COLORADO SUPREME COURT

STANDING COMMITTEE ON THE RULES OF PROFESSIONAL CONDUCT

Approved Minutes of Meeting of the Full Committee
On November 16, 2012
(Thirty-third Meeting of the Full Committee)

The thirty-third meeting of the Colorado Supreme Court Standing Committee on the Rules of Professional Conduct was convened at 9:15 a.m. on Friday, November 16, 2012, 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 Michael H. Berger, Helen E. Berkman, Nancy L. Cohen, Cynthia F. Covell, James C. Coyle, Thomas E. Downey, Jr., John S. Gleason, John M. Haried, David C. Little, Judge William R. Lucero, Cecil E. Morris, Jr., Neeti Pawar, Judge Ruthanne Polidori, Henry R. Reeve, Alexander R. Rothrock, Marcus L. Squarrell, David W. Stark, James S. Sudler III, Anthony van Westrum, and E. Tuck Young. Excused from attendance were Federico C. Alvarez, Gary B. Blum, Christine A. Markman, Lisa M. Wayne, and Judge John R. Webb. Also absent were Boston H. Stanton, Jr. and Eli Wald.

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

I. *Meeting Materials; Minutes of July 13, 2012 Meeting.*

The Chair had provided a package of materials to the members prior to the meeting date, including submitted minutes of the thirty-second meeting of the Committee, held on July 13, 2012. Those minutes were approved as submitted.

II. *Rule 8.4(c) and "Testers."*

The Chair noted that the materials provided for the meeting contained a draft of a letter she proposed to send to the Court, accompanied by the materials that had been provided to the Committee by its subcommittee on "pretexting," chaired by Thomas Downey, and the minutes of the Committee's deliberations of the pretexting issue. She recalled that, at the thirty-second meeting of the Committee, on July 13, 2012, it had been assumed that such a letter would contain a narrative of the subcommittee's work and the Committee's deliberations; but, as she composed her draft of the letter, she determined it need not do more than serve as a letter of transmittal for the accompanying material and that no additional narrative was needed. The members of the Committee were in accord with her view.

The Chair reported that a member who was not in attendance at this meeting had emailed to her the suggestion that her letter note both (1) that the Committee had, at its thirty-first meeting, on January 6, 2012, asked the subcommittee to obtain more input into the pretexting matter from interested constituencies, such as the criminal defense bar and lawyers engaged in other affected practice areas and (2) that the law enforcement community and the criminal defense bar had provided that input but that no lawyer or group engaged in private civil practice had done so.

To that comment, Downey, who had chaired the subcommittee, replied that, while no particular group representing lawyers engaged in private civil practice had filed comments, a number of individual lawyers who are engaged in private practice had commented, including lawyers in that class who are members of the Committee. Accordingly, he contested the suggestion that the Chair's letter be amended to include a comment indicating that the private bar had not been responsive.

Downey also suggested that the Chair's letter might direct the Court's attention to the inclusion, in the second report from the subcommittee, of a listing of all of the comments it had received pursuant to its solicitation for comments on the topic.

The Chair clarified that her letter would be accompanied by minutes from four of the Committee's meeting, being the set of three minutes listed in note 4 of the minutes of the thirty-second meeting, on July 13, 2012, and the minutes of that thirty-second meeting itself.

A member added that the Chair's letter should highlight the action that has been taken by other states with respect to the pretexting issue, pointing to the description of that action that was contained in the subcommittee's report that was considered by the Committee at its thirty-second meeting, on July 13, 2012.

The Chair determined that no further motion was needed to approve her sending of the cover letter to the Court, but the members individually indicated their approval of that course.

III. *Identification of Typographical Error in Internal Reference in Rule 1.13, Comment [3]*.

Referring to pages 30 and 33 of the package of material that the Chair had provided for the meeting, the secretary noted to the Committee that a typographical error exists in Comment [3] of Rule 1.13: The existing reference to "Paragraph (19)" should in fact be to "Paragraph (b)" in the following passage [emphasis added]:

> [3] When constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province. ***Paragraph (19)*** makes clear, however, that, when the lawyer knows that the organization is likely to be substantially injured by action of an officer or other constituent that violates a legal obligation to the organization or is in violation of law that might be imputed to the organization, the lawyer must proceed as is reasonably necessary in the best interest of the organization. As defined in Rule 1.0(f), knowledge can be inferred from circumstances, and a lawyer cannot ignore the obvious.

The Chair pointed out that the error apparently originated in the proposal that the Committee made to the Court for the adoption of the "Ethics 2000" rules, which the Court adopted effective January 1, 2008.

After the Committee indicated its concurrence that this was indeed an error that needed correction, the Chair inquired about how the Court might like to hear of the error. Justice Coats suggested that the Chair send notification of the error to the Court promptly, rather than wait to aggregate it with other proposals that might subsequently be made to the Court.

IV. *Obtaining Interest Rate Comparability for COLTAF Accounts.*

The Chair directed the members to the material that had been provided to them before the meeting, beginning at page 41, for a proposal from the Colorado Lawyer Trust Account Foundation for modification of Rule 1.15 to obtain "interest rate comparability" on COLTAF accounts.

The Chair asked John S. Gleason, Colorado Regulation Counsel, to introduce the topic of interest rate comparability on COLTAF accounts. Gleason responded by advising the members that the board of directors of the Colorado Lawyer Trust Account Foundation had been working for a long time on a proposal to modify Rule 1.15 to require lawyers to hold their COLTAF accounts in financial institutions that pay interest or dividend rates on those accounts that are the same as those paid on comparable non-COLTAF accounts. The purpose of the proposed rule change is to ensure the fair treatment of COLTAF accounts and help maximize the resources available for Colorado's civil legal aid delivery system.

Gleason introduced to the meeting Philip E. Johnson, the president, and Diana Poole, the executive director, of the Colorado Lawyer Trust Account Foundation, and asked them to explain the proposal to the members.

Johnson began by noting that the proposal is the result of a significant amount of work done by a significant number of people. Rule 6.1, he reminded the members, imposes a professional duty on each lawyer to provide legal services to those unable to pay, pursuant to which rule, among other things, "a lawyer should voluntarily contribute financial support to organizations that provide legal services to persons of limited means."[1] The bar has responded to Rule 6.1 by providing time and effort and by establishing organizations that implement the provision of legal services to the poor, including Colorado Legal Services and various *pro bono* programs maintained by local bar associations across the state. Some of those organizations are funded by voluntary financial contributions from lawyers and from resources obtained from the Colorado Lawyer Trust Account Foundation under the Colorado version of the IOLTA — interest on lawyer trust accounts — program.

Johnson characterized the Foundation's board of directors as "terrific," noting that it is composed of lawyers, judges, and bankers, reflecting a high level of confidence in the Colorado legal community.

But the Foundation's income is almost exclusively obtained from income earned on lawyers' COLTAF accounts; although, Johnson noted, in this past year, in response to the significant decrease in funding received from COLTAF accounts due to the unusually low rates of interest paid on those accounts, the Colorado Judicial Branch and the Colorado Bar Association have provided augmenting funds.

Of the disbursements made by the Foundation to legal service entities, eighty percent goes to Colorado Legal Services and the balance goes to local bar association *pro bono* programs and other programs that provide civil legal assistance to the indigent.

Johnson said that, historically, banks have paid less interest on COLTAF accounts than on comparable accounts maintained for other banking customers, primarily because no one has been watching the rates. As the system is now designed, lawyers who maintain COLTAF accounts do not see the process by which rates are determined and interest payments are made to the Foundation. Having no accountability, banks have paid low rates on COLTAF accounts.

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1. *See* n. 3 to these minutes.

—Secretary

Across the country, IOLTA groups have approached the banks to obtain voluntary increases in interest rates, and they have examined regulations to see what might be done to preclude discrimination against COLTAF accounts. The Foundation has communicated with Colorado banks, and has had "relatively good success" with local and regional banks in Colorado, although it has not, Johnson said, had as much success with national banks operating in Colorado.

In 2006, the Foundation retained the services of an IOLTA expert, who examined the Foundation's records and reported that the Foundation could benefit from a "comparability requirement," requiring that banks pay on COLTAF accounts rates of interest comparable that are to other accounts maintained by other banking customers. But, Johnson noted, the Foundation was not technologically equipped at that time to implement and enforce a comparability requirement. In response to the recommendations of the retained expert, the Foundation's board of directors determined to defer further consideration of a change to Rule 1.15 until it obtained a more sophisticated data base that would enable it to implement a comparability rule.

The issue was set aside until 2010, when the Foundation secured the services of another IOLTA expert and determined that appropriate technology was now available to it for implementation of a comparability requirement. The Foundation also undertook a very robust analysis of the thirty-three states that have implemented comparability requirements. The banking committee of the Foundation began to work on a proposal for changes to Rule 1.15 to reflect its own thoughts and to incorporate the ideas developed by experts from the American Bar Association and the National Association of IOLTA Programs, utilizing the immense amount of information that was now available from other states on what worked, what did not work. The banking committee refined its proposal and vetted it with a number of people who were experienced with current Rule 1.15 and the COLTAF program, including John Gleason, Regulation Counsel. With the assistance of those outsiders, the banking committee refined the concepts and the mechanics of its proposal. The proposal was then approved by the Foundation's board of directors, by Regulation Counsel, and by the Colorado Access to Justice Commission.

The basic premise of the proposal is that banks should not discriminate against COLTAF accounts. But, Johnson noted, the proposal does not attempt to regulate the conduct of banks; rather, it regulates the conduct of lawyers by requiring lawyers to maintain their COLTAF accounts in banks that do not discriminate against such accounts.

Johnson said that the experience of the thirty-three states that have already implemented comparability requirements is that any "pushback" from banks was resolved early in the effort. And, he noted, the bankers who are on the Foundation's board of directors approve of the proposal. To accommodate concerns about administrative burdens on the banks, the proposal offers them two mechanisms for compliance: Each bank may adopt an internal program to determine what rates it offers to its other customers on comparable accounts and may pay that rate on COLTAF accounts; or, without undertaking such an analysis, the bank may choose to pay the "benchmark" rate that is determined from time to time by the Foundation based on rates across the banking community. If the bank adopts the second methodology, it need only follow the benchmark rate and need not worry further about the comparability of the rates of interest it pays on its COLTAF accounts to those paid on other accounts. Johnson pointed out that there is a built-in incentive for the Foundation to limit the benchmark rate to a reasonable rate, one that is high enough to maximize interest earnings on COLTAF accounts but low enough that banks will adopt and adhere to it. He noted that the availability of a benchmark rate eases the administrative burden borne by small banks when providing COLTAF account services.

Johnson said the Foundation has been told by the bankers on its board of directors that its historical success in obtaining good rates of interest on COLTAF accounts will not continue in the

present banking environment; the banking crisis has put extreme pressure on banks, and they will not voluntarily do anything they need not do.

Under its proposal, the Foundation will determine whether a bank is offering COLTAF accounts that comply with the Foundation's requirements for such accounts and will periodically publish a list of the banks that do; lawyers need only look to the list to determine whether the banks they intend to use for their COLTAF accounts are listed or not.

Johnson admitted that there is some small possibility that the proposal would have a financial impact on lawyers: The proposal limits the charges that banks may offset against interest earned by the Foundation on COLTAF accounts, prohibiting other charges that some banks historically have made that reduce the amount of interest paid to the Foundation but have no relationship to the cost of maintaining COLTAF accounts. Accordingly, if a bank chooses to make such other charge, the burden will fall on the account holder — the lawyer — and will not diminish the COLTAF payments to the Foundation. Some of the states that have implemented comparability requirements, Johnson noted, have not limited the banks' offsets against the IOLTA return; the proposal that the Foundation is making does limit those offsets — the proposal only permits deductions, against the interest payable to the Foundation, of "allowable reasonable COLTAF fees.". As Johnson put it, it is not possible to limit the banks' overall charges for carrying COLTAF accounts; but the lawyers who establish the accounts will be the ones who are in a position to bargain with the banks about the charges that the banks may wish to make in addition to the charges that may be offset against the interest payable to the Foundation: The lawyers can choose to place their COLTAF accounts only with banks that do not impose additional charges or can accept the burden of the additional charges by paying those charges themselves.

Johnson concluded his remarks by thanking the Committee for the opportunity to present the Foundation's proposal for changes to Rule 1.15.

The Chair thanked Johnson for his presentation

The Chair commented that, normally, the Committee would form a subcommittee to study any proposed change to the Rules, and she noted that it might choose to do so in this case, as well. But, she added, the proposal for changes to Rule 1.15 that the Foundation — with the participation of at least one member of the Committee, Gleason — has presented to the Committee is the kind of well-developed product that, in the typical case, the Committee would receive from a subcommittee and would use as a basis its own substantive discussion. She asked whether the members were willing to commence a discussion on that basis.

A member moved straight to such substance, expressing his concern about the continued overloading of Rule 1.15 with directives to lawyers. The Foundation's work on its proposed changes was marvelous, he said, and the language comprising the changes was well-crafted. But he asked whether there might be some other way to accomplish the goal of comparability in interest rates without extending the complexity of Rule 1.15. Currently, lawyers are required to have one account as an operating account and one as a trust account that may, but need not, be a COLTAF account. Is there not, he wondered, some way to provide this kind of detailed regulation outside of the Rules? He noted that banks that provide COLTAF accounts already have some duty to report to the Office of Attorney Regulation Counsel regarding activity in those accounts; but, he noted, this implies that the lawyers themselves have corresponding duties, simply because the rules guiding participating banks are found in the rules governing lawyers. In its current version, Rule 1.15 is already a difficult rule for lawyers to comply with, especially, he noted, for solo and small-firm lawyers. The addition of provisions governing the relationship between participating banks and the Foundation, provisions that do not touch the relationship between participating banks and participating lawyers . . . well, he asked, isn't there some

other place to implement that relationship, other than in the rules governing lawyers? The rule governing lawyers ought to be limited to details about how the lawyer keeps client property separate from lawyer property.

To those comments, Johnson responded that the placement of the comparability requirements was an ongoing topic of discussion in the drafting of the Foundation's proposal. He noted, however, that the drafters had not considered placing those requirements in another location; their inclusion in Rule 1.15 was how it has been done in other jurisdictions, and the Foundation followed that lead. Poole added that the expert who had been engaged by the Foundation had advised that the comparability requirements be added to this rule, saying that, since there was no other existing structure governing the bank-Foundation relationship, one might as well utilize the existing rule. But, she noted, a couple of other states had done that work outside of Rule 1.15; perhaps one could look to what those states had done.

Johnson said he wanted to emphasize that the concept is a simple one from the lawyer's perspective: All he need do is determine whether the bank in which he wishes to establish a COLTAF account is listed as an acceptable bank. It is the banks that have to take action to comply with the comparability requirements if they wish to offer COLTAF account services.

To Johnson's comment, the member who had expressed his concern about overloading Rule 1.15 replied that, even if comparability is not made the lawyer's problem, the proposal places the matter — a banking matter — in the rules governing the lawyer's conduct. It just adds another layer of complexity to Rule 1.15, a layer that is out of place there.

Poole pointed out that the rule governing lawyers — Rule 1.15 — would have to be modified, at the least, to require the lawyer to put his COLTAF-type funds in an interest-bearing account that provided rate comparability. To that extent, the proposal does regulate the lawyer's conduct.

A member concurred that the proposal is an expansion of Rule 1.15, continuing the rule's growth. Perhaps it could be modified so that only the lawyer-pertinent part that Poole just mentioned — the requirement that the lawyer use a complying bank for his COLTAF account, a bank that is on the list maintained by the Foundation pursuant to Rule XXX — is placed in Rule 1.15 and the balance is placed in some Rule XXX found elsewhere than in the Rules of Professional Conduct.

The Chair commented that the Committee did not need to address the point about process; the Committee could determine, at this point, to send the proposal to a subcommittee or could continue the discussion at this meeting. But she responded to her own suggestion by deciding to let the Committee continue a substantive discussion of the proposal.

A member pointed out that existing Rule 1.15 does not follow the American Bar Association's model version of Rule 1.15. The Colorado Supreme Court determined to combine a model bookkeeping rule with the ABA version of Rule 1.15, the latter being but a short provision governing the safekeeping of property. The result of the Colorado approach is a single rule that deals with general financial obligations, including provisions governing COLTAF compliance, provisions mandating both trust and operating accounts, provisions governing bank account reconciliation, and the like. The rule was

reorganized about four years ago,[2] with the addition of headings and the like. Prior to the expansion, she noted, many lawyers had not thought about, say, reconciliation of trust accounts. This member was not in favor of separating the comparability requirements from the rest of Rule 1.15; in her view, it made sense to keep all this detail in a single rule, Rule 1.15; even though it made the rule a bit cumbersome, it was better than telling the lawyer that he had additional obligations and should go looking for them elsewhere.

Another member expressed his own concerns about the proposal. He noted that Rule 6.1 characterizes a lawyer's obligation to provide legal services to the poor as "aspirational."[3] But, he said, by this proposal we would be trying to make those aspirations mandatory, with yet another imposed burden, that of meeting an interest rate threshold on COLTAF accounts. At present, the COLTAF portions of Rule 1.15 do not obligate the lawyer to determine what rate of interest is paid on the COLTAF account that he maintains under the rule. Under the proposal, the member asked, must he check monthly to see that the bank he has chosen has remained listed? Banks make frequent changes in their account provisions, he noted. This member said that his law practice includes the representation of banks. He is aware that every bank account is "tiered," with service charges going up and down as balances fluctuate. Must he monitor the imposed charges as his COLTAF account balances fluctuate? The mechanics of this proposal, he predicted, will not be simple. He agreed with the purpose of maximizing the returns to the Foundation on COLTAF accounts, but he found the proposal to be unduly burdensome to lawyers. Without a certified public accountant on staff, compliance with this proposal will be difficult work for the small firm lawyer.

To that, Johnson responded that the only burden on the lawyer will be to ascertain whether the bank chosen for the COLTAF account is listed; there is no further obligation. Johnson acknowledged, however, that, if the bank imposes a service charge, in addition to the "allowable reasonable COLTAF fees" that the proposal would permit the bank to deduct from the Foundation's interest earnings, that additional charge will have to be borne by the lawyer.

A member who had not previously spoken concurred that the proposal should not be incorporated into Rule 1.15. Given the concerns expressed by the member who had last spoken before Johnson's acknowledgment that the lawyer may have to bear some bank charges, this member wondered whether banks located outside of the larger metropolitan areas of the state would choose to offer complying COLTAF accounts. He would want any change in the rule to leave unchanged the current burden on lawyer, with the only obligation on the lawyer being to look to the list of acceptable banks. The process by which banks become listed should be left to a mechanism that was located outside of Rule 1.15. In

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2. Lexis-Nexis, the official publisher of the Colorado Revised Statutes, provides the following history of Rule 1.15, commencing with the adoption of the "Ethics 2000" rules by the Colorado Supreme Court effective January 1, 2008:

> [E]ntire Appendix [Rules of Professional Conduct] repealed and readopted April 12, 2007, effective January 1, 2008; [Rule 1015](d)(2) and (i)(6) amended and effective November 6, 2008; [Rule 1015](j)(6), (j)(7), (l), and Comment 1 amended and [Rule 1015](j)(8) deleted and effective February 10, 2011.

http://www.lexisnexis.com/hottopics/Colorado/

—Secretary

3. Rule 6.1 provides, in part, "Every lawyer has a professional responsibility to provide legal services to those unable to pay. A lawyer should aspire to render at least fifty hours of pro bono publico legal services per year. . . .In addition, a lawyer should voluntarily contribute financial support to organizations that provide legal services to persons of limited means."

—Secretary

short, keep Rule 1.15 as it now is, with the only obligation to be to use an approved bank;[4] leave it to the Office of Attorney Regulation to determine how banks get on the approved bank list.

Another member spoke for the first time, thanking Johnson for the effort to deal with the issue of interest rate compatibility. He thought it indisputable that the getting rate comparability is a worthy goal. The question, though, was how best to accomplish that goal — in his view, the answer was not by way of a rule. Under the current rule, lawyers need not go beyond the list of approved banks, it being up to the banks and the OARC to establish the requisite relationship for approval. In his view, it was best to leave the determinations regarding which banks provide compliant COLTAF accounts to dealings between the OARC and the individual banks, without imposing obligations on individual lawyers to determine compliance.

Poole affirmed that, currently, the only nexus between compliant banks and the OARC is the undertaking of the banks to advise the OARC of overdraft occurrences. Under the proposal, the Foundation would communicate with the OARC as it does presently when banks do not perform in accordance with the requirements. There would be no obligation on the lawyer other than to check the list of approved banks, and he would not have to do so more frequently than is now required. It would be incumbent on the OARC, she said, to contact the lawyer and advise the lawyer that the bank in which he maintained his COLTAF account was no longer compliant. The Foundation did not see that happening any more frequently than there have been instances of overdrafts in the COLTAF system.

The member who had spoken before Poole concluded from her comments that all of the purposes of the proposal could be attained by dealing with the relationship between the bank and the OARC outside of Rule 1.15. There was no need, then, to put anything in Rule 1.15 that would require the Committee's getting involved in the rules-changing processes.

Gleason spoke to add some history to the Committee's considerations. The trust account notification program existed before the development of this proposal, and the OARC has communicated with banks that have failed to comply with the notification requirements. As the system is structured, no individual lawyer would be aware of any such communication between his chosen bank and the OARC. If the OARC becomes aware that an NSF — nonsufficient funds — check has been drawn on a trust account but that the drawee bank has not reported the occurrence to the OARC in accordance with its agreement to do so, the OARC investigates the matter, confirms the bank's noncompliance, and, in Gleason's words, "deals with the bank." In at least one such case, the OARC had to take the matter to the bank's counsel for correction; as Gleason put it, "It's either or. . . ." Noncomplying banks will be removed from the list of approved banks. Gleason could not recall any situation in which a problem had occurred that had not been rectified nearly immediately. He pointed out that Colorado was about the sixteenth state to adopt an IOLTA program, there now being more than forty that have done so. The OARC has met with the banks regarding the implementation of the program; many smaller banks were at first concerned but, in the end, all or almost all banks have joined the program and now offer COLTAF accounts.

James Sudler, a member of the Committee who is a Chief Deputy Regulation Counsel within the Office of Regulation Counsel, added that the only powers the Court has to implement the COLTAF program are the powers it has over the conduct of lawyers; the Court cannot regulate banks. It can only

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4. Current Rule 1.15(e)(3) provides, in part, "Trust accounts shall be maintained only in financial institutions doing business in Colorado that are approved by the Regulation Counsel based upon policy guidelines adopted by the Board of Trustees of the Colorado Attorneys' Fund for Client Protection. Regulation Counsel shall annually publish a list of such approved institutions."

—Secretary

require lawyers to keep trust funds in compliant accounts; it can impose requirements on lawyers, This proposal is not, however, a fight over how to get lawyers to do something; rather, it is an effort to get the rates of interest that are paid to the Foundation on COLTAF accounts increased.

The member who had expressed a concern about whether banks located outside the larger metropolitan areas of the state would offer complaint accounts averred that he had no dispute about the goal behind the proposal and was only concerned about how to get there. As the discussion had continued, he said, he had become more and more convinced that the comparability requirement need not be part of Rule 1.15. In fact, he would move out of the rule, to some other location, the current provision dealing with the obligation of participating banks to give notice of overdrafts to the OARC.[5] In his view, Rule 1.15 is much too long in its current form — lawyers are intimidated by it and don't read it; it's too long. But one cannot tell them to ignore the detail; what is in the rule must be understandable and pertinent. It is important not to add more verbiage to Rule 1.15 if that verbiage need not be put there.

The member who had first spoken after Johnson's opening presentation formally moved that a subcommittee be formed to look into the implementation of the Foundation's proposal, a proposal that he characterized as being "rates of interest on COLTAF accounts shall be of a certain standard." His concern was this, he said: If my bank does not comply, am *I* guilty of a Rule violation? Frankly, he said, he did not know what this was all about; he saw a need for a subcommittee to sort it out.

A member who had not previously spoken asked what she said might be a silly question: Might a bank say that it is offering compliant COLTAF accounts and yet fail to comply, without remedy?

To that question, Gleason answered that the bank will have signed an agreement with the OARC before it is listed as an approved bank. He did not say what remedies the OARC might pursue in the event of breach of that agreement.

The member who had moved for the formation of a subcommittee thought that all of the detail constituting the rules for compliant COLTAF accounts could be included in just such an agreement and need not be included in Rule 1.15.

A member commented that there is precedent for references within the Rules of Professional Conduct to provisions located outside of the Rules. For example, Rule 1.5(c) refers to C.R.C.P. Chapter 23.3[6] for provisions regulating contingent fee agreements That is, we already have at least one of the Rule of Professional Conduct, under which a lawyer may be disciplined, that refers to an external rule for content.

That member added that the mechanisms implementing the Foundation's proposal would have to separate the requirements that are imposed on lawyers from the provisions governing the relationship between the Foundation and the banks that offer COLTAF accounts. Even under current Rule 1.15 there is more than just an NSF notification; there is also the requirement for an affirmative direction by the

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5. *See* n. 4 to these minutes.

—Secretary

6. Current Rule 1.5(c) provides—

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is otherwise prohibited. A contingent fee agreement shall meet all of the requirements of Chapter 23.3 of the Colorado Rules of Civil Procedure, "Rules Governing Contingent Fees."

—Secretary

lawyer to the bank to remit interest on the COLTAF account to the Foundation.[7] This member felt that it would not be a huge drafting task to provide that separation, if the Committee determined that interest rate comparability was a useful goal.

In a straw poll conducted by the Chair, nearly all the members approved of a requirement that interest rate comparability be offered by each bank offering COLTAF accounts.

The Chair noted that, if the Committee determined that some portion of a rate comparability requirement should be located outside of the Rules of Professional Conduct, the Committee faced a question of its jurisdiction: Could it prescribe any provision that lay outside those Rules? The Chair added that she wanted the discussion to continue.

The member who had noted the aspirational nature of Rule 6.1 said he felt that details of the content of the agreement between compliant banks and the OARC would be misplaced in Rule 1.15. Lawyers should only have one obligation: to put COLTAF funds in approved banks, without regard to the terms upon which approval had been obtained and without regard to compliance with those terms. No further requirement should be imposed on the lawyer, for the issues are of concern to the Foundation and the banks, not to the lawyer. This member also worried about a matter that had not yet received much consideration in the discussion, the possibility that additional bank charges against the COLTAF account, other than "allowable reasonable COLTAF fees," could cause an insufficiency of funds and overdrafts. The mechanics of this, he noted, were difficult.

A member who had not previously spoken noted that the current rule already imposes labeling requirements on the accounts that the lawyer must maintain.[8] She asked whether a separate rule would be appropriate, one devoted exclusively to required bank accounts, clearly prescribing all that lawyers must do with respect to their bank accounts. A subcommittee could consider that kind of revision in the course of considering the Foundation's proposal.

Another member who had not previously spoken commended the goal of rate comparability. But, he said, reading the proposal, one realizes that a duty is imposed on the lawyer to do something if the bank imposes charges other than "allowable reasonable COLTAF fees." Accordingly, the proposal does impose a duty on the lawyer to watch the account and make necessary accommodations. In view of that, this member seconded the motion that the proposal be sent to a subcommittee for development. Such

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7. Current Rule 1.15(h)(2)(c) provides—

> (c) A lawyer or law firm depositing funds in a COLTAF account shall direct the depository institution:
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> (i) To remit interest, net of service charges or fees, if any are charged, computed in accordance with the institution's standard accounting practice, at least quarterly, to COLTAF; and
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> (ii) To transmit with each remittance to COLTAF a statement showing the name of the lawyer or law firm on whose account the remittance is sent and the rate of interest applied.

—Secretary

8. Current Rule 1.15(d)(2) provides—

> (2) A business account or accounts into which all funds received for professional services shall be deposited. All business accounts, as well as all deposit slips and all checks drawn thereon, shall be prominently designated as a "professional account," an "office account," or an "operating account."

Additionally, Rule 1.15(e)(1) provides, "All COLTAF accounts shall be designated "COLTAF Trust Account," and Rule 1.15(e)(2) provides, "All such trust accounts, whether general or specific, as well as all deposits slips and checks drawn thereon, shall be prominently designated as a "trust account."

—Secretary

a subcommittee could consider what parts of Rule 1.15 might be carved out and placed elsewhere to accommodate the mechanics of rate comparability and the other aspects of the relationship between the bank, the OARC, and the Foundation.

Yet another member who had not previously spoken noted that, when the Committee effected the previous revision of Rule 1.15, it initially considered some small modifications to the existing text but eventually determined that the whole rule had to be rewritten, because it was incomprehensible. And yet it remains a very complex rule. The proposal from the Foundation runs on for five pages; it was likely, this member said, that only a few members of the Committee had read it. He did not know whether the Foundation had the authority to say to the banks, you must do it this way in order to gain approval and listing. But he was of the view that the matter need not be located in a rule governing the conduct of lawyers.

A member responded to suggest that the detail was necessarily placed in Rule 1.15 because of the Court's inability to require banks to provide trust accounts that permit the OARC to police lawyers' handling of client funds. Under that view, it would appear that the provisions would fit in a rule governing the conduct of lawyers. It was clear to this member that the matter should go to a subcommittee for consideration.

A member asked how much detail really was required. Could it not be simply stated as, "All trust accounts must be approved accounts"?

To that comment, Johnson responded that banks will want rules that clearly state what they must do if they wish to offer compliant accounts.

A member who had not previously spoken asked what she characterized as a practical question: Was a problem encountered four years ago? She noted that the City of Denver found that it could not control banking charges at the Denver International Airport. Accordingly, the subcommittee will need to consider a mechanism that can handle sudden increases in banks' charges, increases that the Court will not be able to prevent. The Court's rule cannot regulate banks and, therefore, is necessarily directed toward lawyers. But the handling of trust accounts is already difficult for lawyers, who often relegate trust account matters to bookkeepers, under their supervision.[9] This proposal adds a dangerous amount of detail to an aspect of law practice that many lawyers are simply not familiar with, not comfortable with. In her view, the simpler the better.

Poole responded to those comments by agreeing that bank charges will be an issue in the proposal. The Foundation has urged banks to waive their charges on COLTAF accounts. But, with all the changes currently occurring in the banking industry, it is difficult to determine what banks are doing with their charges. In the future, bank charges may erode returns from trust accounts. She noted that

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9. Current Rule 1.15(i)(2) provides—

> (2) All trust account withdrawals and transfers shall be made only by a lawyer admitted to practice law in this state or by a person supervised by such lawyer and may be made only by authorized bank or wire transfer or by check payable to a named payee.

And Rule 1.15(i)(5) provides—

> (5) Persons Authorized to Sign. Only a lawyer admitted to practice law in this state or a person supervised by such lawyer shall be an authorized signatory on a trust account

—*Secretary*

the Foundation has even had conversations with the banks about the "reimbursement" of charges imposed on low-balance COLTAF accounts.

A member who had not spoken before said he believed this was merely a matter of economics. The banks will measure their willingness to offer COLTAF accounts by their net costs of carrying such accounts — the interest they have to pay on account balances net of the charges they can impose for maintaining such accounts. It must be possible for the Foundation to utilize the bargaining power that is represented by the total of balances carried at any time in all COLTAF accounts maintained in all banks, saying to the banking community: If you wish to obtain your share of those balances, you must agree, first, not to impose any charge against any such account other than "allowable reasonable COLTAF fees" and, second, to pay an interest rate on all the accounts that we find acceptable. By such bargaining, individual banks and the Foundation can agree upon the returns that will be paid to the Foundation on COLTAF accounts under those parameters, where the question is not just interest rate comparability but net-return comparability. Surely that is but an economic determination that can be attained from bargaining utilizing the Foundation's control over all available deposits, recognizing that the Foundation's bargaining position must certainly be greater than that of any individual lawyer or law firm. The idea, contained in the Foundation's proposal, of a benchmark rate fits neatly into this approach. Such a mechanism, established by a rule by which the Court granted to the Foundation or the OARC that bargaining authority, would, by controlling all allowable charges in the process of determining net returns, eliminate the possibility that lawyers would themselves have to bear any charge for their COLTAF accounts. And such a mechanism would legitimate the claim that the only obligation on lawyers would be to pick banks from the approved-bank list.

A member asked whether such a system would present a constitutional "takings" issue. The member who had proposed the system responded that he understood the "takings" question had been resolved by the courts and that his proposal did not impose any regulation on any bank. Each bank would be free to stay far away from COLTAF accounts if it chose; the Court's regulatory power would remain directed at lawyers; and, as under the Foundation's proposal, the underlying impetus would be the banks' desire to provide accounts that met the desires of a particular group of customers — lawyers — at costs the banks could afford to pay.

The Chair determined to send the matter to a subcommittee. She asked that it include the representatives of the Foundation and those members who had expressed opposition to the concept. She stated that its mandate would be "open-ended": It might even return with a recommendation that the Foundation's goal of rate comparability not be pursued.

A member asked whether the subcommittee could consider a full revision of Rule 1.15, rather than a revision that only made the changes needed to accomplish rate comparability..

To that question, Johnson said that the Foundation had considered how the rule might be modified to attain rate comparability, and it felt that its proposal provided for the smallest possible change. The Foundation had talked about "starting from scratch" but decided on "the least change possible." But, he added, the Foundation has no investment in the approach it has offered.

A member asked whether there was any other group that should be drawn into the subcommittee's consideration of the proposal in order to save time. The Chair responded by noting that, historically, the Committee has developed a work product before proposing it to other groups.

The member who had suggested that a mechanism be developed that maximized the bargaining power of the aggregation of all COLTAF balances pointed out that interest rates on all bank accounts are at near nil levels, so that there is no material benefit to be gained by rushing a revision that would be

lost if the Committee took time to consider a full revision of Rule 1.15. The Chair agreed but added that she wanted to move forward quickly.

The Committee determined, unanimously, that a subcommittee should be established; and the Chair appointed Sudler to chair the subcommittee.

On behalf of the Committee, the Chair expressed thanks to Johnson and Poole.

V. *Amendments to the American Bar Association Model Rules of Professional Conduct*

The Chair pointed the members to that portion of the meeting materials that contained the changes to the American Bar Association Model Rules of Professional Conduct that the ABA adopted at its 2012 annual meeting.

Some of the changes, the Chair noted, were merely technical, and none were "earth-shattering." She found especially interesting the addition of an exception to the client confidentiality provisions of Rule 16 to accommodate conflict checking in the lateral-hire situation; she noted that Colorado was way ahead of the ABA on that matter.[10]

The Chair added that the Committee needed to appoint a subcommittee to provide an initial study of the ABA's 2012 changes.

A member pointed out that the Attorney Regulation Committee of the Office of Attorney Regulation has already begun a study of at least one of the rule changes.

The Committee approved the establishment of a subcommittee to study the ABA's 2012 changes to the Model Rules of Professional Conduct. Michael Berger and James Coyle were appointed to co-chair the subcommittee.

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10. The Chair was referring to the Colorado addition of Comment [5A] to Rule 1.6, reading—

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

—*Secretary*

VI. *Adjournment; Next Scheduled Meeting.*

The meeting adjourned at approximately 11:15 a.m. The next scheduled meeting of the Committee will be on Friday, February 1, 2013, beginning at 9:00 a.m., at the Office of Attorney Regulation Counsel, at 1560 Broadway, Denver, Colorado.

RESPECTFULLY SUBMITTED,

Anthony van Westrum, Secretary

[These minutes are as approved by the Committee at its Thirty-fourth Meeting, on February 1, 2013.]