

COLORADO SUPREME COURT

STANDING COMMITTEE ON THE RULES OF PROFESSIONAL CONDUCT

Approved Minutes of Meeting of the Full Committee

On

October 28, 2022

Sixty-Fifth Meeting of the Full Committee

The sixty-fifth meeting of the Colorado Supreme Court Standing Committee on the Rules of Professional Conduct was convened at 9:00 AM on Friday, October 28, 2022, 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, Thomas E. Downey, Jr., Judge Adam Espinosa, Margaret Funk, Marcy Glenn, Erika Holmes, April Jones, Matthew Kirsch, Judge Bryon M. Large, Marianne Luu-Chen, Cecil E. Morris, Jr., Noah Patterson, Judge Ruthanne Polidori, Troy Rackham, Henry Richard Reeve, Alexander R. Rothrock, Marcus L. Squarrell, David W. Stark, Robert W. Steinmetz, Jamie S. Sudler, III, Eli Wald, Jennifer J. Wallace, Judge John R. Webb, Jessica E. Yates, Fred Yarger, and E. Tuck Young. Liaison Justice Monica Márquez was excused from attendance. Tyrone Glover, Julia Martinez, and Lisa Wayne were absent. Special guests in attendance were Daniel Smith, National Association of Patent Practitioners Advocacy Committee Chair; Molly Kocialski, United States Patent and Trademark Office; and Natalie Landis.

1. Call to Order.

Judge Lipinsky called the meeting to order at 9:00 AM. He welcomed those attending in person, virtually via Webex, and by telephone. He reviewed the names of all attendees and noted those having excused absences. He also noted the attendance of guests Dan Smith, Molly Kocialski, and Natalie Landis.

2. Approval of Minutes for July, 2022 Meeting.

A motion was made and seconded to approve the minutes for the meeting of July 22, 2022. After correcting a misspelling of one member's name, the motion was approved unanimously.

3. Report on the Patent Practitioner Harmonization Proposal.

A report on the Patent Practitioner harmonization proposal was provided by members Rob Steinmetz and Alec Rothrock. Mr. Steinmetz reported that the subcommittee had met on August 31, 2022, with a group of patent practitioners and licensed patent attorneys to discuss the issues associated with the patent practitioner harmonization proposal. At the meeting, the subcommittee agreed to reach out to licensed patent

attorneys for additional input. Dan Smith reported that he had contacted attorneys Curtis Vock, a partner at Lathrop GMP, and Mike Drapkin, a partner at Holland & Hart, who have agreed to meet with the subcommittee to provide their perspective on the patent practitioner harmonization proposal and to describe steps they have taken to deal with issues relating to the harmonization proposal. Mr. Steinmetz advised that the subcommittee would provide a report to the standing committee at its meeting on January 27, 2023.

4. Report of the Status of Proposed Amendment to Rule 1.8(e).

Judge Lipinsky reported that the Colorado Supreme Court had adopted the proposed amendment to Rule 1.8(e), without opposition, on September 8, 2022. Judge Lipinsky thanked liaison Justice Maria Berkenkotter and all members of the Supreme Court for their action in adopting the proposed amendment. Judge Lipinsky also thanked John Asher for being the driving force in bringing the matter to the attention of the standing committee and its adoption by the Colorado Supreme Court.

5. Update on the Proposed Amendments to Rule 1.4.

Jessica Yates and Dave Stark provided an update on the status of the proposed amendments to Rule 1.4. The standing committee had forwarded its proposed amendments to Rule 1.4 to the Colorado Supreme Court for further consideration. Following its initial review, the Supreme Court requested a meeting with members Stark and Yates seeking clarification on several issues before posting the proposal for public comment and hearing. Member Yates reported there was some discussion about eliminating certain language from proposed Rule 1.4(a)(5)(c). Member Stark reported that the Court had good suggestions for eliminating “legalese” from the language of proposed Comment [10] to Rule 1.4 and eliminating the proposed Comment [19] to Rule 1.5. Member Yates noted that she expects the Court will return the proposal with comments to the standing committee for additional consideration at the January, 2023 meeting.

6. Update From the PALS II Committee.

Judge Lipinsky began the discussion by reminding members that the hearing before the Colorado Supreme Court on the proposed licensed legal paraprofessional program was scheduled for November 16, 2022. The Chair noted the November 10 deadline for filing comments and the deadline for signing up to request to speak at the public hearing.

Judge Espinosa began his update by referring members to the extensive materials contained in Attachment 2 of the meeting agenda. He urged committee members to file written comments in favor of the program. He noted that the materials in Attachment 2 contained twenty-six letters in favor of the proposal authored by individuals and a number of organizations. The materials also contain twelve letters providing negative comments. He commented briefly on the mix of reviews from the CBA Law Council. Overall, Judge Espinosa believed the comments were largely supportive of the program.

Comments or concerns centered on several issues: 1. Some questioned whether the estate limit of \$250,000 was too low given the current economic climate; 2. Some viewed the program as diluting or impairing the value of an attorney's license to practice law; 3. Concerns were raised regarding the necessity for malpractice insurance and the limits required; 4. Some expressed concern that work performed by licensed legal paraprofessionals may require subsequent corrective by attorneys, resulting in increased costs to the client; 5. Questions were raised regarding the dollar amount of the fees to be charged by licensed legal paraprofessionals; 6. Some expressed concern that the initial limited nature of the proposed program for licensed legal paraprofessionals would lead to efforts to expand the areas of practice for licensed legal paraprofessionals.

Judge Lipinsky commented that the Access to Justice Committee favored the proposal and briefly reviewed the analogous programs in Arizona and Utah. He noted that the programs in Arizona and Utah were successful and had not encountered serious adverse issues. He noted that, in Arizona, "legal paraprofessionals" are allowed to appear and speak in court.

Judge Espinosa noted that, if approved by the Colorado Supreme Court, the proposal would be referred to the standing committee to recommend necessary and appropriate amendments to the Rules of Professional Conduct. In addition, the Supreme Court would adopt a separate set of Rules of Professional Conduct for licensed legal paraprofessionals.

Member Stark expressed his hope that the Supreme Court will approve the program. He noted that the hard work of implementing the program will begin following such approval. He estimated it would take approximately one year to implement the program. During a brief discussion about education for licensed legal paraprofessionals, the Chair noted that the James E. Rogers College of Law at the University of Arizona offers courses for those desiring to become "legal paraprofessionals." Member Yates noted that three community colleges in Colorado were currently exploring the possibility of offering such courses.

7. Possible Rule on Civility.

Guest Natalie Landis reviewed her recent experience in seeking repairs to her apartment complex on behalf of herself and other residents. In light of her negative experience with counsel for the complex's property management company, she suggested that the standing committee consider a rule on civility. Ms. Landis provided copies of her correspondence to the property manager and the response from counsel for the management company, together with pictures documenting certain of the issues of concern to residents of the complex. Copies of the materials were included in Attachment 3 to the meeting packet.

Ms. Landis first reviewed her advocacy background in other matters before addressing her attention to the apartment complex issues. Residents of the apartment complex had long standing concerns about a number of maintenance, safety, and security issues.

Attachment 3, Document A, is the letter Ms. Landis sent to the management company. Attachment 3, Document B, is the response from counsel for the management company. In such letter, counsel for the management company advised that any claim against the management company would be considered “groundless and frivolous” and that the residents “should expect vigorous opposition, including but not limited to recoupment of attorney’s fees and other damages” to any claims they may file. The attorney also expressed that certain actions by the residents could potentially give rise to defamation claims and cautioned that any disorderly conduct or disturbing of the peace would result in “all available legal recourse” being taken against the residents. Ms. Landis told the standing committee that she felt the letter from counsel for the management company was threatening and sent with the intent to silence the residents. She said that the tone of and threats in the letter affected her advocacy on behalf of the residents of the apartment complex. She stated that a Rule of Professional Conduct directed towards increasing civility in the legal process would allow the “little people” to freely voice concerns without fear of receiving threatening letters from attorneys representing an adverse party.

Judge Lipinsky thanked Ms. Landis for bringing the matter to the attention of the standing committee. He then reviewed the history of the Civil Rules Committee’s consideration of a possible rule on civility in 2016. Copies of the historical materials that Judge Lipinsky referenced were included in Attachment 3 of the meeting agenda. He noted that, in September 2016, a working group of the Colorado Supreme Court Civil Rules Committee considered the addition of a Section 1-27 to C.R.C.P. 121 that would address attorney civility. After considerable deliberation and advocacy on both sides of the issue, the working group decided not to recommend the proposed rule to the full Civil Rules Committee.

Judge Lipinsky read from the provisions of paragraphs 2 and 8 of proposed Section 1-27. He noted that the CBA Executive Council had voted not to support the proposed rule. Others opposed the proposed rule, believing it was too subjective, that a rule could not legislate civility, and that it would only create additional litigation. The Chair noted that Judge Jonathan Shamis, who was a member of the working group, was a tireless advocate for the proposed rule, believing that it would promote professionalism in the courtroom and create a new conversation related to professionalism. The Chair noted that he had reached out to Judge Shamis on the issue but had not received a response.

Member Stark said that the CBA Committee on Professionalism in the Courts had also examined the issue for approximately a year. He noted that the Colorado group had invited Wyoming Attorney Regulation Counsel, Mark Gifford, to inform it on Wyoming’s experience with that state’s civility rule — Rule 801 of the Uniform Rules for District Courts of the State of Wyoming. Mr. Gifford noted that the Wyoming professionalism provisions had not been utilized much, recalling only two occasions where the Wyoming rule had been used. Member Stark noted that the CBA committee had drafted a definition of professionalism and principles of professionalism.

Member Cohen, while stressing the need for professionalism, expressed concerns that proposed rules on civility were very subjective, and that their enforcement by trial judges against attorneys could adversely impact client advocacy. She asserted that Rule 4.4 adequately addresses the issue and supported the determinations of other committees that had questioned the need for rules on civility and determined that such rules were neither needed nor warranted.

Judge Webb commented that Rule 4.1, which precludes attorneys from making misrepresentations of fact or law, provides some protection on the civility issue and that Rule 8.4 might apply in extreme cases.

Justice Berkenkotter thanked Ms. Landis for bringing the matter to the attention of the standing committee and for her advocacy on behalf of the members of her apartment complex. The Chair also thanked Ms. Landis for her presentation and advocacy and concluded the discussion by stating that the standing committee would not take further action on her proposal at the present time.

8. Comment Concerning Advice Regarding Reproductive Health.

Member Cohen led a discussion regarding the ethical implications for Colorado attorneys who provide reproductive health advice based on state laws enacted after the United Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*. The materials included with the agenda for the meeting included member Cohen's memorandum on the issue, together with related correspondence and statutory material.

After a brief review of the issue and the materials, member Cohen requested that the Chair form a subcommittee to investigate the issue and to draft a possible comment to Rule 1.2. A brief discussion followed, with some members favoring the formation of the subcommittee, some questioning whether any action was necessary, some questioning what, if any, protection the proposed comment to Rule 1.2 would provide, and some noting the similarity of the issue to the concerns that led to the adoption of comment [14] to Rule 1.2. (That comment allows Colorado lawyers to advise clients on Colorado's marijuana laws.)

The Chair, having considered the materials and multiple views expressed by members of the standing committee, formed the subcommittee to investigate the issue and to determine if a comment to Rule 1.2, or some additional rule, was warranted. The following members volunteered to serve on the subcommittee: Dave Stark, Matt Kirsch, Jessica Yates, Troy Rackham, Cindy Covell, Dick Reeve, Cecil Morris, Tom Downey, Jamie Sudler, Judge Webb, Margaret Funk, Alec Rothrock, and Marcy Glenn. Member Cohen will serve as chair.

9. New Business.

No new business was presented for the committee's consideration.

10. Adjournment.

The chair noted that the next meeting of the committee will be held on January 27, 2023. A motion to adjourn was made and seconded. The meeting adjourned at approximately 10:15 AM.

Respectfully submitted,

Thomas E. Downey, Jr., Secretary