

COLORADO SUPREME COURT

STANDING COMMITTEE ON THE RULES OF PROFESSIONAL CONDUCT

Approved Minutes of Meeting of the Full Committee On October 19, 2018 (Fifty-second Meeting of the Full Committee)

The fifty-second meeting of the Colorado Supreme Court Standing Committee on the Rules of Professional Conduct was convened at 9:00 a.m. on Friday, October 19, 2018, by Chair Marcy G. Glenn. The meeting was held in the Supreme Court Conference Room on the fourth floor of the Ralph L. Carr Colorado Justice Center.

Present in person at the meeting, in addition to Chair Marcy G. Glenn and Justice William W. Hood III, were Committee members Gary B. Blum, Nancy L. Cohen, Cynthia F. Covell, Judge Adam J. Espinosa, Lino Lipinsky de Orlov, David C. Little, Judge William R. Lucero, Judge Ruthanne Polidori, Alexander R. Rothrock, Marcus L. Squarrell, David W. Stark, James S. Sudler III, Anthony van Westrum, Eli Wald, Jessica E. Yates. Present by conference telephone were members Thomas E. Downey, Jr., Henry R. Reeve, Judge John R. Webb, and E. Tuck Young. Excused from attendance were Justice Monica M. Márquez and members Judge Michael H. Berger, Margaret B. Funk, John M. Haried, and Frederick R. Yarger. Absent were members Boston H. Stanton, Jr., David C. Little, Cecil E. Morris, Jr., and Lisa M. Wayne. Also present were Supreme Court staff attorneys Kathryn Michaels and Jennifer J. Wallace.

Present as a guest was Noah Patterson of the Office of the Colorado Attorney General.

The Committee joined the Chair in congratulating Lino Lipinsky upon his selection by Governor John Hickenlooper to serve on the Colorado Court of Appeals, an appointment that will become effective on January 8, 2019.

I. *Subcommittee on Rule 8.4(c).*

The Chair called on member Thomas E. Downey, Jr. to bring the Committee up to date on the activities of the "pretexting" subcommittee that Downey chairs. In doing so, the Chair noted that the subcommittee had been reconvened to consider the adoption of a comment to Rule 8.4(c) to deal with "pretexting." She explained that the provision currently defines professional misconduct to include engaging "in conduct involving dishonesty, fraud, deceit or misrepresentation," but with the exception "that a lawyer may advise, direct, or supervise others, including clients, law enforcement officers, or investigators, who participate in lawful investigative activities"; concern had been expressed that pretexting might not be considered a "lawful investigative activity."

Downey replied that his report this day would be the same as that which he gave to the Committee at its fifty-first meeting, on July 27, 2018, which he said had been accurately reported in the minutes of that meeting. Downey forecast that the subcommittee would have more to report at the next Committee meeting.

II. *Meeting Materials; Minutes of July 27, 2018, Meeting, the Fifty-first Meeting of the Committee.*

The Chair had provided a package of materials to the members prior to the meeting date, including submitted minutes of the fifty-first meeting of the Committee, held on July 27, 2018. Those minutes were approved with one correction, in the spelling of a name.

III. *Subcommittee on a Rule for Contingent Fee Agreements.*

Member Alexander R. Rothrock reported that the subcommittee that is considering the matter of contingent fee agreements had no presentation for this meeting.

The Chair added that member Rothrock had become engaged to be married, an announcement that was met by a vigorous round of applause from the members.

IV. *Proposed Amendments to Rule 1.5 Regarding Flat Fee Agreements.*

The Chair reported that she had sent to the Court this Committee's proposal for amendments to Rule 1.5, dealing with flat fee agreements. Justice Hood remarked that the Court had not yet set a schedule for receiving public comments upon, and for itself considering, the Committee's submission but that it will do so.¹

V. *Amendments to American Bar Association Model Advertising Rules, Rules 7.1 through 7.5.*

In the materials provided to the members for this meeting, the Chair had included a copy of a summary authored by the American Bar Association Standing Committee on Ethics and Professional Responsibility regarding amendments to Rules 7.1 through 7.5 of the ABA Model Rules of Professional Conduct, which the ABA House of Delegates adopted at its meeting in August 2018. The summary was accompanied by a redlined version of those amendments, as they appeared in the House of Delegates' Resolution and Report.

The Chair reminded the members that the Colorado version of the advertising rules are already considerably different from the existing ABA version. She advised the Committee that member Eli Wald had agreed to chair a subcommittee to consider the ABA amendments. And she invited discussion about the material that had been provided to the Committee.

A member commented that, if the Committee embarks on a review of the Colorado advertising rules, it should look not only at the ABA amendments but also at the extensive report

1. Subsequently to the meeting, the Court announced a period for receipt of public comment on the Committee's flat fee proposal, ending on January 16, 2019. See https://www.courts.state.co.us/Courts/Supreme_Court/Rule_Changes.cfm:

Deadline for Comments: January 16, 2019 at 5 p.m.

The Colorado Supreme Court requests written public comments by any interested person on the proposed amendments to Rule 1.5 and Comment to Rule 1.5 of the Colorado Rules of Professional Conduct, and Proposed Form Flat Fee Agreement. Written comments should be submitted to Cheryl Stevens, Clerk of the Supreme Court. Comments may be mailed or delivered to 2 East 14th Avenue, Denver, CO 80203 or emailed to cheryl.stevens@judicial.state.co.us no later than 5:00 p.m. on January 16, 2019. The Clerk will post written comments here after the comment period closes.

–Secretary

issued by the Association of Professional Responsibility Lawyers in 2015² about what was then a proposal for those amendments to the ABA model rules; the member understood that the National Association of Bar Counsel has agreed with the APRL report and with the ABA amendments. This member noted that it would be helpful to the Committee to consider the APRL report input in order to understand fully the intent behind the ABA amendments.

Another member recalled that the Colorado Bar Association had once undertaken to write an ethics opinion on the topic of lawyer advertising but had abandoned that effort. He suggested that our Committee reach out to that ethics committee and to other bar groups to seek input on the ABA amendments. He added that there is a component of the bar that publicly advertises legal services and spends time and money doing so. He understood the purpose of the ABA amendments was to make such advertising "less problematic" (to use his words); this Committee might want to involve lawyers who do such advertising as it considers the ABA amendments.

Two other members responded to that suggestion by identifying some specific legal organizations to which offers to participate might be extended; one member also suggested looking in the Yellow Pages to identify lawyers who make significant use of advertising.

But another member stated his opposition to inclusion of other groups in this Committee's consideration of the ABA amendments. He recalled a couple of previous occasions in which the Committee invited the participation of particular factions within the bar in the drafting of some rules — invitations that, in this member's characterization, each "turned into a complete disaster." This member did not believe that it would be necessary or useful to invite to the Committee's deliberations lawyers that happen to be advertisers of their services. He added that he had himself represented lawyers who have been among the most prolific advertisers and that he had no personal opposition to such advertising. But he believed that inviting them to participate in the Committee's discussions as a special interest group invited problems; he distinguished the kind of participation to which he was objecting from written comments from such groups to the Committee, about the ABA amendments, for the Committee's consideration. He prophesied that the Committee would prepare many drafts in the course of its work on the ABA amendments and that it might at some stage in that process want to expose its deliberations and its draft product in a publication such as *The Colorado Lawyer*, inviting written comment. But he quite definitely did not want to be harangued by direct participation of such interest groups in the Committee's efforts. That could be left to the public comment period that would be provided by the Court itself following receipt of a proposal from the Committee.

To that, the member who had previously suggested the involvement of lawyers who advertise in the Committee's consideration of the ABA amendments said he had more in mind the approach taken by the Committee when it previously considered the pretexting exception added to Rule 8.4(c) relating to lawful investigative activities, when, he recalled, the Committee had engaged the United States Attorney's office in its discussions. And, he added, while it might not be appropriate to include the lawyer advertising community in the Committee's initial discussions of the ABA amendments and in its initial drafting efforts, it might be useful to do so when the drafting effort had proceeded toward a final product that would be submitted to the Court.

2. The report is available at https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aprl_june_22_2015%20report.pdf. –Secretary

Another member joined this discussion by recalling that the Committee had invited bankers to participate in the development of the COLTAF principles that became the Rule 1.15 series of rules. In that circumstance, the Committee sought the special expertise of bankers regarding the special bank accounts that those rules require lawyers to maintain when they hold funds that belong to others. Maybe, this member suggested, this matter of advertising is another area where the Committee does not itself have all of the necessary expertise to understand the import of any rules changes it might propose.

The member who had earlier suggested consideration of the positions taken by bar counsel on the ABA amendments now added her view that it would be important for the Committee to have the participation, in some fashion, of lawyers who advertise. She noted that the Colorado Trial Lawyers Association has a division between those who advertise their services and those who do not. Waiting until the end of the Committee's consideration of the ABA amendments before involving others in the drafting process ran the risk of omitting important, valuable ideas that could have been more easily included in the Committee's product if they had been considered early in its efforts.

Member Wald, who is to chair the subcommittee that will undertake the first stages of the Committee's efforts, said he would be glad to try to handle the effectuation of these ideas as he directed that subcommittee. Referring to the recollections of the member who spoke of prior difficulties experienced by the Committee when it invited outside groups to participate in other drafting efforts, Wald suggested that it might be sensible to invite the Colorado Trial Lawyers Association to send representatives from both of its factions — those who advertise and those who oppose advertising — to participate in the subcommittee's drafting efforts, while avoiding being overwhelmed by "twenty or so" participants. Wald concluded his remarks by saying he shared the views of the members who had thought it useful to invite the participation, in some fashion, of lawyers who do advertise their services, in order to have their insights.

It was noted that eight members have already agreed to participate on Wald's subcommittee.

VI. *Consideration of Lawyer Conduct Involving Harassment.*

The Chair had provided, in the materials for this meeting, an excerpt from Part V of the minutes of the Committee's forty-seventh meeting, on June 16, 2017, at which it considered what was then the recent adoption by the American Bar Association of Model Rule 8.4(g), which provision reads—

It is professional misconduct for a lawyer to:

* * *

(g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.

As reported in those minutes, after some discussion of the ABA provision and note of the fact that no other jurisdiction had then adopted the ABA text — and that Colorado has existing case law on

the matter of sexual harassment within a law firm³ — the Committee decided at that forty-seventh meeting to "let the matter percolate."

The Chair characterized that earlier decision of the Committee to be a reflection of the fact that Colorado has a rule on harassment that is both larger and more narrow than what the ABA was then offering as its new Rule 8.4(g), as well as a reflection of concerns that had been expressed in other fora that the ABA rule was either unwise or even unconstitutional. The Committee had decided, at that forty-seventh meeting, not to be in the forefront on this matter, she said.

But, in the intervening months, there have been many developments in the area of sexual harassment, including the growth of the #MeToo movement, as well as expression of concerns about the constitutionality of efforts to regulate such conduct. The Chair asked whether the Committee now thought this matter should be reconsidered, commencing with the formation of a subcommittee for that purpose.

A member asked member Jessica Yates, who is Colorado's Attorney Regulation Counsel, whether there is a sense that the legal profession would be acting to protect itself by not adopting the ABA's provision. To that question, Yates referred to the testimony of the Colorado Secretary of State in March 2018 on Colorado House Bill 18-1152 in the context of a broader effort to legislate harassment. And she added that her office had received a complaint regarding the conduct of a municipal judge, a complaint that was eventually dismissed.⁴

And, at this point, at 9:30 a.m., the meeting was informally adjourned in response to an emergency evacuation of the entire Ralph Carr Justice Center.

[Following the meeting, the Chair advised the Secretary that (1) member Judge John Webb had advised the Chair, before the meeting, that he was willing to chair a reconvened subcommittee to consider amendment of Rule 8.4(g), and (2) in an informal gathering of some of the members during the evacuation, member Jessica Yates agreed to co-chair the reconvened subcommittee with Judge Webb.]

VII. *Adjournment; Next Scheduled Meeting.*

As just noted, the meeting was informally adjourned at 9:30 a.m. The next scheduled meeting of the Committee will be on Friday, January 11, 2019, beginning at 9:00 a.m., in the Conference Room 1-B of the Ralph L. Carr Judicial Center, unless otherwise announced.

RESPECTFULLY SUBMITTED,


Anthony van Westrum

[These minutes are as approved by the Committee at its fifty-third meeting, on January 11, 2019.]

3. *People v. Lowery*, 894 P.2d 758 (Colo.1995).

–Secretary

4. Colorado Attorney Regulation Counsel does not have jurisdiction over a complaint against a municipal judge.

–Secretary