attorney fees in Rule 1.5, it would be confusing to put any new rule relating to ***referral*** fees (which are not attorney fees) in Rule 1.5. This proposal would eliminate the current reference to referral fees in Rule 1.5, which may result in clarity of the issue.

A member asked how imputation of a conflict from receiving a referral fee would work, particularly for larger firms. Mr. Rothrock suggested that the imputation would work the same way as the imputation of a conflict arising from receipt of a gift, which is contained in Rule 1.8(j). The subcommittee thought that this is similar enough to the issue of receiving a gift such that receipt of a referral fee should be imputed.

Another member suggested that, if the revision goes into Rule 1.8, it should be put at the end of the Rule rather than replacing Rule 1.8(j), which is the ban on sex with clients. It is better not to change the Rule structure because there are many PDJ opinions and other opinions that specifically reference Rule 1.8(j). Members suggested that the revision would be better after Rule 1.8(k).

One member suggested that it would be impossible to screen for conflicts relating to receipt of referral fees at a law firm. This would have to be addressed through training rather than through

conflict checking or anything else. Mr. Rothrock discussed the proposed comment, as well. If the Committee elects to put the new rule at the end of Rule 1.8, it would be reasonable to put the comment at the end of Rule 1.8's comments. The comment also should include a letter to demonstrate that it is different from the Model Rules. The comment would either be comment [24] or comment [23a].

A motion was made to adopt the Rule and comment with the reflected modifications in it, as redlined, but not to place them exactly where they are indicated to be placed, but to instead place the proposed Rule at Rule 1.8(l) and the proposed comment as Comment [24]. A member moved to revise the proposal to adopt the Rule as Rule 1.8(c)(2) and make current Rule 1.8(c) Rule 1.8(c)(1). The comment then would be comment [8a]. The motion carried.

Another motion was made to amend the proposal to place the proposed amendments under the umbrella of Rule 1.5 rather than Rule 1.8. The motion did not receive a second.

9. NEW BUSINESS.

A. Artificial Intelligence. The Committee discussed artificial intelligence and whether the Rules of Professional Conduct should be revised to address use and misuse of artificial intelligence by lawyers. The Committee was advised of a recent reported instance where a lawyer used artificial intelligence to come up with case citations to support an argument in his brief, which involved a misuse of ChatGPT and impacted the lawyer's ethical obligation. Another lawyer in southern Colorado recently was in the press for doing something similar. The Committee discussed the fact that artificial intelligence has been present for some time. Westlaw and Lexis use artificial intelligence, but the tools are different than ChatGPT.

Judge Lipinsky included in the materials for the committee meeting an article that addresses some of the issues and nuances involved with a lawyer using ChatGPT. The Supreme Court would like this Committee to form a subcommittee to address a lawyer's use of tools such as ChatGPT and whether the Unauthorized Practice of Law Rules also need amendments relating to use of artificial intelligence. There is an overlap with the Unauthorized Practice of Law Rules and we do not have jurisdiction over those Rules. Currently, there is a drafting subcommittee in the Unauthorized Practice of Law Committee that could work with our subcommittee to avoid duplication of efforts. Our subcommittee would work on possible amendments to the Rules of Professional Conduct, but it would work hand-in-hand with the Unauthorized Practice of Law subcommittee to identify uniform amendments to both the Rules of Professional Conduct and the Unauthorized Practice of Law Rules.

A member moved to form a subcommittee, which was duly seconded. The Committee took a vote on whether to form this subcommittee, as requested by the Colorado Supreme Court. The motion carried. If you would like to participate on the subcommittee, please email Judge Lipinsky by close of business on July 31, 2023. If any member would like to serve as chair of the subcommittee, please email Judge Lipinsky by July 31, 2023.

B. Remote Practice. Mr. Rothrock presented on remote practice. Think about a lawyer in Indiana who wants to live full time in Telluride but wants to continue his practice in

Indiana full time while residing in Colorado. Is that lawyer engaged in the unauthorized practice of law in Colorado? Different authorities have different opinions on this issue. The issue boils down to whether the lawyer is practicing law in Colorado even though he is representing Indiana clients on Indiana matters despite being physically present in Colorado. A motion was made to form a subcommittee to examine this issue and consider amendments to Rule 5.5 to address unique issues involved with remote practice. The motion carried. If any member would like to serve as chair of the subcommittee, please email Judge Lipinsky by July 31, 2023.

9. ADJOURNMENT. A motion to adjourn was made at 12:05 pm and was duly seconded. The motion carried. The next meeting of the Committee will be on October 27, 2023, at 9 a.m.

Respectfully submitted,

Troy R. Rackham, Secretary