DRAFT: AUGUST 15, 2010
— ANTHONY VAN WESTRUM —

COLORADO SUPREME COURT

STANDING COMMITTEE ON THE RULES OF PROFESSIONAL CONDUCT

Submitted Minutes of Meeting of the Full Committee
On June 7, 2010
(Twenty-seventh Meeting of the Full Committee)

The twenty-seventh meeting of the Colorado Supreme Court Standing Committee on the Rules of Professional Conduct was convened at 9:00 a.m. on Monday, June 7, 2010, by Chair Marcy G. Glenn. The meeting was held in a conference room of the Office of Attorney Regulation Counsel on the nineteenth floor of 1560 Broadway.

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

I. *Welcome of New Member.*

The Chair welcomed James S. Sudler III as a new member of the Committee.

II. *Meeting Materials; Minutes of February 26,2010 Meeting.*

The Chair had provided materials to the members prior to the meeting date, including submitted minutes of the twenty-sixth meeting of the Committee, held on February 26,2010, prepared by secretary *pro tem* Cynthia F. Covell. Those minutes were approved with one correction.

III. *Rule 1.16A.*

The Chair opened the discussion of further changes to Rule 1.16A by noting that there were both procedural and substantive aspects that the Committee should consider.

A. *Process.*

As was reported in the minutes of the twenty-sixth meeting of the Committee on February 26, 2010, legislation was introduced in the 2010 Colorado General Assembly[1] at the instigation of the Colorado District Attorneys' Council ("CDAC"), to establish minimum periods for the retention of files by "attorneys of record" in criminal matters. By the time that legislation had been introduced, this Committee had submitted to the Supreme Court its proposal for the adoption of a new Rule 1.16A,

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1. H.B. 10-1251, "Concerning file retention by attorneys of record in felony criminal cases," available at http://www.leg.state.co.us/Clics/CLICS2010A/csl.nsf/BillFoldersHouse?openFrameset.

dealing with file retention issues by all lawyers, a proposal that did not distinguish between criminal and civil practice.

As indicated in the minutes of the February 26th meeting, the Committee authorized its member, John Gleason, to communicate with the CDAC and the sponsor of H.B. 10-1251 with a view toward ending the effort to legislate lawyer file retention requirements and to bring the matter to the Committee for development of a rule covering the topic. At the February meeting, it was thought that the matter could be dealt with by modifications to the Committee's proposed Rule 1.16A, which could have been considered at the hearing on that proposed Rule that the Court had already scheduled for June 10, 2010.

As explained in a June 2, 2010 letter[2] to the Clerk of the Supreme Court from Ted Tow, Executive Director of the CDAC, the matter progressed differently than the Committee had expected at its February 26th meeting. As indicated in that letter, the proponents of H.B. 10-1251 — then facing opposition from the Office of Attorney Regulation Counsel ("OARC") — obtained the bill sponsor's agreement to withdraw the bill[3] in the House Judiciary Committee; and a "Working Group" consisting of representatives from the CDAC, 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 was formed to consider the file retention matter. With that June 2nd letter, Mr. Tow submitted the Working Group's proposal directly to the Supreme Court. That proposal would, among other changes, add a new subrule to Rule 1.16A as it was proposed by the Committee to the Court on January 20, 2010, which new subrule would set specific retention periods for a "lawyer in a criminal matter." None of the participants on the working committee sought the participation of the Committee or advised it of their activity, despite the Chair's inquiries to the OARC about what drafting efforts might be occurring.

The Chair remarked that this episode provided a "teachable moment" for the Committee. She noted that the Committee has interests that might differ, on any issue, from those of any particular constituency, including in particular the OARC. However, it might be that others are sometimes not aware of the Committee's separate status and might think, for example, that it is represented by the OARC.

The Chair noted, also, that the Committee approaches its tasks regarding the Rules of Professional Conduct in an open and transparent manner, welcoming all interested persons to participate in or observe its deliberative processes; and, she added, the Committee takes the time needed to give a full, refined analysis of the substantive matters it takes up. Its processes differ in significant respects from the legislative process, which is subject to constitutional deadlines and in which interest groups may develop proposals without the transparent deliberation that characterizes the Committee's approach. The Chair made it clear that she would not want to see the Committee's processes compromised by activities that lie outside the bounds of transparency.

The members then discussed, at some length, the Committee's role in the rule-making process and the activities of other entities — such as specific interest groups and the General Assembly — that impact upon, or substitute for, rule-making. They recognized that some of them, such as those members who also participate in the legislation-monitoring functions of various bar associations and groups, are in positions to keep the Chair and the Committee informed of outside activities that may impinge upon rule-

2. A copy of which letter, together with the Working Group's proposed version of Rule 1.16A, was included in the materials provided to the Committee for this meeting.

3. *See* http://www.leg.state.co.us/clics/clics2010a/csl.nsf/fsbillcont3/22A44EB61BDA912B872576A80026BA85?Open&file=HB1251_C_001.pdf for indefinite postponement of H.B. 10-1251 in the House Judiciary Committee.

making or lead to legislation in lieu of rule-making. And they saw a need to educate the practicing bar about the Committee's role and processes.

But the members also understood that the 2010 legislative effort with respect to file retention requirements for criminal law matters had been terminated in that session on an understanding that the issue would be considered in the Supreme Court's rule-making process, so that it was now incumbent on the Committee to look again at its proposed Rule 1.16A and determine what changes, if any, might be proposed to deal with the particular concerns of the criminal law bar. The Committee would be constrained in that process by the fact that the General Assembly will convene again in January and that the General Assembly's own processes generally require that proposed legislation, such as any further proposal for file retention legislation in the absence of a Court Rule, be developed prior to that convening.

It was agreed that the issues raised by the Working Group should be considered by the subcommittee, chaired by Marcus L. Squarrell, that had developed the Committee's existing proposal for Rule 1.16a, and that the subcommittee should invite the participation of members of the Working Group.

B. *Substance*

The Committee then turned to the substance of the Working Group's proposal, as it had been submitted to Court with the June 2, 2010 letter from the CDAC, and to the task of deciding whether further changes should be made to Rule 1.16A as it had been submitted to the Court. It was understood that the Squarrell subcommittee would take the Committee's deliberations into account in its further consideration of the Rule with the Working Group.

A member noted that the structure of the Rule as proposed by the Working Group was confusing, jumping from requirements of apparently universal application to requirements specific to a criminal law file. Another member agreed, commenting that this Rule, which will be a recipe that lawyers will look to in the course of establishing specific file procedures, must be an understandable and usable guideline.

A member who was familiar with the advice typically given by the OARC about file retention requirements commented that, under the present state of the Rules and law, the advice is simple: There is no Rule; be aware of the possibility of a malpractice action if you destroy a client's files too soon. He added that the Working Group's proposal, and H.B. 10-1251 before it, are dominated by concerns that are specific to criminal law practice.

A member explained that the OARC had expressed the concern that H.B. 10-1251 would impose a new burden on that office to enforce file retention requirements. This member suggested that that concern could be eliminated by retaining the Rule's references, in the Committee' proposal, to the file retention requirements of "other law," whatever those other requirements might be. In that case, legislation could be adopted specifically covering files generated in criminal matters, and the Rule would not need to deal specifically with those matters. But it was noted that such a move might lead other practice groups, such as probate and real estate lawyers to seek similar, specific legislative solutions to their file retention dilemmas.

Another member agreed that it would be good to adhere to the principle that the Rules of Professional Conduct apply generally to all lawyers without practice classifications. But, he suggested, the Colorado comments could be expanded to explain the application of the Rule to specific practice areas. Then, only when appropriate guidance could not be obtained through such commentary, would it be necessary to add specific substantive provisions to accommodate particular practice areas in particular regards. Other members found that approach to be unsatisfactory.

A member noted that the issue of the application of the Rules to specific practice areas has arisen before. The Presiding Disciplinary Judge has dealt with the question of whether Rule 3.8, establishing special responsibilities of prosecutors, apply to Federal prosecutors, and immigration lawyers have argued that the Rules do not apply to their Federal practice. The member prophesied that soon lawyers with law degrees obtained in foreign jurisdictions will be "practicing" in Colorado — like the "flat earth," he said, the world of law is arguably "flat"; and, if we do not respond with appropriate Rules, particular practice areas will seek legislative solutions to their perceived special concerns. In short, he cautioned, this is a very complicated area.

A member asked whether the American Bar Association has provided guidance on the matter we are considering. The member who had just noted that the legal world is flattening noted that the Court has adopted Rule 220 dealing with out-of-state lawyers practicing in Colorado. Some of those lawyers, he said, come to the state to practice in its Federal courts under their licenses from other states, raising the question of whether the Colorado Court's ethics rules apply to their conduct here in the Federal cases. He pointed out that the prior Colorado rule that prosecutors disclose all exculpatory facts to grand juries was deleted because of its conflict with Federal principles.

The members turned to a consideration of the time available for the Committee's further work on Rule 1.16A. A member suggested that the Court be asked to postpone the hearing, presently scheduled for June 10, 2010, on the Committee's existing proposal for Rule 1.16A, with a view toward a meeting of the Squarrell subcommittee with the Working Group and a further meeting of the Committee in September to make a final determination about any changes to the proposed Rule 1.16A. In that manner, a modified Rule could be adopted in advance of the 2011 General Assembly and thereby preclude a legislative substitute.

The members were in general agreement that the Squarrell subcommittee should work with the Working Group to develop some modification to proposed Rule 1.16A that would accommodate the agreement that the district attorneys and the public defenders seem to have reached. There was a consensus that the task could be accomplished (although it might result in special provisions for criminal law matters) in a way that met the Committee's desire for a comprehensible guideline on file retention. And the members confirmed their agreement that the Chair could communicate directly with the other stakeholders to inform them about how the Committee intended to deal with the matter.

With regard to the pending June 10, 2010 hearing on Rule 1.16A — which hearing is also scheduled to cover proposed amendments to Rule 1.15 and Rule 3.8 — it was noted that no comments had been received regarding Rule 3.8. It was forecast that the Court would adopt Rule 3.8 as proposed and would cancel the hearing as to both Rule 1.15 and Rule 1.16A.[4]

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

The Chair referred the members to the letter dated April 14, 2010, that Alexander R. Rothrock had addressed to her as chair of this Committee and to David W. Stark as chair of the Supreme Court's Attorney Regulation Advisory Committee, which letter had been included in the meeting materials. In that letter, Rothrock pointed out that Rule 251.5(b) of the Colorado Rules of Civil Procedure states that "[a]ny act or omission which violates the criminal laws of this state or any other state, or of the United States," while Rule 8.4(b) of the Rules of Professional Conduct states 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."

4. Following the meeting, the Court canceled the scheduled hearing.

Rothrock noted that the Attorney Regulation Advisory Committee, to which he had also directed his letter and of which he is also a member, has appointed him to chair a subcommittee of that group to look into the matter. That subcommittee has not acted, pending consideration of the matter by this Committee.

Rothrock commented that the discrepancy between the two rules has been relevant to his law practice, which includes defense of lawyers in disciplinary matters. In short, he said, the apparent requirement of Rule 8.4(b) that there be a nexus is illusory, because discipline can be imposed under Rule 251.5(b) without regard to nexus.

Rothrock pointed out that Rule 8.4(b) was not changed in the 2008 adoption of the Ethics 2000 Rules; likewise, Rule 251.5(b) is a long-existing rule.

Rothrock cited the *DeRose*[5] disciplinary case, in which the hearing board found a guilty plea to a Federal crime to be grounds for discipline under Rule 251.5(b) and also under Rule 8.4(b), with disbarment being the appropriate sanction. To Rothrock, it was bizarre that the hearing board found it necessary to establish the requisite Rule 8.4(b) nexus and to find the Rule 8.4(b) violation, when the simple fact of the guilty plea would suffice for discipline, without further analysis, under Rule 251.5(b).

Rothrock's review of cases from other jurisdictions identified some in which the requisite nexus between the crime and the elements of Rule 8.4(b) was found and others in which it was not; Rothrock could find no rhyme or reason to the varying results. In similar circumstances in Michigan, he noted, the courts there have determined that the general provision of Michigan's analog to Rule 251.5(b) trumps the nexus requirement of its version of Rule 8.4(b). Rothrock's letter summarized his examination of Colorado cases: 121 cases finding violations of both Rules, fifty-two cases finding violations of Rule 8.4(b) but not of Rule 251.5(b) (a majority of them involving conditional admissions), and ninety-four cases finding violations of Rule 251.5(b) but not of Rule 8.4(b).[6] He commented that he did not

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5. *In re DeRose*, 55 P.3d 126 (Colo. 2002). In that case, the lawyer pled guilty to a Federal charge of aiding and abetting in structuring a transaction to avoid Federal financial institution reporting requirements. The Court upheld the hearing board's easy finding that the felony plea was grounds for discipline under Rule 251.5(b); the court also accepted the hearing board's determination that the lawyer's knowledge that his actions were illegal and the fact that he aided and abetted his client's illegal activities evidenced a "willingness to wrongfully circumvent, if not flout, the mandatory provisions of a federal law," and thereby constituted a violation of Rule 8.4(b). The hearing board determined that disbarment was the appropriate discipline, under § 5.11 of the American Bar Association's sanction guidelines, which prescribed disbarment where "the lawyer engages in any other intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that *seriously* adversely reflects on the lawyer's fitness to practice.." [Emphasis added.] The Court agreed:

> The crime of structuring and aiding and abetting to which DeRose pled guilty is a felony. Therefore, the crime is a serious crime . . . .
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> DeRose intentionally and dishonestly structured transactions to avoid reporting requirements imposed by federal law. An attorney has a special duty to respect, abide by and uphold the law. DeRose's criminal offense adversely reflects on his fitness to practice law.
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> DeRose argues that his conviction is not sufficient to warrant disbarment because the crime of structuring does not necessarily involve fraud or moral turpitude. Whether or not structuring is a crime involving fraud or moral turpitude under federal law, DeRose's conduct involved dishonesty and deceit which adversely reflects on his fitness to practice law. The Hearing Board rejected his contention that his conduct was innocent and not intentional. Based upon the record, the Hearing Board's finding is not clearly erroneous.

6. The counts included cases arising under prior analogs of the Rules; those cases finding violations of one or the other, but not both, of the Rules did not generally find *non*-violations of the other Rule but simply did not consider that other Rule.

have any information about OARC'S application of prosecutorial discretion — when and why they choose to proceed under one or the other or both provisions.

In short, the problem is that the apparently narrowing language of Rule 8.4(b), requiring a nexus between the crime and the lawyer's "honesty, trustworthiness or fitness as a lawyer in other respects," is misleading, since it promises a defense to discipline that is not available under the alternative Rule 251.5(b).[7]

In Rothrock's view, the Committee should consider the matter to be one of policy: Should the two provisions be reconciled now — they have stood side by side for many years — and, if so, in which direction should the two provisions be reconciled — with or without the requirement of a nexus? The Committee could determine that any violation of any criminal law is grounds for discipline, as is now the case under Rule 251.5(b), or it could make sure that the requirement of a nexus is preserved, either by proposing the deletion of Rule 251.5(b) or its amendment either to simply cross-reference Rule 8.4(b) or to repeat its wording.

The Chair appointed Rothrock to chair a subcommittee of the Committee to work with the subcommittee that the Advisory Committee has already appointed, with him as its chair, to consider the matter, with the expectation that the subcommittee would report to the Committee at its next meeting.

A member noted that the subcommittee should discern whether the ranges of "criminal conduct" covered by the two provisions are congruous — for example, do they both cover misdemeanor conduct?

Another member added that the subcommittee should also consider the differences as to a second lawyer's reporting duty, since the reporting duty of Rule 8.3 applies only to conduct that violates a Rule of Professional Conduct and does not apply to conduct that violates a Rule of Civil Procedure such as Rule 251.5(b).

V. *Code of Judicial Conduct*.

The Chair pointed out that the Colorado Code of Judicial Conduct has recently been repealed and reenacted. She appointed Judge John Webb to chair a subcommittee to review the interrelationships between that revised code and the Rules of Professional Conduct to determine what impact, if any, the revision has upon the Rules that are within the Committee's purview

A member agreed with the Chair's assessment that there may be differences, suggesting that the provisions governing *ex parte* communications between lawyer and judge may differ between the Code and the Rules: There are communications that the Code permits a judge to pursue that would cause a lawyer, at the other end of the communications, to violate Rule 3.5. This member noted that Oregon specifies, in its Rules of Professional Conduct, that an *ex parte* communication with a lawyer that is permitted to a judge is thereby permitted to the lawyer also.

Another member added that the Code's imposition of a reporting duty on judges for misconduct in their courts differs from the reporting requirements of Rule 8.3.

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7. To that, a member jokingly commented that the distinction would seem to be important only to the lawyer who was thinking about whether to commit a crime.

VI. *Lateral Hires.*

Eli Wald raised, as a new matter for the Committee's consideration, the question of "lateral hires." He explained the matter as follows: A seasoned lawyer, licensed in New York, joins a Colorado law firm in April. Because of the schedule of the Board of Law Examiners, the lawyer is not able to take the Colorado bar examination until July and must wait until October for admission to the Colorado bar. Until that admission, he is not authorized to practice law in Colorado; because he has taken domicile in Colorado, he cannot look to Rule 220 for interim authority to practice. This problem, Wald noted, is serious enough for a law firm associate; it is likely to be even more troublesome for a lawyer who practice for years at a partner level and comes to Colorado with a substantial "book of business" that he must attend to.

Another member commented that her law firm has experienced exactly this problem, one that involved a lateral hire of a senior-level associate who had passed the Colorado bar examination and was awaiting the October admission. She reported that the OARC investigated his pre-admission conduct and even extended its investigation to the lawyer within the law firm who supervised the newly hired lawyer. The matter was resolved with a diversion under the OARC processes.

But, this member noted, the problem lies within Chapter 18 of the Rules of Civil Procedure, governing admission to practice law in Colorado, and not with any Rule of Professional Conduct, other than Rule 5.5(a)(3) governing a lawyer's assistance of the unauthorized practice of law.

Joining the discussion, another member pointed out that Colorado is at a tipping point regarding these jurisdictional issues. This member is a participant on the Calling Committee of the Colorado Bar Association's Ethics Committee and, from that vantage point, sees the issue raised by callers in inquiries such as, "I am moving from Pennsylvania to Colorado with my wife and family, and I wish to continue to practice law, from Colorado, on my computer for my Pennsylvania-based clients." The existing rules do not permit that, she noted.

A member commented that the Court is aware of these kinds of issues, and he suggested that this Committee join with the Supreme Court Attorney Regulation Advisory Committee to consider them "at a deep level." He pointed out that the issues also implicate the concept of inter-state reciprocity, a concept that has been discussed but not really implemented.

A member who had participated in the efforts in the early 2000s that led to C.R.C.P. 220 commented that it had been a "hard sell" to get that out-of-state practice rule adopted.

Another member noted that similar questions are raised with regard to international aspects, such as the provision of legal services to Colorado lawyers by lawyers located in other countries, notably India.

The Chair agreed that a subcommittee should be appointed to consider these questions; she dubbed it the "Subcommittee on Cross-Border Practice." She appointed Wald to chair the subcommittee. And she agreed with a member's comment that Wald should invite the participation of lawyers who had participated in the Colorado Bar Association's C.R.C.P. 220 activities in the early 2000s, which had been alluded to previously.

Wald said the first task of the subcommittee would be to determine which among the many aspects of cross-border practice it should undertake to consider. He anticipated that the subcommittee would report back to the full Committee on that question, to receive further direction from the Committee about what the actual scope of the subcommittee should be. The Chair replied that she would leave it

to Wald and the subcommittee to determine what it would consider and whether to return to the Committee for further guidance in that regard if that was thought necessary.

VII. *Adjournment; Next Scheduled Meeting.*

The meeting adjourned at approximately 11:00 p.m. The next scheduled meeting of the Committee will be on Thursday, August 19, beginning at 9:00 a.m., in a conference room at the Office of Attorney Regulation Counsel.

RESPECTFULLY SUBMITTED,

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Anthony van Westrum, Secretary