COLORADO SUPREME COURT STANDING COMMITTEE ON THE COLORADO RULES OF PROFESSIONAL CONDUCT

AGENDA

May 6, 2011, 9:00 a.m.
OARC Conference Room, 1560 Broadway, 19th Floor – Follow the Signs

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1. Approval of minutes:
   a. August 21, 2009 meeting [pages 1-8]
   b. January 21, 2011 meeting [pages 9-20]
2. Report on Supreme Court action on proposed amendments [Marcy Glenn, pages 21-25]
3. Report from Code of Judicial Conduct Subcommittee [Alec Rothrock, pages 26-27]
4. Report from CRPC 8.4(b) and CRCP 251.5(b) Subcommittee [Alec Rothrock and Dave Stark]:
5. Report from Pretexting (CRPC 4.1/4.3) Subcommittee [Tom Downey]
6. New business:
7. Administrative matters:
   a. Select next meeting date
8. Adjournment (before noon)

Chair
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COLORADO SUPREME COURT

STANDING COMMITTEE ON THE RULES OF PROFESSIONAL CONDUCT

Submitted Minutes of Meeting of the Full Committee
On August 21, 2009
(Twenty-Fifth Meeting of the Full Committee)

The twenty-fifth meeting of the Colorado Supreme Court Standing Committee on the Rules of Professional Conduct was convened at 9:05 a.m. on Friday, August 21, 2009, by Chair Marcy G. Glenn. The meeting was held in the Supreme Court Conference Room on the fifth floor of the Colorado State Judicial Building.

Present in person at the meeting, in addition to Marcy G. Glenn and Justices Michael L. Bender and Nathan B. Coats, were Federico C. Alvarez, Michael H. Berger, Cynthia F. Covell, Thomas E. Downey, Jr., John S. Gleason, David C. Little, Judge William R. Lucero, Cecil E. Morris, Jr., Neeti Pawar, Helen E. Raabe, Henry R. Reeve, David W. Stark, Anthony van Westrum, Eli Wald, Lisa M. Wayne, Judge John R. Webb, and E. Tuck Young. Alexander R. Rothrock and Marcus L. Squarrell joined the meeting sometime after it commenced. Excused from attendance were Gary B. Blum, Nancy L. Cohen, Boston H. Stanton, Jr., and Judge Ruthanne Polidori. Also absent was John M. Haried. The term of Kenneth B. Pennywell expired effective June 30, 2009, and the Chair has reported to the Court that Mr. Pennywell has determined not to seek reappointment to the Committee.

I. *Meeting Materials; Minutes of May 8, 2009 Meeting.*

The Chair had provided a package of materials to the members prior to the meeting date, including submitted minutes of the twenty-fourth meeting of the Committee, held on May 8, 2009. Those minutes were approved as submitted.

II. *Further Consideration of Amendments to Rules 1.6, 3.8, and 8.6 Regarding Prosecutorial Discovery of Exonerating Evidence.*

At its twenty-fourth meeting, on May 8, 2009, the Committee adopted a proposal for amendments to Rule 3.8 regarding a prosecutor's duties with respect to exonerating evidence but determined to postpone further action on related proposals — (1) to add a Rule 8.6 regarding the duties of lawyers other than prosecutors with respect to exonerating evidence, and (2) to amend Rule 1.6, to provide a related exception to its duty of confidentiality — until receiving input from the American Bar Association's Center for Professional Responsibility. Following the May meeting, the Chair had sent an inquiry to the Center for Professional Responsibility, a copy of which was included in the materials provided to the members for the current meeting of the Committee, together with a brief reply from the director of the Center.

The Chair asked Judge John Webb, who chairs the subcommittee on these matters, to review for the Committee the ABA's response and to direct the Committee's further discussion of these matters.

Judge Webb reported that the Center for Professional Responsibility did not provide any response to the Committee's proposed Rule 8.6. As to the Committee's proposed modifications to the ABA's version of Rule 3.8, the Center's only comment was that it would prefer use of the single word "promptly" in place of the Committee's words "reasonable time" in Rule 3.8(g) and Rule 3.8(h), which

state the duties of prosecutors with respect to exonerating evidence; the Center's position was that "promptly" gives better guidance — "more direction" and a "clearer standard" — to both prosecutors and disciplinary authorities about the speed with which the prosecutor should act.[1]

The Chair noted that the reply received from the director for the Center gives some indication that they have divided our inquiry into two parts, for their separate consideration: (1) our modifications to their Rule 3.8, and (2) our independent addition of Rule 8.6 and a seventh exception to Rule 1.6. But they have not yet provided us with any significant response to our request for input.

Judge Webb suggested that the Committee could proceed to send to the Court its proposed changes to Rule 3.8, as approved at the twenty-fourth meeting, even though it does not now have any substantive reply from the ABA on Rule 8.6 and the Rule 1.6 exception and may not have any such reply before its next meeting.

The Chair noted that a proposal seems to be floating before the Criminal Justice Section of the ABA to add another exception to Rule 1.6 to allow a lawyer to reveal information regarding a *deceased* client if that information would be exculpatory as to another person. Perhaps, she suggested, the Committee should await development of that proposal.

The Chair also noted that the materials for the meeting contained Wisconsin's adoption of Rules 3.8(g) and (h), as proposed by the ABA. She noted that Colorado would be the second state to adopt those provisions if the Court were to act on the Committee's proposal. But she noted that the Committee had determined, at its twenty-fourth meeting, to delay submission of those amendments until it acted on the related proposals regarding new Rule 8.6 and the additional exception to Rule 1.6. She has also been awaiting the Committee's conclusion of its consideration of Rule 1.15 and Rule 1.16A, to which she now directed the Committee's attention.

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1. The email from John Holtaway, of the ABA CPR staff, to the Chair, dated August 19, 2008 and contained in supplemental materials the Chair provided to the members for this meeting, stated—

> We still strongly encourage the CRPC to recommend the adoption of new subsections (g) and (h) that do not delete the word "promptly" and substitute the phrase "within a reasonable time." Subsections (g) and (h) are addressing the reality that any criminal justice system may produce wrongful convictions and that prosecutors, as ministers of justice, have a duty to remedy such convictions in the face of newly discovered evidence. The Rules of Professional Conduct prescribe a prosecutor's professional responsibilities, functioning as substantive and procedural law. As your Committee's Report notes, the Rules should give a prosecutor as specific direction as possible when describing a required course of conduct. We would suggest that the term "promptly" gives prosecutors more direction than the term "within a reasonable time". A criminal defendant who is wrongly incarcerated, and possibly scheduled for execution, should be assured that a prosecutor who has discovered credible and material evidence will act promptly to disclose that evidence. In response to a prosecutor's concern that prompt disclosure to the defense might undermine the investigation of the exculpatory information or otherwise interfere with legitimate law enforcement interests, the disclosure requirement is qualified by the term, "unless a court authorizes delay."
>
> Additionally, prosecutors who may have violated the Rules of Professional Conduct are subject to disciplinary proceedings. In order for disciplinary counsel to successfully prosecute lawyers for violations of the Rules, the Rules must have as clear standards of professional conduct as possible. In this context as well, "prompt" disclosure is a much clearer standard for lawyers and disciplinary counsel to understand and apply than "reasonable time."
>
> The CRPC may want to keep its new Comment 7A in the proposed new subsections (g) and (h), but again we would suggest that you change "within a reasonable time" to "promptly."

III. *Further Consideration of Closed Client Files.*[2]

At its twenty-fourth meeting, on May 8, 2009, the Committee voted to recommend to the Court amendments to Rule 1.15 and the addition of new Rule 1.16A regarding the disposition of closed client files. However, the Chair informed the Committee, some ambiguity had been discovered in the Committee's recommendations following that twenty-fourth meeting; and she and Marcus Squarrell, chair of the closed client files subcommittee, had determined to bring the matter back to the Committee for clarification.

At the Chair's invitation, Squarrell informed the Committee that the ambiguity lay in the last sentence of Comment 3 to proposed Rule 1.16A, which read, "A client's receipt of papers forwarded from time to time by the lawyer during the course of the representation does not alleviate the lawyer's obligations under Rule 1.16A." He recounted that, following the twenty-fourth meeting of the Committee, Alexander Rothrock had taken the lead in preparing the Committee's proposals for Rule 1.15 and Rule 1.16A for submission to the Court. But, as reflected in the minutes of the twenty-fourth meeting, the Committee had not made a clear determination about where these Rules or their comments should express the concept that distribution of papers to a client during the course of a representation does not alleviate the lawyer's duties as to file retention following the termination of the representation: Was the idea to be retained as the last sentence to Comment [3] to Rule 1.16A or was it to be moved to Rule 1.16 as part of its Comment [9] or as a new Comment [9A]? Or was it to be found in both places?

After some discussion, the Committee determined to include the concept both as a new Comment [9A] to Rule 1.16 and as the last sentence of Comment [3] to Rule 1.16A. Thus, the Committee agreed with the proposal that had been included in the materials provided to the members for the meeting. It was noted that the two provisions are not actually redundancies, because the concept as found in Comment [9A] can be applied to the time immediately following termination of a representation while the concept as found in the last sentence of Comment [3] of Rule 1.16A is applicable to the fuller post-termination period that is dealt with by Rule 1.16A.

IV. *Further Consideration of Midstream Fee Adjustments under Rule 1.5(b) and Rule 1.8(a).*

At its twenty-fourth meeting, on May 8, 2009, and after a lengthy discussion of Rule 1.5(b), Rule 1.8(a), and the issue of a lawyer's "midstream" modification of the arrangement with the client for fees and expenses, the Committee had returned the matter to its subcommittee for further work. The Chair now requested the subcommittee chair, Alexander Rothrock, to explain its revised proposal for amendments to Rule 1.5(b).

At the beginning of the meeting, Rothrock had distributed the following proposal to the members, showing the subcommittee's revised proposal for amendments to the current text of Rule 1.5(b) and its Comment [3A]:

> Rule 1.5
>
> (b) When the lawyer has not regularly represented the client, the basis or rate of the fee and expenses shall be communicated to the client, in writing before or within a reasonable time after commencing the representation. ***The lawyer also shall communicate in writing to the client any change to the basis or rate of the fee or expenses.*** Except as ~~**provided in**~~ ***agreed by*** a ~~**written fee agreement**~~ ***lawyer and a client regarding reasonable periodic increases in the fee charged to the client,*** any material changes to the basis or rate of the fee or expenses are subject to the provisions of Rule I.8(a).

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2. The Committee's proposal for the addition of Rule 1.16A was extensively revised at its twenty-eighth meeting, on August 19, 2010. The reader should review the minutes of that meeting, too. —*Secretary*

Comment

[3A] ~~For purposes of Paragraph (b), a material change to the basis or rate of the fee is one that is reasonably likely to increase the amount payable by the client or which otherwise makes more burdensome the original financial obligations of the client~~ ***Reasonable periodic increases in the fee or expenses to which the client expressly or impliedly agrees are not subject to Rule 1.8(a). The client's agreement to such periodic increases may be manifested by a provision for such increases in any written fee agreement, any communication required by the first sentence of Rule 1.5(b) to which the client assents, or a course of dealing between the lawyer and client. The reasonableness requirement of Rule 1.5(a) applies to increases in the fee or expenses.*** When a change in the basis or ***the*** rate of the fee or expenses is reasonably likely to benefit the client, such as a reduction in the hourly rate or a cap on the fees or expenses that ~~did not~~ previously ***did not*** exist, the change is not material ~~for these purposes~~ and Rule I.8(a) **is** ***does*** not ~~required~~ ***apply***.

Rothrock characterized the new proposal as a simple one: It would change Rule 1.5(b) to make it clear that the lawyer and the client may agree to periodic, reasonable increases in the lawyer's fee, an agreement which — as the comment explains — may be included in a written fee agreement, may be included in the written communication contemplated in the first sentence of Rule 1.5(b), or may be established by a course of dealing between the lawyer and the client.[3]

A member suggested that the word "by" in the phrase "Except as agreed by a lawyer and a client" should be changed to "between." That suggestion was not supported by other members and was not pursued.

After some discussion, the members agreed that the concept of changes in expenses, found elsewhere in the proposal, should be added to the phrase "regarding reasonable periodic increases in the fee" in the second sentence of Rule 1.5(b), so that it would read, ""regarding reasonable periodic increases in the fee or expenses." In the course of the discussion, one member noted that it was common for her employer, a municipal corporation, to enter into engagement agreements that allowed expenses as percentages of fees and as to which provisions might be included for the periodic alteration of those percentages. Another member suggested that similar adjustments might be provided for expenses for legal research.

A member noted that the concept of a "charge to the client" was implied throughout the rule and need not be stated in the text of the rule itself.

That member also asked why the text needed to refer to a "course of dealing between the lawyer and client." She reminded the Committee[4] that a course of dealing could not be a basis for satisfying Rule 1.5(b) for any representation that had commenced after the 1999 adoption of the requirement that the basis or rate of fee be disclosed to the client in writing before or within a reasonable time after commencing the representation. All agreed that the concept of a course of dealing was included only to accommodate representations commenced before the 1999 amendment to the Rule.

A member detected some sentiment that continued accommodation of the course of dealing concept might not be worth the complexity it added to the text.

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3. As discussed later in the meeting, an agreement by way of a course of dealing could occur only in the context of a representation that commenced before the Rule was amended in 1999 to add a requirement of at least a written communication regarding the fee.

4. *See* the minutes of the twenty-fourth meeting of the Committee, held on May 8, 2009, for a discussion of grandfathering of pre-1999 fee agreements founded on courses of dealing.

Another member suggested adding the clause "or, with respect to a regularly represented client," before the words "a course of dealing between the lawyer and client" in the comment, in order to clarify that the concept of a course of dealing can apply to an existing matter for an existing client but can also apply to a new matter for an existing client.

A member asked whether the text accommodating a course of dealing improperly implied that ground for a periodic modification of the basis or rate of the lawyer's fee or charges for expenses might be established by way of a course of dealing even for representations begun after 1999. But another member pointed out that such a ground could never be established in logic in that circumstance, since the *first* such modification, necessary to start such a course of dealing, could itself never be justified as having been made in a continuum constituting the supposed course of dealing. After some discussion among the members regarding that point, the members agreed that the logic worked to solve the perceived problem and to preclude any reliance on a supposed course of dealing in a representation that commenced after the 1999 change to the Rule.

A member spoke to state his approval of the entire proposal as he understood it: Whether one views the modifications as providing protections for the client or for the lawyer — in his view, the clarifications aided both parties — the proposal goes well beyond the minimum guidance provided in the ABA Ethics 2000 Rules, which only requires that "[a]ny changes in the basis or rate of the fee or expenses shall also be communicated to the client" and gives no warning that Rule 1.8(a) lies in wait. Further, lawyers have been concerned about the Rule 1.8(a) implications even when their written engagement agreements with their clients make careful provision for periodic changes in their hourly rates. There is no need for that concern, as we are clarifying. And we have continued to grandfather pre-1999 representations with appropriate accommodation to a course of dealing, not just to protect the lawyer but to reflect the deal as established by a principle of contract law.

A motion was made to adopt the subcommittee's proposal, with insertion of "expenses" and deletion of "charged to the client" as had been proposed in the course of the discussion.

A member asked whether the motion would also include the suggestion that had earlier been made to add the words "or, with respect to a regularly represented client," before "a course of dealing between the lawyer and client" in the comment. He explained that he thought the addition would give the Office of Attorney Regulation Counsel a basis — necessary in his view — for countering an overly-expansive reading of the course of dealing concept. In his view, that concept should not be available for the lawyer who has not "regularly represented" the client.

A member asked how that text would apply to a single matter that had been undertaken for a client, for which she had obtained a detailed engagement agreement but had failed to cover fee changes, but as to which she had in fact been making periodic fee adjustments for many years: Would that constitute a "course of dealing" as contemplated by the comment with the addition of a "regular representation" requirement?

The member who had suggested the addition of the "regular representation" text responded that she would be covered. He noted that his purpose had been to include the circumstance of a client whom the lawyer had represented regularly but for whom there had been a series of separate matters separated by gaps of time in which all matters had been concluded and no new matter had been undertaken. In his view that lawyer-client relationship could be grandfathered — if it had originated before the 1999 amendment to the Rule — and post-1999 increases in the rate of fee for new matters, without a new, Rule-1.5(b) written communication or written agreement would be appropriate under the course of dealing principle. He believed the subcommittee's proposal encompassed that situation but thought the addition of the clause would clarify the point.

The Chair then proposed what she characterized as a radically different approach to midstream fee adjustments from that which had been proposed by the subcommittee: She proposed the following:

1. Delete the last sentence of the subcommittee's proposal — reading "Except as agreed by a lawyer and a client regarding reasonable periodic increases in the fee charged to the client, any material changes to the basis or rate of the fee or expenses are subject to the provisions of Rule I.8(a)" — and substitute the following: "Any changes in the basis or rate of the fee or expenses shall also be promptly communicated to the client, in writing."

2. Delete all of Comment [3A] except that which would say that Rule 1.8(a) applies to fee increases.

3. Drop the proposed change to Comment [1] of Rule 1.8.

She explained that the Committee's drafting conundrum began with its desire to protect the client from a midstream change in fee structure — typically from an hourly rate to a contingency but sometimes from a contingency to an hourly rate — that is motivated by the lawyer's desire to increase the compensation to come from the representation, to the client's substantial detriment when compared to the original fee structure. In such a situation, the protections that Rule 1.5 affords to a new engagement — provide for the compensation and state it in writing — are ineffective to protect the client who has already selected the lawyer and agreed to a fee arrangement and who cannot now easily take the representation to another lawyer when faced with the first lawyer's demand for a change. Rule 1.8(a) applies to that situation, and the Committee only sought to make that application clear by the addition of a reference in Rule 1.5(b).

But the Committee's good intentions had led to confusion, confusion arising because well-intentioned lawyers try to conform to the Rules as they are written. They found Rule 1.8(a) to be troublesome for existing relationships because of its apparent treatment of *any* fee adjustment as a covered "business transaction" for which the lawyer was required to advise the client to get another lawyer to counsel the client on that business transaction. The solution, she suggested, was to drop the reference in Rule 1.5(b) to Rule 1.8(a). That would not alter the fact that Rule 1.8(a) continued to apply to such cases. But, a reasonable lawyer, seeking to comply with Rule 1.8(a), would, as that provision required, communicate the proposed fee change to the client, in writing. And the lawyer would necessarily comply with Rule 1.5's requirement that the fee, as adjusted, still be reasonable; thus the lawyer would also comply with the "fair and reasonable" aspect of Rule 1.8(a). Further, the written communication requirement of Rule 1.8(a)(2) is echoed in that of Rule 1.5(b). All that is left out from Rule 1.8, under the Rule 1.5 amendments as proposed by the Chair, would be its independent-legal-counsel requirements. So, for the normal, reasonable rate change, the "elaborate" aspects of Rule 1.8 were not, in her view, needed. For the "problematic" structural change, as from an hourly to a contingent fee, the panoply of Rule 1.8 provisions are needed, for such a change would probably not be "fair and reasonable." In short, the Chair concluded, the client is adequately protected by Rule 1.5 in the "normal" fee adjustment situation and no reference to Rule 1.8(a) is needed.

Further, the Chair argued, the Committee has assumed that the written communication requirement of Rule 1.5(b) does not apply if the lawyer has regularly represented the client and wants to make a regular or "periodic" change in the hourly rate. But that is not correct. It is true that there need be no written communication of the basis or rate of fee if there has been a regular representation of the client — a grandfathered situation. But the requirement of the second sentence of Rule 1.5(b) as currently before the Committee and which the Chair would retain — "The lawyer also shall communicate in writing to the client any change to the basis or rate of the fee or expenses" — would be applicable

whether or not the lawyer and the client had an ongoing relationship of which fee adjustments had been an aspect.

In answer to a member's question, the Chair said she was not proposing a reversion to the ABA Ethics 2000 version; she would retain the Colorado requirement that the basis or rate of fee be communicated to the client before or within a reasonable time after commencement of the representation.

A member noted that there was a pending motion to adopt the subcommittee's proposal with some modifications.

A member asked about the experience of the Office of Attorney Regulation Counsel with fee modification issues and was told that about fifteen percent of its investigations relate to fee agreements, some of which relate to periodic modifications. For the most part, however, the OARC sees the issue as a matter that is frequently raised by lawyers at seminars, where they are seeking guidance on how to comply with the Rules.

Upon a vote, the pending motion (not the Chair's alternative proposal) was adopted, with seven voting in opposition.

Justice Bender asked whether those who dissented on the vote for the motion would have supported the Chair's alternative, and five of the seven dissenters said that they would have done so. Justice Bender asked that they submit a minority report to the Court with the Committee's approved proposal for amendments to Rule 1.5(b) and Rule 1.8(a). The Chair agreed to draft that report and to circulate it among those dissenters for comments and agreement.

V. *Extension of CLE Requirements to Senior Lawyer Retaining Active Licenses.*

The secretary asked whether it would be appropriate for the Committee to consider extension of the Colorado mandatory continuing legal education requirements to each lawyer without age limit so long as the lawyer retains an active license. Currently, he noted, Rule 260.5, C.R.C.P., provides that "Any registered attorney shall be exempt from the minimum educational requirements set forth in these rules for the years following the year of the attorney's 65th birthday."

Another member noted that he understood that possibility was being actively looked at by others in the legal community. A second member added that he understood that the inquiry was a quiet one, directed specifically and only at the secretary.

A member who was familiar with the activities of the Board of Continuing Legal Education said he believed it was that committee, not this Committee, that was the appropriate forum for consideration of extension of the CLE requirements. He added that the question was entirely a political one, the wisdom of extension being self-evident, although he admitted to some difficulty in re-applying the requirement to lawyers who have been freed from it for some period of time.

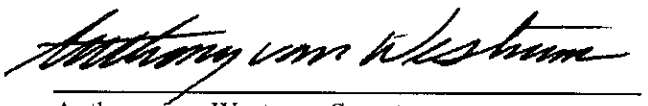
VI. *Expiration of Committee Memberships.*

The Chair noted that the terms of some of the Committee's members had technically expired on June 30, 2009. She expected each term — other than that of the member who had indicated a wish not to be reappointed — to be extended for another two years and, in answer to a member's question about the effectiveness of the vote of such a member on the issues considered at this meeting, assured the members that the extensions of the terms would be *nunc pro tunc* so that there would be no lapse in authority.

VII. *Adjournment; Next Scheduled Meeting.*

The meeting adjourned at approximately 10:30 p.m. The next scheduled meeting of the Committee will be on Friday, February 26, 2010, beginning at 9:00 a.m., in the Supreme Court Conference Room.

RESPECTFULLY SUBMITTED,



Anthony van Westrum, Secretary

COLORADO SUPREME COURT

STANDING COMMITTEE ON THE RULES OF PROFESSIONAL CONDUCT

Submitted Minutes of Meeting of the Full Committee
On January 21, 2011
(Twenty-Ninth Meeting of the Full Committee)

The twenty-ninth meeting of the Colorado Supreme Court Standing Committee on the Rules of Professional Conduct was convened at about 9:00 a.m. on Friday, January 21, 2011, by Chair *Pro Tem* Michael H. Berger. The meeting was held in a conference room at the Office of Attorney Regulation Counsel, 1560 Broadway.

Present in person or by conference telephone at the meeting, in addition to Michael H. Berger and Justices Nathan B. Coats and Monica M. Marquez, were Cynthia F. Covell, Thomas E. Downey, Jr., John S. Gleason, David C. Little, Judge William R. Lucero, Cecil E. Morris, Jr., Neeti Pawar, Judge Ruthanne Polidori, Helen E. Raabe, Henry R. Reeve, Alexander R. Rothrock, Marcus L. Squarrell, Boston H. Stanton, Jr., James S. Sudler III, David W. Stark, Anthony van Westrum, Lisa M. Wayne, and Judge John R. Webb. Excused from attendance were the Chair, Marcy G. Glenn; John M. Haried; and Eli Wald. Also absent were Federico C. Alvarez, Gary B. Blum, and Nancy L. Cohen.

In addition to the members of the Committee, John R. Posthumus, of Sheridan Ross, P.C., and Adam L. Scoville, of Re/Max, LLC, were present by invitation.

I. *Introductions.*

The Chair recognized Justice Monica Marquez, who has become the Court's co-liaison to the Committee, joining Justice Coats in that capacity and replacing now-Chief Justice Michael L. Bender. To help her feel at home, the Chair asked the members of the committee to introduce themselves, and they did.

II. *Meeting Materials; Minutes of August 19, 2010 Meeting.*

The Chair had provided a package of materials to the members prior to the meeting date, and submitted minutes of the twenty-eighth meeting of the Committee, held on August 19, 2010, were separately provided to the members prior to the meeting date. Those minutes were approved with one correction.

III. *Update on Pending Proposals.*

Justice Coats informed the members about the status of two proposals that the Committee had recently made to the Court — the proposal to amend Rule 1.5(b) and its comments, and Comment [1] to Rule 1.8, regarding modifications to a lawyer's fee agreement during the course of an engagement; and the proposal for amendments to Rule 1.15, and the addition of Rule 1.16A, regarding client file destruction (which, the Justice noted, the Committee had withdrawn and resubmitted to the Court in November 2010). Justice Coats noted that a hearing had been scheduled on the fee agreement proposals in October but had been canceled for lack of public comment; he did not expect the Court to schedule a further hearing on the modified client file proposal. He characterized both proposals as "on track" and said he expected the Court to take action on them soon

A member pointed to text of Rule 1.15 that is included in the Committee's proposed amendments to that Rule — albeit text that already exists in the current version of the Rule — and limits application of the Rule to "property of clients or third persons that is in a lawyer's possession in *connection with a representation.*" He contrasted that operative text with that found in Comment [6] to the Rule, which states that the "obligations of a lawyer under this Rule are independent of those arising from activity other than rendering legal services. For example, a lawyer who serves as an escrow agent is governed by the applicable law relating to fiduciaries even though the lawyer does not render legal services in the transaction. See Rule 1.16(d) for standards applicable to retention of client papers." In his view, the comment indicates that the scope of the Rule itself is intended to be larger than just holding property in the course of a representation.

Other members questioned the accuracy of that reading of Comment [6]. On reflection, the member who had raised the point concluded that he had been mistaken and that Rule 1.15 is indeed limited in scope to property a lawyer possesses "in connection with a [legal] representation" and that the comment is consistent with that limitation.

IV. *Interplay between Rules of Professional Conduct and Revised Code of Judicial Conduct.*

At the Chair's request, Judge John Webb reported to the Committee on the activities of the subcommittee that had been formed to consider the interplay between the revised Code of Judicial Conduct and the possibility that lawyers could be sanctioned under the Rules for participating in conduct initiated by, and appropriate for, judges under the Code as it was revised effective July 1, 2010.[1]

Webb summarized the subcommittee's findings as follows: The deeper the subcommittee looked at the two sets of rules, the more it determined that any differences were either insignificant or explained, by rigorous reading, to encompass duties imposed in different capacities. The subcommittee concluded that there were no real conflicts in fact between the two regimes.

The subcommittee did detect one anomaly, regarding criminal conduct: A lawyer may be more subject to discipline under Rule 8.4(b), C.R.P.C.,[2] than a judge would be under the comparable provision in the Code of Judicial Conduct,[3] due to nuanced differences in the texts. The subcommittee considered melding the two in this regard by text that would cause Rule 8.4(b) to preempt Rule 1.1 but concluded that was not necessary. Webb said that conclusion was based on differences between the jurisdiction of the Judicial Discipline Commission, which regulates the conduct of judges, and that of the Office of Attorney Regulation Counsel, which can discipline former judges: If a judge were to escape the reach of the Judicial Discipline Commission by resignation from the bench, the judge would then come within the reach of the OARC. Accordingly, there is no need to add a preemptive provision to the Rules in this regard.

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1. *See* p. 50 *et seq.* of the materials provided for the meeting for the subcommittee's report.

2. Rule 8.b(b), C.R.P.C., provides, "It is professional misconduct for a lawyer to . . .(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects . . . ."

3. Rule 1.1, CJC, provides, in part, as follows:

> (B) Conduct by a judge that violates a criminal law may, unless the violation is minor, constitute a violation of the requirement that a judge must comply with the law.
>
> (C) Every judge subject to the Code of Judicial Conduct, upon being convicted of a crime, except misdemeanor traffic offenses or traffic ordinance violations not including the use of alcohol or drugs, shall notify the appropriate authority* in writing of such conviction within ten days after the date of the conviction. . . .

Webb concluded by saying that, apart from two small changes, the subcommittee saw no need for any change to the Rules of Professional Conduct occasioned by the revision of the Code of Judicial Conduct. The two changes he referred to are identified at the end of the subcommittee's report and in two attachments to that report, which are memoranda prepared by subcommittee member Alexander Rothrock. The first change — which the subcommittee characterized as a housekeeping matter — would be to text in Comment [1] to Rule 1.12, dealing with restrictions on a lawyer's practice when the lawyer previously served as a judicial officer. The second change deals with the possibility that a lawyer who engages in an *ex parte* communication with a judge could be disciplined for violation of Rule 3.5, even if the judge initiated the communication *sua sponte* and even though, from the judge's perspective, the communication was proper under Rule 2.9 of the Code of Judicial as a communication for "scheduling, administrative, or emergency purposes."

Alexander Rothrock then explained the two changes to which Webb had referred, as follows:

A. *Rule 1.12 References to Code of Judicial Conduct.*

Rule 1.12 deals with former judges, arbitrators, and the like, and Comment [1] refers to provisions of the American Bar Association's Model Code of Judicial Conduct as promulgated in 1990. The subcommittee proposes changing those references to the current correlative provisions of the Colorado Code of Judicial Conduct and providing a more accurate paraphrase of one of those provisions, as follows:

> .... ***Paragraph III(B)*** ~~**Paragraphs C(2), D(2) and E(2)**~~ of the Application Section of the ~~**Model**~~ *Colorado* Code of Judicial Conduct **provide** ***provides*** that ~~**a part-time judge, judge pro tempore or retired judge recalled to active service,**~~ ***Part Time Judges*** "shall not act as a lawyer in **any** ***a*** proceeding in which ~~**he**~~ ***the judge has*** served as a judge or in any other proceeding related thereto." ~~**Canon 3(C)(1)(b)**~~ ***Rule 2.11(A)(5)(a)*** of the Colorado Code of Judicial Conduct requires a judge to disqualify himself or herself in a proceeding in which the judge served as a lawyer in the matter in controversy, or ~~**a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter**~~ ***the judge was associated with a lawyer who participated substantially as a lawyer in the matter during such association.*** Although phrased differently from this Rule, those Rules correspond in meaning.

As Rothrock put it, it makes sense for the Colorado Court, speaking through this comment, to state the Court's purpose in other provisions it has adopted — its rules of conduct for Colorado judges — rather than to state the purpose of a model code adopted by an independent professional association that has no authority over Colorado judges.

A member who is familiar with the current activities of the Office of Attorney Regulation Counsel said he thought these changes would be acceptable to the OARC; he noted, too, that the OARC is currently working with the Judicial Discipline Commission to update the Commission's procedural rules. Accordingly, this member suggested, the numbering of provisions in the Code of Judicial Conduct may be changed by that effort; he proposed that this Committee postpone implementation of this suggestion from the subcommittee until that other task has been completed and the proper references to the Code are known.

In view of those comments, a member proposed tabling this proposal, and that motion carried.

B. Ex Parte *Communications under Rule 3.5 vs. Rule 2.9(A).*

Upon receiving clarification that the pending refinements to the Code of Judicial Conduct would not obviate the second of the two changes proposed by the subcommittee as it would the first of these changes, Rothrock undertook to explain that second matter to the Committee.

Rothrock explained that Rule 2.9(A) of the revised Code now permits a judge to communicate *ex parte* in certain circumstances.[4] The rule regulates a judge's *ex parte* communications concerning pending and impending matters with *any* person, including expert witnesses and court staff; importantly for the Committee's purposes, it also regulates a judge's *ex parte* communications with parties and their lawyers. As to lawyers, the Code Rule permits a judge to "initiate, permit, or consider [an] ex parte communication[] . . . for scheduling, administrative, or emergency purposes, which does not address substantive matters." (Rothrock commented that this authority was probably implied under the prior version of the Code but has now been made explicit.) Contrariwise, the Rule governing a lawyer's communications with judges, jurors, and other officials — Rule 2.5 of the Rules of Professional Conduct — permits a lawyer to communicate *ex parte* "with" a judge only if "authorized to do so by law or court order." Rothrock summarized by pointing out that Code Rule 2.9(A) grants authority to a *judge* for certain *ex parte* communications with a lawyer but that neither that Code Rule nor any Rule of Professional Conduct grants corresponding authority to the *lawyer* to participate in that communication, and that, in the absence of such authority from some source running to the *lawyer*, Rule 3.5(b) flatly prohibits the lawyer's participation in the communication.

To address the inconsistency between Rule 3.5 and Code Rule 2.9(A), the subcommittee has proposed the addition of a few words to Rule 3.5(b) and a change to the corresponding comment, as follows:

> RULE 3.5. IMPARTIALITY AND DECORUM OF THE TRIBUNAL
>
> A lawyer shall not:
>
> . . . .
>
> (b) communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order, ***or unless a judge communicates ex parte with the lawyer under the authority of Rule 2.9(A)(1) or (4) of the Colorado Code of Judicial Conduct***;
>
> ---
>
> [Comment] [2] During a proceeding a lawyer may not communicate ex parte with persons serving in an official capacity in the proceeding, such as judges, masters or jurors, unless authorized to do so by law or court order ***or a judge communicates ex parte with the lawyer under the authority of Rule 2.9(A)(1) or (4) of the Colorado Code of Judicial Conduct.***

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4. Rule 2.9(A), CJC, reads, in part, as follows:

> (A) A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties or their lawyers, concerning a pending or impending matter, except as follows:
>
> (1) When circumstances require it, ex parte communication for scheduling, administrative, or emergency purposes, which does not address substantive matters, is permitted, provided:
>
> (a) the judge reasonably believes that no party will gain a procedural, substantive, or tactical advantage as a result of the ex parte communication; and
>
> (b) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication, and gives the parties an opportunity to respond.
>
> . . . .
>
> (4) A judge may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to settle matters pending before the judge.

Rule 2.9(A)(1) of the CJC authorizes a judge to engage in nonsubstantive ex parte communications with lawyers for scheduling, administrative, or emergency purposes. Rule 2.9(A)(4) of the CJC authorizes a judge to engage in ex parte communications with lawyers, with the consent of the parties, in an effort to settle matters pending before the judge.

Rothrock noted that such a change would not be unprecedented: DR 7-110(B) of the Colorado Code of professional Responsibility, like the corresponding provision in the ABA Model Code, contained an exception for a lawyer's *ex parte* communications "authorized by law, or by Section (A)(4) under Canon 3 of the Code of Judicial Conduct" — § (A)(4) of Canon 3 being the predecessor to Code Rule 2.9(A). Rothrock did not know why, and found it puzzling that, the revised ABA Ethics 2000 Rules did not carry over this exception; some of the jurisdictions that have adopted the Ethics 2000 Rules have reinserted the exception, as the subcommittee is now proposing that the Committee do.[5]

Under the subcommittee's proposal, Rothrock noted, a lawyer could not properly *initiate* a call that a judge could have made — an *ex parte* call about a scheduling, administrative, or emergency matter. The proposal would not permit that but, rather, would require that the communication be initiated by the judge.

Rothrock pointed out that the suggested addition to Comment [2] is not necessary but merely helpful and could be omitted by the Committee.

Webb added that the subcommittee endorses the two changes that Rothrock addressed.

A member commented that the purpose — clarification — of the two proposals Rothrock addressed was a good one, but he felt that the proposals themselves might cause more trouble than was necessary. As to the second proposal, he felt that the existing text of Rule 3.5(b) adequately permits the lawyer to engage in such communications as are "authorized by law"; he noted, in that regard, that Rule 65(b), C.R.C.P.,[6] permits a lawyer to have *ex parte* communications with a judge to set a hearing on a motion for a temporary restraining order. The member also suggested that there may be legal authority, other than the cited provisions of the Code of Judicial Conduct, for the judge's communication, but the subcommittee' suggested modifications would not encompass that other authority.

Another member voiced agreement with those comments and added that, perhaps, the two rules regimens should be different with respect to communications — that lawyers should not necessarily get off the hook just because the judge thinks the judge is acting appropriately.

A member, who said she had lots of experience with judges located in judicial districts with smaller populations and fewer court facilities than are found in the metropolitan districts, remarked that

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5. In his June 25, 2010 memorandum to the subcommittee, Rothrock speculated, "It is possible the ABA believed that the exception in Model Rule 3.5(b) for ex parte communications authorized by 'law' made specific reference to the CJC unnecessary, although the fact that DR 7-110(B) referred to both 'law' and the CJC indicates that the drafters of the Code believed otherwise." *See* p. 67 of the materials provided to the Committee for this Report.

6. Rule 65(b) provides—

(b) Temporary Restraining Order; Notice; Hearing; Duration. A temporary retraining order may be granted without written or oral notice to the adverse party or his attorney only if: (1) It clearly appears from specific facts shown by affidavit or by the verified complaint or by testimony that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or his attorney can be heard in opposition, and (2) the applicant's attorney certifies to the court in writing or on the record the efforts, if any, which have been made to give the notice and the reasons supporting his claim that notice should not be required. . . .

many judges in those districts keep their own calendars, so that the lawyer is often told by court staff to contact the judge directly for scheduling purposes.

Another member said that any lawyer will want to protect himself or herself from challenge on account of improper contact with the judge and, therefore, will make sure opposing counsel is included in any communication with the judge. Transparency is important, she added.

A member who was familiar with water law practice agreed with the view that the suggested modifications Rule 3.5(b) could have the unintended effect of excluding other authority for a lawyer's communications. She noted that water referees frequently get involved in case settlements, where their job is to move the settlement process along; the *ex parte* communications inherent in those efforts should not be excluded by an inadvertent narrowing of the Rule.

A member asked whether the subcommittee had considered merely referencing the Code of Judicial Conduct as just one example of authority for *ex parte* communications.

In answer to that inquiry, Rothrock responded that the subcommittee had considered that approach and that some jurisdictions have done that. But Rothrock reemphasized the subcommittee's concern, which he had identified in his initial remarks, that the Code's grant of authority to the *judge* to communicate with respect to scheduling, administrative, or emergency matters does not constitute the requisite authority for the *lawyer* under Rule 3.5(b); the Code text appears to grant no authority whatsoever to the lawyer. So the approach of merely referencing the Code as an example of authority does not in fact solve the *lawyer's* problem.

Rothrock did agree with the comments that had noted the possibility of other sources of authority for a lawyer's *ex parte* communications. He pointed out that Federal judges are subject to a different code of conduct, one that was not included in the proposed reference to the Colorado Code; and, he agreed, there may be still other sources of authority. The subcommittee had suggested a reference that was limited to the Colorado Code simply because that is that the pre-2008 version of Rule 3.5(b) had done. The proposal could be expanded to include other such sources. Or, he suggested, the Committee could decide to simply state that, if the judge is authorized to have the communication, the lawyer may participate in it, whatever the source of the judge's authority may be.

On the separate question of whether resolution of the matter should be relegated to an expanded comment to Rule 3.5(b), Rothrock's answer was no, that should not be done. He adhered to the principle that a comment cannot alter or amplify the operative text of a Rule; comments are only for explanation. Thus, if Rule 3.5(b) continued to proscribe a lawyer's *ex parte* communications with a judge absent some authority running to the lawyer, the comment could not alter that proscription by claiming that it would not apply if there were authority running to the judge.

And, as to the suggestion that perhaps lawyers should be subject to a different standard and prohibited from engaging in communications that a judge might find proper from the judge's standpoint, Rothrock could not think why that would be good public policy. If the communication were proper for the judge, he could not imagine why it would not be proper for the lawyer, too. And he noted that it would be unwieldy to permit a judge to engage in communication with a lawyer, without sanction, while the lawyer would be subject to sanction for participating in that communication.

The Chair asked for the Committee's suggestions on what action to take with regard to these matters.

A member who had objected to the subcommittee's proposal said he favored the idea of adding commentary to Rule 3.5, and he suggested that it be written to clarify that the words "as authorized by law" in the text of Rule 3.5(b) includes authority running to the judicial officer who is engaged in the communication. This member believed that such a comment would not itself constitute substance but only explanation of the substance of the Rule's operative text.

Another member who had spoken in opposition to the subcommittee's proposal suggested that Comment [2] be modified similarly to the subcommittee's proposed modification but that the modification not be limited to the authority for the judge's communication that comes from the Code of Judicial Conduct.

To that suggestion, Rothrock objected that it does not solve the problem that the Rule text would still require some authority running directly to the lawyer, a requirement that the judge's authority, *from whatever source*, simply could not satisfy.

Members who were familiar with cases that have come before the Office of Attorney Regulation said they had never seen one involving an *ex parte* communication that was initiated by a judge. They had seen, of course, cases involving other kinds of *ex parte* communications violating Rule 3.5(b).

That observation, Rothrock commented, was irrelevant. He noted that the Rules deal with many matters that do not generate great numbers of grievances. One of the two members who had spoken about the OARC experience expressed his agreement with Rothrock's comment.

Webb seconded Rothrock's position that any comment which merely cited the possibility that the judge's participation in the communication might be authorized would not solve the lawyer's problem. He raised a further problem: What if the judge properly initiates a conversation — proper for the judge under the Code — but then "strays off the reservation" and into a discussion about substantive matters? Should the lawyer be free to follow the judge wherever the judge leads or must the lawyer remain obligated to tell the judge the lawyer is not comfortable going beyond the permitted topics of scheduling, administration, or whatever the emergency was?

The member who had first noted that there may be a justification for the lawyer's rule to be different from that established for the judge said that it was this possibility — the judge's departure from the reservation — that she had in mind when she made her comment.

Addressing the suggestion about expansion of the comment, Rothrock pointed to the approach taken by Arizona:[7] "Lawyers should refer to the Code of Judicial Conduct, Canon 3B(7) for authorized ex parte communications." In his view, that language was insufficient, since the referenced Code provision did not grant any authority to the lawyer.

Addressing excursions beyond the reservation, Rothrock said that was not a real issue, since the judge would have exceeded the judge's authority for the conversation and thus, under any principle, could not extend authority to the lawyer to follow.

A member who had favored the addition of commentary to resolve the matter said he agreed with Rothrock about two things — the fact that the Committee's efforts to deal with issues should not be limited only to issues that might likely be the subject of discipline and the fact that a lawyer is necessarily

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7. *See* p. 67 *et seq.* of the material that had been provided for the meeting for the Arizona source.

in peril if the lawyer follows the judge into impermissible topics of conversation. This member said he was prepared to offer further text for Comment [2] if the Committee wished to take it up.

Another member, who had not previously spoken, interjected that, as Rothrock had stated, the problem could not be resolved by commentary that modified or added to substance stated in the Rule's text.

To that, a member who had also not spoken before said he guessed the proferred commentary would not contradict or add to the substance of the Rule but would merely explain what "authority" was contemplated by the Rule text.

But Rothrock again argued that the authority contemplated by the Rule text is that which runs to the lawyer. The text refers to the authority of the *lawyer*, not to the authorization of the *communication*. Absent modification of the Rule text, the lawyer will remain exposed.

A member, who had not previously spoken, moved to table the discussion, noting that a motion to table takes precedence and is not subject to debate.

After a brief comment by another member, the motion to table was adopted.

Rothrock indicated that the subcommittee would look further into the matter.

V. *Rule 4.1, Rule 4.3, and "Testers."*

The Chair introduced guest John Posthumus, the chair of the Colorado Bar Association's Intellectual Property Section, and asked him to address the Committee about that Section's concerns about "testers."[8]

Posthumus explained that intellectual property lawyers often engage testers in connection with pre-filing and post-filing investigations for injunctions against patent, copyright, or trademark infringement, seeing that step as necessary to ensure their compliance with the reasonable inquiry requirements of Rule 11. Testers are used, too, he noted, in other areas of the law, such as civil rights law. But use of testers involves direct or indirect contact by the lawyer with unrepresented third persons or with third persons who are represented by other counsel, and, therefore, Rule 4.1 or Rule 4.3 is implicated. Posthumus said there has been much discussion in the national intellectual property bar about the ethical implications of the use of testers; indeed, a seminar held in Denver in April 2010 had focused on the matter.

Posthumus reported that the CBA Intellectual Property Section had undertaken a deeper look at the issues, forming a task force for that purpose and seeking input from a number of intellectual property lawyers. That task force had been chaired by the other guest at this meeting, Adam Scoville, and Posthumus turned the discussion over to Scoville.

Scoville reiterated that the issue of use of testers also arises in other areas of the law; for the intellectual property lawyer the question often is, "Are they still selling the product?" or "What are they still saying about the product?" That needs to be answered by going into commerce — by going into a store or going online to see what is actually happening. To be effective, such a foray obviously cannot

8. *See* p. 70–71 of the materials provided for the meeting for the inquiry Posthumus had addressed to the Chair.

begin, "I am representing the plaintiff that obtained an injunction against the sale of this product and am checking to see if you are still selling it."

Scoville contrasted what the Intellectual Property Section was dealing with from the "pretending" that made the news a few years ago, when members of the board of directors of a large computer company were found to have been pretended to be other members of that board and, as such, to have sought copies of the telephone records of those other members.

Even in the circumstances contemplated by the Intellectual Property Section, some "pretexting" is occurring: The tester does what a real customer might do — sit on the couch in the showroom — but does so without the ultimate goal of buying the couch. In fact, the tester is being dishonest about his purpose. In the civil rights context, he noted, the tester might be trying to determine whether the fuel retailer regularly prevents people of color from paying at the pump as other customers are permitted to do. Lawyers need guidance on this kind of pretexting — required to meet their evidentiary and procedural burdens but perhaps violative of Rule 4.1 or Rule 4.3.

The Chair asked the Committee whether a subcommittee should be formed to consider this inquiry.

A member responded that the Intellectual Property Section had raised a legitimate question, one that the Committee should consider. He noted that Colorado has existing law on the matter, referring to the *Pautler*[9] case. Pretexting, he agreed, arises in many areas of the law, including employment law. He suggested that the Committee would need to be careful in its considerations, since, in his view, *Pautler* now provides clear Colorado law on the matter. He also noted that the website for the American Bar Association Center for Professional Responsibility posts the audio of an October 2010 seminar on "The Ethics of Investigation."[10]

Another member agreed that a subcommittee should be formed to consider issues raised by the Intellectual Property Section. He said that he is the loss prevention partner for his law firm and has had to deal with the issues.

But another member cautioned that the Committee is not an "ethics committee" that issues opinions about the law applicable to particular issues. Rather, it is a committee that proposes rules, and modifications to rules, governing lawyer's professional conduct. He added that some jurisdictions — naming Virginia — have modified their rules to permit some kinds of these communications. The question, however, will be whether pretexting can ever be permitted in view of the lawyer's abiding duty of honesty.

Scoville noted to the Chair that there is little law on the topic and that most of the existing law goes only to the admissibility of evidence gathered on the basis of pretexting. He was not aware of any state's ethics opinion on any of the issues.

The Chair determined that a subcommittee would be established to deal with these issues.

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9. In re Pautler, 47 P.3d 1175 (Colo. 2002).

10. *See* http://www.abanet.org/abastore/index.cfm?section=main&fm=Product.AddToCart&pid=CET10ENSC. The faculty for the seminar includes John Gleason, Attorney Regulation Counsel for Colorado.

VI. *Status Report, Rule 8.4(b) and C.R.C.P Rule 251.5(b) Conflict*

At the Chair's request, David Stark, who is also chair of Colorado Supreme Court Advisory Committee on Attorney Regulation, reported that it was his understanding that the proposal that this Committee adopted in coordination with that advisory committee, to resolve the conflicts between Rule 8.4(b) and C.R.C.P Rule 251.5(b) as to the kinds of criminal conduct that can subject a lawyer to discipline, had been formally presented to the Court for its consideration.[11]

VII. *Court's Request for Committee Consideration of Lawyer Advertising.*

The Chair pointed the Committee to Item 6c on the meeting agenda, the request from an informal group called The Trial Lawyers of Colorado that the Court consider adoption of rules governing lawyer advertising, which request the Court had forwarded to the Committee.[12] The request suggested that advertising rules adopted by the Iowa supreme court would be appropriate for Colorado, including a rule reading as follows:

> Information permitted by these rules, articulated only by a single nondramatic voice, not that of the lawyer, and with no other background sound, may be communicated by radio or television, or other electronic or telephonic media. In the case of television, no visual display shall be allowed except that allowed in print as articulated by the announcer. All such communications shall contain the disclosures required by paragraph (h) when applicable.

The Chair commented that proposals to tighten up the regulation of lawyer advertising are made, dependably, every few years. The question he put before the Committee was whether a subcommittee should be formed to consider the matter. The members agreed that such a subcommittee should be formed.[13]

A member asked that the Committee give some expression of the scope of the subcommittee's undertaking, which, he noted, could be immensely time-consuming, including First Amendment considerations, surveys of action taken in other jurisdictions, and the like.

A member who was familiar with lawyer advertising issues as seen by the Office of Attorney Regulation Counsel said that these matters have been extremely perplexing to OARC, particularly because of the First Amendment implications and the difficulty of defining what a permissibly "dignified" advertisement might be. This member felt that Colorado's existing rules were sufficient; in his view, they were difficult to apply in actual cases but that difficulty stemmed from the nature of the problem, not from inadequacies in the rules. He added that there have not been many actual cases presented to OARC, not much activity.

The Chair observed that this would be a very big undertaking for the Committee and that it should not embark on the effort unless it really perceived a need to do so.

To that, the member who had first noted the immensity of the task said that the Committee should not proceed with the undertaking. Referring to the kinds of ads that are found in the telephone directories

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11. *See* minutes of the twenty-eighth meeting of the Committee, held on August 19, 2010, for the Committee's action on the matter.

12. *See* p. 90 *et seq.* of the meeting materials for the inquiry.

13. But, as noted further in these minutes, that decision was subsequently reversed.

and that offend some lawyers, this member said the problem was akin to "defining pornography." There are those, he said, who want to limit lawyer advertising to just that which "informs" and to exclude that which "incites."

A member suggested that the Committee take no action until Florida completes its current analysis of lawyer advertising. In answer to a question from the Chair, this member confirmed that the Iowa rules have withstood court challenge.

The Chair said he would take these comments as a motion that the Committee not set up a subcommittee, contrary to what had initially been decided.

With that probable result in mind, a member asked whether it would be appropriate for the Committee Chair to inform the inquiring group that the Committee is aware that the issues are being examined elsewhere and that the Committee might reconsider the matter at a later time, depending on the outcome in those other jurisdictions? This member was under the impression that, in the absence of dishonesty, the advertising lawyer usually prevails when the advertisement is challenged. But she was willing to look further if other states take some action.

A member, who had not previously spoken on the topic, noted that the inquiry seemed to be a proposal that the Court simply adopt the Iowa rules. To this member, it would be appropriate for the Committee to ask the inquirers to identify specific inadequacies and deficiencies in Colorado's current rules and to propose specific solutions to the problems so identified.

Another member said he read the inquiry as a move to curtail "egregious" advertisements, and he named some that he would put in that category, characterizing them all as "undignified."

Another member, who had not previously spoken, said she agreed with the suggestion that the inquirers be asked for specifics. Reading between the lines of the inquiry, she thought the inquirers did not think the current rules permit the shutting down of advertisements they do not like. But, in her view, it was not proper for the rules to set an elitist tone, with "lawyers above the commoner."

With one objection, a motion to desist from revisiting the existing advertising rules or setting up a subcommittee to deal with any of the issues was adopted. It was expected that the Chair would send an appropriate message to the inquirers.

VIII. *Proposal Regarding Rule 3.3, Remedial Measures for False Evidence, and Confidentiality.*

The Chair raised the last issue on the meeting agenda, being the problems confronted by a lawyer who is required by Rule 3.3 make disclosures to the court of materially false evidence that has been offered by the lawyer, the client, or a witness called by the lawyer, if that disclosure is necessary in order "to take reasonable remedial measures" respecting the false evidence. The problem, the Chair said, can arise any number of ways.

The Chair pointed out that Rule 3.3(c) expressly provides that the duty of disclosure prevails "even if compliance requires disclosure of information otherwise protected by [the confidentiality provisions of] Rule 1.6." But the Rule does not address whether it requires disclosures of communications that are subject to the attorney-client privilege. He said that the *Casey*[14] case arguably says that the privilege does not prevail over the disclosure obligation; but he noted that *Casey* does not

14. People v. Casey, 948 P.2d 1014 (Colo. 1997).

consider the separation-of-powers issue raised by the fact that the privilege is a legislative mandate. Most of the sparse authority from other jurisdictions requires disclosure of privileged communications under Rule 3.3, at least in a "nonevidentiary context," but the outcome might be different if the lawyer were called to testify, as evidence, about privileged communications or otherwise to present privileged evidence in an disclosure context.

The Chair noted that the Colorado Bar Association Ethics Committee has been trying, for a long time, to write an opinion on the issues. But an opinion is not a clarification of the Rule, and only the Court can adopt such a clarification. He asked whether a subcommittee should be formed to propose an amendment to the Rule to resolve the matter.

In answer to a question about the nature of the problem, the Chair said that Rule 3.3 expressly trumps the confidentiality requirement of Rule 1.6 but is silent about whether it requires disclosure of privileged evidence.

The member who asked that question asked how the Committee might resolve the problem. The Chair responded that the Court clearly has the constitutional authority to preserve the dignity and the integrity of Colorado courts, even if that means trumping the statutory privilege. Lawyers, he said, cannot disobey a rule of the court.

A member agreed with the Chair that Rule 3.3 trumps Rule 1.6 and that Rule 1.6 says nothing about the attorney-client privileged. There is a school of thought, this member said, that the attorney-client privilege is a free-standing duty of confidentiality that the legislature has imposed on lawyers. But that view is incorrect in this member's view, and, at best, those who think along those lines are confusing the Rule's confidentiality requirements with the general confidentiality principles of agency law. In his view, one cannot "breach" the privilege as one can breach a duty of confidentiality. The privilege is a rule of evidence, not a rule of conduct or a duty to a client or a principal.

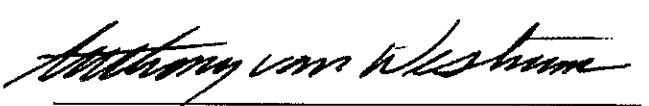
That member suggested that a comment could be added to Rule 3.3 to the effect that the disclosure requirement not only trumps confidentiality but also prevails over any application of the attorney-client privilege that would otherwise prevent the disclosure. He concluded his comments by noting that the lawyer's problems are not likely to be eliminated even by such a comment, for the conflict between duties and the privilege can arise in, for example, depositions; and lawyers may have to think fast on their feet when questioned by the judge who takes the position that he is not, in his questioning, looking for evidence and thus is not implicating the privilege.

At the Chair's suggestion, the Committee determined to table the matter until after the CBA Ethics Committee has issued its opinion on the issues.

IX. *Adjournment; Next Scheduled Meeting.*

The meeting adjourned at approximately 10:50 a.m. The next scheduled meeting of the Committee will be on Friday, May 6, 2011, beginning at 9:00 a.m., in the same conference room of the Office of Attorney Regulation.

RESPECTFULLY SUBMITTED,



Anthony van Westrum, Secretary

RULE CHANGE 2011(4)

COLORADO RULES OF PROFESSIONAL CONDUCT
RULES 1.15, 1.16A, 3.6 AND 3.8

Rule 1.15 Safekeeping Property

General Duties of Lawyers Regarding Property of Clients and Third Parties

(a) through (c) [No Changes]

Required Bank Accounts

(d) through (e) [No Changes]

Trust Account Requirements and Management; COLTAF Accounts

(f) through (i) [No Changes]

Required Accounting Records; Retention of Records; Availability of Records

(j) (1) through (5) [No Changes]

(6) Copies of all records showing payments to any persons, not in the lawyer's regular employ, for services rendered or performed; and

(7) All bank statements and photo static copies or electronic copies of all canceled checks ~~; and.~~

~~(8) Copies of those portions of each client's case file reasonably necessary for a complete understanding of the financial transactions pertaining thereto.~~

(k) [No Changes]

(l) Dissolutions and Departures. Upon the dissolution of a law firm, the lawyers in the lawfirm shall make ~~any partnership of lawyers or of any professional corporation or limited liability corporation, the former partners or shareholders shall make appropriate~~ arrangements for the maintenance or disposition of records and client files in accordance with ~~by one of them or by a successor firm of the records specified in~~ subsection (j) of this Rule and Rule 1.16A. Upon the departure of a lawyer from a law firm, the departing lawyer and the lawyers in the law firm shall make appropriate arrangements for the maintenance or disposition of records and client files in accordance with subsection (j) of this Rule and Rule 1.16A.

(m) [No Changes]

COMMENT

[1] A lawyer should hold property of others with the care required of a professional fiduciary. Securities should be kept in a safe deposit box except when some other form of safekeeping is warranted by special circumstances. "Property" generally refers to jewelry and other valuables entrusted to the lawyer by the client, as well as documents having intrinsic value or directly affecting valuable rights, such as securities, negotiable instruments, deeds, and wills. All property that is the property of clients or

third persons should be kept separate from the lawyer's business and personal property and, if monies, in one or more trust accounts.

[2] through [8] [No Changes]

ANNOTATION

[No Changes]

RULE 1.16A. CLIENT FILE RETENTION

(a) A lawyer in private practice shall retain a client's files respecting a matter unless:

(1) the lawyer delivers the file to the client or the client authorizes destruction of the file in a writing signed by the client and there are no pending or threatened legal proceedings known to the lawyer that relate to the matter; or

(2) the lawyer has given written notice to the client of the lawyer's intention to destroy the file on or after a date stated in the notice, which date shall not be less than thirty days after the date of the notice, and there are no pending or threatened legal proceedings known to the lawyer that relate to the matter.

(b) At any time following the expiration of a period of ten years following the termination of the representation in a matter, a lawyer may destroy a client's files respecting the matter without notice to the client, provided there are no pending or threatened legal proceedings known to the lawyer that relate to the matter and the lawyer has not agreed to the contrary.

(c) Notwithstanding paragraphs (a) and (b) above, a lawyer in a criminal matter shall retain a client's file for the following time periods:

(1) for the life of the client, if the matter resulted in a conviction and a sentence of death, life without parole, or an indeterminate sentence, including a sentence pursuant to the Colorado Sex Offender Lifetime Supervision Act of 1998, 18-1.3-1001 et seq., C.R.S.

(2) for eight years from the date of sentencing, if the matter resulted in a conviction for any other felony and the conviction and/or sentence was appealed;

(3) for five years from the date of sentencing, if the matter resulted in a conviction for any other felony and neither the conviction nor the sentence was appealed.

(d) A lawyer may satisfy the notice requirements of paragraph (a)(2) of this Rule by establishing a written file retention policy consistent with this Rule and by providing a notice of the file retention policy to the client in a fee agreement or a in writing delivered to the client not later than thirty days before destruction of the client's file or incorporated into a fee agreement.

(e) This Rule does not supersede or limit a lawyer's obligations to retain a client's file that are imposed by law, court order, or rules of a tribunal.

COMMENT

[1] Rule 1.16A is not intended to impose an obligation on a lawyer to preserve documents that the lawyer would not normally preserve, such as multiple copies or drafts of the same document. A client's files, within the meaning of Rule 1.16A, consist of

those things, such as papers and electronic data, relating to a matter that the lawyer would usually maintain in the ordinary course of practice. A lawyer's obligations with respect to client "property" are distinct. Those obligations are addressed in Rules 1.16(d), 1.15(a) and 1.15(b). "Property" generally refers to jewelry and other valuables entrusted to the lawyer by the client, as well as documents having intrinsic value or directly affecting valuable rights, such as securities, negotiable instruments, deeds, and wills.

[2] A lawyer may comply with Rule 1.16A by maintaining a client's files in, or converting the file to, electronic form, provided the lawyer is capable of producing a paper version if necessary. Rule 1.16A does not require multiple lawyers in the same law firm to retain duplicate client files or to retain a unitary file located in one place. "Law firm" is defined in Rule 1.0 to include lawyers employed in a legal services organization or the legal department of a corporation or other organization. Rule 5.1(a) addresses the responsibility of a partner in a law firm to "make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct." Generally, lawyers employed by a private corporation or other entity as in-house counsel represent such corporation or entity as employees and the client's files are considered to be in the possession of the client and not the lawyer, such that Rule 1.16A would be inapplicable. Where lawyers are employed as public defenders or by a legal services organization or a government agency to represent third parties under circumstances where the third-party client's files are considered to be files and records of the organization or agency, the lawyer must take reasonable measures to ensure that the client's files are maintained by the organization or agency in accordance with this rule.

[3] Rule 1.16A does not supersede obligations imposed by other law, court order or rules of a tribunal. The maintenance of law firm financial and accounting records covered by Rule 1.15(a) and 1.15(j) is governed exclusively by those rules. Similarly, Rule 16A does not supersede specific retention requirements imposed by other rules, such as Rule 5.5(d)(2) (two-year retention of written notification to client of utilization of services of suspended or disbarred lawyer), Rule 4, Chapter 23.3 C.R.C.P. (six year retention of contingent fee agreement and proof of mailing following completion or settlement of the case) and C.R.C.P. 121, §1-26(7) (two year retention of signed originals of e-filed documents). A document may be subject to more than one retention requirement, in which case the lawyer should retain the document for the longest applicable period. Rule 1.16A does not prohibit a lawyer from maintaining a client's files beyond the periods specified in the Rule.

[4] A lawyer may not destroy a client file when the lawyer has knowledge of pending or threatened proceedings relating to the matter. The Rule does not affect a lawyer's obligations under Rule 1.16(d) with respect to the surrender of papers and property to which the client is entitled upon termination of the representation. A client's receipt of papers forwarded from time to time by the lawyer during the course of the representation does not alleviate the lawyer's obligations under Rule 1.16A.

[5] The destruction of a client's files under paragraph (a) of Rule 16A is subject to two sets of preconditions. First, the lawyer must have given written notice to the client of the lawyer's intention to destroy the files on or after a date certain, which date is not less than thirty days after the date the notice was given or the client has authorized the destruction of the files in a writing signed by the client. As provided in

paragraph (d), the notice requirement in paragraph (a) can be satisfied by timely giving the client a written statement of the applicable file retention policy; for example, that policy could be contained in a written fee agreement. A lawyer should make reasonable efforts to locate a client for purposes of giving written notice when such notice was not provided during the representation. If the lawyer is unable to locate the client, written notice sent to the client's last known address is sufficient under paragraph (a) Rule 1.4. A. Second, the lawyer may not destroy the files if the lawyer knows that there are legal proceedings pending or threatened that relate to the matter for which the lawyer created the files, if the file is subject to paragraph (c) of this Rule, or if the lawyer has agreed otherwise. If these preconditions are satisfied, the lawyer may destroy the files in a manner consistent with the lawyer's continuing obligation to maintain the confidentiality of information relating to the representation under Rules 1.6 and 1.9. Nothing in this Rule is intended to mandate that a lawyer destroy a file in the absence of a client's instruction to do so. Notwithstanding a client's instruction to destroy or return a file, a lawyer may retain a copy of the file or any document in the file.

Rule 3.6. Trial Publicity

(a) [No Changes]

(b) Notwithstanding paragraph (a) and Rule 3.8(f), a lawyer may state:

(1) through (7) [No Changes]

(c) Notwithstanding paragraph (a) and Rule 3.8(f), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

(d) [No Changes]

COMMENT

[1] through [8] [No Changes]

Rule 3.8 Special Responsibilities of a Prosecutor

The prosecutor in a criminal case shall:

(a) through (e) [No changes]

(f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused unless such comments are permitted under Rule 3.6(b) or 3.6(c), and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.

(g) through (h) [No Changes]

COMMENT

[1] through [4] [No Changes]

[5] Paragraph (f) supplements ~~Rule 3.6, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding.~~ the prohibition in Rule 3.6, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding, but does not limit the protection of Rule 3.6(b) or Rule 3.6(c). In the context of a criminal prosecution, a prosecutor's extra judicial statement can create the additional problem of increasing public condemnation of the accused. Although the announcement of an indictment, for example, will necessarily have severe consequences for the accused, a prosecutor can, and should, avoid comments which have no legitimate law enforcement purpose and have a substantial likelihood of increasing public condemnation of the accused. Nevertheless, a prosecutor shall not be subject to disciplinary action on the basis that the prosecutor's statement violated paragraph (f), if the statement was permitted by Rule 3.6(b) or Rule 3.6(c). ~~Nothing in this Comment is intended to restrict the statements which a prosecutor may make which comply with Rule 3.6(b) or 3.6(c).~~

[6] through [9A] [No Changes]

ANNOTATION

[No Changes]

Amended by the Court, En Banc February 10, 2011, effective immediately.
By the Court:

Nathan B. Coats
Justice, Colorado Supreme Court

JUDICIAL CODE SUBCOMMITTEE

PROPOSED CHANGE TO COLO. RPC 3.5(B) AND COMMENT [2]; APRIL 13, 2011

RULE 3.5. IMPARTIALITY AND DECORUM OF THE TRIBUNAL

A lawyer shall not:

(a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;

(b) communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order, or unless a judge initiates such a communication and the lawyer reasonably believes that the subject matter of the communication is within the scope of the judge's authority under a rule of judicial conduct.

(c) communicate with a juror or prospective juror after discharge of the jury if:

(1) the communication is prohibited by law or court order;

(2) the juror has made known to the lawyer a desire not to communicate;

(3) the communication involves misrepresentation, coercion, duress or harassment; or

(4) the communication is intended to or is reasonably likely to demean, embarrass, or criticize the jurors or their verdicts; or

(d) engage in conduct intended to disrupt a tribunal.

COMMENT

. . .

[2] During a proceeding a lawyer may not communicate ex parte with persons serving in an official capacity in the proceeding, such as judges, masters or jurors, unless authorized to do so by law or court order. The exception in the Rule for communications initiated by a judge enables a lawyer to respond to an ex parte communication that is initiated by a judge under the authority of a rule of judicial conduct. *See, e.g.,* Rules 2.9(A)(1) and (4) of the Colorado Code of Judicial Conduct (permitting nonsubstantive ex parte

communications for scheduling, administrative, or emergency purposes, or to facilitate settlement). This exception does not authorize the lawyer to (a) initiate such a communication, even if a rule of judicial conduct would authorize the judge to engage in it; or (b) include matters not within the exception when responding to such a communication. A lawyer must therefore discontinue a communication if and when the lawyer reasonably believes that the communication exceeds the authority granted to the judge by a rule of judicial conduct.

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