COLORADO SUPREME COURT

Standing Committee on Rules of Professional Conduct

Approved Minutes of Meeting of the Full Committee
On February 24, 2017
(Forty-Sixth Meeting of the Full Committee)

The forty-sixth meeting of the Colorado Supreme Court Standing Committee on the Rules of Professional Conduct was convened at 9:00 a.m. on Friday, February 24, 2017, by chair Marcy Glenn. The meeting was held at 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 Marcy G. Glenn, were Justices Márquez and Coats and members Judge Michael Berger, Gary Blum, Nancy Cohen, Cynthia Covell, Jim Coyle, Tom Downey, John Haried, Dave Little, Cecil Morris, Dick Reeve, Alec Rothrock, Matt Samuelson, Marcus Squarrell, Jamie Sudler, and Eli Wald. Also present were J.J. Wallace, Supreme Court Staff Attorney, and guests Lindy Frohlich (by phone), Stephanie Scoville, David Blake, Douglas Wilson, Frances Smylie Brown, Oscar Cobos, Jacki Cooper Melmed, and Margaret Funk.

Present by conference telephone were members Federico Alvarez, Judge Ruthanne Polidori, Lisa Wayne, and Tuck Young.

Judge Bill Lucero, Boston Stanton, David Stark, Anthony Van Westrum, Eli Wald, and Judge John Webb were excused.

1. *Introductions.*

The Chair explained the absences of Judge Webb (due to an accident) and Tony Van Westrum (weather issues) and welcomed guests Lindy Frohlich, Director, Office of Alternate Defense Counsel (by phone); Stephanie Scoville, Senior Assistant Attorney General; David Blake, Chief Deputy Attorney General; Douglas Wilson, State Public Defender; Frances Smylie Brown, General Counsel, Office of State Public Defender; Oscar Cobos, Jacki Cooper Melmed (Counsel to the Governor), and Margaret Funk (Office of Attorney Regulation Counsel).

2. Meeting materials; Minutes of November 4, 2016 meeting.

The minutes of the November 4, 2016 meeting were not available and the Chair tabled approval of the minutes.

3. Agenda Item 6(a) – ABA Rule 8.4(g)(prohibiting engaging in conduct that the lawyer knows or reasonably should know is harassment or discrimination).

A subcommittee was formed, to be chaired by Judge Webb. The Committee agreed to solicit subcommittee participation from non-members, including those who have already sent comments and statements of interest. Notice of the formation of the subcommittee will be posted on the CBA Diversity Listserve.

4. Agenda Item 2 (Report from Rule 1.6 Subcommittee regarding Attorney General Coffman's proposed amendments)

Because subcommittee chair Dave Stark was unavoidably out of town, subcommittee member Jamie Sudler reported on the Colorado Attorney General's request in March 2016 for a comment (and, subsequently, for a rule change) excepting from the Rule 1.6 confidentiality requirement the aggregate amount of legal fees or costs incurred by a public entity on a particular matter. This request was also supported by an attorney who typically represents the press. Sudler summarized the reasons the Attorney General's office believes this rule or comment change should be made and the subcommittee majority's reasons for not recommending any change.

Sudler explained that the subcommittee considered who is or is not a "public" lawyer and who is or is not a "public" client, and the possible conflicts between the Rules of Professional Conduct and the Colorado Open Records Act ("CORA"). The subcommittee does not believe there is a conflict,for reasons explained in the majority report. The subcommittee discussed whether there should be a distinction between the obligation of a "public" lawyer, such as a member of the Attorney General's office, and a private lawyer who represents a public entity, such as a town attorney. Sudler noted that the rule change would be made to Rule 1.6(b), which provides for permissive, not mandatory, disclosure of information otherwise protected by Rule 1.6(b).

The minority report notes the importance of transparency in government, and asserts that public clients do not expect information about aggregate legal fees and costs to be kept confidential, and that case law has authorized disclosure of fees.

The majority report disagrees for the following reasons: (1) Rule 1.6 covers information relating to fees, and the majority found unpersuasive the case law allowing fees to be disclosed under certain circumstances; (2) neither the ABA nor any state has such an exception; (3) a client should have the opportunity to consent (or not) to such disclosure; (4) Rule 1.6 does not distinguish between public and private lawyers, and, in the context of the proposed rule change, it is not clear who is a "public" or a "private" lawyer.

David Blake presented the Attorney General's view, reading a statement regarding the Attorney General's dual commitment to transparency in government and to legal ethics. He opined that the specific concerns of the majority could have been addressed had the subcommittee supported the concept of a rule change or comment. He has represented the Attorney General's office for over six years with regard to transparency issues and CORA requests. He presented the history of past and present releases of such information by the Attorney General's office, and pointed out the Rules' recognition of the unique nature of government practice, as recognized by the Preamble to the Rules at Section 18. The Attorney General's office strives to balance the legal obligation of transparency of "all public records" and the lawyer's ethical obligations. He noted that courts generally strike a balance that favors transparency, and that CORA does not distinguish between public and private lawyers. He stated that while the subcommittee majority placed confidentiality above transparency, the Attorney General is seeking a more balanced and less absolutist approach. The public and the press want to know how tax dollars are being spent. The Attorney General has never sought release of detailed expenditures, just the ability to release the total expenditures for a particular representation. The majority position results in less transparency.

The Chair stated that the majority of the members of the subcommittee were not members of the Standing Committee on the Rules of Professional Conduct. She recognized their hard work and many drafts, even though they did not reach agreement.

A member gave the example of the Office of Respondent Parent Counsel (ORPC) and asked Mr. Blake whether the aggregate amount spent in representation of an individual respondent parent – a private citizen - should be disclosed.

Mr. Blake responded that the proposed rule change would allow this disclosure unless a CORA disclosure exception would apply.

Public Defender Doug Wilson provided a history of the rule change request, explaining that a bill was introduced in the legislature three years ago that would have applied CORA to the Public Defender's Office and the Office of Alternate Defense Counsel with the goal of requiring disclosure of amounts spent on representation of individual clients. He noted that the bill would have applied only to these agencies, out of all of the agencies that represent indigent clients at public expense, and that the bill failed, but was brought back again last year. Mr. Wilson asserted that the majority position is the law, that the Rule 1.6 obligation extends to people, and therefore should extend to public agencies that represent individual people.

A member inquired whether this proposed amendment would require the judiciary to maintain time records of its work on a particular case, so the public could know how much time was invested in a particular case.

CORA is not applicable to judicial agencies. Mr. Blake stated that he did not believe a rule change or comment would compel a change in practice by the judiciary. The Chair noted that Rule 1.6 applies to lawyers representing clients, not to the judiciary.

A member spoke in favor of the majority recommendation, based on her 13 years representing criminal defendants, both in the Public Defender's Office and in private practice. The member stated that the proposed rule change is targeted at poor people and people of color. They are the people who are represented at taxpayer expense. They have the least voice in the system, and the Public Defender's Office and the Office of Alternate Defense Counsel are their voices. The member also noted that private clients would never countenance release of such information by their lawyers. The member expressed the view that the effort to amend the rule was really an effort to find a way to cut funding for the Offices of Public Defender and Alternate Defense Counsel.

Another member who represents municipal governments that often get CORA requests stated that governments have public budgets for legal expenses, which are available to the press and taxpayers. Drilling down to individual matters of representation disadvantages the poor, who have a constitutional right to counsel, and CORA requests should be made to the agencies, not their counsel.

A member of the subcommittee noted that Rule 1.6 is geared to protection of the client. The client can always consent to release of the information. The issue here is whether the lawyer should be able to release the information without client consent.

A member of the Committee commended the subcommittee for its well-written reports, and asked if fee-related information is "information related to the representation" under Rule 1.6. The member noted that the "transparency" issue is an issue between the public and the governmental agency, not the lawyers for the agency. The member expressed concern about allowing lawyers to release information without client consent, stating that Rule 1.6 is very clear.

Mr. Blake stated that the Attorney General's office has historically released information about the aggregate amount of fees billed to a client on a particular matter (such as implementation of a

gun control law), and that "aggregate billing" on a matter is not closely "related to the representation" and therefore not necessarily within the ambit of Rule 1.6. He noted that the process required to obtain client consent is cumbersome. He noted that the Attorney General's office also represents "people" and that the rule amendment is not about the Public Defender's Office or any other agency in particular. He noted that the Attorney General's office does not believe it may redirect a CORA request to the appropriate agency, and that a legislative effort to allow this failed.

Ms. Melmed noted that in the case of the gun law, the Governor's Office consented to the Attorney General's disclosure of fee-related information.

Mr. Blake noted that the CORA timelines are very tight and it is not always possible to get consent within the time frame for response. CORA requests are generally for specific information, and it is not responsive to direct the inquirer to the agency's budget.

A Committee member stated that Rule 1.6 reflects a value judgment made by the Supreme Court when the Rules of Professional Conduct were adopted. The member questioned whether Rule 1.6 may simply be too broad. He stated that protecting all "information relating to the representation" may go too far, and may be a standard that is impossible to meet. The member noted the importance of transparency in government, and does not believe that an aggregate fee is constitutionally protected or that its disclosure would encroach upon the attorney-client relationship. The member is less concerned about the need for Colorado to be consistent with the Model Rules, and suggests that Attorney General's inquiry should go to the ABA. The member believes the Attorney General's proposal has merit, and would support it if the ambiguities could be resolved.

Another member stated that the rule change goes too far. A public agency tasked with representing private individuals is in a unique situation, and is unlike other public agencies. The member noted further that the Public Defender (or Alternate Defense Counsel) doesn't control the litigation – the District Attorney's office does. Defense attorneys must expend resources to defend the charges brought by the District Attorney. The rule change could open the door to public outcry over expenditures made to provide legal services to people who are legally entitled to counsel, either as a constitutional matter or as a social decision. The rule change might be a different question when an agency's client is not a private individual as is the client of the Office of the Public Defender, Office of Alternate Defense Counsel, or the Office of Respondent Parents' Counsel.

Another member, who has served as both a public defender and assistant attorney general, stated that we should remember the role of lawyers, who must be independent and circumspect in all dealings with clients. The member likes Rule 1.6 and its clear statement that information relating to the representation is confidential. Confidentiality is the basis of the attorney-client relationship. The member pointed to the unsuccessful effort of insurance companies to audit legal bills pertaining to representation of their insureds. The insurance industry initially wanted to audit aggregate billing, and then drilled down to individual itemized billings. The member does not support an intrusion on the attorney-client relationship, including a change to Rule 1.6, and strongly supports the majority.

A Committee member stated that this is a political issue masquerading as an ethical issue. An attorney should not be constrained in representing a client in a sphere where the public may have an interest in the outcome of the representation, but this is what a rule change would do. We as

lawyers have the same obligation to every client. Rule 1.6 should not be changed. The member strongly supports the majority.

Another member also supports the majority. The proposed change to Rule 1.6 would give lawyers discretion that should reside with the client regarding release of information.

The Chair called for a vote on the proposed amendment to Rule 1.6. The amendment is to add the following exception to Rule 1.6(b): *"(9) to comply with a request for information made under other law when the information sought is the total number of attorney hours expended or the total amount of costs incurred on a particular matter by a public law office on behalf of a client."* The Chair noted her intention to send both the majority and minority reports to the Supreme Court, notwithstanding the outcome of the vote, because a lot of work has gone into considering this issue. The Court should have the benefit of this work, regardless of the outcome of the vote.

All Committee members (those present in person and those present by telephone) voted against the amendment. None voted for the amendment.

The Chair thanked the guests for their input and participation in this project.

5. Agenda Item 3. Report from Fee Subcommittee.

Nancy Cohen reported that the Fee Subcommittee has drafted what it believes the Committee directed, including proposed Alternative 5, as included in the packet. Another subcommittee meeting is needed to address Alternative 5. The subcommittee welcomes any input other Committee members wish to offer.

6. Agenda Item 4. Report from Civil Rules Committee Subcommittee on Judicial Expectations Amendments to CRCP.

Judge Berger reported that the proposal was withdrawn because the CBA and the DBA did not support it. A CBA/DBA joint committee is working on a revised proposal, but it has not been released. That committee will be meeting on March 8, 2017.

7. Agenda Item 5. U.S. District Court Local Rule Amendments.

The Chair reviewed the new rules, effective December 1, 2016. The federal district court in Colorado has historically adopted the Colorado Rules of Professional Conduct, but has carved out certain rules it believes should not be applied in federal court. The new amendments are noteworthy in that they no longer carve out Colorado Rules 4.4(b) (duty to notify sender of receipt of inadvertently sent document) and Colorado Rule 6.5 (regarding nonprofit and court-annexed limited legal services programs). The rules and comments regarding unbundled legal services and marijuana remain carved out.

8. Agenda Item 6(b). Pretexting – The Sequel.

A *Denver Post* article inaccurately reported that a complaint had been made to the committee, and nothing had been done. The Chair wrote to correct the inaccuracies and that *Post* corrected only the inaccuracy about the body to which the complaint was made. A Committee member reported that he had met with a District Attorney group following and he expects the group to request the Committee to again consider a rule amendment that would except "pretexting" for

law enforcement purposes from the prohibition on deceptive conduct in Rule 8.4(c). So far, however, nothing has been received.

9. Agenda Item 6(c). Potential Contingent Fee Rule Amendments.

The Chair reported that the Supreme Court had transferred responsibility for proposing amendments to the contingent fee rules to this Committee. Next steps may include cleaning up inconsistencies in language and considering whether those rules should be located in the Rules of Professional Conduct or elsewhere. The matter was tabled.

10. Agenda Item 6(d). Potential amendments to require engagement agreements.

Item tabled, as Tony Van Westrum was not at the meeting, and Dave Little had departed by the time this agenda item was reached.

11. Agenda Item 6(e). Housekeeping Amendments.

Members voted to recommend two corrections to the Supreme Court: (1) renumber current Comment [14] to Rule 1.2 to make clear that it is a Colorado-unique comment; and (2) correct Comment [12] to Rule 1.5 to refer to Rule 1.15B(a)(1) instead of to Rule 1.15. A member noted that there may also be a mistake in Rule 5.4. The committee will wait until it has accumulated a number of minor changes and corrections before submitting recommended changes to the Supreme Court.

Next meeting date: June 16, 2017.

Meeting adjourned at 11:05 a.m.

Cynthia Covell, acting secretary

These minutes of the forty-sixth meeting of the Committee are as approved at the forty-seventh meeting of the Committee, on June 16, 2017.

Anthony van Westrum, Secretary