

COLORADO SUPREME COURT

STANDING COMMITTEE ON THE RULES OF PROFESSIONAL CONDUCT

Submitted Minutes of Meeting of the Full Committee
On September 25, 2020
Fifty-Seventh Meeting of the Full Committee
Virtual Meeting in Response to Covid-19 Restrictions

The fifty-seventh meeting of the Colorado Supreme Court Standing Committee on the Rules of Professional Conduct was convened at 9:00 AM on Friday, September 25, 2020, 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 liaison Justices Monica M. Márquez and William W. Hood, III, were Judge Michael H. Berger, Nancy L. Cohen, Cynthia Covell, Thomas E. Downey, Jr., Judge Adam J. Espinosa, Margaret Funk, April Jones, Judge Lino S. Lipinsky de Orlov, Judge William R. Lucero, Marianne Luu-Chen, Julia Martinez, Noah C. Patterson, Henry Richard Reeve, Alexander R. Rothrock, Marcus L. Squarrell, David W. Stark, Jamie S. Sudler, III, Eli Wald, Jennifer Wallace, Lisa A. Wayne, Judge John R. Webb, Jessica E. Yates and Tuck Young. Excused from attendance were Judge Ruthanne N. Polidori and Frederick R. Yarger. Katherine Michaels attended the meeting in place of excused Supreme Court Staff Attorney Jennifer J. Wallace. Absent were Tyrone Glover, Cecil E. Morris, Jr. and Boston H. Stanton, Jr. John M. Lebsack, Katayoun A. Donnelly, and Matthew Kirsch attended the meeting as guests.

1. Meeting Materials: Minutes of April 3, 2020 Meeting

The Chair had provided the submitted minutes of the fifty-sixth meeting of the committee held on April 3, 2020 to the members prior to the meeting. The minutes of the fifty-sixth meeting of the Full Committee held on April 3, 2020 were approved.

2. Report on Adoption of Proposed Advertising and Contingent Fee Amendments
(Subcommittee Chairs Eli Wald and Alec Rothrock)

Professor Eli Wald, Chair of the ABA Advertising Amendments Subcommittee, reported that on September 10, 2020, the Colorado Supreme Court adopted the Full Committee's recommended amendments to Rule 7.1 through 7.5, effective immediately.

Alec Rothrock, Chair of the Contingent Fee Subcommittee, reported that the Colorado Supreme Court had set a hearing to consider the Full Committee's recommended amendments to the rules governing contingency fees. He further reported that no public comments were received, and that the Supreme Court had canceled the public hearing and had taken the matter

under advisement. Justice Márquez added that the Supreme Court would reach out to the Full Committee if it had additional questions.

3. Report from Diversity Subcommittee (Subcommittee Chair, Judge Adam J. Espinosa)

The Diversity Subcommittee's Chair, Judge Espinosa, provided a brief report on the subcommittee's activities to date, including reaching out to the various specialty bar organizations to determine interest and identification of potential candidates for membership on the Full Committee. Judge Espinosa reported that the subcommittee's activities are ongoing.

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

The report of the Rule 1.5(b) Subcommittee dated September 16, 2020 was presented at pages 008-061 of the meeting materials and through the report of its Chair, Noah Patterson. Mr. Patterson thanked the members of the subcommittee and provided an overview of the subcommittee's report addressing the proposed changes to Rule 1.5(b) and its comment. Several subcommittee members offered brief comments regarding the proposed changes. One member suggested that the proposed comment was an improvement over that of the model rule because it was more helpful and less confusing.

Several members expressed agreement with the proposed changes to the rule but expressed concern that the language "... except when the lawyer will charge a regularly represented client on the same basis or rate" was confusing and unclear. Another member commented on the proposed amendments to the comment, inquiring whether the requirement of communicating to the client any change in the scope, fee and expenses could be satisfied by language in the original engagement letter. Several members commented on existing practices of attorneys and law firms to include language in their engagement letters advising the client that fees are adjusted annually effective January 1 of each year, along with the practice that actual communication of any such fees changes was provided by the delivery of new invoices.

There was discussion of the "...on the same basis or rate" and "... scope of the representation..." language in the proposed rule and review of the subcommittee's consideration of the "or" versus "and" and related issues as discussed in the second paragraph of page 7 of the Subcommittee report (meeting materials page 014).

There was discussion of the policy considerations of attempting to conform the language of the Colorado Rules to the language of the Model Rules in order to provide uniformity and to draw on other states' interpretations as an aid in interpreting the corresponding Colorado Rules.

A member suggested that the comment should reference Rules 1.2 and 1.4 and should address the communication and informed consent provisions of those rules.

After additional discussion of the proposed amendments, Chairman Glenn suggested that the matter be referred back to the subcommittee for additional consideration of the language of both the proposed rule and comment. The subcommittee was asked to conduct further

investigation, based on the comments of the members of the Full Committee, on the following issues:

1. Additional consideration of the “scope of the representation” and “... except when the lawyer will charge a regularly represented client on the same basis or rate” language of the proposed rule, including the use of “and” versus “or”.

2. Additional consideration of the language of the proposed comment in light of any changes to the proposed rule and to address the “scope of the representation” language and Rule 1.2 and Rule 1.4 issues raised at the meeting.

5. New Business

A. ABA Model Rule 1.8(e) Amendment

Chairman Glenn reported on the adopted amendments to Model Rule 1.8(e), which are part of the meeting materials at pages 062-063. There was a brief discussion of the amendments. The Full Committee did not believe that the revisions warrant further consideration at this time and voted against the formation of a subcommittee.

B. Potential Proposed Amendments to Rule 6.1

Member Cynthia Covell reported on activities of a subcommittee of the Colorado Bar Association Ethics Committee related to potential proposed amendments to Rule 6.1 regarding *pro bono* representation. The Ethics Committee subcommittee is investigating whether some of the language of the rule is vague and overly broad, making attorney compliance difficult to determine. She briefly described an article published by Judge Daniel Taubman (“Has the Time Come to Revise Our Pro Bono Rules?”, 97 University of Denver Law Review 395 (2020)), which addresses the issue. Ms. Covell advised that she would keep the Full Committee apprised of further activities of the Ethics Committee subcommittee.

6. Administrative Matters

The committee agreed to hold its next meeting on January 8 or 22, 2021. The Chair will select the date with notification to members to follow.

Meeting adjourned at 10:28 AM.

Respectively submitted

Thomas E. Downey, Jr., Secretary