COLORADO SUPREME COURT

STANDING COMMITTEE ON THE RULES OF PROFESSIONAL CONDUCT

Submitted Minutes of Meeting of the Full Committee
On October 4, 2019
(Fifty-Fourth Meeting of the Full Committee)

The fifty-fourth meeting of the Colorado Supreme Court Standing Committee on the Rules of Professional Conduct was convened at 9:00 AM on Friday, October 4, 2019, by Chair Marcy G. Glenn. The meeting was held in the Court of Appeals Conference Room on the third floor of the Ralph L. Carr Colorado State Judicial Building.

Present in person at the meeting, in addition to Marcy G. Glenn and Justice William W. Hood, III, were Judge Michael H. Berger, Nancy L. Cohen, Thomas E. Downey, Jr., Judge Adam J. Espinosa, Judge Lino S. Lipinsky de Orlov, Cecil V. Morris, Jr., Noah C. Patterson, Judge Ruthanne N. Polidori, Henry Richard Reeve, Alexander R. Rothrock, Marcus L. Squarrell, Jamie S. Sudler, III, Eli Wald, Frederick R. Yarger, and Jessica E. Yates. Persons attending the meeting by telephone were Margaret Funk, John M. Haried, Boston H. Stanton, Jr., Lisa M. Wayne, Judge John R. Webb and Tuck Young. Excused from attendance were Gary B. Blum, Cynthia F. Covell, Justice Monica M. Marquez, and David W. Stark. Katherine Michaels attended the meeting on behalf of excused Supreme Court staff attorney and Committee liaison Jennifer J. Wallace.

1. Meeting Materials: Minutes of January 11, 2019 Meeting

The Chair had provided a package of materials to the members prior to the meeting date, including submitted minutes of the fifty-third meeting of the Committee, held on January 11, 2019. The minutes of the fifty-third meeting of the full Committee, held January 11, 2019, were approved.

2. Report Re: Supreme Court's Adoption of New Rule 8.4(i)

Member Yates and Justice Hood provided a brief report on the Colorado Supreme Court's public hearing on September 18, 2019 regarding the adoption of Rule 8.4(i) and comment 5A to the Rule. The reporting members advised there were 3 public speakers at the hearing on September 18 and that the matter was quickly considered and approved by the Court. The formal Order was issued by the Court, *en banc*, on September 19, 2019 and made effective immediately.

3. Report from the Rule 8.4(c) Subcommittee (Chair, Tom Downey)

Tom Downey, who chaired the Subcommittee, directed the members to the Subcommittee's written report, which had originally been presented at the meeting of the Committee on January 11, 2019, and which was included in the materials for the October 4 meeting at pages 15 – 17. Mr. Downey also directed the members' attention to the Colorado Bar Association (CBA) Ethics Committee Opinion No. 137 entitled "Advising, Directing and Supervising Others in Lawful Investigative Activities That Involve Dishonesty, Fraud, Deceit, or Misrepresentation," contained at pages 18 – 37 of the meeting materials.

Mr. Downey reviewed the Subcommittee's report, noting it had recommended that no comment was needed but had alternatively prepared a comment in the event the Committee determined that a comment was more appropriate. Mr. Downey briefly summarized CBA Opinion 137, noting that it specifically discussed the issues addressed in the alternative comment prepared by the Subcommittee. Mr. Downey reported the Subcommittee had reviewed the Subcommittee's initial recommendations as outlined in the written report following the issuance of CBA Opinion 137, and had again concluded that no comment was required and, alternatively, that if the Committee desired to have a comment, that it should be brief and contain the language outlined in the Subcommittee's report.

Judge Berger informed the full Committee that Assistant Attorney General Joe Michaels had published an article on Rule 8.4(c) in *The Colorado Lawyer* and recommended it to the members of the Committee.

A motion was made and seconded to adopt the Subcommittee's recommendation that no comment be adopted to address the meaning of the words "lawful investigative activities" as it appears in Rule 8.4(c). A vote of the full Committee was taken and all members except one voted to adopt the Subcommittee's recommendation to not adopt a comment.

Judge Webb suggested that the Committee reconsider its vote and either adopt the comment proposed by the Subcommittee or adopt a comment simply referring to CBA Opinion 137. After discussion, the Committee affirmed its previous vote against recommending the adoption of a comment to Rule 8.4(c).

The Chair advised that some members of the CBA Ethics Committee who worked on Ethics Opinion No. 137 had voiced strong objections to the adoption of Rule 8.4(c) and were considering recommending that the Supreme Court reconsider the language of Rule 8.4(c) as adopted by the Court in September 2017.

A discussion was held as to how to advise the Court that the Committee had voted to not recommend a comment to Rule 8.4(c). After some discussion, it was agreed that the Chair would send a letter to the Court advising that the Committee had considered whether to recommend the adoption of a comment to Rule 8.4(c) and that after study by a Subcommittee and consideration by the Committee it was the Committee's recommendation that the Court not adopt a comment to address the meaning of the words "lawful investigative activities" as it appears in Rule 8.4(c).

4. Report from the Contingent Fee Subcommittee (Chair, Alec Rothrock)

The report of the Contingent Fee Subcommittee was presented at pages 38-39 of the meeting materials and through the report of its Chair, Alec Rothrock. Mr. Rothrock reported that the Subcommittee had met several times and had made considerable progress in drafting a new rule to present to the Committee along with associated forms. Mr. Rothrock reported that most of the work on the language of the rule itself had been completed but the Subcommittee still needed to draft an associated form of a contingent fee agreement.

The key features of the Subcommittee's work to date were summarized in the eight points set forth at pages 38-39 of the meeting materials. Mr. Rothrock reviewed each of those points He noted that, as discussed in item 5 of the Subcommittee's written report, the proposed rule would protect clients through language prohibiting contingent fee agreement provisions that require clients to reimburse the lawyer for all sanctions awarded against the lawyer and by requiring lawyers to inform clients that they may disapprove the hiring of associated counsel and discharge associated counsel hired without their approval.

One member commented that if the rules relating to contingent fee agreements were incorporated into the Rules of Professional Conduct, it might generate more disciplinary complaints by attorneys against other attorneys. The member also commented that if the rules relating to contingent fee agreements were incorporated into Rule 1.5, they should be set forth in a separate section of that rule. The member also commented that the contingent fee provisions relating to payment of sanctions awarded against the attorney may need additional revision as it might not be appropriate for the rule to require that the lawyer is always responsible for paying any sanctions awarded against the lawyer. Mr. Rothrock noted that the Subcommittee's intent was not to assign the responsibility for sanctions awards either to the client or to the lawyer, but to eliminate the ability of the lawyer to unilaterally shift to the client the burden of paying all awarded sanctions.

Mr. Rothrock concluded his report by noting that the Subcommittee would now turn its focus to drafting forms of contingent fee agreements to accompany the language of the new rule.

5. Report from the ABA Advertising Amendments Subcommittee (Chair, Eli Wald)

Professor Eli Wald, chair of the ABA Advertising Amendments Subcommittee, presented the Subcommittee's report, which appeared in the meeting materials at pages 40-178.

Professor Wald began by noting that in August 2018 the American Bar Association (ABA) House of Delegates revised Chapter 7, Rules 7.1-7.5, of the ABA Model Rules of Professional Conduct regulating advertisement and solicitation. In 2019, the Committee formed a Subcommittee to review and report on the ABA amendments. Committee members Nancy Cohen, Cynthia Covell, Tom Downey, Judge Adam Espinosa, Margaret Funk, Cecil Morris, Noah Patterson, Marcus Squarrell, David Stark and Jamie Sudler, as well as non-members Casey Canonsburg and Saul Sarney served on the Subcommittee. The Subcommittee had also reached out and invited representatives from the Colorado Attorney General's office, Colorado Trial

Lawyers Association, CBA Young Lawyers Division, and the Office of Attorney Regulation Counsel.

At the outset of his report, Professor Wald reviewed the three trends viewed by the ABA as warranting updating of the rules: (1) a lack of uniformity among state rules in an era of increased competition in the market for legal services coupled with the nationalization of law practice required a uniform approach to eliminate the "dizzying number of state variations"; (2) the technological advancements of the internet and social media had changed the landscape relating to advertising and solicitation and the increased speed of the flow of information required review and updating of the old rules; and (3) the ABA believed that in order to continue to ensure client access to accurate information about lawyers and legal services, while respecting First Amendment and antitrust law provisions, changes to the existing rules were required.

The Subcommittee recommended that the Committee revise Colorado Rules 7.1-7.5 to conform to the Model Rules in all respects with six exceptions, where the Subcommittee recommends that existing Colorado language be retained.

The written materials at pages 41 through 48 contain a brief summary of the recommended changes and the six instances where the Subcommittee recommends that existing Colorado provisions be retained. The written materials also contain a redlined version of the advertising rules (pages 49-65), the Association of Professional Responsibility Lawyers (APRL) 2015 Report of the Regulation of Lawyer Advertising Committee, dated June 22, 2015 (pages 66-121), the Supplemental APRL Report, dated April 26, 2016 (pages 122-143), and the Report of the ABA House of Delegates, dated August, 2018 (pages 144-178).

A member questioned why any change is necessary and pointed out that some states, like Florida, had taken separate action not consistent with the proposed Model Rules. Another member noted that although there are a few disciplinary complaints made relating to advertising and solicitation, the paucity of such complaints does not necessarily indicate compliance with the existing rules. Professor Wald responded by reiterating the idea that the existing rules need updating in order to recognize the technological changes relating to the free flow of information in the marketplace, but also noting that to date there has been limited state adoption of the new Model Rules. With respect to the issue of whether there is a need for change, a member noted that the APRL reports as well as the report of the House of Delegates demonstrate the need to revise the rules. Another member noted that the multijurisdictional practice of many lawyers today necessitates uniform standards.

A member, while expressing agreement with the overall concept of adopting the revisions, pointed out a perceived conflict between proposed Rule 7.2(b) and existing Rule 1.5(e), which prohibits referral fees. The member suggested that perhaps Rule 1.5(e) should be eliminated. The member also questioned the Subcommittee's recommendation to retain existing Rule 7.3(c) and 7.3(d) and suggested that proposed Rule 7.5(b) needs some additional work. Professor Wald indicated that he does not believe the proposed provisions of Rule 7.2(b) would conflict with existing Rule 1.5(e).

In a straw vote, members indicated their general agreement to recommend approval of some version of the new Model Rules.

Another member agreed with Professor Wald that the provisions of proposed Rule 7.2(b) are not necessarily inconsistent with existing Rule 1.5(e).

Following a short break, the Committee engaged in a discussion of proposed Rules 7.1-7.3 and their proposed comments:

Proposed Rule 7.1. Committee members expressed an overall consensus on the language of the proposed rule itself with the discussion focusing on certain of the proposed comments. Comment 3A is one of the aforementioned instances where the Subcommittee recommends that the language of the existing Colorado comment be retained. Proposed Comment 3A states:

> Any communication that states or implies the client does not have to pay a fee if there is no recovery shall also disclose that the client may be liable for costs. This provision does not apply to communications that only state that contingent or percentage fee arrangements are available, or that only state the initial consultation is free.

The Committee Chair suggested that the language "only state" be changed to read "state only". A member suggested that the first sentence of the comment be amended to provide "... that the client may be liable for costs of the adverse party's attorneys' fees if so ordered by the court." There was a general discussion of the use of the word "shall" in the comment with certain members expressing that the mandatory language implied by the use of that word was improper and that the word "shall" be changed to read either "must" or "should".

The discussion over use of the word "shall" also carried over into a discussion of proposed Comment 6 to proposed Rule 7.1. Comment 6, which also deviates from Comment 6 to the Model Rule in that it retains existing Colorado language, provides as follows:

> A law firm with offices in more than one jurisdiction may use the same name or other professional designation in each jurisdiction, but identification of the lawyers in an office of the firm shall indicate the jurisdictional limitations on those not licensed to practice in the jurisdiction where the office is located.

A member suggested that replacing the word "shall" with the word "should" would water down the provisions of the comment and that it would be more instructive to practicing lawyers that the comment make an affirmative statement that something either is or is not misleading. Another member again cautioned against adopting language other than the Model Rule language in order to promote uniformity.

Proposed Rule 7.2. Professor Wald highlighted the provisions of Rule 7.2(d)(5), which allows an attorney to "... give nominal gifts as an expression of appreciation that are neither intended nor reasonably expected to be a form of compensation for recommending a lawyer services." He also reviewed the language of proposed Rule 7.2(c) dealing with the issues of lawyer certification and

specialization. The discussion turned to proposed comment 11A to this rule, which retains existing Colorado language. A member suggested that the language "... claims to be certified" be amended to read "claims to specialize". Other members disagreed with the suggestion of substituting "specialize" for "certified" by noting that existing Rule 7.2(c)(1) uses the word "certified" and by noting that the language of the comment should track the language of the rule. There was a brief comment regarding Comment 1, which, as proposed, permits dissemination of information concerning a lawyer's or law firm's name, address, email address, website, and telephone number among other informational material.

Proposed Rule 7.3. Professor Wald again reiterated the need to balance the free flow of information for marketing of legal services while restricting overreaching by lawyers with vulnerable clients. He pointed out that the rationale behind proposed Rule 7.3(b)(2) and (3) was that the clients described in those sections were not considered vulnerable. The proposed rule retains the language of existing Rule 7.3(c) in proposed Rule 7.3(d). A member suggested that perhaps language of proposed Rule 7.3(d)(2) should be moved to a comment while another member strongly disagreed and favored keeping the language in the rule. There was some discussion about the origins of the language contained in proposed Rule 7.3(d) (which retains the language of existing Rule 7.3(c)) with one member noting that the restrictions of the rule parallel statutory restrictions contained in C.R.S. §13-93-111, regarding contacting accident victims within a period of time following an accident. There was some discussion regarding the relationship between proposed Rule 7.3(d)(1) and current Rule 4.2 and whether both provisions are necessary. A member expressed his view that both sections are necessary because they deal with separate policy issues. During the discussion on this issue, the Committee Chair reminded members of CBA Ethics Opinion 111 and suggested that it be reviewed in connection with proposed Rule 7.3(b) and 7.3(d). Professor Wald indicated he would do some additional research with respect to the origins of the language of proposed Rule 7.3(d).A member suggested that proposed Rule 7.3(d) goes beyond the requirements of existing Colorado statutes.

Professor Wald noted that the language of proposed Rule 7.3(f) derives from long-standing Colorado-adopted language on advertising. The members discussed the need to protect potential vulnerable clients and whether the average person distinguishes between the terms "advertising material and "solicitation materials". There was some discussion about the proposed rule's four-year retention requirement. A member suggested that it be increased to five years to track an applicable statute of limitations. It was also suggested that the record-keeping requirement be eliminated for those persons described in proposed Rule 7.3(b)(1), (2), and (3), and that consideration be given to using some of the language of proposed Rule 7.3(b)(1) at the beginning of proposed Rule 7.3(f).

The discussion concluded with the Committee Chair praising the work of the Subcommittee and requesting the Subcommittee to address the issues raised at the meeting and provide the Committee with redlined and clean versions of the proposed rules and comments at the Committee's next meeting.

6. Administrative matters

a. Diversity Subcommittee. Judge Espinosa, as chair of the Diversity Subcommittee, reported that the Subcommittee had an initial telephone conference meeting to discuss ideas for developing and attracting qualified, diverse members for service on the Committee. A Subcommittee member discussed her efforts to develop candidates for another committee and offered to share her ideas and materials to assist the Subcommittee. The Committee Chair requested that members volunteer for service on this Subcommittee and encouraged the Subcommittee to continue its efforts and report back at the next meeting.

b. The next meeting date of the full Committee was scheduled for January 10, 2020.

c. The meeting was adjourned at 12:03 PM.

Respectfully submitted

Thomas E. Downey, Jr., Secretary