

MONTGOMERY LITTLE  
SORAN MURRAY & KUHN, PC

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Attorneys at Law

DAVID C. LITTLE, ESQ.  
303-779-2720  
dlittle@montgomerylittle.com

May 25, 2006

The Honorable Michael Bender  
c/o Susan J. Festag  
Clerk of the Colorado Supreme Court  
2 East 14th Avenue  
Denver, CO 80203-2116

Re: Proposed Changes to the Rules of Conduct

Dear Justice Bender:

I have pondered a long time whether it is appropriate for me to be making any comment about the proposed changes to the Colorado Rules of Professional Conduct. I was a member of the subcommittee appointed by the Supreme Court Standing Committee on the Rules of Professional Conduct to evaluate the ABA Ethics 2000 changes. I participated in developing recommendations to the whole committee that formed the basis for the committee's December 30, 2005 report to the Court. Since I participated in the Committee's evaluation of the Ethics 2000 changes, I am not entirely clear on whether it is appropriate for me to make any comments and if there is any question about this propriety, I would ask that you simply ignore this letter.

By and large the proposed changes are, in my judgment, appropriate and seasonal. Both the American Bar Association and the Supreme Court's Standing Committee and its Subcommittee devoted a considerable amount of time and resource to evaluate the relevance of the existing rules and the propriety for any modifications to those rules. I believe the Court should look favorably on the changes proposed by the Standing Committee, save and except in one situation.

I am deeply concerned about a proposed change to the Preamble to the Rules and I suggest that it should not be changed. This change would, I believe, eventually change the basis for civil liability claims against lawyers arising out of the rendering of professional services. My concern focuses on the proposed modification to the Preamble and specifically what would become paragraph 20 of the Preamble. The proposed paragraph 20 is a modification of existing C.R.P.C. Preamble paragraph 18. The change is addressed at pages 20 and 21 of the December

30, 2005 report.

Initially paragraph 18 provided that nothing in the Rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such a duty. As noted at page 20, some courts have held that since the Rules do not give rise to a cause of action, a lawyer's violation of a Rule is not relevant in the civil action for liability for the lawyer's breach of the standard of care. The report also notes that other courts have ruled otherwise and Colorado courts have not spoken on the issue. *Id.* p. 21.

The new paragraph 20 provides, in essence, that since the Rules do establish standards of conduct, in appropriate cases, a lawyer's violation of a Rule may evidence the breach of the applicable standard of conduct. The Court should note that the recommendation and the proposal address specifically standards of conduct, not standards of care. Nonetheless, the change to the Preamble invites trial courts to overlook the distinction between standard of conduct and standard of care, and to admit evidence of a breach of a Rule on the issue of breach of the standard of care. The distinction between breach of a standard of conduct and the breach of a standard of care is an esoteric distinction not easily defined or debated.

Without going into the decisional history of the utilization of the Rules in civil actions, I would refer the Court to the Committee's December 30, 2005 report at pages 20 and 21 and Appendices D and E attached to the report itself. In addition to these discussions, I would ask the Court to consider one potential consequence of this change. I suggest that there would be a propensity for the Rules to become literally a codification of the standards of care and, as such, to become both sword and shield to be debated in civil liability actions.

In many cases the Rules establish minimal standards of conduct associated with the professional service a lawyer provides to a client, but do not address the ultimate care and concern a lawyer should have for a client's interest. A Rule of Conduct may not be the entire measure of the concern and devotion a lawyer should give to a client's matter. A lawyer's dedication to the client interest may not be measured in every instance by a written code of conduct. A lawyer might provide the bare minimum of client service in conformance with a strict adherence to the Rules and thus earn a fee where the standard of care might suggest that the lawyer should devote an extra measure of dedication not required by the rigid application of the conduct rule. In such a case such, the Rule could become a shield by which the lawyer might avoid exposure to liability even though the client's interest might have been better served by the extra measure of professional devotion.

For instance, Rule 1.2 allows a lawyer to provide limited or "unbundled" legal services to a client, but gives minimal guidance to any concern for the client's ability to adequately manage the complexities of that part of the matter the client must manage without legal assistance. If some adverse development occurs because the client was not sophisticated enough to deal with the situation, the client might try to hold the lawyer civilly responsible. The lawyer might be able

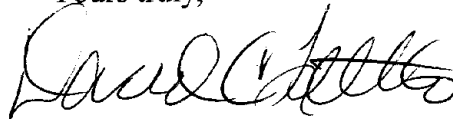
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to use conformance to the codified minimum requirements of the Conduct Rule as a defense to a claim for breach of the standard of care. If violation of a rule can evidence breach of the standard, conformance with the rule ought to evidence compliance with the standard.

The Courts have functioned well in the analysis of professional liability claims against lawyers in any number of factual settings and have not needed to use the Rules of Conduct as a means to establish civil liability. The change proposed by this modification would, in my judgment, invite the use of the Rule in civil litigation. It is unlikely that the semantical distinction between the "standard of conduct" and the "standard of care" would serve to minimize this likely utilization.

If I am not being too presumptuous and if it is appropriate for me to do so, I would ask the Court to reject the change to the Preamble as suggested in the Standing Committee's report. Thank you for your attention and consideration of this matter.

Yours truly,

A handwritten signature in black ink, appearing to read "David C. Little". The signature is written in a cursive style with a large, prominent initial "D".

David C. Little

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