COLORADO SUPREME COURT

STANDING COMMITTEE ON THE RULES OF PROFESSIONAL CONDUCT

Approved Minutes of Meeting of the Full Committee
On January 26, 2018
(Forty-ninth Meeting of the Full Committee)

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The forty-ninth meeting of the Colorado Supreme Court Standing Committee on the Rules of Professional Conduct was convened at 9:00 a.m. on Friday, January 26, 2013, by Chair Marcy G. Glenn. The meeting was held in the Supreme Court Conference Room on the fourth floor of the Ralph L. Carr Colorado Justice Center.

Present in person at the meeting, in addition to Chair Marcy G. Glenn and Justices Nathan B. Coats and Monica M. Márquez, were Committee members Judge Michael H. Berger, Cynthia F. Covell, James C. Coyle, Thomas E. Downey, Jr., Judge William R. Lucero, Cecil E. Morris, Jr., Judge Ruthanne Polidori, Alexander R. Rothrock, Marcus L. Squarrell, David W. Stark, James S. Sudler III, Anthony van Westrum, Eli Wald, Judge John R. Webb, and Frederick R. Yarger. Present by conference telephone were members John M. Haried, Jacqueline Cooper Melmed, Henry R. Reeve, and E. Tuck Young. Excused from attendance were members Federico C. Alvarez, Gary B. Blum, Nancy L. Cohen, Margaret B. Funk, and Boston H. Stanton, Jr. Absent were members David C. Little and Lisa M. Wayne. Also present was Court staff attorney Jennifer J. Wallace.

I. *Meeting Materials; Minutes of October 27, 2017 Meeting, the Forty-eighth Meeting of the Committee.*

The Chair had provided a package of materials to the members prior to the meeting date, including submitted minutes of the forty-eighth meeting of the Committee, held on October 27, 2017. Those minutes were approved as submitted.

II. *Report from Contingent Fee Subcommittee.*

Deviating from the agenda that she had provided in advance of the meeting, the Chair asked member Alexander R. Rothrock to report to the Committee on behalf of the subcommittee that is considering the implications of a move of Colorado's rules governing contingent fee agreements from Chapter 23.3 of the Rules of Civil Procedure to the Rules of Professional Conduct.[1]

Rothrock named the members of the subcommittee as himself, the Chair, and members Thomas E. Downey, James S. Sudler III, and Eli Wald.

Rothrock noted that the fact that the contingency fee rules properly lie within reach of the Rules of Professional Conduct rather than in the Rules of Civil Procedure is well-evidenced by the references in

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1. *See* Item VIII of the minutes of the forty-fourth meeting of the Committee, on October 27, 2017, regarding member Judge Michael H. Berger's report to the Committee that the Court had approved transfer of jurisdiction of the contingency fee rules from the Standing Committee on the Rules of Civil Procedure, which is chaired by Berger, to this Committee on the Rules of Professional Conduct, giving this Committee authority to consider such matters as the proper placement of the contingency fee rules among the various classifications and categorizations of the Court's rules, their coordination with various provisions contained within the Rules of Professional Conduct, and the like.

—*Secretary*

Rule 1.5(c) and elsewhere in the Rules of Professional Conduct to contingency fee agreements, making violation of those rules a matter for discipline as well as a basis for a lawyer's liability to the client.

He pointed out that Colorado's rules governing contingent fee agreements can be traced back to a report from an *ad hoc* committee of the Colorado Bar Association printed in the August 1978 issue of *The Colorado Lawyer*,[2] and he added that some of the wording in the current rules is now antiquated or no longer germane to contingency fee agreements — in his word, the rules are of a hybrid nature. So, he said, it is time to update the contingency fee rules and to make them more easily found within the Court's rules.

The subcommittee had first considered some large-scale changes of the contingency fee rules, including moving them into the Rules of Professional Conduct as additional provisions of Rule 1.5(c) as is done in the American Bar Association's Model Rules of Professional Conduct. Such a move would dovetail with discussions within the Colorado Supreme Court Advisory Committee. But, while considering whether the contingency fee rules become a part of Rule 1.5(c) or are moved to another place where they could be readily found, the subcommittee has been mindful of existing cases from the Supreme Court interpreting those rules and of the adverse impacts that a restructuring of the rules could have on the continued application of that valuable case law to the use of contingency fee agreements by lawyers in the future and to client/lawyer disputes and disciplinary cases arising with regard to those agreements, whether the agreements themselves predate or follow such restructuring.

But the subcommittee sees areas in which the contingent fee rules can be made more consistent with other rules that are implicated in contingency fee cases and, further, sees ways in which the substance of existing Supreme Court case law regarding contingent fee agreements can be reflected in a revision of the rules governing those agreements. Modification of the rules could also be an opportunity to incorporate concepts expressed in Opinion 100 of the Colorado Ethics Committee[3] regarding the conversion of a contingency fee agreement to an alternate fee arrangement in advance of the occurrence of the contemplated contingency.

In short, Rothrock said, the subcommittee is looking at a number of ambitious possibilities and seeks guidance from the full Committee about the direction it should take.

In response to the Chair's request for comments from the Committee about the direction the subcommittee should take, member James C. Coyle, Colorado's Attorney Regulation Counsel, said that the Office of Attorney Regulation Counsel has always thought it unusual that the contingency fee rules — Chapter 23.3 — are found amidst the Rules of Civil Procedure, especially as they deal with client-lawyer agreements as to fees rather than to procedures in judicial processes. The OARC is, Coyle noted, proposing revisions to other rules to make them more user-friendly and easier to find; this proffered move of the contingency fee rules to the Rules of Professional Conduct is timely and sensible, he said.

Member Judge Michael Berger added his view that the proposal to move the rules into the Rules of Professional Conduct makes sense, noting that he has previously served on other, *ad hoc* committees that have considered the contingency fees rules without having a proper focus and without success.

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2. *See* 7 *The Colorado Lawyer* 1353 (August, 1978) for "Proposed Regulation of Lawyer Contingent Fees: A Report From the CBA Ad Hoc Committee".

*—Secretary*

3. Opinion 100, "Use of Conversion Clauses in Contingent Fee Agreements," adopted June 21, 1997, by the Colorado Bar Association Ethics Committee.

*—Secretary*

Another member with experience in the regulation of contingency fees agreements added that this will be a huge project, quite unlike the "simple" flat fee addition that the Committee has been considering and will consider later in this meeting. It is, he stressed, important for the Committee to understand that this will be a major undertaking.

The Chair proposed that the membership of the existing subcommittee be expanded to include other members of the Committee who are interested in the matter of contingent fees, as well as to include other stakeholders who are not members of the Committee. A member added that it would be appropriate to include nonlawyers as members, to gain clients' perspectives.

A member commented that, in the past, the contingent fee agreement was most frequently thought of as an arrangement to be used in personal injury litigation. But now, he said, the contingent fee agreement is being used even in large commercial litigation involving corporate parties. Such entities are now among the stakeholders in regulation of the contingent fee agreement.

The Chair asked for an expression of the negatives of such an undertaking by this Committee. Rothrock offered that it will entail a lot of work; some might say, "Leave well enough alone; we have a tab in our books to find the existing rule and have a body of case law." Would the potential for improvement in the Colorado law governing contingent fee agreements outweigh such disruption? Rothrock thought that it would but could understand that others might question that view.

The Chair noted that the Committee need not this day impose any limitations on the direction the subcommittee might take; if it simply approves of the subcommittee going forward as the subcommittee may determine, the details can come later. The question today is simply whether the Committee undertakes to invest time in the matter.

In answer to a member's question whether violation of the contingent fee rules is presently a matter for discipline, Rothrock said that it is, pointing to Rule 1.5(c), which specifies, as a rule of conduct, that 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.'"

The Chair concluded the discussion by noting that no opposition had been expressed. Rothrock noted the significance of that absence.

III. *Subcommittee on Lawful Investigative Activities Under Rule 8.4(c).*

The Chair invited member Thomas E. Downey to give a report to the Committee on behalf of the subcommittee that has been considering the issue of "pretexting" in lawful investigations under the strictures of honesty imposed upon lawyers by Rule 8.4(c). The subcommittee had been established at the Committee's forty-eighth meeting, on October 27, 2017, to propose a comment for Rule 8.4(c) that would assist in determining the meaning of "lawful investigative activities," which is the phrase that the Court used in its recent amendment to that paragraph to provide an exception to that paragraph's general proscription against "conduct involving dishonesty, fraud, deceit or misrepresentation" — the added exception permits "a lawyer [to] advise, direct, or supervise others, including clients, law enforcement officers, or investigators, who participate in lawful investigative activities."[4]

4. The Committee had previously considered the application of Rule 8.4(c) to "pretexting" as a tool for determining violation of trademarks and service marks and in other matters involving the investigation of wrongful conduct by third parties That consideration began at its twenty-ninth meeting, on January 21, 2011, (*see* Part V of the minutes of that meeting) and continued at its thirtieth meeting, on May 6, 2011, (*see* Part V of those minutes), its thirty-first meeting, on January 6, 2012, (*see* Part IV of those minutes), its thirty-second meeting, on July 13, 2012, (*see* Part III

Downey said that the pretexting subcommittee to which the Chair referred in her introduction includes members of this Committee and others who had participated in the earlier consideration of Rule 8.4 as it applies to pretexting. He commented that one could write law review articles or, indeed, textbooks about the exception that the Court has added to Rule 8.4(c) but added that the subcommittee has considered the narrower question of whether a comment about the exception is warranted; he pointed out that the Court itself had not seen a need for a comment when it added the exception to the rule. A straw poll among the subcommittee participants at its first meeting had indicated a prevailing view that no comment was needed. But the subcommittee has continued work on developing a comment nonetheless, in response to this Committee's request that it do so. The subcommittee had a long discussion at its second meeting, narrowing the choice for text of a comment to two versions, neither of which was yet ready for presentation to this Committee at this meeting. But, Downey said, the subcommittee is making progress toward a "minimalist" comment. It will meet next on February 13, 2018, to "re-tinker" the two versions, with a view toward presenting text for a comment to the next meeting of this Committee.

IV. *Housekeeping Change*.

The Chair invited member Anthony van Westrum to discuss his suggestion that the words "that is" be added to the introductory clause of Rule 5.4(d) — which clause the Committee had agreed, at its forty-eighth meeting, on October 27, 2017, should be corrected to read as follows:

> A lawyer shall not practice with or in the form of a professional company *authorized to practice law for profit*, if . . . .[5]

Van Westrum noted that the style used throughout the Rules is to preface an adjectival phrase such as this "authorized to practice law for profit" with the words "that is": With that change, the clause would read as follows:

> A lawyer shall not practice with or in the form of a professional company *that is* authorized to practice law for profit, if . . . .

Rothrock noted that the terminology that the Committee had approved at its forty-eighth meeting is that which is used in the American Bar Association's Model Rules of Professional Conduct, but he agreed that the change proposed by van Westrum should be adopted for consistency in the style used in the Colorado Rules.

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of those minutes), and its thirty-third meeting, on November 16, 2012, (*see* Part II of those minutes). Part III of the minutes of the thirty-fourth meeting, on February 1, 2013, contains the Chair's report to the Committee about her letter to the Court, dated November 19, 2012, advising the Justices that the Committee had determined against recommending a modification of Rule 8.4(c) to deal with pretexting but providing to the Court the Committee's extensive work product on that matter. As Downey explained to the Committee at its forty-seventh meeting, on June 16, 2017, the votes taken by the Committee in its deliberations on the pretexting matter had been close ones; at that forty-seventh meeting, the application of Rule 8.4(c) to investigative conduct was back before the Committee upon the Court's own proposal to add this exception to Rule 8.4(c): "except that a lawyer may advise, direct, or supervise others, including clients, law enforcement officers, or investigators, who participate in lawful investigative activities"; the Committee then directed the Chair to advise the Court (1) that the Committee did not believe that it could add more to the Court's deliberation than what it had previously provided and (2) that, if the Court added the anticipated exception, it should consider the addition of commentary to Rule 8.4 to give guidance to lawyers in the application of the exception. The Court adopted that exception on September 28, 2017, without providing commentary.

—*Secretary*

5. That addition had been made to correct a defective alteration in the text of the Rules to utilize the defined term "professional company"; without the correction, lawyers were ostensibly prohibited from serving as lawyers in nonprofit entities, such as legal aid organizations, that have interest-holders who are not lawyers.

—*Secretary*

The Committee unanimously approved the change.

V. *Lawyer's Self-Assessment Program, from OARC.*

At the Chair's invitation, member Coyle reviewed the Colorado Lawyer Self-Assessment Program that the Office of Attorney Regulation Counsel now makes available on its website.[6]

Coyle reported that each of the ten sections of the program takes about fifteen minutes to complete; he suggested that a lawyer might complete a section of the program before lunch and then take a nice walk to review it in the lawyer's mind. Coyle stressed that the program can be particularly valuable for sole practitioners, who are not practicing from within law firms that may have established their own procedures and protocols that affect the conduct of their lawyers.

Coyle said that Committee member David W. Stark, who is chair of the Colorado Supreme Court Advisory Committee, chaired the subcommittee that developed the program.[7] He added that the program is the first of its kind in the nation and is getting a "good response" nationwide. Coyle will give a presentation about the program at the Conference of Chief Justices in Henderson, Nevada, and Chief Deputy Attorney Regulation Counsel — and Committee member — Margaret B. Funk will give a presentation about it before the California Bar Association Board of Trustees in Los Angeles, over the coming weekend; it will be considered at the midyear meeting of the American Bar Association in Vancouver, British Columbia, that will commence in a few days after this meeting of the Committee.

One working group (Coyle, Donnelly, Glenn, Fogg, Mihm, Stark, and Jonathan P. White) within the program development subcommittee is now developing a confidentiality rule for the assessment, so that a lawyer's results cannot be utilized in disciplinary action against that lawyer, and is also considering a statutory privilege for the program.

Coyle concluded his remarks by saying that the assessment tool, as it is currently available, is just "Version 1.0"; the OARC intends to use feedback that it receives from lawyers to improve the tool, with a view toward making it a "working tool" for lawyers. One particular goal in its development is to make it useful to young lawyers — to get them thinking early in their careers about the topics it covers – and useful to sole practitioners.

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6. The program introduction is found at http://www.coloradosupremecourt.com/AboutUs/LawyerSelfAssessmentProgram.asp, from which the program itself may be accessed online. The program is available as a pdf file at http://www.coloradosupremecourt.com/PDF/PMBR/PMBR%20check%20list%20final.pdf.

*–Secretary*

7. The OARC website — http://www.coloradosupremecourt.com/PDF/AboutUs/Annual%20Reports/2017%20Annual%20Report.pdf — names the members of the Proactive Management-Based Program Subcommittee as follows:

> David Stark (Chair), Suzann Bacon, Zak Bratton, Barbara Brown, Brett Corporon, Jim Coyle, Katy Donnelly, Barbara Ezyk, Jay Fernandez, Jill Fernandez, Mark Fogg, Heather Folker, Marci Fulton, Margaret Funk, Charles Garcia, Marcy Glenn, Karen Hammer, Jack Hanley, Melinda Harper, Karen Hester, Kim Ikeler, Steve Jacobson, Patricia Jarzobski, Genet T. Johnson, Josh Junevicus, Mark Lyda, Greg Martin, Dawn McKnight, April McMurrey, Scott Meiklejohn, Michael Mihm, Justin Moore, Geanne Moroye, Cecil Morris, Chris Murray, Reba Nance, Chris Newbold, William Ojile, Tim O'Neill, Margrit Parker, Cori Peterson, Ryann Peyton, Leni Plimpton, Katrin Rothgery, Matthew Samuelson, Catherine Shea, Jamie Sudler, Sara Van Deusen, Tom Werge, Jonathan White, James Wilder, and David H. Wollins
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> *–Secretary*

The Chair followed Coyle's remarks with the observation that this program puts Colorado in the forefront of developing good tools for lawyers' practice.

VI. Flat Fees.

The Chair invited member James S. Sudler III to report to the Committee on the progress of the subcommittee that is considering Rules text to deal with lawyers' undertakings to provide legal services to clients for "flat fees."

Sudler referred the Committee to the materials that the Chair had provided for the meeting, commencing at page 17 thereof. The text to which Sudler directed the Committee's attention — with one correction that Sudler explained to the Committee — reads as follows—

C.R.P.C. 1.5

(a) through (g) [no changes]

(h) A "flat fee" is a fee for specified legal services by a lawyer for which the client agrees to pay a fixed amount, regardless of the time or effort involved.

(1) The basis or rate of a flat fee shall be communicated in writing before or within a reasonable time after commencing the representation and shall contain the following:

(i) A description of the services the lawyer agrees to perform;

(ii) A statement of the amount to be paid to the lawyer for the services to be performed;

(iii) If all or any portion of a flat fee is to be earned by the lawyer upon the completion of specific tasks or the occurrence of specific events in the representation, a description of the amount to be earned upon the completion of each specified task or the occurrence of each specified event; and

(iv) The amount of any of the fees the lawyer is entitled to keep upon termination of the representation before all the legal services have been performed.

(2) If all or any portion of a flat fee is paid in advance of being earned and a dispute arises about whether the lawyer has earned all or part of the flat fee, the lawyer shall comply with Rule 1.15(A)(c) with respect to any portion of the flat fee that is in dispute.

The change that Sudler referred to was the substitution of the word "specified" for the word "specific" that had been used with the words "legal services" in Paragraph (h) as it was stated in the meeting materials; Sudler commented that the purpose of that word is to require that, to qualify as a permissible "flat fee" arrangement under the proposal, the contemplated legal services would have to be *specified* with respect to the arrangement.

Sudler explained the genesis of this text as follows: Following the forty-eighth meeting of the Committee, on October 27, 2017,[8] member Funk went to the drafting board and drafted the bulk of this proposed text, following which the subcommittee met on December 8, 2017, to review it with the purpose of preparing a draft for consideration by the Committee at this meeting. Sudler said the subcommittee believed that the proposal addresses the comments made at the Committee's forty-eighth meeting.

As had been requested at the forty-eighth meeting, this proposal encompasses all of the flat fee rule within one paragraph — ¶ (h) — of Rule 1.5, including, at the beginning of the provision, a definition of the "flat fee" that is encompassed by the paragraph. And the proposal applies to a flat fee that is to be paid after completion of the specified services as well as to one that is to be received and held by the lawyer in

8. *See* Part II of the minutes of the forty-eighth meeting of the Committee, on October 27, 2017, for the Committee's discussion of flat fees at that meeting.

—*Secretary*

advance of performance of the services. The inclusion, within the provision, of flat fees that are to be paid only after completion of the services had been resisted initially by some members of the subcommittee, Sudler said, but concurrence on the point had ultimately been obtained.

Sudler explained that ¶ (h)(1)(iii) of the rule requires that, if portions of the flat fee are to be earned "upon the completion of specific tasks or the occurrence of specific events in the representation," the tying of each such amount earned to the specific task or event upon which it is earned must be described in the arrangement — a requirement that is not applicable if none of the fee will be deemed earned until all of the specified legal services have been performed or events have occurred.

Sudler added that the proposal is to be applicable to a single engagement and, as well, to an undertaking to perform the specified legal services in a series of engagements, such as an undertaking to perform all of the client's real estate foreclosures for a stated flat fee applicable to each such engagement.

Upon conclusion of Sudler's remarks, the Chair asked van Westrum to review the alternative text that he had offered to the subcommittee and which the Chair had included in the materials for this meeting, beginning at page 18 of those materials.[9]

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9. Van Westrum's proposal differed from the proposal submitted by the flat fee subcommittee as follows:

> (a) through (g) [no changes]
>
> (h) A "flat fee" is a fee for specified legal services by a lawyer for which the client agrees to pay a fixed amount, regardless of the time or effort involved.
>
> (1) The basis ~~**or rate**~~ of a flat fee shall be communicated in writing before or within a reasonable time after commencing the representation and shall contain the following:
>
> (i) A ~~**description**~~ ***statement*** of the ***specified legal*** services the lawyer agrees to perform;
>
> (ii) A statement of the amount ***of fee*** to be paid to the lawyer for the services to be performed;
>
> (iii) If ***less than*** all ~~**or any portion of a**~~ ***of the entire*** flat fee is to be earned by the lawyer upon the completion of specific tasks or the occurrence of specific events in the representation~~**, a description of the amount**~~ ***but before completion of all of the services the lawyer agrees to perform, a statement of each specified task or event and of the amount of fee*** to be earned upon the completion ~~**of each specified task or the occurrence of each specified event; and**~~ ***or occurrence thereof; and***
>
> (iv) ~~**The amount of any of the fees**~~ ***A statement of the amount of fee, if any, that*** the lawyer is entitled to keep upon termination of the representation before ***completion of*** all the~~**legal**~~ services ~~**have been performed**~~ ***the lawyer agrees to perform***.
>
> (2) If all or any portion of a flat fee is paid in advance of being earned and a dispute arises about whether the lawyer ~~**has earned all or part**~~ ***is entitled to retain any*** of the ~~**flat fee**~~ ***amount so paid***, the lawyer shall comply with Rule 1.15(A)(c) with respect to ~~**any portion of**~~ the ~~**flat fee**~~ ***amount*** that is in dispute.
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> ***(3) The other provisions of this Rule apply to a flat fee agreement and to the lawyer's flat fee under such an agreement; without limiting the generality of the foregoing, paragraph (a), paragraph (f), and paragraph (g) of this Rule apply to a flat fee.***

*–Secretary*

Ignoring van Westrum's opening comment that his proposal was on its face brilliant and coherent and should be adopted in full, the Chair asked him to explain the differences between that proposal and the subcommittee's proposal.

Van Westrum began by identifying his deletion of the words "or rate" from the phrase "The basis or rate" that begins ¶ (h)(1) of the subcommittee's proposal, explaining that a flat fee is conceptually the antithesis of a rate of fee, such as $X per hour. To that, a member suggested that a fee arrangement might encompass both a flat fee for certain specified services and an hourly or other "basis" for a fee applicable to other services. And, to that, van Westrum responded that the concept of a flat fee should not be clouded by blending it with other arrangements; those other arrangements should be analyzed under the remainder of Rule 1.5 and not under ¶ (h) of the rule.

A member expressed concern that the remaining term — the "basis" of the flat fee — was not precise and suggested that the rule should "drill down" on the matter. Concurring, Van Westrum replied that a statement of the "basis" for a flat fee could well turn out to be a treatise; but he pointed out that the word exists in the current rule in opposition to the alternative of a "rate" and thus probably is an adequate expression of what is contemplated by ¶ (h)(1). Another member suggested substitution of the word "terms," so that ¶ (h)(1) would open with the requirement that "[t]he terms of a flat fee shall be communicated . . . and shall contain" what is then listed in ¶ (h)(1)(i) through ¶ (h)(1)(iv).

A member concurred with van Westrum's observation that use of the word "basis" in the existing text of ¶ 1.5(b) — where the phrase "basis or rate" was seemingly intended to encompass both time-based and flat fees — indicates its sufficiency for its purpose in this ¶ (h)(1).

But another member suggested that ¶ (h)(1) open with the words "The flat fee arrangement shall be communicated . . . ." Van Westrum responded that such wording was quite acceptable to him, for he has been in favor of text that would recognize that what is being dealt with by the provision is in fact an "arrangement" or, more specifically, an agreement — wording that has been avoided throughout the discussion. To that, another member concurred, wondering why the provision does not expressly recognize that it is dealing with an agreement between the lawyer and the client. And, to that, Sudler explained that the subcommittee had purposely avoided use of the word "agreement" or "contract," just as those words had been avoided in the drafting of the current text of Rule 1.5. The subcommittee retained "basis or rate" from the existing rule, and van Westrum narrowed that to "basis" but neither referred to an "agreement." And, to that, a member expressed her understanding that the text had been drafted to avoid reference to an agreement or a contract in order to avoid an implication that the client had to "sign off" on the matter in some fashion that could become cumbersome when the lawyer was responding rapidly to a sudden need for the lawyer's services.

Another member reiterated the suggested substitution of "terms" for "basis," leaving until later in the rule the matter of dealing with the amount that the lawyer will charge for the specified legal services. Van Westrum concurred in that suggestion, commenting that the purpose of this text in ¶ (h)(1) is to set up the following subparagraphs that flesh out the requirements for a flat fee arrangement, including specifically requiring, in ¶ (h)(1)(ii), a "statement of the amount [of fee] to be paid to the lawyer for the services to be performed" — an amount that will be known because the fee is "flat."

A member concurred with the suggestion that the term be "terms," noting that there will usually be details regarding the structure of the flat fee arrangement, including, for example, the establishment of milestones to mark the performance of the specified legal services.

The Chair asked whether there was a consensus behind substitution of the phrase "The terms of a flat fee shall be communicated" for "The basis or rate of a flat fee shall be communicated" in ¶ (h)(1), and

the Committee responded affirmatively. Additionally, the Committee was in agreement that ¶ (h)(1)(i) should begin with "A statement of the specified legal services" rather than "A description of the services."

But Sudler then stated his opposition to the switch from "description" to "statement" in that text; he began to explain why he took that position but admitted that it just felt better to him, though he could not say why.

And with that the Committee determined not to make either of the changes it had just agreed upon, choosing instead to leave the initial words of ¶ (h(1)(i) as proposed by the subcommittee: "A description of the services."

The Chair then directed the Committee's attention to van Westrum's suggestion that the word "fee" be added to ¶ (h(1)(ii), so that it would begin, "A statement of the amount of fee to be paid to the lawyer," thereby distinguishing the fee from expenses or other amounts that the client might also be obligated to pay.

A member responded by wondering whether the timing of the payment of the amount was important, and another member clarified that the issue really was when the fee was to be *paid*, as distinguished from when it was *earned*; that, he pointed out, was not addressed in either proposal.

Sudler pointed the Committee to the following sentence in existing Comment [14] to Rule 1.5: "[T]he 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, regardless of the precise amount of the lawyer's time involved." But the member who had spoken about the importance of the timing of the payment responded that the cited comment referred to the activities — the "tasks" — that constitute the legal services, not to the timing of payment for those services. He suggested that ¶ (h)(1)(ii) read in full, "A statement of the amount to be paid to the lawyer for the services to be performed *and the timing of payment*."

A member who had not previously spoken wondered what in fact is the payment to which this text referred. He noted that timing is provided for both in ¶ (h)(1)(iii) — fee earned "upon the completion of specific tasks or the occurrence of specific events" — and in ¶ (h)(1)(iv) — keeping some portion of fee "upon termination of the representation before all the legal services have been performed." In his view that emphasis was appropriate: The rule should focus on clarity about what the lawyer is to do and when he has earned payment for doing it; it need not focus on the timing of the client's payment obligation.

The member who had earlier expressed her understanding that there had been a specific avoidance of reference to an agreement or a contract in Rule 1.5 now commented that, if a dispute develops between client and lawyer, it will be over how and how much fees are earned and for what services or upon what events they are earned, not about the timing of payment. She would resolve the current question by having ¶ (h)(1)(ii) read, "A statement of the amount to be paid, and the timing of the payment, to the lawyer for the services to be performed."

But another member responded to that by saying that the textual proposals have not dealt with the difference that might exist between dates for payment and events triggering payment. She would, however, leave dealing with that distinction to later in the rule; she would leave ¶ (h)(1)(ii) to deal only with the amount to be paid for the specified services, whenever that amount is to be paid. She would add an additional subparagraph to deal with the timing of payments, structured in parallel to ¶ (h)(1)(iii) as it requires a description of "each specific task or . . . occurrence of specific events" generating an entitlement to payment.

And a member responded to that by noting that the points upon which fees are earned may not necessarily parallel the timing of the services performed to those points. Payment could be due upon completion of particular services — or upon some other trigger.

Another member summarized by noting that a statement of when the client is to make payment is an important part of the arrangement and the rule should require that it be specified, that the timing of each payment should be specified.

A member noted that the discussion has identified a nuance: That there is both the matter of earning a fee and the matter of when it is to be paid, and that the lawyer should express both elements when stating the flat fee arrangement to the client.

Another member reverted to the prior suggestion that ¶ (h)(1)(ii) read, "A statement of the amount to be paid to the lawyer for the services to be performed and the timing of payment."

But Sudler asked why the matter of timing of payment needed to be called out in the text of the rule — wasn't it encompassed in the requirement that the lawyer state the "terms" of the arrangement? If the lawyer wants to provide for partial payments in advance of completion of all the specified services or anticipated events, the lawyer may include the details in the "terms of a flat fee" that are to be communicated to the client pursuant to ¶ (h)(1)(i).

Another member, however, suggested that the Committee has tackled the flat fee in part because lawyers are getting the details of advance payment wrong — they have focused on the need to put advances of fees into their trust accounts pursuant to Rule 1.15, as they are reminded to do by Comment [12] to Rule 1.5, and have not well-documented the timing of payments that are to be made in advance of completion of all the specified legal services.

A member who had not previously spoken suggested that the timing matter could be placed in its own subparagraph under ¶ (h)(1): "A schedule of the payments to be made to the lawyer." Another member concurred, saying she often sees arrangements by which the client agrees to pay $XXX in fees to arraignment and disposition of the case but $YYY if the case goes to trial.

A member pointed out that the question of timing of payment is relevant whether or not payment is to be made in advance of services (an unearned payment) or after completion of a stated portion or all of the services. The details about the payment obligation need to be stated to the client.

A member said that one of the comments that had just been made had triggered in his mind this additional question: Should this ¶ (h) make it clear that its listing of the terms that are to be communicated to the client is not an exclusive listing? To that, another member replied that that could create a trap for the lawyer who communicated all that the Court has thought to specify in its rule on flat fees but who might nevertheless face discipline for having failed to communicate some other element that is later thought to be important to the lawyer's particular engagement. The two members then compared usage of the words "include" and "contain" — the latter word being the verb that now closes the preamble of ¶ (h)(1) before the colon that sets up the statement of the four items that required by the paragraph; they concluded that the word used — "contain — is to be read as setting up an exclusive listing of required provisions, the provision of which in an engagement suffices for compliance with the flat fee rule.[10]

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10. The question of whether "contains" sets up an exclusive listing was not further considered at the meeting. It is instructive that Comment [7] to Rule 3.6 attaches "only" to "contain" to indicate exclusivity: "Such responsive statements should be limited to *contain only* such information as is necessary to mitigate undue prejudice created by the statements made by others"; that shows how exclusivity can be expressed in the Rules when it is intended.

A member suggested that the Court should provide a form for flat fee arrangements similar to its provision of a form, in Rule 7 of C.R.C.P. Rule 23.3, for contingent fee agreements the use of which is sufficient for compliance with Rule 23.3. Another member rejected that idea as not getting to the concern that the proposed list of requirements in ¶ (h)(1) — which is designed to accommodate many different flavors of flat fee arrangements — may not be inclusive of all that should be included to make a particular flat fee arrangement sufficiently clear to the client and hence, in her view, should not be exclusive.

A member interjected that he, too, had concluded that the listing of requirements in ¶ (h)(1) should not be exclusive of what should be contained in a lawyer's communication about a particular flat fee arrangement in order to avoid discipline: He would end the preamble of ¶ (h)(1) with the words, "and shall *include* the following." Additionally, he suggested, a comment could clarify that payments need not be timed to match the events upon which they are earned, a comment that could speak to "timing" and flesh out the matters that the Committee has been discussing.

A member reverted to the prior suggestion that ¶ (h)(1)(ii) read, "A statement of the amount to be paid to the lawyer for the services to be performed and the timing thereof." To that, another member suggested that it read, "A statement of the amount *of fee* to be paid to the lawyer for the services to be performed and the timing thereof"; but a third member pointed out that the client may be obligated to make payments of other amounts in addition to fees, and those amounts should also be identified appropriately, even if their amounts and timing cannot be predetermined. Another member responded with the suggestion that the provision read, "A statement of the amounts to be paid to the lawyer *and the timing thereof* for the services to be performed and the timing thereof." And another refined that by deleting the word "thereof," so that ¶ (h)(1)(ii) would read, "A statement of the amounts to be paid to the lawyer and the timing of those payments for the services to be performed."

The Chair asked Sudler whether a comment could encompass these matters, as a member had previously suggested; Sudler replied affirmatively.

But the Committee expressed a consensus that the word "contain" should be changed to "include" so that the preamble of ¶ (h)(1) would end with the words, "and shall *include* the following."

The Chair then asked that the Committee turn its attention back to the first line of ¶ (h) and strike from there the words "by a lawyer," so that it would read, "A 'flat fee' is a fee for specified legal services for which the client agrees to pay . . . ." The change would recognize that a lawyer may charge a client not only for the lawyer's services but also for those of paralegals and other nonlawyers. The Committee agreed with that suggestion.

A member then suggested that the word "scheduling" be substituted for "timing" in the text the Committee had reached consensus upon for ¶ (h)(1)(ii), which was "A statement of the amounts to be paid to the lawyer and the timing of those payments for the services to be performed." But another member objected that the concept of a schedule of payments was too rigid. An informal polling of five of the members who had spoken in the preceding discussion of that subrule indicated that a majority preferred "timing" to "scheduling."

The Committee then considered van Westrum's suggestions for ¶ (h)(1)(iii), which would read—

> (iii) If ***less than*** all ~~**or any portion of a**~~ ***of the entire*** flat fee is to be earned by the lawyer upon the completion of specific tasks or the occurrence of specific events in the representation~~**, a description of the amount**~~ ***but before completion of all of the services the lawyer agrees to***

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*—Secretary*

***perform, a statement of each specified task or event and of the amount of fee*** to be earned upon the completion ~~**of each specified task or the occurrence of each specified event; and**~~

In his introductory remarks, van Westrum had characterized the changes that he proposed as "self-explanatory"; the Chair now asked him why he thought so.

As to the suggestion that the provision begin with "If less than all," rather than with "If all or any portion," van Westrum explained that, if the arrangement provided that *all* of the flat fee was earned "upon the completion of specific tasks or the occurrence of specific events in the representation," then logically there would be no need for a description by which portions of that unitary flat fee were to be earned. The preceding requirements of ¶ (h)(1)(ii) — a statement of the services to be performed — and ¶ (h)(1)(iii) — a statement of the fee to be paid for those services — established all that need be said for the case of a unitary fee.

A member suggested this alternative: "If any portion of the flat fee is to be earned by the lawyer before completion of the representation, a description of the amount to be earned upon the completion of specific tasks or the occurrence of specific events . . . ."[11] In response to a member's inquiry, this member noted that an engagement agreement might fix earnings points by date: By May 30th Lawyer shall have completed Task XXX and thereupon will be entitled to $YYY.

A member expressed concern about the references to the *lawyer's* accomplishing tasks, noting that in many cases billable tasks may be completed by the lawyer's paralegal or a properly-chargeable consultant.

To that concern, van Westrum suggested substitution of "legal services to be provided" for "services the lawyer agrees to perform" in the two places the later phrase appears in his proposal.

A member took that suggestion as the basis for his suggestion that the phrase be changed to "completion of all of the specified legal services" in a revision of ¶ (h)(1)(iii).

Another member suggested that the references to the "amount of fee" be expanded to refer both to the amount and to the alternative of a calculation: "the amount or method of calculating the fee."

That same member asserted that van Westrum's reference to the retention of fees "upon termination of the representation before completion of all the services" was to an event that was always possible. Accordingly, she would change the wording of ¶ (h)(1)(iv) to, "A statement of the amount of fee, if any, that the lawyer is entitled to retain if the representation is terminated before the completion of all the specified legal services the lawyer has agreed to perform." In answer to van Westrum's question about that proposal, the member said the proposal was to deal with an early-termination fee that was fixed without reference to the nature or quantity of service rendered to the point of termination. To that, Sudler commented that such an early-termination fee would not be "for specified legal services" and thus could be charged separately and apart from all of the provisions of proposed ¶ (h). Sudler stressed that that fact — that an early-termination fee that is not tied to the completion of specified legal services may be charged

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11. The suggestion differed from van Westrum's proposal as follows:

> If ~~**less than all**~~ ***any portion*** of the ~~**entire**~~ flat fee is to be earned by the lawyer ***before completion of the representation, a description of the amount to be earned*** upon the completion of specific tasks or the occurrence of specific events

*—Secretary*

under the lawyer's engagement with the client without regard to the existence of a flat fee in that engagement — should be clearly stated in the minutes of the meeting.

Several members urged that ¶ (h)(1)(iv) use the word "earns," in place of a reference to the lawyer's "entitlement" to some amount, noting that we are discussing between-the-milestone terminations and that a lawyer may not withdraw from an advanced deposit of funds contained in the lawyer's trust account under Rule 1.15 unless and until the amount withdrawn has been "earned."[12] Other members balked at the switch from entitlement to earning, and a member noted that, if the wording is changed from "is entitled" to "earns" in this clause (iv), a parallel change should be made to ¶ (h)(2).

Yet another member expressed dislike for the words "to keep" in the phrase of ¶ (h)(1)(iv) then under discussion — "is entitled to keep" — "arguing that it begged the question of where that keeping must be done.

The Committee chose to use "earned" to comport with the terminology of Rule 1.15, so that the phrase would read, "fees the lawyer earns . . . ."

And a number of members disagreed with van Westrum's position that the phrase he used, "before completion of all the services the lawyer agrees to perform," could not logically include the circumstance in which the lawyer had completed some milestones but had not yet completed all the milestones encompassed by the engagement. That is, they rejected Van Westrum's view that "completion of all the services" could not occur until all of the services contemplated to be provided under the engagement had in fact been provided.

That concluded the Committee's exercise in collective drafting. The Committee had rejected most, if not all, of van Westrum's suggestions, and the Committee's resulting version of Rule 1.4 now compared to the proposal that had been submitted by the subcommittee for the meeting read as follows:

> (a) through (g) [no changes]
>
> (h) A "flat fee" is a fee for specified legal services ~~**by a lawyer**~~ for which the client agrees to pay a fixed amount, regardless of the time or effort involved.
>
> (1) The ~~**basis or rate**~~ ***terms*** of a flat fee shall be communicated in writing before or within a reasonable time after commencing the representation and ~~**shall contain**~~ ***must include*** the following ***information***:
>
> (i) A description of the services the lawyer agrees to perform;
>
> (ii) ~~**A statement of the**~~ ***The*** amount to be paid to the lawyer ***and the timing of payment*** for the services to be performed;
>
> (iii) If ~~**all or**~~ any portion of ~~**a**~~ ***the*** flat fee is to be earned by the lawyer ~~**upon the completion of specific tasks or the occurrence of specific events in the representation, a description of**~~ ***before completion of the representation,*** the amount to be earned upon the completion of ~~**each**~~ specified ~~**task**~~ ***tasks*** or the occurrence of ~~**each**~~ specified ~~**event**~~ ***events***; and
>
> (iv) The amount ~~**of,**~~ ***if*** any***, or the method*** of ~~**the**~~ ***calculation, of*** fees the lawyer ~~**is entitled to keep upon termination of**~~ ***earns, if*** the representation ***terminates*** before ~~**all**~~ ***completion of*** the ***specified*** legal services ~~**have been performed**~~.

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12. *See, e.g.*, Rule 1.15B(a)(1) (emphasis added):

> A trust account or accounts, separate from any business and personal accounts and from any other fiduciary accounts that the lawyer or the law firm may maintain as executor, guardian, trustee, or receiver, or in any other fiduciary capacity, into which the lawyer shall deposit all funds entrusted to the lawyer's care and any advance payment of fees that have not been *earned* or advance payment of expenses that have not been *incurred*.

*—Secretary*

(2) If all or any portion of a flat fee is paid in advance of being earned and a dispute arises about whether the lawyer has earned all or part of the flat fee, the lawyer shall comply with Rule 1.15(A)(c) with respect to any portion of the flat fee that is in dispute.

***(3) The [following form] [form appearing in Appendix ___] may be used for flat fees. The authorization of this form shall not prevent use of other forms consistent with this Rule.***

The Committee applauded its own efforts at that task and determined that its work product at this meeting should be circulated as a further draft to the members to be sure that it correctly reflects the changes made at this meeting, with the understanding that the subcommittee would then turn its attention to a comment dealing specifically with ¶ (h).

At a member's suggestion that the subcommittee look to the form that is provided in C.R.C.P. Rule 23.3 for contingent fee arrangements, Sudler replied that the subcommittee will prepare a draft of a form for flat fees for the Committee to consider at its next meeting.

The Chair summarized by pronouncing that the Committee had, in substance, approved the text of the language in the rule and would turn to the comment at its next meeting.

VII. *Conjunction / Disjunction in Rule 8.4(c)*

Member Downey noted that, at its forty-eighth meeting, on October 27, 2017, the Committee had considered whether the disjunction "or" used by the Court in its addition of the investigation exception to Rule 8.4(c), in the phrase "a lawyer may advise, direct, or supervise others, including clients, law enforcement officers, or investigators," should instead be the conjunction "and." The Committee had, at that meeting, referred that burning question to the pretexting subcommittee. Downey now reported that the subcommittee had then looked at the question, and at usage throughout the Rules, and determined that the conjunction "and"should be used; and now Downey suggested that it would be appropriate for the Chair to propose that housekeeping change to the Court. The Committee approved that action.

VIII. *Adjournment; Next Scheduled Meeting.*

The meeting adjourned at approximately 11:25 a.m. Following the meeting, the Chair advised the Committee that its next scheduled meeting would be on Friday, April 27, 2018, beginning at 9:00 a.m., in the Supreme Court Conference Room.

The Chair noted that at least one topic for that next meeting will be a continued discussion of pretexting under Rule 8.4 under member Downey's direction.

RESPECTFULLY SUBMITTED,

Anthony van Westrum, Secretary

[These minutes are as approved by the Committee at its fiftieth meeting, on April 27, 2018.]