COLORADO SUPREME COURT

STANDING COMMITTEE ON THE RULES OF PROFESSIONAL CONDUCT

Approved Minutes of Meeting of the Full Committee
On November 4, 2016
(Forty-fifth Meeting of the Full Committee)

The forty-fifth meeting of the Colorado Supreme Court Standing Committee on the Rules of Professional Conduct was convened at 9:00 a.m. on Friday, November 4, 2016, by Chair Marcy G. Glenn. The meeting was held in Conference Room Nº 2215 on the second 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, Helen E. Berkman, Gary B. Blum, Nancy L. Cohen, Cynthia F. Covell, James C. Coyle, Thomas E. Downey, Jr., John M. Haried, David C. Little, Judge William R. Lucero, Cecil E. Morris, Jr., Melissa Meirink, Judge Ruthanne Polidori, Henry R. Reeve, Alexander R. Rothrock, Matthew A. Samuelson, Marcus L. Squarrell, James S. Sudler III, Anthony van Westrum, and Judge John R. Webb. Present by conference telephone were members Boston H. Stanton, Jr. and E. Tuck Young. Excused from attendance were members Federico C. Alvarez, James C. Coyle, Thomas E. Downey, Jr., David W. Stark, Eli Wald, and Lisa M. Wayne. Also present were Supreme Court staff attorney Melissa C. Meirink and the following guests, who introduced themselves to the members at the beginning of the meeting: Angela R. Arkin, Ann C. Gushurst, Joan H. McWilliams, Diana L. Powell, Sue A. Waters, Helen C. Shreves, and Gina B. Weitzenkorn. Guest David Littman joined the meeting after it had commenced.

I. *Court Staff Changes*.

The Chair advised the members that Christine A. Markman, staff attorney to the Court and member of the Committee since its thirty-first meeting, has left the Court's service and the Committee to become a lawyer at Wheeler, Trigg & O'Donnell LLP. The Court's staff attorneys who will now participate with the Committee are Melissa C. Meirink and Jennifer June (J.J.) Wallace.

II. *Meeting Materials; Minutes of July 22, 2016 Meeting, the Forty-fourth 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-fourth meeting of the Committee, held on July 22, 2016. Those minutes were approved with corrections.

III. *Report from Rule 2.I (Parental Conflict) Subcommittee*.

Noting that the guests who were present at the meeting were with the Committee to discuss the sixth item on the meeting agenda that the Chair had included with the meeting materials, the Chair determined that that item would be the first to be considered at the meeting. That item was the proposal to add to Comment [5] of Rule 2.1 a new, third, sentence reading—

> In a matter involving the allocation of parental rights and responsibilities, an attorney should consider advising the client that parental conflict can have a significant adverse effect on minor children.

The Chair referred the members to the report of the Rule 2.1, Parental Conflict, Subcommittee, beginning at page 74 of the meeting materials; and she invited the subcommittee chair, member Alexander R. Rothrock, to review the subcommittee's deliberations for the Committee.

Rothrock began by identifying the following as the members of the subcommittee: Committee members David C. Little, Ruthanne Polidori, and James S. Sudler III and, additionally, Angela Arkin, Gina B. Weitzenkorn, and Joan H. McWilliams — who were present as guests at this meeting — and Margaret Funk and Michael F. DiManna. The subcommittee had held one meeting, at which all but one of those just named were in attendance and Sue A. Waters, another guest at this meeting, was also in attendance.

As stated in the subcommittee's report, Rothrock said that the subcommittee approached the matter by first discussing whether any wording should be added to the Rules of Professional Conduct that referred to the impact parental conflict in litigation can have on children — and, if some statement should be included, whether it should be placed in the text of a rule or in a comment to a rule. There was, he said, disagreement on what, if anything should be added to the C.R.P.C. but agreement that, if anything were to be added, it should be placed in a comment and not in a rule. Further, while some participants felt that nothing should be added, even to a comment, they, as well as those who wished to make an addition, felt that the text quoted above was acceptable if any addition were to be made.

Noting that the participants on the subcommittee were "not representative of the populace as a whole," Rothrock directed the members to the sixth and seventh numbered paragraphs of the subcommittee's report for a summary of the views of those participants. Those opposing any addition to the Rules expressed concerns both about adding text to the C.R.P.C. that applied only to a particular area of legal practice and about the unwanted effect that any such addition to the Rules might lead to the establishment of a standard of care applicable to civil claims against lawyers. Rothrock emphasized that Rule 2.1 itself is a standard of conduct for disciplinary purposes, not a standard of care for civil liability.[1]

But, Rothrock continued, no participant argued that parental conflict cannot have harmful effects on children; perhaps this proposed addition to Comment [5] of Rule 2.1 is "the only way to tackle the problem." The purpose of the proponents of the addition is just to try to raise the consciousness of the bar to the fact of the problem; they believe that the addition would do some good, ultimately, by changing the behavior of some parents in divorce. Those opposed, however, see the proposal as an over-reaction, one that could lead to lawyer liability if the lawyer failed to give the advice contemplated by the addition. Some also felt that the addition of this language for this particular practice area could lead to requests from other practice areas for language of the same ilk covering concerns pertinent to those other practice areas.

Rothrock said that the proposed wording — "an attorney should consider" — is not a command or requirement. Comment [5] contemplates advice that might be given and, therefore, the lawyer should consider giving it.

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1. The second and third sentences of Section [20] of the Scope section of the Colorado Rules of Professional Conduct states—

> The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability.
>
> —*Secretary*

Rothrock concluded his review by saying the language quoted above is the language that the subcommittee proposed to the Committee — although some of the subcommittee participants would prefer that no addition be made.

To a member's question of whether there was any subcommittee opposition to the proposed text of the sentence to be added to Comment [5], Rothrock said there was no opposition to the language — no proposal for alternative language — though some participants wanted no such addition.

A member, who had been a member of the subcommittee, said that member and another participant on the subcommittee had been the ones who thought no addition should be made. In their view, the addition would not actually change parental behavior: A certain number of clients will not listen to anyone; this will not change behavior. This member and the colleague on the subcommittee were skeptical.

A member asked whether the subcommittee had concluded that a lawyer may presently give the contemplated advice — that parental conflict can harm children — to a client in the absence of such a provision in a rule or comment. Rothrock replied that it is understood that such advice may already be given under the current Rules without this addition.

The member who had earlier spoken of skepticism said the American Academy of Matrimonial Lawyers already has a practice standard calling for this advice.[2]

The member who had asked whether such an addition was thought to be necessary to enable lawyers to give this advice without violating a principle of the Rules asked the guests whether they believed that such an addition was necessary or at least would induce more lawyers to give this advice than now do so.

One of the guests replied that she did not know whether lawyers already give such advice; she was of the view that lawyers think their client is the parent with whom they have engaged, and they do not consider the children. The membership of the American Academy of Matrimonial Lawyers is small, so its practice standard is not widely known; and this guest would like to see the addition made to Comment [5]. Matrimonial lawyers do not think they have a duty to the children of their clients; she cited letters from parents who have stated that they did not hear this advice from their lawyers.

Another guest agreed that those who have been litigants in inter-parental disputes report that no one ever gave them such advice. She added that the toll on children is pretty alarming. The proponents of the addition understand that the lawyers' role is to act on behalf of their clients, but the proponents want to encourage lawyers, by this addition to the comment, to give that advice for the protection of the children. The addition, she said, would be a way to start the process of changing behavior.

Another guest noted that there is a statutory basis for the idea that the lawyer engaged in this field of practice does have a role to play in protecting children, since the court need not approve a parenting plan unless it is found to be in the best interest of the child. But that consideration is possible only if both parents are represented by lawyers in the process. And that, the guest concluded, implies that there is a qualitative difference in the process that comes about because of the presence of lawyers as representatives of the parents. She added that she felt this proposal to add the suggested text to

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2. *See* "Bounds of Advocacy, Goals for Family Lawyers," American Academy of Matrimonial Lawyers, *available at* http://ny.aaml.org/sites/ny.aaml.org/files/bounds_of_advocacy.pdf.

—*Secretary*

Comment [5] was the least that could be done; she would be even more forceful in telling lawyers that this is a part of their role in the process.

A member of the Committee spoke to say that he had handled no domestic relations case since he was in law school and that his knowledge about this matter comes from representing lawyers facing discipline before the Attorney Regulation Counsel and in mediating legal malpractice cases from within the domestic relations practice area. To him, the allegations made by former clients in those contexts are generally unbelievable: "I never knew this. My lawyer never told me this." This member starts his consideration of this proposal with the view that there should be no content in the Rules directed toward specific practice areas and continues with the belief that it is inappropriate to think that the Rules can regulate practice styles. As he put it, some lawyers are always ready to go to war; others are calmer; still other seek to get the respective clients into mediation. There are, in short, different approaches to the practice of law, he said. The proposal that is before the Committee, he said, is an opening for the Committee's "legislating the practice of law." In contrast, he pointed out, the Colorado Bar Association's Ethics Committee did not take a similar route when asked by lawyers practicing water law to provide special rules regarding conflicts of interest that can arise within that practice area.

To those comments, a guest responded that no one could be more interested in protecting lawyers from risks of litigation than she; but, she felt, this proposal presented no such litigation risk: The proposed language would be discretionary. It would, she added, help young lawyers understand what is permitted. This is not, she said, just water rights; one half of Colorado children are or will be children of divorce. The proposal would guide young lawyers. If the proposal did not have a positive impact, the Committee could, in the future, reject any proposal for a rule with an additional duty; she added that this proposal does not in fact impose an additional duty. The proposal gives permission to lawyers to do what they have been doing for a long time.

A guest, who introduced his comments by noting that he has served on the Colorado Bar Association's Ethics Committee for eight or nine years, spoke in opposition to the previous comments of the member who had disapproved of adding special rules to the C.R.P.C. for particular areas of practice. The guest said that he has, for the last two or three years, made a presentation at a seminar on ethics; he would like to be able to tell the attendees, in the future, that the Supreme Court has added the proposed text to the comment, calling the attendees' attention to that comment in Rule 2.1 by saying that the lawyer has the specific option of discussing, with the client, the effects on the client's children of an allocation of the client's parental rights and responsibilities. The added text in the comment would give the lawyer, as advisor, the context for revisiting with the client the impact of "high conflict" on children. It would give the lawyer another tool to use in difficult cases.

A member spoke to say he had been a member of the subcommittee; he noted that the subcommittee had first rejected the addition of this matter to the text of Rule 2.1, before considering its addition to a comment to that rule. He had, himself, at first been opposed even to the addition of the concept to a comment for the reason previously expressed by the other member: We do not tell lawyers about conduct within specific practice areas. But, he said, he had "come around" because this matter is so important, involving the well-being of minor children. In his view, the adoption of the proposal would not mean the Committee was moving down a slippery slope; "this is the end of the matter" if the Court adopts the proposal. Important to his conclusion, he said, is the fact that the proposal does not establish a rule of conduct.

Another member referred back to the remarks of the member who had expressed the view that the Rules should not contain special statements about particular areas of law practice. This member asked what other alternatives there might be for providing this important "education" to parents about the adverse impacts of their disputes with one another on their minor children?

A guest noted that all of the guests work in this very arena, providing educational programs for lawyers and judges alike about such impacts on children. But, she said, there are lawyers who do not attend such programs and do not receive such education: "Those who hang their shingles do not go to those special education programs." So, the matter should be talked about "through the rule"; those lawyers should learn of the matter in the process of becoming members of the bar. So many lawyers, she added, do not have the breadth of experience that those present at this meeting take for granted. This proposed addition to the comment would provide an "entry level" education for lawyers entering domestic relations practice. This proposed addition would require the lawyer to think about the conflict-impact issue; it would not require the lawyer to make a statement to the client about the issue.

Another guest said that those who practice law should be proud of what they do in many areas of the law. To her, it is apparent that the proposal calls merely for the addition of a comment; it is not a rule of conduct. It is appropriate for the comment to acknowledge a special problem for children in a special area of law. She noted that the things parents in domestic conflict cannot agree upon are astonishing: which school a child should attend, and the like. The legal profession should acknowledge that its practitioners are not just advocates but are also part of the larger community. The proposed comment is a way of talking to the lawyer about how this matter of adverse impact on children can be considered in the lawyer's practice. "Family law is different," she said.

A member said that she was not convinced that the proposal was a slippery slope into regulation of conduct in special practice areas. This, she said, just speaks to a special area; she reminded the Committee of the recent addition of Comment [14] to Rule 1.2, providing that a lawyer may counsel and assist a client regarding the provisions of Colorado law regulating conduct with respect to cannabis but directing the lawyer also to advise the client about related federal law and policy. Marijuana law is not necessarily a special area of law practice, she said, but it is getting special attention. She added that it is distressing to her to see the command "shall" in a comment — as Comment [14] commands that the lawyer who undertakes to counsel with respect to cannabis "shall also advise the client regarding related federal law and policy." In contrast, the proposal permitting lawyers to discuss the adverse effects on minor children caused by strife over parental rights is not, in her view, a slippery slope. If it is not helpful, at least it does not create a standard of practice and cannot serve as the basis for a grievance against a lawyer, since it merely states that the lawyer "should consider" advising the client about the adverse impacts contemplated by the comment. She observed that Rule 2.1 already provides, in its rule text, that, in the realm of litigation, "a lawyer should advise the client of alternative forms of dispute resolution"; the proposal at hand was not different from that.

The member who had earlier spoken to say that she had been a member of the subcommittee and had, with one other subcommittee member, thought no addition should be made, because it would not actually change parental behavior, spoke again. She said that, as a judge, about a third of her cases involve domestic relations. Yes, she said, there is a problem that the proposal seeks to address. She has seen parenting after the parents have attended the divorce classes that are mandatory in all jurisdictions: If you file with children, you must attend the course. Originally, the courses were taught by very competent lecturers. Then changes were made to the Colorado Rules of Civil Procedure to provide for initial status conferences in divorces, with the judge and the parties; good judges took advantage of those conferences to point out that bad parental conduct is harmful to the children. She agreed with the comment of a guest that there needs to be an effort to educate judges about what is good behavior in this regard. But, she added, we must consider that, in calendar year 2015, sixty-five percent of divorce cases were conducted without any lawyer, seventy-five percent of all parties having no lawyer. The proposed comment will affect a very limited number of parties. For the other cases, there must be a better way — better than a C.R.C.P. comment directed only at lawyers — to get the message to all parents. Her conclusion was that, if the Committee thought addition of the proposed text to the comment would change behavior, it should proceed to do that; in her view, it would not be useful.

To those comments, a guest drew upon the cited fact that, around the country, seventy-five percent of parties in divorces do not have lawyers and added that mediators in such cases hear from parties who are parents with children that the parents do not want lawyers because they think the presence of lawyers in the process will destroy the civility between them. If, then, this comment is intended to be directed toward parents, through their lawyers, we need first to get rid of the perception that the lawyers, by intruding, will destroy that civility. But, if lawyers are mainly involved in cases that already involve conflict, the proposed comment will be useful. This can, she said, help the profession erase its "terrible reputation."

A guest who had not previously spoken commented that the number of parties in divorce cases who are not represented by lawyers is troubling. But "multiple exposures" to the thought that they should strive to avoid harm to their children will nevertheless be useful to them as they go through the process; sometimes they just have not realized that the ongoing pressures of the divorce process are troubling to the children. In accord with the previous comment that the added text would give the lawyer, as advisor, another tool for explaining the impact of "high conflict" on children in difficult cases, this proposal would not be a "magic bullet," but that limitation does not mean the amendment should not be made. The change effected by the amendment will be just a suggestion, not a rule imposing a requirement on lawyers. And, the guest added, "the system" needs to change from the ground up: It must become as socially unacceptable to harm children in the course of divorce as it has become to smoke or to drive while under the influence of alcohol.

A member noted that it is already known that "high conflict" is harmful; one just needs to be "a functioning human being" to have that awareness. She noted that the proposed addition, to the effect that there can be parental conflict in divorces involving children, states the obvious: Even if the parties are "getting along" and are headed toward an agreed settlement of their marriage, there is nevertheless "conflict" between them. The member would change the dialogue from "high conflict" to "extreme conflict" to make the distinction.

Another member spoke in support of the proposal. He noted that there is universal agreement that divorce involves real conflict and that, as had been suggested by another member, there is no downside to making the addition. Would the change actually help? To this member, even if there were but a small number of cases in which the change had an effect, the change should be made, as it would not cause harm. As to whether this would be a "slippery slope" down which other discipline-specific changes might be proposed, the member was certain that this Committee and the Supreme Court itself could guard against that result.

The guest who had previously noted the efforts that the domestic relations bar makes to educate judges and lawyers about the adverse impacts of divorce conflict on children, and the failure of some lawyers to attend such educational opportunities, added that the addition of the proposed text to the comment will be beneficial if parents can be steered away from conflict escalation by the counseling of their lawyers given early in the divorce process. When a lawyer explains such concerns to the client, it can have a huge benefit over what the court might be able to accomplish by words from the bench. The trust that clients have with their counsel is an important component of that beneficial effect. As to the comment previously made that attempted to distinguish between high conflict and extreme conflict, this lawyer had seen conflict over matters such as who shares the Christmas holiday with which parent; the tension over that issue, or similar issues regarding birthdays, can be damaging to the children. She added an observation about watching parents exchanging custody of children in Walmart parking lots. If lawyers can play a role, by advising clients about the adverse effects of conflict on children, from the beginning of the divorce process, there will be advantages.

The member who had expressed concern about the gradation of conflict said that she understood the possibility of benefits such as those of which the guest had spoken but added she was remained confused about what the proposal was intended to accomplish. The conflict between the divorcing parents arises because they do not love each other. What is added, she asked, by a comment that suggests to their lawyers that they be reminded that their conflict "sucks for the children"?

A guest responded that the goal is to open a new avenue, in which the lawyer, having pointed out the possibility for adverse effects on the children, can say, "Let's choose the better way, because there are better and worse ways to go about this process. We can have a sophisticated fight in court, or we can do it another way."

To that, another guest added, "This information is not getting to the parents."

A third guest noted that lawyers are trained to be advocates for their clients; the proposal will let them know that it is "okay to talk to parents about this aspect of the whole picture." In response to a member's inquiry about the role of the judge in this regard, the guest replied that, hearing this from a judge in a status conference is "just a black robe telling the parties."

To that, the member who had made the inquiry commented that, if the status conferences includes not just judges but also family coordinators, those coordinators can be directed to explain to the parents the adverse impacts that the process can have on children. There are, the member said, "things within the system that can be sharpened up."

A member commented that, looking at other comments to Rule 2.1, this proposal is not, in fact, of a different ilk. She referred specifically to Comment [4] of the rule, which already refers to "family matters."[3] She asked, though, why the subcommittee's proposal would put the added text in Comment [5] of the Rule rather than Comment [2],[4] which, she noted, already speaks of "effects on other people." She added that she was not opposed to the addition but was just wondering about its location.

A member recalled that the Colorado Bar Association Ethics Committee had recommended a different comment on the issue. A guest replied that the proposal had originally been to include the concept in Rule 2.1, Comment [5], in conjunction with the instruction that Rule 1.4 might make it

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3. Rule 2.1, Comment [4], reads—

> [4] Matters that go beyond strictly legal questions may also be in the domain of another profession. Family matters can involve problems within the professional competence of psychiatry, clinical psychology or social work; business matters can involve problems within the competence of the accounting profession or of financial specialists. Where consultation with a professional in another field is itself something a competent lawyer would recommend, the lawyer should make such a recommendation. At the same time, a lawyer's advice at its best often consists of recommending a course of action in the face of conflicting recommendations of experts.

—*Secretary*

4. Rule 2.1, Comment [2], reads—

> [2] Advice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.

—*Secretary*

necessary for the lawyer to inform a client, in litigation, about dispute resolution mechanisms that might be alternatives to litigation. She recalled that the ethics committee had rejected the idea of an entire rule devoted to the matter but had concluded that a comment "should be considered."

The member who had commented on location reiterated that she simply wondered whether the addition would be better placed in Comment [2] to Rule 2.1; again, she said, she was not opposed to its inclusion somewhere.

The member who had voiced his concern about "legislating the practice of law" said that he was not opposed to educating lawyers about matters such as this. But he viewed the proposal as unnecessarily restricted to one particular area of practice, domestic relations. Rather, he said, if the Committee wanted to effect change, the concept contained in the proposal should be included in the Scope section of the Rules or in ¶ [2] of the Preamble, with its recognition that, "[a]s a representative of clients, a lawyer performs various functions," and its inclusion in those functions of the roles of advisor, advocate, negotiator, and evaluator. Matters such as the stressful effects of divorce proceedings on children are, he said, discussed in law schools. He agreed with the prior comment from the member who had pointed to the existing reference to "[f]amily matters" in Comment [4] to Rule 2.1. But he disagreed with the comment that this is not special treatment of a particular practice area that would put the Committee on a slippery slope; he wanted the Committee to recognize that it is in fact special treatment of one practice area. He empathized with the guest who had spoken about the position of trust that lawyers hold with clients, a position that gives their admonitions about adverse impacts on children special importance to their clients, noting that the guest had experience in representations in juvenile courts and with the question of whom it was she was representing in those cases. This member's concern, however, was that changes such as here proposed would change the roles of lawyers, incrementally. But he acknowledged that, as written, this addition would be a matter of discretion and not a basis for discipline by Regulation Counsel.

A member noted that, because of his role in the preparatory work of bringing this matter before the Committee, he had tried to remain neutral in the discussion but now wanted to express his support for the proposal because, as had been previously said, there is real impact on children in divorce proceedings and there is no downside to the addition of the proposed text, no real risk of slipping down a slope. And, he added, he favored placing the addition in Comment [2] of Rule 2.1 rather than in its Comment [5].

That member added that divorce proceedings can adversely impact persons other than children, as had been earlier noted. Putting this idea after the first sentence of Comment [2] of Rule 2.1, with its existing reference to "effects on other people" and altering its expression so that it was not exclusive to children might work.

A member referred to the earlier comment that the proposal might not be sufficiently targeted to have a real effect. As had then been said, he recounted, in every divorce there is conflict; and he asked whether the proposed addition should acknowledge that, rather than say that parental conflict "can" have a significant adverse effect on minor children. A guest responded that, in many cases, the parties come to court with "everything already worked out," so that, while their marriages cannot continue, they are not actually "in conflict." They are not in conflict; they just want a divorce. In many cases, they have observed other divorcing couples proceed through the process badly and with damage, and they want to avoid doing that themselves. To that, the member said that had not been his point. Even if both parties are in agreement, it was his suspicion that the process would still be stressful to the children. Accordingly, as the other member had said earlier, he wondered whether the proposition really is that, where there is a potential for conflict over parenting issues, that poses a problem for children. If that is the specific concern, he would be specific about it in the comment.

To that, a guest pointed out that things are often much better after the divorce has been finalized, when the children are no longer living in a conflicted atmosphere. She added that often young parents are thrust into conflict with one another by reason of the divorce.

And to that, the member replied that there must be a better way to say this.

A member called for a vote on the proposal to add to Comment [5] of Rule 2.1 a new, third, sentence reading—

> In a matter involving the allocation of parental rights and responsibilities, an attorney should consider advising the client that parental conflict can have a significant adverse effect on minor children.

A member moved to amend the location of that sentence from Comment [5] to Comment [2] of the rule.

Another member said that she was not concerned about the fact that the proposed addition applied to just one practice area; she understood there to be a number of occasions where that was done within the Rules. But she would lessen the exclusivity of this addition by adding the words "for example," so that the added text would read—

> For example, in a matter involving the allocation of parental rights and responsibilities, an attorney should consider advising the client that parental conflict can have a significant adverse effect on minor children.

That, she said, would keep the addition more in line with the "abstract" scope of the rule itself.

The member who had moved that sentence be relocated to Comment [2] said that she did not object to the addition of the words "For example." But another member said he did not see that the words would add anything to the concept of the sentence.

The member who had proposed the addition of the words "For example" pointed out the text of Rule 2.1 itself has correlative language regarding a lawyer advising a client about dispute resolution methods that are alternatives to litigation, which language contains the directive "should": "[T]he lawyer should advise the client of alternative forms of dispute resolution . . . ." But, she said, the foundation for that directive "should" is missing in the case at hand, involving advice about the adverse effect of divorce proceedings on children.

A member suggested, as an alternative to the proposal, that the following sentence be added to either to the end of Comment [2] of Rule 2.1 or to the end of Comment [5] of that rule: "Without limiting other occasions when a lawyer may advise a client regarding the interests of other persons, a lawyer may advise a client that parental conflict can have an adverse effect on minor children." He explained that the specific purpose of the formulation was to make it clear that advisement about the effects of adverse impacts on children in divorce proceedings was just one kind of advice that might be given in one circumstance, and that there is a general principle that lawyers can advise clients that other persons might be affected by courses of action the clients intend to take. The language that was set forth in the pending motion was seemingly more limiting and exclusive.

That proposal generated neither support nor comment.

The member who had proposed that the language of the pending motion be moved to Comment [2] of Rule 2.1, as the second sentence of that comment, renewed that motion.

The member who had requested that the text be amended by the addition of the prefatory phase "For example," reiterated that request, noting that it would make clear that the intention is to apply a general concept to a particular example.

But, upon a vote of twelve in favor and six opposed, the Committee determined to suggest to the Court that a new, second sentence be added to Comment [2] of Rule 2.1 reading—

> In a matter involving the allocation of parental rights and responsibilities, an attorney should consider advising the client that parental conflict can have a significant adverse effect on minor children.

* * * * * *Secretary's Note of Subsequent Action* * * * * *

By email action initiated by the Chair after this forty-fifth meeting of the Committee, the Committee determined to place the proposed added sentence as the third, rather than the second, sentence of Comment [2] of Rule 2.1, with the word "lawyer" being substituted for the word "attorney." As thus changed, the Committee's proposal to the Court would be that Rule 2.1, Comment [2], read in its entirety as follows:

> [2] Advice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. In a matter involving the allocation of parental rights and responsibilities, a lawyer should consider advising the client that parental conflict can have a significant adverse effect on minor children. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.

Without conducting a hearing on the proposal, the Court adopted it, effective December 1, 2016.

* * * * * *End Secretary's Note* * * * * *

IV. *Relocation of Rules Governing Contingent Fees.*

At the Chair's request, member Michael H. Berger reported that he and the Chair, as the chairs of the Standing Committee on the Rules of Civil Procedure and of this Committee, respectively, had asked the Court to reallocate responsibility for the Colorado Rules Governing Contingent Fees, found in Chapter 23.3 of the Colorado Rules of Civil Procedure, from the Standing Committee on the Rules of Civil Procedure to this Committee. Berger reported to this Committee that he has been told by a justice of the Supreme Court that such reallocation will be done.

V. *Report Regarding Civil Rules Subcommittee Consideration of Rule on Judicial Expectations for Professionalism.*

The Chair directed the Committee's attention to Item № 7 on the agenda for the meeting and to pages 24 through 29 of the materials provided to the Committee for its forty-fourth meeting, on July 22, 2016. The item relates to a proposal to add a Section 1-27 to Rule 121 of the Colorado Rules of Civil Procedure; the text of the proposal is found in the material the Chair provided for that forty-fourth

meeting of the Committee, beginning at page 24 of those materials. The Chair asked member John R. Webb to tell the Committee about the proposal.

Webb said the proposal might be characterized by the rubric "professionalism." The proposal has been taken up by the Standing Committee on the Rules of Civil Procedure. Webb said the members of that committee were presently split on the proposal, judges favoring it and lawyers not liking it, but, despite that split, the committee is proceeding with consideration of the proposal, sending it to a subcommittee for consideration. At the first meeting of that subcommittee, the same split emerged, judges — and representatives from the Office of Attorney Regulation Counsel favoring the proposal — and lawyers not liking it. Among the matters being considered by the subcommittee are the proper location for the proposal, alternatives to placement in the C.R.P.C. including, among others, the Colorado Rules of Professional Conduct.

VI. *Amendment to Rule 1.6*.

On behalf of David Stark, the chair of the Committee's subcommittee that is considering a proposal from Colorado Attorney General Cynthia Coffman for the addition of a comment to Rule 1.6, the Chair provided a status report on the work of the subcommittee. The proposed comment, or possibly new rule text, would provide that the total amount of fees and costs incurred by a public entity on a particular legal matter is not "information relating to the representation of a client" that is protected by Rule 1.6(a) from disclosure by a lawyer representing the public entity. The Chair reported that the subcommittee has had a number of productive meetings; that the members are split regarding whether to recommend a new comment or rule amendment as sought by the Attorney General; and that it is likely that the subcommittee will present the Committee, at a subsequent meeting, with majority and minority reports expressing the members' competing views.

VII. *Provisions for Flat Fee Agreements.*

The Chair invited member Nancy L. Cohen to report to the Committee on the activities of the subcommittee of the Committee that has been studying the question of whether provision should be made in the Rules for flat fee agreements.[5]

Cohen reported that the subcommittee proposes the addition of a new paragraph (h) to Rule 1.5 on that topic, reading as follows:

> (h) Notwithstanding anything to the contrary in Rule 1.5(b) lawyers may enter into flat fee agreements.
>
> (1) If a lawyer receives in advance a flat fee or any portion thereof, the lawyer's flat fee agreement shall be in writing and shall contain the following:
>
> (a) A description of the services the lawyer agrees to perform;
>
> (b) A statement of the amount to be paid to the lawyer for the services to be performed;

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5. Previous consideration by the Committee of the matter of flat fees for legal services can be found in these minutes of the Committee:

> Fortieth meeting, 6/5/2015, Item IV, p. 6 *et seq.*
> Forty-first meeting, 10/16/2015, Item IV, p. 5 *et seq.*
> Forty-second meeting, 1/29/2016, Item V, p. 8 *et seq.*
> Forty-third meeting, 4/29/2016. Item 3, p. 2 *et seq.*
> Forty-fourth meeting, 7/22/2016, Item III, p. 2 *et seq.*

—Secretary

(c) A description of when or how portions of the flat fee are deemed earned by the lawyer;

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

(2) A "flat fee agreement" refers to an agreement for specific legal services by a lawyer under which the client agrees to pay a fixed amount for the legal service to be performed by the lawyer, regardless of the time or effort involved or the result obtained.[6]

Cohen said the subcommittee had first thought of adding the substance of the proposal to Rule 1.5(f) but found that there would be too much placed in that paragraph if that were done; so, the subcommittee proposes placement of the flat fee concept in its own paragraph within that rule.

In addition to the addition of paragraph (h) to Rule 1.5, the subcommittee proposes making changes to a number of the existing comments to Rule 1.5,[7] including deletion of the term "lump-sum"

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6. *See* p. 68 of the materials the Chair provided to the Committee for this meeting

—*Secretary*

7. The subcommittee's proposal would—

   A. Add a new, fifth sentence to Comment [2] of Rule 1.5, reading, "When using a flat fee a lawyer must provide a written flat fee agreement for all funds received in advance pursuant to paragraph (h)."

   B. Add a new, second sentence to Comment [11] of the rule, reading, "In flat fee agreements, the lawyer must describe when or how portions of the flat fee are earned under paragraph (f)(3) unless none of the fee is earned until all of the services have been provided."

   C. Amend Comment [12] of the rule as follows:

   [12] Advances of unearned fees~~**, including "lump-sum" fees and "flat fees,"**~~ are those funds the client pays for specified legal services that the lawyer has agreed to perform in the future. Pursuant to Rule 1.15, the lawyer must deposit an advance of unearned fees in the lawyer's trust account. The funds may be earned only as the lawyer performs specified legal services or confers benefits on the client as provided for in the written statement of the basis of the fee, if a written statement is required by ~~**Rule 1.5(b)**~~ ***paragraph (b)***. ***Paragraph (h) requires advanced payment under a flat fee agreement to be in writing.*** See also Restatement (Third) of the Law Governing Lawyers §§ 34, 38 (1998). Rule 1.5(f) does not prevent a lawyer from entering into these types of arrangements.

   [*Secretary's Note:* The foregoing corrects a reference to "Paragraph (f)" that was contained in the proposal as stated on page 68 of the materials provided to the Committee for the meeting to "Paragraph (h)." Cohen pointed out the need for that correction in the course of her presentation of the proposal.]

   D. Amend Comments [14] through [16] as follows, including to delete references to "lump-sum fees":

   [14] Alternatively, the lawyer and client may agree to an advance ~~**lump-sum or**~~ flat fee that will be earned in whole or in part based upon the lawyer's completion of specific tasks or the occurrence of specific events, regardless of the precise amount of the lawyer's time involved. For instance, in a criminal defense matter, a lawyer and client may agree that the lawyer earns portions of the advance lump-sum or flat fee upon the lawyer's entry of appearance, initial advisement, review of discovery, preliminary hearing, pretrial conference, disposition hearing, motions hearing, trial, and sentencing. Similarly, in a trusts and estates matter, a lawyer and client may agree that the lawyer earns portions of the ~~**lump-sum or**~~ flat fee upon client consultation, legal research, completing the initial draft of testamentary documents, further client consultation, and completing the final documents.

(continued...)

with reference to fees. And the subcommittee drafted a form of flat fee agreement — Cohen noted that she had previously expressed her own concern about such an undertaking. If the lawyer does not enter into a written flat fee agreement, then, upon non-completion of the undertaking, the lawyer must refund all of the fee; if the written agreement provides for an alternative handling of the fee in the event of non-completion, then the lawyer must comply with the agreement in that event.

The subcommittee proposes five alternative versions of what would be Rule 1.5((h)(1)(e), covering the situation where the lawyer's flat fee agreement does not comply with the terms of the proposed rule, four of which versions are set forth on page 69 of the materials provided to the Committee for the meeting and a fifth which was developed subsequently to the drafting of that proposal. The five alternatives are summarized in the footnote accompanying this text.[8]

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7. (...continued)

> [15] The portions of the ~~**advance lump sum or**~~ ***advanced*** flat fee earned as each such event occurs need not be in equal amounts. However, the fees attributed to each event should reflect a reasonable estimate of the proportionate value of the legal services the lawyer provides in completing each designated event to the anticipated legal services to be provided on the entire matter. ~~**See Rule 1.5(a); *Feiger, Collison & Killmer v. Jones*, 926 P.2d 1244, 1252-53 (Colo. 1996) (client's sophistication is relevant factor).**~~
>
> [16] "[A]n 'engagement retainer fee' is a fee paid, apart from any other compensation, to ensure that a lawyer will be available for the client if required. An engagement retainer must be distinguished from a ~~**lump-sum**~~ ***flat*** fee constituting the entire payment for a lawyer's service in a matter and from an advance payment from which fees will be subtracted ~~**(see § 38, Comment g)**~~. A fee is an engagement retainer only if the lawyer is to be additionally compensated for actual work, if any, performed." Restatement (Third) of the Law Governing Lawyers § 34 Comment e. An engagement retainer fee agreement must comply with Rule 1.5(a), (b), and (g), and should expressly include the amount of the engagement retainer fee, describe the service or benefit that justifies the lawyer's earning the engagement retainer fee, and state that the engagement retainer fee is earned upon receipt. As defined above, an engagement retainer fee will be earned upon receipt because the lawyer provides an immediate benefit to the client, such as forgoing other business opportunities by making the lawyer's services available for a given period of time to the exclusion of other clients or potential clients, or by giving priority to the client's work over other matters.
>
> —*Secretary*

8. The first four alternatives for a Rule 1.5(h)(1)(e), set forth below, are found on page 69 of the materials provided to the Committee for the meeting; the fifth was subsequently developed:

> № 1: Make no provision, omitting such a paragraph altogether;
>
> № 2: "If a flat fee agreement is not in substantial compliance this Rule then it is unenforceable."
>
> № 3: "If a flat fee agreement is not in substantial compliance this Rule and the attorney client relationship is terminated before the representation is completed, the lawyer must refund all fees to the client upon termination. However, nothing in this rule prohibits the lawyer from pursuing recovery in a civil action."
>
> № 4: "If a flat fee agreement is not in substantial compliance with the Flat Fee Agreement form [refer to where from is placed] and the attorney client relationship is terminated before the representation is completed, the lawyer must refund all fees to the client upon termination. However, nothing in this rule prohibits the lawyer from pursuing recovery in a civil action."
>
> № 5: "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."

A member of the subcommittee added that the proposal now refers to a "flat fee agreement" rather than merely characterizing the matter as an "arrangement."[9]

Another member of the subcommittee pointed to the opening phrase of the proposal: "Notwithstanding anything to the contrary in Rule 1.5(b), lawyers may enter into flat fee agreements." But, the member countered, there is nothing contained in Rule 1.5(b) as presently stated that is inconsistent with flat fee agreements, so the opening, conditional phrase is misleading. The present rule's inconsistency lies in its linkage of the requirement for a writing regarding the engagement — the requirement that there be a written communication to the client stating the basis or rate of the fee and expenses — to the situation where "the lawyer has not regularly represented the client." It is not, the member emphasized, controversial that lawyers may charge flat fees, although many lawyers are not aware of that.

A member asked whether, therefore, the opening phrase, "Notwithstanding anything to the contrary in Rule 1.5(b)," could simply be deleted, to leave the sentence reading, "Lawyers may enter into flat fee agreements." The member also proposed amending the prefatory language in proposed Rule 1.5(h)(1) to read, "If a lawyer receives in advance a flat fee or any portion thereof, the basis or rate of fee and expenses shall be shall be communicated to the client in a writing that shall contain the following: . . . ."

That member also suggested that the order of paragraphs (h)(1) and(h)(2) be reversed, so that the proposed definition of "flat fee agreement" now found in paragraph (h)(2) would be moved to the front of the paragraph. Cohen said the subcommittee had considered that or even putting the definition in Rule 1.0 with other definitions.

The member also suggested switching the term from "flat fee agreement" to "flat fee," with the subcommittee's proposed definition of "flat fee agreement" being used for the shortened term and with the word "agreement" being omitted from the term as stated within quotation marks in that definition but being retained in the body of the definition. Her concern was that Rule 1.5(h) as proposed, using the defined term "flat fee agreement," would imply to lawyers that the "agreement" as thus defined could constitute the entire expression of the agreement for the provision of legal services between the lawyer and the client, although it would in fact only cover the fee aspect of that larger agreement and would omit other provisions that are often necessary in the client-lawyer agreement.

In short, the member would narrow the terminology to "flat fee" and narrow the extent of the model form of agreement that would be included with this Rule 1.5(h) to just that provision within the full agreement between a lawyer and a client that deals with the flat fee, implying that there should be more to the full agreement than just a provision for the fee.

In response, Cohen said the text could be amplified to recognize that there are other provisions that a lawyer may wish to include in a full expression of the agreement with the client for legal services. That should not, she said, be controversial.

A member spoke in agreement with this, stating that defining a "flat fee" is sufficient for the proposal's purposes; it need not define "flat fee agreement." But the member wondered whether the proposal is robust enough to encompass a tiered flat-fee agreement, such as $X for the filing of a

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9. The Committee considered the terminology "flat fee arrangement" and "flat fee agreement" at some length at its forty-fourth meeting, on July 22, 2016, determining then to use the word "agreement" instead of "arrangement." —*Secretary*

complaint, $Y more for the discovery process, and $Z more for a trial. Cohen responded that the proposed text is sufficient to cover all of that. The member said that what confused him was the word "effort" in the definitional phrase "regardless of the time or effort involved or the result obtained" — he was not confused by the reference to "time" but by the reference to "effort."

To that, a member of the subcommittee said the word "effort" had been lifted from the contingency fee rules, for parallelism.

Cohen said that both time and effort are at issue: A skilled lawyer familiar with a field of law might be able to accomplish a matter in much shorter time but to the same effect as one less competent. So it is appropriate to include both concepts in the definition.

As to the initial clause, "Notwithstanding anything to the contrary . . . ," Cohen agreed with the previous comment and found it to be unnecessary.

The member who had made the suggestion that the term be shortened to "flat fee" pointed out that elimination of the word "agreement" in that phrase would permit omission of any reference to an "agreement" elsewhere in the proposal. She added that she was aware that some members were of the view that Rule 1.5 should openly recognize that lawyers necessarily have agreements — contracts — with their clients, whether written or unwritten, expressed or implied.

A member who had not previously spoken to the proposal agreed with its requirement that the agreement for a flat fee be stated in writing if any part of the fee is to be paid in advance of service. Lawyers should not be misled into believing that there need be no agreement for that and thus no need for a writing. He thus approved of the requirement that, if any part of the fee is paid in advance of service, the agreement for the flat fee "shall be in writing and shall contain . . . ." Cohen said she agreed with that.

Another member, who had been on the subcommittee but had not previously spoken to the proposal, asked whether, if the representation were terminated before completion of the services, the client would pay for the services actually rendered at an hourly rate for the time accrued in performing those services. In her view, the rule should make it clear that the fees accrued on the basis of time in that situation could not exceed the agreed-upon flat fee for those services. She noted that there might be cases in which the lawyer would find that the flat fee arrangement gave a lower fee than would otherwise have been earned on a per-time basis. All agreed, she said, that this was an omission in the proposal that should be rectified.

Cohen said the subcommittee had not considered the alternative of proposing that no change be made to the Rules to deal with flat fees — the subcommittee felt that the "ship had sailed" on that matter, so that some provision would be added.

Cohen agreed that the language could be changed from "flat fee agreement" to "flat fee for legal services."

A member noted that some useful commentary about Rule 1.5(b) could get lost in this revision if care were not taken, such as the matter of timing of the required communication about the basis or rate of fees and expenses, applicable in all cases whether or not involving flat fees. If this proposal is to be a statement of how the requirement of Rule 1.5(b) — that the basis or rate of fee and expenses is to be stated in writing in connection with an engagement for a client with whom there has not been a regular representation — is to be satisfied in the case of a flat fee, then that must be carefully done. In short, the

proposed addition of Rule 1.5(h) must be clear that it applies only to the flat fee and does not alter the existing requirements of Rule 1.5(b), which are of general application.

To that, Cohen said that, if there is to be a new application of proposed Rule 1.5(h) upon each new engagement for an existing client — one who has been regularly represented by the lawyer — under flat fee agreements, then that requirement should be expressed in the added text. Looking at the second sentence of existing Rule 1.5(b) — "Any changes in the basis or rate of the fee or expenses shall also be promptly communicated to the client, in writing" — that sentence continues to apply to a flat fee agreement; the lawyer cannot change the flat fee structure, after commencement of the representation, except pursuant to a clear agreement with the client that provides for such change.

A member noted that the matter is not unlike the question of what services an hourly fee covers — what services the lawyer has undertaken to provide and the client has undertaken to pay for. In a water law case, she added, the scope of services is often in question. The scope of services can likewise be a concern in a flat fee structure.

A member who had not previously spoken to the proposal said he had little experience with flat fees but was concerned about the injection of the flat fee concept into Rule 1.5 as the proposal would do, concerned about the implications of such specificity about flat fees on the nature of the agreement that the lawyer must express in the different situation of an hourly fee or other fee structure. Lawyers are familiar with legal service agreements — and he stressed that they are indeed agreements — that can be several pages long and cover such details of the client-lawyer engagement as who is burdened with keeping copies of documents and for how long, what personnel will be utilized to perform the services, and, more fundamentally, what are the services that are to be performed and for whom are they to be performed: who is the client? The proposal seems to create a stepchild agreement, implying that the lawyer can in other engagements forego stating the usual details of well-crafted engagement agreements, as the rule would imply that "agreements" are needed only if the lawyer is using a flat fee structure — with those agreements needing to be in writing only if any portion of the agreed flat fee were to be taken in advance of performance of the services.

In short, this member added, the discussion has been too focused on the flat-fee aspect of the lawyer's agreement with the client; Rule 1.5 should recognize the complexity of the client-lawyer relationship — in particular the scope of the legal services that are to be provided by the lawyer and the identity of the client or clients for whom they will be provided. He suggested that this proposal be scrapped and an effort be made to change Rule 1.5 to deal more fully and appropriately with the entire agreement that lies, in fact and law, between the lawyer and the client.

Another member who had not previously spoken to the proposal concurred with those remarks, pointing out that, despite the present Rule's studied avoidance of the term "agreement" or "contract," a lawyer has a contract with the client for the rendering of services, whether expressed or implied, oral or in writing. There is a contract that Professor Corbin would recognize and that is susceptible of analysis under familiar principles of contract law. In particular, there is some agreement, expressed or implied, about what services are to be provided and for whom, although the scope of those services may be left to contention if not clearly expressed at the outset.

Cohen acknowledged that the text of Colorado's Rule 1.5(b) — "When the lawyer has not regularly represented the client, the basis or rate of the fee and expenses shall be communicated to the client, in writing, before or within a reasonable time after commencing the representation" — is an anomaly among the states. But, she added, too many states have many and complex rules governing what must be included in the lawyer's agreement with the client, rules that may lead to discipline if the lawyer does not comply with them. She asked whether lawyers are to become like doctors, with lengthy

agreements filled with protective provisions. And, she added, if the rule is amended to require complexity in agreements for legal services, that will magnify the cost of obtaining those services.

A member pointed out that this question has come before the Committee on the inquiry of Steven Jacobson, as chair of the Attorney Regulation Committee.[10] That committee, Jacobson had noted in his letter of inquiry, sees many problems arising because lawyers cannot write effective flat fee agreements. And the inquiry came after the issuance of the *Gilbert*[11] case, in which, the member said, the Supreme Court specifically asked this Committee for a rule governing flat fees. If this Committee were to determine that there should be no rule covering flat fees and the possibility of termination of the relationship before completion of the contemplated services, *Gilbert* would remain the authority for the matter — and it does not provide satisfactory answers.

To those comments, Cohen replied that it had become clear to her, from the Committee's discussion, that the Committee thinks there should a rule speaking to flat fees, and she liked the changes that had been proposed during the course of the discussion.

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10. The letter from Steven K. Jacobson, chair of the Supreme Court Attorney Advisory Committee, to Marcy G. Glenn was included in the materials the Chair provided for the fortieth meeting of the Committee, on June 6, 2015, beginning at p. 152 of those materials. The letter included the following:

> The ARC believes that minimal standards would require all fee agreements to include provisions addressing the following (some of which are already in various rules or established by case law):
>
> a. The base and rate of the fee.
>
> b. That fixed/flat fees agreements must specify the benefits conferred on the client or specify the legal services performed in order for the fees to be earned.
>
> c. The prohibition of the earning of fees deemed to be engagement or signing fees in circumstances where the lawyer is being hired to represent the client on an already identified matter versus being available for matters to be identified in the future.
>
> d. That unearned non-fixed fees will be held in trust until such time as they are considered earned pursuant to a described billing period.
>
> e. That unearned fixed/flat fees will be held in trust until such time as the occurrence of benchmarks/milestones relating to the nature of the case involved. These benchmarks, might include for example, the movement from one stage of legal proceedings to another.
>
> f. Provisions for the refunding of unearned fees, including a clear statement that a fee agreement may not contain provisions providing for nonrefundable fees and nonrefundable retainers.
>
> g. Provisions detailing the client's and lawyer's rights to terminate the representation and a statement addressing the basis and rate at which any fixed/flat fees held in trust will be distributed. (See Matter of Gilbert, --- P.3d ----, 2015 WL 1608818, 2015 CO 22, Colo., April 06, 2015 (NO. 13SA254).
>
> h. Provisions addressing if, how and when a lawyer may change the fee during the course of the representation.
>
> i. Provisions addressing how expenses incurred during the representation will be handled.
>
> j. Provisions relating to how fees and communications will be handled when the fee is to be paid by a person other than the client.
>
> k. Provisions addressing ownership of "the file".
>
> —*Secretary*

11. *In re Gilbert*, 346 P.3d 1018 (Colo. 2015).

The Chair suggested that the available options included adding text regarding flat fees or considering fuller text that recognized the existence of an "agreement" between the lawyer and the client and made for a fuller overhaul of Rule 1.5(b). But those options would leave unconsidered Jacobson's broader inquiry from the Advisory Committee, which remains on the table and refers to more than just flat fees.

Cohen responded that her sense was that the subcommittee should draft a form of flat fee agreement for the Committee to review.

The chair commented that no member appeared to want the Committee to take no action on the flat fee matter. Two members spoke to contradict her by noting that at least one member — not them — had expressed the view that there should be no rule amendment dealing with flat fees. Cohen responded that she had always understood the Committee at large wanted a draft for consideration.

The Chair asked that the Committee be prepared to continue the conversation at its next meeting.

A member noted that one of the Committee members who had an extensive practice in the field of criminal defense had been on the subcommittee and had provided valuable input on the question in prior meetings but was not present at this meeting. A member of the subcommittee added that the member to whom reference had just been made had been active in the subcommittee's deliberations.

Another member of the subcommittee noted that yet another member of that subcommittee, who handled small claims matters, had also been valuable to the subcommittee's deliberations but also was not present at this meeting to speak to the matter.

Yet another member said he sees lawyers who handle flat fee billing arrangements correctly and those who do not. He, too, thought it would be useful for the Committee to continue its consideration when these absent members could be present to provide their input.

Cohen suggested that the Committee could refine a proposed Rule 1.5(h) and circulate it among the criminal defense bar and other practitioners who commonly employ flat fee billing arrangements for their reviews, before the Committee finalized and forwarded a proposal to the Court. The submittal to those groups and practitioners might contain the proposal and provide, as alternatives, amendments such as had been proposed at this meeting or that there be no rule.

A member who had not previously spoken to the proposal reminded the Committee that, while the proposal has merit, Cohen had pointed out the flipside: A specific rule could be the basis for discipline. He suggested, as an alternative, flipping that structure upside down by defining *inappropriate* flat fee arrangements and providing that a lawyer could be disciplined for employing such arrangements. He added that the contingency fee provisions of C.R.C.P. 23.3 are incorporated into the Rules of Professional Conduct by Rule 1.5(c) and thus can serve as a basis for discipline if violated.

To that, Cohen responded that the subcommittee had felt that the matters contained in its proposal were matters that should be *included* in agreements for flat fees; it was for that reason, and to enhance flexibility in that context, that the subcommittee included alternatives. Most of the subcommittee members had not favored the third and fourth alternatives for noncompliant arrangements — refunding all fees upon termination of services before completion, under a noncompliant arrangement — viewing that drastic result as inequitable. She said that left the first (no provision addressing noncompliance), second (a noncompliant flat fee agreement is "unenforceable"), and fifth (disputed fees shall be kept separate until the dispute is resolved) alternatives.

A member who had been a member of the subcommittee pointedly expressed his belief that this Committee would never achieve consensus on what should happen in the case of a noncompliant flat fee agreement.

Another member said she liked the fifth alternative, and she asked whether it would be included among the formally presented alternatives. Cohen and her co-chair, James S. Sudler, responded that it would be included.

In response to the suggestion that the proposal be altered to a list of what is inappropriate for flat fees, a member noted that lawyers are already subject to discipline if they use fee arrangements that violate the strictures of Rule 1.5. What they need, he said, is both an affirmative rule and a form for such arrangements — a form that is not offered as a complete form for the agreement for legal services between a lawyer and a client but only for the flat fee portion of such an agreement. The Rule and its accompanying form can make it clear that the form is not intended to be a full expression of the client-lawyer agreement for professional services.

The member continued by saying that, when the Court developed the contingency fee rules of Chapter 23.3, C.R.C.P, it considered the public's interest when it recognized a need for properly constructed contingent fee agreements. His feeling is that the Court has, likewise in this matter of flat fees, done the same thing. For that reason, the subcommittee tracked the contingent fee rules in drafting this proposal. It is now essential that the Committee tweak the proposal and provide alternatives for handling noncompliant arrangements; he noted that the contingency fee rules provide for noncompliant agreements. This member would send the proposal back to the subcommittee for further work in light of the discussion at this meeting.

A member interjected that the Committee has before it the idea of circulating this work product, with some refinement, to the criminal defense bar and other practitioners who use flat fee arrangements. Another member's proposal to send the matter to the Colorado Bar Association Ethics Committee was rejected for fear that it would take too long to receive a response.

A member who was not a member of the subcommittee opened his comment by noting that his thought might be outlandish. But, following on the references to the contingency fee rules, he pointed out that Colorado is one of the few jurisdictions that does not require lawyers to have fee agreements with their clients for legal services. As has been noted a number of times, our Rule 1.5(b) requires only that "the basis or rate of the fee and expenses . . . be communicated to the client, in writing," and it requires even that only when the lawyer has not "regularly represented the client." The Rules do not state what ordinarily would be included in a fee agreement, as Rule 23.3 does for the special case of the contingent fee. The member proposed that the subcommittee give a comprehensive review of how fees may be calculated, including the possibility of abandoning our Rule 1.5(b) and adopting the American Bar Association model rule.[12] He added that earlier references to multi-page engagement agreements fortified his idea that we need to provide for such agreements, but our rules presently give no guidance to their content and contain no forms. In his experience as a lawyer defending lawyers, many malpractice

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12. Rule 1.5(b) of the American Bar Association Model Rules of Professional Conduct reads—

> (b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.

—Secretary

actions have arisen in the context of inadequate engagement agreements, failing to cover matters such as who shall be responsible for retaining documents generated in the course of the representation.

To that, a member challenged the view that the ABA version of Rule 1.5 contains a requirement for a written agreement, requires anything beyond the statement of the basis or rate of fees and expenses and, she noted, the scope of the engagement. The member responded that he sees, in the ABA model text, an innuendo of a fuller agreement than is implied by the Colorado text.

The Chair proposed that those members who would consider a fuller statement, within Rule 1.5, of the minimum content of a proper agreement between lawyer and client for legal services get together and make such a proposal to the Committee for it to consider at its next meeting. She suggested that they consider rules in other jurisdictions that may have done that. But, for now, she asked that the Committee continue, at least, consideration of additional Rule text governing flat fees.

VIII. *Adjournment; Next Scheduled Meeting.*

The Chair determined to defer the new business that had been identified in the agenda for the meeting. She said that the next meeting would be on February 24, 2017, with January 20, 2017, being an alternative date. She would communicate the selected date by email to the Committee.

The meeting adjourned at approximately 12:05 p.m. The next scheduled meeting of the Committee will be on Friday, February 24, 2017, 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-seventh meeting, on June 16, 2017.]