COLORADO SUPREME COURT

STANDING COMMITTEE ON THE RULES OF PROFESSIONAL CONDUCT

Approved Minutes of Meeting of the Full Committee
On October 27, 2017
(Forty-Eighth Meeting of the Full Committee)

The forty-eighth meeting of the Colorado Supreme Court Standing Committee on the Rules of Professional Conduct was convened at 9:00 a.m. on Friday, October 27, 2017, 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, Gary B. Blum, Cynthia F. Covell, Thomas E. Downey, Jr., Margaret B. Funk, David C. Little, Judge William R. Lucero, Jacki Cooper Melmed, Judge Ruthanne Polidori, Henry R. Reeve, Alexander R. Rothrock, Marcus L. Squarrell, James S. Sudler III, Anthony van Westrum, Eli Wald, Judge John R. Webb, and Frederick R. Yarger. Present by conference telephone were members Boston H. Stanton, Jr. and E. Tuck Young. Excused from attendance were members Federico C. Alvarez, Nancy L. Cohen, James C. Coyle, John M. Haried, Cecil E. Morris, Jr., Matthew Samuelson, and David W. Stark. Absent was member Lisa M. Wayne.

I. *Meeting Materials; Minutes of June 16, 2017 Meeting, the Forty-Seventh 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-seventh meeting of the Committee, held on June 16, 2017. Those minutes were approved as submitted.

II. *Flat Fee Agreements for Legal Services.*

The chair invited members Nancy Cohen and James Sudler, co-chairs of the "flat fees" subcommittee to review the subcommittee's proposal for a rule to govern a lawyer's fee agreement with a client that provides for flat fees for specific legal services to be rendered by the lawyer for which the client agrees to pay a fixed amount, regardless of the time or effort involved in providing those services.

The co-chairs began the discussion by giving the Committee a short history of the matter. The Committee's consideration of flat fees was instigated by a letter sent in May 2015 to the Chair by Steven K. Jacobson, chair of the Attorney Regulation Committee of the Office of Attorney Regulation Counsel. Jacobson's letter outlined a perceived need for a specific rule within the Rules of Professional Conduct to deal with flat fees; and the subcommittee was appointed to consider specific provisions in Rule 1.5 to deal with the flat fee. At the Committee's forty-seventh meeting, on June 16, 2017, Sudler had given a brief report to the effect that the subcommittee had met once in advance of that Committee meeting and had reached a consensus on the principles to apply when a lawyer has failed to comply with the requirements of the Rules governing flat fee agreements. Sudler had added then that the subcommittee intended to send its proposal to lawyers in the Colorado Criminal Defense Bar Association and the Colorado Bar Association's Trusts and Estates Section for their comment; that was done following the forty-seventh Committee meeting.

In its subsequent deliberations, the subcommittee recognized that there is already one set of rules establishing detailed requirements for one specific type of fee agreement — Chapter 23.3 covering contingent fee agreements — but those rules do not apply to an agreement for a fee that is not contingent upon an outcome. The subcommittee also considered *Matter of Gilbert*,[1] in which a divided Supreme Court held that the attorney in that disciplinary case was entitled, by application of the *quantum meruit* doctrine, to be paid a portion of an agreed-upon flat fee for the work that the lawyer performed prior to the client's termination the representation, so that the lawyer's retention of that portion did not violate that part of Rule 1.16 that requires a refund to the client of "any advance payment of fee . . . that has not been earned or incurred after termination of representation."

The subcommittee considered many versions of a specific provision to deal with flat fees, with the view toward placing those provisions at the end of Rule 1.5. Its resulting proposal to the Committee, as contained in the materials that the Chair provided to the Committee for this meeting and reading as set forth immediately below, would add three new subsections to the end of Rule 1.5:

> (h) A "flat fee" is for specific legal services by a lawyer for which the client agrees to pay a fixed amount for those services, regardless of the time or effort involved or the result obtained.
>
> (i) If a lawyer receives in advance a flat fee or any portion thereof, the basis or rate of the fee shall be communicated in writing before or within a reasonable time after commencing the representation and shall contain the following:
>
> (1) A description of the services the lawyer agrees to perform;
>
> (2) A statement of the amount to be paid to the lawyer for the services to be performed;
>
> (3) A description of when or how portions of the flat fee are deemed earned by the lawyer;
>
> (4) The amount, if any, of the fees the lawyer is entitled to keep upon termination of the representation before all the specified legal services have been performed.
>
> (j) If a dispute arises about whether the lawyer has earned all or part of a flat fee, the portion of the flat fee in dispute shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the flat fee as to which the interests are not in dispute.

Additionally, the proposal would modify the Comment [11] to Rule 1.5 as follows—

> [11] To make a determination of when an advance fee is earned, the written statement of the basis or rate of the fee, when required by Rule 1.5(b), should include a description of the benefit or service that justifies the lawyer's earning the fee, the amount of the advance unearned fee, as well as a statement describing when the fee is earned. ***In flat fee agreements, the lawyer must describe when or how portions of the flat fee are earned under paragraph (i)(3) unless none of the fee is earned until all of the services have been provided.*** Whether a lawyer has conferred a sufficient benefit to earn a portion of the advance fee will depend on the circumstances of the particular case. ***If a portion of an advanced flat fee has been earned pursuant to a written agreement and transferred out of trust, after which the client disputes that it was earned, the lawyer is not required to return the funds to trust. See Rule 1.15A(c).*** The circumstances under which a fee is earned should be evaluated under an objective standard of reasonableness. Rule 1.5(a).

—and would make minor changes in other comments to the rule.

Sudler noted that a principal matter of concern to the subcommittee is a provision to deal with disputes between the lawyer and the client over the lawyer's entitlement to any part of the flat fee.

1. 346 P.3d 1018 (Colo. 2015).

Proposed paragraph (j) reflects the subcommittee's consensus on that issue, although Sudler said the matter had not been resolved to everyone's satisfaction.

Cohen added that Sudler had refrained from noting the significant amount of time it had taken in subcommittee deliberations to arrive at this proposal — this proposal that, she added, all now feel makes the most sense for a flat fee provision.

Sudler reported that the proposal that is now before the Committee had been sent to both the Trust and Estates Section of the Colorado Bar Association and the Colorado Criminal Defense Bar Association and that each of those groups had responded that they had no comments on that version. He added that two lawyers who specialize in immigration law practice participated on the subcommittee and approve of the proposal.

Sudler explained that proposed Rule 1.5(i) — requiring that a written communication of the basis or rate of the flat fee, with the additional information required by the subclauses of that paragraph, be given to the client "before or within a reasonable time after commencing the representation" — applies only if any portion of the flat fee is received by the lawyer in advance of completion of the specified legal services. Paragraph (i) does not apply to a flat fee the entirety of which is received after completion of all the services that are covered by the flat fee. Notably, however, paragraph (i) applies — in the case of the advanced fee — whether or not the lawyer has "regularly represented" the client as is provided by existing paragraph (b); but paragraph (b) would continue to apply to the flat fee agreement, as it does to all fee agreements and without regard to when any portion of the flat fee is paid, if the lawyer has not previously represented the client.

Sudler concluded his review with the optimistic comment that he and Cohen were hoping the Committee would vote the proposal up or down this day.

Cohen added her concurrence that paragraph (j) had proved the most difficult part of the proposal in the subcommittee's deliberations, especially as the subcommittee considered both the majority and the minority opinions in *Gilbert*. She reported that Jacobson, whose letter had instigated the consideration of flat fees, agreed that paragraph (j) as proposed makes the most sense. Speaking for herself, Cohen said she looked at the provision knowing that it will be a basis for attorney discipline and must serve as guidance for lawyers about what they should and should not do if they use flat fee agreements. In short, and overall, the subcommittee is of the view that the proposal makes sense.

In response to the Chair's request for comments or questions from the members, one asked what provisions are found in other jurisdictions regarding flat fee agreements and, further with regard to paragraph (j), what is its application to the situation where the client disputes the fee upon becoming dissatisfied with the lawyer's services long after they have been rendered. How, he asked further, would that work out if the paid fee had already been distributed by a law firm to its individual lawyers.

Noting that these were good points, Cohen replied that the Colorado Bar Association's Ethics Committee has already given consideration to the timing of the client's disputation.[2] The client must initiate the "dispute" that is contemplated by paragraph (j) on a timely basis, she said; it would not be fair for the lawyer to have to deal with a dispute raised six months or more after the services have been concluded. She suggested the addition of the word "timely" as an adjective for the word "dispute" in paragraph (j).

---

2. Colo. Bar Assoc. Ethics Comm. Formal Op. 118, "Handling of Funds Disputed After Proper Withdrawal From Trust Account" (2008).

Sudler added that the changes proposed by the subcommittee to Comment [11] of Rule 1.5 clarify that, if the lawyer has properly taken a portion of the advanced payment from the trust into which it had been deposited, the lawyer is not required to redeposit that portion back into trust if the client subsequently disputes whether the portion had been earned.

As to the member's question about other jurisdictions' adoption of rules on this topic, Sudler responded that, in Colorado, the *Sather*[3] case held that a lawyer may not take any payment, other than for deposit into a COLTAF or other trust account, until the services for which the payment has been made have been completed. Other states, he said, permit lawyers to take advance payment of fees directly into their coffers upon receipt; that, he said, would not be acceptable in Colorado under *Sather*.

Cohen added that the proposed changes to Comment [11] to Rule 1.5, to which Sudler referred, cite Rule 1.15A(c) regarding trust account deposits.

The member who had raised these points responded that Sudler's and Cohen's responses made sense to him, adding that, if a dispute over the services or the fees does arise, it may be nothing more than a "malpractice issue."

A member noted that he had separately provided some minor suggestions for changes to Sudler in advance of this meeting. The Chair asked that the Committee first look at the substance of the subcommittee's proposal before nitpicking it.

A member said that he had come to like the proposal, although he had at first been skeptical. He suggested that the words "a fee" be added in paragraph (h) so that it would begin, "A 'flat fee' is *a fee* for . . . ." And, referring to the phrase "If a lawyer receives in advance a flat fee . . ." at the beginning of paragraph (i), he asked what was the event to which "in advance" referred. He acknowledged that we think the event is the rendering of all the specific legal services, but he suggested that should be clarified.

The member continued, saying he liked the changes that the subcommittee proposed for Comment [11] of Rule 1.5. But he referred to the added sentence in that comment, reading, "In flat fee agreements, the lawyer must describe when or how portions of the flat fee are earned under paragraph (i)(3) unless none of the fee is earned until all of the services have been provided." In his view, that "unless" exception should be set forth in the substantive text of paragraph (i)(3) and not be left to the comment; without the addition of the exception to the substantive text of the rule, the comment would be inconsistent with the substantive text: The comment would state that no reference need be made to portions of the fee if "none of the fee is earned until all of the services have been provided," while the substantive text of paragraph (i)(3) would require a "description of when or how portions of the flat fee are deemed earned by the lawyer" even though no "portion" could be deemed earned unless and until all of the services had been performed.

To the first of those comments, Cohen agreed that the words "a fee" should be added at the beginning of paragraph (h) as had been suggested. With regard to the question of what was the event with respect to which a fee might be received "in advance" of, she suggested the addition of the clause "before the work has commenced" after the introductory words "If a lawyer receives" in paragraph (i).

But, to the member's suggestion for modification of subparagraph (i)(3), she responded that the substantive text of the flat fee provisions is intended to be general and that she preferred to leave to the

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

comment — as is done in the proposal — a statement of the exception for the particular case in which no portion of the fee can be earned before all of the specified legal services have been completed.

Sudler added that he had no position about the location of the statement regarding that circumstance.

A member said he would leave subparagraph (i)(3) and Comment [11] as the subcommittee has proposed them. But he would change the introductory clause of paragraph (i) to read, "If a lawyer receives in advance a flat fee or any portion thereof ***before performing the specific legal services*** . . . ." He did not specify whether the performance that he contemplated in that addition was of all or just any portion of those services and did not propose to strike the phrase "in advance," which would be made redundant by his addition.

Another member said that she did not see a need to clarify what event the concept of "advance" was to reference; the term is presently used in paragraph (f) — "Advances of unearned fees . . . " — and she was not aware that its un-referenced usage there had caused problems. She has read that usage in paragraph (f) to refer to any advance, even of a "retainer" that is to be drawn down under an agreement by which fees are earned on the basis of accrued hours of service. The usage of "advance" in proposed paragraph (i) is simply for a specific type of fee that is both advanced and "flat."

The member additionally commented about the structure of the entirety of Rule 1.5 as it would be changed by the subcommittee: Existing Rule 1.5 consists of seven paragraphs covering topics as follows: ¶ (a), the reasonableness of fees; ¶ (b), a requirement for a writing of the basis or rate of fee for a new client; ¶ (c), dealing with contingent fees; ¶ (d), dealing with a division of fees between lawyers; ¶ (e), prohibiting referral fees; ¶ (f), identifying when fees are earned and requiring the deposit of advance fees in trust, whatever the agreement under which they may be earned; and ¶ (g), a proscription of nonrefundable fees. Given that existing structure, the member believed that all of the new provisions that the subcommittee would divide among new paragraphs (h), (i), and (j) should be included as subparts of a single new paragraph (h).

Further, this member noted the relationship between the proposed addition to Rule 1.5 and the existing provision found in paragraph (b) requiring that a writing be given, to client whom the lawyer has not "regularly represented," of the basis or rate of the fee — a requirement that is applicable without regard to whether the fee is "flat," "hourly," or otherwise. She urged that, once the substance of the flat fee additions have been determined, care be taken to be sure the reader understands that other provisions of the rule continue to apply to the flat fee agreement in addition to the special provisions that would be contained in what is now proposed as paragraphs (h) through (j). In particular, she noted, it should be clarified that the requirement of paragraph (f) — that advances of fees be deposited in trust — applies as well to "flat fees" as to other types of fees.

And the member asked why, when the existing, general provision of paragraph (b), which requires that a written communication of the basis or rate of fee be given only when the lawyer has not "regularly represented" the client, the subcommittee would now require a written communication regarding a flat fee agreement to be given with respect to each new matter a lawyer undertook for a client, even for a client who has been regularly represented by the lawyer under such arrangement.

To that last point, Sudler responded that the subcommittee specifically intended that disclosure of the details for flat fee agreements involving *advances* of fees would be required pursuant to paragraph (i) in each new undertaking, even for a repeat client, because of the importance of those details to the relationship. To that answer, the member who had raised the question suggested that it should then

be made more explicit that the advance-flat-fee agreement is an exception to the more limited requirement of Paragraph (b) and the circumstance where the flat fee is not paid in advance of services.

Referring to the prior discussion with other members about Comment [11], this member added that it was interesting to see how different people can read the same text and see different issues arising from it. In her view, the client always needs to be told how portions of the advanced fee can be earned by the lawyer; that need exists without exception.

The member who had earlier said that the "unless" exception expressed in Comment [11] needed to be moved to the substantive text of subparagraph (i)(3) now responded that, if the substantive text did not negate the need for a statement of milestones in the case where no part of the fee was to be paid before completion of all the services, then a disgruntled client might challenge the absence of such milestones on the grounds — meaningless as such milestones might be — because the specific text of that subparagraph (i)(3) required "[a] description of when or how portions of the flat fee are deemed earned by the lawyer" without exception. He added that the lawyer, who knows she cannot earn any portion of the advance until all of the specified services have been performed, might cite the exception stated in Comment [11] in defense of the omission, but the client would cite *Gilbert* in response — "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"[4] — and argue that the lawyer cannot rely on that exception.

In reply, the member who thought the client always needs to be told how portions of the advanced fee can be earned by the lawyer now reiterated, "Let's tell the lawyer that she does need to set milestone markers in all cases."

To that discussion, a member asked: If a lawyer undertakes to prepare a will for a client for a flat fee of $1,000, advanced to the lawyer, and then does prepare and send a draft of the will to the client, has not the lawyer done as agreed and is not the lawyer then entitled to the flat fee? The member who had last previously spoken disagreed: For that proposition to be true, the lawyer will have had to say, in the description of the contemplated services, "I will be entitled to the fee covered by this advance when I deliver a *draft* of the will to you." If our intention is to protect clients, we must require that the lawyer be specific about what services are to be performed to earn the fee; in this member's view, preparation of a draft would not be performance of the undertaking to prepare a will; the effort would have had to carry through to a document that the client executed as his will. But, the member added, she believes the current proposal, as written, already requires that kind of specificity for the milestones.

Cohen asked whether the previously expressed proposal — that the entire rule should make clear, in some fashion, that paragraphs such as (c) and (f) apply not only to the common hourly rate basis of fee but also to the flat fee that is covered by the details of paragraphs (h) through (j) — would require insertion into those other provisions of explicit cross-references to the flat fee provisions. The member who had made that proposal responded that the fact that the more general provisions of the rule continue to apply to the flat fee agreement as they do for other fee arrangements — notwithstanding that the flat fee agreement was called out for additional, special treatment — could be expressed within the flat fee provisions themselves and need not be sprinkled among the more general provisions. Speaking specifically about the difference between existing paragraph (b), which requires a writing only for the client who has not been "regularly represented," and the proposed special requirement that the details governing advanced flat fees always be stated in writing, even for repeat clients, the member said the fact

4. Matter of Gilbert, *supra* n. 1, 346 P.3d at 1026 (Colo. 2015).

that the advanced flat fee is an exception to paragraph (b) should be identified within paragraph (i)(3) itself.

A member who had not spoken before said he agreed with the observation that the flat fee provisions should be contained within a single paragraph of Rule 1.5, with appropriate subdivisions and with the addition of a clarification that the exception found in paragraph (b) with regard to the regularly represented client did not apply to exempt the application of the special flat fee rules from regularly represented clients. He noted that currently the contingency fee provisions of Chapter 23.3 require a separate writing for each new engagement without regard to whether the lawyer has been previously engaged by the client under a contingency fee agreement. He added that he would vote for the current proposal for the flat fee additions just to see them be adopted before he retired and expired.

Cohen acknowledged that the subcommittee had not focused on the exception that it had made, as to regularly represented clients, between flat fee agreements and other types of fee arrangements; she agreed that the difference in treatment should be highlighted in the flat fee provisions.

A member, who had not previously spoken, now echoed those comments: He agreed with the structural proposal that the flat fee provisions share their own paragraph — despite, he said, his desire to see this project be finished — adding that, when the Committee engages in the drafting process, it often spends so much time on the particularities of the topic under examination that it allows them to overshadow the entirety of the rule that would be amended. But, especially for Rule 1.5, it is the earlier, already-existing parts of the rule that are the critical parts of the rule.

Turning to the matter of whether a new writing should be required with respect to each new flat fee engagement even for regularly represented clients, he contrasted that situation with the special rules for contingent fee agreements found in Chapter 23.3. The contingency fee agreement has typically been used in one-time representations, not with regular clients; accordingly, the absence of a regular-representation exception for contingent fee agreements was not a substantive argument for the exception in the case of flat fee agreements. Yet, in the circumstance of the application of a flat fee agreement for the first time to a new engagement by a client who has regularly been represented by the lawyer on an hourly or other non-flat-fee basis, he would require a written statement of the new deal, with the details prescribed by the proposed flat fee provisions.

The member added that perhaps the contingency fee agreement itself is becoming more common and perhaps an exception to the writing requirements imposed by Chapter 23.3 should be provided where the client has regularly agreed to a contingency fee deal with the lawyer.

A member, who had not previously spoken, said he now wanted to get back to the basics — "brains, trains, caboose" is how he put it. He asked whether an "advance flat fee" is the same as an "advance unearned fee." He asked whether the terminology in proposed paragraph (i) ("receives in advance a flat fee") and in Comment [11] ("an advance fee"; "the advance unearned fee"; and "an advanced flat fee") should be the same as that in current paragraph (f) ("[a]dvances of unearned fees"): Is the subject being discussed the same concept in each case? Similarly, he pointed out the distinction in phraseology made between "kept separate" as said in paragraph (j) and "trust" as used twice in Comment [11].

The member who had expressed concern about expiring before this task was completed said he saw no reason to send the draft back to the subcommittee just to deal with highlighting the distinction between the regular representation of a client under some non-flat-fee agreement and the regular representation of a client using a flat fee agreement. If, after fifty engagements with a client using, say, an hourly rate fee agreement, the lawyer and the client enter the fifty-first engagement under a flat fee

agreement, there should be a writing for that new agreement, complying with these flat fee disclosure provisions. That is, there should be no exception, in the flat fee agreement, for regularly represented clients. He added that there could be an umbrella agreement for the flat fee — set up in compliance with the disclosure requirements of these flat fee provisions — with that umbrella agreement specifically contemplating subsequent, specific matters being handled under that agreement.

Another member who had not previously spoken said she agreed with the position that a lawyer should be able to make an initial disclosure to a client or potential client under the flat fee provisions — "We will handle all your mechanic's lien foreclosures for a flat fee of $500" — and then undertake specific engagements with that client for that scope of work without further written disclosures. Maybe, she added, the rules should be changed, as some have long advocated, to require proper written engagement agreements in all circumstances; she did not pursue that thought.

Noting the absence of a pending motion, a member made a motion comprising these elements:

1. That the subcommittee's proposed paragraphs (h), (i), and (j) be consolidated as subparagraphs within a single paragraph (h) of Rule 1.5;

2. That the flat fee provisions be made applicable to all flat fee agreements — in contrast, paragraph (i) as proposed by the subcommittee applies only to *advances* of flat fees and, under the current proposal, all other flat fee agreements simply fall under the general requirement of paragraph (b) that, for a client who has not been regularly represented by the lawyer, a writing be given stating the basis or rate of the flat fee.

3. That the subcommittee circulate the text of its further proposal for the flat fee provisions to the members of the full Committee before the next meeting of the Committee.

A member who had participated to a significant degree in the prior discussion said he supported this motion. He noted that the Committee had a similar discussion about paragraph (b) at an earlier meeting and had considered beginning the special provisions for flat fee agreements with the introductory clause, "Anything in paragraph (b) to the contrary notwithstanding . . . ." That the flat fee provisions — like the contingency fee rules — are exceptions to the general rule should be specified within their substantive text and not left to a comment.

Another member concurred with the restructuring proposed within the motion, adding that whether provisions containing cross-references or explanations regarding the application of paragraph (b) or paragraph (f) should be added to the new provisions can be decided after the restructured text is at hand. But this member objected to the application of the flat fee disclosure provisions, as currently proposed as paragraph (i) to flat fee agreements, to arrangements that do not involve advances of payment. If the flat fee is not to be received until after all the specified legal services have been performed, then the fee agreement is not really of a different ilk than what is currently provided for in paragraph (b) by the requirement of a statement of the "basis" for the fee.

A member, who had not previously spoken, agreed with the proposed restructuring of the flat fee provisions into a single paragraph but saw no need to return the matter to the subcommittee or for a general circulation of revised text before the next meeting. He was ready to support the changes and move forward; he noted that the essential purpose of the new provisions was just to specify when fees are earned, and, in his view, the lawyer and the client can agree to that. Accordingly, this member would (i) shift every item in currently proposed paragraph (i) to the right by one outline sublevel, becoming subparagraphs under what is currently paragraph (h); (ii) insert the words "of the work" after the word "advance"; and, (iii) leave Comment [11] as proposed by the subcommittee.

Another member rejected the thought of completing the revision task at this meeting; in his view, the suggestions had gone beyond what the full Committee could safely do as "editing." But he believed the substance of the Committee's consensus was expressed in the pending motion and he asked that it be voted upon. The member making the motion agreed with these comments.

But another member asked that the vote on the motion be delayed, for she had more to add to the discussion.

This member pointed out that paragraph (c) deals specifically with contingent fees to the extent of recognizing that they may be employed — "except in a matter in which a contingent fee is otherwise prohibited" — and explicitly referring the reader to C.R.C.P. Chapter 23.3 for the details. Similarly, as to flat fees, Rule 1.5 could contain, first, a statement that a lawyer may receive a flat fee if in compliance with the rule but must also comply with the specific provisions of a paragraph (h) that encompassed what is currently proposed in both paragraph (h) and paragraph (i). Rephrasing, she suggested that the text be something like, "The lawyer shall communicate the basis or rate of a flat fee in accordance with paragraph (b), and the lawyers shall communicate the following information with respect to any agreement that provides for payment of any portion of the flat fee in advance of completion of all of the specified for legal services that are to be performed for the flat fee [with the specific disclosures then being stated]."

The member added that she did not understand what the subcommittee meant by its proposed subparagraph (i)(4): "The amount, if any, of the fees the lawyer is entitled to keep upon termination of the representation before all the specified legal services have been performed."

Sudler replied that subparagraph (i)(4) covers the situation where the lawyer has defined "milestones" for the earning of fees but has not completed a specific milestone before his services are terminated; the subparagraph requires that there be an agreement for determining what portion of the entire contemplated fee for that milestone has been earned at the time of termination. The agreement could provide that the lawyer would be entitled to a fee determined from the hours accrued on the milestone service to the time of termination, at a stated hourly rate. In his view, subparagraph (i)(4) was more than just an elaboration of subparagraph (i)(3).

The questioning member responded that she understood that intention; however, she read the provision to mean that the lawyer could obtain a bonus upon the early termination: Upon termination, the lawyer might be able to keep a portion of the advance fee on account of the fact of termination and without regard to the value of the work performed on the milestone to the point of termination.

The member who had earlier made the pending motion withdrew it.

And a member, who had not previously spoken, asked that the entire matter now be returned to the subcommittee, expressing his view that wordsmithing the proposal at this meeting by the whole Committee could not be successful. As he put it, the Committee was now talking about proposals to modify proposals that had been made to modify the subcommittee's initial proposal to the Committee.

Accepting that as a motion to table, another member moved that the subcommittee be directed, in further deliberations, to restructure the three currently proposed paragraphs into parts of a single new paragraph and that language be inserted, similar to that currently found in paragraph (c) regarding contingent fee agreements, that regular representation of the client did not excuse the lawyer from making the required disclosures with each new engagement employing a flat fee agreement. Additionally, the member moved for the inclusion of the other minor wording changes that appeared to have been accepted by the Committee as consensus reached in the course of this discussion. He accepted

the Chair's friendly amendment of his motion that members of the Committee who were not also members of the subcommittee be invited to send other, minor, wording changes to the subcommittee. Additionally, the moving member found friendly a proposal that the subcommittee provide that a lawyer may have a general flat fee arrangement that, without further disclosures, applied to subsequent separate undertakings to provide services to the client under that disclosed arrangement.

The committee unanimously approved the motion, as it had been modified.

At a member's suggestion, Sudler agreed that the subcommittee would circulate its next draft to the whole Committee in advance of its next meeting.

III. *Introduction of New Member.*

Following a break in the proceedings, and at the Chair's invitation, Jacki Cooper Melmed introduced herself to the Committee as its newest member. She is currently legal counsel to Colorado Governor John Hickenlooper, who has a year left in his term. Prior to taking the position with the governor, she had practiced in a small litigation firm in Boulder.

IV. *Chair's Report on Court's Adoption of Amendments to Rule 8.4(c).*

The Chair reported to the Committee that the Court has amended Rule 8.4(c), adding an exception to it so that the entire paragraph reads as follows:

> (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation, except that a lawyer may advise, direct, or supervise others, including clients, law enforcement officers, or investigators, who participate in lawful investigative activities;

No changes were made to the comments to the rule.

The Chair added that minutes of the forty-seventh meeting of the Committee, at which the matter of "pretexting" that is dealt with in the Court's modification of Rule 8.4(c) had been discussed at length, indicated that the Committee had directed the Chair as follows:

> The Chair is directed to advise the Court that the Committee had, in 2011 and 2012, carefully considered the addition of an exception to Rule 8.4(c) to permit lawyers to advise, direct, or supervise nonlawyers in their lawful but covert activities; and that it had previously provided the Court with documentation reflecting the Committee's analyses from that time. The Chair shall advise the Court that, at the Committee's forty-seventh meeting, on June 16, 2017, it had discussed the proposal that the Court has now made in this regard but does not believe that it can add more to the Court's deliberation than what it had previously provided. And the Chair should suggest to the Court that, if it does amend the rule to provide an exception, it should consider the addition of commentary to Rule 8.4 to give guidance to lawyers in the application of the exception.

But those minutes had not been provided by the secretary to the Chair, even in draft form, until after the Court had held a hearing on the question of the amendment to Rule 8.4(c) to deal with pretexting. In the absence of timely minutes to remind her of the Committee's instructions, the Chair had not, in her presentation to the Court at its hearing, provided the Court with the information contemplated in those instructions. But she now pointed out to the Committee that nothing precluded the Committee from taking up, on its own volition, the question of whether a comment could be added in that regard.

A member noted that the Court's addition of the investigation exception to Rule 8.4(c) had already received a great deal of attention from practicing lawyers; he had fielded a spike of questions about the exception while serving on the "ethics hotline" provided by the Colorado Bar Association Ethics Committee, especially from lawyers practicing in large litigation law firms asking what is encompassed by the phrase "lawful investigative activities" — clearly those law firms want to be able to employ or engage non-lawyer personnel for such activities. Noting that he spoke with all due respect for the two justices who attend this Committee's meetings as liaisons from the Court, he forecast a donnybrook over this added exception. He was sure that the practicing bar would welcome any guidance that this Committee might generate by way of proposing a comment for the rule.

Taking that point, another member moved that the Chair form a subcommittee to draft a comment that would give content to the phrase "lawful investigative activities."

In response to the discussion, the Chair asked Thomas Downey, who had chaired the subcommittee that had previously made a thorough review of the pretexting issue for the Committee, to reconstitute that subcommittee and serve again as its chair; and he agreed to do so. He also concurred that there would be a donnybrook over the meaning and application of this added exception to Rule 8.4(c); but he suggested that the Committee wait for some of that external discussion to develop before it began drafting commentary: The Committee should wait to see what issues actually develop as the new exception is put into application by lawyers before providing commentary. He asked, however, that, if the Committee now felt differently, it give his subcommittee specific direction about what it wanted to see in a new comment. And he added that there had been major substantive disputes in the subcommittee's previous deliberations on the exception.

A member who had participated in the earlier deliberations recalled that the "angst" had come from the law enforcement community, which is bound by the principle that there can be no "fraud" employed to get a confession. The "rub" comes in the carryover of that fundamental principle of criminal law into the civil law arena. In this member's view, it was appropriate for the Committee now to take up the matter of an explanatory comment to supplement the exception. He suggested that a line might be drawn between giving a free rein to undercover criminal investigations while civil investigators were bound by concepts precluding fraud and the like.

As to the matter of waiting awhile to see what concerns arise in practice with respect to the added exception to Rule 8.4(c), the Chair noted that quite a bit of time will necessarily pass, within which those kinds of observations can be made, before the Committee could complete the comment-drafting process, even if it were to begin that process now.

An informal poll of the attending members indicated a clear desire to draft a comment directed to the meaning of the phrase "lawful investigative activities." Downey agreed to proceed to engage the reconstituted subcommittee for that purpose; he said that he would want those members who participated on the earlier subcommittee to join this effort — particularly so that they could share their recollections of the history of those prior deliberations — but would welcome new members as well.

V. *Peña-Rodriguez Case.*

At the Chair's invitation, member Judge John Webb reported on the case of *Peña-Rodriguez v. Colorado,*[5] in which the United States Supreme Court held that, where a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth

5. Peña-Rodriguez v. Colorado, 137 S.Ct. 855 (2017). *See* Part V of the minutes of the forty-seventh meeting of he Committee, on June 16, 2017, for the Committee's earlier consideration of this case and Rule 3.5(c). —*Secretary*

Amendment of the United States Constitution requires that the no-impeachment-of-the-verdict rule give way in order to permit the trial court to consider the evidence of the juror's statement and any resulting denial of the constitutional jury trial guarantee.

At the forty-seventh meeting of the Committee, on June 16, 2017, member Judge Michael Berger had expressed the concern that, if a lawyer called out a juror because of a racially discriminatory remark made while in service as a juror, the lawyer's comment could be viewed as demeaning, embarrassing, or criticizing that juror. Berger had recommended the formation of a subcommittee to consider that possibility, and Webb had undertaken to chair such a subcommittee.

Webb now reported that the subcommittee that had then been formed had, after considering the *Peňa-Rodriguez* decision, developed little enthusiasm for modifying the existing comment to Rule 3.5(c). Webb referred the members to the memorandum on this matter that had been included in the materials that the Chair provided for this meeting; that memorandum reports that a majority on the Court's Committee on the Rules of Evidence disfavored modification of the relevant rule, Colorado Rule of Evidence 606(b), but might recommend the addition of a comment to that rule that would reference the *Peňa-Rodriguez* case, and, further, that Marsha Piccone, the current chair of the Court's Committee on Pattern Civil Jury Instructions, had indicated a willingness to look into a modification of Civil Jury Instruction 1:18, regarding juror discharge instructions, in order to deal with the concern that *Peňa-Rodriguez* might lead to more post-trial contacts between lawyers, or their surrogates, and jurors. In part, Webb said, this Committee's Rule 3.5(c) subcommittee was concerned about altering the parallelism that now exists between that provision in the Rules of Professional Conduct and CRE 606(b). Webb summarized his report by saying that a majority of the subcommittee declined to propose any changes with respect to Rule 3.5(c) at this time, preferring to leave the matter to the Civil Jury Instructions committee.

Another member referred the members to the report found beginning at page 27 of the materials for this meeting, to which Webb had made reference, and explained that the text there recited as the proposal of the Committee on the Rules of Evidence has since been changed by the deletion of the first sentence, which referred to the earlier, Colorado, treatment of the *Pena-Rodriguez* case; with that modification, the proposed comment to CRE 606(b) would begin with the second sentence of what is quoted on that page 27, with the additional reference back to the earlier Colorado decision — "granted certiorari" — also being deleted from the comment as revised.

VI. *Housekeeping Amendments: Rule 5.4(d); Rule 7.3(c)(1).*

At the Chair's invitation, member Alexander Rothrock reminded the members that, at the Committee's forty-seventh meeting, on June 16, 2017, he had recommended the correction of a scrivener's error found in Rule 5.4(d): an erroneous omission of the phrase "authorized to practice law for a profit" from within the provision that prohibits a lawyer from practicing law in a professional company having owners who are "nonlawyers." Before the extensive amendments of Rule 265, regarding "professional service companies," in 2009, which included an accompanying addition of a definition of the term "professional company" in C.R.P.C. 1.0(1) and amendment of Rule 5.4, that Rule 5.4(d) had — by use of the phrase "authorized to practice law for a profit" to describe the kinds of entities in which lawyers could *not* be employed if they had nonlawyer owners — permitted lawyers to be employed by *nonprofit* entities: Before the adoption and application of the generic phrase "professional company," Rule 5.4 had referred to practice from within a "professional corporation, association, or limited liability company, authorized to practice law for a profit." That included phrase, "authorized to practice law for a profit," served the important purpose of permitting lawyers to practice law from within nonprofit organizations advocating civil rights or pursuing public policy litigation — organizations that might be deemed to be "owned" by nonlawyers. Apparently the specifying of the

profit element had been lost in the scrivener's substitution of the newly defined term "professional company" for the previous listing of specific forms of entity.

Rothrock pointed out that the result of the scrivener's error was to make lawyers' practice with legal aid organizations and other nonprofit entities, which might be considered to have nonlawyer owners, be a violation of the Rules of Professional Conduct. He proposed that the introductory clause of Rule 5.4(d) be amended 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 . . . .

The Committee approved that amendment.

Rothrock then turned the Committee's attention to Rule 7.3(c)(1), which currently contains a typographical error: The phrasing "to whom the communication is directed is represented resented by a lawyer in the matter" should read, "to whom the communication is directed is represented by a lawyer in the matter": The extra word "resented" should be omitted.[6]

The Committee agreed to propose that correction to the court, too.

VII. *Housekeeping Amendments: Rule 8.4(c).*

The Chair invited member Anthony van Westrum to discuss the matter he had raised in an email to the Chair that is included in the materials for this meeting, beginning at page 31.

Van Westrum pointed out to the Committee that the standard usage in clauses of inclusive listings in the Rules — similar to the inclusive clause that the Court has now added to Rule 8.4(c) to deal with a lawyer's directing others in "lawful investigative matters" — is to conclude such a listing with the conjunctive "and" rather than the disjunctive "or." That was not done in the amendment to Rule 8.4(c) itself, however; it ends with the disjunctive:

> (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation, except that a lawyer may advise, direct, or supervise others, including clients, law enforcement officers, ***or*** investigators, who participate in lawful investigative activities;

A member spoke to agree with the suggestion that the word "or" be changed to "and" at the end of that listing but moved that the matter be referred to the subcommittee that will now be considering the addition of a comment to deal with investigative activities. That motion was approved by the Committee.

---

6. Rothrock noted that this error had previously been spotted by the Committee. *See* the minutes of its thirty-ninth meeting, on March 14, 2014:

> A member pointed out that Colorado's existing Rule 7.3(c)(1) — probably erroneously — refers to a petulant lawyer; it reads, "[N]o such communication may be made if the lawyer knows or reasonably should know that the person to whom the communication is directed is represented resented by a lawyer in the matter . . . ."
>
> The Committee . . . agreed that reference to the lawyer's resentment should be removed from Rule 7.3(c)(1).

–Secretary

VIII. *Changing Jurisdiction for Contingency Fee Rule.*

The Chair referred the members to the August 11, 2015 letter from the Chair, speaking for this Committee, and from Judge Michael Berger, speaking for the Standing Committee on the Rules of Civil Procedure, to Justice Márquez, who is the Colorado Supreme Court liaison justice to this Committee and to Justice Eid, who at that time was the liaison justice to the Civil Procedure Rules Committee, in which the two committee chairs proposed that jurisdiction for the contingency fee rules be shifted to this Committee from the Civil Procedure Rules Committee. That letter was contained within the materials provided to the Committee for its forty-sixth meeting, on November 4, 2015.

At the Chair's invitation, Judge Berger then reported to the Committee that Justice Eid has advised him that the Court has approved that transfer of jurisdiction. Berger suggested that the shift in responsibility gives 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.

In response to Berger's comments, the Chair said that she would form a subcommittee to take up his suggestions.

Recalling his participation in the *ad hoc* committee that had initially worked on the adoption of contingency fee rules, Berger said there had been a number of lawyers in that effort who frequently used contingency fee agreements, and he now suggested that they be included in the subcommittee that the Chair anticipated forming. The Chair agreed and said she would circulate an invitation to join that subcommittee and seek a chair for it.

IX. *Lawyers' Engagement Agreements.*

The Chair asked members Anthony van Westrum and David Little for their thoughts on the question of an expanded rule to deal with lawyers' agreements to provide legal services — lawyers' "engagement agreements."

Van Westrum said that he and Little have long discussed between themselves the fact that — although lawyers regularly draft detailed contracts for their clients, they often do not take care to document their own agreements with those clients for the legal services that they will provide to those clients. All that is currently required by the Rules of Professional Conduct — except in the special cases of contingency fee agreements — in that regard is what is found in the requirement of Rule 1.5(b) that the lawyer "communicate to the client, in writing. . . the basis or rate of the fee and expenses"; and even that minimal information need not be given before the services are commenced and need not be given to a client whom the lawyer has "regularly represented." In particular, the Rules do not articulate a duty of the lawyer to state what legal services will be provided for that fee. It is the view of van Westrum and Little that the Rules ought to require more of the lawyer with respect to documentation of the deal with the client for the lawyer's legal services — and, van Westrum noted, even the proposal from the flat fee subcommittee that was considered earlier in the meeting would impose a requirement for a written "description of the services the lawyer agrees to perform" only in the case where the client makes an advance payment of the flat fee. In short, van Westrum said, he and Little have long thought that the Rules should contain provisions that would require of lawyers, for their legal services, more of what they would expect to provide to their clients by way of contract for their clients' services to their customers.

Little then noted the common experience of a member of a corporate board of directors button-holing the corporation's lawyer after a board meeting and saying "Let me ask you something. . .," something about a matter that had arisen in the board member's life apart from his position with the

corporation that the lawyer was there representing at the meeting. And the lawyer responds with words of advice, of legal advice, without thinking about whether she is now undertaking a new and different client-lawyer relationship, outside of the one she has with the corporation. And she does not advise the board member that, by saying something of legal substance in response to his question, she is not undertaking a new engagement that covers this new matter — and she likely does not consider that, by giving any words of legal advice, she may have established a client-lawyer relationship with the board member despite any such disclaimer that she might express. She certainly does not think of the nicety of a formal engagement agreement. If that lawyer had been asked by a client to draft an agreement for that client's sale of goods to another person, the lawyer would have a list of questions about what is to be included in that contract, such as how are the goods to be described, what is the delivery schedule, what warranties are to be provided, and the like. But the lawyer does not think to do anything like that for her own relationship with this board member, who may have just become the lawyer's client in fact.

Little continued: As the rules of professional contract are being written, the drafters worry about imposing contracting requirements on the lawyer that would be difficult to comply with in the face of an urgent call for immediate legal assistance, and thus the rules they draft impose very little obligation upon the lawyer with respect to the terms of the client-lawyer relationship. But lots of malpractice cases arise out of this kind of circumstance, because a client can have a different expectation of what the lawyer is supposed to do for the client than has the lawyer. The rules do not provide a comprehensive guidance for the lawyer about documentation of that client-lawyer relationship.

Little concluded by admitting that a good agreement for legal services, covering all that is involved in the client-lawyer relationship, could run to several pages.

Van Westrum and Little told the Chair that they would think further about this matter; they did not suggest the formation of a subcommittee to consider it and did not suggest that it be added to the continuing deliberations of the flat fee subcommittee.

X. *Adjournment; Next Scheduled Meeting.*

The meeting adjourned at approximately 11:35 a.m. The next scheduled meeting of the Committee will be on Friday, January 26, 2018, beginning at 9:00 a.m., in the Supreme Court Conference Room unless otherwise announced.

RESPECTFULLY SUBMITTED,

Anthony van Westrum, Secretary

[These minutes are as approved by the Committee at its Forty-Ninth Meeting, onJanuary 26, 2018.]