

**COLORADO SUPREME COURT STANDING COMMITTEE ON THE COLORADO RULES OF
PROFESSIONAL CONDUCT**

AGENDA

June 25, 2021, 9:00 a.m.

**(Hopefully last) VIRTUAL MEETING IN RESPONSE TO COVID-19
RESTRICTIONS**

Meeting invitation with connection info to arrive via email next week

1. Approval of minutes for March 5, 2021 meeting [pp. 001 - 003]
2. Membership and leadership update [Marcy Glenn and Judge Lipinsky] [pp. 004 - 005]
3. Old business:
 - a. Status report on Rule 1.5(b) “Scope of Representation” recommended amendments [Justice Márquez or Justice Berkenkotter]
 - b. Status report on proposed housekeeping amendments to Rule 1.1., cmt. [6], and Rule 5.5(a)(1) and cmt. [1] [Marcy Glenn, pp. 006 - 013]
 - c. Rule 3.8(d) Subcommittee [Jessica Yates]
 - d. Rule 1.5(e) Subcommittee [Marcy Glenn, for Alec Rothrock]
4. New business:
5. Administrative matters:
 - a. Select next meeting date
6. Adjournment (before noon)

Marcy G. Glenn, Chair
Holland & Hart LLP
(303) 295-8320
mglenn@hollandhart.com

COLORADO SUPREME COURT
STANDING COMMITTEE ON THE RULES OF PROFESSIONAL CONDUCT

Submitted 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

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

SUPREME COURT, STATE OF COLORADO

**IN RE: APPOINTMENT TO THE COLORADO SUPREME COURT
STANDING COMMITTEE ON THE
COLORADO RULES OF PROFESSIONAL CONDUCT**

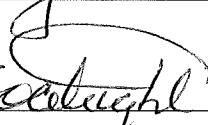
ORDER OF THE COURT

IT IS ORDERED that the following individuals be reappointed as members of the Colorado Supreme Court Standing Committee on the Colorado Rules of Professional Conduct for a three-year term effective July 1, 2021 and expiring on June 30, 2024.

Nancy L. Cohen
The Honorable Adam Espinosa
Marcy G. Glenn
The Honorable Lino Lipinsky
The Honorable William R. Lucero
Noah Patterson
David W. Stark
James S. Sudler
Eli Wald
Lisa M. Wayne
The Honorable John R. Webb
Jessica Yates

IT IS ORDERED that existing committee member THE HONORABLE LINO LIPINSKY is appointed as Chair of the Colorado Supreme Court Standing Committee on the Colorado Rules of Professional Conduct for a three-year term effective July 1, 2021 and expiring on June 30, 2024.

BY THE COURT, EN BANC, this 17th day of June, 2021.



Brian D. Boatright
Chief Justice, Colorado Supreme Court

cc: The Honorable Lino Lipinsky, via email or by mail
Colorado Court of Appeals
2 East 14th Avenue
Denver, Colorado 80202

Cheryl Stevens
Clerk, Colorado Supreme Court

SUPREME COURT, STATE OF COLORADO

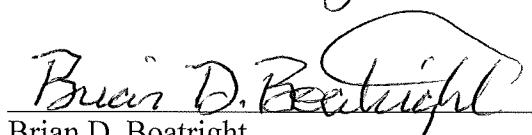
**IN RE: APPOINTMENT TO THE COLORADO SUPREME COURT
STANDING COMMITTEE ON THE
COLORADO RULES OF PROFESSIONAL CONDUCT**

ORDER OF THE COURT

IT IS ORDERED that the following individuals be appointed as members of the Colorado Supreme Court Standing Committee on the Colorado Rules of Professional Conduct for a three-year term effective July 1, 2021 and expiring on June 30, 2024.

Erika L. Holmes
Matthew Kirsch
Troy Rackham
Robert W. Steinmetz

BY THE COURT, EN BANC, this 13th day of June, 2021.



Brian D. Boatright
Chief Justice, Colorado Supreme Court

cc: The Honorable Lino Lipinsky, via email or by mail
Colorado Court of Appeals
2 East 14th Avenue
Denver, Colorado 80202

Cheryl Stevens
Clerk, Colorado Supreme Court

RULE CHANGE 2021(10)

COLORADO RULES OF PROFESSIONAL CONDUCT

Rules 1.1, 1.3, 1.15D, 1.15E, 5.4, and 5.5

Rule 1.1. Competence

[NO CHANGE]

COMMENT

[1] - [5] [NO CHANGE]

[6] Before a lawyer retains or contracts with other lawyers outside the lawyer's own firm to provide or assist in the provision of legal services to a client, the lawyer should ordinarily obtain informed consent from the client and must reasonably believe that the other lawyers' services will contribute to the competent and ethical representation of the client. See also Rules 1.2 (allocation of authority), 1.4 (communication with client), 1.5(d)_e (fee sharing), 1.6 (confidentiality), and 5.5(a) (unauthorized practice of law). The reasonableness of the decision to retain or contract with other lawyers outside the lawyer's own firm will depend upon the circumstances, including the education, experience, and reputation of the nonfirm lawyers; the nature of the services assigned to the nonfirm lawyers; and the legal protections, professional conduct rules, and ethical environments of the jurisdictions in which the services will be performed, particularly relating to confidential information.

[7] - [8] [NO CHANGE]

Rule 1.3. Diligence

A lawyer shall act with reasonable diligence and promptness in representing a client.

COMMENT [1] – [4] [NO CHANGE]

[5] To prevent neglect of client matters in the event of a sole practitioner's death or disability, the duty of diligence may require that each sole practitioner prepare a plan, in conformity with applicable rules, that designates another competent lawyer to review client files, notify each client of the lawyer's death or disability, and determine whether there is a need for immediate protective action. Cf. Rule 28 of the American Bar Association Model Rules for Lawyer Disciplinary Enforcement (providing for court appointment of a lawyer to inventory files and take other protective action in absence of a plan providing for another lawyer to protect the interests of the clients of a deceased or disabled lawyer); C.R.C.P. 2_{4451.32(h)}.

Rule 1.15D. Required Records

(a) – (c) [NO CHANGE]

(d) Any of the records required to be kept by this Rule shall be produced in response to a subpoena duces tecum issued by the Regulation Counsel in connection with proceedings pursuant to C.R.C.P. 2₄₂₅₄ or C.R.C.P. 243. When so produced, all such records shall remain confidential except for the purposes of the particular proceeding, and their contents shall not be

disclosed by anyone in such a way as to violate the attorney-client privilege of the lawyer's client.

Rule 1.15E. Approved Institutions

(a) – (b) [NO CHANGE]

(c)(1) – (c)(3)(ii) [NO CHANGE]

(4) The financial institution agrees to cooperate fully with the Regulation Counsel and to produce any trust account records on receipt of a subpoena for the records issued by the Regulation Counsel in connection with any proceeding pursuant to C.R.C.P. 242 or C.R.C.P. 243⁵⁴. Nothing herein shall preclude a financial institution from charging a lawyer or law firm for the reasonable cost of producing the reports and records required by this Rule, but such charges shall not be a transaction cost to be charged against funds payable to the COLTAF program.

(c)(5) – (c)(13) [NO CHANGE]

Rule 5.4. Professional Independence of a Lawyer

(a) – (e) [NO CHANGE]

(f) For purposes of this Rule, a “nonlawyer” includes (1) a lawyer who has been disbarred, (2) a lawyer who has been suspended and who must petition for reinstatement, (3) a lawyer who is subject to an interim suspension ~~has been immediately suspended~~ pursuant to C.R.C.P. 242⁵⁴.228 or 251.20(d), (4) a lawyer who is on inactive status pursuant to C.R.C.P. 227(A)(6), ~~or~~ (5) a lawyer who has been permitted to resign under C.R.C.P. 227(A)(8), ~~or~~ (6) a lawyer who, for a period of six months or more, has been (i) on disability inactive status pursuant to C.R.C.P. 243⁵⁴.623 or (ii) suspended pursuant to C.R.C.P. 227(A)(4), 242⁵⁴.238.5, 242.24, 227(A)(4) or 260.6, or 251.8.6.

COMMENTS [1] – [3] [NO CHANGE]

Rule 5.5. Unauthorized Practice of Law; Multijurisdictional Practice of Law

(a) A lawyer shall not:

(1) practice law in this jurisdiction without a license to practice law issued by the Colorado Supreme Court unless specifically authorized by C.R.C.P. 204, et seq. ~~C.R.C.P. 204 or C.R.C.P. 205~~ or federal or tribal law;

(2) - (4) [NO CHANGE]

(b) – (d) [NO CHANGE]

| (e) Once notice is given pursuant to C.R.C.P. 2~~4251~~3228 or this Rule, then no additional notice
is required.

COMMENT

[1] The definition of the practice of law is established by law and varies from one jurisdiction to another. In order to protect the public, persons not admitted to practice law in Colorado cannot hold themselves out as lawyers in Colorado or as authorized to practice law in Colorado. Rule 5.5(a)(1) recognizes that C.R.C.P. 204, et seq. ~~C.R.C.P. 204 and C.R.C.P. 205~~ permit lawyers to practice law in accordance with their terms in Colorado without a license from the Colorado Supreme Court. Lawyers may also be permitted to practice law within the physical boundaries of the State, without such a license, where they do so pursuant to Federal or tribal law. Such practice does not constitute a violation of the general proscription of Rule 5.5(a)(1).

[2] – [6] [NO CHANGE]

Rule 1.1. Competence

[NO CHANGE]

COMMENT

[1] - [5] [NO CHANGE]

[6] Before a lawyer retains or contracts with other lawyers outside the lawyer's own firm to provide or assist in the provision of legal services to a client, the lawyer should ordinarily obtain informed consent from the client and must reasonably believe that the other lawyers' services will contribute to the competent and ethical representation of the client. See also Rules 1.2 (allocation of authority), 1.4 (communication with client), 1.5(d) (fee sharing), 1.6 (confidentiality), and 5.5(a) (unauthorized practice of law). The reasonableness of the decision to retain or contract with other lawyers outside the lawyer's own firm will depend upon the circumstances, including the education, experience, and reputation of the nonfirm lawyers; the nature of the services assigned to the nonfirm lawyers; and the legal protections, professional conduct rules, and ethical environments of the jurisdictions in which the services will be performed, particularly relating to confidential information.

[7] - [8] [NO CHANGE]

Rule 1.3. Diligence

A lawyer shall act with reasonable diligence and promptness in representing a client.

COMMENT [1] – [4] [NO CHANGE]

[5] To prevent neglect of client matters in the event of a sole practitioner's death or disability, the duty of diligence may require that each sole practitioner prepare a plan, in conformity with applicable rules, that designates another competent lawyer to review client files, notify each client of the lawyer's death or disability, and determine whether there is a need for immediate protective action. Cf. Rule 28 of the American Bar Association Model Rules for Lawyer Disciplinary Enforcement (providing for court appointment of a lawyer to inventory files and take other protective action in absence of a plan providing for another lawyer to protect the interests of the clients of a deceased or disabled lawyer); C.R.C.P. 244.

Rule 1.15D. Required Records

(a) – (c) [NO CHANGE]

(d) Any of the records required to be kept by this Rule shall be produced in response to a subpoena duces tecum issued by the Regulation Counsel in connection with proceedings pursuant to C.R.C.P. 242 or C.R.C.P. 243. When so produced, all such records shall remain confidential except for the purposes of the particular proceeding, and their contents shall not be

disclosed by anyone in such a way as to violate the attorney-client privilege of the lawyer's client.

Rule 1.15E. Approved Institutions

(a) – (b) [NO CHANGE]

(c)(1) – (c)(3)(ii) [NO CHANGE]

(4) The financial institution agrees to cooperate fully with the Regulation Counsel and to produce any trust account records on receipt of a subpoena for the records issued by the Regulation Counsel in connection with any proceeding pursuant to C.R.C.P. 242 or C.R.C.P. 243. Nothing herein shall preclude a financial institution from charging a lawyer or law firm for the reasonable cost of producing the reports and records required by this Rule, but such charges shall not be a transaction cost to be charged against funds payable to the COLTAF program.

(c)(5) – (c)(13) [NO CHANGE]

Rule 5.4. Professional Independence of a Lawyer

(a) – (e) [NO CHANGE]

(f) For purposes of this Rule, a “nonlawyer” includes (1) a lawyer who has been disbarred, (2) a lawyer who has been suspended and who must petition for reinstatement, (3) a lawyer who is subject to an interim suspension pursuant to C.R.C.P. 242.22, (4) a lawyer who is on inactive status pursuant to C.R.C.P. 227(A)(6), (5) a lawyer who has been permitted to resign under C.R.C.P. 227(A)(8), or (6) a lawyer who, for a period of six months or more, has been (i) on disability inactive status pursuant to C.R.C.P. 243.6 or (ii) suspended pursuant to C.R.C.P. 227(A)(4), 242.23, 242.24, or 260.6.

COMMENTS [1] – [3] [NO CHANGE]

Rule 5.5. Unauthorized Practice of Law; Multijurisdictional Practice of Law

(a) A lawyer shall not:

(1) practice law in this jurisdiction without a license to practice law issued by the Colorado Supreme Court unless specifically authorized by C.R.C.P. 204, *et seq.* or federal or tribal law;
(2) - (4) [NO CHANGE]

(b) – (d) [NO CHANGE]

(e) Once notice is given pursuant to C.R.C.P. 242.32 or this Rule, then no additional notice is required.

COMMENT

[1] The definition of the practice of law is established by law and varies from one jurisdiction to another. In order to protect the public, persons not admitted to practice law in Colorado cannot hold themselves out as lawyers in Colorado or as authorized to practice law in Colorado. Rule 5.5(a)(1) recognizes that C.R.C.P. 204, *et seq.* permit lawyers to practice law in accordance with their terms in Colorado without a license from the Colorado Supreme Court. Lawyers may also be permitted to practice law within the physical boundaries of the State, without such a license, where they do so pursuant to Federal or tribal law. Such practice does not constitute a violation of the general proscription of Rule 5.5(a)(1).

[2] – [6] [NO CHANGE]

Amended and Adopted by the Court, En Banc, May 20, 2021, effective July 1, 2021.

By the Court:

Monica M. Márquez
Justice, Colorado Supreme Court