

COLORADO SUPREME COURT

STANDING COMMITTEE ON THE RULES OF PROFESSIONAL CONDUCT

Approved Minutes of Meeting of the Full Committee  
On  
January 28, 2022  
Sixty- Second Meeting of the Full Committee  
Virtual meeting in Response to Covid-19 Restrictions

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The sixty-second meeting of the Colorado Supreme Court Standing Committee on the Rules of Professional Conduct was convened at 9:00 AM on Friday, January 28, 2022, by Chair Judge Lino Lipinsky de Orlov. The meeting was conducted virtually.

Present at the meeting, in addition to Judge Lino Lipinsky de Orlov and liaison Justice Maria Berkenkotter, were Nancy L. Cohen, Thomas E. Downey, Jr., Judge Adam Espinosa, Margaret B. Funk, Marcy Glenn, A. Tyrone Glover, Erika Holmes, April Jones, Matthew Kirsch, Julia Martinez, Cecil E. Morris, Jr., Noah C. Patterson, Judge Ruthanne N. Polidori, Troy Rackham, Henry Richard Reeve, Alexander R. Rothrock, Marcus L. Squarrell, Jamie S. Sudler, III, Robert W. Steinmetz, Eli Wald, Jennifer J. Wallace, Lisa M. Wayne, Frederick R. Yarger, Jessica E. Yates, and E. Tuck Young. Justice Monica Márquez, Cynthia F. Covell, Judge William R. Lucero, Marianne Luu-Chen, David W. Stark, and Judge John R. Webb were excused from attendance. Special guests in attendance were Judge Angela Arkin and Jonathan D. Asher, Executive Director, Colorado Legal Services.

1. Introductory Remarks.

The Chair informed the Committee that Tom Downey had agreed to continue to serve as Secretary through 2022 and requested volunteers to assume the position commencing in 2023. Member Rackham volunteered to assume the duties of Secretary in 2023. The Chair accepted member Rackham's offer and thanked him for his willingness to take on the position of Secretary.

2. Approval of Minutes of September 24, 2021.

The Chair had provided the submitted minutes of the sixty-first meeting of the Committee held on September 24, 2021, to the members prior to the meeting. Member Yates noted a misspelling on page 6, requested the deletion of the word "Submitting" in the fourth line on page 7, and, subject to those comments, moved that the minutes be approved as submitted. Member Reeve seconded the motion. The minutes were approved by vote of the Committee.

### 3. Old Business.

#### a. Status Report on the Proposed Revision to Rule 3.8(d).

The Chair reported that the public hearing scheduled on the proposed revision to Rule 3.8 (d) and comment [3] was scheduled for 3:30 PM on February 8, that the deadline for filing written comments was January 15, 2022, and that the deadline to sign up to speak at the public hearing was January 31, 2022. The Chair noted that the United States Department of Justice had filed a letter opposing the proposed revision to the Rule and comment, the criminal defense bar had filed a letter in support of the proposed revisions, and that those comments and others were available on the website of the Colorado Supreme Court.

#### b. Report from the Rule 1.4 Subcommittee.

Member Yates provided a short report on the activities of the Rule 1.4 Subcommittee and its efforts to draft proposed revisions to Rule 1.4 and proposed disclosures regarding malpractice insurance coverage. She noted that the Subcommittee had considered, and was making modifications to, language adopted by the Commonwealth of Pennsylvania on these issues. Member Yates reported that the Subcommittee was making progress and that it would be prepared to provide a full report to the Committee at the meeting on April 22, 2022.

### 4. New Business

#### a. Report on the Proposed Amendment to Rule 1.8(e).

Jonathan D. Asher presented a report requesting that the Committee consider revisions to Rule 1.8(e) and its comments. Mr. Asher noted that amendments to Rule 1.8 (e) and its comments dealing with the provision of financial assistance to indigent clients was necessary considering amendments made to the American Bar Association Model Rule 1.8(e) in 2020 and the increased financial needs of indigent clients in the current economic and COVID-19 pandemic conditions. Written materials relating to Mr. Asher's report are contained in Attachment 2 of the meeting materials packet.

Mr. Asher provided a redlined draft of the ABA Model Rule and comments to highlight the slight changes from the Model Rule being proposed for Colorado Rule 1.8(e) and its comments. Mr. Asher noted that the proposed Colorado Rule would apply in cases where attorneys represent clients with no payment of a fee or through nonprofit legal services, public interest organizations, law school clinics, or other pro bono programs. He noted that the proposed revisions to the Rule would only apply in those types of situations and would limit the assistance provided to indigent clients to "modest gifts" for food, rent, transportation, medicine and other basic living expenses. He noted that the proposed rule would prohibit using the "modest gifts" as an inducement to continue the client-lawyer relationship, seeking reimbursement for the gifts, or publicizing the availability of such gifts to prospective clients. He noted that the proposed Rule carefully delineates the

circumstances under which “modest gifts” are allowable and emphasized that the proposed rule is a realistic, carefully crafted response respecting well-established ethical principles of the attorney-client relationship while providing guidance to attorneys for the infrequent and unique circumstances that arise during the course of their representation of indigent, struggling clients and their families. Mr. Asher concluded his remarks by requesting that the Committee recommend adoption of the proposed revisions to Rule 1.8 (e) and its comments to the Colorado Supreme Court.

Following Mr. Asher’s report, a member inquired whether the use of the word “and” at the conclusion of proposed Rule 1.8(e)(2) meant that the provisions of subsections 2 and 3 had to go together. Mr. Asher responded by advising that the provisions of the two Rules did not have to go together and stated that the word choice was a slight tweaking of the ABA Model Rule language.

The Chair proposed the formation of a subcommittee to investigate the proposed revisions to Rule 1.8(e) and related comments and requested volunteers to serve on the subcommittee. A number of members volunteered to serve on the new subcommittee. Member Glenn noted that the issue of attorneys providing financial assistance to clients had been raised with the Committee years ago by attorney Ben Aisenberg. She noted that the Committee had declined to investigate the issue at that time.

Discussion on the issue concluded with the Chair requesting that the new subcommittee meet, investigate the issue, and make a proposal to the full Committee.

b. Report on the PALS II Committee.

Judge Angela Arkin presented a report on the PALS II Subcommittee. Written materials relating to Judge Arkin’s presentation are contained in Attachment 3 of the meeting materials packet

In February 2020, the Colorado Supreme Court ordered the creation of a new subcommittee of the Supreme Court Advisory Committee to explore the possible creation of a regulatory process for licensing qualified paraprofessionals to engage in the practice of law in limited circumstances in certain types of domestic relations matters. Pursuant to that order, the Advisory Committees Paraprofessionals and Legal Services (PALS) Subcommittee developed and proposed a new program that would authorize Licensed Legal Paraprofessionals (LLPs) to offer and provide limited representation to parties in certain domestic relations matters. The proposals and recommendations of the PALS Subcommittee were approved by the Supreme Court Advisory Committee on May 21, 2021, and forwarded to the Colorado Supreme Court for further consideration. The Supreme Court, by Order dated June 3, 2021, directed the Advisory Committee to create an additional subcommittee or subcommittees to develop detailed requirements for licensure and practice by LLPs, to create a plan to launch the LLP program, and to draft appropriate Supreme Court rules to govern the LLP program.

Judge Arkin noted that approximately 75% of litigants in domestic relations cases do not have legal representation and that licensed legal paraprofessionals could provide needed assistance in lower-asset marital dissolution cases. She noted that fifteen to twenty other states either have paraprofessionals licensing rules or are considering them and that the PALS Subcommittee had examined and considered those provisions in formulating the proposals for Colorado. She noted that, in most instances, tasks of LLPs are limited to domestic relations matters where the net marital assets are \$200,000 or less.

The program under consideration would allow for licensure of LLPs by the Colorado Supreme Court to engage in the limited practice of domestic relations law, either with a law firm or with their own paraprofessionals firm. The scope of practice of LLPs would be limited to uncomplicated domestic relations matters where the combined marital estate is \$200,000 or less. The limited tasks that an unsupervised LLP could perform were set forth in detail at pages 3-5 of the PALS Subcommittee report of May 2021 included in Attachment 3. That report also details qualifications, education and training, annual registration, CLE requirements, potential malpractice insurance requirements, and potential ethical rules applicable to LLPs.

Following Judge Arkin's presentation, members of the Committee raised questions relating to whether professional liability insurance was available for LLPs, how much LLPs could charge, the success or failure of similar programs in other states, rules of professional conduct applicable to LLPs, and additional issues associated with organizing, approving, funding, and implementation the LLP program.

There was a brief discussion of the LLP program that had been initiated in Washington state but allowed to sunset in 2020. Judge Arkin noted that many issues prevented that program from continuing, including, but not limiting to, provisions making it difficult to attract potential LLPs and insufficient support from members of the bench and bar.

Judge Espinosa, a member of the Committee and the PALS Subcommittee, noted that he had begun working on potential rules of professional conduct for LLPs. Member Kirsch expressed confidence that the LLP program could be successful in Colorado. He noted, however, that the proposed limit on \$200,000 of combined net marital assets may need to be reexamined considering current economic conditions in Colorado, which have resulted in values of single-family residences to increase significantly.

The Chair proposed creation of a subcommittee to address rules of professional conduct for LLPs. Judge Espinosa volunteered to lead the subcommittee. Judge Arkin expressed her support for having members of the Committee work with Judge Espinosa and for his ongoing work on the PALS Subcommittee to establish rules of professional conduct for LLPs. Judge Arkin noted there was a lot of "heavy lifting" left to do to launch the LLP program and that she did not expect the program to be operational before January 2024. The Chair sought and obtained volunteers from members of the Committee to work on the new subcommittee led by Judge Espinosa. Members Kirsch, Wald, Yarger, Wayne, Patterson, and Holmes volunteered to serve on the subcommittee. Judge Arkin agreed to

provide the Chair with additional materials in her possession on the implementation and sunset of the program in Washington.

Judge Arkin concluded her remarks by expressing gratitude for the opportunity to present the LLP program to the Committee and special thanks to member Yates and Judge Espinosa for their contributions to the LLP program. The Chair concluded the discussion by summarizing that a subcommittee of the Committee had been formed to investigate and develop rules of professional conduct for LLPs and stating that he looked forward to its reports at future meetings.

5. Concluding Remarks.

Prior to adjournment, the Chair expressed his thanks to Ms. Wallace for her work on behalf of the Committee.

6. Adjournment.

A motion was made and seconded to adjourn the meeting. The meeting was adjourned at 10:26 A.M.

Respectfully submitted,

Thomas E. Downey, Jr., Secretary