

# **COLORADO SUPREME COURT**

## **STANDING COMMITTEE ON THE RULES OF PROFESSIONAL CONDUCT**

### **Approved Minutes of Meeting of the Full Committee**

**On**

**July 22, 2022**

### **Sixty-Fourth Meeting of the Full Committee**

The sixty-fourth meeting of the Colorado Supreme Court Standing Committee on the Rules of Professional Conduct was convened at 9:00 AM on Friday, July 22, 2022, 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., Judge Adam Espinosa, Erika Holmes, April Jones, Matthew Kirsch, Judge Byron M. Large, Marianne Luu-Chen, Julia Martinez, Cecil E. Morris, Jr., Noah Patterson, Troy Rackham, Henry Richard Reeve, Alexander R. Rothrock, Marcus L. Squarrell, David W. Stark, Robert W. Steinmetz, Jamie S. Sudler, III, Jennifer J. Wallace, Judge John R. Webb, Jessica E. Yates, and E. Tuck Young. Liaison Justice Monica Márquez, Margaret Funk, Marcy Glenn, Tyrone Glover, Eli Wald, and Lisa Wayne were excused from attendance. Judge Ruthanne Polidori was also absent. Special guests in attendance were Daniel Smith, National Association of Patent Practitioners Advocacy Committee Chair; Molly Kocialski, United States Patent and Trademark Office; Judge Lipinsky's law clerk Carey DeGenaro; and his extern, Kristina Konstantinovna Abdalla.

#### **1. Call to Order.**

Judge Lipinsky called the meeting to order at 9:03 AM. He welcomed those attending in person, virtually via Webex, and by telephone. He reviewed the names of all attendees and noted those having excused absences. He also noted the attendance of his law clerk and extern as well as guests Dan Smith and Molly Kocialski. Judge Lipinsky reported that Judge William R. Lucero had stepped down from the Committee upon his retirement as the state's Presiding Disciplinary Judge, and welcomed Bryon M. Large, who succeeded Judge Lucero as Presiding Disciplinary Judge.

#### **2. Approval of Minutes for April 22, 2022 Meeting.**

A motion was made and seconded to approve the minutes for the meeting of April 22, 2022. The motion was approved unanimously with the exception of one abstention by a member who was not in attendance at the April 22 meeting.

#### **3. Report on Approval of the Technical Correction to Comment [3] to Rule 1.16A.**

The Chair reported that, on April 28, 2022, the Supreme Court adopted the technical correction to Comment [3] to Rule 1.16A as recommended by the Committee. The Chair

thanked member Rothrock and Steve Masciocchi for their work on the matter and thanked the Supreme Court for its quick action in adopting the Committee's recommendation.

#### **4. Report on the Public Hearing on the Proposed Amendment to Rule 1.8 (e).**

The Committee had previously recommended amendments to Rule 1.8(e). The Chair reminded the Committee that the deadline for public comment was July 22, 2022, and noted that comments will be posted to the Supreme Court website.

#### **5. Report from the Rule 1.4 Subcommittee**

The Chair introduced the topic for the Committee's consideration, noting that, depending on comments made today, the matter would most likely proceed to a vote of the Committee following discussion.

Member Yates thanked the members of her subcommittee for their participation, noting that the subcommittee had considered the comments of the Committee made at the April 22, 2022 meeting when making its amendments, and proposed recommendations for the Committee's further consideration. She noted that the proposed changes were intended to require an attorney who does not carry professional liability insurance to make a disclosure of the lack of such insurance to the client in writing before or within a reasonable time after commencing the representation. The subcommittee sought to eliminate confusing language regarding coverage issues and focus on disclosure of lack of coverage. She noted that the subcommittee, in addition to proposing changes to the language of the Rule itself, was also proposing changes to comments 8, 9, and 10, and was recommending deletion of Comment 19 to RPC 1.5. Member Yates invited comments and questions from members of the Committee.

A member questioned whether it might be useful for the proposal to state there was no ongoing obligation for an attorney to make additional disclosures should coverage that was in existence at the commencement of the representation subsequently lapse or be terminated. The member suggested an amendment to proposed Rule 1.4(c) to change the timing of the disclosure to "on or before the representation beginning." Member Yates responded that the subcommittee's proposed language requiring that the disclosure be made "in writing before or within a reasonable time after commencing the representation" was similar to the timing language recently addressed in Rule 1.5, and suggested that the subcommittee's proposed language was more favorable because representation often begins before an actual writing is in place. A member commented that the language proposed by the subcommittee was acceptable and that the proposed amendment was not any clearer than the subcommittee's proposed language requiring disclosure "in writing before or within a reasonable time after commencing the representation . . . ." Another member recalled that another rule requires attorney

disclosure in the event reported professional liability insurance coverage lapses or is terminated or canceled. Member Yates followed up on that comment, noting that Rule 227 requires an attorney to provide notice to the Supreme Court if information previously submitted changes, and specifically noted that Rule 227(2)(b) requires disclosure of lapses in professional liability insurance within twenty-eight days. After comments by several additional members and those of member Yates, the member who originally proposed the amendment to the subcommittee's proposed language indicated that he had no strong feelings on the issue of his proposed amendment. Members Stark and Yates both noted that the subcommittee had not considered safe harbor language or the intersection of Rule 227 and RPC 1.5. Member Stark suggested that it might be helpful for the two rules to be consistent and to require an attorney to also disclose to the client when professional liability insurance was no longer in existence.

Member Kirsch expressed his concern about structuring the Rules of Professional Conduct in the manner proposed. He suggested that, if the goal was to require attorneys to have liability insurance, it should simply be made a requirement that all attorneys have professional liability insurance rather adopting a half-measure requiring disclosures by attorneys who do not have insurance. Member Yates noted that studies indicate that the average potential client assumes that attorneys have liability insurance. Member Stark noted that, as a consumer protection matter, potential clients are entitled to know if the attorney they propose to engage has insurance. Several members expressed agreement with member Kirsch's view but noted that the proposal under consideration was the best option because neither the Supreme Court nor the Committee was prepared to require mandatory insurance for all attorneys. The Chair agreed with those comments, noting that there was no overwhelming support for mandating insurance coverage for all attorneys. Another member noted that the Committee's prior discussions regarding the concept of mandatory insurance coverage had not resulted in a consensus that such provisions be adopted.

Following some brief additional discussion, a motion to adopt the subcommittee's recommendations was made by member Sudler and seconded by member Morris. There was no additional discussion on the motion. Twenty members of the members of the Committee voted to adopt the subcommittee's recommendations; four members voted in opposition to the motion. The motion carried. The Chair concluded the discussion on this topic by thanking the members of the subcommittee.

## **6. Report on the Patent Practitioner Harmonization Proposal.**

Members Steinmetz and Rothrock provided a brief report on the subcommittee investigating harmonization of certain Rules of Professional Conduct for patent practitioners. Member Steinmetz noted that the subcommittee held a brief meeting and will hold an additional meeting in August. He advised that the subcommittee will provide an additional report at the Committee meeting on October 28, 2022.

## **7. Report on the PALS II Committee.**

Judge Espinosa began his report by noting that the full proposal and report had been submitted to the Supreme Court and had been published on the Court's website together with a request for public comment. Judge Espinosa briefly reviewed the history of the development of the Licensed Legal Paraprofessional (LLP) program, noting that it has been in progress for approximately five years. He briefly reviewed the public policy reasons for the program and outlined the proposals of what LLPs would be permitted to do and the specific areas in which they would not be permitted to act. Judge Espinosa spoke briefly about the similar Arizona program, which is broader than the program proposed for Colorado, noting that Arizona licensed paraprofessionals can represent clients in certain criminal and civil matters. He stated that the progress in Arizona was encouraging and satisfactory.

Member Stark noted that presentations regarding the LLP program had been made to several groups and mentioned that, on August 9, the Colorado Bar Association would hold a town hall on the topic. He noted that subcommittee members engage in monthly roundtable discussions with groups in other states and Canadian provinces working on similar programs. He observed that the proposed Colorado program was unique and stressed the safeguards built into the proposed LLP program regarding licensure, limits of practice, passage of a bar examination, passage of an ethics examination, experience requirements, and educational requirements. Member Yates suggested that members of the Committee go online and review the lengthy full report and recommendations of the PALS II committee to the Court. The Chair also encouraged members of the Committee to review the entire report and recommendations published on the Supreme Court's website, noting that attachment 3 to the meeting materials was merely the executive summary of that full report. The Chair noted that the public comment period on the proposal concludes on September 14, 2022, and that the Court could possibly decide to proceed after that time and request that the Committee review and act upon proposed amendments to the Rules of Professional Conduct necessitated by the new program. The Chair noted that, if approved, the program would require statutory changes to the existing attorney-client privilege statute, changes to certain of the Rules of Professional Conduct, and the adoption of Rules of Professional Conduct for LLPs. Member Espinosa noted that the Rules of Professional Conduct for LLPs would likely be referred to the Advisory Committee and the Standing Committee on the Rules of Professional Conduct. Member Stark noted that implementation of the LLP program would require amendments to several of the Rules in the 5 series, as well as to the definition of "firm" in Rule 1.0. Several other members said they anticipated that the Court would hold a public hearing following the comment period.

Given the earlier discussion regarding Rule 1.4(a), a member inquired as to whether there would be any liability insurance requirements for LLPs. Member Yates noted that, at present, there is no proposal that LLPs have professional liability coverage, but that insurance markets in several jurisdictions were moving to include coverage for LLPs. She noted that the Supreme Court may require disclosure requirements for LLPs similar to the disclosure requirements for attorneys.

The Chair concluded the discussion by thanking the individuals leading the efforts for adoption of the licensed legal paraprofessionals program.

**8. New Business.**

No new business was presented for the Committee's consideration.

**9. Adjournment.**

The chair noted that the next meeting of the Committee will be held on October 28, 2022. Motion to adjourn was made and seconded. The meeting adjourned at 9:58 AM.

Respectfully submitted,

Thomas E. Downey, Jr., Secretary