COLORADO SUPREME COURT

Standing Committee on Rules of Professional Conduct

Approved Minutes of Meeting of the Full Committee
On April 29, 2016
(Forty-Third Meeting of the Full Committee)

The forty-third meeting of the Colorado Supreme Court Standing Committee on the Rules of Professional Conduct was convened at 9:00 a.m. on Friday, April 29, 2016, 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 Justice Màrquez and members Federico Alvarez, Judge Michael Berger, Helen Berkman, Gary Blum, Nancy Cohen, Cynthia Covell, Jim Coyle, John Haried, Dave Little, Judge Bill Lucero, Judge Ruthanne Polidori, Alec Rothrock, Matt Samuelson, Marcus Squarrell, David Stark, Jamie Sudler, Eli Wald, Lisa Wayne, and Judge John Webb. Also present were Melissa Meirink, Supreme Court Staff Attorney, Diana Poole, Executive Director of COLTAF, and Courtney Shephard, attorney with Burns, Figa & Will, P.C.

Present by conference telephone were members Tuck Young, Tom Downey and Dick Reeve.

Justice Coats and Boston Stanton were excused.

Introductions.

The chair introduced guests Diana Poole, Executive Director of COLTAF, and Courtney Shephard, attorney with Burns, Figa & Will, P.C.

1. Meeting materials; Minutes of January 29, 2016 meeting.

The Chair had provided a package of material and the minutes of the January 29, 2016 meeting to the members prior to the meeting date. The minutes of the January 29, 2016 meeting were approved.

2. Report re ABA Ethics 20/20 and other amendments approved April 7, 2016; outreach.

The Chair reported that the Ethics 20/20 rule amendments, as well as the others submitted, were approved by the Supreme Court on April 7, 2016, effective immediately. She asked if the Committee should plan some educational outreach, as was done after the extensive 2008 rule revisions. Jamie Sudler stated that he had made a presentation to the Larimer County Bar Association, and Judge Taubman had presented at the CBA Ethics Committee. Jim Coyle offered to put a taped presentation on the OARC website. The Chair stated that this was not a matter that needed to be voted on. The Committee decided that Marcy Glenn, Dave Stark and Jamie Sudler would make a presentation through the CBA and that they would attempt to have it taped for the OARC website. Matt Samuelson thinks CLE credit can be obtained. The Committee also decided that someone (maybe Alec Rothrock) should write an article for *The Colorado Lawyer*.

3. Fee Subcommittee.

Jamie Sudler reported that he had authored the memo provided to the Committee; it is not a report of the fee subcommittee. Following the January 2016 meeting, Jamie concluded it was necessary to provide background from OARC's perspective, as flat fee contracts are a big problem for OARC. Fee issuet seq. represent about 11% of intake issues, and a significant percentage of the complaints that result in discipline or diversion.

The subcommittee is in agreement with the proposed rule sections (a) and (b), which define a "flat fee," require a written fee agreement, and state what must be contained in the flat fee agreement. The key area of disagreement on the subcommittee is the consequence of not meeting the requirements of the rule for the flat fee agreement and termination of the attorney before completion of the representation. Options are: (1) there would be no stated consequences for noncompliance; (2) the non-complying agreement would be unenforceable (like a non-complying contingent fee agreement); (3) the attorney would be required to return all amounts paid and to seek recovery in quantum meruit; or (4) unless the attorney substantially complied with the form (as opposed to the rule), the attorney would be required to refund fees and seek quantum meruit recovery. OARC's concern is that attorneys need to know what they must do and the *Gilbert* case doesn't give guidance. OARC favors option (3).

A member stated that the 11% figure for fee-related intake issues includes requests for investigation that do not necessarily have to do with flat fees. A distinction should be made between flat fees that are not deposited into trust accounts, as they should be, and flat fee agreements that are not written. (It is already a rule violation if the rate and basis of the fee are not disclosed in writing.) Those are different issues. With regard to option (3), if 95% of the work has been done, it is problematic to require an attorney to return the entire fee and seek quantum meruit recovery. Balance should be considered. This member also noted that the subcommittee did not discuss termination with or without cause, or Ethics Opinion 100 (conversion clauses), which are relevant with respect to the contingent fee rule. This member does not believe that cause should be a factor in a flat fee rule. She does not favor including a subparagraph (c) and supports Version 1 that does not include any language regarding the consequences of non-compliance. Although there are vulnerable clients, this is not always the case, and the consequences provisions could create a windfall for some clients.

Another member noted that subparagraph (c) simply encourages attorneys to draft an appropriate fee agreement. The first member replied that this could always be said, and OARC already has the power to discipline an attorney for a violation of subparagraph (a) or (b). However, including subparagraph (c) prevents the lawyer from seeking a declaratory judgment.

Jamie Sudler asked what advice could be given to attorneys in the absence of subparagraph (c).

Another member stated that you can tell lawyers to put aside disputed funds until the matter is resolved, per Rule 1.15(c). This member thinks that subparagraph (c) may be workable depending on the language. He acknowledged the difficulty of setting milestones, and stated that subparagraph (c) should include language about substantial good faith compliance.

Another member stated that she would like to hear from members who have a criminal defense practice, and whether subparagraph (c) will discourage flat fees. A member with a criminal defense practice replied that subparagraph (c) is problematic because it is not always possible to anticipate the direction a case will take. She did not know whether including subparagraph (c) would limit access to justice in small cases like misdemeanors.

A member stated that we do not need a new rule; we need clarification of the issues in the *Gilbert* case, where the lawyer had a flat fee agreement without milestones, and was terminated. The "Sather comments" to Rule 1.5 (Comments 10 – 15) already address milestones, but not termination. The member believes there should be two comments: (1) unless the lawyer has a written fee agreement with milestones, the lawyer may not transfer any of the flat fee from the trust account to the operating account until the entire representation is completed; and (2) if the lawyer does not have a written fee agreement with milestones and is terminated before completion of the representation, the lawyer must return the portion that was indisputably not earned as of termination, and must keep the amount believed to have been earned in trust as "disputed." The lawyer must then proceed proactively to seek resolution. The member thinks (2) is what the *Gilbert* case says, both in the majority and dissenting opinions. He recommends comments similar to the Rule 1.15 comments regarding third party funds. He does not think flat fees are as controversial and problematic as contingent fees; the attorney doesn't have a stake in the case.

Jamie Sudler said that the Supreme Court is clear that comments are not enforceable, so OARC wants a rule. Putting disputed funds in trust gives the power over the funds to the lawyer, and could prejudice the client who may need them to carry on the case with new counsel.

A member stated that he is now leaning toward support for the rule. Many lawyers and clients don't understand flat fee agreements. A lawyer will likely violate the rule only once. Although some lawyers may stop accepting flat fee cases, the rule addresses a problem with a solution that is not too onerous.

Another member did not support subparagraph (c) in its present form. It is too one-sided in favor of the client. If the lawyer terminates the relationship, the lawyer should return all the fees, but this should not automatically be required if the client terminates the relationship.

A member asked who would determine if an agreement is in "substantial compliance" with the rule. Jamie said it would be OARC if a grievance is filed. The member asked what happens if the attorney thinks the fee agreement is compliant, and gets terminated. Can the lawyer retain what he/she has earned so far? Jamie said "yes," if the lawyer thinks the fee agreement is in substantial compliance. But the lawyer could still end up being subjected to a grievance or become involved in a fee arbitration proceeding.

Another member expressed concern about the arbitration provision in the model flat fee agreement. The Supreme Court has never said that a lawyer can force a client to waive the right to trial and use arbitration instead. The Chair stated that the Committee would return to that issue later.

Another member said that the form, if not in the rule, would not be enforceable. He noted that we rely heavily on comments in Colorado. If we take the position that comments are nothing, we'll need to do a lot of work on the rules, and may need to have rules for all sorts of fee arrangements. The member is persuaded that the burden of lack of clarity should be borne by the lawyer.

A member would like to see a comment that combines the milestone concept (no payment until the end of the engagement if fee agreement doesn't set milestones) and the requirement to segregate the disputed portion of the fee until the dispute is resolved. The member would like to see actual comment language before the Committee votes.

The Chair could not think of another rule that limits lawyers' legal remedies. The rules should give lawyers ethical guidance. If we have subparagraphs (a) and (b), an attorney could be disciplined, and could face malpractice liability and fee forfeiture. If we take one more step by including subparagraph (c), we would also say the lawyer's only remedy is a quantum meruit claim. Does Colorado have other rules that operate this way? Do other states?

The Chair noted that there is a range of options available to the Committee: do nothing; suggest to the Court that this subject belongs elsewhere in the rules (like the contingent fee rule); or prepare a comment to the rule. The Chair agrees with Jamie that if only a comment is added, there is no direction for what to do with an attorney whose fee agreement is not consistent with a comment. The Chair is okay with a rule, either in the Rules of Professional Conduct or elsewhere. She does not like subparagraph (c). It addresses two issues: retention of money and limitation of a lawyer's remedy to quantum meruit. It is unclear what goes into trust: the disputed portion or the entire fee? How does the lawyer know what to put into trust? If the lawyer has a $10,000 fee and thinks he/she has done $3,000 of work – the whole fee goes into trust, and gets distributed when the dispute is resolved.

Another member disagrees that subparagraph (c) limits the lawyer's remedies.

The Chair said she had reread *Gilbert*. Nothing in the rules currently requires milestones. Subparagraphs (a) and (b) address that. The Supreme Court didn't ask about subparagraph (c). Jamie agreed that the *Gilbert* majority's comment sought clarification regarding including a milestone requirement in the rule.

Another member pointed out that the contingent fee rule, incorporated in Rule 1.5, limits remedies by requiring the fee agreement to comply with the contingent fee rule (which says a defective contingent fee agreement cannot be enforced.) He noted that subparagraph (c) comes into play only if the lawyer's fee agreement does not substantially comply with the rule. The lawyer can avoid the problem by drafting the fee agreement correctly. It is not right to think of this as bargaining between a lawyer and client – lawyers are in the stronger position.

A member noted that in no other profession is the professional's license jeopardized if the client is overcharged. The member noted a recent Supreme Court opinion by Justice Hobbs on contingent fees and how they are to be divided. The member believes it is one of the worst opinions he's seen. It will take lawyers away from representing clients, and require them to focus instead on what happens if a firm splits up. This member does not think a lawyer is in a position of power if he/she has to refund fees. The member doesn't think the Supreme Court understands the real world of fees, and favors a comment. He believes if you have a rule that requires compliance with subparagraphs (a) and (b), (c) shouldn't come into play, but subparagraph (c) imposes a huge burden on the lawyer who gets the fee agreement wrong. He thinks subparagraph (c) is inappropriate and not needed.

OARC asserts that a lawyer's license isn't in danger if the requirements of the rule are met.

Another member explained that in a real world situation in a criminal practice, the lawyer often has to hit the ground running. For example, a client who is the target of a criminal investigation may need immediate representation. The lawyer may get the fee agreement in place after the immediate work is done, and the client doesn't want to pay. It is not unusual to take a couple of weeks to get the fee agreement in place, but the client typically wants to know the maximum fee, so flat fee agreements are pretty common. Meanwhile, if the lawyer has money in trust, he/she can't draw on it until the fee agreement is in place.

A member read from *Gilbert*, and said that if the Committee is going to propose a rule, Rule 1.5 regarding a first-time fee agreement should be reviewed, the commentary on *Sather* in Rule 1.5 should be cross-referenced, and any form agreement should be carefully vetted. None of this has been done.

The Chair reviewed footnote 12 in *Gilbert*, which states that clarifying amendments to Rule 1.5(f) may be warranted. The Chair believes this references the need for milestones. OARC's approach could leave the client in the very position OARC is trying to avoid – the attorney makes a decision to retain the fee and can do so as long as the attorney "checks the boxes" and includes milestones. The lawyer is still deciding independently if the milestones have been met. Jamie stated that if the lawyer makes a good faith effort to defend the milestones, he/she should be protected.

A member asked who is the typical client in a flat fee case. Affluent client as in the criminal defense example? The less affluent client in Jamie's example? Jamie stated that typical flat fee cases are consumer bankruptcy and criminal cases, mostly state misdemeanors. Jim Coyle stated that wealthy clients don't use the OARC grievance system.

In a straw vote, the Committee voted 14-7 against including subparagraph (c).

The Committee then discussed placement of subparagraphs (a) and (b). A member suggested the Committee should propose something like the contingency fee rule. He expressed concern about putting the Committee in the position of identifying milestones. Having subparagraphs (a) and (b) as rule requirements means that the safest course of action in the event of a dispute is to give back the fee, but seems unfair to the terminated lawyer who may have gotten sideways with the client for any number of reasons. Another member said it would be a mistake for this Committee to dump the rule-drafting onto the Civil Rules Committee, which doesn't have the expertise to deal with the ethical issues. Another member suggested that this Committee could work with the Civil Rules Committee as it did with Rule 265.

A member asked for the definition of a "flat fee" and how it differed from a "fixed fee." Another member noted that these terms seem to be used interchangeably and inconsistently, but should not be. A "fixed fee" is, for example, "$200/hour but not to exceed $25,000."

With regard to placement of subparagraphs (a) and (b), the Committee voted in a straw vote as follows: three members voted to place in Rule 1.5 itself; eight members voted to place in a new Rule of Civil Procedure (200 series) to be incorporated into Rule 1.5; six members voted for a comment only; and one member voted to have nothing at all. The subcommittee was directed to draft a new Rule of Civil Procedure to be incorporated in Rule 1.5; members were urged to email the subcommittee co-chairs with suggested accompanying comment language.

4. Orphaned COLTAF Funds.

A member provided the subcommittee report. Orphaned COLTAF funds are either funds in a trust account that belong to a client who has disappeared or are unidentified. Ethics Opinion 95 advises turning these funds over to the State under the Unclaimed Property Act. The Act now exempts COLTAF funds, so the lawyer no longer has that option. The subcommittee proposed new Rule 1.15B(k), a new Comment [7] to Rule 1.15, and new Rule 1.15D(a)(1)(C). The member explained these changes, which allow lawyers to either continue to hold orphaned funds in their trust accounts or give them to COLTAF under certain circumstances. Rule 1.15D(a)(1)(C) addresses remitting the orphaned funds to COLTAF and obtaining a refund if the

client later surfaces. The comment also addresses what happens if a lawyer dies with orphaned funds in a trust account, but that is problematic because the rules don't apply to non-lawyers, and a non-lawyer may administer a deceased lawyer's trust account.

Jamie stated that this is a very important issue about which OARC fields calls routinely. Diana Poole stated that COLTAF supports the rule and comments drafted by the subcommittee. COLTAF will reserve some percentage of its funds against claims from reappearing clients, and will watch what happens for a few years to see what sort of claim history emerges.

The rule does not provide immunity to the lawyer who follows the new rules; the subcommittee determined that this cannot be done in a rule of professional conduct.

The Committee voted unanimously to approve the rule and comment with some minor corrections. Courtney Shephard was commended for her research and writing assistance to the subcommittee.

5. New Business.

a. Proposed Amendment to Rule 1.6 Comments

Attorney General Cynthia Coffman has requested a new or amended comment to Rule 1.6 to address release of information regarding legal fees incurred by public entities. Justice Màrquez explained that this request is an outgrowth of concerns by the Access to Justice Commission about a Chief Justice Directive regarding public access to judicial records, which does not include access to court administrative records. During and after the *Holmes* case (Aurora theater shooting), the State Public Defender's office refused to release its fee and cost records, citing Rule 1.6. There is no clear answer to the scope of Rule 1.6; and courts cannot answer the question.

Members commented that if a subcommittee is formed, it should include public defenders and local government attorneys, who also face this issue. A member cautioned against the Committee getting in the middle of cross-fire between the district attorneys and public defenders, and noted that the media can always file lawsuits seeking information. Other members noted that this is not just an issue between district attorneys and public defenders, and the Colorado attorney general has requested guidance. A subcommittee was authorized, with Jamie Sudler as Chair. [After the meeting, and with the Chair's approval, Dave Stark agreed to chair the subcommittee in Jamie Sudler's stead, and Jamie Sudler agreed to serve as a member of the subcommittee.]

b. Proposed amendment to ABA Model Rule 8.4 and Comment [3]

The Chair reported that the ABA wants to move Comment [3] (regarding lawyer manifesting bias or prejudice) into Rule 8.4. The Colorado rule already addresses this, but not in the way the ABA is proposing. The Chair's report is provided for informational purposes; the Committee will wait to see what the ABA does.

New OARC Website.

Jim Coyle presented the new OARC website, which has a lot more content, and is intended to be more focused on the Preamble to the CRPC.

Advertising Rules.

Jim Coyle reported that he had served as the liaison to the National Organization of Bar Counsel on a subcommittee of the Association of Professional Responsibility Lawyers (APRL) that has proposed simplified rules related to the "Series 7" issues, *i.e.*, advertising, solicitation, referrals, and other marketing issues. The proposed rules are intended to provide simplicity and consistency to allow lawyers to compete in an era of social media. He previously provided to the Chair APRL's initial report, issued on June 22, 2015, and the Chair distributed that report to the Committee as part of the materials for the Committee's October 16, 2015 meeting. He will provide the APRL supplemental report dated April 26, 2016 to the Chair for distribution.

Administrative Matters

Next meeting date: July 15, 22 or 29. The Chair will schedule by email.

Meeting adjourned at 11:44 a.m.

These minutes, taken by Acting Secretary Cynthia F. Covell, are as approved at the forty-fourth meeting of the Committee, on July 22. 2016. . . . . *Anthony van Westrum, Secretary*