

COLORADO SUPREME COURT

RULES OF PROFESSIONAL CONDUCT STANDING COMMITTEE

Approved Minutes of Meeting of the Full Committee

On

April 26, 2024

Seventy-First Meeting of the Full Committee

The seventy-first meeting of the Colorado Supreme Court Standing Committee on the Rules of Professional Conduct was convened at 9:04 am on Friday, April 26, 2024, by Chair Judge Lino Lipinsky de Orlov. Judge Lipinsky initially took attendance.

Present at the meeting were Judge Lipinsky (Chair), Katayoun Donnelly, Margaret B. Funk, April D. Jones, Judge Bryon M. Large, Marianne Luu-Chen, Stephen G. Masciocchi, Troy R. Rackham, Marcus L. Squarrell, Robert W. Steinmetz, David Stark, James S. Sudler, Eli Wald, Fred Yarger, and Jessica Yates.

Present for the meeting by virtual appearance were Cynthia F. Covell, Thomas E. Downey, Jr., Scott L. Evans, Marcy Glenn, Erika Holmes, Julia Martinez, Henry Reeve, Alexander R. Rothrock, and Judge John R. Webb.

Committee members excused were Nancy L. Cohen, Judge Adam Espinosa, Matthew Kirsch, Cecil E. Morris, Jr., Noah Patterson and liaison Justices William Hood and Maria Berkenkotter. Michael Kaufmann, a member of the Colorado bar, attended as a guest.

1. CALL TO ORDER. Judge Lipinsky called the meeting to order at 9:04 a.m. Judge Lipinsky welcomed the members in attendance and virtually, as well as guest Mr. Kaufmann.

2. APPROVAL OF MINUTES FOR JANUARY 2024 MEETING. A member moved to approve the minutes, which another member seconded. A member requested an amendment to the minutes to remove the word “strategic” on page 5. A vote was taken on motion to approve the minutes with the amendment. The motion passed unanimously.

3. OLD BUSINESS.

A. REPORT ON PROPOSED AMENDMENTS TO RPCs 1.5 AND 1.8 AND THE LLP RULES [Judge Lipinsky]. Judge Lipinsky presented the proposed amendments to RPC 1.5 and 1.8. The Supreme Court set a hearing on the proposed amendments for May 7, 2024, at 3:30 p.m. The deadline to request to speak at the public hearing is April 29, 2024, at 4:00 p.m. The comment period on the proposed amendments has expired. Mr. Rothrock, the chair of the subcommittee that proposed the amendments said he planned to present on the proposed amendments if he could participate in the hearing virtually. Judge Lipinsky explained that the recent technology upgrades at the Carr Courthouse should allow virtual participation in the hearing. If any member of the Committee is interested in speaking at the hearing, the member should submit a request to speak and let Judge Lipinsky know.

The PALS II Project’s Limited Licensed Paraprofessional Rules of Professional Conduct and the related amendments to the Rules of Professional Conduct took effect upon the Court’s approval on November 16, 2023. Chair Lipinsky thanked all of those who were involved.

B. REPORT ON PROPOSED REVISIONS TO RPCs 1.8, 1.13, 1.14, 4.2, 4.5, 5.5, AND 6.1 [Judge Lipinsky]. Judge Lipinsky reported that the Court adopted the Committee’s proposed revisions to RPCs 1.8, 1.13, 1.14, 4.2, 4.5, 5.5, and 6.1 to eliminate gendered pronouns, effective February 8, 2024. Rule Change 2024(06), which effected these revisions, is on the Court’s website and can be found in attachment 5 to the materials for the January 26, 2024, meeting of the Committee.

C. REPORT ON PROPOSED REVISIONS TO RPC 1.2 [Judge Lipinsky]. Judge Lipinsky reported on the proposed revisions to Colo. RPC 1.2. Judge Lipinsky explained that the Court elected to defer consideration of the proposed amendments to Rule 1.2.

D. REPORT FROM THE AI SUBCOMMITTEE [Julia Martinez]. Julia Martinez provided an update on the work of the AI Subcommittee. The subcommittee, which meets regularly, has had very robust discussions on potential AI-related amendments to a variety of rules. The subcommittee anticipates that it will recommend AI-related proposed revisions to certain of the rules at the Committee’s meeting scheduled for July 26, 2024.

E. REPORT FROM THE REPRODUCTIVE HEALTH SUBCOMMITTEE [Nancy Cohen]. Ms. Cohen was excused from attending the meeting, so Judge Webb presented on the work of the subcommittee in her stead. The work of the subcommittee is ongoing and there have been robust discussions. The subcommittee expects to present proposed draft amendments and a report at the July 26, 2024, meeting of the Committee. The primary focus of the subcommittee is whether to allow a lawyer to provide legal assistance and advice to clients in jurisdictions where the conduct would be unlawful.

F. REPORT FROM THE ATTORNEY REFERENCE/RPC 6.1 SUBCOMMITTEE [Steve Masciocchi]. Mr. Masciocchi explained that the subcommittee met in February. Before meeting, members of the subcommittee searched the RPCs to determine if they used the term “attorney” instead of “lawyer.” There are 106 references to “attorney” in the RPCs. Most of those references to “attorney” are in model pro bono policy appended to RPC 6.1. In other rules, “attorney” appears as a term of art, such as “power of attorney,” “attorney general,” or “attorney-client privilege.” The other references are fairly innocuous, such as “attorney discipline.” The overall view of the subcommittee was not to recommend revisions because there are no ambiguities and because the references to “attorney” are terms of art or are innocuous. The issue was put to a vote before the entire Committee. The Committee unanimously voted to not act further on this issue.

After the vote, a member raised a question about whether the Committee should revise the comments and cross-references to the model pro bono policy. In addition, some of the references to the Rules of Civil Procedure and statutes in the model pro bono policy are outdated and need to be revised. There are two options. One is to simply check the cross-references in the pro bono policy and ensure that they are accurate. Another is to take a fresh look at the entire RPC 6.1 and

model pro bono policy. The RPC 6.1 subcommittee will review the C.R.C.P. and statutory references in the rule and recommend revisions to them to ensure that the cross-references are accurate. That work should be completed, with recommendations, by the July 26, 2024, meeting.

The Chair asked the Committee whether there is a need to take a fresh look at RPC 6.1 or the model pro bono policy. A discussion ensued. No member of the Committee moved to take a fresh look at RPC 6.1 or the model pro bono policy appended to the Rule.

G. Report on the Letter Regarding the Amendments to Rule 1.16 of the Model Rules [Steve Masciocchi]. Mr. Masciocchi reported on the letter regarding the amendments to RPC 1.16 of the Model Rules. Mr. Masciocchi explained the history of the issue. In August 2023, the ABA House of Delegates passed Resolution No. 100, which authorized revisions to Model RPC 1.16 that impose obligations on lawyers to report clients who may be involved in money laundering, human trafficking, or other illegal conduct. The revisions to Model Rule 1.16 were an effort to avoid the risk that Congress will take certain actions affecting lawyers. The revisions to Model Rule 1.16 go beyond the limited situations described above but would also apply to situations involving client fraud or generalized misconduct.

In April 2024, the Committee first discussed the issue. The Committee elected to authorize Mr. Masciocchi to draft a proposed letter to the Court describing the revisions to Model Rule 1.16, explaining the Standing Committee's current view of the revisions, and asking whether the Court wants the Committee to evaluate and consider adopting the language of the 2023 amendments to Model Rule 1.16 or alternative language. Another member proposed revisions to Mr. Masciocchi's draft letter. A member also asked whether other jurisdictions have adopted the revisions to Model Rule 1.16. Mr. Masciocchi has researched the issue and has not found any jurisdictions that have adopted the revisions to Model Rule 1.16. Members of the subcommittee were going to perform further research to determine whether other jurisdictions have adopted the revisions to Model Rule 1.16. Another member explained that the ABA Center on Professional Responsibility is a good resource to determine whether other jurisdictions have adopted the revisions to Model Rule 1.16. Members of the subcommittee will contact the ABA Center on Professional Responsibility to get further information.

The Chair put the redline version of ABA Resolution No. 100 on the screen so members of the Committee could review it. Committee members discussed the revisions to Model Rule 1.16. The Chair explained that, in August 2023, he attended an ABA meeting at which the proposed revisions were debated. One lawyer at the meeting presented an interesting hypothetical involving a patent lawyer who represents many clients in a very limited way. Does the lawyer have to do a thorough investigation of each client, despite the limited scope of her engagement, to comply with Model Rule 1.16? That hypothetical created concerns among the lawyers at the ABA meeting who were evaluating and debating the proposed revisions to Model Rule 1.16.

Mr. Kaufmann asked for the context of the Model Rule 1.16 revisions. A member reported on the background of the revisions to Model Rule 1.16, which come from a treaty about money laundering. As a result of the treaty, the Treasury Department proposed anti-money laundering regulations that would apply to lawyers. The revisions to Model Rule 1.16 were an effort to avoid regulation of lawyers by the Treasury Department. Another member explained that Sarbanes-

Oxley would have allowed regulation of lawyers in certain contexts. That resulted in the revisions to Model Rule 1.13 addressing obligations of lawyers to run issues up the corporate chain.

A motion was made to approve the revised letter to send to the Court. The motion was seconded. The motion carried unanimously.

H. RULE 8.4 SUBCOMMITTEE. No report.

4. NEW BUSINESS.

a. Proposed New Rule Addressing a Client's Refusal to Accept Funds Belonging to the Client [Joseph Michaels, Chair of the CBA Ethics Committee]. In Mr. Michaels's absence, the Chair presented on the issue, which concerns clients who do not wish to receive funds from a lawyer's trust account, despite being entitled to the monies. The issue emanates from a request to the CBA Ethics Committee, as explained in attachment 3 to the meeting materials. A member asked about the factual circumstances involved when this issue comes up because logically, one would think the client would want to retain the funds. Another member explained that some clients may be disqualified from public or other benefits if the client receives funds. A member explained that prisoner clients sometimes do not want to receive funds because of the requirements of incarceration. A third member explained that sometimes the clients have diminished capacity that interferes with their understanding about the funds belonging to the clients. A member who also serves on the CBA Ethics Committee explained that the Committee gets a number of inquiries on this topic and generally avoids providing a recommendation because the Rules of Professional Conduct do not provide clear guidance. The Committee agreed to form a subcommittee to consider the issue. The members of the subcommittee will be Mr. Sudler (Chair), Ms. Luu-Chen, Ms. Donnelly, Mr. Squarrel, Mr. Rothrock, Mr. Yarger, and Ms. Holmes. The Chair of the Committee thanked those who volunteered to serve on this subcommittee.

5. ADJOURNMENT. A motion to adjourn was made at 9:48 a.m. and was duly seconded. The motion carried. The meeting adjourned at 9:49 a.m. The next meeting of the Committee will be on July 26, 2024.

Respectfully submitted,

Troy R. Rackham, Secretary