Approved by the Committee
October 4, 2019

COLORADO SUPREME COURT

STANDING COMMITTEE ON THE RULES OF PROFESSIONAL CONDUCT

Approved Minutes of the Full Committee
On January 11, 2019
(Fifty-third Meeting of the Full Committee)

The fifty-third meeting of the Colorado Supreme Court Standing Committee on the Rules of Professional Conduct was convened at 9:00 a.m. on January 11, 2019, by Chair Marcy G. Glenn. The meeting was held at 2 East 14th Avenue, Conference Room 1-B.

Present in person at the meeting, in addition to Chair Marcy G. Glenn and Justices Monica Màrquez and William Hood, were Committee members Judge Michael H. Berger, Cynthia F. Covell, Thomas E. Downey, Jr., Judge Adam J. Espinosa, Margaret Funk, John M. Haried, Judge Lino S. Lipinsky de Orlov, David C. Little, Cecil E. Morris, Jr., Noah C. Patterson, Judge Ruthanne N. Polidori, Henry Richard Reeve, Alexander R. Rothrock, Marcus L. Squarrell, David W. Stark, Eli Wald, Judge John R. Webb, Frederick R. Yarger, and Jessica E. Yates. Also present were Supreme Court staff attorney Jennifer J. Wallace and visitor Matthew Morrissey.

Present by conference telephone were members Lisa Wayne, Anthony van Westrum, and Tuck Young.

Members Gary Blum, Nancy Cohen, Judge William R. Lucero, Boston Stanton, and James S. Sudler were excused.

Announcements

Chair Glenn announced that Lino S. Lipinsky de Orlov had been sworn in and started his duties as a judge on the Court of Appeals. She introduced new member Noah Patterson and announced that member Fred Yarger has gone into private practice, and member Dick Reeve would be retiring from the full-time practice of law—but not from the Committee—next week.

Approval of Minutes

The minutes of the fifty-second meeting of the full Committee, held October 19, 2018, were approved.

Report from Rule 8.4(g) Subcommittee (Co-Chairs Jessica Yates and Judge John Webb)

Chair Glenn explained that the committee was not considering the Model Rule language that the committee had previously declined to recommend.

Ms. Yates stated that her office had received a complaint about a request for information about alleged sexual misconduct by a judge, which had been the subject of a disciplinary investigation but was now no longer available. This triggered an inquiry about Rule 8.4(g). [Secretary note: Rule 8.4(g) provides that it is professional misconduct for a lawyer to engage in conduct, in the representation of a client, that exhibits or is intended to appeal to or engender bias against a person on account of that person's race gender, religion, national origin, disability, age, sexual orientation, or socioeconomic status, whether that conduct is directed to other counsel, court personnel, witnesses, parties, judges, judicial officers, or any persons involved in the legal process].

It may be argued that sexual harassment, particularly in the workplace, may not quite fit within the strictures of Rule 8.4(g), which requires the conduct to have occurred "in the representation of a client." Likewise, Rule 8.4(h) provides that it is professional misconduct to "engage in any conduct that directly, intentionally, and wrongfully harms others and that adversely reflects on a lawyer's fitness to practice law." In some cases, Rule 8.4(h) also does not get to the issue of sexual harassment by an attorney. OARC would like to have a rule that specifically mentions sexual harassment to make clear its ability to address non-criminal harassment outside of the context of representation of a client. The subcommittee's report, including the following two versions of a recommended new Rule 8.4(i) and a comment thereto, was provided with the Committee materials:

> Shorter version:
>
> (i) Engage in conduct the lawyer knows or reasonably should know constitutes sexual harassment that is directed at any person with whom the lawyer has a professional relationship.
>
> Longer version:
>
> (i) Engage in conduct the lawyer knows or reasonably should know constitutes sexual harassment that is directed at any person with whom the lawyer has contact through the practice of law or with whom the lawyer otherwise has a professional relationship.

The subcommittee also unanimously recommended the following new comment:

> [_] Sexual harassment may include, but is not limited to, sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature that is reasonably interpreted as unwelcome. "Professional relationship" is not limited to the attorney-client relationship. The substantive law of employment discrimination, including anti-harassment statutes, regulations, and case law, may guide application of paragraph (i).

Judge Webb noted that four of the six subcommittee members were present, and should chime in. He stated that sexual harassment is primarily an employment law concept. In the attorney regulation context, there are two issues: (1) enforcement and (2) notice to the bar. It would be helpful to have sexual harassment addressed specifically in the Rules.

The subcommittee members all agreed that sexual harassment is a serious concern. It concluded unanimously that sexual harassment should be addressed in a rule rather than a comment but was divided on the language of a new rule. One view, not accepted by the subcommittee, is that sexual harassment is more about personal conduct than professional conduct, has a lot of vagaries, and should not be the subject of professional discipline. The other end of the spectrum is the notion that there should be a rule that applies in every instance of sexual harassment whether or not it occurs in a professional context. This would be similar to Rule 8.4(b), which prohibits criminal conduct regardless of whether it occurs in the practice of law.

The subcommittee debate centered on the question whether there should be some nexus between the lawyer's conduct and the lawyer's "professional context." The subcommittee considered conduct arguably at the margins of the "professional context":

(1) When a lawyer sexually harasses employees (should be covered by rule);
(2) When a lawyer sexually harasses a non-employee who is tangentially related to the lawyer's professional context, such as one who provides janitorial services to the lawyer's office;
(3) When a lawyer is not acting as a lawyer, but rather in another context, such as a law professor, legislator, or lobbyist.

The majority of the subcommittee favors the shorter version of proposed Rule 8.4(i) as being more discrete and less subject to nuanced interpretation. Some subcommittee members thought the longer version better reached the "margins" of the professional context. The subcommittee as a whole recommends that sexual harassment be addressed in a rule; that there be some limitations on the applicability of the rule; and that the proposed comment be adopted.

A member asked if the subcommittee had considered the Washington state language "in connection with the lawyer's professional activities"?

Judge Webb replied that the ABA language is "related to … professional activities." He would not object to the Washington language.

Another member asked if the subcommittee intended that the Colorado rule be consistent with the Washington rule, and what the overall intent of the proposed rule is.

Judge Webb stated that the intent of the rule is to be sure egregious conduct is covered. The concern is how and at what "margin" to draw the line. For example, if the rule says "in connection with the lawyer's professional activities," would the rule apply and should it apply to

a lawyer who attends a professional function and develops a personal relationship that later deteriorates into sexual harassment?

A member stated that he preferred the Washington language because it doesn't require a "professional relationship," which can be hard to define. "Professional activities" better covers the janitor situation.

Judge Webb, Chair Glenn and the member discussed various permutations of the language.

Chair Glenn requested that the committee discuss the rule itself first. Should "knows or reasonably should know" stay in?

A member told the committee that the Washington rule is tied to an existing body of law regarding discrimination, which is broader than sexual harassment. He asked if sexual harassment is a subset of discrimination. Judge Webb noted that the body of law regarding sexual harassment has developed in the employment context.

The member stated he believed we should have a rule that tracks with the law of sexual harassment. The proposed rule does not tie to any body of law or past conduct of OARC. The question is "professional relationship" vs. "in connection with the lawyer's professional activities." The standard should be tied to an existing body of law rather than be made up as we go.

Judge Webb stated that it may not be feasible to define sexual harassment in a rule.

The member stated that it was not necessary to define sexual harassment in a rule, but it should be tied into existing law.

Another member said that the idea of the rule was to be able to go beyond existing law.

Member Yates stated that the subcommittee report contains summaries of case law in the disciplinary context that go beyond existing law. For example, propositioning a court clerk is unethical although it may not be prohibited by law.

A member noted that the reach of the rule would be shorter if it is tied to Colorado law. Judge Webb agreed.

The member who first discussed the Washington law noted that his point was that he preferred the phrase "professional activities." He does not think the rule should be limited to Colorado law regarding sexual harassment.

Chair Glenn redirected the discussion to the proposed versions of Rule 8.4(i), starting with a discussion of the desired scope of the rule.

A member asked if the longer version was intended to capture the propositioned court clerk example. Judge Webb said that it was intended to capture that example and also the example of the office janitor.

A member noted that the Washington language is likely as broad as the ABA language. The ABA rule was also disapproved because it covered more than sexual harassment.

A member of the subcommittee stated that the subcommittee thought Rule 8.4(g) was too narrow. Should 8.4(g) be more limited than 8.4(i)?

Judge Webb stated that the subcommittee thought a new Rule 8.4(i) was better than trying to fold it into existing Rule 8.4(g).

A member expressed concern that limiting the context to "professional activities" would be misunderstood to mean that the rule is limited to activities in connection with the client-lawyer relationship.

Another member moved to adopt the shorter version with a revision to say "in connection with a lawyer's professional activities" rather than "with whom the lawyer has a professional relationship". Motion seconded.

Another member asked if the phrase was used elsewhere in the Rules and was advised that it is.

A member asked if the proposed language was the same as "related to the practice of law" (used by the ABA). If so, should we just go with the ABA language?

A member stated that so far, only one state has gone with the ABA proposal. Two states use the phrase "professional activities." This member thinks the Washington language is clear and concise.

A member asked what the difference in scope was between the shorter version with the requested revision and the longer version.

The member who made the motion said he thinks the Washington language is shorter and more concise, and does not require construing the phrase "having a professional relationship with..." He also thinks this language would cover the office janitor example.

Another member said that there is a substantial body of law regarding "in connection with," a very broad concept that would cover all of the examples.

A member asked if the motion on the floor was about the shorter version, because there has also been discussion of the longer version.

Judge Webb stated that the motion was to replace "with whom the lawyer has a professional relationship" with "in connection with the lawyer's professional activities." This language could go in either version.

A member asked if the motion was intended also to delete "directed at any person." The movant said it was not.

Another member preferred "in connection with the lawyer's professional activities" in both versions. He suggested that in the longer version, we should delete "with whom the lawyer has contact through the practice of law or ..." That concept is subsumed in the change.

The subcommittee co-chairs expressed their view that. with the change to "in connection with the lawyer's professional activities," the longer version is not needed.

The movant confirmed that "professional activities" would include both the court clerk and the janitor examples.

The Committee voted on this language change, and the change was approved.

The Chair read the shorter version as revised.

The committee then turned to the phrase "knows or reasonably should know," which appears in both versions.

Judge Webb stated that this language was taken from the ABA Model Rule and is also found in other states' rules.

A member said that an objective standard is needed. A comment should clarify that conduct prohibited by the rule goes beyond what the law prohibits as "sexual harassment." The member suggested that the draft comment should be revised to include "professional activities" to be consistent with the now-revised proposed rule, and the last sentence of the comment should be changed to clarify that substantive law provides a floor but not a ceiling.

Judge Webb noted that the first sentence of the comment is derived from the Code of Judicial Conduct and the second sentence could be revised to say that "professional activities" are not limited to those that occur in the client-attorney relationship.

A member suggested that the Committee vote on the rule first, and then move on to the comment. The Chair did not want to vote yet on the rule, noting that "sexual harassment" may become a point of discussion,

Another member reiterated that the phrase "that is directed at any person" should be deleted from the rule.

Another member noted that the Washington rule says "where the act is committed…"

A member moved to revise the motion to change "directed at any person" to "where the act is committed in connection with the lawyer's professional activities." Seconded. Another member recommended the word "conduct" should be used instead of "act."

The motion is to approve the following revision: "…. should know constitutes sexual harassment where the conduct occurs in connection with the lawyer's professional activities." Motion carries.

The Chair directed the discussion to the proposed comment, with the penultimate sentence to be revised to read "Professional activities are not limited to those that occur in the attorney-client relationship."

The Chair next directed the discussion to the phrase "sexual harassment."

A member said the last sentence of the comment should make clear that it is broader than the substantive law. Judge Webb suggested revising: "Although sexual harassment is broader, the substantive law …"

Another member raised the question of "reasonably interpreted as unwelcome" vs. "unwelcome." He noted that the Colorado Code of Judicial Conduct does not include "reasonably interpreted as." It is unclear whether "reasonably interpreted" refers to the interpretation of the target of the activity, or the interpretation of a third party. He recommends removing "reasonably interpreted" entirely.

A member suggested "is unwelcome or that a target would reasonably view as unwelcome." Another member suggested "is unwelcome or that a reasonable person would interpret as unwelcome." Another member stated that there should be a reasonableness standard. A member suggested: "that a reasonable person would interpret as unwelcome" or "a person would reasonably interpret as unwelcome" or "is unwelcome."

Another member suggested "that the lawyer knows or reasonably should know" is unwelcome. The committee discussed other language revisions for this concept. A motion was made to revise the first sentence of the comment, as follows: "…of a sexual nature that a reasonably prudent person would perceive as unwelcome." Motion carried.

The committee voted that the "professional activity" sentence be put at the end of the comment.

The committee discussed the "substantive law" sentence, with a member commenting that there are two concepts: what is sexual harassment and whether it applies in a non-employment context. The committee discussed whether the substantive law should "guide," "guide but not limit" or "inform" application of Rule 8.4(i).

A member moved that the last sentence of the comment read, "The substantive law of employment discrimination … may guide but does not limit application of paragraph (i)." Motion carried.

A motion was made to recommend to the Supreme Court approval of a new Rule 8.4(i) and comment that read as follows:

> *(i) Engage in conduct the lawyer knows or reasonably should know constitutes sexual harassment where the conduct occurs in connection with the lawyer's professional activities.*
>
> *Comment: Sexual harassment may include, but is not limited to, sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature that a reasonable person would perceive as unwelcome. The substantive law of employment discrimination, including anti-harassment statutes, regulations, and case law, may guide, but does not limit, application of paragraph (i). "Professional activities" are not limited to those that occur in the attorney-client relationship.*

A member asked if the rule requires a victim. The answer is "yes."

A member asked about a lawyer who tells a dirty joke at a CLE program, and was advised by another member that that the EEOC doesn't find a one-off action like that to be worth pursuing. Member Yates responded that the OARC would consider the context of this sort of complaint.

A member stated that "directed at any person" does not add anything and is not necessary.

Another member said that we need to be able to discuss with lawyers what is and is not sexual harassment. This rule doesn't go as far as the ABA rule.

Another member expressed concern about removing "directed at any person." He noted that removing this language could raise the question whether a bystander could claim sexual harassment even if the target is not offended.

A member asked if the committee could vote on the rule and the comment separately.

Motion to approve the rule carried.

Motion to approve the comment carried.

The Chair said she would send the Supreme Court the rule and redline to the subcommittee proposal, with the statement that the Court had requested the Committee to look at this issue, and that the recommended version varies from the subcommittee proposal. She will also send the subcommittee report and accompanying handout and explain that the recommended version emerged from the committee meeting. No changes will be made to the subcommittee report.

Report from Rule 8.4(c) Subcommittee (Chair Tom Downey)

[Secretary's note: The Supreme Court amended Rule 8.4(c) in 2017 to state that it is professional misconduct to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation, except that a lawyer may advise, direct, or supervise others, including clients, law enforcement officers, *or* investigators, who participate in lawful investigative activities." (Emphasis added.) The subcommittee was formed to consider whether a comment on the phrase "lawful investigative activities" was necessary and to consider whether the word "or" shown in italics should be replaced with the word "and."]

Member Downey reported that the subcommittee was great and represented a large diversity of practice areas. It recommends no new comment to Rule 8.4(c). If there is to be a comment, it should be very brief, and should say "lawful" is determined on a case-by-case basis, and should note the potential to violate other rules.

The subcommittee's report lists reasons for not recommending a comment, including the fact that the committee had previously rejected a comment proposed by then-attorney general Cynthia Coffman, and that the general sentiment of the committee was to see how interpretations of the new rule may develop.

Member Downey also noted that the CBA Ethics Committee is working on a formal ethics opinion on this rule. He was authorized by the Chair of the Ethics Committee to receive a draft of that opinion and noted that it follows the concepts the subcommittee evaluated in considering whether to recommend a comment. The Ethics Committee, which must approve a formal opinion at two meetings, will be considering it for the second time tomorrow (January 12, 2019).

A member moved to table further discussion of this until after the Ethics Committee opinion is published. Motion carried.

Report from Contingent Fee Subcommittee (Chair Alec Rothrock)

Member Rothrock reported that he had circulated materials to the subcommittee and it will be meeting later in January.

Report from ABA Advertising Amendments Subcommittee (Chair Eli Wald)

Member Wald reported that the subcommittee is large and diverse, including members from the CTLA and the Young Lawyers Division of the CBA. The subcommittee has met and is underway.

Next Meeting Date

The committee agreed to hold the next meeting in mid-April. It will be scheduled by email.

The meeting adjourned at 11:02 a.m.

Respectfully submitted

Cynthia F. Covell, acting secretary