

COLORADO SUPREME COURT

STANDING COMMITTEE ON THE RULES OF PROFESSIONAL CONDUCT

Approved Minutes of Meeting of the Full Committee
On January 8, 2021
Fifty-Eighth Meeting of the Full Committee
Virtual Meeting in Response to Covid-19 Restrictions

The fifty-eighth meeting of the Colorado Supreme Court Standing Committee on the Rules of Professional Conduct was convened at 9:00 a.m. on Friday, January 8, 2021, by Chair Marcy G. Glenn. The meeting was conducted virtually in response to Covid-19 restrictions.

Present in person at the meeting, in addition to Marcy G. Glenn and Justices Monica M. Márquez and William W. Hood, III, were Nancy L. Cohen, Cynthia F. Covell, Thomas E. Downey, Jr., Judge Adam J. Espinosa, Margaret Funk, Tyrone Glover, April Jones, Judge Lino S. Lipinsky de Orlov, William R. Lucero, Marianne Luu-Chen, Julia Martinez, Cecil E. Morris, Jr., Noah C. Patterson, Judge Ruthanne N. Polidori, Henry Richard Reeve, Alexander R. Rothrock, Marcus L. Squarrell, David W. Stark, Jamie S. Sudler, III, Jennifer J. Wallace, Lisa M. Wayne, Judge John R. Webb, Frederick R. Yarger, Jessica E. Yates, and Tuck Young. Eli Wald was excused from attendance. Absent from attendance was Boston H. Stanton, Jr. John M. Lebsack, Katy Donnelly, and Erika Holmes attended the meeting as guests.

1. Meeting Materials: Minutes of September 25, 2020 Meeting.

The Chair had provided the submitted minutes of the fifty-seventh meeting of the committee held on September 25, 2020 to the members prior to the meeting. The minutes of the fifty-seventh meeting of the Full Committee held on September 25, 2020 were approved.

2. Report from the Rule 1.5(b) “scope of representation” Subcommittee.

The Supplemental Report of the Rule 1.5(b) Subcommittee dated December 2, 2020 was presented at pages 001-011 of the meeting materials and through the report of its Chair and Committee member Noah Patterson. Mr. Patterson reported that the Subcommittee had drafted three options for consideration in response to the comments of the Full Committee at the meeting of September 25, 2020. Mr. Patterson noted that the Subcommittee had worked on the language of only the Rule with the understanding that drafting the Comment to accompany the Rule would be accomplished more efficiently after the language of the Rule had been finalized. Mr. Patterson then reviewed the three options presented for consideration. He noted that Option #1 was very similar to the version reviewed at the September 25, 2020 meeting with one small exception and noted that the benefit of Option #1 is that it tracks closely with the ABA’s Model Rule 1.5(b). Mr. Patterson then reviewed Option #2, noting that it separates the concepts of “scope of representation” from the concept of “basis or rate of the fee and expenses,” and that its wording took inspiration from and borrowed some language from New York Rule 1.5(b). He noted that

the language of Option #2 was intended to parallel the substance of the language set forth in Option #1 except that it makes the exception for communication of the scope of representation dependent on the provision of services “that are of the same general kind as previously rendered to the client.” In reviewing Option #3, Mr. Patterson noted that Option #3 parallels the substance of Option #2 but attempts to simplify the requirements of the proposed changes by stating it in three separate parts.

Following Mr. Patterson’s review of the options under consideration, members provided a number of comments both with respect to the timing of communication to the client and the scope of representation issues. There was discussion as to whether the timing of the communication to the client regarding the basis or rate of the fee and expenses should be “... before or within a reasonable time after commencing the representation” or “promptly.” With respect to the scope of representation issue, several members having experience representing institutional clients essentially as an outside General Counsel expressed concern regarding communicating with the client regarding the scope of the representation and the language “... except when the lawyer will perform services that are of the same general kind as previously rendered to a regularly represented client...” Some members expressed the view that Option #3 adequately addressed concerns regarding institutional clients and communications regarding the scope of representation was adequately handled in.

Following additional discussion, there appeared to be a consensus favoring the layout and content of Option #3. The discussion continued, however, on whether the written communication to the client should be done “promptly” or “before or within a reasonable time after commencing the representation.”

The Committee took a straw vote approving an amended Option #3 as follows:

- (b) The lawyer shall communicate before or within a reasonable time of commencing the representation to the client in writing:
 - (1) the basis or rate of the fee and expenses for which the client will be responsible, except when the lawyer will continue to charge a regularly represented client on the same basis or rate, and
 - (2) the scope of representation, except when the lawyer will perform services that are of the same general kind as previously rendered to a regularly represented client.

The lawyer shall communicate promptly to the client in writing any changes in the basis or rate of the fee or expenses.

The Committee also referred the matter back to the Subcommittee to consider the overall formatting of the language of the Rule and to address concerns raised during the discussion in the drafting of a proposed Comment to the Rule.

3. New Business:

A. Advisory Committee's proposed renumbering amendments to Rules 1.3, 1.15D, 1.15E, 5.4, and 5.5.

Attorney Regulation Counsel and Committee member Jessica Yates provided an update on the Advisory Committee's proposed updating to Rules 1.3, 1.15D, 1.15E, 5.4, and 5.5 as more fully outlined in the meeting materials at pages 012 through 018. Ms. Yates noted that the reference to C.R.C.P. 260.6 that appears in the last line of Rule 5.4 on page 014 should be deleted and replaced with "250.7". No formal action of the Full Committee was required on this issue. The Chair thanked Ms. Yates for her report.

B. Potential housekeeping amendment to Rule 5.5(a)(1) and comment [1].

Committee guest John Lebsack made a presentation with respect to potential housekeeping amendments to Rule 5.5 dealing with the Unauthorized Practice of Law and Comment 1 to that Rule. Mr. Lebsack suggested that housekeeping amendments may be necessary in view of other recent rule changes. Mr. Lebsack reviewed the meeting materials at pages 017-018 and reviewed several options for the Committee's consideration. The potential housekeeping amendments centered on Rule 5.5(a)(1) and whether the current references to "... C.R.C.P. 204 or C.R.C.P. 205 ..." should be changed to reflect the fact that the text of former C.R.C.P. 204 and C.R.C.P. 205 has been moved to new rules now numbered as C.R.C.P. 204.1 through 204.6 and C.R.C.P. 205.1 through 205.8, but the rule books continue to include C.R.C.P. 204 and C.R.C.P. 205, albeit without any text.

After discussion, a motion was made to amend Rule 5.5(a)(1) by changing the existing language "... C.R.C.P. 204 or C.R.C.P. 205 ..." to read "... C.R.C.P. 204, *et. seq* or C.R.C.P. 205, *et. seq.*..." The motion was approved.

C. Potential housekeeping amendment to Rule 1.1, comment [6].

Committee member Alec Rothrock proposed an additional housekeeping amendment in Comment [6] to Rule 1.1, which includes a cross-reference to other Rules, with brief parentheticals summarizing the cross-referenced rules' subject matter. The comment includes an inaccurate cross-reference to "1.5(e) (fee sharing)," a subject that is actually addressed in Rule 1.5(d). (Rule 1.5(e) states that referral fees are prohibited.) To correct this error, the Committee voted to recommend changing "1.5(e)" to "1.5(d)".

D. Potential amendment to Rule 4.5(a).

The Chair reviewed a suggestion made to the CBA Ethics Committee and referred by that committee to the Standing Committee, that Rule 4.5(a), which precludes a lawyer from threatening criminal, administrative, or disciplinary charges to obtain an advantage in a civil matter, should be amended to also prohibit threats by an attorney or the attorney's client to post negative information about another party on social media or other electronic sources. Several Committee members expressed concern that threats of social media posts do not rise to the same

level of harm as the conduct that Rule 4.5 currently prohibits. Other members noted the First Amendment issues associated with prohibitions on the use of social media. In light of these concerns, as well as the Committee's belief that the concerns raised by the inquiry were adequately addressed by the existing provisions of Rules 8.4(c) and 8.4(h), the Committee declined to form a subcommittee to further investigate the issue.

4. Administrative Matters

The Committee agreed to hold its next meeting in March 2021. Meeting dates for either March 5 or March 12 were proposed. Based on members' availability, the Chair will select the date for the March 2021 meeting, with notification to members to follow.

Meeting adjourned at 11:00 a.m.

Respectively submitted.

Thomas E. Downey, Jr., Secretary