COLORADO SUPREME COURT

STANDING COMMITTEE ON THE RULES OF PROFESSIONAL CONDUCT

Submitted Minutes of Meeting of the Full Committee
On May 6, 2011
(Thirtieth Meeting of the Full Committee)

The thirtieth meeting of the Colorado Supreme Court Standing Committee on the Rules of Professional Conduct was convened at 9:10 a.m. on Friday, May 6, 2011, by Chair Marcy G. Glenn. The meeting was held in a conference room of the Office of Attorney Regulation.

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

I. *Meeting Materials; Minutes of August 21, 2009 and January 21, 2011 Meetings.*

The Chair had provided a package of materials to the members prior to the meeting date, including submitted minutes of the both the twenty-fifth meeting of the Committee, which was held on August 21, 2009, but for which the secretary had not previously submitted minutes; and of the twenty-ninth meeting of the Committee, held on January 21, 2011 Those minutes were approved, with minor corrections to the minutes of the twenty-ninth meeting.

II. *Status of Committee's Proposals to the Court.*

John Gleason distributed to the members printed copies of the amendments the Court has adopted modifying Rule 1.5(b) and striking its existing Comment [3A], effective July 1, 2011.

The Chair noted that the Court adopted the minority report to the Committee's proposal to amend Rule 1.5(b) to deal with mid-stream modifications to lawyers' fee agreements. She noted that the Court's deletion of Comment [3A] is not obvious from the presentation of the Court's action on its website,[1] which reports that there are no changes to Comments [1] through [3] and no changes to Comments [4] through [18] and thereby merely implies that Comment [3A] has been deleted. But the Chair confirmed that the Court *did* delete Comment [3A] in its entirety, and another member added that Westlaw has reported the amendments to reflect that deletion.

The Chair added that the Court has now acted on all of the proposals for amendments to the Colorado Rules of Professional Conduct ("CRPC") that the Committee has proposed to it since the adoption of the "Ethics 2000" Rules on January 1, 2008.

---

1. *See* http://www.courts.state.co.us/userfiles/file/Court_Probation/Supreme_Court/Rule_Changes/2011/2011_05%20redlined%281%29.pdf.

III. *Interplay between Rules of Professional Conduct and Revised Code of Judicial Conduct Regarding* ex Parte *Communications*.

At the Chair's request, and in the absence of the designated subcommittee's chair, Judge Webb, Alexander Rothrock reported to the Committee on the subcommittee's further consideration of the interplay between amended Rule 2.9 of the Colorado Code of Judicial Conduct ("CJC") and Rule 3.5 of the Colorado Rules of Professional Conduct ("CRPC"), which had first been discussed by the full Committee at its Twenty-Ninth Meeting, on January 1, 2011.[2]

Rothrock began by noting that, at its Twenty-Ninth Meeting, the Committee had postponed taking action on the subcommittee's proposal that references in CRPC Rule 1.12 to the Model Code Of Judicial Conduct should be revised to be, instead, direct references to the analog provisions in the CJC and that a member had suggested that that effort be delayed until the numbering of the CJC was stabilized — that is, until after completion of a pending effort by the Colorado Judicial Discipline Commission to update the Commission's procedural rules, an effort that would entail renumbering of some of the provisions in the CJC — and the proper references to the CJC are known.

John Gleason reported that the Judicial Discipline Committee had now completed its work in that respect and that the numbering that the subcommittee had used in the changes it proposed to CRPC Rule 1.12 at the Twenty-Ninth Meeting was accurate. The Chair commented that there was, then, no need for further discussion of the subcommittee's proposed changes to CRPC Rule 1.12, which seemed not to be controversial.

Rothrock then recounted the Committee's deliberations, at its Twenty-Ninth Meeting, about lawyers' *ex parte* communications with judges under CRPC Rule 3.5 and judges' *ex parte* communications with lawyers under CJC Rule 2.9.[3] At that meeting, the Committee had been informed that, although the Code of Judicial Conduct permits judges to engage in certain *ex parte* communications with lawyers, there is no corresponding provision in the Rules of Professional Conduct permitting lawyers to participate in those same communications. But, at its Twenty-Ninth Meeting, the Committee had rejected the proposal of the subcommittee that language matching CJC Rule 2.9 be added to CRPC Rule 3.5(b).

---

2. The minutes of the Twenty-Ninth meeting describe the subcommittee's initial recommendations as follows:

> The first change — which the subcommittee characterized as a housekeeping matter — would be to text in Comment [1] to Rule 1.12, dealing with restrictions on a lawyer's practice when the lawyer previously served as a judicial officer. The second change deals with the possibility that a lawyer who engages in an *ex parte* communication with a judge could be disciplined for violation of Rule 3.5, even if the judge initiated the communication *sua sponte* and even though, from the judge's perspective, the communication was proper under Rule 2.9 of the Code of Judicial as a communication for "scheduling, administrative, or emergency purposes."

3. CJC Rule 2.9 provides in part as follows:

> (A) A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties or their lawyers, concerning a pending* or impending matter,* except as follows:
>
> (1) When circumstances require it, ex parte communication for scheduling, administrative, or emergency purposes, which does not address substantive matters, is permitted, provided:
>
> (a) the judge reasonably believes that no party will gain a procedural, substantive, or tactical advantage as a result of the ex parte communication; and
>
> (b) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication, and gives the parties an opportunity to respond.

Rothrock directed the Committee's attention to the subcommittee's revised proposal, which had been included in the package of materials that was provided to the members for the current meeting, which proposal would amend CRPC Rule 3.5 as follows:

> RULE 3.5. IMPARTIALITY AND DECORUM OF THE TRIBUNAL
>
> A lawyer shall not:
>
> (a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;
>
> (b) communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order***, or unless a judge initiates such a communication and the lawyer reasonably believes that the subject matter of the communication is within the scope of the judge's authority under a rule of judicial conduct.;***
>
> (c) communicate with a juror or prospective juror after discharge ~~**of the**~~ ***of the*** jury if:
>
> (1) the communication is prohibited by law or court order;
>
> (2) the juror has made known to the lawyer a desire not to communicate;
>
> (3) the communication involves misrepresentation, coercion, duress or harassment; or
>
> (4) the communication is intended to or is reasonably likely to demean, embarrass, or criticize the jurors or their verdicts; or
>
> (d) engage in conduct intended to disrupt a tribunal.
>
> COMMENT
>
> [2] During a proceeding a lawyer may not communicate ex parte with persons serving in an official capacity in the proceeding, such as judges, masters or jurors, unless authorized to do so by law or court order. ***The exception in the Rule for communications initiated by a judge enables a lawyer to respond to an ex parte communication that is initiated by a judge under the authority of a rule of judicial conduct. See, e.g., Rules 2.9(A)(l) and (4) of the Colorado Code of Judicial Conduct (permitting nonsubstantive ex parte communications for scheduling, administrative, or emergency purposes, or to facilitate settlement). This exception does not authorize the lawyer to (a) initiate such a communication, even if a rule of judicial conduct would authorize the judge to engage in it; or (b) include matters not within the exception when responding to such a communication. A lawyer must therefore discontinue a communication if and when the lawyer reasonably believes that the communication exceeds the authority granted to the judge by a rule of judicial conduct.***

Rothrock pointed out that the subcommittee's modifications would do these things:

1. Rather than make specific reference in CRPC Rule 3.5 to the provision in CJC Rule 2.9(A)(1) permitting a judge's *ex parte* communications for scheduling, administrative, or emergency purposes, the subcommittee's proposed amendments to CRPC Rule 3.5(b) would make a generic reference to communications that are "within the scope of the judge's authority under a rule of judicial conduct." This would encompass communications permitted to a judge, whether under the Colorado rules of judicial conduct or otherwise.

2. To answer the question of how the lawyer is to know that the judge is permitted to engage in the communication, proposed CRPC Rule 3.5(b) would apply if "the lawyer reasonably believes" that the judge's authority extends to the communication.

3. The subcommittee would revise Comment [2] to CRPC Rule 3.5 to refer both to CJC Rule 2.9(A)(1)[4] and to CJC Rule 2.9(A)(4)[5] as examples of *ex parte* communications that are permitted to the judge and thus are permitted also to the lawyer under CRPC Rule 3.5.

4. But, under the subcommittee's proposal, the lawyer would not be permitted to *initiate* the communication with the judge; any communication would have to be initiated by the judge. Rothrock said that the subcommittee's proposal would only allow the lawyer to react to the judge's initiative; he noted that there may still be circumstances where it is not entirely clear whether the lawyer would be permitted to respond to the judge under the subcommittee's proposal, as where the judge says, conditionally, "If we are to deal with this, you need to call me."

5. And, under the subcommittee's proposal, the lawyer would not be permitted to stray beyond the permitted "subject matter" of the communication; as the proposed revised comment would clarify—

> This exception does not authorize the lawyer to . . . (b) include matters not within the exception when responding to such a communication. A lawyer must therefore discontinue a communication if and when the lawyer reasonably believes that the communication exceeds the authority granted to the judge by a rule of judicial conduct.

Rothrock explained that the subcommittee's proposal would not permit the lawyer to talk *ex parte* about anything that is outside the judge's *ex parte* authority: If, for instance, the judge initiated a call to set an emergency hearing, the lawyer would not be permitted to raise any matter of substance. Further, Rothrock said, the proposal would require the *lawyer* to cut off the conversation if the *judge* had strayed beyond the permitted scope — that is, if the lawyer were not reasonably believe that the expanded subject matter of the conversation remains within the judge's authority.

Rothrock commented that the subcommittee "made up" the last two points — they were not included in the directions the Committee gave to the subcommittee at its Twenty-Ninth Meeting.

The Chair, Rothrock, and another member confirmed that William J. Campbell, Executive Director of the Colorado Commission on Judicial Discipline, has indicated his approval of the subcommittee's current proposal.

Opening discussion, a member affirmed her view, expressed at the Committee's Twenty-Ninth Meeting, that this proposal is simply not practicable for the smaller judicial districts within the state, where judges carry their own calendars and, accordingly, lawyers commonly initiate communications with the judges to set matters for hearing. The subcommittee's proposal would not permit that kind of communication. Further, she believed, the amendments should not "hide the ball" as is done in the amended Comment [2] but, rather, should explicitly state for the lawyer what *ex parte* communications are permitted to judges under Rule 2.9 of the Code of Judicial Conduct.

Another member added that it is common in family law practice, where there is a heavy volume of cases, for practitioners to "network" with the judges and to encounter the judges frequently, as, for example, at professional luncheons. An informal howdy-do may lead to a judge's instruction to "email me to set a hearing on that matter." In other words, she said, the frequency of these kinds of

---

4. *See* n. 3 to these minutes for the text of CJC Rule 2.9 A)(1).

5. CJC Rule 2.9(A)(4) provides, "A judge may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to settle matters pending before the judge."

communications that had been commented on with respect to "small districts" may also be found in particular practice areas.

A member expressed his concern that the proposed comment places a terrible burden on the lawyer by requiring the lawyer to cut off a communication initiated by a "judicial officer." He wondered why he should be made responsible to monitor the judge's conduct, and he gave as an example the dilemma faced by the lawyer who is asked by the judge something relating to the substance of a case, such as, "Is your client still a party in that case?" Speaking for himself, he said that he would not dare cut off the judge who asked him such a question.

But another member suggested that an appropriate reaction might be to press the conference telephone button and get opposing counsel into the conversation with a "That's a good question, Judge; let me get the other lawyer on the line." No one noted that this precise solution would not be available in a face-to-face conversation.

A member asked how these matters are handled in practice under the existing rules. She noted that the proposal is intended to make the Rules of Professional Conduct, governing lawyers, match those of the Code of Judicial Conduct, governing judges, but CRPC Rule 3.5 currently forbids a lawyer to "communicate ex parte with [a judge, juror, prospective juror or other official] during the proceeding unless authorized to do so by law or court order." How do lawyers currently handle the judge's direction to "email me to set that matter" given during an encounter at a bar association event?

A member replied that she understood the existing rule's prohibition of *ex parte* communications to cover only those communications that involve substantive issues about cases. But, she said, when the text of the rule is made more precise, distinguishing between initiation and receipt of communications, it appears to draw bright lines that do not permit that substance/non-substance distinction.

But the member who had inquired about current practices pointed out that there is no textual basis, in current CRPC Rule 3.5, for that suggested substance/non-substance distinction.

A member commented that, while it is difficult to place oneself in the mind of a judge, he would assume that the judge who said, "Email me to set that matter," actually intended that the subsequent emailed communication would be sent both to the judge and to the opposing lawyer, so that it would not be *ex parte* in fact. In other words, the judge's offhand comment might not actually be an invitation to an *ex parte* communication.

Rothrock stepped in to remind the Committee that current CRPC Rule 3.5 is an absolute prohibition against the lawyer's participation in an *ex parte* communication unless some "law or court order" authorizes the *lawyer* to do so. The lawyer has no exception for communications that a judge may engage in and has initiated; and, even with the recent amendment to CJC Rule 2.9, there is no rule permitting the judge to engage in the kinds of communications the members were now discussing. Before the amendment to CJC Rule 2.9 effective July 1, 2010, even judges were out of bounds when having *ex parte* communications even about scheduling, administrative, or emergency matters. Rothrock suggested that there had been a disconnect between the absoluteness of the rules and the actual practice of lawyers and judges, a practice that is now — at least for judges — largely accommodated by the revision to CJC Rule 2.9. Accordingly, he added, perhaps the Committee should bow to reality, which seems to be inconsistent with an insistence that the judge be the initiator of all *ex parte* communications. Do we, he asked, make the rule reflect reality, or make reality adhere to the subcommittee's idea about initiation?

A member who represents lawyers in discipline cases described one such case that he was currently involved in. A young lawyer had been party to an *ex parte* communication initiated by a judge in a major piece of litigation. It had at first been unclear to the lawyer what the scope of the communication was, but, when it became clear that the judge had gone far beyond what was permitted to him by the Code of Judicial Conduct, the lawyer felt he could not hang up on the judge. In the course of representing the lawyer, the member spoke with a number of ethics experts, researched the issue, and made his recommendation to the lawyer. But the experience has left the member with the belief that there needs to be an absolute ban on the judge communicating with the lawyer about any matter that is beyond what is permitted by CJC Rule 2.9. As the other member had said previously, it is difficult for the lawyer to adhere to the rule when it is the judge who strays. In this member's view, the prohibition should be entirely on the judge, and the lawyer should not be obligated to cut off the judge when the judge does stray. Perhaps, he suggested, there should be a tattletale proviso applicable to the lawyer, but that would be appropriate only if there were first an absolute ban on the judge's extended communication. In reply to a member's question, this member said the problem lies in the Code of Judicial Conduct, not in CRPC Rule 3.5. In answer to a question whether this member was suggesting that it would be a mistake to make CRPC Rule 3.5 match CJC Rule 2.9, as the subcommittee has suggested, this member said that any exception available to the lawyer should be made very narrow, so that the lawyer knows the precise limits of the permitted *ex parte* communications and can say, "I'm sorry, your honor, but under CRPC Rule 3.5 I cannot continue this conversation." In this member's view, the subcommittee's proposal was not narrow enough.

A member pointed out that CRPC Rule 3.5 as proposed by the subcommittee applies not only to communications regarding a particular case but to any *ex parte* communication with a judge before whom a lawyer has a pending case. Does this mean, the member asked, that the rule would prohibit the lawyer from commenting about the weather to a judge during the entire pendency of the case? His question prompted another member to recall the concern of a young associate of hers, who had been invited to the home of a judge for whom the associate had previously clerked. This member agreed that it was not clear whether the entire concept of an *ex parte* communication was to be restricted to communications that had something — substantively or procedurally — to do with a pending case or might extend to encompass entirely unrelated subjects. The member who had initiated this thought commented that he agreed with the previous suggestion that the ethics rule should not place on lawyers the burden of policing the communications of judges.

A member noted that every lawyer has an obligation, under CRPC Rule 8.3(b), to report judges' misconduct to "the appropriate authority." In her view, the Committee should not propose a rule that addresses an egregious situation but does not provide an answer to the general circumstance. As the rule now reads, it permits *ex parte* communications that are "authorized by law or court order";[6] thus, because the Code of Judicial Conduct is such a "law," CRPC Rule 3.5 as currently stated already permits to the lawyer all of the communications that CJC Rule 2.9 permits to the judge. Given that this is model language from the Model Rules of Professional Conduct, she cautioned that the Committee should not willy-nilly amend the provision.

A member underscored the comment made earlier that the ethics rules should not place on lawyers the burden of policing the communications of judges. This member's concern was that amended Comment [2], as the subcommittee proposed it, imposes precisely that policing duty. He gave as an example a judge's casual comment, "How are you getting along with So-and-So," and suggested that the Committee should not propose a rule that imposes a duty on the lawyer to cut off that judge.

---

6. *See* Rule 3.5(c)(1).

Another member said he was equally uncomfortable with telling the judge to stop, But, he noted, if we don't impose that obligation on the lawyer, we are left with only the reporting duty of CRPC Rule 8.3(b). He recalled a case from years ago involving a judge who regularly gave a district attorney a ride to the courthouse and who, on one occasion, gave the district attorney advice on how to handle a case. The district attorney did report the judge under the applicable ethics rule and the particular case was assigned to a different judge. This member summarized that example as follows: Either you cut off the judge in mid-sentence, or you report him pursuant to CRPC Rule 8.3(b); cutting him off in mid-sentence is the easier thing to do, and that is what the subcommittee is proposing.

Another member agreed with that position. He suggested that most judges would appreciate being reminded of the limitations of CJC Rule 3.5; this should not be a hard thing for a lawyer to do in practice. Sometimes, he commented, lawyers have to make hard decisions. But the line should be clearly drawn, so that the lawyer is not left in doubt and left to police the judiciary without adequate guidance. He wanted more specificity than the subcommittee's proposal offers; he, too, would prefer in CRPC Rule 3.5 a precise restatement of the limits expressed in CJC Rule 2.9.

A member moved that the matter be referred back to the subcommittee with instructions to make further modifications to its proposal that reflected the gist of this meeting's comments — that the statement of *ex parte* communications that are permitted to the lawyer be made more specific than just those "the subject matter of [of which] is within the scope of the judge's authority under a rule of judicial conduct." This member also proposed that the Committee recommend to the Colorado Commission on Judicial Discipline that it amend CJC Rule 2.9 to be more specific, too.

A member noted that territorial aspects would need to be reflected in any revision to the subcommittee's proposal — in Colorado, the limitations on the lawyer would correspond directly to those imposed on judges under CJC Rule 2.9, but for *ex parte* communications governed by principles found under other jurisdictions, the lawyer would have to look to those other principles or other applicable law for guidance.

Rothrock responded to these comments by saying that the underlying problem is that the Code of Judicial Conduct does not authorize the *lawyer* to do anything; it only covers the conduct of the judge. Thus, if the ethics rule, CRPC Rule 3.5, states that the lawyer shall not engage in any *ex parte* communication except that which some provision authorizes the lawyer to engage in, we cannot say that the rule permits the lawyer to engage in *ex parte* communications regarding case scheduling — because there is no authority for the *lawyer* to engage in that kind of communication, and the lawyer cannot exercise the authority that CJC Rule 2.9 extends to the judge.

A member commented that he had participated in the drafting of the Model Code of Judicial Conduct by the American Bar Association ("ABA"). The trend, he noted, was to draft the model analog of CJC Rule 2.9 to broaden the scope of judges' permitted *ex parte* communications with lawyers; the effort was to broaden the ability of judges and lawyers to communicate. The Colorado Commission on Judicial Conduct spent two years working to adopt the ABA revisions to the Colorado code, and, in the public comment stage, testimony was received supporting a broadening of CJC Rule 2.9 for the "substantiative courts," for family courts, and so forth to contend with expanding dockets, reduce court staffing and similar impacts. He remarked that the trend in this Committee discussion was flowing in the other direction, to ask the Court to *narrow* the authority of the judge to engage in *ex parte* communications.

Another member noted that the full Committee needed to provide the subcommittee with some direction. He commented that everyone seems to accept the concept that *ex parte* communications about "procedural" matters are okay, such as the setting of dates for hearings, while all substantiative *ex parte*

communications should be proscribed. He ask why we could not simply work that procedural / substantive distinction into the words of CRPC Rule 3.5.

The member who had served in the ABA's effort to expand the analog to CJC Rule 2.9 replied that that distinction is already included in revised CJC Rule 2.9. He agreed that it should be reflected in CRPC Rule 3.5 and in its comments.

The Chair noted that there was a pending motion to return the matter to the subcommittee for further revisions to clarify what *ex parte* communications are permitted and what communications are proscribed. The motion, she said, included an instruction that the subcommittee consider whether to propose that the Committee request that the Commission on Judicial Conduct consider specific changes to CJC Rule 2.9.

A member suggested that the phrase, " and the lawyer reasonably believes that the subject matter of the communication is within the scope of the judge's authority under a rule of judicial conduct" be stricken so that CRPC Rule 3.5(b) would simply say, "[A lawyer shall not] (b) communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order, or unless a judge initiates such a communication," and the lawyer would not be at risk to make a determination whether the judge had the authority to engage in the communication.

Another member responded negatively to that suggestion by saying that it would permit a miscreant judge to engage in improper communications and green-light the lawyer to follow on. She thought the lawyer would have a duty to report the miscreant judge under CRPC Rule 8.3(b) but thought that the ethics rules should also subject the lawyer himself to discipline for letting the improper conversation proceed.

By a straw poll conducted at a member's request, it was made clear that no one favored a proposal that CJC Rule 2.9 be amended to *eliminate* the exception for judges that is contained in CJC Rule 2.9(A)(1).

But one member responded to the poll by stating his feeling that the provision should be tightened up, so that it is "very, very clear" to both the judge and the lawyer what is permitted and what is proscribed.

The member who had served in the ABA's effort to expand the analog to CJC Rule 2.9 recited the wording of CJC Rule 2.9(A)(1), and another member followed that lead by asking the member who had urged clarity whether he really thought the words could be made any tighter. That member admitted he was not sure how they could be.

A member asked whether the text of CJC Rule 2.9(A)(1) was the model language that was promulgated by the ABA. The member who had participated in that process was not sure whether it was identical; he thought that there may have been public comment in the Colorado process seeking a broadening of the judge's authority for *ex parte* communications.[7]

The Chair said she detected no sentiment among the members to ask for a revision, a clarification, of the Colorado Code of Judicial Conduct in this regard.

---

7. There appears to be no change in CJC Rule 2.9(A)(1) from the Model Code of Judicial Conduct analog, as adopted in February 2007. See http://www.americanbar.org/content/dam/aba/migrated/judicialethics/ABA_MCJC_approved.authcheckdam.pdf. —Secretary

A member concurred with that observation but added that she would like to see the text of the Code rule be recited in the ethics rule in order to provide guidance to the lawyer.

A member suggested that some of the perceived need to add clarity could be satisfied if some of the specifics of CJC Rule 2.9 were put into the commentary to CRPC Rule 3.5. He suggested, in particular, that reference could be made in the comment to communications about "substantive matters" and reference could be made to the judge's CJC Rule 2.9(A)(1)(b) duty to notify absent parties about the *ex parte* communications after they occur. He added that his focusing on the actual text of CJC Rule 2.9(A)(1) in the course of this discussion had convinced him that it works pretty well.

A member noted that the reference in CRPC Rule 4.2[8] to a lawyer's *ex parte* communications with a represented party is parallel to the principle in CRPC Rule 3.5. Under CRPC Rule 4.2, the lawyer must not engage in such a communication unless specifically permitted to do so, and the comment makes clear that the lawyer must "immediately terminate" a communication that has begun if he learns that it is proscribed under the rule. The member admitted that there might be differences between communications with someone else's client and communications with a judge, but he saw parallels as well.

Rothrock, the reporter for the subcommittee, said the subcommittee needed guidance on the question of whether a lawyer should be permitted to *initiate* a conversation with a judge that a judge could herself initiate under CJC Rule 2.9.

To Rothrock's query, a member suggested that there might be an alternative. He suggested defining "initiation" to include a "generic" invitation by a judge, to the lawyers in the "circuit" she rides, to communicate with her about scheduling matters. But it would have to be clear that the permitted scope of such generically initiated communications would be limited to procedural topics.

To that, a member wondered why such a generic concept would be required at all. Why couldn't the one lawyer contact the other lawyer to agree upon a proposed schedule that they could, together, communicate to the judge? She could not see a circumstance where a generic "invitation" to *ex parte* communications would be ever be needed.

At this point, the movant said he saw confusion in the Committee's understanding of what it would be doing by adoption of the motion, and he withdrew it.

Stepping in to fill the void, another member moved as follows: First, amend CRPC Rule 3.5(b) by deleting all after "court order," so that it reads—

> (b) [A lawyer shall not] communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order**~~, or unless a judge initiates such a communication and the lawyer reasonably believes that the subject matter of the~~**

---

8. Rule 4.2 reads in part as follows:

> In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

Comment [3] provides—

> [3] The Rule applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that person is one with whom communication is not permitted by this Rule.

~~communication is within the scope of the judge's authority under a rule of judicial conduct~~;

Second, modify the comment to address two points: To clarify that "authorized to do so by law" means that, if the judge can engage in the communication, then the lawyer can do so also. And to recite the wording of CJC Rule 2.9, which, the movant suggested, is pretty clear about what can and what cannot be included in an *ex parte* communication. The movant noted that her preference usually is to include substantive text in a rule rather than just in a comment but, in this case, that has proved difficult to do. The motion was seconded.

A member responded by stating his dislike of the motion. He did not want to bury substance in the comment rather than include it in the body of the rule. Further, in his view, the present content of the comment makes a pretty good statement of a safe harbor. And, he said, the qualifier that the lawyer should reasonably believe that the subject matter of the communication is within the scope of the judge's authority is appropriate and should be retained in the body of the rule rather than be stricken as the motion would do. He did, however, agree that the comment could be expanded to include discussion of CJC Rule 2.9.

The movant responded that these comments were not friendly to her motion.

A member commented that all of the discussion has involved pros and cons. He felt that, when the subcommittee reconvened to consider its next proposal, it would identify a number of unintended consequences; accordingly, the full Committee should give the subcommittee a good deal of leeway in making that next proposal and not box it in. Judges will stray, he noted, and making this rule more strict and constraining will not eliminate that problem. In his view, CJC Rule 2.9 is an adequate statement of conduct and the rest should be left to education of judges and lawyers alike. Making either rule more strict will not help.

The Chair noted that a motion was on the table, which she construed as calling for the inclusion of the substance of CJC Rule 2.9 in the comments to CRPC Rule 3.5 — leaving to the subcommittee to determine how that is done — and explaining in a comment that "authorized by law" extends to the lawyer the authority that CJC Rule 2.9 grants to the judge.

The movant explained her intention that, if the judge can engage in an *ex parte* communication then the lawyer can initiate and engage in the same communication. To that the Chair disagreed, and the movant suggested that the language to be clarified to make the point clear.

The Chair said she understood that the movant would take the position that the rule text, as proposed to be modified, would inherently permit the lawyer to initiate an ex parte communication that the judge could initiate, while the member who had first commented on the motion would add that initiating-authority to the comment. In the Chair's opinion, neither approach made it clear that the lawyer had such authority, and she disagreed with the movant and another member who insisted that the authority would be clear under the text as modified by the motion.

The Chair also observed that another member had found the entire approach to be inappropriate because it burdened the lawyer with the duty to police the judge.

A member suggested that the text proposed by the motion be modified to include reference to substantive matters, reading as follows:

> (b) [A lawyer shall not] communicate ***about substantive matters*** ex parte with such a person during the proceeding unless authorized to do so by law or court order**~~, or unless a judge~~**

~~initiates such a communication and the lawyer reasonably believes that the subject matter of the communication is within the scope of the judge's authority under a rule of judicial conduct~~

In the member's opinion, this change would make clear the distinction between procedural and substantive matters.

The movant said she liked that suggestion and noted that, if the text of CJC Rule 2.9 is included in the comment to CRPC Rule 3.5, then the distinction between procedural and substantive matters will be manifested and clarified. The member who had seconded the motion also found that suggestion to be friendly.

Rothrock said he disliked both the motion as made and as it would be modified by the last suggestion. What the Committee should be doing, he said, is make CRPC Rule 3.5 mirror CJC Rule 2.9 as much as possible. Extending the lawyer's authority to all "procedural" communications while banning "substantive" communications would omit the limitation, in CJC Rule 3.5, of the judge's *ex parte* communications to only those that are for "scheduling, administrative, or emergency purposes." "Procedural" is not a synonym for those limited purposes. Everyone, Rothrock noted, seems to be in favor of an expansion of the comment. He is opposed to an expansion of CRPC Rule 3.5 that would provide that the lawyer is authorized to initiate any communication that the judge is authorized to initiate under CJC Rule 2.9. Further, he noted, the ethics rules use, in CRPC Rule 1.6(b), in CRPC Rule 4.2, and elsewhere, the concept of a lawyer being authorized by law to engage in certain conduct; therefore, the Committee must be careful not to alter that concept of the lawyer's authority, by wording in this CRPC Rule 3.5, to include authority that is derived from authority that is in fact extended only to someone else, such as a judge. Who the law authorizes is an important factor, and we should not, by modification of CRPC Rule 3.5, dilute that concept. Rothrock directed the members to the text of CRPC Rule 4.2 — " . . . a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer . . . is authorized to do so by law . . . ." — and noted that there the concept clearly refers only to authority that is extended to the lawyer directly.

A member said he did not feel the Committee could capitulate to the expressed concern that it would unfairly burden lawyers with the need to police judges. It would be purest, he agreed, if there could be no *ex parte* communications, but that would not be a practical rule. Yet, we should not be doing anything to encourage lawyers to have *ex parte* communications with judges, and it would be wrong to imply that thy can have any *ex parte* communication so long as it is not "substantive."

To that, another member claimed that everyone agreed that lawyers can have *ex parte* communications with judges so long as they do not relate to the pending proceeding — such as comments about the weather. The existing rule, however, does not permit those obviously acceptable communications. To that, another member said everyone understands that the limitations of existing CRPC Rule 3.5 extend only to communications about a proceeding in which both the judge and the lawyer are involved.

A member said the procedural / substantive distinction is in fact inappropriate, noting that a judge might say that the case would be governed by the *substantive* law of Texas but that the *procedural* law of Colorado would be used. We should actually be talking about "administrative" communications.

The member who had seconded the pending motion said that she now withdrew her consent to the amendment that had been proposed to add the words "about substantive matters" to CRPC Rule 3.5(b).

To the comment that we should be referring to "administrative" matters rather than to "substantive" matters, the member who had suggested adding the words "about substantive matters" explained that he had use the word "substantive" only because it is used in CJC Rule 2.9. Another member, however, pointed out that it is used in CJC Rule 2.9 only for a limited purpose: to state a class of communications that is only for "scheduling, administrative, or emergency purposes, which does not address substantive matters."

The movant restated her motion: Cut off CRPC Rule 3.5(b) after the words, "or court order"; expand the comment to include the substance of CJC Rule 2.9; and let the subcommittee determine how to modify the rest of CRPC Rule 3.5 to accommodate these changes. Then, she said, the full Committee can reconsider the entire rule based on the subcommittee's resulting revised proposal.

A member forecast that, if the motion failed, he would move to accept the subcommittee's existing proposal regarding the text of CRPC Rule 3.5 but to amend its comment both to include the substance of CJC Rule 2.9 rather than rely on mere cross-reference to that rule and to include examples of circumstances when the lawyer should know that the judge has strayed from her authority.

In answer to a member's question, the Chair assured the Committee that it would not be constrained, in its subsequent consideration of CRPC Rule 3.5, by any instruction given to the subcommittee or by any proposal the subcommittee might return with.

In answer to a member's question to him, Rothrock explained that the subcommittee had not found itself in uncharted territory. He pointed to the package of materials that had been provided to the members in advance of the meeting, which, beginning at page 64, outlined the subcommittee's research into action that other jurisdictions have taken with respect to *ex parte* communications.

On a vote of the members, the pending motion was defeated.

The member who had forecast an alternative motion now moved that the subcommittee be directed to retain its currently-proposed text for CRPC Rule 3.5 and that it modify the rule's comments to—

1. "Flush out," with specificity, the exception provided to the judge by CJC Rule 2.9(A);

2. Explain the concept of the "initiation" of a communication to include a judge's standing or generic invitation to "call me to schedule all matters"; and

3. Consider explanation of a distinction between procedure and substance when the lawyer is determining whether it is his duty to keep the judge within the field of "scheduling, administrative, or emergency purposes, which does not address substantive matters," that is contemplated by CJC Rule 3.5.

And, the movant said, if the subcommittee finds that it cannot accomplish this, it can return to the full Committee with that conclusion.

A member asked that the subcommittee be directed to cover both the "initiation" of *ex parte* communications and the "invitation" for such communications. The movant said that is what the second part of his motion was intended to cover.

A member asked whether, if this motion is approved and the subcommittee returns with a proposal as intended, the full Committee would then be limited to a consideration only of that proposal. All agreed that it would not be so constrained.

The motion was approved.

IV. *Status Report, Rule 8.4(b) and C.R.C.P. Rule 251.5(b) Conflict.*

David Stark reported, for the subcommittee that had been tasked with resolving the conflict in language between CRPC Rule 8.4(b) and C.R.C.P. Rule 251.5(b), that the issue had been passed on to the Advisory Committee of the Office of Attorney Regulation. That committee has determined to recommend to the Court that C.R.C.P. Rule 251.5(b) be modified to match the language of CRPC Rule 8.4(b), which proscribes commitment of "a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects." Stark did not know the status of the recommendation.

V. *Rule 4.1, Rule 4.3, and "Testers."*

For the subcommittee that has been tasked with considering the request of the Intellectual Property Section of the Colorado Bar Association that the ethics rules regarding honesty be modified to accommodate "pretexting" to determine whether trademark rights were being violated, Thomas Downey reported that the subcommittee had met twice, at one of which meeting guests from the Intellectual Property Section were in attendance. The subcommittee is getting organized and getting a sense of "the lay of the land," including an understanding of the *Pautler*[9] case and the various rules — in addition to Rule 8.4(c) regarding honesty and Rule 4.2 and Rule 4.3 regarding contact with persons represented by other counsel and with unrepresented persons — that might be applicable to the issue. With regard to Rule 8.4(c) and the strong language found in *Pautler*,[10] Downey said the subcommittee was discussing what, if anything might be done to provide an exception for pretexting. He noted that the subcommittee has sought input from several Federal agencies, from the U.S. Attorney's office, and from the Colorado Attorney General's Office.

Downey said that, at the subcommittee's meeting on April 19, 2011, it reviewed correspondence from U.S. Attorney John Walsh and heard comments from representatives of the U.S. Attorney's Office and of the Colorado Attorney General; as well as from several representatives of the Colorado Bar Association Intellectual Property Section. Walsh had looked at the matter from a law enforcer's perspective and had suggested that the Committee consider amendments that would sanction law enforcement undercover work. The representative from the Attorney General's Office was in accord with Walsh and noted the Department of Law has a large section devoted to consumer protection and to criminal law, which would be accommodated by an expansion of the rules to permit pretexting.

The subcommittee was inclined to propose amendments to Rule 8.4 and perhaps one other rule. It was looking, too, at addressing the situation in which a lawyer, whether enforcing civil or criminal laws, might not be engaged directly in covert conduct but might be directing agents who were "legitimately" engaged in undercover work.

---

9. In re Pautler, 47 P.3d 1175 (Colo. 2002).

10. *E.g.*, "We ruled [in *People v. Reichman*, 819 P.2d 1035 (Colo.1991)] that even a noble motive does not warrant departure from the Rules of Professional Conduct." *Id*. 47 P.3d at 1180. —Secretary

Downey summarized by saying the subcommittee had heard enough already to believe that it had to make some proposals. Its next task is to draft some specific language, a task that he characterized as very complex and that might lead to alternative proposals. It was, he said, a very good subcommittee, very enthusiastic, but its work was cut out for it.

A member of the subcommittee added that it is not starting from scratch. The United States Attorney, John Walsh, had given it some good information from other jurisdictions; and it appears that some states specifically permit law enforcement officers to supervise undercover agents, while others permit "any lawyer" to do so. He pointed out that it would take a rule that extended permission for undercover work beyond law enforcement to satisfy the concerns of the Intellectual Property Section.

Downey outlined the areas to be covered as, first, that of law enforcement; second, government lawyers in the enforcement of civil laws; and third, any lawyer in specified circumstances.

A member commented that the *Pautler* case will be a significant restriction, but other members noted that the impact of that decision can be changed by the Court itself by adoption of a rule. Downey said the subcommittee accepts that the Court may reject any proposal for change and confirm the constrictions of *Pautler*.

A member commented that Rule 8.4(c) extends all of the ethics rules' proscriptions to a lawyer's use of an agent.[11] But, he said, in practice lawyers have for many years use private investigators "in circumstances that the Rules don't really allow."

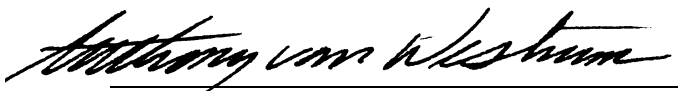
In answer to the Chair's question, Downey said the subcommittee had not yet researched the action, if any, of the ABA in this area. He noted that no consideration had been given to these issues in the course of reviewing the Ethics 2000 Rules for adoption in Colorado.

Downey concluded his report by noting that the *Pautler* expression of resolute discipline in the matter of dishonesty was very strong. But, he noted, the representatives from law enforcement told the subcommittee that at least the last four Colorado Attorneys General have been concerned about the implications of that position for their enforcement activities. He said the subcommittee is well underway but has much work to do before it will be able to make any proposals to the Committee.

VI. *Adjournment; Next Scheduled Meeting.*

The meeting adjourned at approximately 11:30 a.m. The next scheduled meeting of the Committee will be on Friday, September 23, 2011, beginning at 9:00 a.m. It will be held in the conference room of the Office of Attorney Regulation Counsel, 1560 Broadway, 19th Floor, Denver, Colorado.

RESPECTFULLY SUBMITTED,



Anthony van Westrum, Secretary

11. Comment [1] to Rule 8.4 confirms that "Lawyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct . . . through the acts of another, as when they request or instruct an agent to do so on the lawyer's behalf." —Secretary