COLORADO SUPREME COURT

STANDING COMMITTEE ON THE RULES OF PROFESSIONAL CONDUCT

Approved Minutes of Meeting of the Full Committee
On January 29, 2016
(Forty-Second Meeting of the Full Committee)

The forty-second meeting of the Colorado Supreme Court Standing Committee on the Rules of Professional Conduct was convened at 9:00 a.m. on Friday, January 29, 2016, by Chair Marcy G. Glenn. The meeting was held in the Court of Appeals Full Court Conference Room on the third floor of the Ralph L. Carr Colorado Justice Center.

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

I. *Meeting Materials; Minutes of October 16,2015 Meeting.*

The Chair had provided a package of materials to the members prior to the meeting date, including submitted minutes of the forty-first meeting of the Committee, held on October 16,2015. Those minutes were approved with one correction.

II. *Housekeeping Changes.*

The Chair directed the Committee's attention to her email to the Committee on November 21, 2015, which she had attached beginning on the thirteenth page of the materials accompanying the notice of this meeting. In that email, she noted that, at its forty-first meeting,[1] the Committee had approved the recommendation, to the Court, of certain housekeeping changes but had deferred, to a subsequent meeting, action with respect to proposals involving the use of words such as "telephonic" and "electronic." In her email, the Chair suggested that the Committee should await a report from its ABA 20-20 subcommittee with respect to those proposals.

The Chair's email also noted that, following the Committee's forty-first meeting, Catherine Sue Shea, an Assistant Regulation Counsel, had identified an error in the Committee's proposed Comment [18] to revised Rule 1.6, where the phrasing would be [emphases added] "Paragraph (c) requires a lawyer *to make reasonable measures* to safeguard information"; Ms Shea had noted that the referenced text in the actual rule would read, "A lawyer shall *make reasonable efforts* to prevent the inadvertent or unauthorized disclosure . . ."; and she suggested the comment be modified either to read, "Paragraph (c) requires a lawyer to take reasonable measures . . ." or "Paragraph (c) requires a lawyer to make reasonable efforts. . . ." After discussion the Committee approved the latter phrasing.

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1. *See* Part VIII of the minutes for the forty-first meeting of the Committee, held on October 16, 2015,

As the Chair's November 21, 2015 email explained, at its forty-first meeting the Committee had approved a proposed model for pro bono legal services by in-house law departments, to be placed after the existing model for lawyers in private practice, which is found after Rule 6.1 itself. But, while it generally approved of a proposed comment related to pro bono legal services by governmental lawyers as well, the Committee had seen a need for some further refinement of that comment before it was adopted. The Chair's email reported that she and member David Stark had subsequently made those refinements and were now circulating the results of their efforts for Committee approval. Their proposal read—

> Government organizations are encouraged to adopt pro bono policies at their discretion. Individual government attorneys should provide pro bono legal services in accordance with their respective organization's internal rules and policies. For further information, see the Colorado Bar Association Voluntary Pro Bono Public Service Policy for Government Attorneys, Suggested Program Guidelines, 29 *Colorado Lawyer* 79 (July 2000).

—and they suggested that the comment be made Comment [8A] to Rule 6.1. The Committee now approved the proposed comment and that numbering.

A member noted that Comment [8] to Rule 1.5, which reads [emphases added], "Paragraph *(e)* [of this Rule 1.5] does not prohibit or regulate division of fees to be received in the future for work done when lawyers were previously associated in a law firm," should refer, instead, to Paragraph *(d)* of Rule 1.5, which is where the provisions regarding the division of fees among lawyers who are not in the same law firm is located in the Colorado Rules — the provision being located in 1.5*(e)* of the American Bar Association Model Rules of Professional Conduct. The Chair recalled that the Committee had previously noted the erroneous reference; perhaps it had not actually recommended a correction to the Court.[2] The Committee now approved recommending to the Court that the reference to "Paragraph (e)" in Comment [8] to Rule 1.5 be corrected to "Paragraph (d)".

With the accomplishment of those approvals, the Chair said she would now forward all the housekeeping changes to the Court for its consideration.

III. A.L.L. *Subcommittee and Possible Amendment to Comment [3] of Rule 3.1.*

The Chair introduced the topic of the *A.L.L.* case[3] and an amendment to Comment [3] of Rule 3.1 by remarking that the matter was being brought back to the Committee notwithstanding the Committee's decision, at its forty-first meeting, to amend the comment to add a second sentence referencing the *A.L.L.* case, so that the entire comment would read as follows:

> [3] The lawyer's obligations under this Rule are subordinate to federal or state constitutional law that entitles a defendant in a criminal matter to the assistance of counsel in presenting a claim or contention that otherwise would be prohibited by this Rule. As to

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2. *But see* the Committee's discussion in Part III.F of the minutes of its thirty-ninth meeting, on March 14, 2014, when it noted the need to correct the erroneous references to Rule 1.5(*e*), to make them references to Rule 1.5(*d*), both in Comment [7] and in Comment [8] to Rule 1.5. *And see* the Chair's November 21, 2015 email referenced above in the body of these minutes; the materials containing the Committee's recommendations to the Court, as presented by the Chair at the Court's hearing on November 4, 2015 (and attached to the Chair's November 21, 2015 email), included recommendations to correct the erroneous references to Paragraph 1.5(e) in both Comment [7] and Comment [8] to Rule 1.5. *Compare* the discussions at Part III.D and Part III.E of the minutes of the twenty-first meeting of the Committee, on August 21, 2008, when the Committee corrected similar erroneous references in Comment [5] to Rule 1.17 and in Comment [8] to Rule 7.2.

3. A.L.L. v. People, 226 P.3d 1054(Colo. 2010).

> the obligations of court-appointed counsel for a respondent parent in a termination of parental rights appeal, see *A.L.L. v. People* ex rel. *C.Z.*, 226 P.3d 1054, 1060 (Colo. 2010) ("So long as the attorney does not misstate the facts or controlling law, [the appointed attorney] is free to present her client's arguments to the court as well as her client's desire to prevail. . . . [A]n appointed attorney cannot be held to have violated her ethical duties by presenting apparently meritless claims, where her client's right to take the appeal is protected by law.")

The Chair requested that the chair of the subcommittee that had drafted the amendment, Cynthia Covell, now resume the Committee's consideration of the *A.L.L.* case. Covell began by recalling the deliberations on the matter at the Committee's forty-first meeting, when there had been suggestions that the comment be extended beyond the circumstance of the court-appointed lawyer that was the situation in the *A.L.L.* case to include private lawyers; the Committee had wondered what the Court was signaling by its specific reference to the fact of court appointment in its decision. It became apparent following the meeting that some members were dissatisfied with the limited approach taken by the Committee at the forty-first meeting. Some members felt that the cautious approach of the comment that the Committee approved at the prior meeting — which included a quotation of the Court's opinion that emphasized the fact of the court appointment — put, by contradistinction, non-appointed counsel in jeopardy if they pursued a meritless appeal for a client under a statutory mandate similar to that involved in the *A.L.L.* case.

A member followed on Covell's comments by suggesting that the apparent distinction would give indigent parties greater rights to appeal than were given to those who could afford to engage counsel to pursue the appeals under such statutes. This member was, he said, "just concerned" about that.

Another member said he thought the context of the *A.L.L.* case provided the answer, since, he noted, the attorney in that case sought to avoid the merits — or lack thereof — by filing an *Anders*-like brief[4] explaining why he could not cite supporting authority; the Court determined differently. As this member saw it, one can read the *A.L.L.* opinion to deal only with court-appointed counsel and to have no application to other counsel.

To that, a member asked why this Committee would feel restricted to crafting a rule that just followed the Court's ruling in a particular case, without considering and perhaps determining that the principle that lawyers may ethically pursue even meritless appeals when their clients are given statutory rights to those appeals should apply to all lawyers, whether or not they are court-appointed. The member who would limit the comment to the *A.L.L.* situation of court-appointed counsel replied that the privately-engaged lawyer can withdraw from the engagement rather than pursue the meritless appeal. The member who had asked the question then asked why the possibility of withdrawal should override the paying client's statutory right to the appeal; why should it be that only indigent clients could take such appeals?

To that discussion, another member suggested that the comment be expanded so that the comment itself asks whether the *A.L.L.* case is to be limited to the court-appointed attorney. Another

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4. As the Court explained in *A.L.L.*, 226 P.3d at 1056:

> Counsel for both A.L.L. and D.Z. during the termination hearing subsequently submitted petitions on appeal to the court of appeals. The petitions were crafted to comply with those procedures outlined by the Supreme Court in Anders to protect a client's rights while simultaneously respecting an attorney's ethical bar against bringing frivolous claims before a court. See 386 U.S. at 744, 87 S.Ct. 1396. The petitions identified potential legal issues arising from the termination hearing that might be challenged on appeal. The parents' trial counsel then described why, with each identified legal issue, they felt the trial court had properly considered applicable law and relevant facts. Counsel concluded that there were no viable issues on appeal and requested that they be allowed to withdraw from their respective roles representing the parents.

member agreed that it might do so, and a third suggested phrasing such as, "As to the court-appointed lawyer, the Supreme Court has determined, in *A.L.L.* . . . "

Covell reminded the Committee of the *Dooly* case, to which she had referred in the discussion at the forty-first meeting of the Committee. As the minutes of that meeting reflect, she had said—

> [T]he issue is confused by the subsequent *Dooly* case,[5] in which the court, citing *A.L.L.*, concluded that the lawyer had a right to withdraw rather than pursue an [*sic*] meritless appeal in a criminal case. In that case, the defendant sought a post-conviction appeal; his public defender first filed the appeal but then withdrew it. The *Dooly* opinion found that the most that Rule 3.1 required was that the lawyer file a motion to withdraw; if the motion were denied, the lawyer could ethically continue the representation and pursuit of the meritless appeal.

In *Dooly*, the Court of Appeals had sustained dismissal of an application for post-conviction relief upon the public defender's motion for dismissal on the ground that the application failed to state a claim and therefore had no arguable merit. The Supreme Court overturned that ruling, stating—

> Because every person convicted of a crime is provided a statutory right to make application for post-conviction review and is entitled to a prompt review and ruling granting or denying any motion substantially complying with Form 4, the district court erred in granting counsel's motion to dismiss against Dooly's wishes. The judgment of the court of appeals is therefore reversed with instructions to order that the defendant's application for post-conviction relief be reinstated.

A member asked Covell why the Committee had not chosen to speak also about the *Dooly* case when it approved the recommended comment at the prior meeting; she responded that she thought the Committee had not known how to characterize the *Dooly* result.

The Chair noted that the entire issue had been raised by the member who, now, has said that he believed that the private — as distinguished from the court-appointed — lawyer is entitled to withdrawal from a case in which a statute grants a litigant a right to a meritless appeal; she asked him why he had raised the matter if he thought withdrawal was the proper result for the private lawyer. He replied that he had seen the *A.L.L.* case as an anomaly the existence of which should be pointed to lawyers; he now believed that the comment adopted at the prior meeting adequately accomplished that.

Covell noted that the basis for the *A.L.L.* decision was the existence of a statutory right of appeal; it just happened that the statute in question involved the termination of parental rights and that the litigants were indigent. She quoted from the case—

> [A]n appointed appellate lawyer who reasonably concludes a parent's appeal is without merit must nonetheless file petitions on appeal in accordance with C.A.R. 3.4, which requires that petitions on appeal from D & N proceedings include, inter alia, a statement of the nature of the case, concise statements of the facts and legal issues presented on appeal, and a description and application of pertinent sources of law. . . . The legal issues presented in the brief can be either those identified and developed by the attorney, or, if she can find none, those points the parent wants argued. The petition in such instances, though perhaps wholly unpersuasive, is not wholly frivolous. In so doing, even where the parent's attorney concludes the appeal is meritless, she abides by her dual obligations to her client and to the court, and remains an advocate in fact as well as in name.

—and pointed out that this makes it clear that the decision was indeed limited to the facts of the case.

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5. Dooly v. People, 302 P.3d 259, 2013 CO 34.

One of the members who had earlier expressed a concern that the comment, by its specific quotation of the *A.L.L.* case to highlight that the opinion dealt with a court-appointed attorney, implied that private lawyers could not likewise pursue meritless appeals for clients despite statutory entitlements thereto, now noted that the comment's quotation implies that *A.L.L.* dealt only with the termination of parental rights. In fact, he asserted, the case dealt with more than that.

Covell added that the Court in *A.L.L.* seemed to disapprove of the *Anders* approach, with its two steps for the lawyer: first, to determine whether there is a merited basis for appeal, and then, if the lawyer determines that the appeal is "wholly frivolous," moving for withdrawal. The *Anders* approach opens all of the matters to the appeal, which the *A.L.L.* court seemed not to like.[6]

To that comment, another member responded that, although the *A.L.L.* court cited *Anders*, its ruling may not have been limited to that: Maybe the lawyer may say *either*, "I have no basis for appeal and will withdraw," *or* "I will appeal anyway, as permitted by *A.L.L.*"

Covell followed that with the observation that lawyers need guidance. Another member suggested that the key to the matter is the existence or absence of a statute granting the client a right to appeal. A third member added that the *A.L.L.* case shows that the issue can arise in contexts outside of criminal prosecutions.

In answer to a member's question, another member said that *A.L.L.* does not reflect the holding in some other federal or state case that was based upon a special rule applicable only to court-appointed counsel; the *Anders* case, this member said, did not turn on that aspect.

Another member returned to the question before the Committee: The discussion, he noted, has been centered upon a comment that would accommodate the specific facts of *A.L.L.* and the court's reference to the fact of court appointment. Rather, he said, if this is a matter of sufficient concern to the Committee to justify a comment, then we should structure the comment to cover what we think the proper principle is in a civil matter, beyond the constitutional principles applicable to criminal cases.

To that, Covell commented that the subcommittee had considered expansion of the comment but had decided not to recommend that; a member of the subcommittee confirmed that there had been that discussion, leading to that conclusion.

The member who had pointed out that the *Anders* case had not presented a distinction between court-appointed and private counsel now noted that the proposed comment actually effects a change in

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6. *See* A.L.L.,226 P.3d 1054, at 1058:

> Unfortunately, courts and commentators have often conflated these distinct components of the Supreme Court's opinion, confusing the problem addressed in *Anders* and the role of the procedure outlined therein. Furthermore, the Supreme Court never clearly identified the line between when a court-appointed attorney has satisfied the constitutional mandate of advocacy and when he has unilaterally donned the role of amicus curiae and thereby rendered constitutionally deficient representation. *See id.* at 744, 87 S.Ct. 1396; Haines v. People, 169 Colo. 136, 145, 454 P.2d 595, 599 (1969) (discussing *Anders*' "intendment that an indigent defendant shall have counsel who is an Advocate rather than Amicus curiae"). The confusion is made worse by the plain fact that briefs by amici to the court often appear indistinguishable from those of the parties in the way arguments are structured and presented. However, as we read *Anders*, the gravamen of the Supreme Court's opinion there targets the role of a court-appointed lawyer rather than the substance of her brief to the court. *See Anders*, 386 U.S. at 742–44, 87 S.Ct. 1396. Arguments may vary widely in their effectiveness in pursuing a client's desired outcome in a case. What equal protection does not allow is for court-appointed attorneys to abandon their role as careful and compassionate advocates for their clients where a richer client would be able to buy a lawyer's efforts even when a case seemed hopeless, just to ensure their arguments were heard. *See id.* at 742, 745, 87 S.Ct. 1396.

Rule 3.1 itself, which contains no exception from a universal no-frivolous-basis principle, even as to criminal proceedings or proceedings in which incarceration may be imposed, the only current concession in the rule from the universal principle for those types of cases being permission to "require that every element of the case be established." Another member who was also participating in the conversation agreed with that observation.

The Chair said she detected no approach to a consensus. She asked whether the Committee should simply reverse its earlier approval of the comment the subcommittee had put before the forty-first meeting and send the matter back to the subcommittee.

A member who had been participating in the conversation suggested that the presently proposed comment be corrected so that it referred to "an appeal from dependency and neglect proceedings" rather than to "a termination of parental rights appeal" and that it be amended to state that *A.L.L.* does not address the circumstance of a privately-engaged lawyer. He recognized, he said, that the Court itself might be reluctant to add a comment to its Rules that noted a limitation in the coverage of one of its own cases.

To the suggestion that the text be changed from "a termination of parental rights appeal," a member said that the Court had been specific that the case before it had involved a termination of parental rights and was not just a general dependency and neglect case — the termination of the parents' rights to their child was important to the ruling. This member said that the small group of lawyers who practice in this area are well-aware of the *A.L.L.* case. The issue they commonly face, the member said, is that of whether to admit the fact of dependency and neglect or to seek a jury determination of that matter; only after that admission or determination is there a consideration of termination of the parents' rights. That latter issue is, the member said, akin to the constitutional issues that are presented in criminal prosecutions, and it is that question that the Court focused on — not all of the various steps that can occur in a dependency and neglect case before that issue is reached.

The member who had proposed the switch from the termination circumstance to dependency and neglect responded that there can be both sets of circumstances. It would be strange, he said, if the principle reflected in our comment was that the lawyer — however engaged — could withdraw from representation if the issues were of dependency and neglect but could not, later, withdraw when the issues had switched to termination of parental rights.

A member expressed her experience that the unsuccessful client "always" wants an appeal. If we believe that the lawyer can extend the case, under a comment that extended *A.L.L.* to that circumstance, then the cases will regularly be prolonged by appeals. To that, another member added that there is always, also, an attendant bureaucratic overlay.

The member who had proposed the switch said that the question for the Committee was whether the lawyer dealing with a dependency and neglect case that did not yet involve termination of parental rights could withdraw. The other member who had been engaged on the point responded that the *A.L.L.* decision itself dealt only with the termination of parental rights.

To this, another member posited cases in which fundamental parental rights might arise at the dependency and neglect stage, before that of termination of parental rights, because lawyers, knowing the seriousness of the latter question, would work hard during the dependency and neglect stage to avoid getting to that latter question.

The member who questioned the switch from a discussion of the termination of parental rights to one of dependency and neglect asked a fundamental question: Why did any comment need be added

to Rule 3.1 because of the *A.L.L.* case? All of the lawyers practicing in the implicated area of law are already well-informed of the case and its holding.

To that, another member responded that, although the *A.L.L.* case arises under a particular statute, the principle at stake, as in criminal prosecutions, is of a constitutional level: the termination of the parent's rights with respect to the child.

A member proposed another approach to the matter: Eliminate the comment's existing introduction of *A.L.L.* and simply add a *cf* citation to *A.L.L.* and, in place of the existing parenthetical, simply describe the nature of the case:

> [3] The lawyer's obligations under this Rule are subordinate to federal or state constitutional law that entitles a defendant in a criminal matter to the assistance of counsel in presenting a claim or contention that otherwise would be prohibited by this Rule. ~~As to the obligations of court-appointed counsel for a respondent parent in a termination of parental rights appeal, see~~ ***Cf***. *A.L.L. v. People* ex rel. *C.Z.*, 226 P.3d 1054, 1060 (Colo. 2010) ~~("So long as the attorney does not misstate the facts or controlling law, [the appointed attorney] is free to present her client's arguments to the court as well as well as her client's desire to prevail. . . . [A]n appointed attorney cannot be held to have violated her ethical duties by presenting apparently meritless claims, where her client's right to take the appeal is protected by law."~~ ***(dealing with an appeal by a court-appointed lawyer in a case involving termination of parental rights***).

Another member said that he had been about to suggest a similar approach, by which the *A.L.L.* case would be described parenthetically as one "extending the above principles to a case involving a termination of parental rights." A member suggested revising that to "extending the principles stated in this comment to a case involving a termination of parental rights," but that modification was not acceptable to the member making the suggestion. That member then suggested eliminating the preamble text, "As to the obligations of court-appointed counsel for a respondent parent in a termination of parental rights appeal," and reducing the entire discussion of *A.L.L.* to "*See* A.L.L. v. People ex rel. C.Z., 226 P.3d 1054, 1060 (Colo. 2010), extending the principles of the preceding sentence of this comment to a court-appointed attorney for a parent in a proceeding for termination of parental rights."

To all of that, a member said he recalled nothing in the *A.L.L.* opinion that spoke of "extending principles." The case simply said that the court-appointed attorney could not withdraw from the case solely because the appeal lacked merit.

And to that, Covell noted that the opinion spoke of Rule 3.1 itself and criticized the existing ethics opinion of the Colorado Bar Association Ethics Committee for its undervaluing the role of the lawyer as advocate, and that it mentioned Comment [2]. Covell read at length from the Court's opinion—

> By approving of the ABA approach in *McClendon*, we implicitly held that, while the merit of an appeal may be related to a determination of its frivolity, a lack of merit alone is not sufficient to render a criminal defendant's appeal by right "wholly frivolous." To the contrary, an appointed attorney cannot be held to have violated her ethical duties by presenting apparently meritless claims where her client's right to take the appeal is protected by law. If a defendant is not entitled to prevail on appeal, that conclusion will quickly become evident upon review of the controlling law and examination of the defendant's best arguments.

But, Covell concluded, the opinion did not mention Comment [3] or the "principles" therein; it did not "extend" any "principles."

And, with that review, another member stated his agreement with the prior comment that the *A.L.L.* case simply did not talk about "extending principles."

A member returned to the idea of a shortened reference to *A.L.L.*, with a minimal characterization along the line previously proposed but without a statement about the extension of principles.

Covell replied that the subcommittee had discussed the alternatives of "characterizing" the *A.L.L.* case or simply leaving it to characterize itself by a quotation from the opinion, which was ultimately the course taken in the subcommittee's text.

Another suggested simply providing a citation to the case with no characterization or quotation.

Yet another member formally moved that the following be added as a second sentence to the existing Comment [3] to Rule 3.1: "*See* A.L.L. v. People ex rel. C.Z., 226 P.3d 1054, 1060 (Colo. 2010) (addressing responsibilities of a court-appointed attorney in a termination-of-parental-rights appeal.)"

To that, a member suggested changing "responsibilities" to "obligations"; and, with the unanimous agreement of the Committee, the addition to Comment [3] of Rule 3.1 of a sentence reading—

> *See* A.L.L. v. People ex rel. C.Z., 226 P.3d 1054, 1060 (Colo. 2010) (addressing obligations of a court-appointed attorney in a termination-of-parental-rights appeal.)

—was approved for recommendation to the Court.

IV. *Colorado Access to Justice Commission Proposal for Amendments to Rules 1.15B and 1.15D Regarding "Orphaned" Funds in COLTAF Accounts.*

Noting the formation, at the forty-first meeting of the Committee, of a subcommittee to consider the matter of "orphaned" funds in COLTAF accounts, the Chair asked subcommittee chair Alexander R. Rothrock for a status report.

Rothrock replied that the subcommittee had met and deliberated and was now circulating a draft of a proposal for a rule amendment to deal with that matter. He thought the subcommittee would be able to make a recommendation at the Committee's next meeting.

V. *Flat Fees and the* Gilbert *Case.*

The Chair asked James S. Sudler III and Nancy L. Cohen for a report from the subcommittee considering the *Gilbert* case and the charging of flat fees for legal services.[7]

Sudler reported that the subcommittee is dealing with the issues presented by the charging of flat fees and the need to protect clients. The subcommittee had, he said, a number of great discussions about the matter in light of the *Gilbert* case and the letter to the letter to the Chair from Steven Jacobson, chair of the Supreme Court's Attorney Regulation Committee.[8]

The subcommittee has identified four alternatives, or versions, of a rule to address, first, what should be required for the terms of a permissible flat fee agreement and, second, what adjustments to the attorney's fee are to be made upon a termination of the engagement before the fulfillment of the expected

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7. *See* Part IV of the minutes of the fortieth meeting of the Committee, held on June 5, 2015, and Part IV of the minutes for the forty-first meeting, held on January 29, 2016, for the Committee's prior discussions of these matters, including a review of In re Gilbert, 346 P.3d 1018, 2015 CO 22.

8. *See* the Jacobson letter found beginning at p. 152 of the materials for the fortieth meeting.

goal or purpose of the engagement. Additionally, the subcommittee is drafting a form flat fee agreement for approval by a court.

[Exhibit A, attached to these minutes, extracts from the subcommittee's report the four proposals contained therein, to add context to the discussion reflected below. References in the minutes that follow to "Versions" are to the versions set forth in the exhibit, by the version numbers used there. The exhibit also provides a comparison of ¶ (c) of the respective versions, dealing with what is referred to as "early termination" in the following minutes, for it is only as to that paragraph that the versions differ.]

Sudler explained that each of the versions would define a "flat fee" and require the "flat fee arrangement" be in a writing that provided for (1) a description of the services the attorney agrees to perform; (2) a statement of the maximum amount to be paid to the attorney for the services performed; and (3) a description of when or how fees are earned by the attorney, unless the attorney earns no fees until all of the specified legal services are completed.

The subcommittee's Version 1 would not make any provision for early termination. Version 2 would provide that any flat fee arrangement would not be enforceable if it were not in substantial compliance with the rule. Version 3 would deal with a flat fee arrangement that was not in substantial compliance with the rule by requiring a complete refund of all received fees upon an early termination, but it would state that the rule did not "prohibit[] the lawyer from pursuing recovery in the event the lawyer asserts the client has been unjustly enriched." Version 4 would, similarly to Version 3, require a full refund for a noncomplying flat fee agreement, but the measure of noncompliance would not be the terms of the rule itself but a model form of "Flat Fee Agreement" provided in the rule; as in Version 3, Version 4 would state that the rule did not prohibit suit for unjust enrichment.

As yet, the subcommittee has no recommendation to make with regard to those versions.

Cohen added that the subcommittee was in agreement on the provisions of the rule that prescribe the requirements of a compliant flat fee arrangement — paragraphs (a) and (b) of all of the versions (Version 4 would actually set forth a complying model form) — but was in disagreement about early termination, which disagreement led to the drafting of the four different versions of the rule that the subcommittee has submitted to the Committee, with the differences being reflected in the paragraphs (c). The subcommittee recognized that, as a practical matter, the lawyer would be unlikely to collect any of the fee if, as the first step, all of the fee had to be refunded before an unjust enrichment claim could be pursued. It also recognized the practical problem that suits for fees are often met with malpractice claims relating to the underlying services. But it was divided on the question of whether a declaratory judgment were an appropriate mechanism for resolution of the matter.

Cohen pointed out that the majority opinion in *Gilbert* determined that the lawyer could recover a portion of the flat fee, upon early termination, under Rule 1.16 and a personal determination of the amount earned under quantum meruit principles.[9] The dissent was of the view that the lawyer's had "unilaterally withheld funds that she had not earned by the terms of her written agreement without first obtaining a quantum meruit ruling in her favor." (The lawyer had determined the amount that she would withhold upon the early termination of her services by multiplying the hours actually accrued by an hourly rate of $250, refunding the remainder of the flat fee above that accrual.)

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9. The majority opinion concluded with, "We hold that, under the circumstances of this case, Gilbert did not violate Colo. RPC 1.16(d) when she failed to return a portion of the advance fee to which she was entitled under quantum meruit" and affirmed a hearing board's order to the same effect.

Sudler amplified Cohen's remark by characterizing *Gilbert* as being about whether a lawyer can unilaterally determine what amount to retain as "quantum meruit." The majority determined that she could, although the majority opinion hedged to this extent:

> [B]y upholding the Hearing Board's determination in this case, we do not intend to suggest that attorneys may unilaterally determine what they believe they are owed in quantum meruit. Rather, we simply conclude that the Hearing Board did not err in this case when it determined that Gilbert did not violate Rule 1.16(d) by failing to return that portion of the fee to which she was entitled in quantum meruit.

The dissent found a duty to refund all of the flat fee, with the lawyer's remedy being to seek quantum meruit in court. Sudler summarized the effect of the two opinions by saying that *Gilbert* presents an enforcement issue for Attorney Regulation Counsel.

A second ruling in *Gilbert* went to the question of whether a compliant flat fee arrangement is required to meet the requirements of the second sentence of Comment [12] to Rule 1.5: "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)." The majority found that Regulation Counsel's argument in that regard "hinges on its view that, for purposes of Rule 1.16(d), an attorney cannot 'earn' a fee except as explicitly provided for in the fee agreement. This view is not grounded in Rule 1.16(d) but instead rests on comment 12 to Rule 1.5"; but the majority found the text of the rule, not the comment, is authoritative. The dissent would have used the comment as "a guide to interpretation" as directed by ¶ 14 and ¶ 21 of the Scope part of the Rules, "especially where the rule's language is as general as that of 1.5(f)."

Sudler said that, accordingly, the Office of Attorney Regulation Counsel wants to elevate to a rule the principle expressed in that second sentence of Comment [12] to Rule 1.5. He noted that the majority itself concluded that "the wiser course would have been for [the lawyer] to include benchmarks or milestones in the fee agreement" and suggested, in a footnote, that, "given the growing prevalence of such fee arrangements, clarifying amendments to Colo. RPC 1.5(f) may be warranted." He added that the majority did not say that Comment [12] encompassed all that should be included in such a rule.

A member asked whether the proper remedy to be pursued in court by the lawyer was a declaratory judgment, as Cohen had said, or quantum meruit. Cohen responded by commenting on the unlikelihood of a lawyer pursuing either remedy without instigating a responsive malpractice claim. She said the subcommittee was seeking a mechanism that would permit the lawyer to retain a proper amount, upon an early termination, without having to refund all of the fees and then seek a recovery of the appropriate amount thereof for the services actually rendered — when the flat fee arrangement did not itself provide a "description of when or how fees are earned by the attorney" as is required by ¶ (b)(3) of all of the versions. That mechanism might require "putting it in safekeeping."

Another member asked whether the subcommittee considered an interpleading of the fees. Cohen said it had not done so but agreed that might be yet another mechanism to use; she wondered, though, whether the Court would want to be burdened with holding the funds during the interpleader action.

Cohen returned to what she called the "philosophical question": Should the lawyer be required to provide a full refund and be relegated to a collection action?

Sudler pointed out that, when a representation ends prematurely, with the client's goal as yet unattained, the client often has to engage another lawyer to complete the matter and would also have to engage a lawyer for representation in the quantum meruit, declaratory judgment, unjust enrichment or

interpleader action if one were brought by the former lawyer for the disputed fees. If the lawyer retained the disputed fees while the matter were being litigated, the client would not have those funds to apply to his further legal costs. It would be, for the client, he said, a question of timing, not of ultimate recovery or obligation. And, he noted, the subcommittee's refund alternatives apply only when the lawyer's flat fee arrangement fails to comply substantially with the elements outlined in the preceding provisions of the subcommittee's proposal.

A member asked whether the subcommittee had sought the input of lawyers who regularly handle criminal cases for flat fees. Sudler said that it had done so. The member then posed this hypothetical situation: A lawyer in a small firm is asked by a potential client to handle a speeding ticket. Could the lawyer say he would represent the client for a flat fee of $250, with that fee increasing to a total of $500 if the case went to trial? Sudler replied that such an arrangement would comply with the proposed rule.

The member then stated her concern, that the proposals may not help meet the goal of providing client access to justice in small claims matters. She would have the rule simply say that the lawyer must return all of the fees that have not "reasonably been earned." She did not accept the requirement that all of the fees be returned in the first instance. Lots of lawyers engaged in criminal defense practice utilize flat fee arrangements; they should not be subject to rules requiring them to make refunds.

Another member responded by wondering whether it was right for the lawyer to be able to make a unilateral decision about what portion to retain, essentially cutting off the client's right to a return of unearned fees. Is that, he asked, good for justice, as distinguished from just being good for the bar?

Sudler commented that Lisa M. Wayne, who has a criminal defense practice and was a member of the subcommittee, did not take one side or the other in the refund question; she had explained that properly-crafted flat fee agreements can be very thoughtful and thorough in their provision for contingencies. The rule, though, would be for application to lawyers who are not already crafting good agreements.

A member spoke to what Cohen had called the philosophical issue: To require, initially, a complete refund or to permit the lawyer to make a unilateral assessment of what portion of the flat fee had been earned. If the lawyer were required to give some portion back, at least that portion would be available to the client for the engaging of another lawyer. If, on the other hand, the lawyer's position is that enough was done to retain all of the flat fee, even though the engagement ended early, then he should be subject to discipline: His position would be disingenuous as well as mathematically illogical. But, for guidance toward a proper rule, the member would look to Comment [3] to the COLTAF Rules—

> [3] Lawyers often receive funds from third parties from which the lawyer's fee will be paid. If there is risk that the client may divert funds without paying the fee, the lawyer is not required to remit the portion from which the fee is to be paid. However, a lawyer may not hold funds to coerce a client into accepting the lawyer's contention. The disputed portion of the funds should be kept in trust and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration. The undisputed portion of the funds should be promptly distributed.

The comment is applicable to the circumstance where the third-party-provided funds are a likely source of payment of the lawyer's legal fees, some amount of which are in dispute between the lawyer and the client. That the comment contemplates the lawyer making a unilateral determination about what portion is disputed and what portion is undisputed is inconsistent with a requirement, in the analogous circumstance the Committee is now considering, for a full refund and a subsequent process for recovery of the amount ultimately found to be due to the lawyer. This member would resolve the problem by

requiring the lawyer to hold the funds in trust until the determination of his entitlement is resolved by the appropriate mechanism.

That member also asked about the subcommittee's proposal — in all its versions — that "flat fee arrangements" be in writing. That, he said, would be a fundamental change in the way lawyers work and would be inconsistent with Rule 1.5(b), which only requires that "the basis or rate of the fee and expenses shall be communicated to the client, in writing" when the lawyer has not regularly represented the client. Under all of the subcommittee's versions, failure to put the flat fee arrangement in writing would be substantial noncompliance requiring a full refund followed, perhaps, by some judicial recourse for the lawyer. Likewise, failure to include all the required elements in whatever writing was provided would be substantial noncompliance.

A member asked about the application of the proposal that the "disputed portion" of the fees — to use the terminology of the cited Comment [3] to the COLTAF rules — be held in trust analogously to that Comment [3], rather than fully refunded, pending a judicial determination of the lawyer's entitlement. The member who had made the proposal replied that the issue would be centered on the "disputed fees," that being terminology that limited the analysis. But the questioning member's response to that explanation was that even a requirement that a portion of the fees be held in trust would be directed toward settlement of the matter, since the lawyer could not utilize those funds until the matter was resolved.

But another member pointed out that the funds should have been placed in trust at the beginning of the engagement in any event, as required by Rule 1.5(f). In fact, the lawyer in *Gilbert* was disciplined for her failure to place the flat fee in trust pending her earning them, and she had not contested that discipline.

A member pointed out that Comments [12] through [18] of Rule 1.5, found following the caption "Rule 1.5(f) Does Not Prohibit Lump-sum Fees or Flat Fees," already provide guidance on flat fees. He wondered why the Committee need go through such gyrations given those existing provisions. He added that the flip side to a rule requiring refunds of unearned fees would be its adverse impact on small claims cases, those a lawyer would undertake only upon certainty of being paid his fees. If all such cases were subject to dispute and refund, would lawyers simply stop taking them?

Another lawyer noted that he had never underestimated [*sic*] what his fee would be for an engagement. The eventual rule must be clear that, when a dispute arises as to the unearned portion of a fee in a case of early termination, an hourly rate should not be the alternative measure; rather, the earned fee should be determined based upon the proportion of the engagement that was completed before the early termination bore to the undertakings of the entire engagement. To that, he compared the rules for contingency cases.

Cohen responded to that by positing a flat fee arrangement that provided that early termination occurring after the accomplishment of a stated milestone would entitle the lawyer to an alternative recovery of the hours actually expended to that milestone multiplied by a stated hourly rate, not to exceed, however, the entire agreed flat fee. That was her recommendation for a flat fee arrangement. She said she'd never met a lawyer who estimated on the high side [*sic*], so too much risk is taken when setting milestones. That is why some of the members of the subcommittee had concerns about a risk of loss of license for noncompliance with the requirements listed in ¶ (b) of all of the versions.

Another member said that many low-cost misdemeanor cases are taken on a flat fee basis, to give some certainty of recovery to the lawyer. For that reason, she worried — as had been previously suggested — about the access to justice.

To those comments, Sudler said that the elements of a complying flat fee arrangement are the same in each of the four versions, as listed in the respective ¶ (b). There is no question that these elements should be spelled out. The question that the Committee has been discussing arises because the lawyer has failed to meet those requirements. Hypotheticals about $250 traffic tickets are misapplied. Why, he asked, should we be worried about the lawyer who has failed to do, at the initiation of the engagement, what the rule would require be done? It is the client in that circumstance that needs protection, not the lawyer.

Another member agreed with Sudler. The Committee is determining the peril for the lawyer who does it wrong. That lawyer has the power to do it correctly; the client does not. The lawyer can take or reject the engagement. So, what is the appropriate penalty for the noncomplying lawyer?

But another member, who said he did not himself take flat fee cases, looked to what he called the practical aspects of law practice, something he said was not of concern to the Office of Attorney Regulation Counsel. He knows many lawyers who do take flat fee cases, doing so without written agreements. All of the proposals would make unwritten flat fee agreements a rule violation, while also requiring a full refund of the fees — it is clear that, if the fee must be entirely refunded, the lawyer is not thereafter likely to collect any portion of it through some judicial process. Essentially, the proposals reverse the holding in *Gilbert* and adopt the view of the dissent: Give back all the fee and go after a portion if you can. As Cohen said, this member noted, the lawyer will lose both as a matter of discipline and monetarily.

The member continued: If there must be any refund, it should be of the undisputed amount of unearned fees, if any such portion is indeed not in dispute. The disputed portion should be retained in the lawyer's trust account while the lawyer pursues a judicial determination of the matter by interpleader or other appropriate mechanism. If there must be a full refund, then, as a practical matter, the lawyer will not receive any payment for any work done. To say that we must protect the public and that the lawyer will automatically lose is simply not fair. While this question would not affect this member's practice, a refund requirement would set up lawyers who agreed to flat fee arrangements to certain loss; that would be unfair.

A lawyer who had earlier been concerned about access to justice noted that there are law firms that have a basic traffic-law practice. Any rule requiring refund would increase their overheads, and that would necessarily curtail public access to justice.

To that, another member responded that such an increase in overhead is justified, for it would be merely an incremental increase in the cost of those firms' business but worth it to encourage compliance with reasonable rules. This member sees no difficulty if discipline is to result from failure to comply with the stated requirements for a flat fee arrangement. But, the member continued, she understands the previously expressed concern about double jeopardy — the risk of discipline as well as not getting paid for work indisputably done.

Sudler challenged that, however, noting that the issue lies in the words "indisputably done." Why is the lawyer entitled to make the initial determination of what has been done?

James C. Coyle, who is Attorney Regulation Counsel, said this problem is rarely seen in contingency fee cases, because every lawyer who takes cases on contingency now knows how to set them up in compliance with the contingency fee rules. The Office of Attorney Regulation Counsel is seeing an increase in the prevalence of flat fee arrangements, however. Clients like them for the certainty they provide, enabling the clients to plan for litigation costs. Accordingly, lawyers are increasingly willing

to accommodate client wishes by engaging on flat fee terms. This rule, whichever version is adopted, will give the lawyers needed guidance.

A member responded to that by saying she agreed with the elements of a proper flat fee arrangement as delineated in ¶ (a) and ¶ (b) of the various versions; the question, however, was which, if any, version of ¶ (c), regarding treatment of the unearned portion of fees upon early termination, should be adopted. Perhaps, she suggested, that matter should be left to case-by-case discipline, because of the different consequences that can arise in different cases.

A member noted that Rule 1.5(c), its Comment [2], and Comment [3] to Rule 1.16A [regarding file retention] all refer directly to the requirements of Rule 23.3, C.R.C.P., regulating contingency fees. Why, he asked, is not something similar done to deal with the complexities of early termination in flat fee arrangements? To that, another member wryly noted that he spends hours searching whenever he is trying to locate Rule 23.3.

Another member responded saying that the reason the contingency fee provisions work so well is that noncomplying agreements are not enforceable.

A member commented that "every time we make a rule, we miss some aspect" that should have been considered. The possibility of doing that again is great in the black-and-white approaches taken by the subcommittee. If we design a rigid rule, how do we handle the odd turn that a particular case may take, such as an unanticipated plea deal that avoids a jail term? We would not want a rigid rule to interfere with the lawyer's reaching the right decision about how to advise the client in that circumstance. What of a client engaged in the marijuana business, engaging for business counseling but finding that unexpected regulatory requirements impede his plans? Can he fire his lawyer and recover his fee — yes, because the flat fee agreement did not set a milestone contemplating regulatory difficulties. A hard and fast rule may be a license for many clients to take advantage of their lawyers. And, he added, clients are now often more sophisticated about such matters than in the past, because of the much greater informational resources that are now available to them.

A member asked how the proposed rules would apply to a pure retainer, a $5,000 per month fee for the agreement to be immediately available when the client calls with a problem.

That kind of arrangement, Sudler said, would not be covered by any of the proposals. The rule would apply to only to a specific engagement for legal services: "an arrangement for legal services of an attorney or attorneys under which the client agrees to pay a specified maximum amount for a legal service to be performed by the attorney."

The Chair sought an assessment of the Committee's views, noting that the subcommittee needs the Committee's guidance. She asked for a straw poll on these alternatives:

(1) Adopt no rule; leave the matter to *Gilbert* and its progeny; or

(2) Provide the requirements for an enforceable flat fee arrangement, as stated in ¶ (a) and ¶ (b) of the subcommittee's versions; or

(3) Provide the requirements for an enforceable flat fee arrangement, as stated in ¶ (a) and ¶ (b) of the subcommittee's versions, and require that a noncompliant arrangement is not enforceable [Version 2]; or

(4) Provide the requirements for an enforceable flat fee arrangement, as stated in ¶ (a) and ¶ (b) of the subcommittee's versions, and provide, in a new version of ¶ (c), that fees held under a noncompliant arrangement upon early termination are to be held in trust pending a judicial determination of the lawyer's entitlement.

To the Chair's listing, a member reiterated his concern that any requirement of a writing for a flat fee arrangement would be a large change in the rules governing law practice. He has already heard that the Court does not favor flat fee arrangements; a rule requiring them to be in writing would be a dramatic manifestation of that dislike, driving flat fees toward extinction to the detriment of access to justice for many clients.

A member questioned that, noting that the requirements of the writing could be satisfied by adopting a simple model form. The other member was not persuaded, citing instead the law of unintended consequences and commenting that lawyers practicing in rural Colorado would hate the rule.

Returning to her request for a straw poll, the Chair narrowed the eligible alternatives to these:

(1) Provide the requirements for an enforceable flat fee arrangement, as stated in ¶ (a) and ¶ (b) of the subcommittee's versions, with a ¶ (c) providing that the lawyer must, upon early termination, return all of the fees the lawyer does not believe have been earned and must put disputed fees into trust pending a judicial determination of entitlement; or

(2) No detailing of the requirements for an agreement but a provision, "(c)," providing that the lawyer must, upon early termination, return all of the fees the lawyer does not believe have been earned and must put disputed fees into trust pending a judicial determination of entitlement.

As to Nº (2) of that arrangement, a member pointed out that it would say no more than is currently provided by Rule 1.5(f), requiring that advances of unearned fees be deposited in the lawyer's trust account until earned.

The Chair then proposed a longer list alternatives for the poll:

(1) No rule; or

(2) Provide the requirements for an enforceable flat fee arrangement, as stated in ¶ (a) and ¶ (b) of the subcommittee's versions; or

(3) Provide the requirements for an enforceable flat fee arrangement, as stated in ¶ (a) and ¶ (b) of the subcommittee's versions, with a ¶ (c) that provides for non-enforceability if the arrangement is not in substantial compliance with those requirements; or

(4) Provide the requirements for an enforceable flat fee arrangement, as stated in ¶ (a) and ¶ (b) of the subcommittee's versions, with a ¶ (c) that provides for a full refund of fees upon early termination under a noncomplying arrangement; or

(5) Provide the requirements for an enforceable flat fee arrangement, as stated in ¶ (a) and ¶ (b) of the subcommittee's versions, with a ¶ (c) that requires refund of any portion that clearly had not been earned upon early termination and requires depositing the disputed amount in trust pending judicial determination of the lawyer's entitlement; or

(6) Provide no detailing of the requirements for an agreement but provide, by a "¶ (c)," that the lawyer must, upon early termination, return all of the fees the lawyer does not believe have been earned and must put disputed fees into trust pending a judicial determination of entitlement.

A vote was taken; the secretary did not make note of the outcome.

A member interjected that, if the Committee's job is to propose rules that are designed to protect the public, should not a member of the public be seated on the Committee? Cohen replied that the subcommittee itself has had a member of the public participating in its deliberations.

The Chair agreed that the comment was pertinent and indicated that she would put, on the agenda of a future meeting, the matter of having a public member on the Committee.

A member asked whether the subcommittee had considered what other jurisdictions have done with respect to flat fee arrangements. Sudler responded that it did look elsewhere but found little, adding that Colorado already differs from other jurisdictions by its requirement in Rule 1.5(f) that advance fees be placed in trust until earned — other jurisdictions permit advance fees to be deposited in lawyers' operating accounts. But no other jurisdiction seems to have dealt specifically with the problem of early termination under flat fee arrangements.

Sudler commented on his personal experience from within the Office of Attorney Regulation Counsel: No one who has not seen what is seen by those in that office can understand the frustration of the client who feels the lawyer has mistreated him. Sudler said he was not offended by any position taken by any member in this conversation; he was just noting that he and his colleagues see things that the rest of the members cannot be aware of.

The Chair replied that it is not unusual to see differences in views between the regulated and the regulators. But, she added, there are also savvy clients taking advantage of lawyers. Flat fees are "the rage," she said, in large law firms for big cases. She could envision an instance involving a flat fee of $250,000 and a client who wanted to terminate the matter two-thirds of the way to completion. So, she summarized, lawyers outside the regulatory office can have some experience with this matter, too.

A member suggested establishing a threshold above which the rule would not apply, a threshold that would protect the client in a small matter but would leave the larger arrangement unregulated.

Coyle added that the Office of Attorney Regulation Counsel strives not only to protect the client but also to protect the integrity of the legal profession. In the matter of flat fees, he would like to find some way to ensure that lawyers were properly advising their clients of all aspects of the arrangement without relying just on the Office's disciplinary power to accomplish that.

To that, the Chair pointed out that eight members voted in the straw poll for one or another alternative rule that would provide for some refund to the client in the event of an early termination under a noncompliant arrangement.

A member said he did not know how the cases appear at the Office of Attorney Regulation Counsel, but he would like to see a rule structured to permit the lawyer to revert the fee arrangement to an hourly-rate calculation in the event of early termination. He recognized that even that solution would give the lawyer significant discretion and could be unfair to clients. But he would prefer some such extra-judicial addressing of the problem of determining what amount has been earned in the event of early termination.

Sudler said the subcommittee will work further to refine and clarify a rule. Another member commented that lobbying would be permitted.

A member suggested that some members who had objected to the requirements of ¶ (a) and ¶ (b) of the subcommittee's versions might accept a "¶ (c)," standing alone, if it permitted retention of the amount that was clearly earned by the time of the early termination and required a refund of the rest. To that, however, another member said such is already the lawyer's obligation under Rule 1.5(f), Rule 1.15A(c) and Comment [3] to the COLTAF rules.

Another member added that, although some of the members preferred that there be no rule, they may have specific views about the aspects of the rule, if one will nevertheless be proposed. The Chair added that the subcommittee should not let the results of the straw poll limit its further deliberations.

VI. *Adjournment; Next Scheduled Meeting.*

The meeting adjourned at approximately 11:40 a.m. The next scheduled meeting of the Committee will be on Friday, April 29, 2016, beginning at 9:00 a.m., in the Supreme Court Conference Room.

VII. *Kumbaya?*

The Chair's last word to the departing Committee was a question: Kumbaya? The answer was a resounding Kumbaya!

RESPECTFULLY SUBMITTED,

Anthony van Westrum, Secretary

[These minutes are as approved by the Committee at its Forty-Third Meeting, on April 29, 2016.]

[Extract from report of Flat Fee Subcommittee to Full Committee]

The issue on which there was no consensus among the subcommittee members is what happens if a lawyer's flat fee arrangement [is not substantially compliant with the requirements of the rule.]

Version 1 has no provision about what happens.

Version 2, 3 and 4 contain alternative provisions.

Version 2 provides:

> (c) If a flat fee arrangement is not in substantial compliance with this Rule then it is unenforceable.

Version 3 provides:

> (c) If a flat fee arrangement is not in substantial compliance with this Rule and the client-lawyer 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 the event the lawyer asserts that the client has been unjustly enriched.

Version 4 provides:

> (c) If a flat fee arrangement is not in substantial compliance with the Flat Fee Arrangement 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 the event the lawyer asserts that the client has been unjustly enriched. . . . Version 4 refers to a Flat Fee Arrangement form [a copy of which is provided in the full report from the subcommittee].

* * * * * * * * * *

Version 1

(a) The term "flat fee" refers to an arrangement for legal services of an attorney or attorneys under which the client agrees to pay a specified maximum amount for a legal service to be performed by the attorney.

(b) Each flat fee arrangement shall be in writing and shall contain the following:

(1) A description of the services the attorney agrees to perform;

(2) A statement of the maximum amount to be paid to the attorney for the services performed;

(3) A description of when or how fees are earned by the attorney, unless the attorney earns no fees until all of the specified legal services are completed;

(4) The amount if any of the fees the attorney is entitled to keep upon termination of the representation before the specified legal services or a portion of them have been performed.

* * * * * * * * *

Version 2

(a) The term "flat fee" refers to an arrangement for legal services of an attorney or attorneys under which the client agrees to pay a specified maximum amount for a legal service to be performed by the attorney.

(b) Each flat fee arrangement shall be in writing and shall contain the following:

(1) A description of the services the attorney agrees to perform;

(2) A statement of the maximum amount to be paid to the attorney for the services performed;

(3) A description of when or how fees are earned by the attorney, unless the attorney earns no fees until all of the specified legal services are completed;

(4) The amount if any of the fees the attorney is entitled to keep upon termination of the representation before the specified legal services or a portion of them have been performed.

(c) If a flat fee arrangement is not in substantial compliance with this Rule then it is unenforceable.

* * * * * * * * *

Version 3

(a) The term "flat fee" refers to an arrangement for legal services of an attorney or attorneys under which the client agrees to pay a specified maximum amount for a legal service to be performed by the attorney.

(b) Each flat fee arrangement shall be in writing and shall contain the following:

(1) A description of the services the attorney agrees to perform;

(2) A statement of the maximum amount to be paid to the attorney for the services performed;

(3) A description of when or how fees are earned by the attorney, unless the attorney earns no fees until all of the specified legal services are completed;

(4) The amount if any of the fees the attorney is entitled to keep upon termination of the representation before the specified legal services or a portion of them have been performed.

(c) If a flat fee arrangement is not in substantial compliance with this Rule and the client-lawyer 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 the event the lawyer asserts that the client has been unjustly enriched.

* * * * * * * * * *

Version 4

(a) The term "flat fee" refers to an arrangement for legal services of an attorney or attorneys under which the client agrees to pay a specified maximum amount for a legal service to be performed by the attorney.

(b) Each flat fee arrangement shall be in writing and shall contain the following:

(1) A description of the services the attorney agrees to perform;

(2) A statement of the maximum amount to be paid to the attorney for the services performed;

(3) A description of when or how fees are earned by the attorney, unless the attorney earns no fees until all of the specified legal services are completed;

(4) The amount if any of the fees the attorney is entitled to keep upon termination of the representation before the specified legal services or a portion of them have been performed.

(c) If a flat fee arrangement is not in substantial compliance with the Flat Fee Arrangement form [refer to where from is placed] and the client-lawyer 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 the event the lawyer asserts that the client has been unjustly enriched.