

COLORADO SUPREME COURT

STANDING COMMITTEE ON THE RULES OF PROFESSIONAL CONDUCT

Approved Minutes of Meeting of the Full Committee  
On March 5, 2021  
Fifty-Ninth Meeting of the Full Committee  
Virtual Meeting in Response to Covid-19 Restrictions

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The fifty-ninth meeting of the Colorado Supreme Court Standing Committee on the Rules of Professional Conduct was convened at 9:00 AM on Friday, March 5, 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, the committee's new liaison justice, Justice Maria Berkenkotter, and Justice Monica Márquez, were Nancy L. Cohen, Cynthia F. Covell, Thomas E. Downey, Jr., Judge Adam J. Espinosa, Margaret Funk, Judge Lino S. Lipinsky de Orlov, Judge 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, Eli Wald, Jennifer J. Wallace, Lisa M. Wayne, Judge John R. Webb, Frederick R. Yarger, Jessica E. Yates and Tuck Young. Tyrone Glover and April Jones were excused from attendance. Boston H. Stanton, Jr. was absent. John M. Lebsack, Katayoun Donnelly and Erika Holmes attended the meeting as guests.

1. Meeting Materials: Minutes of January 8, 2021 Meeting

The Chair had provided the submitted minutes of the fifty-eighth meeting of the committee held on January 8, 2021 to the members prior to the meeting. The minutes were approved.

2. Agenda item 5.a. HB\_\_, Concerning Measures to Enhance Prosecutor Accountability

Member Yates requested the Full Committee to form a subcommittee to study whether there should be any recommended changes to the Rules of Professional Conduct and/or their comments, to address recently raised concerns about a prosecutor's obligations to disclose exculpatory evidence pursuant to RPC 3.8(d) in light of proposed legislation entitled "Concerning Measures To Enhance Prosecutor Accountability." Member Yates also briefly discussed the Colorado Supreme Court decision of *In re Attorney C*, 47 P.3d 1167, which she thought might be the motivation behind the proposed legislative changes.

A general discussion was held regarding the Committee's prior practice of commenting on proposed legislation and concerns about the timing of any subcommittee work in relation to the timing of the legislative process. The Chair indicated she could not recall a similar request coming before the committee. The Chair questioned whether it was appropriate for the

committee to comment on proposed legislation in the political process in view of its role to serve the Colorado Supreme Court in reviewing and proposing rules of professional conduct. Several members expressed agreement with the comments of the Chair, noting the separate governmental functions of the legislative and judicial branches, and suggested that the committee allow the legislative process to take its course and then, if necessary, address any potential changes necessary because of any enacted legislation.

Several members spoke in favor of forming a subcommittee to address issues relating to prosecutorial misconduct. One member offered that in her experience as a criminal defense lawyer, it was not uncommon for prosecutors to withhold exculpatory evidence. The member indicated that the criminal justice system needs several reforms, and that formation of a subcommittee would be a proactive response by the committee. Other members supported the forming of a subcommittee to determine if the existing provisions of RPC 3.8 are adequate and concurred with the idea of getting out in front of the issue, but did so with the caveat that the subcommittee and full committee should not engage in any lobbying related to the proposed legislation.

After hearing the comments of various members of the committee, Justice Márquez noted that members of the Colorado Supreme Court support the formation of a subcommittee to determine the adequacy of the language of RPC 3.8 and whether changes are needed.

Following some brief additional comments, the Chair formed a subcommittee to review the provisions of RPC 3.8, appointed member Yates to chair the subcommittee and requested members to volunteer to serve. A member suggested that invitations be made to members of the District Attorney's Association and the criminal defense bar for service on the subcommittee.

3. Agenda item 3. Report from the Rule 1.5 (b) "Scope of Representation" Subcommittee (Chair, Noah Patterson)

Subcommittee chair, Noah Patterson, reviewed the action of his subcommittee since the January 8, 2021 meeting and the meeting materials contained at pages 005-010.

With respect to the proposed changes to Rule 1.5(b), Patterson pointed out that the subcommittee made minor changes to the version of the rule approved by the committee at the January 8, 2021 meeting, by rearranging some language to a position at the beginning of the rule and by adding the word "the" before the word "representation" in subparagraph (b)(2). The committee agreed with the slight modifications proposed by the subcommittee.

Patterson then led a discussion of the proposed changes to Comment [2] to the rule. He noted that the subcommittee's overall goal was to make the comment clearer. He then reviewed the proposed language contained in the 4 paragraphs of Comment [2] and, the subcommittee's reasoning for its proposed language.

Members suggested moving some language and proposed that the word "new" be added before the word "representation" in the first sentence of the third paragraph. There was a brief discussion regarding the possible addition of the word "material" before the word "changes" in

the first sentence of the fourth paragraph, but it was ultimately agreed that such change was not necessary because the concept of materiality is already built into the rule. Several members also noted that the writing required when there are changes in the basis or rate of the fee or expenses can be satisfied by sending a billing statement reflecting those changes.

At the conclusion of the discussion on the Comment, it was agreed to add the word “new” before the word “representation” in the first sentence of the third paragraph of the proposed Comment and to adopt the remainder of the proposed Comment language. A motion to approve the proposed changes to RPC 1.5(b) and the proposed changes to Comment [2], including the addition of the word “new” in the first sentence of the third paragraph of the comment, was made and approved by the committee.

4. Agenda item 4. Proposed Housekeeping Amendments to Rule 1.1, comment [6], and Rule 5.5(a)(1) and comment [1]

The Chair reviewed her letter of January 29, 2021 to the Colorado Supreme Court proposing housekeeping amendments to Rule 1.1, Comment [6] and Rule 5.5(a)(1) and Comment [1] as set forth in pages 011 through 016 of the meeting materials.

5. Agenda item 5.b. Recommendations to repeal Rule 1.5(e)

Member Rothrock reviewed his letter to the Chair of March 2, 2021, requesting that the committee consider recommending to the Colorado Supreme Court that RPC 1.5(e) be deleted. Rothrock’s letter and supporting positions for the requested action are contained at pages 045-047 of the meeting materials. Rothrock commented on what he believed to be the overbroad provisions of Rule 1.5(e) and its inconsistency with RPC 7.2(f). He suggested that a subcommittee be formed to review both rules and to determine whether the committee should recommend that RPC 1.5(e) be deleted.

After a brief discussion, the Chair formed a subcommittee to address the issues. Rothrock agreed to chair the subcommittee.

6. Administrative matters

Dates for the next meeting were discussed. The Chair advised she would select the date and inform the members via email.

7. Adjournment. The meeting was adjourned at 10:18 a.m.

Respectfully submitted,  
Thomas E. Downey, Jr., Secretary