

COLORADO SUPREME COURT

STANDING COMMITTEE ON THE RULES OF PROFESSIONAL CONDUCT

Approved Minutes of Meeting of the Full Committee

On

April 14, 2023

Sixty-Seventh Meeting of the Full Committee

The sixty-seventh meeting of the Colorado Supreme Court Standing Committee on the Rules of Professional Conduct was convened at 9:02 AM on Friday, April 14, 2023, by Chair Judge Lino Lipinsky de Orlov.

Present at the meeting, in addition to Judge Lipinsky and liaison Justice Maria Berkenkotter, were Hon. Adam Espinosa, Margaret Funk, April Jones, Matthew Kirsch, Judge Bryon M. Large, Julia Martinez, Noah Patterson, Alexander R. Rothrock, Marcus L. Squarrell, David W. Stark, Robert W. Steinmetz, Jennifer Wallace, Hon. John Webb, Frederick Yarger. Present for the meeting by virtual appearance were Nancy Cohen, Thomas E. Downey, Jr., Marcy Glenn, Erika Holmes, Justice Monica Márquez, Marianne Luu-Chen, Troy Rackham, Henry Reeve, E. Tuck Young. Committee members excused were Cynthia Covell, Tyrone Glover, April Jones, Cecil E. Morris, Jr., Hon. Ruthanne Polidori, Jamie Sudler, Eli Wald, and Jessica Yates.

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.

2. APPROVAL OF MINUTES FOR JANUARY 27, 2023 MEETING. Chair Lipinsky noted that the minutes needed to be amended to reflect that Dick Reeve was present virtually for the meeting. Dave Stark also requested an amendment of the minutes because they listed him as attending both virtually and in person, but he was present only in person. With those amendments, a motion was made to approve the minutes. Dick Reeve seconded the motion. The motion was approved unanimously.

3. REPORT REGARDING RULE 1.4. Justice Berkenkotter reported that the Court voted to publish the proposed amendments to Rule 1.4 and have a hearing on the proposed amendments in September. The hearing date and publication of the proposed revisions to Rule 1.4 should be on the Colorado Supreme Court's website shortly.

4. REPORT ON PATENT PRACTITIONER HARMONIZATION PROPOSAL. A proposed report was in the packet. Mr. Smith and others suggested changes to the proposed report. Chair Lipinsky suggested that the Subcommittee meet again to discuss the proposed changes and report back to the Committee next meeting. Mr. Smith and the Subcommittee agreed to this approach.

5. REPORT FROM THE PALS II COMMITTEE. Chair Lipinsky referenced the memorandum that Judge Espinosa drafted nearly a year ago relating to the proposed rules of professional conduct for licensed paralegals pursuant to the PALS. The rules will be LLP rules of

professional conduct located in Rule 207. The memorandum in the packet is the last draft of the LLP rules that would be proposed to the Court. Judge Espinosa discussed proposed changes to the Rules of Professional Conduct rules that may need to be made.

Judge Espinosa commented that he was delighted that the Court approved the PALS II proposal. A year ago, the Subcommittee was tasked with reviewing and proposing rules for LLPs for professional conduct and to suggest revisions to the Rules of Professional Conduct that will need to be implemented for the PALS II program.

In the preamble, the Subcommittee is suggesting a relatively small change to comment [5] in the preamble to include LLPs as a stakeholder that lawyers must respect. The Subcommittee also suggested that there should be a revision to Rule 1.0's definition of a firm, as reflected in Judge Espinosa's memo. Additionally, the Subcommittee suggested including a definition of LLPs in the Rule 1 series. The Subcommittee does not believe any changes need to be made to the Rule 2 series. The Subcommittee suggested revisions to Rule 3.4 and 3.7 to include LLPs as part of the rules. The same was true with the suggestion to Rule 4.2.

Justice Berkenkotter mentioned that there will be a proposed curriculum for LLPs and the Court is working with stakeholders to get that curriculum up and running. Dave Stark referenced that there is a group working on a bar exam for LLPs, which will include a substantive exam and an ethics exam (like the MPRE). Dave Stark referenced that the group intends to have the proposed curriculum ready to be offered by the fall of 2023.

Judge Espinosa indicated that decisions need to be made soon, as soon as the Committee is able to make the decision with regard to the proposed changes to the Rules of Professional Conduct. Noah Patterson asked whether we are voting on changes to the proposed black letter rules or the comments as well. Judge Espinosa responded that he believed we should vote on the black letter changes now and then consider other changes to the comments later. Justice Berkenkotter agreed. Judge Lipinsky suggested that we vote on the proposed black letter changes to the Rules during this meeting and then vote on changes to the comments in the next meeting.

Judge Lipinsky asked a question with respect to the recommended changes to Rules 5.1 and 5.2. The proposed change references the Rules of Professional Conduct and the LLP Rules of Professional Conduct. Judge Lipinsky asked whether these terms are defined terms in the Rules. They are not. The Subcommittee suggested revisions to Rule 5.3 to include LLPs.

Alec Rothrock noted that the proposed changes to Rule 5.2 are not merely technical or cosmetic, but they are substantive. The proposed change to Rule 5.2 suggests that LLPs would be subject to the Rules of Professional Conduct. Other Committee members suggested that there is no intent to bind LLPs to this proposed Rule. The problem is that the revisions suggest that LLPs are the subject of the regulations contained in Rule 5.2. Mr. Stark noted that the proposed changes to Rule 5.2 are intended to address a circumstance where an LLP is working at a law firm and would apply in the same way that a paralegal already is addressed in Rule 5.2. Mr. Patterson suggested that the inclusion of LLPs really just belongs in Rule 5.3 rather than Rule 5.2. Mr. Kirsch agreed that Rule 5.2 should not be revised at all because the proposed changes to Rule 5.3

addresses the issue. Ms. Glenn agreed that Rule 5.2 should not be changed because of the recommended changes to Rule 5.3, which covers the issue.

Judge Espinosa does not recall why the Subcommittee recommended changes to Rule 5.2. He tended to agree that the revisions to Rule 5.3 would cover the issue.

Judge Espinosa stated that the proposed rules for LLPs were released yesterday. He was checking whether the LLP rules have something similar to a Rule 5.2. Judge Espinosa read the proposed Rule 5.2, which correlates to Rule of Professional Conduct 5.2. Judge Lipinsky put the proposed rule on the screen so all Committee members could review. Judge Espinosa explained that the proposed LLP rules were intended to be similar to the Rules of Professional Conduct. As a result of this discussion, Judge Lipinsky suggested that perhaps this Committee does not need to revise Rule 5.2. Judge Espinosa agreed. There will be no proposed changes to Rule 5.2 as a result of this discussion.

Regarding Rule 5.3, Judge Lipinsky suggested that there will need to be proposed changes to Rule 5.3. Mr. Patterson agreed. Judge Lipinsky suggested that we consider revising the title to Rule 5.3. Judge Espinosa explained that an LLP would still be a nonlawyer assistant, so there would be no reason to change the title. Mr. Stark indicated that the term nonlawyer assistant is broad and would include a nonlawyer assistant. Ms. Funk suggested that we revise the term nonlawyer assistant to staff. Judge Large indicated that Rule 5.1 addresses supervising LLPs specifically, so there would be no need to include LLPs into Rule 5.3. Ms. Glenn suggested that Rule 5.1 and 5.3 are different. In Rule 5.1(a), it addresses a subset of lawyers (managerial, etc.). Rule 5.3 applies to all lawyers, which would include an associate that has direct supervisory authority over nonlawyers. Also, Rule 5.1 addresses the lawyers responsibility to ensure that the other lawyer conforms to the Rules of Professional Conduct and the LLP rules, but the rules are not necessarily congruent.

Mr. Rothrock asked for the proposed revision to Rule 5.1 to be revised grammatically because it is somewhat verbose. He suggested revising the proposed language to say “reasonable assurance that all lawyers and LLPs in the firm conform to the applicable Rules of Professional Conduct.” The term applicable would mean the relevant Rules germane to the particular conduct at issue.

Mr. Squarrell indicated that he is struggling with the proposed change to Rule 5.1 because he does not recall whether there is some other place in the proposed revisions that refer to the LLP rules of professional conduct. Judge Espinosa indicated that there is no part of the proposed revisions that refer to the LLP rules of professional conduct. Judge Espinosa suggested that we propose a revision to the definition section in Rule 1.0 to define the LLP rules of professional conduct. Mr. Rothrock suggested that we add the definition to Rule 1.0 and then cross-reference the definition in the germane rules.

Mr. Steinmetz suggested that putting language in Rule 1.0 that defines the LLP rules and an acknowledgement that LLPs are subject to their own rules. This would address the potential confusion over the term “applicable” rules. Mr. Rothrock suggested that the scope section of the Rule 1 series would be the best place to explain that LLPs are subject to their own rules of

professional conduct. Mr. Rothrock suggested it would not be very hard to find a place to put the reference to the LLP rules in the scope section. Judge Webb said if there is a specific reference to the LLP rules of professional conduct in the scope, then we probably do not need to reference “applicable rules.” It actually could create confusion for LLPs to wonder if there are sections in the Rules of Professional Conduct to which they also must confer. Mr. Kirsch responded that the intention was to make it clear that there are some rules that a lawyer must follow. The term “Rules of Professional Conduct” contained in Rule 5.1(a) would be generic and potentially mean both LLP rules of professional conduct and the lawyer Rules of Professional Conduct.

Mr. Rothrock suggested that there could be a problem in that lawyers now will need to familiarize themselves with the LLP rules of professional conduct. The lawyer would need to understand the additional rules of ethics to ensure that the LLPs are compliant with their own rules of ethics, which is a burden. Right now, there is nothing that says that a lawyer must ensure that a professional with whom the lawyer is working (such as a CPA) must comply with their own ethics rules. This would be a big change to require lawyers to know what the LLP rules are in order to ensure that an LLP conforms to the LLP rules of professional conduct.

Mr. Stark suggested revising the term applicable rules to “these rules” to address the confusion that could come from the term “applicable rules.” Judge Lipinsky noted that the term “applicable” could mean germane to the particular conduct rather than the entire body of rules. There are no phrases currently in the Rules that reference “applicable rules.” Rather, the Rules of Professional Conduct reference “the Rules.” Judge Webb suggested a revision to Rule 5.1(a) that would clarify the application of the Rule. Ms. Cohen suggested making a revision to include the phrase “that professional’s rules” to make the distinction clear.

Mr. Rothrock suggested that this change could be sweeping because it could require a lawyer to ensure that a nonlawyer assistant who is a professional, such as a CPA, to comply with the particular ethics rules. The overall need for a change is to make it clear that a lawyer simply must ensure that the supervision or interaction by the lawyer with the LLP complies with the rules of Professional Conduct because that focuses on the lawyer’s duties rather than the LLP duties.

Mr. Rothrock changed his mind about the scope issue. He explained that for clarity, we should make the changes rule by rule rather than making one change to the scope section of the Rules of Professional Conduct.

Mr. Patterson suggested that putting the term “nonlawyers and LLPs” in Rule 5.3 and then using the term “or LLP” in Rule 5.3(a) and Rule 5.3(b) creates confusion. We want to make it clear that the lawyer complies with his or her obligations under the rules, but not the LLP rules. Mr. Kirsch explained that rule 5.3 addresses a group of lawyers that Rule 5.1 does not. Mr. Kirsch believed that it is important to have the first reference to LLPs in the first sentence of Rule 5.1, but not reference it in Rule 5.1(a) or Rule 5.1(b). The objective is to ensure that the acts of the other person – whether an LLP or other person – does not interfere with the lawyer’s obligations under the Rules of Professional Conduct. Mr. Kirsch suggested that because of this, there is no need to change Rule 5.3 at all.

Mr. Rothrock asked what is the substantive difference between Rule 5.1 and 5.3? Members of the committee discussed this issue. Another member suggested that there is a substantive difference because one relates to the managerial authority of a lawyer (e.g., managing partner) while the other references obligations to supervise nonlawyers. Mr. Steinmetz suggested removing the word “assistants” from Rule 5.3 and instead simply retain the word nonlawyers. The only proposed change to Rule 5.3 would be to the title of Rule 5.3 to remove the word “assistants” and then delete the other recommended changes to the black letter Rule of 5.2.

The Committee discussed the proposed revisions to Rule 5.4. Ms. Glenn wondered about the term “non LLP employees” in Rule 5.4(a)(4). Ms. Glenn suggested changing the term to “nonlawyer employees other than an LLP.” Judge Lipinsky noted that Rule 5.4(f) specifically references “nonlawyer other than LLP” and defines it.

Mr. Rothrock commented that the proposed revisions to Rule 5.4 are significant and substantively different than the previous rules. These proposed changes are very significant. An LLP could have an ownership interest in a law firm or could potentially own their own law firm without any lawyers. Mr. Stark suggested that an LLP could not solely own a law firm. Mr. Rothrock suggested that this would be a big change.

Judge Lipinsky referenced the LLP rules and put LLP rule 5.4 up on the screen. Judge Espinosa discussed the proposed Rule 5.4 in the LLP rules. Mr. Stark noted that this proposed change to Rule 5.4 is significant, but many states have gone significantly farther. The Subcommittee did not go as far as other jurisdictions, like Arizona and Utah. The Subcommittee intended to limit the expansion of Rule 5.4 just to LLPs. This is a big change, but not nearly as big as it could have been or as other states have approved.

The intent of the proposed revisions is to allow an LLP to work independently or with a law firm. The proposed revisions to the definition of a firm in Rule 1.0 allow either approach. An LLP may share fees with a lawyer in a law firm or may have his or her own firm. But with respect to the expansion of Rule 5.4, the horse is already out of the barn given the Court’s approval of the PALS II proposal.

Judge Webb asked why is it necessary to afford LLPs the right to participate in the equity of a law firm or ownership in a law firm? Judge Lipinsky asked whether there is harm to the public if an LLP can participate in the profits of a law firm. Another member suggested that it is improper to dictate the economic terms of an LLPs participation in the law firm. The concern, initially, was that a nonlawyer would put pressure on a lawyer to do something that is inconsistent with the lawyer’s duties or the client’s interests. Judge Lipinsky noted that this same concern is not applicable to an LLP because of the limited scope of work that an LLP would be allowed to do.

Mr. Rothrock explained that this change would necessarily apply to enrolled agents or patent practitioners, who also would want a “piece of the action” in terms of getting equity for firms. If we propose revisions to Rule 5.4 to allow nonlawyer LLPs to participate in the equity or profits in a firm by being an owner, it would be hard to restrict the rule to other professionals who also want to participate in the ownership of a law firm. Judge Lipinsky asked whether the other states, Utah or Arizona, have had problems regarding this issue. Mr. Yarger explained that he

agrees whole heartedly with Mr. Rothrock because the expansion could lead to litigation funders or CPAs to participating in ownership of the firm. Mr. Yarger indicated that the current limitation to LLPs licensed in Colorado should assuage the concerns. Judge Espinosa indicated that this proposed change relates to an access to justice issue, but limits the involvement of an LLP to simply do limited family law matters as compared to the other states, that allow nonlawyers to provide legal services in broader ways such as representing criminally accused in misdemeanor matters and handling jury trials.

Judge Lipinsky noted that the judicial officers in Arizona are very enthusiastic about their expansion of the rules. The feedback received from Arizona and Utah was why is Colorado limiting their rules as compared to the other states. Judge Lipinsky explained that we are not jumping into the deep end like other states have done and we are limiting the approach to have a more conservative change than others.

The Committee discussed the proposed changes to Rule 5.5 relating to the unauthorized practice of law. Ms. Glenn wondered whether the LLP rules reference disbarment because these proposed revisions use the term disbarred. Judge Espinoza responded that the LLP rules refer to an LLP being suspended or disbarred. Ms. Glenn wondered whether the rules governing admission and regulation of an LLP use the term “bar” or “disbarred” because “bar” typically means a group of licensed lawyers. Judge Espinosa referred to the proposed Rule 206.7, which refers to the disbarment of an LLP.

The Committee looked at the proposed registration and disciplinary rules for LLPs. Those proposed registration and disciplinary rules reference an LLP being admitted to the bar and being disbarred as a form of discipline. New definition 9 of the proposed rules, Rule 250.1, specifically reference disbarment for an LLP. Thus, using the term “disbar” in the proposed revisions to Rule 5.5 would be consistent with the proposed LLP rules. The Committee discussed the cross-referencing between the two sets of Rules.

Mr. Rothrock suggested that Rule 3-1 in subsection (c) in the LLP discipline rules should instead be Rule 4 and should track what a lawyer can do in employing a suspended or disbarred lawyer. The language should be parallel to the same rule for lawyers. Mr. Stark suggested that we may not need this rule at all. Mr. Rothrock noted that there is a difference between what subsection (c) says and what the intention is in Rule 5.1 of the Rules of Professional Conduct. The proposal contained in Rule 3-1 may be redundant of what already exists.

Judge Espinosa had to leave, so he suggested another Subcommittee member go through the remainder of the proposed changes and then Judge Espinosa can coordinate with the member to ensure that the proposed changes are made. Judge Lipinsky noted that this is too important to rush. Judge Espinosa and Mr. Stark will coordinate, integrate the changes discussed, and then the entire proposal will be reviewed and voted on during the next meeting.

Mr. Stark suggested that the purpose behind Rule 3-1 would be to address the duties an LLP would have to notify clients and tribunals in the event of suspension or disbarment. The requirements would essentially correlate to the duties a suspended or disbarred lawyer would have upon the imposition of discipline.

Mr. Stark discussed proposed revisions to Rule 7.3. Mr. Patterson wondered why we suggested a new subsection rather than just referencing LLPs earlier in the rule. The Committee discussed the issue and decided simply to refer to LLPs instead of licensed legal profession in Rule 7.3(b)(4).

The Committee discussed the proposed revisions to Rule 8.4(a). Mr. Rackham suggested that the proposed revision is unnecessary because the Rule already prevents a lawyer from inducing another – whether an LLP or other person – to induce a violation of the Rules of Professional Conduct. The purpose of this rule is to prevent a lawyer from using an agent to do what the lawyer cannot do. Members of the Committee believed that the concern about an LLP acting as an agent of the lawyer to do something the lawyer cannot do is addressed in Rule 5.1 and Rule 5.3. Other members had a concern about LLPs who are not in the same firm as the lawyer and therefore Rule 5.1 and Rule 5.3 would not apply. Mr. Funk disagreed. She explained that Rule 5.3 does not apply to an employment or firm relationship, but instead applies to lawyers associating with other nonlawyers.

Judge Lipinsky noted that the proposed revisions to Rule 8.4(a) would actually limit the scope of the rule. He suggested adding another subsection that would address the obligation of a lawyer to avoid inducing an LLP specifically to violate the LLPs rule. The Committee suggested that adding another section would be complicated because of the multiple subsections. Ms. Cohen suggested it would be better to break Rule 8.4(a) down into Rule 8.4(a)(1) and 8.4(a)(2).

The Committee took a 10-minute break. (Marcus Squarrell took the minutes for the remainder of the Committee meeting because Mr. Rackham had a conflict).

6. REPORT BY RULE 1.2 SUBCOMMITTEE. The subcommittee will expand Comment [14] to Rule 4.2 to address the Colorado Natural Medicine Act. The subcommittee will submit a written report in July. Subject matter experts will attend the July meeting. Judge Lipinsky asked for the names and contact information for the experts. He will invite them to the July meeting.

7. REPRODUCTIVE HEALTH SUBCOMMITTEE. Nancy Cohen explained the Subcommittee’s report and proposed comment. The Subcommittee met and revised the draft comment based on comments at the last Committee meeting. The second sentence of the proposed comment was revised to suggest the lawyer advise the client “that the conduct may be unlawful in another relevant jurisdiction...” The revision is intended to avoid placing the burden on lawyers to know the laws of other jurisdictions.

A member mentioned that a wrongful death action has been filed in Texas for providing information on medication to terminate a pregnancy. Judge Webb suggested removing the comma after “jurisdiction” in the second sentence. Alec Rothrock questioned the appropriateness of tracking the language of Comment [14] because to do so would impose a “reasonably believes” standard.

Fred Yarger questioned whether the comment is necessary because the freedom to advise a client is as broad as permitted by Rule 1.2(d). Dave Stark asked whether the comment was

premature given the fluidity of the law and pending legislation. Nancy pointed out that lawyers are uniquely at risk because every other profession is protected by the Governor's executive order.

Judge Webb raised a concern that although the focus of the first sentence of the comment is on Colorado, the comment requires the lawyer to be familiar with the laws of other jurisdictions. The Committee discussed whether it would be possible to consult with lawyers from other states to determine whether conduct in Colorado may be prohibited in the other states. Members discussed whether Texas law, for example, would make it unlawful for a lawyer in Texas to give advice on such questions. Several members expressed concern about the possibility that the laws of a relevant jurisdiction may prevent the client from obtaining advice about the consequences of the client's conduct in that jurisdiction. Judge Webb said he would send Nancy alternative language addressing the "other jurisdiction" issue. After a very interesting discussion, Judge Lipinsky continued the discussion to the July meeting.

8. REPORT ON THE RULE 1.5(E) SUBCOMMITTEE. Mr. Rothrock advised that the Subcommittee will submit a report and recommended revisions to the Rules for consideration at the July meeting.

9. NEW BUSINESS. Judge Lipinsky announced that Tuck Young and Judge Polidori were leaving the Committee at the end of their terms. Judge Lipinsky thanked Mr. Young and Judge Polidori for their contributions to the Committee. Judge Lipinsky acknowledged the value of their unique perspectives: Mr. Young's insights into the practice of law outside the Denver bubble and Judge Polidori's experience on the bench. Judge Espinosa asked for volunteers to work on the advisory committee for LLPs.

10. ADJOURNMENT. A motion to adjourn was made. The meeting adjourned at 12:10 p.m. The next meeting of the Committee will be on July 28, 2023 at 9 a.m.

Respectfully submitted,

Troy R. Rackham, Secretary