COLORADO SUPREME COURT

STANDING COMMITTEE ON THE RULES OF PROFESSIONAL CONDUCT

Approved Minutes of Meeting of the Full Committee
On
April 22, 2022
Sixty- Third Meeting of the Full Committee
Virtual meeting in Response to Covid-19 Restrictions

The sixty-third meeting of the Colorado Supreme Court Standing Committee on the Rules of Professional Conduct was convened at 9:00 AM on Friday, April 22, 2022, by Chair Judge Lino Lipinsky de Orlov. The meeting was conducted virtually.

Present at the meeting, in addition to Judge Lipinsky and liaison Justices Monica Márquez and Maria Berkenkotter were Cynthia Covell, Thomas E. Downey, Jr., Judge Adam Espinosa, Margaret B. Funk, Marcy Glenn, Erika Holmes, April Jones, Matthew Kirsch, Marianne Luu-Chen, Julia Martinez, Cecil E. Morris, Jr., Judge Ruthanne N. Polidori, Troy Rackham, Henry Richard Reeve, Alexander R. Rothrock, Marcus L. Squarrell, David W. Stark, Jamie S. Sudler, III, Judge William R. Lucero, Robert W. Steinmetz, Eli Wald**,** Jennifer J. Wallace, Judge John R. Webb, Jessica E. Yates, and E. Tuck Young. Nancy L. Cohen, A. Tyrone Glover, Noah C. Patterson, Lisa M. Wayne and Frederick R. Yarger were excused from attendance. Special guests in attendance were Daniel Smith, National Association of Patent Practitioners Advocacy Committee Chair; Christopher M. Turoski, President, National Association of Patent Practitioners; Molly Kocialski, United States Patent and Trademark Office; and Jonathan D. Asher, Executive Director, Colorado Legal Services.

1. Call to Order.

The Chair called the meeting to Order at 9:04.

2. **Approval of Minutes of January 28, 2022**.

The Chair had provided the submitted minutes of the sixty-second meeting of the Committee held on January 28, 2022, to the members prior to the meeting. A motion to approve the minutes was made and seconded. The motion to approve the minutes carried by a unanimous vote of the Committee.

3. Technical Correction to comment [3] to Rule 1.16A.

Item 3A – Technical correction to comment [3] to RPC 1.16A. Mr. Rothrock presented. Mr. Rothrock explained that there is a reference in comment [3] that is outdated. The comment currently references "Rule 4, Chapter 23.3 C.R.C.P. (six-year retention of contingent fee agreement and proof of mailing following completion or settlement of the

case)." The reference is outdated because RPC 1.5 was changed significantly and now contains the rules on contingent fees. Mr. Rothrock proposed a change to the comment that would reference RPC 1.5(c)(3), which explains that "[t]he lawyer shall retain a copy of the contingent fee agreement for seven years after the final resolution of the case, or the termination of the lawyer's services, whichever first occurs." A motion to approve was made, which was seconded. No further discussion. The motion carried unanimously.

4. **Report of the RPC 1.4 Subcommittee**.

Jessica Yates and David Stark presented. Ms. Yates identified the members of the subcommittee who worked on the changes and thanked them for their work. The goal of the subcommittee was to work on changes to the rule to incentivize disclosure of the absence of malpractice insurance. Dave Stark noted that approximately 2,100 Colorado attorneys do not carry professional liability insurance. He discussed the different approaches other states use that require disclosure of insurance. A member asked if other states have record retention requirements like what is in the proposed Rule. Ms. Yates explained that the record retention language comes from Pennsylvania's rule, and perhaps other states contain the same language.

A member asked whether there was coordination between C.R.C.P. 265 and the proposed changes to Colo. RPC 1.5. The member also asked whether states are requiring disclosure to the bar and disclosure to the client, because it used to be that states would require one or the other, but not both. A member raised another issue about the block quote contained in the proposed change to Colo. RPC 1.4 comment [9] because the block quote seems structurally inconsistent with how other comments are drafted. Finally, a member of the committee suggested that comment [19] of Colo. RPC 1.5 was so abstract that it was not useful.

Ms. Yates responded that the subcommittee had coordinated with C.R.C.P. 265 and used the same aggregate limits as C.R.C.P. 265. Mr. Stark explained that the subcommittee looked at C.R.C.P. 265, and it has more information than could be coordinated with Colo. RPC 1.4. The subcommittee believed that C.R.C.P. 265 may need to be amended to address nuances such as eroding limits, effect of claims on insurance, etc. The subcommittee elected to keep the proposed changes to RPC 1.4 to keep the issue simple, ensure it is raised with the clients, and then incentivize clients to talk to lawyers about insurance once the information is disclosed.

Regarding the block quote in comment [9] of RPC 1.4, as it relates to the safe harbor language, the subcommittee had not given much consideration to the formatting of the quote. The subcommittee was willing to consider revising the structure to eliminate the block quote and keep the substance.

Ms. Yates commented that proposed comment [19] to RPC 1.5 was just an effort by the subcommittee to cross-reference other rules. The subcommittee would review the matter and consider removal of the proposed draft comment [19].

A member provided historical context to the discussion, noting that about a decade ago the Committee had examined the issue and found that states either required an indirect disclosure requirement (e.g., disclosing to the bar) or a direct disclosure to the client, but not both. At that time, the Colorado Supreme Court elected to adopt the indirect disclosure concept by requiring lawyers to identify whether they have insurance at the time of annual registration.

A discussion on the need to advise clients at the first retention and then advise clients again when lawyers fall out of coverage was held. Making this revision would incentivize lawyers to communicate material information about changes in insurance coverage during the retention. Ms. Yates explained that the subcommittee discussed this issue at length. It discussed how the issue would work as a practical matter. For example, if the lawyer had insurance that was in place at the time of retention, but lapsed for a few months, does the lawyer have an obligation to communicate the lapse to the client? Another big complicating factor is that most liability insurance is written on a "claims made" basis, which means that the coverage *during* the representation is less meaningful than insurance *after* the representation when a claim is made. Communicating to a client that insurance lapsed during the representation creates confusion because the coverage would not be triggered until much later when a claim is made. Because these complicated nuances, which will change over time, would make a disclosure very complicated, the subcommittee opted for a more simple approach.

Mr. Stark addressed the issue of direct versus indirect nondisclosure. He explained that there is a good reason to keep both requirements in place because the indirect disclosure (disclosure to OARC) allows the bar to track how many lawyers have insurance, which is important. The subcommittee also decided, however, that the indirect disclosure does not assist the client very much.

Another member agreed with having both direct and indirect disclosures but suggested that the direct disclosure requirement could have an adverse effect, which only targets less affluent lawyers and lawyers in solo practices rather than lawyers in medium-sized or large law firms.

Another member explained that without the indirect disclosure, a prospective client who is researching a potential lawyer would not have access to information about the lawyer's lack of insurance coverage. Additionally, with respect to lawyers who fall out of coverage, they may not know that they fell out of coverage. As a result, if the committee changes the language to require disclosure of circumstances where lawyers fall out of coverage, there should be a scienter requirement.

Another member expressed concerns about proposed comment [19] of RPC 1.5. The member's concern was that comment [19] was unnecessary and may be incorrect. The language explains that "[t]he provisions of other Rules may require a lawyer to include additional terms or statements in communications concerning fees. See Rule 1.4." That is inaccurate because Rule 1.5 addresses the requirements of what a lawyer must

communicate about fees and expenses. It does not require the communication to be together.

A member suggested that the structure of the disclosure requirement could be a problem because it could be misleading to a client because of the uniqueness of insurance coverage (claims made, eroding limits, etc.). Those unique features could be misleading to a client because it may give the false impression that the existence of insurance coverage at the time of retention means that insurance coverage will exist at the time a claim is made.

The subcommittee discussed this issue. It was a risk-benefit analysis. While there is a risk that requiring disclosure to the client can create false impressions or erroneous assumptions on the part of the client, requiring the disclosure does not necessarily add to the confusion because most clients assume that the lawyer has malpractice insurance. The disclosure at least helps inform the client at the outset that there may be additional risk. It also fosters a discussion between the client and the lawyer about the absence of insurance coverage if that information is disclosed. As a result, the benefits of the proposed rule net out in a positive way, even if there are some risks in requiring the disclosure.

A member suggested that the existing indirect disclosure enables a prospective client or a client to determine from the website whether the lawyer has coverage. The member suggested that a client or prospective client may become confused with a direct disclosure if the client or prospective client had already evaluated coverage by consulting the website.

A member raised an issue about what data the subcommittee considered in terms of increases in coverage or increases in premium. Ms. Yates explained that there is not a lot of reliable and consistent data on this topic, but the subcommittee did not dig into the data substantially.

A member of the subcommittee reported that he initially was resistant to the direct disclosure rule. He came around to support these proposed changes because the data shows clearly that clients believe that lawyers always have malpractice insurance. Because they assume insurance coverage, clients should be advised when a lawyer does not have coverage. If the supreme court does not mandate malpractice insurance, this is a good alternative. The members of the subcommittee did not believe it was advisable to propose a rule mandating that Colorado lawyers carry malpractice insurance because it could potentially exclude many valuable members of the Bar and it did not believe there was consensus for such action.

A member suggested that, in the absence of a mandate to require malpractice insurance, the proposed change is good because it at least requires a disclosure to the client and could foster a discussion between the lawyer and the client. A member suggested that it is a bit odd to have a disclosure requirement in RPC 1.4 instead of 1.5 or another rule because RPC 1.4(b) addresses the obligation to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." That relates to issues after the representation begins. It may not be germane to include requirements in

RPC 1.4 relating to material information to be provided to the prospective before the representation begins.

Members of the subcommittee expressed concern about how much information is useful to a client and how much may be confusing. They noted that insurance terms are complicated and often difficult to understand, and that clients generally do not like long and complicated engagement letters.

Mr. Stark explained that C.R.C.P. 265 avoids joint and several liability between law partners so long as minimum coverage exist. Put another way, C.R.C.P. 265 provides that a partner in a law firm will not be liable for his partner's professional negligence so long as the firm carries sufficient insurance coverage. That is one method the Court has adopted to incentivize insurance. Mr. Stark also explained that the coverage identified in this disclosure rule uses the current minimum coverage limits. The subcommittee used those numbers to ensure that lawyers could effectively and appropriately have insurance coverage without requiring unrealistic insurance.

The Chair expressed appreciation for the informed and robust discussion. The Chair proposed that the subcommittee review the minutes, consider the comments made on the proposed changes, and then come back during the next meeting to potentially make revisions and for a possible vote on the proposal.

5. **Report on Patent Practitioner Harmonization**

Dan Smith presented. Mr. Smith's letter to Judge Lipinsky of April 14, 2022 requesting the Committee's assistance is contained in Attachment 3 to the meeting agenda. His goal is to have the Committee harmonize the Colorado Rules of Professional Conduct with the Rules of Professional Conduct issued by the United States Patent and Trademark Office ("USPTO rules)". The USPTO rules are based on the ABA model rules, but the USPTO has changed the word "lawyer" to "practitioner." It did this because the term "practitioners" includes patent attorneys, trademark attorneys, and patent agents. A patent agent is a person who has taken the patent bar and been approved by the USPTO to represent clients before the USPTO. But a patent agent is not necessarily a lawyer. A patent agent is not licensed by a state to practice law.

Molly Kocialski from the Denver office of the USPTO discussed patent agents and their required backgrounds. Mr. Smith indicated that a subcommittee may need to be formed to look at the issue and recommend precise language.

A member raised a question about what the National Association of Patent Practitioners ("NAPP") is doing in other states. NAPP is reaching out to other states, but Colorado is the first. NAPP is reaching out to the ABA to recommend similar changes to the Model Rules. NAPP has a concern that the ABA process is very slow and cumbersome, so it wanted to take a parallel approach of addressing the issue with individual states and the ABA at the same time.

Ms. Kocialski explained that, while the rules of professional conduct in the District of Columbia, Virginia and Maryland have been harmonized with the USPTO rules, the rules of professional conduct in many other jurisdictions, including Colorado, have not, and, as a result, patent practitioners have narrower opportunities in law firms or in house positions because of the limitations imposed by the rules of professional conduct. She discussed the historical utilization of patent agents in patent and trademark matters and how that practice provides a more economical alternative to hiring an attorney for clients in need of those services.

A member suggested that this issue merits a subcommittee, but the issue merits a larger discussion of whether it should encompass other types of professionals. The Supreme Court and the Committee are currently considering licensed limited legal technicians, who are nonlawyers but could handle uncomplicated family matters. The member suggested that issues related to patent agents be considered together with the paraprofessional licensing under consideration. Mr. Smith expressed concern about expanding the discussion to include paraprofessionals because doing so would inject delay into the process and because inclusion of paraprofessionals raised additional issues because they are not licensed, whereas patent agents are licensed. Mr. Smith viewed the patent agent and paraprofessional issues as being separate and distinct, requiring separate treatment. The member responded that the issues are not materially different because the Colorado proposal would allow limited licensed paraprofessionals to be licensed and to practice law in a limited scope.

A member also raised a question about RPC 5.4 generally. Arizona recently dispensed with RPC 5.4. Utah revised RPC 5.4 to allow nonlawyers to be involved with law firm ownership. Mr. Smith advised he was aware of those interesting developments but stated he did not view them as resolving the specific issues of patent agents.

A member explained that, if RPC 5.4 is amended, then a patent agent could share all fees in a law firm even though the patent agent is not a lawyer. Mr. Smith explained that the USPTO licenses patent agents, which enables them to earn and share fees. The member suggested that revising RPC 5.4 would not really be harmonizing existing rules with the USPTO rules, but instead would be changing the status quo because it would allow other conduct besides just sharing fees.

Mr. Smith and Ms. Kocialski both explained that 25% of the total patent bars are patent practitioners. Without changing the rules, those people will have impairments in the law firm context because they cannot share origination credit or fees, which limits their opportunities.

A member also raised the issue about other circumstances, such as enrolled agents who provide tax advice and tax representation. Those agents are allowed by federal law to provide legal services even though the agents are not lawyers. IRS circular 230 allows nonlawyers to be enrolled agents. Lawyers who have shared fees with enrolled agents have been subject to discipline because of gaps in the rule. As a result, the member noted that he would be receptive to the idea of revising the rule to accommodate enrolled agents,

patent agents, and individuals practicing before the SEC and the Department of Veterans Affairs.

A member wondered if it would be better to just leave this to the ABA instead of being the first state to revise the rule. Mr. Smith responded that, while waiting for the ABA to act is an option, the stress on the patent and trademark practice and the need for additional patent agents required faster action. Ms. Kocialski described the urgency issue as a "crisis," noting that the biggest complaint she hears from inventors and businesses is the cost necessary to protect their inventions. She said that, because patent agents are much more cost-effective than patent lawyers, the use of patent agents makes the intellectual property system more accessible to clients. She said that disciplinary data from the USPTO indicates that patent agents are less likely to be disciplined than patent lawyers.

The Chair formed a subcommittee to consider Ms. Smith's proposal. Marcus Squarrel, Dan Smith, Rob Steinmetz, Molly Kocialski, Eli Wald, Alec Rothrock, and Jessica Yates all volunteered to participate in the subcommittee. Other members desiring to participate were encouraged to advise the Chair of their interest.

6. **Report on proposed amendment to RPC 1.8(e).**

Jon Asher shared with the committee the subcommittee's proposal for revisions to RPC 1.8(e). Mr. Asher thanked the subcommittee members for their respective participation on the subcommittee. Mr. Asher also thanked the committee for welcoming him and providing robust comments on the subcommittee's proposal to Mr. Asher and the subcommittee. Mr. Asher said he believed that the proposed language before the committee is significantly clearer and simpler than the ABA model rule. The subcommittee resolved all disputes about the proposed language, except for RPC 1.8(e)(3)(iii) as it relates to not publicizing or advertising gifts to prospective clients. Mr. Asher explained that the issue related to the word "prospective" because sometimes advertising is to clients rather than just to prospective clients. The member who raised this concern indicated that he is fine with the term "prospective."

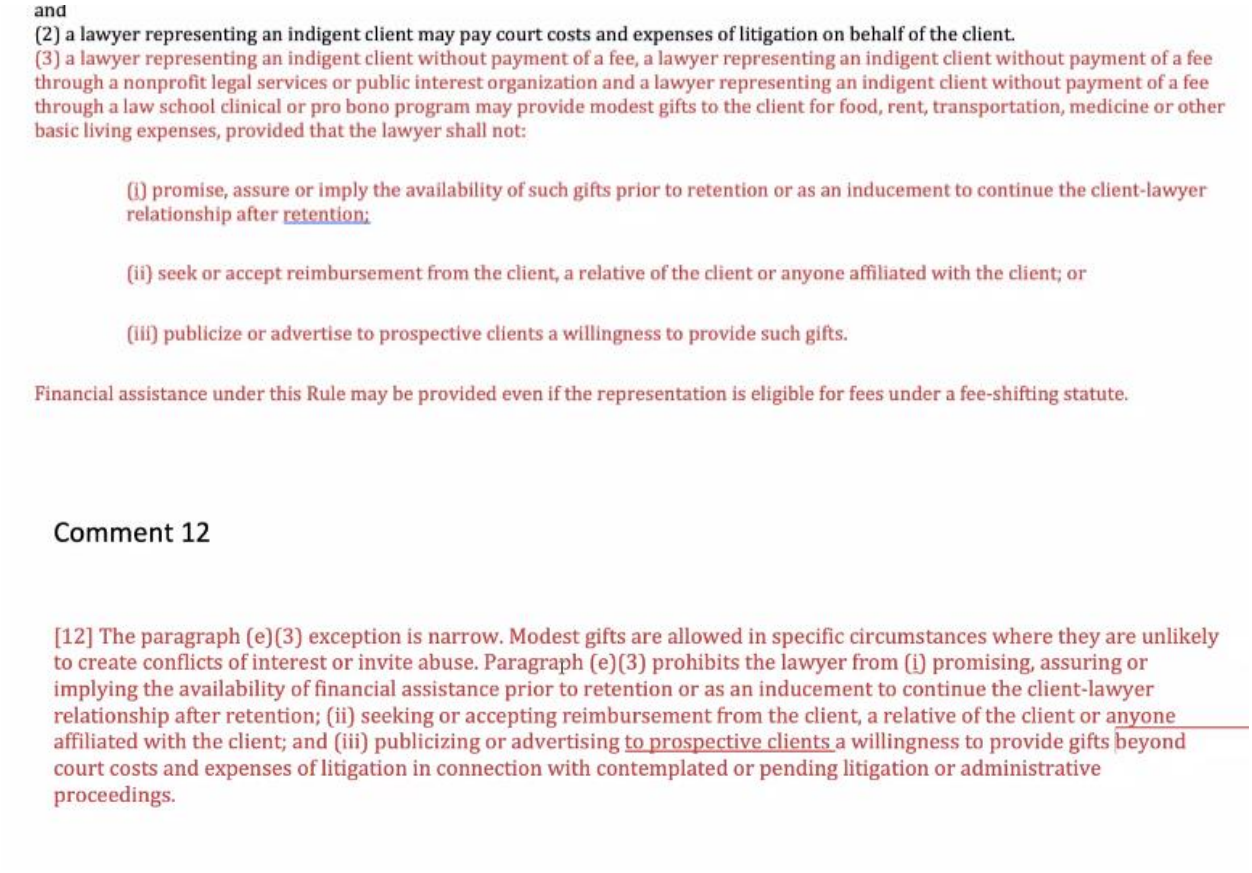
A member explained that the phrasing is confusing because it is not clear whether a lawyer may not advertise or publicize to prospective clients or whether a lawyer may not provide gifts to prospective clients. The member suggested a friendly amendment to RPC 1.8(e)(3)(iii) to say, "provided that the lawyer may not: . . . (iii) publicize or advertise to prospective clients a willingness to provide such gifts."

Members discussed whether to include the word "prospective" at all. Some members indicated that the language in RPC 1.8(e)(3)(iii) may be unnecessary altogether.

A member raised a concern about the structure of RPC 1.8(e). RPC 1.8(e) uses the term "shall not provide" and then RPC 1.8(e)(1)-(3) provides exceptions to that, and then RPC 1.8(e)(3)(iii) provides an exception to the exception. That can be confusing. Additionally, use of the term "may not" in RPC 1.8(e)(3)(iii) differs from "shall not." So RPC 1.8(e)(3) should say "shall not."

A motion was made to approve the proposed revisions to RPC 1.8(e) with the friendly amendments.

The proposal with the friendly amendment language is as follows:



and
(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.
(3) a lawyer representing an indigent client without payment of a fee, a lawyer representing an indigent client without payment of a fee through a nonprofit legal services or public interest organization and a lawyer representing an indigent client without payment of a fee through a law school clinical or pro bono program may provide modest gifts to the client for food, rent, transportation, medicine or other basic living expenses, provided that the lawyer shall not:

(i) promise, assure or imply the availability of such gifts prior to retention or as an inducement to continue the client-lawyer relationship after retention;

(ii) seek or accept reimbursement from the client, a relative of the client or anyone affiliated with the client; or

(iii) publicize or advertise to prospective clients a willingness to provide such gifts.

Financial assistance under this Rule may be provided even if the representation is eligible for fees under a fee-shifting statute.

Comment 12

[12] The paragraph (e)(3) exception is narrow. Modest gifts are allowed in specific circumstances where they are unlikely to create conflicts of interest or invite abuse. Paragraph (e)(3) prohibits the lawyer from (i) promising, assuring or implying the availability of financial assistance prior to retention or as an inducement to continue the client-lawyer relationship after retention; (ii) seeking or accepting reimbursement from the client, a relative of the client or anyone affiliated with the client; and (iii) publicizing or advertising to prospective clients a willingness to provide gifts beyond court costs and expenses of litigation in connection with contemplated or pending litigation or administrative proceedings.

The motion was seconded. The committee approved the motion unanimously.

7. **PALS Committee**

Judge Espinoza spoke. His memorandum regarding the status of the licensed legal paraprofessional initiative (known as "PALS") was included with the materials for this meeting. Judge Espinoza identified and thanked those members who are participating in the PALS committee and summarized his memorandum.

8. Adjournment.

A motion was made and seconded to adjourn the meeting. The meeting was adjourned at 11:36 A.M.

Respectfully submitted,

Troy Rackham
Thomas E. Downey, Jr., Secretary