COLORADO SUPREME COURT

STANDING COMMITTEE ON THE RULES OF PROFESSIONAL CONDUCT

Approved Minutes of Meeting of the Full Committee
On September 24, 2021
Sixty- First Meeting of the Full Committee
Virtual meeting in Response to Covid-19 Restrictions

The sixty-first meeting of the Colorado Supreme Court Standing Committee on the Rules of Professional Conduct was convened at 9:00 AM on Friday, September 24, 2021, by Chair Judge Lino Lipinsky de Orlov. The meeting was conducted virtually in response to Covid-19 restrictions.

Present at the meeting, in addition to Judge Lino Lipinsky de Orlov and liaison Justices Maria Berkenkotter and Monica Márquez, were Nancy L. Cohen, Cynthia F. Covell, Thomas E. Downey, Jr., Judge Adam Espinosa, Margaret B. Funk, Marcy Glenn, A. Tyrone Glover, Erika Holmes, April Jones, Judge William R. Lucero, Marianne Luu-Chen, Julia Martinez, Cecil E. Morris, Jr., Noah C. Patterson, Judge Ruthanne N. Polidori, Troy Rackham, Henry Richard Reeve, Alexander R. Rothrock, Robert W. Steinmetz, Marcus L. Squarrell, David W. Stark, Jamie S. Sudler, III, Eli Wald**,** Jennifer J. Wallace, Lisa M. Wayne, Judge John R. Webb, Frederick R. Yarger, Jessica E. Yates, and E. Tuck Young. Special guests in attendance were Judge Michael Berger (at the beginning of the meeting); Dan Rubinstein, District Attorney, 21st judicial district; and Lucienne Ohanian, Deputy Public Defender, Appellate Division.

1. Introductory Remarks.

   The Chair introduced and welcomed four new members to the Committee and thanked them for their willingness to serve. The new members are Erika Holmes, Matthew Kirsch, Troy Rackham, and Robert Steinmetz.

   The Chair next offered a tribute to Member Glenn for her many years of service to the Committee as its first and only chair. The Chair thanked member Glenn for the thoughtful, graceful, and practical way that she conducted the Committee's business, allowing all voices and points of view to be heard and considered. The Chair then introduced Member Wayne who, on behalf of the full Committee, presented a gift to Member Glenn in appreciation for her many years of service to the Committee. Since the meeting was conducted remotely, Member Wayne had the honor of opening the gift and showing Member Glenn and the Committee the beautifully designed Tiffany bowl. The bowl was inscribed as follows: "To our dear friend Marcy with great appreciation for your inspiring dedication and leadership. The Members of the Standing Committee." Member Glenn addressed the Committee and expressed her deep appreciation for the Committee's going above and beyond in recognizing her service as Chair of the

Committee. Member Glenn stated that it has been a gift to her to have served as Chair of the Committee for so many years and to have worked tirelessly with Committee members, many of whom she considers as family. While acknowledging that the business of the Committee often generated differing points of view, she praised the members for their thoughtful and respectful approach to reconciling differences and trying to reach consensus. Member Glenn stated that she will treasure the Tiffany bowl for years to come and will feel joy each time she reads the thoughtful inscription. The Chair concluded the recognition of Member Glenn by thanking Member Wayne for all efforts in selecting and acquiring the gift for Member Glenn.

2. Approval of Minutes of June 25, 2021 Meeting.

   The Chair had provided the submitted minutes of the sixtieth meeting of the Committee held on June 25, 2021 to the members prior to the meeting. A motion to approve the minutes was made and seconded. The minutes were approved by a vote of the Committee.

3. Old Business

   a. Approval of amendments to Rule 1.5(b) "Scope of Representation" and comment [2]

      The Chair noted that the Colorado Supreme Court had approved the amendments to Rule 1.5(b) on Scope of Representation as well as comment [2] to the Rule. Justice Márquez thanked the Committee for its work on the amendments. She noted that the proposed amendments were published and that no public comments were received. The Court determined that, in the absence of any public comments, a hearing was unnecessary and it adopted the amendments as proposed by the Committee. The Chair joined Justice Márquez in thanking the Committee members who worked on the amendments.

   b. Proposed Revision to Rule 3.8(d) and comment [3] and subcommittee report.

      Member Yates presented the Subcommittee's report, which is attachment 3 to the meeting materials, and led the discussion regarding potential changes to Rule 3.8(d) and comment [3]. The Subcommittee is also proposing a change to Rule 3.8(f).

      The Subcommittee's report lists the individual members of the Subcommittee, the objectives of the Subcommittee, and the work the Subcommittee completed. The Subcommittee was comprised of a diverse group of state and federal prosecutors, as well as State Public Defenders, private criminal defense counsel, and members of this Committee. The Subcommittee's objective was to set forth a clearer standard regarding a prosecutor's duties to timely disclose evidence or information under Rule 3.8(d) that could either negate guilt; affect a defendant's strategic decisions, including plea decisions; affect the defendant's sentence; and to diligently seek information when it is in the possession of other law enforcement agencies. The Subcommittee

sought to add rule and comment language that would abrogate parts of *In re Attorney C,* 47 P.3d 1167 (Colo. 2002), which held that Rule 3.8(d) was not violated unless a prosecutor intended to not timely disclose material information, and that information is not material unless the outcome of the overall proceeding would have been different if the information had been more timely disclosed.

The Subcommittee reviewed professional conduct rules similar to Rule 3.8(d) from other states and the *In re Attorney C* decision of the Supreme Court. The Subcommittee was concerned about the retrospective view of materiality espoused in that case, especially when other Rules of Professional Conduct require lawyers to act and apply rules prospectively or contemporaneously. There was also concern with language in that case indicating that no regulatory violation of Rule 3.8(d) would occur unless there was proof that the prosecutor intended not to disclose exculpatory evidence. It was the view of the Subcommittee that the decision of *In re Attorney C* presented almost a complete bar to regulatory enforcement of Rule 3.8(d).

The Subcommittee report notes that initial meetings featured experienced criminal defense attorneys sharing their experiences in obtaining exculpatory evidence on a timely basis. Defense attorneys felt the current Rule failed to adequately address timely disclosure, especially in the context of the plea bargaining phase of a criminal case. They were also concerned that there was no express obligation to ensure that participating agencies provided prosecutors with information in the case that may need to be disclosed. Prosecutors participating in the Subcommittee discussions noted the logistical challenges they face in ensuring that their files are complete and include information from other agencies. They noted prosecutors are often unaware of information that a defense attorney may deem relevant to case strategy, and that prosecutor's offices do not have the logistical capability to seek out potential impeachment evidence from all available public agencies.

The Subcommittee's proposed revision to Rule 3.8(d) and comment [3] are found in attachments A and B to its report.

Member Yates introduced Dan Rubinstein, District Attorney for Mesa County, and Lucienne Ohanian, of the Colorado Public Defender's Office to offer remarks on their experiences and the need for revisions to Rule 3.8(d), comment [3] to Rule 3.8(d), and a slight modification to Rule 3.8(f).

Dan Rubenstein thanked the Committee for the opportunity to share his thoughts and to work on the Subcommittee proposing revisions to the language of the Rule and the comment. He discussed the issues that prosecutors face when dealing with the amount of digital evidence available today and budgetary issues on review and dissemination of that information. He addressed the importance of the timing issue, noting that it was imperative for prosecutors to disclose information to defense counsel in sufficient time for defense counsel to weigh such information in light of critical decisions to be made throughout the case, and commented that the guidance from *In*

re Attorney C was not helpful. He stated that he was in communication with the other elected district attorneys throughout the state and sought their input on the proposed revisions. He indicated that the proposed revisions to the Rule and the comment would provide good guidance to prosecutors and provide defense counsel with good expectations relating to disclosures. He requested that the Committee adopt the proposed language to Rule 3.8(d) and comment [3].

Lucienne Ohanian thanked the Committee for the opportunity to share her thoughts on the proposed revisions to the Rule and the comment. She stated that adoption of the proposed revisions to Rule 3.8(d) provided Colorado the opportunity to be a leader in in adding specificity, clarity, and transparency to the Rules of Professional Conduct relating to disclosure of exculpatory evidence. She stressed that the proposed revisions to the Rule and the comment reflected a consensus approach between the prosecution and defense members of the Subcommittee. She reiterated the concerns relating to the materiality and retrospective standards set by *In re Attorney C*, noting that it is almost impossible to know if undisclosed evidence would have impacted pretrial or trial proceedings. She recommended that the Committee adopt the proposed revisions to Rule 3.8(d) and comment [3].

At the conclusion of the remarks by Mr. Rubenstein and Ms. Ohanian, member Yates requested that the Committee adopt the Subcommittee's proposed revisions to Rule 3.8(d), comment [3] to Rule 3.8(d) and the proposed revision to Rule 3.8(f). She noted the significant input from both the prosecution and defense bars into the concepts set forth in the proposed amendments, stressed that the requested revisions represented a consensus proposal, and welcomed comments from the Committee that may add clarity to the consensus opinions expressed. The matter was then opened for discussion by the Committee.

A member questioned why the proposed new rule includes the language "a prosecutor may not condition plea negotiations on postponing disclosures of information known to the prosecutor that negates the guilt of the accused" when that language was not part of the existing rule. Ms. Ohanian explained that, in some cases, a prosecutor will approach defense counsel with a plea bargain, noting that they have some exculpatory information that they do not want to present at that stage of the proceeding. In these cases, the prosecutor will then offer the defendant a plea if they agree to waive the prosecutor's requirement to disclose exculpatory information under Rule 3.8(d). Ms. Ohanian explained that such situations put the defendant and defense counsel in a very difficult position because, while the proposed plea agreement may seem reasonable, making that decision in the absence of the exculpatory information is difficult. A Member thanked the Subcommittee for its significant work but discussed her concern about the use of the word "timely" as it relates to disclosures. She felt "timely" was too subjective and that a more objective standard would be more appropriate. Member Yates responded, indicating that the "reasonably should know" language in the proposed rule is a defined term that provides the objective standard

for action for a reasonably prudent attorney. Other members suggested that the words "reasonably" or "promptly" could be substituted for "timely." Subcommittee member Rubinstein noted that the language in comment [3] requiring prosecutors to evaluate timeliness of disclosure in light of case specific factors should also alleviate concerns regarding the use of "timely." Several other members commented on the "reasonably should know" language utilized in the proposed rule. Subcommittee member Rubenstein noted that he believed the "reasonably should know" language was protective but also noted that it is almost impossible to set up an objective standard that would apply to all situations. A member inquired whether the Subcommittee had considered the recent CBA Ethics Opinion 142 dealing with an attorney's duty to inquire with respect to his or her client in connection with the issue under discussion. Member Yates responded by again noting that "reasonably should know" is a defined term under the Rules. She noted that the Subcommittee did not specifically look at Rule 1.2(d) and did not, given the timing of the issuance of opinion 142, consider that opinion. Another member questioned whether the Subcommittee had considered use of the word "promptly" in lieu of the word "timely." In response, member Yates noted that they had not considered the use of the word "promptly" and utilized "timely" because it is used in the current version of the Rule. Subcommittee members Rubinstein and Ohanian also noted the use of "timely" in the current rule and said that the language in the comment provides some clarity on what that means insofar as such disclosures must occur before important events in the case. A member raised the question relating to the proposed comment and whether it made a distinction between guilt and credibility of an accused. Subcommittee members Rubinstein and Ohanian responded by reviewing the language of the comment that stresses prosecutors have to evaluate the timeliness of disclosures at the time they possess the information in light of case specific factors, one of which could pertain only to credibility or negating the guilt of the accused. There was a brief discussion of the difficulty of drawing a bright line, but the Subcommittee concluded that the language proposed in the comment represented a consensus view of the prosecution and defense bars. A member inquired as to whether the defense filing a specific Rule 16 motion at the beginning of a criminal case could potentially impact later action by attorney regulatory counsel. Member Yates responded by referring to the language of proposed comment [3], which says that whether a prosecutor reasonably should know of the existence of information that must be disclosed will depend on the facts and circumstances in any given case. A member inquired as to the proper name and location for the proposed comment, questioning whether it should be referred to as comment [3] or comment [3A]. The member requested that his remarks be reflected in the minutes and possibly in the future letter of transmittal to the Supreme Court. Member Yates indicated she had no strong feelings one way or the other on the issue, while another member: suggested that it be kept as comment [3].

Member Glover moved that the proposed revision to Rule 3.8(d) be adopted. The motion was seconded by Judge Webb. All of the members present at the meeting,

with the exception of Member Wayne, voted to approve the proposed revision to Rule 3.8(d).

Member Yates moved to approve the proposed revision to Comment [3]. Member Cohen seconded the motion. All of the members present at the meeting, with the exception of Member Wayne, voted to approve the proposed revision to Comment [3].

Member Yates then proceeded to review the proposed revision to Rule 3.8(f). She described the proposed addition of the language "or other law" as being noncontroversial and necessary in light of SB 271, which was passed in 2021. There were no comments or questions on the proposed amendment. Judge Espinosa moved to adopt the proposed revision to Rule 3.8(f). The motion was seconded by member Sudler. The motion passed unanimously.

c. Proposal regarding Rule 1.4

Members Stark and Yates reviewed materials being considered by the Malpractice Insurance Subcommittee of the Supreme Court Advisory Committee regarding mandatory insurance disclosures, and suggested that the issues presented by that Committee's work were also ripe for consideration by the Standing Committee on the Rules of Professional Conduct.

The materials presented by Members Stark and Yates are set forth in Attachment 4 to the meeting materials.

Members Stark led the discussion of the proposal and congratulated member Yates for her work on the Malpractice Insurance Subcommittee. Member Stark reported that, at its meeting on September 17, 2021, the Malpractice Insurance Subcommittee made a recommendation regarding mandatory disclosure of professional liability insurance details to prospective and actual clients. Although that subcommittee had considered recommending mandatory insurance coverage, it declined to make that recommendation but instead chose to recommend that attorneys make certain mandatory disclosures. The Subcommittee considered positions adopted by other states both on mandatory insurance and mandatory disclosure requirements. The disclosures contemplated would include information relating to basic insurance coverage on a per claim and aggregate basis, potential deductibles, events that may erode coverage, such as defense costs, and other matters. The Malpractice Insurance Subcommittee is considering that such disclosures should be provided in writing to a client and whether said writing would constitute informed consent without having to be signed by the client. Government attorneys, in-house counsel, and legal services organization attorneys would be exempt from the disclosures.

Comments raised by members of the Committee touched on the number of issues. First, some questioned whether the Standing Committee need to be actively involved at this point and whether the issue should just continue to be advanced by the Malpractice Insurance Subcommittee of the Supreme Court Advisory Committee on Attorney Regulation. Some members were critical about the number and scope of contemplated disclosures, indicating there could be traps for lawyers. Many members expressed a preference that lawyers should carry malpractice insurance, but disagreed that it should be a mandatory requirement and had questions about potential disclosures. Some members were comfortable with the concept that an attorney simply disclose whether they carry malpractice insurance at the time they renew their annual attorney registration without getting into the details of that coverage. Such a disclosure would create a public record of whether the registered attorney carries malpractice insurance. There was, however, support among certain members for mandatory disclosures regarding professional liability coverage. Members Stark proposed that a subcommittee of the Standing Committee be formed to address mandatory insurance disclosure requirements from a Rules of Professional Conduct point of view. There was discussion for and against the formation of the subcommittee, but a vote on the issue resulted in formation of a subcommittee.

d. Report from Rule 1.5(e) Subcommittee.

Member Rothrock presented the report of the Rule 1.5(e) Subcommittee, which is contained in Attachment 5 of the meeting materials. Rothrock pointed out that Rule 1.5(e), which is unique to Colorado, prohibits lawyers from paying or receiving referral fees. Rule 7.2(b), which has its origin in the Model Rules, merely prohibits lawyers from paying referral fees or other compensation for recommending the lawyer's services and does not regulate a lawyer's receipt of referral fees. Member Rothrock and the Subcommittee see inherent conflicts between the rules and recommend that Rule 1.5(e) should yield to Rule 7.2(b).

Member Rothrock reported that the Subcommittee had determined there were several options to deal with this conflict between the rules. At a minimum, the Subcommittee recommended that the full Committee revise Rule 1.5(e) to make it expressly subject to Rule 7.2(b). Another option was to eliminate Rule 1.5(e). Such action would leave Rule 7.2(b) to regulate the payment of referral fees and other Rules of Professional Conduct to regulate the receipt of referral fees. Although Colorado does not have an ethics opinion or reported case addressing a lawyer's receipt of compensation for referring current clients to third parties, the Subcommittee noted that many other states do. These other states analyze the lawyer's obligations under Rule 1.7(a)(2)'s conflict of interest analysis and Rule 1.8(a)'s prohibitions against a lawyer entering into a business transaction with a client. Member Rothrock indicated that if the language of Rule 1.5(e) was eliminated he would encourage the CBA Ethics Committee to issue a formal opinion addressing the propriety of a lawyer receiving

compensation for the referral of current clients to a third party. He noted that such action by the ethics committee would most probably analyze the policy issues in the context of the conflict of interest under Rule 1.7(a)(2) and the prohibition against business transactions in Rule 1.8(a).

The Subcommittee's recommendation was to revise the language of Rule 1.5(e) to read as follows: "A lawyer shall not accept compensation for referring the client to a third party for products and services related to the lawyer's representation of the client." Member Rothrock noted that there was some discussion in the Subcommittee about the proper placement of the proposed language in the Rules and recommended that the language be recognized as Rule 1.8(k) with the current Rule 1.8(k) becoming Rule 1.8 (l).

In the discussion following member Rothrock's presentation, a member inquired as to the origin of this request for revision. Member Rothrock responded by reminding the Committee that he had brought this conflict to the attention of the Committee in the letter that resulted in the formation of the Subcommittee to review the issue. He noted that this issue was not being proposed or advocated by any section of the bar. Another member noted that the issue under discussion involved much more than a simple clarification of two rules that appear to be in conflict and involved a fundamental policy issue. The member noted that our Supreme Court, while allowing division of fees, expressly prohibits "naked" referral fees. The member suggested that Rule 1.5(e) needs to remain in the Rules as currently stated or, alternatively, language could be added to Rule 1.5(e) to provide "except as otherwise prohibited by these rules." A member raised the question regarding the Committee's policy of trying to follow the Model Rules where appropriate. Member Rothrock responded by indicating that the Subcommittee's proposed revisions are trying to eliminate the conflict between Rule 1.5(e) and Rule 7.2(b). He again noted that Rule 1.5(e) is a Colorado-specific Rule and is not part of the Model Rules.

After brief further discussion, member moved that the matter be referred back to the Subcommittee for additional consideration on whether the proposed revised language for Rule 1.5(e) should be included in Rule 7.2 and Rule 1.8. The motion was seconded and passed by the Committee.

4. New business. No new business was presented for the Committee's consideration.

5. Adjournment. The chair adjourned the meeting at 11:45 AM. The next meeting for the Committee was scheduled for January 28, 2022.

Respectfully submitted,
Thomas E. Downey, Jr., Secretary