COLORADO SUPREME COURT

STANDING COMMITTEE ON THE RULES OF PROFESSIONAL CONDUCT

Approved Minutes of Meeting of the Full Committee
On December 6, 2013
(Thirty-Eighth Meeting of the Full Committee)

The thirty-eighth meeting of the Colorado Supreme Court Standing Committee on the Rules of Professional Conduct was convened at 9:00 a.m. on Friday, December 6, 2013, 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 Justices Nathan B. Coats and Monica M. Márquez, were Committee members Michael H. Berger, Helen E. Berkman, Nancy L. Cohen, John M. Haried, David C. Little, Judge William R. Lucero, Christine A. Markman, Cecil E. Morris, Jr., Neeti Pawar, Judge Ruthanne Polidori, Henry R. Reeve, Alexander R. Rothrock, Marcus L. Squarrell, David W. Stark, James S. Sudler III, Anthony van Westrum, and Eli Wald. Present by conference telephone were members Judge John R. Webb and E. Tuck Young. Excused from attendance were members Federico C. Alvarez, Gary B. Blum, Cynthia F. Covell, James C. Coyle, Thomas E. Downey, Jr., Neeti Pawar, and Boston H. Stanton, Jr. Also absent was member Lisa M. Wayne.

I. *Meeting Materials.*

The Chair had provided a package of materials to the members prior to the meeting date. The secretary confessed to technical incompetencies that prevented him from getting submitted minutes of the thirty-seventh meeting of the Committee, held on October 11, 2013, distributed to the members in time for their review and approval. He promised that they would be available before the next meeting of the Committee.

II. *Submissions from Committee to Court.*

The Chair reported that the Committee's recent proposals for the addition of a Comment [2A] to Rule 8.4 and the addition of a new Rule 8.6 — both in response to amendments to the Colorado Constitution permitting marijuana use and commerce — have been submitted to the Supreme Court for its consideration. The Court will hold a hearing on the proposals at 1:30 p.m. on March 6, 2014, and it has set February 25, 2014 as the deadline for the submission of comments on the proposals. The Chair encouraged members of the Committee to submit to the Court their own comments on the proposals.

The Chair also reported that the Committee's proposal for a complete revision of Rule 1.15, regarding a lawyer's safekeeping of others' property and the use of Colorado Lawyer Trust Account Foundation ("COLTAF") accounts, will be soon submitted to the Court. She had received some suggestions from the Court's librarian for a reformatting of the proposal — which proposal splits existing Rule 1.15 into five rules of co-equal status — to conform with the Court's formatting policies, and she is in the process of making the necessary revisions.

III. *Pro Bono Policy.*

The Chair directed the members to the fifth item on the agenda for the meeting and to the accompanying material, provided by member David W. Stark, relating to the development of additional attachments to Rule 6.1, which attachments would provide recommended model pro bono policies for lawyers employed in government service or in in-house legal departments. The two model policies have been developed by the Chief Justice's Commission on the Legal Profession.

The Chair explained that she did not wish to take up the details of the proposed policies at this meeting but wanted to establish a process by which the Committee might subsequently consider the proposals. She acknowledged the importance of the proposed additional model policies to accommodate the differing circumstances in which lawyers are engaged in practicing law, but she did not want to put the Committee's consideration of the proposed policies ahead of its pending consideration of the amendments to the Rules that have been proposed by the American Bar Association as the "20/20 Amendments" and which have been under study by a subcommittee of the Committee. The ABA amendments are the fourth item on this meeting's agenda, and the Chair expects the Committee to devote at least this and the next meeting to them, meaning it will not be able to consider the pro bono policies until some later meeting.

The Chair reminded the Committee that it did not review, before adoption, the existing model pro bono policy — the Recommended Model Pro Bono Policy for Colorado Licensed Attorneys and Law Firms — that is currently found following Comment [11] to Rule 6.1. Rather, the Court adopted the model pro bono policy, and placed it following the commentary to Rule 6.1, without consultation with or notice to the Committee. She recalled that some Committee members had been concerned about the placement of that model policy within the Rules themselves. The current proposal for government and in-house lawyers also originates from outside this Committee and would essentially triple the length of the insertion into the Rules if placed adjacent to the current model policy. She has suggested to Stark that all of the model policies might be more appropriately placed in some other location, outside of the Rules.

In response to the Chair's comments, Stark spoke to set the context for the current proposed model policies. They are the product of the Chief Justice's Commission on the Legal Profession and have been developed in the course of that commission's effort to increase the participation of lawyers in pro bono publico activities. Past efforts had led to increased participation, but it was realized that lawyers who practice in governmental agencies and in in-house legal departments are likely to find that their employing legal departments have not adopted pro bono policies to guide them. Justice Gregory J. Hobbs suggested the addition of the two additional models. Stark said he has no personal preference as to where the policies are located, so long as they are available to lawyers.

A member noted that an effort could also be made to reach the 700 lawyers who practice as prosecutors within the state.

Another member agreed with that suggestion, noting that other states have focused on pro bono participation by government lawyers, offering policies that are better fitted to those lawyers' circumstances. Without tailoring to those needs, model policies will be ignored by those lawyers.

To that discussion the Chair added that an appropriate vehicle for considering such policies might be a group composed of a subcommittee of this Committee together with groups from the Court's Criminal Rules Committee and Civil Rules Committee.

A member noted the problem, commenting that the location of the proposals in, say, the Rules of Civil Procedure would seem to evade the notice of lawyers accustomed to looking, instead, to the Rules of Criminal Procedure.

The Chair reiterated her desire that participation include those from all areas of law practice, but she suggested that this Committee's participation with the Civil Rules Committee and no other group might be sufficient, since, she noted, the latter group handles all issues of lawyer regulation. She then refined her thought by suggesting that the appropriate three groups to staff the effort might be this Committee and the Court's Civil Rules Committee and Advisory Committee to the Office of Attorney Regulation Counsel.

To a member's comment that the Civil Rules Committee does not deal with the regulation of lawyers, the Chair recalled that that committee had been involved in the revisions to Rule 265 dealing with the practice of law by lawyers from within professional companies. Another member explained that the mid-1990s revisions to Rule 265 preceded the establishment of this Committee; at that time, in the absence of this Committee, the Civil Rules Committee undertook the task of that revision. Yet another member suggested that, if the matter arose today in the absence of this Committee, revisions to Rule 265 would probably be assigned to the OARC's Advisory Committee; he suggested that we not let history dictate the selection of appropriate participants now.

Stark pointed out that the proposed model pro bono policies would not constitute rules but, instead, would merely be suggestions and guidelines for lawyers' conduct. The Supreme Court will not be issuing orders prescribing what actual pro bono policies should look like. The effort is simply to develop models that will help lawyers make and meet commitments for fifty hours of pro bono service each year.

Stark noted that there are statutory limitations restricting pro bono service by Colorado prosecutors, and he thought the same kinds of restrictions might exist for Colorado public defenders and for Federal prosecutors and public defenders as well He added that we should not get concerned that the proposals will amount to impositions directing that, and how, every lawyer is to provide pro bono services.

A member noted, and Stark confirmed, that the provisions now found in the Rules following Rule 6.1 contain a continuing legal education component.[1] The member suggested that the CLE component indicates that the Board of Continuing Legal Education, or its advisory committee, should also be involved in the development of the policies.

The Chair resisted the addition of the Continuing Legal Education board or its advisory committee to the development group, noting that the granting of CLE credits for pro bono services has already been established in connection with the present model policy. She noted, again, that the existing model policy is just a policy, not a rule, and that no proposal has been made to change any of the Rules. She did not want to see the matter blown up into a big deal. And she added that, when some group is actually formed to deal with these proposals, it can determine whom else to invite to the effort.

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1. Item VI of the Model Pro Bono Policy, found after Rule 6.1, advises—

C.R.C.P. 260.8 provides that attorneys may be awarded up to nine (9) hours of CLE credit per three-year reporting period for: (1) performing uncompensated pro bono legal representation on behalf of clients of limited means in a civil legal matter, or (2) mentoring another lawyer or law student providing such representation.

Stark and the members generally agreed that the effort should go forward with members of the Committee and members of the OARC Advisory Committee, co-chaired by a member of this Committee and of that committee. Stark added that he is the chair of the OARC Advisory Committee.

IV. *Second Supplemental Report of the Amendment 64 [Marijuana] Subcommittee.*

Referring the members to the first page of the materials that had been provided for the meeting, the Chair asked Judge Webb — who was attending the meeting by conference telephone — to discuss the addition of a comment, to be numbered [12A], to Rule 1.2 to cross-reference proposed Rule 8.6.

Webb noted that the members might have determined that the effort to amend the Rules to deal with the questions of lawyers advising clients with respect to marijuana use and commerce, and to the use of marijuana by lawyers themselves, in the light of the amendments to the Colorado Constitution dealing with marijuana use and commerce, had been concluded with the proposals that the Committee has already made to the Court, to which the Chair had referred earlier in the meeting.

However, that effort had overlooked the addition of some reference in Rule 1.2 — which provides that a "lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal" — to Rule 8.6, which, if adopted, would permit counseling clients with respect to marijuana use or commerce that, while now (or soon to be) lawful under Colorado law, remains illegal under Federal law.

To cure the omission, the subcommittee that had been assigned the task of dealing with the marijuana issues now recommended the addition of the following comment to Rule 1.2:

> [12A] Paragraph(d) should be read in conjunction with Rule 8.6.

The addition of a new comment to Rule 1.2 would highlight the unique, non-uniform addition of Rule 8.6 to Colorado's version of the Model Rules of Professional Conduct.

Webb pointed out that those on the subcommittee who have had reservations or opposition to the substance of the Rule 8.4 and Rule 8.6 proposals regarding marijuana have not changed those views but nevertheless believe that, if Rule 8.6 is to be added, the cross-reference should also be added to Rule 1.2.

Webb pointed out that a member of the subcommittee, Eli Wald, preferred instead that a last sentence be added to existing Comment [12] to Rule 1.2, reading, "In appropriate circumstances, paragraph (d) should be read in conjunction with Rule 8.6." The other members of the subcommittee preferred the addition of the new comment that Webb had read.

Wald spoke to Webb's comment about his view, saying that his concern was merely one of form; he simply felt that the cross-reference could be accomplished without the need for an additional numbered comment.

Upon a vote, the Committee approved the proposal that it recommend to the Court that Comment [12A] be added to Rule 1.2 as the subcommittee proposed.

V. *ABA Model Rules Changes.*

The Chair turned the Committee's attention to the Report and Recommendation of the New ABA Model Rules Subcommittee that 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.

As she invited the subcommittee's chair, Michael Berger, to guide the discussion of the subcommittee's proposals, the Chair congratulated Berger for his recent nomination to a seat on the Colorado Court of Appeals.[2]

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

A. *Rule 1.0, Definitions.*

The ABA Commission proposed an expansion of the definition of "writing" to include "electronic communications", deleting "e-mail."[3]

The last sentence of Comment [9] to Rule 1.0, regarding the defined term "screened," would be modified to include information that is in electronic form.[4]

Berger reported that the subcommittee supported both of these changes. The members approved them as proposed changes to the Colorado Rules.

B. *Rule 1.1. Competency.*

The ABA proposed a new Comment [6][5] to existing Rule 1.1 that would suggest that an existing client's informed consent be obtained before a lawyer engaged the services of additional lawyers, from outside of the lawyer's own law firm, to work on an existing representation. Berger explained that the imposition is sensible, inasmuch as the client will be paying for the additional services and inasmuch as

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2. Michael H. Berger was appointed to the Colorado Court of Appeals by Governor John Hickenlooper on December 18, 2013. His investiture was conducted on January 24, 2014. —Secretary

3. The first sentence of the definition of "writing" in Rule 1.0 would be amended as follows: "Writing" or "written" denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or videorecording, and ~~e-mail~~ *electronic communications*.

4. The last sentence of Comment [9] to Rule 1.0 would be amended as follows:

> To implement, reinforce and remind all affected lawyers of the presence of the screening, it may be appropriate for the firm to undertake such procedures as a written undertaking by the screened lawyer to avoid any communication with other firm personnel and any contact with any firm files or other ~~**materials**~~ ***information, including information in electronic form,*** relating to the matter, written notice and instructions to all other firm personnel forbidding any communication with the screened lawyer relating to the matter, denial of access by the screened lawyer to firm files or other ~~**materials**~~ ***information, including information in electronic form,*** relating to the matter, and periodic reminders of the screen to the screened lawyer and all other firm personnel.

5. New Comment [6] to Rule 1.1 would read—

> [6] Before a lawyer retains or contracts with other lawyers outside the lawyer's own firm to provide or assist in the provision of legal services to a client, the lawyer should ordinarily obtain informed consent from the client and must reasonably believe that the other lawyers' services will contribute to the competent and ethical representation of the client. See also Rules 1.2 (allocation of authority), 1.4 (communication with client), 1.5(e) (fee sharing), 1.6 (confidentiality), and 5.5(a) (unauthorized practice of law). The reasonableness of the decision to retain or contract with other lawyers outside the lawyer's own firm will depend upon the circumstances, including the education, experience and reputation of the nonfirm lawyers; the nature of the services assigned to the nonfirm lawyers; and the legal protections, professional conduct rules, and ethical environments of the jurisdictions in which the services will be performed, particularly relating to confidential information.

it is not appropriate for the lawyer "to hire all his friends" if their services are not actually needed for the representation.

A new Comment [7] to Rule 1.1 would suggest that lawyers who come together from more than one firm to provide "legal services to a client on a particular matter" confer among themselves and with the client as to the allocation of their responsibilities. Although the point is common-sensical, Berger said, the subcommittee recommended the addition of the comment to the Colorado rules as a matter of uniformity.

An amendment to Comment [6] (which would be renumbered as Comment [8]) to Rule 1.1 would specify that a lawyer should keep abreast not only of changes in the law but also of "changes in communications and other relevant technologies." Berger pointed out that the subcommittee was troubled by the ABA's reference to the "benefits and risks" of new technology; it wondered whether a risk analysis would be required anew with each sending of an email to a client. Berger said that all authorities believe the use of email to be appropriate in most cases; rare would be the case where the risks were so great that email should not be used. Accordingly, the subcommittee struck the "benefits and risks" analysis.[6] As an aside, Berger commented that it is common for engagement agreements to address and authorize the use of email for communications.

To these comments about the use of email to communicate with clients, a member noted that many clients use the email addresses that they are provided in the course of their employment. The member referred to a New York case that spoke of the lawyer's obligation to confer with the client about the risks associated with that usage. Many employers take the positions that email communications on their facilities belong to them and that they merely permit the employee to utilize their facilities. The member asked whether revised Comment [8] should also note the benefit of reviewing with the client these aspects of the technology that both lawyer and client might use in the representation. She suggested that these kinds of concerns may be why the ABA version referred to a risk/benefit analysis.

Berger said that the ABA proposed changes to comments to Rule 1.6, dealing with confidentiality, which might address some of this concern, although not specifically with regard to discussion of risks with clients. Berger referred to the ABA's proposed changes to Comment [16] (to be renumbered as Comment [18]) of Rule 1.6, which would specify that Rule 1.6(c) requires a lawyer to "make reasonable measures to safeguard information relating to the representation of a client against unauthorized access by third parties."

A member noted that the text Berger quoted from the proposed comment to Rule 1.6 would not apply to emails sent from a lawyer to a client using the client's employer's email service that were subsequently accessed by the employer, because that access would not be "unauthorized" under an employer policy claiming ownership of all emails utilizing its service.

To this discussion, the member who had initiated the conversation by noting the risks attendant to using employer email services said that communication with an employed client should be addressed in Rule 1.6 rather than Rule 1.1, inasmuch as the issues specifically deal with confidentiality, the topic of Rule 1.6 rather than with competency, the topic of Rule 1.1. Berger agreed and referred to an ABA

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6. The subcommittee's proposal for changes to existing Comment[6] to Rule 1.1 (to be renumbered as Comment [8]) differs from the ABA proposal as follows:

> [6] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law ~~**and its practice, including the benefits and risks associated with relevant technology**~~ ***and changes in communications and other relevant technologies*****,** engage in continuing study and education, and comply with all continuing legal education requirements to which the lawyer is subject.

opinion noting the lawyer's duty to counsel the client about the potential lack of confidentiality when using employer email service. He also suggested that there is caselaw on the point and added that he thought the Committee should specifically deal with the matter.

To that suggestion another member said he would prefer to retain the ABA's proposal for Comment [8].to Rule 1.1, with its reference to both the benefits and the risks of technologies. He believed that a case raising the issue has reached the United States Supreme Court and suggested there was merit in retaining uniformity with the ABA model in this instance. He added that issues of benefits and risks may arise in technological contexts other than communications and suggested that the ABA's text more appropriately identifies the breadth of the issues.

A member who had not previously spoken countered, saying that the text proposed by the subcommittee was sufficiently parallel to the ABA's version and suggesting that, if more need be said, it should be said in the context of confidentiality under Rule 1.6. Rule 1.1 deals with competency about the law, not about cryptology, he said. To the extent that we are specifically concerned about the maintenance of confidentiality in the face of technological risks, we should tackle the problem in Rule 1.6, whether or not we retain or delete the ABA's risk/benefits language in the comment to Rule 1.1.

Berger asked — he said that he did so in order to defend the subcommittee's position — what could be meant by "changes in the . . . practice [of law], including the benefits and risks associated with relevant technology"? What would "benefits and risks" mean, practically speaking, in the context of the practice of law?

The member who had favored the ABA's model said this is not a question that arises every time an email is sent but, rather, is one that should be considered "more globally": What are the risks of using email or faxes? He moved for the adoption of the ABA's version of renumbered Comment [8] of Rule 1.1. The motion was not seconded.

A member noted that the ABA's text went beyond communications, and another member added to that the suggestion that it would encompass "cloud-based" technologies, in which information is transferred to storage on third-party systems.

The member who had initiated the conversation by noting the risks attendant to using employer email services suggested that this addition be made to renumbered Comment [8]: "Technology is continually changing, and the lawyer needs to be aware of the risks as he adopts that technology and needs to discuss the risks and benefits with the client as appropriate" She suggested that this be done by the addition of a separate paragraph to the comment, one that would make the statement sufficiently broad that we would not need to come back to it as the technological possibilities expanded.

Berger repeated his concern that the meaning of "benefits and risks" is unclear; if we do not understand it, he said, we should reject it. But he would agree with the addition of a new Comment [8A] that would speak more directly to all kinds of technology.

The member who had suggested the addition of text to the comment pointed out that technological risks may develop at any state of a representation, so that our additional commentary should deal with that prospect, too, and not just be associated with the commencement of a representation.

A member who had not previously spoken said he believed the appropriate place to deal with these matters would be in renumbered Comment [18] to Rule 1.6, governing confidentiality, where the implications of email access to communications, cloud-basing client information, and the like could be

dealt with. Among the considerations, he suggested, should be claims of waiver. He would adopt the subcommittee's recommendations for renumbered Comment [8] in 1.1 and add more to Rule 1.6.

To that, a member suggested that there may be technological issues that raise other hazards besides those impairing confidentiality.

A member who had not previously spoken agreed that the subcommittee's proposal for renumbered Comment [8] should be adopted and that a more general statement should be added to Rule 1.6 in line with the text previously suggested about continually-changing technology.

Noting that the motion to adopt the ABA's version of renumbered Comment [8] of Rule 1.1 had not been seconded, a member asked for discussion of the subcommittee's proposal to strike the words "and its practice" following "keep abreast of changes in the law." But Berger returned instead to the comments suggesting that these matters be dealt with in the context of confidentiality and Rule 1.6. He said there is a direct relationship between competency and confidentiality; the two principles go together, and some cross-reference should be added between the two expressions of the principles in the two rules — Rule 1.1 and Rule 1.6 — to reflect that relationship.

The member who had proposed adherence to the ABA model commented that a large part of ethical conduct is to keep abreast of dangers to client-lawyer confidentiality. He advised that we not get overly technical in our analysis, pointing out that we speak of "risks" all the time in the context of professional conduct and suggesting that we need not avoid the term as the subcommittee proposed.

A member who had not previously spoken expressed a concern that the ABA's indication that a lawyer should keep abreast of technological changes that impact modes of law practice — quite apart from the adverse impact of such changes on confidentiality — could be burdensome for those who like the ways they have been practicing law.

To that Berger said that all that the revised comment speaks to is the need for those lawyers to "stay abreast" of changes in technologies in the course of doing what the existing comment says they should already be doing: keeping abreast of "changes in the practice of law."

A member who had not previously spoken suggested that the Committee accept the subcommittee's proposal for renumbered Comment [8] to Rule 1.1 and added that he thought the Committee would find that renumbered Comment [18] Ito Rule 1.6 would prove to be the right place to deal with concerns about the impact of technology on confidentiality, as it already says a lot in that respect.

Another member agreed with those comments and with the prior comments that had directed the Committee's attention to renumbered Comment [18] to Rule 1.6.

The member who had initiated the conversation by noting the risks attendant to using employer email services moved that the subcommittee be directed to expand the commentary in the light of the discussion and decide where the expanded commentary should be inserted in the comments to the Rules. She noted her agreement that the phrase "and its practice" and the phrase "benefits and risks" should be omitted from renumbered Comment [8] to Rule 1.1 as the subcommittee proposed. Her motion was seconded.

In the discussion that followed, the member who had made the unseconded motion to retain the ABA's version of renumbered Comment [8] to Rule 1.1 commented that *all* of the ABA 20/20 changes have been motivated by the perception that the Rules need to accommodate changes in the technologies

that impact lawyers in their practice of law. In that light, he said, reference to technology is necessary in both Rule 1.1 — Competency — and Rule 1.6 — Confidentiality. He again proposed retention of the ABA's text for the renumbered comment.

The member who had commented that Rule 1.1 deals with competency about the law, not about cryptology, agreed with the member who had suggested that the Committee would find that renumbered Comment [18] to Rule 1.6 was the right place to deal with concerns about the impact of technology on confidentiality. He referred to the text of renumbered Comment [19] to Rule 1.6—

> . . . Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule. . . .

—and said that he understood the pending motion to be to consider whether or not some change should be made to capture the concerns of the Committee but was not a mandate to the subcommittee to make any change.

Berger said he would consider it friendly to the subcommittee's proposal to retain the phrase "or its practice" in renumbered Comment [8], but he continued to reject the phrase "benefits and risks."

A member asked for a restatement of the pending motion, and the member who had made the motion restated it as follows: Accept renumbered Comment [8] to Rule 1.1 as proposed by the subcommittee — but with the retention of the phrase "and its practice" — and let the subcommittee reconsider whether renumbered Comments [18] and [19] of Rule 1.6 deal adequately with the implications of changing technology or should be expanded and, also, consider whether an appropriate cross-reference to any of the additions should be added to a comment in Rule 1.1.

A member, describing his comment to be unrelated to the discussion that had just occurred, pointed out that new Comment [6], dealing with "the lawyer who hires his friends to work on the matter," has application to the phenomenon of lawyers outsourcing legal services to oversees providers. He found that comment to be particularly valuable, perhaps the most important change to be made by the ABA modifications.

Speaking against the pending motion, a member argued that the Committee kept adding more and more text to the commentary, making it more and more complex. She urged the subcommittee to consider that problem if it returns to the commentary upon adoption of the pending motion.

Upon a call for the question, the pending motion was adopted.

Following adoption of the motion, a member lamented that the text, as proposed by the subcommittee, had been found acceptable. Another member replied that the subcommittee has been given broad authority and might conclude that what it had proposed was indeed sufficient. But the member who had made the motion pointed out that the cross-referencing portion of the motion had been mandated and was not left to the discretion of the subcommittee.

Upon a motion, the Committee approved the subcommittee's recommendations for changes to Rule 1.1, subject to the possible reworking of renumbered Comment [8] in the context of renumbered Comments [18] and [19] of Rule 1.6 pursuant to the previously adopted motion.

C. *Rule 1.2. Scope of Representation and Allocation of Authority Between Client and Lawyer.*

Berger directed the Committee's attention to the subcommittee's proposal to add two comments, numbered [5A] and [5B], to Rule 1.2 for the purpose of cross-referencing to the two comments — Comments [6] and [7] — that are to be added to Comment 1.1 regarding consultation with the client before engaging the services of additional lawyers and coordination of efforts by lawyers from different law firms engaged on a matter. The subcommittee proposed adding the same cross-referencing comments to Rule 1.4 as well.

Upon a motion, the Committee approved the subcommittee's proposals regarding Rule 1.2.

A member asked why these concepts (consultation with the client before engaging the services of additional lawyers and coordination of efforts by lawyers from different law firms engaged on a matter) should be added to the competency provision — Rule 1.1, as previously amended — as well as to the scope-of-representation provision, Rule 1.2. He pointed out that both of the concepts deal with communications — with clients and among lawyers — and are seemingly unrelated to competency.

To that, Berger replied that the ABA and the subcommittee had felt the concepts implicated both competency and scope of representation. In any event, he urged that the cross-references be retained in Rule 1.4, which deals specifically with client communication.

A member noted that the Committee had just approved the addition of Comments [5A] and [5B] to Rule 1.2, but she now questioned whether the phrase that is used to open both of the comments — "Regarding communications with clients" — should be changed.

The member who had raised the question that the Committee had just considered, about the location of the consultation and coordination concepts, said he found the wording not only to be redundant but to be confusing, because it is the scope of the representation — rather than communications with the client — that Rule 1.2 "regards." Perhaps, he suggested, the two comments might begin "In determining, with the client, the . . . ."

The Committee determined to retain some cross-reference in the comments to Rule 1.2 back to the concepts expressed in new Comments [6] and [7] to Rule 1.1 but to give the subcommittee permission to reconsider the introductory wording of the cross-referencing.

D. *Rule 1.4. Communication.*

Berger characterized the modification that the ABA made to Comment [4] to Rule 1.4 — to recognize that a lawyer should promptly "respond to or acknowledge" communications from the client, whether they arrived by telephone or otherwise — as not being controversial.

And Berger pointed out that the subcommittee proposed the addition, to Rule 1.4, of the same cross-referencing comments, referring back to new Comments [6] and [7] of Rule 1.1, that were to be added to Rule 1.2 and had been the discussion of the Committee's preceding conversation.

A member asked why cross-referencing comments back to new Comments [6] and [7] of Rule 1.1 were needed in both Rule 1.2 and in Rule 1.4. Berger replied that he did not have strong feelings about the matter.

The Committee approved the subcommittee's further consideration of whether the cross-referencing comments were appropriate for both Rule 1.2 and Rule 1.4 or could be omitted from the latter rule.

E. *Rule 1.6. Revelation of Client Confidentiality to Resolve Conflicts of Interest.*

Berger pointed the Committee to the ABA's addition of a new clause (b)(7) to Rule 1.6 to permit a lawyer, under limited circumstances, to reveal limited client information in the course of a "lawyer's change of employment or from changes in the composition or ownership of a firm." He reminded the Committee that Comment [5A] to the Colorado Rule[7] speaks of a lawyer's "implied authorization" by her client to make disclosures of the client's information in that context, but he noted that the concept embodied in that comment has never really worked — there is in fact no "implied authorization," because clients do not actually contemplate the occurrence in which the authorization would be needed.[8]

The ABA's changes would insert the concept directly into the text of the Rule rather than relegating it to a comment. The subcommittee considered, Berger said, all of the substantive differences between the existing Colorado comment and the ABA's text of new clause (b)(7) of Rule 1.6 and determined that it was sensible to insert, directly in the rule's text, this exception to the obligation to maintain client confidentiality. Further, Berger noted, the ABA's language is worded better than the Colorado comment and appropriately covers law firm mergers as well as a lawyer's "lateral move."

But the subcommittee did not approve of the ABA's decision to permit disclosure of client information in the law-firm-merger or lateral-move context "if the revealed information would not compromise the attorney-client privilege or otherwise materially prejudice the client." The subcommittee recommended, instead, that such disclosure be permitted "only if the revealed information is not protected by the attorney-client privilege and its revelation is not reasonably likely to otherwise materially prejudice the client." In the subcommittee's view, if the subject information is indeed privileged, the lawyer should not be permitted to breach that privilege in the context of either a law firm merger or a lateral move between firms. The subcommittee felt that *any* breach of the privilege in either of those contexts would be a "compromise" of the privilege, so that the ABA's suggestion that some breaches of privilege could be something less than "compromises" was not comprehensible.

Berger noted that the subcommittee was also troubled by the ABA's use of "would," implying that an actuality of prejudice to the client is required before the disclosure is prohibited. The subcommittee felt that a risk analysis — "not reasonably likely" — should be utilized. If there is risk to the client because of a disclosure in the context of a law firm merger or a lateral move, the client's

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7. Colorado Rule 1.6, Comment [5A], reads as follows:

> [5A] A lawyer moving (or contemplating a move) from one firm to another is impliedly authorized to disclose certain limited non-privileged information protected by Rule 1.6 in order to conduct a conflicts check to determine whether the lawyer or the new firm is or would be disqualified. Thus, for conflicts checking purposes, a lawyer usually may disclose, without express client consent, the identity of the client and the basic nature of the representation to insure compliance with Rules such as Rules 1.7, 1.8, 1.9, 1.10, 1.11 and 1.12. Under unusual circumstances, even this basic disclosure may materially prejudice the interests of the client or former client. In those circumstances, disclosure is prohibited without client consent. In all cases, the disclosures must be limited to the information essential to conduct the conflicts check, and the confidentiality of this information must be agreed to in advance by all lawyers who receive the information.

8. At page 10 of the subcommittee's written report to the Committee dated October 3, 2013, found at page 77 of the materials for the Committee's thirty-seventh meeting, on October 11, 2013, the subcommittee noted that the change from comment to rule "[makes] clear that it is an express exception rather than merely an impliedly authorized disclosure. That rationale has never really worked because 1.6(a) permits disclosures that are 'impliedly authorized to can·y out the representation,' not to allow a lawyer to change firms." —Secretary

information should not be disclosed — no matter how troublesome nondisclosure might be to the lawyers who desire the merger or the lateral move — unless the client has consented to the disclosure.

Accordingly, the subcommittee recommended that the added clause (b)(7) to Rule 1.6 read as follows:

> (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
>
> . . .
>
> (7) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information is not protected by the attorney-client privilege and is not reasonably likely to otherwise materially prejudice the client; or. . . .

A member noted that this proposal and Berger's explanation took the Committee back to the risk/benefit matter that had underlain its earlier discussion about email communications and other technology issues. In the context of this addition of a new Rule 1.6(b)(7), she asked whether the subcommittee has sufficiently justified its proposal to stray from the model language.

To that question, Berger responded that the subcommittee felt that the language goes to the heart of the duty to maintain client confidentiality The subcommittee saw the matter of the lawyer's breach of a client confidence to serve the lawyer's own interest differently that did the ABA.

A member noted that he was gratified to see the subcommittee's revision to the ABA text, since it tracked the position that he had, himself, proposed to the ABA Committee on Professional Responsibility years ago. He approved of the subcommittee's approach. But he noted that the ABA's model does not use the adjective "material" before the word "prejudice" as does the subcommittee's proposal.

Berger explained the insertion of the "material" qualifier this way: If the impact on the client is small, it is not worth stopping the lawyer from making the immaterial disclosure in the law firm merger or lateral move context.

The member who had noted the subcommittee's addition of the "material" qualifier said he liked the outcome, and he noted that, if the prejudice would be "material," the lawyer may seek the client's "informed consent" to the disclosure under existing Rule 1.6(a).

A member asked about the word "otherwise" in the phrase "not reasonably likely to otherwise materially prejudice the client." She observed that, if the information is protected by privilege, it is by definition "protected" by that privilege; what, she asked, could "otherwise materially prejudice the client" mean?

Two members expressed their agreement with that observation, but a third objected that the second part of the clause's structure deals not with privilege but with other aspects of confidentiality.

But one of the two members who had agreed with the initial observation pointed out that the word "otherwise" had been used in the ABA construction — "not compromise the attorney-client privilege or otherwise prejudice the client" — with the verbs "compromise" and "prejudice" to distinguish the circumstances of those two different actions. Dropping the two verbs, she said, changes the structure and eliminates the need for "otherwise/"

To that, another member agreed but argued that removal of the word "otherwise" would not alter the application of the clause as the objecting member had pointed out was necessary.

On a motion, the subcommittee's text was approved as amended to strike the word "otherwise."

The Chair pointed out that the Committee's approval of the insertion of clause (b)(7) to the text of Rule 1.6 required that the existing Colorado comment to the rule, Comment [5A], be deleted. The Committees approved that deletion.

F. *Rule 1.18. Prevention of Unauthorized Disclosure of Client Confidentiality.*

Berger referred the Committee to the ABA's proposal for a short new Rule 1.6(c), requiring that a lawyer take "reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client." The subcommittee recommended that addition.

Berger then turned the Committee's attention to Comment [16] of Rule 1.6, which, with the ABA's other changes, would be renumbered as Comment [18], and which is the comment that had been mentioned earlier in the Committee's consideration of the principle that lawyers be competent with respect to technology, particularly that which impacts client confidentiality. Berger referred to the ABA's "conflation" of confidentiality with the need to be competent in preventing breaches of confidentiality.

Berger explained that the subcommittee decided to track, in renumbered [16], the actual text of the correlative provision in Rule 1.6 itself. Rather than use the ABA's shorthand construction in the comment — "Paragraph (c) requires a lawyer must act competently to safeguard information . . ." — the subcommittee's version would more closely adhere to the text of new Rule 1.6(c), " Paragraph (c) requires a lawyer to take reasonable measures to safeguard information . . . ."

Berger reported that the subcommittee had sensed an unnecessary duplication in the ABA's Comment [19] to Rule 1.6 (renumbered and amended Comment [17] of the current rule). Ultimately, however, it determined to adopt the ABA version of the comment because, even though it is duplicative, it accurately discusses the lawyer's duty to comply with state and Federal data privacy and other such laws. Berger observed that every time the Colorado rules deviate from the ABA Model Rules, particularly by way of an omission of ABA text, readers wonder what the deviation implies. He said there is no reason to send the reader on a wild goose chase by omitting the ABA's proposed addition to renumbered Comment [19].

The Chair noted that, on page 12 of the subcommittee's report — page 79 of the meeting materials for the thirty-seventh meeting of the Committee, on October 11, 2013 — the subcommittee's proposed version of renumbered Comment [18] to Rule 1.6 is introduced as if it were the *ABA* proposal While, as said there, the ABA did renumber Comment [16] to be Comment [18], the textual revision that follows that statement is the revision as proposed by the subcommittee.

A member referred back to the point that had been made earlier about the risk/benefit analysis that is applicable in the context. He said that a client might "authorize" a lawyer's measures to protect the client's information — such as by authorizing the use of email for communications between the lawyer and the client — and yet the authorized measures might nevertheless not be "reasonable" for the purpose.

Upon a motion, the Committee approved the changes to Rule 1.6 and its comments as recommended by the subcommittee.

G. *Rule 1.17. Prevention of Unauthorized Disclosure of Client Confidentiality.*

Berger explained that the ABA made changes to Rule 1.17 — dealing with the sale of a law practice — to clarify Comment [7] and to add a cross-reference in Comment [7] to the similar circumstances that may be encountered in a law firm merger or a lateral move, which would be addressed in new Rule 1.6(b)(7).

Upon a motion, the Committee approved the subcommittee's recommendation to adopt the ABA's changes to Comment [7] of Rule 1.17.

H. *Rule 1.18. Prospective Clients.*

Berger reported that the ABA had made a number of helpful changes to Rule 1.18, the rule dealing with a lawyer's duties to "prospective clients." He described the changes as follows:

1. The term "consult" had been substituted for the word "discuss" in the set-up of the context for Rule 1.18: "A person who *consults* with a lawyer *about* the possibility of forming a client-lawyer relationship . . . ."

2. The ABA revised Comment [2], which provides guidance for distinguishing the "prospective client" who is the subject of the rule from others who may communicate with a lawyer in contexts that do not make them "prospective clients." In providing that guidance, the revised comment would distinguish between communications in response to a lawyer's invitation to provide information about a potential representation and communications that are uninvited but may be received by a lawyer in response to the lawyer's advertising of practice areas, contact information, and the like or in response to the lawyer's public provision of "legal information of general interest." Berger noted that the use of lawyer blogs presents difficult issues in this context.

3. And the ABA added to the comment the statement that "a person who communicates with a lawyer for the purpose of disqualifying the lawyer is not a 'prospective client.'" Berger noted that it is not unheard of for potential litigants to make contact with law firms that they would not wish to have on the other side of the eventual litigation, merely to disqualify those law firms from representing their opponents. A member noted that this is not uncommon in Colorado in the domestic relations field, and another noted that it is not uncommon in small communities having few lawyers. Berger pointed out that commentators have, for some time, argued that such contacts, not made in good faith, do not give rise to "prospective client" status; the ABA change simply adds that conclusion to the comment. The subcommittee liked the addition.

Berger said the subcommittee recommended the adoption of all of the ABA's changes.

A member commented that, as revised, Comment [2] appeared to turn on an analysis of the communication from the communicant's viewpoint, not from the lawyer's viewpoint. How can the lawyer know whether the person is responding to a generic advertisement — and thus is not a "prospective client" — or is communicating for the purpose of disqualifying the lawyer from representing the communicant's opponents?

Berger responded that it would not be impossible to draw a conclusion about the inquirer's purpose: One can make a judgment based on the circumstances; there is no other way to deal with the situation but to make such a judgment.

Another member quoted from the existing text of Comment [2] — "A person who communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, is not a 'prospective client' . . . ."

But the member who had raised the point noted that even that existing construction implicates "the reasonable mind" in the making of the necessary judgment.

Both Berger and the member who had quoted the existing text of the comment pointed out that it would be difficult to resolve the problem in any other way but that of judgment, since the mind of the potentially prospective client cannot be examined. And another member noted that the question of what is in another's mind, even a client's mind, is found throughout the rules, such as in the matter of implied consent.

A member who serves on the staff of the Office of Attorney Regulation Counsel said that, when the OARC determines to prosecute a matter under the Rules, it often finds the comments to be aspirational statements rather than useful guides to the meaning of the texts of the rules. In this case, when a complainant might say that she spoke with the lawyer at a party, that will seem much less "prospective" than, "I went to his office." The circumstances are indicative.

To that, the member who had noted that the "prospective client" question often arises in domestic relations practice commented that the divorcing party will often actually visit four or five different lawyers for the purpose of disqualifying them.

Upon a motion, the Committee approved the subcommittee's recommendations for Comment [7] to Rule 1.18.

I. *Rule 4.4. Respect for Rights of Third Persons.*

Berger asked that the Committee postpone discussion of the ABA's changes to Rule 4.4 until the next Committee meeting.

J. *Rule 5.3. Responsibilities Regarding Nonlawyer Assistants*

Berger explained to the Committee that Rule 5.3, dealing with the lawyer's responsibilities for the conduct of nonlawyer assistants, differs from the situation previously considered, the employment of other lawyers. The ABA's changes to Rule 5.3 include a reversal of the order of the two existing comments and the addition of two comments. The subcommittee generally approved of the ABA's changes but rejected the ABA's insertion in new Comment [4] of the concept of "monitoring" outside nonlawyer services that are utilized at the client's direction; the comment states that the lawyer should reach an agreement with the client about the "allocation of responsibility for monitoring [the outside service] as between the client and the lawyer." The problem the subcommittee identified is that Rule 5.3 does not itself contain the concept of "monitoring" any nonlawyer assistant's conduct, whether "inside" or "outside."

Accordingly, the subcommittee substituted, for the ABA's "allocation of responsibility for monitoring," the clause:"allocation of responsibility, as between the client and the lawyer, for the supervisory activities described in Comment [3] above," relative to the provider whose service the client has required to be used.

A member asked how the subcommittee's formulation would work when the lawyer, rather than the client, selected the outside assistant. Berger replied that proposed Comment [4] deals with the

increasingly frequent circumstance in which a sophisticated client requires that law firms use the services of particular outside providers — as an example, forcing the lawyer to outsource document review to service providers in a foreign country. The comment is intended to suggest that the lawyer and the client should reach agreement on which of them will be responsible for finding out what is going on in the offices of the service provider in that foreign country. It is reasonable, he said, to expect that the client will assume that responsibility if it is the client who has mandated use of the foreign provider. Berger confirmed that the suggestion in proposed Comment [4] that the client may assume responsibility for an outside provider is *not* intended to apply to the circumstance in which it is the lawyer who has chosen the outside provider, even if the lawyer has done so in response to the client's request or direction that the lawyer obtain the services from outside the law firm.

Another member referred the Committee to proposed new Comment [3] to Rule 5.3, which deals with the lawyer's responsibilities when it is the lawyer who has engaged the services of the outsider assistant. He added that his law firm has had experiences with outside service providers selected by the firm's clients — and he remarked that those experiences have not been good ones.

A member commented that the problems that the rule and these comments contemplate often arise in the client's selection of other lawyers to do cite-checking and the like.

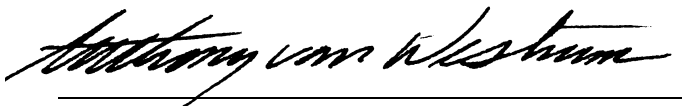
Another member asked those who reported experience with client-selected outside service providers whether they do, in fact, utilize written allocations of the selection process. Responding members said that they do so, as a matter of their own protection, at least by laying an "email trail."

Upon a motion, the Committee approved the subcommittee's recommendations for Rule 5.3.

VI. *Adjournment; Next Scheduled Meeting.*

The meeting adjourned at approximately 12:00 p.m. The next scheduled meeting of the Committee will be on Friday, March 14, 2014, 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 thirty-ninth meeting, on March 14, 2014.]