COLORADO SUPREME COURT

STANDING COMMITTEE ON THE RULES OF PROFESSIONAL CONDUCT

Submitted Minutes of Meeting of the Full Committee
On January 21, 2011
(Twenty-Ninth Meeting of the Full Committee)

The twenty-ninth meeting of the Colorado Supreme Court Standing Committee on the Rules of Professional Conduct was convened at about 9:00 a.m. on Friday, January 21, 2011, by Chair *Pro Tem* Michael H. Berger. The meeting was held in a conference room at the Office of Attorney Regulation Counsel, 1560 Broadway.

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

In addition to the members of the Committee, John R. Posthumus, of Sheridan Ross, P.C., and Adam L. Scoville, of Re/Max, LLC, were present by invitation.

I. *Introductions.*

The Chair recognized Justice Monica Marquez, who has become the Court's co-liaison to the Committee, joining Justice Coats in that capacity and replacing now-Chief Justice Michael L. Bender. To help her feel at home, the Chair asked the members of the committee to introduce themselves, and they did.

II. *Meeting Materials; Minutes of August 19, 2010 Meeting.*

The Chair had provided a package of materials to the members prior to the meeting date, and submitted minutes of the twenty-eighth meeting of the Committee, held on August 19, 2010, were separately provided to the members prior to the meeting date. Those minutes were approved with one correction.

III. *Update on Pending Proposals*.

Justice Coats informed the members about the status of two proposals that the Committee had recently made to the Court — the proposal to amend Rule 1.5(b) and its comments, and Comment [1] to Rule 1.8, regarding modifications to a lawyer's fee agreement during the course of an engagement; and the proposal for amendments to Rule 1.15, and the addition of Rule 1.16A, regarding client file destruction (which, the Justice noted, the Committee had withdrawn and resubmitted to the Court in November 2010). Justice Coats noted that a hearing had been scheduled on the fee agreement proposals in October but had been canceled for lack of public comment; he did not expect the Court to schedule a further hearing on the modified client file proposal. He characterized both proposals as "on track" and said he expected the Court to take action on them soon

A member pointed to text of Rule 1.15 that is included in the Committee's proposed amendments to that Rule — albeit text that already exists in the current version of the Rule — and limits application of the Rule to "property of clients or third persons that is in a lawyer's possession in *connection with a representation*." He contrasted that operative text with that found in Comment [6] to the Rule, which states that the "obligations of a lawyer under this Rule are independent of those arising from activity other than rendering legal services. For example, a lawyer who serves as an escrow agent is governed by the applicable law relating to fiduciaries even though the lawyer does not render legal services in the transaction. See Rule 1.16(d) for standards applicable to retention of client papers." In his view, the comment indicates that the scope of the Rule itself is intended to be larger than just holding property in the course of a representation.

Other members questioned the accuracy of that reading of Comment [6]. On reflection, the member who had raised the point concluded that he had been mistaken and that Rule 1.15 is indeed limited in scope to property a lawyer possesses "in connection with a [legal] representation" and that the comment is consistent with that limitation.

IV. *Interplay between Rules of Professional Conduct and Revised Code of Judicial Conduct.*

At the Chair's request, Judge John Webb reported to the Committee on the activities of the subcommittee that had been formed to consider the interplay between the revised Code of Judicial Conduct and the possibility that lawyers could be sanctioned under the Rules for participating in conduct initiated by, and appropriate for, judges under the Code as it was revised effective July 1, 2010.[1]

Webb summarized the subcommittee's findings as follows: The deeper the subcommittee looked at the two sets of rules, the more it determined that any differences were either insignificant or explained, by rigorous reading, to encompass duties imposed in different capacities. The subcommittee concluded that there were no real conflicts in fact between the two regimes.

The subcommittee did detect one anomaly, regarding criminal conduct: A lawyer may be more subject to discipline under Rule 8.4(b), C.R.P.C.,[2] than a judge would be under the comparable provision in the Code of Judicial Conduct,[3] due to nuanced differences in the texts. The subcommittee considered melding the two in this regard by text that would cause Rule 8.4(b) to preempt Rule 1.1 but concluded that was not necessary. Webb said that conclusion was based on differences between the jurisdiction of the Judicial Discipline Commission, which regulates the conduct of judges, and that of the Office of Attorney Regulation Counsel, which can discipline former judges: If a judge were to escape the reach of the Judicial Discipline Commission by resignation from the bench, the judge would then come within the reach of the OARC. Accordingly, there is no need to add a preemptive provision to the Rules in this regard.

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1. *See* p. 50 *et seq.* of the materials provided for the meeting for the subcommittee's report.

2. Rule 8.b(b), C.R.P.C., provides, "It is professional misconduct for a lawyer to . . .(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects . . . ."

3. Rule 1.1, CJC, provides, in part, as follows:

> (B) Conduct by a judge that violates a criminal law may, unless the violation is minor, constitute a violation of the requirement that a judge must comply with the law.
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> (C) Every judge subject to the Code of Judicial Conduct, upon being convicted of a crime, except misdemeanor traffic offenses or traffic ordinance violations not including the use of alcohol or drugs, shall notify the appropriate authority* in writing of such conviction within ten days after the date of the conviction. . . .

Webb concluded by saying that, apart from two small changes, the subcommittee saw no need for any change to the Rules of Professional Conduct occasioned by the revision of the Code of Judicial Conduct. The two changes he referred to are identified at the end of the subcommittee's report and in two attachments to that report, which are memoranda prepared by subcommittee member Alexander Rothrock. The first change — which the subcommittee characterized as a housekeeping matter — would be to text in Comment [1] to Rule 1.12, dealing with restrictions on a lawyer's practice when the lawyer previously served as a judicial officer. The second change deals with the possibility that a lawyer who engages in an *ex parte* communication with a judge could be disciplined for violation of Rule 3.5, even if the judge initiated the communication *sua sponte* and even though, from the judge's perspective, the communication was proper under Rule 2.9 of the Code of Judicial as a communication for "scheduling, administrative, or emergency purposes."

Alexander Rothrock then explained the two changes to which Webb had referred, as follows:

A. *Rule 1.12 References to Code of Judicial Conduct.*

Rule 1.12 deals with former judges, arbitrators, and the like, and Comment [1] refers to provisions of the American Bar Association's Model Code of Judicial Conduct as promulgated in 1990. The subcommittee proposes changing those references to the current correlative provisions of the Colorado Code of Judicial Conduct and providing a more accurate paraphrase of one of those provisions, as follows:

> . . . . ***Paragraph III(B)*** ~~**Paragraphs C(2), D(2) and E(2)**~~ of the Application Section of the ~~**Model**~~ ***Colorado*** Code of Judicial Conduct ~~**provide**~~ ***provides*** that ~~**a part-time judge, judge pro tempore or retired judge recalled to active service,**~~ ***Part Time Judges*** "shall not act as a lawyer in ~~**any**~~ ***a*** proceeding in which ~~**he**~~ ***the judge has*** served as a judge or in any other proceeding related thereto." ~~**Canon 3(C)(1)(b)**~~ ***Rule 2.11(A)(5)(a)*** of the Colorado Code of Judicial Conduct requires a judge to disqualify himself or herself in a proceeding in which the judge served as a lawyer in the matter in controversy, or ~~**a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter**~~ ***the judge was associated with a lawyer who participated substantially as a lawyer in the matter during such association***. Although phrased differently from this Rule, those Rules correspond in meaning.

As Rothrock put it, it makes sense for the Colorado Court, speaking through this comment, to state the Court's purpose in other provisions it has adopted — its rules of conduct for Colorado judges — rather than to state the purpose of a model code adopted by an independent professional association that has no authority over Colorado judges.

A member who is familiar with the current activities of the Office of Attorney Regulation Counsel said he thought these changes would be acceptable to the OARC; he noted, too, that the OARC is currently working with the Judicial Discipline Commission to update the Commission's procedural rules. Accordingly, this member suggested, the numbering of provisions in the Code of Judicial Conduct may be changed by that effort; he proposed that this Committee postpone implementation of this suggestion from the subcommittee until that other task has been completed and the proper references to the Code are known.

In view of those comments, a member proposed tabling this proposal, and that motion carried.

B. Ex Parte *Communications under Rule 3.5 vs. Rule 2.9(A).*

Upon receiving clarification that the pending refinements to the Code of Judicial Conduct would not obviate the second of the two changes proposed by the subcommittee as it would the first of these changes, Rothrock undertook to explain that second matter to the Committee.

Rothrock explained that Rule 2.9(A) of the revised Code now permits a judge to communicate *ex parte* in certain circumstances.[4] The rule regulates a judge's *ex parte* communications concerning pending and impending matters with *any* person, including expert witnesses and court staff; importantly for the Committee's purposes, it also regulates a judge's *ex parte* communications with parties and their lawyers. As to lawyers, the Code Rule permits a judge to "initiate, permit, or consider [an] ex parte communication[] . . . for scheduling, administrative, or emergency purposes, which does not address substantive matters." (Rothrock commented that this authority was probably implied under the prior version of the Code but has now been made explicit.) Contrariwise, the Rule governing a lawyer's communications with judges, jurors, and other officials — Rule 2.5 of the Rules of Professional Conduct — permits a lawyer to communicate *ex parte* "with" a judge only if "authorized to do so by law or court order." Rothrock summarized by pointing out that Code Rule 2.9(A) grants authority to a *judge* for certain *ex parte* communications with a lawyer but that neither that Code Rule nor any Rule of Professional Conduct grants corresponding authority to the *lawyer* to participate in that communication, and that, in the absence of such authority from some source running to the *lawyer*, Rule 3.5(b) flatly prohibits the lawyer's participation in the communication.

To address the inconsistency between Rule 3.5 and Code Rule 2.9(A), the subcommittee has proposed the addition of a few words to Rule 3.5(b) and a change to the corresponding comment, as follows:

> RULE 3.5. IMPARTIALITY AND DECORUM OF THE TRIBUNAL
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> A lawyer shall not:
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> . . . .
>
> (b) communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order***, or unless a judge communicates ex parte with the lawyer under the authority of Rule 2.9(A)(1) or (4) of the Colorado Code of Judicial Conduct***;
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> [Comment] [2] During a proceeding a lawyer may not communicate ex parte with persons serving in an official capacity in the proceeding, such as judges, masters or jurors, unless authorized to do so by law or court order ***or a judge communicates ex parte with the lawyer under the authority of Rule 2.9(A)(1) or (4) of the Colorado Code of Judicial Conduct.***

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4. Rule 2.9(A), CJC, reads, in part, as follows:

> (A) A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties or their lawyers, concerning a pending or impending matter, except as follows:
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> (1) When circumstances require it, ex parte communication for scheduling, administrative, or emergency purposes, which does not address substantive matters, is permitted, provided:
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> (a) the judge reasonably believes that no party will gain a procedural, substantive, or tactical advantage as a result of the ex parte communication; and
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> (b) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication, and gives the parties an opportunity to respond.
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> . . . .
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> (4) A judge may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to settle matters pending before the judge.

Rule 2.9(A)(1) of the CJC authorizes a judge to engage in nonsubstantive ex parte communications with lawyers for scheduling, administrative, or emergency purposes. Rule 2.9(A)(4) of the CJC authorizes a judge to engage in ex parte communications with lawyers, with the consent of the parties, in an effort to settle matters pending before the judge.

Rothrock noted that such a change would not be unprecedented: DR 7-110(B) of the Colorado Code of professional Responsibility, like the corresponding provision in the ABA Model Code, contained an exception for a lawyer's *ex parte* communications "authorized by law, or by Section (A)(4) under Canon 3 of the Code of Judicial Conduct" — § (A)(4) of Canon 3 being the predecessor to Code Rule 2.9(A). Rothrock did not know why, and found it puzzling that, the revised ABA Ethics 2000 Rules did not carry over this exception; some of the jurisdictions that have adopted the Ethics 2000 Rules have reinserted the exception, as the subcommittee is now proposing that the Committee do.[5]

Under the subcommittee's proposal, Rothrock noted, a lawyer could not properly *initiate* a call that a judge could have made — an *ex parte* call about a scheduling, administrative, or emergency matter. The proposal would not permit that but, rather, would require that the communication be initiated by the judge.

Rothrock pointed out that the suggested addition to Comment [2] is not necessary but merely helpful and could be omitted by the Committee.

Webb added that the subcommittee endorses the two changes that Rothrock addressed.

A member commented that the purpose — clarification — of the two proposals Rothrock addressed was a good one, but he felt that the proposals themselves might cause more trouble than was necessary. As to the second proposal, he felt that the existing text of Rule 3.5(b) adequately permits the lawyer to engage in such communications as are "authorized by law"; he noted, in that regard, that Rule 65(b), C.R.C.P.,[6] permits a lawyer to have *ex parte* communications with a judge to set a hearing on a motion for a temporary restraining order. The member also suggested that there may be legal authority, other than the cited provisions of the Code of Judicial Conduct, for the judge's communication, but the subcommittee' suggested modifications would not encompass that other authority.

Another member voiced agreement with those comments and added that, perhaps, the two rules regimens should be different with respect to communications — that lawyers should not necessarily get off the hook just because the judge thinks the judge is acting appropriately.

A member, who said she had lots of experience with judges located in judicial districts with smaller populations and fewer court facilities than are found in the metropolitan districts, remarked that

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5. In his June 25, 2010 memorandum to the subcommittee, Rothrock speculated, "It is possible the ABA believed that the exception in Model Rule 3.5(b) for ex parte communications authorized by 'law' made specific reference to the CJC unnecessary, although the fact that DR 7-110(B) referred to both 'law' and the CJC indicates that the drafters of the Code believed otherwise." *See* p. 67 of the materials provided to the Committee for this Report.

6. Rule 65(b) provides—

> (b) Temporary Restraining Order; Notice; Hearing; Duration. A temporary retraining order may be granted without written or oral notice to the adverse party or his attorney only if: (1) It clearly appears from specific facts shown by affidavit or by the verified complaint or by testimony that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or his attorney can be heard in opposition, and (2) the applicant's attorney certifies to the court in writing or on the record the efforts, if any, which have been made to give the notice and the reasons supporting his claim that notice should not be required. . . .

many judges in those districts keep their own calendars, so that the lawyer is often told by court staff to contact the judge directly for scheduling purposes.

Another member said that any lawyer will want to protect himself or herself from challenge on account of improper contact with the judge and, therefore, will make sure opposing counsel is included in any communication with the judge. Transparency is important, she added.

A member who was familiar with water law practice agreed with the view that the suggested modifications Rule 3.5(b) could have the unintended effect of excluding other authority for a lawyer's communications. She noted that water referees frequently get involved in case settlements, where their job is to move the settlement process along; the *ex parte* communications inherent in those efforts should not be excluded by an inadvertent narrowing of the Rule.

A member asked whether the subcommittee had considered merely referencing the Code of Judicial Conduct as just one example of authority for *ex parte* communications.

In answer to that inquiry, Rothrock responded that the subcommittee had considered that approach and that some jurisdictions have done that. But Rothrock reemphasized the subcommittee's concern, which he had identified in his initial remarks, that the Code's grant of authority to the *judge* to communicate with respect to scheduling, administrative, or emergency matters does not constitute the requisite authority for the *lawyer* under Rule 3.5(b); the Code text appears to grant no authority whatsoever to the lawyer. So the approach of merely referencing the Code as an example of authority does not in fact solve the *lawyer's* problem.

Rothrock did agree with the comments that had noted the possibility of other sources of authority for a lawyer's *ex parte* communications. He pointed out that Federal judges are subject to a different code of conduct, one that was not included in the proposed reference to the Colorado Code; and, he agreed, there may be still other sources of authority. The subcommittee had suggested a reference that was limited to the Colorado Code simply because that is that the pre-2008 version of Rule 3.5(b) had done. The proposal could be expanded to include other such sources. Or, he suggested, the Committee could decide to simply state that, if the judge is authorized to have the communication, the lawyer may participate in it, whatever the source of the judge's authority may be.

On the separate question of whether resolution of the matter should be relegated to an expanded comment to Rule 3.5(b), Rothrock's answer was no, that should not be done. He adhered to the principle that a comment cannot alter or amplify the operative text of a Rule; comments are only for explanation. Thus, if Rule 3.5(b) continued to proscribe a lawyer's *ex parte* communications with a judge absent some authority running to the lawyer, the comment could not alter that proscription by claiming that it would not apply if there were authority running to the judge.

And, as to the suggestion that perhaps lawyers should be subject to a different standard and prohibited from engaging in communications that a judge might find proper from the judge's standpoint, Rothrock could not think why that would be good public policy. If the communication were proper for the judge, he could not imagine why it would not be proper for the lawyer, too. And he noted that it would be unwieldy to permit a judge to engage in communication with a lawyer, without sanction, while the lawyer would be subject to sanction for participating in that communication.

The Chair asked for the Committee's suggestions on what action to take with regard to these matters.

A member who had objected to the subcommittee's proposal said he favored the idea of adding commentary to Rule 3.5, and he suggested that it be written to clarify that the words "as authorized by law" in the text of Rule 3.5(b) includes authority running to the judicial officer who is engaged in the communication. This member believed that such a comment would not itself constitute substance but only explanation of the substance of the Rule's operative text.

Another member who had spoken in opposition to the subcommittee's proposal suggested that Comment [2] be modified similarly to the subcommittee's proposed modification but that the modification not be limited to the authority for the judge's communication that comes from the Code of Judicial Conduct.

To that suggestion, Rothrock objected that it does not solve the problem that the Rule text would still require some authority running directly to the lawyer, a requirement that the judge's authority, *from whatever source*, simply could not satisfy.

Members who were familiar with cases that have come before the Office of Attorney Regulation said they had never seen one involving an *ex parte* communication that was initiated by a judge. They had seen, of course, cases involving other kinds of *ex parte* communications violating Rule 3.5(b).

That observation, Rothrock commented, was irrelevant. He noted that the Rules deal with many matters that do not generate great numbers of grievances. One of the two members who had spoken about the OARC experience expressed his agreement with Rothrock's comment.

Webb seconded Rothrock's position that any comment which merely cited the possibility that the judge's participation in the communication might be authorized would not solve the lawyer's problem. He raised a further problem: What if the judge properly initiates a conversation — proper for the judge under the Code — but then "strays off the reservation" and into a discussion about substantive matters? Should the lawyer be free to follow the judge wherever the judge leads or must the lawyer remain obligated to tell the judge the lawyer is not comfortable going beyond the permitted topics of scheduling, administration, or whatever the emergency was?

The member who had first noted that there may be a justification for the lawyer's rule to be different from that established for the judge said that it was this possibility — the judge's departure from the reservation — that she had in mind when she made her comment.

Addressing the suggestion about expansion of the comment, Rothrock pointed to the approach taken by Arizona:[7] "Lawyers should refer to the Code of Judicial Conduct, Canon 3B(7) for authorized ex parte communications." In his view, that language was insufficient, since the referenced Code provision did not grant any authority to the lawyer.

Addressing excursions beyond the reservation, Rothrock said that was not a real issue, since the judge would have exceeded the judge's authority for the conversation and thus, under any principle, could not extend authority to the lawyer to follow.

A member who had favored the addition of commentary to resolve the matter said he agreed with Rothrock about two things — the fact that the Committee's efforts to deal with issues should not be limited only to issues that might likely be the subject of discipline and the fact that a lawyer is necessarily

7. *See* p. 67 *et seq.* of the material that had been provided for the meeting for the Arizona source.

in peril if the lawyer follows the judge into impermissible topics of conversation. This member said he was prepared to offer further text for Comment [2] if the Committee wished to take it up.

Another member, who had not previously spoken, interjected that, as Rothrock had stated, the problem could not be resolved by commentary that modified or added to substance stated in the Rule's text.

To that, a member who had also not spoken before said he guessed the proferred commentary would not contradict or add to the substance of the Rule but would merely explain what "authority" was contemplated by the Rule text.

But Rothrock again argued that the authority contemplated by the Rule text is that which runs to the lawyer. The text refers to the authority of the *lawyer*, not to the authorization of the *communication*. Absent modification of the Rule text, the lawyer will remain exposed.

A member, who had not previously spoken, moved to table the discussion, noting that a motion to table takes precedence and is not subject to debate.

After a brief comment by another member, the motion to table was adopted.

Rothrock indicated that the subcommittee would look further into the matter.

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

The Chair introduced guest John Posthumus, the chair of the Colorado Bar Association's Intellectual Property Section, and asked him to address the Committee about that Section's concerns about "testers."[8]

Posthumus explained that intellectual property lawyers often engage testers in connection with pre-filing and post-filing investigations for injunctions against patent, copyright, or trademark infringement, seeing that step as necessary to ensure their compliance with the reasonable inquiry requirements of Rule 11. Testers are used, too, he noted, in other areas of the law, such as civil rights law. But use of testers involves direct or indirect contact by the lawyer with unrepresented third persons or with third persons who are represented by other counsel, and, therefore, Rule 4.1 or Rule 4.3 is implicated. Posthumus said there has been much discussion in the national intellectual property bar about the ethical implications of the use of testers; indeed, a seminar held in Denver in April 2010 had focused on the matter.

Posthumus reported that the CBA Intellectual Property Section had undertaken a deeper look at the issues, forming a task force for that purpose and seeking input from a number of intellectual property lawyers. That task force had been chaired by the other guest at this meeting, Adam Scoville, and Posthumus turned the discussion over to Scoville.

Scoville reiterated that the issue of use of testers also arises in other areas of the law; for the intellectual property lawyer the question often is, "Are they still selling the product?" or "What are they still saying about the product?" That needs to be answered by going into commerce — by going into a store or going online to see what is actually happening. To be effective, such a foray obviously cannot

8. *See* p. 70–71 of the materials provided for the meeting for the inquiry Posthumus had addressed to the Chair.

begin, "I am representing the plaintiff that obtained an injunction against the sale of this product and am checking to see if you are still selling it."

Scoville contrasted what the Intellectual Property Section was dealing with from the "pretending" that made the news a few years ago, when members of the board of directors of a large computer company were found to have been pretended to be other members of that board and, as such, to have sought copies of the telephone records of those other members.

Even in the circumstances contemplated by the Intellectual Property Section, some "pretexting" is occurring: The tester does what a real customer might do — sit on the couch in the showroom — but does so without the ultimate goal of buying the couch. In fact, the tester is being dishonest about his purpose. In the civil rights context, he noted, the tester might be trying to determine whether the fuel retailer regularly prevents people of color from paying at the pump as other customers are permitted to do. Lawyers need guidance on this kind of pretexting — required to meet their evidentiary and procedural burdens but perhaps violative of Rule 4.1 or Rule 4.3.

The Chair asked the Committee whether a subcommittee should be formed to consider this inquiry.

A member responded that the Intellectual Property Section had raised a legitimate question, one that the Committee should consider. He noted that Colorado has existing law on the matter, referring to the *Pautler*[9] case. Pretexting, he agreed, arises in many areas of the law, including employment law. He suggested that the Committee would need to be careful in its considerations, since, in his view, *Pautler* now provides clear Colorado law on the matter. He also noted that the website for the American Bar Association Center for Professional Responsibility posts the audio of an October 2010 seminar on "The Ethics of Investigation."[10]

Another member agreed that a subcommittee should be formed to consider issues raised by the Intellectual Property Section. He said that he is the loss prevention partner for his law firm and has had to deal with the issues.

But another member cautioned that the Committee is not an "ethics committee" that issues opinions about the law applicable to particular issues. Rather, it is a committee that proposes rules, and modifications to rules, governing lawyer's professional conduct. He added that some jurisdictions — naming Virginia — have modified their rules to permit some kinds of these communications. The question, however, will be whether pretexting can ever be permitted in view of the lawyer's abiding duty of honesty.

Scoville noted to the Chair that there is little law on the topic and that most of the existing law goes only to the admissibility of evidence gathered on the basis of pretexting. He was not aware of any state's ethics opinion on any of the issues.

The Chair determined that a subcommittee would be established to deal with these issues.

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

10. *See* http://www.abanet.org/abastore/index.cfm?section=main&fm=Product.AddToCart&pid=CET10ENSC. The faculty for the seminar includes John Gleason, Attorney Regulation Counsel for Colorado.

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

At the Chair's request, David Stark, who is also chair of Colorado Supreme Court Advisory Committee on Attorney Regulation, reported that it was his understanding that the proposal that this Committee adopted in coordination with that advisory committee, to resolve the conflicts between Rule 8.4(b) and C.R.C.P Rule 251.5(b) as to the kinds of criminal conduct that can subject a lawyer to discipline, had been formally presented to the Court for its consideration.[11]

VII. *Court's Request for Committee Consideration of Lawyer Advertising.*

The Chair pointed the Committee to Item 6c on the meeting agenda, the request from an informal group called The Trial Lawyers of Colorado that the Court consider adoption of rules governing lawyer advertising, which request the Court had forwarded to the Committee.[12] The request suggested that advertising rules adopted by the Iowa supreme court would be appropriate for Colorado, including a rule reading as follows:

> Information permitted by these rules, articulated only by a single nondramatic voice, not that of the lawyer, and with no other background sound, may be communicated by radio or television, or other electronic or telephonic media. In the case of television, no visual display shall be allowed except that allowed in print as articulated by the announcer. All such communications shall contain the disclosures required by paragraph (h) when applicable.

The Chair commented that proposals to tighten up the regulation of lawyer advertising are made, dependably, every few years. The question he put before the Committee was whether a subcommittee should be formed to consider the matter. The members agreed that such a subcommittee should be formed.[13]

A member asked that the Committee give some expression of the scope of the subcommittee's undertaking, which, he noted, could be immensely time-consuming, including First Amendment considerations, surveys of action taken in other jurisdictions, and the like.

A member who was familiar with lawyer advertising issues as seen by the Office of Attorney Regulation Counsel said that these matters have been extremely perplexing to OARC, particularly because of the First Amendment implications and the difficulty of defining what a permissibly "dignified" advertisement might be. This member felt that Colorado's existing rules were sufficient; in his view, they were difficult to apply in actual cases but that difficulty stemmed from the nature of the problem, not from inadequacies in the rules. He added that there have not been many actual cases presented to OARC, not much activity.

The Chair observed that this would be a very big undertaking for the Committee and that it should not embark on the effort unless it really perceived a need to do so.

To that, the member who had first noted the immensity of the task said that the Committee should not proceed with the undertaking. Referring to the kinds of ads that are found in the telephone directories

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11. *See* minutes of the twenty-eighth meeting of the Committee, held on August 19, 2010, for the Committee's action on the matter.

12. *See* p. 90 *et seq*. of the meeting materials for the inquiry.

13. But, as noted further in these minutes, that decision was subsequently reversed.

and that offend some lawyers, this member said the problem was akin to "defining pornography." There are those, he said, who want to limit lawyer advertising to just that which "informs" and to exclude that which "incites."

A member suggested that the Committee take no action until Florida completes its current analysis of lawyer advertising. In answer to a question from the Chair, this member confirmed that the Iowa rules have withstood court challenge.

The Chair said he would take these comments as a motion that the Committee not set up a subcommittee, contrary to what had initially been decided.

With that probable result in mind, a member asked whether it would be appropriate for the Committee Chair to inform the inquiring group that the Committee is aware that the issues are being examined elsewhere and that the Committee might reconsider the matter at a later time, depending on the outcome in those other jurisdictions? This member was under the impression that, in the absence of dishonesty, the advertising lawyer usually prevails when the advertisement is challenged. But she was willing to look further if other states take some action.

A member, who had not previously spoken on the topic, noted that the inquiry seemed to be a proposal that the Court simply adopt the Iowa rules. To this member, it would be appropriate for the Committee to ask the inquirers to identify specific inadequacies and deficiencies in Colorado's current rules and to propose specific solutions to the problems so identified.

Another member said he read the inquiry as a move to curtail "egregious" advertisements, and he named some that he would put in that category, characterizing them all as "undignified."

Another member, who had not previously spoken, said she agreed with the suggestion that the inquirers be asked for specifics. Reading between the lines of the inquiry, she thought the inquirers did not think the current rules permit the shutting down of advertisements they do not like. But, in her view, it was not proper for the rules to set an elitist tone, with "lawyers above the commoner."

With one objection, a motion to desist from revisiting the existing advertising rules or setting up a subcommittee to deal with any of the issues was adopted. It was expected that the Chair would send an appropriate message to the inquirers.

VIII. *Proposal Regarding Rule 3.3, Remedial Measures for False Evidence, and Confidentiality*.

The Chair raised the last issue on the meeting agenda, being the problems confronted by a lawyer who is required by Rule 3.3 make disclosures to the court of materially false evidence that has been offered by the lawyer, the client, or a witness called by the lawyer, if that disclosure is necessary in order "to take reasonable remedial measures" respecting the false evidence. The problem, the Chair said, can arise any number of ways.

The Chair pointed out that Rule 3.3(c) expressly provides that the duty of disclosure prevails "even if compliance requires disclosure of information otherwise protected by [the confidentiality provisions of] Rule 1.6." But the Rule does not address whether it requires disclosures of communications that are subject to the attorney-client privilege. He said that the *Casey*[14] case arguably says that the privilege does not prevail over the disclosure obligation; but he noted that *Casey* does not

14. People v. Casey, 948 P.2d 1014 (Colo. 1997).

consider the separation-of-powers issue raised by the fact that the privilege is a legislative mandate. Most of the sparse authority from other jurisdictions requires disclosure of privileged communications under Rule 3.3, at least in a "nonevidentiary context," but the outcome might be different if the lawyer were called to testify, as evidence, about privileged communications or otherwise to present privileged evidence in an disclosure context.

The Chair noted that the Colorado Bar Association Ethics Committee has been trying, for a long time, to write an opinion on the issues. But an opinion is not a clarification of the Rule, and only the Court can adopt such a clarification. He asked whether a subcommittee should be formed to propose an amendment to the Rule to resolve the matter.

In answer to a question about the nature of the problem, the Chair said that Rule 3.3 expressly trumps the confidentiality requirement of Rule 1.6 but is silent about whether it requires disclosure of privileged evidence.

The member who asked that question asked how the Committee might resolve the problem. The Chair responded that the Court clearly has the constitutional authority to preserve the dignity and the integrity of Colorado courts, even if that means trumping the statutory privilege. Lawyers, he said, cannot disobey a rule of the court.

A member agreed with the Chair that Rule 3.3 trumps Rule 1.6 and that Rule 1.6 says nothing about the attorney-client privileged. There is a school of thought, this member said, that the attorney-client privilege is a free-standing duty of confidentiality that the legislature has imposed on lawyers. But that view is incorrect in this member's view, and, at best, those who think along those lines are confusing the Rule's confidentiality requirements with the general confidentiality principles of agency law. In his view, one cannot "breach" the privilege as one can breach a duty of confidentiality. The privilege is a rule of evidence, not a rule of conduct or a duty to a client or a principal.

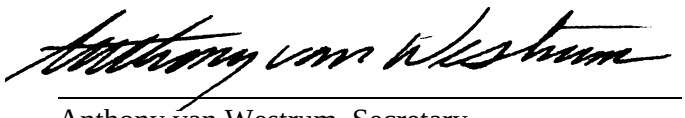
That member suggested that a comment could be added to Rule 3.3 to the effect that the disclosure requirement not only trumps confidentiality but also prevails over any application of the attorney-client privilege that would otherwise prevent the disclosure. He concluded his comments by noting that the lawyer's problems are not likely to be eliminated even by such a comment, for the conflict between duties and the privilege can arise in, for example, depositions; and lawyers may have to think fast on their feet when questioned by the judge who takes the position that he is not, in his questioning, looking for evidence and thus is not implicating the privilege.

At the Chair's suggestion, the Committee determined to table the matter until after the CBA Ethics Committee has issued its opinion on the issues.

IX. *Adjournment; Next Scheduled Meeting.*

The meeting adjourned at approximately 10:50 a.m. The next scheduled meeting of the Committee will be on Friday, May 6, 2011, beginning at 9:00 a.m., in the same conference room of the Office of Attorney Regulation.

RESPECTFULLY SUBMITTED,



Anthony van Westrum, Secretary