COLORADO SUPREME COURT

STANDING COMMITTEE ON THE RULES OF PROFESSIONAL CONDUCT

Submitted Minutes of Meeting of the Full Committee
On August 21, 2009
(Twenty-Fifth Meeting of the Full Committee)

The twenty-fifth meeting of the Colorado Supreme Court Standing Committee on the Rules of Professional Conduct was convened at 9:05 a.m. on Friday, August 21, 2009, 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 at the meeting, in addition to Marcy G. Glenn and Justices Michael L. Bender and Nathan B. Coats, were Federico C. Alvarez, Michael H. Berger, Cynthia F. Covell, Thomas E. Downey, Jr., John S. Gleason, David C. Little, Judge William R. Lucero, Cecil E. Morris, Jr., Neeti Pawar, Helen E. Raabe, Henry R. Reeve, David W. Stark, Anthony van Westrum, Eli Wald, Lisa M. Wayne, Judge John R. Webb, and E. Tuck Young. Alexander R. Rothrock and Marcus L. Squarrell joined the meeting sometime after it commenced. Excused from attendance were Gary B. Blum, Nancy L. Cohen, Boston H. Stanton, Jr., and Judge Ruthanne Polidori. Also absent was John M. Haried. The term of Kenneth B. Pennywell expired effective June 30, 2009, and the Chair has reported to the Court that Mr. Pennywell has determined not to seek reappointment to the Committee.

I. *Meeting Materials; Minutes of May 8, 2009 Meeting.*

The Chair had provided a package of materials to the members prior to the meeting date, including submitted minutes of the twenty-fourth meeting of the Committee, held on May 8, 2009. Those minutes were approved as submitted.

II. *Further Consideration of Amendments to Rules 1.6, 3.8, and 8.6 Regarding Prosecutorial Discovery of Exonerating Evidence.*

At its twenty-fourth meeting, on May 8, 2009, the Committee adopted a proposal for amendments to Rule 3.8 regarding a prosecutor's duties with respect to exonerating evidence but determined to postpone further action on related proposals — (1) to add a Rule 8.6 regarding the duties of lawyers other than prosecutors with respect to exonerating evidence, and (2) to amend Rule 1.6, to provide a related exception to its duty of confidentiality — until receiving input from the American Bar Association's Center for Professional Responsibility. Following the May meeting, the Chair had sent an inquiry to the Center for Professional Responsibility, a copy of which was included in the materials provided to the members for the current meeting of the Committee, together with a brief reply from the director of the Center.

The Chair asked Judge John Webb, who chairs the subcommittee on these matters, to review for the Committee the ABA's response and to direct the Committee's further discussion of these matters.

Judge Webb reported that the Center for Professional Responsibility did not provide any response to the Committee's proposed Rule 8.6. As to the Committee's proposed modifications to the ABA's version of Rule 3.8, the Center's only comment was that it would prefer use of the single word "promptly" in place of the Committee's words "reasonable time" in Rule 3.8(g) and Rule 3.8(h), which

state the duties of prosecutors with respect to exonerating evidence; the Center's position was that "promptly" gives better guidance — "more direction" and a "clearer standard" — to both prosecutors and disciplinary authorities about the speed with which the prosecutor should act.[1]

The Chair noted that the reply received from the director for the Center gives some indication that they have divided our inquiry into two parts, for their separate consideration: (1) our modifications to their Rule 3.8, and (2) our independent addition of Rule 8.6 and a seventh exception to Rule 1.6. But they have not yet provided us with any significant response to our request for input.

Judge Webb suggested that the Committee could proceed to send to the Court its proposed changes to Rule 3.8, as approved at the twenty-fourth meeting, even though it does not now have any substantive reply from the ABA on Rule 8.6 and the Rule 1.6 exception and may not have any such reply before its next meeting.

The Chair noted that a proposal seems to be floating before the Criminal Justice Section of the ABA to add another exception to Rule 1.6 to allow a lawyer to reveal information regarding a *deceased* client if that information would be exculpatory as to another person. Perhaps, she suggested, the Committee should await development of that proposal.

The Chair also noted that the materials for the meeting contained Wisconsin's adoption of Rules 3.8(g) and (h), as proposed by the ABA. She noted that Colorado would be the second state to adopt those provisions if the Court were to act on the Committee's proposal. But she noted that the Committee had determined, at its twenty-fourth meeting, to delay submission of those amendments until it acted on the related proposals regarding new Rule 8.6 and the additional exception to Rule 1.6. She has also been awaiting the Committee's conclusion of its consideration of Rule 1.15 and Rule 1.16A, to which she now directed the Committee's attention.

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1. The email from John Holtaway, of the ABA CPR staff, to the Chair, dated August 19, 2008 and contained in supplemental materials the Chair provided to the members for this meeting, stated—

> We still strongly encourage the CRPC to recommend the adoption of new subsections (g) and (h) that do not delete the word "promptly" and substitute the phrase "within a reasonable time." Subsections (g) and (h) are addressing the reality that any criminal justice system may produce wrongful convictions and that prosecutors, as ministers of justice, have a duty to remedy such convictions in the face of newly discovered evidence. The Rules of Professional Conduct prescribe a prosecutor's professional responsibilities, functioning as substantive and procedural law. As your Committee's Report notes, the Rules should give a prosecutor as specific direction as possible when describing a required course of conduct. We would suggest that the term "promptly" gives prosecutors more direction than the term "within a reasonable time". A criminal defendant who is wrongly incarcerated, and possibly scheduled for execution, should be assured that a prosecutor who has discovered credible and material evidence will act promptly to disclose that evidence. In response to a prosecutor's concern that prompt disclosure to the defense might undermine the investigation of the exculpatory information or otherwise interfere with legitimate law enforcement interests, the disclosure requirement is qualified by the term, "unless a court authorizes delay."
>
> Additionally, prosecutors who may have violated the Rules of Professional Conduct are subject to disciplinary proceedings. In order for disciplinary counsel to successfully prosecute lawyers for violations of the Rules, the Rules must have as clear standards of professional conduct as possible. In this context as well, "prompt" disclosure is a much clearer standard for lawyers and disciplinary counsel to understand and apply than "reasonable time."
>
> The CRPC may want to keep its new Comment 7A in the proposed new subsections (g) and (h), but again we would suggest that you change "within a reasonable time" to "promptly."

III. *Further Consideration of Closed Client Files.*[2]

At its twenty-fourth meeting, on May 8, 2009, the Committee voted to recommend to the Court amendments to Rule 1.15 and the addition of new Rule 1.16A regarding the disposition of closed client files. However, the Chair informed the Committee, some ambiguity had been discovered in the Committee's recommendations following that twenty-fourth meeting; and she and Marcus Squarrell, chair of the closed client files subcommittee, had determined to bring the matter back to the Committee for clarification.

At the Chair's invitation, Squarrell informed the Committee that the ambiguity lay in the last sentence of Comment 3 to proposed Rule 1.16A, which read, "A client's receipt of papers forwarded from time to time by the lawyer during the course of the representation does not alleviate the lawyer's obligations under Rule 1.16A." He recounted that, following the twenty-fourth meeting of the Committee, Alexander Rothrock had taken the lead in preparing the Committee's proposals for Rule 1.15 and Rule 1.16A for submission to the Court. But, as reflected in the minutes of the twenty-fourth meeting, the Committee had not made a clear determination about where these Rules or their comments should express the concept that distribution of papers to a client during the course of a representation does not alleviate the lawyer's duties as to file retention following the termination of the representation: Was the idea to be retained as the last sentence to Comment [3] to Rule 1.16A or was it to be moved to Rule 1.16 as part of its Comment [9] or as a new Comment [9A]? Or was it to be found in both places?

After some discussion, the Committee determined to include the concept both as a new Comment [9A] to Rule 1.16 and as the last sentence of Comment [3] to Rule 1.16A. Thus, the Committee agreed with the proposal that had been included in the materials provided to the members for the meeting. It was noted that the two provisions are not actually redundancies, because the concept as found in Comment [9A] can be applied to the time immediately following termination of a representation while the concept as found in the last sentence of Comment [3] of Rule 1.16A is applicable to the fuller post-termination period that is dealt with by Rule 1.16A.

IV. *Further Consideration of Midstream Fee Adjustments under Rule 1.5(b) and Rule 1.8(a).*

At its twenty-fourth meeting, on May 8, 2009, and after a lengthy discussion of Rule 1.5(b), Rule 1.8(a), and the issue of a lawyer's "midstream" modification of the arrangement with the client for fees and expenses, the Committee had returned the matter to its subcommittee for further work. The Chair now requested the subcommittee chair, Alexander Rothrock, to explain its revised proposal for amendments to Rule 1.5(b).

At the beginning of the meeting, Rothrock had distributed the following proposal to the members, showing the subcommittee's revised proposal for amendments to the current text of Rule 1.5(b) and its Comment [3A]:

> Rule 1.5
>
> (b) When the lawyer has not regularly represented the client, the basis or rate of the fee and expenses shall be communicated to the client, in writing before or within a reasonable time after commencing the representation. ***The lawyer also shall communicate in writing to the client any change to the basis or rate of the fee or expenses.*** Except as ~~**provided in**~~ ***agreed by*** a ~~**written fee agreement**~~ ***lawyer and a client regarding reasonable periodic increases in the fee charged to the client,*** any material changes to the basis or rate of the fee or expenses are subject to the provisions of Rule 1.8(a).

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2. The Committee's proposal for the addition of Rule 1.16A was extensively revised at its twenty-eighth meeting, on August 19, 2010. The reader should review the minutes of that meeting, too. —*Secretary*

Comment

[3A] ~~For purposes of Paragraph (b), a material change to the basis or rate of the fee is one that is reasonably likely to increase the amount payable by the client or which otherwise makes more burdensome the original financial obligations of the client~~ ***Reasonable periodic increases in the fee or expenses to which the client expressly or impliedly agrees are not subject to Rule 1.8(a). The client's agreement to such periodic increases may be manifested by a provision for such increases in any written fee agreement, any communication required by the first sentence of Rule 1.5(b) to which the client assents, or a course of dealing between the lawyer and client. The reasonableness requirement of Rule 1.5(a) applies to increases in the fee or expenses.*** When a change in the basis or ***the*** rate of the fee or expenses is reasonably likely to benefit the client, such as a reduction in the hourly rate or a cap on the fees or expenses that ~~did not~~ previously ***did not*** exist, the change is not material ~~for these purposes~~ and Rule I.8(a) is ***does*** not ~~required~~ ***apply***.

Rothrock characterized the new proposal as a simple one: It would change Rule 1.5(b) to make it clear that the lawyer and the client may agree to periodic, reasonable increases in the lawyer's fee, an agreement which — as the comment explains — may be included in a written fee agreement, may be included in the written communication contemplated in the first sentence of Rule 1.5(b), or may be established by a course of dealing between the lawyer and the client.[3]

A member suggested that the word "by" in the phrase "Except as agreed by a lawyer and a client" should be changed to "between." That suggestion was not supported by other members and was not pursued.

After some discussion, the members agreed that the concept of changes in expenses, found elsewhere in the proposal, should be added to the phrase "regarding reasonable periodic increases in the fee" in the second sentence of Rule 1.5(b), so that it would read, ""regarding reasonable periodic increases in the fee or expenses." In the course of the discussion, one member noted that it was common for her employer, a municipal corporation, to enter into engagement agreements that allowed expenses as percentages of fees and as to which provisions might be included for the periodic alteration of those percentages. Another member suggested that similar adjustments might be provided for expenses for legal research.

A member noted that the concept of a "charge to the client" was implied throughout the rule and need not be stated in the text of the rule itself.

That member also asked why the text needed to refer to a "course of dealing between the lawyer and client." She reminded the Committee[4] that a course of dealing could not be a basis for satisfying Rule 1.5(b) for any representation that had commenced after the 1999 adoption of the requirement that the basis or rate of fee be disclosed to the client in writing before or within a reasonable time after commencing the representation. All agreed that the concept of a course of dealing was included only to accommodate representations commenced before the 1999 amendment to the Rule.

A member detected some sentiment that continued accommodation of the course of dealing concept might not be worth the complexity it added to the text.

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3. As discussed later in the meeting, an agreement by way of a course of dealing could occur only in the context of a representation that commenced before the Rule was amended in 1999 to add a requirement of at least a written communication regarding the fee.

4. *See* the minutes of the twenty-fourth meeting of the Committee, held on May 8, 2009, for a discussion of grandfathering of pre-1999 fee agreements founded on courses of dealing.

Another member suggested adding the clause "or, with respect to a regularly represented client," before the words "a course of dealing between the lawyer and client" in the comment, in order to clarify that the concept of a course of dealing can apply to an existing matter for an existing client but can also apply to a new matter for an existing client.

A member asked whether the text accommodating a course of dealing improperly implied that ground for a periodic modification of the basis or rate of the lawyer's fee or charges for expenses might be established by way of a course of dealing even for representations begun after 1999. But another member pointed out that such a ground could never be established in logic in that circumstance, since the *first* such modification, necessary to start such a course of dealing, could itself never be justified as having been made in a continuum constituting the supposed course of dealing. After some discussion among the members regarding that point, the members agreed that the logic worked to solve the perceived problem and to preclude any reliance on a supposed course of dealing in a representation that commenced after the 1999 change to the Rule.

A member spoke to state his approval of the entire proposal as he understood it: Whether one views the modifications as providing protections for the client or for the lawyer — in his view, the clarifications aided both parties — the proposal goes well beyond the minimum guidance provided in the ABA Ethics 2000 Rules, which only requires that "[a]ny changes in the basis or rate of the fee or expenses shall also be communicated to the client" and gives no warning that Rule 1.8(a) lies in wait. Further, lawyers have been concerned about the Rule 1.8(a) implications even when their written engagement agreements with their clients make careful provision for periodic changes in their hourly rates. There is no need for that concern, as we are clarifying. And we have continued to grandfather pre-1999 representations with appropriate accommodation to a course of dealing, not just to protect the lawyer but to reflect the deal as established by a principle of contract law.

A motion was made to adopt the subcommittee's proposal, with insertion of "expenses" and deletion of "charged to the client" as had been proposed in the course of the discussion.

A member asked whether the motion would also include the suggestion that had earlier been made to add the words "or, with respect to a regularly represented client," before "a course of dealing between the lawyer and client" in the comment. He explained that he thought the addition would give the Office of Attorney Regulation Counsel a basis — necessary in his view — for countering an overly-expansive reading of the course of dealing concept. In his view, that concept should not be available for the lawyer who has not "regularly represented" the client.

A member asked how that text would apply to a single matter that had been undertaken for a client, for which she had obtained a detailed engagement agreement but had failed to cover fee changes, but as to which she had in fact been making periodic fee adjustments for many years: Would that constitute a "course of dealing" as contemplated by the comment with the addition of a "regular representation" requirement?

The member who had suggested the addition of the "regular representation" text responded that she would be covered. He noted that his purpose had been to include the circumstance of a client whom the lawyer had represented regularly but for whom there had been a series of separate matters separated by gaps of time in which all matters had been concluded and no new matter had been undertaken. In his view that lawyer-client relationship could be grandfathered — if it had originated before the 1999 amendment to the Rule — and post-1999 increases in the rate of fee for new matters, without a new, Rule-1.5(b) written communication or written agreement would be appropriate under the course of dealing principle. He believed the subcommittee's proposal encompassed that situation but thought the addition of the clause would clarify the point.

The Chair then proposed what she characterized as a radically different approach to midstream fee adjustments from that which had been proposed by the subcommittee: She proposed the following:

1. Delete the last sentence of the subcommittee's proposal — reading "Except as agreed by a lawyer and a client regarding reasonable periodic increases in the fee charged to the client, any material changes to the basis or rate of the fee or expenses are subject to the provisions of Rule I.8(a)" — and substitute the following: "Any changes in the basis or rate of the fee or expenses shall also be promptly communicated to the client, in writing."

2. Delete all of Comment [3A] except that which would say that Rule 1.8(a) applies to fee increases.

3. Drop the proposed change to Comment [1] of Rule 1.8.

She explained that the Committee's drafting conundrum began with its desire to protect the client from a midstream change in fee structure — typically from an hourly rate to a contingency but sometimes from a contingency to an hourly rate — that is motivated by the lawyer's desire to increase the compensation to come from the representation, to the client's substantial detriment when compared to the original fee structure. In such a situation, the protections that Rule 1.5 affords to a new engagement — provide for the compensation and state it in writing — are ineffective to protect the client who has already selected the lawyer and agreed to a fee arrangement and who cannot now easily take the representation to another lawyer when faced with the first lawyer's demand for a change. Rule 1.8(a) applies to that situation, and the Committee only sought to make that application clear by the addition of a reference in Rule 1.5(b).

But the Committee's good intentions had led to confusion, confusion arising because well-intentioned lawyers try to conform to the Rules as they are written. They found Rule 1.8(a) to be troublesome for existing relationships because of its apparent treatment of *any* fee adjustment as a covered "business transaction" for which the lawyer was required to advise the client to get another lawyer to counsel the client on that business transaction. The solution, she suggested, was to drop the reference in Rule 1.5(b) to Rule 1.8(a). That would not alter the fact that Rule 1.8(a) continued to apply to such cases. But, a reasonable lawyer, seeking to comply with Rule 1.8(a), would, as that provision required, communicate the proposed fee change to the client, in writing. And the lawyer would necessarily comply with Rule 1.5's requirement that the fee, as adjusted, still be reasonable; thus the lawyer would also comply with the "fair and reasonable" aspect of Rule 1.8(a). Further, the written communication requirement of Rule 1.8(a)(2) is echoed in that of Rule 1.5(b). All that is left out from Rule 1.8, under the Rule 1.5 amendments as proposed by the Chair, would be its independent-legal-counsel requirements. So, for the normal, reasonable rate change, the "elaborate" aspects of Rule 1.8 were not, in her view, needed. For the "problematic" structural change, as from an hourly to a contingent fee, the panoply of Rule 1.8 provisions are needed, for such a change would probably not be "fair and reasonable." In short, the Chair concluded, the client is adequately protected by Rule 1.5 in the "normal" fee adjustment situation and no reference to Rule 1.8(a) is needed.

Further, the Chair argued, the Committee has assumed that the written communication requirement of Rule 1.5(b) does not apply if the lawyer has regularly represented the client and wants to make a regular or "periodic" change in the hourly rate. But that is not correct. It is true that there need be no written communication of the basis or rate of fee if there has been a regular representation of the client — a grandfathered situation. But the requirement of the second sentence of Rule 1.5(b) as currently before the Committee and which the Chair would retain — "The lawyer also shall communicate in writing to the client any change to the basis or rate of the fee or expenses" — would be applicable

whether or not the lawyer and the client had an ongoing relationship of which fee adjustments had been an aspect.

In answer to a member's question, the Chair said she was not proposing a reversion to the ABA Ethics 2000 version; she would retain the Colorado requirement that the basis or rate of fee be communicated to the client before or within a reasonable time after commencement of the representation.

A member noted that there was a pending motion to adopt the subcommittee's proposal with some modifications.

A member asked about the experience of the Office of Attorney Regulation Counsel with fee modification issues and was told that about fifteen percent of its investigations relate to fee agreements, some of which relate to periodic modifications. For the most part, however, the OARC sees the issue as a matter that is frequently raised by lawyers at seminars, where they are seeking guidance on how to comply with the Rules.

Upon a vote, the pending motion (not the Chair's alternative proposal) was adopted, with seven voting in opposition.

Justice Bender asked whether those who dissented on the vote for the motion would have supported the Chair's alternative, and five of the seven dissenters said that they would have done so. Justice Bender asked that they submit a minority report to the Court with the Committee's approved proposal for amendments to Rule 1.5(b) and Rule 1.8(a). The Chair agreed to draft that report and to circulate it among those dissenters for comments and agreement.

V. *Extension of CLE Requirements to Senior Lawyer Retaining Active Licenses.*

The secretary asked whether it would be appropriate for the Committee to consider extension of the Colorado mandatory continuing legal education requirements to each lawyer without age limit so long as the lawyer retains an active license. Currently, he noted, Rule 260.5, C.R.C.P., provides that "Any registered attorney shall be exempt from the minimum educational requirements set forth in these rules for the years following the year of the attorney's 65th birthday."

Another member noted that he understood that possibility was being actively looked at by others in the legal community. A second member added that he understood that the inquiry was a quiet one, directed specifically and only at the secretary.

A member who was familiar with the activities of the Board of Continuing Legal Education said he believed it was that committee, not this Committee, that was the appropriate forum for consideration of extension of the CLE requirements. He added that the question was entirely a political one, the wisdom of extension being self-evident, although he admitted to some difficulty in re-applying the requirement to lawyers who have been freed from it for some period of time.

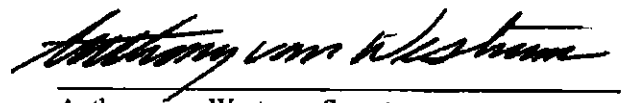
VI. *Expiration of Committee Memberships.*

The Chair noted that the terms of some of the Committee's members had technically expired on June 30, 2009. She expected each term — other than that of the member who had indicated a wish not to be reappointed — to be extended for another two years and, in answer to a member's question about the effectiveness of the vote of such a member on the issues considered at this meeting, assured the members that the extensions of the terms would be *nunc pro tunc* so that there would be no lapse in authority.

VII. *Adjournment; Next Scheduled Meeting.*

The meeting adjourned at approximately 10:30 p.m. The next scheduled meeting of the Committee will be on Friday, February 26, 2010, beginning at 9:00 a.m., in the Supreme Court Conference Room.

RESPECTFULLY SUBMITTED,



Anthony van Westrum, Secretary