COLORADO SUPREME COURT

STANDING COMMITTEE ON THE RULES OF PROFESSIONAL CONDUCT

Submitted Minutes of Meeting of the Full Committee
On July 26, 2013
(Thirty-sixth Meeting of the Full Committee)

The thirty-sixth meeting of the Colorado Supreme Court Standing Committee on the Rules of Professional Conduct was convened at 9:00 a.m. on Friday, July 26, 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 Justice Nathan B. Coats, were Federico C. Alvarez, Michael H. Berger, Helen E. Berkman, Gary B. Blum, Cynthia F. Covell, John M. Haried, Judge William R. Lucero, Christine A. Markman, Cecil E. Morris, Jr., Neeti Pawar, Henry R. Reeve, Alexander R. Rothrock, Marcus L. Squarrell, Boston H. Stanton, Jr., David W. Stark, James S. Sudler III, Anthony van Westrum, Eli Wald, Judge John R. Webb, and E. Tuck Young. Excused from attendance were Justice Monica M. Márquez, Nancy L. Cohen, Thomas E. Downey, Jr., and Judge Ruthanne Polidori. Also absent were James C. Coyle, David C. Little, and Lisa M. Wayne.

Present as guests were Diana M. Poole, the director of the Colorado Lawyers Trust Account Foundation; Philip E. Johnson, of the law firm of Bennington Johnson Biermann & Craigmile, LLC, the president of the board of directors of the COLTAF Foundation; and William A. Bianco, of the law firm of Davis, Graham & Stubbs, a member of that board of directors. Also present was Cynthia F. Fleischner, the current chair of the Colorado Bar Association Ethics Committee, and Judge Daniel W. Taubman, of the Colorado Court of Appeals, a former chair of the Colorado Bar Association Ethics Committee.

I. *Meeting Materials; Minutes of May 3, 2013 Meeting; Announcements; Disclosures.*

The Chair had provided a package of materials to the members prior to the meeting date, including submitted minutes of the thirty-fifth meeting of the Committee, held on May 3, 2013. Those minutes were approved as submitted.

II. *Passing of Prof. James E. Wallace.*

The Chair told the members that James E. Wallace, professor emeritus, University of Denver Sturm College of Law, had passed away in May 2013. Prof. Wallace had been one of the original appointees to the Committee when it was formed in 2003 and had been a principal participant in the Committee's long effort to review the American Bar Association's Ethics 2000 Rules of Professional Conduct and adapt them for the Supreme Court's eventual adoption in Colorado. With nods of agreement from the members, the Chair said Prof. Wallace had been a wonderful person.

III. *ABA Model Rules Changes.*

At the Chair's request, Michael H. Berger reported that the subcommittee considering recent changes made by the American Bar Association has drafted a report to the Committee, which draft is now

being reviewed by the subcommittee members and will be ready for presentation to the Committee at its next meeting.

IV. *Dependency and Neglect Case Appellate Practice Issues.*

The Chair noted that the Committee had briefly considered, at its twenty-eighth meeting on August 19, 2010, the Supreme Court's opinion in of *A.L.L. v. People, in the Interest of C.Z.*, 226 P.3d 1054 (Colo. 2010). In that dependency and neglect case, the Court determined that

> an appointed appellate lawyer who reasonably concludes a parent's appeal is without merit must nonetheless file petitions on appeal in accordance with C.A.R. 3.4, which requires that petitions on appeal from D & N proceedings include, inter alia, a statement of the nature of the case, concise statements of the facts and legal issues presented on appeal, and a description and application of pertinent sources of law. See C.A.R. 3.4(g)(3).

At that meeting, the Committee had determined to form a subcommittee to develop, in light of that opinion, an appropriate comment to Rule 3.1, which proscribes "[bringing or defending] a proceeding, or [asserting or controverting] an issue therein, unless there is a basis in law and fact for doing so that is not frivolous." But, the Chair now noted, the subcommittee had not yet been staffed, and she called for volunteers now to join the subcommittee under Cynthia F. Covell's chairmanship.

V. *Amendment of Rule 1.15.*

The Chair requested James S. Sudler III, chair of the subcommittee considering revisions to Rule 1.15 — including revisions intended to obtain comparability in the rates paid by banks on COLTAF accounts — to report on the subcommittee's recommendations.

Sudler began by saying that the subcommittee had many meetings, with dedicated service by its members, including, specifically, COLTAF guests Diana Poole, Philip Johnson, and William Bianco.

At its thirty-fourth meeting, on February 1, 2013, the Committee had approved, in principle, the subcommittee's recommendation that existing Rule 1.15 be divided into five separate rules in an effort to make the requirements related to safeguarding client and third-person property more accessible to lawyers. That division, Sudler said, makes sense when one considers the various purposes of the provisions. He explained—

> Rule 1.15 is the basic rule. Rule 1.15B delineates the accounts that a lawyer must maintain. Rule 1.15C deals with the use of a lawyer's trust accounts, providing, for example, restrictions on the means that a lawyer may use to deposit funds into and withdraw funds from those accounts. Rule 1.15D establishes the record-keeping requirements for such accounts and is drawn largely from the ABA model rule. Rule 1.15E is entirely new, delineating the requirements to which a financial institution must accede if it wishes to be approved as an institution that a Colorado lawyer may use for trust accounts.

Sudler noted that, at its thirty-fourth meeting, on February 1, 2013, the Committee had considered putting the provisions dealing with the approval of financial institutions in a chief justice directive, because the provisions establish an approval process that will entail agreements between financial institutions and Regulation Counsel in which lawyers will not have direct interests. Lawyers will be required to utilize "approved financial institutions" for trust accounts but will not be required to look beyond a list of such institutions, which will be maintained by Regulation Counsel, to determine whether any particular financial institution actually meets the requirements for approval. But, at that meeting, the Committee had recognized that substantive financial matters, such as the fees that approved financial institutions

may charge, should be locked down in a rule rather than left to a chief justice directive, yet should be separated from the provisions that govern lawyer conduct; the subcommittee's proposal for Rule 1.15E would accomplish that.

Sudler then embarked on a more detailed review of each of the rules' provisions.

Proposed Rule 1.15A is the basic rule, requiring that the lawyer segregate from the lawyer's own assets all funds and property in which clients or other persons have interests. The content of that rule is derived from Rule 1.15 of the American Bar Association's Model Rules, but existing Colorado Rule 1.15 has already diverged substantially from that ABA text.

Proposed Rule 1.15A(a) continues the basic requirement, found in current Rule 1.15(a), that client and third person property that a lawyer holds in connection with a representation be held separate from the lawyer's own property. But, rather than establish the permitted location of trust accounts, as the current provision does, Rule 1.15A(a) refers to Rule 1.15B for provisions delineating the features of such accounts, including their location.

Proposed Rule 1.15A(b) is a replication of current Rule 1.15(b), requiring prompt delivery of funds and property to the persons entitled to them and a rendering of an accounting thereof.

Proposed Rule 1.15A(c) is drawn from current Rule 1.15(c), dealing with disputes over property held by a lawyer, although it speaks more generally of a "resolution of the [competing] claims" instead of "an accounting and severance of their interests."

Proposed Rule 1.15A(d) is a cross-reference to the other rules — Rule 1.15B, Rule 1.15C, Rule 1.15D, and Rule 1.15E — guiding the lawyer to those provisions with respect to "funds and other property, and to accounts, held or maintained by the lawyer, or caused by the lawyer to be held or maintained by a law firm through which the lawyer renders legal services, in connection with a representation."

Proposed Rule 1.15B delineates the accounts that the lawyer, or the lawyer's law firm, must maintain.

Proposed Rule 1.15B(a) characterizes the two types of accounts that the lawyer or the lawyer's law firm must maintain: trust accounts (Rule 1.15A(a)(1)) and business accounts (Rule 1.15A(a)(2)). The business account provision expands, beyond current Rule 1.15(d)(2), the list of terms that may be used to designate the account into which the lawyer must deposit funds received for legal services by permitting — in addition to"business account," "office account,""operating account," or "professional account" — any "similarly descriptive term that distinguishes the account from a trust account and a personal account."

Proposed Rule 1.15B(b) defines "COLTAF account," using the "pooled" account, "nominal amounts" and "short periods of time" terminology of current Rule 1.15(h)(2) for the definition; but, unlike current Rule 1.15(h)(2), the proposal leaves to another provision — Rule 1.15B(e) — the details about interest and insurance. The proposal abandons the odd structure of current Rule 1.15(h)(2), which states that the lawyer "shall establish" a COLTAF account if "the funds" are not held in accounts in which interest is paid to clients or third persons but which does not also mandate that "the funds" shall be deposited in such COLTAF account — the closest the current rule comes to such a mandate being found in Rule 1.15(h)(2)(b), which requires that the COLTAF account "shall include" client and third person funds that are nominal in amount or are to be held for a short period of time. In the proposal, the deposit requirement is affirmatively stated in proposed Rule 1.15B(g), which directs all entrusted fund

either into a COLTAF account or into a trust account that, as required by proposed Rule 1.15B(h), complies with all of the specifications for trust accounts found in Rule 1.15B(c) through Rule 1.15B(e).

Proposed Rule 1.15B(c) requires that each lawyer trust account be designated a "trust account," with a COLTAF account to be designated a "COLTAF Trust Account." Unlike the current rule, though, the proposal would also permit any "additional descriptive designation that is not misleading."

Proposed Rule 1.15B(d) generally requires that each trust account be maintained in an approved institution — that is, one listed by Regulation Counsel pursuant to the provisions of Rule 1.15E — *unless* the persons whose funds are to be held in trust agree otherwise under these conditions: they are "informed in writing that Regulation Counsel will not be notified of any overdraft on the account" and, additionally, they give their "informed consent" to the holding of their funds in unapproved institutions. Sudler commented that the subcommittee had wrestled with this matter but concluded that there might be circumstances where the entrusting persons had reasons of their own for wanting the funds held in institutions that were not on the approved list and that they should be permitted to do so if they had been warned that Regulation Counsel would not be notified of overdrafts in such cases.

Similarly to the choice offered by proposed Rule 1.15B(d) for use of unapproved institutions, proposed Rule 1.15B(e) permits entrusting persons to decide that their funds will be held in non-insured accounts. That, of course, might be the case where the entrusting persons' preferences are, say, for a foreign institution.

Proposed Rule 1.15B(f), like current Rule 1.15(g), permits the lawyer to make deposits of the lawyer's own funds into a trust account to cover "anticipated service charges or other fees for maintenance or operation" of the account.

Proposed Rule 1.15B(g), as Sudler had indicated earlier, directs all entrusted fund into COLTAF accounts by default — all entrusted funds "shall be deposited in a COLTAF account unless . . . " — but permits use of non-COLTAF accounts if they comply with proposed Rule 1.15B(h). Sudler pointed out that this has been drafted with a view toward compliance with the requirements of judicial opinions regarding the permitted use of "IOLTA" accounts.

Proposed Rule 1.15B(h), permits the use of non-COLTAF accounts if the accounts meet all of the requirements contained in Rule 1.15B(c) through Rule 1.15B(e). There is no requirement that the entrusting persons agree to the use of either a COLTAF or a non-COLTAF account — the choice lies with the lawyer unless the entrusting parties participate in the choice by their agreement with the lawyer. But, Sudler noted, it is likely that lawyers will want to use COLTAF accounts because of the administrative ease of doing so, with the "nominal" interest earnings being distributed to the COLTAF Foundation by the bank without the lawyer's need to participate in accounting and distribution of the earnings. [Later in his remarks, Sudler raised as an open issue the question of whether a lawyer could ever be entitled to share in interest or dividends earned on any trust account; like current Rule 1.15(h)(1), proposed Rule 1.15B(h) provides that the "lawyer and the law firm shall have no right or claim to such interest or dividends."]

Proposed Rule 1.15B(i) contains a "look-back" provision that is very similar to current Rule 1.15(h)(3), directing the lawyer to request a refund from the COLTAF Foundation of interest paid on funds if the funds have "mistakenly" been held so long, or are of such amount, "that interest or dividends on the funds . . . exceeds the reasonably estimated cost of establishing, maintaining, and accounting" for a trust account in which the interest would have gone to the entrusting parties in the first instance.

Proposed Rule 1.15B(j), like the ninth sentence of current Rule 1.15, contains the lawyer's "deemed consent" to the financial institutions' reporting and production in accordance with the agreement reached with Regulation Counsel pursuant to Rule 1.15E and the lawyer's undertaking to "indemnify and hold harmless the financial institution for its compliance with such reporting and production requirement."

Sudler described proposed Rule 1.15C as the easiest of the proposed rules. It continues the provisions currently found in Rule 1.15(i), which are applicable not just to COLTAF accounts but to all trust accounts, such as the proscription against the use of debit cards, and the requirement for lawyer supervision of trust account transactions and reconciliation.

Proposed Rule 1.15D contains the record-keeping requirements; like the provisions of current Rule 1.15(j) and Rule 1.15(k), the provisions are drawn from ABA Model Rule 1.15. But, Sudler noted, changes have been made to match other Colorado rules changes, such as speaking of "copies of written communications setting forth the basis or rate for the fees charged by the lawyer as required by Rule 1.5(b))" in the provision requiring retention of copies, as well as " copies of all writings, if any, stating other terms of engagement for legal services." In that regard, Sudler pointed out that current Rule 1.15(j)(3) might itself be read to require full-blown "retainer and compensation agreements with clients" when in fact the only writing required by the Rules in that regard is the "writing setting forth the basis or rate for the fees charged by the lawyer" required by Rule 1.5(b). The subcommittee also modified the record-keeping requirements to accommodate banking practices, such as those that now make individual copies of canceled checks available only electronically and not by "photo static" copy.

Proposed Rule 1.15E contains the provisions governing the approval of financial institutions for lawyers' trust accounts. Sudler stressed that the proposal does not give Regulation Counsel any leeway to modify the requirements: The requirements must be met by any agreement with any financial institution if the institution is to be "approved." He added that adoption of proposed Rule 1.15E will necessitate Regulation Counsel pursuing new agreements with the financial institutions with which it currently has agreements, since the existing agreements will not contain all of the proposed requirements.

Sudler commented that the subcommittee had discussed the question of the geographic location of lawyer's trust accounts: Currently, Rule 1.15 provides that trusts account must be "maintained in the state where the lawyer's office is situated . . . ." But what does it mean for an account to be "maintained" in a specific geographical location? Ultimately, the subcommittee decided to require that the account be in a financial institution that does business in Colorado. In discussing this aspect of the rule, the subcommittee focused on the circumstances of a multi-state law firm: The subcommittee agreed that it would be preferable for Colorado-based funds to be positioned where the interest accruals would benefit the Colorado Lawyers Trust Account Foundation, but it recognized that it is difficult, in some cases, to determine the "locale" of a representation or the situs of funds held in connection with the representation. As Sudler put it, the subcommittee wanted "Colorado funds to be held in COLTAF accounts"; it thrashed this question for a long time and, he hoped, its solution is a good one.

Sudler explained that the major conceptual change wrought by the subcommittee's revision is found in proposed Rule 1.15E(c)(7), which provides for "rate comparability" and reads as follows:

> (7) The financial institution agrees to pay on any COLTAF account not less than (i) the highest interest or dividend rate generally available from the financial institution on non-COLTAF accounts when the COLTAF account meets the same eligibility requirements, if any, as the eligibility requirement for non-COLTAF accounts; or (ii) the rate set forth in subparagraph (c)(9) below. In determining the highest interest or dividend rate generally available from the financial institution to its non-COLTAF customers, the financial institution may consider factors customarily considered by the financial institution when setting interest or dividends rates for its non-COLTAF accounts, including account balances,

> provided that such factors do not discriminate between COLTAF accounts and non-COLTAF accounts. The financial institution may choose to pay on a COLTAF account the highest interest or dividend rate generally available on its comparable non-COLTAF accounts in lieu of actually establishing and maintaining the COLTAF account in the comparable highest interest or dividend rate product.

The language is precisely worded, he said, to require that the rate of interest or dividend on a COLTAF account be the same as on a "comparable account" and to establish what is a "comparable account." But, he said, the beauty of the proposal is that the banks do not need to perform the calculation of their "comparable rate"; they can choose, instead, to utilize proposed Rule 1.15E(c)(9) and pay the "benchmark rate, which COLTAF is authorized to set periodically, but not more frequently than every six months, to reflect an overall comparable rate offered by financial institutions in Colorado . . . ."

Proposed Rule 1.15E(c)(8) delineates the four types of accounts that may be used for COLTAF accounts.

Proposed Rule 1.15E(c)(10) lists the "allowable reasonable COLTAF fees" that a bank may charge, under its agreement with Regulation Counsel, against interest and dividends earned on COLTAF accounts. The deductible fees must be computed on a per-account basis; a bank may not deduct fees accrued on one COLTAF account from earnings from another COLTAF account. But a bank is not limited to earnings in determining all of its fees with respect to COLTAF accounts; although other fees cannot be deducted from the COLTAF earnings, "[a]ny fee other than allowable reasonable COLTAF fees are the responsibility of, and the financial institution may charge them to, the lawyer or law firm maintaining the COLTAF account."

Proposed Rule 1.15E(c)(12) leaves it to COLTAF to monitor bank compliance with the COLTAF agreements with Regulation Counsel that give them "approved financial institution" status; Regulation Counsel and lawyers need not perform that task.

Turning to the proposed comments for the revised series of Rule-1.15 rules, Sudler pointed out that the subcommittee omitted current Comment [1] to Rule 1.15, which exceeds the substantive content of the rule itself by gratuitously stating that "[a] lawyer should hold property of others with the care required of a professional fiduciary." The subcommittee also omitted current Comment [7] and its irrelevant reference to a "client's security fund."

The first of the comments that the subcommittee has retained for its revised series of Rule-1.15 rules describes a lawyer's obligation to exercise a "good faith judgment in determining initially whether funds are of such nominal amount or are expected to be held by the lawyer for such a short period of time that the funds should not be placed in an interest-bearing account for the benefit of the client or third person." This text is, Sudler noted, pertinent to the legality of IOLTA accounts under constitutional caselaw; he said that he was not aware of any disciplinary action in Colorado arising in this connection.

The second comment for the revised series of Rule 1.15 Rules deals with the multistate-practice situation. The subcommittee identified two issues that it felt needed to be addressed by the whole Committee, issues that it identified on page 5 of its report to the Committee (page six of the meeting materials): (1) May the person whose funds are held in a trust account consent to the account being one that does not bear interest; and (2) may a lawyer share in the earnings on funds held in a trust account in proportion to the interest that the lawyer may have in those funds?

As to the first of those issues, a number of subcommittee members felt that, if funds need not be in interest-bearing accounts, there would be a disincentive against the holding of funds in accounts from which the interest would flow to the COLTAF Foundation.

The subcommittee's report provided this example of a situation presenting the second issue, a lawyer's entitlement to a share of earnings on a trust account:

> An example of this situation is when a lawyer represents a plaintiff in a personal injury case. The matter settles with a settlement check made to both lawyer and client which may be deposited in non-COLT AF trust account. The lawyer through a contingent fee agreement is entitled to a percentage of the settlement. After the settlement funds are received by the lawyer, but before those funds are disbursed, they may earn interest. Current Rule 1.15 and Proposed Rule 1.15B(h) provide that a lawyer cannot take any of the interest earned on those funds while they are in trust.

Sudler explained that the delay in disbursal might be caused by the need to get an insurance-proceeds check cleared through the trust account institution. Current Rule 1.15 denies the lawyer the right to receive any share of the account earnings, even on that portion that will eventually be disbursed to the lawyer.[1]

The subcommittee could not determine what recommendation to make to the Committee with regard to either of these issues, Sudler said, as he concluded his presentation.

The Chair noted that, at its thirty-fourth meeting, on February 1, 2013, the Committee approved the subcommittee's proposal that current Rule 1.15 be broken into a series of five co-equal rules in an effort to make the provisions regarding the safekeeping of property, including the various account requirements, more comprehensible than they are presently. That division, she added, seems now to be something the Committee could assume had been approved and would not be reversed at this stage of the revision.

Outlining the discussion to follow Sudler's report, the Chair commented that there was a lot in the subcommittee's report and proposal and noted that the Committee members may have made a number of notes in marking up the proposal prior to the meeting. She asked that, given the plethora of changes made by the subcommittee, the members restrict their comments during the meeting to matters of substance and direct wordsmithing to Sudler by email and other communication after the meeting; the subcommittee could review all of the comments and provide, with revised text at the next Committee meeting, a redline reflecting all of the changes made to the draft that was submitted to this meeting.

The Chair opened the floor to questions and immediately took the floor to ask questions of her own.

In response to the Chair's inquiry whether the numbering of the first of the new 1.15 series should simply be "Rule 1.15" rather than "Rule 1.15A," with the second of the series to be numbered "Rule 1.15A," a subcommittee member defended the numbering system that the subcommittee had proposed, both because it recognizes that each of the rules in the series is of equal dignity with each of

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1. Rule 1.15(h)(2), C.R.P.C., provides in part [emphasis added]—

(h) COLTAF Accounts:

(1) Except as may be prescribed by subparagraph (2) below, interest earned on accounts in which the funds are deposited (less any deduction for service charges or fees of the depository institution) *shall belong to the clients or third persons whose funds have been so deposited; and the lawyer or law firm shall have no right or claim to such interest*.

(2) If the funds are not held in accounts with the interest paid to clients or third persons as provided in subsection (h)(1) of this Rule, a lawyer or law firm shall establish a COLTAF account, which is a pooled interest-bearing insured depository account for funds of clients or third persons that are nominal in amount or are expected to be held for a short period of time in compliance with the following provisions:

(a) *No interest from such an account shall be payable to a lawyer or law firm.*

the others, as well as with all of the other rules within the Rules of Professional Conduct, and because it identifies the Colorado lawyer account rules, including the trust account rules, as uniquely different from ABA Model Rule 1.15.

The Chair questioned the shortening of the phrase that opens current Rule 1.15(b) — "Upon receiving funds or other property in which a client or third person has an interest," — to "Upon receiving funds or other property of a client or third person" in the correlate, proposed Rule 1.15A(b), deleting the words "has an interest." The Chair suggested that the current phrasing identifies a difference between knowledge that the property belongs to a person and just a mere claim that the person may have a claim to the property. The change, the Chair said, suggests that ownership must now be an objective fact.

Sudler responded that the subcommittee found the current phrasing too ambiguous, seemingly allowing any claimant, by his claim, to create an immediate requirement that the property to which he has made his claim be segregated. Another member of the subcommittee pointed out that the provision deals with the obligation to distribute property promptly to those who are entitled to it — the only implication being that there is no alternative claim to what is to be distributed — leaving it to the next provision, proposed Rule 1.15A(c), to deal with contending claims to property.

The Chair noted that, like current Rule 1.15, the proposal repeatedly uses the term "Regulation Counsel"; the Chair suggested that, if the term is not defined somewhere in the existing Rules,[2] a definition should now be added.

The Chair noted that current Rule 1.15(d)(3) requires a lawyer who has discovered that funds have been held in a COLTAF account "in a sufficient amount or for a sufficiently long time" such that it would have been feasible to hold the funds in a trust account created for the benefit of the persons to whom the funds belong — the Chair characterized the provision as the "look-back" provision — to request COLTAF "to calculate and remit trust account interest already received by it to the lawyer or law firm for the benefit of such client or third person in accordance with written procedures" established by COLTAF. The provision specifically states that the remittance is for the benefit of the person to whom the funds held in the COLTAF account belong. She contrasted that with proposed Rule 1.15B(i), which merely requires the lawyer to request a refund from COLTAF in accordance COLTAF's procedures but omits to note that the lawyer will then hold the remittance for the benefit of the person to whom the funds belong.

Sudler and other subcommittee members agreed with this observation and agreed that reference to the remittance being held for the benefit of the owner of the funds should be reinserted, if only to prevent an unintended adverse inference from the "legislative history" of the texts.

The Chair asked whether the benchmark rate, which proposed Rule 1.15E(c)(9) contemplates may be fixed by COLTAF from time to time, will be posted on the Internet; the draft rule does not require that posting as an aspect of the contemplated agreement between Regulation Counsel and an approved financial institution. Sudler pointed out that the proposal requires Regulation Counsel to "maintain a list of approved financial institutions," but it does not require a posting of the benchmark rate. Philip Johnson, attending the meeting as president of the board of directors of the COLTAF Foundation, agreed that such a posting would be a good idea; the Chair agreed that it need not be made a requirement under proposed Rule 1.15E.

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2. In the current Rules of Professional Conduct, the term "Regulation Counsel" is used only in Rule 1.15, without definition.

The Chair asked about the location of the six comments that have been proposed by the subcommittee for the entire proposed series of Rule 1.15 rules. Sudler suggested that they might be moved up to follow proposed Rule 1.15A, with a notation that they apply to all of the rules in the series.

The Chair concluded her series questions with the observation that the subcommittee's work product was marvelous, the result of a huge effort.

Referring to proposed Rule 1.15C(c), a member commented that he has represented lawyers who have not known what is required by the "reconciliation" of trust accounts. In response, a member of the subcommittee noted that it had wrestled with what more might be said in that provision but, in the end, had decided "to leave the matter to trust account school." It is, he noted, hard to write accounting rules into these rules of conduct; he suggested that Regulation Counsel might consider making the trust account manual used by the Office of Attorney Regulation Counsel available to the bar without charge. Another member of the subcommittee suggested that it might survey what, if anything, other states have added to their correlative provisions for guidance.

The Chair introduced Cynthia F. Fleischner. Fleischner applauded the proposal that a trust account manual, if indeed Regulation Counsel has one, be made available to the bar; she said the manual would be valuable to law office staff and would more efficiently inform the bar about what reconciliation entails than would an article in a bar publication.

A member approved the earlier statement that the numbering system proposed by the subcommittee was appropriate, as it would flag that the Colorado provisions on lawyer accounts, including trust accounts, are very different from ABA Model Rule 1.15. The Colorado Rules of Professional Conduct will generally follow the ABA numbering system, and the lawyer account rules, with their different numbering, will stand out as being different in substance from the ABA rules. The member added the suggestion that something might be said at the beginning of the series of Rule-1.15 rules to advise the reader about the nature of the package that follows — that this series is different in kind from the other rules.

That member, though, added that he was concerned about proposed Rule 1.15E. He asked whether it was appropriate to include in the Rules of Professional Conduct provisions that do not apply to lawyers. He noted that, in a number of provisions, the Rules make cross-references to substantive provisions lodged elsewhere in the Court's rules of civil procedure;[3] and he suggested that perhaps we could lodge the substance of proposed Rule 1.15E in some other location and make a similar cross-reference to it in these rules.

Sudler responded that the subcommittee had considered that suggestion at some length and then rejected it, in part because this Committee has no authority to deal with other areas of the Court's rules. It realized that the provisions guiding Regulation Counsel in reaching agreements with "approved financial institutions" do not directly apply to lawyers but are relevant to them in that they may maintain accounts only in such institutions, subject to the specific exceptions that the subcommittee has proposed.

A member of the subcommittee added that inclusion of the requirements for Regulation Counsel's agreement with approved financial institutions in this series of proposed rules has the simple advantage of providing for a coherent whole. Another member of the subcommittee agreed, commenting that she

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3. *See, e.g.*, the cross-reference in the definition of "professional company" in Rule 1.0(1) to a full definition of that term in C.R.C.P. 265; *and see* the reference in Rule 1.2(c) to the unbundling rules of by C.R.C.P. 11(b) and C.R.C.P. 311(b).

would have preferred lodging this detail in a chief justice directive, but that had not proved feasible and this solution provides for accessibility to the requirements.

Poole added that, while the requirements for agreements between Regulation Counsel and participating financial institutions do not directly apply to lawyers, the Court's only ability to enforce those requirements is by requiring lawyers to place their accounts only with financial institutions that have voluntarily agreed with what the Court thinks are necessary for those accounts, that is, with accounts that meet those requirements.

A member said that he found the subcommittee's recommendation to be a "phenomenal job" and that he liked a lot of the changes that had been made. But he seconded the earlier proposal that something be said at the outset of the series of rules to tell the reader what "these rules mean and why."

That member added that he wanted to clarify the meaning of "severance" and the handling of disputes in proposed Rule 1.15A(c), which compares to current Rule 1.15A(c) as follows:

> (c) When in connection with a representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer until there is ~~**an accounting and**~~ ***a resolution of the claims and, when necessary, a*** severance of their interests. If a dispute arises concerning their respective interests, the portion in dispute shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.

He noted that the current rule calls for "an accounting and a severance" of the claimants' interests, while the proposal calls for "a resolution of the claims" and, when necessary, a severance of their interests. The second sentences of the respective provisions, in identical language, calls for separation of the disputed portion of the property until the dispute is resolved. It has been his understanding, he said, that Regulation Counsel believes that "severance" must occur contemporaneously with the withdrawal of funds from a trust account — for example, for the lawyer to withdraw a now-earned "retainer" from a trust account, he must send an invoice "severing" the entitlement to the funds from the client who deposited them there. The member understood that Regulation Counsel believed that the funds could not be withdrawn until the severance — the sending of the invoice — had occurred. Now, he noted, the proposed wording is "until there is an accounting and a resolution of the claims and, when necessary, a severance of their interests." When, he asked, is severance "necessary"? He referred then to the description contained on page 7 of the subcommittee's report (page 8 of the materials provided to the members for this meeting):

> 4. Proposed Rule l.I5A(c) is basically the same as Current Rule l.15(c) but has been changed to clarify that claims of a lawyer, client or third party may be resolved short of some sort of formalized severance proceeding.

He was, he said, confused about when severance is needed — indeed, he was confused about the whole provision.

Another member said the provision had confused her, too; when she compared the Colorado provisions to ABA Model Rule 1.15(e),[4] she found the latter simply said, "until the dispute is resolved.

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4. Rule 1.15(e) of the ABA Model Rules of Professional Conduct read—

> (e) When in the course of representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.

Sudler began his response to these comments by exhaling, "Where to begin . . . ?" He summarized how lawyers at Regulation Counsel deal with these questions — which he characterized as "what should a lawyer do?" and "what does 'severance' mean?" — by saying he was not sure that they all dealt with the questions in the same way. He has, himself, been uncomfortable with the interpretation that leads to the requirement that an invoice be sent before an earned retainer be withdrawn from a trust account deposit. The proposed revision, he said, was the subcommittee's attempt to deal with the matter. Perhaps, he noted, a better solution would be to adopt the ABA terminology, as the other member had suggested, leaving the provision to deal solely with the resolution of disputes to funds and not include the circumstance of allocation when entitlements change — such as occurs when a retainer has been earned — without dispute.

A member who had been a member of the subcommittee noted that the proposed text would cover not only the earning of a retainer but also, for example, the action by which shares of stock are transferred on the books of a corporation and certificates issued in new names. Perhaps that is a "severance" of the kind contemplated by the proposed language.

Yet another member who had been a member of the subcommittee commented on the similar debate that had occurred in the subcommittee's deliberations. Claiming that he was not burdened by the fact of his having been on the subcommittee, he now proposed that the aberrant text be omitted and the provision restored to the ABA model, which deals only with the resolution of disputes and not to other severance actions. The member who had raised the issue approved of that solution.

That member, who had raised the severance issue, commented as an aside that he intended to raise, in the future after the adoption of these rule changes, a proposal to deal with "unclaimed funds" in trust accounts — funds as to which the lawyer either knows the identity of the owner but cannot locate that person or funds as to which, because of, say, an accounting mistake, the owner cannot be identified. This member's purpose would be, he said, to amend the rule to permit such funds to be transferred to the COLTAF Foundation. Another member pointed out that the proposal might implicate the State's escheat laws. When the Chair asked whether the proposer wished to make his proposal at this time, the proposer replied that he felt the current Rule 1.15 project should be completed first, before his proposition was pursued, and that perhaps it could then be pursued by the same subcommittee. He added that he felt the COLTAF Foundation was "leaving money on the table," subject to whatever might be required by escheat law.

Sudler pointed out to the Committee that, just the week of this meeting, a hearing board in a disciplinary case had noted that there is no Colorado commentary or case law establishing what is required by the "full accounting" provision within current Rule 1.15(b).[5] That is in contrast to other states' rules, which deal comprehensively with that concept. He asked that the subcommittee be directed to look into the concept with a view toward clarifying its meaning.

A member who had not spoken previously also commended the subcommittee's work product and added that he felt the Committee should recommend prompt action by the Court on the proposal. But he added, with respect to trust funds in which a person "claims an interest," that the current rule and the subcommittee's proposal both retain that terminology from the ABA model provision; and he noted that the topic is the subject of Opinion Nº 94 of the Colorado Bar Association's Ethics Committee. He

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5. Rule 1.15(b), C.R.P.C., states—

> (b) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall, promptly or otherwise as permitted by law or by agreement with the client or third person, deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, promptly upon request by the client or third person, render a full accounting regarding such property.

did not regard the phrase "claims an interest" to be surplusage and felt the matter should be considered further.

The Chair asked that members of the Committee send to Sudler, by not later than the end of August, any comments that they might have about the subcommittee's proposal. But she also asked for a straw vote to gain the Committee's general view about the proposed series of Rule 1.15 rules.

Before that vote was taken, a member noted that the Committee had not yet considered two questions that the subcommittee had left for deliberation by the Committee: May a lawyer use, with the consent of those having interest in funds, a non-interest-bearing, non-dividends-bearing trust account?[6] May a lawyer share in the interest or dividend earnings of a trust account holding funds in which she has an interest? The Chair agreed that those questions needed discussion.

A member who had been a member of the subcommittee said that he was comfortable with the idea that funds could be held in non-earning accounts, noting that clients and other funds owners may have reasons for avoiding reportable income. As to the second of the questions, this member said that, in some cases, the lawyer may have, as a matter of law, a claim on a portion of the funds, albeit subject to conditions precedent to withdrawal or to unresolved disputes. The member postulated the case in which the lawyer's representation is "terminated on the courthouse steps" after funds are deposited in a settlement. It is a fiction, the member said, to assume that the lawyer can never have an interest in the deposited funds.

To those comments, another member who had been a member of the subcommittee asked that the two questions be considered one at a time. As to the first question, this member said that permitting funds to be held in non-earning accounts would create a loophole disadvantaging COLTAF. In her view, there should be earnings, and they should go either to the persons owning the funds or to COLTAF. The COLTAF possibility comes only when the funds are small in amount or are to be held for a short time. She likened the matter to the prudent-man standard of fiduciaries holding funds, suggesting that the funds should not be put under the bed, with no earnings. If the persons owing the funds do not want the earnings, they should go instead to COLTAF.

Another member of the subcommittee said that he had come down on the other side of this particular question when it was being discussed by the subcommittee. If the client or another person is putting the funds in the lawyer's trust, that person should be able to decide how the funds are to be handled. The member noted that, at the subcommittee's discussion, others had suggested that clients and others may have legitimate reasons for avoiding income that might entail reporting to United States or state tax authorities if earned. What, he asked, would be the reason for denying these persons the right to make that decision?

A member asked Poole for the COLTAF Foundation's position on the question. Poole replied that the Foundation would be concerned that permission within the rule to put funds in non-earning

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6. The question was posed on page 5 of the subcommittee's report as follows:

> The Subcommittee considered a similar issue: whether a client who is receiving the interest on the account should be allowed to consent to funds being held in a noninterest bearing account. Neither the Current Rule nor the Proposed Rule contains such a provision. The Committee as whole should determine whether to allow such a provision. The Subcommittee recognizes that theoretically a client should be allowed to consent to client funds being held in a non-interest bearing account when the client would otherwise be entitled to the interest. However, a significant amount of discussion by the Subcommittee concerned whether allowing such consent might undermine the use of COLTAF accounts for those funds that are appropriate for COLT AF accounts. Several members of the Subcommittee were opposed to permitting a client to consent to non-interest-bearing accounts.

accounts might become standard in lawyers' engagement agreements simply to avoid the need to maintain COLTAF accounts. The Foundation would prefer that the default be that funds be deposited in interest-bearing COLTAF accounts, if they are not held in accounts from which earnings are paid to those having interests in the funds.

The member who had expressed his comfort with the idea of non-earning accounts said he shared Poole's concern, but he noted that, if the proposal were amended to permit funds to be held in an non-earning account, it would require the owner's "informed consent" for the use such an account. The matter, he thought, could not just be hidden away in a fee agreement. To that, a guest asked how a regulator would be able to discern whether the consent had been properly obtained or simply made a part of an engagement form.

Another member of the subcommittee simply said that he found it exceedingly strange that the Court would preclude a property owner from deciding that his funds would not be invested in an interest- or dividend-earning account.

Two guests noted that questions have been raised about the taxability of earnings that might have gone to funds owners but are diverted to COLTAF.

The member who had expressed his skepticism about the court precluding an owner from deciding to put funds in a non-earning account added that he thought that the loss of funds to COLTAF because of a rule permitting the use of non-earning accounts would be small, as a practical matter.

A member who had not been a member of the subcommittee expressed his concern about what he saw as a loophole. He agreed, he said, that an engagement agreement provision could not, of itself, be the requisite "informed consent" to the use of a non-earning account; but that just meant the lawyer would have to proceed to give the information required to obtain "informed consent"[7] — and that would result in the loophole that he was concerned about. To a member's suggestion that a comment be included to deal with this possibility, given informed consent, this member replied that it would have to be a very complicated comment. He concluded by saying that he desired that clients have control over their own money but that he thought the default here should be that interest would be earned on that money while it is in the lawyer's trust.

Another member expressed his concern that permitting non-earning accounts could undermine the "mandatory nature" of the COLTAF account, to the disadvantage of the interests of the bar. The argument for client autonomy, he thought, was a false one; that autonomy could be attained in other ways. In his view, the COLTAF account was proper (a) for small amounts, (b) for amounts to be held for short periods of time, and (c) when the client did not want earnings.

The discussion then shifted to the second question that the subcommittee had posed, the lawyer's right to share in interest or dividends earned on funds in which the lawyer has a claim.[8]

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7. "Informed consent" is defined in Rule 1.0(e), C.R.P.C. as follows:

"Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

8. The question was posed on page 5 of the subcommittee's report as follows:

It is not unusual for a lawyer to hold funds in trust for a period of time in which the lawyer has an interest. An example of this situation is when a lawyer represents a plaintiff in a personal injury case. The matter settles with a

A member who had been a member of the subcommittee commented that she had been the major opponent to the idea that a lawyer could share in account earnings in proportion to the lawyer's interest in the deposited funds. She was of the view that it was absolutely not possible for the lawyer to have an interest in the deposited funds, under the Court's rules, bankruptcy principles, and the like.[9] She said that Tenth Circuit Court decisions have been to the effect that settlement funds are entirely the funds of the parties to the settlement, with their lawyers having no property interest in those funds. A lawyer might have a lien on his client's funds, she agreed, but no part of the funds themselves was the lawyer's property. Any indication that the lawyer could have an interest in deposited settlement funds would be contrary to those principles. If one owns the principal, one owns the interest thereon, she said.

To that, another member pointed out that creditor law recognizes equitable claims as property interests. Bankruptcy law will not get to where the previous member wished her argument to go, he said.

To all of that, another member asked how apportionment might be administered. Sudler answered that the situation could apply only to funds that were not in a COLTAF account, for, in a COLTAF account, all earnings would go to the COLTAF Foundation.

On a straw vote, the concept of amending the rules to permit a lawyer to share in earning from trust account funds in which he had an interest was defeated.

A member asked whether a lawyer's engagement agreement could specify that the lawyer was entitled to share in trust account earnings in proportion to his interest in the account principal. Sudler replied that such sharing would violate both current Rule 1.15(h)(1) and the subcommittee's proposal. A member pointed out that the argument that had been made — that no part of the funds in a trust account can, as a matter of law, belong to the lawyer — was a question of law; the member asked whether our vote would be a modification of law. A second straw vote was taken and, again, the Committee determined not to change the proposal to permit a lawyer to share in earnings from trust account funds.

The Committee then approved the direction that the subcommittee had taken in its proposal, with incorporation of the points discussed by the Committee at this meeting.

VI. *Consideration of Rules Changes to Recognize Colorado Changes Regarding Marijuana Sale and Usage.*

After a short break, the Chair turned the discussion over to Judge Webb and the further report of the Amendment 64 subcommittee, the subcommittee considering what, if any, changes might be made

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settlement check made to both lawyer and client which may be deposited in non-COLT AF trust account. The lawyer through a contingent fee agreement is entitled to a percentage of the settlement. After the settlement funds are received by the lawyer, but before those funds are disbursed, they may earn interest. Current Rule 1.15 and Proposed Rule 1.15B(h) provide that a lawyer cannot take any of the interest earned on those funds while they are in trust. The subcommittee discussed the issue that the lawyer may be entitled to interest on the portion of the settlement that belongs to the lawyer. The Proposed Rule I.15B(h) does not allow that. The Subcommittee discussed this issue at some length There was significant support for either resolution.

9. Current Rule 1.15(c) recognizes that a lawyer may have an interest in deposited funds; it provides, in part, "When in connection with a representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer until there is an accounting and severance of their interests."

to the Rules of Professional Conduct to reflect that the Colorado Constitution has been changed to permit both medical and recreational use of marijuana.[10]

Webb began by referring the members to page 48 of the materials that the Chair had provided for this meeting for the beginning of the subcommittee's supplemental report. On that initial page, the subcommittee had summarized the charge it had received from the Committee at its thirty-fifth meeting, on May 3, 2013, as follows:

> - Review and, as necessary, revise proposed Rule 8.6 and the accompanying comments to implement the Standing Committee's vote, which took out the phrase "for engaging in conduct," and then approved, but only in principle, the concept of a safe harbor for lawyers who advise clients · concerning their conduct involving marijuana, which is compliant with state law but violates federal law.
> - Prepare an alternative, narrower version of Comment [2A] to Rule 8.4 so that the safe harbor would protect only a lawyer's private conduct involving cultivation, possession, and use of marijuana, compliant with the Colorado Constitution, but would not exempt a lawyer's commercial conduct involving marijuana, such as owning or operating a licensed distribution facility. The Standing Committee did not take a straw vote on this question, but directed the subcommittee to present this alternative, based on concerns expressed by some members of the Standing Committee about lawyers who might become entrepreneurs in this industry.

As directed by the Committee at its thirty-fifth meeting on May 3, 2013, the subcommittee deleted from its proposal for Rule 8.6 the phrase "for engaging in conduct" — the change being shown on the redline provided to the Committee on page 5 of the subcommittee's report (page 51 of the meeting materials) — but the subcommittee proposed no other changes to the text of that rule. It did, however, propose changes to the accompanying comment, the thrust of which would be to clarify that the rule applies only to lawyers' advice to clients and does not apply to a lawyer's personal conduct.

As to Rule 8.4, Webb said the subcommittee responded not to any particular Committee vote but, rather, to the tenor of the Committee's discussion at the prior meeting. He noted that there had been strong views that, perhaps, the "safe harbor" provided by that rule should be limited to a lawyer's personal conduct and not extend to a lawyer's commercial, for-profit activities. To that end, the subcommittee had made some changes to its proposed additional comment to Rule 8.4, changes that were set forth on pages 6 and 7 of its report (pages 52 and 53 of the meeting materials). Webb noted that the changes to the comment do not reflect any principled basis for them, referring to the discussion on the fourth page of the subcommittee's report (page 50 of the meeting materials).[11]

At the Chair's request, Webb turned back to proposed Rule 8.6, noting that he would have more to say about Rule 8.4 later but asking the Committee first to discuss proposed Rule 8.6.

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10. As stated in the minutes of the Thirty-Fourth Meeting of the Committee, on February 1, 2013, the Committee "determined to form a subcommittee to consider such issues relating to the legalization of marijuana in Colorado as the subcommittee chooses to consider."

11. The subcommittee's report states—

> A majority of the subcommittee recognizes that the dilemma of state-law-compliant conduct which violates federal law exists in both private, noncommercial and commercial conduct. Although distinguishing between them does not have a principled basis under the constitutional amendments, it has a pragmatic one. And presenting a pragmatic approach may assist the Supreme Court, when it considers a recommendation from the Standing Committee.

A member noted that the text of proposed Rule 8.6 does not actually refer to the specific, marijuana, provisions of Article XVIII of the Colorado Constitution but, rather, refers to *any* "specific provision of the Colorado Constitution . . . [by which conduct] is either (a) permitted, or (b) within an affirmative defense to prosecution under state criminal law, solely because that same conduct, standing alone, may violate federal criminal law." Yet, the member pointed out, the proposed Comment [1] characterizes the rule itself as one that "specifically addresses" the two marijuana provisions of the Constitution. Webb replied that, to his knowledge, only the marijuana provisions in the constitution have the state/Federal dichotomy that has led to the proposal for the changes to the rules, In the future, he said, there might be other such dichotomies, and he agreed that those could be dealt with as they arose and that the current proposal for the text of the rule could be changed to deal only with the marijuana amendments to the Constitution.

A member said the proposal seems to give the "illusion" to lawyers that it offers a safe harbor and protects the lawyer from the wider risks of advising about marijuana issues. He suggested this example: A banking client calls a lawyer for assistance in making a loan to a land owner for a marijuana grow facility, a facility that the owner/borrower will lease to a licensed marijuana grower. Any lawyer undertaking to provide that advice to the bank will find that she must consider Federal law as well as Colorado law. This member asked how far one might go with this, noting that our rule and comment would not discuss the Federal consequences of such a legal representation. He suggested that, in the example, the lawyer would have to advise the bank that the grow facility might be subject to Federal forfeiture, with the consequent loss of security to the bank for the loan. Or, the lawyer might find herself subpoenaed by a grand jury. With these kinds of possible consequences, the member asked, what kind of advice must the lawyer give to the client; he added that his concern was that our text might lead the practitioner to feel that all was well and there could be no adverse consequences from providing advice in a case such as the member posed. While it might not be a disciplinary issue, because of the accommodating changes made to the Rules of Professional Conduct, there may be other, serious consequences from giving advice in this fraught area of the law, risks about which those Rules would not give warning.

A member noted that the subcommittee's new proposal for Comment [1] to proposed Rule 8.6 characterizes the proposed rule as "specifically address[ing] the need for legal advice in connection with" the two constitutional amendments, implying, perhaps, that the rule does not encompass legal advice that might be given about the marijuana activities that are permitted by those amendments, such as advice about contract law that might be needed by a licensed marijuana establishment. To avoid such an implication, the member suggested deleting that phrasing.

Webb replied that the subcommittee had added that phrasing in response to the strong comments made at the prior Committee meeting and that it was in accord with the medical marijuana ethics opinion that had been issued by the Colorado Bar Association Ethics Committee.

The member who had earlier noted that the proposed text of Rule 8.6 itself did not distinguish between the marijuana amendments and any constitutional provision that might be at variance from Federal law said he would like to see the text be limited to the marijuana amendments.

Responding to the comment by a member that Comment [1] to proposed Rule 8.6 referred specifically to advice about the two constitutional amendments and not to other legal advice about marijuana-related conduct, a guest noted that the text of Rule 1.2(d)[12] has not been clear to many lawyers.

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12. The provision reads—

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or

The comment, he suggested, could be revised to say that Rule 8.6 specifically addresses the need for legal advice "because of the ambiguity of Rule 1.2," without stating more.

The member who had made the earlier comment agreed that the guest's suggestion might help alleviate the problem, but he asked why it would not, then, be placed as a comment to Rule 1.2.

Webb replied to these remarks by saying the subcommittee had proposed that a comment be added to Rule 1.2 to provide a cross-reference to Rule 8.6, with its provisions permitting counseling and assisting clients in connection with conduct involving marijuana.

To all of that discussion, a member provided a different reading of the subcommittee's Comment [1] to proposed Rule 8.6: The text of the proposed rule, he noted, does not itself say that the advice is limited only to advice *about* the two constitutional amendments. Rather, it specifically permits

> counseling or assisting a client to engage in conduct, that by virtue of a specific provision of the Colorado Constitution (and in implementing legislation or regulations) is either (a) permitted, or (b) within an affirmative defense to prosecution under state criminal law, solely because that same conduct, standing alone, may violate federal criminal law.

The comment, the member said, does not constrict that counsel and assistance to questions about the meaning of the two constitutional amendments but merely gives an example of why there may be a need for such counsel and assistance.

A member who had been a member of the subcommittee said he agreed that the proposal would permit lawyers to give counsel and assistance generally about marijuana use and commerce and not just be limited to advice about the meaning of the two constitutional amendments. He had no doubt about that. He said the subcommittee had backed away from inclusion of the concept within Rule 1.2 or its commentary because it would be hard to delineate between the context at hand — the dichotomy created by the marijuana amendments between Colorado and Federal law — without using a "forty page article" on the nuances between counsel and assistance. Accordingly, he said, the subcommittee determined to use a comment to proposed Rule 8.6 and a cross-reference with Rule 1.2.

A member who had not previously spoken commented on the prior observation that lawyers might be misled, by these rules, into ignoring applicable Federal law when giving advice and assistance to their clients. The member pointed out that the opening sentence of proposed Rule 8.6 begins, "Notwithstanding any other provision of these rules . . . ," and he suggested that, perhaps, the text should make it clear that the leeway given relates only to Colorado discipline, not to other rules, including other rules of discipline applicable in the Federal courts. Another member suggested that the point be made by referring specifically to discipline meted out by Colorado Regulation Counsel. To that suggestion, another member objected, pointing out that the Federal authorities know how to distinguish their rules from local rules; and yet another member noted that a specific reference here to discipline by Colorado Regulation Attorney would simply raise questions about whether *other* rules had some different reach.

Webb asked for a vote on the subcommittee's proposed Rule 8.6 and comments, with the amendments that the Committee had thus far discussed.

The member who had earlier noted that the text of the proposed rule does not distinguish between the specific, marijuana, provisions of the Colorado Constitution and any other "specific provision of the

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fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

Colorado Constitution" that might condone conduct that is violative of Federal law asked that the language be changed from that generality to a reference only to the two marijuana provisions. He wished to see the provision actually refer only to what the Committee had actually been discussing. He added that he was speaking just as a member of the Committee and not as the representative of any particular authority.

A member who was also a member of the subcommittee moved the adoption of the subcommittee's proposal for Rule 8.6 and its comments; he added that he could support the narrowing from the proposal's generality to specific references to the marijuana amendments, noting that the concept had been discussed by the subcommittee.

After some discussion about the proper form of the motion, it was agreed that the motion up for approval was the subcommittee's text of Rule 8.6 — without consideration of the proposed comments — but with a narrowing of the rule's text to references only to the marijuana amendments to the Colorado Constitution. The motion was narrowly adopted.

A member then moved for the adoption of the subcommittee's proposed comments to its proposed Rule 8.6.

Two members, who had been members of the subcommittee, said that, with the change to the text of proposed Rule 8.6 itself to specify the two marijuana amendments, it would be unnecessary, confusing, and repetitive to retain proposed Comment [1] specifying those two amendments. In response, the movant remarked that he liked that portion of Comment [1] that highlighted the need for lawyers to be able to give counsel and assistance, but he withdrew his motion.

Another member then proposed the deletion of proposed Comment [1], the renumbering of proposed Comment [2] as Comment [1] and its adoption. That motion passed.

The Chair invited guest Fleischner to review the deliberations of the Colorado Bar Association Ethics Committee regarding the marijuana issues. Fleischner began by commenting that, as Judge Taubman had explained at the Committee's previous meeting on May 3, 2013, the CBA Ethics Committee had contemplated direct changes to Rule 1.2(d) regarding a lawyer's counseling and advising a client about marijuana-related conduct; but, she noted, this Committee had determined not to take that course. In its Opinion Nº 124, the CBA Ethics Committee concluded that a lawyer's personal, medical use of marijuana that complied with Colorado law adopted under Article XVIII, § 14, of the Colorado Constitution would not violate Rule 8.4(b). At its meeting in June 2013, the CBA Ethics Committee determined to extend Opinion Nº 124, by an addendum, to include a lawyer's personal, recreational use of marijuana under the constitutional amendment adopted by the voters in November 2013, Article XVIII, § 16. The CBA Ethics Committee is also working on an opinion, to be issued as Opinion Nº 125, that would conclude that a lawyer does not violate Rule 1.2(d) by counseling a client in activity that is within the scope of the constitutional amendments, although it would not countenance "negotiating" for a client in that context. Fleischner noted that the latter opinion had been considered further at the committee's July 2013 meeting and was likely to be considered further at its September 2013 meeting.

Judge Taubman added that, at the annual meeting of the American Bar Association House of Delegates to be held in August, a resolution from the King County, Washington, Bar Association will be proposed by which the American Bar Association would urge lawyer disciplinary authorities not to take disciplinary action against lawyers who counsel and assist clients about compliance with state laws legalizing the possession and use of marijuana.

Webb then turned the Committee's attention to the proposals for addition of a Comment [2A] to current Rule 8.4. He said that, as originally proposed by the subcommittee, the comment would have precluded discipline for *any* marijuana activity by a lawyer that was permitted by the Colorado Constitution. But, at its thirty-fifth meeting, on May 3, 2013, the Committee had directed the subcommittee to narrow the safe harbor to personal, non-commercial use,[13] and, in response, the subcommittee's current proposal for Comment [2A] is limited to "private, non-commercial conduct of a lawyer" under the specified marijuana amendments to the Colorado Constitution.

Webb and other members of the subcommittee had looked for other words to substitute for "non-commercial" such as "non-profit." But, Webb said, on the eve of this Committee meeting, a member, who had not been a member of the subcommittee, had suggested to the subcommittee that, instead of looking for words to characterize the permitted conduct, the comment could simply refer to the specific constitutional provisions establishing the Colorado law on marijuana use. The member's proposal was that Comment [2A] read as follows:

> [2A] Conduct of a lawyer which, by virtue of either of the provisions of the Colorado Constitution that are cited below, is either (a) permitted, or (b) within an affirmative defense to prosecution under state criminal law, and which is in compliance with legislation or regulations implementing such provisions, does not reflect adversely on the lawyer's honesty, trustworthiness, or fitness in other respects, solely because that same conduct, standing alone, may violate federal criminal law. The provisions referred to above are the following: Article XVIII. Miscellaneous, Section 14, Medical use of marijuana for persons suffering from debilitating medical conditions, Subsection 14(4); and Article XVIII, Miscellaneous, Section 16, Personal use and regulation of marijuana, Subsection 16(3). The phrase "solely because" clarifies that a lawyer's personal, noncommercial use of marijuana, while itself permitted under state law, may cause a lawyer to violate other state laws, such as prohibitions upon driving while impaired, and other rules, such as the lawyer's duties of competence and diligence, which may subject the lawyer to discipline. See Rules1.1 and 1.3. The phrase "standing alone" is explained in Comment [2] to Rule 8.6.

A member referred to the proposals from the subcommittee and from the other member, each of which would refer to conduct "which may violate federal criminal law." But, this member said, the conduct in question *clearly* would violate Federal law, and he asked whether that would change the meaning of the proposals. In response, another member said he understood that the intent of the proposals was that even a conviction proving violation of Federal law would not be subject to Colorado discipline. The member who had raised the point said he would want to see the language be clarified to that end.

Webb said the intent of the proposals is to recognize a distinction between permitted personal use of marijuana and other, entrepreneurial, activity. He observed that the possibility of a lawyer being prosecuted for personal marijuana use within the constitutional permissions was vanishingly small, but that, he added, is aided by the decision not to protect entrepreneurial use. The proposals, he confirmed, would preclude discipline for personal use permitted under Colorado law, even if that resulted in a conviction under Federal law.

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13. The minutes of the thirty-fifth meeting of the Committee, on May 3, 2031, state—

> Webb said that, if the direction of the Committee was to make a distinction between a lawyer's personal use of marijuana (permitted) and his personal involvement in commercial marijuana activities (disciplinable), that could be done.
>
> Upon a vote, the Committee determined to return the matter to the subcommittee to develop alternatives on how to deal with a lawyer's personal use of marijuana and a lawyer's personal involvement in commercial marijuana activities.

A member suggested that the phrasing be "private, not-for-profit" conduct, and Webb indicated his approval of that language — if the lawyer's conduct is not for profit, it would be permitted. A sale, however, would be different.

The member who had proposed, as an alternative, that Comment [2A] simply refer to § 14(4) and § 16(3) of Article XVIII explained the reasoning behind his proposal: He had considered, he said, other available statutory language that distinguishes between personal and other activities, such as the phrasing "personal, family, or household use" that is found in consumer legislation. But, he realized, the marijuana amendments themselves make the necessary distinctions, and further characterization by additional adjectives in the comment was unnecessary.

A member approved of the suggested alternative to Comment [2A], saying that the effort to distinguish between permitted nonprofit activity and disciplinable profit activity was a trap that the alternative avoided. Another member added his approval.

But another member said she thought that the member's proposed alternative for Comment [2A] was not likely to be understood by lawyers; they would, she said, simply conclude by the comment that they can engage in marijuana activity as can any other person under Colorado law. This member suggested that some additional indication of restriction, such as that the lawyer cannot provide a marijuana "establishment," be added.

To that, the member who had suggested the alternative replied that he thought that any lawyers who wished to conduct commercial activities, activities that we feel a lawyer should not engage in, would surely look beyond the text of the comment to the cited constitutional provisions as they planned their conduct and that they, therefore, would be very well informed about what was permitted and what was disciplinable.

The Chair put to the Committee the general question of whether it supported the broad approach, which would permit a Colorado lawyer to engage in any marijuana-related activity condoned by Colorado law. By a vote, the Committee determined that it did not support such a rule.

Webb then moved for the adoption of the proposal that Comment [2A] to Rule 8.4 simply refer to § 14(4) and § 16(3) of Article XVIII, as the member had proposed. Before action was taken on his motion, a member who had been a member of the subcommittee said he would like to look at text that incorporated some statement highlighting that a lawyer could not engage in commercial activity.

The member who had made the proposal that the comment contain only the sectional references suggested that the Committee let the subcommittee consider whether such additional text was "worth the candle." He suggested that the matter be sent back to the subcommittee with the flexibility to decide whether an indication of prohibited activity — that is, activity that would not be permitted by Article XVIII, § 14(4) or § 16(3) but was commercial activity permitted only under Article XVIII, § 16(4) — would be useful.

A member questioned the delay that would result from sending the matter back to the subcommittee. The Chair replied by noting that the subcommittee's subsequent deliberations could be circulated and approved by emails before the next meeting of the Committee. She added that perhaps the phrasing "personal, non-commercial use" could be changed to "personal or medical" use.

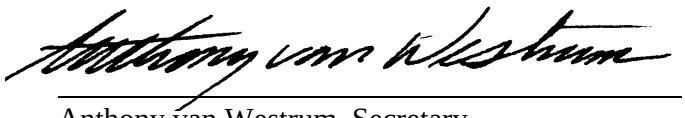
By a vote, the suggestion to return the matter to the subcommittee for consideration of language that might be added, to the proposed references in Comment [2A] to § 14(4) and § 16(3) of

Article XVIII, to indicate the range of permitted or precluded activity was approved, the supposition being that the subcommittee's further deliberations might then be subject to email approval.

VII. *Adjournment; Next Scheduled Meeting.*

The meeting adjourned at approximately 12:00 p.m. The next scheduled meeting of the Committee will be on Friday, October 11, 2013, 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-seventh Meeting, on October 11, 2013.]