



**COLORADO SUPREME COURT
ATTORNEY REGULATION ADVISORY COMMITTEE**

MEETING MINUTES
September 16, 2022, 12:00 p.m. – 2:02 p.m.
Conducted via Zoom

Members present: Chair David W. Stark; Cynthia Covell; Steve Jacobson; Hon. Andrew McCallin; Henry (Dick) Reeve; Brian Zall; Sunita Sharma; Carolyn Love, Ph.D.

Members absent: Nancy Cohen; Hon. Adam Espinosa; Alison Zinn

Liaison Justices present: Justice Monica Márquez; Justice Maria Berkenkotter

Office of the Presiding Disciplinary Judge: Hon. Bryon Large; Cori Peterson

Colorado Lawyer Assistance Program (COLAP): Sarah Myers, Executive Director; Amy Phillips, Assistant Director

Colorado Attorney Mentoring Program (CAMP): Ryann Peyton, Executive Director

Office of Attorney Regulation Counsel (OARC): Jessica Yates, Attorney Regulation Counsel; Margaret Funk, Chief Deputy Regulation Counsel; Alan C. Obye, Senior Assistant Regulation Counsel

Guests: Professor Scott Johns, University of Denver Sturm College of Law; Uchechukwu “Emeka” Eze; David Beller; Hon. David Furman; Kristin Marburg; J.J. Wallace

1. Approval of the May 20, 2022 meeting minutes

Dick Reeve moved to approve the minutes. Brian Zall seconded. The minutes were approved.

2. Discussion on proposed changes to Rule 232 – UPL and contempt proceedings (Peterson/Yates) (Attachment 2)

Jessica Yates introduced the proposed changes to the UPL and contempt rules. Ms. Yates stated Cori Peterson worked hard on fine-tuning the rules and making sure they were in alignment with C.R.C.P. 107.

Cori Peterson stated as follows: The changes are largely refinements to C.R.C.P. 232.24. Drafting was guided by Justice Berkenkotter’s feedback. Amendments include (1) adding the respondent’s right under Rule 107 to make a statement in mitigation; (2) making clear the special master should recommend a specific sanction to the supreme court, including

the length of the sentence of imprisonment, and making clear the special master has the full range of contempt sanctions under the rule; and (3) providing a mechanism for remand from the supreme court to the special master if the supreme court finds imprisonment is warranted, so that the special master can take the respondent into custody.

The Chair noted the changes are set forth on page 24 of handout materials, or page 31 of the PDF packet provided to the Committee. The Chair requested comment.

Justice Berkenkotter thanked everyone for work on the revisions and stated as follows: The concern is that because UPL contempt is so infrequent, any judicial officer must get it right. If someone is picked up in Arapahoe for a UPL case heard in Denver by a special master, the concern is that someone could purge the contempt, and if the mittimus isn't clear, the respondent could be locked up on a Friday for days. All these efforts have been designed to try to ensure that doesn't happen.

Justice Berkenkotter asked why on page 24 the rule mentions "including whether the sanctions should be bifurcated." Ms. Peterson responded that edit was made to clarify that a judge should be able to recommend a sequencing of the sanction to the supreme court: first remedial, then punitive. Judge McCallin added that some judges employ a practice in Denver where they impose a remedial sanction, for example \$100/day until paid, bifurcate the punitive contempt to a later date and allow the individual to purge, and during this time consider whether performance has been made while considering punitive sanctions. Justice Berkenkotter clarified the procedure would involve holding a substantive hearing on remedial and punitive contempt, imposing remedial sanctions, and setting punitive sanctions out to a date certain.

Ms. Yates explained that as background, the Presiding Disciplinary Judge has served as special master in the past but doesn't have access to resources that a district court judge would have, such as a jail or the ability to issue warrants. If a Denver district court judge hears these cases, they can use their local practice.

Mr. Jacobson moved to make a recommendation to the supreme court that the proposed changes be made to the rules. Mr. Reeve second. The motion passed unanimously.

Ms. Yates noted that five years of work went into this rule and gave a special shoutout to Cori Peterson for her work.

Dr. Carolyn Love asked about the process once a recommendation is made to the court. The Chair explained the court can do whatever it likes, including accept or reject the recommendation. Justice Marquez explained the court can adopt minor recommendations on the spot or can post more substantive revisions for comment or public hearing. This rule may have gone through that process already.

3. Discussion of protocols for complaints against Regulation Counsel or OARC attorneys and staff (Yates) (Attachments 3A & 3B)

Ms. Yates stated the internal protocols attached to the agenda are outdated. For example, when the policies were adopted, there was no admissions/registration/CLE under the

umbrella of OARC. Ms. Yates stated she would like to have a brief discussion and form a working group to look at these policies and make proposed changes. The working group may involve individuals from the Legal Regulation Committee or this Committee.

The Chair stated as follows: The protocol covers two kinds of complaints regarding Attorney Regulation Counsel or its lawyers. One would be a complaint alleging violation of the Colorado Rules of Professional Conduct. The other would deal with other matters, such as unprofessional conduct. In the past, we have determined whether a complaint is of one kind or another, and then dealt with it. Complaints are to be made in writing and come to Mr. Stark. Mr. Stark confers with Ms. Yates, and they decide what we should do. If the complaint alleges violations of the Rules of Professional Conduct, Mr. Stark sends it to Steve Jacobson and the Legal Regulation Committee, which investigates. A special investigator may be used to avoid potential conflicts. This protocol covers complaints against the PDJ. Mr. Stark can appoint a personnel committee from the Advisory Committee to review and investigate such allegations, and make a recommendation to the Committee as to what to do.

Mr. Jacobson referenced the protocol attached to agenda and noted the need to update language about seeking a special investigator from the supreme court; that should be the Legal Regulation Committee per other rules.

Ms. Yates stated she would appreciate nuances memorialized in the protocol, for example involving complaints about OARC intake attorneys often allege that someone is unprofessional and biased because they've decided to dismiss my complaint. An intake dismissal is final and not reviewable, so that "complaint" is like an appeal of an intake dismissal. Per earlier discussions with the Chair of the Advisory Committee, Ms. Yates does not send those to the Committee but would like to memorialize that in writing. The protocols for the Advisory Committee and Legal Regulation Committee should be consistent so it's clear where to send each kind of complaint.

The Chair suggested appointing a subcommittee and solicited volunteers. Dick Reeve, Steve Jacobson, David Beller, the Chair, Cynthia Covell, Sarah Myers, and Ms. Yates will participate. The Chair offered to set up meeting in the near future to get started.

4. Discussion on proposed changes to Rule 205.3 – Pro Hac Vice Authority Before State Courts – Out-of-State Attorney, with Indian Child Welfare Act (ICWA) exceptions (Judge Furman/Yates) (Attachments 4A & 4B)

Judge Furman recommends these amendments be approved. The ICWA working group has been working on this rule as described in the attachment to the agenda.

Kristin Marburg commented that rule is narrowly-tailored and helps avoid a federal preemption issue.

Ms. Yates commented that from a procedural standpoint, Ms. Funk, Dawn McKnight, and Ms. Yates made sure this amendment is workable in general with the pro hac vice rules. This is a workable proposal.

The Chair noted the essence of the changes is in new section (8) to 205.3. Ms. Sharma moved to recommend that the court adopt the proposed changes. Judge McCallin seconded. The motion passed unanimously.

Justice Marquez left the meeting at 12:30.

5. Consideration of re-approval by Colorado Bar Association Ethics Committee for designation as Peer Assistance Program (Stark) (Attachment 5)

The Chair explained that Rule 253 provides for approval of lawyer peer assistance programs, and the purpose of being designated such a program is that people working in the program are relieved of the obligation to report violations of the ethical rules. This would apply to the CBA Ethics Committee and its hotline.

Ms. Covell added that this is a valuable service provided to members of the bar. She endorsed the idea of continuing to be part of the program. The ethics hotline gets many calls from attorneys trying to figure out what their ethical obligations are, which is laudable. Sometimes they've gotten themselves into something that another attorney would otherwise be required to report. Being a designated Peer Assistance Program is therefore helpful.

Mr. Reeve noted that he and Ms. Covell are part of ethics committee but he will participate in the vote unless there is some reason he shouldn't. The Chair agreed there is no reason Mr. Reeve should not participate. Mr. Reeve moved to recommend that the supreme court approve the request. Ms. Covell seconded. The motion passed unanimously.

6. Discussion of recommendations and approval of new and continuing hearing board members (Judge Large) (Attachment 6)

Judge Large introduced the topic as follows: Members of the disciplinary hearing board pool are appointed for six-year terms. One group's term will expire November 1. This summer, Judge Large started making calls to see if people wanted to seek reappointment. A handful did not. A couple did not respond. A large group did want to seek reappointment. Judge Large is recommending their reappointment.

Judge Large is actively trying to recruit people to participate in the pool. Priorities include diversity categories, including gender, race, religion, sexual orientation, and geographic diversity. The current hearing board pool is Denver-centric. Judge Large is working on getting more non-lawyers. The five-year goal is to have one non-lawyer on every hearing board. Resumes are attached for those seeking appointment. Judge Large has done disciplinary history searches. He recommends their approval.

Dr. Carolyn Love asked Judge Large about the recruitment strategy for the hearing board pool. Judge Large said recruitment includes asking around and asking current members for recommendations. He did a presentation with the rotary club in Westminster two weeks ago and is trying to get into those types of civic organizations across the state. Dr. Love suggested looking for people who may be running non-profits across the state. The Chair commented that the Committee generally relies on people on the Committee to help with

recommendations and recruiting; there is the ability to self-nominate on the website and it's a question of getting the message out.

Dr. Love moved to approve the proposed list. Judge McCallin seconded. Mr. Reeve did not participate in the vote. The motion passed unanimously.

7. Approval of a committee appointment to the Advisory Committee as follows:

David Beller is being nominated to fill an opening created by the resignation of Alec Rothrock. David Stark, Chair of the Advisory Committee, asks for David Beller to be appointed and serve a term of seven years effective October 1, 2022, term expiring on September 30, 2029 (see resume, Attachment 7)

The Chair explained that David Beller will replace Alec Rothrock on this Committee and thanked Mr. Beller for his willingness to serve.

Mr. Beller summarized his background as follows: He is a partner at local Denver firm, Recht Kornfeld. He was previously a public defender in Adams County. For the last 15 years he has been in private practice and started out doing criminal defense. Over that time, thanks to the goodwill of a lot of good attorneys, his practice has evolved into a lot of attorney regulation defense and judicial discipline defense. He has served on the character and fitness committee for about four years and enjoys that work. He is honored to have been asked to serve on this Committee and would appreciate the opportunity.

Mr. Reeve moved to approve the appointment. Mr. Zall seconded. The motion passed unanimously. The recommendation will be sent to the court.

8. Discussion of the Advisory Committee meetings staying on Zoom, occasionally in-person, or a hybrid meeting (Stark)

The Chair opened the topic for discussion. Mr. Jacobson asked Ms. Yates to talk about hybrid meetings and technology.

Ms. Yates explained as follows: There is a large monitor at the end of the extra-large conference room that can be used for hybrid Zoom meetings. The experience is "not too bad." People show up on Zoom on the screen at one end, but people in person at the table have to remember to look at those people and be careful to be audible. People on Zoom probably do not get same experience in this format. We may look into "owl" technology. Ms. Yates offered to try a hybrid meeting in December. Ms. Covell commented that hybrid meetings may encourage geographic diversity.

Ms. Yates noted that we need to upgrade the microphones to pick up speakers on the table, rather than through the monitor at the end of the table. Judge Large suggested a call-in option. Ms. Yates replied that OARC has tried that option but has experienced feedback.

Justice Berkenkotter left the meeting at 12:53 p.m.

The Chair expressed interest in a hybrid meeting. No members opposed a hybrid meeting. The December 9 meeting will be hybrid.

9. Other updates:

a. Office of the Presiding Disciplinary Judge (Judge Large) (Attachment 8)

Judge Large presented the following: Judge Large started serving as the PDJ on June 1. He has been challenging his staff to find ways to be more transparent in the office's work. They are making progress. The office returned to in-person hearings for anything new that is set. For matters currently set, the office contacted hearing board members to decide whether to hold hearings in person. The office changed its Zoom rooms to be public-facing, with login information available on the website.

The office is working on website updates. There is now a link to recent decisions in reverse chronological order. A member of the media contacted the office about an opinion that hadn't been released to Westlaw but was on the website, so people are checking it.

Administrator Tammy Bailey is retiring at end of October. The office recently completed its search for her successor. Judge Large asked Tammy to redact all identifying information from résumés before passing them out to staff. There were 20 applicants, with 9 selected for interviews. Judge Large asked his staff to conduct initial interviews because it is important that everyone get along. Two of the finalists were people of color. Isidro Luna will be the new court administrator.

Judge Large held a dialogue meeting between court staff, OARC attorneys, and respondents' counsel. The next such meeting is planned for January 13.

The office is working on courtroom upgrades. The office budgeted \$25,000, and a quote came in at \$50,000.

A recent switch in phone systems has inhibited the ability to have telephone appearances.

The office is trying to get onto the state court e-filing system. Judge Large has had a couple meetings with the State Court Administrator's Office. SCAO cannot support putting the PDJ's office on their system right now, which is frustrating, as being on the e-filing system is important for transparency. There is concern that the office may be losing its current case-management software in the next couple years. At this point any recommendation from this Committee to the supreme court that e-filing be a priority would be helpful.

Judge Large would like permission to name the courtroom after Judge Lucero.

Mr. Reeve left the meeting at 1:03 p.m.

Judge Large discussed a proposed buildout of the PDJ's office suite. He shared photos of the current entry area into the suite. He would like to open up a window behind the current waiting room that would lead to the court administrator's office in order to increase public access. This would replace what is currently a conference room.

The office is waiting for a quote on the buildout. The current estimate is \$75,000, which is too high to ask the Committee at this time. Judge Large may ask as part of next year's budget.

Dr. Love asked for clarification of what changes the office was requesting and what the benefit would be. Judge Large explained the new waiting area and reception window would increase public access so that the public is not just looking at a locked door.

There was discussion of what may happen to the current judicial discipline offices if the Commission on Judicial Discipline leaves that space. Judge Large explained that there is not currently room for either the PDJ's office or the CJD office to grow, but there may be some shifting around if CJD leaves.

There was a motion to name the PDJ's courtroom after Judge Lucero. Judge McCallin seconded. The Chair clarified with Ms. Yates that the Committee probably does not need to request the supreme court's permission to do so, but Ms. Yates will put this in the transmittal letter from this meeting to the court.

Judge Large noted he has not spoken with Judge Lucero about this plan because he is humble and may decline the honor.

The motion passed unanimously.

There was discussion about how to go about requesting e-filing privileges for the PDJ's office. Ms. Yates suggested requesting a budget quote from SCAO. Judge Large suggested it will be in the six-figure range. The Chair, Ms. Yates, and Judge Large will work on communicating with SCAO. Ms. Yates will convey that this is a priority.

Judge McCallin moved, and there was a second, to convey that sense to the court. The vote was unanimous. Ms. Yates and Judge Large will convey to the court that that is the sense of the committee.

b. Colorado Attorney Mentoring Program (Attachment 9)

Ryann Peyton referenced the CAMP report and reported as follows: Outreach has tripled compared to this time last year. CAMP is outreaching about mentoring but also professionalism and diversity, equity, and inclusiveness and other issues. Last week Justice Marquez and Ms. Peyton were in El Paso County doing a hot wings challenge. Legal Entrepreneurs for Justice is recruiting for its next class. CAMP can provide promotional materials for distribution. LEJ is a small business incubator for law practices to serve low income communities.

In January, CAMP is launching Modern Law University, which is piloting this year.

CAMP is collaborating with CU and DU law schools to bring together law students with disabilities for mentoring.

c. Colorado Lawyer Assistance Program (Myers)

Sarah Myers reported as follows: COLAP has seen the expected dip in calls for assistance during the summer, as is typical due to summer vacation travel plans in the legal community. By August, those numbers soared back up. COLAP is getting reports about burnout and exhaustion. People are getting long COVID and are experiencing burnout

even without diagnosed long COVID. Burnout is extending to judges as well. Judges have been calling in record numbers since the beginning of COVID. COLAP is especially focused on connecting new judges with resources available to them through SCAO, COLAP, and other supportive entities such as the Judicial Standing Committee on Wellbeing.

COLAP's presentation calendar is booked through 2022 and they are booking into 2023. COLAP is seeing requests for consultation with leadership and legal employers about the challenges resulting from shifting from remote to hybrid work with employees in both public and private sectors expressing desires for a continued remote option or, at the least, a permanent hybrid solution. The majority of requests for COLAP appearances are still virtual.

The ABA Commission on Women in the Profession put forth a parenthood survey that will be promoted by the CBA, and Ms. Myers sent a link to the survey and description of survey to the Zoom meeting chat.

d. Office of Attorney Regulation Counsel (Yates)

Ms. Yates reported as follows: OARC conducted the bar exam. 730 people sat for an in-person exam at the National Western Complex. People are more comfortable with an in-person exam from a COVID perspective. There was a mask requirement.

OARC is always recruiting for proctors and graders.

OARC has stopped doing any work for the Commission on Judicial Discipline. This resulted from CJD becoming an independent office funded by the legislature. OARC no longer pays CJD salaries but still pays for office space. It will take time to unravel that issue. SCAO is trying to find CJD additional space in the Carr building or move it elsewhere.

e. Licensed Legal Paraprofessional Proposal Update (Stark)

The Chair reported as follows: The supreme court posted a proposal for an implementation plan. Public comments were solicited and due two days ago. The court received many comments. The Chair expects comments will be posted on the court's website and that the court will schedule a public hearing on the proposal. There may be some naysayer comments, but the movement's time has come from an access-to-justice perspective.

f. Mandatory Pro Bono Reporting Update (Stark)

The Chair reported as follows: The Advisory Committee has a subcommittee studying a proposal for mandatory pro bono reporting as part of the registration requirement. The subcommittee's last meeting was September 9. The subcommittee is gathering information from other states that have mandatory reporting. There has been discussion about what counts as pro bono service. The subcommittee believes we should not treat false reporting as a Colo. RPC 8.4(c) violation if someone gives an answer that's inaccurate. There has been discussion about how to handle financial contributions, and whether we break down

reporting geographically or some other way. There will likely be several more meetings before the subcommittee has a proposed rule change to bring back to this Committee. The idea would be a change to C.R.C.P. 227 to add additional registration questions.

g. Well-Being Task Force and Recognition Program (Peyton) (Attachment 10)

Ryann Peyton reported as follows: The proposal for a well-being recognition program for legal employers has been four years in the making. The idea came out of the well-being task force. A pilot program launched in 2020. 27 employers from across the state participated. This was a good success. The data indicated there was enough for a proof of concept for this to be a standing program of the supreme court. An implementation committee met through the early part of this year to work out details. The report provided with the agenda shows who is part of committee.

The structure of the program would be similar to the court's pro bono recognition program. Employers make a pledge annually. The pledge would represent six goal areas. Employers spend the remainder of the year working toward those pledged goals. At the end of year, the employer submits an attestation form attesting they participated as best they can. The program oversight team would not evaluate specifics. The court provides recognition through an annual event and wall certificate, email signature certificate, and things like that.

CAMP has been budgeting staff capacity to take this on if the court gives the green light. CAMP has a little budget allocation to get off the ground in early 2023. Then CAMP will need \$17,000 per year to run from then on. This may require a rule change to update Rule 255 to put the program under CAMP's umbrella.

CAMP is hoping for a recommendation from the Advisory Committee to submit the proposal to the court for its consideration.

Dr. Love stated she thinks this is excellent. She expressed concern over the legal profession's billable hour requirement and wondered if the subcommittee had navigated through that challenge. Ms. Peyton stated that tension has not been resolved, and employers have not been open to the suggestion that they look at a different model than billable hours. The subcommittee took that language out of the proposal, and that will continue to be a tension. Ms. Yates commented that the subcommittee still included language about additional performance metrics besides billable hours to look holistically at what associates are doing at firms. The Chair noted that here was a lot of discussion around this, and he believes using billable hours makes us sick, but it's an easy way to bill clients and few firms have the courage to do it a different way. A different model would require budgeting on the front end and staying on budget throughout the case; that may change someday but will take time.

Ms. Sharma moved to make the recommendation to the court. There was a second. The motion passed unanimously.

h. Professor Scott Johns and Uchechukwu "Emeka" Eze:

Professor Johns stated he wanted to make himself available to answer questions about the relationship between the Colorado cut score and the community good. He suggests we move to a “next-generation” bar exam. Our law students that just entered will presumably be taking a next-generation bar exam. He suggests a liaison member for the Board of Law Examiners or the Advisory Committee. He suggests posting exam answers for transparency and publishing information about the demographic impact of the bar exam.

Professor Johns referenced anecdotal information about bar exam accommodations. He said we are seeing anecdotal information from students denied accommodation in Colorado, and then go to other states. He believes that applicants that are denied accommodations have a tough hole to dig out of. He wonders whether some review or auditing of the accommodations issue could be helpful.

Professor Johns’ primary issue is the relationship between the Colorado cut score and his letter. Based on evidence he sees, there’s no relationship between high cut scores or low cut scores and the public good as measured by attorney discipline.

Emeka Eze spoke in support of his suggestion to lower the bar exam passing score from 276 to 266. He echoed Professor Johns’ suggestions. He suggested lowering the Colorado cut score from 276 to 266 unless the cutoff of 276 can be objectively justified. He hopes this Committee has the objective information available. He referenced his written comments.

Mr. Eze asked, what does a 276 look like? What’s the difference between 274 and 276? He realized he was asking the wrong question. It’s not about the history of the 276; it’s about the impact of the 276 on people. He believes lowering the score could have a positive effect on mental health and well-being.

Mr. Eze points out that Colorado having the second highest score means no law school wants to admit students they believe cannot pass the bar. The score cutoff has an influence on who walks in the door of our schools. He stated that one year, DU had only 2 students identifying as black or African-American. His recommendation is to lower the minimum passing score.

Ms. Sharma stated she appreciates Mr. Eze’s concerns and the Committee is taking them seriously.

10. Meeting dates for 2022:

December 9, 2022

Proposed dates for 2023:

March 17, 2023

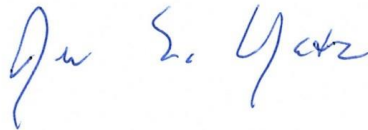
May 19, 2023

September 22, 2023

December 8, 2023

11. Executive session: none.

The meeting adjourned at 2:02 p.m.

A handwritten signature in blue ink, appearing to read "Jessica E. Yates".

Jessica E. Yates
Attorney Regulation Counsel