COLORADO SUPREME COURT

STANDING COMMITTEE ON THE RULES OF PROFESSIONAL CONDUCT

Approved Minutes of Meeting of the Full Committee
On July 27, 2018
(Fifty-first Meeting of the Full Committee)

The fifty-first meeting of the Colorado Supreme Court Standing Committee on the Rules of Professional Conduct was convened at 9:00 a.m. on Friday, July 27, 2018, by Chair Marcy G. Glenn. The meeting was held in the Court of Appeals Full Conference Room on the third floor of the Ralph L. Carr Colorado Justice Center.

Present in person at the meeting, in addition to Chair Marcy G. Glenn and Justice William W. Hood III, were Committee members Judge Michael H. Berger, Thomas E. Downey, Jr., Judge Adam Espinosa, Margaret B. Funk, John M. Haried, Lino Lipinsky de Orlov, Melissa C. Meirink, Cecil E. Morris, Jr., Judge Ruthanne Polidori, Marcus L. Squarrell, David W. Stark, James S. Sudler III, Anthony van Westrum, Eli Wald, Lisa M. Wayne, Judge John R. Webb, and Jessica E. Yates. Present by conference telephone was E. Tuck Young. Excused from attendance were members Gary B. Blum, Nancy L. Cohen, Cynthia F. Covell, David C. Little, Judge William R. Lucero, Henry R. Reeve, Alexander R. Rothrock, Boston H. Stanton, Jr., and Frederick R. Yarger. Justice Monica M. Márquez, Jacki Cooper Melmed, and Lisa M. Wayne were not in attendance. Also present was Hannah Armentrout, who is serving as a summer clerk at the Chair's law firm.

I. *Introductions of New Participants*

The Chair introduced to the members Justice William W. Hood III, who replaces now Chief Justice Nathan B. Coats as a liaison justice to the Committee, joining Justice Monica Márquez in that position.

The Chair also introduced new members Judge Adam J. Espinosa, Lino S. Lipinsky de Orlov, and Jessica E. Yates, who was recently appointed to be Colorado Attorney Regulation Counsel.

II. *Meeting Materials; Minutes of April 27, 2018 Meeting, the Fiftieth Meeting of the Committee.*

The Chair had provided a package of materials to the members prior to the meeting date, which was followed, tardily, by submitted minutes of the fiftieth meeting of the Committee, held on April 27, 2018. Those minutes were approved with one correction.

III. *Subcommittee on Rule 8.4(c).*

The Chair called on member Thomas E. Downey, Jr. to bring the Committee up to date on the consideration by the subcommittee that Downey chairs, which had been reconvened to consider the adoption of a comment to deal with "pretexting" for Rule 8.4(c), the rule that defines professional misconduct to include engaging "in conduct involving dishonesty, fraud, deceit or misrepresentation," with the exception "that a lawyer may advise, direct, or supervise others,

including clients, law enforcement officers, or investigators, who participate in lawful investigative activities"; concern had been expressed that pretexting might not be considered a "lawful investigative activity."

Downey reported that the subcommittee had met four times prior to this meeting of the Committee and that he expects to provide a full report to this Committee at its next regular meeting. Anticipating what that report might be, Downey said the subcommittee has taken a number of straw polls of its members, each such poll indicating that the members do not believe any comment regarding pretexting is necessary; nevertheless, in view of the expressions of members of the full Committee at previous meetings of the Committee, the subcommittee is working on a draft of such a comment. Downey forecast that the subcommittee's report to the Committee will include the text of such a comment, together with a statement of the subcommittee's view that the comment is not needed.

IV. *Subcommittee on a Rule for Contingent Fee Agreements.*

For absent member Alexander R. Rothrock, the Chair reported that a subcommittee, chaired by Rothrock, has met to consider a rule for lawyers' contingent fee agreements. Rothrock has commented to the Chair that the subcommittee's membership is small and could well be expanded, especially to include lawyers who have specific interest in contingent fee agreements and in a rule to govern them; Rothrock is reaching out to such lawyers in both the plaintiffs' bar and the defendants' bar.

The subcommittee is looking at the language currently found in Rule 1.5(c)—

> (c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is otherwise prohibited. A contingent fee agreement shall meet all of the requirements of Chapter 23.3 of the Colorado Rules of Civil Procedure, "Rules Governing Contingent Fees."

—with a view toward moving the substance of the cited Chapter 23.3 into the body of the Rules of Professional Conduct, with an updating and a deletion of obsolete text. The subcommittee is very focused on two aspects of contingent fee agreements: First, fundamentally, should enforceability of contingent fee agreements — their "substantial compliance" with the rule's requirements — be left to determinations by courts in litigation between lawyer and client? And, related to that, how might a new rule preserve the existing body of case law dealing with the conversion of a contingent fee agreement into a fee based on *quantum meruit*?

The Chair added that Committee guest Hannah Armentrout, a summer clerk at her law firm, has completed a "fifty state survey" to determine what other states have done with respect to contingent fee agreements, rules, and statutes. Rothrock's subcommittee is now considering the wealth of information that Ms. Armentrout has provided.

V. *Subcommittee on Flat Fee Agreements.*

The Chair now turned the meeting over to member James S. Sudler III, to guide the Committee's continuing consideration of a rule to govern flat fee agreements.

Sudler began by alluding to the Committee's previous discussion of contingent fee agreements, noting that the overlay of contingent fee principles with those that should govern flat fee agreements was discussed at some length at the Committee's fiftieth meeting, on April 27, 2018.

Serious consideration of flat fees as a matter of lawyer professional conduct, Sudler said, began with the Colorado Supreme Court's decision in *Gilbert*.[1] The Court in that case found that the Rules of Professional Conduct do not themselves provide what Attorney Regulation Counsel sought to establish in that case — that, "for purposes of Rule 1.16(d), an attorney cannot 'earn' a fee except as explicitly provided for in the fee agreement," as the Court characterized Attorney Regulation Counsel's position in the *Gilbert* case. While, as the Court noted, Comment [12] to Rule 1.5 provides that advances of unearned fees "may be earned only as the lawyer performs specified legal services or confers benefits on the client as provided for in the written statement of the basis of the fee, if a written statement is required by Rule 1.5(b)," that is not sufficient for discipline: "Comments to the Rules of Professional Conduct do not add obligations to the Rules but merely provide guidance for practicing in compliance with the Rules." The *Gilbert* court essentially invited this Committee to consider the application of the Rules to flat fee agreements.

In response to its charge, the subcommittee has drafted proposed Rule 1.5(h) to deal with flat fee agreements. The proposed text was included in the materials that the Chair provided to the Committee for this meeting. In passing, Sudler commented that the subcommittee has "played around" with the terms "agreement" and "arrangement" in its proposal. He added that Steven K. Jacobson, a member of the subcommittee, has submitted a letter to the Committee expressing the need for a rule of conduct governing flat fee agreements in order to guide both practicing lawyers and Attorney Regulation Counsel in disciplinary matters.

Sudler pointed out that the subcommittee has not proposed any further changes to the text of Rule 1.5(h) that it had previously proposed to the Committee. He added that, at the April meeting of the Committee, there had been concern about the statement that use of the form of flat fee agreement that is to be proffered with the rule "shall be sufficient."

Sudler concluded his reintroduction of the topic of flat fee arrangements with the observation that the subcommittee had responded to all of the matters raised by Committee members about the proposed flat fee rule and comments at the Committee's April meeting, adding that most of those comments had been accepted.

But, Sudler continued, a Committee member, Anthony van Westrum, had, the evening before this meeting, sent an email to Sudler and the Chair raising some further issues. Sudler indicated that van Westrum would speak to those concerns after Sudler finished his review.

Sudler said that the bulk of the subcommittee's time spent since the April meeting had been devoted to developing a form flat fee agreement for inclusion in the Rules. The Committee had not expressed any dissent to the inclusion of such a form; and, Sudler added, lawyers like to use them. The subcommittee's proposal can be found at page 12 of the materials that the Chair provided to the Committee for this meeting.

---

1. In re Gilbert, 346 P. 32 1018 (2015).

The proposed form of flat fee agreement provides for early termination of a flat fee engagement by either the lawyer or the client, although, as had been discussed at the April meeting, Section V of the form provides that the lawyer may terminate the engagement before conclusion of all the undertaken tasks only if that termination is done in compliance with Rule 1.16; indeed, reference to that rule is made twice in the text of that Section V.

Sudler said the subcommittee had a long discussion about how lawyers might take advantage of the interim periods between identified milestones. The form provides for that eventuality but, as a result of concerns expressed by a non-lawyer member of the subcommittee that there should be a notion of fairness in how that eventuality is handled, Section V of the proposed form concludes with the over-arching requirement that "in any event, all fees shall be reasonable." As explained in Sudler's memorandum to the Committee dated July 6, 2018, "The thinking of the subcommittee was influenced by our non-lawyer member who was concerned that Lawyer could take advantage of Client by doing work that was of no benefit to the client. The added language to the form emphasizes Lawyer's obligations under Rule l.5(a)."

Sudler concluded his remarks with the observation that a subcommittee member had asked whether the form flat fee agreement as actually employed by a lawyer in an engagement could be provided to the client with hyperlinks to the cited Rule 1.16. A Committee member suggested that the text of those provisions be made available to the client in footnotes to the agreement.[2]

In response to a question from a Committee member, Sudler said that the American Bar Association has not developed a model rule or agreement for flat fee arrangements, and he knew of no other state that has done so. He added that other jurisdictions do not seem to give such scrutiny to flat fee agreements as Colorado has done since the *Sather* case.[3] Indeed, it appears that, in many jurisdictions, a lawyer may deposit a flat fee payment in the lawyer's operating account even before the work to be done under the engagement has been performed.

At this point, Sudler invited member van Westrum to raise with the Committee the concerns that he had expressed about the subcommittee's draft to Sudler and the Chair in his last-minute email to them the previous evening. As van Westrum is the secretary who prepares these minutes and because he does not remember as he prepares these minutes what it is he actually said in his remarks to the Committee, he here asserts secretarial privilege and extracts from the email that he sent to the Chair and to Sudler, as follows:

> I am looking at Comments [13] and [14] to Rule 1.5, as [the subcommittee] would modify them.
>
> In the current rules, those two comments provide two alternatives, in succession, to accompany the principle enunciated in Comment [12] that, "Pursuant to Rule 1.15, the lawyer must deposit an advance of unearned fees in the lawyer's trust account." Comments [13] and [14] follow that statement of principle in Comment [12] by Comment [13] saying that the lawyer and client may agree to the earning of those "unearned fees" by the lawyer's accrual of billable hours, and Comment [14] saying that, "Alternatively, the lawyer and client may agree to an advance lump-sum or flat fee that will be earned in whole or in part based upon the lawyer's completion of specific tasks or the occurrence of specific events." That is,

---

2. The Committee returned to the matter of how providing the client with the text of cited Rule 1.16 toward the end of the meeting, and that discussion follows below in these minutes.

—*Secretary*

3. In re Sather, 3 P.3d 403 (Colo. 2000).

Comment [13] and Comment [14] are two examples of alternatives by which a lawyer may become entitled to claim that she has earned fees and may now withdraw those earned fees from the deposit contemplated by Comment [12].

But we now would put a new sentence at the beginning of Comment [13], interjecting the flat fee concept even in that first alternative that is currently devoted to the hourly accrual of fees: We say, "A lawyer and client can agree that a flat fee or a portion of a flat fee is earned in various ways." But, because we retain, in the rest of the comment, the current text, we follow that new statement about flat fees with "an example" that does not talk about flat fees at all but, rather, tells the reader that "the lawyer and client may agree that portions of the advance of unearned fees are deemed earned at the lawyer's hourly rate and become the lawyer's property as and when the lawyer provides legal services."

Our next comment, Comment [14], usefully advises that, "Alternatively, the lawyer and client may agree to an advanced flat fee that will be earned in whole or in part based upon the lawyer's completion of specific tasks." But, in current Comment [14], that alternative (along with the lump sum alternative, however that might differ) is an alternative to the hourly rate arrangement just spoken of in Comment [13] — a comment that we are now turning into the first of two comments on flat fees. That seems gummed up to me.

That Comment [14], as we have modified it, is, by the way, the only place we used the past tense "advanced" in our drafts of the flat fee rules The word is not used at all in the current text of Rule 1.5 or its commentary: Indeed, it shows up only in Comment [1] to Rule 1.14 — "some persons of *advanced* age can be quite capable of handling routine financial matters" (ahh, would that this example of a person of advance age had that capability) — and in Rule 7.4 — " Certification signifies that an objective entity has recognized an *advanced* degree of knowledge and experience in the specialty area."}

I see no reason why existing Comment [12] needs the clause," including 'lump-sum' fees and 'flat fees,'" in its first sentence. I'd strike that clause and also would delete our new, first, sentence to Comment [13], so that the trio [with a bit of tweaking of Comment 14] would read—

> [12] Advances of unearned fees are those funds the client pays for specified legal services that the lawyer has agreed to perform in the future. Pursuant to Rule 1.15, the lawyer must deposit an advance of unearned fees in the lawyer's trust account. The funds may be earned only as the lawyer performs specified legal services or confers benefits on the client as provided for in the written statement of the basis of the fee, if a written statement is required by Rule 1.5(b). See also Restatement (Third) of the Law Governing Lawyers §§ 34, 38 (1998). Rule 1.5(f) does not prevent a lawyer from entering into these types of arrangements.
>
> [13] For example, the lawyer and client may agree that portions of the advance of unearned fees are deemed earned at the lawyer's hourly rate and become the lawyer's property as and when the lawyer provides legal services.
>
> [14] Alternatively, the lawyer and client may agree to an advance of a flat fee that will be earned in whole or in part based upon the lawyer's completion of specific tasks or the occurrence of specific events, regardless of the precise amount of the lawyer's time involved.

But I am not finished questioning Comment [12]: The existing text, unchanged by the Sudler subcommittee, says that advances of unearned fees — deposits, that is — are "those funds the client pays for specified legal services." But why must the services be "specified"; may I not enter into a "general retainer" with a client where I promise to be on call to deal with whatever legal issues she sends my way — without specification — and to do that work on an hourly rate, while she agrees to maintain with me, in my COLTAF account, $1,000 against which I may draw my payment for whatever she does send my way? And, why does it use the fancy language "as the lawyer performs specified legal services or confers benefits" rather than simply say "as the lawyer earns the fees"?

Further, that third sentence of existing Comment [12] goes on to say that the specified legal services or conferred benefits that entitle the lawyer to draw from the deposit must have been "provided for in the written statement of the basis of the fee, if a written statement is required by Rule 1.5(b) or (h)." In my example, I don't have a written statement of the basis or rate of the fee with my client because I just happened to be grandfathered in within the meaning of Rule 1.5(b), for I have "regularly represented the client" from time immemorial. How do I draw from that deposit in the absence of any written statement — a written statement that happens not to be required by Rule 1.5(b) in my case?

. . . .

But why can't Comment [12] simply read—

> [12] Advances of unearned fees are those funds the client pays for specified legal services that the lawyer has agreed to perform in the future. Pursuant to Rule 1.15, the lawyer must deposit an advance of unearned fees in the lawyer's trust account. The funds may be drawn from the trust account only as the lawyer earns the fees. Rule 1.5(f) does not prevent a lawyer from entering into these types of arrangements.

In response to van Westrum's actual remarks to the Committee, a member said that Comment [13] was purposely geared toward engagement under an hourly fee arrangement and was structured to permit the lawyer to withdraw funds from the advanced fee deposit as hours of service were accrued. Other members disputed whether flat fees were to be covered by Comment [13] or by Comment [14].

A member suggested that, while there were inconsistencies in the proposed flat-fee comments to Rule 1.5, those could be corrected by the Committee by further revision at a subsequent time; this member was opposed, however, to undertaking a general revision of the comments now; he would not "go for the perfect" and thereby delay adoption of a rule governing flat fee agreements.

Another member echoed Sudler's comment that flat fees have been a particular concern in Colorado since the *Sather* opinion; The Colorado Supreme Court "spent a lot of time" on the flat fee situation in *Sather*, and the existing comments needed to be regarded in the context of *Sather*. The member's recollection was that the existing comments were adopted before this Committee became a participant in the drafting of comments; in that recollection, the comments now under scrutiny were the creation of the Court in the light of *Sather*, and this Committee should not be altering them.

Other members questioned that recollection, remembering that the Committee — and its predecessor that developed the Colorado Rules of Professional Conduct as adopted in 2003 from the American Bar Association's model rules — had been involved in the writing of the comments to Rule 1.5 that are now under consideration in the flat fee context. One member thought that the comments have "not been perfect for a long time" and that the Committee might now ask the subcommittee to take a broader look at all of those comments. But she acknowledged the concern that provisions dealing specifically with flat fees were needed now and should not be delayed while a more complete review of all of the comments to Rule 1.5 was undertaken.

Van Westrum responded by pointing out that lawyers who now undertook to apply these new, provisions to their flat fee arrangements would not be thinking about the precedential *Sather* case and its overlay as the Committee was discussing at this meeting. Accordingly, the Committee should be proposing a flat fee rule and comments that were self-explanatory and available for application by lawyers unfamiliar with the *Sather* history. Van Westrum gave as an example the simple matter of a $10,000 retainer: The lawyer performs some work, sends a bill for $7,000, and takes payment for that work out of the retainer. Van Westrum did not think the proposed comments covered that situation.

To that, the Chair responded with a Yiddish word with which the Secretary was not familiar; she translated it, if the Secretary remembers correctly, as "big and confusing."

The member who had first responded to van Westrum's comments by urging the Committee to not let the perfect delay the good repeated his request that the Committee proceed now to propose to the Court the Sudler subcommittee's provisions for both rule and comment, with its form of agreement, and return to further work on the comments at a later time.

The straw poll taken by the Chair showed that a majority of the members chose to go forward now with the form flat fee agreement and with some version of proposed comments, with refinement of the comments to come at a later time. To a member's inquiry about how often questions about flat fee agreements might arise, many other members answered that such questions arise often.

A member suggested that the Committee delay a fuller review of the comments until it has proposals for additional comment text from Rothrock's contingent fee subcommittee — the Committee could then deal with comments that covered both flat fee and contingent fee arrangements. For the present, this member would respond to van Westrum's concerns about Comments [13] and [14] by moving the first sentence of Comment [13] to Comment [14] and changing the initial word "Alternative" that begins what would become the second sentence of Comment [14] to "For example." As modified, Comments [12], [13], and [14] would read—

> [12] Advances of unearned fees, including advances of all or a portion of a flat fee are those funds the client pays for specified legal services that the lawyer has agreed to perform in the future. Pursuant to Rule 1.15, the lawyer must deposit an advance of unearned fees in the lawyer's trust account. The funds may be earned only as the lawyer performs specified legal services or confers benefits on the client as provided for in the written statement of the basis of the fee, if a written statement is required by Rule 1.S(b) or (h). See also Restatement (Third) of the Law Governing Lawyers§§ 34, 38 (1998). Rule 1.S(t) does not prevent a lawyer from entering into these types of arrangements.
>
> [13] For example, the lawyer and client may agree that portions of the advance of unearned fees are deemed earned at the lawyer's hourly rate and become the lawyer's property as and when the lawyer provides legal services.
>
> [14] A lawyer and client may agree that a flat fee or a portion of a flat fee is earned in various ways. For example, the lawyer and client may agree to an advanced flat fee that will be earned in whole or in part . . . .

And the member formally moved that, with those changes, the Committee submit the Sudler subcommittee's product to the Court.

There followed some proposals for minor modifications that were not generally accepted; and the motion described above was then adopted, followed by a round of applause for the service performed by Sudler and his subcommittee.

The Chair asked for the Committee's guidance about whether, as she submitted the flat fee changes to the Court, she should note that the Committee intended to turn to specific rules for contingent fee arrangements and might, in that context, propose further changes to the comments that the Committee was now submitting to the Court to deal with flat fee arrangements. The consensus of the members was that she should so advise the Court but that she should add that the Committee wished that the Court would not delay adoption of these current changes, as now submitted to the Court, until it later received the Committee's proposal for contingent fees.

Prompted by a member's question about how the client who is asked to sign the form of flat fee agreement might be provided with the content of Rule 1.16 that is cited in that form, the members again discussed the technical merits and limitations of hyperlinking and footnoting and found no satisfactory method by which that might be done. In particular, the suggestion that the text of Rule 1.16 be appended to the form was rejected as being impracticable because of the sheer length of the rule; it would not be read at the time the agreement was entered into.

Further, as another member noted, adding a requirement that the text of Rule 1.16, or a method such as a hyperlink by which that text might be obtained by the client, must be given to the client as a part of the flat fee agreement would undoubtedly create compliance questions in practice. That member pointed out that Rule 1.16 does not impose limitations on the client's ability to terminate the engagement, so it is not important that the client be aware of the Rule's requirements that are imposed on the lawyer who seeks to terminate an engagement prior to its completion.

The members agreed that nothing further need be said in the flat fee provisions or form of agreement regarding Rule 1.16.

VI. *Departures from the Committee.*

The Chair noted to the Committee, with regret, the resignations of two of its members, Judge Federico C. Alvarez and James C. Coyle, the former Colorado Attorney Regulation counsel.

VII. *Adjournment; Next Scheduled Meeting.*

The meeting adjourned at approximately 10:20 a.m. The next scheduled meeting of the Committee will be on Friday, October 19, 2006, beginning at 9:00 a.m., in the Supreme Court Conference Room unless otherwise announced.

RESPECTFULLY SUBMITTED,

Anthony van Westrum

[These minutes are as approved by the Committee at its fifty-first meeting, on October 19, 2018.]