COLORADO SUPREME COURT

STANDING COMMITTEE ON THE RULES OF PROFESSIONAL CONDUCT

Approved Minutes of Meeting of the Full Committee
On October 16, 2015
(Forty-First Meeting of the Full Committee)

The forty-first meeting of the Colorado Supreme Court Standing Committee on the Rules of Professional Conduct was convened at 9:10 a.m. on Friday, October 16, 2015, by Chair Marcy G. Glenn. The meeting was held in the Court of Appeals Conference Room on the third floor of the Ralph L. Carr Colorado Justice Center; and the Chair thanked Judges Michael H. Berger and John R. Webb, of the Court of Appeals, for the accommodations.

Present in person at the meeting, in addition to Marcy G. Glenn and Justices Nathan B. Coats and Monica M. Márquez, were Committee members Michael H. Berger, Helen E. Berkman, Nancy L. Cohen, Cynthia F. Covell, James C. Coyle, Thomas E. Downey, Jr., David C. Little, Judge William R. Lucero, Cecil E. Morris, Jr., Judge Ruthanne Polidori, Henry R. Reeve, Alexander R. Rothrock, David W. Stark, James S. Sudler III, and Anthony van Westrum. Present by conference telephone were members Boston H. Stanton, Judge John R. Webb, and E. Tuck Young. Also present were Supreme Court staff attorney Melissa C. Meirink, Supreme Court rules attorney Jenny A. Moore, and Matthew A. Samuelson,[1] Excused from attendance were members Federico C. Alvarez, Gary B. Blum, John M. Haried, Marcus L. Squarrell, Jr., Eli Wald, and Lisa M. Wayne and Supreme Court staff attorney Christine A. Markman.

Present as a guest was Diana M. Poole, the director of the Colorado Lawyers Trust Account Foundation.

I. *Meeting Materials; Minutes of March 14, 2014, and June 6, 2015 Meetings.*

The Chair had provided a package of materials to the members prior to the meeting date, including submitted minutes of both the thirty-ninth meeting of the Committee, held on March 14, 2014, and the fortieth meeting of the Committee, held on June 6, 2015. The minutes of the thirty-ninth meeting were approved as submitted, and those of the fortieth meeting were approved with one correction.

II. *Supreme Court Hearing on Proposals to Adopt 2012 and 2013 ABA Amendments*

The Chair referred the members to her May 22, 2015 letter to the Supreme Court, forwarding the Committee's proposals for amendments to the Rules based upon amendments to the Model Rules of Professional Conduct that had been adopted by the American Bar Association in 2012 and 2013; that letter and accompanying documents reflecting the proposals had been provided to the Committee with the materials for its fortieth meeting, on June 5, 2015. The Court has scheduled a hearing on the proposals on November 4, 2015; the Chair intends to attend for the purpose of answering questions that the justices might pose but does not intend otherwise to make a statement about the proposals.

---

1. It is anticipated that in due course the Supreme Court will issue an order appointing Mr. Samuelson to the Committee, *nunc pro tunc*.

III. *Task force on Pro Bono Services by In-House and Government Lawyers; Development of Model Pro Bono Policy*.

At the Chair's invitation, David Stark reported to the Committee on the activities of a joint effort among members of this Committee and the Attorney Regulation Advisory Committee of the Supreme Court.[2] The participants in that effort were Helen E. Berkman, James C. Coyle, Marcy G. Glenn, Anh-Thu Mai-Windle, Carolyn S. Powell, H. Richard Reeve, and Judge Daniel H. Taubman.

Stark began by recounting the origination of the effort as one to draft a model pro bono policy for lawyers in government service, drawing from the existing Recommended Model Pro Bono Policy for Colorado Licensed Attorneys and Law Firms. But the charge to the subcommittee was then expanded to draft also a model policy for lawyers in private in-house practice; and the subcommittee was also directed to consider whether all of the model policies should be set forth in some location other than within the Rules of Professional Conduct themselves, where the existing model policy is found appended to Rule 6.1.

At the fortieth meeting of the Committee, Stark had explained that Kristin Burke, counsel to Chief Justice Rice, had suggested the addition of the following as a comment to Rule 6.1 itself:

> Individual government attorneys may provide pro bono legal services in accordance with their respective organization's internal rules and policies. Government organizations may adopt pro bono policies at their discretion.[3]

At the end of a thorough discussion at the fortieth meeting, the Committee had determined to recommend to the Court a revision of the Chief Justice's suggestion, reversing the order of the sentences and changing the words "may" to "should"; as revised the proposal would 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.

Stark said that following that fortieth meeting, the task force determined to add to that comment a reference to an article by Cile Pace and Kenneth Hubbard, "CBA Availability of Legal Services Committee Task Force on Government Attorneys and Pro Bono," found at 29 The Colorado Lawyer 79 (July 2000). The task force also now proposed a revision of the "Recommended Model Pro Bono Policy for Colorado In-House Legal Departments," that had been included in the materials for the fortieth meeting of the Committee.[4] The model policy would complement the existing "Recommended Model Pro Bono Policy for Colorado Licensed Attorneys and Law Firms" that follows Rule 6.1 in the Colorado Rules of Professional Conduct. The changes made by the task force to its earlier deal with policy limitations on the performance of pro bono services during business hours, limitations on the use of the employer's assets in the course of that service, avoidance of affiliating the company with that service, and the like.

---

2. Stark had also provided a report on the subcommittee activities to the Committee at its fortieth meeting, on June 6, 2015. *See* beginning at p. 107 of the materials provided by the Chair to the Committee for the fortieth meeting, on June 6, 2015, and Part III of the minutes for that meeting. For additional materials, see beginning at p. 141 of the materials provided to the Committee for this forty-first meeting.

3. *See* pp. 107–109 of the materials provided to the Committee for its fortieth meeting, held on June 5, 2015.

4. *See* pp. 155–161 for the revised model policy, *and see* pp. 146–154 for a redline comparison of that to the draft model policy that was provided in the materials for the fortieth meeting of the Committee, held on June 5, 2015.

Stark noted that the materials provided for this meeting include an email from Anh-Thu Mai-Windle, an attorney in the Civil Division of the U.S. Department of Justice, to the task force that reviewed various statutory provisions that might apply to pro bono service by government lawyers; that review rebuts many of the reasons that government lawyers have given to justify their belief that they would not be permitted to provide pro bono services. He added that the task force looked particularly at existing programs of the Federal Government and other governmental agencies, programs that already permit their lawyer employees to provide pro bono services outside their functions as agency employees.

Stark recounted that he had met with the lawyer at the Colorado Office of the Attorney General who had set up that office's active pro bono program, which provides pro bono representation through a legal clinic in the Eighteenth Judicial District, with thirty-seven lawyers serving fifty-six clients in 2014. He was told that that office permits its lawyers to provide pro bono services during its office hours, so long as they fulfill the 1,800 hours of annual service to the office itself. The lawyers are permitted to use their legal assistants in their pro bono service; the legal assistants are permitted a dozen hours of "leave time" per year for their assistance. The lawyer who had explained that office's pro bono program to Stark had commented to him that the office was "learning" and looking for new opportunities for its lawyers' pro bono service — and that the office's program is now cited in refutation of claims by other agencies that they cannot establish such programs.

Turning to the text of the current version of the task force's model policy, a member noted that the mandatory word "must" is used in some of the provisions, such as that stating that "Individuals must obtain the approval of their supervisors to perform pro bono services during scheduled work hours." She asked whether that kind of restriction was necessary; Stark replied that this is just a model policy and that an agency may modify it as it wishes — or may determine to adopt no written policy at all.

Another member raised the question of whether this proposal and the existing model policy for lawyers in private practice or law firms which is found in the Colorado Rules of Professional Conduct immediately after Rule 6.1 are properly placed there; is there not a more appropriate place, she asked? Stark replied that the task force had spent a good deal of time to that question but had concluded that it would not take a position or make any suggestion in that regard. He noted that alternative locations include use of a chief justice directive or posting of the model policies on the Office of Attorney Regulation's website or that of the Colorado Bar Association. He remarked that "the task force does not much care where they go."

To that discussion another member remarked that lawyers now know where the existing model is placed and that there is no need to move it and the new one from that location. If anything, she added, additional copies of the model policies could be located on websites such as Stark had suggested.

A member who had raised the same question during the discussion of this matter at the fortieth meeting of the Committee said she was now convinced that there was no strong reason to change the location; the task force had considered the matter and not proposed a change, and that now satisfied her.

The Chair pointed out that, if the Committee were now to take a position on the proposed model policy, now was the time to decide whether it and the existing model policy should be left following Rule 6.1 or moved elsewhere; there was no need for further Committee discussion of the point.

To that, a member said she did not like having the policies located as if they were comments to Rule 6.1, but she added that they cannot serve as bases for attorney discipline anyway, so she would leave them there.

The Chair then turned the discussion to the text that is to be added as an actual comment to Rule 6.1, which Stark had outlined at the beginning of his discussion of the task force's efforts.

Stark directed the members to the second unnumbered paragraph now found after existing Rule 6.1(b)(3), beginning, "Where constitutional, statutory or regulatory restrictions prohibit . . . ." It is that paragraph to which the proposed additional comment text is directing attention. The additional language would be that which was approved at the fortieth meeting, with the reference to the guidelines that had been proposed by the Colorado Bar Association in 2000 that he had mentioned at the beginning of his presentation. Thus, the suggested additional comment would read—

> Government organizations should be 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, please see the voluntary pro bono program suggested in Case and Hubbard, "CBA Availability of Legal Services Committee Task Force on Government Attorneys and Pro Bono," 29 THE COLORADO LAWYER 79 (July 2000) and Rule 6.1(b).

To a member's concern that the chief justice — who had originated the idea of adding this comment — might not appreciate the addition of the third sentence referencing the bar association program, Stark answered that the reference to the article in *The Colorado Lawyer* had come at the suggestion of Kristin Burke, counsel to Chief Justice Rice. Another member referred the Committee to the minutes of the fortieth meeting, in which the origination of the proposal is recounted.[5]

To a member's question of who was the "encourager" who would be doing the encouraging that is contemplated in the text of the proposal, another member answered, "the Court."

Upon a motion and a second, the text of the comment was approved.

The Chair then turned the Committee to a detailed consideration of the proposed "Recommended Model Pro Bono Policy for Colorado In-House Legal Departments," noting that the Committee could determine only whether to propose its insertion within the Rules of Professional Conduct and was not empowered to suggest its insertion in some place external to those Rules.

To that, a member asked why the two model policies — the proposal and the existing one — could not be positioned as appendices to the Rules, outside of the Rules themselves. Another member pointed out that the Rules themselves are already an appendix to Rule 251 of the Colorado Rules of Civil Procedure. A third member suggested the formation of a terminology subcommittee to consider whether the proper word, then, for such a placement might be "adjunct" to the "appendix." To all of that, yet another member pointed out, again, that the recommended model policy for private lawyers is already placed after Rule 6.1 and commented that the Committee should be consistent with that.

Upon a motion and a second, the text of the proposed "Recommended Model Pro Bono Policy for Colorado In-House Legal Departments" was approved, to be placed following the existing model policy that is found after Rule 6.1.

---

5. *See* p. 2 of the minutes of the fortieth meeting of the Committee, held on June 5, 2015, which is found at p. 17 of the material provided for this forty-first meeting of the Committee.

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

At the Chair's request, Nancy Cohen and James Sudler outlined for the Committee the consideration that a subcommittee had been giving to the matter of flat fees and the implications of the *Gilbert* case — including the implicit requests within the opinions emanating from Supreme Court in that case for modification of the Rules to deal with flat fees.[6]

Cohen commented that the subcommittee had been having some interesting debates; another meeting will be held in a couple of weeks following this forty-first meeting of the Committee. The subcommittee has been discussing the addition of a rule to deal with a lawyer's flat fee for services; it has not yet addressed the matter of setting minimum standards for written fee agreements, which had been raised in a letter to the Chair from Steven Jacobson, chair of the Supreme Court's Attorney Regulation Committee, as noted at the Committee's fortieth meeting.[7]

Cohen summarized the state of the subcommittee's discussion by saying that its members had not yet decided what the subcommittee wanted to do; she noted that a couple of its members — who practice in areas in which flat fees are in use — have not yet been able to attend its meetings but will be able to provide valuable information when they can attend.

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

The Chair invited Cynthia Covell to present a proposal to amend Comment [3] to Rule 3.1 to add a reference to, and brief explanation of, the recent case *A.L.L. v. People* ex rel. *C.Z.*, 226 P.3d 1054 (Colo. 2010). The proposed amendment is found at page 27 of the materials for this meeting.

Covell explained that the *A.L.L.* case presented the issues of (1) whether court-appointed counsel would be permitted to pursue an appeal of a termination of parental rights — even though the lawyer does not personally believe that is a meritorious argument to be made on the appeal — when the parent had a statutorily-protected right to an appeal in a manner that might be likened to a criminal defendant's right to appeal, and (2) whether the lawyer was precluded from participating in that appeal because of her obligations under Rule 3.1. The first sentence of Rule 3.1 provides, "A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law." The second sentence of the rule states, as an exception for the criminal case, that the lawyer "may nevertheless so defend the proceeding as to require that every element of the case be established." Comment [3] to Rule 3.1 explains, "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."

The *A.L.L.* case did not involve a criminal prosecution as presently contemplated by the exception contained in the second sentence of Rule 3.1 but it did involve parents' statutory right of appeal, pursuant to § 19-1-109, C.R.S., "from any order, decree, or judgment" in a dependency and neglect proceeding.

---

6. *See* Part IV of the minutes of the fortieth meeting of the Committee, held on June 5, 2015, for the Committee's initial discussion of these matters, including a review of the *Gilbert* case.

7. *See* n. 4 of the minutes for the fortieth meeting of the Committee, held on June 5, 2015, and the Jacobson letter found beginning at p. 152 of the materials for that meeting.

Covell explained that the Colorado Supreme Court looked to Federal precedent that a client's constitutional right to an appeal must be protected in spite of his lawyer's conclusions that there is no merit to the appeal — and discussed the matter of the lawyer withdrawing from representation rather than pursue a meritless appeal, concluding that an appointed lawyer may not withdraw solely because she determines that the appeal lacks merit.

It is clear, Covell said, that Rule 3.1 should be modified in some manner to recognize the *A.L.L.* case. The proposal would not amend Rule 3.1 itself but would add the reference to the *A.L.L.* case to Comment [3]. Covell noted that the subcommittee did not think the Court intended, in *A.L.L.*, to go beyond what the amended comment comprehends.

A member asked why the modification did more than simply reference the case, by adding a parenthetical that quotes from the opinion in the case, including the statement that "[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."

Covell explained that the subcommittee thought this expressed the essence of the *A.L.L.* opinion and that its inclusion in the comment would be helpful to the practitioner. The subcommittee had considered a broader change, to the text of the rule itself, but determined to leave the matter to this proposed modification and its included comment on the *A.L.L.* case.

A member pointed to the negative implication of the reference to "appointed attorney"; would the comment also protect the engaged lawyer, or would that lawyer be required to withdraw from the engagement rather than pursue a meritless appeal? Covell replied that the subcommittee does not know the answer to that; she pointed out that the *A.L.L.* opinion refers both to the client's right to a lawyer, even if one must be appointed, and to the client's statutory right to appeal. The subcommittee decided not to go further than the appointed-counsel context of the *A.L.L.* case.

To that discussion, another member wondered about other permutations, such as the lawyer who has taken the case voluntarily but as a pro bono matter. Again, Covell said the subcommittee did not know how the Court's opinion might be applied in those situations. The opinion refers to the two rights — the right to a lawyer and the right to an appeal. One might conclude that the right is to a lawyer for the appeal, no matter how the litigant is able to obtain that lawyer. But at least some members of the subcommittee thought that taking that position in the rule would be going too far.

Covell added that the issue is confused by the subsequent *Dooly* case,[8] in which the court, citing *A.L.L.*, concluded that the lawyer had a right to withdraw rather than pursue an 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.

Another member added her concern about the negative implication that stemmed from the specific coverage of the appointed lawyer.

In reply to Covell's response, again, that the subcommittee did not know how to deal with that problem in light of the *A.L.L.* opinion, a member pointed out that the task of the Committee is to propose rules of professional conduct as it believes them to be properly fashioned, whatever the source or context

8. Dooly v. People, 302 P.3d 259 (Colo. 2013).

from which change may arise. The Committee, this member said, is not restricted by specific case precedent and could extend the exception beyond the appointed lawyer if it thought that to be a proper rule.

A member responded that any change to Rule 3.1 or its Comment [3] is unnecessary, because the *A.L.L.* case itself gives all the guidance the bar needs.

But another member painted the situation this way: The *A.L.L.* case seems to impose an obligation on the lawyer that differs from the existing ethical standard expressed in Rule 3.1, which prohibits meritless appeals except in the limited, expressed exception of the lawyer for "the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration." Comment [3] already recites that the ethical obligations imposed by the rule "are subordinate to federal or state constitutional law" that entitles a defendant to counsel in a criminal context. This member did not want to trap lawyers but, rather wanted the rules to give them "guidance."

A member concurred with that position, and another member said he found the subcommittee's proposal to be useful. He pointed out that the existing second sentence of Rule 3.1 and the existing Comment [3] identify one situation in which a lawyer may ethically pursue a meritless appeal for a client; the *A.L.L.* case identifies another such situation. But, he added, the change should also make it clear that these two now-identified situations may not be the only ones that may be excepted from the general restriction of Rule 3.1. In every case before a court, he noted, the litigant has some right to appeal; a difference between whether that right is limited by the requirement of merit in the appeal or not can differ — in the *A.L.L.* case, the clients had underlying rights, their parental rights to the child, and had the statutory right to appeal to protect that relationship.

To that, Covell observed that, in the *A.L.L.* opinion, the court spoke at some length about the importance of the parental rights termination proceeding and the substantial constitutional issues that were implicated. She suggested that the parenthetical could be dropped from the modification, so that it simply cited the *A.L.L* case without elaboration. The modification would then just be an alert to the case, which just happened to involve a court appointment.

A member moved that the comment be amended as the subcommittee had proposed it, with the inclusion of the explanatory parenthetical. The motion was adopted by a narrow majority.

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

The Chair directed the Committee's attention to the information found beginning on p. 28 of the materials provided for this forty-first meeting, in which the Colorado Access to Justice Commission has proposed amendments to Rule 1.15B and Rule 1.15D, which amendments would implement H.B.15-1371, signed into law on May 29, 2015, exempting from Colorado's escheat law, the Unclaimed Property Act, all funds held in a lawyer's COLTAF account.[9]

9. *See* H.B.15-1371, as enacted, at pp. 32–33 of the materials provided to the Committee for this forty-first meeting.

The Commission seeks amendments to Rule 1.15B and Rule 1.15D that would "provide direction to lawyers and law firms regarding the disposition of funds in COLTAF accounts where the proper recipient of the funds cannot be identified or, if identified, cannot be located."[10]

The Chair introduced Diana Poole, the director of the Colorado Lawyers Trust Account Foundation, to discuss this proposal, noting, as she did so, that she had told Poole that she expected the Committee to form a subcommittee to consider the proposed amendments and that there would be no full discussion of them at this meeting.

Poole explained to the Committee that, each year, lawyers ask her about how to handle funds held in their COLTAF accounts for persons they cannot now identify or locate. Historically, the COLTAF foundation has responded to the inquiries by referring to Opinion 95[11] of the Colorado Bar Association's Ethics Committee, issued in 1993, and to the Colorado Unclaimed Property Act. The 2015 legislation exempts these funds from the state's reach through the Unclaimed Property Act. Poole noted that member Alexander R. Rothrock and his colleague, Courtney M. Shephard, worked on the amendments that are now proposed to the Committee.

The Chair invited members to join the subcommittee, and she noted that it would be valuable also to have non-members participate on this subcommittee. Poole added that the COLTAF board includes three bankers, who are helping the Foundation with analysis of the legislation.

VII. *Housekeeping Changes.*

The Chair then turned the Committee's attention to some uncontroversial corrections or improvements that should be made to the Rules of Professional Conduct, as had been listed in Item 6 of the agenda for this meeting. The Committee dealt with the matters as follows:

A. The Committee approved the correction of the reference, in the second sentence of Rule 1.5(f), from "Rule 1.15(f)(1)" to "Rule 1.15B(a)(1)," and the correction of the reference at the end of the third sentence of Rule 1.5(f) from "Rule 1.15(a)" to "Rule 1.15A(a)."

B. The Committee approved the correction of the reference, in Comment [3] to Rule 1.13, from "Paragraph (19)" to "Paragraph (b)."

C. The Committee approved the correction of the reference, in the citation at the end of Comment [9] to Rule 1.16, from "See Rule 1.15" to "See Rule 1.16(d)."

---

10. *See* the August 7, 2015 letter to the Chair from the Commission, with the Commission's proposed amendments, at pp. 29–31 of the materials provided to the Committee for this forty-first meeting.

11. The syllabus of Opinion 95 reads—

> A lawyer may request in advance, as part of a written retainer agreement, that a client consent to the donation of unexpended funds if the client subsequently cannot be located provided that such consent is given freely and without any pressure exerted upon the client. In the alternative, a lawyer may ethically permit nominal amounts of client funds to remain in his or her COLTAF account. The lawyer may make reasonable expenditures from the fund to attempt to locate the client. If such efforts are unavailing, the lawyer may hold indefinitely in the COLTAF account funds which are nominal in amount. Alternatively, the lawyer may proceed under the Unclaimed Property Act, C.R.S. §§ 38-13-101, et seq., to have the funds be considered as abandoned property and delivered to the Colorado state treasurer. In the case of funds which are not nominal but are expected to be held for a short period of time, the lawyer may be required to proceed under the Unclaimed Property Act

D. The Committee approved the correction of the references, in Comment [1] to Rule 1.16A, from "Rules 1.16(d), 1.15(a) and 1.15(b)" to "Rules 1.15A and 1.16(d)."

E. The Committee approved the alteration of the second sentence of Comment [3] to Rule 1.16A from "The maintenance of law firm financial and accounting records covered by Rule 1.15(a) and 1.15(j) is governed exclusively by those rules," to "The maintenance of law firm financial and accounting records is governed exclusively by Rules 1.15A and 1.15D."

F. The Committee approved the correction of the references, in Comment [9] to Rule 1.18, from "Rule 1.15" to "Rules 1.15A and 1.15D."

G. The Committee approved the correction of the references, in Rule 5.5(a)(1), from "C.R.C.P. 220, C.R.C.P. 221, C.R.C.P. 221.1, C.R.C.P. 222 or federal or tribal law" to "C.R.C.P. 204 or C.R.C.P. 205 or federal or tribal law."

H. Likewise, the Committee approved the correction of the references, in Comment [1] to Rule 5.5, from "C.R.C.P. 220, C.R.C.P. 221, C.R.C.P. 221.1, and C.R.C.P. 222" to "C.R.C.P. 204 and C.R.C.P. 205."

I. And, similarly, the Committee approved the correction of the references, in Comment [1A] to Rule 8.5, from "C.R.C.P. 220, C.R.C.P. 221, C.R.C.P. 221.1, or C.R.C.P. 222" to "C.R.C.P. 204 or C.R.C.P. 205."

The Chair then directed the Committee to proposed changes in a comment to Rule 7.2 and in Rule 7.3 and its comments. She noted that the proposals were more stylistic, in contrast to the simple corrections that the Committee had just considered, and she explained that, after the Committee's proposals for changes in response to the American Bar Association's 2012 and 2013 Model Rules of Professional Conduct had been sent to the Court in May 2015, it was seen that there was some unnecessary inconsistency in the way various kinds of communications are referred to in the Rules — "communications," "live telephone," "electronic communications," and the like. For example, she said, there is no need to put the word "live" before "telephone."

A member commented that the phrase "live telephone"[12] was intended to distinguish "robo" telephone communication. In reply, the Chair noted that robo calls present the same kinds of problems as do the referenced live calls.

In response to a member's question whether the provisions should also cover "text" messages on "smart phones," another member thought not, because telephone communications involve bringing a person to a telephone at the other end of the line, while a text message can simply be deleted from one's screen.

James Coyle, Colorado's Attorney Regulation Counsel, remarked that proposals will be coming from his office for changes to most of the solicitation and advertising rules.[13]

---

12. The phrase "live telephone" is found in Rule 7/3(a) and Comment [1] and Comment [3] to that rule.

13. *See* Part VIII.A of these minutes for the subsequent discussion of proposals from the Association of Professional Responsibility Lawyers.

A member noted that Comment [2] to Rule 7.3 makes a distinction between "live" telephone communications and "robo" calls or, as the comment refers to them, "recorded communication," while Rule 7.2 refers permissively to "recorded or electronic communication" (subject to the requirements of Rule 7.1 and Rule 7.3).

Another member pointed out that the model rule on which Rule 7.3 is based uses the phrase "live telephone."

A member pointed to the second sentence of Comment [3] to Rule 7.3, which reads, "The contents of advertisements and communications permitted under Rule 7.2 can be permanently recorded so that they cannot be disputed and may be shared with others who know the lawyer." Another member agreed that that sentence, in the context of the entirety of that comment, makes the distinction between the permanence that can more easily be given to recorded or electronic messages, including robo telephone messages, than to in-person, "live" communications, so that there is, as explained in that comment, less chance for dispute about what was said than is the case for a "live" communication. Because of that, the member would retain the word "live."

The Committee determined to leave these proposals to further consideration at a subsequent meeting.

VIII. *Food for Thought.*

A. *The APRL Report*.

The Chair asked James Coyle to comment on the report from the Association of Professional Responsibility Lawyers (APRL), entitled "2015 Report of the Regulation of Lawyer Advertising Subcommittee" and found beginning at page 51 of the materials provided for this meeting. Coyle was liaison to the effort from the National Organization for Bar Counsel.

Coyle explained that the proposals contained in the APRL report do not deal with the solicitation rules contained in the Rules of Professional Conduct but collapse the several advertising rules into a single rule. A goal of the proposals is to assure that accurate information is received by the "consumer" of legal services while permitting lawyers to make use of new technologies and methods of communication when advertising their services. Coyle said the Office of Attorney Regulation Counsel is working on proposals for changes to the Rules of Professional Conduct, stemming from the APRL report, and has involved members of the Colorado bar who have concerns about the proposals. He asked the members of this Committee to give him any comments they might have, that he might pass them on to the working group. He expects to bring proposals to the Committee in the future.

The Chair commented that the APRL report contained very interesting ideas and might lead to significant changes in Colorado's advertising rules. She added that New York has been considering relaxing its limitations regarding out-of-state lawyers practicing within that state; Coyle added that California and Florida, too, are considering reciprocal admissions with other jurisdictions.

B. *Nine Ways to Fix Rule 1.8(e).*

The Chair had included, beginning at page 107 of the materials for this meeting, an article from the *Georgetown Journal of Legal Ethics* entitled "The Unethical Ethics Rule: Nine Ways to Fix Model Rule of Professional Conduct 1.8(e)." The author, she explained, does not believe that Rule 1.8(e) — which prohibits a lawyer from providing financial assistance to a client in a litigation matter except to advance costs and expenses on a contingency basis or for an indigent client — protects against a real

danger; the author proposes changes to the provision. The Chair said she included the article in the materials because she found it interesting and because she is aware of Colorado lawyers who have long sought a change in the provision.

A member noted that a lawyer had proposed specific changes to the provision a long time in the past but the Committee had determined not to pursue that proposal.[14] To that, another member proposed that the Committee "continue not to do anything."

In the absence of proposals to take any action, the Chair said she would let the matter lie.

IX. *Adjournment; Next Scheduled Meeting.*

The meeting adjourned early, sometime before 12:00 p.m. The next scheduled meeting of the Committee will be on Friday, January 29, 2016, beginning at 9:00 a.m., in the Supreme Court Conference Room.

RESPECTFULLY SUBMITTED,

Anthony van Westrum, Secretary

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

14. *See* Part IV of the minutes of the eighth meeting of the Committee, held on On March 23, 2005.