COLORADO SUPREME COURT

STANDING COMMITTEE ON THE RULES OF PROFESSIONAL CONDUCT

Approved Minutes of Meeting of the Full Committee
On
January 27, 2023
Sixty-Sixth Meeting of the Full Committee

The sixty-sixth meeting of the Colorado Supreme Court Standing Committee on the Rules of Professional Conduct was convened at 9:00 AM on Friday, January 27, 2023, 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., Margaret Funk, Marcy Glenn, Erika Holmes, April Jones, Matthew Kirsch, Judge Bryon M. Large, Noah Patterson, Troy Rackham, Alexander R. Rothrock, David W. Stark, and Robert W. Steinmetz.

Present for the meeting by virtual appearance were Justice Monica Márquez, Marianne Luu-Chen, Cecil E. Morris, Jr., Molly Kocialski (guest from United States Patent and Trademark Office), Daniel Smith (guest as Chair of National Association of Patent Practitioners Advocacy Committee), Marcus L. Squarrell, David W. Stark, Jamie S. Sudler, III, and E. Tuck Young. Committee members excused were Judge Adam Espinosa, Judge Ruthanne Polidori, Judge John R. Webb, Julia Martinez, Henry R. Reeve, Eli Wald, and Fred Yarger. Tyrone Glover was absent.

1. CALL TO ORDER. Judge Lipinsky called the meeting to order at 9:02 AM. He welcomed those attending in person or virtually. He reviewed the names of all attendees and noted those having excused absences. He also noted the attendance of guests Dan Smith and Molly Kocialski

2. APPROVAL OF MINUTES FOR OCTOBER 28, 2022 MEETING. Judge Large made a motion to amend the minutes to correct the spelling of his name. Ms. Yates made a motion to amend to correct spelling of Judge Espinosa's name. With two amendments, a motion was made to approve. Motion was seconded by Mr. Morris. Motion approved unanimously.

3. REPORT FROM THE RULE 1.4 SUBCOMMITTEE. Ms. Yates reported that the Subcommittee received feedback from the Supreme Court on the previous recommendation. The Court's feedback was that it desired the Committee to further streamline the rule. The Subcommittee met afterwards to discuss the Court's feedback. The Subcommittee recommends changes that remove the reference to limits of an insurance policy. The Subcommittee discussed the fact that the reference to the limits was unnecessary because the market takes care of limits given that the lowest minimum limits correlate to what previously was in the draft proposed change to Rule 1.4. The Subcommittee retained its recommendations for comments regarding disclosure to the client. Cecil Morris, Jr. asked whether the proposal should reference something like limits consistent with the market. Ms. Yates explained that the Subcommittee discussed this issue and thought it unnecessary. Mr. Morris moved to approve the proposal. Mr. Rackham seconded the

motion. Judge Large abstained. Motion carried with three votes in opposition: Ms. Covell, Ms. Glenn, and Mr. Kirsch.

4. REPORT ON PATENT PRACTITIONER HARMONIZATION PROPOSAL. Robert Steinmetz reported that the Subcommittee met in December. The Subcommittee was joined by Molly Kocialski, Dan Smith, and three lawyers practicing in the patent area. The Subcommittee's discussion addressed the fact that the proposal affects more than just Rule 5.4(d). The Subcommittee was unsure whether the charter of the Subcommittee was broad enough to cover other rules. The simple fix to the Rule 5.4(d) issue is to carve out patent practitioners from the reach of Rule 5.4(d), but there are several other rules that require lawyers to be involved, such as the trust accounting rules contained in Rule 1.15A et al. The Subcommittee is inquiring as to whether the scope should be expanded to consider other germane rules that also may need to be amended for patent practitioners.

Ms. Funk inquired whether the proposed changes would just be the Rules of Professional Conduct, or would also include proposed changes to the Rules of Civil Procedure. The Rules of Civil Procedure are addressed by a different Committee of the Court. Ms. Yates raised these other issues (such as profit sharing and trust accounting) and noted that there are Rules of Professional Conduct applicable to the patent practitioners issued by the USPTO. Ms. Yates recognized that expanding the scope to these issues creates a sizeable amount of work. The Committee does not want to unfairly burden the Subcommittee with additional work, but if the work of the Subcommittee is limited, the Committee should keep on the agenda the proposition that other rules will need to be changed as well. Mr. Rothrock commented that he is sympathetic to the concerns expressed by Ms. Yates and believes our Committee should evaluate the other potentially applicable Rules. Mr. Rothrock noted that many of the revisions would also apply to nonlawyers representing individuals in other matters, such as immigration, social security, enrolled tax agents, and the like. Ms. Funk noted that this is a really big issue and applies well beyond patent practitioners. It would be a big deal to allow profit sharing in these very broad areas.

Ms. Covell noted that the Subcommittee discussed this topic in the past before the Enron-related problems. She noted that this is a discussion that the Committee needs to have because it extends to many areas. The discussion about revising the Rules on a wholesale level to address nonlawyer patent practitioners (and other nonlawyers providing legal services) would be significant and complicated. Ms. Cohen noted that there are nonlawyers who are bankruptcy petition preparers. When there are individuals authorized by statute or regulation to provide what are historically legal services (such as enrolled tax agents, patent practitioners, etc.), the Committee needs to recognize that and analyze why they should be treated differently. They should be able to work at a law firm, share in profits, etc. Based on prior work from the Committee, Ms. Cohen suggested that we first discuss the issue with the Court and see if the Court has an interest in changing the rules before the Committee undertakes a discussion and proposed revisions to the Rules to address the nonlawyer provision of services.

Dan Smith noted the differences between a patent practitioner and other nonlawyers providing services (such as enrolled tax agents, bankruptcy petition preparers, etc.). Patent practitioners must take a bar exam and, once successful, are afforded the same privileges of practicing as a patent lawyer has. Patent practitioners also have to follow the USPTO rules of

professional conduct, which are similar to the model Rules of Professional Conduct. The USPTO Rules also have requirements for insurance. As a result, it may be reasonable to treat patent practitioners differently than other nonlawyers. Mr. Smith thanked the Committee for tackling this issue and noted that it is the first state to consider the issue.

Ms. Glenn noted that the Committee typically lets the ABA take the lead on the issue. Although Colorado sometimes is the first state to revise rules, those amendments are related to unique items of Colorado law such as the marijuana revisions to Rules 1.2 and 8.4. Ms. Glenn noted that the patent practitioners issue is nationwide and therefore we would expect that the ABA would pave the path for the issue. Mr. Smith noted that the ABA is considering this matter, but its committee works much more slowly. Mr. Smith also noted that the ABA committee is merely advisory so it would not have the same effect as a proposal from this Committee to be considered by the Colorado Supreme Court.

Ms. Kocialski commented about the patent practitioners bar. She echoed the comments of Mr. Smith. Patent practitioners still have to take a bar exam and have the same privileges of practicing as a patent lawyer would have. Patent practitioners also have to follow the USPTO rules of professional conduct.

Ms. Funk noted that immigration courts do not have a bar, but they have a certification process that has to be followed. It sounds like a similar process, although not the same. It is at least a prior verification and training process. Ms. Covell commented that perhaps patent practitioners should be treated differently, but the Committee also needs to think about the larger picture involving nonlawyers practicing in other areas as described above.

Ms. Yates explained that the Rules applicable to patent agents have trust account rules, but they are different Rules because Colorado has a unique approach to the trust accounting rules. Ms. Yates suggested that only reviewing and proposing revisions to Colo. RPC 5.4(d) would be shortsighted because there are many other rules implicated. She explained that she knows of patent practitioners in Colorado who are unable to open a trust account because they are nonlawyers, even though USPTO rules have trust accounting rules. Mr. Patterson suggested that this is an access to justice issue. Particularly in other areas where access to legal services is scarcer, such as bankruptcy, tax enrolled agents, and the like.

Chair Lipinsky suggested that the Committee ask the Court if the Court is interested in having the Committee take a larger view and evaluate other rules that would be applicable to nonlawyers practicing in the areas described above.

Ms. Cohen explained that if we want patent practitioners or nonlawyer practitioners to be able to use trust accounts and share profits of a firm, then we would want to have the practitioners follow Colorado Rules. Ms. Funk explained that there are some jurisdictional issues because federal rules applicable to patent practitioners, tax enrolled agents, and the like, would apply over the state rules.

Judge Large commented on the admissions rules. Those rules have carve-outs to allow a non-licensed person to have a limited practice here in Colorado. Those carve outs allow the non-

licensed person to be subject to the jurisdiction of OARC. Ms. Yates also noted that because of the US Supreme Court's decision, patent practitioners are allowed to practice here in Colorado. As a result, there may be significant problems in Colorado attempting to impose additional restrictions on a patent practitioners.

Dan Smith commented on the registration process for patent practitioners. Registered patent practitioners are permitted in Colorado. Molly Kocialski referenced that because patent practitioners are already working and providing legal services in Colorado, the question is whether Colorado should adopt rules for how a patent practitioner might practice in conjunction with other lawyers.

Chair Lipinsky suggested that the Subcommittee prepare a list of questions/ issues for the Court to consider. Chair Lipinsky will work with the Subcommittee and run the proposed list of questions/ issues by Ms. Yates and Judge Large in advance of submitting to the Court. Judge Lipinsky would then get feedback from the Court.

5. REPORT FROM THE PALS II COMMITTEE. Ms. Yates described the hearing that occurred before the Court on November 16, 2022. Some of the issues the Court inquired about were whether the size of dispute limitations based on income/ asset caps were appropriate. The Court inquired whether there was a better or more reliable test to determine complexity in terms of drawing the line on what a PALS could do compared to what the lawyer could do. Another topic inquired into by the Court was whether a PALS practitioner could make statements or examine witnesses in courts. A third topic involved insurance. Washington requires insurance and other states are considering it. A fourth topic was whether there should be an experiential basis for admission as a PALS. Ms. Yates noted that the Subcommittee is considering these topics and expects to have a proposal to address them by the April meeting.

Chair Lipinsky asked whether the Committee should start reviewing language under the Rules to determine what amendments need to be made, to move together with the PALS Rules. Ms. Yates suggested it would be better to defer consideration of this issue until the April meeting when there is more guidance from the Subcommittee.

6. REPORT FROM THE REPRODUCTIVE HEALTH COMMITTEE. Ms. Cohen presented on this topic. She referenced an article from the ABA Professional Liability Litigation Committee authored by a Texas lawyer that addressed some of these issues. It was an interesting and timely article. The Subcommittee met in December and then had a lively discussion over email. That lively discussion resulted in a proposal to change the proposed comment [15] to use the word "may" instead of "shall," as it is used in comment relating to marijuana. The reason for this is that the comments provide guidance and should not include mandates. Ms. Cohen referenced the fact that several providers are building facilities near the southern border of Colorado because there is a significant demand for these reproductive services from neighboring states. Ms. Cohen explained the bases for the phrasing in the proposed comment identified in the memo.

Judge Lipinsky proposed changing "actions or proposed actions is" to "actions or proposed actions are." Thus, the wording would be changed:

> Comment 15: A lawyer may counsel or assist a client rendering, seeking, or receiving reproductive health care, as defined in C.R.S. § 25-6-402(4), that the lawyer reasonably believes is not prohibited by the laws and regulations of Colorado. In these circumstances, if the lawyer also reasonably believes that the client's actions or proposed actions ~~is~~ are likely to result in another jurisdiction finding that the client's conduct is prohibited, the lawyer should advise the client of the potential consequences regarding conduct that may be prohibited under another state's law.

Mr. Kirsch suggested the grammatical problem also could be addressed in other ways. Ms. Covell suggested that this proposal puts a lot of burden on a lawyer to provide advice regarding the laws of another state. Chair Lipinsky indicated he shared Ms. Covell's concern because if a large pharmacy company asked can we provide these pills in each state, he would have found a lawyer in each state to advise on the topic. Mr. Downey suggested that he shares the concern that it opens a lawyer up to exposure unnecessarily.

Ms. Cohen suggested that perhaps this issue could be addressed by changing the language in the comment from "that the lawyer reasonably believes is not permitted" to "if the lawyer ~~also reasonably believes~~ knows that the client's actions or proposed actions ~~is~~ are likely to result in another jurisdiction finding that the client's conduct is prohibited…."

Ms. Funk suggested that this problem could be resolved by a lawyer limiting her representation to clarify that she is not providing advice about another jurisdiction's law. Ms. Glenn moved to return this proposed comment to the Subcommittee to rework the second sentence that could include "unless the lawyer and client have agreed to a more general scope of representation, then…." Ms. Cohen suggested that this language is perhaps broader than the current version. Ms. Glenn suggested that what is needed is a revision to the conditional portion of the sentence in the comment. Ms. Glenn suggested that there could be other ways to revise the language as well.

Ms. Covell asked how this issue plays out in actual circumstances. She explained that if a patient comes from Texas, the patient presumably knows that Colorado's laws are more permissive of reproductive health choices than those of Texas. A lawyer in that circumstance could advise on Colorado law without having to address the issue of whether the conduct is permitted in Texas. Ms. Cohen explained that what is happening is that lawyers are giving advice, particularly in circumstances where a patient has a prescription for medication that is prohibited in Texas. Ms. Cohen agreed that the Subcommittee may have to revise the proposed comment's language in light of the comments today.

Ms. Luu-Chen suggested shortening the second sentence to say: "The lawyer should consider advising the client that the conduct may be prohibited in other jurisdictions." Mr. Sudler commented that perhaps we do not need the second sentence of the comment at all. All we are talking about is a comment and not a black letter rule, so the language of the comment should not be used to create an affirmative obligation on the part of the lawyer. Mr. Sudler agreed that the Subcommittee needs to reexamine the issue and determine whether the second sentence is needed at all.

Mr. Patterson noted that the second sentence comes from the marijuana rule, but that is because possession and use of marijuana remains illegal in Colorado under federal law. The reproductive services, in contrast, are legal in Colorado because there is no federal prohibition on reproductive services.

Mr. Rothrock suggested that the proposed comment must track the language of Rule 1.2(d). The blackletter rule uses the term "knows." The phrase from this proposed comment, "reasonably believes," is more restrictive and inconsistent with Rule 1.2(d). Mr. Rothrock also suggested that there is inconsistency in the structure because Rule 1.2(d) describes what a lawyer cannot do while the comment proposes suggesting what a lawyer may do. Mr. Rothrock addressed the issue of reciprocal discipline. That is in another Rule and not governed by this Committee. That Rule – CRCP 242.21 – would need to be revised. Ms. Glenn also recommended that the comment should be called comment [15A] because it is Colorado specific, consistent with the past practices of the Committee.

The Subcommittee will review the proposed language and suggest changes at the next meeting in April.

7. REPORT FROM THE RULE 1.5(E) SUBCOMMITTEE. Mr. Rothrock addressed the Committee. Rule 1.5(e) prohibits referral fees. Rule 7.2(b) addresses referral fees as well, but somewhat inconsistently. Rule 1.5(e) is unique to Colorado and not in the Model Rules. The Model Rules address referral fees only in Rule 7.2(b). Colo. Rule 1.5(e) is very broad and prohibits referral fees in any circumstances. The Subcommittee's proposal is to revise Rule 1.5(e) to apply only to a lawyer's receipt of referral fees rather than payment. There is also a potential inconsistency with Colo. Rule 1.5(d) relating to division of fees. The concept behind these proposed revisions is to ensure each rule regulates three discrete types of conduct: (1) division of fees; (2) payment of referral fees; and (3) receipt of referral fees. There is also an issue about whether a lawyer should be able to receive referral fees for former clients referred to a professional for non-legal services, such as financial services. The Subcommittee therefore debated whether former clients should be included within the prohibition of referral fees for clients. The final issue is where the proposed changes should go. One possibility is Rule 1.5(e). Another possibility is Rule 1.8. The third possibility is Rule 7.2. The Subcommittee would like the Committee Members' views on these issues.

The first issue is whether the proposed revisions should include former clients. Mr. Rothrock believed that former clients should not be included. It can be nuanced and factually intensive to determine whether a person or entity is a former client.

Chair Lipinsky identified a hypothetical scenario. A lawyer gets a very lucrative medical malpractice case. He refers it to another lawyer and terminates the representation. After the representation is over, the new lawyer gets a big contingency and pays 20% of the fee to the referring lawyer as a referral fee. Would that be prohibited if the Rule does not include former clients? Mr. Kirsch asked whether the *payment* of the referral fee would be prohibited under Rule 7.2. Mr. Rothrock agreed that it would be.

Ms. Glenn asked about nuanced situations. What if the referral comes from an out of state lawyer? Or what if the referral comes from a nonlawyer. Can a lawyer get a referral fee from a nonlawyer? Ms. Glenn suggested that the language be clarified to address this issue.

Mr. Morris suggested that this is a large public policy issue for the Court to consider. Many states allow referral fees as an incentive to get a matter to a more competent or special counsel. Those public policy issues are important but go beyond these suggested changes to the Rules. Mr. Morris suggests that the Colorado Supreme Court already decided this issue deliberately and expressly to prohibit receipt of referral fees, but fees can only be shared through Rule 1.5(d) with joint acceptance of responsibilities. Mr. Morris suggested that we simply revise Colo. Rule 1.5(d) to say any fees from the representation of a client cannot be shared amongst lawyers not in the same firm unless there is joint acceptance of responsibilities.

There was a lengthy discussion of whether Rule 7.2(b) includes payment of fees to nonlawyers because the rule references "a person" rather than a lawyer. This proposal Rule is trying to codify a policy choice that other states have decided to either conclude that this is a nonwaivable conflict that a lawyer cannot do or it is a waivable conflict that lawyers can do. All this proposed rule is trying to do is address the receipt of a referral fee.

Ms. Glenn said now, upon consideration and reflection, she believes a change is necessary because the rules do not address this particular issue. Ms. Glenn referenced Rule 1.5 comment [7]. Ms. Glenn explained that she agrees with the proposed changes. Ms. Glenn suggested that this issue may be better placed in Rule 1.8 rather than Rule 1.5. Rule 1.5 addresses fees from clients. Rule 1.8 addresses conflicts coming from business relationships or incentives, including from nonclients. This is really addressing payment of fees by a person, not a client, for the lawyer referring his client to the person for products or services.

Ms. Holmes suggested that this issue should not be in Rule 1.5(d) because that relates to division of fees and this is more specific to referral compensation. Mr. Rothrock did not have a concern about putting this issue in Rule 1.8. It might make more sense to put it in Rule 1.8. The shallow reasoning would be to include it in Rule 1.5 simply because it is easier to do that. Mr. Rothrock also suggested that Rule 1.5 is getting more cumbersome and complicated with the recent changes, so it might be concerning if a lawyer is trying to find the specific rule as part of Rule 1.5.

Regarding whether former clients should be included, Judge Large suggested that consideration should be given to the often disparate views between a client and a lawyer as to whether the client is a current client. Ms. Luu-Chen suggested that in Trusts and Estates practice, there often are needs by former clients for third party professional services or products, such as tax planning, financial planning, closing services, title services, etc. She suggested that the current rules set a high standard because there is something wholesome about not getting a referral fee in this circumstance. Further, there is no time restriction on referral fees.

Mr. Kirsch suggested leaving the term "former client" out and instead addressing the concept of "former client" in a comment to explain the issue. There was a consensus on this issue after a straw poll was taken. The Subcommittee was given enough guidance to put the proposal in Rule 1.8 and provide the comments that clarify the application to former clients in the comments

to the Rule. There also would be a comment to Rule 1.5 relating to the division of fees issue that says referral fees are included within the division of fees analysis with a cross-reference to Rule 1.8. Ms. Glenn and Ms. Holmes agreed to work with the Subcommittee on these revisions. The Subcommittee will send an additional report in April.

8. NEW BUSINESS.

a. **Possible Amendment to Comment [14] to Rule 1.2 to Address Proposition 122**. Ms. Glenn gave some background on Comment [14] to Rule 1.2 to address concerns about giving advice to a client in the marijuana industry. In 2014, this Committee suggested several revisions to Colo. RPC 1.2 to address these issues in terms of personal consumption by a lawyer of marijuana and advice by a lawyer in the marijuana industry. The backstory is that the current rule came about by a change that the Court initiated. The Chief Justice at the time said she could not get the votes for the proposal from the Committee. The Chief Justice wrote the proposed amendment with a back and forth and that resulted in the current rule. The revisions have worked well in terms of providing guidance to lawyers and avoiding discipline against lawyers for personal consumption and providing advice to clients in the marijuana industry.

Now that the voters approved Proposition 122, there is a similar need for revision to Rule 1.2 to address the issues arising from Proposition 122. Ms. Glenn suggested a Subcommittee should be formed to evaluate proposed revisions to Rule 1.2. A Subcommittee was formed with six members. Mr. Patterson agreed to serve as chair of the Subcommittee.

b. **Committee Changes.** Chair Lipinsky thanked Mr. Downey for serving as secretary. Chair Lipinsky also noted that Lisa Wayne was recently appointed to serve as chair of the National Criminal Defense Bar, so she is resigning from this Committee. The Court will fill her vacant position. There are members whose term is up. If such a member does not wish to continue on the Committee, that member should advise Chair Lipinsky, who will in turn advise the Court of the need for a replacement. Chair Lipinsky also noted that Mr. Rothrock will be moving to South Carolina but will continue to practice law in Colorado and continue to serve on this Committee.

9. **Adjournment.** A motion to adjourn was made at 11:31 a.m. A member seconded the motion. The motion carried. The next meeting of the Committee will be on April 14, 2023 at 9 a.m.

Respectfully submitted,

Troy R. Rackham, Secretary