COLORADO SUPREME COURT

STANDING COMMITTEE ON THE RULES OF PROFESSIONAL CONDUCT

Approved Minutes of Meeting of the Full Committee
On February 1, 2013
(Thirty-Fourth Meeting of the Full Committee)

The thirty-fourth meeting of the Colorado Supreme Court Standing Committee on the Rules of Professional Conduct was convened at 9:20 a.m. on Friday, February 1, 2013, by Chair Marcy G. Glenn. The meeting was held in the conference room of the Office of Attorney Regulation Counsel, at 1560 Broadway, Denver, Colorado.

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

Also in attendance were Philip E. Johnson, of the law firm of Bennington Johnson Biermann, the chairman of the Colorado Lawyers Trust Account Foundation, and Diana M. Poole, the executive director of the COLTA Foundation.

I. *Meeting Materials; Minutes of November 16, 2012 Meeting.*

The Chair had provided a package of materials to the members prior to the meeting date, including submitted minutes of the thirty-third meeting of the Committee, held on November 16, 2012. Although consideration of those minutes was postponed until completion of the Committee's discussion of Colorado's legalization of medical and recreational marijuana, reflected in Part II of these minutes, they were then approved with one correction.

II. *Colorado Legalization of Medical and Recreational Marijuana*.

The Chair opened the Committee's substantive discussions with the question of whether the Committee should form a subcommittee to consider amendment of the Rules of Professional Conduct in response to the addition of § 14 to Article 18 of the Colorado Constitution in 2000 to permit use of medical use of marijuana for persons suffering from debilitating medical conditions and the addition of § 16 to Article 18 of the Colorado Constitution, by Amendment 64 in 2012, to permit and regulate personal use of marijuana. The Chair noted that she was moving this discussion to the head of the agenda because Judge Webb, whom she asked to lead the discussion, would not be able to attend the entire meeting.

Judge Webb pointed the Committee to the meeting materials for a brief memorandum he had prepared to present the question of a lawyer's personal use of marijuana, an activity that is no longer illegal under Colorado law but remains illegal under Federal law, should subject him to discipline under Rule 8.4(b), which proscribes commission of "a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects." Judge Webb's memorandum echoed

Opinion 124 of the Colorado Bar Association Ethics Committee, which recognized that that committee could not predict how the Office of Attorney Regulation Counsel would regard a lawyer's lawful use of medical[1] marijuana, and concluded that the resulting uncertainty could chill a lawyer's exercise of conduct permitted by Amendment 64. The memorandum suggested that whether lawyers should be held to higher standards in this or other areas is a policy question. He contrasted the circumstance of a lawyer lawfully but surreptitiously recording telephone conversations, a practice that the Colorado Bar Association Ethics Committee has concluded involves "an element of trickery or deceit, [so that] it is generally improper for an attorney to engage in surreptitious recording even if the recording is legal under state law."[2]

Judge Webb noted that, since he prepared his memo, the current Colorado Attorney Regulation Counsel, John S. Gleason, had announced that his office would not seek to discipline lawyers whose use of marijuana complied with the Colorado Constitution, notwithstanding that such use continues to be illegal under Federal law. But, Judge Webb noted, Mr. Gleason is retiring from that office in March 2012, and it cannot be known what position the next Attorney Regulation Counsel might take on the matter.

Judge Webb concluded his remarks by stating that his purpose was simply to get a subcommittee of the Committee appointed to consider the application of the Rules of Professional Conduct to marijuana usage that is lawful under Colorado law.

At first, the Chair's request for discussion was met with silence. Then a member spoke to ask what the task would be for any such subcommittee. The member noted that the Colorado Bar Association Ethics Committee's existing opinion goes only to a lawyer's use of marijuana for medical purposes; it does not consider the Rule's implications for a lawyer who seeks to advise clients who are engaged in marijuana usage, or a marijuana business, that is now permitted by Colorado law. The member added that Rule 8.4(b), subjecting some, but not all, criminal conduct to discipline, depending on the reflections on the lawyer's "honesty, trustworthiness or fitness as a lawyer in other respects," must be applied on a crime-by-crime basis.

To that, Judge Webb expressed his disagreement; in his view, a possible approach is to add a comment to Rule 8.4 stating that any conduct that is explicitly exempted from state prosecution by Colorado law cannot be conduct that would adversely reflect on the lawyer within the meaning of Rule 8.4(b). He was thinking, he said, of a generic comment, not one directed only to conduct involving use of marijuana that is lawful in Colorado. He referred the members to the suggestion for a comment to Rule 8.4 that he included at the end of his memorandum: "[2A] A lawyer shall not be subject to discipline for engaging in conduct that is illegal under federal criminal law, if the Colorado Constitution precludes prosecution of that conduct under state criminal law.

The Chair noted that the discussion was moving to the substance of the matter, beyond the question of whether a subcommittee should be formed to consider the matter. She added, responding to Judge Webb's suggestion that a solution might be placed in a comment, that the Committee tries, as a

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1. At the time Colorado Bar Association Ethics Committee Opinion 124 was issued, on April 23, 2012, Article 18, § 14, regulating medical marijuana use, had been added to the Colorado Constitution, but Article 18, § 16, permitting personal, non-medical use of marijuana had not yet been added. *See* http://www.cobar.org/repository/Ethics/FormalEthicsOpion/FormalEthicsOpinion_124_2012.pdf for Opinion 124.

—Secretary

2. Colorado Bar Association Ethics Committee Opinion 112, July 19, 2003, http://www.cobar.org/repository/Ethics/FormalEthicsOpion/FormalEthicsOpinion_112_2011.pdf.

—Secretary

matter of drafting principle, not to place substantive provisions in comments but, rather, to embed them in the blackletter text of rules. She also expressed concern about the particular wording that Judge Webb suggested; she recounted that, in the deliberations on marijuana usage by the Colorado Bar Association Ethics Committee, the understanding was that conduct that did not violate Colorado law, though it be illegal under Federal law, should not be considered violative of Rule 8.4(b) (reflecting adversely on the lawyer's fitness) but could leave a lawyer in a state that caused him to violate the rule requiring competency (Rule 1.1) or the rule requiring diligence in the course of the representation (Rule 1.3). She would not approve a comment, such as that suggested by Judge Webb, that would immunize a lawyer from discipline under any of the rules simply because his misconduct occurred in the course of conduct that is exempted from prosecution by a constitutional provision.

Judge Webb responded to the Chair's comments by noting that he had offered his suggestion simply to engender discussion. He found the Chair's concerns to be valid, justifying alteration of his suggested language, and he asked that any text of a solution be subjected to debate in a subcommittee appointed for the purpose.

The Chair noted that the discussion thus far in the meeting indicated there was a need for such a subcommittee.

To that, a member responded that he did not think many Colorado lawyers were really concerned just about their personal use of marijuana. In this member's view, the legalization of marijuana under Colorado law raises significant questions under Rule 1.2(d), which proscribes counseling or assisting a client "in conduct that the lawyer knows is criminal or fraudulent," but permits the lawyer to "discuss the legal consequences of any proposed course of conduct with a client and [to] counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law." He suggested that a subcommittee consider these kinds of questions.

To that suggestion, Judge Webb said he would be glad to chair a subcommittee that had a broader charter to consider all of the significant questions that the Colorado legalization of marijuana use and business raises for lawyers.

The Chair noted that the Committee had earlier determined not to form a subcommittee to consider the implications on the Rules of the legalization of medical marijuana.

But another member followed Judge Webb's offer by concurring that a subcommittee should be formed to consider any or all of the issues the subcommittee thinks are raised for lawyers by the Colorado legalization of marijuana usage and business. The member put that suggestion in the form of a motion, and the motion was seconded.

Another member pointed out that Amendment 64 permits the possession only of less than one ounce of marijuana; in her view, it did not "change the lay of the land." She asked for a friendly survey of the members to see if there were even five who cared to pursue the matter. In response, substantially more than five members indicated their willingness to serve on a subcommittee appointed to consider marijuana issues. A member added that there were undoubtedly members of the Colorado Bar Association Ethics Committee who would like to participate on such a committee.

The member who had opened the discussion by noting that Rule 8.4(b) seems to call for a crime-by-crime analysis said that he would like to participate on such a subcommittee, although he remained skeptical that an efficacious amendment to Rule 8.4 could be found. In his view, the questions included how the court would "bear down" on the issues, a question that would not be easily answered. For him, however, the simple question of whether to form a subcommittee to consider the questions had a low

threshold: If people want to participate, there should be a subcommittee. If the subcommittee determined that action would be premature, it can report that conclusion.

Upon a vote, 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. Judge Webb accepted the Chair's appointment to chair the subcommittee.

III. *Chair's Reports to Supreme Court.*

The Chair directed the members to the two letters, each addressed to Justice Coats and Justice Marquez and dated November 19, 2012, that she had included in the materials that she provided in advance of the meeting.

The first of the two letters dealt with the pretexting issue to which the Committee had devoted considerable attention at its meetings on May 6, 2011, January 6, 2012, and July 13, 2012. The Chair advised the Justices that—

> The Standing Committee voted against recommending any pretexting-related rule changes to the Court. However, in light of (a) the substantial work devoted to potential amendments to CRPC 8.4(c), and (b) the division of strongly held views among members of the Standing Committee on whether to recommend those amendments, the Standing Committee concluded that it would share its work product with the Court, for the Court to review and use as it deems appropriate.

And—

> After lengthy discussion and intense debate at its July 13, 2012 meeting, a majority of the Standing Committee voted against recommending any amendments to the Court. However, as noted above, the Standing Committee voted to provide its work product to the Court. The arguments for and against the various proposed amendments are set forth in detail in the enclosed materials.

The second of the two letters pointed out that Comment [3] to Rule 1.13 contains a typographical error, in that the reference to "Paragraph (19)" therein should be to "Paragraph (b)."

The Chair told the Committee that she had received no response from the Court with respect to either of the matters dealt with in the letters but that no further action was required of the Committee with respect to the matters dealt with in the letters.

IV. *Rule 1.15 and COLTAF Rate Comparability.*

The Chair then turned the Committee's attention to what she termed the main item on the agenda: Rule 1.15 and the issue of interest rate comparability for COLTAF accounts. She asked James S. Sudler, the chair of the subcommittee formed to consider those matters, to lead the discussion.

Sudler recalled that the subcommittee had been formed to determine how to implement, if appropriate, interest rate comparability on COLTAF accounts, after the Colorado Lawyer Trust Account Foundation had found that some banks have been paying lower interest rates on COLTAF accounts than they pay on comparable trust accounts. That, he said, is not good; he added that the Colorado Supreme Court has supported COLTAF since at least 1981.

The subcommittee was formed at the Committee's thirty-third meeting, on November 16, 2012, and commenced its deliberations shortly thereafter. Sudler reported that the subcommittee members

quickly determined that they wanted to consider broad revision of Rule 1.15, not merely to amend it to accomplish the goal of rate comparability but also to make it "more readable." The subcommittee recognized that revision of Rule 1.15 had undertaken before, but it felt it necessary to make a further effort at improving the entire Rule, which has long been considered opaque.

Sudler explained that the subcommittee would divide current Rule 1.15 into four separate rules, numbered 1.15A, 1.15B, 1.15C, and 1.15D; and it would put the substance of the comparable-rate provisions not in a rule but in a "Chief Justice Directive."

- Rule 1.15A would contain what is included in the American Bar Association's model Rule 1.15.

- Rule 1.15B would contain much of what the Colorado court has already added to model Rule 1.15, including provisions requiring the maintenance of business and trust accounts. It is this rule that would refer to the Chief Justice Directive for determination of the financial institutions that could be approved by the Office of Attorney Regulation Counsel for lawyers' trust accounts. Moving those provisions to a separate rule should make them more accessible, Sudler said.

- Rule 1.15C would contain the rules governing trust account activities, such as deposits and withdrawals; the rule banning ATM and debit card usage; the rule for periodic reconciliation; and the like.

- Rule 1.15D would contain the record-keeping requirements of the current rule.

Sudler acknowledged that the use of a chief justice directive as the subcommittee proposes would be novel; it would remove from the rule — a rule governing the conduct of lawyers — a number of provisions that are of concern to the banks that choose to offer COLTAF and other lawyer trust accounts but that do not directly bear on lawyer conduct. As Rule 1.15 would be revised by the subcommittee, a lawyer would need only to select an "approved financial institution" from a list of those institutions maintained by the OARC; the lawyer would not need to determine, independently, whether the financial institution was in compliance with its agreement with the OARC, under the terms of the Chief Justice Directive, that led to its being listed as an approved financial institution.

The Chief Justice Directive would permit a financial institution to be approved for use for trust accounts if it agreed to report overdrafts, to cooperate with the COLTA Foundation and the OARC and to report on, and produce the records of, lawyer trust accounts upon subpoena by the OARC. The directive would permit the institution to charge the lawyer or law firm with the cost of producing the reports and records required by its agreement under the terms of the directive.

The paragraph enumerated 5) in the proposed Chief Justice Directive would require the financial institution to agree, as a condition to being approved for lawyers' trust accounts, to remit monthly earnings to COLTAF after deduction of "allowable reasonable COLTAF fees" as subsequently defined in ¶ 9) of the directive.

Paragraph 6) of the directive would provide for the financial institution's agreement to pay a comparable interest or dividend rate on COLTAF accounts — "the highest interest or dividend rate generally available from the financial institution on non-COLTAF accounts when the account meets the same eligibility requirements" — and ¶ 8) would permit the COLTA Foundation periodically to establish a benchmark rate reflecting "overall comparable rate offered by financial institutions in Colorado net of allowable reasonable COLTAF fees."

Paragraph 7) of the directive would list four different types of accounts that a lawyer or law firm might use for a COLTAF account.

Paragraph 9) of the directive would deal with the "allowable reasonable COLTAF fees" that a bank might deduct from the interest or dividend earnings that it paid to COLTAF; the subcommittee provided three alternatives for the provision in its initial report to the Committee:

- The first alternative is as proposed by the COLTA Foundation. It would permit the financial institution to deduct, from earnings paid to the COLTA Foundation, as "allowable reasonable COLTAF fees," only (1) a "reasonable fee to cover the cost of complying with the remittance and reporting requirements" for COLTAF accounts and (2) "sweep fees" charged on accounts having automated overnight investment features, so long as those sweep fees did not exceed sweep fees charged on non-COLTAF accounts. All other fees that the institution might choose to charge would have to be borne by the lawyer or law firm maintaining the account.

- The second alternative, proposed by one participant on the subcommittee, would permit the financial institution to deduct both a reasonable COLTAF-compliance fee and *any* additional fees, so long as the additional fees were not in excess of fees assessed on comparable non-COLTAF accounts. The second alternative would not permit the financial institution to charge any additional fee against the lawyer or law firm maintaining the account.

- The third alternative (also, like the first alternative, proposed by the COLTA Foundation) would permit additional deductions — per-check and per-deposit charges and federal deposit insurance fees — as well as sweep fees and the COLTAF-compliance fee, if the additional deductions were comparable to those charged on non-COLTAF accounts. As in the first alternative, the financial institution would be permitted to assess other fees against the lawyer or law firm maintaining the account.

Sudler noted that the first and third alternatives, which would permit financial institutions to assess charges against the lawyers and law firms who maintain COLTAF accounts, raise what he characterized as a "philosophical" issue: Should lawyers be obligated to bear additional fees in order to maintain the required COLTAF accounts, thereby effectively subsidizing the earnings paid to COLTAF? What if the banks imposed "enormous" additional fees on the lawyers and law firms?

Sudler concluded his overview by noting that paragraphs 10) through 12) of the proposed Chief Justice Directive contain, essentially, additional details that are presently provided in Rule 1.15. He then invited other participants on the subcommittee to add their comments and asked the Chair whether interest rate comparability remains a topic that the Committee wished to pursue. If it were, he asked for consideration of whether the proposal to leave the details of the features of a COLTAF account to a chief justice directive was acceptable to the Committee.

A member who was a participant on the subcommittee noted that he had offered to the subcommittee a substantial revision of the entire rule, revisions that were directed not only to incorporation of a rate comparability requirement but also to cleaning up and improving a rule that is widely acknowledged to be very difficult to parse.

In response to Sudler's questions, the Chair solicited an indication from the Committee about whether it wished to pursue incorporation of a comparable-rate requirement into Rule 1.15, and the Committee responded overwhelmingly that it did so.

The chair then asked whether the Committee wished to pursue a complete reconsideration of all of Rule 1.15, as the subcommittee participant had suggested should be done.

With the assistance of another subcommittee participant, the member who had made the suggestion argued that a complete revision need not take an inordinate amount of time to accomplish and noted that the current Rule contains manifest inconsistencies — he pointed out that Rule 1.15(a) permits a lawyer to hold client or third-party funds in jurisdictions other than Colorado if that is done with the consent of the client or third person, while Rule 1.15(e)(3) requires all trust funds, without exception, to be maintained in financial institutions that do business in Colorado and are approved by Regulation Counsel. To the member, it was clear that Rule 1.15 would need to be clean up eventually; he argued that the rule should be revised once, completely, rather than twice, piecemeal. He added that he had already proposed to the subcommittee a substantial restructuring and revision of the rule to that end.

Another member who was a participant on the subcommittee supported the suggestion that a complete revision of the rule be undertaken. He expressed confidence that the subcommittee could consider, in the first instance, all policy issues that might be encountered in that endeavor.

In response to a member's question, Philip E. Johnson confirmed that the COLTA Foundation board of directors includes two bankers and that they, as well as regional and national banks operating in Colorado, support the comparable-rate proposal.

In response to the Chair's request for specific comment on the issue of expanding the subcommittee's task to a complete revision of Rule 1.15, another member "echoed" the calls for that effort, saying the subcommittee had done a good deal of that work already and that he liked its workproduct as developed to date; he urged that a complete revision be done now, all at one time. But he questioned the use of a chief justice directive to deal with the banking details of a COLTAF account. That, he noted, would be a new mechanism to add to the regulation of professional conduct in Colorado, which heretofore has been by way of rules adopted by the entire Court, whereas a chief justice directive would be the exercise of authority by the Chief Justice alone.

A member who was a participant on the subcommittee responded to the comments about the use of a chief justice directive by characterizing it as simply a mechanism for establishing the parameters of trust accounts that banks might choose, or not choose, to offer. The mechanism would not and could not require the banks to take any action that they did not agree to take; none need offer a COLTAF or other compliant trust account. The chief justice directive would essentially just authorize the Office of Attorney Regulation Counsel and COLTAF to negotiate with the financial institutions to develop the terms of such trust accounts. But the mechanism would permit the removal of all of the details about trust accounts from the rules that govern lawyers' conduct; each lawyer would simply have to select from among the financial institutions that have agreed to the established terms.

A member who had been involved at the inception of the COLTAF program commented that banks had initially expressed concerns about the difficulty of developing compliant software; but, he said, they are now "on board."

A member who was a participant on the subcommittee but who had not previously spoken commented that, if the Chief Justice accepted the use of a chief justice directive as envisioned by the subcommittee, that would be one of the best aspects of the subcommittee's proposal, as it would remove from the rules governing lawyers' conduct details over which lawyers have no control. They need not worry about what a bank must agree to in order to become an approved institution; they need only select from among those that are approved.

But, that member said, he was concerned the scope of the subcommittee's undertaking if Rule 1.15 were returned to it for a wholesale revision, a revision that would, he said, entail consideration of an infinite number of ways the rule might be revised. It would be easy, he thought, for the effort to get bogged down in "wordsmithing." What is presently in the subcommittee's proposal, although broken into new classifications, is nevertheless familiar to the Committee: Rule 1.15A would be drawn from the model provision offered by the American Bar Association, Rule 1.15B was developed a couple of years ago, Rule 1.15C is also drawn from the ABA model. He was a proponent of uniformity with the ABA proposals; he would generally prefer uniformity to good wordsmithing.

But the member agreed that there was at least one inconsistency in the present rule that needed to be fixed, as had previously been noted, and he admitted that he had his own "pet idea," to resolve the problem that arises when funds are left in a trust account that cannot be traced to a particular client or third person, and was aware of at least one aspect of Rule 1 15 that should be removed from the Rules of Professional Conduct and placed elsewhere in the "251" series of the Court's rules.

Another member, who was not a participant on the subcommittee, agreed that, while Rule 1.15 could undoubtedly be written better, that effort should not be undertaken. He was, he said, not aware that the current rule is not working or that there is a "big problem" with them. He was not in favor of letting the subcommittee undertake a complete revision of Rule 1.15.

The Chair noted that the Committee had been presented with two options, one being a narrow effort that would simply divide the current rule into four parts and provide for rate comparability, the other being an effort to provide not only for rate comparability but also for wordsmithing. She pointed out that the subcommittee could be instructed to prepare two versions, so that the Committee could select one or the other.

The member who had proposed a complete revision of Rule 1.15 spoke, arguing that, in contrast to many of the Rules of Professional Conduct, there was in fact no particular value to uniformity in Rule 1.15.

The member who had initially argued to the contrary, that he preferred uniformity to good wordsmithing, said he agreed that there really was little value to uniformity in Rule 1.15, other than in what is currently Rule 1.15(a).

The member who urged a complete revision added that the subcommittee could consider preserving the uniformity of Rule 1.15(a) in its revision efforts, although, he noted, it is that paragraph that contains the first part of the most significant inconsistency that is contained in the rule, as it is that paragraph permits trust accounts to be maintained in any jurisdiction with the consent of those having interests in the deposited funds.

Without further discussion, the Committee agreed that the subcommittee should be directed to consider a complete revision of Rule 1.15 and not limit its efforts to incorporation of a comparable-rate provision.

With that decision, the Committee then turned its attention to the details of the subcommittee's existing proposal.

Diana M. Poole, the COLTA Foundation director, noted that people familiar at the national level with the IOLTA — interest on lawyers' trust accounts — concept had expressed a concern with using a chief justice directive as the fulcrum for dealing with participating financial institutions. The concern

seemed to be an appearance that the judicial branch was seeking to regulate financial institutions rather than lawyers.

A member who was a participant on the subcommittee suggested that, if that appearance were a concern, the details that the subcommittee had suggested be included in a chief justice directive could, instead, be tucked into an appendix to the Rules of Professional Conduct, as the current Model Pro Bono Policy is an appendage to, rather than a part of, Rule 6.1.

Justice Coats advised the Committee that chief justice directives typically are issued by the Chief Justice following consultation with Judicial Department staff, taking into account the operations of the department. Other justices may or may not have input into any particular directive; recently they have been involved in discussions about the content of directives, but each is issued within the discretion of the Chief Justice. There is, he noted, some debate about the authority behind chief justice directives, but, as a practical matter, they have been complied with.

Sudler commented that the subcommittee chose to move what it placed in the draft Chief Justice Directive out of the Rules of Professional Conduct because the material does not directly impact lawyers — as do the other provisions of the Rules — but, rather, deals with matters that are beyond the lawyer's control, matters that the lawyer cannot control vis-à-vis the financial institution at which he maintains his required accounts. The subcommittee viewed the proposed Chief Justice Directive as regulating the Court's agency, the Office of Attorney Regulation Counsel, and containing matters that would be the subject of discussions between the OARC and the COLTA Foundation and negotiation with financial institutions.

In response to a member's question, Sudler confirmed that other states place these matters within their rules of professional conduct; but, he added, the matters just gum up the works there. In response to another member's question, Sudler said that the subcommittee had considered moving the material to another formal civil court rule but had not arrived at a final decision about that prospect. The member suggested that the further work of the subcommittee include a determination of where the material should be located.

A member who was a participant on the subcommittee said that he had been the member who had objected to the lodging of the material in a chief justice directive, being of the view that that would turn a substantive matter of ethics — in particular, the issue of what fees and costs might be charged to lawyers — over to the discretion of a single individual, the Chief Justice.

Another member who was a participant on the subcommittee said he had pondered how to handle these matters efficiently. He did not think the provisions that are directed toward participating banks should be included in the rules governing lawyers, but he agreed they might be allocated to an appendix to those rules. That course, he suggested, would have the advantage of "looking like a rule" and, therefore, not looking like an effort to regulate banks, as distinguished from the lawyers that are within the Court's jurisdiction. Use of an appendix, too, would avoid the concern that too much discretion would be given to an individual justice. He suggested, then, that the subcommittee be directed to recraft what it had placed in the Chief Justice Directive into some format that is attached to the Rules.

The Chair commented that the only available precedent is the Model Pro Bono Policy, a policy that was developed without the Committee's involvement and to its surprise — a surprise, she reminded the Committee, that had been expressed to the Court as a concern that the Committee's role had been bypassed. The Committee had felt, she recalled, that the process of developing the Model Pro Bono Policy was imperfect, inasmuch as the Committee had worked hard to handle the development of the Rules responsibly, and that it had been a mistake to include the policy as an "example" within the Rules.

In her view, there was no good precedent for appending to the Rules what is now included in the subcommittee's proposal for a Chief Justice Directive. Further, she commented, the provisions in question involve matters of discipline.

The member who had suggested use of an appendix to the Rules pointed out that the only element of the provisions in question that could involve lawyer discipline would be the requirement to use an approved financial institution for the lawyer's accounts; the lawyer should have no reason to negotiate the terms of the accounts with the financial institution and should only be subject to a requirement to pick an approved institution. The situation was fundamentally different from the pro bono policy, he argued. He agreed that the substance that the subcommittee had placed in the Chief Justice Directive could be included within the Rules of Professional Conduct but said that should only be done in a manner that did not subject lawyers to unintended banking fees. If the use of a chief justice directive were deemed inappropriate, then perhaps the provisions could be included in a separate civil rule; he wanted, however, to assure the COLTA Foundation that the principles would not end up being merely aspirational.

A member asked whether the subcommittee's proposal to split current Rule 1.15 into four rules would be akin to a schoolchild responding to a teacher's criticism of an essay by dividing it into chapters. Would lawyers think the Committee has fiddled with form only to leave the substance unchanged, and wonder why that was done?

To that, Sudler replied that the subcommittee had considered the question and determined that the effort would make the rule more comprehensible. It would also, he noted, be an easier set of provisions for the Office of Attorney Regulation to teach in its ethics programs.

A member who was a participant on the subcommittee said her initial concern had been that readers would not read beyond what would be Rule 1.15A. But, she said, the subcommittee added appropriate cross-references among the divisions to address that concern. In her view, the restructuring would help lawyers understand the structure of their obligations with regard to trust and other accounts.

James C. Coyle, of the Office of Attorney Regulation Counsel, added that the office frequently gets calls about obligations under Rule 1.15. He felt that the restructuring would help lawyers better understand their obligations with respect to accounts, overcoming the complexity of the current rule that stops lawyers from analyzing and its requirements.

A member who was not on the subcommittee said that he agreed with the subdividing that the subcommittee has proposed.

In answer to a question, Sudler confirmed that, under the American Bar Association's model rules, the bookkeeping provisions are also separate from the safekeeping provisions.

A member who was a participant on the subcommittee said he had also been concerned about the subdividing of Rule 1.15 at first but now agrees that it is the best course. That is especially so, he said, because the subdividing permits most of the provisions of Rule 1.15 that do not concern lawyer conduct and discipline to be moved to the Chief Justice Directive or wherever else the Committee ultimately determines to locate them. With that separation, he could now consider locating those provision in some other chapter of the court's rules.

To that comment, another member pointed out that the Rules of Professional Conduct — the C.R.P.C. — are themselves considered "an appendix of Chapters 18 to 20" of the Colorado Rules of Civil Procedure. He noted a need to avoid circularity.

Another member who was a participant on the subcommittee said she found use of a chief justice directive to be the most efficient course to take. Making those provisions that the subcommittee has proposed be lodged in a directive yet another rule, instead, would make those provisions harder to change as change was needed. They were directed, she noted, at only a limited number of entities — the OARC, the COLTA Foundation, and the participating financial institutions.

Another member, who had also been a participant on the subcommittee, disagreed with that view. He said that, because the provisions in question deal with the fees that can be imposed upon lawyers as costs of complying with the account requirements of Rule 1.15, they should not be placed in a vehicle that could be changed in the discretion of a single justice. He referred back to the minutes of the Committee's thirty-third meeting, recording a proposal that the bargaining power represented by all of the COLTAF accounts in the state be recognized and applied, through the OARC's bargaining with the state's financial institutions with regard to all of the fees and charges that could be assessed against COLTAF accounts, to obtain agreement that no additional charges would be assessed against the lawyers who maintain those accounts. The structure should not permit a single justice to decide that lawyers should be made to bear charges out of pocket.

Another member, also a participant on the subcommittee, agreed with those comments. He noted that banks typically "tier" their charges according to account balances. He said that his own examination of the terms currently available from a large national banking institution showed that it currently provides an especially good rate and fee deal on COLTAF accounts and does not charge any fees against the lawyer maintaining the account. He feared that, if a rule or chief justice directive approved of such charges against lawyers, banks might begin to impose them, mostly likely adversely impacting sole practitioners and small law firms that do not maintain large COLTAF balances. All that involves substantive policy that should not be left to a single justice to resolve by directive. The member wanted to see a no-other-charge policy stated in a court rule, not just a directive.

A member pointed out that the American Bar Association model rules do divide related provisions among separate rules, including segregating the bookkeeping provisions. In response to her question, Poole and Sudler said the ABA does not provide much guidance on location. Poole added that the ABA did not, originally, want to put any IOLTA provisions within the Rules of Professional Conduct, because those provisions were then under constitutional scrutiny. The COLTA Foundation had been told that, although several rules have things in common, they have been located in different places, some even being called "administrative rules." There is, in fact, no model ABA rule for IOLTA accounts.

A member noted that the Court currently puts its rules governing contingent fees in Chapter 23.3 of the Colorado Rules of Civil Procedure and asked whether these provisions regarding the details of the accounts that are to be maintained at approved financial institutions could similarly be located in a chapter of the C.R.C.P. She shared the concern that substantive rules having a financial impact on lawyers should not be left to a chief justice directive that was not subject to the same oversight and procedure for amendment that govern court rules.

The member who had expressed a desire to assure the COLTA Foundation that the principle of rate comparability would not end up merely aspirational commented that one advantage to retaining all of the provisions within the Rules would be that the Committee could address all of Rule 1.15 at one time. If there were substantial concern about use of a chief justice directive, the provisions in question could be lodged in Rule 1.15E, with a preamble that establishes its scope and clarifies that it does not impose disciplinary standards on lawyers, other than to maintain their accounts in approved financial institutions. This would, he said, address the expressed concerns about putting too much authority in the hands of a single justice and would also address Poole's concern that, if the Court stated the provisions

somewhere other than in the Rules governing lawyers' conduct, it might give an appearance that the Court was seeking to regulate banks.

After a brief discussion among several members about the value of giving direction to the subcommittee as to the location of the banking provisions — with a general recognition that substantive financial matters, such as permissible fees, should be locked down in a rule, rather than left to a chief justice directive, but otherwise separating those provisions from the provisions that govern lawyer conduct — the Committee determined that the subcommittee was already sufficiently informed, by the discussion, about those matters and did not need a specific instruction from the Committee.

Following a break in the Committee's deliberations, Sudler reported that an understanding had been reached, which was acceptable to Poole and Johnson, that the subcommittee should pursue what had been identified, in the Chief Justice Directive that had been appended to the subcommittee's report and earlier in the meeting, as the "third alternative" for COLTAF fees. This alternative, Sudler said, would define the fees that a participating financial institution could charge with respect to a COLTAF account. It would permit additional fees to be charged against the lawyers for services performed for their benefit, but which do not benefit COLTAF, such as wire transfer fees.

The Chair noted that progress is being made on the COLTAF matters.

V. *ABA Model Rules Changes.*

The Chair then asked Michael H. Berger, chair of the subcommittee formed at the Thirty-Third meeting of the Committee, on November 16, 2012, to consider recent changes made by the American Bar Association to its model rules of professional conduct, to report on that subcommittee's work.

Berger reported that the subcommittee had met twice, dividing itself into five working groups, of which four had already reported back to the whole subcommittee with recommendations on most of the rules changes. He anticipated that the subcommittee would meet a couple of more times before finalizing a report to the full Committee. He hoped that could be accomplished by the time of the next meeting of the Committee.

Berger raised one matter on which he wished Committee discussion: He said that the subcommittee had determined not to recommend a change that the ABA has proposed to make to the comments to Rule 4.4 regarding inadvertent disclosure of privileged communications or workproduct; the subcommittee had concluded that there are larger issues in that topic and that those issues should be referred to a subcommittee having a specific charge to deal with them. This is, Berger said, not a new concern but raises issues of which the Committee is already aware, such as whether the obligations imposed on the lawyer who receives inadvertently-sent information should be enlarged or otherwise altered. Currently, the ABA's Rule 4.4 requires only that the receiving lawyer notify the sender of the fact of the transmission; the ABA would change a comment to Rule 4.4 to provide that receipt of metadata embedded in electronic information triggers the notification duties of the rule, but only when the receiving lawyer knows or has reason to believe that the metadata was inadvertently sent.

Berger pointed out that the Colorado Court has added Rule 4.4(c), which imposes additional obligations on the lawyer who, before reviewing the document, receives notice from the sender that the document was inadvertently sent; in that case, the receiving lawyer is not permitted to examine the document and must abide by the sender's instructions as to its disposition — or pursue a court determination about how the information is to be treated. He noted that a number of lawyers believe that the Colorado addition is "the wrong structure," incentivising the receiving lawyer to read the material very quickly upon receipt, before notice can be given that it was inadvertently sent. That just does not

sound right, Berger said; that conduct is not professional. The question, then, is whether that conduct should be made unethical; some think so, he said. The ABA's identifying a special character of metadata would be inconsistent with an opinion issued by the Colorado Bar Association's Ethics Committee[3] that determined that metadata is, in essence, no different from other information. Colorado's Rule 4.4 is itself inconsistent with the "clawback" provisions of the Federal Rules of Civil Procedure, under which the sending lawyer may require the receiving lawyer to sequester inadvertently-sent information until a court has determined usage. It would seem that, at a minimum, the Colorado comments should be modified to make lawyers aware of other such rules and laws that may impose obligations on receiving lawyers. Berger said he understands that the Supreme Court's Standing Committee on the Rules of Civil Procedure is presently considering amendment of the Colorado rules to incorporate the Federal clawback principles.

For all these reasons, Berger said, the Committee should consider appointing a subcommittee to consider the entirety of Rule 4.4, including the comment change made by the ABA.

The Chair asked whether a new subcommittee was required or whether the scope of Berger's subcommittee could be expanded to include the larger review that Berger was suggestion. Berger replied that the subcommittee would be an appropriate body for that work, if its charge were expanded.

Berger added that the issues involve another intrusion into the client-lawyer relationship, the addition of a societal burden on that relationship. He observed that even at this meeting members were looking at messages on their smartphones, which are frequent sources of inadvertent transmissions of information. A lawyer's obligation of confidentiality is a very important one. But a receiving lawyer has a duty to her client as well and is conflicted if bound to say, "we cannot use, to your advantage, this information we have received and now know about." Berger hoped that the subcommittee would consider the importance of the client-lawyer relationship when it considers whether to impose a further burden on it.

A member said the entire principle embodied in the clawback approach made no sense to him. In his view, the burden and consequences should be borne by the erring sending lawyer, and the remedy should be a malpractice claim rather than a directive to the receiving lawyer not to use all that he knows for the benefit of his client.

To that, a number of members noted the ease that modern software gives to making such mistakes; the member who had found it senseless responded that the sending lawyer should deal with the software and avoid the mistakes.

The Committee agreed to expand the scope of Berger's subcommittee to include a complete revisit to Rule 4.4.

VI. *Rule 5.5(a)(3) and Assistance in Unauthorized Practice of Law.*

The Chair noted that the meeting materials included a memorandum Anthony van Westrum had sent her pointing out an apparent wording error in Rule 5.5(a)(3).[4] The memorandum went on to raise

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3. Opinion 119: Disclosure, Review, and Use of Metadata. Colorado Bar Association Ethics Committee, issued May 17, 2008

—Secretary

4. The error is found in the reference, within Rule 5.5(a)(3) to "subpart (a) of this Rule," in what is itself a part of "subpart (a)." The memorandum suggested that a proper reference would be to "sub***paragraph*** (a)***(1)*** of this Rule."
—Secretary

a substantive question: Does the prohibition against assistance in conduct that is the unauthorized practice of law apply just to assistance (or just to UPL conduct) occurring only in Colorado or does it extend to activity in any jurisdiction? The current formulation of the rule — listing all the ways one may be authorized to practice law in Colorado — seems to contemplate only Colorado-related conduct, but it ends with operative words that actually prohibit assistance of unauthorized practice of law in any jurisdiction, unbounded. Indeed, as the memorandum explained, the current rule does not prohibit a lawyer from assisting a Colorado-licensed colleague in conduct which constitutes the unauthorized practice of law in, say, Nebraska, although it would preclude unauthorized-practice-of-law assistance to anyone, in Colorado or elsewhere, who is not licensed in Colorado.

Van Westrum noted that Rule 8.5 contains the choice-of-law rules for application of the Colorado Rules of Professional conduct, but he confessed that he did not know how the jurisdictional question he raised about Rule 5.5 would be resolved under Rule 8.5.

The Chair asked van Westrum to chair a subcommittee to deal with the questions he raised.

VII. *Retirement and New Assignment for Colorado's Regulation Counsel, John S. Gleason.*

The Chair informed the Committee that John S. Gleason, who has been Regulation Counsel for Colorado since the establishment of the Office of Regulation Counsel, is retiring from that office and taking a similar position in Oregon.

The Committee gave Gleason a warm round of applause.

VIII. *Adjournment; Next Scheduled Meeting.*

The meeting adjourned at approximately 11:50 p.m. The next scheduled meeting of the Committee will be on Friday, May 3, 2013, beginning at 9:00 a.m., in the Ralph L. Carr Hall of Justice.

RESPECTFULLY SUBMITTED,

Anthony van Westrum, Secretary

[These minutes are as approved by the Committee at its Thirty-fifth Meeting, on May 3, 2013.]