COLORADO SUPREME COURT

STANDING COMMITTEE ON THE RULES OF PROFESSIONAL CONDUCT

Approved Minutes of Meeting of the Full Committee
On August 19, 2010
(Twenty-Eighth Meeting of the Full Committee)

The twenty-eighth meeting of the Colorado Supreme Court Standing Committee on the Rules of Professional Conduct was convened at 9:00 a.m. on Friday, August 19, 2010, by Chair Marcy G. Glenn. The meeting was held in the Supreme Court Conference Room on the fifth floor of the Colorado State Judicial Building.

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

I. *Meeting Materials; Minutes of June 7, 2010 Meeting.*

The Chair had provided a package of materials to the members prior to the meeting date, and submitted minutes of the twenty-seventh meeting of the Committee, held on June 7, 2010, were separately provided to the members prior to the meeting date. Those minutes were approved as submitted. A member, reflecting on the conversation at the June meeting regarding the respective roles of the Committee, the Office of Attorney Regulation Counsel, and others in the Rule-making process, which was outlined in the minutes, commented that the OARC would never seek to usurp the Committee's role in that process.

II. *Hearing on Proposed Amendments Regarding Midstream Fee Modifications*.

The Chair informed the Committee that a public hearing was scheduled for 1:30 p.m. on October 27, 2010, on the Committee's proposed amendments to Rule 1.5(b) and its comments and to Comment [1] to Rule 1.8, regarding modifications to a lawyer's fee agreement during the course of an engagement. The deadline set for the submission of comments and requests to appear at the hearing was October 20, 2010. The Chair said she intended to attend the hearing; but she noted that she had been a proponent of the minority report that has been submitted to the Court regarding the amendments and hoped that someone who had been among those supporting the majority report would also attend the hearing. In the absence of volunteers answering her request, the Chair undertook to present the majority's position as well.

III. *Adoption of Amendments Regarding Special Responsibilities of Prosecutors*.

The Chair informed the Committee that the Court had adopted the amendments to Rule 3.8, regarding the special responsibilities of prosecutors, as they had been proposed by the Committee. The effective date for the amendments was July 1, 2010. [Further amendments to Rule 3.8 were discussed later in the meeting; see Part VII of these minutes.]

IV. *Counseling Medical Marijuana Businesses*.

Item 6a on the meeting's agenda was the request made by the Colorado Bar Association Real Estate Section Council for consideration of an ethical rule or a comment to provide guidance to lawyers who undertake to provide legal services to persons involved in the medical marijuana industry. By amendment to the Colorado constitution, that industry has gained legality under Colorado law, although the distribution of marijuana remains a Federal offense. With the understanding that the current Federal Administration does not intend to enforce the Federal laws against the medical use of marijuana, many medical marijuana dispensary businesses have been formed, or are being considered, in Colorado; and, like most businesses, they need the customary legal services of lawyers.

The Chair asked for views on the preliminary question of whether consideration of this matter was within the Committee's purview. Was it, instead, something that might first be considered by a group such as the Ethics Committee of the Colorado Bar Association? The Chair suggested that a subcommittee be formed to look into the matter, including that preliminary consideration.

A member suggested that it might be appropriate — given the unusual nature of the industry and of any Rule or Rule change that might deal with it, and given that a significant issue is whether the Office of Attorney Regulation Counsel would prosecute lawyers for providing legal services to the industry — that the matter first be considered by the Advisory Committee of the Office of Regulation Counsel. But another member pointed out that the OARC does not give advisory opinions on potential lawyer conduct and would not likely do so in this instance.

Another member, pointing to the existence of Federal law that proscribes the basic premise of the medical marijuana industry — the distribution of marijuana — thought that it would be inappropriate for this Committee to recommend a Rule premised on *de facto* acceptability of that industry. The Federal law, she believed proscribed not only the primary activity of distribution or possession of marijuana but also aiding and abetting the crime.

Another member supported the idea of forwarding the issue to the CBA Ethics Committee; he noted that he had been requested to provide legal representation to a medical marijuana dispensary and had declined to do so.

A member who has a criminal law practice remarked that she has "five calls a day" about the topic. It was her understanding that there are a number of respected lawyers who are already providing legal representation to the industry, especially in Boulder, where there is a plethora of shops, each of which is treated as legitimate by, and taxed by, the city. And those lawyers are, she thought, very busy and making lots of money in that practice. Yet it was her view that the law needs to work out the legalities of the industry, at both the state and Federal level, before any Rule could be proposed to deal with the ethical issues.

Another member wondered what special ethical issues would remain after the legalities were resolved.

The Chair noted that this Committee has not established a "duck" rule such as the CBA Ethics Committee has, but that it does have jurisdictional limitations. She felt that this particular matter fell outside the Committee's reach and said that she would refer the CBA Real Estate Section's inquiry to the CBA Ethics Committee. The members agreed to this course of action.

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

The materials that the Chair provided for the meeting included a copy of *A.L.L. v. People, in the Interest of C.Z.*, 226 P.3d 1054 (Colo. 2010). In that dependency and neglect case, the parents, whose parental rights had been terminated by the trial court, had exercised their statutory rights and directed their lawyers to appeal the termination. As the Supreme Court explained [some citations omitted]—

> The petitions were crafted to comply with those procedures outlined by the [United States] Supreme Court in [Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967)] to protect a client's rights while simultaneously respecting an attorney's ethical bar against bringing frivolous claims before a court. . . . The petitions identified potential legal issues arising from the termination hearing that might be challenged on appeal. The parents' trial counsel then described why, with each identified legal issue, they felt the trial court had properly considered applicable law and relevant facts. Counsel concluded that there were no viable issues on appeal and requested that they be allowed to withdraw from their respective roles representing the parents.

Over a dissent by Justice Eid, joined in by Justice Rice, the Supreme Court concluded that, in a D&N case, "a lack of merit neither renders an appeal of a termination order frivolous nor constitutes sufficient grounds to allow an attorney's withdrawal."

> Rather, an appointed appellate lawyer who reasonably concludes a parent's appeal is without merit must nonetheless file petitions on appeal in accordance with C.A.R. 3.4, which requires that petitions on appeal from D & N proceedings include, inter alia, a statement of the nature of the case, concise statements of the facts and legal issues presented on appeal, and a description and application of pertinent sources of law. See C.A.R. 3.4(g)(3). The legal issues presented in the brief can be either those identified and developed by the attorney, or, if she can find none, those points the parent wants argued. The petition in such instances, though perhaps wholly unpersuasive, is not wholly frivolous. In so doing, even where the parent's attorney concludes the appeal is meritless, she abides by her dual obligations to her client and to the court, and remains an advocate in fact as well as in name.

The Chair said she was aware that lawyers are wrestling with how the Court's conclusions match up with the proscription of Rule 3.1 against "[bringing or defending] a proceeding, or [asserting or controverting] an issue therein, unless there is a basis in law and fact for doing so that is not frivolous." She wanted suggestions from the Committee about ways in which lawyers affected by the *A.L.L.* ruling might be alerted to the existence of the case.

Cynthia Covell noted that the Colorado Bar Association Ethics Committee has also given some consideration to the case and to the issue, and that some lawyers have questioned whether the case reaches to private counsel as well as to appointed counsel. Covell suggested that a subcommittee be formed to develop an appropriate comment to Rule 3.1 on the matter. With no one opposing the suggestion, the Chair appointed Covell to chair that subcommittee.

VI. *Proposed Amendments Regarding File Retention.*

As the minutes of the twenty-seventh meeting of the Committee, on July 7, 2010, indicate, a bill had been introduced in the 2010 Colorado General Assembly, at the instigation of the Colorado District Attorneys' Council, to establish minimum periods for the retention of files by "attorneys of record" in criminal matters. Although the Committee had, at its twenty-sixth meeting, on February 26, 2010, thought that the matter could be dealt by withdrawal of the legislation and by referral of the matter to the Committee for suitable revision of its proposed file retention rule, Rule 1.16A, the matter took a different course: A "working group" consisting of representatives from the Colorado Defense Attorneys Council ("CDCA"), the OARC, the United States Attorney's Office, the Office of the State Public Defender, the Office of the Federal Public Defender, the Office of Alternative Defense Counsel, and the Colorado

Criminal Defense Bar Association developed its own proposal and submitted it directly to the Supreme Court. Among other things, that proposal would have added a new subrule to Rule 1.16A to set specific retention periods for a "lawyer in a criminal matter."

Following this Committee's twenty-seventh meeting on June 7, 2010, Marcus Squarrell's subcommittee for file retention and Rule 1.16A met with members of the working group to resolve the matter. At the Chair's request, Squarrell updated the Committee about that effort of the combined drafting group.

Squarrell reported that, contrary to expectations, the combined drafting group did not focus on the legislative proposal that the CDCA had developed, with its classifications of types of criminal cases. Instead, the group focused on problems that court-appointed defense counsel contend with, such as those encountered in communicating with clients with whom they have little pre-courtroom contact (including difficulties in giving notices such as draft Rule 1.16A prescribes). Squarrell noted that it's an odd client relationship: The lawyer meets the client for the first time as they are headed into court. The issue on which the lawyer is providing representation may be resolved with only a single hearing. There is not much opportunity for the lawyer to give notices to the client about file retention undertakings. In an office such as that of the Public Defender, files may not be retained following termination of the representation. The concern of those drafters who came from criminal law practice was not about keeping files in accordance with the classifications proposed by the CDCA but, instead, about keeping and managing files for the required two years and consistently with other Rules.

Further, Squarrell, noted, the combined drafting group had been confused by timing ambiguities in the first paragraph of Rule 1.16A as the Committee had proposed it. Squarrell believed the intention of the prior draft was this: The lawyer must keep the client's file until the client has received information that the lawyer's may destroy the file; that information need not be provided contemporaneously with the destruction — it may be contained in an engagement agreement or may be given as a written statement of a file retention policy at the commencement of the engagement or at any time later, or it can be given by specific, *ad hoc* notice; and an agreement may provide for a shorter retention period than the Rule's default period of two years. But, however that information is provided to the client, and whatever the agreement about the retention period, the file must be kept at least until termination of the representation and expiration of at least thirty days after notice, given sometime after that termination, has been given to the client that the file may be destroyed. But, re-reading the proposal six months after the Committee had last dealt with the proposed Rule, Squarrell was no longer sure it read as clearly as the Committee had intended. Accordingly, he intended that any revision would clarify the timing requirements.

Squarrell pointed out that the initial paragraph of the drafting group's revised Rule 1.16A is limited in coverage to "lawyers in private practice" — it does not apply to public defenders. This carve-out does not solve all the problems faced by alternative defense counsel, he noted, but they seem to have accepted that situation. To that observation, a member commented that alternative defense counsel should find the revised proposal acceptable because alternative defense counsel is a private lawyer. The problem is different for the public defender's office, which has vast numbers of files to contend with. The limitation of the Rule to "lawyers in private practice" thus alleviates the public defender's retention problems. But Squarrell repeated his comment that alternative defense counsel will still have retention and notice burdens under the revision but seem to accept them.

Noting that there was much for the Committee to digest and talk about, the Chair categorized the discussion topics as follows:

1. The concern of both the district attorneys and the defense counsel groups about the two-year file retention burden under the prior draft of Rule 1.16A;

2. The continuing concern of alternative defense counsel about the notice burden; and

3. The change to permit file destruction prior to the expiration of two years after termination of the representation — even permitting file destruction prior to the termination of the representation (a huge change, she noted, from the Committee's prior proposal).

Squarrell commented on the last point: The drafting group had determined that there was nothing "magical" about a *two-year* post-termination retention period. The committee looked at shorter periods but eventually found that any specific period had insufficient merit to be worth the "excepts" and "notwithstandings" that were required to state it. Eventually the drafting group dropped the requirement that files be retained for any specific time, pre- or post-termination, and provided, instead, a roadmap that assures that the client will be fully informed of the lawyer's retention policy. While it may be difficult for the client in the case of a court appointment, in most cases the client will be able to bargain for a different arrangement if that is desired.

The Chair noted that another policy matter, apart from a minimum period of file retention, is whether notice of pending file destruction must be given contemporaneously with that destruction — apart from the ten-years-after-termination principle.

Squarrell explained that at least thirty days must lapse between the client receiving the information that the file may be destroyed to the time of that destruction, but that information can be given long before that destruction, as in an engagement agreement. He noted that several members in the drafting group, as well as several members of the Colorado Bar Association Ethics Committee when it had considered an opinion on the file retention topic, felt strongly that pre-termination destruction should not be permitted. Again, he noted, the difficulties of drafting a clear rule on this issue proved to be more significant than the post-termination principle seemed to justify, particularly to those on the drafting group who felt that this was a matter that could be left to agreement between lawyer and client and need not be micromanaged by the Rule.

A member emphasized that one of the driving considerations of the drafting group was clarity. A frequent inquiry to the CBA Ethics Committee calling committee is: How long do I have to keep the file? It is a seemingly simple question, a question that does not implicate loyalty, competence, or other fundamental ethical principles. The guideline needs to be understandable. It is understandable as proposed by the drafting group: You are going to keep the file until you destroy it or give it back. You are not going to destroy it unless the client has given you authority to do so or ten years have passed since the representation ended. This member noted that there are lawyers with garages full of old files, and he asked what was the ethical mandate that they do so. In his view, Squarrell and the subcommittee had done a masterful job of resolving the issues and crafting a clear rule on what has been a perplexing issue.

Another member said that she had first been of the view that the file should always be retained until sometime after termination of the representation. She noted that she had formerly been in a position to take troubled calls from lawyers' widows about their spouses' boxes of files. But she came to the view that the matter can appropriately be handled in an engagement agreement or a written policy, as many other complex aspects of the client-lawyer relationship are dealt with and provided for. And, she noted, this solution is particularly appropriate for lawyers in criminal law practice and others whose clients may be hard to locate after the representation has ended. So she saw that the Committee's earlier version of the Rule imposed an unnecessary burden on the lawyer. If the engagement agreement or an effective policy statement makes the matter of file retention and destruction clear, why should the Rule create compound notice requirements or extended retention periods?

A member with regular involvement in the disciplinary process wondered why this topic was one of discipline; to him it was a matter of law office management and not an area into which the Rules should intrude by way of specific requirements. He favored the proposal of the drafting group, since it recognized the issues regarding file retention but left resolution up to the agreement of the lawyer and the client, without micromanagement. This member also commented on the great difficulty that a lawyer with a criminal law practice could experience trying to find his client for post-termination notification about file destruction.

A member who had a private criminal law practice said that she was pulled in two directions. She had been a public defender before entering private practice and, from that experience, knew that the defendant can be given the contemplated information about file retention at the beginning of the relationship with the lawyer, at the time application is made for a public defender. Yet, particularly in a case of, say, sexual assault, the lawyer should retain the file indefinitely, because of the possibility of a Rule 35 inadequate-counsel claim or of a change in the law. Of course, the need for file retention may be much reduced in a misdemeanor matter. Accordingly, the lawyer should consider the nature of the particular case in determining how long to retain the file. As she put it, her heart was with the public defenders on this question, but she felt it would be unfair to the client for the file to be gone when the case takes another turn two years later.

Squarrell replied to these comments by pointing out two aspects of the revised Rule. First, the exclusion of lawyers in *public* practice is found only in Rule 1.16A(a); it does not apply to Rule 1.16A(b), which deals specifically with the files of a "lawyer in a criminal matter," whether public or private, prosecution or defense. Those provisions impose file retention burdens in all cases resulting in felony convictions. Squarrell noted that these provisions were specifically approved by members of the drafting group from both the public and private spheres.

The member whose comments had prompted Squarrell's explanation said she thought the list of cases subject to the specific provisions of Rule 1.16A(b) should be revised to extend the stated eight-year retention rule to all felony cases, not just those that were appealed. Another member joined her in this view.

But another member, who had participated in the drafting group, said that the time periods set forth in Rule 1.16A(b) had been carefully developed by both the prosecutor and the defense counsel members of the group.

Another member echoed that comment by saying these concepts had been considered by the subcommittee of the Committee that had drafted the initial proposal. As she recalled those conversations, the prosecutors had pushed for longer retention periods and the defense counsel for shorter periods. What the drafting group has proposed represents a compromise between those two groups.

A member who had not spoken before did so now to offer his compliments to Squarrell and the drafters. He noted there had been two principal policy questions: Should there be a post-termination retention requirement — two years unless agreed otherwise? And what notice should be given? The two-year-post-retention question was just a fillip. Particularly in cases of criminal representation, the more important issue is that of notice about file destruction. But as to notice, how effective would notice given by the public defender, on what would be just another form, at the conclusion of trial really be, if it were mandated?

Another member remarked that she was being persuaded by those speaking in support of the new draft. But she still wondered whether a two-year rule might be useful. The discussion has assumed that the moment of "termination of the representation" was a simple, black-and-white fact; but in practice its

occurrence can be difficult to determine. She thought that a minimum retention period of two years might insure actual retention for at least some period of time in which the client could consider and take charge of the file while it still existed. But another member noted that the question of when termination actually occurred was in fact an argument for dispensing with that aspect of the Rule.

And Squarrell commented that, if a post-termination retention period were mandated, he would want it to be written as a flat, unvariable period; but even with that, it would be difficult to determine, in many cases, when the period began to run. Squarrell also noted that there remains the problem of defining what is the "file" that is the subject of the Rule, even as revised by the subcommittee. Members of the drafting group had tried out various definitions but had given up the effort. So there will remain the question of what the file consists of. Some lawyers keep drafts for a drafting history, others toss them. Some lawyers cull the file down to minimum documentation throughout, or at the end of, a representation; others keep everything. No attempt has been made to define the file beyond what is stated in Comment [1]: "A client's files, within the meaning of Rule 1.16A, consist of those things, such as papers and electronic data, relating to a matter that the lawyer would usually maintain in the ordinary course of practice." And that statement, he noted, is not given to expand or contract the concept of a file but only to distinguish the "file" — whatever it is — and Rule 1.16A from the "property" that is the subject of Rule 1.15 and Rule 1.16(d).

A member emphasized that the revision has entirely eliminated the importance of termination of the representation. Squarrell confirmed that that was correct, and he added that the lawyer has the choice of returning the file to the client or obtaining the client's agreement to its destruction, on the one hand, or giving the client notice of the intention to destroy the file thirty days or more after the notice. But that notice can be given to the client as early as the time the representation commences.

The member who had earlier noted that clarity had been a driving consideration for the drafting group added that the two-year period found in the earlier proposal had been developed from the two-year statute of limitations generally applicable to professional malpractice cases. But, he thought, that statutory period should be an irrelevant consideration in the drafting of the file retention Rule, for it would beg the question of when that statutory period began to run in a given case, a question that can be compounded by concealment, discovery, and similar issues. So the two-year period, serving as a reminder of a two-year statute of limitations, would prove to be misleading. Accordingly, it should not be a factor in determining the content of the Rule. In his view, the simplicity of the three possible situations was appealing: Keep the file, give the file back to the client, or destroy the file — nice and uniform. There is some arbitrariness; but in the end good, clear guidelines have been established.

A lawyer who had not previously spoken on the proposal echoed her approval of the proposal. She thought the proposal would be very helpful to lawyers. We will not be able to draft a Rule that perfectly anticipates every eventuality; this one does so to a reasonable degree.

The Chair asked for further comments, and Squarrell responded by suggesting that the question of whether this topic — file retention — belongs in the Rules of Professional Conduct, the ethics rules, is one worthy of further consideration. Perhaps, he suggested, the file retention rule should be lodged in the 251 series of rules.

To Squarrell's suggestion, another member responded that the rule, wherever lodged, would still be one that could give rise to disciplinary action; accordingly, it is appropriate to place it in the Rules of Professional Conduct, where lawyers expect to find those kinds of rules.

Another member noted that it could be promulgated as a Chief Justice's Directive, but she knew that many lawyers are unfamiliar with those directives and not likely to learn about such a rule.

A member also felt that this isn't quite of the same ilk or character as the other Rules within the Rules of Professional Conduct. He wondered whether it could be reduced to a comment to one of the other Rules. As a practical matter, he felt, a violation of this Rule was not likely to go before the Presiding Disciplinary Judge unless the conduct were part of a more extensive disciplinary problem.

A member noted the analog of the contingent fee, which is dealt with in great detail in C.R.C.P. Chapter 23.3 but is the subject of a cross-reference in Rule 1.5(c).

The member who had first suggested tucking this into a comment to some other Rule noted that the Rule as proposed by the drafting group is helpful.

Squarrell wondered whether the text could be moved to an appendix to the Rules, comparably to the "Model Pro Bono Policy, Recommended Model Pro Bono Policy for Colorado Licensed Attorneys and Law Firms." But another member noted that those provisions are actually contained within, and are a part of, the Rules of Professional Conduct, although they are expressed as aspirational and are not a basis for discipline.

A member agreed that the drafting group's proposal contained a lot of "practice management" material, but he pointed out that the same is true of Rule 1.15 regarding lawyers' funds and checking and COLTAF account management. In his view, this proposal is very helpful. It is not a square peg in a round hole; he noted, too, that other Rules govern the handling of client property with similar specificity.

A member commented that he understood that a number of criminal appointments in the counties with smaller populations are to "contract lawyers," and he wondered about the application of this Rule to them. A member who had been with the Public Defender's office before going into private practice said that her understanding was that these lawyers' law firms have formal contracts for such service and are as able to handle clients' files as are other private lawyers.

Another member noted that the answer for such "contract lawyers" probably lies in the concept of a "file" as outlined in Comment [1]: It is what a lawyer ordinarily keeps. If those kinds of lawyers do not ordinarily keep much, that tells us what their "file" is.

The Chair asked whether the term "lawyer in private practice" was appropriate. A member noted that the term is used in, for example, the trust account provisions of Rule 1.15.

A member wondered whether it would smooth the language to begin Rule 1.16A(a) with "Except as provided in paragraph (c) below" and to drop the introductory clause of Rule 1.16A(c), reading 'Notwithstanding paragraphs (a) and (b) above." But Squarrell defended the proposed wording, noting that it must be emphasized, in (c), that it superseded both (a) and (b). The member withdrew her comment.

The Chair noted that some members had small, stylistic comments, including with respect to the sentence in Comment [2] beginning, "Where lawyers are employed as public defenders . . . ." It was agreed that Squarrell could resolve those minor matters on his own after the meeting.

With only one objector, the subcommittee's proposal was approved with direction that it be submitted to the Court for adoption, with Squarrell authorized to attend to the stylistic concerns to which the Chair had just referred.

VII. *Amendments to Rules 3.6 and 3.8 Regarding Prosecutor Publicity.*

As reported in the minutes of the twenty-sixth meeting of the Committee, held on February 26, 2010, a subcommittee had been formed, with David Stark as its chair, to consider questions raised from outside the Committee about whether Rule 3.6(b)(2) — which permits public statements of "information contained in a public record" as an exception to the general proscription of materially prejudicial extrajudicial public statements — should be limited to preclude a prosecutor from making prejudicial extrajudicial statements, under that exception, of information that he has himself unnecessarily added to the public record.

At the Chair's request, Stark reported to the Committee on the subcommittee's deliberations and its recommendations.[1] He began by noting that the subcommittee had included a number of invitees in addition to members from within the Committee.

Stark reminded the Committee that Rule 3.8(f) requires a prosecutor to "refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused," with the exception only of "statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose." Rule 3.8(f) also requires the prosecutor to prevent those persons who are associated with the prosecutor "from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule."

The issue the subcommittee considered was whether the "safe harbor" of Rule 3.6(b)(2) was or should be applicable to prosecutorial statements that were otherwise subject to the special provisions of Rule 3.8. Stark pointed out that, because the two Rules, Rule 3.6 and Rule 3.8, contain circular cross-references, it was clear to the subcommittee that correction of some sort was required. He also noted that the subcommittee was aware of questions within the Office of Attorney Regulation Counsel about which of the two provisions prevailed.

The subcommittee also quickly determined that it would not be appropriate to limit prosecutors to "no comment" responses, effectively gagging them. It considered defining what constituted the "public record," as the phrase is used in Rule 3.6(b)(2), but determined that was not a feasible solution. It deliberated at length on a change that would give Rule 3.8 predominance over Rule 3.6, clarifying that the public record safe harbor was *not* available to relieve the prosecutor from the constrictions of Rule 3.8; but it felt that prosecutors often have legitimate reasons for making public statements based on the pubic record, and should not be precluded from doing so.

Ultimately, the subcommittee determined to make it clear, by amendments, that the safe harbor found in Rule 3.6(b)(2), as well as that found in Rule 3.6(c) — "a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client" — *do* apply to statements otherwise proscribed by Rule 3.8, so that prosecutors can rely on the Rule 3.6 safe harbors when making extrajudicial statements.

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1. The subcommittee's report had been included in the materials provided to the Committee prior to the meeting. Stark noted that the sentence found at the bottom of page 5 of that report, reading, "Finally, the subcommittee considered and agreed to recommend changes to Rules 3.6(b), 3.6(c), 3.8(f), and Comment [5] that would clearly subordinate the prohibition in Rule 3.8(f) to the safe harbors in Rule 3.8(b) and 3.8(c)." should have referred to Rule 3.6, rather than Rule 3.8, as the source of the safe harbors; it should have read, "Finally, the subcommittee considered and agreed to recommend changes to Rules 3.6(b), 3.6(c), 3.8(f), and Comment [5] that would clearly subordinate the prohibition in Rule 3.8(f) to the safe harbors in Rule 3.6(b) and 3.6(c)."

A member remembered that the inquiry which prompted formation of the subcommittee implied that the inquirer preferred that the public record safe harbor would *not* be available to prosecutors to override the restrictions of Rule 3.8. The subcommittee's recommendation, she pointed out, was exactly the opposite of that.

Stark responded that the inquiry had been sparked by perceived improper use of a thirty page "speaking document" — a very detailed probable cause affidavit — by a prosecutor in a recent investigation of a sitting judge for computer theft. But the subcommittee concluded that this sort of thing is not a practice of prosecutors within the state — it is possible, but it is not a practical problem. And, he pointed out, Rule 3.8 remains in the toolbox for use by the Office of Attorney Regulation Counsel in appropriate cases. Instead, the subcommittee felt that the problem that needed solving was the circularity in the existing text of the two Rules, which it resolved in favor of making the public record a safe harbor for lawyers in general under the trial publicity principles of Rule 3.6 and for prosecutors in particular under the special provisions of Rule 3.8.

No member offered any further comment on Stark's report or the subcommittee's recommendations.

Stark offered his thanks to Judge John Webb for the latter's work in preparing the initial draft of the subcommittee's report.

On a motion duly seconded, the Committee approved the amendments to Rule 3.6 and to Rule 3.8 that the subcommittee had recommended as Version B of its report and determined to recommend those amendments to the Court.

VIII. *Apparent Conflict between Rule 8.4(b) and C.R.C.P Rule 251.5(b).*

In the absence of Alexander Rothrock, who had chaired the subcommittee that had been formed at the twenty-seventh meeting of the Committee on June 7, 2010, to deal with apparent conflicts between Rule 8.4(b) and Rule 251.5(b), C.R.C.P. regarding violations of law as bases for discipline, the Chair called upon Judge John Webb to report on the subcommittee's deliberations and report.

Webb identified the conflict that presently exists between Rule 8.4(b) and C.R.C.P. 251.5(b) regarding a lawyer's violations of law that can lead to discipline. Rule 8.4(b) provides that it is professional misconduct for a lawyer to:"commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects." That provision thus requires a nexus between the fact of criminal act and the lawyer' honesty, trustworthiness, or fitness. In contrast, Rule 251.5(b) merely states that any "act or omission which violates the criminal law of this state or any other state or of the United States" is grounds for discipline; no connection need be shown between the illegal act and the lawyer's fitness to practice.

The subcommittee, Webb said, quickly determined that the conflict should be resolved. At present, lawyers are misled by Rule 8.4(b) to think that some nexus must be shown between the illegal act and fitness, whereas, in truth, they are subject to the unrestricted text of Rule 251.5(b). The subcommittee's recommendation is that the nexus requirement of Rule 8.4(b) be added to Rule 251.5(b)/ Webb noted that the subcommittee felt that the American Bar Association had gotten the matter right in its draft of Rule 8.4(b): There should be some link between the illegal act and the thing that the Rules deal with: the lawyer's professional conduct.

A member who was familiar with the views of the Office of Attorney Regulation Counsel, and who had served on the subcommittee, commented that the OARC had initially thought that there was no

problem that needed fixing. But it concluded that there really is an inconsistency between the two Rules that is indefensible. Looking at the ABA provisions for sanctions, the OARC realized that the characteristics identified in Rule 8.4(b) — honesty, trustworthiness, and fitness — are the guiding concerns for discipline and sanction, whether or not now stated in Rule 251.5(b), so it made sense to OARC to clarify the matter by appropriate amendment to that Rule.

Another member, who had served on the subcommittee, noted that there was another difference between Rule 8.4(b) and Rule 251.5(b): The latter, by its limitation of activating crimes to those that violate "state" and "United States" laws, excludes municipal law violations. The subcommittee, she pointed out, recommends adoption of the Rule 8.4(b) principle, which covers all criminal acts, including those which violate municipal codes.

The Chair pointed out that Rule 251.5 is not within the Committee's jurisdiction. But a member of the subcommittee reminded her that the subcommittee had been established as a joint subcommittee of both this Committee and of the Advisory Committee of the Office of Attorney Regulation Counsel. The Chair noted that, in similar situations in the past, the Committee has taken the position that it was making a recommendation to the other committee as to a matter that was properly within the jurisdiction only of the other committee and suggested that this approach can be taken on this occasion, too.

The Committee agreed to that course of action with respect to the subcommittee's proposals.

IX. *ABA Adoption of Colorado-Style Screening.*

The Chair noted, for the Committee's information, that Opinion 09-455, titled "Disclosure of Conflicts Information When Lawyers Move Between Law Firms," cites Comment [5A] to Colorado Rule 1.6 in support of its conclusion that

> Conflicts analysis cannot be accomplished without sharing conflicts information generally about the persons and issues involved in a matter. Because conflicts information is needed to detect and resolve conflicts of interest when lawyers move between firms, as a general matter and subject to the limitations stated below, disclosure of conflicts information otherwise protected by Rule 1.6 should be considered permissible as necessary to comply with the Rules.

X. *Adjournment; Next Scheduled Meeting.*

The meeting adjourned at approximately 11:15 p.m. The next scheduled meeting of the Committee will be on Friday, January 21, 2010, beginning at 9:00 a.m., in the conference room at the Office of Attorney Regulation Counsel, 1560 Broadway, 19th Floor.

RESPECTFULLY SUBMITTED,

Anthony van Westrum, Secretary

[These minutes are as approved by the Committee at its meeting on January 21, 2011.]