COLORADO SUPREME COURT

STANDING COMMITTEE ON THE RULES OF PROFESSIONAL CONDUCT

Approved Minutes of Meeting of the Full Committee
On March 14, 2014
(Thirty-Ninth Meeting of the Full Committee)

The thirty-ninth meeting of the Colorado Supreme Court Standing Committee on the Rules of Professional Conduct was convened at 9:00 a.m. on Friday, March 14, 2014, by Chair Marcy G. Glenn. The meeting was held in the Supreme Court Conference Room on the fourth floor of the Ralph L. Carr Colorado Justice Center.

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

Present as guests was Benjamin T. Figa, of the Governor's Office of Legal Counsel.

I. *Meeting Materials; Minutes of Meetings of October 11, 2013, and December 6, 2013.*

The Chair had provided a package of materials to the members prior to the meeting date, including submitted minutes of the thirty-seventh and thirty-eighth meetings of the Committee, held on October 11, 2013, and December 6, 2013, respectively. Those minutes were approved as submitted.

II. *Chair's Report on Supreme Court's Consideration of Rules Relating to Marijuana Commerce*.

The Chair reported to the Committee on the hearing conducted by the Supreme Court on March 6, 2014, to consider the Committee's proposals for, and to adopt, rules governing lawyers' conduct with respect to marijuana use and counseling in light of changes in Colorado law to permit medical and recreational use of marijuana, usage that remains a violation of Federal law. The Committee's proposals had been sent to the Court following the Committee's thirty-seventh meeting, on October 11, 2013.[1]

At the hearing, the Chair made the first presentation to the Court; she was joined by Committee member Judge Michael H. Berger and by Cynthia F. Fleischner, Gerald D. Pratt, and Judge Daniel A. Taubman, each of whom is a member of the Colorado Bar Association Ethics Committee. Following https://www.courts.state.co.us/Courts/Supreme_Court/Committees/Committee.cfm?Committee_ID=24

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1. The Chair noted that information concerning the proceedings are available through links on the Committee's page on the Supreme Court's website, at https://www.courts.state.co.us/Courts/Supreme_Court/Committees/Committee.cfm?Committee_ID=24, specifically links found after the heading "2013 RECOMMENDED CHANGES TO COLORADO RULES OF PROFESSIONAL CONDUCT SUBMITTED BY THE COLORADO SUPREME COURT STANDING COMMITTEE ON THE CRPC."

presentations by several private practitioners, Attorney Regulation Counsel James C. Coyle made the final presentation on behalf of the Office of Attorney Regulation Counsel.[2]

The Chair's presentation to the Court included a discussion of changes proposed to the professional conduct rules in Washington State to accommodate that state's legalization of marijuana activities. She said that King County, Washington, had proposed amendments to that state's rules of professional conduct drawn from our Committee's drafts of an added Rule 8.6 and an added Comment [2A] to Rule 8.4. The Ethics Committee of Washington State's integrated bar association had issued an interim opinion that took the position that, under that state's existing Rule 1.2, lawyers may advise clients regarding marijuana activities under Washington law notwithstanding the continued illegality of those activities under Federal law. That approach, the Chair noted, was not within the proposals made by our Committee to the Colorado Supreme Court nor within Opinion 125 issued by the CBA Ethics Committee. The Washington state bar association then proposed to omit the addition of a Rule 8.6, to add a comment to Rule 1.2, and to add a comment to Rule 8.4 equivalent to our Committee's proposed Comment [2A] to Colorado's Rule 8.4. But the Washington approach would remain quite distinct from our Committee's proposals, for it would contain references to Federal enforcement policies and would note that those policies could be changed, thereby instigating changes in Washington's rules; indeed, the Washington proposal would cross-refer to a very detailed state bar association opinion on the topic.

The Chair noted that information about the Washington approach is included as a part of the materials that were provided to members of the CBA Ethics Committee for its March 15, 2014 meeting.

The Chair said she had received nine questions from the justices at the Supreme Court's hearing, with questions also being asked of other presenters.

The Chair reported that Chief Justice Rice had, the day before this thirty-ninth Committee meeting, asked her and Committee members Webb and Coyle to attend a meeting on March 19, 2014; she was not able to make predictions about that meeting.

James Coyle declined the Chair's invitation to give the Committee his own view of the hearing before the Supreme Court.

III. *Subcommittee on ABA Amendments to Model Rules*.

The Chair returned the Committee's attention to the Report and Recommendations of the New American Bar Association Model Rules Subcommittee, which had been included in the meeting materials for the Committee's thirty-seventh meeting, on October 11, 2013, beginning on page 68 of those materials. She invited Berger, chair of that subcommittee, to resume the Committee's consideration of the Report and Recommendations.

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2. The Supreme Court issued an amendment to the Colorado Rules of Professional Conduct regarding marijuana on the date of this Committee meeting. The Court declined to adopt the proposals of the Committee and, instead, added the following as Comment [14] to Rule 1.2:

> A lawyer may counsel a client regarding the validity, scope, and meaning of Colorado constitution article XVIII, secs. 14 & 16, and may assist a client in conduct that the lawyer reasonably believes is permitted by these constitutional provisions and the statutes, regulations, orders, and other state or local provisions implementing them. In these circumstances, the lawyer shall also advise the client regarding related federal law and policy.

Its order is found at https://www.courts.state.co.us/userfiles/file/Court_Probation/Supreme_Court/Rule_Changes/2014/2014%2805%29%20redlined.pdf. —*Secretary*

Berger indicated that, as at the prior meeting, his approach would be to present a summary of each change to rule or comment in the ABA's Model Rules of Professional Conduct that has been proposed by the American Bar Association's Commission on Ethics 20/20 and then seek Committee discussion and vote on the changes as they were taken up. He would use as his guide the Report to which the Chair had referred the members.

A. *Rule 5.5, Unauthorized Practice of Law; Multijurisdictional Practice of Law.*

Berger began by noting that the subcommittee did not recommend acceptance of any of the ABA's proposed changes to Rule 5.5. The Committee did not specifically review any of those changes but accepted the subcommittee's recommendation that they not be adopted.

B. *Rule 7.1, Communications Concerning a Lawyer's Services.*

The ABA proposed the adoption of a new Comment [8] to Rule 7.1 (the existing comment to be renumbered [9]) that discusses advertisements that "truthfully [report] a lawyer's achievements on behalf of clients" but may nevertheless lead a reasonable person to an unjustified expectation that the same results might be obtained in another matter and discusses advertisements that make "unsubstantiated" comparisons of the lawyer's fees or services to those of other lawyers, noting that appropriate disclaimers might avoid those problems The subcommittee recommended that the ABA addition be adopted, and the Committee agreed.[3]

C. *Rule 7.2, Advertising.*

Berger reported that the ABA proposed useful modifications in the terms used in the comments to Rule 7.2 regarding email addresses, websites, and Internet and other forms of electronic communication. More substantively, the ABA proposed changes to Comment [5] to Rule 7.2 regarding lawyers' use of third party services to "generate client leads," establishing guidelines within which such services may be used. Berger commented that, while there are many concerns about lawyer advertising, it is constitutionally protected speech and the advertising rules must by updated to reflect present practices. The subcommittee felt that the ABA's proposals are also appropriate in view of the multi-state aspects of lawyer advertising and the resulting benefit of uniformity in the various states' advertising rules. The Committee approved the subcommittee's recommendation that the ABA's proposed changes to the Rule 7.2 be adopted.

D. *Rule 7.3, Direct Contact with Prospective Clients.*

Berger then turned to the ABA's proposed changes to Rule 7.3, regarding a lawyer's solicitation of clients. He began by noting that the Colorado version of Rule 7.3 is substantively different from the ABA Model Rules, because the Supreme Court has inserted into the Colorado Rule 7.3(c), mandating a thirty-day cooling-off requirement for solicitations in personal injury matters. The subcommittee did not propose that the cooling-off period be deleted, but it did recommend that the other changes proposed by the ABA be adopted—

1. The title of Rule 7.3 would be changed from "Direct Contact with Prospective Clients" to "Solicitation of Clients," reflecting the terminology that is commonly used in practice.

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3. The Chair noted that the Committee had approved the subcommittee's recommendation regarding the addition of the new Comment [8] to Rule 7.1 at its thirty-eighth meeting, on December 6, 2013, but that the approval had not been noted in the minutes of that thirty-eighth meeting. —*Secretary*

2. The term "prospective client" would be dropped at several points within the text of the rule, to be replaced by more general terms such as "the target of the solicitation" or even "anyone." Those changes acknowledge the specific use of the term "prospective client" in Rule 1.18, which prescribes specific duties to "[a] person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter" — that is, "a prospective client." The solicitation contemplated by Rule 7.3 may target a broader grouping, as the textual change indicates.

3. Berger noted that the ABA considered further changes to deal with the development of technology that can permit interaction with digital devices that are, in Berger's words, "nearly like a live exchange"; he referred to the movie "Her."[4] But the ABA chose not yet to undertake revisions to Rule 7.3 to deal with those "nearly real personal interactions," and the subcommittee appreciated that restraint; changes can be made when actual abuses of this kind of technology are subsequently developed.

With the retention of Colorado's unique Rule 7.3(c), the subcommittee recommended the adoption of these other changes the ABA proposed to the rule.

A member pointed out that Colorado's existing Rule 7.3(c)(1) — probably erroneously — refers to a petulant lawyer; it reads, "[N]o such communication may be made if the lawyer knows or reasonably should know that the person to whom the communication is directed is represented *resented* by a lawyer in the matter . . . ."

The Committee approved of the subcommittee's recommendations regarding Rule 7.3 and agreed that reference to the lawyer's resentment should be removed from Rule 7.3(c)(1).

E. *Rule 8.5, Disciplinary Authority; Choice of Law.*

Berger reported that the ABA proposed modification of Rule 8.5 to permit a lawyer to contract around the application of the Rules in a limited context, by the addition of text to Comment [5] to Rule 8.5 as follows:

> [5] When a lawyer's conduct involves significant contacts with more than one jurisdiction, it may not be clear whether the predominant effect of the lawyer's conduct will occur in a jurisdiction other than the one in which the conduct occurred. So long as the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect will occur, the lawyer shall not be subject to discipline under this Rule. ***With respect to conflicts of interest, in determining a lawyer's reasonable belief under paragraph (b)(2), a written agreement between the lawyer and client that reasonably specifies a particular jurisdiction as within the scope of that paragraph may be considered if the agreement was obtained with the client's informed consent confirmed in the agreement.***

The comment refers to Rule 8.5(b)(2) which specifies that, for conduct that is *not* connected to a matter pending before a tribunal, "the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct." The proposition reflected in the ABA's proposal is that many legal services are now provided by lawyers across jurisdictions and, as an accommodation, a lawyer should be able to contract with the client as to which of the rules within the various jurisdictions covered by the principle expressed in Rule 8.5(b)(2) are to govern the lawyer's conduct.

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4. *See* https://en.wikipedia.org/wiki/Her_%28film%29 —*Secretary*

Berger reported that a majority of the subcommittee did not accept the ABA's addition to the comment. The concern was that no rule should indicate that a lawyer may contract around any of the rules. The question of what rules should control the lawyer's conduct — which is itself a question of law — should be left to resolution under the principles of conflicts of law, as outlined in Rule 8.5(b)(2), and not to the lawyer's and the client's deal. Berger noted that a minority of the subcommittee wanted to expand the ABA's approach, to provide that the lawyer and the client could contract for the application of any of the sets of conflicts-of-interest rules spanned by the possible jurisdictions, rather than state that just those of the jurisdiction "reasonably specified," could be chosen.

A member who had served on the subcommittee noted that she could not recall what her position had been when the subcommittee considered the ABA's addition to Comment [5], but she now was concerned that there might be a negative implication to be drawn from a Colorado rejection of the ABA's addition. Her concern was that one might conclude, by that rejection, that a lawyer and a client may never contract as to the meaning of any of the rules of professional conduct.

Although other members expressed their view that no such negative implication could properly be drawn from a rejection of this addition to this comment, the member expressed her view that the ABA's proposal contained adequate safeguards — the provision applied only to the conflicts-of-interest rules; and the contracted-for choice must be "reasonably specified" and, even if specified with the client's informed consent, nevertheless would be merely a basis for consideration of whether the lawyer's belief that the selected jurisdiction was appropriate for application of Rule 8.5(b)(2) was reasonable — and that the proposal dealt with what can be a significant problem for lawyers practicing in large, multi-state law firms.

A member asked whether the comment could be augmented by a statement indicating no negative implication was to be drawn with respect to other rules and principles; others noted that the negative implication had been claimed to exist only with respect to a Colorado rejection of the ABA proposal. A member suggested that, as the entire matter was found only in a comment, and not in rule text, there was little possibility that a negative implication would be drawn from a Colorado rejection of the addition to the comment; in this member's view, the ABA addition only added confusion.

When another member spoke to support acceptance of the ABA's addition to the comment, yet another member said he felt the subcommittee's rejection of the addition, based on the proposition that a lawyer cannot contract around the Rules, was the better decision.

Berger directed the Committee to the text of the subcommittee's report, as found on page 85 of the materials provided for the thirty-seventh meeting, on October 11, 2013:

> The Subcommittee considered several courses of action with respect to this ABA change. Some members favored expanding the new ABA sentence to eliminate the apparent limitation on the use of such agreements to conflicts issues. A majority of the Subcommittee concluded that such an expanded sentence would be ill-advised because it would invite lawyers to contract around numerous ethical rules. (The ABA Report specifically stated that such agreements would be considered only to resolve conflicts issues, precisely to avoid contracting around other ethics rules.)
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> A majority of the Subcommittee also concluded that the ABA amendment to Comment [5] was improperly underinclusive. There may be situations in which an agreement between a lawyer and a client may be relevant to resolving choice of law issues relating to matters other than conflicts; the Subcommittee was not comfortable absolutely prohibiting (through negative inference) the use of such an agreement in situations addressing ethical issues other than conflicts.

Berger focused the Committee on the second quoted paragraph, noting that a comment that referred only to a client-lawyer contract for purposes of the conflicts-of-interest provisions seemingly precludes such contracts in other circumstances where they may be reasonable and acceptable. While a Colorado omission of the ABA addition may carry a negative implication that even waivers of conflicts are not permitted, as the member who had first raised the matter suggested, Berger felt that inclusion of the ABA addition to Comment [5] would leave the negative implication that the subcommittee had seen. Perhaps, Berger suggested, the solution was to add yet more text that would disclaim that negative implication, that implication that the lawyer could not seek to clarify other issues arising under the Rules by way of contract with the client.

Another member, who had not yet spoken, expressed his general dislike for the idea of contracting around the application of the rules, but he added that this particular provision does not say the contract is binding but only that it may be "considered" in determining the underlying choice of law matter. Maybe that worked, he suggested.

To yet another member's observation that the ABA's proposed addition merely permits the lawyer and the client to enter into a "written agreement" that may be considered by the court in determining what conflicts rules actually to apply — and thus doesn't add anything to the fact that the court could consider such an agreement even in the absence of the added text in the comment — Berger responded that the mere expression, in any fashion in any of the rules or comments, that the lawyer and the client may contract as to their application has significant implications.

At the request of a member who had not spoken on the matter, the Chair called for a vote on the matter. The subcommittee's recommendation was approved, and the ABA addition to Comment [5] of Rule 8.5 was rejected.

F. *Miscellaneous Corrections.*

It was noted that the existing Comment [1] to Colorado Rule 4.3 contains a cross-reference to Rule 1.13(d) that should be to Rule 1.13(f). The Committee approved the correction of that error.

It was also noted that both Comment [7] and Comment [8] to Rule 1.5 erroneously refer to Paragraph (e) of that Rule 1.5; the references should be to Paragraph (d) of the rule. The Committee approved the correction of those errors.

G. *Rule 4.4, Respect for Rights of Third Persons.*

The Chair asked Berger to lead the Committee through a discussion of the New ABA Model Rules changes to Rule 4.4.

Berger began that discussion by commenting that he would not have anticipated that this provision would generate the extensive discussion that it actually caused among the subcommittee members, as is indicated in the subcommittee's report.[5] The approach taken by the ABA is a simple one: If the lawyer receives a document that was inadvertently sent to the lawyer, the lawyer need only give notice of that receipt to the sender. Other, further responses may be required by other law, but the ABA's rule, standing alone, would itself require nothing more. For example, it would not mandate that the lawyer not read or use the received document.

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5. The report of the New ABA Model Rules Subcommittee on the ABA's changes to Rule 4.4 begin on p. 18 of the materials provided to the Committee for this thirty-ninth meeting.

But such a rule would not be consistent with the ethical principles expressed by the CBA Ethics Committee in its published opinions and would be a change from existing Colorado Rule 4.4(c), which provides—

> (c) Unless otherwise permitted by court order, a lawyer who receives a document relating to the representation of the lawyer's client and who, before reviewing the document, receives notice from the sender that the document was inadvertently sent, shall not examine the document and shall abide by the sender's instructions as to its disposition.

Berger recalled that, when the Committee considered Rule 4.4 in its initial review of all the ABA Ethics 2000 Rules for adoption in Colorado,[6] it had a lengthy discussion about the receiving lawyer's duties with respect to a document that had been inadvertently sent to the lawyer. Were there ethical constraints limiting the lawyer's freedom to use the document for the benefit of the lawyer's client? Many on the Committee, as on the CBA Ethics Committee, felt that there should be some constraints. Rule 4.4(c) was the result of that discussion. Berger summarized the provision this way: If, before you start reading, you know the document was not intended for you, you should not read it unless and until a court determines that you may do so.

In their review of the matter, Berger and Judge Ruthann Polidori had felt that the current Colorado version of Rule 4.4 did not sufficiently deal with the ethical dimensions presented by the situation. They would expand the rule's coverage to include a document that the lawyer would know, from the nature of the document and the circumstances and even without notice from the sender, was not intended for the lawyer — "it would be obvious to anyone."

But, Berger noted, one should be careful in what one wishes for. Several subcommittee members responded to Berger's and Polidori's move to expand Rule 4.4(c) by seeking to delete the entire subparagraph, retaining only the ABA version of Rule 4.4. The result was the subcommittee's inability to reach agreement, reporting out, instead, six different alternatives for the full Committee to consider.[7] Berger noted that only one of the alternatives had received support from a majority of the subcommittee's members, a majority that lasted for only an hour. There are many possibilities: Leave Rule 4.4(c) as currently stated in the Colorado Rules; delete it in a reversion to the ABA's approach; strengthen it as Berger and Polidori suggested; or drop both it and Rule 4.4(b)[8] on the theory that the innocent receiving lawyer should have no duty at all to the erring sender, no duty that would prevail over the use of the mistakenly sent document for the benefit of the lawyer's own client, leaving the party that was damaged by the inadvertent transmission with a malpractice claim against the erring lawyer.

As reported out by the subcommittee, Alternative № 1 would modify the existing text of Rule 4.4(c) as follows:

> (c) Unless otherwise permitted by court order, a lawyer who receives a document relating to the representation of the lawyer's client and who, ~~**before reviewing the document**~~ ***within a reasonable time thereafter also*** receives notice from the sender that the document was inadvertently sent,

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6. *See* Part III.C of the minutes of the Committee's eleventh meeting, on September 27, 2005.

7. *See* beginning on p. 9 of the subcommittee's report, page 26 of the materials provided to the Committee for this thirty-ninth meeting.

8. Rule 4.4(b) reads, "A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender." It does not itself preclude use of the document.

shall not ~~**examine**~~ ***make any use of*** the document and shall abide by the sender's ***reasonable*** instructions as to its disposition.

As explained in the subcommittee's report, this alternative would extend the receiving lawyer's duties — to not make use of the document and to abide by the sender's instructions as to its disposition — beyond the circumstance where the receiving lawyer has received notice of the inadvertent transmission before reviewing the document to the circumstance where such notice is received within "a reasonable time" after receipt of the document, even if the lawyer had reviewed the document before receipt of that notice. The purpose of the change is to reduce the perceived perverse incentive for the receiving lawyer to conduct a "review" before notice of the inadvertent transmission arrives. Those opposing this alternative wondered how the lawyer who did review the document within that period of time would purge knowledge of its contents when the notice of inadvertent transmission eventually arrived.

Alternative № 2 would leave Rule 4.4(c) unchanged but add text to Comment [2] to Rule 4.4 to explain that the phrase "reviewing the document" includes "any examination of the document by the [recipient] lawyer," so that even "[opening] an email, or [looking] at the letterhead, address field, or subject line of a document or email" before receiving notice of its inadvertent transmission would thereby eliminate any obligation under Rule 4.4(c). Those opposing this alternative felt that the expanded comment would be inconsistent with the intent of the subparagraph itself, as it would permit use of received information that was obviously intended to be confidential, such as when the email subject line read, "Here is your confidential psychiatric assessment," unless the notice of inadvertence was received before the email was downloaded and its subject line exposed to the recipient's view.

Alternative № 3 would revert the text of Rule 4.4 to that of the ABA model rule, dropping Rule 4.4(c) and reducing the ethical obligation of the lawyer who receives a document that the receiving lawyer knows or should know was sent inadvertently — even if the inadvertence were obvious by the nature of the document — to that expressed in Rule 4.4(b), that is, merely advising the sending party of the receipt of the document. Those who oppose Alternative № 3 note that it was rejected by the whole Committee when it first considered the matter in 2005 and by the Supreme Court when it accepted the recommendation of the whole Committee and adopted Rule 4.4(c).

Alternative № 4 would make the usage prohibition of Rule 4.4(c) apply only to documents that are protected within the statutory attorney-client privilege or as trial-preparation material, recognizing that the Supreme Court has, by its recent amendments to Colorado Rule 45(d)(2)(B), permitted clawback of privileged material that is inadvertently disclosed pursuant to a subpoena.[9] While some members of the subcommittee felt that this approach would at least provide for certainty, Berger believed that no member of the subcommittee now promoted the cumbersome alternative.

Alternative № 5 would extend the reach and requirements of Rule 4.4(c) by prohibiting the receiving lawyer from using a document that the lawyer knows was inadvertently sent, whether or not notice of the inadvertence is ever given; that lawyer must notify the sender of the receipt and abide by

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9. C.R.P.C. 45(d)(2)(B) reads—

(B) *Information Produced*. If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

the sender's instructions regarding return or destruction of the document. The explanation given by the proponents of this alternative is that the use of confidential or privileged information based upon an error made by the sending lawyer before a court has a reasonable opportunity to adjudicate claims of waiver is not right and therefore could not be ethical conduct by the receiving lawyer. But such an approach would entirely protect the inadvertence of the sending party at the expense and burden of the receiving lawyer.

Alternative № 6 would remove all discussion of the inadvertent transmission from the Colorado Rules, the argument being that any such rule distorts the judicial process of examination of facts and requires special conduct of the innocent receiving lawyer that is intended to relieve the erring lawyer of the consequences of the error. Logically, this alternative could also include repeal of Rule 4.4(b), although the lone proponent of this alternative on the subcommittee would retain the notice requirement of Rule 4.4(b).

With that review, Berger concluded his report for the subcommittee.

A member who had been a member of the subcommittee said she did not believe that all is fair in love, war, and litigation. In her view, the subcommittee could write a proper Rule 4.4 if the whole Committee gave guidance on these matters:

1. As now written, both Rule 4.4(b) and Rule 4.4(c) are directed toward information that is inadvertently sent by a lawyer or an opposing party — the first sentence of Comment [2] to Rule 4.4 recognizes "that lawyers sometimes receive documents that were mistakenly sent or produced by opposing parties or their lawyers." In recognition of the scope of the title to the rule — "Respect for Rights of Third Persons" — should the comment be clarified to cover information that was inadvertently sent by someone other than an opposing party or her lawyer, such as by an opposing party's doctor or accountant or by some other class of person, professional or otherwise, to protect not only of the opposing party but also of the person who sent it? An example would be that of the wife in a divorce, who has locked her computer, and the husband who, visiting the children, breaks the code, opens the computer, retrieves the wife's private emails and other documents, and provides the information to the lawyer who represents the husband in the divorce. Another example, of which this member was actually familiar, is that of a wife who has received temporary custody of the couple's minor child because of the husband's sexual misconduct, where the husband has recovered the wife's mental health records from her mental health counselor and disclosed those records to his lawyer.

To that second example, another member pointed to C.R.S. 18-4-412, making theft of medical records a Class 6 felony. Subsection (1) of that statute reads—

> (1) Any person who, without proper authorization, knowingly obtains a medical record or medical information with the intent to appropriate the medical record or medical information to his own use or to the use of another, who steals or discloses to an unauthorized person a medical record or medical information, or who, without authority, makes or causes to be made a copy of a medical record or medical information commits theft of a medical record or medical information.

The member who directed the Committee's attention to that section recalled that it was added to the statutes in the 1970s in response to the conduct of some lawyers defending clients against personal injury claims. There was a hew and cry; people care about this kind of conduct, that member noted. The member who was compiling the list of matters on which the Committee might be given guidance for a re-written Rule 4.4 asked whether the rule might also refer to that criminal law provision.

2. As had been noted earlier, C.R.C.P. 45 was amended recently to deal with the inadvertent disclosure of privileged information in response to a subpoena. The member who was compiling the list of matters on which the Committee might be given guidance for a re-written Rule 4.4 asked whether reference should be made to that rule.

Another member reminded the Committee that the first section of the preamble to the Colorado Rules states, "A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice." He urged the Committee to keep the lawyer's tripartite role, as manifested in that provision, in sight as it modified the Rules, including this one regarding the integrity of the informational process in litigation. This member "did not disagree that not all is fair in litigation" — a field he characterized as nevertheless far from love. We must be aware, he said, that our brothers and sisters who apply the rules governing lawyers' conduct need our guidance.

To the example of the mis-sent email that contains the subject line, "Here is your confidential psychiatric assessment," this member responded that that was an easy one; the lawyer receiving that email should recognize that it was sent inadvertently and should notify the sender of the error. But what about the email that just says, "the attached document kills our case"? What is the receiving lawyer to do in that situation? That lawyer's client is entitled to know that the other side has suddenly seen the weakness of its case, and yet our Rule 4.4(c) would seem to say that information — or at least the document in which it was contained, depending upon the alternative that the Committee now adopts — cannot be used by the receiving lawyer. This member would not oppose an obligation for the receiving lawyer to notify the sender of the receipt of the document but would not want the receiving lawyer to be precluded from using the information contained therein for that lawyer's client's benefit. It would be the sending lawyer who was at fault for the inadvertent transmission, not the recipient; the sending lawyer should not be able to say to Attorney Regulation Counsel, "It was the recipient who had the last best chance to avoid the harm from my error." This member urged the Committee to remember the need for balance; in his view, some version of Rule 4.4(c) is necessary, but the Committee should not shift the burden too dramatically upon the receiving lawyer.

Another member expressed his view that it was not appropriate for the Committee or the courts to assign to the innocent receiving lawyer any responsibility for protecting the interests of the sending lawyer and that lawyer's client. This member had represented lawyers on each side of the problem and found that the erring senders had to live with the consequences of the inadvertent disclosures of information: It was appropriate to assign to the receiving lawyer the duty of notifying the sending lawyer of the mistake, as Rule 4.4(b) does, for that approach affords the erring sending lawyer an opportunity to take some action to protect the client's interest. But there should be no other obligation on the receiving lawyer, such as having to comply with the sending lawyer's instructions. This member felt that, as the member who had just previously spoken had said, the rights of the receiving lawyer's client are at least as strong, in this situation, as those of the sending lawyer's client.

The member continued: Thus, the only obligation of the receiving lawyer should be to give notice of the receipt to the sending lawyer. But that is a different burden than is now mandated by Rule 4.4(c); furthermore, there really is no recognized process, at present, for the receiving lawyer to follow. The member said, as an example, that he had recently received a response to his request for admissions that, somehow, had inadvertently disclosed the instructions that the client had given to the responding lawyer about how to answer the requests. Those instructions from the client, inadvertently sent along with the answers to the requests for admission, disclosed the opponent's entire case. The member had felt it was appropriate for him to give the other lawyer notice that he'd received those instructions, asking what the sending lawyer now wanted him to do with the information and thereby giving that erring lawyer an opportunity to seek the court's protection.

A member who had served on the subcommittee responded to those comments by expressing his discomfort with any rule that required the receiving lawyer to abide by the instructions of the erring sending lawyer. He noted that sometimes the receiving lawyer needs to "push back," and he felt that the better course was for the rule to require a sequestration of the inadvertently sent document until the matter could be resolved by the court. That course, he felt, would be consistent with caselaw and struck the right balance between the interests of the respective parties.

Another member who had served on the subcommittee spoke to Alternative № 3, which would revert Rule 4.4 to the ABA Model Rule, dropping Rule 4.4(c) but retaining Rule 4.4(b) and requiring only that the receiving lawyer — if that lawyer knows or should know the document was inadvertently sent — advise the sending party of the receipt of the document. In this member's view, the foundations of Colorado's Rule 4.4(c) were shaky and the provision was in fact a house of cards. The provision, she noted, had been included in our Committee's initial recommendation to the Supreme Court covering the ABA's Ethics 2000 Rules only because of the existence of the CBA Ethics Committee's Opinion 108, adopted by that committee in May 2000. Yet, although our Committee had cited the Colorado ethics opinion in its recommendation of Rule 4.4(c) to the Supreme Court, its explanation to the Court had erred by stating that the CBA Ethics Committee had relied on existing Rule 4.4 in arriving at that opinion; in fact, the Ethics Committee had not referred to the then-existing rule — which did not then impose any burden on the receiving lawyer — but found, principally by looking at the prohibition against dishonest conduct that is stated in Rule 8.4(c), not only a duty to give notice of the receipt of the inadvertently-sent document but also to abide by the sending lawyer's instructions as to the disposition of the document. In sum, this member said, the proponents for retention of Rule 4.4(c) are wrong to cite adherence to the CBA Ethics Committee's Opinion 108 as a reason for that retention, because the provision does not parallel that opinion.

The member continued by noting that the CBA Ethic Committee's Opinion 108 was itself based in part upon Formal Opinion 92-368 of the ABA Standing Committee on Ethics and Professional Conduct, which opinion has been withdrawn by the ABA committee, with its issuance of Formal Opinion 05-437, in recognition of the fact that the ABA's Model Rule 4.4(b) had only required notice to the sender and did not require non-examination and non-use of the document nor compliance with the sending lawyer's instructions about disposition of the document. In subsequent opinions, the ABA Standing Committee had recognized that the rule should not express "principles involving the protection of confidentiality, the inviolability of the attorney-client privilege, the law governing bailments and missent property, and general considerations of common sense, reciprocity, and professional courtesy," because the application of other law is beyond the scope of the ethics rules and not a proper basis for a formal opinion on professional conduct.[10] In this member's view, if such law is not a proper basis for an ethics opinion, it is not a proper basis for an ethics rule; such law should be left to separate, independent application. This member commented that she was in favor of courtesy but must think about her obligations to her client when she is the lawyer who has received inadvertently-sent material that is relevant to her representation of that client; while she would be subject to a court's instructions, she should not be subject to the instructions of the erring sending lawyer.

The member said the impact of the current rule is to turn a disclosure matter, a matter of court procedure, into a disciplinary matter. The member agreed with the point that Berger had made in his review of the subcommittee's alternatives — that the circumstances covered by the rule are exacerbated by the advent of electronic communication. She felt, however, that this was one more reason for leaving the entire matter to other law, outside the disciplinary context.

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10. *See* the discussion of the history of ABA Formal Opinion 92-368 and its successor, Formal Opinion 05-437, at p. 5 of the subcommittee's report on Rule 4.4, found at p. 22 of the materials provided to the Committee for this thirty-ninth meeting.

The member added that the ABA Standing Committee has devoted much attention and effort to these issues — as is evidenced by the recounting of its various opinions in the subcommittee's report on Rule 4.4 — and has determined only to impose a duty of notice upon the receiving lawyer. Twenty-nine other states have adopted that position. She suggested that the subcommittee could aid the Committee in its consideration of the rule by charting what other states have done, some of which have provided for cooling-off periods, court resolution and the like; although, she added, such a chart might be much like a Chinese restaurant, offering too many choices.

Wherever the Committee came out, this member hoped that it would avoid reference to privileged and confidential material, for the interjection of those specialized concepts would only lead to confusion and unintended consequences by adding to the receiving lawyer burden the need to consider and resolve the application of those concepts when determining what course of action to take in response to the inadvertently received document.

Another member, who had also been a member of the subcommittee, said his concerns with the existing rule and with all of the proposals reflected two dramatically different scenarios. In the first, the sender has hit the wrong button on the email service, or a doctor has misdirected a report. In that scenario, he felt, it was appropriate to put some slight burden on the receiving lawyer. In the second scenario, the document has inadvertently been included in a response to a formal discovery request. In that scenario, if the rule were written as some members proposed then the sending lawyer could take the position that there was no need to exercise care to protect the client's confidential information in the discovery response because inadvertently-disclosed information could be clawed back. In that scenario, this member felt, there should in fact be no ethical imposition on the receiving lawyer.

To those comments, another member said that Rule 1.6 establishes the principle obligation of the erring lawyer: Do not disclose confidential client information unless disclosure is impliedly authorized to carry out the representation. If, by Rule 4.4, we send a second message to lawyers — that breaches of the duty of confidentiality can be mitigated by shifting burdens to receiving lawyers — we have weakened the fundamental mandate of Rule 1.6.

That member continued by suggesting that, outside the litigation context, there is not likely to be a court available to determine the outcome, although, if the mistake is big enough and the stakes high enough, the matter might end up in court. The structure of the rule will determine which lawyer would be obligated to take the matter to court for that resolution, the sender or the recipient. If the sending lawyer rushed to court for protection, that could well spell the spoiling of a pending transaction. This member saw a need for something in the rule to "set the tone" for how the parties might resolve the inadvertent disclosure without having to resort to court; in his view, the rule should be written with more than just the litigation scenario in mind.

Another member responded to several of the comments that others had made by noting that lawyers are not just warriors on a battle field. Referring again to the preamble to the Rules, he pointed out that lawyers have additional responsibilities to the judicial system itself. In his view, the ABA approach is dead wrong; there are ethical implications when a lawyer receives things that should not have been sent; those are not just matters for other law, such as the law governing legal privileges, but are matters that should be dealt with also in the rules of professional conduct.

Whatever restrictions are provided for, this member noted, will merely be temporal, as the rule will spell out procedures to be followed to resolve the situation. None of the proposals is an absolute barrier to use of inadvertently-disclosed information by the receiving lawyer; the proposals just say go to court to see whether there has been a waiver of a privilege or other right to confidentiality existing under law external to the rules of professional conduct. The fact that the receiving lawyer must wait for

a resolution should not control the situation. It may be a very specific situation in which the inadvertently-disclosed information might greatly affect the parties' respective rights and the outcome of the case. Why should the rule not provide for an opportunity for the court to resolve the matter?

This member noted, with respect to the earlier comment that the result might be different in the context of a response to a formal discovery request, that the Supreme Court's Civil Rules Committee would soon be considering a change to C.R.C.P. 26 to adopt the clawback rule found in Federal Rule of Civil Procedure 26. He noted that litigants in the Federal courts have been dealing with that rule for a long time without problem. That provision, he said, requires as a matter of procedure what Alternative Nº 3 would require as an ethical principle. Further, he said, the Colorado Supreme Court, by its adoption of changes to C.R.C.P. 45, has accepted that clawback might be appropriate.

A member spoke in favor of Alternative Nº 2, which would leave Rule 4.4(c) unchanged (but clarify by comment that any observation of the mis-sent document would constitute the receiving lawyer's "review" sufficient to avoid any further obligation to respond to the sending lawyer's instructions regarding use of the document). In addition to the virtue that it would retain the provision that has been in effect since 2008, this alternative has a very narrow scope: When, before "review" of the document, the receiving lawyer is notified that the document was inadvertently sent, the receiving lawyer must not examine the document and must abide by the sender's instructions for disposition. That's a very narrow burden, he felt, to impose on the receiving lawyer in a very narrow circumstance. It is not, in his view, a "balancing act," but, rather, a barrier to examination that can exist only where the receiving lawyer has notice of the inadvertence of the transmission before the lawyer has been exposed to any bit of information contained in the transmission.

That member said he had previously been in favor of the Colorado version of the rule and had played a role in the adoption of CBA Ethics Committee Opinion 108; he remained in favor of them. Both deal only with the situation where notice of the inadvertent transmission is received before the content of the transmission becomes known to the receiving lawyer. He noted that Rule 1.15(a) covers property that belongs to another, requiring the lawyer to hold such property separate from the lawyer's own property and appropriately safeguarding that property until it is returned pursuant to Rule 1.15(b). Existing Rule 4.4 is much narrower, only requiring notice to the sending lawyer and compliance with the sending lawyer's disposition instructions. The opponent's open briefcase in the conference room is not to be examined; it is as appropriate to say the mis-directed Federal Express package is also not to be opened when it arrives tomorrow after today's notice of its inadvertent dispatch.

As to what's fair in litigation — as distinguished from what's fair in love — the rules of professional conduct are the appropriate place to deal with these problems.

In this member's view, all that is needed is the suggested comment, which is a part of Alternative Nº 2, refining the nature of what constitutes a "review" of the mis-sent document sufficient to cut off a duty to comply with the sending lawyer's instructions.

A member pointed out that the rule in question would apply to criminal cases as well as to civil litigation. She directed the Committee's attention to CBA Ethics Committee Opinion 102, which, similarly to Opinion 108, would preclude use of information inadvertently disclosed in response to a subpoena.[11]

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11. The syllabus of CBA Ethics Committee Opinion 102, issued in 1998, expresses the matter as follows:

If information, documents, photographs or other objects are inadvertently received from a witness on whom a subpoena duces tecum has been served that the lawyer knows to be, or that appear on its face to be privileged or

Another member said he supported Alternative № 2 for all the reasons that had been expressed by the member who had just spoken about that alternative before the reference to Opinion 102. In this member's view, Alternative № 2 was right in the middle between the harsh ABA "caveat emptor" rule and, at the other end of the spectrum, the proposals that would impose more significant burdens on the receiving lawyer and that are themselves inconsistent with the changes that are being made to the civil procedure rules.

The Chair spoke to say that it was no more clear now than before about which way the Committee would go. She asked for a straw vote on the matter, noting that there was not a sufficient number of members in attendance to make a final decision about Rule 4.4.

After discussion directed to restating the alternatives, the first vote was on deleting Rule 4.4(c) and adding a comment that referred the duty expressed in Rule 3.4(c) to comply with court rules. That proposal failed, with the result, as the Chair noted, that some version of Rule 4.4(c) would be retained.

After further discussion about approaches that might be taken toward the remaining alternatives, it was decided, by vote, just to leave Rule 4.4(c) as it is currently stated in the existing rules.

H. *Other ABA Changes; Commendation of the Subcommittee Chair.*

Berger reported that New ABA Model Rule 4.4 would add the concept of "electronically stored information" to the concept of a "document" in the context of the inadvertent disclosures that are covered by Rule 4.4. The subcommittee agreed with that addition but felt that the term "document" should be defined in Rule 1.0 to include electronically stored information so that such information would be included in each reference to a "document" within any of the rules.

ABA Model Rule 4.4(b) also now defines "electronically stored information" to include "embedded data (commonly referred to as metadata)," so that the usage principles of Rule 4.4 would apply to metadata as they do to overt information within a "document," precluding usage only if the metadata were inadvertently included in the transmission and were then the subject of a notice given as contemplated by the rule.

These changes were approved by the Committee.

With that action, the Committee concluded its review of the revised ABA Model Rules. The Chair commended Judge Berger for his work, and that of the subcommittee, in guiding the Committee through that review.

IV. *Next Committee Meeting.*

The Chair noted that the Committee's work load was presently pretty light. A subcommittee chaired by David Stark is considering pro bono policies for in-house and governmental attorneys, and

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confidential, then the lawyer receiving such information has an ethical obligation to refrain from reviewing the information after becoming aware of the privileged or confidential nature of the information. The lawyer then has an ethical duty to notify the adverse party, if unrepresented, or the adverse party's lawyer and the producing witness. A lawyer must also take reasonable steps to notify the person entitled to invoke the privilege with respect to the information that the lawyer possesses such information and either follow the instructions of the person who is entitled to invoke the privilege with respect to the information or refrain from reviewing the information until a definitive resolution is obtained from the court or other tribunal.

a subcommittee chaired by Cynthia Covell is considering a revision to Comment [3] to Rule 3.1 to alert lawyers to the decision in *A.L.L. v. People ex rel. C.Z.*, 226 P.3d 1054 (Colo. 2010).

Given that level of workload, the Chair felt that the next meeting could be put off for four months or so, to late July 2014. She said she would check with the Court and advise the members of the actual date of the next meeting.

V. *Adjournment.*

The meeting adjourned at approximately 11:50 a.m. The next meeting of the Committee will be announced at a later date.

RESPECTFULLY SUBMITTED,

Anthony van Westrum, Secretary

[These minutes are as approved by the Committee at its forty-first meeting, on October 16, 2015.]