

COLORADO SUPREME COURT

STANDING COMMITTEE ON THE RULES OF PROFESSIONAL CONDUCT

Approved Minutes of Meeting of the Full Committee

On

January 26, 2024

Seventieth Meeting of the Full Committee

The seventieth meeting of the Colorado Supreme Court Standing Committee on the Rules of Professional Conduct was convened at 9:02 am on Friday, January 26, 2024, by Chair Judge Lino Lipinsky de Orlov. Judge Lipinsky initially took attendance.

Present in person at the meeting, in addition to Judge Lipinsky and liaison Justices William Hood and Maria Berkenkotter, were Katayoun Donnelly, Margaret B. Funk, Matthew Kirsch, Marianne Luu-Chen, Stephen G. Masciocchi, Marcus L. Squarrell, David Stark, and Jessica Yates.

Present for the meeting by virtual appearance were Cynthia F. Covell, Thomas E. Downey, Jr., Scott L. Evans, Marcy Glenn, Erika Holmes, April Jones, Julia Martinez, Noah Patterson, Troy R. Rackham, Alexander R. Rothrock, Robert Steinmetz, and James Sudler. Committee members excused were Nancy Cohen, Judge Adam Espinosa, Judge Bryon Large, Cecil Morris, Jr., Henry Reeve, Eli Wald, Judge John Webb, and Fred Yarger.

1. CALL TO ORDER. Judge Lipinsky called the meeting to order at 9:04 am. He welcomed those attending in person or virtually. Judge Lipinsky welcomed Justice Hood as a new liaison justice to the Committee. Justice Hood will replace Justice Márquez as the liaison because Justice Márquez is transitioning to Chief Justice and that is consuming her time.

2. APPROVAL OF MINUTES FOR OCTOBER 27, 2023 MEETING. Jessica Yates sent an amendment, which has been made. The Committee reviewed the minutes from the October 27, 2023, meeting. David Stark moved to approve the minutes with the amendment. The motion was seconded. The Committee unanimously voted to approve the minutes, as amended.

3. OLD BUSINESS.

A. REPORT FROM PALS II SUBCOMMITTEE [JUDGE LIPINSKY]. The PALS II Project's proposed revisions to the Rules of Professional Conduct (RPCs) became official immediately upon approval by the Supreme Court on November 16, 2023. Chair Lipinsky thanked all of those who were involved.

B. REPORT ON PROPOSED REVISIONS TO COMMENT [14] OF RPC 1.2 [Judge Lipinsky]. Judge Lipinsky reported that the Supreme Court adopted the Committee's proposed revisions to RPC 1.2 comment [14] relating to the Natural Medicine Act. The Court approved the proposal on January 11, 2024, effective immediately, with one minor change. The adopted language is below, with the new language noted in blue underlined font:

A lawyer may counsel a client regarding the validity, scope, and meaning of Colorado constitution article XVIII, secs. 14 & 16, [and the Colorado Natural Medicine Act of 2022](#), and may assist a client in conduct that the lawyer reasonably believes is permitted by these constitutional provisions [and statutes](#), and the statutes, regulations, orders, and other state or local provisions implementing them, [as they may be amended from time to time](#). In these circumstances, the lawyer shall also advise the client regarding related federal law and policy.

C. REPORT ON PROPOSED REVISIONS TO RPCs 1.5 AND 1.8 [Alec Rothrock]. Attachment 2 to the meeting materials consisted of the public comments to the proposed revisions to Colo. RPCs 1.5 and 1.8. Mr. Rothrock discussed the comments. The comments reflect a fundamental misunderstanding of what RPCs 1.5 and 1.8 do and what the revisions propose. The comments related to issues not addressed by the proposed revisions to RPCs 1.5 and 1.8. Judge Lipinsky raised the issue of whether the Committee should respond to the comments. Justice Berkenkotter noted that the Court would decide next Thursday whether to have a public hearing on the proposed amendments. Mr. Rothrock may be able to appear at the hearing virtually if the Court decides to have a hearing. If the Court is unable to conduct the hearing virtually, or in hybrid format, other members of the Committee may be willing to speak on the proposed amendments and address the confusion reflected in the comments. Justice Hood said he thought a public hearing would be a good idea and noted that the Court has the capability to hear from virtual speakers. Judge Lipinsky noted that the Committee would be able to find someone to speak in person, if necessary.

D. REPORT FROM THE RULE 5.5 SUBCOMMITTEE [Steve Masciocchi]. Mr. Morris was unavailable, so Mr. Masciocchi presented on the draft proposal. The materials do not reflect the numerous interim discussions about whether the rule was too busy and too repetitive, or needed other revisions. The subcommittee decided to pare down the proposed revision even further. There were comments that the Committee should attempt to make the draft consistent with the temporary practice rule. The subcommittee ultimately changed the language in the latter part of the proposed comment to conform with the temporary practice rule. The proposed revision was put on the screen for the Committee. The proposed revisions had been sent earlier in the week.

Mr. Masciocchi explained that the subcommittee has been dutifully working. Jessica Yates asked Mr. Rothrock whether this proposed revision addresses his concern from a year ago. Mr. Rothrock responded that it did. Ms. Covell recommended adopting the proposed revision. Mr. Rothrock thought that this proposed revision would be a good addition and is ready to go. He noted that this proposed revision, if adopted, would make Colorado consistent with other jurisdictions that either have adopted a rule change or an ethics opinion on the issue. Mr. Squarrell moved to approve. The motion was seconded.

Mr. Kirsch asked whether the language, holding himself “out,” required the phrase “to the public.” There was a discussion about whether the language “to the public” was necessary. Mr. Squarrell considered the proposed amendment striking the phrase “to the public” a friendly amendment. Mr. Kirsch moved to strike that language from the proposed amendment. A majority of the Committee voted to approve the proposed amendment with Mr. Kirsch’s proposed revision. The vote carried.

E. REPORT FROM THE AI SUBCOMMITTEE [Julia Martinez]. Julia Martinez provided an update of what the AI Subcommittee has been doing. The subcommittee has had numerous meetings and has considered numerous materials. The subcommittee is looking at what rules should be revised. Ms. Martinez suggested that the subcommittee will likely propose several amendments to the rules to address considerations involved in a lawyer's use of generative artificial intelligence. Justice Berkenkotter thanked all of those participating in the AI subcommittee because this issue is important and has the interest of the Justices.

Judge Lipinsky noted that changes in generative AI technology are occurring swiftly. Westlaw and LEXIS have their own AI tools that may significantly impact the AI analysis. The changes in legal technology may reduce some of the concerns involved in a lawyer's use of generative AI, such as fictitious citations and the like.

F. REPORT FROM RULE 1.2 SUBCOMMITTEE [Erika Holmes]. Ms. Holmes presented on the work of the subcommittee. The issue is whether RPC 1.2(c), which addresses limited scope representation, needs to be revised. The subcommittee thinks that it was just an oversight that RPC 1.2(c) does not reference C.A.R. 5 — the Colorado Appellate Rule that allows limited representation in an appeal. The subcommittee is proposing referencing C.A.R. 5 in RPC 1.2(c) so that there is a direct reference to the applicable appellate rule. The proposal is to list C.A.R. 5 in the references in the comment to RPC 1.2(c). Justice Lipinsky noted that the Rules Committee is currently considering a revision to C.A.R. 5(e). Depending on the language of C.A.R. 5(e) that the Rules Committee ultimately proposes, and the Court ultimately adopts, there may be another necessary revision to RPC 1.2(c).

Chair Lipinsky asked whether there was a motion to approve the proposed revision to Colo. RPC 1.2(c) and comment [7]. Ms. Donnelly moved to approve the proposal. The motion was seconded. Mr. Masciocchi recommended inserting a comma and removing the word “and.” Mr. Rothrock asked whether it was necessary to list the specific Colorado Rules of Civil Procedure or Colorado Rule of Appellate Procedure. It may be better simply to reference that rules of the Court allow limited scope representation, so that the Committee does not have to keep suggesting revisions whenever the rules change in the future. Ms. Yates thought that this was a good point because the rules keep being revised. Ms. Yates also noted that the federal courts are now adopting times when there can be limited scope of the representation. A lawyer looking at the Colorado RPCs may find it helpful to have a reference to “any other rules or law that allows for limited representation.” This would capture the federal courts' and other state courts' revisions in the future. Mr. Rothrock liked the idea of having catch-all language like what Ms. Yates proposed.

Ms. Donnelly asked whether adding a term like “for instance” at the beginning of the language may be helpful because it broadens the scope. Ms. Funk thought this was unnecessary and made it appear like a suggestion or comment rather than a rule. Ms. Donnelly suggested that perhaps the entire proposed revision should be moved to a comment. Judge Lipinsky suggested reconsidering these comments when the subcommittee reconvenes to suggest other changes, but to vote on the current proposal now. Judge Lipinsky suggested keeping the subcommittee in place to address appropriate changes if and when the Court adopts revisions to C.A.R. 5. Justice Hood

suggested that perhaps Justice Berkenkotter and Justice Hood could suggest language to the subcommittee to be more efficient.

The Committee voted on the motion to approve the proposal, as amended. The motion carried unanimously.

G. REPORT FROM THE RPC 8.4 SUBCOMMITTEE CONSIDERING INTENTIONAL MISGENDERING [M. Kirsch]. This subcommittee was formed after a CLE presentation where one of the speakers intentionally misgendered another participant, who neither identifies as male or female. Possible rule revisions are contained in attachment 4 to the materials. The subcommittee also noted the current rules that it reviewed but determined were not applicable. The rules that the subcommittee focused upon are contained in section 1(b) of the outline, and specifically are RPC 8.4(h) and RPC 8.4(g).

The current RPC 8.4(h) already has a broad scope sufficient to address intentional misgendering, but the rule requires specific intent and requires actual harm. RPC 8.4(g) applies to a lawyer who is representing a client and covers gender and sexual orientation discrimination. RPC 8.4(g) does not include the word sex. The subcommittee could not determine why or reconstruct the reason for not including the word sex. The subcommittee reached out to subject matter experts. One of the experts believed that the word gender is insufficient to cover the concept because gender is different than sex. The concept of sex is a biological concept. The term sexual orientation refers to the sex of the person to whom the other is attracted. The term gender or gender identity instead refers to what sex the person feels themselves to be. Gender expression is a term that refers to how a person portrays his, her, or their gender to others.

RPC 8.4(g) also has a more limited applicability because it is connected to a lawyer's representation of the client. RPC 8.4(g) would not cover the circumstance that led the subcommittee to consider this issue in the first place, which was intentional misgendering at a continuing legal education event. The subcommittee would like some guidance from the Committee about how to proceed with the alternatives. The first alternative is to not recommend any changes. The second alternative is to revise RPC 8.4(g) to include the term "sex" or replace the term "gender" with "sex." A third alternative would be to either revise comment [3] to RPC 8.4 to add definitions of "gender" and expand the concept of intentional discrimination on the basis of gender, at least in connection with a lawyer's representation of a client.

Mr. Kirsch explained that there have been no complaints to OARC or even nationwide about lawyers intentionally misgendering another. Other states or jurisdictions have made proposals to address these issues. Typically those proposals get dragged into the culture wars about "wokeness." That is something of which the Committee should be conscious in deciding what to do, although it should not be dispositive of the decision. Ms. Yates explained that, from a disciplinary perspective, this could be a very tricky issue because of the intent requirement (was it negligent or was it knowing or was it intentional?).

Ms. Donnelly shared a personal experience about the absence of complaints or grievances to OARC. She explained that a pleading filed in court in one of her cases many years ago referred to her as "whatever her name is, the Asian chick." No complaints were filed by the court or the

lawyers. Ms. Donnelly explained that things happen that make people feel uncomfortable, but there are reasons not to make a complaint. Ms. Donnelly said she believed that it was important to have a rule that makes it clear that such things are not right and need to be addressed, even if there are not disciplinary complaints.

Justice Hood asked whether in crafting something like this, the Court would be inviting members of the bar to misgender lawyers as part of a political expression. He asked whether it could create unexpected consequences to address a rule like this because it invites political expression that would lead to worse problems than currently exist. If the issue already is in RPC 8.4(g), and lawyers have been disciplined under the Rule (*Abrams*), then what would additional provisions add?

The ABA Model Rule 8.4(g) does not have the term “in representation of a client.” Colorado also removed the word “sex” and removed the word “ethnicity,” but included the term “national origin.” One member suggested that the reason for these revisions was to avoid a First Amendment challenge to the proposed rule.

Mr. Stark noted that an extended family member wants to use the pronoun “they.” Sometimes family members cannot remember to use the pronoun “they.” Other family members refuse to use the pronoun and therefore cause controversy within the family. The point is that this is a real hornet’s nest. It is very difficult to determine whether the conduct was intentional or negligent or to even determine whether the comment was “intended to cause bias.” It may cause more trouble than it fixes to suggest a revision to the current rules.

Judge Lipinsky noted the two possible problems with the current rule. One is that it does not refer to sex but instead gender and omits other categories of discrimination contained in the model rule. Another is that it refers to national origin rather than ethnicity.

Mr. Patterson suggested that it is worthy to pursue even with the controversy, even though it would be likely to cause more conflict for the court. Mr. Patterson thought it was important to include sex, gender identity, and gender expression, as well as ethnicity. Mr. Masciocchi agreed that the Committee should include these concepts into the rule. Mr. Masciocchi suggested adding a mens rea element that is more specific and clearer than the current rule. The ABA model rule uses “knows or reasonably should know.” Colorado’s rule uses the term “exhibits or is intended to appeal to or engender bias against a person.” This language could be a strict liability standard or at least does not have a clear mens rea.

Justice Hood asked what other states are doing. Mr. Kirsch explained that other states have adopted rules much closer to the ABA model rule. Justice Hood did not recall any discussion about ethnicity or national origin, so that just may be an unintended consequence.

Mr. Kirsch noted that there are two large issues. The first is the perception that our profession is intended to be an exemplar for conduct, so having a broad, aspirational rule is good. The second issue is enforceability, meaning concerns relating to the mens rea for the lawyer to have violated the rule. Ms. Donnelly explained that the limitation to the practice of law, and requiring intent, is what ensures that this rule satisfies the First Amendment.

Mr. Kirsch questioned whether the term “exhibits” adds something in the rule. If the rule prohibited conduct that “is intended to appeal to bias against a person,” the standard of the rule would be clearer and easier to enforce because that is an issue common to criminal law or other contexts. It is important to be thoughtful if the subcommittee is going to pursue revisions because the subcommittee may be chasing after a problem that does not exist, particularly because no person has raised a defense claiming that the standard was a strict liability standard.

Another member asked whether the term contained in the ABA model rule (relating to the practice of law) would capture the continuing legal education scenario. Ms. Yates noted that Pennsylvania had a broader rule that captured the CLE issue and that rule has been challenged and revised numerous times based on constitutional concerns. Judge Lipinsky noted that the current rule has been in place for 8 years. There is a disciplinary case affirming discipline against a lawyer for sending a discriminatory email. The point is that there is some precedent for the rule and some case law from the rule, which could be impacted with proposed revisions.

Judge Lipinsky suggested engrafting the language from the ABA Model Rule (the list of categories of discrimination) but leave everything else unchanged. Judge Lipinsky asked whether this gives enough guidance to the subcommittee going forward. Mr. Kirsch wanted to know whether a majority of the Committee wants the subcommittee to work on this more and come up with a proposal. Mr. Masciocchi suggested a secondary straw poll as to whether there was consensus on adding the categories of discrimination in the ABA Model Rule to the Colorado rule. A third straw poll would be whether to revise the mens rea language. A fourth would be whether the Committee would support eliminating the limitation contained in RPC 8.4(g) that requires the conduct occur in the representation of a client.

On the first straw poll, the Committee voted unanimously to have the subcommittee continue its work. On the second straw poll, the Committee voted unanimously to add to the Colorado Rule the list of categories of discrimination from the ABA Model Rule. On the third straw poll, a majority of the Committee voted against exploring revising the mens rea requirement of the Colorado rule to make it consistent with the ABA Model Rule. (The secretary kept a roster of the votes). On the fourth straw poll, a majority of the Committee voted against exploring revising RPC 8.4(g) to remove or revise the concept of “in the representation of a client.”

The committee took a break from 10:33 to 10:47 am. The Committee reconvened at 10:47 a.m.

H. GENDER NEUTRAL LANGUAGE IN THE RPCS [Judge Lipinsky]. Judge Lipinsky explained that a few rules (e.g., RPC 1.13) use pronouns like “he or she,” as do several of the comments to particular rules. Judge Lipinsky explained that the Court is looking into this through a committee that Judge Jerry Jones chairs. Judge Jones’s committee has researched how other states handle this issue. Some states get rid of pronouns altogether and refer to people in their roles (e.g., Plaintiff, Defendant, Appellant, Appellee, etc.). The consensus of the group was to not do this. Instead, the Committee is looking for ways that make sense to remove the gendered language from the various rules. The good news is that the RPCs use very few gendered terms and it is mainly in the comments. Judge Lipinsky took a deep dive in the RPCs and found a few

examples where the RPCs use gendered language. Judge Lipinsky's memorandum is Exhibit 5 to the packet. It contains some of the examples of gendered language contained in the RPCs. The first example is comment [17] to RPC 1.8. It refers to "his or her" conduct. Judge Lipinsky proposes changing this to "the lawyer's own conduct." RPC 1.13(e). There is a reference to "he or she." Judge Lipinsky suggested changing this to "the lawyer." Same in 1.13 comment [8].

RPC 1.14 comment [10] requires a lawyer to disclose to any tribunal involved and to any other counsel involved the nature "of his or her relationship." Judge Lipinsky suggested changing the language to "the lawyer's" to eliminate the gendered reference.

Comment [7] to Rule 4.2 also involves gendered language. In the context where "his or her" is used, Judge Lipinsky proposes changing the term to "the client" instead of his or her. Judge Lipinsky commented on gendered language contained in comment [7] to RPC 4.5. The current language addresses notice provided by the lawyer and references "he or she." Judge Lipinsky suggested revising this language to "the lawyer" to remove the gendered reference.

Judge Lipinsky reviewed RPC 6.1, which references "he/she." Judge Lipinsky proposes changing those references to "the attorney." Judge Lipinsky went through the remainder of the language contained in his memorandum. Judge Lipinsky apologized for not forming a subcommittee but thought this process would be more efficient. From here, the decisions are: (1) vote to approve the recommended changes; (2) form a subcommittee to consider the changes; or (3) vote to do nothing.

Ms. Donnelly moved to approve the changes. Ms. Glenn seconded the motion. Ms. Glenn also suggested changing the references to "attorney" in RPC 6.1 to "lawyer," which is the word that the other rules use. Mr. Masciocchi noted that the use of the term "attorney" in RPC 6.1 is in the model pro bono policy. Mr. Masciocchi suggested that to be consistent, we should change the reference to "attorney" to be "lawyer" throughout the rule. In addition, Ms. Yates noted that the C.R.C.P. references in RPC 6.1 no longer exist or were moved, so those need to be changed.

Judge Lipinsky noted that the RPC 6.1 references to "attorney" are unique, so perhaps we need a subcommittee to address those references independently. Judge Lipinsky noted that we could make the changes to the gendered language to all the rules now and then form a subcommittee to address RPC 6.1 differently. Ms. Donnelly did not consider the proposed changes to RPC 6.1 to address "attorney" versus "lawyer" friendly because that is a different issue.

Ms. Jones asked whether if we submit proposed changes to the gendered language, will the second set of changes need to go to the Court. The answer is yes.

The Committee voted on whether to approve Judge Lipinsky's proposed revisions to correct the gendered language in the RPCs. The Committee unanimously voted in favor of the proposal.

The Committee voted on whether to form a subcommittee to review RPC 6.1 and other rules for use of the term "attorney" versus "lawyer" and to suggest revisions to it. Committee

members volunteered to serve on the subcommittee, including Jessica Yates, Noah Patterson, Steve Masciocchi, and David Stark. Mr. Masciocchi agreed to chair the subcommittee.

I. REPRODUCTIVE HEALTH SUBCOMMITTEE [Nancy Cohen]. There was no report from the reproductive health subcommittee.

J. ABA'S REVISIONS TO RPC 1.16 [Judge Lipinsky]. The minutes from the last meeting reflect that Judge Lipinsky and Steve Masciocchi were going to send a letter to the Court to address the ABA's proposed revisions to Rule 1.16 to require mandatory withdrawal if a client is engaged in criminal or fraudulent activity. Mr. Masciocchi and Judge Lipinsky will send that letter.

4. NEW BUSINESS. No new business was proposed.

5. ADJOURNMENT. A motion to adjourn was made at 11:08 am and was duly seconded. The motion carried. The meeting adjourned at 11:09 a.m. The next meeting of the Committee will be on April 26, 2024.

Respectfully submitted,

Troy R. Rackham, Secretary