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

AGENDA

June 7, 2010, 9:00 a.m.
OARC Conference Room, 1560 Broadway, 19th Floor – Follow the Signs

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1. Approval of minutes of February 26, 2010 meeting [materials to be distributed before or at meeting]

2. Report on status of proposed amendments to CRPC 1.15 and new CRPC 1.16A [Marcy Glenn]:

   a. January 20, 2010 letter from John Gleason to the Supreme Court, with proposed changes [February 26, 2010 packet, pages 1-19]

   b. June 2, 2010 letter from District Attorneys' Council, with proposed amendments to proposed CRPC 1.16A [pages 1-4]

   c. Status of June 10, 2010 hearing

3. Report on status of proposed amendments to CRPC 1.5(b) [Marcy Glenn – pages 5-6]

4. New business:

   a. Proposed potential amendments to CRPC 8.4(b) and CRCP 251.5(b) [Alec Rothrock – pages 7-11]

   b. Repeal and reenactment of Judicial Code, effective July 1, 2010

5. Administrative matters:

   a. Select next meeting date

6. Adjournment (before noon)

Chair
Marcy G. Glenn
Holland & Hart LLP
P.O. Box 8749
Denver, Colorado 80201
(303) 295-8320
mglenn@hollandhart.com

Marcy Glenn

From: Kelsey Hoffman [KelseyH@cdac.state.co.us]
Sent: Wednesday, June 02, 2010 12:30 PM
To: john.gleason@csc.state.co.us; Marcy Glenn
Subject: Proposed amendments to Rule 1.16A
Attachments: Proposed Amendments to Rule of Professional Conduct 1.16A.pdf; Proposed File Retention Rule.docx

Mr. Gleason and Ms. Glenn –
Per Ted Tow's request, I am sending the attached documents regarding the proposed amendments to Rule 1.16A. If you have any questions or comments, please feel free to contact Ted. He can be reached by email at ted@cdac.state.co.us or by phone at 303-830-9115.

Thank you,

Kelsey Hoffman
Colorado District Attorneys' Council
1580 Logan Street, Suite 420
Denver, CO 80203
303-830-9115/fax 303-830-8378

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Colorado District Attorneys' Council

1580 Logan Street, Suite 420
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June 2, 2010

Ms. Susan Festag
Clerk of the Colorado Supreme Court
101 West Colfax Avenue
Suite 800
Denver, Colorado 80202

Re: Proposed Amendments to Rule of Professional Conduct 1.16A

Dear Ms. Festag:

As you may be aware, CDAC proposed legislation during this year's legislative session that would have created a requirement regarding the length of time a criminal defense attorney is required to retain his or her file in a criminal matter. The goal was to better be able to assess and respond to claims in subsequent challenges to the conviction, such as a rule 35(c) claim of ineffective assistance of counsel, as to what the defense attorney had obtained in discovery and work product, and the steps taken to plan and implement defense of the case. In response to opposition from the Judicial Department, and in particular the Office of Attorney Regulation, CDAC agreed to work with that office to convene a working group of stakeholders to offer amendments to proposed Rule of Professional Conduct 1.16A. That working group included the Office of Attorney Regulation and representatives from CDAC, the U.S. Attorney's office, the Office of the State Public Defender, the Office of the Federal Public Defender, the Office of Alternative Defense Counsel, and the Colorado Criminal Defense Bar.

I am enclosing herewith the product of the discussions of that working group. This is a redline version of our proffered changes to the current proposed language of Rule 1.16A. These changes are intended to account for the unique situation presented by the criminal law as it relates to file retention needs, and the needs of the criminal justice system to ensure and verify that effective assistance of counsel has been provided. The proposal also represents a balancing of those interests with the financial impact of the proposal on the attorneys affected.

We largely avoided making any changes to the specifics established in the proposed rule, instead offering additional language as a paragraph (2), we have suggested two modifications to the existing proposal. First, we suggest reducing the current ten year requirement to eight years, in order to remain consistent with the eight year requirement for appealed felony convictions in our suggested paragraph (2). This proposal is based on a recognition that some private attorneys handle both civil and

criminal matters, sometimes arising out of the same transaction and occurrence, and thus the time restraints should be consistent. Second, we suggest removing the requirement of specific notice after termination of the representation. Such a requirement may prove unduly burdensome to a large office like the State Public Defender, who would be in the position of having to keep tabs on upwards of 50,000 former clients, sometimes for several years, in order to provide them the required notice. In addition, to the extent this requirement would impose a burden of notice on a District Attorney, that burden would be logistically impossible to satisfy: how can one who is acting in the name of "the People of the State of Colorado" give notice "to the client." With the proposed change, a public posting in the office or on an office website of the file retention policy would satisfy any notice requirement that may be imposed.

We appreciate the Office of Attorney Regulation taking the time to facilitate this discussion, and thank the rules committee for taking the time to consider these suggestions.

Sincerely,

Ted C. Tow
Executive Director

c.c. John Gleason
Marcy Glenn

Colo.RPC 1.16A. Client File Retention

(a) Except as provided in a written agreement signed by a client, the lawyer shall retain a client's files respecting a matter for a period of not less than two years following the termination of representation in the matter, unless the lawyer previously delivered the files to the client or disposed of the files in accordance with the client's instructions. Notwithstanding any agreement to the contrary, a lawyer shall not destroy a client's files after termination of the lawyer's representation in the matter unless:

(1) ~~after such termination,~~ the lawyer has given written notice to the client of the lawyer's intention to do so on or after a date stated in the notice, which date shall not be less than thirty days after the date ~~the notice was given~~ of termination of representation, and

(2) there are no pending or threatened legal proceedings known to the lawyer that relate to the matter. At any time following the expiration of a period of ~~ten~~ eight years following the termination of 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. This Rule does not supersede or limit a lawyer's obligations to retain a file that are imposed by law, court order, or rules of a tribunal.

(b) Notwithstanding the requirements set forth in 1.16A(a) above, a lawyer in a criminal matter shall maintain a copy of all notes and work product related to that matter for the following time period:

(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 1988, 18-1.3-1001et 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.

ATTORNEY REGULATION COUNSEL

Regulation Counsel
John S. Gleason

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Nancy L. Cohen

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Attorneys' Fund for Client Protection
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April M. McMurrey
Charles E. Mortimer, Jr.
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Louise Culberson-Smith
James S. Sudler

April 23, 2010

The Honorable Michael L. Bender
Colorado Supreme Court
2 East 14th Avenue, Fourth Floor
Denver, CO 80203

The Honorable Nathan B. Coats
Colorado Supreme Court
2 East 14th Avenue, Fourth Floor
Denver, CO 80203

RE: Proposed Amendments to CRPC 1.5(b) and Comments [2] and [3A]; Comment [1] to CRPC 1.8; and Majority and Minority Reports Concerning Those Proposed Amendments

Dear Justice Bender and Justice Coats:

We write on behalf of the Court's Standing Committee on the Colorado Rules of Professional Conduct (the Standing Committee). Enclosed are proposed amendments to Rule 1.5(b) of the Colorado Rules of Professional Conduct (CRPC), Comments [2] and [3A] to Rule 1.5, and Comment [1] to Rule 1.8. A majority of the Standing Committee recommends these changes for the reasons stated in the Majority Report dated February 23, 2010, which is also enclosed. A minority of the Standing Committee voted against the proposed amendments and in favor of a different approach, for the reasons stated in the Minority Report dated April 6, 2010, which is also enclosed.

The proposed amendments relate to fee agreements and, in particular, to changes to fee agreements made during the course of a representation, sometimes referred to as "midstream modifications." Current CRPC 1.5(b) addresses that subject in language that is unique to Colorado, by providing that "[e]xcept as provided in a written fee agreement, any material changes to the basis or rate of the fee or expenses are subject to the provisions of Rule 1.8(a)[,]" which applies to a lawyer's business

transactions with a client. Current Comment [3A] to Rule 1.5, which is also unique to Colorado, defines a "material change" as that phrase is used in Rule 1.5(b). The language quoted above in Rule 1.5(b), and Comment [3A], has proved confusing to a sizable number of Colorado lawyers, who have sought clarification concerning when Rule 1.8(a) applies to a midstream fee modification. A majority of the Standing Committee recommends the proposed amendments in order to provide that clarification.

The enclosed majority and minority reports provide further background to the proposed amendments, discussion of the text of the proposed amendments, and explanation of the views of the majority and minority of the Standing Committee on the proposed amendments.

We are enclosing a paper red-line version of the proposed changes for each rule and have emailed a complete copy in the Court's required format to Justice Bender's assistant. On behalf of the Standing Committee, we respectfully ask the Court to favorably consider the proposed changes.

Sincerely,

John S. Gleason
Regulation Counsel

Marcy G. Glenn
Chair, Standing Committee

JSG/MGG/nmc
enclosures

Burns Figa & Will P.C.

ALEXANDER (ALEC) R. ROTHROCK
arothrock@bfw-law.com

April 14, 2010

Via Email & U.S. Mail

Marcy G. Glenn, Esq.
Chair, Colorado
Supreme Court Standing Committee on the
Colorado Rules of Professional Conduct
Holland & Hart LLP
555 17th Street, Ste 3200
Denver, CO 80202-3979

David W. Stark, Esq.
Chair, Colorado
Supreme Court Attorney Regulation
Advisory Committee
Faegre & Benson LLP
3200 Wells Fargo Center
1700 Lincoln Street, Ste 3200
Denver, CO 80203-4532

Re: **Conflict between C.R.C.P. 251.5(b) and Colo. RPC 8.4(b)**

Dear Ms. Glenn and Mr. Stark:

This letter concerns the interrelationship between two Colorado Supreme Court rules, each of which appears to fall under the jurisdiction of a different committee. The common subject of these rules is the circumstances under which a Colorado lawyer is subject to discipline for engaging in criminal conduct. As discussed below, certain language in Colo. RPC 8.4(b) that qualifies and limits the type of criminal act that will subject a lawyer to discipline is misleading and illusory because any criminal act will subject a lawyer to discipline under C.R.C.P. 251.5(b). The purpose of this letter is to request consideration of the revision or removal of one rule or the other to make them consistent.

(The Rules)

C.R.C.P. 251.5(b) states in relevant part that the following act shall be grounds for discipline:

> (b) Any act or omission which violates the criminal laws of this state or any other state, or of the United States. . . .

C.R.C.P. 251.5(b) is identical to former C.R.C.P. 241.6(5), which the Court repealed in 1999.

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Colo. RPC 8.4(b), with emphasis added, states that 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*. . . . .

Colo. RPC 8.4(b) is identical to ABA Model Rule 8.4(b) and to DR 1-102(A)(3) of the former Colorado Code of Professional Responsibility.

Comment [2] of Colo. RPC 8.4 describes the types of criminal conduct that subject a lawyer to discipline under Colo. RPC 8.4(b):

> [2] Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offenses carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

Comment [2] is identical to Comment [2] of ABA Model Rule 8.4 and, for all relevant purposes, identical to a paragraph in the 2007 version of the Comment to Colo. RPC 8.4.

There is no definitive description in Colorado of the type of criminal conduct that reflects adversely on a lawyer's honesty, trustworthiness or fitness as a lawyer in other respects. Indiana requires proof of a "nexus between the criminal act and one of the three personal qualities set forth in [Rule] 8.4(b), to-wit: honesty, trustworthiness, or fitness as an attorney." *In re Stults*, 644 N.E.2d 1239, 1241 (Ind. 1994). Washington State requires proof of a "nexus between the lawyer's conduct and those characteristics relevant to law practice." *In re Curran*, 801 P.2d 962, 972 (Wash. 1990). The Oregon Supreme Court interpreted an identical disciplinary rule in similar fashion:

> To some extent, every criminal act shows lack of support for our laws and diminishes public confidence in lawyers, thereby reflecting adversely on a lawyer's fitness to practice. DR 1-102(A)(2) [identical to Colo. RPC 8.4(b)] does not sweep so broadly, however. For example, a misdemeanor assault arising from a private

> dispute would not, in and of itself, violate that rule. *See In re Johnson,* 106 Ariz. 73, 74, 741 P.2d 269 (1970) (holding that a lawyer who had been charged with assault did not violate the parallel Arizona disciplinary rule; incident was isolated, not involving a fixed pattern of misbehavior, and did not involve moral turpitude). Each case must be decided on its own facts. There must be some rational connection other than the criminality of the act between the conduct and the actor's fitness to practice law. Pertinent considerations include the lawyer's mental state; the extent to which the act demonstrates disrespect for the law or law enforcement; the presence or absence of a victim; the extent of actual or potential injury to a victim; and the presence or absence of a pattern of criminal conduct.

In re Conduct of White, 815 P.2d 1257, 1265 (Ore. 1991).

(Enforcement of C.R.C.P. 251.5(b) and Colo. RPC 8.4(b))

Research on Colorado attorney discipline cases shows the following statistics:

1. In 121 cases, the lawyer was found to have violated C.R.C.P. 251.5(b) or its predecessor, 241.6(5), and Colo. RPC 8.4(b) or its Code predecessor, DR 1-102(A)(3).

2. In 52 cases, the lawyer was found to have violated Colo. RPC 8.4(b) or its predecessor, DR 1-102(A)(3), but not C.R.C.P. 251.5(b) or its predecessor, C.R.C.P. 241.6(5). A majority of these cases resulted from conditional admissions of misconduct. There is no explanation in any case for why the lawyer was found to have violated the substantive ethics rule but not the procedural rule.[1]

3. In 94 cases, the lawyer was found to have violated C.R.C.P. 251.5(b) or former C.R.C.P. 241.6(5), but not Rule 8.4(b) or former DR 1-102(A)(3). There is no explanation in any case for why the lawyer was found to have violated the procedural rule but not the substantive ethics rule.

4. Summaries of matters resulting in diversion, published quarterly by the Office of Attorney Regulation Counsel in *The Colorado Lawyer,* reveal similar patterns, or the absence of patterns.

(Either C.R.C.P. 251.5(b) or Colo. RPC 8.4(b) should be Modified or Deleted)

The foregoing statistics indicate that, singly or together with C.R.C.P. 251.5(b), Colo. RPC 8.4(b) is enforced without regarding to whether the criminal acts "reflect[ ]

[1] C.R.C.P. 251.5(b) is located in C.R.C.P. Chapter 20, entitled "Colorado Rules of Procedure Regarding Attorney Discipline and Disability Proceedings, Colorado Attorneys' Fund for Client Protection, and Mandatory Continuing Legal Education and Judicial Education."

adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects." This construction is consistent with a Michigan case involving essentially identical rules. In *Grievance Administrator v. Deutch,* 565 N.W.2d 369 (Mich. 1997), the Michigan Supreme Court held that a Michigan court rule almost identical to C.R.C.P. 251.5(b) was not qualified by the "reflects adversely" language in Michigan Rule 8.4(b), reversing two inferior disciplinary tribunals.

Through no fault of the Office of Attorney Regulation Counsel, the effect of C.R.C.P. 251.5(b) is to render the "reflects adversely" language in Colo. RPC 8.4(b), as well as the entirety of Comment [2], misleading and illusory. The words are superfluous and without meaning. *See People v. Madden,* 111 P.3d 452, 457 (Colo. 2005) (courts are to "give effect to every word [of a statute] and . . . not . . . adopt a construction that renders any term superfluous").[2] What these words take away in terms of disciplinary exposure, C.R.C.P. 251.5(b) adds back in.

Few lawyers would expect there to be more than one rule imposing discipline for criminal conduct. Fewer still would think to look in C.R.C.P. Chapter 20 in addition to the Colo. RPC. The relative obscurity of C.R.C.P. 251.5(b) might not rise to the level of a due process violation, but it does nothing to promote confidence in the fairness of the discipline system. Further, the haphazard pattern of prosecution under these rules gives the appearance of arbitrariness.

Compared to the present state of affairs, Colorado lawyers would be better off by eliminating Colo. RPC 8.4(b) (and Comment [2]) altogether. At least lawyers would be forced to look up C.R.C.P. 251.5(b) and would not stop at Colo. RPC 8.4(b) in the reasonable belief that there was no need to do further research. After all, neither rule so much as cross-references the other. Another option would be to eliminate C.R.C.P. 251.5(b) or modify it to be consistent with Colo. RPC 8.4(b).

This brings up the policy issue. The policy issue is whether the qualifying language in Colo. RPC 8.4(b) (and Comment [2]) should be given meaning. Now it has none. If Colorado lawyers should not be subject to discipline for criminal acts that do not "reflect[ ] adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects," then C.R.C.P. 251.5(b) should be eliminated or modified to be consistent with Colo. RPC 8.4(b). Giving effect to these words would make the rule conform to ABA Model Rule

[2] Rules of procedure are interpreted consistent with principles of statutory construction. *People v. Shell,* 148 P.3d 162, 178 (Colo. 2006). By extension of this principle, rules of statutory construction would or at least should apply to rules of professional conduct. *See Industrial Claim Appeals Office v. Zarlingo,* 57 P.3d 736, 737 (Colo. 2002) ("As with statutes, specific and general rules of court should be construed harmoniously where possible."); *Avink v. SMG,* 761 N.W.2d 826, 831 n. 14 (Mich. App. 2009) (rules of statutory construction apply to Michigan Rules of Professional Conduct, drawing on prior Michigan cases applying principles of statutory construction to court rules).

8.4(b) and to identical rules in those jurisdictions that have adopted it, enabling Colorado lawyers to benefit from other states' interpretations of the same language.

The countervailing policy choice is to hold Colorado lawyers to the higher, absolute standard imposed by C.R.C.P. 251.5(b). That is the standard applicable in Michigan and possibly elsewhere. There is also something to be said for a bright-line standard such as in C.R.C.P. 251.5(b), particularly where it has long been the prevailing standard.

It is difficult to gauge what the practical difference would be between an absolute standard and the qualified standard under Rule 8.4(b). There is a surprising dearth of case law in other jurisdictions addressing whether certain criminal act "reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects."[3] The absence of case authority seems to reflect what the Oregon Supreme Court stated in *White, supra:* "To some extent, every criminal act shows lack of support for our laws and diminishes public confidence in lawyers, thereby reflecting adversely on a lawyer's fitness to practice." It also reflects, to some degree, the exercise of prosecutorial discretion not to bring charges for certain criminal acts, as well as the fact that cases in which the lawyer wins outright are generally not published. Even if the practical effect of a rule change would be minimal, however, for the reasons stated above, this conduct should be addressed either by one rule or by two rules that are consistent with each other.

Sincerely,

BURNS, FIGA & WILL, P.C.

Alec

Alexander R. Rothrock

cc: Attorney Regulation
Counsel John S. Gleason

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[3] *E.g., In re Beren,* 874 P.2d 320 (Ariz. 1994) (affirming dismissal of Rule 8.4(b) and one other charge based on conviction of 12 counts of misdemeanor "facilitation of money laundering"); *Attorney Grievance Comm'n v. Post,* 710 A.2d 935 (Md. 1998) (reversing finding of Rule 8.4(b) violation based on "failing timely to file withholding tax returns and/or to remit the taxes reportedly withheld, and to hold in trust those taxes," but affirming violation of Rule 8.4(d) (conduct prejudicial to administration of justice) based on same conduct).

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OFFICE OF THE STATE PUBLIC DEFENDER

DOUGLAS K. WILSON
STATE PUBLIC DEFENDER

June 2, 2010

Chief Justice Mary Mullarkey
Colorado Supreme Court
101 West Colfax, Suite 800
Denver CO 80202

Dear Chief Justice Mullarkey and the other Justices on the Supreme Court,

I am a member of the working group of stakeholders asked to review proposed Rule 1.16A - File Retention - of the Colorado Rules of Professional Conduct. Ted C. Tow, the Executive Director of the Colorado District Attorneys' Council has sent you the working group's redlined version of amendments to the proposed rule. Mr. Tow explained the group's rationale for our proposed changes but I am writing separately to further explain the working group's request to delete certain language from section (a)(1) of the proposed rule as drafted by the Colorado Supreme Court Standing Committee on the Rules of Professional Conduct.

Section (a)(1) of the proposed rule, governs when a client must be notified that his/her file will be destroyed. The Standing Committee's version of Rule 1.16A requires that if a lawyer wants to destroy a closed case file before ten years, (please note that the working group is recommending that this be lowered to eight years) that the lawyer must give a client written notice after the representation has terminated that the file will be destroyed on a certain date.

As you are aware, this Office closed almost 100,000 cases last year – which translates to about 70% of the statewide felony case filings, 50% of the statewide misdemeanor case filings and about 80% of the statewide juvenile case filings. Because of the possibility of post-conviction proceedings, this Office has had a file destruction policy for many years and, under this policy, we keep closed cases anywhere from eighteen month to indefinite depending on the nature of the case. With a clientele consisting of indigent, transient and often homeless clients, maintaining current client contact information is a never ending process and it is not unusual for us to lose contact with a client as soon as the last court proceeding has concluded. Keeping client contact information for years after a case has been closed would, frankly, be near impossible and the costs of sending such notices – in dollars and manpower – would far outweigh any benefit in going through the motions of sending a notice to the "last known address." In short, the requirement in (1)(a) would put a tremendous financial and logistical burden on the Colorado Public Defenders, would actually be impossible to meet in many situations and would not accomplish the purposes intended by the proposed Rule.

However, we do agree with the Standing Committee that clients should be informed that their case files will be destroyed and therefore we do not argue that the requirement of written notice of file destruction be eliminated. Instead we would request that the requirement that this notice

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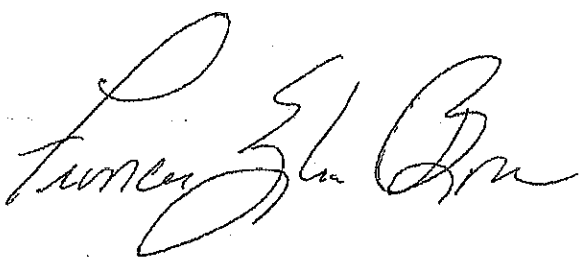
can be given only after representation has terminated be eliminated. Granted most private attorneys will probably give notice of file destruction in their closing letters to their clients and the Court can even note this as the "preferred method" in the Comment section. However, eliminating the requirement that this is the only time notice can be given would give agencies, such as the Public Defenders, the Alternate Defense Counsel and the Office of Child's Representative, more flexibility in establishing procedures that best reflect the realities of the services they provide and the make-up of the populace they serve. For example, the application form - JDF 208 - could be amended to include file destruction information or direct the client to a website that provides this information. Additionally, the various District Attorney offices could post their file destruction information on their own websites or on the CDAC website.

I am authorized to say that other stakeholders in the working group – the private attorneys, the Alternate Defense Counsel, the US Attorney's Office and the CDAC – agree with this proposed amendment to proposed Rule 1.16A. Consequently we would request that section (a)(1) be amended to read:

> (a) Except as provided in a written agreement signed by a client, the lawyer shall retain a client's files respecting a matter for a period of not less than two years following the termination of representation in the matter, unless the lawyer previously delivered the files to the client or disposed of the files in accordance with the client's instructions. Notwithstanding any agreement to the contrary, a lawyer shall not destroy a client's files after termination of the lawyer's representation in the matter unless:
>
> (1) ~~after such termination,~~ the lawyer has given written notice to the client of the lawyer's intention to do so on or after a date stated in the notice, which date shall not be less than thirty days after the date ~~the notice was given~~ of termination of representation, and

Please do not hesitate to contact me if you have any additional questions.

Sincere,



Frances Smylie Brown
Chief Deputy Public Defender

cc by email: Marcy Glenn
John Gleason

COLORADO SUPREME COURT
STANDING COMMITTEE ON THE RULES OF PROFESSIONAL CONDUCT

Minutes of Meeting of February 26, 2010

The meeting of the Committee was called to order by Chair Marcy Glenn on February 26, 2010 at 9:05 a.m. Federico Alvarez, Justice Michael Bender, Gary Blum, Justice Nathan Coats, Nancy Cohen, Cynthia Covell, John Gleason, Marcy Glenn, Dave Little, Cecil Morris, Neeti Pawar, Helen Raabe, Dick Reeve, Alec Rothrock, David Stark, Marcus Squarrell, Judge John Webb, and Tuck Young (by telephone) were in attendance. Tom Downey, John Haried, PDJ Lucero, Ruthanne Polidori, Boston Stanton, Tony van Westrum, Eli Wald and Lisa Wayne were excused.

1. . Minutes of August 21, 2009 meeting. The minutes of the August 21, 2009 meeting were not available.

2. Report on status of proposed rule amendments approved at August 21, 2009 meeting. The Chair reported that the proposed rule amendments have been posted on the Supreme Court website. Comments are due June 3, 2010 and the Supreme Court will hold a hearing on the amendments on June 10, 2010 at 5:00 p.m. The Chair will attend the hearing and make a few comments, and will be available to answer any questions from the Court.

2.a. January 20, 2010 letter from John Gleason to Justices Bender and Coats. On behalf of the Standing Committee, this letter recommends changes to Rules 1.15 and 3.8 regarding retention and destruction of files. The letter explains that the proposed amendments were approved by the Standing Committee after having been requested by the CBA Ethics Committee, and discussed at length by the Standing Committee.

2.b. February 20, 2010 email exchange with Ted Tow concerning HB 1251. Ted Tow, Executive Director of the Colorado District Attorneys' Council ("CDAC") advised the Chair by email of pending HB 1251, supported by both CDAC and the criminal defense bar, that would require defense attorneys of record in criminal cases to retain their files for a certain length of time, generally from 5-8 years, and for the life of a defendant who received a life sentence or indeterminate sex offense sentence. Mr. Tow asked if this language could be included in the proposed file retention rules as an alternative to the legislation, although HB 1251 had already been introduced. The Chair advised that the file retention rule had already been forwarded to the Supreme Court.

The Committee discussed this matter at length. A member noted that the bill carries no consequence for failure to comply; rather, it contemplates that the Office of Attorney Regulation would prosecute a statutory violation as a rule violation. Therefore, it should be included in the rules. A subcommittee will be formed to review the bill with the idea of including the concept as a rule. Ted Tow and the bill's sponsor would agree to pull the bill if OARC would work with them to craft a rule of professional conduct

containing the requirements of the bill. The member recommended including some private defense counsel in the subcommittee, as well as representatives of the Public Defender and Alternate Defense Counsel. It would be necessary to have a proposed rule in 2-3 weeks in order to meet the Court's public hearing schedule on new rules of professional conduct. The Standing Committee would have to handle this by email.

Another member requested that the draft be circulated to the criminal defense bar listserv, and that the Chair send a letter to Justices Coats and Bender about the proposed rule.

A member noted that the language in the proposed bill should not be too controversial as it is almost identical to the public defender's file retention rule, and he believed the criminal defense bar has been involved with the bill drafting.

Another member asked if this fast-track rule proposal was intended to head off legislation and whether there was a substantive concern that the Standing Committee had failed to address this issue in its proposed rule amendments. Counsel for the OARC stated that he had both concerns. The criminal defense bar wants a good file retention policy, and the public defender's policy is pretty good. The question is the impact on private attorneys and Alternate Defense Counsel. A member explained that prosecutors don't want defense attorneys to destroy their files because prisoners often raise ineffective assistance claims years later. The defense bar wants to be able to respond intelligently, but there is a cost to the public and to the lawyers. Since we now have laws that can impose life sentences for repeated sex offenses, it is important to address file retention.

The Chair requested the key points of the bill, but a member noted that it may not be the end result. The basic notion is that the file retention period is longer for worse crimes, and files must be retained for the life of the defendant convicted of a sex offense or Class 1 felony. There are other time periods for other offenses, depending on the seriousness. The bill was reportedly endorsed by the CBA.

The members discussed the practical consequences of such a rule, including cost (high), consequences of death of a sole practitioner before the defendant dies (inventory counsel can be appointed, very expensive), but noted that prosecutors and defense attorneys are in accord on the need for file retention requirements. A member stated that this type of file retention requirement encourages better practice and solves other social needs.

A member expressed concern that the proposed file retention rule would be one of general application, but that the provisions in the bill, if incorporated into the proposed rule, would result in special provisions for particular areas of practice. Another member was concerned about the disciplinary consequences of a rule that is only applicable to certain classes of lawyer, and believes this is a slippery slope towards a series of such rules.

Another member stated that there should be a rule, and noted that in the past attorney discipline has resulted from a Supreme Court determination of ineffective assistance in a criminal case.

The member who had brought this issue to the Standing Committee explained that if the Committee cannot reach a decision today, he would have to tell Mr. Tow, and there would be a statute. The basis for pulling the bill was this member's representation that the matter would be presented to the Supreme Court for consideration in June along with the other proposed amendments to the rules. The member didn't endorse this process, but felt there was no alternative at this time. Mr. Tow has agreed to communicate immediately with OARC in the future if other legislation regulating attorneys is contemplated.

A member noted that in this case, a proposed rule containing many of the same concepts is already being considered by the Supreme Court. However, it is not identical to HB 1251. Because the bill is well on its way to passage, the Standing Committee has only limited ability to stop it.

A member asked if this suggests the legislature is starting to regulate attorneys. Others agreed that the legislature tries to do this regularly, noting that a collaborative law bill is before the legislature too, and a current law permits non-lawyer school truancy officers to engage in unauthorized practice of law (in one member's view.)

Another member reported that there is not a clear distinction in all cases between the Supreme Court's authority to regulate the practice of law, and the legislature's authority. Rather, there are areas of overlap, and many uneasy compromises.

Upon a vote, the Standing Committee authorized John Gleason to negotiate with Ted Tow and the bill's sponsor and to bring back a proposed rule for committee review within the next 2 - 3 weeks.

A member suggested that the Standing Committee contact the CBA Legislative Policy Committee, and ask it to oppose the bill, or withdraw support. The members agreed that an informal contact with CBA lobbyist Michael Valdez would be most appropriate.

(Later in the meeting, a member reported that he had contacted Michael Valdez, who advised that the CBA had talked to the criminal defense bar, which favored the bill. The CBA decided to take no position. Michael stated that the CBA will now oppose the bill if need be. Michael recognized the importance of not setting up OARC to enforce statutes, and agreed to better communicate with OARC in the future.)

4. New business

a. Proposed amendments to Rules 3.6 and 3.8. Kory Nelson, an attorney with the Denver City Attorney's office, requested the Standing Committee to consider

proposed amendments to Rules 3.6 (Trial Publicity) and 3.8 (Special Responsibilities of a Prosecutor) regarding the scope of prosecutors' statements to the press and public. His interest in this issue arose from the Duke lacrosse team prosecutions, and the statements made by the special prosecutor during the investigation of Denver District Court Judge Larry Manzanares. Nelson felt prosecutors' statements were out of line in both cases.

Mr. Nelson filed a request for investigation of the special prosecutor, and was advised by OARC that the RPC allow prosecutors to provide statements of fact contained in court documents. (Counsel for OARC advised the Committee that the matter was in fact extensively reviewed by OARC when the request for investigation was made.) According to Mr. Nelson, the prosecutor in Judge Manzanares' case was ethically in bounds when he repeated statements from the investigator's affidavit. Nelson thinks this exception swallows the rule, and requested a change to prevent a prosecutor from making statements prejudicial to a defendant.

The committee discussed this proposal, considering whether access to the public records should be limited, and the boundaries of a prosecutor's free speech rights vs. a defendant's right to a fair trial. Members noted that Rule 3.8(f) applies to investigators too, and apparently addresses statements that would be *prohibited* under Rule 3.6, as indicated by the comment to 3.8, which states, "[n]othing 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)." Colorado Rules 3.6, 3.8 (f) and the comment to 3.8 are identical to the Model Rules.

An important question is the meaning of "the public record." If something filed with the court is "public record," either prosecutors or defense attorneys could put information into the public record so it can be discussed in the press.

Another member noted that First Amendment rights are implicated, citing the *Gentile* case from Nevada. First Amendment rights may also be particularly significant in the case of statements by prosecutors in the election campaign process. A member who represents attorneys in disciplinary matters stated that First Amendment rights of attorneys have proven to be very significant considerations in disciplinary cases. The member also noted that prosecutors have great protections for their actions, and should be conscientious in their public statements. However, he concluded that these matters are best addressed on a case-by-case basis because they are very factually driven, and very complicated because of the First Amendment implications.

Upon a vote (with two members voting "no"), the Standing Committee approved establishing a subcommittee to further investigate. The Chair will establish the subcommittee. Mr. Nelson agreed to serve on it. [After the meeting, at the Chair's request, David Stark agreed to chair the subcommittee.]

3. Subcommittee Report

3.a. Rule 1.5(b). Alec Rothrock, the subcommittee spokesman, presented a draft of a proposed majority report to the Supreme Court. He hoped its represents what the majority of the committee was thinking when it voted to retain language in Rule 1.5 that applies Rule 1.8(a) to midstream modifications of fee agreements. The report goes through the history of the Colorado rules, similar rules in Indiana, law in other jurisdictions in civil cases dealing with midstream modifications, and Colorado law regarding the burden of proof in midstream modifications. The report also addresses changes the Standing Committee approved and issues that resulted in the minority view. Mr. Rothrock's draft endeavors to explain the overall problem and why there is a need to have Rule 1.8(a) apply in regard to midstream modifications.

A couple of minor modifications were suggested to the Comments to Rule 1.5 and Rule 1.8, as follows:

Rule 1.5

Comment [2] When the lawyer has regularly represented a client, they ordinarily will have evolved an understanding concerning the basis or rate of the fee and the expenses for which the client will be responsible. . . . [*Replacement third sentence as approved by Committee with minor modification*] When developments occur during the representation that render an earlier communication substantially inaccurate, a revised written communication should be provided to the client.

Rule 1.8

Comment [1] A lawyer's legal skill and training, together with the relationship of trust and confidence between lawyer and client, create the possibility of overreaching when the lawyer participates in a business, property or financial transaction with a client, for example, a loan or sales transaction or a lawyer investment on behalf of a client. . . . "Except as stated in the last sentence of Rule 1.5(b), it does not apply to ordinary fee arrangements between client and lawyer, which are governed by Rule 1.5, although its requirements must be met when the lawyer accepts an interest in the client's business or other nonmonetary property as payment of all or part of a fee. . . .

Mr. Rothrock agreed that these revisions are consistent with the majority position.

The Chair noted that at the last meeting, the Standing Committee had voted to provide a minority report to the Supreme Court. It was drafted before the drafter saw the majority report, but the drafter does not believe changes are needed to the minority report.

It was moved and seconded to approve the ancillary changes to the majority report. Some additional language changes were discussed. The ancillary changes were amended further so that the revised sentence of the Comment reads, "Subject to the last sentence of Rule 1.5(b)..." This amendment was considered friendly.

The subcommittee voted unanimously to accept the ancillary changes.

The Chair noted that only those who had voted with the majority could vote on the majority report.

Upon a vote, a majority of those who had voted for the majority position voted to approve the majority report. One member voted against it.

Although two members who had voted for the minority position were not present at the meeting, a vote was held and a majority of all members who had voted for the minority position voted to approve the minority report.

The Chair noted that there would be a "cyberspace" meeting regarding the file retention rule. The Chair stated that she would investigate conference room availability on May 18, or 21 and June 1, at the Office of Attorney Regulation Counsel, for the Committee's next "in-person" meeting.

Meeting adjourned.