This file,
avrc012116 - All SCSCRPC minutes, Vol. 2,
contains the minutes of the twentieth meeting,
on 4/18/2008, through the minutes of the
fortieth meeting, on 6/5/2015

COLORADO SUPREME COURT

STANDING COMMITTEE ON THE RULES OF PROFESSIONAL CONDUCT

Approved Minutes of Meeting of the Full Committee
On April 18, 2008
(Twentieth Meeting of the Full Committee)

The twentieth meeting of the Colorado Supreme Court Standing Committee on the Rules of Professional Conduct was convened at 9:10 a.m. on Friday, April 18, 2008, 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, Nancy L. Cohen, Cynthia F. Covell, Thomas E. Downey, Jr., John M. Haried, Judge William R. Lucero, Cecil E. Morris, Jr., Judge Ruthanne Polidori, Henry R. Reeve, Alexander R. Rothrock, Boston H. Stanton, Jr., David W. Stark, Anthony van Westrum, Judge John R. Webb, and E. Tuck Young. Excused from attendance were John S. Gleason, David C. Little, P. Kathleen Lower, Kenneth B. Pennywell, and Eli Wald. Also absent were Michael H. Berger, Gary B. Blum, Helen E. Raabe, and Lisa M. Wayne.

I. *Meeting Materials; Minutes of November 30, 2007 Meeting.*

The Chair had provided a package of materials to the members prior to the meeting date, including submitted minutes of the nineteenth meeting of the Committee, held on November 30, 2007. Those minutes were approved as submitted.

II. *No Modification by United States District Court of Administrative Order Adopting Some of Colorado "Ethics 2000" Rules.*

The Chair referred the members to the minutes of the Nineteenth Meeting of the Committee on November 11, 2007, which outlined the promulgation of Administrative Order 2007-6 by the United States District Court for the District of Colorado. Under that order, the District Court adopted most, but not all, of the Colorado Rules of Professional Conduct as adopted by the Colorado Supreme Court effective January 1, 2008. As detailed in the minutes of the Nineteenth Meeting, the District Court's order raised questions about Rule 1.2(c)—

> By excluding the first sentence as well as the second, the District Court seemingly has precluded any agreement between the lawyer and the client regarding the scope of the representation, even in a formal representation that does not involve the unbundling of legal services for a pro se litigant that is contemplated by the second sentence. While the second sentence is a Colorado addition to the Model Rules, the first sentence (with a Colorado addition of the word "objectives") is a Model Rules provision.

—and Rule 4.4(b)—

> The discussion revealed that the administrative order is both over- and under-inclusive. It is over-inclusive in rejecting Rule 4.4(b) in its entirety, even though FRCP 26(b)(5)(B) applies only to a limited sub-category of inadvertently produced information; thus, under the District Court's local rules, a lawyer who receives an

inadvertently-transmitted document outside the discovery process may not invoke Rule 4.4(b). It is under-inclusive by declining to adopt only Rule 4.4(b) and not also Rule 4.4(c), at least insofar as those Rules apply to documents inadvertently produced in discovery.

Following the Committee's discussion at its Nineteenth Meeting, the Chair had advised the District Court of the Committee's concerns. At this Twentieth Meeting, the Chair reported to the Committee that she had recently been advised that Administrative Order 2007-6 will stand without change.

III. *Amendments to CRCP Rule 265 and CRPC Rules 1.0 and 5.4.*

David Stark reported that the amendments to CRCP Rule 265 (professional service companies) and CRPC Rules 1.0 and 5.4 (definitions and professional independence) — which the Committee had proposed to the Court in a joint effort with the Court's Standing Committee on the Rules of Civil Procedure — have been published for public comment by the Court.[1] The comment period ends July 15, 2008.

IV. *Rule 1.15(i)(6) and Bank Statement Reconciliations.*

Alexander Rothrock reported on the matter of Rule 1.15(i)(6). As detailed in the minutes of the Nineteenth Meeting of the Committee on November 11, 2007, lawyers have been questioning whether Rule 1.15(i)(6) permits a lawyer to delegate the task of trust account reconciliation to a non-lawyer. Rothrock noted that the prior version of Rule 1.15 had spoken in the passive voice about the reconciliation process, so that the question of who could, or must, perform the task had been evaded. Although the active voice has been used in the current rule, no particular thought had been given to whether the actor could only be a lawyer or could be another person acting under the lawyer's general supervisory oversight; read closely, that appears to mandate that a lawyer must conduct the reconciliation process and cannot delegate the task to a nonlawyer.

Rothrock had proposed one form of amendment at the Nineteenth Meeting. Under the Committee's instructions given at that meeting, Rothrock had met with Nancy Cohen and John Gleason, and as a subcommittee they have proposed that the ability to delegate the task, under a lawyer's general supervisory obligations that are contained in other Rules, be clarified by amending Rule 1.15(i)(6) as follows:

> Reconciliation of Trust Accounts. No less than quarterly, a lawyer ***or a person authorized by the lawyer*** shall reconcile the trust account records both as to individual clients and in the aggregate with the lawyer's trust account bank statement(s).

Rothrock commented that he had recently made a presentation to the Association of Legal Administrators and had learned there of their significant concern about the current text of the Rule. The proposed change, he felt, would resolve a matter that has troubled the legal community.

Nancy Cohen said that the Office of Attorney Regulation Counsel was satisfied with the proposed amendment because the delegating lawyer will be required to supervise the process under Rule 5.3.

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1. The posting for public comment can be found at http://www.courts.state.co.us/supct/rules/proposedrulechanges/CRCP_265changesmarked.pdf (for Rule 265) and at http://www.courts.state.co.us/supct/rules/proposedrulechanges/CRPC_1.0_5.4changesmarked.pdf (for Rules 1.0 and 5.4).

Upon a motion duly seconded, the Committee adopted the proposal to amend Rule l.15(i)(6) as described by Rothrock.

[As outlined in the minutes that follow regarding the discussion of Rule 1.5(b), the Committee considered, during that discussion, how the proposed changes to Rule 1.15(i)(6) and Rule 1.5(b), as well as some technical changes, might be presented to the Court for adoption.]

V. *Rule 1.5(b) and Modification of Fees in Existing Representation*.

The Chair directed the Committee to the memorandum she had provided to them, in the packet of materials for the meeting, outlining concerns that have been expressed about the second sentence of new Rule 1.5(b). (The text of that memorandum is attached to these minutes as Attachment I.)

The new provision reads—

> (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. Except as provided in a written fee agreement, any material changes to the basis or rate of the fee or expenses are subject to the provisions of Rule 1.8(a).

The Chair commented that the Committee had thought it was being "helpful" to clients when it added the second sentence but that the addition has caused much confusion for lawyers. She added that the memorandum she had provided lays out a number of the concerns that she has heard expressed and that there may be other concerns as well.

The Chair asked the Committee whether it wished to deal with the details of the issues at this meeting or refer the issues to an *ad hoc* subcommittee for an initial consideration. The Committee agreed that subcommittee consideration would be useful. Alexander Rothrock agreed to chair that subcommittee, and the other members were invited to join that subcommittee.

A member commented that she hoped these issues could be resolve quickly, for she knew they were of real concern to lawyers.

The Chair asked that the subcommittee return with a recommendation to the whole Committee at its next meeting. She added that she expected that the Office of Attorney Regulation Counsel would have a number of technical changes — she referred to "punctuation" as examples — to propose to other provisions in the Rules and thought all such changes, including those to be proposed to Rule 1.5(b), could be presented to the Court in a single package.

The Chair inquired of the attending justices whether they would prefer to see the changes that have already been proposed to Rule 1.15(i)(6) now, with other proposed changes to follow later, or to receive a single proposal encompassing all that the Committee determines are appropriate in these first months following adoption of the new Rules. Justice Bender responded that he thought it would be easiest for the Court to deal with a single package of proposals rather than to receive two or more sets over a period of time.

Summarizing, the Chair said that she would ask the Office of Attorney Regulation Counsel to circulate a memorandum identifying the changes that it would like to have considered, with a view toward the Committee having an electronic "virtual meeting" to approve those changes so that they and

the Rule 1.15(i)(6) change could be presented to the Court. Proposed changes to Rule 1.5(b) would follow at a later date.

VI. *ABA Proposal to Amend Rule 3.8 Regarding Prosecutorial Discovery of Exonerating Evidence*.

Judge John Webb reported to the Committee that the American Bar Association has adopted an amendment to Rule 3.8 regarding a prosecutor's duties upon learning of "new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted." The ABA adopted the amendment at its midwinter meeting in February 2008, with input from the National Association of District Attorneys. The Department of Justice, he noted, had opposed the amendment.

Judge Webb said that his own, unscientific survey had revealed strong opposition from one prosecutor and concern about difficulties in application of the revised rule from another prosecutor. He proposed that the Committee appoint an *ad hoc* subcommittee to consider whether the Committee should recommend the ABA's amendment to our Court. He added that the issues involved do not seem to implicate the value of uniformity in the Rules among the various states.

The Committee approved the formation of the subcommittee, with Judge Webb to be its chair.

VII. *Continuing Education about Ethics 2000 Rules*.

Judge Ruthanne Polidori recounted a gory tale of a harddrive crash that had taken with it a good deal of her detailed knowledge about the efforts that have already taken place in Colorado to educate the practicing bar about the new Ethics Rules, as the Court adopted them effective January 1, 2008. Accordingly, she said, she was unable to provide the Committee with an update on those activities.

A member commented that the practicing bar still has a lot of questions about the new Rules, as the concerns about Rule 1.5(b) discussed earlier in the meeting indicated. The apparent need to "hassle" long-time clients about regular fee increases, because of Rule 1.5(b), is one example of the concerns and confusions that the new Rules can raise with clients. But this member also found himself unable to answer other questions that lawyers had put to him about some of the new Rules.

Judge Polidori suggested that the Committee compile a list of "frequently asked questions" and their answers that could be provided to speakers for use in future CLE presentations. The Chair responded that the Committee should probably not embark on that effort until it has completed its own examination of issues such as Rule 1.5(b). But the judge said she was thinking not of Rule 1.5(b) and Rule 1.15(i)(6), which remain open items for resolution, but other questions that appear to be arising among lawyers. In reply to the Chair's comment that she was not aware of many other concerns, a member said he receives many inquiries about advance waivers of conflicts of interest. Another member said a number of practical issues have been raised during his presentations to groups of legal administrators; he said he would gather them and bring them to the Committee for discussion. The Chair suggested that the Committee could work with the Colorado Bar Association Ethics Committee's "hot line" to see what kinds of issues are being frequently raised through that portal. Perhaps a further article, dealing with these issues, could be placed in *The Colorado Lawyer*. Another member thought that was a good idea, noting that these are largely not new problems but "more of the same" that are perennially raised by lawyers. But the member who spoke about the issues raised by the legal administrators wondered what could be said in an article before we ourselves know the issues. Another member noted that lawyers are raising questions about the breadth of Rule 1.16 and "permissive withdrawal."

The discussion concluded with the formation of an ad hoc subcommittee, to be co-chaired by the Chair and Alec Rothrock, to coordinate efforts with the Colorado Bar Association Ethics Committee in developing an article on these kinds of issues.

VIII. *Closed Client Files*.

Alexander Rothrock reported that the Colorado Bar Association Ethics Committee is presently considering proposing an amendment to the Rules regarding the handling of "closed client files" — the files lawyers have accumulated on representations that have been concluded or otherwise terminated.

Rothrock noted that issues relating to those files come up constantly for lawyers and are without clear answer in the Rules. There is, he noted, an article on the subject in a 1989 issue of *The Colorado Lawyer* but little, if any, other guidance. The Ethics Committee hopes to be able to provide that guidance in the form of a new Rule on the matter. Rothrock said he expected the proposal to be presented within the next five years (the secretary assumes he was exaggerating for effect and that a more realistic timeline would be two or three years).

IX. *Retroactive Application of Ethics 2000 Rules*.

The Chair turned to the question of whether the new Rules are to be applied retroactively. For example, do the refined requirements of the conflicts provisions for client waivers of conflicts of interest to be confirmed in writing apply to waivers given before January 1, 2008, in matters that continue to present the conflicts covered by those waivers?

A member commented that she was aware of an arbitrator's ruling that the new Rule did apply to an existing waiver, requiring it now to be confirmed in writing.

The Chair pointed out that the issue of retroactivity is "a question of law" but added that it would not be the first example of questions of law that are dealt with or resolved in the Rules themselves.

It was noted that the Office of Attorney Regulation Counsel has not faced difficulties regarding the retroactive application of the new Rules. It has looked to the date of the conduct in question — if the conduct occurred before January 1, 2008, the waiver standard in effect under the pre-existing Rules has been applied. But it was admitted that it is not clear whether the new Rules' requirements regarding written waivers should apply to conduct occurring in 2008 that involves conflicts of interest as to which oral waivers had been given before 2008. Given that most conflicts issues "are pretty discrete," the question of conflicts-and-consents spanning the effective date of the new Rules simply has not been seen in practice.

It was suggested that the American Bar Association's Center for Professional Responsibility might have some learning about retroactivity that the Committee could tap.

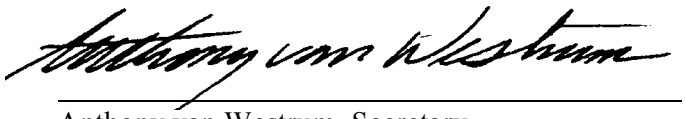
A member said he had researched some aspects of the retroactivity issue years ago. His recollection was that he had found a handful of cases indicating the guiding principles were those that governed the retroactive application of statutory changes, with a presumption that changes were to be applied prospectively only. The member spoke of a case arising under the Illinois ethics rules and involving a noncompetition agreement in a law firm partnership agreement that had been permitted under the rules when adopted but which would be proscribed under amended rules. His recollection was that, in a civil case seeking application of the noncompetition agreement, the Illinois supreme court had applied the new proscription and voided that agreement.

This general issue of retroactivity was assigned to an *ad hoc* subcommittee to be chaired by Alexander Rothrock.

X. *Adjournment; Next Scheduled Meeting.*

The meeting adjourned at approximately 12:00 p.m. The next scheduled meeting of the Committee will be on Thursday, July 17, 2008, beginning at 9:00 a.m., in the Supreme Court Conference Room.

RESPECTFULLY SUBMITTED,



Anthony van Westrum, Secretary

[These minutes are as approved by the Committee at its meeting on August 21, 2008.]

MEMORANDUM

April 14, 2008

TO: CRPC Standing Committee

FROM: Marcy Glenn

RE: Rule 1.15(b)

Background

A number of lawyers, both on and off the Standing Committee, have voiced concerns about the second sentence of CRPC 1.5(b), bolded below:

> (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. Except as provided in a written fee agreement, any material changes to the basis or rate of the fee or expenses are subject to the provisions of Rule 1.8(a).

The ABA Model Rule counterpart to the bolded sentence states: "Any changes in the basis or rate of the fee or expenses shall also be communicated to the client." Thus, the Colorado rule differs from the ABA rule in three respects: (1) the Colorado rule applies to only "material changes" to the fee, while the ABA rule applies to "[a]ny changes"; (2) the Colorado rule requires material changes to conform to CRPC 1.8(a), governing business transactions with clients, while the ABA rule requires only that the lawyer "communicate[ ]" the change to the client; and (3) the Colorado rule, but not the ABA rule, allows a "written fee agreement" to preempt the rule's requirements. If applicable, CRPC 1.8(a), in turn, requires an attorney-client transaction and its terms to be fair and reasonable to the client and fully disclosed in a reasonably understandable fashion, requires the lawyer to advise the client in writing of the desirability of seeking the advice of independent legal counsel and to give the client a reasonable opportunity to do so, and requires the client's informed consent in a signed writing to the essential terms of the transaction.

Comment [3A] CRPC 1.5, which is unique to Colorado, reads:

> [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. When a change in the basis or 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 exist, the change is not material for these purposes and compliance with Rule 1.8(a) is not required.

Issues

These are some of the issues raised concerning the meaning and wisdom of the bolded sentence in CRPC 1.5(b):

1. Many firms, large and small, are apparently confused about whether they comply with CRPC 1.5(b) if their engagement letters advise clients that their rates are adjusted periodically. Typical language might be: "These rates are adjusted at least annually, usually on January 1. Services performed after the effective date of the new rates will be charged at the new applicable rates."

2. If the answer to the first question is "yes" — that language similar to that quoted above does permit a subsequent increase in fees without triggering the requirements of CRPC 1.8(a) — and if firms regularly include such language in their engagement letters, does the bolded sentence provide much actual protection to clients? Is it worth having if as a practical matter it will not provide clients with the protections of CRPC 1.8(a)?

3. Does CRPC 1.5(a), which prohibits an unreasonable fee, already adequately protect clients from unreasonable fee increases? If yes, is it worth having the bolded sentence in CRPC 1.5(b)?

4. Does the Court intend the comment to mean what it says — that every increase in a fee is material, no matter how small?

5. The use of the phrase "written fee agreement" in the bolded sentence of the rule seems wrong when the rule does not require a "fee agreement" in the first instance. It requires only a communication setting forth the basis or rate of the fee, and even that is required only for new clients.

6. Does the bolded sentence in the rule apply retroactively? In other words, if the engagement began years ago, must the lawyer now send a new engagement letter explaining that fees will be adjusted periodically (or must the lawyer comply with Rule 1.8(a) every time it increases its fees)?

As an aside, the retroactivity issue raised in paragraph 6 above arises in other contexts, too. Perhaps most prevalent, the new rules require all conflict consents to be confirmed in writing. See CRPC 1.7(b)(4); 1.9(a). Does the "confirmed in writing" requirement apply to an ongoing engagement that began before the rules took effect, when there was only an oral consent requirement? Must the lawyer go back and confirm that earlier oral consent in writing?

COLORADO SUPREME COURT

STANDING COMMITTEE ON THE RULES OF PROFESSIONAL CONDUCT

Approved Minutes of Meeting of the Full Committee
On August 21, 2008
(Twenty-First Meeting of the Full Committee)

The twenty-first meeting of the Colorado Supreme Court Standing Committee on the Rules of Professional Conduct was convened at 9:00 a.m. on Thursday, August 21, 2008, 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 Michael H. Berger, Nancy L. Cohen, Cynthia F. Covell, Thomas E. Downey, Jr., John S. Gleason, John M. Haried, David C. Little, Judge William R. Lucero, Cecil E. Morris, Jr., Kenneth B. Pennywell, Judge Ruthanne Polidori, Helen E. Raabe, Henry R. Reeve, Alexander R. Rothrock, David W. Stark, Anthony van Westrum, Eli Wald, Judge John R. Webb, and E. Tuck Young. Lisa M. Wayne attended a portion of the meeting by telephone. Excused from attendance were Federico C. Alvarez, Gary B. Blum, and Boston H. Stanton, Jr.[2]

I. *Meeting Materials; Minutes of April 18, 2008 Meeting.*

The Chair had provided a package of materials to the members prior to the meeting date, including submitted minutes of the twentieth meeting of the Committee, held on April 18, 2008. Those minutes were approved as submitted.

II. *Consideration of "Housekeeping Amendments" to Rules as Adopted January 1, 2008.*

Among the materials provided to the members for the meeting was a report from a housekeeping subcommittee, composed of John Gleason and Alexander Rothrock, which proposed that the Committee recommend to the Court several minor, "housekeeping" amendments to the Rules of Professional Conduct as they became effective January 1, 2008. The Committee considered the subcommittee's proposals, and some other housekeeping proposals, in turn.

A. Proposal for Amendment of Rule 1.6(b)(2).

The housekeeping subcommittee proposed that Rule 1.6(b)(2) be amended to cure a perceived overuse of the word "reveal": The Rule currently reads (emphasis added)—

> (b) A lawyer may *reveal* information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
>
> (1) . . . .
>
> (2) to *reveal* the client's intention to commit a crime and the information necessary to prevent a crime.

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2. The appointments of Neeti Pawar and Marcus L. Squarrell to the Committee for terms expiring June 30, 2011, had not been announced by the Court at the time of the meeting.

Noting that the existing wording follows that contained in the American Bar Association Ethics 2000 text, the Committee determined not to recommend to the Court that the existing wording be amended.

B. Proposal for Amendment of Rule 1.15(d)(2).

The housekeeping subcommittee suggested that lawyers be permitted to designate their business accounts as "operating accounts"; presently, those accounts must be designated either as "professional accounts" or "office accounts." Rule 1.15(d)(2) would read as follows with that change:

> (d) Every lawyer in private practice in this state shall maintain . . .:
>
> (1) . . .
>
> (2) A business account or accounts into which all funds received for professional services shall be deposited. All business accounts, as well as all deposit slips and all checks drawn thereon, shall be prominently designated as a "professional account**,**" ~~**or**~~ an "office account**,**" ***"or an operating account"***.

The Committee approved this proposal.

C. Proposal for Amendment of Rule 1.15(k).

The housekeeping subcommittee noted that existing Rule 1.15(k) mandates that the bookkeeping records required by Rule 1.15 must be located at the law firm's "principal Colorado office." The provision currently reads (emphasis added)—

> (k) The financial books and other records required by this Rule shall be maintained in accordance with one or more of the following recognized accounting methods: the accrual method, the cash basis method, and the income tax method. All such accounting methods shall be consistently applied. Bookkeeping records may be maintained by computer provided they otherwise comply with this Rule and provided further that printed copies can be made on demand in accordance with this Rule. They shall be *located at the principal Colorado office* of each lawyer, partnership, professional corporation, or limited liability corporation.

The subcommittee proposed that the provision be modified to permit off-site storage of those records.

A member of the Committee suggested that this change be effected by deleting the entire last sentence of the provision while retaining the requirement that printed copies of the records be producible on demand.

But further discussion revealed other problems with Rule 1.15(k), such as confusion between the phrase "financial books and other records required by this Rule" and the phrase "bookkeeping records" and questions about the antecedent for the pronoun "they" in the last sentence of the provision. The members were also reminded that the Ethics Committee of the Colorado Bar Association had recently considered additions to Rule 1.15 to deal with closed client files, additions that were likely soon to be formally submitted to this Standing Committee by the Colorado Bar Association. The Committee decided to form a subcommittee to consider Rule 1.15 in more depth, and Rothrock agreed to chair that subcommittee.

D. Proposal for Correction of Comment [5] to Rule 1.17.

The housekeeping subcommittee noted that the cross-reference to Rule 1.5(***e***) that is presently found at the end of the second sentence of Comment [5] to Rule 1.17 should actually be to Rule 1.5(***d***). The comment discusses limitations on a lawyer's sale of an "area of practice" and clarifies that a lawyer who has sold an area of practice may not thereafter assume some responsibility for a matter undertaken within that area of practice and divide the resulting fees with another lawyer as would otherwise be permitted under Rule 1.5. The provision within Rule 1.5 that deals with fee division is Rule 1.5(d), not Rule 1.5(e) as currently cited in Comment [5].

The Committee approved the proposal.

E. Proposal for Correction of Comment [8] to Rule 7.2.

The housekeeping subcommittee pointed out that the fourth sentence of Comment [8] to Rule 7.2 improperly cites Rule 1.5(***e***), rather than Rule 1.5(***d***), as the provision permitting fee divisions when lawyers share joint responsibility for client representations or divide responsibilities for the representation between them.

The Committee approved the proposal.

F. Proposal for Amendment of Comment [7] to Rule 1.5.

The Chair informed the Committee that a Pennsylvania lawyer has suggested altering the penultimate sentence of Comment [7] to Rule 1.5 — which is taken from the ABA Ethics 2000 text — to correct a perceived error in its grammar. The suggested change is as follows:

> A lawyer should ~~**only**~~ refer a matter ***only*** to a lawyer ~~**whom**~~ ***who*** the referring lawyer reasonably believes is competent to handle the matter. See Rule 1.1.

The Committee approved the proposal.

G. Proposal for Caption for Comment [16] to Rule 1.5.

A member noted that Comment [16] to Rule 1.5 does not bear a caption. His motion to add one paralleling that found before Comment [12] — which reads, "Rule 1.5(f) Does Not Prohibit Lump-sum Fees or Flat Fees" — and referring to retainers died for lack of a second.

H. Proposal for Amendment of Comment [9] to Rule 5.7.

The Chair noted that a comma appears to be missing in the list of examples of "law-related services" contained in the second sentence of Comment [9] to Rule 5.7 as found in the Colorado Rules. The Colorado provision refers to "accounting trust services" as if to a single type of service; the ABA Ethics 2000 text divides the phase into two kinds of services by placing a comma after the word "accounting." She proposed that the Committee recommend to the Court that the missing comma be inserted.

The Committee approved the Chair's proposal.

III. *Processing Changes That Are Proposed by the Committee*.

The Chair noted that the Committee had, at its April 18, 2008 meeting, proposed a modification to Rule 1.15(i)(6) that would permit reconciliation of COLTAF and other trust accounts by nonlawyers acting under a lawyer's direction. She expressed her desire that this proposal, those approved by the Committee at this meeting, and others that the Committee might hereafter make for changes in the Rules formally proceed to the Court as proposals made by this Committee and not merely as proposals emanating from the Office of Attorney Regulation Counsel as results of its own activities.

A member added that the Committee should ensure that there is a centralized and organized process for reporting to the bar the changes that are made to the Rules as they are adopted. This member's preference was that changes be adopted in bundles, rather than issued piecemeal, so that the bar would be more likely to focus on and absorb them rather than lose sight of them in their multiplicity.

In response to that comment, the Chair noted the tension between grouping Rule changes in a manner to command attention and not unduly delaying important changes until some sufficient quantity had been proposed.

Justice Bender responded to a question from the Chair by saying there were no other changes to the Rules pending before the Court. He expected to raise with the Court, at its conference in September, these that the Committee considered this day, but he noted that all of the recent deadlines for processing changes and getting them into the rules publications had passed.

John Gleason noted that the website maintained by the Office of Attorney Regulation Counsel posts the Rules changes. But another member commented that the bar is not likely to check the OARC website as much as might be warranted.

IV. *ABA Proposal to Amend Rule 3.8 Regarding Prosecutorial Discovery of Exonerating Evidence*.

At the meeting of the Committee on April 18, 2008, Judge John Webb had reported to the Committee that the American Bar Association has adopted an amendment to Rule 3.8 regarding a prosecutor's duties upon learning of "new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted." Judge Webb had also reported that he had detected opposition to the ABA proposal, and the Committee had determined to form a subcommittee to consider the matter further, chaired by Judge Webb.

Judge Webb now reported that the subcommittee's initial discussions indicated a consensus that the ABA might have rushed the Rule 3.8 changes through without sufficient consideration. Among the ideas considered by the subcommittee was the expansion of the rule to include within its scope nonprosecuting government lawyers as well as prosecutors. Judge Webb noted that Jeffrey S. Pagliuca has participated on the subcommittee to provide a defense lawyer's perspective. The judge expected to provide a fuller report to the Committee at its next meeting.

V. *Retroactive Application of the Ethics Rules*.

The Chair reminded the Committee that it had, at its April 18, 2008 meeting, appointed a subcommittee to consider the issue of retroactive application of the changes contained in the Ethics 2000 Rules that were adopted by the Court at the beginning of 2008. The chair of that subcommittee, Alexander Rothrock, had provided a written report that had been included in the materials provided to the members prior to this meeting, a copy of which is attached to these minutes as Attachment I.

Rothrock explained that the question of retroactively had been raised in the context of the addition to Rule 1.5(b) of the sentence reading, "Except as provided in a written fee agreement, any material changes to the basis or rate of the fee or expenses are subject to the provisions of Rule 1.8(a)." Similarly, it has been asked whether the requirement of revised Rule 1.7 — that consents to conflicts be confirmed "in writing" — applies to a conflict arising after the adoption of the Ethics 2000 Rules but for which oral consent was given prior to their adoption.

The retroactivity subcommittee, composed of Rothrock, Federico A. Alvarez, and Boston H. Stanton, Jr., found little authority on the general question of whether changes to the Rules are to be applied retroactively or only prospectively. They spotted, in Paragraph [19] of the Preamble, text carried over from the 1993 "Kutak" version of the Rules stating that "The Rules presuppose that disciplinary assessment of a lawyer's conduct will be made on the basis of the facts and circumstances as they existed *at the time of the conduct in question* and in recognition of the fact that a lawyer often has to act upon uncertain or incomplete evidence of the situation." Although the subcommittee had doubts about the intended meaning of this sentence, they took it as some indication that the Rules are to be applied only prospectively, as it suggests that discipline is to take into account not only the factual context of the lawyer's conduct but also the content of the Rules in effect at the time that conduct occurred.

Rothrock noted that a Massachusetts court has construed the corresponding sentence in the preamble to the Massachusetts version of the Rules to mean that the Rules are to be applied only prospectively.[3] As indicated in the attached report from the subcommittee, courts in New Jersey and Washington have concluded that their rules of professional conduct are to be applied only prospectively, without reference to that sentence.

Rothrock noted that a conclusion that changes in the Rules are to be applied only prospectively is consistent with general case law considering the applicability of statutory changes, the presumption being that they are to be applied prospectively. It is consistent, too, with the Legislature's general guide, found in C.R.S. § 2-4-202 among the statutes governing statutory construction, that a statute is "presumed to be prospective in its operation."

As further evidence of prospectivity for the Rules, Rothrock pointed out that, in disciplinary cases considered by the Colorado Supreme Court after the "Kutak" Rules became effective on January 1, 1993 but involving conduct occurring before that date, the Court applied the rules in effect at the time of the subject conduct. And, in a case involving conduct that spanned the effective date of the Kutak Rules, the Court applied the respective versions of the Rules to the respective periods of conduct.

Rothrock referred to two Illinois cases in which the appellate courts refused to enforce contracts that violated public policy that was expressed in changes to the rules of professional conduct adopted after the contracts were entered into — one case involving a lawyer's noncompetition agreement and the other involving fee splitting. The courts refused to enforce the contracts, concluding that the modified rules were just new expressions of pre-existing public policies. Rothrock suggested that these two cases can be reconciled with prospectivity by considering them not as disciplining the lawyers for *entering into* the agreements but only as precluding enforcement of the agreements as written.

Another case evidencing that the Rules are to be applied only prospectively is the *Sather*[4] case, in which the Colorado Supreme Court chose not to discipline the lawyer for what it concluded in that

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3. *In re Estate of Southwick*, 850 N.E.2d 604 (Mass.App. 2006).

4. *In re Sather*, 3 P.3d 403 (Colo. 2000)

case was mishandling of a "nonrefundable retainer," concluding, "Because we have not previously made clear an attorney's obligation to deposit all forms of advance fees into trust accounts or explained the prohibition against "non-refundable" fees, we do not sanction Sather for violating these rules."[5]

A member commented that the Office of Attorney Regulation appears to have reached the same conclusion as has Rothrock's subcommittee — that the Rules are for prospective, not retroactive, application. In particular, it was noted that, in conflicts cases, the OARC applies the conflicts rule that was in effect at the time the consent to the conflict was given.

Another member, however, questioned this conclusion regarding conflicts. He asked why an oral consent given in 2007 should have continuing vitality after the amendment of Rule 1.7 to require written confirmation. It was, he said, a question that deserved discussion.

But that viewpoint was roundly criticized by the other members. It was pointed out as an analogy that the modification of Rule 1.5(b) in 2000 to require that the basis or rate of fees and expenses be communicated to the client in writing was not imposed upon representations begun before the effective date of that requirement. And it was noted that a client's actual awareness that he had consented to a conflict, or that he had accepted the method by which his legal fees were to be determined, once deemed sufficient even though not stated in writing, would not be diminished merely because a requirement for a writing had subsequently been added to the Rules.

A member who represents a large organization that is regularly asked to consent to conflicts said she does not expect that lawyers will approach her now for written confirmation of conflicts waivers the organization had previously granted.

A member asked what the Committee should do with the conclusion it has apparently reached, that Rothrock's subcommittee is correct in its views that the Rules are to be applied only prospectively. Alluding to the previous discussion about the location of records under Rule 1.15(k), another member responded that we might tuck this work product in David Little's garage. But another member more usefully suggested that Rothrock should present these conclusions about prospectivity in *The Colorado Lawyer*.

VI. *FAQs.*

The Chair and Alexander Rothrock told the Committee that they had discussed a process for providing answers to "frequently asked questions" or "FAQs" raised by the bar about the revised Rules, much as software suppliers provide answers to their users' FAQs — they thought that *The Colorado Lawyer* might be a suitable vehicle for that exercise, were it justified by the number of issues that could be discussed as FAQs.

To examine the need, they had surveyed members of the Colorado Bar Association Ethics Committee's "call-in committee," which is established to provide rapid answers to lawyers' ethics questions. But, apart from the frequently raised questions about whether fee increases for existing clients required Rule 1.8 treatment as suggested by the last sentence of Rule 1.5(b) and its Comment [3A],[6] they found that, at least so far, there are not enough frequently asked questions — either

5. *Id*. at 415

6. See the subsequent discussion of this topic in Part VII of these minutes.

about the newly-adopted Rules or about the rules of professional conduct in general including provisions carried over from the "Kutak Rules" — to justify establishment of an organized structure for answers.

In answer to a member's question, the Chair said they had in mind not a formal activity of the Committee under the Court's auspices but, rather, something more informal undertaken by individuals, perhaps as an extension of the roles members of the Committee have played to date in serving as a resource to continuing legal education efforts within the bar. But, again, she noted that there does not yet appear to be a sufficient mass of questions to justify further action at this time.

[At this time, Lisa Wayne withdrew from telephonic participation in the meeting.]

VII. *Fee Increases and Rules 1.5(b) and 1.8.*

Alexander Rothrock (who obviously had been busy on the Committee's behalf since its April meeting) referred the Committee to a report dealing with questions raised within the bar regarding the new, last sentence of Rule 1.5(b) and new Comment [3A] to that Rule. A copy of the report had been included with the materials provided to the members for the meeting, and a copy of the report is attached to these minutes as Attachment II.

These questions had first been raised with the Committee by way of a memorandum from the Chair to the Committee that was considered at the April 18, 2008 meeting and is attached to the minutes of that meeting. Rothrock's subcommittee was formed at that meeting and consisted of himself, Federico A. Alvarez, Michael H. Berger, Nancy L. Cohen, Thomas E. Downey, Jr., and David W. Stark.

The questions arise from the second sentence of Rule 1.5(b), which was added by the Committee when it proposed the adoption of modified ABA Ethics 2000 Rules to the Court. The entire provision reads—

> (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. Except as provided in a written fee agreement, any material changes to the basis or rate of the fee or expenses are subject to the provisions of Rule 1.8(a).

Rothrock noted that there is confusion about whether the exception stated at the beginning of the second sentence really means what it says — that a written fee agreement can provide for future, material changes in the basis or rate of fees or expenses, without compliance with the strictures of Rule 1.8(a) governing a lawyer's business dealings with clients when the basis or rate is actually changed. There is also concern that, despite the use of the word "material" in the Rule, the distinction made in Comment [3A] between decreases and increases in the basis or rate of fee means that *any* increase, however small, engages the requirements of Rule 1.8(a). [The memorandum that the Chair provided to the Committee for the April 18, 2008 meeting provides a more complete review of the issues raised by Rule 1.5(b).]

Rothrock pointed out that, by common law, the initial fee communication contemplated by the first sentence of Rule 1.5(b), and indeed most initial engagement agreements, are exceptions to the Rule 1.8 requirements for a lawyer's business dealings with a client. In fact, it could not be otherwise, since, if the client needed another lawyer to look over the terms of the engagement, she would need yet a third lawyer to look over the terms of that second lawyer's engagement for that task, and so on. (Rothrock alluded to unusual features, such as the client's grant of a security interest in her assets to

secure payment of the lawyer's fees, that might implicate the Rule 1.8 business-dealings limitations[7] even in the case of an initial engagement agreement).

Yet, he noted, other jurisdictions have frequently held that mid-stream alterations in the terms of the engagement, including fee increases, *are* subject to Rule 1.8 because the lawyer has become a fiduciary by that time and is not merely a person who is negotiating as an arms'-length party for an engagement that has not yet been put in place to create the lawyer-client relationship. He pointed in particular to an opinion of the Chicago Bar Association issued in the 1960s, before the existence of Rule 1.8, to the effect that mid-stream fee increases were presumptively fraudulent.

In this context, Rothrock recalled, the Committee had sought by its Comment [3A] to provide some guidance to the Colorado lawyer. But, as indicated by the Chair's April memorandum, our effort has led to confusion.

The subcommittee proposed changing the second sentence of Rule 1.5(b) into two sentences reading as follows:

> Whether or not the lawyer has regularly represented the client, a lawyer shall comply with the provisions of Rule 1.8(a) in the event of a change to the basis or rate of the fee. However, a lawyer is not required to comply with the provisions of Rule 1.8(a) if (1) the lawyer has informed the client of the potential change, in writing, before or within a reasonable time after commencing the representation, or (2) the lawyer and the client have agreed to periodic changes in the rate of an hourly fee through a course of dealing not governed by, or inconsistent with, a written fee agreement or confirmatory writing.

And Comment [3A] would read as follows:

> [3A] For purposes of Paragraph (b), a change in the basis of the fee is one that changes the structure of the fee agreement, such as a change from an hourly fee representation to a contingent fee or flat fee representation. A change in the rate of the fee is one that changes the method of calculating the fee based on an existing fee structure, such as a rate increase in an hourly fee representation. If the lawyer's fee agreement with the client permits the lawyer to increase the rate of the fee from time to time, the lawyer is not required to comply with Rule 1.8(a). Even if a lawyer in this situation is not required to comply with Rule 1.8(a), the lawyer is required to comply with Paragraph (a) of Rule 1.5, which prohibits a lawyer from making an agreement for, charging, or collecting an unreasonable fee. When a change in the basis or 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 exist, Rule 1.8(a) is inapplicable.

Rothrock commented that the opening clause — "Whether or not the lawyer has regularly represented the client" — announces that these provisions are broader in scope than the first sentence of Rule 1.5(b), which by its terms applies only if the lawyer has *not* regularly represented the client;[8] the

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7. Among other requirements, Rule 1.8(a) requires that the client be "advised in writing of the desirability of seeking and [be] given a reasonable opportunity to seek the advice of independent legal counsel on the transaction" between the client and the lawyer.

8. Note that the exception for a regular representation of a client, which the first sentence carves out of the general requirement that the lawyer provide a written communication to each client of the rate or basis of his fee, logically cannot apply to any client for whom the first representation is undertaken after the 2000 adoption of the written communication requirement.

principles governing changes in the basis or rate of fee apply even for "regular clients" whose fee arrangements were not initially communicated in writing.

Rothrock explained that there is a distinction between the "basis of the fee" — whether it is to be contingent on an outcome or is flat, hourly, or some combination of bases — and the "rate of the fee" — $X per hour, or Y% of the recovery, for example.

Rothrock said the proposal provides three exceptions to the application of Rule 1.8(a) to proposed changes to the basis or rate of fee. Those exceptions are as follows:

1. *Clause (1): Changes in the rate of fee that accord with notice (which the proposal terms 'informing the client') of the potential for such changes that is given to the client "before or within a reasonable time after commencing the representation"*. The proposal does *not* permit a lawyer to reserve a right to change the *basis* for the fee without complying with Rule 1.8(a). The proposal imposes no limitation based on the materiality or immateriality of the a change in the rate, although, of course, the resulting fee must be reasonable under Rule 1.5(a)'s stricture. The proposal requires that the notice of the potential for changes in the rate must be given in writing; this is, Rothrock said, a convergence of contract law and ethics rule. If the lawyer has communicated only a fixed rate and has not provided for the possibility of changes in that rate "before or within a reasonable time after commencing the representation," he will not be able to fit a subsequent rate change into this exceptions to Rule 1.8(a) so as to effect a unilateral rate change.

2. *Clause (2): Course-of-dealing changes*. Rothrock characterized Clause (2) of the proposal as contemplating the situation where the lawyer and the client have "been together for so long they cannot remember where the formal fee communication is or even if there ever was one," but the lawyer has changed the rate from time to time and the client has paid the bills reflecting the increases. As indicated in Clause (2), such a course of dealing could also supplant a contrary fee agreement or contrary written communication given pursuant to the first sentence of Rule 1.5(b).

3. *Implicit exception: Changes that benefit the client*. A fee decrease, a fee cap, or another change in the basis or rate of fee that only benefits, and does not disadvantage, the client — such as a fee cap put in place by the lawyer, after a representation is underway, for the benefit of a client who is struggling to pay the fees — may be effected without compliance with Rule 1.8(a).

Rothrock said the subcommittee completely revised Comment [3A]. As revised, it explains the difference between the *basis* and the *rate* of fee and then provides examples of the changes that may be made under the exceptions set forth in Rule 1.5(b) without compliance with Rule 1.8(a).

A member's question led to a wide-ranging discussion of the interplay between this proposal and Rule 1.8(a), what kinds of changes can occur and what ones typically occur, and what theory supports these provisions. It was explained that the initial fee arrangement or engagement agreement between the lawyer and her client for the representation is deemed to be bargained for by parties acting at arms' length but that, after that arrangement or agreement is established, the lawyer is deemed to be a fiduciary to the client and, therefore, is unable to act further to change the relationship except as is permitted under the strictures of Rule 1.8(a) or the exceptions established here in Rule 1.5(b). Yet, a member noted, the

first sentence of Colorado's version of Rule 1.5(b) already differs from the ABA Ethics 2000 text,[9] and he wondered why there was any need to deal with changes in the rate of fees. Another member replied that there are, in practice, not only switches from time-based fees to contingent fees, as when the client finds that she cannot keep up with the billings — these changes in the basis of computation must be made in compliance with Rule 1.8(a) — but also changes in the rates of fees; and it is appropriate to allow the engagement terms to contemplate those rate changes or for them to be effected under the other exceptions provided by this proposal and without compliance with Rule 1.8(a). Another member noted the need to prevent, say, a patent lawyer from taking advantage of a client by switching to a contingent fee when he belatedly recognizes that a patent he is prosecuting for the client might be usually valuable.

The discussion led to the comment that it will be necessary for the Committee to ensure that the ultimate proposal is very clear about what can be changed without Rule 1.8(a) compliance and to articulate clearly to the Court why the proposed changes are needed.

A member summarized the situation as follows, noting that this was reflected in the Chair's April memorandum: In written engagement agreements for representations that are likely to span considerable periods of time, many lawyers and law firms provide for subsequent increases in billing rates that can be put in effect without contemporaneous client approval. But the second sentence of Rule 1.5(b) and its Comment [3A], as adopted January 1, 2008, implies that *any* increase in the rate of fee must be processed in compliance with Rule 1.8(a), even those made pursuant to such engagement agreements.

In response to a member's question, Rothrock confirmed that the proposed second and third sentences of Rule 1.5(b) would apply in all cases, whether the rate of fee was established by way of the "regular representation" contemplated in the first sentence of the Rule, by a written fee communication from the lawyer to the client, or by a full-blown engagement agreement. And it would apply whether or not the relationship between the lawyer and the client could be characterized as an ongoing relationship or only for a special and limited purpose or single matter.

The member who had asked that question also asked for an explanation of why mid-stream changes in the rate of fee should be countenanced at all outside of Rule 1.8(a). That question generated a disagreement between two other members, one of whom believed that the current text of Rule 1.5(b) does not except from Rule 1.8(a) even a written agreement that contemplates fee increases and the other who believed that a written agreement for subsequent fee increases is just what the second sentence presently excepts from Rule 1.8(a). A third member suggested that there may be a question whether a statement in an engagement agreement of the kind mentioned in the Chair's April report — "These rates are adjusted at least annually, usually on January 1. Services performed after the effective date of the new rates will be charged at the new applicable rates." — leaves too much discretion in the lawyer and thus fails as an enforceable contract. A fourth member commented that the position taken in Comment [3A] that any increase in a fee is a material increase implicating Rule 1.8(a) puts in doubt the efficacy of any engagement agreement that attempts to provide for subsequent fee increases. Yet another member noted the confusion entailed in the reference, in the second sentence of Rule 1.5(b), for the only occasion in all of the Rules, to a "written fee agreement." But all agreed that the matter is confused by the existing second sentence of Rule 1.5(b) and is not illuminated by existing Comment [3A].

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9. The text Rule 1.5(b) as found in the American Bar Association Ethics 2000 Rules is as follows:

> The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.

A member took the occasion to commend Rothrock and his subcommittee for its work but added that it has provided a solution that is in search of a problem and is not a very good solution at that. If, he noted, a change is made with respect to a contingent fee, the change must comply with the detailed rules found in Chapter 23.3 of the Colorado Rules of Civil Procedure. And this proposal draws into the Rules of Professional Conduct concepts such as course-of-dealing that are more at home in the Uniform Commercial Code and are "not helpful" here.

A member noted that we are dealing not just with contract principles but with the ethical issues attendant to changes made to the lawyer-client relationship at a time when the lawyer's continued services are needed by the client and, thus, when the lawyer has gained the power to be coercive.

A member suggested returning to the model text of the ABA Ethics 2000 Rule: "Any changes in the basis or rate of the fee or expenses shall also be communicated to the client."

But the proposal to use the ABA text was faulted by another member because it would not adequately advise the lawyer of the fiduciary issues that arise in connection with changes in fee arrangements in existing lawyer-client relationships, which issues were noted years ago by the Colorado Court of Appeals in the *Barnhill*[10] case.

The Chair agreed with these latter comments. She noted that, when the Committee considered the ABA Ethics 2000 text in the course of its initial review of Rule 1.5, it thought that version was under-protective of the client's interests. That text did not even require a written communication about the fees, as the Colorado Rule has now required for a number of years. And, she recalled, the Committee had been concerned about the unequal bargaining power that the lawyer is likely to hold when a midstream change is made. While the requirement that fees be reasonable would protect against a midstream demand for an unreasonable fee, that would not protect against, say, a unilateral fee increase from $200 to $220, but such an increase would be unfair if not anticipated in the parties' arrangement and if obtained because of the lawyer's bargaining advantages.

But, the Chair said, it is important that the Committee deal with the concerns that have been raised, including those outlined in her April memorandum. The work of Rothrock's subcommittee has provided the Committee with a good starting point for further discussion, a discussion that would not be resolved at this meeting.

The Chair outlined four alternative paths for the Committee to take on this matter:

1. Do nothing, leaving the current text of Rule 1.5(b) and Comment [3A] unchanged;

2. Retain the current text of Rule 1.5(b) but modify Comment [3A] to clarify its impact, perhaps by adding examples bookending the issues;

3. Go back to the ABA Ethics 2000 text — although this had already been proposed and found by most of the members to be unacceptable;

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10. *Taylor v. Barnhill*, 470 P.2d 902 (Colo.App. 1970). "Plaintiffs' claim is based upon a fee arrangement entered into several months after the attorney-client relationship had been established. Once such an attorney-client relationship has been established, stringent rules govern the conduct of an attorney in seeking compensation. The attorney in such cases has the burden of proving that any agreements subsequently entered into concerning fees are fairly and openly arrived at, and that the services performed are reasonably worth the fee charged." *Id* at p. 906.

4. Change both Rule 1.5(b) and Comment [3A] in some fashion.

With these alternatives before them for a straw vote, the members divided fairly equally between those wanting to leave the text of the Rule unchanged but modify Comment [3A] and others wanting to improve both the Rule and the comment. Compromising, the Committee determined to take both paths at the same time, as alternative solutions.

The Committee agreed that one item that must be corrected is the unanchored reference to a "written fee agreement."

A member suggested shortening the text by altering the structure of the second and third sentences of the subcommittee's proposal for Rule 1.5(b) to this format: "Whether or not the lawyer has regularly represented the client, a lawyer shall comply with the provisions of Rule 1.8(a) in the event of a change to the basis or rate of the fee *unless (1) . . . or (2) . . . .*"

A member said he stumbled over the phrase "inconsistent with" at the end of the subcommittee's proposal, and he suggested that the text be changed to read "through a course of dealing not governed by, or notwithstanding, a written fee agreement."

To that another member asked why, if the existence of a course of dealing superseded all requirements for compliance with Rule 1.8(a), the text did not simply say that and leave it at that.

That comment prompted another to ask why, if a written agreement were in effect, a course of dealing should be permitted to override that agreement. Others were of the view that a course of dealing could, under general contract principles, alter a written agreement and that the text did no more than recognize that principle.

A member asked how Rule 1.8(a)'s strictures should be applied, if at all, to a modification in the basis or rate of fee that is reasonably viewed as being beneficial to the client.

A member noted with amazement that, eight years after the Court modified Rule 1.5(b) to require fee arrangements to be communicated to the client in writing, many lawyers still do not comply; she suggested that there is likely to be even less compliance with a writing requirement when changes in the rate of fee are instituted.

The members engaged in an extended discussion about the course-of-dealing concept, whether it could indeed contradict or could only supplement a written agreement, and whether the concept should be recognized in the Rule as revised. Among the matters noted was that the Rule as written contemplates a written communication from the lawyer to the client establishing the basis or rate of fee but does not require an "agreement" to that effect; accordingly, limitations on the capacity for a course of dealing to contradict a written *agreement* may not be applicable in this circumstance. But it was also pointed out that the text proposed by the subcommittee specifically contemplates a course of dealing that is "inconsistent with" the written agreement of the lawyer and client.

In response to a member's comment that the course of dealing concept proposed by the subcommittee was a new idea in the Rules, another noted to the contrary that the existing provision for a fee arrangement established in the course of a "regular representation" is itself a recognition of a course of dealing. But, this member added, the interjection of the specific contract principle of course of dealing as a modifier of an existing billing arrangement was problematic. She said our only goal should

be to create a safe harbor for the lawyer who has been regularly increasing fees for longtime clients over the years, increases that have been accepted by those clients.

Another member agreed with the last comment, adding that the Committee was simply trying to grandfather the unwritten fee arrangements entered into prior to the adoption of the written communication requirement in 2000 and to cover the existing client who comes to the lawyer for a new matter for which a new engagement agreement is not entered into.

In answer to a member's question, Rothrock said he was not aware that any other jurisdiction had tackled these issues in its rules.

A member noted that one important reason for the Committee's text that found its way into the existing Rules was to let the lawyer know that Rule 1.8(a) *is* generally applicable to changes in the lawyer-client relationship. That led another member to suggest that the text of Rule 1.5(b) be modified to emphasize the requirement for a writing to effect a change in the rate of fee and then use Comment [3A] to warn of the applicability of Rule 1.8(a). That suggestion did not find favor with another member, who argued that relegation of the matter to a comment would inhibit disciplinary action against improper fee changes; that, it was argued, would be particularly true if the "legislative history" showed that the provision had once been in the text of the Rule itself.

The Committee eventually ended its discussion without resolution of the issues.

VIII. *Expired Terms*.

The Chair noted that the three-year terms of appointment for a number of the members expired at the end of the preceding June. She reported that each of these members had been approached and had agreed to continue serving on the Committee if asked by the Court. She expected each of the terms to be extended by the Court when it met in its September conference.

IX. *Adjournment; Next Scheduled Meeting.*

The meeting adjourned at approximately 11:35 a.m. The next scheduled meeting of the Committee will be on Friday, October 31, 2008, beginning at 9:00 a.m., in the Supreme Court Conference Room.

RESPECTFULLY SUBMITTED,

Anthony van Westrum, Secretary

[These minutes are as approved by the Committee at its meeting on October 31, 2008.]

MEMORANDUM

TO: Marcy G. Glenn, Esq.,
Chair, Colorado Supreme Court
Standing Committee on the
Rules of Professional Conduct

FROM: Subcommittee Prospective or Retroactive Application of "New" Colorado Rules of Professional Conduct

DATE: August 11, 2008

SUBJECT: Prospective or Retroactive Application of"New" Colorado Rules of Professional Conduct

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At its April 2008 meeting, this Committee formed a subcommittee consisting of Federico Alvarez, Boston Stanton and Alec Rothrock to provide guidance to the Committee regarding when a lawyer's conduct will be subject to the pre-2008 version of the Colorado Rules of Professional Conduct, and when it will be subject to the 2008 version of the Colorado Rules of Professional Conduct. The subcommittee's conclusions are as follows.

Since the Colorado Supreme Court adopted them in 1993, and continuing to the present time, the Colorado Rules of Professional Conduct have contained the following sentence: *"The Rules presuppose that disciplinary assessment of a lawyer's conduct will be made on the basis of the facts and circumstances as they existed at the time of the conduct in question* and in recognition of the fact that a lawyer often has to act upon uncertain or incomplete evidence of the situation." *See* Preamble and Scope, Scope [19], Colo. RPC (2008) (emphasis added). This sentence derived from the American Bar Association's Model Rules of Professional Conduct and has not changed since the adoption of those rules in the early 1980s.

No published decision in this state has interpreted this sentence or addressed the broader issue studied by the subcommittee. However, a Massachusetts court of appeals interpreted the identical sentence to mean that "[d]isciplinary rules operate prospectively, not retroactively." *In re Estate of Southwic*k, 850 N.E.2d 604, 609 (Mass. App. 2006). Without reference to this language, courts in other states have reached the same conclusion in determining the applicable version of a rule of legal ethics. *See Comparato v. Schait*, 848 A.2d 770, 774 (N.J. 2004) (affirming denial of disqualification motion premised on participation of presiding judge's former law clerk in representation of defendant, in alleged violation of version of New Jersey equivalent of Colo. RPC 1.12(a) in effect at time of conduct in question); *First Small Business Company of California v. Intercapital Corp. of Oregon*, 738 P.2d 263,269-70 (Wash. 1987) (reversing imputed disqualification of law firm based on Washington equivalent of Colo. RPC 1.10 in effect at time of conduct; refusing to give retroactive effect to new Rule 1.10 in contrast to case where legislative intent to give statute retroactive effect was clear).

The principle that disciplinary rules operate prospectively and not retroactively is consistent with a Colorado statute stating that a statute is "presumed to be prospective in its operation." C.R.S. § 2-4-202. The statute also reflects a general principle of statutory construction, although the issue is more complex than this summary allows. *See Ficarra v. Dep't of Regulatory Agencies*, 849 P.2d 6 (Colo. 1993)

(describing prospective, retroactive and "retrospective" application of statutes in light of Colorado Constitutional prohibition against the passage of laws retrospective in application).

C.R.S. § 2-4-202 is also consistent with published disciplinary decisions issued by the Colorado Supreme Court in the aftermath of its adoption, in 1993, of the Colorado Rules of Professional Conduct to replace the Colorado Code of Professional Responsibility. In those cases, the Court applied the ethics code in effect at the time of the conduct in question, and both codes if the conduct occurred both before and after the change. *E.g., People v. Stewart*, 892 P.2d 875, 877 (Colo. 1995) (finding violations of analogous provisions of Code and Rules where conduct occurred both in 1992 and in 1993); *People v. Lopez*, 845 P.2d 1153, 1154 n. 1 (Colo. 1993) (although decision issued after adoption of Rules, applying Code because conduct occurred prior to effective date of Rules). In several civil cases from other jurisdictions, courts have applied ethics rules prospectively.

There is, however, ostensibly contrary case authority in one state, Illinois. In *Dowd & Dowd, Ltd. v. Gleason*, 693 N.E.2d 358,369 (Ill. 1998), the Illinois Supreme Court refused to enforce a noncompetition clause in a law firm partnership agreement because it reflected the violation of a rule of professional conduct that was not in effect when the parties signed the agreement. The court reasoned that the rule had retroactive effect insofar as the clause violated public policy. *Accord Paul B. Episcope, Ltd. v. Law Offices of Campbell and Di Vincenzo*, 869 N.E.2d 784, 793 (Ill. App. 2007) (following *Dowd*, refusing to enforce agreement between lawyers in different firms to divide fee based on agreement's violation of rule of professional conduct existing at time of litigation but not in effect during events in question). Similarly, Colorado courts have refused to enforce provisions of an engagement agreement on the grounds that they violated the public policy expressed in particular rules of professional conduct. *E.g., Jones v. Feiger, Collison & Killmer*, 903 P.2d 27, 34 (Colo. App. 1994) (refusing to enforce provision in engagement agreement that impaired client's right to make settlement decisions, as set forth in Colo. RPC 1.2(a)), rev 'd on other grounds 926 P.2d 1244 (Colo. 1996).

It is possible to reconcile the Illinois cases with the principle that rules of professional conduct are to be applied prospectively. The Illinois courts refused to enforce the contracts because they violated a public policy that did not exist at the time of their execution. There was no suggestion in either case that the lawyers had violated any rules of professional conduct. A disciplinary assessment of their conduct should have reached the conclusion that the lawyers engaged in no misconduct. The enforceability of contracts that violate a public policy that did not exist, or had not been expressed, at the time of their execution is a matter of contract law, not the law of legal ethics.

In summary, the version of the Colorado Rules of professional Conduct in effect at the time of a lawyer's conduct should govern the ethical propriety of that conduct. For example, a lawyer who, prior to 2008, obtained verbal client consent to a conflict of interest in compliance with the then-existing version of Colo. RPC 1.7 would not violate that rule if she did not confirm the consent in writing after January 1,2008, as required by the current version of the rule. The consent was valid at the time the client gave it and did not become invalid at the stroke of midnight on January 1,2008. Also, client consent to a conflict is not a contract subject to enforcement because the client is free to revoke it at any time. Comment [21], Revoking Consent, Colo. RPC 1.7.

On the other hand, a nonrefundable retainer provision in an engagement agreement signed prior to *In re Sather*, 3 P.3d 403 (Colo. 2000), may well have been unenforceable after the decision as contrary to the public policy against nonrefundable retainers. *Id.* at 412-13. The provision would not, however, have subjected to discipline the attorney who signed the engagement agreement. In fact, the Court in *Sather* did not discipline the respondent lawyer in that case for including a nonrefundable retainer in his engagement agreement. *Id.* at 414- 15.

MEMORANDUM

TO: Marcy G. Glenn, Esq.,
Chair, Colorado Supreme Court
Standing Committee on the
Rules of Professional Conduct

FROM: Subcommittee on Colo. RPC 1.5(b)

DATE: August 16, 2008

SUBJECT: Colo. RPC 1.5(b) and Comment [3A]

This memorandum attempts to address the concerns expressed about existing Colo. RPC 1.5(b) and related Comment [3A]. Many of these concerns are set forth in the Chair's dated April 14, 2008 memorandum to this Committee.

The Subcommittee's proposed Colo. RPC 1.5(b) and Comment [3A] are set forth immediately below, followed by the existing Colo. RPC 1.5(b) and Comment [3A] for comparison. The highlighted language in the proposed rule and comment represent language not found in the existing rule and comment. In other words, the Subcommittee recommends revision of the entire rule and comment except for the first sentence of the rule.

Significantly, the Subcommittee recommends the elimination of the concept of materiality from the rule and comment. The proposed rule also reflects a distinction between changes to the basis of a fee, on one hand, and changes to the rate of a fee, on the other. This distinction is explained in the proposed Comment. The proposed rule also contains an exception to the rule requiring all changes to comply with Colo. RPC 1.8(a). The purpose of this exception is to avoid the disturbance of longstanding fee arrangements where no written fee agreement or other writing governs the fee arrangement and the "course of dealing" between the lawyer and client has been for the lawyer to charge hourly fees that increase from time to time.

Proposed Colo. RPC 1.5(b) and Comment [3A].

(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. Whether or not the lawyer has regularly represented the client, a lawyer shall comply with the provisions of Rule 1.8(a) in the event of a change to the basis or rate of the fee. However, a lawyer is not required to comply with the provisions of Rule 1.8(a) if (1) the lawyer has informed the client of the potential change, in writing, before or within a reasonable time after commencing the representation, or (2) the lawyer and the client have agreed to periodic changes in the rate of an hourly fee through a course of dealing not governed by, or inconsistent with, a written fee agreement or confirmatory writing.

[3A] For purposes of Paragraph (b), a change in the basis of the fee is one that changes the structure of the fee agreement, such as a change from an hourly fee representation to a

contingent fee or flat fee representation. A change in the rate of the fee is one that changes the method of calculating the fee based on an existing fee structure, such as a rate increase in an hourly fee representation. If the lawyer's fee agreement with the client permits the lawyer to increase the rate of the fee from time to time, the lawyer is not required to comply with Rule 1.8(a). Even if a lawyer in this situation is not required to comply with Rule 1.8(a), the lawyer is required to comply with Paragraph (a) of Rule 1.5, which prohibits a lawyer from making an agreement for, charging, or collecting an unreasonable fee. When a change in the basis or 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 exist, Rule 1.8(a) is inapplicable.

Existing Colo. RPC 1.5(b) and Comment [3A].

(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. Except as provided in a written fee agreement, any material changes to the basis or rate of the fee or expenses are subject to the provisions of Rule 1.8(a).

[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. When a change in the basis or 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 exist, the change is not material for these purposes and compliance with Rule 1.8(a) is not required.

COLORADO SUPREME COURT

STANDING COMMITTEE ON THE RULES OF PROFESSIONAL CONDUCT

Approved Minutes of Meeting of the Full Committee
On October 31, 2008
(Twenty-Second Meeting of the Full Committee)

The twenty-second meeting of the Colorado Supreme Court Standing Committee on the Rules of Professional Conduct was convened at 9:00 a.m. on Friday, October 31, 2008, by Chair Marcy G. Glenn. The meeting was held in the Supreme Court Conference Room on the fifth floor of the Colorado State Judicial Building.

Present in person or by conference telephone at the meeting, in addition to Marcy G. Glenn and Justices Michael L. Bender and Nathan B. Coats, were members Federico C. Alvarez, Michael H. Berger, Cynthia F. Covell, Thomas E. Downey, Jr., John M. Haried, 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., David W. Stark, Anthony van Westrum, Eli Wald, Lisa M. Wayne, Judge John R. Webb, and E. Tuck Young. Excused from attendance were members Gary B. Blum, Nancy L. Cohen, John S. Gleason, David C. Little, and Judge William R. Lucero. Also absent was member Kenneth B. Pennywell. Jeffrey S. Pagliuca was present by invitation.

I. *New Members.*

The Chair welcomed new members Neeti Pawar and Marcus L. Squarrell to the Committee. At the Chair's request, they and the other attendees gave brief introductions of themselves.

II. *Meeting Materials; Minutes of September 26, 2005 Meeting.*

The Chair had provided a package of materials to the members prior to the meeting date, including submitted minutes of the twenty-first meeting of the Committee, held on August 21, 2008. Those minutes were approved as submitted.

III. *Proposed Housekeeping Amendment Submitted to Supreme Court.*

The Chair reported that she and John Gleason had advised the Court of some "housekeeping" amendments that, on close review, they believed should be made to the Rules of Professional Conduct that became effective on January 1, 2008. Justice Bender noted that the Court will put those proposed amendments on its docket for consideration after technical deficiencies in the manner by which they had been submitted to the Court were corrected. The Chair commented that the changes were very minor and indicated that she believed they could be adopted by the Court without the need for public comment.

IV. *Proposal for Amendments to Rules 1.6, 3.8, and 8.6 Regarding Prosecutorial Discovery of Exonerating Evidence.*

Judge John Webb reported on behalf of the subcommittee that had been formed, at the twentieth meeting of the Committee on April 18, 2008, to consider what changes, if any, the Committee should recommend be made to the Rules of Professional Conduct to deal with new exculpatory evidence. The

subcommittee considered the changes that have been adopted by the American Bar Association to Rule 3.8 — which Rule is entitled "Special Responsibilities of a Prosecutor" and applies only to prosecutors — and has proposed adoption of the ABA's amendments, although with some modifications proposed by the subcommittee.

While it would follow the essence of the ABA's amendments to Rule 3.8 with respect to prosecutors, the subcommittee would go further than did the ABA by amending the Rules to add provisions on disclosure of exculpatory evidence that would be applicable to nonprosecuting lawyers. As indicated in the opening paragraphs of the subcommittee's report (a copy of which, with three attachments, is appended to these minutes), a majority of the subcommittee would impose a disclosure duty on nonprosecuting lawyers, while a minority would amend Rule 1.6 to add a permissive disclosure exception to its broad protection of a client's confidential information. Both the majority and the minority deal only with exculpatory information that does not relate to a current or former client, and neither of their proposals would permit or require disclosure of information that could implicate the disclosing lawyer's current or former client in a crime.

In addition to modifying Rule 3.8, a majority of the subcommittee would add a new Rule 8.6, captioned "Other Reporting Duties," that would *require* any lawyer who is not already subject to a prosecutor's duties under Rule 3.8 to disclose, to "the proper prosecuting authority," information the lawyer knows that "creates a reasonable probability" that a convicted felon did not commit the offense for which the felon was convicted. But that duty would exist only if the information does not "relate to the representation of a current or former client."

A minority of the subcommittee would not create a *duty* of disclosure on the nonprosecuting lawyer, such as the majority would do with its proposed Rule 8.6, but would add a new Paragraph (8)[11] to Rule 1.6(b) that would permit a lawyer to "assist a defendant whom the lawyer knows has been wrongfully convicted of a felony" by providing to the "appropriate prosecuting authority" "only the information necessary that will not implicate the lawyer's own current or former client."

As to Rule 3.8, the provisions affecting prosecutors, Judge Webb said the subcommittee believed that none of its changes to the ABA text was of material effect, but he characterized the many wording changes that the subcommittee proposed as being driven by the subcommittee's recognition that the prosecutor who is considering the disclosure or withholding of new exculpatory evidence may be, in essence, betting his or her law license on the decision. With that in mind, the subcommittee sought to add precision to the changes that the ABA had adopted. In choosing its terminology, the subcommittee drew on Colorado case law regarding the question of whether to hold a new trial on account of newly discovered evidence and, to a lesser extent, regarding the question of whether to hold a new trial on account of prosecutorial misconduct.

The Chair raised the question whether the proposed changes to Rule 3.8 had received adequate review by the organizations representing prosecutors and criminal defense counsel. She understood that the subcommittee had spoken with the Colorado District Attorneys Association and understood that, while the comments from that association were mostly disapproving, they were not thorough or fully developed. She added that, similarly, the Department of Justice and the National District Attorneys Association had not been active participants in the ABA's consideration of its proposed changes to

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11. The subcommittee's report indicates the addition to Rule 1.6(b) would be numbered Paragraph (b)(5), but the Committee determined that, if it were to be added, it would be added as Paragraph (b)(8) following the last existing Paragraph, (b)(7).

Rule 3.8. In view of all that, the Chair suggested that this Committee ask the Court formally to request input from the Colorado District Attorneys Association.

Jeffrey Pagliuca, who had participated in the subcommittee's work, commented that the subcommittee had communicated with the Colorado District Attorneys Association but that the subcommittee had not had time to run its written report past that association for comment before getting it to this Committee for this meeting. In Pagliuca's view, this Committee should seek input not only that association but also groups such as the Colorado Bar Association's Ethics Committee, the defense bar, and others. In short, he said, this report has not been vetted beyond the subcommittee itself.

A member pointed out that the National Association of Criminal Defense Lawyers was holding its meeting in Florida this week and was seeking input from its members on the ABA proposal. The member noted that the defense bar is split on the issue of disclosure by nonprosecutor lawyers. The member was generally well-disposed to the changes that the subcommittee has proposed to Rule 3.8 but would prefer that the prosecutor be required to disclose "promptly" as the ABA provision would require, rather than "within a reasonable time" as provided in the subcommittee's revision The member stressed that this matter is of great interest to the criminal defense bar and that the Committee should solicit input from as many lawyers as feasible.

Another member commented that the Colorado Public Defender had indicated support for the ABA's changes, but the Pubic Defender's views about the subcommittee's modifications and additions are not known.

A member noted that the Court would expect that the Committee had fully considered the views of both proponents and opponents in a matter of this scope before making a proposal to the Court. To that, the Chair added that these issues are different enough in kind from those that the Committee has generally considered in its years-long review of the ABA's Ethics 2000 Rules, and are sufficiently important, that the Committee would clearly benefit from a broad distribution and review of some version of a draft proposal before the Committee made any determinations about these issues.

A member asked for more information concerning Attachment 3 to the subcommittee's report, which would amend Rule 1.6(b) to permit disclosure of exculpatory evidence so long as the disclosure did not implicate a current or former client. He noted that the suggested provision is fairly limited in scope and is merely the addition of one more permitted disclosure to the list of permitted disclosures that is currently found in Rule 1.6(b); he wondered why it was considered controversial.

To that question, a member of the subcommittee responded that the proposed addition to Rule 1.6(b) was the least well thought out change proposed by the subcommittee. This member characterized it as having been proposed by prosecutors who felt that, if they were to be required to make disclosures, then there ought also to be some concomitant burden on nonprosecutor lawyers as well (that burden apparently being the burden of having to contemplate whether or not to make the permitted disclosure). Judge Webb questioned whether that was an accurate explanation of the development of the proposed addition to Rule 1.6(b) but said he recognized the subcommittee was breaking new ground with that suggestion.

A member asked under what circumstances the proposed addition to Rule 1.6(b) would apply: When would a lawyer know that another person had been wrongly convicted of a felony if he did not learn of it from his current or former client, such as by that client saying, I know that person is innocent, because I committed the crime"? But clearly disclosure would not be permitted in that case, because it would "implicate" the lawyer's client. Judge Webb responded with the example of a witness interview

in a divorce, during which the child tells the lawyer that one parent urged the child to claim that the other parent molested the child, a claim that the child now confesses was untrue.

Another member added that there can be many ways in which information comes to a lawyer about a wrongful conviction besides through a client. Under the majority's proposal, new Rule 8.6 would *require* the lawyer to make the disclosure however the information came to him, while, under the minority's proposal, new Rule 1.6(b)(8) would *permit* the lawyer to make the disclosure.

The Committee then spent a considerable amount of time discussing how it might seek input from the bar at large. Some members were of the view that the changes to Rule 3.8 were well-developed and should be given some form of Committee endorsement before they were submitted for broader examination, while the proposals affecting nonprosecutor lawyers could be exposed for public comment with an indication that the Committee was open-minded about them. Some even suggested that the Committee could act on the proposals for Rule 3.8 without seeking outside review, while submitting the nonprosecutor proposals — Rule 1.6(b)(8) and Rule 8.6 — for that review. Others felt that they were not comfortable taking action on any part of the proposal at this stage and would want the submission for broader examination to cover all of the subcommittee's proposals and to go out from the subcommittee rather than from the Committee as if with its imprimatur.

In the course of that discussion, it was noted — as pointed out at the end of the subcommittee's report — that the minority on the subcommittee who sought to add Paragraph (8) to Rule 1.6(b) had not had time to prepare a full "minority report" before the subcommittee submitted its report to the Committee The Committee agreed that they could add such a minority report to the report that would be circulated for public comment, provided that they gave the majority a chance to review the minority report and determine whether to make any responsive modifications to its own portion of the report.

Also in the course of that discussion, a member questioned the wording of the first sentence of Comment [8] to Rule 3.8 as proposed by the subcommittee. It was agreed that the subcommittee would correct the sentence before issuing its report.

After a full airing of the manner by which some or all of the subcommittee's proposal might be exposed for public comment, the Committee determined, on a vote, that a revised report including a minority report — issued by the subcommittee rather than by the whole Committee — would be exposed to interested groups for comment.

The Committee then discussed to what groups the revised subcommittee report should be sent and identified the following groups: The Colorado District Attorneys Association, the Colorado Public Defender, the Colorado Alternate Defense Counsel, the Colorado Bar Association Ethics Committee, and the Colorado Trial Lawyers Association.

At the conclusion of the discussion, the Chair thanked Jeffrey Pagliuca for his participation.

V. *Fee Increases and Rules 1.5(b) and 1.8(a).*

Alexander Rothrock provided the Committee with an update on the efforts of the subcommittee that had been appointed, at the twentieth meeting of the Committee on April 18, 2008, to consider the matter of effectuating fee increases in existing representations. As discussed at the twentieth meeting, Colorado substituted "Except as provided in a written fee agreement, any material changes to the basis or rate of the fee or expenses are subject to the provisions of Rule 1.8(a)" for the second sentence of Rule 1.5(b), which sentence reads as follows in the ABA model version: "Any changes in the basis or rate of the fee or expenses shall also be communicated to the client." In a memorandum that was attached as Attachment I to the minutes of the twentieth meeting, the Chair had laid out concerns that had been raised by the bar about the Colorado text and, in particular, about its invocation of the provisions of Rule 1.8(a) governing a lawyer's "business transactions" with a client when fees are raised in an existing representation.

Rothrock reported that the subcommittee needed additional time to complete its examination of the issues. He said that, at the last subcommittee meeting, the members had decided to return to first principles and consider whether or not Rule 1.8(a) should be made to apply to a fee increase in an existing representation. The subcommittee intended to research whether other states have perceived a need to invoke Rule 1.8(a) to fee increases and, if so, how they have done that.

In answer to a member's inquiry about what possible application Rule 1.8(a) might have to a fee increase, Rothrock responded that, once the lawyer has entered into a representation of a client following the establishment of the engagement, the lawyer has become a fiduciary to the client and any change in the lawyer-client relationship is to be scrutinized carefully.

The member who had asked the question said he had thought that the second sentence of Rule 1.5(b) was intended only to apply to "big changes" in the fee structure, not merely to "$10 fee increases." Rothrock pointed out, however, that Colorado's added comment to the Rule, Comment [3A], expressly provides that *any* change in the basis or rate of fee that makes it reasonably likely that the amount payable by the client will increase is a "material change" within the meaning of the sentence in question, in explicit contrast to any change that will reduce the fees.

Another member commented that, viewing the Colorado change to the ABA model text, lawyers are worried that they cannot make provision for future fee increases in their initial engagement agreements that would avoid the requirement for compliance with Rule 1.8(a) at the time the fee increase is imposed. That is contrary to the actual provision, but a number of lawyers have voiced the concern.

VI. *Rule 1.15(k) and Closed Client Files.*

At its twenty-first meeting on August 21, 2008, the Committee had considered what initially appeared to be a mere housekeeping issue about where a law firm's bookkeeping records should be located and whether off-site storage should be permitted under Rule 1.15(k). However, as the Committee discussed the matter at that meeting, it found that other issues lurked in the provision, and it formed a subcommittee to consider the provision in depth.

On behalf of that subcommittee, Alexander Rothrock gave this meeting an initial report. He reminded the Committee that, among the issues identified at the twenty-first meeting were (1) confusion in terms, such as between the phrase "financial books and other records required by this Rule" and the phrase "bookkeeping records" and (2) the prospect of maintaining bookkeeping records in electronic form. He also noted that the preliminary examination of Rule 1.15(k) had led to the spotting of

terminology oddities in several other parts of Rule 1.15, notwithstanding that it had been extensively revised by the Committee in the course of adopting the Ethics 2000 Rules.

Marcus Squarrell, who serves as the current chair of the Colorado Bar Association's Ethics Committee, added that the Ethics Committee had worked for nearly a year on a proposed amendment to the Rules to delineate a lawyer's duties with respect to "closed files" of current or former clients. That effort had led to a proposal for a new rule, which had recently been approved by the Executive Council for the Colorado Bar Association. Squarrell noted that the ethics committee had not considered any aspect of Rule 1.15 other than closed files. It had focused on establishing clear guidelines for the lawyer, including requiring notice to the client prior to "getting rid" of files following the termination of a representation but permitting destruction of files without notice if they have been retained by the lawyer for at least ten years following termination of the matter to which they relate.

Rothrock added that, in an examination of other states, he found that only Maine and Missouri have attempted to deal with retention and destruction of client files; he believed that neither state had come up with satisfactory provisions. In his view, the CBA Ethics Committee's product was vastly superior to what could be found in any other jurisdiction. This is, he remarked, an area that cries out for guidance to the bar. He added that the report from the CBA Ethics Committee does a good job of laying out the policy issues and their complexities — the Chair noted approvingly that Rothrock had been the author of that report.

Another member echoed Rothrock's and the Chair's views about the importance of a Rule covering these matters. She noted that families can end up with the client files of a deceased relative in their basements and that some law firms have charged former associates for storing their client's files. A Rule is long overdue, she said.

The Chair proposed that the Committee act at this meeting to approve the subcommittee's proposal for amendment to Rule 1.15(k), leaving to the next meeting consideration of the closed files issue.

With that, the Committee approved recommending that Rule 1.15(k) be amended to read as follows (indicating changes from the current text):

> (k The **~~financial books and other~~** ***accounting*** records required by this Rule shall be maintained in accordance with one or more of the following recognized accounting methods: the accrual method, the cash basis method, and the income tax method. **~~All such accounting methods~~** ***The method used*** shall be consistently applied. **~~Bookkeeping records may be maintained by computer~~** ***All records required to be maintained by subparagraphs (a) and (j) of this Rule may be maintained in electronic form,*** provided they otherwise comply with this Rule and provided further that printed copies can be made on demand in accordance with this Rule. **~~They~~** ***All records required to be maintained by subparagraphs (a) and (j) of this Rule that are not maintained in electronic form*** shall be located **~~at the principal Colorado office of each lawyer, partnership, professional corporation, or limited liability corporation~~** ***in Colorado***.

The Chair directed the formation of a subcommittee to consider the closed files matter and the proposal on that topic that has come from the CBA Ethics Committee. Marcus Squarrell agreed to chair that subcommittee.

VII. *Subcommittee on Lawyers Giving Advice in Other Than Client Representations.*

Anthony van Westrum reported that, in an effort to give some content to a matter that he had raised with the Committee at its fourteenth and sixteenth meetings, he had met with Prof. Scott R. Peppet, of the University of Colorado Law School, to discuss the broad topic of the Rules' application to lawyers who give legal advice to persons whom the lawyers do not regard as their clients.[12] A classic example of that circumstance is the lawyer in a mediation setting involving two disputants who have engaged the lawyer's services as a "neutral." The disputants have engaged the lawyer in part because of her skills as a neutral but also because of her knowledge of the law applicable to their dispute. They and the lawyer will have all proclaimed that there is no lawyer-client relationship among the disputants and the lawyer, but the lawyer will then proceed, sometimes with great specificity, to give the disputants advice about, and the lawyer's views about, the law that governs their dispute.

Van Westrum reported that he and Prof. Peppet had agreed that Rule 2.4 is all that the existing Rules of Professional Conduct provide to deal with this circumstance and had agreed that, on its face, Rule 2.4 begs the question of whether the lawyer-neutral has "clients." That is, by its terms it is not applicable *if* the lawyer does have clients; its premise is that the lawyer in question has no lawyer-client relationship with the mediating parties. But, are the two disputants the lawyer's clients if she gives them advice about the law applicable to their dispute, or evaluates their legal claims in the course of mediating the dispute? The case *Denver Bar Ass'n v. Public Utilities Commission*[13] held that one practices law when one "acts in a representative capacity in protecting, enforcing, or defending the legal rights and duties of another and in *counselling, advising and assisting* him in connection with these rights and duties . . . ." [Emphasis added.] Yet the comments to Rule 2.4 indicate that a lawyer serving as a neutral within the contemplation of that Rule may be an "evaluator" — does that include "evaluating" the parties' rights under the law?

Van Westrum said he and Prof. Peppet had recognized that a number of core principles in the Rules — such as those requiring competency, preserving confidentiality, mitigating the effects of conflicts of interest, and regulating fees and the sharing of fees with nonlawyers — can have implications for the lawyer who gives advice to "non-clients." They concluded it would be appropriate for the Court to adopt Rules applying those core principles to lawyers in advising-nonclients circumstances; they had noted that the Court has already impose the obligations of Rule 5.7 on the "law-related" activities of lawyers. Such a new Rule could, say, modify the conflicts principles of Rule 1.7 to accommodate the fact that the interests of the two disputants in the mediation setting are necessarily in conflict. Of course, any such Rule would need to define the parameters of its application, so that it could not be invoked by a lawyer as a cloak for misconduct in circumstances where a true "lawyer-client relationship" existed.

Prof. Peppet had pointed out to van Westrum that the drafters of the ABA's Ethics 2000 Rules had before them some explicit, detailed proposals from the Georgetown Law Center for a Rule dealing with neutral services but that those proposals were not incorporated in the Ethics 2000 Rules as adopted.

Van Westrum concluded his report by saying he did not propose actually to develop such a Rule for the Committee's consideration and was not likely to refer to the matter again in the future. He commented that it would, however, be an appropriate topic for someone's law review article.

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12. A copy of van Westrum's file memorandum of his meeting with Prof. Peppet had been provided to the members with the materials for the twenty-second meeting of the Committee.

13. 154 Colo. 273, 391 P.2d 467 (Colo. 1964).

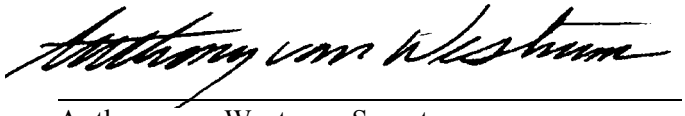
VIII. *The Future of Regulation.*

The Chair referred the members to the article found on page 28 of the October 2008 issue of the American Bar Association *Journal* regarding the future of attorney regulation. The article suggests, among other things, that the growing variety of "practice settings and substantive fields" and the varying forms of relationships that lawyers establish with clients in differing kinds of practice may justify more than one form of attorney regulation, or more than one body of Rules, designed to accommodate the differences, rather than a regulatory system and set of Rules that is premised on a "monolithic client-lawyer relationship." The members agreed with the Chair that the Committee need not appoint a futurism subcommittee — at least not yet.

IX. *Adjournment; Next Scheduled Meeting.*

The meeting adjourned at approximately 11:00 a.m. The next scheduled meeting of the Committee will be on Friday, February 20, 2009, beginning at 9:00 a.m., in the Supreme Court Conference Room.

RESPECTFULLY SUBMITTED,



Anthony van Westrum, Secretary

These minutes are as approved by the Committee at its meeting on February 20, 2009.

REPORT OF RULE 3.8 SUBCOMMITTEE

I. Summary

The Rule 3.8 subcommittee unanimously recommends adoption of paragraphs (g) and (h), and Comments [7], (7A), [8], (8A), and [9], to Rule 3.8, which addresses a prosecutor's duties concerning new, exculpatory evidence. *See* Attachment 1, which is redlined against the ABA proposal. The subcommittee believes that our limited changes to the ABA proposal afford prosecutors additional guidance and use terminology from Colorado criminal cases that is better defined.

Although the subcommittee also recommends that this duty be extended to nonprosecutor lawyers, we are divided on implementation. A majority recommends the addition of new Rule 8.6 and a comment. *See* Attachment 2. A minority recommends addition of new subparagraph (5) to Rule 1.6. The primary difference between them is whether the liberty interest implicated by such new evidence should prevail over the disclosing lawyer's duty of confidentiality.

II. Background

ABA Model Rule 3.8(g) and (h) and the accompanying comments (collectively referred to as "Amendment"), were proposed by the ABA Section of Criminal Justice. The ABA House of Delegates approved them in February 2008. The Amendment is based on proposed rules adopted by the New York State Bar Association House of Delegates in early November 2006.[1] The Amendment concerning a prosecutor's obligation when a convicted defendant may be innocent arose from a 2006 report of the Association of the Bar of the City of New York, which reviewed various aspects of prosecutors' duties.[2] The New York State Bar Association studied the issue for a period of time. Thereafter the New York Bar Association sent its proposed rule to the ABA for consideration. The Criminal Justice Section spent more than a year redrafting the New York rule in response to comments from various constituents of the Criminal Justice Section and other ABA Committees.

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[1] The proposed New York Rule was part of its comprehensive review of the State's Disciplinary Code. The New York Committee that drafted proposed Rule 3.8(g) and (h) received significant input from State and Federal prosecutors and Representatives of the Criminal Defense Bar.

[2] *See* Proposed Prosecution Ethics Rules, the Committee on Professional Responsibility, 61 The Record of the Association of the Bar of the City of New York 69 (2006).

Since the ABA adopted Rule 3.8(g) and (h), three states, in addition to Colorado, are studying the Amendment: Illinois, Minnesota and North Carolina.

The Criminal Justice Section has also being studying an amendment to Rule 1.6 (confidentially), which would allow an attorney to reveal confidential information received from a now deceased client that could prevent or rectify the wrongful conviction of another person. This has not garnered much support within the Criminal justice Section or from the ABA Ethics Committee.

III. Discussion

A. Duties of a Prosecutor

The prosecutor is a minister of justice and as such has a unique role in the criminal justice system. Accordingly, when a prosecutor knows of new, credible evidence that a defendant has been wrongly convicted, the prosecutor must take action as described in the Amendment. Because of concern that the Amendment did not clearly define exactly what action must be taken, the subcommittee believes that a prosecutor's new duties should be clearly described. The prosecutor who puts his or her law license on the line by deciding not to act when presented with

what may be evidence within the scope of the Amendment is entitled to reasonable predictability if that decision is challenged. We believe that the below-discussed changes to the Amendment achieve this objective without materially diluting the Amendment. We also believe that the issue is primarily local, and thus the presumption in favor of uniformity does not apply.

1. Rule 3.8(g)

A number of the changes to this section address what some members of the subcommittee believed were words that had vague meaning. The subcommittee decided to use the phrase "reasonable probability" because it is defined in many more Colorado cases than is the phrase "reasonable likelihood."[3] Additionally, because the subcommittee was concerned that "promptly" might impose an obligation to act in undo haste, given other considerations, we substituted "within a reasonable time." *See* discussion of new Comment (7A) below.

[3] *People v. District Court, City and County of Denver*, 808 P.2d 831, 834 (Colo. 1991) ("A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome."); *People v. Cevallos-Acosta*, 140 P.3d 116, 125 (Colo. App. 2005) (same); *People v. White*, 64 P.3d 864, 874 (Colo. App. 2002) (same); *People v. Bradley*, 25 P.3d 1271, 1276 (Colo. App. 2001) (same); *People v. Wilson*, 841 P.2d 337, 339 (Colo. App. 1992) (same).

In subparagraph (1), adding "prosecutorial" to "authority" clarifies the obligation. In subparagraph (2), the subcommittee believes that "prosecutor's jurisdiction" should be more clearly defined to avoid some confusion about whether the jurisdiction includes where an inmate is housed, if that is different from the court in which the conviction was obtained. The subcommittee believes the additional comment explains that "prosecutorial jurisdiction" is in the county or judicial district where the prosecutor exercises authority. In subparagraph (2)(B), we feel that an obligation to investigate could be problematic, given the limited resources available to many prosecutors, and that the objective could be achieved by moving the court to appoint counsel for the defendant. This change is probably our most significant departure from the Amendment.

2. Rule 3.8(h)

The word "remedy" is, in our view, too open ended. For example, would a prosecutor be obligated to approach the governor for clemency? We believe that the phrase "take steps in the appropriate court" places an outer limit on the prosecutor's obligations. We also believe that the phrase "consistent with

applicable law" removes any obligation on the prosecutor to craft a unique remedy.

3. Comment [1]

Substituting "address" for "rectify" is consistent with deleting "remedy" from Rule 3.8(h).

4. Comment [7]

The deletions and additions are consistent with the changes to Rule 3.8(h).

5. New Comment (7A)

This comment sets forth factors that we believe should be considered if the timeliness of a prosecutor's disclosure were challenged. In our view, these factors reflect the magnitude of the defendant's interest in prompt disclosure as well as the realities that may limit a prosecutor in doing do.

6. Comment [8]

Deletion of "remedy" and addition of "steps in the appropriate court" have been discussed above. We added the references to state and federal statutes because of concerned that the Amendment was ambiguous if applied to a defendant who did not commit the crime, but was culpable as a complicitor.

7. New Comment (8A)

Although the touchstone of a prosecutor's obligation is "new" evidence, the subcommittee is concerned at the lack of a definition in the Amendment to guide the prosecutor. We recognize that an exhaustive definition of "new" would be impossible, but we believe that the enumerated factors reflect the context in which a reasonable prosecutor would decide if evidence was "new."

8. Comment [9]

The subcommittee believes that this comment is necessary to protect the prosecutor who makes a reasonable decision not to disclose. In our view, the Amendment's phrase "independent judgment," for which we substituted "reasonable judgment," was unclear. We considered, but abandoned, defining "credible" and "material" within Rule 3.8(g). Instead, the subcommittee drew on language from Colorado criminal cases, primarily those dealing with newly discovered evidence.[4] While such cases may be analogous, we do not suggest that a prosecutor's obligations are limited to outcome determinative evidence, which is the ultimate criterion

[4] *People v. Gutierrez*, 622 P.2d 547, 559-60 (Colo. 1981) ("To succeed on a motion for a new trial [based on new evidence], the defendant should show that . . . the newly discovered evidence is material to the issues involved, and not merely cumulative or impeaching . . . .").

used to set aside a conviction. In addition, the subcommittee recognized that an anomaly could arise if new evidence showed that a defendant had not committed the offense to which the defendant had pled, but that offense was solely a matter of plea agreement negotiation to meet the parties' objectives, such as avoiding sex offender registration. Hence, the last clause indicates that disclosure would not be required if in pleading guilty, the defendant waived the factual basis.

B. Duties of a Nonprosecutor lawyer

The subcommittee unanimous recommends that the duty of disclosure be extended to all lawyers. Because nonprosecutor lawyers do not exercise prosecutorial authority or have access to law enforcement resources, and usually are not public employees, we believe that the duty of such lawyers should be more limited. However, we were unable to resolve the conflict between a nonprosecutor lawyer's duty of disclosure and that lawyer's obligation to protect client confidences.

1. New Rule 8.6

A majority of the subcommittee believes that protecting client confidences is more important than vindicating the liberty interest

of defendants who have been wrongly convicted, and therefore, recommends that the disclosure obligation not be added to the permissive exceptions in Rule 1.6(b). The death penalty scenario may already be addressed in Rule 1.6(b)(1). In the majority's view, confidentiality is a core element of the attorney-client relationship. Also, the experience of the Office of Attorney Regulation Counsel in matters involving breach of confidentiality weighs against adding permissive exceptions. Once the majority decided against a permissive exception, the best place for this duty appeared to be under Maintaining the Integrity of the Profession. The majority believes the wording on new Rule 8.6 and the comment to be self-explanatory. *See* Attachment 2.

2. New Rule 1.6(b)(5)

The minority strongly believes that the liberty interest of a wrongly convicted defendant at least warrants a permissive exception to confidentiality for disclosure of exculpatory information. The minority also believes that lack of such an exception erodes public confidence in our profession much more than would a permissive exception. Hence, the minority proposed a new subparagraph (5) to Rule 1.6(b). *See* Attachment 3. The

limitation that disclosed information may not "implicate the lawyer's own current or former client" affords such clients some protection.

Due to other professional obligations, the minority did not have an opportunity to prepare a minority report. The minority may address this issue at length on October 31.

Respectfully submitted,

/s/ John R. Webb

(g) When a prosecutor knows of new, credible and material evidence creating a reasonable probability~~likelihood~~ that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall within a reasonable time:

(1) ~~promptly~~ disclose that evidence to an appropriate court or prosecutorial authority, and

(2) if the judgment of conviction was entered by a court ~~obtained~~ in which the prosecutor exercises prosecutorial authority~~'s jurisdiction,~~

(A) ~~promptly~~ disclose that evidence to the defendant, ~~unless a court authorizes delay,~~ and

(B) if the defendant is not represented, move the court in whichundertake ~~further investigation, or make reasonable efforts to cause an investigation, to determine whether~~ the defendant was convicted to appoint counsel to assist~~of an offense that~~ the defendant in dealing with the evidence.~~did not commit.~~

(h) When a prosecutor knows of clear and convincing evidence establishing that a defendant ~~in the prosecutor's jurisdiction~~ was convicted in a court in which the prosecutor exercises prosecutorial authority, of an offense that the defendant did not commit, the prosecutor shall take steps in the appropriate court, consistent with applicable law,~~seek~~ to set aside~~remedy~~ the conviction.

:

[1] A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient evidence~~,~~ and that special precautions are taken to prevent and to address~~rectify~~ the conviction of innocent persons. The extent of mandated remedial action is a matter of debate and varies in different jurisdictions. Many jurisdictions have adopted the ABA Standards of Criminal Justice Relating to the Prosecution Function, which are the product of

prolonged and careful deliberation by lawyers experienced in both criminal prosecution and defense. Competent representation of the sovereignty may require a prosecutor to undertake some procedural and remedial measures as a matter of obligation. Applicable law may require other measures by the prosecutor and knowing disregard of those obligations or a systematic abuse of prosecutorial discretion could constitute a violation of Rule 8.4.

:

[7] When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a person outside the prosecutor's jurisdiction was convicted of a crime that the person did not commit, paragraph (g) requires ~~prompt~~ disclosure to the court or other prosecutorial~~appropriate~~ authority, such as the chief prosecutor of the jurisdiction where the conviction occurred. ~~. If the conviction was obtained in the prosecutor's jurisdiction, paragraph (g) requires the prosecutor to examine the evidence and undertake further investigation to determine whether the defendant is in fact innocent or make reasonable efforts to cause another appropriate authority to undertake the necessary investigation, and to promptly disclose the evidence to the court and, absent court-authorized delay, to the defendant.~~ Consistent with the objectives of Rules 4.2 and 4.3, disclosure to a represented defendant must be made through the defendant's counsel, and, in the case of an unrepresented defendant, the prosecutor must take the affirmative step of making~~would ordinarily be accompanied by~~ a request to a court for the appointment of counsel to assist the defendant in taking such legal measures as may be appropriate.

(7A) What constitutes "within a reasonable time" will vary according to the circumstances presented. When considering the timing of a disclosure, a prosecutor should consider all of the circumstances, including whether the defendant is subject to the death penalty, is presently incarcerated, or is under court supervision. The prosecutor should also consider what investigative resources are available to the prosecutor, whether the trial prosecutor who prosecuted the case is still reasonably available, what new investigation or testing is appropriate, and the prejudice to an on-going investigation.

[8] Under paragraph (h), once the prosecutor knows of clear and convincing evidence that the defendant was convicted of an offense that the defendant did not commit or the commission of an offense that includes conduct of others for which the defendant is legally accountable (see C.R.S. 18-1-601 et seq and 18 U.S.C. Section 2), then the prosecutor must seek to take steps in the appropriate court., ~~the prosecutor must seek to remedy the conviction.~~ Necessary steps may include disclosure of the evidence to the defendant, requesting that the court appoint counsel for an unrepresented indigent defendant and, where appropriate, notifying the court that the prosecutor has knowledge that the defendant did not commit the offense of which the defendant was convicted.

(8A) Evidence is considered new when it was unknown to a trial prosecutor at the time the conviction was entered or, if known to a trial prosecutor, was not disclosed to the defense, either deliberately or inadvertently. The reasons for the evidence being unknown (and therefore new) are varied. It may be new because: the information was not available to a trial prosecutor or the prosecution team at the time of trial; or the police department investigating the case or other agency involved in the prosecution did not provide the evidence to a trial prosecutor; or recent testing was performed which was not available at the time of trial. There may be other circumstances when information would be deemed new evidence

[9] A prosecutor's reasonable~~independent~~ judgment~~,~~ made in good faith, that the new evidence is not of such nature as to trigger the obligations of sections (g) and (h), although subsequently determined to have been erroneous, does not constitute a violation of this Rule. Factors probative of the prosecutor's reasonable judgment that the evidence does not cast serious doubt on the reliability of the judgment of conviction include: whether the evidence was essential to a principal issue in the trial that produced the conviction; whether the evidence goes beyond the credibility of a witness; whether the evidence is subject to serious dispute or whether the defendant waived the establishment of a factual basis pursuant to criminal procedural rules.

Attachment 2

Rule 8.6 Other Reporting Duties

When a lawyer who is not subject to Colo. RPC 3.8 knows of information that does not relate to the representation of a current or former client, which creates a reasonable probability that a convicted defendant did not commit a felony offense of which the defendant was convicted, then the lawyer shall promptly disclose such information to the appropriate prosecutorial authority in the jurisdiction where the defendant was convicted.

Comment

The reliability of convictions and the public's confidence in the criminal justice system is diminished when a defendant has been wrongfully convicted. The public assumes that prosecutors have the resources and responsibility to ensure that a defendant is never wrongfully convicted. Sometimes, a lawyer who is not subject to Colo. RPC 3.8 obtains information that does not relate to the representation of a current or former client, which leads the lawyer to reasonably believe that a defendant has been wrongfully convicted. "Wrongfully convicted" means that a person was convicted for an offense the person did not commit.

Prosecutors have special duties to promptly take appropriate steps when they obtain information that a defendant has been wrongfully convicted, *see* Colo. RPC 3.8 (g) and (h). If a lawyer who is not subject to Colo. RPC 3.8 knows that a defendant has been wrongfully convicted because the lawyer has information that does not relate to the representation of the client or former client, then the lawyer must reveal such information to the appropriate prosecutorial authority. The lawyer does not have a duty to investigate or assess the reliability of such information.

(5) to assist a defendant whom the lawyer knows has been wrongfully convicted of a felony, by providing only the information necessary that will not implicate the lawyer's own current or former client, to the appropriate prosecutorial authority in the state where the defendant was wrongfully convicted;

End of Appendix to SCSCRPC Minutes of
Twenty-Second Meeting, on October 31, 2008

COLORADO SUPREME COURT

STANDING COMMITTEE ON THE RULES OF PROFESSIONAL CONDUCT

Approved Minutes of Meeting of the Full Committee
On February 20, 2009
(Twenty-Third Meeting of the Full Committee)

The twenty-third meeting of the Colorado Supreme Court Standing Committee on the Rules of Professional Conduct was convened at 9:00 a.m. on Friday, February 20, 2009, by Chair Marcy G. Glenn. The meeting was held in the Supreme Court Library on the fourth 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, Nancy L. Cohen, 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, Alexander R. Rothrock, Marcus L. Squarrell, David W. Stark, Anthony van Westrum, Lisa M. Wayne, Judge John R. Webb, and E. Tuck Young. Excused from attendance were Michael H. Berger, Gary B. Blum, John M. Haried, Henry R. Reeve, Boston H. Stanton, Jr., and Eli Wald. Also absent was Kenneth B. Pennywell.

I. *Meeting Materials; Minutes of October 21, 2008 Meeting.*

The Chair had provided a package of materials to the members prior to the meeting date, including submitted minutes of the twenty-second meeting of the Committee, held on October 21, 2008. Those minutes were approved as submitted.

II. *Housekeeping Amendments Adopted by Supreme Court.*

John Gleason reported that on November 6, 2008, the Colorado Supreme Court adopted, with immediate effect, the housekeeping amendments to the Colorado Rules of Professional Conduct that the Chair and he had submitted. That submission had been reported to the Committee at its twenty-second meeting on October 31, 2008. A copy of the Court's order identifying the amendments is attached to these minutes. Gleason confirmed to the Chair that the Office of Attorney Regulation Counsel has not proposed any changes to the Rules that have not been considered by the Committee.

Gleason noted, too, that Alexander Rothrock will, in his annual survey of ethics developments for *The Colorado Lawyer*, describe changes that have been made to the annual lawyer registration statement and to Rule 227 regarding a new website that the Office of Attorney Regulation Counsel will maintain commencing in March 2009. Rothrock's survey will also, Gleason said, review disciplinary cases from 2008 in a nice, concise way.

Gleason asked that members submit to the Chair, for processing, any further "housekeeping" changes that they may identify in the Rules.

III. *Amendment to Rule 1.15(k) Held for Future Submission*.

The Chair noted that the Committee had, at its twenty-second meeting on October 31, 2008, agreed to submit to the Court proposed changes to Rule 1.15(k) and reported that she had decided to hold that submission for the time being in view of the likelihood that the Committee would take action on the related matter of closed client files at this meeting.

IV. *Subcommittee on Closed Client Files*.

Marcus Squarrell reported to the Committee on behalf of the subcommittee that had been formed at the twenty-second meeting on October 31, 2008, to take up a proposal that had been received from the Colorado Bar Association Ethics Committee for a Rule relating to the disposition of client files created in the course of representations that have been terminated. Squarrell acknowledged Alexander Rothrock as the "reporter" for the subcommittee's efforts to date.

Squarrell said the subcommittee decided to propose a new Rule, numbered 16A, for the closed client files provisions, rather than to insert them in an existing Rule such as Rule 16(d), which requires a lawyer to "take steps" to protect a client's interests upon termination of a representation.

Squarrell noted that at least one member of the subcommittee had opposed the proposal because of a fear that lawyers would treat such a Rule as if it made a definitive statement about how long they must preserve client files, when in fact there are numerous statutes and many other considerations, varying among areas of practice, that dictate longer retention periods in particular circumstances. Yet, Squarrell, said, a clear majority of the subcommittee favored adoption of the proposed Rule.

A member asked whether the subcommittee had received any input from the Trusts and Estates Section of the Colorado Bar Association, whose lawyers might be faced with contests over wills, for which the files they generated might have contained useful information, but who were instructed by their clients, the still-living testators, to turn over, or destroy, those files during their lifetimes as is contemplated by the proposed Rule.

Squarrell and another member of the subcommittee replied that the subcommittee had not affirmatively sought the input of any such section or group of practitioners but that it had realized that many areas of practice may have practical considerations that, by the natures of those practices, call for longer periods of retention than are established by the proposal. For example, they noted, lawyers representing criminal defendants are aware of the possibility of claims of ineffective assistance of counsel made being years after conviction and that the files of the defendants' original counsel are pertinent to those claims. But the subcommittee determined it would not be possible to craft a Rule that covered those varying situations and accommodated varying principles and considerations governing retention periods. Instead, the subcommittee has proposed a comment on the matter, found as the last sentence of Comment [1] to proposed Rule 16A: " . . . Rule 1.16A does not supersede the specific retention requirements imposed by other rules, such as Rule 5.5(d)(2) (two year retention of written notification to client of utilization of services of suspended or disbarred lawyer) and Rule 4, Chapter 23.3, C.R.C.P. (six year retention of contingent fee agreement and proof of mailing following completion or settlement of the case)."

They added that the issue of how long files must be retained might well be a standard-of-care question pertinent to a malpractice action, but — beyond the parameters established by the proposed Rule — it should not be a matter of discipline.

Squarrell pointed out that the subcommittee has also proposed deleting existing Rule 1.18(j)(8), which requires a lawyer to "maintain in a current status and retain for a period of seven years after the event that they record . . . [c]opies of those portions of each client's case file reasonably necessary for a complete understanding of the financial transactions pertaining thereto." He commented that it was difficult to determine the intended scope of this requirement; read literally, it could encompass every document in a file. Given that proposed Rule 16A would conflict with such a reading, the subcommittee chose to delete Rule 1.18(j)(8).

A member suggested that many lawyers' files are now mostly in digital format, as to which an ongoing retention obligation would not impose a significant burden.

But Squarrell responded that many items of a "file" are not easily digitized — at least not without significant cost — and that the very suggestion raises questions of what constitutes matter in a "file."

Another member of the subcommittee added that the last sentence of proposed Comment [2] to Rule 1.16A would permit digitization: "A lawyer may comply with Rule 1.16A by maintaining a client's file in, or converting it to, a purely electronic form, provided the lawyer is capable of producing a paper version if necessary." Accordingly, he said, one can choose to digitize and retain a file for longer than the periods prescribed in the proposal.

This member also noted that, with respect to the question that had been asked earlier about practice areas for which files might need to be retained for longer periods of time, the subcommittee had spent a good deal of time considering that matter. He commented that there are various ethics opinions from other jurisdictions that, in his words, "make up" retention periods based on statutory mandates that are of general application and not specifically targeted to lawyers. Those statutes are clearly *not* intended to establish disciplinary standards of conduct; and, he repeated, our concern is one of the standard of conduct for discipline, not the standard of care for private remedies. If, for example, there is a principle or a consideration that would require a probate lawyer to keep testator-client files for a longer period of time, he must do so under those principles or because of those considerations, not because of a disciplinary rule. The proposal deliberately avoids an attempt to include in the Rule any statute of limitation or of retention or any standard applicable to duty-of-care issues.

There are, the member noted, two sentences in Comment [3] that go to this matter: "The rule does not prohibit a lawyer from maintaining a client's files beyond the two-year period or supersede obligations imposed by other law or a court order. Many lawyers base retention periods on applicable statutes of limitations or on future events that implicate the legal services." These sweep in the whole world of probate, criminal defense, and other practice areas for which longer file retention may be necessary or advisable. There is, he added, no magic to the two-year and ten-year periods provided in the proposal; they were "made up" by the subcommittee, though he felt they worked well in fact.

Responding to the comment that had earlier been made that many practice areas now find lawyers retaining most of their files in digital form, a member said that, while this may be true as of recent times, there are many lawyers who have boxes and boxes of paper files in storage that were generated years ago, and this Committee needs to consider that fact as it crafts a Rule. As practices change in the coming years, using computer innovations, it may become appropriate to revisit and revise the Rule, but it works well, as proposed by the subcommittee, under present circumstances. She added that even digital files need maintenance to avoid deterioration and loss of data over time.

That member raised a question about the sentence in proposed Comment [2] that reads, "Generally, lawyers employed by a private corporation or other entity represent such corporation or

entity as employees and the client's files would be considered to be in the possession of the client and not the lawyer, such that Rule 1.16A would be inapplicable." She questioned whether that sentence could be applied to outside corporate counsel as well as to in-house counsel.

A member commented that she was to testify soon as an expert in an "ineffective assistance of counsel" case under Rule 35(c), C.R.Crim.P.; in that case her testimony will turn on what was *not* found in the lawyer's files. She suggested expanding the text of the proposal that requires longer retention of files when there are "pending or threatened legal proceedings known to the lawyer that relate to the matter and the lawyer has not agreed to the contrary" so as to require retention of files when a proceeding may not be "pending or threatened" but may nevertheless be "reasonably foreseeable." Could we, she asked, do that to cover the lawyer who worries about a possible malpractice claim or the lawyer who should worry about a will contest? Would that be too expansive?

But another member noted that a Rule 35(c) claim in a criminal case may be made well after the close of even the longer period provided by the Rule, ten years. She noted that criminal lawyers do not typically worry about malpractice claims, but that the ineffective-assistance-of-counsel claim is ever-present. In her view, criminal defense counsel should simply keep all of their files forever, and the Rule should contain an exception stating that requirement. She added that she did not know how the Public Defender would react to her proposal.

A member pointed to Comment [4] and its implication that a lawyer cannot destroy a file if a case is "pending or threatened," even if the client has instructed that destruction. The sentence in question reads, "Third, the lawyer may not destroy the files if the lawyer knows that there are legal proceedings pending or threatened that relate to the matter for which the lawyer created the files," In this member's view, the operative sentence in the Rule itself — "Notwithstanding any agreement to the contrary, a lawyer shall not destroy a client's files after termination of the lawyer's representation in the matter unless (1) the lawyer has given written notice to the client of the lawyer's intention to do so on or after a date stated in the notice, which date shall not be less than thirty days after the date the notice was given, and (2) there are no pending or threatened legal proceedings known to the lawyer that relate to the matter" — would, to the contrary, permit the lawyer to destroy the file upon the client's instructions notwithstanding the pendency or threat of a proceeding. The member would clarify the matter by providing in the body of the Rule that a lawyer cannot destroy files in the face of a pending or threatened proceeding *even if* the client has instructed that she do so and that the lawyer cannot comply with a client's instruction to return the files in that circumstance so that the client may herself destroy them.

To that, Squarrell replied that these files have typically been considered to be subject always to the client's right to request that they be turned over to the client. He noted that Colorado Bar Association Ethics Committee Opinion 104 is to that effect. If the client wants the files, the lawyer must turn them over.

Another member supported Squarrell's view on this, pointing out that, while there may be applicable substantive law principles, such as obstruction of justice, the case law is clear all across the country that between the lawyer and the client, the client "owns" the file and is entitled to take them from the lawyer. In her view, lawyers need general guidance on file retention, subject always to other considerations, and this proposed Rule would give them that guidance.

The member who had suggested that the Rule prohibit file destruction or turnover in the face of a pending or threatened proceeding, even on the client's instruction, now suggested that a comment be added highlighting the lawyer's right always to retain a copy of the client's file, even after receiving instructions to deliver the file to the client. The member who had pointed out that clients are deemed

to "own" their files said she liked that suggestion and added that lawyers would be wise to make those copies.

A member asked whether the proposed Rule would be used by lawyers to effect a change in the applicable standard of care, by their arguing that now, in light of new Rule 1.16[A], they were right to destroy the client's will or real property or criminal defense files after just two years, notwithstanding that, before the adoption of the Rule, lawyers might have kept, say, contract files for at least the period of limitations applicable to contract claims.

To that question, a member of the subcommittee pointed out that the two sentences in Comment [3] to which reference had earlier been made preserve the application of other, longer periods of retention in appropriate cases. By those sentences, it is clear that this Rule cannot be used as evidence of a shortened retention period as a new standard of care for private actions in those cases.

Another member said he was not aware of any case from any jurisdiction that had imposed private liability on a lawyer for failure to retain a file for a particular period of time or for destroying files. He said the Committee should be cautious not to create a new cause of action for premature file destruction. The only sanction for premature file destruction should be disciplinary, and, in this member's view, if the proposed Rule would establish a standard of care, the Committee should rethink its adoption.

A member pointed out that the Rule specifically gives control over the retention/destruction issue to the client. But another noted that that might mean very little to a convicted client who has no storage available in jail. A third pointed out, however, that the Rule would permit the convicted client to instruct the *lawyer* to retain the file for a full ten years.

A member of the subcommittee commented that the question of closed client files has been under consideration by the Colorado Bar Association Ethics Committee and this Committee for more than two years. He recalled that, at one time, the drafts had included probate and criminal defense practices as "bookend" examples; those could be restored if the Committee found them useful in giving guidance regarding the wisdom or external requirement to retain some files for longer periods than this disciplinary Rule would mandate. As to the concern about creating or evidencing some inappropriate standard of care, this member noted that, under Paragraph [20] of the Scope section of the Rules of Professional Conduct, that argument can be attempted with just about any of the Rules, although proposed Comment [3] would make that argument harder to sustain in this particular case than might be true with respect to other Rules. In his view, the Committee should not worry about that prospect in formulating what it believes are proper *disciplinary* Rules. Conceptually, then, the bookend examples that he referred to are separate and apart from the import of this Rule.

That member added that proposed Rule 1.16A has no application to "property" that may be in the lawyer's possession. "Property" is governed by Rule 1.15, not this new Rule; and, under Rule 1.15, the lawyer is never permitted to destroy share certificates and other client property that is in her possession.

A member asked how file retention is handled by the prosecutor in a criminal matter. Does, she asked, the prosecutor have to give the contemplated Rule 1.16A notice to the State before destroying files generated in a prosecution? She observed that a defendant may have as great an interest in the retention of the prosecutor's files as does the State.

To those comments Squarrell responded that the subcommittee had given only general consideration to government lawyers and had not specifically reviewed prosecutorial needs or practices.

Another member added that, as the Committee had concluded with respect to the examples of probate and criminal defense practices, this Rule would not impair the application of other laws to the prosecutor's retention of files. In her view, as before, this Rule should not attempt to cover those issues.

The member who had raised the question agreed that such issues should be dealt with in substantive laws and need not be provided for in this proposed Rule.

Squarrell suggested that the idea that is currently expressed in the two sentences found in Comment [3] could be moved to the text of the Rule itself.

A member pointed out that, if we were to add text requiring prosecutors and criminal defense counsel to retain files for longer periods of time, that could have huge implications for the Public Defender. It would also have troubling implications for, say, the families of private practitioners, who may "inherit" voluminous client files; this, she noted, is the subject of frequent calls received by the Calling Committee of the Colorado Bar Association Ethics Committee. In her view, if the Committee were to undertake to say anything to the effect that a longer period of retention might be appropriate for criminal defense practitioners, it should solicit input from those practitioners.

In response to the Chair's request for a summation of the discussion, a member identified two pending suggestions: First, add to the text of the Rule the concept that other principles or considerations may indicate longer retention periods in various cases; second, leave that concept in the comments but expand the discussion there.

The Committee members did not know whether the Colorado Bar Association had circulated the proposal of its Ethics Committee to its various sections before its Executive Council approved that proposal. A member suggested that this Committee could circulate the current proposal to various stakeholders for comment, as it had done following its twenty-second meeting in connection with the proposed changes to Rule 3.8.

A member of the subcommittee said that, when one considers exceptions related to, say, probate or criminal defense practices, one realizes that there can be exceptions for nearly every practice area — she suggested prenuptial agreements and adoption as two other such areas that had not previously been mentioned. She added that the Ethics Committee had itself tried to deal with specific periods drawn from substantive law and had not found that to be workable.

A member of the subcommittee who had not previously spoken said that, in his view, the subcommittee's proposal works well. It sets a minimum default retention period of two years following termination of a matter. It permits the lawyer and the client to agree upon retention periods but requires, even then, that the lawyer remind the client, by written notice, before actual destruction occurs, at which time the client can decide to take possession of the files notwithstanding the earlier agreement. And it sets a reasonable "period of repose" of ten years. But, as Comment [3] makes clear, it does not override substantive law to the contrary and, as that comment thus implies, it does not establish a standard of care. Concerns about what substantive law might govern file retention in this or that area of practice are misplaced, and any effort to deal specifically with some such laws might improperly imply that this Rule *is* a standard of care after all.

Another member expressed his agreement with that view, although he approved of Squarrell's suggestion that the essence of Comment [3] could be moved to the body of the Rule.

Another member of the subcommittee voiced his approval of the prior summation of the proposal's merits and of the suggestion that the text for the Rule be expanded to make clear that the Rule does not override substantive law requirements and cannot be used as evidence of a standard of care. In his view, it would be a mistake to conflate statutes of limitation with ethical requirements; they serve different functions. To incorporate various statutes of limitation would be to establish standards of *conduct* based on statutes, and that would, in his view, be a mistake. The Rule should clearly separate this disciplinary matter from principles of civil law.

But another member thought that the comments should be made more clear, stating specifically that the Rule does *not* indicate any standard of care for any practice area.

Other members continued to discuss whether the Rule provided sufficient guidance and adequately accommodated differing practice areas with their differing aspects bearing on file retention periods, with some taking the position it did and others continuing to express concern that, in areas such as criminal law practice, the Rule might be inappropriately used in attempts to justify premature file destruction in, say, life-sentence cases. Some pointed out that, in the present absence of any Rule on file retention, lawyers may feel free to destroy files after short periods of retention and without notice to their clients; this Rule would add some clarity to the matter and provides for the first time for a notice requirement and by no means would it reduce any existing mandate for a longer file retention period in any particular type of practice.

In response to a member's inquiry about how the Rule would apply to files in the possession of a law firm after the departure of the lawyer who had had primary responsibility for the representation, another member directed attention to the subcommittee's proposed revised Rule 1.15(l).

To the suggestion that this Rule, or a comment to it, expressly state that the Rule is *not* evidence of a standard of care, a member said that would create, by negative implication, an argument that *other* Rules were evidence of standards of care. But another reiterated that the possibility that any Rule might be used as evidence of a standard of care, if that use is logical in the nature of such Rule, is already established by Paragraph [20] of the Scope section, so that an express negation of that possibility in this Rule would not alter the analysis to be undertaken in determining whether any other Rule was or was not evidence of a standard of care in any other circumstance.

To the proposition that there is no present Rule establishing *any* guideline on file retention, so that adding this Rule does not lessen an existing standard, a member countered that what presently stops a lawyer from file destruction after a short period of time is the very absence of an indication that such destruction would be permitted. With this Rule, the member argued, the lawyer can argue that there is specific permission for early destruction, without consideration of principles applicable to particular practice areas that would justify a longer retention period.

A member moved that 1.16A be added, and that Rule 1.15 be amended, as proposed by the subcommittee but with the following modifications: (1) The insertion into the text of Rule 1.16A, at an appropriate location, of the sentence presently found in Comment [3] of the proposal, reading, "The rule does not prohibit a lawyer from maintaining a client's files beyond the two-year period or supersede obligations imposed by other law or by a court order"; and (2) minor changes in Comment [2] to clarify the reference to lawyer-employees as being to lawyers who are in-house counsel to their clients. As a friendly amendment to the motion, the member who had first noted the concept that a client "owns" the file but who had agreed that a lawyer should always be entitled to keep a copy of the file, moved that text be added clarifying that a lawyer may retain a copy of a client's file. The amended motion was seconded.

In discussion on the motion, the movant agreed that it would be appropriate to add "bookends," such as a Rule 35(c), C.R.Crim.P., example and a probate example, indicating that longer periods of retention may be necessary in particular cases in light of applicable principles or circumstances.

The movant did not approve of the suggestion that the Rule preclude compliance with client instructions to deliver files back to the client when a proceeding is pending or threatened; the movant pointed out that, as now proposed, the Rule would permit the lawyer to retain a copy of the files in such a case. After considerable discussion, the motion was modified to explain in Comment [4] to Rule 1/16A that the lawyer may retain a copy of the file notwithstanding a client's instruction not to do so.

The motion was adopted, and the Committee agreed that the matter would be returned to the subcommittee for the actual word-smithing and for further consideration by the Committee at its next meeting.

The Committee authorized Squarrell to report to the Colorado Bar Association Ethics Committee on the status of the Committee's deliberations on the closed client files matter.

V. *Subcommittee on Midstream Fee Adjustments under Rule 1.5(b) and Rule 1.8(a).*

Speaking for the subcommittee considering Rule 1.5(b), Rule 18(a), and midstream modifications in the basis or rate of fees or expenses payable with respect to a representation, Alexander Rothrock directed the members' attention to two memoranda on the subject, the first being the Chair's April 14, 2008 memorandum that had been included in the materials for the twentieth meeting of the Committee on April 18, 2008, and the second being that from the subcommittee, dated February 16, 2009, that was included in the materials provided for today's meeting. He commented that the Chair's memorandum stated well the bar's concerns about when the conflicts provisions of Rule 1.8(a) might apply to midstream adjustments, listing a half dozen issues "concerning the meaning and wisdom" of Colorado's version of Rule 1.5(b).

Rothrock noted, initially, that the bar's confusion about whether a written fee agreement can provide for future fee/expense increases without implicating Rule 1.8(a) is misplaced: The answer is clearly yes, they can do so, as provided by the opening phrase of the last sentence of Rule 1.5(b): "Except as provided in a written fee agreement." However, this phrase does not encompass the one-way writing — the written communication or disclosure from the lawyer to the client that is less than an agreement — that the first sentence of Rule 1.5(b) deems sufficient to establish an initial fees/expenses arrangement; thus, this separate issue is not so clearly resolved by the current text.

Rothrock also noted that the Colorado Rules' linkage between, first, fee/expense increases that are not provided for at the inception of a representation and, second, the conflicts rule, Rule 1.8(a), is not unique, as is pointed out in footnote 1 of the subcommittee's report referencing an Indiana comment to that state's version of Rule 1.8(a). Apart from that Indiana comment, there is not much authority on the issue from an ethics perspective, but Rothrock said the overwhelming weight of authority coming from malpractice cases or other civil litigation is to the effect that a lawyer must treat a fee/expense increase as involving a personal conflict of interest subject to Rule 1.8(a), if it was not provided for at the inception of the representation.

Rothrock said the subcommittee looked afresh at the question of that linkage and decided, again, that Rule 1.8(a) should apply to fee/expense increases that have not been provided for by prior

agreement. (He commented that the discussion that the whole Committee had about these matters at its twenty-second meeting on August 21, 2008, is accurately reflected in the minutes of that meeting.)

Rothrock directed the members' attention to Exhibit D to the subcommittee's report, as included in the materials that had been provided for today's meeting. The subcommittee recommends that the text of Rule 1.5(b) be broadened to make it clear that provision for future fee/expense increases can be made in the written disclosure of the basis or rate of fees and expenses that is already required by the existing first sentence of the Rule (the subcommittee has suggested the phrase "written fee disclosure" as a synonym for the written "communication" contemplated in the first sentence). Thus, that provision could be made in a one-way written communication from the lawyer at the inception of the representation and need not be made in a "written fee agreement" as the second sentence of the current Rule requires.

The subcommittee's proposal inserts as a new, second sentence of Rule 1.5(b) text that is nearly identical to text found in the ABA Ethics 2000 version, which requires that each actual change in the basis or rate of fee or expense be communicated in writing to the client — that is, the client must be given written notice of each change in the basis or rate of fee notwithstanding that the right to make such change may have previously been established, either by an initial, written, one-way communication or fee agreement or by subsequent compliance with Rule 1.8(a). There was, Rothrock said, no good reason for having omitted that requirement for a contemporary notice of each increase from the Colorado Rules as adopted in 2008.

The subcommittee proposes deletion of the third sentence of Rule 1.5 Comment [2], reading, "When the lawyer has regularly represented a client, they ordinarily will have reached an understanding concerning the basis or rate of the fee; but, when there has been a change from their previous understanding, the basis or rate of the fee should be promptly communicated in writing." The subcommittee's report notes that this sentence might be inconsistent with what would be the third sentence of the text of Rule 1.5(b) — "Except as agreed by a lawyer and a client or as provided in a written fee disclosure under this Rule 1.5(b), any material changes to the basis or rate of the fee or expenses are subject to the provisions of Rule l.8(a)" — with respect to "regularly represented clients" (that is, clients who have regularly been represented since a time antedating the 1999 adoption of the written fee communication requirement). In his report to the Committee, Rothrock noted that the deleted sentence is also inconsistent with what the subcommittee proposes to be added as Comment [3B].

The subcommittee continues to recommend what it had proposed at the August 2008 meeting as a new Comment [3A], which explains what is meant by changes in the basis and changes in the rate of fee.

Rothrock commented that the subcommittee has proposed Comment [3B] as a complete revision of current Comment [3A]; there was broad agreement that the problems that had been perceived with the linkage of Rule 1.5(b) with Rule 1.8(a) were largely caused by the second sentence of current Comment [3A] — which can be read to imply that Rule 1.8(a) applies in all cases of change except those involving *decreases* in rates or fees — not by the text of the Rule itself.

The first sentence of proposed Comment [3B] clarifies that, if the lawyer has properly provided for future changes in the rate or basis of fees/expenses, those changes can be implemented without consideration of Rule 1.8(a). (Rothrock noted, however, that, even if future changes were properly provided for, a change that jumped a rate of fee from something reasonable to something unreasonable would still be subject to Rule 1.5(a) and its proscription of unreasonable fees.)

The second sentence of proposed Comment [3B] deals with the "course of dealing" situation, and provides that, if an agreement for "periodic changes to the rate of fee" has been established by a course of dealing, then, again, Rule 1.8(a) does not apply. Necessarily, because no unwritten fee arrangement of any kind is valid for a lawyer-client relationship that begins after the Court's adoption of the written communication requirement in 1999, the course-of-dealing alternative is not available for lawyer-client relationships that began after that 1999 Rule change. Thus, as Rothrock put it, this proposed second sentence would apply only to the circumstance where (1) there has never been a contrary fee agreement, (2) the lawyer-client relationship has existed since before the 1999 Rule change requiring written disclosure, and (3) the lawyer and client "have gone along just fine with regular fee changes." If there has been no problem in that arrangement, that will constitute a course of dealing recognized by law as an "agreement" sufficient to avoid the application of Rule 1.8(a).

The final sentence of proposed Comment [3B] repeats the principle found in existing Comment [3A] that a change that will *benefit* the client is not a "material change" that invokes Rule 1.8(a). (Of course, the proposed new, second sentence of Rule 1.5(b) would require that any change, even beneficial ones and even beneficial ones that have been provided for in advance, be communicated to the client when they occur.)

A member expressed concern that the text of Rule 1.5(b) is still confusing as to the application of Rule 1.8(a). While this member approved of the addition of the proposed second sentence, mimicking the ABA's Ethics 2000 language (but with the added Colorado requirement that notice that a change has actually occurred be communicated in writing), she noted that the ABA provision for effectuating changes — the last sentence of the ABA's version of Rule 1.5(b) — only requires that the client be given notice of a change in the basis or rate of fees/expenses and does not require that the client agree to it. She felt that, even with the proposed modifications, the last sentence of our Rule 1.5(b) would remain unclear; while Comment [3B] would help clarify what is *not* a "material change," the lawyer is not advised of what is a "material change" that would invoke Rule 1.8(a). All that is offered is the negative implication that something which is not beneficial to the client is a "material change."

Another member revisited the basic question of why Rule 1.8(a) should have any application to a change in the basis or rate of fees/expenses. He noted that — while he would prefer that all fee arrangements be by way of written agreements signed by the clients — he had himself effected changes from hourly-rate agreements to flat-fee agreements and had not, at the time, thought that Rule 1.8(a) was implicated. Rothrock responded that — as he had said at the outset of the discussion — while the Colorado text is unique, the application of the conflict provision of Rule 1.8(a) to fee increases is not.

Another member commented that this was a good question, and she wondered whether we had gone down a wrong road with our reference to Rule 1.8(a). Despite the great deal of work that had been done to date, she felt more work might be needed.

That member cited the sentence in proposed Comment [3A] reading, "For purposes of [Rule 1.5](b), a change in the basis of fee is one that changes the structure of the fee, such as a change from an hourly representation to a contingent fee or flat fee representation," and noted that the text of Rule 1.5(b) itself also talks about "[a]ny change to the basis or rate of the fee." She would suggest, as a minor change, that Comment [3A] omit the reference to "change" in the "basis." or "rate" of the fee, and simply explain what "basis" and "rate" mean, including by adding an example of a change in the rate. She proposed revising that comment language to read, "For purposes of paragraph (b), the basis of the fee is the structure of the fee, such as an hourly representation, a contingent fee, or a flat fee representation. The rate of the fee is the method of calculating the fee based on the fee structure, such as the rate in an hourly representation or the fee percentage in a contingent fee representation."

Another member took up the question of why there was any reference at all to Rule 1.8(a). He recalled a couple of reasons: First, client protection, to avoid overreaching after a representation had gotten underway and the client might not be able to easily avoid a fee increase by terminating the representation and moving to other counsel. Second, to advise lawyers that there is in fact a conflicts issue as has been evidenced by actual civil litigation. But, he noted, we have been struggling over the expression of the interplay between fee/expense increases and Rule 1.8(a) mainly to make some accommodation for the lawyer who bills on an hourly basis and must expect to increase fees from time to time in longstanding, regular representations. The experience of many members is that questions about this have been frequently asked at continuing legal education programs regarding the new Rules. This member would, however, be glad to revert to the model ABA text.

A member who is also a member of the Colorado Bar Association Ethics Committee recalled that the discussions there had focused not so much on the existence of a writing — since most practitioners now have written fee agreements — but on the "material change" concept, which seemed to call for an application of Rule 1.8(a) if the change was material even if it had been anticipated in the written agreement.

But another member responded that this fear was unfounded, since the Rule had already been altered to make it clear that a change in the basis or rate of fees/expenses that had been provided for in the initial, written fee agreement did not require Rule 1.8(a) treatment even if "material." Rather, the problems arise under the current text of Rule 1.5(b) when there is no written fee agreement or the one that exists does not anticipate changes. Additionally, lawyers are stumbling over the concept of "material change."

To that, the member who had attempted to recall the CBA Ethics Committee discussion acknowledged that he had expressed it incorrectly and had meant to say what the responding member actually said — in essence, that lawyers fear that the troublesome concept of a "material change" precludes reliance even on initial, written fee agreements that provide for fee/expense increases.

Another member noted that in most other legal contexts the concept of materiality is used without any attempt at a definition; he did not favor trying to define it here. In his view, our facilitation of "beneficial changes" should not be impaired by an attempt to define "material change."

Harking back to the fundamental question that had been raised earlier, a member commented that our difficulties have arisen after adoption of the changes to Rule 1.5(b) as part of the Ethics 2000 modifications, when lawyers began to call the experts asking why written fee agreements could ever be subject to analysis under the conflicts principles of Rule 1.8(a). In this member's view, if the Rules must deal in any way with fees, all of the provisions should be lodged in Rule 1.5, and Rule 1.8(a) should be left to deal with non-representational business relationships with clients, not with fee arrangements. In his view, we should put all that needs to be said about fees in Rule 1.5 without any reference to Rule 1.8, so that it would be easier to understand what is required of the lawyer.

Rothrock acknowledged that these were good points, raising the basic question of whether Colorado should drop all reference, in Rule 1.5, to Rule 1.8 and go the way of the ABA. That, he said, would require us to ask whether lawyers should be under any societal, ethical duty — not a civil duty of care — regarding fee increases. If the lawyer proposes to the client, in the middle of a representation, to change the fee, what should his duty be? The ABA only calls for disclosure; should there be more?

Two members were quick to jump in and say that Rule 1.8 should apply to these changes. In their view, Rule 1.8 is replete with monetary issues that are attendant to the lawyer-client relationship

— the advancement of litigation costs is one example — and do not arise only in non-representational, business relationships. Given that, there is no structural reason to exclude from Rule 1.8 and reserve to Rule 1.5 the basic matter of fees increases. They noted that Rule 1.8 deals not only with business relationships but also with "other pecuniary interest[s]." That is, Rule 1.8 deals with situations where there is monetary pressure and the client does not have good choices.

A member commented that the question of whether Rule 1.8(a) applies to changes in fees/expenses is a different question from whether Rule 1.5(b) needs to make reference to Rule 1.8(a). To that, another member asked whether the "legislative history" would be misleading if all reference to Rule 1.8(a) were now deleted from Rule 1.5(b). To her own question, she responded that we had put the reference in to be helpful, not to add an application of Rule 1.8(a) that did not in fact exist previously. Another agreed: We are doing this to provide guidance, to clarify that Rule 1.8(a) does apply; we are just being up front about it.

A member asked how these matters are actually handled by the Office of Attorney Regulation Counsel. The answer given was that, leaving aside questions of whether the changed fee is unreasonable under Rule 1.5(a), the Office looks to see whether the client was jammed into a fee change without a meaningful choice. The member who had asked the question then asked what Rule 1.8 could have to do with that situation: The client is not in a position to change counsel in midstream. Isn't the "jamming" *sui generis* and not resolved by following Rule 1.8's admonition to advise the client to seek other counsel about how to "deal" on the proposed change? Yes, the answer came; that is correct, and typically the issue is not raise with the Office until years later.

Again it was asked: Can we not deal with the fee change directly in Rule 1.5 and separately from Rule 1.8? In reply, a member characterized that as a great idea that could not work because of the complexity of our Rule. We should not, he said, diverge from the Rule 1.8 model more than is absolutely necessary, for we do not want to confuse lawyers used to practicing under the Ethics 2000 model in other jurisdictions.

In answer to a question from a member, it was said that the Office of Attorney Regulation Counsel does not really see fee-change cases arising under written fee agreements. The Office's experience is with changes that are imposed in the absence of any written fee agreement whatsoever. It has never had problems with fee changes occurring under written fee agreements or in the context of long-term representations. But, it was noted, the Office has had to deal with fee changes jammed down upon clients in the absence of prior agreement for such changes; as Rothrock had noted, there are cases and opinions from other jurisdictions regarding the need to comply with Rule 1.8 in those situations and it is in recognition of those cases and opinions that it was decided to clarify the application of Rule 1.8(a) to such changes in the Colorado Rules.

A member added that a client might be facing a rate increase from $200 per hour to $450 per hour — $450 per hour might not be "unreasonable" in a Rule 1.5(a) sense, but a increase of 125% would be shocking to the client.

A member who had not spoken before said he believed we need to refer to Rule 1.8(a) in Rule 1.5(b) in order to advise lawyers that they have no right to unilaterally change a fee; the Rules should not imply that they can make such changes without agreement and should not imply that the agreements can be extracted without the conflicts protections of Rule 1.8. Clients should be able to say, no, we are going to stick to the original fee agreement.

The member who had previously asked that all provisions regarding fees be lodged in Rule 1.5, without application of Rule 1.8(a), now said that, if we really want any fee/expense change to be provided for in the initial fee arrangement, we should simply say that in Rule 1.5.

The member who had urged adequate guidance for the lawyer said he had no problem with a Rule that required all provision for fee changes to be included, if at all, in an initial, written fee agreement.

Rothrock commented that the subcommittee had understood that the concept of a prior authorization to change fees/expenses should accommodate both the initial written fee disclosure contemplated by the first sentence of Rule 1.5(b) and also a formal written agreement. If it is now the view that midstream changes of any significance must comply with Rule 1.8(a) if not reflected in an initial written *agreement*, we should be carefully say that, so that lawyers are not misled into thinking that they can provide for future fee/expense increases in their initial, one-way written communications contemplated by the first sentence of Rule 1.5(b). Lawyers need to know what is required of them. If Rule 1.8(a) will be applied in fact, we need to tell them that so that they are not blindsided. Or, he added, tell the Office of Attorney Regulation Counsel that Rule 1.8(a) no longer applies to fee/expense changes.

A member noted that we spell out that Rule 1.8(a) has application but, she pointed out, Comment 3 to Rule 1.8 itself notes that the general conflicts rule, Rule 1.7 also has application.[1] She said we could also make a reference to Rule 1.7 in our comments to Rule 1.5. Further, she noted, we do not define "agreement" — should we not, she asked, insert the concept of "informed consent," such as by saying, "Unless the client has given informed consent to a change in the basis or rate of the fee or expense . . ."? Lastly, she asked if she was simply mucking it up more by raising these points.

Another member said that incorporation of the concept of "informed consent" would cause more confusion than it would help. He noted that we have tried to deal with the concept of a course of dealing in long-term representations as a basis for establishing an agreement for fee/expense changes. The informed consent concept would not accommodate that approach. This member suggested a straw vote on the issue of whether Rule 1.5(b) or its comments should contain any reference to Rule 1.8(a). In his view, the problems arise with "jam downs" of changes on clients — for example, in a switch from an hourly rate basis to a contingency basis in a case that is progressing nicely — and a reference to Rule 1.8(a) provides useful caution in those situations.

To that suggestion, the Chair commented that there is no question that Rule 1.8(a) applies in fact to increases in the bases or rates of fees and expenses; the question is whether we should say that in the text of or the comments to Rule 1.5(b). We are, she said, generally split on whether to place the reference in the text or only in the comments. She is reluctant to ask the subcommittee to reconvene and

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1. Comment 3 to Rule 1.8 reads (emphasis added)—

> [3] The risk to a client is greatest when the client expects the lawyer to represent the client in the transaction itself or when the lawyer's financial interest otherwise poses a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's financial interest in the transaction. *Here the lawyer's role requires that the lawyer must comply, not only with the requirements of paragraph (a), but also with the requirements of Rule 1.7.* Under that Rule, the lawyer must disclose the risks associated with the lawyer's dual role as both legal adviser and participant in the transaction, such as the risk that the lawyer will structure the transaction or give legal advice in a way that favors the lawyer's interests at the expense of the client. Moreover, the lawyer must obtain the client's informed consent. In some cases, the lawyer's interest may be such that Rule 1.7 will preclude the lawyer from seeking the client's consent to the transaction.

pursue some entirely new approach. Everyone favors the suggested addition of the proposed second sentence to the text of Rule 1.5(b). We have also decided not to define "material change."

A member asked: Is there an intended difference in the *treatment* of "written fee disclosures" (or written fee "communications," to use the word found in the first sentence of Rule 1.5(b)) and "written fee agreements"? A subcommittee member said there was no intended difference — we are attempting to structure the provision so that both approaches are accommodated, and we have tried to track the two different approaches through the Rule and its comments. Another member of the subcommittee asked whether the question exposed the phrase introducing the second sentence of Rule 1.5(b) — "Except as agreed to by the lawyer and a client or as provided in a written fee disclosure under this Rule 1.5(b) . . ." — as being too narrow; but he was answered with the observation that the first part of that phrase was intended to accommodate an agreement for fee/expense changes that was created by a course of dealing. It was again noted that the subcommittee had been careful to trace the two separate concepts — an agreement and a written disclosure — throughout its modifications.

Another member confirmed that there are two notions: (1) a written fee disclosure of the kind the Colorado Rule has long provided for, communicating the basis or rate of fee and expenses to the client "before or within a reasonable time after commencing the representation" and (2) an agreement as to the basis or rate of fees and expenses — which may also include an agreement as to changes in the basis or rate — that may have developed out of a course of dealing in a "regular representation" that ((necessarily) commenced before the amendment of the Rule in 1999 to require written disclosure.

A member accepted that characterization but added that, in dealing with the course-of-dealing situation that commenced before 1999, we are now telling the lawyer that any change to the basis or rate of fee that was not itself incorporated into the course-of-dealing agreement must be processed under Rule 1.8(a) as a new lawyer-client transaction involving a conflict of interest.

To that view, two members strongly objected that it was unfair and inappropriate to subject the lawyer to Rule 1.8(a) simply because the Committee was not skilled enough to write a proper provision into Rule 1.5. Someone else remarked that the effort was beginning to look a lot like talking to his insurance agent about a policy.

A member moved the adoption of the revisions that were proposed by the subcommittee, with further revisions to Comment [3A] to remove references to "change" in the basis or rate of the fee and to include more examples of the meaning of the "basis" and "rate" of a fee.

The Chair, however, cautioned the Committee not to make changes in the proposal unless it thought the changes really fixed a perceived problem. Rothrock commented that he understood the Chair not to be confident that the changes were useful. He added that the issues the Committee had identified with the proposal were those of "materiality" and with the sufficiency of the fee disclosure.

A member suggested that a penultimate sentence be added to Comment [3B] to the effect that materiality will be a fact-specific issue to be addressed in particular circumstances, and she noted that her effort was to avoid a misleading negative implication in the last sentence of that comment — "When a change in the basis or the rate of the fee or expenses is reasonably likely to benefit the client, . . . the change is not material and Rule 1.8(a) does not apply" — that *any* change which does *not* "benefit the client" must be "material."

Another member noted that it was the first three examples stated in Comment [3B] that caused the confusion.

And another member suggested that the Rules ought to answer these questions: How can I avoid the application of Rule 1.8(a) to my fee arrangements with my client, and, if I am caught by Rule 1.8(a), what am I then required to do? But to the suggestion that the Committee undertake to define the concept of materiality, that member refused to consider the possibility.

A member asked whether the first sentence of Comment [3B] could be modified to read, "If the written fee ***agreement or*** disclosure required by Rule 1.5(b) . . . ." The movant found that to be a friendly amendment. But, when another member suggested that the language refer to "the prior fee agreement" rather than to "the written agreement," so that it would also cover course-of-dealing agreements, the movant countered that such a change would be improper because the intended scope of that first sentence of the comment is only agreements or disclosures that have been made in writing, *not* course-of-dealing agreements; the second sentence of the comment deals with the course-of-dealing situation.

After this discussion, and on a vote, the Committee determined to approve the amendments to Rule 1.5(b) and its comments that had been proposed by the Subcommittee, with the addition of the words "agreement or" after the initial words "If the written fee" in the first sentence of Comment [3A].

The Committee determined that the Chair should propose these changes to Rule 1.5 to the Court promptly, rather than awaiting the Committee's action on the pending closed files changes to Rule 1.15. It was noted that lawyers have had many questions about the current version of Rule 1.5(b) and would welcome a prompt resolution. Thus, the Chair will now proceed to propose to the Court two sets of changes — those to Rule 1.15(k) and these to Rule 1.5(b) and its comments — without further delay.[2]

VI. *Proposal for Amendments to Rules 1.6, 3.8, and 8.6 Regarding Prosecutorial Discovery of Exonerating Evidence.*

In Judge Webb's absence, the Chair reported for the subcommittee considering the American Bar Association's changes to Model Rule 3.8 and related changes to Rule 1.6 and Rule 8.6, which the Committee had considered at its twenty-second meeting, on October 21, 2008. At that meeting, the Committee had determined to expose for public comment a revision of that subcommittee's report that had been presented to the Committee at the October meeting, which revised report would include a minority report, and that the revised report would be directed particularly to the Colorado District Attorneys Association, the Colorado Public Defender, the Colorado Alternate Defense Counsel, the Colorado Bar Association Ethics Committee, and the Colorado Trial Lawyers Association.

The Chair now reported that the Public Defender had indicated he would make some comments, but those have not yet been received and reviewed by the subcommittee. Accordingly, the Chair would hold this matter for the twenty-fourth meeting, so that the subcommittee could provide its views to the whole Committee.

VII. *ABA Proposal for Changes to Rule 1.10 Regarding Screening Walls for Lawyers Moving to Opposing Law Firms.*

The Chair reminded the members that the materials for this meeting had included the text of the American Bar Association's recent proposal to amend Model Rule 1.10 to accommodate lawyer moves

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2. As a result of further suggestions for changes to Rule 1.5(b) that were made after the meeting, the Chair determined to return the Rule 1.5(b) matter to the Committee at its next, twenty-fourth, meeting rather than make the proposals to the Court.

to law firms representing opposing parties in matters on which the moving lawyers had worked while at their former firms. She noted that the ABA had rejected text similar to that adopted by the Colorado Supreme Court effective January 1, 2008, at this Committee's suggestion, and had adopted language that was more permissive. Under the new Model Rule, a lawyer may move to opposing counsel's law firm, without creating a conflict requiring the former client's consent, even if the moving lawyer had substantially participated in the representation while at the former firm, so long as the moving lawyer is screened from the matter at the new firm and the moving lawyer and new firm undertake other procedural steps set forth in the amended Model Rule.

A member urged the Committee to review recent articles in *The New York Times* and *The National Law Journal* criticizing the ABA's proposal, noting that they reflected a growing "firestorm" about the ABA's position.

VIII. *Adjournment; Next Scheduled Meeting.*

The meeting adjourned at approximately 12:00 p.m. The next scheduled meeting of the Committee will be on Friday, May 8, 2009, beginning at 9:00 a.m., in the Supreme Court Conference Room.[3]

RESPECTFULLY SUBMITTED,

Anthony van Westrum, Secretary

[These minutes are as approved by the Committee at its meeting on May 8, 2009.]

3. The twenty-fourth meeting was originally scheduled for April 17, 2009, but was postponed to May 8, 2009, on account of a snowstorm in the Denver area.

Rule Change 2008(16)

COLORADO RULES OF PROFESSIONAL CONDUCT

APPENDIX TO CHAPTER 18 TO 20

RULE 1.5. FEES

Comments [1] through [6] [No Change]
[7]: A division of fee is a single billing to a client covering the fee of two or more lawyers who are not in the same firm. A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well, and most often is used when the fee is contingent and the division is between a referring lawyer and a trial specialist. Paragraph (e) permits the lawyers to divide a fee either on the basis of the proportion of services they render or if each lawyer assumes responsibility for the representation as a whole. In addition, the client must agree to the arrangement, including the share that each lawyer is to receive, and the agreement must be confirmed in writing. Contingent fee agreements must be in a writing signed by the client and must otherwise comply with paragraph (c) of this Rule. Joint responsibility for the representation entails financial and ethical responsibility for the representation as if the lawyers were associated in a partnership. A lawyer should ~~only~~ refer a matter ~~only~~ to a lawyer whom the referring lawyer reasonably believes is competent to handle the matter. See Rule 1.1.
Comments [8] through [18] [No Change]

RULE 1.6. CONFIDENTIALITY OF INFORMATION

Comments [1] through [15] [No change]
[16] A lawyer must act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3.

[17] When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures

if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule.

Former Client

[18] The duty of confidentiality continues after the client-lawyer relationship has terminated. See Rule 1.9(c)(2). See Rule 1.9(c)(1) for the prohibition against using such information to the disadvantage of the former client.

RULE 1.15. SAFEKEEPING PROPERTY

Rule 1.15(d)(2):

(d) [No Change]
(1) [No Change]
(2) A business account or accounts into which all funds received for professional services shall be deposited. All business accounts, as well as all deposit slips and all checks drawn thereon, shall be prominently designated as a "professional account," ~~or~~ an "office account," ~~.~~ or an "operating account."

Rule 1.15(i)(6):

(i) Management of Trust Accounts.
(1)through (5) [No Change]
(6) Reconciliation of Trust Accounts. No less than quarterly, a lawyer or a person authorized by the lawyer shall reconcile the trust account records both as to individual clients and in the aggregate with the lawyer's trust account bank statement(s)

RULE 1.17. SALE OF LAW PRACTICE

Comments [1] through [4] [No Change]

[5]: This Rule also permits a lawyer or law firm to sell an area of practice. If an area of practice is sold and the lawyer remains in the active practice of law, the lawyer must cease accepting any matters in the area of practice that has been sold, either as counsel or co-counsel or by assuming joint responsibility for a matter in connection with the division of a fee with another lawyer as would otherwise be permitted by Rule 1.5~~(e)~~(d). For example, a lawyer with a substantial number of estate planning matters and a substantial number of probate administration cases may sell the estate planning portion of the practice but remain in the practice of law by concentrating on probate administration; however, that practitioner may not thereafter accept any estate planning matters. Although a lawyer who leaves a jurisdiction or geographical area typically would sell the entire practice, this Rule permits the lawyer to limit the sale to one or more areas of the practice, thereby preserving the lawyer's right to continue practice in the areas of the practice that were not sold.

Comments [6] through [15] [No Change]

RULE 5.7. RESPONSIBILITIES REGARDING LAW-RELATED SERVICES

Comments [1] through [8] [No Change]

[9]: A broad range of economic and other interests of clients maybe served by lawyers' engaging in the delivery of law-related services. Examples of law-related services include providing title insurance, financial planning, accounting, trust services, real estate counseling, legislative lobbying, economic analysis, social work, psychological counseling, tax preparation, and patent, medical or environmental consulting.

Comments [10] through [11] [No Change]

RULE 7.2. ADVERTISING

Comment [1] through [7] [No Change]

[8]: A lawyer also may agree to refer clients to another lawyer or a nonlawyer in return for the undertaking of that person to refer clients or customers to the lawyer. Such reciprocal referral arrangements must not interfere with the lawyer's professional judgment as to making referrals or as to providing substantive legal services. See Rules 2.1 and 5.4(c). Except as provided in Rule

1.5~~(e)~~(d), a lawyer who receives referrals from a lawyer or nonlawyer must not pay anything solely for the referral, but the lawyer does not violate paragraph (b) of this Rule by agreeing to refer clients to the other lawyer or nonlawyer, so long as the reciprocal referral agreement is not exclusive and the client is informed of the referral agreement. Conflicts of interest created by such arrangements are governed by Rule 1.7. Reciprocal referral agreements should not be of indefinite duration and should be reviewed periodically to determine whether they comply with these Rules. This Rule does not restrict referrals or divisions of revenues or net income among lawyers within firms comprised of multiple entities.

Amended and Adopted by the Court, En Banc, November 6, 2008, effective immediately.

By the Court:

Michael L. Bender
Justice, Colorado Supreme Court

Nathan B. Coats
Justice, Colorado Supreme Court

End of Appendix to SCSCRPC Minutes of
Twenty-Third Meeting, on February 20, 2009

COLORADO SUPREME COURT

STANDING COMMITTEE ON THE RULES OF PROFESSIONAL CONDUCT

Approved Minutes of Meeting of the Full Committee
On May 8, 2009
(Twenty-Fourth Meeting of the Full Committee)

The twenty-fourth meeting of the Colorado Supreme Court Standing Committee on the Rules of Professional Conduct was convened at 9:00 a.m. on Friday, May 8, 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 or by conference telephone at the meeting, in addition to Marcy G. Glenn and Justices Michael L. Bender and Nathan B. Coats, were Federico C. Alvarez, Michael H. Berger, Gary B. Blum, Nancy L. Cohen, Cynthia F. Covell, Thomas E. Downey, Jr., John M. Haried, David C. Little, Judge William R. Lucero, Cecil E. Morris, Jr., Neeti Pawar, Kenneth B. Pennywell, Judge Ruthanne Polidori, Helen E. Raabe, Alexander R. Rothrock, Marcus L. Squarrell, Boston H. Stanton, Jr., Anthony van Westrum, Eli Wald, Judge John R. Webb, and E. Tuck Young. Excused from attendance were John S. Gleason and Lisa M. Wayne. Also absent were Henry R. Reeve and David W. Stark.

I. *Meeting Materials; Minutes of February 20, 2009 Meeting.*

The Chair had provided two packages of materials to the members prior to the meeting date, one in advance of the meeting as it had first been scheduled for April 19, 2009, and a second in advance of the meeting as it was rescheduled for this day. Included in the second package were submitted minutes of the twenty-fourth meeting of the Committee, held on February 20, 2009. Those minutes were approved as submitted.

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

Although the Committee had thought it had finished its consideration of "midstream fee adjustments" at its February meeting, a footnote in the minutes to that meeting warned, "As a result of further suggestions for changes to Rule 1.5(b) that were made after the meeting, the Chair determined to return the Rule 1.5(b) matter to the Committee at its next, twenty-fourth, meeting rather than make the proposals to the Court." [The subcommittee's further suggestions are attached to these minutes as Appendix I.] The Chair now asked Alexander Rothrock to discuss the changes.

Rothrock pointed out that the first change was a global substitution of the word "communication" for the word "disclosure" in the three places it appeared in the subcommittee's earlier draft of Rule 1.5 and its comments. The subcommittee believes that the word "communication" better reflects the process by which an existing fee agreement might be changed and militates against a misreading by which one might think that the fee agreement can be changed by the lawyer's unilateral action.

The second change, Rothrock explained, was to add an introductory clause to the sixth sentence of Comment [1] to Rule 1.8 to clarify that that conflict Rule applies to midstream modifications of fee agreements: That is, while Rule 1.8 does not apply to "ordinary fee arrangements between client and lawyer, which are governed by Rule 1.5," there is an exception as stated in Rule 1.5(b) for *modifications*

to those "ordinary fee agreements." The added clause, Rothrock said, prevented a reading of Comment [1] to Rule 1.8 from wholly undermining the changes we have made to Rule 1.5(b).

A member promptly took aim at the word "or" found in the introductory clause to the second sentence of Rule 1.5(b), which the subcommittee was now proposing to read, "Except as agreed to by a lawyer and a client *or* as provided in a written fee communication. . . ." He was troubled by the implication, from the use of the disjunctive, that the sentence did not require the client to agree to the modification before it could become effective. That is, he worried that it could be read as follows: "Except as such changes might be stated by a lawyer to the client in a written fee communication under this Rule 1.5(b), any material changes to the basis or rate of the fee or expenses are subject to the provisions of Rule 1.8(a); Rule 1.8(a) is not applicable if the changes are stated to the client in such a communication."

Rothrock answered this point by directing the member to the immediately preceding sentence in Rule 1.5(b), reading, "Any change to the basis or rate of the fee or expenses shall also be communicated to the client in writing." Rothrock said that sentence establishes the basic requirement that *any* change to the basis or rate of fee from that established in an existing fee agreement be "communicated" to the client; the third sentence merely establishes that the imposition of the change is subject to the conflict principles of Rule 1.8(a) unless the prospect for the change has already been agreed to by the lawyer and the client.

But another member rejected Rothrock's explanation, arguing that the member who had raised the matter of the disjunctive "or" was rightly concerned that the third sentence had the operative effect of permitting unilateral changes, via "written fee communications," without application of Rule 1.8(a) *and* without the client's agreement to the change. He stressed that the Rule must be clarified to mean that the client must agree to the change.

A member pointed out that the only circumstance in which there can be an agreement between the lawyer and the client — within the contemplation of the beginning words, "Except as agreed to by the lawyer and the client," in the third sentence — that has *not* been established by "a written communication" of some sort is a lawyer-client fee arrangement established before the introduction of the writing requirement with the 1999 amendment to Rule 1.5; from the adoption of that amendment forward, all fee arrangements must be established by some written communication. Thus, the reference in that third sentence to "a written fee communication" that provides for subsequent changes in the rate or basis of the fee[1] must be to an *initial* written communication that establishes the initial fee and makes provision for its subsequent change. If a post-establishment communication is intended to provide for changes in the rate or basis of fees, that communication will be subject to Rule 1.8(a).

Another member adopted that reasoning and suggested the addition of the word "initial" to make the introductory clause to the third sentence read, "Except as agreed to by a lawyer and a client or as provided in ***an initial*** written fee communication under this Rule 1.5(b) . . . ."

But Rothrock sought to narrow the discussion, arguing that the only issue before the Committee was whether to use the word "communication" or the word "disclosure."

A member directed the Committee's attention to Comment [3B] to Rule 1.5, pointing out that it explains what is meant by Rule 1.5(b). He recalled that, at one time, we had spoken of an "agreement"

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1. The reader should remember that Rule 1.5(b) refers both to changes in the rate or basis of *fees* and to changes in the rate or basis of *expenses*. For simplicity's sake, expenses are not referred to in these minutes. —Secretary.

but had found that to be incorrect, because Rule 1.5 has not required an "agreement" but only a "communication."

A second member agreed that the Committee had stumbled over the word "agreement"; in fact no "agreement" is required. But, she thought, the members who were now raising further concerns about Rule 1.5(b) were right to do so. The Rule, she said, is inherently confusing, and the Committee needs to clear it up so that a lawyer can understand it and will not be led to believe that he can unilaterally change the deal.

The member who had first spoken about the changes clarified his understanding: If he has a written fee agreement with his client — which can be established by a unilateral written communication — and if that agreement provides for, say, reasonable annual modifications to the fee, then he is permitted to make such modifications without complying with Rule 1.8(a). If that is the case, he did not understand why the verb we select for the Rule was important, be it "communicate," "disclose," "impose," "reveal," or some other verb. He commented that the members of the Colorado Bar Association Ethics Committee's calling subcommittee get lots of questions about these matters from lawyers who are trying to comply with the Rule. Yet, he said, Regulation Counsel is always looking with hindsight at what was done, where things may look worse than the lawyer, who had necessarily been analyzing the matter prospectively, understood. In this member's view, if the Committee intended to apply Rule 1.8(a) to something other than "regular adjustments" in fee schedules, then the Rule needed to say more. He did not understand what was fixed by changing "disclosure" to "communication."

To that, Rothrock replied that the real problem is not between "communication" and "disclosure" but, rather, lay in Comment [2] to Rule 1.5, which has not been modified since the 1999 amendment that required even initial fee arrangements to be expressed in writing. Rothrock was referring to the first two sentences of Comment [2], reading, "When the lawyer has regularly represented a client, they ordinarily will have evolved an understanding concerning the basis or rate of the fee and the expenses for which the client will be responsible. In a new client-lawyer relationship, the basis or rate of the fee must be promptly communicated in writing to the client." The essence of the problem with the third sentence of Rule 1.5(b), Rothrock said, lies in the words, "Except as agreed to by a lawyer and a client": Those words, when read in contrast — because of the disjunctive "or — to the following words referring to a "written communication," imply that the contemplated communication is not itself an agreement, and yet we understand it to establish the agreement between the lawyer and the client by the client's acceptance of services without challenge to the fee structure that the lawyer has communicated. Rothrock could not now recall why the Committee had abandoned the effort to base the provision on an "agreement."

To that, a member pointed out that the Committee had made the change in order to establish a basis in the Rule for including a "course of dealing" as one mode of reaching agreement on the fees or on changes to the fees.

A second member supported that explanation, saying that there is always an agreement as to the fee, as a principle of contract, but that it might not always be based on a writing signed by both the lawyer and the client. He suggested: "Except as may be agreed to (which agreement may be established by the written communication contemplated in the first sentence of this Rule 1.5(b), if the basis or rate of fee so established is not promptly rejected by the client) . . . ."

Yet, another member questioned whether that formulation would accommodate the course-of-dealing principle that the Committee clearly wants to preserve.

But a member who had served on the subcommittee pointed out that the subcommittee spent a lot of time on this issue, struggling with the substantive law of contract. He recounted that the subcommittee did not want to restate the law of contracts as a basis for the concepts used in Rule 1.5(b). Instead, it initially used the word "agreement" without the adjective "written," to cover both written arrangements and those established by course of dealing. He said that members' concerns that there might be unilateral changes in fees was misplaced, because our commentary clarifies that all changes must either be provided for in an initial agreement with the client or established by changes that have been subjected to the Rule 1.8(a) conflicts principles. This member compared the American Bar Association Ethics 2000 text, which permits what he characterized as wholesale unilateral changes. This Committee has struck a balance and has expressly warned the practitioner about the Rule 1.8 problem: "If you don't have a deal regarding changes, then any change is a Rule 1.8 "new agreement." All we are doing in the text under consideration now, he said, is simply trying to eliminate the bar's current, misplaced concern that the Rule as amended has precluded the lawyer and the client from agreeing — at the time they initially establish the lawyer-client relationship and set their rules regarding fees and changes in the rate or basis of fees — to ways in which that rate or basis might be changed in the future.

The member who had pointed out that there is, necessarily, always an agreement between the lawyer and the client as to fees formally moved that the third sentence be amended to read, "Except as agreed to by a lawyer and a client (which agreement may include an initial fee communication required by the first sentence of this Rule 1.5(b)) or as provided in a written fee communication under this Rule 1.5(b), any material changes to the basis or rate of the fee or expenses are subject to the provisions of Rule 1.8(a)."

In response to a member's question — would an "agreement" in this formulation include an agreement reached by a course of dealing? — there was a chorus of affirmation that a course of dealing would be included.

Another member suggested the following as an alternative to the text proposed by the motion: "Except as agreed to by a lawyer and a client, including an initial communication contemplated by the first sentence of this Rule 1.5(b)), or as provided in a written fee communication under this Rule 1.5(b), any material changes to the basis or rate of the fee or expenses are subject to the provisions of Rule 1.8(a)."

But another member took issue with both formulations. She noted that the first sentence of Rule 1.5(b) is correctly stated. The second sentence then establishes that any change in the agreement that was established pursuant to the first sentence must be communicated to the client in writing. She feared that, if the Committee modified the third sentence as proposed, it would alter the import of the second sentence, because the third sentence would then be improperly assuming there was an agreement already in place. She questioned whether there would always be, in fact, an agreement formed by the communication-*cum*-acceptance-of-services. She preferred the text of the third sentence as Rothrock's subcommittee had proposed it to the Committee.

Another member supported this view, pointing out that the addition of the reference to the *initial* communication as a basis for establishing an agreement for fee changes had the effect of reading the second sentence of Rule 1.5(b) right out of the Rule.

A third member took issue with that, however, asking how there could be any basis for a fee increase if it is not established either (1) by an initial communication from the lawyer that calls out the possibility of the increase and is followed by the client's acceptance of the lawyer's services or (2) by a formal, written, bilateral agreement that provides for the increase.

Rothrock told the Chair that all of this discussion meant that the matter should be returned once again to the subcommittee for further work. The Chair agreed but said she wanted to be sure the Committee was giving the subcommittee adequate guidance for its further deliberations.

A member commented that providing for fee changes in an "initial" communication is only one of several ways in which changes may be accommodated. In her view, the second sentence of the Rule requires that she give actual notice of any fee change she actually makes, but, if she has provided for the possibility of that change in the agreement she has reached, in one fashion or another, with the client before the client becomes contractually bound to pay for services she renders — that is, before the engagement is established — then she need not comply with Rule 1.8(a) when the notice is given and the fee is increased. She did not want to lose sight of the fact that any actual change in fee must be communicated to the client, even if the possibility of the change being made has been anticipated in the arrangement to which the lawyer and the client are deemed to have agreed.

The Chair pointed out that the Committee has been wrestling with these issues because it felt that the practitioner needed warning of what the case law has established but the ABA Ethics 2000 Rules do not mention: Any change in the basis or rate of fee presents a conflict of interest between the lawyer and the client that must be handled under Rule 1.8(a) *unless* the change was agreed to by the client in the initial process of engagement. She asked whether the Committee should abandon its effort and simply revert to the ABA's approach and text.

To that suggestion, a member countered by saying we need to warn lawyers of the case law analysis that applies Rule 1.8(a) to fee changes to which the client has not previously agreed. And, she felt, there should not be any basis left in our text for a lawyer to argue that Rule 1.8(a) does *not* apply when the lawyer tries unilaterally to increase her fee when the case is four years old and the client has no practical ability to reject the lawyer and the fee increase and find other counsel.

Rothrock said that the Committee should continue its effort to find a way to state, clearly, that Rule 1.8(a) will be applied to midstream fee changes that are not provided for in the initial engagement. He pointed out that no other state has made a serious attempt so to state the matter but that there is nearly universal acceptance, in non-disciplinary encounters between lawyers and clients, of the principle that a midstream fee change, not previously agreed to by the client, is a circumstance in which the lawyer has a conflict implicating Rule 1.8(a). He added that it is his understanding that Regulation Counsel does, in fact, pursue disciplinary sanctions against improper midstream adjustments.

A member supported the idea of sending the matter back to the subcommittee, stating that, as now written, the text of Rule 1.5(b) supersedes Rule 1.8(a) in the case of a midstream agreement or communication that effects a fee change.

On a straw poll, two members favored reverting to the ABA Ethics 2000 Rules, but the remainder did not. Rothrock pointed out that, if the text of Rule 1.5(b) were returned to the ABA Ethics 2000 version, the Committee would have to consider the non-uniform modifications it has made to the comments.

A member who had not previously spoken observed that he had been listening to these ethics experts discuss, with great confusion, what these Rules mean and should mean and was wondering what we might be doing to the practicing lawyer, who does not have the hands-on experience and insight about the Rules and their purposes that this Committee has. Clearly, he felt, the Committee needed to return the matter to the subcommittee for further work.

The Chair clarified that the Committee wants to state that Rule 1.8(a) applies to all material changes in the fee arrangement that have not been anticipated in the initial engagement [or in a post-engagement agreement that, itself, was reached in compliance with Rule 1.8(a)].

Following a withdrawal of the pending motion, the Committee returned Rule 1.5(b) and Rule 1.8(a) and their comments to the subcommittee for further work, with thanks to the subcommittee for all that it has done thus far.

III. *Further Consideration of Closed Client Files*.

The Chair told the Committee that the subcommittee considering the handling of closed client files had further changes to propose for existing Rule 1.15 and for the new Rule 1.16A that the subcommittee had drafted, and she asked subcommittee chair Marcus Squarrell to explain the changes. [The subcommittee's further changes are attached to these minutes as Appendices II-A and II-B.]

Squarrell directed the Committee's attention to the redline showing the changes the subcommittee made to the February version [Appendix II-B] and listed the changes as follows:

1. Chang the word "maintain" to "retain" in several places, to match the title of Rule 1.16A.

2. Add the phrase "after such termination" to Clause (1) of the second sentence of Rule 1.16A to clarify that the notice that a lawyer may give to a client warning of impending file destruction cannot be given prior to the termination of the matter — that is, the notice cannot be included anticipatorily in an engagement agreement or some other communication given before the termination of the matter.

3. Delete the phrase "that relate to the matter" in two places in Rule 1.16A. Marcus commented that the subcommittee had reasoned that the phrase was a redundancy but that he now believed that the phrase probably was *not* redundant.

4. Add a sentence to the end of Rule 1.16A, reading, "This Rule does not supersede or limit a lawyer's obligations to retain a file that are imposed by law, court order, or rules of a tribunal."

5. Modify Comment [3] to clarify that Rule 1.16A permits a lawyer to retain files longer than either the two- or the ten-year period of time referred to in the Rule and add the possibility of a subsequent application for post-conviction relief under Rule 35(c) of the Colorado Rules of Criminal Procedure as an example of why a lawyer might determine to hold the file for longer than the ten-year period of repose contemplated by Rule 1.16A.

The Chair commented that she believed Squarrell's second-guessing was right, that the phase "related to the matter" should not have been deleted. All of the members agreed that the phrase should be added back in both of the places it had been deleted.

A member pointed out that the Committee has taken pains to clarify, in Comment [1] to Rule 1.16A, that the Rule does not have application to the holding of "property." But she questioned the inclusion there of "settlement agreements" as examples of "property," because a settlement agreement is different in kind from the other examples of "property" and cannot be distinguished logically from any other executed contract. Another member concurred in the observation.

A member pointed to an inconsistency between the "unless" clause in the first sentence of the text of Rule 1.16A — " . . . unless the lawyer has previously delivered [the files] to the client or disposed of them in accordance with the client's instructions" — and the last sentence of Comment [3] — "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."

Squarrell agreed that there was an inconsistency. He recounted the genesis of the last sentence of Comment [3], arising out of a discussion within the subcommittee about the situation where the lawyer had regularly mailed material to the client in the course of the representation and was then requested to deliver the entire file to the client upon termination of the matter. The subcommittee believed that the deliveries of material during the course of the representation should not eliminate the post-termination obligation to turn over the entire file.

Another member noted that the requirement that the lawyer turn over a complete file notwithstanding that much of it may have been previously copied to the client would be important in the situation where the matter is turned over to substitute counsel. But this member added that the "client file" is what remains of the file in the lawyer's possession at the end of the representation — if the lawyer turned documents over to the client as the matter progressed, and did not retain copies in her files, they would no longer be part of the "client's file" and would not be covered by Rule 1.16A.

To the suggestion that the last sentence of Comment [3] deals with the turnover of files at the end of a representation, a member said the point would be better placed in Rule 1.16(d), which provides, "Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as . . . surrendering papers and property to which the client is entitled . . . ."

Another member approved of that idea and honed it by suggesting that the last sentence of what has been proposed as Comment [3] to Rule 1.16A be added, instead, at the end of existing Comment [9] to Rule 1.16, which currently reads, "Even if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the consequences to the client. The lawyer may retain papers as security for a fee only to the extent permitted by law. See Rule 1.15."

A member explained the idea behind that suggestion as follows: Even if the lawyer returns parts of the client's files to the client during the course of the matter, there remains an obligation to return the entire file at the end of the matter. But, she said, Rule 1.16A does not deal with the obligation to return files; rather, it deals with the obligations associated with the retention of files and the ways in which those obligations may be terminated in time. Accordingly, it is inappropriate to include, in Rule 1.16A and its comments, provisions regarding file return, as distinguished from provisions regarding file retention or dealing with the end of retention.

The member who had suggested moving the last sentence of Comment [3] of Rule 1.16A to Comment [9] of Rule 1.16 noted that the move would actually be a bit more complex than a simple paste job; perhaps the concept should be stated as a new Comment [9A] in Rule 1.16.

Another member noted that, if the sentence were moved to Rule 1.16, then the existing reference to Rule 1.16A in the subject sentence would need to be changed to refer instead to Rule 1.16.

A member suggested that the subject sentence be modified to clarify that a client's receipt of papers during the course of the representation does not alleviate the lawyer's obligations to return the entire file to the client after the termination of the representation if requested to do so.

Squarrell supported that idea and noted that the "unless" clause of the first sentence of Rule 1.16A itself might be modified to enhance the understanding that the Rule is dealing with "client files." To do that, he would have that clause read, "unless the lawyer has previously delivered ~~them~~ ***the files*** to the client or disposed of ~~them~~ ***the files*** in accordance with the client's instructions."

Another member suggested that the "unless" clause be further modified to clarify that it relates to actions to be taken "after the termination of the representation", as follows: "unless***, after the termination of the representation,*** the lawyer ~~**has previously**~~ delivered the files to the client or disposed of the files in accordance with the client's instructions."

But another member objected that this did not account for the circumstance in which, *during* the course of the representation, the client had instructed the lawyer to return the files to the client without keeping a copy of them in the lawyer's possession.

A second member agreed with that observation. But two members responded that lawyers are always entitled to keep copies of the client files they amass. The two members who had objected to the reformulation of the "unless" clause because it did not take into account file-disposition instructions issued during the course of the representation did not agree that the lawyer had a right to retain copies in the face of contrary instructions from the client and added that proposed Rule 1.16A, with its reference to disposition of client files "in accordance with the client's instructions," would make it difficult to argue otherwise.

The two members who had proposed modification of the "unless" clause to make it apply "after the termination of the representation" said they had become convinced that such a modification would be inappropriate. One of them noted the example of a client who has delivered materials to her lawyer during the course of a representation and then taken those materials back before the representation was concluded.

Seeking to bring the discussion to a close, the Chair asked for a motion.

Instead of a motion, the Chair received a request that the previous question of whether "settlement agreements" are a species of property be resolved. The member who made that request said that other states have included all "executed contracts" within the concept of "property" that must be protected by the lawyer and provided to the client. He suggested that the words "executed contracts" be substituted for "settlement agreements."

That led another member, who is also a member of the Colorado Bar Association's Ethics Committee, to recount that the Ethics Committee had had long discussions about what constituted "client files" and what did not. He noted that clients pay legal fees for legal research— why should they not be entitled to copies of the memoranda generated in the course of that research; but how would such a rule be crafted that would still leave room for the lawyer to decline to turn over to the client the notes that contained personal observations of the client's demeanor or other things that lawyers do in fact insert into file folders with the thought that they will never be exposed to the client? The member added that the elephant in the Ethics Committee's meeting room had been the payment, or nonpayment, of fees. Because of the issue of whether lawyers could refuse to deliver up files while their fees remained unpaid, he said, the words had been "retain" and "retention" rather than "turn over." In this member's view, proposed Rule 1.16A would give good guidance to the practitioner, even though it might not be perfect. And, in his view, a concept that the lawyer must always comply with a client's demand that files be turned over and copies not retained was crazy.

One of the two lawyers who had just been labeled crazy replied that one needed to distinguish between the question of discipline and lawyers' obligations to Regulation Counsel on the one hand and civil liability to clients on the other hand. He suggested that a lawyer who has complied with a client's request to deliver an original document to the client without keeping a copy will do as requested but will do so under a cover letter, copy to file, that memorializes the request and his compliance with it. This member noted that this Committee cannot, by a Rule, resolve questions of civil liability, but it can resolve what can be kept, and must be kept, and how it can be disposed of, as a matter of discipline and as a standard of *conduct*. Thus, setting a standard of conduct — and not a standard of care — this Rule 1.16A begins, "[A] lawyer *shall* retain a client's files . . . ."

A member switched subjects by noting that the Committee had, at its meeting on February 20, 2009, discussed providing a carve-out or recognition of the special concerns of lawyers practicing criminal law. She noted that those who had stressed those concerns at the February meeting were not present this day; in their stead, she said both prosecutors and defense counsel would feel that the two-year period this Rule provides as a minimum retention period is too short for lawyers in criminal law practice.

To that, a member replied that Comment [3] as now proposed contains — as a specific example of a situation in which a lawyer may determine to retain a client's file for longer than the two-year and ten-year periods — a reference to a matter that has resulted in a felony conviction implicating Rule 35(c) of the criminal procedure rules.

A member returned the discussion to settlement agreements, executed contracts, and property. He said the issue is not whether particular papers get returned, or not, at some time but whether they constitute "files" or "property." If they are only "files," the obligation to retain them can be terminated after two years by compliance with the notice provisions of this proposed Rule 1.16A. If they are "property," they must be protected in accordance with Rule 1.16.

Another member agreed that the more general term "executed contracts" should be used in place of "settlement agreements," implying that all executed contracts should be treated as property deserving of protection.

The member who had first raised the issue of "settlement agreements" as "property" said she had concluded that the existing, general reference to "documents of intrinsic value" was sufficient to cover settlement agreements and other executed contracts and that our debate could be resolved by simply eliminating "settlement agreements" from the listing of examples of such "documents of intrinsic value." She moved the deletion of the words "settlement agreements" in the two places they appear in the subcommittee's proposal — Rule 1.15(m)(1) and Comment [3] to Rule 1.16A.

Sensing that the discussion was wrapping up, Squarrell reminded the Committee that the words "the files" should be substituted for the word "them" in both places it is used in the "unless" clause of the first sentence of the text of Rule 1.16A. And he proposed that the last sentence of Comment [3] be retained without change.

But another member suggested, instead, that the last sentence of Comment [3] be deleted entirely; it was not really needed, she said.

Several other members opposed the deletion of last sentence of Comment [3] if its concept was not to be expressed somewhere else in Rule 1.16 or Rule 1.16A. They felt that, even if the lawyer had a practice of contemporaneously copying the client with all additions to the file during the course of the

representation, there needed to be an obligation to offer up the entire file, as it was constituted at the termination of the representation, to the client after the representation was terminated. They proposed leaving the sentence in place, and no other member challenged that proposal.

A member noted that the Committee had, at the beginning of its discussion, generally agreed that the words "related to the matter" should be restored in the two places the subcommittee had deleted them from the draft considered at its February 20, 2009 meeting.

Squarrell added that the Committee had agreed to a modification of the "unless" clause in the first sentence of Rule 1.16A to read, "unless the lawyer has previously delivered ~~them~~ ***the files*** to the client or disposed of ~~them~~ ***the files*** in accordance with the client's instructions."

Upon a vote, the Committee agreed to recommend to the Court the amendment of Rule 1.15, and the addition of new Rule 1.16A, as proposed by the subcommittee and thus modified by the Committee.

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

To begin the Committee's further consideration of the American Bar Association's changes to Model Rule 3.8 and related changes proposed by the subcommittee to Rule 8.6 and, possibly, related changes proposed by a minority of the subcommittee to Rule 1.6, which the Committee had discussed at both its twenty-second meeting, on October 21, 2008, and its twenty-third meeting, on February 20, 2009, the Chair introduced two guests, Ted Tow, of the Colorado District Attorney's Council, and Norman Mueller, a lawyer practicing criminal defense law. She noted that both of the guests had been useful participants in the efforts of the subcommittee that had been appointed to make recommendations regarding the ABA's changes.

The Chair asked Judge Webb, who chairs that subcommittee, to lead the Committee's discussion this day. Judge Webb expressed some trepidation, given the rigors of the Committee's just-concluded discussions about midstream fee adjustments and closed client files, but took on the task notwithstanding.

Judge Webb referred the Committee to the package of materials from his subcommittee that had been provided to the members for the February 20, 2009 meeting — including a minority report supporting the addition, to Rule 1.6, of an exception permitting a lawyer's disclosure of evidence that might exonerate another person if it does not implicate a living current or former client of the lawyer — as well as to two modified versions of the subcommittee's proposals, containing minor modifications, which he had distributed to the attendees this day

The judge reminded the Committee that, at its twenty-second meeting, on October 21, 2008, it had determined to expose for public comment a revision of the subcommittee's report that had been presented to the Committee at the October meeting, together with a minority report regarding a related proposal for the addition of an exception to the nondisclosure requirements of Rule 1.6, and that the materials would be directed particularly to the Colorado District Attorneys Association, the Colorado Public Defender, the Colorado Alternate Defense Counsel, the Colorado Bar Association Ethics Committee, and the Colorado Trial Lawyers Association. The Committee determined not to give substantive attention to the matter at its February meeting, because it understood that the Colorado Public Defender intended to provide some comments and it decided to hold further discussion until the subcommittee had received and reviewed those comments and provided its views thereon to the Committee. In fact, the subcommittee had, in advance of this twenty-fourth meeting of the Committee

as it had been initially scheduled for April 19, 2009, determined that it would not make a further report to the Committee; but, in the interim before holding of the rescheduled meeting on this May 8, 2009, the subcommittee did make some corrections to its proposal, as set forth in the two attachments that the judge provided to the members this day.

Turning to substance, Judge Webb noted that the subcommittee has not proposed to deal with the issue of prospective clients other than by way of the implication to be drawn from the words "current or former client" that are found in the first sentence of proposed Rule 8.6; the subcommittee believes those words make it sufficiently clear that the Rule does not cover prospective clients. The subcommittee would not oppose a comment confirming the implication, but it has not proposed such a comment.

Judge Webb noted that some of the "stakeholders" who had provided comments to the subcommittee were of the view that the Colorado text should adhere closely to that promulgated by the American Bar Association. The subcommittee felt, however, that the issues are of specific, local, Colorado concern and are not likely to be applied substantively by someone from outside the state who would not be aware of the Colorado changes. Accordingly, the subcommittee felt no compunction to adhere to uniform or model language and felt that the changes it proposed were important to reduce the imprecision found in the ABA text. Further, he said, what is going on in other jurisdictions in this area is also a moving target that will probably result in non-uniformity elsewhere as well.

To that point, a member who has been watching what other jurisdictions are doing with the ABA proposal reported that Wisconsin is currently reviewing the proposal but has not yet acted on it and that New York has taken a go-it-alone approach to many of the ABA's rules, including in particular pieces of Rule 3.8. In sum, she said, Colorado is proceeding ahead of most of the states; even the ABA's Criminal Justice Section, which discussed the ABA proposals at its meeting in February 2009, did not consider changes to Rule 1.6 such as have been proposed by our subcommittee. She indicated that she was not concerned that we might deviate from the model text and thereby create non-uniformity.

A. *Proposed Amendments to Rule 3.8*.

Judge Webb then turned to the substance of Rule 3.8, saying he hoped the Committee could bring that part of the matter to a conclusion before turning to Rule 8.6 and Rule 1.6.

A member opened the discussion by saying he did not think there was any need to make any amendment to Rule 3.8. He suspected that the advent of widespread use of DNA evidence in criminal proceedings was driving the perception that something needed to be changed, but he believed that development had nothing to do with prosecutors withholding evidence that they should be disclosing. It is, he said, just a reflection of advancement in the sciences; none of the cases that have achieved notoriety have involved prosecutors sitting on evidence that they should have disclosed to the defense, and it is, he said, false logic to tie that advance in science to the need for a new Rule.

Further, this member said, some prosecutors may already be taking the position that Rule 3.8(d) covers DNA discovered post-conviction. He thought that might be the crux of the Colorado case *In re Attorney C*.[2] In his view, the prosecutor's obligation under Rule 3.8(d) — to disclose to the defense all evidence or information known to the prosecutor that tends to negate the guilt of the accused or

2. *In re Attorney C*, 47 P.3d 1167 (Colo. 2002) (requirement of "timely disclosure" under Rule 3.8(d) means that, when a prosecutor is aware of exculpatory evidence before any critical stage of the proceeding, she must disclose that evidence before the proceeding takes place).

mitigates the offense — is not limited to information known before conviction, notwithstanding the Rule's reference to "timely" disclosure. He referred to the New York City Bar Association's Report on "Proposed Prosecutorial Ethics Rules"[3] that was cited in the subcommittee's report and to Prof. Bruce Green's law review article that was cited in the New York City Bar report,[4] in which the author concluded that Rule 3.8(d) has no application to post-conviction discoveries of evidence; this member said the case the law review article relied upon for that proposition[5] had *dicta* exactly to the contrary, for in that case the court took steps, at the end of its opinion, to refer to the disciplinary authorities in Illinois the matter of the prosecutors' withholding evidence that had been discovered post-conviction.

Given those indications that Rule 3.8(d) already imposes a duty on prosecutors to disclose evidence discovered post-conviction, this member felt that no amendment was needed.

A member asked why, if this view were correct, the ABA had felt modification was needed. Another member replied that questions have been raised about whether Rule 3.8(d) really does apply to post-conviction discoveries of evidence, given its references to "the accused," to mitigation of the offense, and to the sentencing process, all of which might be taken to indicate the disclosure obligation only applies during the pendency of the criminal proceeding and not after conviction. Many believe, as does the member who previously spoke, that the provision applies both before and after conviction, but these wording choices give cause to wonder.

A member noted that the proposed language looked like the *Brady* rule[6] and asked whether there really was a hole in the current Rule that needed filling.

To that the member who had recounted how use of words such as "the accused" in the current rule has given rise to doubts about the application of the Rule to evidence discovered after conviction replied that there is a concern among the defense bar and the public that some prosecutors have failed to disclose such evidence when it is exculpatory. She noted that Colorado's Regulation Counsel has recently had a case in which a prosecutor agreed to public censure for such conduct, but she added that the sense that there is withheld evidence is common across the country.

Norman Mueller commented that he felt the modifications are needed and, further, that the changes that the subcommittee has proposed to the ABA amendments are appropriate. He added that the defense lawyers in the recent *Tim Master* case in Colorado[7] would argue that the prosecutors would not have disclosed the exculpatory DNA evidence there but for the persistence of the defense lawyers.

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3. *Proposed Prosecutorial Ethics Rules*, 2006 REPORT OF THE NEW YORK CITY BAR 69, found at http://www.nycbar.org/Publications/record/vol_61_no_1.pdf/.

4. Green, *Prosecution Ethics As Usual*, 2003 U. ILL. L. REV. 1573 (2003), arguing that, in adopting the Ethics 2000 Rules, the ABA "declined to augment prosecutors' special responsibilities and did not expand any of the existing provisions of Model Rule 3.8." *See* fn 92 (citing *Houston v. Partee*, 978 F.2d 362 (7th Cir. 1992)) and the accompanying text: "Finally, [Rule 3.8] is silent about the prosecutor's exercise of discretion after a conviction has been obtained. It does not identify a duty to confess error when a conviction has been procured through wrongful means or a duty to seek redress when post-trial evidence makes plain that an innocent person was convicted." [Footnotes omitted.]

5. *Houston v. Partee*, 978 F.2d 362 (7th Cir. 1992).

6. *Brady v. Maryland*, 373 U.S. 83 (1963). "We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Id*. at 87.

7. *See The Denver Post*, June 25, 2009, http://www.denverpost.com/search/ci_12685106.

Mueller was concerned that a literal reading of Rule 3.8(d) as written, including the words "in a case" in the prefatory words of the Rule, would support a conclusion that it applies only during the pendency of a case and does not cover evidence discovered by the prosecutor after conviction. He said the subcommittee had looked to actual Colorado cases in developing its proposal for changes to the ABA amendments, in order to define the prosecutor's duties clearly.

Ted Tow noted that there are arguments that Rule 3.8(d) is too broad. The finality of a conviction should have meaning and should be respected as a part of the judicial process. Rule 3.8(d)'s current reference to evidence that "tends to mitigate" an offense — which reaches to evidence that is much less than would be needed to overturn a conviction — imposes too great a burden on prosecutors if it is to be applied post-conviction. Accordingly, he said, the proposed changes are useful clarifications that will guide prosecutors as to their post-conviction obligations. And, he added, it will lay to rest the debate about whether Rule 3.8(d) applies, or not, to evidence discovered after conviction.

The member who had discussed the New York City Bar report and Prof. Green's law review article said it is one thing to resolve whether Rule 3.8(d) applies to evidence discovered after conviction; whether the modified Rule is too broad is another issue. As to the first issue, his own research has turned up nothing to confirm that Rule 3.8(a) does not apply to post-conviction evidence, other than Prof. Green's law review article, which, he reiterated, he believed had incorrectly analyzed the existing case law. What little he has found on the question indicates that the current Rule is to be applied to post-conviction evidence as well as during the trial proceedings.

Another member said that, in his experience, he has seen some prosecutor offices who scrupulously disclose to the defense all material evidence and others who are bent on winning. If one is dealing with an office that does not promote disclosure, we simply will never learn about the nondisclosures — he referred to the recent prosecution of Alaskan Senator Ted Stevens, in which it was not from the prosecutor's office that Stevens learned of the fact that evidence was withheld from him but from a third-party source. Thus, if we are looking for data to support the proposition that the Rule should apply post-conviction, we simply will not find it; instead, we must support that proposition on the grounds of common sense rather than actual experience.

A member followed up that idea with the observation that enactment of a proscriptive Rule will serve, in time, to educate the bar about what is required. Another member joined in the observation by adding that prosecutors, like other attorneys, need guidance about their duties.

Ted Tow commented that, in his discussions with other prosecutors about the proposed changes, some said they were already aware of an obligation to disclose post-conviction evidence and asked why more need be said, but others expressed appreciation for the additional guidance on the point. In short, there was a split of opinion among prosecutors as to the need for modifications of the text, but he felt it appropriate, in the end, to support the proposed changes.

In response to a question, Norman Mueller said he did not regard the subcommittee's proposal to be a dilution of the ABA's requirements for prosecutors but, rather, a clarification. He had considered the imposition of an affirmative duty upon the prosecutor to "investigate" but was persuaded against that by their arguments about costs, etc.

A member commented that the question of costs in applying advanced technology to criminal cases is a huge one; in his view, the motivation to utilize that technology in the development of evidence is going to come from the defense side of a case, and, he added, that is where it should come from.

A member who had participated on the subcommittee agreed with Norman Mueller that the Colorado text is an improvement upon the ABA amendments; she prophesied that the ABA might adopt the Colorado changes.

Ted Tow said he had shared the subcommittee's proposal with other prosecutors nationally and reported that they had liked the Colorado version better than the ABA model, especially as to the duty to investigate. Tow noted, for example, that they approved of the Colorado clarification that a prosecutor does not have a duty to investigate evidence in another jurisdiction.

The Chair suggested that the Committee turn its attention away from Rule 3.8 and to the more controversial aspects of the subcommittee's proposal. Judge Webb asked whether, given the significant differences between those other aspects and Rule 3.8, the Committee might now have an up-or-down vote on Rule 3.8. In response to the Chair's comment that some members might want to see the outcome of the full discussion before voting on Rule 3.8, Judge Webb said that the subcommittee had felt the other aspects to be sufficiently distinct and free-standing from Rule 3.8 that they might not even have been proposed for consideration until the Committee had acted on Rule 3.8.

With the prospect of a vote on the subcommittee's version of Rule 3.8, a member suggested the addition of a comment clarifying that Rule 3.8(*b*) does not have application after conviction. Webb commented that he felt the proposed modifications to Rule 3.8(d) and the addition of Rule 3.8(h) clearly indicated that the Rule 3.8(*b*) duty expired with conviction, but he added that he would not be opposed to a clarifying comment.

Another member noted that the prosecutor in a matter might be subject, after conviction was obtained, to the general disclosure obligations that proposed Rule 8.6 would impose on all lawyers.

A member clarified that the text of proposed Rule 3.8 on which the Committee would vote would have the words "must take steps" substituted for the words "must seek to take steps" in Comment [8], to match the usage in the text of Rule 3.8(h).

Another member suggested, to general approval, that the last sentence of the subcommittee's version of Comment [9] be placed in a new comment, numbered [9A], to indicate that it is a Colorado addition.

With these modifications, the Committee approved the subcommittee's proposal for amendments to existing Rule 3.8. It did not, however, intend that they be submitted to the Court before it took action on the related issues regarding Rule 8.6 and Rule 1.6.

B. *Proposed Amendments to Rule 8.6 and Rule 1.6.*

Judge Webb noted that all of the members of the subcommittee were agreed that the principles now contained in proposed Rule 8.6 should be added to the Rules. The controversy, he said, centered on the question of whether rectification of wrongful conviction should trump the confidentiality provided for by Rule 1.6. If the Committee believes that such rectification is the greater good, then it should modify Rule 1.6 as the minority report has proposed.

A member said she liked the subcommittee's version of Rule 8.6. However, for uniformity's sake, she thought the Committee should, before its adoption in Colorado, submit the text to the ABA for adoption at the national level. Her concern was that the Rule would impose obligations on Colorado

counsel for things known about convictions in another jurisdiction, and she felt the implications of the extra-jurisdictional application of a non-uniform Rule had not been thought through.

Another member urged that the Committee give attention to the impact of the Rule on lawyers in private practice who were not as well-versed in criminal law as are prosecutors or defense counsel. Proposed Rule 3.8 would impose an affirmative duty on every lawyer with respect to all convicted felons, a duty that could not easily be discharged by lawyers who did not have a substantive knowledge of criminal law, such as the meaning of the "reasonable probability" standard used in the proposed Rule. This member also agreed with the previous speaker that there are significant inter-jurisdictional issues in this Rule, which is unlimited in time and place — how is it to be applied to a Colorado lawyer who learns something while attending a cocktail party in Los Angeles? Further, he said, the burdens of the Rule are specifically not applied to clients and representations in the course of practicing law but, rather, to nonclients, leaving the lawyer possibly exposed (by extension into the civil arena) to obligations that might not be covered by his malpractice insurance. What, he asked, is driving this proposal? Could the imposition of such a burden on lawyers, especially one that is unrestricted in time and place, be unconstitutional?

Another member voiced agreement and renewed the suggestion that the subcommittee's proposal be sent to the ABA for a national debate before Colorado adopted it.

To the idea that proposed Rule 8.6 could impose civil liability on a lawyer who failed to comply, a member noted that, as stated in Paragraph 20 of the Scope Section of the Rules, this Rule "should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached."

Another member suggested that the cocktail party example was probably an inaccurate indication of what the Rule would require, given that the Rule is only implicated when the lawyer "knows" the subject information. Still, she acknowledged, others have expressed similar concerns about over-breadth.

The member who had given the cocktail party example said that, while the Rule may narrow the obligation to only that information which is *known*, it imposes a burden on the lawyer to understand the implications of the information — to comprehend whether or not the information "creates a reasonable probability" that the felon did not commit the crime of which she was convicted.

A member asked why the proposal was even being made to the Committee. To that, Judge Webb said the subcommittee had felt that there was a public perception about the legal profession and its willingness to see erroneously convicted persons languish in the presence of information that could exonerate them. The subcommittee felt that, if it was appropriate to burden prosecutors with an obligation to avoid that possibility, then there was no logical basis for not extending the obligation to all members of the bar. The subcommittee members knew the proposition was not clear-cut and free from doubt, but they felt the matter should be put to, and resolved by, the full Committee.

A member asked whether the crux of the matter was presented not by Rule 8.6 but by Rule 1.6: The lawyer knows facts that would exonerate another person — because his client is the guilty person — but is bound by his obligations to his client under Rule 1.6 not to make the disclosure. This member could think of no example that would arise under Rule 8.6 that would not also implicate Rule 1.6. Is this Rule intended just to make lawyers look better to the public, without much scope for actual application?

A member posed this actual example: A prosecutor, on his deathbed, confessed to a lawyer friend that he convicted a person — he did not say whom — on perjured evidence. Three years later the lawyer heard of a death-row situation and connected the dots to what he heard in the confession; he disclosed the relevant information to defense counsel; he was then disciplined for his prior failure to report the erring prosecutor to the disciplinary authorities under Rule 8.3 (Rule 8.6 not being in existence at the time).

A member who had been a member of the subcommittee said the proposal for Rule 8.6 was intended to respond to the public perception that lawyers are in a special position giving them opportunity to obtain knowledge of innocence and that they should not be permitted to sit on that knowledge.

The member who had previously asked why the proposal was even being made to the Committee now moved that further consideration by the Committee be tabled until the proposal had been sent to the ABA and given consideration at the national level.

The Chair responded by saying that she would confer with Judge Webb about procedures and report later to the Committee about how proposed Rule 8.6 might be submitted by the Committee to the ABA for consideration.

Judge Webb indicated he understood the situation to be that Colorado would tell the ABA that it had adopted a version of Rule 3.8 and wanted the ABA to consider and adopt its proposed Rule 8.6. Others, however, said that would be an overstatement of the Committee's attitude toward Rule 8.6.

A member asked that the subcommittee's minority report, regarding Rule 1.6, be included in the submission to the ABA, but another objected that the minority supporting that concept was only two out of six members and, in light of that weak support, the minority report did not deserve such elevation in status.

A member reported that the only aspect of Rule 1.6 that is presently before the ABA involves information arising with respect to a *deceased* client. Another member noted, however, that the matter can also arise with respect to facts gained in the course of representing a living client but where their disclosure would not damage that client, He referred to the guardian *ad litem* example used in the minority report and asked why the guardian should be precluded by Rule 1.6 from making disclosure. Allowing such disclosure would enhance the public's perception about lawyers and the legal profession.

Another member asked, however, why a proposition that is supported by only a small minority should be sent off to the ABA; the Chair responded that it would be appropriate to do that in order to provide a complete record of the Colorado discussion.

A member with experience in lawyer discipline noted that there are many aspects of current Rule 1.6 that are not fully comprehended by many lawyers. She was concerned that an amendment such as that proposed in the minority report would give one more opportunity for lawyers to be misled about their obligations under Rule 1.6, inducing them to think that disclosures might be permitted which in fact should not be made because they could actually "incriminate or implicate" the client. She was very concerned about the proposal to add yet another exception to Rule 1.6.

Ted Tow, noting that he was speaking as a district attorney, said that the vast majority of district attorneys do not want to convict the wrong person. To impose a "Mt. Etna" of additional obligations on prosecutors without putting other lawyers on the same mountainside would, he said, be inconsistent.

If the goal is to avoid conviction of the innocent, to fail even to consider an modification to Rule 1.6 for other lawyers is illogical. The matter needs to be exposed for discussion. In his view, if this Committee were going to send its proposal for Rule 8.6 to the ABA for a larger debate, it should also send the proposal for a corresponding exception to Rule 1.6; it makes a coherent package that should be given consideration from both the prosecutor and private-practitioner sides.

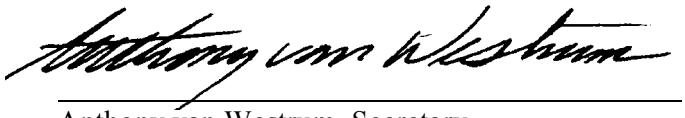
Judge Webb added that the minority report is very well written and that he agreed it should be submitted to the ABA with the majority report.

Upon motion, the Committee narrowly determined to submit both the majority report and the minority report on Rule 8.6 and Rule 1.6 to the ABA.

V. *Adjournment; Next Scheduled Meeting.*

The meeting adjourned at approximately 12:00 p.m. The next scheduled meeting of the Committee will be on Friday, August 21, 2009, beginning at 9:00 a.m., in the Supreme Court Conference Room.

RESPECTFULLY SUBMITTED,



Anthony van Westrum, Secretary

These minutes are as approved by the Committee at its meeting on August 21, 2009.

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. Any change to the basis or rate of the fee or expenses shall also be communicated to the client in writing. Except as agreed to by a lawyer and a client or as provided in a written fee ***communication*** ~~**disclosure**~~ under this Rule 1.5(b), any material changes to the basis or rate of the fee or expenses are subject to the provisions of Rule 1.8(a).

* * * *

Comment

* * * *

[2] When the lawyer has regularly represented a client, they ordinarily will have evolved an understanding concerning the basis or rate of the fee and the expenses for which the client will be responsible. In a new client-lawyer relationship, the basis or rate of the fee must be promptly communicated in writing to the client. When the lawyer has regularly represented a client, they ordinarily will have reached an understanding concerning the basis or rate of the fee; but, when there has been a change from their previous understanding, the basis or rate of the fee should be promptly communicated in writing. All contingent fee arrangements must be in writing, regardless of whether the client-lawyer relationship is new or established. See C.R.C.P., Ch. 23.3, Rule 1. A written communication must disclose the basis or rate of the lawyer's fees, but it need not take the form of a formal engagement letter or agreement, and it need not be signed by the client. Moreover, it is not necessary to recite all the factors that underlie the basis of the fee, but only those that are directly involved in its computation. It is sufficient, for example, to state that the basic rate is an hourly charge or a fixed amount or an estimated amount, to identify the factors that may be take into account in finally fixing the fee, or to furnish the client with a simple memorandum or the lawyer's customary fee schedule. When developments occur during the representation that render an earlier ***communication*** ~~**disclosure**~~ substantially inaccurate, a revised written ~~**communication**~~ ***disclosure*** should be provided to the client.

[3A] For purposes of paragraph (b), a change in the basis of the fee is one that changes the structure of the fee, such as a change from an hourly representation to a contingent fee or flat fee representation. A change in the rate of the fee is one that changes the method of calculating the fee based on an existing fee structure, such as a rate increase in an hourly representation.

[3B] If the written fee ***communication*** ~~**disclosure**~~ required by Rule 1.5(b) permits periodic changes to the rate of the fee, Rule 1.8(a) does not apply. In addition, if a course of dealing between the lawyer and the client establishes an agreement for periodic changes to the rate of the fee, Rule 1.8(a) does not apply. The reasonableness requirement of Rule 1.5(a) applies to increases in the fee. 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 previously did not previously exist, the change is not material and Rule 1.8(a) does not apply.

* * * *

Rule 1.8

* * * *

Comment

[1] A lawyer's legal skill and training, together with the relationship of trust and confidence between lawyer and client, create the possibility of overreaching when the lawyer participates in a business, property or financial transaction with a client, for example, a loan or sales transaction or a lawyer investment on behalf of a client. The requirements of paragraph (a) must be met even when the transaction is not closely related to the subject matter of the representation, as when a lawyer drafting a will for a client learns that the client needs money for unrelated expenses and offers to make a loan to the client. The Rule applies to lawyers engaged in the sale of goods or services related to the practice of law, for example, the sale of title insurance or investment services to existing clients of the lawyer's legal practice. See Rule 5.7. It also applies to lawyers purchasing property from estates they represent. ***Except as stated in the last sentence of Rule 1.5(b), it***, ~~It~~ does not apply to ordinary fee arrangements between client and lawyer, which are governed by Rule 1.5, although its requirements must be met when the lawyer accepts an interest in the client's business or other nonmonetary property as payment of all or part of a fee. In addition, the Rule does not apply to standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others, for example, banking or brokerage services, medical services, products manufactured or distributed by the client, and utilities' services. In such transactions, the lawyer has no advantage in dealing with the client, and the restrictions in paragraph (a) are unnecessary and impracticable.

* * * *

PROPOSED NEW CLIENT FILE RETENTION RULE AND RELATED CHANGES TO COLO. RPC 1.15

MODIFICATION OF COLO. RPC 1.15
[*Showing Changes from Existing Rule*]

* * * *

(j) A lawyer, whether practicing as a sole practitioner, in a partnership, or through an entity authorized pursuant to C.R.C.P. 265, shall maintain in a current status and retain for a period of seven years after the event that they record:

* * * *

(6) Copies of all records showing payments to any person, not in the lawyer's regular employ, for services rendered or performed; and

(7) All bank statements and photo static copies or electronic copies of all cancelled checks.

~~**(8) Copies of those portions of each client's case file reasonably necessary for a complete understanding of the financial transactions pertaining thereto.**~~

(l) Dissolutions and Departures. Upon the dissolution of a law firm, the lawyers in the law firm shall make arrangements for the maintenance or disposition of records and client files in accordance with subsection (ï) of this Rule and Rule 1.16A. Upon the departure of a lawyer from a law firm, the departing lawyer and the lawyers in the law firm shall make appropriate arrangements for the maintenance or disposition of records and client files in accordance with subsection (ï) of this Rule and Rule 1.16A.

(m) Availability of Records. Any of the records required to be kept by this Rule shall be produced in response to a subpoena duces tecum issued by the Regulation Counsel in connection with proceedings pursuant to C.R.C.P. 251. When so produced, all such records shall remain confidential except for the purposes of the particular proceeding and their contents shall not be disclosed by anyone in such a way as to violate the attorney-client privilege of the lawyer's client.

* * * *

[1] A lawyer should hold property of others with the care required of a professional fiduciary. Securities should be kept in a safe deposit box except when some other form of safekeeping is warranted by special circumstances. ***"Property" generally refers to jewelry and other valuables entrusted to the lawyer by the client, as well as documents having intrinsic value or directly affecting valuable rights, such as securities, negotiable instruments, deeds, settlement agreements, and wills.*** All property that is the property of clients or third persons should be kept separate from the lawyer's business and personal property and, if monies, in one or more trust accounts.

RULE 1.16A. CLIENT FILE RETENTION

Except as provided in a written agreement signed by a client, a lawyer shall retain a client's files respecting a matter for a period of not less than two years following the termination of a representation in the matter, unless the lawyer has previously delivered them to the client or disposed of them in accordance with the client's instructions. Notwithstanding any agreement to the contrary, a lawyer shall not destroy a client's files after termination of the lawyer 's representation in the matter unless (I) after such termination, the lawyer has given written notice to the client of the lawyer 's intention to do so on or after a date stated in the notice, which date shall not be less than thirty days after the date the notice was given, and (2) there are no pending or threatened legal proceedings known to the lawyer. At any time following the expiration of a period of ten years following the termination of a representation in a matter, a lawyer may destroy a client's files respecting the matter without notice to the client, provided there are no pending or threatened legal proceedings known to the lawyer and the lawyer has not agreed to the contrary. This Rule does not supersede or limit a lawyer's obligations to retain a file that are imposed by law, court order, or rules of a tribunal.

Comment

[1] Rule 1.16A provides definitive standards regarding the recurring question of how long a lawyer must maintain a client's files before destroying them. Rule 1.16A is not intended to impose an obligation on a lawyer to preserve documents that the lawyer would not normally preserve, such as multiple copies or drafts of the same document. A client's files, within the meaning of Rule 1.16A, consist of those things, such as papers and electronic data, relating to a matter that the lawyer would usually maintain in the ordinary course of practice. A lawyer's obligations with respect to client "property" are distinct. Those obligations are addressed in Rules I.16(d), I.15(a) and 1.15(b). "Property" generally refers to jewelry and other valuables entrusted to the lawyer by the client, as well as documents having intrinsic value or directly affecting valuable rights, such as securities, negotiable instruments, deeds, settlement agreements, and wills. The maintenance of law firm financial and accounting records covered by Rule 1.15(a) and 1.150) is governed exclusively by those rules. Similarly, Rule 1.16A does not supersede specific retention requirements imposed by other rules, such as Rule 5.5(d)(2) (two-year retention of written notification to client of utilization of services of suspended or disbarred lawyer), Rule 4, Chapter 23.3 C.R.C.P.(six-year retention of contingent fee agreement and proof of mailing following completion or settlement of the case) and C.R.C.P. 121, §1-26(7)(two year retention of signed originals of e-filed documents). A document may be subject to more than one retention requirement, in which case the lawyer should retain the document for the longest applicable period.

[2] A lawyer may comply with Rule 1.16A by maintaining a client's file in, or converting it to, a purely electronic form, provided the lawyer is capable of producing a paper version if necessary. Rule 1.16A does not require multiple lawyers in the same law firm to retain duplicate client files or to retain a unitary file located in one place. "Law firm" is defined in Rule 1.0 to include lawyers employed in a legal services organization or the legal department of a corporation or other organization. Rule 5.1(a) addresses the responsibility of a partner in a law firm to "make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct." Generally, lawyers employed by a private corporation or other entity as in-house counsel represent such corporation or entity as employees and the client's files are considered to be in the possession of the client and not the lawyer, such that Rule 1.16A would be inapplicable. Where lawyers are employed by a legal services organization or government agency to represent third parties under circumstances where the third party client's files are considered to be files and records of the organization or agency, the lawyer

must take reasonable measures to ensure that the client's files are maintained by the organization or agency in accordance with this rule.

[3] The two-year period under Rule 1.16A begins upon termination of a representation in a matter, even if the lawyer continues to represent the client in other matters. The rule does not prohibit a lawyer from maintaining a client 's files beyond the two-year and ten-year periods in the Rule. For example, in a matter resulting in a felony criminal conviction, a lawyer may retain a client's file for longer than the two-year and ten-year periods because of Crim.P. 35(c) considerations. The Rule does not supersede obligations imposed by other law, court order or rules of a tribunal. A lawyer may not destroy a file when the lawyer has knowledge of pending or threatened proceedings relating to the matter. The Rule does not affect a lawyer's obligations under Rule 1.16(d) with respect to the surrender of papers and property to which the client is entitled upon termination of the representation. 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.

[4] Except with respect to files maintained by a lawyer for ten or more years, there are three preconditions to the lawyer's actual destruction of the client's files. First, the two-year maintenance period, or such shorter period as the client may have agreed to in a signed written agreement, must have expired. Second, sometime after the termination of representation in the matter, the lawyer must have given written notice to the client of the lawyer's intention to destroy the files on or after a date certain, which date is not less than thirty days after the date the notice was given. The purpose of the timing of the notice is to give the client a meaningful opportunity to recover the file. A lawyer should make reasonable efforts to locate a client for purposes of giving written notice. If the lawyer is unable to locate the client, written notice sent to the client's last known address is sufficient under Rule 1.16A. Third, the lawyer may not destroy the files if the lawyer knows that there are legal proceedings pending or threatened that relate to the matter for which the lawyer created the files, or if the lawyer has agreed otherwise. If these three preconditions are satisfied, the lawyer may destroy the files in a manner consistent with the lawyer 's continuing obligation to maintain the confidentiality of information relating to the representation under Rules 1.6 and 1.9. Nothing in this Rule is intended to mandate that a lawyer destroy a file in the absence of a client's instruction to do so. Notwithstanding a client's instruction to destroy or return a file, a lawyer may retain a copy of the file or any document in the file.

PROPOSED NEW CLIENT FILE RETENTION RULE AND RELATED CHANGES TO COLO. RPC 1.15

MODIFICATION OF COLO. RPC 1.15
[*Showing Changes from Draft Considered at Twenty-Third Meeting*]

* * * *

(j) A lawyer, whether practicing as a sole practitioner, in a partnership, or through an entity authorized pursuant to C.R.C.P. 265, shall maintain in a current status and retain for a period of seven years after the event that they record:

* * * *

(6) Copies of all records showing payments to any person, not in the lawyer's regular employ, for services rendered or performed; and

(7) All bank statements and photo static copies or electronic copies of all cancelled checks.

~~**(8) Copies of those portions of each client's case file reasonably necessary for a complete understanding of the financial transactions pertaining thereto.**~~

(l) Dissolutions and Departures. Upon the dissolution of a law firm, the lawyers in the law firm shall make ~~**appropriate**~~ arrangements for the maintenance or disposition of records and client files in accordance with subsection (j) of this Rule and Rule 1.16A. Upon the departure of a lawyer from a law firm, the departing lawyer and the lawyers in the law firm shall make appropriate arrangements for the maintenance or disposition of records and client files in accordance with subsection 0) of this Rule and Rule 1.16.A.

(m) Availability of Records. Any of the records required to be kept by this Rule shall be produced in response to a subpoena duces tecum issued by the Regulation Counsel in connection with proceedings pursuant to C.R.C.P. 251. When so produced, all such records shall remain confidential except for the purposes of the particular proceeding and their contents shall not be disclosed by anyone in such a way as to violate the attorney-client privilege of the lawyer's client.

* * * *

[1] A lawyer should hold property of others with the care required of a professional fiduciary. Securities should be kept in a safe deposit box except when some other form of safekeeping is warranted by special circumstances. ***"Property" generally refers to jewelry and other valuables entrusted to the lawyer by the client, as well as documents having intrinsic value or directly affecting valuable rights, such as securities, negotiable instruments, deeds, settlement agreements, and wills.*** All property that is the property of clients or third persons should be kept separate from the lawyer's business and personal property and, if monies, in one or more trust accounts.

RULE 1.16A. CLIENT FILE RETENTION

Except as provided in a written agreement signed by a client, a lawyer shall ~~**maintain**~~ ***retain*** a client's files respecting a matter for a period of not less than two years following the termination of a representation in the matter, unless the lawyer has previously delivered them to the client or disposed of them in accordance with the client's instructions. Notwithstanding any agreement to the contrary, a lawyer shall not destroy a client's files after termination of the lawyer's representation in the matter unless (1) ***after such termination*** the lawyer has given written notice to the client of the lawyer's intention to do so on or after a date stated in the notice, which date shall not be less than thirty days after the date the notice was given, and (2) there are no pending or threatened legal proceedings known to the lawyer ~~**that relate to the matter**~~. At any time following the expiration of a period of ten years following the termination of a representation in a matter, a lawyer may destroy a client's files respecting the matter without notice to the client, provided there are no pending or threatened legal proceedings known to the lawyer ~~**that relate to the matter**~~ and the lawyer has not agreed to the contrary. ***This Rule does not supersede or limit a lawyer's obligations to retain a file that are imposed by law, court order, or rules of a tribunal.***

Comment

[1] Rule 1.16A provides definitive standards regarding the recurring question of how long a lawyer must maintain ***a*** client's files before destroying them. Rule 1.16A is not intended to impose an obligation on a lawyer to preserve documents that the lawyer would not normally preserve, such as multiple copies or drafts of the same document. A client's files, within the meaning of Rule 1.16A, consist of those things, such as papers and electronic data, relating to a matter that the lawyer would usually maintain in the ordinary course of practice. A lawyer's obligations with respect to client "property" are distinct. ~~**They**~~ ***Those*** obligations are addressed in Rules 1.16(d), 1.15(a) and 1.15(b). "Property" generally refers to jewelry and other valuables entrusted to the lawyer by the client, as well as documents having intrinsic value or directly affecting valuable rights, such as securities, negotiable instruments, deeds, settlement agreements, and wills. The maintenance of law firm financial and accounting records covered by Rule 1.15(a) and 1.150) is governed exclusively by those rules. Similarly, Rule 1.16A does not supersede the specific retention requirements imposed by other rules, such as Rule 5.5(d)(2) (two-year retention of written notification to client of utilization of services of suspended or disbarred lawyer) ~~**and,**~~ Rule 4, Chapter 23.3 C.R.C.P.(six-year retention of contingent fee agreement and proof of mailing following completion or settlement of the case)~~.~~ ***and C.R.C.P. 121, §1-26(7)(two year retention of signed originals of e-filed documents). A document may be subject to more than one retention requirement, in which case the lawyer should retain the document for the longest applicable period.***

[2] ***A lawyer may comply with Rule 1.16A by maintaining a client's file in, or converting it to, a purely electronic form, provided the lawyer is capable of producing a paper version if necessary.*** Rule 1.16A does not require multiple lawyers in the same law firm to ~~**maintain**~~ ***retain*** duplicate client files or to ~~**maintain**~~ ***retain*** a unitary file located in one place. "Law firm" is defined in Rule 1.0 to include lawyers employed in a legal services organization or the legal department of a corporation or other organization. Rule 5.1(a) addresses the responsibility of a partner in a law firm to "make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct." Generally, lawyers employed by a private corporation or other entity ***as in-house counsel*** represent such corporation or entity as employees and the client's files ~~**would be**~~ ***are*** considered to be in the possession of the client and not the lawyer, such that Rule 1.16A would be inapplicable. Where lawyers are employed by a legal services organization or government agency to represent third parties under circumstances where the third party

client 's files are considered to be files and records of the organization or agency, the lawyer must take reasonable measures to ensure that the client 's files are maintained by the organization or agency in accordance with this rule. ~~**A lawyer may comply with Rule 1.16A by maintaining a client's file in, or converting it to, a purely electronic form, provided the lawyer is capable of producing a paper version if necessary.**~~

[3] The two-year period under Rule 1.16A begins upon termination of a representation in a matter, even if the lawyer continues to represent the client in other matters. The rule does not prohibit a lawyer from maintaining a client's files beyond the two-year ~~**period or supersede obligations imposed by other law or a court order. Many lawyers base retention periods on applicable statutes of limitations or on future events that implicate the legal services. The rule**~~ ***and ten-year periods in the Rule. For example, in a matter resulting in a felony criminal conviction, a lawyer may retain a client's file for longer than the two-year and ten-year periods because of Crim.P. 35(c) considerations. The Rule does not supersede obligations imposed by other law, court order or rules of a tribunal. A lawyer may not destroy a file when the lawyer has knowledge of pending or threatened proceedings relating to the matter. The Rule*** does not affect a lawyer's obligations under Rule 1.16(d) with respect to the surrender of papers and property to which the client is entitled upon termination of the representation. 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.

[4] Except with respect to files maintained by a lawyer for ten or more years, there are three preconditions to the lawyer's actual destruction of the client 's files. First, the two-year maintenance period, or such shorter period as the client may have agreed to in a signed written agreement, must have expired. Second, sometime after the termination of representation in the matter, the lawyer must have given written notice to the client of the lawyer's intention to destroy the files on or after a date certain, which date is not less than thirty days after the date the notice was given. The purpose of the timing of the notice is to give the client a meaningful opportunity to recover the file. A lawyer should make reasonable efforts to locate a client for purposes of giving written notice. If the lawyer is unable to locate the client, written notice sent to the client's last known address is sufficient under Rule I.16A. Third, the lawyer may not destroy the files if the lawyer knows that there are legal proceedings pending or threatened that relate to the matter for which the lawyer created the files, or if the lawyer has agreed otherwise. If these ***three*** preconditions ~~**exist**~~ ***are satisfied***, the lawyer may destroy the files in a manner consistent with the lawyer 's continuing obligation to maintain the confidentiality of information relating to the representation under Rules 1.6 and 1.9. ***Nothing in this Rule is intended to mandate that a lawyer destroy a file in the absence of a client's instruction to do so. Notwithstanding a client's instruction to destroy or return a file, a lawyer may retain a copy of the file or any document in the file.***

COLORADO SUPREME COURT

STANDING COMMITTEE ON THE RULES OF PROFESSIONAL CONDUCT

Approved 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 I.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.

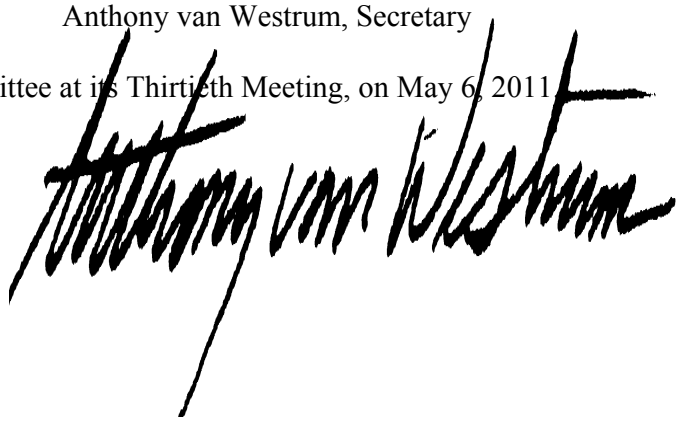
VII. *Adjournment; Next Scheduled Meeting.*

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

[These minutes are as approved by the Committee at its Thirtieth Meeting, on May 6, 2011.]



COLORADO SUPREME COURT
STANDING COMMITTEE ON THE RULES OF PROFESSIONAL CONDUCT

Minutes of Meeting of February 26, 2010

The meeting of the Committee was called to order by Chair Marcy Glenn on February 26, 2010 at 9:05 a.m. Federico Alvarez, Justice Michael Bender, Michael Berger, Gary Blum, Justice Nathan Coats, Nancy Cohen, Cynthia Covell, John Gleason, Marcy Glenn, Dave Little, Cecil Morris, Neeti Pawar, Helen Raabe, Dick Reeve, Alec Rothrock, David Stark, Marcus Squarrell, Judge John Webb, and Tuck Young (by telephone) were in attendance. Tom Downey, John Haried, PDJ Lucero, Ruthanne Polidori, Boston Stanton, Tony van Westrum, Eli Wald and Lisa Wayne were excused.

1. . Minutes of August 21, 2009 meeting. The minutes of the August 21, 2009 meeting were not available.

2. Report on status of proposed rule amendments approved at August 21, 2009 meeting. The Chair reported that the proposed rule amendments have been posted on the Supreme Court website. Comments are due June 3, 2010 and the Supreme Court will hold a hearing on the amendments on June 10, 2010 at 5:00 p.m. The Chair will attend the hearing and make a few comments, and will be available to answer any questions from the Court.

2.a. January 20, 2010 letter from John Gleason to Justices Bender and Coats. On behalf of the Standing Committee, this letter recommends changes to Rules 1.15 and 3.8 regarding retention and destruction of files. The letter explains that the proposed amendments were approved by the Standing Committee after having been requested by the CBA Ethics Committee, and discussed at length by the Standing Committee.

2.b. February 20, 2010 email exchange with Ted Tow concerning HB 1251. Ted Tow, Executive Director of the Colorado District Attorneys' Council ("CDAC") advised the Chair by email of pending HB 1251, supported by both CDAC and the criminal defense bar, that would require defense attorneys of record in criminal cases to retain their files for a certain length of time, generally from 5-8 years, and for the life of a defendant who received a life sentence or indeterminate sex offense sentence. Mr. Tow asked if this language could be included in the proposed file retention rules as an alternative to the legislation, although HB 1251 had already been introduced. The Chair advised that the file retention rule had already been forwarded to the Supreme Court.

The Committee discussed this matter at length. A member noted that the bill carries no consequence for failure to comply; rather, it contemplates that the Office of Attorney Regulation would prosecute a statutory violation as a rule violation. Therefore, it should be included in the rules. A subcommittee will be formed to review the bill with the idea of including the concept as a rule. Ted Tow and the bill's sponsor would agree to pull the bill if OARC would work with them to craft a rule of professional conduct

containing the requirements of the bill. The member recommended including some private defense counsel in the subcommittee, as well as representatives of the Public Defender and Alternate Defense Counsel. It would be necessary to have a proposed rule in 2-3 weeks in order to meet the Court's public hearing schedule on new rules of professional conduct. The Standing Committee would have to handle this by email.

Another member requested that the draft be circulated to the criminal defense bar listserv, and that the Chair send a letter to Justices Coats and Bender about the proposed rule.

A member noted that the language in the proposed bill should not be too controversial as it is almost identical to the public defender's file retention rule, and he believed the criminal defense bar has been involved with the bill drafting.

Another member asked if this fast-track rule proposal was intended to head off legislation and whether there was a substantive concern that the Standing Committee had failed to address this issue in its proposed rule amendments. Counsel for the OARC stated that he had both concerns. The criminal defense bar wants a good file retention policy, and the public defender's policy is pretty good. The question is the impact on private attorneys and Alternate Defense Counsel. A member explained that prosecutors don't want defense attorneys to destroy their files because prisoners often raise ineffective assistance claims years later. The defense bar wants to be able to respond intelligently, but there is a cost to the public and to the lawyers. Since we now have laws that can impose life sentences for repeated sex offenses, it is important to address file retention.

The Chair requested the key points of the bill, but a member noted that it may not be the end result. The basic notion is that the file retention period is longer for worse crimes, and files must be retained for the life of the defendant convicted of a sex offense or Class 1 felony. There are other time periods for other offenses, depending on the seriousness. The bill was reportedly endorsed by the CBA.

The members discussed the practical consequences of such a rule, including cost (high), consequences of death of a sole practitioner before the defendant dies (inventory counsel can be appointed, very expensive), but noted that prosecutors and defense attorneys are in accord on the need for file retention requirements. A member stated that this type of file retention requirement encourages better practice and solves other social needs.

A member expressed concern that the proposed file retention rule would be one of general application, but that the provisions in the bill, if incorporated into the proposed rule, would result in special provisions for particular areas of practice. Another member was concerned about the disciplinary consequences of a rule that is only applicable to certain classes of lawyer, and believes this is a slippery slope towards a series of such rules.

Another member stated that there should be a rule, and noted that in the past attorney discipline has resulted from a Supreme Court determination of ineffective assistance in a criminal case.

The member who had brought this issue to the Standing Committee explained that if the Committee cannot reach a decision today, he would have to tell Mr. Tow, and there would be a statute. The basis for pulling the bill was this member's representation that the matter would be presented to the Supreme Court for consideration in June along with the other proposed amendments to the rules. The member didn't endorse this process, but felt there was no alternative at this time. Mr. Tow has agreed to communicate immediately with OARC in the future if other legislation regulating attorneys is contemplated.

A member noted that in this case, a proposed rule containing many of the same concepts is already being considered by the Supreme Court. However, it is not identical to HB 1251. Because the bill is well on its way to passage, the Standing Committee has only limited ability to stop it.

A member asked if this suggests the legislature is starting to regulate attorneys. Others agreed that the legislature tries to do this regularly, noting that a collaborative law bill is before the legislature too, and a current law permits non-lawyer school truancy officers to engage in unauthorized practice of law (in one member's view.)

Another member reported that there is not a clear distinction in all cases between the Supreme Court's authority to regulate the practice of law, and the legislature's authority. Rather, there are areas of overlap, and many uneasy compromises.

Upon a vote, the Standing Committee authorized John Gleason to negotiate with Ted Tow and the bill's sponsor and to bring back a proposed rule for committee review within the next 2 - 3 weeks.

A member suggested that the Standing Committee contact the CBA Legislative Policy Committee, and ask it to oppose the bill, or withdraw support. The members agreed that an informal contact with CBA lobbyist Michael Valdez would be most appropriate.

(Later in the meeting, a member reported that he had contacted Michael Valdez, who advised that the CBA had talked to the criminal defense bar, which favored the bill. The CBA decided to take no position. Michael stated that the CBA will now oppose the bill if need be. Michael recognized the importance of not setting up OARC to enforce statutes, and agreed to better communicate with OARC in the future.)

4. New business

a. Proposed amendments to Rules 3.6 and 3.8. Kory Nelson, an attorney with the Denver City Attorney's office, requested the Standing Committee to consider

proposed amendments to Rules 3.6 (Trial Publicity) and 3.8 (Special Responsibilities of a Prosecutor) regarding the scope of prosecutors' statements to the press and public. His interest in this issue arose from the Duke lacrosse team prosecutions, and the statements made by the special prosecutor during the investigation of Denver District Court Judge Larry Manzanares. Nelson felt prosecutors' statements were out of line in both cases.

Mr. Nelson filed a request for investigation of the special prosecutor, and was advised by OARC that the RPC allow prosecutors to provide statements of fact contained in court documents. (Counsel for OARC advised the Committee that the matter was in fact extensively reviewed by OARC when the request for investigation was made.) According to Mr. Nelson, the prosecutor in Judge Manzanares' case was ethically in bounds when he repeated statements from the investigator's affidavit. Nelson thinks this exception swallows the rule, and requested a change to prevent a prosecutor from making statements prejudicial to a defendant.

The committee discussed this proposal, considering whether access to the public records should be limited, and the boundaries of a prosecutor's free speech rights vs. a defendant's right to a fair trial. Members noted that Rule 3.8(f) applies to investigators too, and apparently addresses statements that would be *prohibited* under Rule 3.6, as indicated by the comment to 3.8, which states, "[n]othing in this Comment is intended to restrict the statements which a prosecutor may make which comply with Rule 3.6(b) or 3.6(c)." Colorado Rules 3.6, 3.8 (f) and the comment to 3.8 are identical to the Model Rules.

An important question is the meaning of "the public record." If something filed with the court is "public record," either prosecutors or defense attorneys could put information into the public record so it can be discussed in the press.

Another member noted that First Amendment rights are implicated, citing the *Gentile* case from Nevada. First Amendment rights may also be particularly significant in the case of statements by prosecutors in the election campaign process. A member who represents attorneys in disciplinary matters stated that First Amendment rights of attorneys have proven to be very significant considerations in disciplinary cases. The member also noted that prosecutors have great protections for their actions, and should be conscientious in their public statements. However, he concluded that these matters are best addressed on a case-by-case basis because they are very factually driven, and very complicated because of the First Amendment implications.

Upon a vote (with two members voting "no"), the Standing Committee approved establishing a subcommittee to further investigate. The Chair will establish the subcommittee. Mr. Nelson agreed to serve on it. [After the meeting, at the Chair's request, David Stark agreed to chair the subcommittee.]

3. Subcommittee Report

3.a. Rule 1.5(b). Alec Rothrock, the subcommittee spokesman, presented a draft of a proposed majority report to the Supreme Court. He hoped its represents what the majority of the committee was thinking when it voted to retain language in Rule 1.5 that applies Rule 1.8(a) to midstream modifications of fee agreements. The report goes through the history of the Colorado rules, similar rules in Indiana, law in other jurisdictions in civil cases dealing with midstream modifications, and Colorado law regarding the burden of proof in midstream modifications. The report also addresses changes the Standing Committee approved and issues that resulted in the minority view. Mr. Rothrock's draft endeavors to explain the overall problem and why there is a need to have Rule 1.8(a) apply in regard to midstream modifications.

A couple of minor modifications were suggested to the Comments to Rule 1.5 and Rule 1.8, as follows:

Rule 1.5

Comment [2] When the lawyer has regularly represented a client, they ordinarily will have evolved an understanding concerning the basis or rate of the fee and the expenses for which the client will be responsible. . . . [*Replacement third sentence as approved by Committee with minor modification*] When developments occur during the representation that render an earlier communication substantially inaccurate, a revised written communication should be provided to the client.

Rule 1.8

Comment [1] A lawyer's legal skill and training, together with the relationship of trust and confidence between lawyer and client, create the possibility of overreaching when the lawyer participates in a business, property or financial transaction with a client, for example, a loan or sales transaction or a lawyer investment on behalf of a client. . . . "Except as stated in the last sentence of Rule 1.5(b), it does not apply to ordinary fee arrangements between client and lawyer, which are governed by Rule 1.5, although its requirements must be met when the lawyer accepts an interest in the client's business or other nonmonetary property as payment of all or part of a fee. . . .

Mr. Rothrock agreed that these revisions are consistent with the majority position.

The Chair noted that at the last meeting, the Standing Committee had voted to provide a minority report to the Supreme Court. It was drafted before the drafter saw the majority report, but the drafter does not believe changes are needed to the minority report.

It was moved and seconded to approve the ancillary changes to the majority report. Some additional language changes were discussed. The ancillary changes were amended further so that the revised sentence of the Comment reads, "Subject to the last sentence of Rule 1.5(b)..." This amendment was considered friendly.

The subcommittee voted unanimously to accept the ancillary changes.

The Chair noted that only those who had voted with the majority could vote on the majority report.

Upon a vote, a majority of those who had voted for the majority position voted to approve the majority report. One member voted against it.

Although two members who had voted for the minority position were not present at the meeting, a vote was held and a majority of all members who had voted for the minority position voted to approve the minority report.

The Chair noted that there would be a "cyberspace" meeting regarding the file retention rule. The Chair stated that she would investigate conference room availability on May 18, or 21 and June 1, at the Office of Attorney Regulation Counsel, for the Committee's next "in-person" meeting.

Meeting adjourned.

COLORADO SUPREME COURT

STANDING COMMITTEE ON THE RULES OF PROFESSIONAL CONDUCT

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

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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.

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-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.

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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.

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).*

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 . . . .
>
> 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.
>
> 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.

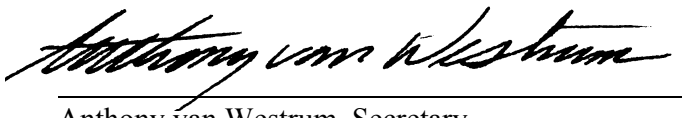
Wald said the first task of the subcommittee would be to determine which among the many aspects of cross-border practice it should undertake to consider. He anticipated that the subcommittee would report back to the full Committee on that question, to receive further direction from the Committee about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



Anthony van Westrum, Secretary

[These minutes are as approved by the Committee at its meeting on August 19, 2010.]

COLORADO SUPREME COURT

STANDING COMMITTEE ON THE RULES OF PROFESSIONAL CONDUCT

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

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

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

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

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

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

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

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

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

IV. *Counseling Medical Marijuana Businesses*.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

VI. *Proposed Amendments Regarding File Retention*.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

X. *Adjournment; Next Scheduled Meeting.*

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

RESPECTFULLY SUBMITTED,

Anthony van Westrum, Secretary

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

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.
>
> (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
>
> A lawyer shall not:
>
> . . . .
>
> (b) communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order***, or unless a judge communicates ex parte with the lawyer under the authority of Rule 2.9(A)(1) or (4) of the Colorado Code of Judicial Conduct***;
>
> ---
>
> [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:
>
> (1) When circumstances require it, ex parte communication for scheduling, administrative, or emergency purposes, which does not address substantive matters, is permitted, provided:
>
> (a) the judge reasonably believes that no party will gain a procedural, substantive, or tactical advantage as a result of the ex parte communication; and
>
> (b) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication, and gives the parties an opportunity to respond.
>
> . . . .
>
> (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.

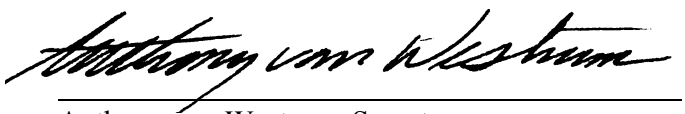
That member suggested that a comment could be added to Rule 3.3 to the effect that the disclosure requirement not only trumps confidentiality but also prevails over any application of the attorney-client privilege that would otherwise prevent the disclosure. He concluded his comments by noting that the 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

COLORADO SUPREME COURT

STANDING COMMITTEE ON THE RULES OF PROFESSIONAL CONDUCT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3. CJC Rule 2.9 provides in part as follows:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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8. Rule 4.2 reads in part as follows:

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

Comment [3] provides—

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The motion was approved.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

VI. *Adjournment; Next Scheduled Meeting.*

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

RESPECTFULLY SUBMITTED,

Anthony van Westrum, Secretary

[These minutes are as approved by the Committee at its Thirty-First Meeting, on January 6, 2012.]

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

COLORADO SUPREME COURT

STANDING COMMITTEE ON THE RULES OF PROFESSIONAL CONDUCT

Submitted Minutes of Meeting of the Full Committee
On January 6, 2012
(Thirty-First Meeting of the Full Committee)

The thirty-first meeting of the Colorado Supreme Court Standing Committee on the Rules of Professional Conduct was convened at 9:09 a.m. on Friday, January 6, 2012, 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 Nathan B. Coats and Monica M. Márquez, were Federico C. Alvarez, Michael H. Berger, Helen E. Berkman, Nancy L. Cohen, Cynthia F. Covell, Thomas E. Downey, Jr., John S. Gleason, John M. Haried, David C. Little, Judge William R. Lucero, Christine A. Markman, Neeti Pawar, Judge Ruthanne Polidori, Henry R. Reeve, Alexander R. Rothrock, Marcus L. Squarrell, James S. Sudler III, David W. Stark, Anthony van Westrum, Eli Wald, Lisa M. Wayne, and Judge John R. Webb. Excused from attendance were Gary B. Blum, Boston H. Stanton, Jr., and E. Tuck Young. Also absent was Cecil E. Morris, Jr.

I. *New Member.*

The Chair welcomed its newest member, Christine A. Markman, to the Committee.

II. *Court Adoption of Rules Amendments.*

The Chair reported that the Colorado Supreme Court adopted an amendment to C.R.C.P. 251.5(b), effective June 16, 2011, making that provision parallel to Rule 8.4(b) in establishing, as grounds for discipline, "[a]ny criminal act [by an attorney[1]] that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects . . . ." The Committee had recommended that amendment to the Court by action taken at its twenty-eighth meeting, held on August 19, 2010, and the Advisory Committee of the Office of Attorney Regulation had joined in its recommendation.

The Chair remarked that it will now be harder to discipline a lawyer because of criminal acts.

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

At the Chair's request, Alexander Rothrock resumed the Committee's discussion of the interplay between amended Rule 2.9 of the Colorado Code of Judicial Conduct ("CJC") and Rule 3.5 of the Colorado Rules of Professional Conduct ("CRPC"), a discussion that had begun at its twenty-ninth

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1. The preamble to C.R.C.P. 251.5 uses the word "attorney," as reflected in this bracket, while amended paragraph (b), like C.R.P.C. 8.4(b), uses the words "lawyer's" and "lawyer."

—Secretary

meeting, on January 1, 2011, and was continued at its thirtieth meeting, on May 6, 2011.[2] The Chair commented that she would not impose any time restriction on the Committee's discussion but that it was time for the Committee to come to a decision on the matter.

Rothrock reminded the Committee that the subcommittee to which the matter had been referred had proposed that Rule 3.5(b) be amended to mirror the text of Rule 2.9 of the Colorado Code of Judicial Conduct ("CJC"), and that the purpose of the proposal was simply to assure that a lawyer could not be disciplined under Rule 3.5(b) for a conversation with a judge in which the judge could engage without sanction under CJC 2.9.

At its thirtieth meeting on May 6, 2011, the Committee had considered a draft that would revise both Rule 3.5 and its comment; the Committee had returned the matter to the subcommittee with instructions to retain its proposed text for the body of Rule 3.5[3] but to modify the comments Rule 3.5 to—

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

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

3. Consider explanation of a distinction between procedure and substance when the lawyer is determining whether it is his duty to keep the judge within the field of "scheduling, administrative, or emergency purposes, which does not address substantive matters," that is contemplated by CJC Rule 3.5.[4]

In response to that instruction, the subcommittee made no further changes to its proposal for the body of Rule 3.5 but proposed that Comment [2] read as follows [showing changes from the current text of the 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**~~***, subject to two exceptions: (1) when a law or court order authorizes the lawyer to engage in the communication, and (2) when a judge initiates an ex parte communication with the lawyer and the lawyer reasonably believes that the subject matter of the communication is within the scope of the judge's authority to engage in the***

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

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

3. As previously proposed by the subcommittee, paragraph (b) of Rule 3.5 would be amended as follows:

> A lawyer shall not:
>
> (a) . . .
>
> (b) communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order***, or unless a judge initiates such a communication and the lawyer reasonably believes that the subject matter of the communication is within the scope of the judge's authority under a rule of judicial conduct . . . .***

4. *See* p. 12–13, minutes of the thirtieth meeting, May 6, 2012.

communication under a rule of judicial conduct. Examples of ex parte communications authorized under the first exception are restraining orders, submissions made in camera by order of the judge, and applications for search warrants and wiretaps. See also Cmt. [5], Colo. RPC 4.2 (discussing communications authorized by law or court order with persons represented by counsel in a matter). With respect to the second exception, Rule 2.9(A)(l) of the Colorado Code of Judicial Conduct, for example, permits judges to engage in ex parte communications for scheduling, administrative, or emergency purposes not involving substantive matters, but only if "circumstances require it," "the judge reasonably believes that no party will gain a procedural, substantive, or tactical advantage as a result of the ex parte communication, "and "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." Code of Jud. Conduct, Rule 2.9(A)(l). See also Code of Judicial Conduct for United States Judges, Canon 3(A)(4)(b)("A judge may . . . (b) when circumstances require it, permit ex parte communication for scheduling, administrative, or emergency purposes, but only if the ex parte communication does not address substantive matters and the judge reasonably believes that no party will gain a procedural, substantive, or tactical advantage as a result of the ex parte communication[.]"). The second exception does not authorize the lawyer to initiate such a communication. A judge will be deemed to have initiated a communication for purposes of this Rule if the judge or the court maintains a regular practice of allowing or requiring lawyers to contact the judge for administrative matters such as scheduling a hearing and the lawyer communicates in compliance with that practice. When a judge initiates a communication, the lawyer must discontinue the communication if it exceeds the judge's authority under the applicable rule of judicial conduct. For example, if a judge properly communicates ex parte with a lawyer about the scheduling of a hearing, pursuant to Rule 2.9(A)(l) of the Colorado Code of Judicial Conduct, but proceeds to discuss substantive matters, the lawyer has an obligation to discontinue the communication.

A member noted that, under the "Civil Access Pilot Project" rules that the Court has adopted for courts in the five metropolitan Denver counties, judges and lawyers are encouraged to have a great deal of communication about procedural matters, in order to facilitate many civil cases. Rothrock stated that the subcommittee had not considered the CAPP rules in making its proposal with respect to Rule 3.5. The member commented that, in the meetings that he had attended in connection with the promulgation of the CAPP rules, participating judges had indicated that they expected to avoid or minimize the need for written motions and the contesting of procedural issues by having conversations with the lawyers, and the member sensed that the judges expected such conversations to be instigated by both the judges themselves and the lawyers.

Another member joined by indicating she would read proposed Rule 3.5(b) to include these kinds of conversations — whether a particular communication was initiated by the lawyer or the judge — as having been″initiated″ by the judge such that the lawyer could ""reasonably believe[] that the subject matter of the communication is within the scope of the judge's authority" within the meaning the proposal, so long as one could consider the judge's furtherance of the principles of the CAPP to be "under a rule of judicial conduct." The member who first raised the CAPP responded that he could accept that reading, but he noted that he would be doing so as an advocate defending the lawyer's communication.

A member questioned whether the proposal would countenance a lawyer's *ex parte* communication with the judge, even under the CAPP principle. She said that she would not initiate an *ex parte* communication with a judge, even about a simple procedural matter; rather, she would always have opposing counsel join her in the initiating call.

The member who had first raised the CAPP said he thought we should be very clear about the permitted scope of these communications. In his view, the proposal was directed at isolating judges even further from society, the message being, "Don't talk to judges."

A member who has experience as a judge said her view was that, if a lawyer needed to get in touch with her, he could do so by an email that copied all counsel, all of whom could then participate in

the resulting telephone conversation. In her view, the subcommittee's proposal accommodated that solution.

Another member noted that she had not perceived that the CAPP rules might present a problem with *ex parte* communications with judges.

Rothrock interjected that he thought the subcommittee' proposal unwittingly solved the problem by its statement of the two exceptions to *ex parte* communications: authorization by law and initiation by the judge. The CAPP rules would provide the authorization by law. And the principle stated in Comment [2] — that "[a] judge will be deemed to have initiated a communication for purposes of this Rule if the judge or the court maintains a regular practice of allowing or requiring lawyers to contact the judge for administrative matters such as scheduling a hearing and the lawyer communicates in compliance with that practice" — would provide the initiation required of the judge. Rothrock added that, in his view, the proposal opens communication with the judiciary rather than, as had been suggested, further closing the judges off "from society."

The member who had first raised the CAPP thanked Rothrock for his analysis.

The Chair asked for comment on the subcommittee's proposal from those members who were familiar with the views of the Office of Attorney Regulation Counsel. One who had been a participant on the subcommittee said he had closely followed the development of the proposal and that he supported it. His experience was that, when a problem of *ex parte* communication reached the OARC, the facts were usually very clear; the typical circumstance involves a communication in a municipal or other lower court in which both the judge and the lawyer were involved in what clearly was an impermissible conversation. Looking at the concerns expressed by the member who had raised the CAPP, this member felt that the subcommittee's proposal adequately facilitated the kinds of conversations envisioned under the CAPP rules.

A member noted that proposed Comment [2] was longer than it need be, there being a repetition of the references to rules permitting "ex parte communications for scheduling, administrative, or emergency purposes . . . ." Another member agreed that there was repetitious language but noted that the repetition came from citation to two different rules; he approved of the comment as written on the grounds that we sought to have the comment be complete in itself, without the need for the reader to refer elsewhere for additional text. Another member added that the comment as written was educational.

On a member's motion, the subcommittee's proposal was approved without change.

The Chair thanked Judge Webb for first raising the issue — the gap between CJC Rule 2.0 and C.R.P.C. Rule 3.5 — and thanked Rothrock and the subcommittee for providing the reconciliation of the two provisions.

IV. *Rules 4.1, 4.2, 4.3, 5.1, and 8.4(c) and "Testers."*

The Chair then invited Thomas Downey to lead the discussion of what the Chair characterized as the main event for the day, the question of whether the Committee should propose amendments to the Rules to permit "pretexting" of one kind or another.

Downey began by reminding the Committee that the pretexting subcommittee had been formed at the twenty-ninth meeting, on January 21, 2011 and that it had provided an interim report to the Committee at the thirtieth meeting, on May 6, 2011. He reported that the subcommittee had met a number of times over the entire year of its existence, and he noted that the names of the participants can

be found in the first footnote of the subcommittee's report that had been provided to the Committee in advance of this meeting. He thanked those participants for their incredibly hard work.

Downey said that the subcommittee had considered lots of issues and had prepared a number of drafts of its proposal, working toward the final product that has now been submitted to the Committee and that is summarized on the twentieth page of the materials provided by the Chair for this meeting. The subcommittee is, he said, recommending that Rule 8.4(c) be modified by the addition of a limited exception, applicable to both governmental lawyers and those in private practice, permitting them to advise clients, investigators, and non-lawyer assistants concerning conduct involving misrepresentation and nondisclosure in investigations, while continuing to prohibit direct participation by the lawyers themselves in any deception or subterfuge. The proposal would continue the current proscription by Rule 8.4(c) of "conduct involving dishonesty, fraud, deceit or misrepresentation," with these exceptions permitting a lawyer to—

> direct, advise, or supervise others in lawful covert activity that involves misrepresentation or deceit, when either:
>
> (1)(A) the misrepresentation or deceit is limited to matters of background, identification, purpose, or similar information, and (B) the lawyer reasonably and in good faith believes that (i) a violation of civil or constitutional law has taken place or is likely to take place in the immediate future, and (ii) the covert activity will aid in the investigation of such a violation; or
>
> (2)(A) [*sic*] the lawyer is a government lawyer and the lawyer reasonably and in good faith believes that (i) the action is within the scope of the lawyer's duties in the enforcement of law, and (ii) the purpose of the covert activity is either to gather information related to a suspected violation of civil, criminal, or constitutional law, or to engage in lawful intelligence-gathering.[5]

Downey recalled that, when the Committee considered the matter at its May 6, 2011 meeting, the discussion had included the possibility of providing situation-specific exceptions for, first, government lawyers involved in law enforcement; second, government lawyers involved in the enforcement of civil laws; and third, lawyers in private practice in specified circumstances. But, instead, the subcommittee's proposal is for one set of exceptions applicable to both governmental and private lawyers. He noted, though, that a minority of the subcommittee was of the view that any exception to the broad proscriptions of existing Rule 8.4(c) should be limited to government lawyers or, perhaps, even to just criminal prosecutions.

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5. The following comments would be added to Rule 8.4:

> [2A] "Covert activity" means an effort to obtain information through the use of misrepresentations or other subterfuge. Whether covert activity is "lawful' will be determined with reference to substantive law, such as search and seizure. However, a lawyer will not be subject to discipline if the lawyer provided direction, advice, or supervision as to the covert activity based on the lawyer's objectively reasonable, good faith belief that the activity was lawful, even if the covert activity is later determined to have been unlawful. The objective reasonableness and good faith of the lawyer's conduct is also determined with reference to substantive law. *See, e.g., Davis v. United States*,_ U.S._, 131 S. Ct. 2419, 2429 (2011); *United States v. Leon*, 468 U.S. 897, 918-22 (1984).
>
> [2B] A lawyer may not participate directly in covert activity. However, Rule 8.4(c) does not limit the application of Rule 1.2(d) (allowing a lawyer to discuss the legal consequences of any proposed criminal or fraudulent conduct with a client or assist a client to make a good faith effort to determine the validity, scope, meaning, or application of the law).
>
> [2C] A lawyer whose conduct falls within the exception to Rule 8.4(c) does not violate Rule 8.4(a)(knowingly assist or induce another to violate these rules). In all other respects, the lawyer's conduct must comply with these rules. For example, a lawyer who directs, advises, or supervises others in covert activity directed at a person or organization the lawyer knows to be represented in the matter that is the subject of the covert activity may violate Rule 4.2. Further, if a lawyer who has directed, advised, or supervised a person engaging in covert activity learns that such person's conduct has exceeded the limitation in Rule 8.4(c)(1)(A), the lawyer may violate Rule 5.3 by failing to take reasonable remedial action.

Downey asked two guests, Adam L. Scoville of RE/MAX, LLC and Matthew T. Kirsch of the Office of the United States Attorney for the District of Colorado, to provide to the Committee the perspectives, respectively, of lawyers in private — particularly, intellectual property — practice and of those in governmental positions.

Scoville said that the lawyer with an intellectual property practice typically sees a need for pretexting in trademark enforcement cases, and he recalled that the catalyst for the Committee's consideration of pretexting was an inquiry from the Intellectual Property Law Section of the Colorado Bar Association.[6] The intellectual property bar, he said, believes that a lawyer's use of investigators, under proper supervision, is necessary and appropriate to determine whether trademark infringements are occurring. The use of investigators in such cases is a perennial topic at continuing legal education seminars on trademark law, with the tension between the requirement that there be an adequate pre-filing investigation to support an infringement complaint and the limitations imposed by Rule 8.4(c). Many lawyers are of the view, he said, that they may engage investigators to act simply like potential customers, not using complex ruses. But that view is jeopardized by the literal wording of Rule 8.4(c) and by the supreme court's *Pautler*[7] decision; the latter stops a lot of intellectual property lawyers from employing investigators, figuring that, if stopping an axe murderer were not sufficient grounds for an exception to Rule 8.4(c), then working up a proper trademark infringement case would not suffice.

Scoville said that the sense of the intellectual property bar is that, if Rule 8.4(c) and *Pautler* are not to be impediments to investigations, then the bar is entitled to know what the boundaries are; if that rule and that case are to be taken literally, then the leaders of the Intellectual Property Law Section need to advise the bar of the risk and back the practitioners away from the line.

At Downey's request, Scoville commented on the development of the law in other states, noting that other states have not yet amended their rules to provide for pretexting in investigations. In one case, a furniture manufacturer had terminated a distribution relationship with a furniture distributor and then received information that the distributor was engaging in bait-and-switch sales practices, misrepresenting the origin of its inventory. The manufacturer sent "interior designers" to the distributor to ask questions such as "Is the quality the same?" and "Is there no other place to obtain this line of furniture any more?" When the distributor challenged that conduct, the court condoned it, determining that the "interior designers" were merely inducing the distributor to engage in its routine business and were not attempting to trick it into saying something it would not otherwise have said. In a case involving snowmobile dealership, the court concluded otherwise, broadly holding that the distributor was a "represented party" for purposes of Rule 4.2 and that the investigator should have disclosed his engagement by opposing counsel.[8] In a case involving pretexting to determine whether blacks were subjected to prepayment obligations that were not imposed on whites, the court took a similar view of the low-level employees who were the targets of the pretexting, finding them to be represented by their company's lawyer for purposes of Rule 4.2.

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6. *See* p. 8 of the minutes of the twenty-ninth meeting of the Committee, on January 21, 2011.

7. 47 P.3d 1175 (Colo. 2002). "[Rule 8.4(c)] and its commentary are devoid of any exception."

> The obligations concomitant with a license to practice law trump obligations concomitant with a lawyer's other duties, even apprehending criminals. . . . We limit our holding to the facts before us. Until a sufficiently compelling scenario presents itself and convinces us our interpretation of Colo. RPC 8.4(c) is too rigid, we stand resolute against any suggestion that licensed attorneys in our state may deceive or lie or misrepresent, regardless of their reasons for doing so.

Id. 47 P.3d at 1182.

8. Midwest Motor Sports, Inc. v. Arctic Cat Sales, Inc., 144 F.Supp.2d 1147 (D.S.D. 2001).

Scoville said that pertinent cases in other jurisdictions represent a continuum from permitted pretexting to prohibited pretexting: The investigator is not permitted to trick the target into saying something that the target would not otherwise have said, but the investigator may conduct the kinds of transactions that other customers would conduct. Some cases have barred the introduction of evidence obtained by pretexting, but Scoville characterized such cases as egregious, such as one involving an investigator's entrapment of a judicial clerk in an effort to obtain a judge's recusal. Like *Pautler*, Scoville said, such a case was "outside the bounds."

Scoville summed up with an answer to this question: If other states have not seen a need to modify their rules of ethics to permit some pretexting, why is Colorado different? His answer was the *Pautler* case, which suggests a much more stringent boundary around Rule 8.4(c) than might exist in other states.

Next, Matthew Kirsch summarized the position stated by United States Attorney John Walsh in a letter that was included in the meeting materials. Kirsch said that the U.S. Attorney's Office encounters the matter of pretexting in both criminal prosecutions and civil cases. Such cases may involve deception as necessary to accomplish enforcement of the law; deception in such cases is regularly used and is appropriate and has been approved by the United States Supreme Court.

Examples abound in criminal cases involving the use of confidential informants, both informants who may themselves have committed crimes and "regular citizens" who may be assisting in the investigation of crimes. There are also cases involving law enforcement officers who work in undercover capacities; the most common example of this is a drug "buy" by an undercover officer, although cases also involve illegal weapon sales and investment frauds, in which investments are made to uncover the fraud. Tax fraud is another example, with statistical analysis being used to uncover anomalies in patterns of fraudulent Schedule Cs prepared by professional tax preparers. Walsh also cites, Kirsch noted, civil cases involving the use of investigators from the Department of Housing and Urban Development to uncover illegal lending practices and home purchase discrimination.

So, Kirsch said, the basic premise of the office is that deception techniques are often used and are necessary for enforcement of many laws.

Second, Kirsch argued, public policy supports the supervision of such activities by lawyers. Lawyers are better able to discern the ethical and legal boundaries of permitted deception than are lay investigators. The result of lawyer supervision of deception is a better evidentiary product coupled with respect for the rights of citizens.

But the U.S. Attorney's Office is, like the private bar, concerned about the import of *Pautler* on these practices. *Pautler* suggests that it may be improper for a lawyer even to supervise deception by investigators, law enforcement officers and others. It is Walsh's and Kirsch's hope that, by participation on the pretexting subcommittee, they can eliminate legal uncertainty in this area. They believe that the subcommittee's proposal accomplishes that, while adhering to the *Pautler* prohibition of direct lawyer conduct amounting to those activities proscribed by Rule 8.4(c). They believe that clarity on the matter would be useful for lawyers engaged in law enforcement.

Downey added that the subcommittee has received input from Jan Zavislan, Colorado Deputy Attorney General, who has expressed concurrence with Walsh's views and who noted that the issue of permitted pretexting and deception has been of great concern to the last four Colorado attorneys general, as it has been to the prosecutorial and intellectual property communities since the *Pautler* decision was rendered.

At Downey's request, Rothrock reviewed the treatment of pretexting under similar ethics rules in other states, referring the members to the chart of cases that was included in the materials for the meeting. A seminal case is that of *Apple Corps Limited v. International Collectors Society*,[9] in which defendants, in an effort to fend off citation for contempt of a consent decree regarding use of likenesses of the Beatles, had sought sanctions for plaintiffs' lawyers alleged misconduct in

> [purchasing] Sell-Off Stamps by (1) speaking to ICS's sales representatives without the consent of ICS's counsel; and (2) not revealing to ICS's sales representatives that they were attorneys or persons acting under the direction of attorneys. Defendants claim this behavior violates three disciplinary rules: (1) the rule forbidding attorneys from engaging in deceitful conduct (Rule 8.4(c)); (2) the rule restricting attorneys from communicating with parties represented by counsel concerning the subject of the representation (Rule 4.2); and (3) the rule regarding an attorney's dealings with an unrepresented party (Rule 4.3).

As Rothrock explained, the *Apple Corps* court looked at a 1995 article from the GEORGETOWN JOURNAL OF LEGAL ETHICS in determining that plaintiff's counsel had not violated New Jersey's Rule 8.4(c)—

> The attorney disciplinary rules prohibit an attorney from engaging in deceitful conduct. RPC 8.4(c) states that an attorney may not engage in conduct involving "dishonesty, fraud, deceit or misrepresentation." RPC 8.4(c) is not by its terms limited only to material representations. It applies to lawyers not only when they are acting as lawyers but also when they are acting otherwise than in a lawyerly capacity. See David B. Isbell & Lucantonia N. Salvi, Ethical Responsibility of Lawyers for Deception by Undercover Investigators and Discrimination Testers; An Analysis of the Provisions Prohibiting Misrepresentation Under the Model Rules of Professional Conduct, 8 GEO. J. LEGAL ETHICS 791, 816 (1995). However, RPC 8.4(c) does not apply to misrepresentations solely as to identity or purpose and solely for evidence-gathering purposes. *Id*. at 812, 816–18.
>
> Undercover agents in criminal cases and discrimination testers in civil cases, acting under the direction of lawyers, customarily dissemble as to their identities or purposes to gather evidence of wrongdoing. This conduct has not been condemned on ethical grounds by courts, ethics committees or grievance committees. *Id.* at 792–94. This limited use of deception, to learn about ongoing acts of wrongdoing, is also accepted outside the area of criminal or civil-rights law enforcement. *Id.* at 794–795, 800 . . . . The prevailing understanding in the legal profession is that a public or private lawyer's use of an undercover investigator to detect ongoing violations of the law is not ethically proscribed, especially where it would be difficult to discover the violations by other means. . . .
>
> Courts which have addressed the issue have approved of attorneys' use of undercover investigators who pose as interested tenants to detect housing discrimination or as prospective employees to detect employment discrimination. See Isbell & Salvi, *supra*, 8 GEO. J. LEGAL ETHICS at 799; Richardson v. Howard, 712 F.2d 319, 321–22 (7th Cir.1983) (observing that the evidence provided by testers is frequently indispensable and that the requirement of deception is a relatively small price to pay to defeat racial discrimination); see also Village of Bellwood v. Dwivedi, 895 F.2d 1521, 1526 (7th Cir.1990); Wharton v. Knefel, 562 F.2d 550, 554 n. 18 (8th Cir.1977); Hamilton v. Miller, 477 F.2d 908, 909 n. 1 (10th Cir.1973).
>
> Plaintiffs could only determine whether Defendants were complying with the Consent Order by calling ICS directly and attempting to order the Sell–Off Stamps. If Plaintiffs' investigators had disclosed their identity and the fact that they were calling on behalf of Plaintiffs, such an inquiry would have been useless to determine ICS's day-to-day practices in the ordinary course of business.
>
> Furthermore, the literal application of the prohibition of RPC 8.4(c) to any "misrepresentation" by a lawyer, regardless of its materiality, is not a supportable construction of the rule. The language of RPC 8.4(c) must be interpreted in the context

9. 15 F. Supp 2d 456 (D.N.J. 1998).

> of the statutory scheme of which it is a part. In this regard, it is significant to take note of RPC 4.1(a) which provides that "[i]n the course of representing a client a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person . . ." If the drafters of RPC 8.4(c) intended to prohibit automatically "misrepresentations" in all circumstances, RPC 4.1(a) would be entirely superfluous. As a general rule of construction, however, it is to be assumed that the drafters of a statute intended no redundancy, so that a statute should be construed, if possible, to give effect to its entire text. U.S. v. Nordic Village, 503 U.S. 30, 36, 112 S.Ct. 1011, 117 L.Ed.2d 181 (1992) (it is a "settled rule that a statute must, if possible, be construed in such a fashion that every word has some operative effect"); Colautti v. Franklin, 439 U.S. 379, 392, 99 S.Ct. 675, 58 L.Ed.2d 596 (1979) (it is an "elementary canon of construction that a statute should be interpreted so as not to render one part inoperative"); Commonwealth of Pennsylvania Dep't. of Pub. Welfare v. United States Dep't. of Health & Human Svcs., 928 F.2d 1378, 1385 (3d Cir.1991).
>
> As stated by Mr. Isbell and Professor Salvi:
>
> > That principle [of statutory construction] would require that Rule 8.4(c) apply only to misrepresentations that manifest a degree of wrongdoing on a par with dishonesty, fraud, and deceit. In other words, it should apply only to grave misconduct that would not only be generally reproved if committed by anyone, whether lawyer or nonlawyer, but would be considered of such gravity as to raise questions as to a person's fitness to be a lawyer. Investigators and testers, however, do not engage in misrepresentations of the grave character implied by the other words in the phrase [dishonesty, fraud, deceit] but, on the contrary, do no more than conceal their identity or purpose to the extent necessary to gather evidence.
>
> Isbell & Salvi, *supra*, 8 GEO. J. LEGAL ETHICS at 817. Accordingly, Plaintiffs' counsel and investigators did not violate RPC 8.4(c).[10]

Rothrock characterized the court's opinion as a bit of a struggle, given the "absoluteness" of the proscription of Rule 8.4(c), a proscription that is not keyed to materiality. In contrast, Rule 4.1, to which the court turned for an understanding, does turn on materiality. As Rothrock explained, the court determined that a serious rule, with serious consequences, should not be applied to immaterial lies, such as telling the lawyer's child that there is a Santa Claus (Rothrock noted, as the court had, that Rule 8.4(c) applies as well to a lawyer's private conduct as to that engaged in as a lawyer representing a client). In Rothrock's view, Colorado should not leave the matter of pretexting to complex and uncertain analyses on a case-by-case basis but, rather should have a rule that says what we want it to say: The use of investigators is okay.

Rothrock noted that, in 2003, Virginia simply modified Rule 8.4(c) to limit its proscriptions to "conduct involving dishonesty, fraud, deceit or misrepresentation *which reflects adversely on the lawyer's fitness to practice law*," language that is similar to that used in Rule 8.4(b) and, now, in Colorado C.R.C.P. 251.5(b) regarding a criminal act by a lawyer "that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects." The Virginia solution has also been adopted in North Dakota and Oregon. The theory, Rothrock explained, is that a lawyer's use of an investigator for undercover activity that involves some deception does not reflect adversely on the lawyer's fitness to practice law; but, he said, the subcommittee dismissed that approach as being too subtle, too uncertain, to be a satisfactory solution.

Rothrock noted that Alabama has, instead of modifying Rule 8.4(c), modified Rule 3.8 to provide prosecutors with the following protection:

> (a) notwithstanding Rules 5.3 and 8.4, the prosecutor, through orders, directions, advice and encouragement, may cause other agencies and offices of government, and may cause non-lawyers employed or retained by or associated with the prosecutor, to engage

10. *Id*. at 475 [footnotes omitted].

> in any action that is not prohibited by law, subject to the special responsibilities of the prosecutor established in (1) above; and (b) to the extent an action of the government is not prohibited by law but would violate these Rules if done by a lawyer, the prosecutor (1) may have limited participation in the action, as provided in (2)(a) above, but (2) shall not personally act in violation of these Rules.

Subsequently to the adoption of this modification, an Alabama ethics opinion extended the principle to lawyers in private practice.

Most states, however, have tackled the problem by modifications of Rule 8.4(c), some limiting the changes to prosecutors and others including private lawyers within the changes. Rothrock said it would be fair to say that the subcommittee's proposal is most similar to the changes made in Iowa and Oregon — Oregon also having a federal case on point. Those states provide much of what the subcommittee proposes, although, he noted, Iowa's change is only in the comment, not in the body of the rule; concerned that a comment could not trump the text of a rule, the subcommittee rejected the Iowa approach.

Rothrock concluded by asserting that the subcommittee's proposal incorporates the best of the concepts utilized in other states, providing guidance to both prosecutors and lawyers in private practice while limiting the permitted activity "as much as possible" and providing useful cross-references to other rules. The proposal is, he said, the best of what is out there.

Downey pointed the members to Part III, captioned "Preliminary Considerations," of the subcommittee's report, contained in the meeting materials. That part manifests that the subcommittee's principal focus to date has been the *Pautler* decision, and its conclusion is that the decision is not a barrier to modification of the rules governing pretexting because the supreme court can by its own amendment of the rules of professional conduct that it promulgates, "overrule" the *Pautler* opinion. Downey pointed out that the court recognized, in footnote 4 of the *Pautler* opinion, that Oregon and Utah permitted governmental deception.[11] Downey commented that, each time he re-reads *Pautler*, he sees that the court was careful to state that it was dealing with the text of Rule 8.4(c) that provided no exceptions to its mandate, in contrast to the text of the rule in some other states, and thereby indicated that it was aware that the text could be modified to permit what was previously prohibited. Downey said the subcommittee sees the *Pautler* decision as a reason for any change to be stated specifically.

Rothrock interjected that he was not aware of any activity within the American Bar Association's Center on Professional Responsibility to propose any modification to the strict text of the model Rule 8.4(c).

Downey agreed with Rothrock's earlier comment that the subcommittee was of the view that any change should be stated in the text of Rule 8.4(c) and not left to a comment. He added that the subcommittee was also of the view that permitting the lawyer to supervise the deceptive conduct of investigators would have the advantage of providing appropriate control over the investigators' conduct.

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11. Footnote 4 in *In re Pautler* reads as follows:

> Only Utah and Oregon have construed or changed their ethics rules to permit government attorney involvement in undercover investigative operations that involve misrepresentation and deceit. See Utah State Bar Ethics Advisory Opinion Comm., No. 02-05, 3/18/02, and Or. DR 1-102(d), respectively. The recently issued advisory opinion of the Utah Bar Ethics Committee holds that attorneys may participate in "otherwise lawful" government investigative operations without violating the state's ethics rules. *Id.* The Oregon rule is more restrictive. It encompasses similar investigative operations, but limits the attorney's role to "supervising" or "advising," not permitting direct participation by attorneys. See Or. DR 1-102(d).

Downey said the subcommittee considered other rules as well — Part IV of the subcommittee's report reviews Rule 3.8, Special Responsibilities of a Prosecutor; Rule 4.1, Truthfulness in Statements to Others; Rule 4.2, Communications with Persons Represented by Counsel; Rule 4.3, Dealing with Unrepresented Persons; and Rule 5.3, Responsibilities Regarding Nonlawyer Assistants. It has determined, however, that, while amendments to the comments of one or more of those rules might be appropriate, it was not likely to recommend any change to the text of any of them.

Downey summarized a point that is elaborated upon in the subcommittee's report: The proposal is more permissive as to governmental lawyers and more restrictive as to non-governmental lawyers, reflecting a reconciliation effort in the subcommittee to avoid majority and minority reports.

While saying he would not get into the details of the subcommittee's proposal, Downey outlined it as adding two exceptions to the existing, proscriptive text of Rule 8.4(c). [See the proposed text of the exceptions on page 5 of these minutes.] For lawyers in private practice, the exception extends only to matters of "background, identification, purpose, or similar information." For government lawyers, the exception includes covert action that is within the scope of the lawyer's duties in the enforcement of law and is purposed to "gather information related to a suspected violation of civil, criminal, or constitutional law, or to engage in lawful intelligence-gathering." By the comments that the subcommittee proposes,[12] it would be made clear that the lawyer may not himself engage in "covert activity" and that conduct that is covered by one of the proposed exceptions to Rule 8.4(c) would not be violative of the proscriptions of Rule 8.4(a) against knowingly assisting or inducing another to violate the Rules of Professional Conduct or doing so oneself through the acts of another.

Downey summarized the subcommittee's work as follows: It had its work cut out for it. It listened to the concerns of the bar about the impediments of Rule 8.4(c) and *Pautler* to covert activities that is in fact perceived as appropriate, leaving many lawyers in unwitting violation of the current proscriptions, perhaps by erroneously thinking that, if they don't really know what their investigators are doing, they are safe from discipline. That perception is not correct.

Downey then invited comments from the members. The Chair interjected to structure the discussion: She asked, first, for a discussion about concept — is this a good idea, to create exceptions to Rule 8.4(c), is it a path that the Committee wants to go down at all? Then the Committee would turn to the specifics of the proposal. She recognized that there is a relationship between the two divisions she envisioned but asked that the general question be considered first.

The Chair opened the discussion with a question to Downey and the subcommittee participants: Did the subcommittee receive the views of the criminal defense bar? She noted that the chart showing activity in other states was useful, but it only shows where action has been taken to permit some exceptions to the strict proscriptions of Rule 8.4(c) — she wondered whether there were examples of states considering, but then rejecting, change, deciding instead not to accommodate any kind of deception.

Downey replied that the subcommittee had not specifically sought the views of the defense bar. It had spoken only to the U.S. Attorney's Office, the Colorado Department of Law, and the Federal Equal Employment Opportunity Commission. Likewise, the subcommittee did not solicit the views of the Colorado District Attorneys Association. He said that, on the criminal law enforcement side of the matter, the subcommittee had felt that it understood the issues well enough, although he admitted that those issues might be nuanced.

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12. *See* n. 5 to these minutes for the subcommittee's proposed comments.

Kirsch added, however, that the subcommittee had gotten concurrence by the Colorado Defense Bar Association to U.S. Attorney Walsh's expressed views.

A member commented that there were three possible scenarios: (1) The lawyer directly engages in covert activity; the proposal would continue the prohibition of direct covert activity. (2) the lawyer engages an investigator — is that "direct participation"? The member was not sure but noted the question can be resolve by stating that the client, rather than the lawyer, may make the engagement with the investigator and by stating that the lawyer can suggest such an engagement to the client pursuant to Rule 1.2(d).[13] (3) The lawyer may use or submit evidence that has been obtained by deceptive means by the client or a third person, pursuant to Rule 3.8, which proscribes the use of evidence known to the lawyer to be false but does not proscribe the use of truthful evidence obtained by deception by the client or another person.

Downey responded to these suggestions by saying that the subcommittee was not addressing rules of evidence. But, he asked, if the conduct in question constituted a violation of law, would not that take the analysis back to Rule 8.4(c) and the current proscriptions?

The member clarified that his question was whether the lawyer's submission of evidence that has been acquired by deception by others would violate any of the Rules of Professional Conduct, not whether it was permitted or blocked by some rule of evidence.

A member who is a member of the subcommittee noted that we are dealing with conduct that occurs before the submission of evidence in a proceeding — we are dealing with conduct in the gathering of evidence — and he asked what difference it can make that the investigator who gathers the evidence has been engaged by the lawyer or by the lawyer's client, alluding to Rule 1.2(d). Another noted that the distinction would break down in the case of an in-house lawyer.

The member who had begun this thread of the discussion characterized Rule 1.2(d) as "wink-wink" and pointed out that, because the subcommittee's own premise is that much deceptive conduct is in fact appropriate, the engagement of another to engage in the deception cannot be violative of Rule 1.2(d). In his view, it was not necessarily violative of Rule 8.4(c), either, as has been supposed by the subcommittee: The lawyer is not advising the client to commit fraud by engaging an investigator; rather, he is advising the client to hire an investigator to engage in lawful deception by the purchase of goods.

A member who had not previously spoken noted that the discussion was turning on a fine distinction. Take, he said, a fair housing violation investigation. A renter wants to wants to rent; he takes notes about what is said by the landlord. That is lawful conduct when done by a private person. We are saying it is problematic if done by a lawyer seeking to gather evidence about the landlord's practices. But the average person would not object to the submission of that evidence in the prosecution of a fair housing case. Why cannot the lawyer submit that evidence?

Kirsch noted that, for a Federal lawyer, there was a problem with the proposition that a lawyer might currently be precluded from advising a client to do something the client might lawfully do. The Federal agencies that the Federal lawyer represents are not his clients — he has no supervisory control

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13. Rule 1.2(d) states—

> (d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

over those agencies; he cannot make them do anything or refrain from doing anything, although, Kirsch noted, the lawyer can refuse to take their case. Accordingly, in Kirsch's view, Rule 1.2(d) is not apposite. Further, for most investigations to be productive, there must be more than the asking of some questions. There is a building of scenarios, the funding of drug purchases; there is more to it than just telling a "client" to go make an investigation.

Another member who had not previously spoken cautioned that the discussion was conflating rules of evidence with rules of professional conduct. Rule 3.3(b),[14] previously alluded to, deals with taking reasonable remedial measures to adhere to the lawyer's duty to be candid with the court, including correcting errors that have already occurred in the proceeding. But the question before the subcommittee deals with conduct that, under Rule 3.3(d) would, presumably, be disclosed to the court, after which the subject evidence could be admitted. In most cases, by the time of trial — or in the course of the trial — the fact that undercover conduct occurred will necessarily have been disclosed to the court.

Another member commented that the subcommittee's proposal does not preclude a prosecutor's suggestion that an affidavit to support a search warrant be submitted on false evidence: "We are looking for an illegal gun," instead of "we are looking for illegal drugs." This possibility probably had not been considered by the subcommittee, the member noted, but it would not be precluded by the subcommittee's proposal. Once the judge has received the affidavit from the police officer and has issued the search warrant, the original deception in the affidavit cannot be remedied, can't be undone.

A member asked whether the concern was that the subcommittee's proposal would condone such conduct by government lawyers because the proposal does not preclude deception of the court itself.

Downey addressed the question by pointing out that procurement of a search warrant on false evidence would not be a lawful activity — only "lawful covert activity" is permitted — and thus would not be a permitted exception under the subcommittee's proposal.

A member who had served on the subcommittee and who now characterized herself as a dissenter said she objected to the creation of any exceptions for lawyers in private practice, as distinguished from government lawyers. Although she was not in family law practice herself, she noted that those who are often "take on the mantle of their clients," and she commented that whether particular deception is "lawful" or is to expose threats to civil rights is often in the eyes of the beholder. In her view, Rule 8.4(c) should not be amended to permit any kind of deceptive conduct by lawyers in private practice; she noted that, in saying this, she was ordinarily opposed to variations in the rules that distinguish between government and private lawyers. In answer to a member's observation, this member said she was not satisfied that the proposal's requirement that the lawyer have a good faith belief in the efficacy of the covert activity would provide sufficient protection against inappropriate conduct. Lawyers, she said, would view the matter from their clients' perspectives.

Rothrock responded to the comment by stating that, on balance, he favored the subcommittee's proposal but that he shared the concerns that the member had expressed. Downey added that the subcommittee had considered these kinds of concerns and noted that the exceptions for the private lawyer are in fact limited to "matters of background, identification, purpose, or similar information."

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14. Rule 3.3(b) reads—

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

Another member who had served on the subcommittee said that he had begun his own participation with views similar to those the member had expressed but had become persuaded that the narrow language proposed for the private lawyer exceptions is sufficient protection against misconduct. It is, however, debatable, he acknowledged.

A member whose practice includes criminal defense said she had a lot to say about the proposal, and she began with the observation that the proposal does affect the criminal defense bar. She added that she had received the proposal only recently, when it was distributed to the members in the materials for the meeting, but that she has now disseminated both locally and nationally for comment by the defense bar. She expected that community will have a lot to say about the proposal, and she asked for time in which to gather those comments.

This member commented that the *Pautler* message from the supreme court had been very clear; she personally knew both the public defenders and the prosecutors who had been involved in the circumstances underlying the opinion. And, she said, the bar now understands the import of the *Pautler* decision; she worried that any deviation from that ruling would be a slippery slope: "Covert is covert," she said. One can say this only permits limited covert activity, but that is itself a subjective matter. She indicated that, in her experience, not all prosecutors are as mindful of proper limitations on covert activity as are those espousing these Rule 8.4(c) changes to this Committee. She added that advice and supervision over covert activity will vary from jurisdiction to jurisdiction within the state. It is one thing to supervise trained undercover officers; it is another to permit other law enforcement officers to engage in covert activity in cases of varying complexity. She used, as an example, a civil tax evasion case that changes into an investigation of criminal tax fraud; in such cases, the investigating officers often have law degrees, and they will not seek a licensed lawyer's supervision of their activity. If you add a requirement that the licensed lawyers provide supervision, you make them integral parts of the investigation, and to say that they are distinct from that investigation is but a fiction. She imagined the conversation: "We did this, what do you think?" "Well, I want you to go back and do it a different way." That involvement would make the supervising lawyer an integral part of the criminal case, would make him a witness: "The lawyer said we should do X, Y, and Z, but we decided that wasn't quite right, so we chose to do it this other way." Suddenly, the lawyer is a witness in his own case. At the least, the prosecutor should be required to disclose to the defense the protocols that were established for the case, so that the defense can consider and argue the ethical aspects of the investigation, can measure whether the investigators adhered to the established protocols. In short, this is a slippery slope, and this member asked that it not be made more common and more acceptable than it currently is.

The member added that, when looking at the proposal from the standpoint of the private lawyer, she could not imagine a criminal defense lawyer ever promoting deceptive conduct. Well, perhaps she could, citing the case of a "flipping" client who had chosen to cooperate with the government. But, in her view, there should be no exception to Rule 8.4(c) to permit any kind of deceptive conduct, because the deceptive conduct will taint the case. Certainly, she thought, deception should never be used by defense counsel.

The member said she has been involved in financial cases involving foreign activity, in which inducements have been extended to bring the defendant back to the United States jurisdiction. While that kind of conduct does not usually occur "at the district attorney's level," it may sometimes affect affidavits that are submitted to the judge: "I did not tell the judge that because I thought it was legitimate to withhold the information from the judge so that it would not be disclosed in the course of the ensuing investigation." This, she characterized, is an ends-justifies-the-means approach to the matter.

Summarizing, the member again noted that this is a slippery slope, and she acknowledged that she felt pretty passionate about the matter. She said, "*Pautler* is clear." She knows, she said, that covert

activity sometimes occurs and acknowledged that it can be "a necessary evil" in unusual circumstances. But it is the law enforcement officer who tells the confidential informant how to act, having learned that in school.

Another member suggested that it would be helpful to the Committee to have the defense bar weigh in on the proposal. He agreed that *Pautler* is certainly troublesome when applied to acceptable undercover law enforcement, which is "part and parcel" of law enforcement. He was not aware of any case that ruled against covert activity by the police, as distinguished from the prosecution. He noted that *Pautler* cited the case *People v. Reichman*,[15] a case involving alleged misconduct by the prosecution by the filing of a false indictment for the purpose of rehabilitating the credibility of an undercover officer in the drug-trafficking community. The member explained that the disciplinary case against the prosecutor in *Reichman* had been prosecuted by a special prosecutor, and he suggested that the subcommittee now solicit the views of that lawyer on its proposal. This member noted that he had once served as a prosecutor and knew, from that experience, that prosecutors in fact try to behave ethically and that they rely on "good faith" as a protection against ethical sanctions. He wondered whether *Reichman* would be decided, under the subcommittee's proposal, as it had been decided under the old Code of Professional Responsibility in 1991. *Pautler*, he said, is s strong statement in favor of honesty. The closer one gets to the border, as a lawyer, the more troubling it is. When you are advising an investigator as to the limits of his conduct, when do you become directly involved in that conduct? That can be difficult to determine. The member also noted that, among the citations in *Pautler* is *Chancey*,[16] in which an Illinois disciplinary board reprimanded a prosecutor for dishonesty notwithstanding the purity of his motive in attempting to rescue his own child from a kidnapper.[17] *Pautler* used *Chancey* to

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15. 819 P.2d 1035 (Colo.1991). The *Pautler* court explained the *Reichman* decision as follows:

> There, a district attorney sought to bolster a police agent's undercover identity by faking the agent's arrest and then filing false charges against him. Id. at 1036. The DA failed to notify the court of the scheme. Id. We upheld a hearing board's imposition of public censure for the DA's participation in the ploy. . . .
>
> To support our holding in Reichman, we cited In re Friedman, 76 Ill.2d 392, 30 Ill.Dec. 288, 392 N.E.2d 1333 (1979). There, a prosecutor instructed two police officers to testify falsely in court in an attempt to collar attorneys involved in bribery. A divided Illinois Supreme Court found such advice violated the ethics code despite the undeniably wholesome motive. Similarly, in In re Malone, 105 A.D.2d 455, 480 N.Y.S.2d 603 (N.Y.App.Div.1984), a state attorney instructed a corrections officer, who was an informant in allegations against correctional officers abusing inmates, to lie to an investigative panel. The instruction was purportedly to save the testifying officer from retribution by the other corrections officers. Again, despite the laudable motive, the New York court upheld Malone's censure for breaking the code.
>
> Thus, in *Reichman*, we rejected the same defense to Rule 8.4(c) that Pautler asserts here. We ruled that even a noble motive does not warrant departure from the Rules of Professional Conduct. Moreover, we applied the prohibition against deception a fortiori to prosecutors:
>
> District attorneys in Colorado owe a very high duty to the public because they are governmental officials holding constitutionally created offices. This court has spoken out strongly against misconduct by public officials who are lawyers. The respondent's responsibility to enforce the laws in his judicial district grants him no license to ignore those laws or the Code of Professional Responsibility.
>
> Reichman, 819 P.2d at 1038-39 (citations omitted).

Pautler, 47 P.3d at 1179. [Citations omitted.]

16. No. 91CH348, 1994 WL 929289 (Ill. Att'y Reg. Disp. Comm'n Apr. 21, 1994).

17. After stating that "This court has never examined whether duress or choice of evils can serve as defenses to attorney misconduct. We note that the facts here do not approach those necessary for either defense: Pautler was not acting at the direction of another person who threatened harm (duress), nor did he engage in criminal conduct to avoid imminent public injury (choice of evils)," the *Pautler* court compared the *Chancey* case as follows:

> In Chancey, a prosecutor with an impeccable reputation drafted a false appellate court order for the sole purpose of deceiving a dangerous felon who had abducted his own child and taken her abroad. Chancey signed a retired

stress that motive is not relevant in determining whether a violation of Rule 8.4(c), as written, has occurred. The member pointed out that *Pautler* itself involved a very serious circumstance, a confrontation with a murderer, and that the trial court had heard from other prosecutors who testified that they had personally told fugitives, on the telephone, that they would not prosecute if there was surrender. But the *Pautler* court distinguished those cases, pointing out that, if Pautler had handed the telephone to a policeman, the matter would not have led to discipline. But, instead, Pautler pretended to be a public defender and on the fugitive's side, and thereafter he did not disclose to the fugitive's lawyers, after the surrender, what Pautler had done, thereby damaging the relationship that those lawyers had as defense counsel for the surrendered fugitive.[18]

A member asked whether there was a similar need to seek the input of representatives of corporations that engage in covert activity in civil contexts. Another member added that there are many such contexts in civil law, such as cases involving employment discrimination; she noted that the Committee has already had input from the intellectual property bar. The member who had asked the question persisted by noting that there are distinctions between the civil and criminal arenas that should be examined. Another member suggested that the subcommittee seek input from groups such as the American Corporate Counsel Association.

A member raised a couple of questions: First, is the difference between prohibited direct engagement in covert activity and permitted supervision of others' covert activity equal to the difference between instigating such activity and advising others who are already embarked on it? And, second, can state or federal public defenders engage in covert activity — which they might wish to do if they believe that the prosecution has already done so in their case — as "government lawyers"?

Without answering that question, another member commented that, as a matter of proper process, the Committee or the subcommittee should hear from other groups of the kinds that have been mentioned, something that could not be done at this meeting. "This is far-ranging stuff," he said, and the Committee needs to hear from interested groups. The member moved to table further consideration of the subcommittee's proposal, and the motion was seconded.

Kirsch interjected that he would like, at this meeting, to respond to some of the comments that had been made on behalf of the criminal defense bar.

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judge's name to the order. He never intended to file the order and did not file the order, nor was the order ultimately used to deceive the felon. Despite its non-use, and despite Chancey's undeniably worthy motive, the Illinois board reprimanded Chancey for his deceit. Rather than consider an exception in light of valid concerns over the safety of an abducted child, the board insisted on holding attorneys, especially prosecutors, to the letter of the Rules. Further, the board observed, and we agree, that motive evidence was only relevant in the punishment phase, as either a mitigating or aggravating factor.

Pautler, 47 P.3d at 1181. [Citations omitted.]

18. The *Pautler* court explained Pautler's post-incident conduct as follows:

However, we do find an additional aggravating circumstance: Pautler's post-incident conduct. An attorney's post-incident conduct also bears upon aggravation and mitigation. See ABA Standards 9.22(j) (indifference in making restitution is an aggravating factor); id. at 9.32(d) (timely good-faith effort to make restitution or to rectify consequences of misconduct is a mitigating factor). After the immediacy of the events waned, Pautler should have taken steps to correct the blatant deception in which he took part. Instead, he dismissed such responsibility believing that the PD's office "would find that out in discovery." Although we do not agree that Pautler's subsequent failure to correct the deception was evidence of a secondary, ulterior motive, as the hearing board found, we do find that such conduct was an independent aggravating factor.

Pautler, 47 P.3d at 1184.

The chair noted that the motion to table was pending. Downey, however, said that he would like to hear Kirsch's comments, and he asked that the motion to table be withdrawn. The Chair noted that there was still a half-hour of scheduled meeting time remaining and ruled that she would consider the pending motion one that precluded a vote on the subcommittee proposal but would allow further discussion in the remaining meeting time. The movant commented that he did not believe there should be any consideration of specific text of any rule change but agreed that further general comment would be useful.

With that, Kirsch responded to the criminal defense lawyer's comments. He said that prosecutors are not commonly involved in micro-management of covert investigations; they are not usually sitting next to the wiretap monitor nor writing scripts for the deception. But more and more Federal agencies are writing policies that require their personnel to consult, "at the macro level," with the Justice Department before engaging in covert activities, the purpose being to determine whether the covert activity is properly engaged in and to ascertain how it might be done and what conduct should be avoided. Further, he said, the prosecution does want to have "clean hands"; it supports such agency consultation because it improves the investigatory process and assures the protection of constitutional rights of those who are investigated. If *Pautler* is read to mean the prosecutor cannot be involved at all in covert activities, then such activities will continue to occur regularly but they will occur without the useful guidance that prosecutors could provide but will choose not to provide because of the risk that their advising could subject them to a disciplinary prosecution by the Office of Attorney Regulation Counsel.

A member commented that defendants can engage in their own investigations without the need to go through lawyers. The public defender may be seen "as a cop," and, if you can misinform them as to your identity, that is a significant danger.

The chair asked the movant to augment the pending motion to table with words of guidance to the subcommittee. She asked in particular for coordination between the subcommittee and other members for the purpose of expanding the communities of interest from whom the subcommittee might seek input. In response, the movant renewed his motion to table, adding that the subcommittee be directed to contact additional communities of interest and then return to the Committee with further information. The movant added that the subcommittee was competent to determine which of such communities it would actually contact. Others added, as suggestions, the American Bar Association and its Center for Professional Responsibility, and the executive director of the Colorado Defense Bar Association

The motion to table was adopted.

The Chair thanked the guests for their participation.[19]

V. *Rule 3.3 and Statutory Privilege; Candor to the Court.*

At the Chair's request, Michael Berger advised the members of Opinion 123 that had been issued by the Colorado Bar Association Ethics Committee on June 18, 2011.[20] The opinion focuses on the requirement of Rule 3.3(a)(3) that, "if a lawyer, the lawyer's client, or witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal." At one end of the spectrum of

19. In addition to Matthew T. Kirsch and Adam L. Scoville, Amanda Rocque was present as a guest.

20. The opinion is available at http://www.cobar.org/index.cfm/ID/386/subID/27384/CETH//.

possible remedial measures, Berger noted, is affirmative disclosure to the tribunal that the evidence was false. The rule itself specifies that the remediation duty applies "even if compliance requires disclosure of information otherwise protected by Rule 1.6." But, Berger noted, the rule does not explain whether disclosure is required in the face of applicable statutory privilege. Often, he explained, the lawyer will learn of the falsity of evidence from his client in a communication that is protected by the statutory attorney-client privilege.[21]

Berger explained that the CBA Ethics Committee determined that, "if all else fails," the lawyer must make disclosure to the court under the mandate of Rule 3.3(a)(3) even if doing so would require the disclosure of communications that are protected by the statutory attorney-client privilege. Such a disclosure must be limited only to that information that is necessary to remediate the falsity of the evidence, and the disclosure to the court must be made in a "extra-evidentiary" manner.

Berger said that he was not aware of any adverse reaction to the Ethics Committee's opinion; he was not sure whether the absence of reaction was due to the obscurity of the opinion or to its correctness. He noted that there is a surprising dearth of opinions or law on the question from other jurisdictions.

Berger asked whether clarification of the question by a modification of Rule 3.3 or its comments would be appropriate for this Committee to consider. He then said that, in his view, the Committee should not consider any change. The conflict between Rule 3.3(a)(3) and the statute governing privilege involves constitutional issues of the separation of powers. He was of the view that the court has ample authority to adopt rules protecting the integrity of court proceedings. But, he thought, it would be preferable to await resolution of the matter by adjudication in a case than by modification of the Rules of Professional Conduct. In the meantime, the Ethics Committee's Opinion 123 gives some guidance to practitioners, and he felt it unlikely that the Office of Attorney Regulation Counsel would prosecute a disciplinary case involving the conflict between rule and statute.

A member spoke, he said, as the devil's advocate. The Committee, could, he said, flag the issue by a proposal to the court and leave it to the court to let the Committee know whether it would adopt the proposal or reject it in favor of case adjudication.

Another member noted that she, like others, had spent a good deal of time considering this issue when it was before the Ethics Committee; she concluded that Opinion 123 is correct, and she agreed with Berger that the Committee should not undertake to craft a rule on point. It would, she said, take the Committee years to get it right.

Berger added the observation that the CBA Ethics Committee opinion pointedly deals only with civil cases, not with criminal cases. The difficulties with covering criminal cases, with their overlay of constitutional principles establishing defendants' rights, are another reason why the Committee should not embark on the project.

By a vote, the Committee determined not to undertake a consideration of the conflict between Rule 3.3(a)(3) and the statutory attorney-client privilege.

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21. Colo. Rev. Stat. Ann. § 13-90-107(b) provides—

> (b) An attorney shall not be examined without the consent of his client as to any communication made by the client to him or his advice given thereon in the course of professional employment; nor shall an attorney's secretary, paralegal, legal assistant, stenographer, or clerk be examined without the consent of his employer concerning any fact, the knowledge of which he has acquired in such capacity.

VI. *Adjournment; Next Scheduled Meeting.*

The meeting adjourned at approximately 12:00 p.m. The next scheduled meeting of the Committee will be on Friday, July 13, 2012, beginning at 9:00 a.m., at the offices of Holland & Hart LLP at 555 Seventeenth Street, Suite 3200.

RESPECTFULLY SUBMITTED,

Anthony van Westrum, Secretary

[These minutes are as approved by the Committee at its Thirty-Second Meeting, on July 13, 2012.]

COLORADO SUPREME COURT

STANDING COMMITTEE ON THE RULES OF PROFESSIONAL CONDUCT

Approved Minutes of Meeting of the Full Committee
On July 13, 2012
(Thirty-Second Meeting of the Full Committee)

The thirty-second meeting of the Colorado Supreme Court Standing Committee on the Rules of Professional Conduct was convened at about 9:00 a.m. on Friday, July 13, 2012, by Chair Marcy G. Glenn. The meeting was held in the offices of Holland & Hart LLP at 555 Seventeenth Street in Denver, Colorado

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

Also present, as guests of the Committee, were Ellen Dole, Regional Counsel for Region VIII (Denver) of the United States Department of Housing and Urban Development; Matthew T. Kirsch, of the Office of the United States Attorney for the District of Colorado; Zach Mountain, of the United States Department of Housing and Urban Development; Raymond P. Moore, Federal Public Defender for the Districts of Colorado and Wyoming,; Amanda Rocque, of the Office of the United States Attorney for the District of Colorado; Adam L. Scoville, of RE/MAX, LLC; John F. Walsh III, United States Attorney for the District of Colorado; and Jan M. Zavislan, Colorado Deputy Attorney General.

I. *Meeting Materials; Minutes of January 6, 2012 Meeting.*

The Chair had provided a package of materials to the members prior to the meeting date, including submitted minutes of the thirty-first meeting of the Committee, held on January 6, 2012. Those minutes were approved as submitted.

II. *Adoption of Rules Amendments.*

Justice Coats advised the Committee that the Supreme Court had adopted, effective July 11, 2012, the following changes to the Colorado Rules of Professional Conduct, changes that the Committee had previously proposed to the Court:

A. Amendment to Comment [1] to Rule 1.12, Former Judge, Arbitrator, Mediator or Other Third-Party Neutral[1]—

> [1] This Rule generally parallels Rule 1.11. The term "personally and substantially" signifies that a judge who was a member of a multimember court, and thereafter left judicial office to practice law, is not prohibited from representing a client in a matter

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1. *See* the minutes of the committee on January 21, 2011 (twenty-ninth meeting of the Full Committee).

pending in the court, but in which the former judge did not participate. So also the fact that a former judge exercised administrative responsibility in a court does not prevent the former judge from acting as a lawyer in a matter where the judge had previously exercised remote or incidental administrative responsibility that did not affect the merits. Compare the Comment to Rule 1.11. The term "adjudicative officer" includes such officials as judges pro tempore, referees, special masters, hearing officers and other parajudicial officers, and also lawyers who serve as part-time judges. ***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 judge*** "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.

B. Amendment to Rule 3.5(b), Impartiality and Decorum of the Tribunal[2]—

A lawyer shall not:

(a) . . .

(b) communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order***, or unless a judge initiates such a communication and the lawyer reasonably believes that the subject matter of the communication is within the scope of the judge's authority under a rule of judicial conduct.***~~;~~**

C. Amendment to Comment [2] to Rule 3.5, Impartiality and Decorum of the Tribunal[3]—

[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**~~***, subject to two exceptions: (1) when a law or court order authorizes the lawyer to engage in the communication, and (2) when a judge initiates an ex parte communication with the lawyer and the lawyer reasonably believes that the subject matter of the communication is within the scope of the judge's authority to engage in the communication under a rule of judicial conduct. Examples of ex parte communications authorized under the first exception are restraining orders, submissions made in camera by order of the judge, and applications for search warrants and wiretaps. See also Cmt. [5], Colo. RPC 4.2 (discussing communications authorized by law or court order with persons represented by counsel in a matter). With respect to the second exception, Rule 2.9(A)(l) of the Colorado Code of Judicial Conduct, for example, permits judges to engage in ex parte communications for scheduling, administrative, or emergency purposes not involving substantive matters, but only if "circumstances require it," "the judge reasonably believes that no party will gain a procedural, substantive, or tactical advantage as a result of the ex parte communication, "and "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." Code of Jud. Conduct, Rule 2.9(A)(l). See also Code of Judicial Conduct for United States Judges, Canon 3(A)(4)(b)("A judge may . . . (b) when circumstances require it, permit ex parte communication for scheduling, administrative, or emergency purposes, but only if the ex parte communication does not address substantive matters and the judge reasonably believes that no party will gain a procedural, substantive, or tactical***

2. *See* the minutes of the Committee on January 6, 2012 (thirty-first meeting of the Full Committee).

3. *See* the minutes of the Committee on January 6, 2012 (thirty-first meeting of the Full Committee).

advantage as a result of the ex parte communication[.]"). The second exception does not authorize the lawyer to initiate such a communication. A judge will be deemed to have initiated a communication for purposes of this Rule if the judge or the court maintains a regular practice of allowing or requiring lawyers to contact the judge for administrative matters such as scheduling a hearing and the lawyer communicates in compliance with that practice. When a judge initiates a communication, the lawyer must discontinue the communication if it exceeds the judge's authority under the applicable rule of judicial conduct. For example, if a judge properly communicates ex parte with a lawyer about the scheduling of a hearing, pursuant to Rule 2.9(A)(l) of the Colorado Code of Judicial Conduct, but proceeds to discuss substantive matters, the lawyer has an obligation to discontinue the communication.

III. *Rule 8.4(c) and "Testers."*

The Chair then asked Thomas Downey to lead the Committee in a resumption of its discussion of "pretexting"[4] and its consideration of the supplemental report of the pretexting subcommittee, which Downey chaired, that had been provided to the members in the materials for the meeting.

Downey began by noting that, at its thirty-first meeting, on January 6, 2012, the Committee had considered an initial written report from the pretexting subcommittee about the application of the Colorado Rules of Professional Conduct, in particular Rule 8.4(c), to lawyer involvement with undercover investigations, pretexting in the course of trademark enforcement, and the like. At the January meeting, the Committee had also heard Adam L. Scoville, of RE/MAX, LLC, and Matthew T. Kirsch, of the Office of the United States Attorney for the District of Colorado, and Committee member Alexander Rothrock had provided a summary of activity in other states that have considered the issues. Downey pointed out that Attachment B to the subcommittee's supplemental report updates the state survey to which Rothrock had referred at the January 6, 2012 meeting.

Downey noted that, at the January 6, 2012 meeting, the Committee had directed the subcommittee to obtain more input into the pretexting matter from interested constituencies, such as the criminal defense bar and lawyers engaged in other affected practice areas. He reported that the subcommittee did that in the months following the January meeting and that Attachment A to the supplemental report includes all of the written comment that the subcommittee had received since the January meeting in response to its solicitation of comments. He said that the subcommittee had solicited comments from both the Colorado Trial Lawyers Association and the Colorado Defense Lawyers Association but that neither of those groups had responded. Following the January meeting, the subcommittee met nearly monthly to deal with the input it had received from others, meetings that Downey characterized as "spirited" and that led to the supplemental report that the subcommittee has now submitted to the full Committee.

Downey reported that, as the supplemental report shows, a majority of the subcommittee supports a revision of Rule 8.4(c) that is simpler than the proposal that the full Committee had considered at its January 6, 2012 meeting. The supplemental report also contains a minority proposal, which Judge Polidori would explain to the Committee following a discussion of the majority proposal. He pointed the Committee to Part III of the supplemental report for a detailed discussion of the revised proposal, made by the majority of the subcommittee, for amendment to Rule 8.4(c), which proposal reads as follows:

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4. The Committee's consideration of pretexting began at its twenty-ninth meeting, on January 21, 2011, (*see* Part V of the minutes of that meeting) and continued at both its thirtieth meeting, on May 6, 2011, (*see* Part V of the minutes of that meeting) and its thirty-first meeting, on January 6, 2012, (*see* Part IV of the minutes of that meeting).

It is professional misconduct for a lawyer to:

. . .

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation***, except that a lawyer may advise, direct, or supervise others, including clients, law enforcement officers, or investigators, who participate in lawful investigative activities***;

Part I of the supplemental report, he said, provides a summary of the issue and of the subcommittee's activities following the January 6, 2012 meeting, explains that there is a minority report (which is set forth in Part V), and lists the additional stakeholders from whom the subcommittee received input. Part II reviews that input, and Part IV provides the majority's conclusory remarks.

Noting that the subcommittee had labored long and hard, Downey thanked all of the subcommittee participants for their service, singling out Judge John Webb and Adam Scoville for their drafting of the supplemental report.

Downey concluded his opening remarks by noting that several avenues were open to the Committee, including (1) adoption of the proposal submitted by the majority of the subcommittee, (2) adoption of the first proposal of the minority to extend a Rule 8.4(c) exception only to lawyers representing the government, (3) embarkation on a new direction of the Committee's own selection, or (4) adoption of the alternative proposal of the minority to propose no change to Rule 8.4(c), a course the minority assures would *not* permit the drawing of any inference that the Committee would thereby have endorsed the broadest possible interpretation of the *Pautler* case.[5]

Downey then laid down what he characterized as important preliminary considerations in the development of any exception to Rule 8.4(c). First, there is the broad language of Rule 8.4(c) itself. Then, in Colorado, there is the broad *Pautler* opinion, in which the Court discussed cases arising in other jurisdictions under other circumstances but in which the focus was on direct action taken by the lawyer under scrutiny in that case, not on indirect conduct involving the giving of advice to or direction or supervision of others.

Downey added that there are times when one feels one is "slugging through at a snail's pace" and other times when one finds moments of clarity; the subcommittee, he said, has had both experiences. He pointed to the Preamble and Scope of the Rules; the Preamble, he noted, speaks about the varying roles of the lawyer. Included in those roles, in representing clients, are the roles of advisor — "As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications" — and evaluator — "As an evaluator, a lawyer acts by examining a client's legal affairs and reporting about them to the client or to others." These observations were relevant to the subcommittee's consideration of pretexting. And the subcommittee recognized that the lawyer must always comply with the law; its proposal countenances only *lawful* investigations. Downey pointed out that the Scope identifies its mandatory rules — those expressed in words such as "shall" — as "[defining] proper conduct for purposes of professional discipline."

So, Downey summarized, the subcommittee looked at the breadth of Rule 8.4(c) and *Pautler* and perceived a need to provide additional guidance to lawyers with respect to pretexting.

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5. *See* the discussion of In re Pautler, 47 P.3d 1175 (Colo. 2002) in the minutes of the thirty-first meeting of the Committee, on January 6, 2012; *and see* n. 25 to these minutes for the minority's discussion of the implications of no action.

Downey added that lawyers are entitled to rules that provide clear guidance for their conduct. Private investigators and others engaged in investigations in the course of law enforcement and the protection of private rights under the law sometimes engage in dishonesty or deceit. Lawyers are entitled to know whether, under the Rules, they may provide advice and guidance to those persons as they engage in those activities.

Downey said that the majority of the subcommittee believes that the conduct its proposal would sanction is not really within the proscriptions of Rule 8.4(c), because the conduct does not involve the direct action by lawyers of the kinds that have been the subject of actual disciplinary cases prosecuted under the rule. The majority also believes that allowing lawyers to give advice to clients and investigators will actually lead to the lawyers being more accountable for the conduct of the investigators whose services they engage; at present, with the uncertainty surrounding the application of Rule 8.4(c) to investigations, many lawyers choose not to know what their investigators are actually doing in the field. That is not, he said, a good effect of Rule 8.4(c) as currently written.

Downey outlined the boundaries of the exception that the majority of the subcommittee has proposed: The conduct covered by the exception — advice, direction, or supervision — must be in the context of lawful investigative activities; the exception has no application in any other context. But the words "lawful investigative activities" are, he said, fairly broad, intentionally so. The lawyer's role is limited to advice, direction, or supervision of others, the exception does not permit the lawyer to participate directly in deceptive investigative activities.

Downey again alluded to the concern that, in light of Rule 8.4(c) and *Pautler*, lawyers have distanced themselves from the actual investigations others engage in in the course of their cases; that, he said, is not a good result of the present state of the rule and case law.

The boundary limiting the exception to "lawful" activities will be determined on a case-by-case basis — and the lawyer will be required to know the law applicable to that determination. Unlike the subcommittee's initial proposal, the exception does not contain concepts of "good faith" or "reasonable belief."[6]

Downey pointed the Committee to page 16 of the subcommittee's supplemental report, on which begins a section in which the majority responded to a number of comments that the subcommittee had received in the course of its work. In that section, the majority considered whether there was really a need for the exception; and Downey referred to the comments of Colorado Attorney General John Suthers, the two letters submitted by United States Attorney John Walsh, and comments from intellectual property rights lawyers that identify such a need. In that section of the supplemental report, the majority also considered the matter of a Colorado divergence from the model text of the American Bar Association's Rules of Professional Conduct. He recalled the "rebuttable presumption" of uniformity that the Standing Committee had adopted in the course of its review and modification of the model text in developing its proposal for the revised Colorado Rules of Professional Conduct that the Court adopted effective January 1, 2008, but he noted that the Committee has recommended and the Court has adopted non-uniform changes in a number of rules.

Downey noted that the proposal does not turn on the lawyer's intent. As explained on page 23 of the supplemental report, "the proposed exception, covering only the lawyer's advice, direction, or supervision of 'lawful investigative activities,' no longer hinges on the intent of the lawyer." Footnote 11 of the supplemental report on that page amplifies the point as follows:

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6. *See* Part IV, at p 5, of the minutes of the Committee's thirty-first meeting, on January 6, 2012, for the text initially proposed by the subcommittee.

> It is worth noting, however, that it would have been inaccurate to characterize even the original proposal as containing "a subjective 'good faith' standard for the lawyer's belief that his/her actions were lawful and in compliance with the exceptions noted in the amendments" . . . . The original proposal required that the lawyer "reasonably and in good faith believes" that the action was within the scope of the scope of the lawyer's law enforcement duties (government), or that the law had been violated and the activity would aid the investigation (private), requiring a belief that is at once objective and subjective. . . . To the extent that the original proposal was overly nuanced concerning intent, the current proposal in any event avoids this concern.

Downey explained that the majority's proposal extends the exception to all lawyers; it is not limited in scope to law enforcement matters and to prosecutors.

And Downey explained that, because there is no conflict between the majority's proposal and Rule 4.2 — the exception does not permit direct action by a lawyer and thus cannot lead to a lawyer's "[communication] about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter" as is prohibited by Rule 4.2 — there is no need to state that amended Rule 8.4(c) provides an exception to Rule 4.2.

Downey then asked Judge Polidori to explain the minority's positions.

Judge Polidori began by noting that, at the thirty-first meeting of the Committee, on January 6, 2012, she had pointed out that there was not unanimity on the proposal made by the subcommittee at that time; now, she said, the minority has provided its own report to the Committee, which is included in the subcommittee supplemental report beginning at page 31.

Characterizing herself as old-fashioned, Judge Polidori said she became a lawyer because it was an honorable profession. We should, as lawyers, be above the common man; we should not permit dishonest conduct by lawyers even if it is "lawful." Some matters can be lawful but still dishonest, as the minority stresses in its report.[7]

It is hard for her, the judge said, even to allow that a government lawyer may engage in advising, directing, or supervising deceptive conduct by others — which is the first of the two alternative proposals made by the minority — but she recognized that there is caselaw supporting that proposition and referred to Opinion 96 of the Colorado Bar Association Ethics Committee.[8] And, she added, there are constitutional guarantees of individual rights — and the exclusionary principle as a check — applicable to the activities of prosecutors and others in law enforcement, guarantees and checks that are not applicable to conduct by private lawyers.

Accordingly, the first alternative proposed by the minority to the proposal made by the majority was to amend Rule 8.4(c) to read as follows [showing the change to the majority's proposal]:

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7. "Because the legality of private conduct involving fraud, deceit, or misrepresentation could be ascertained from statutes and the common law of torts, the Rule's use of the term 'dishonesty,' which alone is neither the basis of any tort nor an element of any crime, must go further." Minority Report, p. 34 of Pretexting Subcommittee's Supplemental Report.

8. *See* CBA Ethics Committee Ethics Opinion 96, Ex Parte Communications with Represented Persons During Criminal and Civil Regulatory/Investigations and Proceedings, 07/15/94. The opinion is available at http://www.cobar.org/index.cfm/ID/386/subID/1817/CETH/Ethics-Opinion-96:-Ex-Parte-Communications-with-Represented-Persons-During-Criminal-and-Civil-Regula/.

It is professional misconduct for a lawyer to:

. . .

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation, except that a lawyer ***representing the government*** may advise, direct, or supervise others, including clients, law enforcement officers, or investigators, who participate in lawful investigative activities;

There is, said Judge Polidori, no caselaw supporting the proposition that private lawyers may engage in "lawful deceit." She sympathized with the stakeholders who lobbied this Committee for exceptions to Rule 8.4(c) — the intellectual property rights lawyers and other business lawyers who are stymied in how to represent their clients. But the majority's proposal would extend the exception to all lawyers, and the judge said she could not imagine what deceits and dishonesties some practitioners might be able to think up in the course of representing their clients. She said she did not intend to imply that lawyers engaged in intellectual property rights practices were of a better caliber than other lawyers practicing in other areas, but she said that so much of what occurs in some other practice areas are "in horrible situations."

Judge Polidori pointed out that the minority's second alternative to the majority's proposal is the proposal that the Committee take no action, make no proposal to the Court to change Rule 8.4(c) or add any comment. She had no preference between the minority's two alternatives.

The judge pointed out that the minority's government-lawyer-only proposal refers to "a lawyer representing the government" rather than to a "governmental lawyer," which was the phrase used in the subcommittee's initial report, considered at the Committee's thirty-first meeting, on January 6, 2012.[9]

Judge Polidori concluded her remarks by saying it is just not appropriate to change a rule for the benefit of a few when the likelihood of abuse of the rule, as changed, is so apparent.

Downey responded to Judge Polidori's comments by saying that the majority, too, recognized that lawyers may engage in misconduct in their various practices. The majority's proposal, he argued, does not permit misconduct; and, he added, similar to the constitutional principles and exclusionary rules applicable to government lawyers, there is a significant check on the conduct of a private practitioner, that check being a nasty letter from the Office of Attorney Regulation Counsel. There are also actual cases in which opposing counsel have obtained court sanctions as a result of investigative misconduct in civil cases.

Downey noted, again, that the Preamble to the Rules of Professional Conduct highlights the lawyer's role as an advisor to his client. Why, he asked, cannot a lawyer advise a client about lawful conduct that the client may engage in, and give that advice without fear of a disciplinary proceeding?

As to the distinction that Judge Polidori noted between a "lawyer representing the government" and a "government lawyer," Downey noted that the majority's proposal applies equally to all lawyers, whether in government service or in private practice. The proposal guides all lawyers; and there is a need, he argued, for such guidance in Rule 8.4(c), guidance as to what a lawyer may do in the role of advisor.

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9. "The phrase 'a lawyer representing the government' avoids potential uncertainty in the phrase 'government lawyer,' which could be interpreted as applying to lawyers who are paid by, but do not represent, the government, such as public defenders, alternative defense counsel, and legal services lawyers." Minority Report, p. 31 of Pretexting Subcommittee's Supplemental Report.

The Chair thanked Downey and Judge Polidori for their presentations and opened the matter for discussion.

Following up on Downey's last comment, a member noted that, while Downey had focused on the lawyer's role as an advisor, the majority's proposal went further and countenanced direction and supervision of investigators as well. Downey agreed with that observation and confirmed the member's subsequent observation that the majority proposal includes only amendment of the text of Rule 8.4(c) without the addition of any comment.

A member asked that the Chair invite the attending guests to speak, and the Chair did so.

Guest Ellen Dole, Regional Counsel for Region VIII of the Department of Housing and Urban Development, spoke first, thanking the Committee for the opportunity to present HUD's views. A major responsibility of her department is to enforce the Federal Fair Housing Act. The Department supports the majority proposal from the subcommittee, which will help in the enforcement of the FHA. The Department's duties include preventing housing discrimination based on race, color, religion, sex, familial status, or national origin. "Testing" is often used by the Department in the course of its enforcement activities; for example, she said that cooperative witnesses, government employees, and contractors are used to test whether they, of a protected class, can obtain rentals on the same terms as those who are not within that protected class. Dole said that, of course, the Department is active nationally, and the testing activity is essential to the enforcement of the law's anti-discrimination provisions. The Tenth Circuit Court of Appeals, she said, has noted the importance of using testers in such enforcement. The majority's proposal for an exception to Rule 8.4(c) will permit the Department's lawyers to supervise investigations without concern about attorney discipline. She noted that a job title for Department lawyers is "attorney advisor," and she appreciated Downey's singling out of the lawyer's role as an advisor that is identified in the Preamble to the Rules of Professional Conduct; if the lawyers within the Department could not freely give advice, they would be hampered in their enforcement efforts. Absent a modification of the rule such as the majority of the subcommittee has proposed, HUD lawyers have to distance themselves from enforcement investigations, so the change would be useful.

Further, Dole said, the Department supports the majority's proposal to extend the exception in Rule 8.4(c) to all lawyers, including those in private practice. Limitation of the exception only to lawyers representing the government would be harmful to the Department, for it often employs lawyers in non-representative roles, such as "grantees of testing." Those persons may not be "lawyers representing the government," but they remain subject to the Rules of Professional Conduct and would not be protected under the minority's proposal that the exception extend only to lawyers representing the government. Second, she said, the Department relies on private fair housing organizations to support its enforcement work; those organizations may employ lawyers who would not be protected by the limited exception proposed by the minority; accordingly, under the minority proposal, the Department would lose their assistance.

A member of the Committee pointed out that what Dole described as enforcement activity at the Department of Housing and Urban Development is also done in other areas of the law, including other areas of civil rights enforcement. So, this member said, the beneficial impact of the proposal would be much broader than just at HUD.

Guest John Walsh, United States Attorney for the District of Colorado, spoke next and began by thanking the Committee, and especially the pretexting subcommittee, for undertaking the pretexting issue; he noted that it is a difficult issue to sort through. But he affirmed Downey's view and said that his office would benefit from very clear guidance in its engagement of investigators for its law enforcement activities. His office has become engaged in this Committee's consideration of the

pretexting issue because of its desire to clarify the application of the Rules of Professional Conduct to conduct that is very lawful and, indeed, is sometimes mandated by guidelines of the Department of Justice that require lawyer review of law enforcement activity that may involve deception. His office supports the majority report, and he seconded the comments of Ellen Dole.

A member asked Walsh whether lawyers in his office have actually faced disciplinary charges or court scrutiny because of their participation in investigations. Walsh responded that he was not aware of any disciplinary action but noted that James Coyle, a Committee member in attendance at the meeting who is Chief Deputy Regulation Counsel, and guest Matthew Kirsch, of Walsh's office, might be able to provide further response to the question. Walsh noted that there is a civil case pending in which a party is seeking dismissal of a Federal Trade Commission action based on this ethical issue.[10] And he stressed that, even though the office has not encountered an actual disciplinary proceeding in this area, the ethical implications of participation in investigatory activity is a common topic of discussion among its lawyers and its ethical counselors frequently receive inquiries about lawyers' conduct in connection with undercover investigations. In the last two years, the Department of Justice has placed a particular emphasis on lawyer review of investigatory activities to assure that the investigations are lawful.

Guest Jan M. Zavislan then introduced himself, stating he was attending on behalf of Colorado Attorney General John Suthers and the entire Colorado Department of Law. He would echo the comments of Ellen Dole and John Walsh; Attorney General Suthers is completely in accord with their position. As Walsh had done, Zavislan noted the pendency of the Federal Trade Commission case[11] and pointed out that the Department's Consumer Protection Section is a co-plaintiff with the FTC in that case. The pertinent allegation in that case is that FTC representatives acted as consumers and, in the course of their activities, made recordings to obtain evidence; defense counsel has sought to exclude the recordings from evidence on the grounds that Rule 8.4(c) was violated. To Zavislan, the perception that everything is actually okay in practice under the current text of Rule 8.4(c) and its application in practice is false: There is a specific challenge, based on Rule 8.4(c), to appropriate undercover activity. The idea that lawyers use evidence obtained by undercover means regularly and without impediment by the rule is just not true; it is not true that lawyers in the Department of Law can engage in this proper conduct without challenge. Proper undercover investigation is, he stressed, not the kind of conduct that Rule 8.4(c) was drafted to prohibit; yet the rule is being used in efforts to exclude evidence that has been properly gathered.

A member stated that he wanted our government vigorously to investigate bad people; but that, he felt, was not the issue that is before the Committee. He commented that he had served six years each on the Committee on Conduct of the United States District Court for the District of Colorado and on the Colorado Supreme Court Grievance Committee and that he had never seen Rule 8.4(c) or its predecessor raised in any of the cases that those panels considered during his tenure. In this member's view, carving out a Rule 8.4(c) exception for special lawyers would be inappropriate, and he felt Judge Polidori had stated the matter well: Lawyers must adhere to the highest standards of conduct; there must be no "wink-wink" to the application of the prohibition against dishonest conduct, no question about where the line might be drawn. This member offered kudos to the subcommittee, which, he noted, has done such a good job serving so many masters. He had, himself, started out thinking that a change or two to Rule 8.4(c) might be helpful, but he now felt that would not be possible and thought, instead, that proposing no change to the rule was the best course for the Committee to take. If the Feds want to pass laws permitting certain conduct, so be it. But he did not want them to come to this Committee and to the Colorado Supreme Court for approval of deceitful conduct, even in the course of lawful investigations.

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10. *See* Federal Trade Commission v. Dalbey, Case № 1:11-CV-01396 RBJ-KLM (D. Colo.).

11. *See* n. 10.

He characterized himself as "old school," noting that he had also opposed collaborative law. He recalled that he had been defeated in his effort to preclude the confidentiality requirements of Rule 1.6 from being preempted by the duty of candor to the court under Rule 3.3, but he admitted he could live with the outcome of that debate.[12] But, he said, he would have a hard time living with the majority's proposal: The exception that the majority proposed to add to Rule 8.4(c) would swallow the prohibitions of Rule 8.4(c). He commented that, as Judge Polidori was concerned about the conduct of lawyers in some practice areas, he, as a mediator and arbitrator, had seen scary conduct by lawyers in the furtherance of their clients' interests.

Another member expressed her complete accord with the comments just made by the other member. It is not, she said, that lawyers in particular practice areas are all "bad"; it is that, if an exception to the proscriptions of Rule 8.4(c) is created, every lawyer will conclude that his or her contemplated conduct falls within the exception. She said that, in her practice, she sees misconduct by opposing counsel but, when she complains to the court about the conduct, she is told that it is not the court's duty to enforce the disciplinary rules and that she must take the matter up with the Office of Attorney Regulation Counsel. Accordingly, the concerns expressed by guest Zavislan were not persuasive to this member.

The member also referred to the comments of guests Zavislan and Walsh to the effect that they have regular conversations within their offices regarding the implications of Rule 8.4(c) on the investigations in which their offices become involved. She understood that the purpose of the rules of professional conduct are to provide guidance. There is no black and white understanding of every possible scenario out there and whether it's within the rules. Therefore, she said, if Rule 8.4(c) is prompting dialogue and critical analysis prior to action, then it is working as it should.

But this member had a particular objection to the minority position that any exception should be extended only to lawyers representing the government: That, she felt, was troublesome; the addition of exceptions to Rule 8.4(c) for only government lawyers would have an adverse impact on young lawyers, the lawyers in the "X and Y" generations in particular. There is, she said, so much distrust of government, institutions, and the "establishment" in those generations. If we, as a profession, put in writing that no lawyer can be dishonest, except those representing the government and law enforcement, it would only contribute to what she saw as an already extreme sense of disenfranchisement among younger lawyers. Creating an exception that allowed government lawyers "to be dishonest" would lack the transparency that is demanded of every level of governmental agencies. It would seem to give additional power and protection to the establishment, those who already have all the power and hold all the cards. The potential for abuse would also be compounded.

Guest Raymond Moore, Federal Public Defender for the Districts of Colorado and Wyoming, then spoke, saying that his comments would be tiered. He spoke, he said, not just from the perspective of a defender of the accused but also from his experience in the criminal law arena over a number of years; he did not come before the Committee with a "get-the-bad-guys" perspective. He commented that he appreciated the consideration the subcommittee had given to a number of the comments that he had submitted to it; he saw the impact of his comments in the current majority proposal, and he felt that the proposal was much better than the one that had been considered by the Committee at the thirty-first meeting on January 6, 2012.

But, Moore said, we should hold ourselves to a higher standard than what is set by the majority proposal; we are better than that. Further, he was still of the view that there was no compelling need to

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12. The member's reference was to Colorado Bar Association Opinion 123, Candor to the Tribunal and Remedial Measures in Civil Proceedings, available at http://www.cobar.org/index.cfm/ID/386/subID/27384/CETH//.

add an exception to Rule 8.4(c), despite what others have said about that. He understood that the Committee's consideration of an exception to Rule 8.4(c) was instigated by an inquiry from the intellectual property rights bar; the government was not, at first, concerned that there was a problem, but it then joined in the debate as a "me, too." Moore did not know of a single instance of law enforcement curtailing an investigation because of the rule. It is not a matter, he said, of being more clear or less clear. It is not a case of someone saying there is some conduct we need to engage in but we cannot now engage in it because of this rule. There is no universe in which the bad guys are getting away with conduct that we cannot now prevent. There is no record of a problem with the rule.

Moore said he would rank the Committee's alternatives this way: First, do nothing; propose no change to Rule 8.4(c). He did not like the minority's first alternative, which it has characterized as limiting the exception only to lawyers who are involved in law enforcement; as proposed, he said, the minority's language — "lawyers representing the government" — was actually broader than just government lawyers engaged in law enforcement. There are many lawyers who represent the government but are not involved in law enforcement, and he cited as an example lawyers employed by the Bureau of Indian Affairs. The minority's exception, he noted, would not extend to him personally, as the Federal Public Defender does not represent the government.

As to the majority's proposal, Moore objected to the exception permitting covered lawyers to *direct* others in investigations. He said there was no actual effort, by the Office of Attorney Regulation Counsel or otherwise, to preclude lawyers from *advising* other persons on what is lawful or unlawful conduct by those persons. But the word "direct" envisions too much involvement by the lawyer — for example, directing the undercover officer as he pretexts a pornographic conversation on the Internet.[13] What the difference is, between typing the text oneself and directing another to do so, escaped him, Moore said.

A member said that it was patently unreasonable for the Rules, as presently constituted, to give government lawyers none of the guidance that they need to have. It goes without saying, he added, that this Committee should propose such guidance to the Court for its adoption to guide those lawyers in lawful activity, activity which the United States Supreme Court has held is lawful. If Attorney Regulation Counsel were to contest that activity by Federal lawyers, he would lose because of the Supremacy Clause. The harder question for this member was the extension of an exception to other lawyers. He agreed with Judge Polidori that there should be no such extension; the risks in doing so are too great. There are no limitations, such as a § 1983[14] challenge, on abuse by private lawyers. He would approve of an exception to Rule 8.4(c) that covered government lawyers — but not private lawyers —

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13. *See* p. 12 of the Subcommittee's Supplemental Report:

> However, stakeholders who opposed the overall proposal took the view that forbidding the lawyer from participating directly does not render the proposal acceptable. As one commentator put it, allowing the lawyer to advise, direct, or supervise pretext investigations is "wordsmithing which will only prove to create a distinction without a difference." FedDefender Comment at 2 (posing the example of a law enforcement officer engaging in an online child pornography sting with a lawyer looking over his shoulder, advising what to type).

14. 42 U.S.C.A. § 1983 provides—

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

and he would, perhaps, tighten the coverage to just government lawyers who are engaged in law enforcement.

A member noted anecdotal references to cases that have been dismissed on the grounds of lawyer misconduct under Rule 8.4(c). Guest Adam Scoville responded that the issue of a violation of Rule 8.4(c) has come up in several cases. The majority of the cases, he reported, have not involved dismissal or exclusion of evidence because of such violations, and there are civil cases holding that a lawyer's participation in lawful pretexting is acceptable; he referenced trademark cases and cases against major oil companies asserting the violation of civil rights against discrimination in the practice of requiring persons of minority status to pay for gasoline before pumping it. Pretexting was approved in the *Arctic Cat*[15] case from South Dakota, to which he had referred in his remarks to the Committee at its thirty-first meeting, on January 6, 2012, a case that involved a trademark infringement investigation of a snowmobile dealer whose distributorship had been terminated. The cases look at a line that condones limited deceitful conduct but does not permit schemes designed to elicit testimony from higher-level executives; they do not permit elaborate ruses to elicit admissions but permit engagement with defendant's staff in ways that an ordinary consumer might do, activity which, if the investigator engaged in openly — "Hi, I am here to investigate possible trademark infringement," as Scoville put it — would not give the investigator the same response as he or she would receive if the investigator had pretended to be an ordinary customer. Scoville pointed out that the trademark laws provide consumer protections; in that respect, they are akin to the laws that are the subjects of law enforcement activities, and private investigations in connection with the protection of trademark rights are akin to the involvement of private persons in the enforcement of the Fair Housing Act in assistance to the Department of Housing and Urban Development. Fake drugs sold as legitimate pharmaceuticals and knockoff ball bearings sold as qualified for service in aircraft engines are examples of the public harm that can be caused by trademark violations. If consumers were not deceived by the trademark infringement — and that is the test, he said — then the owners of the trademarks would not succeed in their enforcement actions. Accordingly, even private lawyers often act for the protection of the public as consumers.

Scoville cited, as an example of a case in which Rule 8.4(c) is preventing legitimate action, "phishing" attacks using email. A website may use what appears to be a logo or trademark of a large real estate agency, and it may appear to be a website maintained by that agency; visitors to the website will be drawn to the website — "Check out these new listings" — and will be asked to "log in" using their email account addresses and secret passwords, thereby giving the criminal website operator access to their private information, including security codes. The bona fide real estate agency will eventually hear from the injured customers, and it will often try to prevent further harm by reporting the abuse to Internet service providers in order to get the website "taken down"; but often its remediation efforts will not be effective until after thousands of users have uploaded their security information. Another real estate scam, he said, is to use a knockoff website to obtain online payments of "the first and last months' rent." The legitimate trademark owner will be reluctant to get involved in stopping these activities, because involvement may incur risks. Scoville said he does not want an employee of his company, an employee that he supervises, to put phony information into such websites in an effort to learn about the scam, even to learn just the Internet Protocol address of the phisher, although that is the kind of information he would need if he were to try to get law enforcement authorities to get involved. Certainly he would not advise an investigator to use the investigator's actual personal information in the course of the phishing investigation, but Rule 8.4(c) constrains him from advising that the investigator use false information in the investigation. Accordingly, legitimate real estate agencies and other such enterprises face a "whack-a-mole" problem; since they cannot conduct an investigation sufficient to expose the schemers behind

15. Midwest Motor Sports, Inc. v. Arctic Cat Sales, Inc., 144 F.Supp.2d 1147 (D.S.D. 2001).

the phony websites, all they can accomplish is the shutdown of a particular website while another springs up in its place.

As to the distinction between the lawyer "advising" the investigator and the lawyer "directing" the investigator, Scoville noted that the law permits him to hire an investigative agent; but, if he has to engage an agent in, say, Thailand and set him up to make an effective investigation with a view toward introduction of the evidence in an American court, he will necessarily have "directed" that investigator. His concern is, in fact, the opposite of Moore's concern. (To that comment, Moore agreed but added that "direct" is a fuzzy term.)

Scoville said that the Federal Trade Commission case to which others had referred[16] may turn on the fact that the conduct under scrutiny there was conduct occurring under the supervision of a lawyer. He noted that the current version of Rule 8.4(c) induces lawyers to stay aloof from the investigatory conduct in order to shield themselves from disciplinary proceedings. Instead, he said, the Rules should permit the oversight of lawful investigations that Rule 8.4(c) currently precludes. He emphasized that the majority's proposal would extend the exception regarding deceit and misrepresentation only to lawful investigatory activities.

A member who had not spoken before said that we need law enforcement to do its job, and it needs to be able to investigate. But she was concerned about the "slippery slope" that would be created if the exception were extended to "ordinary" lawyers directing private investigations. Such a change might, she feared, take the profession back to the days of "zealous" representation.[17] It is, she agreed, a slippery slope.

Guest Moore interjected that he commented as the single representative of a certain side of the issue. There seemed to be a thread to the discussion, he feared, that implied that private lawyers have no ethics, while government lawyers are of the highest level. But in fact, he said, government lawyers can do the wrong thing, too; the notion that because they work for the government they are more moral than private practitioners is wrong.

Guest Kirsch pointed out that none of the guests representing government lawyers was advocating that the Committee select the alternative that extended the exception only to government lawyers. He agreed with the point a member had made about the inappropriateness of carving out an exception applicable only to special lawyers and noted that all the government lawyers who were involved in the subcommittee's and the Committee's deliberations supported the broader exception that the majority had proposed. He added that no subcommittee member felt that government lawyers should not themselves be held to the highest ethical standards. But it is not, he said, possible to keep lawyers away from these activities. Investigations will continue in both civil and criminal cases and will be seen in the courts. The majority seeks to minimize Rule 8.4(c)'s current disincentive, which restrains lawyers from giving advice, direction, or supervision to clients and investigators to assist them in complying with applicable law. The proposal does not just permit *advice* but also permits *direction* and *supervision*, because the majority wanted more lawyer involvement in difficult questions of what may be

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16. *See* n. 10

17. *See* the minutes of these prior meetings of the Committee for its consideration of the matter of "zealousness" in the representation of clients:

- Fifth meeting, on October 1, 2004, Item IV.B;
- Tenth meeting, on July 19, 2005, Item II; and
- Eleventh meeting, on September 27, 2005, Item III.A.

constitutional and lawful, to assure more protection of the rights of defendants. He knew that lawyers would continue to get some of the questions wrong; but, society as a whole will be better off by having lawyers in the game rather than sitting on the investigatory sidelines. He said that there are, in fact, discussions in his office about what is permitted and what is constrained by Rule 8.4(c); the best answer the ethics counselors in the office often can give is "we are not sure." So there is a real effect from the broad wording of the current rule; it may not be an effect felt through disciplinary action by Attorney Regulation Counsel or though dismissal of cases by the courts, but the effect is that investigators are not getting as much guidance as they need. Kirsch concluded by saying he disagreed with the member who had suggested that the addition of an exception to Rule 8.4(c) would swallow the prohibitions of Rule 8.4(c), leading to unlawful investigative activities.

A member who had not previously spoken said there were good arguments on both sides of the question that was before the Committee. He, too, was concerned about the slippery slope — "carve out an exception and you'll drive a truck through it." But, at the same time, it seems inappropriate that lawyers cannot safely advise clients about activities that are intended to enforce state and Federal laws. All of the discussion has been about that category of activity. He proposed, instead of the addition of an exception to the text of Rule 8.4(c) itself, that a comment be added that said, if the lawyer is doing something lawful in furtherance of the client's effort to find out if there has been a violation of law, the lawyer does not thereby violate Rule 8.4(c). He suggested that such a comment would prove to be more manageable than the proposals to amend the text of the rule itself.

A member noted that the Committee had been discussing government lawyers and pointed to the comment that the government lawyers had joined the discussion only after the intellectual property rights bar had made its inquiry. But, he said, the Colorado Bar Association has already issued an extensive ethics opinion on conduct by government lawyers.[18] Difficult questions under the Rules are the name of the game, he argued; he pointed to the conflicts rules[19] as examples of rules that present difficulties in application. So, he concluded, it is not really a question of providing guidance to government lawyers; that is not in fact a problem. And, he said, the issue is not just one of the wording of an ethics rule but also involves the substantive laws that regulate the conduct of government lawyers. The concern is untethered private lawyers.

The member continued: If the concern is that the lawyer cannot ordinarily dissemble, then we have lost the moorings of the word "lawful." The reasoning underlying government deception in law enforcement is that there are statutes that authorize investigatory activities and there are guidelines for the conduct of those activities. That is the basis for the cases that have permitted lawyer involvement in deceptive investigative activities. But there are no such statutes to govern the conduct of private lawyers; the idea that we can have a rule that countenances some dishonesty is crossways. The intellectual property rights bar has a real concern. But what is "lawful" will become "what is not prohibited," and the exception will allow not only pretexting but also secret tape recording by lawyers — conduct that is lawful under many statutes but as to which the Colorado Bar Association Ethics Committee has opined, "[b]ecause surreptitious recording of conversations or statements by an attorney may involve an element of trickery or deceit, it is generally improper for an attorney to engage in surreptitious recording even if the recording is legal under state law."[20] The proposed exception might

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18. *See* n. 8 for information on Colorado bar Association Ethics Committee Opinion 96.

19. *See* C.R.P.C. 1.7 through C.R.P.C. 1.10.

20. *See* Colorado Bar Association Ethics Opinion 112, Surreptitious Recording of Conversations or Statements, 07/19/03. The opinion is available at http://www.cobar.org/index.cfm/ID/386/subID/3809/CETH/Ethics-Opinion-112:-Surreptitious-Recording-of-Conversations-or-Statements,-07/19/03/.

permit pretexting for the purpose of accessing social media. It might permit a lawyer representing a defendant in a personal injury case to go to the door of the plaintiff's residence, with a secret camera, and pretend to ask for help to deal with a flat tire. Is that the direction this Committee wants to go, he asked. No, he answered. There is a limit. This is not a matter of sanctimony. How far can one go in protecting intellectual property rights?

But, this member said, he would not be a spoiler. Instead, he supported the prior speaker's proposal to deal with the matter by a comment that noted that the lawyer may advise a client about lawful activity in which the client may engage. There is, this member said, no need for an exception in Rule 8.4(c); such a comment would protect the intellectual property rights lawyer in advising about lawful pretexting. But the comment would not countenance lawyer involvement to the level of direction or supervision of deceitful conduct. Most states that have made changes in this area, the member noted, have only gone so far as to permit advice, not direction or supervision.

To that member, guest Zavislan asked why direction and supervision should be omitted, when the investigators whom a department like his deals with are employees of the department, not clients. How would the member have government lawyers deal with government employees, whom the government lawyer often has a duty to direct and supervise?

The member responded to Zavislan by saying the statutes that are the subject of the law enforcement activities will give the government lawyers the needed authority. Zavislan replied that this member, and guest Moore, have argued that permitting the lawyer to give direction and supervision goes too far; but, while he does not *direct* the FBI agent, he *directs* his own investigators.

A member said that she was concerned that the proposed exception would conflict with Rule 1.2(d), at least in application to a lawyer dealing with a client. The lawyer cannot, under Rule 1.2(d), counsel or assist a client in fraudulent conduct.[21] In dealing with an investigation of counterfeit products, the necessary pretexting will be fraudulent.

To this, guest Zavislan responded that pretexting is not fraudulent and pretexting is not deceitful conduct such as Rule 8.4(c) was originally intended to proscribe. He too believed, he said, that lawyers are held to a high standard; but Rule 8.4(c) refers to actionable fraud, not to merely advising an investigator, in a lawful investigation, that he need not reveal his true identity. No one is proposing to permit actionable fraud, he added.

A member of the Committee who also served on the subcommittee noted that he had moved from the majority's to the minority's view. In doing so, he had asked his staff to look for cases examining what is lawful and what is unlawful conduct by investigators. As another member had stated, he found that there was very little said in the cases about what is lawful, and he feared that what is "lawful" will become that which is not prohibited. As in the various invasions that are made on the right of privacy, the exception will become the rule. He pointed out that Rule 8.4(c) uses both words, "fraud" and "deceit," so there must be some difference intended between the two kinds of conduct; deceit must mean something more than fraud. Pretending to be someone other than who you are is deceitful. Lawyers, this member said, are held to a higher standard.

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21. C.R.P.C. 1.2(d) reads—

> A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

This member added that, while the subcommittees had sought input from a number of practice areas among the private bar, only the intellectual property rights lawyers have supported the proposed exception. In particular, the Domestic Relations Section of the Colorado Bar Association opposed the proposal to add an exception to Rule 8.4(c).[22] We know, he said, that in the personal injury arena there are surreptitious investigations of claimed injuries, but no lawyer from that practice has spoken about the proposal.

To the suggestion that the Committee provide a comment to the effect that the current text of Rule 8.4(c) permits deceit in a lawful investigation of an expected violation of law, guest Scoville noted that the subcommittee's proposal that had been considered at the Committee's thirty-first meeting, on January 6, 2012, would have permitted involvement by a private lawyer in an investigation when "the lawyer reasonably and in good faith believes that . . . .a violation of civil or constitutional law has taken place or is likely to take place in the immediate future." That limitation on the circumstances in which the private lawyer might advise, direct, or supervise others would have worked, Scoville thought, for the private lawyer. But, he said, the subcommittee determined to drop the complexity of that proposal because the analogous provision for the law enforcement side of the exception — that the government lawyer "reasonably and in good faith believes that . . . the purpose of the covert activity is either to gather information related to a suspected violation of civil, criminal, or constitutional law" — presented too many questions of degree in the area of law enforcement relative to the existence of a violation. That structure of the exception also touched on the concern of the Federal Public Defender, Moore, about the nature of the belief required for application of the exception. The subcommittee always intended that the standards would be objective, although containing a requirement of good faith. But, if the exception applied only when the lawyer was investigating a violation of law, that would raise problems for the lawyer representing a criminal defendant, so there would be uneven application of the exception. The majority of the subcommittee, Scoville said, believes the exception it has proposed permits involvement only with investigative activities that are not tortious.

Guest Kirsch said that, with respect to the matter of guidance, the majority has proposed an exception to the rule rather than the addition of a comment because of the priority that the text of a rule takes over any comment made with respect to that text. That is, the statement of an exception in Rule 8.4(c) would be more certain than a statement of what the unamended rule means. But, Kirsch said, the prosecutors will take any guidance they can get. He noted, however, that the prior reference to Colorado Bar Association Ethics Committee Opinion 96[23] was incorrect; that opinion deals only with a prosecutor's contact with represented parties, not with the role a prosecutor may take in an investigation. As to the example of a lawyer using a secret camera to expose a plaintiff in a personal injury case, Rule 4.2 would be effective to preclude the contact with that plaintiff in the first place. Kirsch emphasized that the majority proposal would not permit otherwise impermissible conduct.

A member who had not previously spoken referred to the previous comment of another member that there must be no "wink-wink" in the application of the prohibition against dishonest conduct; he suggested that, in fact, there has been a good deal of winking going on for a long time. The current text of Rule 8.4(c) seems to preclude a good deal of what lawyers engaged in law enforcement and other practices that entail investigations using deception have been doing for a long time — and yet we have in fact permitted that activity to go on without challenge. Contrary to the view of the member who had pointed to the complexities of the conflicts rules, this member saw that lawyers don't wink at the conflicts rules but rather take them very seriously and try to comply with their constraints. On the other hand, we have allowed what appear to be violations of Rule 8.4(c) and have led lawyers to believe that those

22. *See* p. 35 of the Subcommittee's Supplemental Report.

23. *See* n. 8.

violations will be tolerated. But, as a lawyer who advises other lawyers, this member worried about the advice he can give them in this area. The majority's proposal establishes standards for conduct in connection with investigations that use deception. It is a tool for guidance of lawyers. The Rules of Professional Conduct are, he noted, rules establishing minimum standards of conduct; they do not preclude lawyers from adhering to higher standards.

A member who had not previously spoken said that he supported the majority's proposal. He noted that the legal profession should be prepared and permitted to advise clients — and those who assist lawyers in their representation of clients — about their conduct, to assist them in conducting themselves in compliance with the law but also to assist them, to the fullest extent of the law, in securing and protecting the clients' rights. The profession should not, out of a sanctimonious view that the lawyers themselves are "above that," impede its ability to provide to clients the legal services to which they are entitled.

Another member added his concurrence to the views of the two previous speakers.

The member who had earlier said that it was patently unreasonable for the Rules not to give guidance to government lawyers now said that he supported the first proposal made by the minority. He formally moved that the minority's proposal be adopted, but with a modification so that clause (c) of Rule 8.4 would read as follows [showing his modification of the minority's proposal]:

> engage in conduct involving dishonesty, fraud, deceit or misrepresentation, except that a lawyer representing the government may advise, direct, or supervise others, including clients, law enforcement officers, or investigators, who participate in lawful investigative activities ***in the enforcement of federal, state, or local criminal or civil regulatory law***;

The member said he saw no reason to extend the exceptions to government lawyers when they are acting in *defense* of challenged government conduct; it should apply only when they are acting in the enforcement of the law.

To that suggestion, a participant asked whether the list could be expanded to include constitutional principles; the movant declined to do so.

The motion was seconded.

As a matter of procedure, Downey asked that the Committee first address the majority's proposal, and he asked the movant to withdraw the motion. With the concurrence of the seconding member, the movant did so.

Downey then moved the adoption of the proposal made by the majority of the subcommittee in its supplemental report; the motion was seconded. The motion failed on a vote of seven members in favor, ten opposed.

The member who had made the prior, withdrawn motion then renewed it, and that motion was seconded. When the seconding member asked that the motion be amended to strike the words "direct and supervise," leaving only "advise," the movant declined the request.

A member who serves as a government lawyer in law enforcement spoke to reinforce a comment that guest Zavislan had made as to the different relationships that a government lawyer may have between personnel at represented agencies and employees under the lawyer's command. Such a lawyer may have investigators on staff, which the lawyer will direct and supervise and for the conduct of which

the lawyer will be responsible. It is difficult, as to those investigators, to distinguish between advice and supervision; the two cannot be separated in practice. Creating a meaningful distinction, by adopting a rule that only countenanced advice and did not permit direction or supervision would cause mischief. But, as another member clarified, the motion that was on the table would include all three verbs: *advise*, *direct*, and *supervise*.

In answer to a member's question of why the exception should be limited to law enforcement activities, the movant said that, as stated, the exception would permit lawyers engaged in law enforcement to do what they already can otherwise do under substantive law, and to do so without fear of violating the rules of professional conduct.

Another member noted that the adoption of the motion would cast a significant negative implication about the application of the prohibitions of Rule 8.4(c) to the pretexting activities of the intellectual property rights bar. By expressly recognizing a narrow exception for lawyers representing the government in law enforcement, the rule would support a negative inference that there was no exception for private lawyers participating in any fashion in deceptive investigations in the course of trademark enforcement activities on behalf of their private clients. They would arguably be in violation of Rule 8.4(c)'s basic prohibition against fraud, deceit, and misrepresentation. This member said that he opposed the motion and supported, instead, the idea of adding an appropriate comment to the rule.

To that comment, the movant said he was not in favor, when the Committee is presented with a difficult issue, of burying the idea in a comment to a rule. The principles that the Committee has been dealing with should be covered by some provision in some rule, not in a comment. In this case, lawyers engaged in law enforcement need to be permitted to do what they do without fear of a violation of the ethics rules.

But another member stressed that the negative implication, for private lawyers, that would result from amendment of Rule 8.4(c) as the motion provided, would be stark and severe; the Committee would have answered the inquiry of the intellectual property rights bar with a change that would leave them in a more precarious position than they are in under the present rule.

A member who had been among the minority on the subcommittee asked whether the dilemma could be solved with a combination of rule change and comment addition. But, she said, that approach would have to be limited to private lawyers pursuing the enforcement of their clients' legal rights.

To that suggestion, the movant said that he would not oppose a comment but would oppose a comment that said other than what the amended rule said.

A member asked about the application of the rule as the motion would amend it. If he were a lawyer from the Internal Revenue Service and, in the course of investigating the activities of a fraudulent tax accountant, got another accountant to accept employment in the suspect's office, in order to act at all times lawfully but to report back on what he witnessed, would that investigation entail any illegal activity? To that scenario, guest Kirsch said he could not say whether the investigation would be illegal, but he was sure the scenario would never occur in reality.

But the inquiry prompted other participants to refer to their use of confidential investigators and to note the implication of Fourth Amendment principles in those investigations.

Noting that the proposals before the Committee, including the one contained in the pending motion, were complex and could not easily be drafted, without unforeseen consequences, by the whole

Committee, a member moved that the entire discussion be tabled and remanded to the subcommittee. The motion was seconded but failed.

The Chair then proceeded to a vote on the pending motion to adopt the minority's first alternative, as the movant had proposed it to be amended and without the addition of any comment. The motion failed, seven members voting in favor and nine in opposition.

A member then moved to adopt the second alternative of the subcommittee, which was to make no proposal for any change to the Court. The motion was seconded.

A member spoke to the motion, saying it ignored what lawyers are doing today, activity that has been permitted in practice and that has never been found to violate the current text of Rule 8.4(c). Leaving the matter as it currently stands is not right; admittedly, this is a hard issue, but the Committee has heard that there is a problem, and it should respond with a solution.

Another member concurred with those comments. The Committee should not leave the law between the current state of wink-wink at what we all know goes on, on the one hand, and a slippery slope on the other hand.

A participant asked whether the pending motion would preclude the consideration of a comment that addressed the issue.

In response to that question, a member suggested that the pending motion be amended to include the adoption of a comment to the effect that government lawyers are, despite the apparent strictures of Rule 8.4(c), permitted to do what substantive law permits them to do, even if that would be deceitful. The comment would also clarify that private lawyers can advise their clients about what is lawful conduct by the clients in their enforcement of their legal rights, but it would keep the private lawyer out of direction and supervision of deceitful activities.

The movant agreed that an amendment of her motion to include such a comment would be acceptable, but she said she envisioned a comment that cited pertinent cases.

The member who had earlier sought, by his motion to table the discussion in order to avoid drafting-by-committee, noted that the comment that the movant and others envisioned could not safely be drafted at this meeting and by the whole Committee.

Another member urged that the Committee not get hung up on the words of a comment; it should simply allow government lawyers to engage in activity in which substantive law permits them to engage.

A member asked that the motion be amended to permit the subcommittee to draft the text of a comment.

The movant rejected all amendments to her motion and restated it as a motion to adopt the second alternative of the subcommittee, which was to make no proposal for any change to the Court.

The restated motion was adopted, nine members voting in favor, eight voting opposed. But the entire Committee proceeded to discuss the matter further, as if the motion had failed.

A member moved to add a comment that would permit government lawyers to do what they are permitted to do under substantive law and to permit private lawyers to advise their clients about what the clients can do in securing their private rights.

The Chair commented that, clearly, the Committee could not effectively vote on actual language for any comment in the time remaining for the meeting. But, she said, the subcommittee needed to know the parameters of the proposed comment — would it include, with respect to government lawyers, direction and supervision or just advice? Would the advice that private lawyers would be permitted to dispense be limited to just investigations for the protection of intellectual property rights or could it cover any matter?

The movant noted that the subcommittee had labored for a long time, and he did not wish to set aside all of its work. Lawyers need guidance. Private lawyers may advise their clients about their conduct but may not direct or supervise them or any other persons in deceptive activities. Government lawyers can do what they do. Those were the things he had in mind.

A member objected that the proposed comment would constitute an effort to amend the rule by way of comment; there was no other way to put it. The rule would say that there can be no fraud or deceit . . . but, see the comment. Yet rule amendment by comment cannot work; the rules prevail.

Another member concurred with those comments: If any change were to be made, it must be made in the rule. He noted that most of the states that have considered the issue have included direction and supervision as well as advice; and he noted that, while most of the Colorado rules refer to *supervision*, he understands why government lawyers want *direction* to be included as well. He stressed that the Committee's proposal needs to provide effective guidance to lawyers.

A member of the subcommittee pointed out that its supplemental report identifies, at pages 26 and 27, why a mere comment cannot be effective. In this member's view, the Committee has exhausted itself in its consideration of alternatives and should be content that Colorado remain among the forty or so states that have done nothing to the broad text of Rule 8.4(c).

The member who had moved that the Committee make no proposal said that, while she had not gone through all of the comments, she was sure that some of them have cited specific cases in their text.[24] She suggested that a comment be added that simply reviewed what pertinent cases have said about the issue.

The Chair responded by stating that the Committee has not proposed to alter the import of any rule by way of a comment citing to a case. She read the text of Paragraph [21] of the Scope of the Rules—

> The Comment accompanying each Rule explains and illustrates the meaning and purpose of the Rule. The Preamble and this note on Scope provide general orientation. The Comments are intended as guides to interpretation, but the text of each Rule is authoritative.

A participant asked whether the idea behind the suggestion for a comment was simply to state what the Committee has been hearing in its deliberations: The lawyer does not engage in prohibited fraud, deceit, or misrepresentation when the lawyer gives advice about conduct that a person may lawfully engage in. A member who had been a proponent for the addition of a comment agreed that that embodied the idea behind the suggestion for a comment.

A member moved to table the discussion. The motion was seconded and adopted.

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24. *See* Comment [7A] to Rule 1.0 and Comment [15] to Rule 1.5,

The secretary noted the difficulty he would face in preparing minutes of the meeting and the concern that the Committee should have about the import of its deliberations, deliberations that led to no action: After much deliberation, the Committee has determined to make no proposal to the Court, ostensibly with the result that Rule 8.4(c) will not be changed and with, perhaps, the implication that the Court's standing committee — the committee that is dedicated to considering the state of the Rules of Professional Conduct and suggesting their modification when warranted — has, after receiving and considering at great length a request from the intellectual property rights bar that was subsequently joined in by lawyers engaged in law enforcement, determined that no change should be made to the rule to clarify that lawyers may advise, direct, or supervise others in connection with investigations that might entail deceit or misrepresentation but that are themselves lawful under substantive law. While the implication that Rule 8.4(c) prohibits such activities is not absolute — in fact, the Committee simply could not solve the puzzle, although a substantial number of its members felt that such activity is permitted under the current text of the rule and that the rule could be amended to make that clear and no majority has come together in concurrence that such activities are prohibited — the resulting inaction will certainly lend to the anxieties of lawyers engaged in a wide variety of practices.[25]

A member said he thought the Court would be interested in the subcommittee's gathering of caselaw and rules-changes from other states and in the Committee's deliberations and that detailed minutes of those deliberations would be useful to it. He noted that the Court seems to have valued the reports it has gotten from the Chair on behalf of the Committee on other matters, even those in which the Committee has not concluded its deliberations with proposals for change. It would be helpful to the Court to receive an explanatory letter from the Chair about the Committee's deliberations, over a year and a half, of the pretexting issue, accompanied by the minutes of those deliberations.

The member who had proposed that the Committee take no action moved that the members who had promoted an explanatory comment work up the text for such a comment and get the text to the subcommittee for further refinement.

Another member offered to second that motion but noted that the subcommittee might not want to do more work on the matter.

To that latter comment, Downey noted that the subcommittee was indeed tired, but he undertook, if others did develop some comment to deal with pretexting in light of Rule 8.4(c), to reconvene the

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25. At p. 39 of the supplemental report, the minority denied the existence of any negative implication from that course of action:

> The majority recognizes the concern of some stakeholders that for the Standing Committee to have considered this issue, but then chosen to do nothing further, could be perceived as an endorsement of the broadest possible interpretation of Pautler. Such a perception could reduce the comfort that some government lawyers find in Formal Ethics Opinion 112, "Surreptitious Recording of Conversations or Statements," (July 19, 2003) ("The bases for the Committee's recognition of a 'criminal law exception' are the widespread historical practice of surreptitious recording in criminal matters, coupled with the Committee's belief that attorney involvement in the process will best protect the rights of criminal defendants."), or that other lawyers involved in investigations may take from the explicit, if brief, comment in Pautler distinguishing the attorney's actions from other states' exceptions for the supervision of covert investigations. See *Pautler*, 47 P.3d at 1179 and n.4.
>
> The minority believes that drawing any inferences from inaction by the Standing Committee would be very speculative. The somewhat analogous rule of statutory construction applies only where the legislature has taken "action in amending a previously construed statute without changing the portion that was construed." People v. Swain, 959 P.2d 426, 431 (Colo. 1998). Further, the OARC's representative on the Standing Committee has declined to take a position. This suggests that if the Standing Committee does nothing, OARC would simply continue to exercise reasonable prosecutorial discretion. After all, notwithstanding the shadow cast by Pautler, stakeholder comments confirm that covert investigations are ongoing, in both government and private proceedings.

subcommittee to look at that product and, with its knowledge of the topic gained from its other work, make comments on the comment.

With that undertaking made on behalf of the subcommittee, the motion for the development of a comment was adopted, seven voting in favor, six opposed.

The Chair said that her motion would be to renew the previously defeated motion to adopt the minority's first alternative but with additional text limiting the investigations to matters of law enforcement. She was of the view that the motion may have failed on its first vote out of the belief by some members that the majority's proposal would be adopted; she felt that, since no action had prevailed, a majority of the members might, on reconsideration, adopt that motion.

But another member renewed his concern about the negative implications for private lawyers, especially for those in intellectual property rights practice, that an affirmative statement covering only government lawyers acting in connection with law enforcement would carry.

The Chair's motion for reconsideration failed by a substantial number of votes.

Another member moved that the Chair be directed to provide the Court with a report of the Committee's deliberations; even though the Committee had failed in its effort to deal with the issue, the Court might take action. That motion was seconded.

The member who had first mentioned the prospect of a slippery slope said that she would welcome a reconsideration of the motion to adopt the majority's proposal.

The Chair noted that the Committee could take the pending motion to provide the Court with a report of the Committee's deliberations as a motion for an alternative course should the Committee first reconsider the majority's proposal but then fail to adopt it.

A participant suggested that the motion be to adopt the majority's proposal but with the addition, at its end, of the language that had been offered to limit the investigations to those for the enforcement of federal, state, or local criminal or civil regulatory law.

Another member pointed out that the proper order of motions would be, first, a motion to reconsider the motion to adopt the majority's proposal; if that motion were adopted, the next motion would be one directed toward specific text.

The member who had seconded the motion that the Chair provide a report to the Court withdrew her second of that motion.

A member moved the reconsideration of the majority's proposal.

A member who had been among the minority on the subcommittee said that he would vote against the motion for reconsideration, because the meeting seemed to be evolving into one in which votes would be taken until some answer was obtained.

The Chair said that she sympathized with that sentiment but felt that those who wanted to move forward with the majority's proposal should be given a clear vote on that matter. She called for a vote on the motion to reconsider. It failed.

The Chair called for discussion to draw closure on the matter.

A member renewed her request that the Chair report to the Court about the Committee's deliberations, providing to the Court material that had been gathered that would be useful to it.

But another member, who had favored the majority's report, argued that there was too much room for the Chair's own interpretation in such a report.

To that, the Chair noted that the Court would receive all of the minutes from the three meetings at which the matter had been considered, as well as both reports that the subcommittee had prepared. The Court would receive it all.

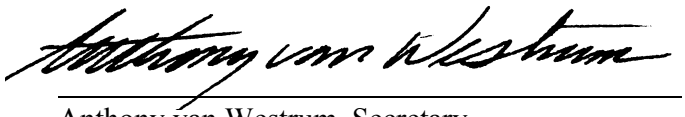
The motion that the Chair provide such a report to the Court was adopted.

The Chair thanked the subcommittee and all who participated in its work and in the Committee's deliberations.

IV *Adjournment; Next Scheduled Meeting.*

The meeting adjourned at approximately 12:00 p.m. The Committee did not have time to reach the remaining items on its agenda, including scheduling of its next meeting The Chair has advised that she will communicate with the members by email to schedule that meeting for mid-October 2012, at a location still to be determined.

RESPECTFULLY SUBMITTED,



Anthony van Westrum, Secretary

[These minutes are as approved by the Committee at its thirty-third meeting, on November 16, 2012.]

COLORADO SUPREME COURT

STANDING COMMITTEE ON THE RULES OF PROFESSIONAL CONDUCT

Approved Minutes of Meeting of the Full Committee
On November 16, 2012
(Thirty-third Meeting of the Full Committee)

The thirty-third meeting of the Colorado Supreme Court Standing Committee on the Rules of Professional Conduct was convened at 9:15 a.m. on Friday, November 16, 2012, by Chair Marcy G. Glenn. The meeting was held in the conference room of the Office of Attorney Regulation Counsel, at 1560 Broadway, Denver, Colorado.

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

Also in attendance were Philip E. Johnson, of the law firm of Bennington Johnson Biermann, and Diana Poole, the executive director of the Colorado Lawyer Trust Account Foundation.

I. *Meeting Materials; Minutes of July 13, 2012 Meeting.*

The Chair had provided a package of materials to the members prior to the meeting date, including submitted minutes of the thirty-second meeting of the Committee, held on July 13, 2012. Those minutes were approved as submitted.

II. *Rule 8.4(c) and "Testers."*

The Chair noted that the materials provided for the meeting contained a draft of a letter she proposed to send to the Court, accompanied by the materials that had been provided to the Committee by its subcommittee on "pretexting," chaired by Thomas Downey, and the minutes of the Committee's deliberations of the pretexting issue. She recalled that, at the thirty-second meeting of the Committee, on July 13, 2012, it had been assumed that such a letter would contain a narrative of the subcommittee's work and the Committee's deliberations; but, as she composed her draft of the letter, she determined it need not do more than serve as a letter of transmittal for the accompanying material and that no additional narrative was needed. The members of the Committee were in accord with her view.

The Chair reported that a member who was not in attendance at this meeting had emailed to her the suggestion that her letter note both (1) that the Committee had, at its thirty-first meeting, on January 6, 2012, asked the subcommittee to obtain more input into the pretexting matter from interested constituencies, such as the criminal defense bar and lawyers engaged in other affected practice areas and (2) that the law enforcement community and the criminal defense bar had provided that input but that no lawyer or group engaged in private civil practice had done so.

To that comment, Downey, who had chaired the subcommittee, replied that, while no particular group representing lawyers engaged in private civil practice had filed comments, a number of individual lawyers who are engaged in private practice had commented, including lawyers in that class who are members of the Committee. Accordingly, he contested the suggestion that the Chair's letter be amended to include a comment indicating that the private bar had not been responsive.

Downey also suggested that the Chair's letter might direct the Court's attention to the inclusion, in the second report from the subcommittee, of a listing of all of the comments it had received pursuant to its solicitation for comments on the topic.

The Chair clarified that her letter would be accompanied by minutes from four of the Committee's meeting, being the set of three minutes listed in note 4 of the minutes of the thirty-second meeting, on July 13, 2012, and the minutes of that thirty-second meeting itself.

A member added that the Chair's letter should highlight the action that has been taken by other states with respect to the pretexting issue, pointing to the description of that action that was contained in the subcommittee's report that was considered by the Committee at its thirty-second meeting, on July 13, 2012.

The Chair determined that no further motion was needed to approve her sending of the cover letter to the Court, but the members individually indicated their approval of that course.

III. *Identification of Typographical Error in Internal Reference in Rule 1.13, Comment [3].*

Referring to pages 30 and 33 of the package of material that the Chair had provided for the meeting, the secretary noted to the Committee that a typographical error exists in Comment [3] of Rule 1.13: The existing reference to "Paragraph (19)" should in fact be to "Paragraph (b)" in the following passage [emphasis added]:

> [3] When constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province. ***Paragraph (19)*** makes clear, however, that, when the lawyer knows that the organization is likely to be substantially injured by action of an officer or other constituent that violates a legal obligation to the organization or is in violation of law that might be imputed to the organization, the lawyer must proceed as is reasonably necessary in the best interest of the organization. As defined in Rule 1.0(f), knowledge can be inferred from circumstances, and a lawyer cannot ignore the obvious.

The Chair pointed out that the error apparently originated in the proposal that the Committee made to the Court for the adoption of the "Ethics 2000" rules, which the Court adopted effective January 1, 2008.

After the Committee indicated its concurrence that this was indeed an error that needed correction, the Chair inquired about how the Court might like to hear of the error. Justice Coats suggested that the Chair send notification of the error to the Court promptly, rather than wait to aggregate it with other proposals that might subsequently be made to the Court.

IV. *Obtaining Interest Rate Comparability for COLTAF Accounts.*

The Chair directed the members to the material that had been provided to them before the meeting, beginning at page 41, for a proposal from the Colorado Lawyer Trust Account Foundation for modification of Rule 1.15 to obtain "interest rate comparability" on COLTAF accounts.

The Chair asked John S. Gleason, Colorado Regulation Counsel, to introduce the topic of interest rate comparability on COLTAF accounts. Gleason responded by advising the members that the board of directors of the Colorado Lawyer Trust Account Foundation had been working for a long time on a proposal to modify Rule 1.15 to require lawyers to hold their COLTAF accounts in financial institutions that pay interest or dividend rates on those accounts that are the same as those paid on comparable non-COLTAF accounts. The purpose of the proposed rule change is to ensure the fair treatment of COLTAF accounts and help maximize the resources available for Colorado's civil legal aid delivery system.

Gleason introduced to the meeting Philip E. Johnson, the president, and Diana Poole, the executive director, of the Colorado Lawyer Trust Account Foundation, and asked them to explain the proposal to the members.

Johnson began by noting that the proposal is the result of a significant amount of work done by a significant number of people. Rule 6.1, he reminded the members, imposes a professional duty on each lawyer to provide legal services to those unable to pay, pursuant to which rule, among other things, "a lawyer should voluntarily contribute financial support to organizations that provide legal services to persons of limited means."[1] The bar has responded to Rule 6.1 by providing time and effort and by establishing organizations that implement the provision of legal services to the poor, including Colorado Legal Services and various *pro bono* programs maintained by local bar associations across the state. Some of those organizations are funded by voluntary financial contributions from lawyers and from resources obtained from the Colorado Lawyer Trust Account Foundation under the Colorado version of the IOLTA — interest on lawyer trust accounts — program.

Johnson characterized the Foundation's board of directors as "terrific," noting that it is composed of lawyers, judges, and bankers, reflecting a high level of confidence in the Colorado legal community.

But the Foundation's income is almost exclusively obtained from income earned on lawyers' COLTAF accounts; although, Johnson noted, in this past year, in response to the significant decrease in funding received from COLTAF accounts due to the unusually low rates of interest paid on those accounts, the Colorado Judicial Branch and the Colorado Bar Association have provided augmenting funds.

Of the disbursements made by the Foundation to legal service entities, eighty percent goes to Colorado Legal Services and the balance goes to local bar association *pro bono* programs and other programs that provide civil legal assistance to the indigent.

Johnson said that, historically, banks have paid less interest on COLTAF accounts than on comparable accounts maintained for other banking customers, primarily because no one has been watching the rates. As the system is now designed, lawyers who maintain COLTAF accounts do not see the process by which rates are determined and interest payments are made to the Foundation. Having no accountability, banks have paid low rates on COLTAF accounts.

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1. *See* n. 3 to these minutes.

—Secretary

Across the country, IOLTA groups have approached the banks to obtain voluntary increases in interest rates, and they have examined regulations to see what might be done to preclude discrimination against COLTAF accounts. The Foundation has communicated with Colorado banks, and has had "relatively good success" with local and regional banks in Colorado, although it has not, Johnson said, had as much success with national banks operating in Colorado.

In 2006, the Foundation retained the services of an IOLTA expert, who examined the Foundation's records and reported that the Foundation could benefit from a "comparability requirement," requiring that banks pay on COLTAF accounts rates of interest comparable that are to other accounts maintained by other banking customers. But, Johnson noted, the Foundation was not technologically equipped at that time to implement and enforce a comparability requirement. In response to the recommendations of the retained expert, the Foundation's board of directors determined to defer further consideration of a change to Rule 1.15 until it obtained a more sophisticated data base that would enable it to implement a comparability rule.

The issue was set aside until 2010, when the Foundation secured the services of another IOLTA expert and determined that appropriate technology was now available to it for implementation of a comparability requirement. The Foundation also undertook a very robust analysis of the thirty-three states that have implemented comparability requirements. The banking committee of the Foundation began to work on a proposal for changes to Rule 1.15 to reflect its own thoughts and to incorporate the ideas developed by experts from the American Bar Association and the National Association of IOLTA Programs, utilizing the immense amount of information that was now available from other states on what worked, what did not work. The banking committee refined its proposal and vetted it with a number of people who were experienced with current Rule 1.15 and the COLTAF program, including John Gleason, Regulation Counsel. With the assistance of those outsiders, the banking committee refined the concepts and the mechanics of its proposal. The proposal was then approved by the Foundation's board of directors, by Regulation Counsel, and by the Colorado Access to Justice Commission.

The basic premise of the proposal is that banks should not discriminate against COLTAF accounts. But, Johnson noted, the proposal does not attempt to regulate the conduct of banks; rather, it regulates the conduct of lawyers by requiring lawyers to maintain their COLTAF accounts in banks that do not discriminate against such accounts.

Johnson said that the experience of the thirty-three states that have already implemented comparability requirements is that any "pushback" from banks was resolved early in the effort. And, he noted, the bankers who are on the Foundation's board of directors approve of the proposal. To accommodate concerns about administrative burdens on the banks, the proposal offers them two mechanisms for compliance: Each bank may adopt an internal program to determine what rates it offers to its other customers on comparable accounts and may pay that rate on COLTAF accounts; or, without undertaking such an analysis, the bank may choose to pay the "benchmark" rate that is determined from time to time by the Foundation based on rates across the banking community. If the bank adopts the second methodology, it need only follow the benchmark rate and need not worry further about the comparability of the rates of interest it pays on its COLTAF accounts to those paid on other accounts. Johnson pointed out that there is a built-in incentive for the Foundation to limit the benchmark rate to a reasonable rate, one that is high enough to maximize interest earnings on COLTAF accounts but low enough that banks will adopt and adhere to it. He noted that the availability of a benchmark rate eases the administrative burden borne by small banks when providing COLTAF account services.

Johnson said the Foundation has been told by the bankers on its board of directors that its historical success in obtaining good rates of interest on COLTAF accounts will not continue in the

present banking environment; the banking crisis has put extreme pressure on banks, and they will not voluntarily do anything they need not do.

Under its proposal, the Foundation will determine whether a bank is offering COLTAF accounts that comply with the Foundation's requirements for such accounts and will periodically publish a list of the banks that do; lawyers need only look to the list to determine whether the banks they intend to use for their COLTAF accounts are listed or not.

Johnson admitted that there is some small possibility that the proposal would have a financial impact on lawyers: The proposal limits the charges that banks may offset against interest earned by the Foundation on COLTAF accounts, prohibiting other charges that some banks historically have made that reduce the amount of interest paid to the Foundation but have no relationship to the cost of maintaining COLTAF accounts. Accordingly, if a bank chooses to make such other charge, the burden will fall on the account holder — the lawyer — and will not diminish the COLTAF payments to the Foundation. Some of the states that have implemented comparability requirements, Johnson noted, have not limited the banks' offsets against the IOLTA return; the proposal that the Foundation is making does limit those offsets — the proposal only permits deductions, against the interest payable to the Foundation, of "allowable reasonable COLTAF fees.". As Johnson put it, it is not possible to limit the banks' overall charges for carrying COLTAF accounts; but the lawyers who establish the accounts will be the ones who are in a position to bargain with the banks about the charges that the banks may wish to make in addition to the charges that may be offset against the interest payable to the Foundation: The lawyers can choose to place their COLTAF accounts only with banks that do not impose additional charges or can accept the burden of the additional charges by paying those charges themselves.

Johnson concluded his remarks by thanking the Committee for the opportunity to present the Foundation's proposal for changes to Rule 1.15.

The Chair thanked Johnson for his presentation

The Chair commented that, normally, the Committee would form a subcommittee to study any proposed change to the Rules, and she noted that it might choose to do so in this case, as well. But, she added, the proposal for changes to Rule 1.15 that the Foundation — with the participation of at least one member of the Committee, Gleason — has presented to the Committee is the kind of well-developed product that, in the typical case, the Committee would receive from a subcommittee and would use as a basis its own substantive discussion. She asked whether the members were willing to commence a discussion on that basis.

A member moved straight to such substance, expressing his concern about the continued overloading of Rule 1.15 with directives to lawyers. The Foundation's work on its proposed changes was marvelous, he said, and the language comprising the changes was well-crafted. But he asked whether there might be some other way to accomplish the goal of comparability in interest rates without extending the complexity of Rule 1.15. Currently, lawyers are required to have one account as an operating account and one as a trust account that may, but need not, be a COLTAF account. Is there not, he wondered, some way to provide this kind of detailed regulation outside of the Rules? He noted that banks that provide COLTAF accounts already have some duty to report to the Office of Attorney Regulation Counsel regarding activity in those accounts; but, he noted, this implies that the lawyers themselves have corresponding duties, simply because the rules guiding participating banks are found in the rules governing lawyers. In its current version, Rule 1.15 is already a difficult rule for lawyers to comply with, especially, he noted, for solo and small-firm lawyers. The addition of provisions governing the relationship between participating banks and the Foundation, provisions that do not touch the relationship between participating banks and participating lawyers . . . well, he asked, isn't there some

other place to implement that relationship, other than in the rules governing lawyers? The rule governing lawyers ought to be limited to details about how the lawyer keeps client property separate from lawyer property.

To those comments, Johnson responded that the placement of the comparability requirements was an ongoing topic of discussion in the drafting of the Foundation's proposal. He noted, however, that the drafters had not considered placing those requirements in another location; their inclusion in Rule 1.15 was how it has been done in other jurisdictions, and the Foundation followed that lead. Poole added that the expert who had been engaged by the Foundation had advised that the comparability requirements be added to this rule, saying that, since there was no other existing structure governing the bank-Foundation relationship, one might as well utilize the existing rule. But, she noted, a couple of other states had done that work outside of Rule 1.15; perhaps one could look to what those states had done.

Johnson said he wanted to emphasize that the concept is a simple one from the lawyer's perspective: All he need do is determine whether the bank in which he wishes to establish a COLTAF account is listed as an acceptable bank. It is the banks that have to take action to comply with the comparability requirements if they wish to offer COLTAF account services.

To Johnson's comment, the member who had expressed his concern about overloading Rule 1.15 replied that, even if comparability is not made the lawyer's problem, the proposal places the matter — a banking matter — in the rules governing the lawyer's conduct. It just adds another layer of complexity to Rule 1.15, a layer that is out of place there.

Poole pointed out that the rule governing lawyers — Rule 1.15 — would have to be modified, at the least, to require the lawyer to put his COLTAF-type funds in an interest-bearing account that provided rate comparability. To that extent, the proposal does regulate the lawyer's conduct.

A member concurred that the proposal is an expansion of Rule 1.15, continuing the rule's growth. Perhaps it could be modified so that only the lawyer-pertinent part that Poole just mentioned — the requirement that the lawyer use a complying bank for his COLTAF account, a bank that is on the list maintained by the Foundation pursuant to Rule XXX — is placed in Rule 1.15 and the balance is placed in some Rule XXX found elsewhere than in the Rules of Professional Conduct.

The Chair commented that the Committee did not need to address the point about process; the Committee could determine, at this point, to send the proposal to a subcommittee or could continue the discussion at this meeting. But she responded to her own suggestion by deciding to let the Committee continue a substantive discussion of the proposal.

A member pointed out that existing Rule 1.15 does not follow the American Bar Association's model version of Rule 1.15. The Colorado Supreme Court determined to combine a model bookkeeping rule with the ABA version of Rule 1.15, the latter being but a short provision governing the safekeeping of property. The result of the Colorado approach is a single rule that deals with general financial obligations, including provisions governing COLTAF compliance, provisions mandating both trust and operating accounts, provisions governing bank account reconciliation, and the like. The rule was

reorganized about four years ago,[2] with the addition of headings and the like. Prior to the expansion, she noted, many lawyers had not thought about, say, reconciliation of trust accounts. This member was not in favor of separating the comparability requirements from the rest of Rule 1.15; in her view, it made sense to keep all this detail in a single rule, Rule 1.15; even though it made the rule a bit cumbersome, it was better than telling the lawyer that he had additional obligations and should go looking for them elsewhere.

Another member expressed his own concerns about the proposal. He noted that Rule 6.1 characterizes a lawyer's obligation to provide legal services to the poor as "aspirational."[3] But, he said, by this proposal we would be trying to make those aspirations mandatory, with yet another imposed burden, that of meeting an interest rate threshold on COLTAF accounts. At present, the COLTAF portions of Rule 1.15 do not obligate the lawyer to determine what rate of interest is paid on the COLTAF account that he maintains under the rule. Under the proposal, the member asked, must he check monthly to see that the bank he has chosen has remained listed? Banks make frequent changes in their account provisions, he noted. This member said that his law practice includes the representation of banks. He is aware that every bank account is "tiered," with service charges going up and down as balances fluctuate. Must he monitor the imposed charges as his COLTAF account balances fluctuate? The mechanics of this proposal, he predicted, will not be simple. He agreed with the purpose of maximizing the returns to the Foundation on COLTAF accounts, but he found the proposal to be unduly burdensome to lawyers. Without a certified public accountant on staff, compliance with this proposal will be difficult work for the small firm lawyer.

To that, Johnson responded that the only burden on the lawyer will be to ascertain whether the bank chosen for the COLTAF account is listed; there is no further obligation. Johnson acknowledged, however, that, if the bank imposes a service charge, in addition to the "allowable reasonable COLTAF fees" that the proposal would permit the bank to deduct from the Foundation's interest earnings, that additional charge will have to be borne by the lawyer.

A member who had not previously spoken concurred that the proposal should not be incorporated into Rule 1.15. Given the concerns expressed by the member who had last spoken before Johnson's acknowledgment that the lawyer may have to bear some bank charges, this member wondered whether banks located outside of the larger metropolitan areas of the state would choose to offer complying COLTAF accounts. He would want any change in the rule to leave unchanged the current burden on lawyer, with the only obligation on the lawyer being to look to the list of acceptable banks. The process by which banks become listed should be left to a mechanism that was located outside of Rule 1.15. In

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2. Lexis-Nexis, the official publisher of the Colorado Revised Statutes, provides the following history of Rule 1.15, commencing with the adoption of the "Ethics 2000" rules by the Colorado Supreme Court effective January 1, 2008:

> [E]ntire Appendix [Rules of Professional Conduct] repealed and readopted April 12, 2007, effective January 1, 2008; [Rule 1015](d)(2) and (i)(6) amended and effective November 6, 2008; [Rule 1015](j)(6), (j)(7), (l), and Comment 1 amended and [Rule 1015](j)(8) deleted and effective February 10, 2011.

http://www.lexisnexis.com/hottopics/Colorado/

—Secretary

3. Rule 6.1 provides, in part, "Every lawyer has a professional responsibility to provide legal services to those unable to pay. A lawyer should aspire to render at least fifty hours of pro bono publico legal services per year. . . .In addition, a lawyer should voluntarily contribute financial support to organizations that provide legal services to persons of limited means."

—Secretary

short, keep Rule 1.15 as it now is, with the only obligation to be to use an approved bank;[4] leave it to the Office of Attorney Regulation to determine how banks get on the approved bank list.

Another member spoke for the first time, thanking Johnson for the effort to deal with the issue of interest rate compatibility. He thought it indisputable that the getting rate comparability is a worthy goal. The question, though, was how best to accomplish that goal — in his view, the answer was not by way of a rule. Under the current rule, lawyers need not go beyond the list of approved banks, it being up to the banks and the OARC to establish the requisite relationship for approval. In his view, it was best to leave the determinations regarding which banks provide compliant COLTAF accounts to dealings between the OARC and the individual banks, without imposing obligations on individual lawyers to determine compliance.

Poole affirmed that, currently, the only nexus between compliant banks and the OARC is the undertaking of the banks to advise the OARC of overdraft occurrences. Under the proposal, the Foundation would communicate with the OARC as it does presently when banks do not perform in accordance with the requirements. There would be no obligation on the lawyer other than to check the list of approved banks, and he would not have to do so more frequently than is now required. It would be incumbent on the OARC, she said, to contact the lawyer and advise the lawyer that the bank in which he maintained his COLTAF account was no longer compliant. The Foundation did not see that happening any more frequently than there have been instances of overdrafts in the COLTAF system.

The member who had spoken before Poole concluded from her comments that all of the purposes of the proposal could be attained by dealing with the relationship between the bank and the OARC outside of Rule 1.15. There was no need, then, to put anything in Rule 1.15 that would require the Committee's getting involved in the rules-changing processes.

Gleason spoke to add some history to the Committee's considerations. The trust account notification program existed before the development of this proposal, and the OARC has communicated with banks that have failed to comply with the notification requirements. As the system is structured, no individual lawyer would be aware of any such communication between his chosen bank and the OARC. If the OARC becomes aware that an NSF — nonsufficient funds — check has been drawn on a trust account but that the drawee bank has not reported the occurrence to the OARC in accordance with its agreement to do so, the OARC investigates the matter, confirms the bank's noncompliance, and, in Gleason's words, "deals with the bank." In at least one such case, the OARC had to take the matter to the bank's counsel for correction; as Gleason put it, "It's either or. . . ." Noncomplying banks will be removed from the list of approved banks. Gleason could not recall any situation in which a problem had occurred that had not been rectified nearly immediately. He pointed out that Colorado was about the sixteenth state to adopt an IOLTA program, there now being more than forty that have done so. The OARC has met with the banks regarding the implementation of the program; many smaller banks were at first concerned but, in the end, all or almost all banks have joined the program and now offer COLTAF accounts.

James Sudler, a member of the Committee who is a Chief Deputy Regulation Counsel within the Office of Regulation Counsel, added that the only powers the Court has to implement the COLTAF program are the powers it has over the conduct of lawyers; the Court cannot regulate banks. It can only

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4. Current Rule 1.15(e)(3) provides, in part, "Trust accounts shall be maintained only in financial institutions doing business in Colorado that are approved by the Regulation Counsel based upon policy guidelines adopted by the Board of Trustees of the Colorado Attorneys' Fund for Client Protection. Regulation Counsel shall annually publish a list of such approved institutions."

—Secretary

require lawyers to keep trust funds in compliant accounts; it can impose requirements on lawyers, This proposal is not, however, a fight over how to get lawyers to do something; rather, it is an effort to get the rates of interest that are paid to the Foundation on COLTAF accounts increased.

The member who had expressed a concern about whether banks located outside the larger metropolitan areas of the state would offer complaint accounts averred that he had no dispute about the goal behind the proposal and was only concerned about how to get there. As the discussion had continued, he said, he had become more and more convinced that the comparability requirement need not be part of Rule 1.15. In fact, he would move out of the rule, to some other location, the current provision dealing with the obligation of participating banks to give notice of overdrafts to the OARC.[5] In his view, Rule 1.15 is much too long in its current form — lawyers are intimidated by it and don't read it; it's too long. But one cannot tell them to ignore the detail; what is in the rule must be understandable and pertinent. It is important not to add more verbiage to Rule 1.15 if that verbiage need not be put there.

The member who had first spoken after Johnson's opening presentation formally moved that a subcommittee be formed to look into the implementation of the Foundation's proposal, a proposal that he characterized as being "rates of interest on COLTAF accounts shall be of a certain standard." His concern was this, he said: If my bank does not comply, am *I* guilty of a Rule violation? Frankly, he said, he did not know what this was all about; he saw a need for a subcommittee to sort it out.

A member who had not previously spoken asked what she said might be a silly question: Might a bank say that it is offering compliant COLTAF accounts and yet fail to comply, without remedy?

To that question, Gleason answered that the bank will have signed an agreement with the OARC before it is listed as an approved bank. He did not say what remedies the OARC might pursue in the event of breach of that agreement.

The member who had moved for the formation of a subcommittee thought that all of the detail constituting the rules for compliant COLTAF accounts could be included in just such an agreement and need not be included in Rule 1.15.

A member commented that there is precedent for references within the Rules of Professional Conduct to provisions located outside of the Rules. For example, Rule 1.5(c) refers to C.R.C.P. Chapter 23.3[6] for provisions regulating contingent fee agreements That is, we already have at least one of the Rule of Professional Conduct, under which a lawyer may be disciplined, that refers to an external rule for content.

That member added that the mechanisms implementing the Foundation's proposal would have to separate the requirements that are imposed on lawyers from the provisions governing the relationship between the Foundation and the banks that offer COLTAF accounts. Even under current Rule 1.15 there is more than just an NSF notification; there is also the requirement for an affirmative direction by the

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5. *See* n. 4 to these minutes.

—Secretary

6. Current Rule 1.5(c) provides—

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is otherwise prohibited. A contingent fee agreement shall meet all of the requirements of Chapter 23.3 of the Colorado Rules of Civil Procedure, "Rules Governing Contingent Fees."

—Secretary

lawyer to the bank to remit interest on the COLTAF account to the Foundation.[7] This member felt that it would not be a huge drafting task to provide that separation, if the Committee determined that interest rate comparability was a useful goal.

In a straw poll conducted by the Chair, nearly all the members approved of a requirement that interest rate comparability be offered by each bank offering COLTAF accounts.

The Chair noted that, if the Committee determined that some portion of a rate comparability requirement should be located outside of the Rules of Professional Conduct, the Committee faced a question of its jurisdiction: Could it prescribe any provision that lay outside those Rules? The Chair added that she wanted the discussion to continue.

The member who had noted the aspirational nature of Rule 6.1 said he felt that details of the content of the agreement between compliant banks and the OARC would be misplaced in Rule 1.15. Lawyers should only have one obligation: to put COLTAF funds in approved banks, without regard to the terms upon which approval had been obtained and without regard to compliance with those terms. No further requirement should be imposed on the lawyer, for the issues are of concern to the Foundation and the banks, not to the lawyer. This member also worried about a matter that had not yet received much consideration in the discussion, the possibility that additional bank charges against the COLTAF account, other than "allowable reasonable COLTAF fees," could cause an insufficiency of funds and overdrafts. The mechanics of this, he noted, were difficult.

A member who had not previously spoken noted that the current rule already imposes labeling requirements on the accounts that the lawyer must maintain.[8] She asked whether a separate rule would be appropriate, one devoted exclusively to required bank accounts, clearly prescribing all that lawyers must do with respect to their bank accounts. A subcommittee could consider that kind of revision in the course of considering the Foundation's proposal.

Another member who had not previously spoken commended the goal of rate comparability. But, he said, reading the proposal, one realizes that a duty is imposed on the lawyer to do something if the bank imposes charges other than "allowable reasonable COLTAF fees." Accordingly, the proposal does impose a duty on the lawyer to watch the account and make necessary accommodations. In view of that, this member seconded the motion that the proposal be sent to a subcommittee for development. Such

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7. Current Rule 1.15(h)(2)(c) provides—

> (c) A lawyer or law firm depositing funds in a COLTAF account shall direct the depository institution:
>
> (i) To remit interest, net of service charges or fees, if any are charged, computed in accordance with the institution's standard accounting practice, at least quarterly, to COLTAF; and
>
> (ii) To transmit with each remittance to COLTAF a statement showing the name of the lawyer or law firm on whose account the remittance is sent and the rate of interest applied.

—Secretary

8. Current Rule 1.15(d)(2) provides—

> (2) A business account or accounts into which all funds received for professional services shall be deposited. All business accounts, as well as all deposit slips and all checks drawn thereon, shall be prominently designated as a "professional account," an "office account," or an "operating account."

Additionally, Rule 1.15(e)(1) provides, "All COLTAF accounts shall be designated "COLTAF Trust Account," and Rule 1.15(e)(2) provides, "All such trust accounts, whether general or specific, as well as all deposits slips and checks drawn thereon, shall be prominently designated as a "trust account."

—Secretary

a subcommittee could consider what parts of Rule 1.15 might be carved out and placed elsewhere to accommodate the mechanics of rate comparability and the other aspects of the relationship between the bank, the OARC, and the Foundation.

Yet another member who had not previously spoken noted that, when the Committee effected the previous revision of Rule 1.15, it initially considered some small modifications to the existing text but eventually determined that the whole rule had to be rewritten, because it was incomprehensible. And yet it remains a very complex rule. The proposal from the Foundation runs on for five pages; it was likely, this member said, that only a few members of the Committee had read it. He did not know whether the Foundation had the authority to say to the banks, you must do it this way in order to gain approval and listing. But he was of the view that the matter need not be located in a rule governing the conduct of lawyers.

A member responded to suggest that the detail was necessarily placed in Rule 1.15 because of the Court's inability to require banks to provide trust accounts that permit the OARC to police lawyers' handling of client funds. Under that view, it would appear that the provisions would fit in a rule governing the conduct of lawyers. It was clear to this member that the matter should go to a subcommittee for consideration.

A member asked how much detail really was required. Could it not be simply stated as, "All trust accounts must be approved accounts"?

To that comment, Johnson responded that banks will want rules that clearly state what they must do if they wish to offer compliant accounts.

A member who had not previously spoken asked what she characterized as a practical question: Was a problem encountered four years ago? She noted that the City of Denver found that it could not control banking charges at the Denver International Airport. Accordingly, the subcommittee will need to consider a mechanism that can handle sudden increases in banks' charges, increases that the Court will not be able to prevent. The Court's rule cannot regulate banks and, therefore, is necessarily directed toward lawyers. But the handling of trust accounts is already difficult for lawyers, who often relegate trust account matters to bookkeepers, under their supervision.[9] This proposal adds a dangerous amount of detail to an aspect of law practice that many lawyers are simply not familiar with, not comfortable with. In her view, the simpler the better.

Poole responded to those comments by agreeing that bank charges will be an issue in the proposal. The Foundation has urged banks to waive their charges on COLTAF accounts. But, with all the changes currently occurring in the banking industry, it is difficult to determine what banks are doing with their charges. In the future, bank charges may erode returns from trust accounts. She noted that

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9. Current Rule 1.15(i)(2) provides—

> (2) All trust account withdrawals and transfers shall be made only by a lawyer admitted to practice law in this state or by a person supervised by such lawyer and may be made only by authorized bank or wire transfer or by check payable to a named payee.

And Rule 1.15(i)(5) provides—

> (5) Persons Authorized to Sign. Only a lawyer admitted to practice law in this state or a person supervised by such lawyer shall be an authorized signatory on a trust account

—*Secretary*

the Foundation has even had conversations with the banks about the "reimbursement" of charges imposed on low-balance COLTAF accounts.

A member who had not spoken before said he believed this was merely a matter of economics. The banks will measure their willingness to offer COLTAF accounts by their net costs of carrying such accounts — the interest they have to pay on account balances net of the charges they can impose for maintaining such accounts. It must be possible for the Foundation to utilize the bargaining power that is represented by the total of balances carried at any time in all COLTAF accounts maintained in all banks, saying to the banking community: If you wish to obtain your share of those balances, you must agree, first, not to impose any charge against any such account other than "allowable reasonable COLTAF fees" and, second, to pay an interest rate on all the accounts that we find acceptable. By such bargaining, individual banks and the Foundation can agree upon the returns that will be paid to the Foundation on COLTAF accounts under those parameters, where the question is not just interest rate comparability but net-return comparability. Surely that is but an economic determination that can be attained from bargaining utilizing the Foundation's control over all available deposits, recognizing that the Foundation's bargaining position must certainly be greater than that of any individual lawyer or law firm. The idea, contained in the Foundation's proposal, of a benchmark rate fits neatly into this approach. Such a mechanism, established by a rule by which the Court granted to the Foundation or the OARC that bargaining authority, would, by controlling all allowable charges in the process of determining net returns, eliminate the possibility that lawyers would themselves have to bear any charge for their COLTAF accounts. And such a mechanism would legitimate the claim that the only obligation on lawyers would be to pick banks from the approved-bank list.

A member asked whether such a system would present a constitutional "takings" issue. The member who had proposed the system responded that he understood the "takings" question had been resolved by the courts and that his proposal did not impose any regulation on any bank. Each bank would be free to stay far away from COLTAF accounts if it chose; the Court's regulatory power would remain directed at lawyers; and, as under the Foundation's proposal, the underlying impetus would be the banks' desire to provide accounts that met the desires of a particular group of customers — lawyers — at costs the banks could afford to pay.

The Chair determined to send the matter to a subcommittee. She asked that it include the representatives of the Foundation and those members who had expressed opposition to the concept. She stated that its mandate would be "open-ended": It might even return with a recommendation that the Foundation's goal of rate comparability not be pursued.

A member asked whether the subcommittee could consider a full revision of Rule 1.15, rather than a revision that only made the changes needed to accomplish rate comparability..

To that question, Johnson said that the Foundation had considered how the rule might be modified to attain rate comparability, and it felt that its proposal provided for the smallest possible change. The Foundation had talked about "starting from scratch" but decided on "the least change possible." But, he added, the Foundation has no investment in the approach it has offered.

A member asked whether there was any other group that should be drawn into the subcommittee's consideration of the proposal in order to save time. The Chair responded by noting that, historically, the Committee has developed a work product before proposing it to other groups.

The member who had suggested that a mechanism be developed that maximized the bargaining power of the aggregation of all COLTAF balances pointed out that interest rates on all bank accounts are at near nil levels, so that there is no material benefit to be gained by rushing a revision that would be

lost if the Committee took time to consider a full revision of Rule 1.15. The Chair agreed but added that she wanted to move forward quickly.

The Committee determined, unanimously, that a subcommittee should be established; and the Chair appointed Sudler to chair the subcommittee.

On behalf of the Committee, the Chair expressed thanks to Johnson and Poole.

V. *Amendments to the American Bar Association Model Rules of Professional Conduct*

The Chair pointed the members to that portion of the meeting materials that contained the changes to the American Bar Association Model Rules of Professional Conduct that the ABA adopted at its 2012 annual meeting.

Some of the changes, the Chair noted, were merely technical, and none were "earth-shattering." She found especially interesting the addition of an exception to the client confidentiality provisions of Rule 16 to accommodate conflict checking in the lateral-hire situation; she noted that Colorado was way ahead of the ABA on that matter.[10]

The Chair added that the Committee needed to appoint a subcommittee to provide an initial study of the ABA's 2012 changes.

A member pointed out that the Attorney Regulation Committee of the Office of Attorney Regulation has already begun a study of at least one of the rule changes.

The Committee approved the establishment of a subcommittee to study the ABA's 2012 changes to the Model Rules of Professional Conduct. Michael Berger and James Coyle were appointed to co-chair the subcommittee.

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10. The Chair was referring to the Colorado addition of Comment [5A] to Rule 1.6, reading—

> [5A] A lawyer moving (or contemplating a move) from one firm to another is impliedly authorized to disclose certain limited non-privileged information protected by Rule 1.6 in order to conduct a conflicts check to determine whether the lawyer or the new firm is or would be disqualified. Thus, for conflicts checking purposes, a lawyer usually may disclose, without express client consent, the identity of the client and the basic nature of the representation to insure compliance with Rules such as Rules 1.7, 1.8, 1.9, 1.10, 1.11 and 1.12. Under unusual circumstances, even this basic disclosure may materially prejudice the interests of the client or former client. In those circumstances, disclosure is prohibited without client consent. In all cases, the disclosures must be limited to the information essential to conduct the conflicts check, and the confidentiality of this information must be agreed to in advance by all lawyers who receive the information.

—*Secretary*

VI. *Adjournment; Next Scheduled Meeting.*

The meeting adjourned at approximately 11:15 a.m. The next scheduled meeting of the Committee will be on Friday, February 1, 2013, beginning at 9:00 a.m., at the Office of Attorney Regulation Counsel, at 1560 Broadway, Denver, Colorado.

RESPECTFULLY SUBMITTED,

Anthony van Westrum, Secretary

[These minutes are as approved by the Committee at its Thirty-fourth Meeting, on February 1, 2013.]

COLORADO SUPREME COURT

STANDING COMMITTEE ON THE RULES OF PROFESSIONAL CONDUCT

Approved Minutes of Meeting of the Full Committee
On February 1, 2013
(Thirty-Fourth Meeting of the Full Committee)

The thirty-fourth meeting of the Colorado Supreme Court Standing Committee on the Rules of Professional Conduct was convened at 9:20 a.m. on Friday, February 1, 2013, by Chair Marcy G. Glenn. The meeting was held in the conference room of the Office of Attorney Regulation Counsel, at 1560 Broadway, Denver, Colorado.

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

Also in attendance were Philip E. Johnson, of the law firm of Bennington Johnson Biermann, the chairman of the Colorado Lawyers Trust Account Foundation, and Diana M. Poole, the executive director of the COLTA Foundation.

I. *Meeting Materials; Minutes of November 16, 2012 Meeting.*

The Chair had provided a package of materials to the members prior to the meeting date, including submitted minutes of the thirty-third meeting of the Committee, held on November 16, 2012. Although consideration of those minutes was postponed until completion of the Committee's discussion of Colorado's legalization of medical and recreational marijuana, reflected in Part II of these minutes, they were then approved with one correction.

II. *Colorado Legalization of Medical and Recreational Marijuana*.

The Chair opened the Committee's substantive discussions with the question of whether the Committee should form a subcommittee to consider amendment of the Rules of Professional Conduct in response to the addition of § 14 to Article 18 of the Colorado Constitution in 2000 to permit use of medical use of marijuana for persons suffering from debilitating medical conditions and the addition of § 16 to Article 18 of the Colorado Constitution, by Amendment 64 in 2012, to permit and regulate personal use of marijuana. The Chair noted that she was moving this discussion to the head of the agenda because Judge Webb, whom she asked to lead the discussion, would not be able to attend the entire meeting.

Judge Webb pointed the Committee to the meeting materials for a brief memorandum he had prepared to present the question of a lawyer's personal use of marijuana, an activity that is no longer illegal under Colorado law but remains illegal under Federal law, should subject him to discipline under Rule 8.4(b), which proscribes commission of "a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects." Judge Webb's memorandum echoed

Opinion 124 of the Colorado Bar Association Ethics Committee, which recognized that that committee could not predict how the Office of Attorney Regulation Counsel would regard a lawyer's lawful use of medical[1] marijuana, and concluded that the resulting uncertainty could chill a lawyer's exercise of conduct permitted by Amendment 64. The memorandum suggested that whether lawyers should be held to higher standards in this or other areas is a policy question. He contrasted the circumstance of a lawyer lawfully but surreptitiously recording telephone conversations, a practice that the Colorado Bar Association Ethics Committee has concluded involves "an element of trickery or deceit, [so that] it is generally improper for an attorney to engage in surreptitious recording even if the recording is legal under state law."[2]

Judge Webb noted that, since he prepared his memo, the current Colorado Attorney Regulation Counsel, John S. Gleason, had announced that his office would not seek to discipline lawyers whose use of marijuana complied with the Colorado Constitution, notwithstanding that such use continues to be illegal under Federal law. But, Judge Webb noted, Mr. Gleason is retiring from that office in March 2012, and it cannot be known what position the next Attorney Regulation Counsel might take on the matter.

Judge Webb concluded his remarks by stating that his purpose was simply to get a subcommittee of the Committee appointed to consider the application of the Rules of Professional Conduct to marijuana usage that is lawful under Colorado law.

At first, the Chair's request for discussion was met with silence. Then a member spoke to ask what the task would be for any such subcommittee. The member noted that the Colorado Bar Association Ethics Committee's existing opinion goes only to a lawyer's use of marijuana for medical purposes; it does not consider the Rule's implications for a lawyer who seeks to advise clients who are engaged in marijuana usage, or a marijuana business, that is now permitted by Colorado law. The member added that Rule 8.4(b), subjecting some, but not all, criminal conduct to discipline, depending on the reflections on the lawyer's "honesty, trustworthiness or fitness as a lawyer in other respects," must be applied on a crime-by-crime basis.

To that, Judge Webb expressed his disagreement; in his view, a possible approach is to add a comment to Rule 8.4 stating that any conduct that is explicitly exempted from state prosecution by Colorado law cannot be conduct that would adversely reflect on the lawyer within the meaning of Rule 8.4(b). He was thinking, he said, of a generic comment, not one directed only to conduct involving use of marijuana that is lawful in Colorado. He referred the members to the suggestion for a comment to Rule 8.4 that he included at the end of his memorandum: "[2A] A lawyer shall not be subject to discipline for engaging in conduct that is illegal under federal criminal law, if the Colorado Constitution precludes prosecution of that conduct under state criminal law.

The Chair noted that the discussion was moving to the substance of the matter, beyond the question of whether a subcommittee should be formed to consider the matter. She added, responding to Judge Webb's suggestion that a solution might be placed in a comment, that the Committee tries, as a

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1. At the time Colorado Bar Association Ethics Committee Opinion 124 was issued, on April 23, 2012, Article 18, § 14, regulating medical marijuana use, had been added to the Colorado Constitution, but Article 18, § 16, permitting personal, non-medical use of marijuana had not yet been added. *See* http://www.cobar.org/repository/Ethics/FormalEthicsOpion/FormalEthicsOpinion_124_2012.pdf for Opinion 124.

—Secretary

2. Colorado Bar Association Ethics Committee Opinion 112, July 19, 2003, http://www.cobar.org/repository/Ethics/FormalEthicsOpion/FormalEthicsOpinion_112_2011.pdf.

—Secretary

matter of drafting principle, not to place substantive provisions in comments but, rather, to embed them in the blackletter text of rules. She also expressed concern about the particular wording that Judge Webb suggested; she recounted that, in the deliberations on marijuana usage by the Colorado Bar Association Ethics Committee, the understanding was that conduct that did not violate Colorado law, though it be illegal under Federal law, should not be considered violative of Rule 8.4(b) (reflecting adversely on the lawyer's fitness) but could leave a lawyer in a state that caused him to violate the rule requiring competency (Rule 1.1) or the rule requiring diligence in the course of the representation (Rule 1.3). She would not approve a comment, such as that suggested by Judge Webb, that would immunize a lawyer from discipline under any of the rules simply because his misconduct occurred in the course of conduct that is exempted from prosecution by a constitutional provision.

Judge Webb responded to the Chair's comments by noting that he had offered his suggestion simply to engender discussion. He found the Chair's concerns to be valid, justifying alteration of his suggested language, and he asked that any text of a solution be subjected to debate in a subcommittee appointed for the purpose.

The Chair noted that the discussion thus far in the meeting indicated there was a need for such a subcommittee.

To that, a member responded that he did not think many Colorado lawyers were really concerned just about their personal use of marijuana. In this member's view, the legalization of marijuana under Colorado law raises significant questions under Rule 1.2(d), which proscribes counseling or assisting a client "in conduct that the lawyer knows is criminal or fraudulent," but permits the lawyer to "discuss the legal consequences of any proposed course of conduct with a client and [to] counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law." He suggested that a subcommittee consider these kinds of questions.

To that suggestion, Judge Webb said he would be glad to chair a subcommittee that had a broader charter to consider all of the significant questions that the Colorado legalization of marijuana use and business raises for lawyers.

The Chair noted that the Committee had earlier determined not to form a subcommittee to consider the implications on the Rules of the legalization of medical marijuana.

But another member followed Judge Webb's offer by concurring that a subcommittee should be formed to consider any or all of the issues the subcommittee thinks are raised for lawyers by the Colorado legalization of marijuana usage and business. The member put that suggestion in the form of a motion, and the motion was seconded.

Another member pointed out that Amendment 64 permits the possession only of less than one ounce of marijuana; in her view, it did not "change the lay of the land." She asked for a friendly survey of the members to see if there were even five who cared to pursue the matter. In response, substantially more than five members indicated their willingness to serve on a subcommittee appointed to consider marijuana issues. A member added that there were undoubtedly members of the Colorado Bar Association Ethics Committee who would like to participate on such a committee.

The member who had opened the discussion by noting that Rule 8.4(b) seems to call for a crime-by-crime analysis said that he would like to participate on such a subcommittee, although he remained skeptical that an efficacious amendment to Rule 8.4 could be found. In his view, the questions included how the court would "bear down" on the issues, a question that would not be easily answered. For him, however, the simple question of whether to form a subcommittee to consider the questions had a low

threshold: If people want to participate, there should be a subcommittee. If the subcommittee determined that action would be premature, it can report that conclusion.

Upon a vote, the Committee determined to form a subcommittee to consider such issues relating to the legalization of marijuana in Colorado as the subcommittee chooses to consider. Judge Webb accepted the Chair's appointment to chair the subcommittee.

III. *Chair's Reports to Supreme Court*.

The Chair directed the members to the two letters, each addressed to Justice Coats and Justice Marquez and dated November 19, 2012, that she had included in the materials that she provided in advance of the meeting.

The first of the two letters dealt with the pretexting issue to which the Committee had devoted considerable attention at its meetings on May 6, 2011, January 6, 2012, and July 13, 2012. The Chair advised the Justices that—

> The Standing Committee voted against recommending any pretexting-related rule changes to the Court. However, in light of (a) the substantial work devoted to potential amendments to CRPC 8.4(c), and (b) the division of strongly held views among members of the Standing Committee on whether to recommend those amendments, the Standing Committee concluded that it would share its work product with the Court, for the Court to review and use as it deems appropriate.

And—

> After lengthy discussion and intense debate at its July 13, 2012 meeting, a majority of the Standing Committee voted against recommending any amendments to the Court. However, as noted above, the Standing Committee voted to provide its work product to the Court. The arguments for and against the various proposed amendments are set forth in detail in the enclosed materials.

The second of the two letters pointed out that Comment [3] to Rule 1.13 contains a typographical error, in that the reference to "Paragraph (19)" therein should be to "Paragraph (b)."

The Chair told the Committee that she had received no response from the Court with respect to either of the matters dealt with in the letters but that no further action was required of the Committee with respect to the matters dealt with in the letters.

IV. *Rule 1.15 and COLTAF Rate Comparability*.

The Chair then turned the Committee's attention to what she termed the main item on the agenda: Rule 1.15 and the issue of interest rate comparability for COLTAF accounts. She asked James S. Sudler, the chair of the subcommittee formed to consider those matters, to lead the discussion.

Sudler recalled that the subcommittee had been formed to determine how to implement, if appropriate, interest rate comparability on COLTAF accounts, after the Colorado Lawyer Trust Account Foundation had found that some banks have been paying lower interest rates on COLTAF accounts than they pay on comparable trust accounts. That, he said, is not good; he added that the Colorado Supreme Court has supported COLTAF since at least 1981.

The subcommittee was formed at the Committee's thirty-third meeting, on November 16, 2012, and commenced its deliberations shortly thereafter. Sudler reported that the subcommittee members

quickly determined that they wanted to consider broad revision of Rule 1.15, not merely to amend it to accomplish the goal of rate comparability but also to make it "more readable." The subcommittee recognized that revision of Rule 1.15 had undertaken before, but it felt it necessary to make a further effort at improving the entire Rule, which has long been considered opaque.

Sudler explained that the subcommittee would divide current Rule 1.15 into four separate rules, numbered 1.15A, 1.15B, 1.15C, and 1.15D; and it would put the substance of the comparable-rate provisions not in a rule but in a "Chief Justice Directive."

- Rule 1.15A would contain what is included in the American Bar Association's model Rule 1.15.

- Rule 1.15B would contain much of what the Colorado court has already added to model Rule 1.15, including provisions requiring the maintenance of business and trust accounts. It is this rule that would refer to the Chief Justice Directive for determination of the financial institutions that could be approved by the Office of Attorney Regulation Counsel for lawyers' trust accounts. Moving those provisions to a separate rule should make them more accessible, Sudler said.

- Rule 1.15C would contain the rules governing trust account activities, such as deposits and withdrawals; the rule banning ATM and debit card usage; the rule for periodic reconciliation; and the like.

- Rule 1.15D would contain the record-keeping requirements of the current rule.

Sudler acknowledged that the use of a chief justice directive as the subcommittee proposes would be novel; it would remove from the rule — a rule governing the conduct of lawyers — a number of provisions that are of concern to the banks that choose to offer COLTAF and other lawyer trust accounts but that do not directly bear on lawyer conduct. As Rule 1.15 would be revised by the subcommittee, a lawyer would need only to select an "approved financial institution" from a list of those institutions maintained by the OARC; the lawyer would not need to determine, independently, whether the financial institution was in compliance with its agreement with the OARC, under the terms of the Chief Justice Directive, that led to its being listed as an approved financial institution.

The Chief Justice Directive would permit a financial institution to be approved for use for trust accounts if it agreed to report overdrafts, to cooperate with the COLTA Foundation and the OARC and to report on, and produce the records of, lawyer trust accounts upon subpoena by the OARC. The directive would permit the institution to charge the lawyer or law firm with the cost of producing the reports and records required by its agreement under the terms of the directive.

The paragraph enumerated 5) in the proposed Chief Justice Directive would require the financial institution to agree, as a condition to being approved for lawyers' trust accounts, to remit monthly earnings to COLTAF after deduction of "allowable reasonable COLTAF fees" as subsequently defined in ¶ 9) of the directive.

Paragraph 6) of the directive would provide for the financial institution's agreement to pay a comparable interest or dividend rate on COLTAF accounts — "the highest interest or dividend rate generally available from the financial institution on non-COLTAF accounts when the account meets the same eligibility requirements" — and ¶ 8) would permit the COLTA Foundation periodically to establish a benchmark rate reflecting "overall comparable rate offered by financial institutions in Colorado net of allowable reasonable COLTAF fees."

Paragraph 7) of the directive would list four different types of accounts that a lawyer or law firm might use for a COLTAF account.

Paragraph 9) of the directive would deal with the "allowable reasonable COLTAF fees" that a bank might deduct from the interest or dividend earnings that it paid to COLTAF; the subcommittee provided three alternatives for the provision in its initial report to the Committee:

- The first alternative is as proposed by the COLTA Foundation. It would permit the financial institution to deduct, from earnings paid to the COLTA Foundation, as "allowable reasonable COLTAF fees," only (1) a "reasonable fee to cover the cost of complying with the remittance and reporting requirements" for COLTAF accounts and (2) "sweep fees" charged on accounts having automated overnight investment features, so long as those sweep fees did not exceed sweep fees charged on non-COLTAF accounts. All other fees that the institution might choose to charge would have to be borne by the lawyer or law firm maintaining the account.

- The second alternative, proposed by one participant on the subcommittee, would permit the financial institution to deduct both a reasonable COLTAF-compliance fee and *any* additional fees, so long as the additional fees were not in excess of fees assessed on comparable non-COLTAF accounts. The second alternative would not permit the financial institution to charge any additional fee against the lawyer or law firm maintaining the account.

- The third alternative (also, like the first alternative, proposed by the COLTA Foundation) would permit additional deductions — per-check and per-deposit charges and federal deposit insurance fees — as well as sweep fees and the COLTAF-compliance fee, if the additional deductions were comparable to those charged on non-COLTAF accounts. As in the first alternative, the financial institution would be permitted to assess other fees against the lawyer or law firm maintaining the account.

Sudler noted that the first and third alternatives, which would permit financial institutions to assess charges against the lawyers and law firms who maintain COLTAF accounts, raise what he characterized as a "philosophical" issue: Should lawyers be obligated to bear additional fees in order to maintain the required COLTAF accounts, thereby effectively subsidizing the earnings paid to COLTAF? What if the banks imposed "enormous" additional fees on the lawyers and law firms?

Sudler concluded his overview by noting that paragraphs 10) through 12) of the proposed Chief Justice Directive contain, essentially, additional details that are presently provided in Rule 1.15. He then invited other participants on the subcommittee to add their comments and asked the Chair whether interest rate comparability remains a topic that the Committee wished to pursue. If it were, he asked for consideration of whether the proposal to leave the details of the features of a COLTAF account to a chief justice directive was acceptable to the Committee.

A member who was a participant on the subcommittee noted that he had offered to the subcommittee a substantial revision of the entire rule, revisions that were directed not only to incorporation of a rate comparability requirement but also to cleaning up and improving a rule that is widely acknowledged to be very difficult to parse.

In response to Sudler's questions, the Chair solicited an indication from the Committee about whether it wished to pursue incorporation of a comparable-rate requirement into Rule 1.15, and the Committee responded overwhelmingly that it did so.

The chair then asked whether the Committee wished to pursue a complete reconsideration of all of Rule 1.15, as the subcommittee participant had suggested should be done.

With the assistance of another subcommittee participant, the member who had made the suggestion argued that a complete revision need not take an inordinate amount of time to accomplish and noted that the current Rule contains manifest inconsistencies — he pointed out that Rule 1.15(a) permits a lawyer to hold client or third-party funds in jurisdictions other than Colorado if that is done with the consent of the client or third person, while Rule 1.15(e)(3) requires all trust funds, without exception, to be maintained in financial institutions that do business in Colorado and are approved by Regulation Counsel. To the member, it was clear that Rule 1.15 would need to be clean up eventually; he argued that the rule should be revised once, completely, rather than twice, piecemeal. He added that he had already proposed to the subcommittee a substantial restructuring and revision of the rule to that end.

Another member who was a participant on the subcommittee supported the suggestion that a complete revision of the rule be undertaken. He expressed confidence that the subcommittee could consider, in the first instance, all policy issues that might be encountered in that endeavor.

In response to a member's question, Philip E. Johnson confirmed that the COLTA Foundation board of directors includes two bankers and that they, as well as regional and national banks operating in Colorado, support the comparable-rate proposal.

In response to the Chair's request for specific comment on the issue of expanding the subcommittee's task to a complete revision of Rule 1.15, another member "echoed" the calls for that effort, saying the subcommittee had done a good deal of that work already and that he liked its workproduct as developed to date; he urged that a complete revision be done now, all at one time. But he questioned the use of a chief justice directive to deal with the banking details of a COLTAF account. That, he noted, would be a new mechanism to add to the regulation of professional conduct in Colorado, which heretofore has been by way of rules adopted by the entire Court, whereas a chief justice directive would be the exercise of authority by the Chief Justice alone.

A member who was a participant on the subcommittee responded to the comments about the use of a chief justice directive by characterizing it as simply a mechanism for establishing the parameters of trust accounts that banks might choose, or not choose, to offer. The mechanism would not and could not require the banks to take any action that they did not agree to take; none need offer a COLTAF or other compliant trust account. The chief justice directive would essentially just authorize the Office of Attorney Regulation Counsel and COLTAF to negotiate with the financial institutions to develop the terms of such trust accounts. But the mechanism would permit the removal of all of the details about trust accounts from the rules that govern lawyers' conduct; each lawyer would simply have to select from among the financial institutions that have agreed to the established terms.

A member who had been involved at the inception of the COLTAF program commented that banks had initially expressed concerns about the difficulty of developing compliant software; but, he said, they are now "on board."

A member who was a participant on the subcommittee but who had not previously spoken commented that, if the Chief Justice accepted the use of a chief justice directive as envisioned by the subcommittee, that would be one of the best aspects of the subcommittee's proposal, as it would remove from the rules governing lawyers' conduct details over which lawyers have no control. They need not worry about what a bank must agree to in order to become an approved institution; they need only select from among those that are approved.

But, that member said, he was concerned the scope of the subcommittee's undertaking if Rule 1.15 were returned to it for a wholesale revision, a revision that would, he said, entail consideration of an infinite number of ways the rule might be revised. It would be easy, he thought, for the effort to get bogged down in "wordsmithing." What is presently in the subcommittee's proposal, although broken into new classifications, is nevertheless familiar to the Committee: Rule 1.15A would be drawn from the model provision offered by the American Bar Association, Rule 1.15B was developed a couple of years ago, Rule 1.15C is also drawn from the ABA model. He was a proponent of uniformity with the ABA proposals; he would generally prefer uniformity to good wordsmithing.

But the member agreed that there was at least one inconsistency in the present rule that needed to be fixed, as had previously been noted, and he admitted that he had his own "pet idea," to resolve the problem that arises when funds are left in a trust account that cannot be traced to a particular client or third person, and was aware of at least one aspect of Rule 1 15 that should be removed from the Rules of Professional Conduct and placed elsewhere in the "251" series of the Court's rules.

Another member, who was not a participant on the subcommittee, agreed that, while Rule 1.15 could undoubtedly be written better, that effort should not be undertaken. He was, he said, not aware that the current rule is not working or that there is a "big problem" with them. He was not in favor of letting the subcommittee undertake a complete revision of Rule 1.15.

The Chair noted that the Committee had been presented with two options, one being a narrow effort that would simply divide the current rule into four parts and provide for rate comparability, the other being an effort to provide not only for rate comparability but also for wordsmithing. She pointed out that the subcommittee could be instructed to prepare two versions, so that the Committee could select one or the other.

The member who had proposed a complete revision of Rule 1.15 spoke, arguing that, in contrast to many of the Rules of Professional Conduct, there was in fact no particular value to uniformity in Rule 1.15.

The member who had initially argued to the contrary, that he preferred uniformity to good wordsmithing, said he agreed that there really was little value to uniformity in Rule 1.15, other than in what is currently Rule 1.15(a).

The member who urged a complete revision added that the subcommittee could consider preserving the uniformity of Rule 1.15(a) in its revision efforts, although, he noted, it is that paragraph that contains the first part of the most significant inconsistency that is contained in the rule, as it is that paragraph permits trust accounts to be maintained in any jurisdiction with the consent of those having interests in the deposited funds.

Without further discussion, the Committee agreed that the subcommittee should be directed to consider a complete revision of Rule 1.15 and not limit its efforts to incorporation of a comparable-rate provision.

With that decision, the Committee then turned its attention to the details of the subcommittee's existing proposal.

Diana M. Poole, the COLTA Foundation director, noted that people familiar at the national level with the IOLTA — interest on lawyers' trust accounts — concept had expressed a concern with using a chief justice directive as the fulcrum for dealing with participating financial institutions. The concern

seemed to be an appearance that the judicial branch was seeking to regulate financial institutions rather than lawyers.

A member who was a participant on the subcommittee suggested that, if that appearance were a concern, the details that the subcommittee had suggested be included in a chief justice directive could, instead, be tucked into an appendix to the Rules of Professional Conduct, as the current Model Pro Bono Policy is an appendage to, rather than a part of, Rule 6.1.

Justice Coats advised the Committee that chief justice directives typically are issued by the Chief Justice following consultation with Judicial Department staff, taking into account the operations of the department. Other justices may or may not have input into any particular directive; recently they have been involved in discussions about the content of directives, but each is issued within the discretion of the Chief Justice. There is, he noted, some debate about the authority behind chief justice directives, but, as a practical matter, they have been complied with.

Sudler commented that the subcommittee chose to move what it placed in the draft Chief Justice Directive out of the Rules of Professional Conduct because the material does not directly impact lawyers — as do the other provisions of the Rules — but, rather, deals with matters that are beyond the lawyer's control, matters that the lawyer cannot control vis-à-vis the financial institution at which he maintains his required accounts. The subcommittee viewed the proposed Chief Justice Directive as regulating the Court's agency, the Office of Attorney Regulation Counsel, and containing matters that would be the subject of discussions between the OARC and the COLTA Foundation and negotiation with financial institutions.

In response to a member's question, Sudler confirmed that other states place these matters within their rules of professional conduct; but, he added, the matters just gum up the works there. In response to another member's question, Sudler said that the subcommittee had considered moving the material to another formal civil court rule but had not arrived at a final decision about that prospect. The member suggested that the further work of the subcommittee include a determination of where the material should be located.

A member who was a participant on the subcommittee said that he had been the member who had objected to the lodging of the material in a chief justice directive, being of the view that that would turn a substantive matter of ethics — in particular, the issue of what fees and costs might be charged to lawyers — over to the discretion of a single individual, the Chief Justice.

Another member who was a participant on the subcommittee said he had pondered how to handle these matters efficiently. He did not think the provisions that are directed toward participating banks should be included in the rules governing lawyers, but he agreed they might be allocated to an appendix to those rules. That course, he suggested, would have the advantage of "looking like a rule" and, therefore, not looking like an effort to regulate banks, as distinguished from the lawyers that are within the Court's jurisdiction. Use of an appendix, too, would avoid the concern that too much discretion would be given to an individual justice. He suggested, then, that the subcommittee be directed to recraft what it had placed in the Chief Justice Directive into some format that is attached to the Rules.

The Chair commented that the only available precedent is the Model Pro Bono Policy, a policy that was developed without the Committee's involvement and to its surprise — a surprise, she reminded the Committee, that had been expressed to the Court as a concern that the Committee's role had been bypassed. The Committee had felt, she recalled, that the process of developing the Model Pro Bono Policy was imperfect, inasmuch as the Committee had worked hard to handle the development of the Rules responsibly, and that it had been a mistake to include the policy as an "example" within the Rules.

In her view, there was no good precedent for appending to the Rules what is now included in the subcommittee's proposal for a Chief Justice Directive. Further, she commented, the provisions in question involve matters of discipline.

The member who had suggested use of an appendix to the Rules pointed out that the only element of the provisions in question that could involve lawyer discipline would be the requirement to use an approved financial institution for the lawyer's accounts; the lawyer should have no reason to negotiate the terms of the accounts with the financial institution and should only be subject to a requirement to pick an approved institution. The situation was fundamentally different from the pro bono policy, he argued. He agreed that the substance that the subcommittee had placed in the Chief Justice Directive could be included within the Rules of Professional Conduct but said that should only be done in a manner that did not subject lawyers to unintended banking fees. If the use of a chief justice directive were deemed inappropriate, then perhaps the provisions could be included in a separate civil rule; he wanted, however, to assure the COLTA Foundation that the principles would not end up being merely aspirational.

A member asked whether the subcommittee's proposal to split current Rule 1.15 into four rules would be akin to a schoolchild responding to a teacher's criticism of an essay by dividing it into chapters. Would lawyers think the Committee has fiddled with form only to leave the substance unchanged, and wonder why that was done?

To that, Sudler replied that the subcommittee had considered the question and determined that the effort would make the rule more comprehensible. It would also, he noted, be an easier set of provisions for the Office of Attorney Regulation to teach in its ethics programs.

A member who was a participant on the subcommittee said her initial concern had been that readers would not read beyond what would be Rule 1.15A. But, she said, the subcommittee added appropriate cross-references among the divisions to address that concern. In her view, the restructuring would help lawyers understand the structure of their obligations with regard to trust and other accounts.

James C. Coyle, of the Office of Attorney Regulation Counsel, added that the office frequently gets calls about obligations under Rule 1.15. He felt that the restructuring would help lawyers better understand their obligations with respect to accounts, overcoming the complexity of the current rule that stops lawyers from analyzing and its requirements.

A member who was not on the subcommittee said that he agreed with the subdividing that the subcommittee has proposed.

In answer to a question, Sudler confirmed that, under the American Bar Association's model rules, the bookkeeping provisions are also separate from the safekeeping provisions.

A member who was a participant on the subcommittee said he had also been concerned about the subdividing of Rule 1.15 at first but now agrees that it is the best course. That is especially so, he said, because the subdividing permits most of the provisions of Rule 1.15 that do not concern lawyer conduct and discipline to be moved to the Chief Justice Directive or wherever else the Committee ultimately determines to locate them. With that separation, he could now consider locating those provision in some other chapter of the court's rules.

To that comment, another member pointed out that the Rules of Professional Conduct — the C.R.P.C. — are themselves considered "an appendix of Chapters 18 to 20" of the Colorado Rules of Civil Procedure. He noted a need to avoid circularity.

Another member who was a participant on the subcommittee said she found use of a chief justice directive to be the most efficient course to take. Making those provisions that the subcommittee has proposed be lodged in a directive yet another rule, instead, would make those provisions harder to change as change was needed. They were directed, she noted, at only a limited number of entities — the OARC, the COLTA Foundation, and the participating financial institutions.

Another member, who had also been a participant on the subcommittee, disagreed with that view. He said that, because the provisions in question deal with the fees that can be imposed upon lawyers as costs of complying with the account requirements of Rule 1.15, they should not be placed in a vehicle that could be changed in the discretion of a single justice. He referred back to the minutes of the Committee's thirty-third meeting, recording a proposal that the bargaining power represented by all of the COLTAF accounts in the state be recognized and applied, through the OARC's bargaining with the state's financial institutions with regard to all of the fees and charges that could be assessed against COLTAF accounts, to obtain agreement that no additional charges would be assessed against the lawyers who maintain those accounts. The structure should not permit a single justice to decide that lawyers should be made to bear charges out of pocket.

Another member, also a participant on the subcommittee, agreed with those comments. He noted that banks typically "tier" their charges according to account balances. He said that his own examination of the terms currently available from a large national banking institution showed that it currently provides an especially good rate and fee deal on COLTAF accounts and does not charge any fees against the lawyer maintaining the account. He feared that, if a rule or chief justice directive approved of such charges against lawyers, banks might begin to impose them, mostly likely adversely impacting sole practitioners and small law firms that do not maintain large COLTAF balances. All that involves substantive policy that should not be left to a single justice to resolve by directive. The member wanted to see a no-other-charge policy stated in a court rule, not just a directive.

A member pointed out that the American Bar Association model rules do divide related provisions among separate rules, including segregating the bookkeeping provisions. In response to her question, Poole and Sudler said the ABA does not provide much guidance on location. Poole added that the ABA did not, originally, want to put any IOLTA provisions within the Rules of Professional Conduct, because those provisions were then under constitutional scrutiny. The COLTA Foundation had been told that, although several rules have things in common, they have been located in different places, some even being called "administrative rules." There is, in fact, no model ABA rule for IOLTA accounts.

A member noted that the Court currently puts its rules governing contingent fees in Chapter 23.3 of the Colorado Rules of Civil Procedure and asked whether these provisions regarding the details of the accounts that are to be maintained at approved financial institutions could similarly be located in a chapter of the C.R.C.P. She shared the concern that substantive rules having a financial impact on lawyers should not be left to a chief justice directive that was not subject to the same oversight and procedure for amendment that govern court rules.

The member who had expressed a desire to assure the COLTA Foundation that the principle of rate comparability would not end up merely aspirational commented that one advantage to retaining all of the provisions within the Rules would be that the Committee could address all of Rule 1.15 at one time. If there were substantial concern about use of a chief justice directive, the provisions in question could be lodged in Rule 1.15E, with a preamble that establishes its scope and clarifies that it does not impose disciplinary standards on lawyers, other than to maintain their accounts in approved financial institutions. This would, he said, address the expressed concerns about putting too much authority in the hands of a single justice and would also address Poole's concern that, if the Court stated the provisions

somewhere other than in the Rules governing lawyers' conduct, it might give an appearance that the Court was seeking to regulate banks.

After a brief discussion among several members about the value of giving direction to the subcommittee as to the location of the banking provisions — with a general recognition that substantive financial matters, such as permissible fees, should be locked down in a rule, rather than left to a chief justice directive, but otherwise separating those provisions from the provisions that govern lawyer conduct — the Committee determined that the subcommittee was already sufficiently informed, by the discussion, about those matters and did not need a specific instruction from the Committee.

Following a break in the Committee's deliberations, Sudler reported that an understanding had been reached, which was acceptable to Poole and Johnson, that the subcommittee should pursue what had been identified, in the Chief Justice Directive that had been appended to the subcommittee's report and earlier in the meeting, as the "third alternative" for COLTAF fees. This alternative, Sudler said, would define the fees that a participating financial institution could charge with respect to a COLTAF account. It would permit additional fees to be charged against the lawyers for services performed for their benefit, but which do not benefit COLTAF, such as wire transfer fees.

The Chair noted that progress is being made on the COLTAF matters.

V. *ABA Model Rules Changes.*

The Chair then asked Michael H. Berger, chair of the subcommittee formed at the Thirty-Third meeting of the Committee, on November 16, 2012, to consider recent changes made by the American Bar Association to its model rules of professional conduct, to report on that subcommittee's work.

Berger reported that the subcommittee had met twice, dividing itself into five working groups, of which four had already reported back to the whole subcommittee with recommendations on most of the rules changes. He anticipated that the subcommittee would meet a couple of more times before finalizing a report to the full Committee. He hoped that could be accomplished by the time of the next meeting of the Committee.

Berger raised one matter on which he wished Committee discussion: He said that the subcommittee had determined not to recommend a change that the ABA has proposed to make to the comments to Rule 4.4 regarding inadvertent disclosure of privileged communications or workproduct; the subcommittee had concluded that there are larger issues in that topic and that those issues should be referred to a subcommittee having a specific charge to deal with them. This is, Berger said, not a new concern but raises issues of which the Committee is already aware, such as whether the obligations imposed on the lawyer who receives inadvertently-sent information should be enlarged or otherwise altered. Currently, the ABA's Rule 4.4 requires only that the receiving lawyer notify the sender of the fact of the transmission; the ABA would change a comment to Rule 4.4 to provide that receipt of metadata embedded in electronic information triggers the notification duties of the rule, but only when the receiving lawyer knows or has reason to believe that the metadata was inadvertently sent.

Berger pointed out that the Colorado Court has added Rule 4.4(c), which imposes additional obligations on the lawyer who, before reviewing the document, receives notice from the sender that the document was inadvertently sent; in that case, the receiving lawyer is not permitted to examine the document and must abide by the sender's instructions as to its disposition — or pursue a court determination about how the information is to be treated. He noted that a number of lawyers believe that the Colorado addition is "the wrong structure," incentivising the receiving lawyer to read the material very quickly upon receipt, before notice can be given that it was inadvertently sent. That just does not

sound right, Berger said; that conduct is not professional. The question, then, is whether that conduct should be made unethical; some think so, he said. The ABA's identifying a special character of metadata would be inconsistent with an opinion issued by the Colorado Bar Association's Ethics Committee[3] that determined that metadata is, in essence, no different from other information. Colorado's Rule 4.4 is itself inconsistent with the "clawback" provisions of the Federal Rules of Civil Procedure, under which the sending lawyer may require the receiving lawyer to sequester inadvertently-sent information until a court has determined usage. It would seem that, at a minimum, the Colorado comments should be modified to make lawyers aware of other such rules and laws that may impose obligations on receiving lawyers. Berger said he understands that the Supreme Court's Standing Committee on the Rules of Civil Procedure is presently considering amendment of the Colorado rules to incorporate the Federal clawback principles.

For all these reasons, Berger said, the Committee should consider appointing a subcommittee to consider the entirety of Rule 4.4, including the comment change made by the ABA.

The Chair asked whether a new subcommittee was required or whether the scope of Berger's subcommittee could be expanded to include the larger review that Berger was suggestion. Berger replied that the subcommittee would be an appropriate body for that work, if its charge were expanded.

Berger added that the issues involve another intrusion into the client-lawyer relationship, the addition of a societal burden on that relationship. He observed that even at this meeting members were looking at messages on their smartphones, which are frequent sources of inadvertent transmissions of information. A lawyer's obligation of confidentiality is a very important one. But a receiving lawyer has a duty to her client as well and is conflicted if bound to say, "we cannot use, to your advantage, this information we have received and now know about." Berger hoped that the subcommittee would consider the importance of the client-lawyer relationship when it considers whether to impose a further burden on it.

A member said the entire principle embodied in the clawback approach made no sense to him. In his view, the burden and consequences should be borne by the erring sending lawyer, and the remedy should be a malpractice claim rather than a directive to the receiving lawyer not to use all that he knows for the benefit of his client.

To that, a number of members noted the ease that modern software gives to making such mistakes; the member who had found it senseless responded that the sending lawyer should deal with the software and avoid the mistakes.

The Committee agreed to expand the scope of Berger's subcommittee to include a complete revisit to Rule 4.4.

VI. *Rule 5.5(a)(3) and Assistance in Unauthorized Practice of Law.*

The Chair noted that the meeting materials included a memorandum Anthony van Westrum had sent her pointing out an apparent wording error in Rule 5.5(a)(3).[4] The memorandum went on to raise

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3. Opinion 119: Disclosure, Review, and Use of Metadata. Colorado Bar Association Ethics Committee, issued May 17, 2008

—Secretary

4. The error is found in the reference, within Rule 5.5(a)(3) to "subpart (a) of this Rule," in what is itself a part of "subpart (a)." The memorandum suggested that a proper reference would be to "sub***paragraph*** (a)***(1)*** of this Rule."
—Secretary

a substantive question: Does the prohibition against assistance in conduct that is the unauthorized practice of law apply just to assistance (or just to UPL conduct) occurring only in Colorado or does it extend to activity in any jurisdiction? The current formulation of the rule — listing all the ways one may be authorized to practice law in Colorado — seems to contemplate only Colorado-related conduct, but it ends with operative words that actually prohibit assistance of unauthorized practice of law in any jurisdiction, unbounded. Indeed, as the memorandum explained, the current rule does not prohibit a lawyer from assisting a Colorado-licensed colleague in conduct which constitutes the unauthorized practice of law in, say, Nebraska, although it would preclude unauthorized-practice-of-law assistance to anyone, in Colorado or elsewhere, who is not licensed in Colorado.

Van Westrum noted that Rule 8.5 contains the choice-of-law rules for application of the Colorado Rules of Professional conduct, but he confessed that he did not know how the jurisdictional question he raised about Rule 5.5 would be resolved under Rule 8.5.

The Chair asked van Westrum to chair a subcommittee to deal with the questions he raised.

VII. *Retirement and New Assignment for Colorado's Regulation Counsel, John S. Gleason.*

The Chair informed the Committee that John S. Gleason, who has been Regulation Counsel for Colorado since the establishment of the Office of Regulation Counsel, is retiring from that office and taking a similar position in Oregon.

The Committee gave Gleason a warm round of applause.

VIII. *Adjournment; Next Scheduled Meeting.*

The meeting adjourned at approximately 11:50 p.m. The next scheduled meeting of the Committee will be on Friday, May 3, 2013, beginning at 9:00 a.m., in the Ralph L. Carr Hall of Justice.

RESPECTFULLY SUBMITTED,

Anthony van Westrum, Secretary

[These minutes are as approved by the Committee at its Thirty-fifth Meeting, on May 3, 2013.]

COLORADO SUPREME COURT

STANDING COMMITTEE ON THE RULES OF PROFESSIONAL CONDUCT

Approved Minutes of Meeting of the Full Committee
On May 3, 2013
(Thirty-fifth Meeting of the Full Committee)

The thirty-fifth meeting of the Colorado Supreme Court Standing Committee on the Rules of Professional Conduct was convened at 9:05 a.m. on Friday, May 3, 2013, by Chair Marcy G. Glenn. The meeting was held in the Supreme Court Conference Room on the fourth floor of the Ralph L. Carr Judicial Center.

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

Also present was Judge Daniel M. Taubman, of the Colorado Court of Appeals, representing the Colorado Bar Association Ethics Committee as its chairman, and Larry W. Berkowitz, another member of that ethics committee.

I. *Meeting Materials; Minutes of February 1, 2013 Meeting.*

The Chair had provided a package of materials to the members prior to the meeting date, including submitted minutes of the thirty-fourth meeting of the Committee, held on February 1, 2013. Those minutes were approved as submitted.

II. *ABA Model Rules Changes.*

At the Chair's request, Michael H. Berger reported that the subcommittee considering recent changes made by the American Bar Association to its model rules of professional conduct had met four times and had concluded its work; he was in the process of preparing the subcommittee's report to the whole Committee. He commented that the subcommittee would recommend that the Committee adopt most of the ABA's changes, although the subcommittee would "tweak" a few of them. Two of the ABA's changes would not be recommended for adoption in Colorado. Berger noted that the most controversial of the changes will be for a complete revamping of Rule 4.4's requirements regarding inadvertently-sent communications.

The Chair indicated that, at the Committee's next meeting, the report of the subcommittee considering revisions to Rule 1.15 will have priority over the report of the subcommittee considering the ABA changes.

III. *Amendment of Rule 1.15.*

At the Chair's request, James S. Sudler III reported that the subcommittee considering revisions to Rule 1.15, including revisions intended to obtain comparability in the rates paid by banks on COLTAF accounts, had made great progress. He forecast that just one more meeting of the subcommittee would be needed to complete his work, and he hoped that the subcommittee would have a report on its work for a July 2013 meeting of the whole Committee.

IV. *Consideration of Rules Changes to Recognize Colorado Changes Regarding Marijuana Sale and Usage.*

At the Chair's request, Judge John R. Webb reported for the Amendment 64 subcommittee,[1] the subcommittee considering what, if any, changes might be made to the Rules of Professional Conduct to reflect that the Colorado Constitution has been changed to permit both medical[2] and recreational[3] use of marijuana. Webb reminded the Committee that the subcommittee's report had been included in the materials that the Chair had provided to the Committee in advance of this meeting.

The subcommittee included Ronald Nemirow, who is a member of the ethics committee of the Colorado Bar Association but not of the Committee. Nemirow was not able to attend this meeting of the Committee, but Webb introduced Judge Daniel M. Taubman, who, as the current chair of that ethics committee, was in attendance at this meeting to give to the Committee the view of that ethics committee on the need for modifications to the professional conduct rules in recognition of the modification of Colorado law regarding marijuana use and commerce.

Webb reported that the Office of Attorney Regulation Counsel had chosen to provide its own memorandum to the Committee,[4] in which it opposed the recommendations that the subcommittee proposes. The subcommittee received that memorandum only shortly in advance of this meeting of the Committee, but it was received in time for mention in the subcommittee's report; Webb indicated it would be referred to in the course of his report, for added perspective.

Webb pointed out the fundamental truth that any activity permitted by Colorado law with respect to marijuana use and commerce remains unlawful under Federal law. That presents two dilemmas: First, personal marijuana use by a lawyer, whether medicinally or recreationally, might be deemed to be violative of Rule 8.4(b), which provides that it is professional misconduct for a lawyer to "commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects." Second, representing clients with respect to marijuana activities, whether as to commerce or personal use, might be deemed to constitute a violation of Rule 1.2(d) — "A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal . . . ."

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1. As stated in the minutes of the Thirty-Fourth Meeting of the Committee, on February 1, 2013, the Committee "determined to form a subcommittee to consider such issues relating to the legalization of marijuana in Colorado as the subcommittee chooses to consider."

2. Colorado Constitution, Art. 18, § 14, added by initiative November 7, 2000, effective December 28, 2000.

3. Colorado Constitution, Art. 18, § 16, added by initiative November 6, 2012, effective upon the proclamation of the governor, December 10, 2012.

4. The memorandum of the Office of Attorney Regulation Counsel is contained at p. 102 of the materials that were provided to the Committee in advance of this meeting.

The existence of these two dilemmas creates what Webb characterized as a "chilling effect" on lawyers' conduct. The extent of that effect is unmeasurable, but lawyers are by nature cautious and will surely consider their risk of professional discipline before using marijuana themselves, notwithstanding that all persons aged twenty-one years or older may now use marijuana in accordance with the 2012 amendment of the Colorado Constitution. The mere issuance of the OARC's memorandum in opposition to the subcommittee's proposals will certainly chill lawyers' willingness to give counsel and advice to clients regarding marijuana use and commerce, Webb said.

The subcommittee has made two recommendations. One focuses on the issue of personal marijuana use by lawyers — the Rule 8.4(d) issue. Webb note that the OARC's memorandum states its disapproval of such use but maintains that the OARC will not use its authority to discipline for such use. Webb found that position to be puzzling.

The subcommittee's proposal regarding personal use of marijuana is found on page 12 of its report. The proposal is not to amend the text of Rule 8.4 but to add a Comment [2A] to the rule, to read as follows:

> [2A] Conduct of a lawyer that by virtue of a specific provision of the Colorado Constitution (and in implementing legislation or regulations) is either (a) permitted, or (b) within an affirmative defense to prosecution under state criminal law, does not reflect adversely on the lawyer's honesty, trustworthiness, or fitness in other respects, solely because that same conduct, standing alone, may violate federal criminal law. This comment specifically addresses two constitutional amendments: Article XVIII. Miscellaneous,§ 14. Medical use of marijuana for persons suffering from debilitating medical conditions, and Article XVIII. Miscellaneous,§ 16. Personal use and regulation of marijuana. The phrase "solely because" clarifies that a lawyer's use of marijuana, while itself permitted under state law, may cause a lawyer to violate other state laws, such as prohibitions upon driving while impaired, and other rules, such as the lawyer's duties of competence and diligence, which may subject the lawyer to discipline. See Rules1.1 and 1.3. The phrase "standing alone" is explained in Comment [2] to Rule 8.6.

That comment, Webb noted, utilizes the existing terminology — the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects — of Rule 8.4(b), which already recognizes that some criminal offenses *do not* reflect adversely on a lawyer's fitness to practice law.

Webb pointed out that the proposed comment reflects the view of the CBA Ethics Committee, as expressed in its Formal Opinion № 124 (issued April 23, 2012, before the adoption of the second constitutional amendment) regarding a lawyer's personal use of marijuana for medical purposes, as permitted by the amendment to the Colorado Constitution in 2000. And Webb noted that the OARC's memorandum indicates that the OARC finds that opinion "well-reasoned." The subcommittee believes that its recommendation is in line with the CBA committee's opinion.

Webb explained that — by its recognition that a lawyer's engaging in conduct which the Colorado Constitution makes lawful ["permitted," in the words of the proposed comment] or makes not subject to Colorado prosecution does not adversely reflect on a lawyer's fitness — the subcommittee's proposed Comment [2A] to Rule 8.4 resolves the "fitness" issue that is raised by a lawyer's conduct involving marijuana that is thus protected. But there are two caveats contained in the comment, he noted: The "solely because" caveat is an acknowledgment that the lawyer's use of marijuana may lead to other conduct that itself implicates other rules, such as Rule 1.1's requirement of competency or Rule 1.2's requirement of diligence, in a representation. The "standing alone" caveat, as explained in proposed Comment [2] to proposed Rule 8.6 [discussed below], is a warning that a lawyer's conduct involving marijuana may be combined with other conduct that is not protected by the Colorado Constitution and is otherwise violative of law.

In addition to the subcommittee's proposal for the addition of Comment [2A] to Rule 8.4 is its proposal for a new rule, Rule 8.6. Webb noted that the subcommittee had reviewed the very scholarly work of Prof. Eli Wald,[5] in which "tweaking" of Rule 1.2 is recommended; but the subcommittee determined instead to propose the addition of Rule 8.6, which is similar in structure to proposed Comment [2A] to Rule 8.4 but covers not only the lawyer's personal conduct but also the lawyer's counseling or assisting a client regarding the client's conduct. As proposed in the subcommittee's report to the Committee, Rule 8.6 would read—

> Notwithstanding any other provision of these rules, a lawyer shall not be in violation of these rules or subject to discipline for engaging in conduct, or for counseling or assisting a client to engage in conduct, that by virtue of a specific provision of the Colorado Constitution (and in implementing legislation or regulations) is either (a) permitted, or (b) within an affirmative defense to prosecution under state criminal law, solely because that same conduct, standing alone, may violate federal criminal law.

That new rule would be accompanied by two comments, one of which would parallel proposed Comment [2A] to Rule 8.4 in explaining the derivation of the rule from the marijuana amendments to the Colorado Constitution; that comment would read—

> [1] This rule specifically addresses two constitutional amendments: Article XVIII. Miscellaneous, § 14. *Medical use of marijuana for persons suffering from debilitating medical conditions*, and Article XVIII. Miscellaneous, § 16. *Personal use and regulation of marijuana*.

The second proposed comment to proposed Rule 8.6 would define the meaning of "standing alone" [which phrase is also used in proposed Comment [2A] to Rule 8.4 and to which Webb had previously referred to in his discussion of the proposed changes to Rule 8.4]. But Webb pointed out that a member of the Committee, who had not been a member of the subcommittee, had suggested, shortly before this meeting, that the language of the second comment match that of proposed Rule 8.6 itself — using, that is, the phrase "counsels or assists a client to engage in" in place of the phrase "advice to clients" that was contained in the subcommittee's original report. Accordingly, just before this meeting, the subcommittee had agreed that its proposed second comment to proposed Rule 8.6 would read—

> [2] The phrase "standing alone" clarifies that this rule does not preclude disciplinary action if a lawyer (1) personally engages in, or (2) counsels or assists a client to engage in, conduct that is permitted by the Colorado constitution and which also relates to conduct that contravenes federal laws other than those prohibiting possession or cultivation of marijuana.

—and the subcommittee had supplemented its report to reflect that change.

Webb characterized clause (2) of proposed Comment [2A] as being a cleaner indication of what is left open to discipline by the OARC when a lawyer's conduct includes that which is permitted by the Colorado Constitution but, at the same time, violates Federal law *other* than Federal law criminalizing the described marijuana activity — "possession or cultivation of marijuana."

Webb told the Committee that the OARC advised the subcommittee, at the outset of its work, that the OARC would take a contrary view to that which ultimately prevailed on the subcommittee [and those views were reflected in the OARC's memorandum to the Committee].

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5. Sam Kamin and Eli Wald, "Marijuana Lawyers: Outlaws or Crusaders?," Legal Studies Research Paper № 12-31, University of Denver Sturm College of Law. The paper is contained in the materials provided to the Committee in advance of the Thirty-fifth Meeting on May 5, 2013, beginning at p. 44 of the materials, and is available at http://ssrn.com/abstract=2131563. (Prof. Wald is a member of the Committee.)

At the Chair's request, James S. Sudler, who is both a member of the Committee and Chief Deputy Regulation Counsel for Colorado, responded to Webb's presentation of the subcommittee's report.

Sudler referred the members to page 102 of the meeting materials for a copy of the April 26, 2013. OARC memorandum. He began his comments by stating that the OARC has not prosecuted any case involving a lawyer's marijuana-related conduct that would be permitted by the Colorado Constitution; he pointed to the third page of the OARC's memorandum, in which it stated—

> From a historical perspective, before passage of both of the marijuana amendments, an attorney's personal use or possession of marijuana in Colorado in small amounts was never the sole misconduct in an attorney disciplinary case or a diversion matter as far as anyone in OARC remembers. Of course, such conduct standing alone could have been the subject of a disciplinary case. Based upon our collective memories there are very few cases in which a lawyer was alleged to have violated a law involving personal use or possession of marijuana. The only cases that we remember involving such an allegation were dismissed.

Sudler said the OARC does not consider personal use of small amounts of marijuana to be a fitness issue within the meaning of Rule 8.4(b); personal use simply has not attracted much attention, although "trafficking" has. Sudler added that, as the immediate-past Attorney Regulation Counsel, John S. Gleason, had said, the OARC would "follow the guidance of the People" as to a lawyer's personal use of marijuana.

But, Sudler added, the subcommittee's proposals would permit a lawyer not only to use marijuana but also to cultivate and sell marijuana. That was a much more substantial issue, one that is not fleshed out but is left largely unattended to in the subcommittee's proposals. The OARC questions whether a lawyer should be freed from discipline for that kind of activity, though it is proscribed by Federal law.

Sudler added that the OARC addresses each disciplinary case on its own terms; there is no "matrix" that is applied to its cases. He noted that this case-by-case approach was recently affirmed by the Colorado Supreme Court in *In re Attorney F*, in which the Court said, "As we have previously observed, 'individual circumstances make extremely problematic any meaningful comparison of discipline ultimately imposed in different cases.'"[6]

Sudler referred to a recent opinion from the Connecticut Bar Association[7] that concluded that, when a lawyer considers giving advice to a client about how to comply with that state's medical marijuana licensing regulations, she must determine, under Rule 1.2(d), whether the particular legal service she would render would rise to the level of assistance in violating Federal law; the opinion notes that "the Rule which governs attorney conduct does not make a distinction between crimes which are enforced and those which are not," but left it to individual lawyers to draw the line between permissible advice to clients about the Connecticut medical marijuana act and impermissible assistance to clients in conduct that violates Federal law. But, as Sudler put it, the problem is "what happens after that." He added that Prof. Wald dealt with that matter in great detail in the article to which reference had previously been made,[8] but, Sudler said, the professor's proposals do not work — the proposed distinction between knowing assistance and intentional assistance is unworkable. Referring again to *In re Attorney F*, Sudler said that, because the OARC proceeds case by case, substantial violations of the Federal marijuana laws

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6. In the Matter of Attorney F, 285 P.3d 322, 327 (Colo. 2012).

7. Connecticut Bar Ass'n Prof. Ethics Committee, Informal Opin. 2013-02 (2013).

8. *See* n. 4.

may still present disciplinary problems, and the OARC does not believe that the Court should adopt a rule that precludes that case-by-case approach.

But, Sudler concluded, if the Court does adopt something such as has been proposed by the subcommittee, the OARC will comply with the changed rules in its enforcement activities. It is, he said, a very vague situation.

The Chair asked Michael Berger, who was a member of the subcommittee, to make additional comments.

Berger responded to the Chair's request by saying that the subcommittee had carefully considered the OARC's views and respectfully rejected them. He characterized the essence of the OARC position to be that its prosecutorial discretion would be curtailed by adoption of the subcommittee's proposals. That, he said, would be true, but only to a very limited extent. The subcommittee considered, he said, the lawyer whose use of marijuana — for medical or recreational purposes — leads to incompetent representation or a failure of diligence. Obviously, he said, the OARC needs to be empowered to investigate and prosecute such a case, and the subcommittee's proposals would permit it to do so.

Berger characterized the subcommittee's proposals as a recognition that the constitutional amendments are expressions of the will of the people: The subcommittee's proposals merely provide that, if all the lawyer does is use marijuana in conformity with Colorado law — without, as Berger put it, "collateral consequences" — then the lawyer will not be subject to discipline. But in all other circumstances — Berger mentioned money laundering as an example, as does the subcommittee in its report[9] — the entire prosecutorial arsenal remains available to the OARC.

Berger pointed out that discretion is certainly necessary in any prosecutorial system, but that does not, he said, mean that all discretion is good. Discretion "at the margins" is not consistent with the rule of law; prosecutors must not be permitted to establish the law; he referred the members to the discussion of that point in the subcommittee's report.[10] Continuing, Berger said that no one would suggest that a prosecutor can use his discretion to define what is unlawful; and yet that, the subcommittee thinks, is what the OARC is seeking to do, notwithstanding the recent amendments to the Colorado Constitution. Yes, he said, there remains the large problem vis-à-vis the continued Federal criminalization of marijuana use, but there is nothing that this Committee, the OARC, or the Colorado Supreme Court can do about that. But one problem can be solved by rule changes, changes that would tell Colorado lawyers that, if they comply with the State Constitution and implementing law, the Colorado system will not come after them for that, for that which is specifically allowed by Colorado law.

For those reasons, Berger said, the majority on the subcommittee urged that the Committee adopt the majority's report and proposals.

Berger added: There are two positions expressed in the OARC memorandum to the Committee. One is, "We will adhere to the will of the people, as expressed in the constitutional amendments. " But,

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9. Subcommittee report, p. 8.

10. "A prosecutor has no discretion to decide that certain conduct is inimical to society and should be prosecuted, if the legislature has not seen fit to criminalize the conduct." Subcommittee Report, p. 8, citing, in n. 10, People v. Gallegos, 644 P.2d 920, 930 (Colo. 1982|) ("If the habitual criminal statute delegated to prosecutors the power to define criminal conduct then it might run afoul of separation of powers limitations . . . . Only the legislature may declare an act to be a crime.").

any comfort that you might take from that position will be dissipated by the other position of the OARC, expressed in its memorandum, that its enforcement efforts must proceed case by case.[11]

The Chair then asked Judge Taubman to present the views of the Colorado Bar Association Ethics Committee.

Taubman began by pointing out that he was the current chair of that Ethics Committee and noting that at least eight prior chairs of that committee were present as members of the Supreme Court's Committee. He said that he would outline the deliberations of the CBA committee on marijuana issues for lawyers, particularly the issues presented under Rule 1.2(d) for lawyers giving legal advice about marijuana. Those are, he said, among the most difficult issues that the ethics committee has considered in the twenty years he has been a member of the committee.

The ethics committee was presented with at least four views: There was the view expressed in Prof. Wald's article,[12] concluding that a lawyer may, under the current Rules, advise about marijuana usage without violating Rule 1.2(b). There is the "more restrictive" approach advocated by Alexander R. Rothrock in his 2012 article on advising medical marijuana dispensaries.[13] Both of those articles, by esteemed members of the CBA Ethics Committee and of this Committee, are very well written, Taubman noted, and together they reflect the difficulty in finding agreement on the subject. Yet others say that Rule 1.2(d) will preclude a lawyer's representation of a client in virtually any marijuana matter. And the fourth view is that it is okay to provide representation involving only prior activity but that the possibility of providing representation as to future activity is limited at best — for example, representation in defense of past violations of a building lease by reason of marijuana sales would be permitted to the lawyer but negotiation of a new lease for a dispensary would be violative of Rule 1.2(d), for it would be assisting a client in conduct the lawyer knows is criminal under Federal law.

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11. The memorandum states—

> OARC submits that the Committee should not recommend to the Court that attorneys be permitted to advise a client how to violate federal law or to assist clients in violation of federal law. An attorney's knowing assistance to a client and participation in a crime itself should still be subject to regulation, and initiation of disciplinary proceedings if warranted under OARC's discretion.

OARC memorandum to Committee, 4/26/13, p. 5 (p. 106 of materials provided to the members for this meeting). And, at memorandum p. 6:

> Some lawyers might be heavily involved in transactions which violate federal law. Once again, it is difficult to state categorically that attorneys involved in such situations would always be subject to discipline. The facts of each case are critical.

12. *See* n. 4.

13. Alec Rothrock, Is Assisting Medical Marijuana Dispensaries Hazardous to A Lawyer's Professional Health?, 89 DENV. U. L. REV. 1047 (2012) (attachment 6 to the subcommittee's report, at p. 90 of the meeting materials). Rothrock concludes, with respect to advising marijuana dispensaries, as follows:

> It is readily apparent that drawing lines between providing information, on one hand, and providing counseling or assistance, on the other, is largely a self-defeating exercise. There are a good many public policy reasons why Rule 1.2(d) should not smother lawyer assistance to clients in the medical marijuana industry, but these reasons do not change the plain wording of Rule 1.2(d). And, of course, Colorado Rule of Professional Conduct 1.2(d) is not interpreted one way for medical marijuana violations of federal law and another way for all other crimes. Lawyers who represent medical marijuana dispensaries in a business setting almost cannot help but violate the rule.

Id., at 1058.

The CBA Ethics Committee's members gave overwhelming approval for the submission of a letter by Taubman, as its chair, to the Committee urging that the Committee recommend the adoption of a rule that provided that an attorney would not be subject to discipline for providing advice to a client regarding conduct that is lawful under Colorado law.

Taubman said that, when it began its deliberations, the ethics committee had assumed that the issues would center around advising clients participating within the marijuana industry, such as leasing dispensary space. But over time, the committee came to realize that the issues are of broader scope. He cited as an example the recent Colorado court of appeals case concerning whether an employer might discharge an employee for marijuana use notwithstanding the decriminalization of such use under Colorado law.[14]

One arena in particular drew the ethics committee's interest, that of family law. Rule 1.2(d) provides, Taubman pointed out, that, while a lawyer may not "counsel or assist a client to engage in activity the lawyer knows to be criminal, the lawyer "may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law." So, what does this mean? How is it to be interpreted, say, in the context of a child custody issue in a dissolution of marriage case when one spouse holds a license to use marijuana for medical purposes? Multiply the complexity fifty-fold, Taubman said, when the marijuana usage in question is recreational. If the lawyer may not advise the client on that particular issue, may she represent the client in *any* aspect of the dissolution? Is reasonable unbundling of the lawyer's services possible?[15] If the lawyer may discuss the legal consequences, but may not "counsel or assist" in criminal activity, may the lawyer say, "But you know that the use of marijuana remains illegal under Federal law" and absolve his conundrum under Rule 1.2(d)? But the client already knows that his conduct remains illegal under Federal law. Does the lawyer's statement free the lawyer to go further and represent the client in the negotiation of the client's use of marijuana during child visitation or in some stated period before visitation begins? What if one spouse says there shall no use during visitation, the other asks for the right to use marijuana up to twelve hours before visitation begins, and the first spouse insists on a twenty-four hour no-use period before visitation? Is the lawyer now well beyond discussing consequences and into assisting in activity that would violate Federal law? Matters would be much clearer if the Rules provided guidance.

Taubman noted two comments that had been made by other judges. One of the judges serving on the CBA Ethics Committee was part of a small minority of that committee's members who were opposed to the CBA Ethics Committee issuing its Opinion № 124 regarding medical marijuana; she felt that the ethics committee could not speak effectively until Rule 1.2(d) was changed. Another judge and

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14. Coats v. Dish Network, L.L.C., 2013 COA 62, 2013 WL 1767846 (Colo.App. 2013):

> Thus, because activities conducted in Colorado, including medical marijuana use, are subject to both state and federal law, . . ., for an activity to be "lawful" in Colorado [within the meaning of the statute making it an unfair employment practice for an employer to terminate the employment of any employee due to that employee's engaging in any lawful activity off the premises during nonworking hours], it must be permitted by, and not contrary to, both state and federal law. Conversely, an activity that violates federal law but complies with state law cannot be "lawful" under the ordinary meaning of that term. Therefore, applying the plain and ordinary meaning, the term "lawful activity" . . . means that the activity—here, plaintiff's medical marijuana use—must comply with both state and federal law.

15. Rule 1.2(c):

> (c) A lawyer may limit the scope or objectives, or both, of the representation if the limitation is reasonable under the circumstances and the client gives informed consent. A lawyer may provide limited representation to pro se parties as permitted by C.R.C.P. 11(b) and C.R.C.P. 311(b).

member of the ethics committee, Taubman recalled, offered this example of a real situation during the ethics committee deliberation about a further opinion dealing with recreational use of marijuana: The judge had been sitting on a criminal case; after the case was resolved, the prosecutor and defendant, in open court, discussed what might be done to avoid future prosecution; did this, he had asked the ethics committee, constitute a violation of the Rules? In short, Taubman said, judges across the state are facing these questions on a regular basis.

So, Rule changes are needed to address these problems, Taubman said. Other states have addressed at least the medical marijuana context and have come up with different answers under existing Rule 1.2(d), trying to put a square peg into a round hole, trying to solve a problem using a rule that simply was not crafted in contemplation of a dichotomy between state and Federal law. The Colorado constitutional amendments are "an experiment in democracy"; and, without modification of the Rules, "the Court risks leaving the conduct of that experiment to proceed without the assistance of Colorado lawyers." Those are, Taubman said, pertinent descriptions of the problem; he urged the Committee to propose Rule changes to the Court.

Following Taubman's remarks, the Chair said that she did not wish to cut off debate but wanted to approach the discussion in stages, the first being the determination of whether or not the members felt disposed to adopting *any* Rule changes, holding off for the moment any discussion of what those changes might be.

A member who was also a member of the CBA Ethics Committee said that she had been struck, during the ethics committee's discussions, with how many of its members were concerned about whether they could give advice to clients about marijuana usage or participation in the marijuana industry. Taubman had dealt with those issues as they might arise in a domestic relations practice, but they clearly are not limited to that context. Saying "I'm not going to advise you about that" leaves the citizenry having to figure out what to do without advice of counsel, because lawyers decline to advise in the face of disciplinary risk.

This member has a number of lawyers as her clients, lawyers who have asked whether they can even advise about medical marijuana usage. The best that can be said is, "You may get in trouble," but that is not helpful. After listening to the debate in the ethics committee meetings and reading the available literature, this member has concluded that lawyers need affirmation that they will not be disciplined for giving advice about activities that now are lawful under Colorado law. Surely the Federal authorities may yet pursue aiding and abetting charges against lawyers, but that is a different problem from the problem of licensure discipline; lawyers will have to figure that problem out separately. But, as to the discipline issue, Colorado lawyers need prompt assurance that they will not face discipline for advising clients about activities that are lawful under Colorado law; otherwise, citizens will be left to proceed on their own without representation.

James Coyle, who is Colorado Attorney Regulation Counsel and a member of the Committee, said that he appreciated all the work that had been done so far in this uncharted area. It has not been easy work. And, he said, he understands the concerns about the uncertainties about the likelihood of discipline, as had been expressed in the subcommittee's report. Clearly lawyers feel vulnerable. But this is not an issue about whether the OARC has unbridled discretion in prosecution; rather, it is a question of what message should be sent to the citizens of the state. Would this Committee be setting a position that the Court would be comfortable with by adoption of the subcommittee's proposals? Is it good policy to give this message to the public? The legal profession is a self-policing profession, as is stated in the

Preamble to the Rules.[16] Would the Committee really wish to change the Rules to excuse lawyers from legal limitations on their personal use of marijuana?

Coyle added that the changes proposed by the subcommittee would need to be accompanied by changes to C.R.C.P. Rule 251.1(a)[17]: Lawyers are charged with supporting the Constitution of the United States and with obedience to the laws. Coyle acknowledged that "we are in a state of flux," but the changes desired by the subcommittee would require a modification of C.R.C.P. 251.1 to say it is okay, nevertheless, for lawyers to violate Federal law. And other provisions of the Preamble to the Rules of Professional Conduct would also have to be changed, such as that which commands a respect for the rule of law and the maintenance of authority.[18] These kinds of additional changes would be required if those proposed by the subcommittee were adopted; the OARC does not, Coyle said, believe it is necessary to make the changes sought by the subcommittee.

Coyle admitted that he was not a constitutional law lawyer, but he said that all of these issues will come before the Court, and he asked whether the Committee was ready to constrict the Court's ability to deal with those cases as they arise, by altering these rules. Lawyers are a self-policing profession; what would the impact of the profession's changing these rule to sanction violations of Federal law by lawyers have on members of other professions?

A member responded to Coyle's comments by saying that, the way the member saw it, the proposal does not say that *any* conduct of a lawyer should be beyond the reach of discipline but only conduct falling within two particular categories: recreational or medical marijuana usage in conformity with Colorado law. But the most important aspect of the Rules of Professional Conduct are those permitting a lawyer to give advice to clients about conduct that is permitted by the law, in this case by

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16. Paragraph [10] of the Preamble to the Colorado Rules of Professional Conduct states—

> [10] The legal profession is largely self-governing. Although other professions also have been granted powers of self-government, the legal profession is unique in this respect because of the close relationship between the profession and the processes of government and law enforcement. This connection is manifested in the fact that ultimate authority over the legal profession is vested largely in the courts.

And—

> [12] The legal profession's relative autonomy carries with it special responsibilities of self-government. The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar. Every lawyer is responsible for observance of the Rules of Professional Conduct. A lawyer should also aid in securing their observance by other lawyers. Neglect of these responsibilities compromises the independence of the profession and the public interest which it serves.

17. Rule 251.1, C.R.C.P., states—

> (a) Statement of Policy. All members of the Bar of Colorado, having taken an oath to support the Constitution and laws of this state and of the United States, are charged with obedience to those laws at all times. As officers of the Supreme Court of Colorado, attorneys must observe the highest standards of professional conduct. A license to practice law is a proclamation by this Court that its holder is a person to whom members of the public may entrust their legal affairs with confidence; that the attorney will be true to that trust; that the attorney will hold inviolate the confidences of clients; and that the attorney will competently fulfill the responsibilities owed to clients and to the courts.

18. Paragraph [6] of the Preamble to the Colorado Rules of Professional Conduct states, in part—

> In addition, a lawyer should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority.

Colorado law. The proposal would just clarify the import of the pertinent rules, not really change them. Recognizing the existing principle that some crimes do not indicate a lawyer's unfitness to be a lawyer, Rule 8.4 would be clarified to say that a lawyer's use of marijuana within the bounds of Colorado law, though remaining criminal under Federal law, would be such a crime, one that did not indicate that the lawyer was unfit. That concept — that some crimes don't indicate unfitness — is not a new concept.

Another member, though, spoke to admit that, while she might be old-fashioned, she felt this battle was being fought in the wrong forum. Lawyers are used to preaching, if you don't like the law, change it. Many don't like the Federal laws that criminalize marijuana usage. But why ask this Committee to change a rule that will not change the Federal law? It would be better to ask the Federal representatives to change the Federal law so that the lawyer would not be in violation of it by engaging in the conduct that these proposals would exempt from discipline. She likened the situation to the prior prohibition of alcohol usage: It is ridiculous, with our firepower, not to pursue a change of the Federal laws, she said. But it would be ludicrous for us to set up a newspaper headline reading, "Colorado Supreme Court Says Okay for Colorado Lawyers to Violate Federal Law."

Another member spoke, saying it had not been his intention to speak but that he found himself prompted to do so by the comments of the member who had been struck with how many of the members of the bar association's ethics committee were concerned about whether they could give advice to clients about marijuana usage or participation in the marijuana industry. This member said that he had occasion to defend a lawyer, in a malpractice case, who had set up a corporation to dispense medical marijuana. He had asked himself, "Since I am defending a lawyer for conduct that is not permitted under Federal law, will I now have to advise the OARC of my client's violation of the law by reason of representation of another in connection with the medical marijuana business?" That is, this member said, the questions arise not just for the lawyer dealing with a client who is active in the marijuana industry but also for those involved in the peripheries of that primary activity — such as with respect to licensure issues, financing, all of the activities that go on in connection with any industry. All of that affects the decision that this Committee is going to make. This is, the member said, an insoluble dilemma right now, one that we cannot resolve to the complete satisfaction of all who are concerned, because of the dichotomy between the Colorado and Federal laws. We are going to do, this member predicted, what the member who previously spoke had suggested: We are going to provide a nice headline about lawyers, and we are going to have to accept that fact. But, he continued, we need to do that. In order to serve the bar, we need to say that, yes, a lawyer can violate Federal law regarding marijuana as long as his conduct in in accord with Colorado law. The people have a right to counsel, and it is not right to say that such counsel must be denied because another jurisdiction criminalizes certain aspects of the conduct for which counsel is sought.

A member who had been attending the meeting by telephone spoke to say that he needed to leave the conversation but wanted to register his support for the subcommittee's proposals and to state that he thought the position taken by the OARC was misguided.

A member who had not previously spoken suggested — tongue in cheek, he said — that the problem could be solved by a Colorado decision that its law preempts Federal law. But he added that his goal was to see if there were some other way to resolve the problem. In his view, Colorado continues to see amendments being made to its constitution that have no business being there. What, he asked, would we do if the constitution were amended to provide that any person may carry an automatic weapon, creating another conflict between Colorado and Federal law? We, as the drafters of the rules governing lawyers, are in a challenging era because of what can get into the Colorado Constitution, changes that can create similar, and difficult, issues of state and Federal conflict. We'll soon be back at the table trying to figure out what to do in the next such case. In this member's view, the subcommittee's suggested

course of action was premature; Coyle, for the OARC, is correct; and the proper course is simply to let some disciplinary cases go before the courts.

This member continued: If the Committee chooses to go forward, the changes should be clearly limited to the marijuana context, so that they do not extend to whatever matter the citizens may next choose to add to the Colorado Constitution. As proposed, the subcommittee's rule changes would blanketedly say that, if it's in the Colorado Constitution, it passes the disciplinary hurdle; there is, the member said, no way to predict what would end up there, and we will eventually find ourselves saying, "What did we do by opening the door to all that?" The Committee should make sure that the changes are narrowly crafted to deal only with the marijuana context now, so that future, presently-unknown effects are minimized.

Another member acknowledged that the Colorado constitutional amendments de-linking Colorado treatment of marijuana from the Federal regime has created a huge problem, one that is the product of the Supremacy Clause of the Federal Constitution. The subcommittee's course, with this particular issue of marijuana, would be to "give lawyers a pass." But what precedent would that set for the next such issue, be it guns, fracking, or the like? Is the right way to solve the conundrum to say that it is permissible to violate Federal law if the conduct, whatever the conduct, is permitted by Colorado law — that it is okay to violate Federal law?

A member said that he was struck by the position taken in the OARC's memorandum to the Committee — that the proposed changes are premature and are not needed at this time, not right now. Things are changing, as a member had said earlier. And there is the Federal law. This member was concerned that lawyers should always be able to fulfill their roles as advisors about the law, but he was equally concerned about advising clients about conduct that violated Federal law. He asked, "Is it time to step in now?" He knew that there was concern among the private bar, concern about potential discipline. But he asked, "Is this the time to make changes?"

A member who had given the matter scholarly attention then spoke. First, he said, it is incorrect to say that subcommittee's report would permit lawyers to violate any law. To a question about how that applied to condoning a lawyer's personal use of marijuana, the member replied that such use would be implicated by the Rules only if it impacted something such as competence or diligence. But nothing in the proposals green-lighted violations of the law. The pertinent topic is the giving of advice to clients about the law, not about personal usage, and the Committee should not get confused about that.

Second, the member said, as others had pointed out, the entire thrust of the Rules is professional conduct. The role of lawyers is to give clients access to the rule of law and to give them legal advice. We need to have lawyers involved in the democratic process. Yes, as Coyle had said, lawyers also have a role to play in upholding the rule of law; but the primary constituency of lawyers is clients.

Finally, the member said, one must keep the context in mind. The subcommittee's proposals are very modest, narrowly tailored, changes. He understood what previous comments had raised — that the subcommittee's proposals might have automatic application to other, future deviations of the Colorado Constitution from Federal law. But, he said, the proposals actually just deal with the giving of advice under the strictures of Rule 1.2(d) and do not open the door to a vast array of issues. These represent a compromise, in a conceptually narrow arena that is of interest to some of our fellow lawyers.

A guest at the meeting responded to the previous suggestion that the proposed changes would be premature by pointing out that the constitutional amendment permitting medical marijuana was adopted in 2000, becoming effective at the end of that year, and has been implemented by extensive statutory and regulatory enactments. Already the Colorado Court of Appeals has seen a substantial number of cases,

each of which has involved representation by lawyers. If action is not taken by the Committee and the Court to change the Rules in this regard, lawyers will continue to represent clients on marijuana issues unless and until the OARC decides to pursue preclusive disciplinary action — or, as has been suggested at this meeting, lawyers will become chilled and leave issues to *pro se* litigants. In short, enough time has lapsed to indicate that, short of some OARC disciplinary action, the issue of whether a lawyer can safely advise about Colorado's marijuana laws is not like to get to the Court for resolution.

Continuing, the guest turned to the question of adverse publicity if the Court were to adopt the proposed rules. The nature of the resulting publicity, he suggested, would largely depend on what this Committee, the Court, and the bar did to inform the public about the issues. Throughout time, lawyers have been involved in unpopular causes — terrorists, he noted, have a right to counsel. That lawyers do things that are not popular is not unusual. Lawyers practicing under the rules as they would be changed by these proposals, he said, would not encourage clients to break the law; in fact, they would be assisting clients to comply with Colorado law.

A member who had not previously spoken said, with respect to prosecutorial discretion, that some may have a misunderstanding of the issue. Prosecutorial discretion is the discretion to choose *not* to prosecute, notwithstanding that the conduct may have been a crime. Further, the OARC cannot pursue any disciplinary case without the approval of its advisory committee, a committee that this member said was not a rubber stamp. To suggest that the OARC always gets what it wants would be inaccurate. The advisory committee provides oversight of the entire disciplinary system, including oversight of Attorney Regulation Counsel and the presiding disciplinary judge. So, this member said, the Committee should rely on the system, including the prosecutorial discretion that may be wielded by Regulation Counsel and the advisory committee, with respect to the developing area of marijuana law, at least at this time. Adoption of the subcommittee's proposals would be premature. Things are in a state of flux. The legislature is, he noted, concerned about the taxation of the new industry. The earlier suggestion was correct; this Committee should be asking United States Attorney General Eric Holder and the Federal Government to resolve the dilemma. This is the wrong time to ask the Colorado Supreme Court for a resolution.

In response to a member's question, Webb confirmed that no other state has made any change to its professional conduct rules, notwithstanding that eighteen states now permit the use of medical marijuana.

The member who had asked the question about changes in other states' rules said that she did not agree with the prior characterization of the issues as not being about violation of Federal law. As she saw it, the issues clearly include that problem; indeed, the proposals for the addition of a comment to Rule 8.4 is premised on the fact that marijuana use violates Federal law.

The Chair noted that, the way the discussion was set up, the Committee would vote on whether to take up the substance of the subcommittee' proposals or determine not to do so. She asked whether there was a third course of action, one that would permit a lawyer to give advice about marijuana issues but would still provide for discipline for a lawyer's personal use of marijuana. That course, she admitted, might not solve anyone's concerns, from whatever vantage point. Changes of that kind would not permit a lawyer's personal use but would permit the giving of legal advice. Certainly they would not assuage the concerns of those members who advocated taking no action at this time.

A member spoke, noting that the Committee had heard many observations about the issues and that he did not, himself, support the subcommittee's proposals. He did not believe the proposals were good policy, for they put the Colorado Supreme Court in a "terrible position," endorsing a principle that lawyers will not be subject to discipline for assisting clients in the violation of Federal law.

Unfortunately — or not — he said, an ethics committee opinion is not one that has the imprimatur of a court agency. The prior observations that lawyers are starving for guidance are excellent. Can lawyers help clients who want to get involved in the marijuana industry? This Committee does not issue advisory opinions; that is done by the Colorado Bar Association Ethics Committee. Although the ethics committee's opinions are not binding on the OARC or any court, they have been a great source of guidance to lawyers on many issues. Such an opinion is what is needed now, the member suggested. There is much misunderstanding about what Rule 1.2(d) says. He pointed out that the provision expressly permits a lawyer to advise about the legal consequences of a proposed course of conduct: "a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law." He would not oppose the addition of a comment to Rule 1.2(d) that would expand on the black-letter principle as it applies to counseling with regard to marijuana issues. There is lots, the member said, that is permitted under Rule 1.2(d). But, the member continued, as to a lawyer who counsels or assists a client to go forward and commit a Federal crime, we should not have a rule that condones that activity. We are not in a position to condone such activity or to disapprove of Federal law criminalizing the conduct.

The member added that, contrary to a prior suggestion that the adoption of the subcommittee's proposal would insulate a lawyer from OARC investigation, the proposed changes — particularly the "standing alone" language that would be contained both in proposed Rule 8.6 and in proposed Comment [2A] to Rule 8.4 — would seem, instead, to invite more investigations. The member concluded by stating that he was opposed to the subcommittee's proposals "at this time."

Another member said she felt differently than Coyle did about the message that adoption of the subcommittee's proposals would send. She saw adoption of the proposals as a message that the Court recognized that there is a booming new industry in Colorado, one which raises countless issues — employment, commercial, etc. — that needed resolution, and that the legal profession would be in the forefront to resolving those issues. To be in that position, she said, would be to show that we were not putting our heads in the sand. The message, she felt, was a fantastic message about the profession, and the time to state it was now.

Following a fifteen minute break, the Committee returned to its consideration of the subcommittee's proposals for adoption of rules and comments in response to the amendments to the Colorado Constitution permitting medical and recreational use of marijuana.

A member who had not previously spoken began his comments by saying that the subcommittee had done a terrific job, and he joined in the comments of prior speakers who supported the subcommittee's proposals. Noting the observation that the law regarding marijuana usage is in flux, this member pointed out that the law is always in flux; given that condition, he asked, can the rules of ethics be inflexible? The Colorado electorate has adopted constitutional amendments permitting marijuana use and initiating a new industry, lawful under Colorado law. Are Colorado citizens to be unable to get the advice of lawyers about that law? That would be preposterous, the member said. Advising is a lawyer's role. Now the highest frame of Colorado law, the Colorado Constitution, permits this activity. It would be peculiar to say that lawyers may not advise about the ensuing issues. To say that would be to abrogate Colorado's position in a federal system. Can we acknowledge movement at the state level but say that lawyers may not advise? Already, the Colorado Bar Association's affiliates are providing continuing legal education programs on issues of marijuana law; are they aiding and abetting the violation of Federal law? We have previously seen important Rules changes in the areas of client confidentiality to accommodate conflict checks in inter-firm lawyer moves. More importantly now, we need to protect the body of the law. Those who changed that body of law by amending the Colorado Constitution are entitled to receive our advice about the changed law. Mention had previously been made of the lawyer's role during the era in which important civil rights laws were adopted; in the days in which pressure grew

for those changes, lawyers advised people who were burning their draft cards; similar lawyer involvement was seen in the overturning of miscegenation laws by the *Loving* case. Lawyers sat in protest on civil rights matters. Now there is another movement, and we cannot tell what its trajectory is. The rules governing lawyers' professional conduct should accommodate the bar's participation in this current movement, too.

Taubman told the Committee that, during the break, the Chair had asked him specifically to respond to a previous comment by a member that the battle was being fought in the wrong forum. He said he disagreed with that assessment. Clearly, if the Federal law criminalizing marijuana usage were changed, that would obviate the need for changes such as the subcommittee has proposed. But there are two different issues. This is not a question of changing Federal law to permit people to use marijuana. Instead, we are considering whether lawyers should be able to represent clients in their use of, or their commercial dealings in, marijuana. Even if one agrees in principle with the Federal proscription of marijuana usage, one can recognize the need for lawyers to give advice about the entire legal framework.

Another member said he found the discussion to be "impassioned." How would a rules change look? It bothered him very little, he said, that the Court would adopt a modification to the Rules of Professional Conduct to address the issues of marijuana law practice. He added that, when he first heard of this topic it seemed to be directed toward punitive laws targeting minorities. He had, he said, no problem being "unpopular" in this case. As lawyers, we can look at the legal situation and conclude, that there are two laws here and we don't permit you to pick one or the other. It is often the case, for instance, that an issue may be directed to the Public Utilities Commission or to the Legislature; we deal with such situations all the time, picking the rules — or the forum — that we are most comfortable using for a resolution of a problem. It is in such a case of duality that the people need lawyers. So what if things are evolving. If a rule dealing with marijuana law practice is going to be useful, it is now, while things are in flux.

The Chair indicated that she would like to proceed with a straw vote, but first she asked Webb to respond to the discussion that had occurred.

Webb said that he had five points to make:

1. The discussion had covered the matter of prosecutorial discretion and the need for checks and balances on the OARC.

2. The discussion had heard claims that the proposed changes were premature and the matter should be left to resolution by the Supreme Court on a case-by-case basis. But he could not envision any flow of cases to that Court that would resolve the issues surrounding the fact that the conduct to be advised about is both lawful and unlawful under the two separate legal regimes.

3. Only two out of fifty states have thus far approved the recreational use of marijuana; there is no groundswell that would prompt a quick, resolving, action by Congress.

4. As to whether marijuana usage, medical or recreational, violates Federal law can be left to the United States Attorney to deal with. The subcommittee's proposals deal with only one matter, giving lawyers immunity from loss of license if their conduct comports with the Rules as they would be changed by adoption of the subcommittee's proposals

5. He would hope that this Committee would not make its decisions whether to propose to the Court that changes be made to the Rules of Professional Conduct by looking to

headlines or spin doctors. We can leave it to the Court to make the required policy decisions.

6. (And a sixth point.) The subcommittee's proposed changes are a matter of public interest. More Coloradans voted in favor of Amendment 64, the recreational-marijuana-usage amendment of 2012, than voted for the presidential winner in Colorado. And all of the electorate had been informed, by the "Blue Book," that the use of marijuana would remain illegal under Federal law.

Webb concluded by saying that he hoped the Committee would get beyond the initial issue of whether to consider any changes and would move on to a consideration of the substance of the proposed changes.

The Chair proposed a straw vote on these alternatives: (1) Adopt the subcommittee's proposals. (2) adopt the OARC'S approach and propose no changes to the Rules. (3) Take some middle ground providing for disciplinary insulation for giving advice about marijuana but prohibiting a lawyer's personal use of marijuana.

To the Chair's proposal, a member objected that the first two alternatives were "binary": If either the first or second alternative prevailed, then there would be no occasion to consider the third alternative. To that, two members suggested that the first vote be taken on Alternative (2), doing nothing. If that vote failed, then the Committee could vote upon whether to proceed with Alternative (1) or Alternative (3). To that, the Chair objected that she could see herself voting for Alternative (3) and for neither Alternative (1) or Alternative (2); that prompted another member to say that, if Alternative (2) prevailed, he would want to vote for Alternative (3).

To all of that, Webb noted that the essential first choice was either to do something or to do nothing. And to that, the members responded in chorus that they wished to do something.

A member then asked whether the Committee wanted to adopt the proposed comment to Rule 8.4? Did they want to adopt proposed Rule 8.6? With or without tinkering? And to that, another member pointed out that the Committee had not yet decided whether to take the whole package as proposed by the subcommittee. And to that, the Chair said her point had been made: Could the Committee determine to permit a lawyer to give advice about marijuana law while still subjecting the lawyer to discipline for personal use of marijuana?

A member asked the Chair why she would want to draw the line between advising and using; if it were public relations she was worried about, he said, his answer would be, who cares?

But the Chair said she saw a policy need for the Rules to permit lawyers to do their job, to provide legal services. But it was a different policy question as to whether lawyers themselves can engage in activity which is directly violative of Federal law. She proposed being "surgical" and dealing with those policy matters. The member who had asked why the Chair would want to draw the line as she was proposing quipped that she had answered his question — but not satisfactorily.

In answer to a member's question whether the Chair's proposal would permit a lawyer to advise a client about how to set up a pot shop but would subject the lawyer to discipline if the lawyer owned a pot shop himself, the Chair replied affirmatively, adding that she saw that as a reasonable compromise, permitting the lawyer to advise but prohibiting active conduct that was violative of Federal law.

A member suggested that the Chair's position would be a reversal of the position taken by the CBA Ethics Committee in its medical marijuana opinion, Opinion № 124; that opinion had concluded

that a lawyer's personal use of medical marijuana in compliance with the first amendment to the Colorado Constitution would not adversely reflect on the lawyer's fitness for purposes of Rule 8.4(b). He doubted whether the Committee would want to undermine Opinion Nº 124 as, he believed, the Chair's proposal would do.

To that, the Chair responded that she saw no inconsistency. The ethics committee had crafted Opinion Nº 124 as it did in order to avoid issuing an opinion on the question of whether a lawyer could advise another about medical marijuana use given the constrictions of Rule 1.2(d); the committee had seen an opening to, at least, deal with the personal-use issue as a matter of fitness under Rule 8.4(b). That position, she said, could survive if we simply added a clarifying amendment. the Chair's explanation did not satisfy the member who had worried about undermining Ethics Opinion Nº 124.

But the Chair's comments prompted another member to say that, if necessary, he would accept a comment under Rule 8.4(b) that would clarify that personal use of marijuana in compliance with Colorado law would not by itself adversely reflect on a lawyer's fitness for purposes of Rule 8.4(b). He would also support some explanation under Rule 1.2 regarding a distinction between what is prohibited by that rule — counseling or assisting a client in the violation of law — and what is permitted — representation in a criminal case in defense of prior conduct, "as has been done for hundreds of years."

To that comment, the lawyer who had commented, early in the discussion, with how she been struck with how many lawyers were concerned about whether they could give advice about marijuana usage asked whether a lawyer's representation of a participant in the marijuana "grow" business in the negotiation of a lease for that purpose would be providing advice or giving assistance to a crime. The member who had last previously spoken said he would consider such lease negotiation to be prohibited counseling or assistance.

A member who had participated substantially in the Committee's discussion before it took its break said that he acknowledged the substance of the Chair's point that the primary role of the lawyer is to give advice about the law. That is why there is a legal profession, and that is why only lawyers are permitted to give advice about the law; these are essential bases for the Rules of Professional Conduct. The policy underpinnings about that role of the lawyer do not give a basis for condoning a lawyer's personal use of marijuana in violation of Federal law. Yet the fitness issue does serve as a basis for Opinion Nº 124 of the CBA Ethics Committee; that issue has not been entirely ignored. The Federal prosecutors can still file charges against a lawyer for her personal use of marijuana; the ethics committee would simply guide the OARC to a conclusion that the Federal crime did not, of itself, call into question the lawyer's fitness to represent clients. That's all that would need to be said: Personal use of marijuana in compliance with Colorado law is not a "fitness" issue. Why state that formally in a rule or a comment? Because it would clarify the answer. But it would not be critical to do that.

A member asked whether a lawyer should be subject to discipline for setting up his own grow or sale business. If he can advise others in that regard, why should he not be permitted to do it himself?

The member who had last previously spoken responded that there is a difference: Personal use, in conformity with Colorado law but in violation of Federal law does not implicate fitness. But personal participation in the substantial activity of commercial engagement, in a criminal business enterprise, would, it could be argued, implicate fitness.

The Chair said that she was surprised by that last response. The member who had made that response said he thought we needed to run the question of personal involvement in the industry to ground and then see whether the subcommittee's proposals were appropriate as applied to that activity. He believed that a reference to "noncommercial, private" usage might be a simple way of distinguishing the

two kinds of personal activity and thereby excluding entrepreneurial, commercial activity from that which would be condoned by the rules changes. But, he said, that was the tail of the dog; the Committee should concentrate on the question of giving advice to the marijuana industry.

A member moved the adoption of the subcommittee's report, subject only to "linguistic revision"; the motion was seconded. But, in response to that motion, another member said he thought it unworkable to first say that the report was approved and then to commence on retooling of the proposals. He was not, himself, ready to give a broad approval to the subcommittee's work.

The movant said he would change his motion to one for a straw vote on the subcommittee's report. The Chair noted that that course would leave open the issue, focused on late in the preceding discussion, of a lawyer's personal involvement in commercial marijuana activities.

Webb suggested that the Committee first vote on the subcommittee's proposal to add Rule 8.6—

> Notwithstanding any other provision of these rules, a lawyer shall not be in violation of these rules or subject to discipline for engaging in conduct, or for counseling or assisting a client to engage in conduct, that by virtue of a specific provision of the Colorado Constitution (and in implementing legislation or regulations) is either (a) permitted, or (b) within an affirmative defense to prosecution under state criminal law, solely because that same conduct, standing alone, may violate federal criminal law.

In answer to another member's question, Webb agreed that this provision would permit a lawyer not only to use marijuana in conformity with Colorado law but also to engage in commercial marijuana activities in conformity with that law. But, he said, the language could be changed to preclude commercial activities. As the Chair then put it, the vote would be between Rule 8.6 as proposed by the subcommittee and Rule 8.6 as amended to permit only personal use and not personal commerce.

A member posed this situation: A Colorado lawyer negotiates, on behalf of a Colorado client, with a California grower for a marijuana supply. If the Federal prosecutors secured a conviction of the client, the lawyer would be exposed to a Federal charge of aiding and abetting the crime. Webb responded to the example by answering that, if the lawyer's activities in the course of the representation were in accord with Colorado law, Rule 8.6 as proposed would preclude discipline.

The Chair expressed her confusion: She had thought that the vote would go only to the question of whether a lawyer should be permitted to engage in personal marijuana use in conformity with Colorado law, not the question of whether he can give advice to others about marijuana activities. That is, she had thought the purpose of the vote was to decide whether the Committee like "the middle ground."

Another member said she thought the first decision should be whether to condone the giving of advice — or assistance — to clients with respect to their activities. Then the Committee could turn to the lawyer's personal activities, whether merely using or also engaging in commercial activities.

A member suggested, as a way of setting up that vote, that the text of Rule 8.6 be considered as if it had been changed to delete the words "for engaging in conduct, or" and instead read as follows:

> Notwithstanding any other provision of these rules, a lawyer shall not be in violation of these rules or subject to discipline ~~**for engaging in conduct, or**~~ for counseling or assisting a client to engage in conduct, that by virtue of a specific provision of the Colorado Constitution (and in implementing legislation or regulations) is either (a) permitted, or (b) within an affirmative defense to prosecution under state criminal law, solely because that same conduct, standing alone, may violate federal criminal law.

That vote was taken and that version of Rule 8.6 was approved by the Committee.

But a member questioned the meaning of the vote, noting that the Committee had not thereby voted to prohibit either a lawyer's personal use of marijuana or his personal involvement in commercial marijuana activities. Webb agreed with that and said it would create more problems than were solved if the proposed rule were left in this condition and there were no change in Comment [2A] to Rule 8.4. He suggested that an easy fix to proposed Comment [2A] to Rule 8.4 would be to refer there to "personal, noncommercial" use. The comment, modified in accord with that proposal, would read—

> [2A] Conduct of a lawyer that by virtue of a specific provision of the Colorado Constitution (and in implementing legislation or regulations) is either (a) permitted, or (b) within an affirmative defense to prosecution under state criminal law, does not reflect adversely on the lawyer's honesty, trustworthiness, or fitness in other respects, solely because that same conduct, standing alone, may violate federal criminal law. This comment specifically addresses two constitutional amendments: Article XVIII. Miscellaneous,§ 14. Medical use of marijuana for persons suffering from debilitating medical conditions, and Article XVIII. Miscellaneous,§ 16. Personal use and regulation of marijuana. The phrase "solely because" clarifies that a lawyer's ***personal, noncommercial*** use of marijuana, while itself permitted under state law, may cause a lawyer to violate other state laws, such as prohibitions upon driving while impaired, and other rules, such as the lawyer's duties of competence and diligence, which may subject the lawyer to discipline. See Rules1.1 and 1.3. The phrase "standing alone" is explained in Comment [2] to Rule 8.6.

A member, who had been opposed to the subcommittee's report in its entirety, suggested that the entire matter be returned to the subcommittee for further work. Another member agreed, commenting that the Committee was now uncertain as to how the provisions would actually read, and the subcommittee should be given an opportunity to clarify matters.

Another member noted that, by the vote, the Committee had indicated that proposed Rule 8.6 was acceptable without the words "for engaging in conduct, or," leaving aside the question of whether the original proposal, *with* those words, was also acceptable.

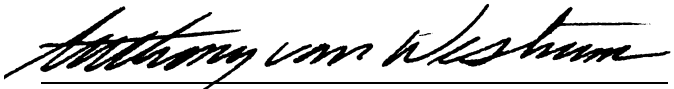
Webb said that, if the direction of the Committee was to make a distinction between a lawyer's personal use of marijuana (permitted) and his personal involvement in commercial marijuana activities (disciplinable), that could be done.

Upon a vote, the Committee determined to return the matter to the subcommittee to develop alternatives on how to deal with a lawyer's personal use of marijuana and a lawyer's personal involvement in commercial marijuana activities.

V. *Adjournment; Next Scheduled Meeting.*

The meeting adjourned at approximately 11:50 a.m. The next scheduled meeting of the Committee will be on Friday, July 26, 2013, beginning at 9:00 a.m., in the Supreme Court Conference Room.

RESPECTFULLY SUBMITTED,



Anthony van Westrum, Secretary

[These minutes are as approved by the Committee at its Thirty-sixth Meeting, on July 26, 2013.]

COLORADO SUPREME COURT

STANDING COMMITTEE ON THE RULES OF PROFESSIONAL CONDUCT

Submitted Minutes of Meeting of the Full Committee
On July 26, 2013
(Thirty-sixth Meeting of the Full Committee)

The thirty-sixth meeting of the Colorado Supreme Court Standing Committee on the Rules of Professional Conduct was convened at 9:00 a.m. on Friday, July 26, 2013, by Chair Marcy G. Glenn. The meeting was held in the Supreme Court Conference Room on the fourth floor of the Ralph L. Carr Colorado Justice Center.

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

Present as guests were Diana M. Poole, the director of the Colorado Lawyers Trust Account Foundation; Philip E. Johnson, of the law firm of Bennington Johnson Biermann & Craigmile, LLC, the president of the board of directors of the COLTAF Foundation; and William A. Bianco, of the law firm of Davis, Graham & Stubbs, a member of that board of directors. Also present was Cynthia F. Fleischner, the current chair of the Colorado Bar Association Ethics Committee, and Judge Daniel W. Taubman, of the Colorado Court of Appeals, a former chair of the Colorado Bar Association Ethics Committee.

I. *Meeting Materials; Minutes of May 3, 2013 Meeting; Announcements; Disclosures.*

The Chair had provided a package of materials to the members prior to the meeting date, including submitted minutes of the thirty-fifth meeting of the Committee, held on May 3, 2013. Those minutes were approved as submitted.

II. *Passing of Prof. James E. Wallace*.

The Chair told the members that James E. Wallace, professor emeritus, University of Denver Sturm College of Law, had passed away in May 2013. Prof. Wallace had been one of the original appointees to the Committee when it was formed in 2003 and had been a principal participant in the Committee's long effort to review the American Bar Association's Ethics 2000 Rules of Professional Conduct and adapt them for the Supreme Court's eventual adoption in Colorado. With nods of agreement from the members, the Chair said Prof. Wallace had been a wonderful person.

III. *ABA Model Rules Changes.*

At the Chair's request, Michael H. Berger reported that the subcommittee considering recent changes made by the American Bar Association has drafted a report to the Committee, which draft is now

being reviewed by the subcommittee members and will be ready for presentation to the Committee at its next meeting.

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

The Chair noted that the Committee had briefly considered, at its twenty-eighth meeting on August 19, 2010, the Supreme Court's opinion in of *A.L.L. v. People, in the Interest of C.Z.*, 226 P.3d 1054 (Colo. 2010). In that dependency and neglect case, the Court determined that

> an appointed appellate lawyer who reasonably concludes a parent's appeal is without merit must nonetheless file petitions on appeal in accordance with C.A.R. 3.4, which requires that petitions on appeal from D & N proceedings include, inter alia, a statement of the nature of the case, concise statements of the facts and legal issues presented on appeal, and a description and application of pertinent sources of law. See C.A.R. 3.4(g)(3).

At that meeting, the Committee had determined to form a subcommittee to develop, in light of that opinion, an appropriate comment to Rule 3.1, which proscribes "[bringing or defending] a proceeding, or [asserting or controverting] an issue therein, unless there is a basis in law and fact for doing so that is not frivolous." But, the Chair now noted, the subcommittee had not yet been staffed, and she called for volunteers now to join the subcommittee under Cynthia F. Covell's chairmanship.

V. *Amendment of Rule 1.15.*

The Chair requested James S. Sudler III, chair of the subcommittee considering revisions to Rule 1.15 — including revisions intended to obtain comparability in the rates paid by banks on COLTAF accounts — to report on the subcommittee's recommendations.

Sudler began by saying that the subcommittee had many meetings, with dedicated service by its members, including, specifically, COLTAF guests Diana Poole, Philip Johnson, and William Bianco.

At its thirty-fourth meeting, on February 1, 2013, the Committee had approved, in principle, the subcommittee's recommendation that existing Rule 1.15 be divided into five separate rules in an effort to make the requirements related to safeguarding client and third-person property more accessible to lawyers. That division, Sudler said, makes sense when one considers the various purposes of the provisions. He explained—

> Rule 1.15 is the basic rule. Rule 1.15B delineates the accounts that a lawyer must maintain. Rule 1.15C deals with the use of a lawyer's trust accounts, providing, for example, restrictions on the means that a lawyer may use to deposit funds into and withdraw funds from those accounts. Rule 1.15D establishes the record-keeping requirements for such accounts and is drawn largely from the ABA model rule. Rule 1.15E is entirely new, delineating the requirements to which a financial institution must accede if it wishes to be approved as an institution that a Colorado lawyer may use for trust accounts.

Sudler noted that, at its thirty-fourth meeting, on February 1, 2013, the Committee had considered putting the provisions dealing with the approval of financial institutions in a chief justice directive, because the provisions establish an approval process that will entail agreements between financial institutions and Regulation Counsel in which lawyers will not have direct interests. Lawyers will be required to utilize "approved financial institutions" for trust accounts but will not be required to look beyond a list of such institutions, which will be maintained by Regulation Counsel, to determine whether any particular financial institution actually meets the requirements for approval. But, at that meeting, the Committee had recognized that substantive financial matters, such as the fees that approved financial institutions

may charge, should be locked down in a rule rather than left to a chief justice directive, yet should be separated from the provisions that govern lawyer conduct; the subcommittee's proposal for Rule 1.15E would accomplish that.

Sudler then embarked on a more detailed review of each of the rules' provisions.

Proposed Rule 1.15A is the basic rule, requiring that the lawyer segregate from the lawyer's own assets all funds and property in which clients or other persons have interests. The content of that rule is derived from Rule 1.15 of the American Bar Association's Model Rules, but existing Colorado Rule 1.15 has already diverged substantially from that ABA text.

Proposed Rule 1.15A(a) continues the basic requirement, found in current Rule 1.15(a), that client and third person property that a lawyer holds in connection with a representation be held separate from the lawyer's own property. But, rather than establish the permitted location of trust accounts, as the current provision does, Rule 1.15A(a) refers to Rule 1.15B for provisions delineating the features of such accounts, including their location.

Proposed Rule 1.15A(b) is a replication of current Rule 1.15(b), requiring prompt delivery of funds and property to the persons entitled to them and a rendering of an accounting thereof.

Proposed Rule 1.15A(c) is drawn from current Rule 1.15(c), dealing with disputes over property held by a lawyer, although it speaks more generally of a "resolution of the [competing] claims" instead of "an accounting and severance of their interests."

Proposed Rule 1.15A(d) is a cross-reference to the other rules — Rule 1.15B, Rule 1.15C, Rule 1.15D, and Rule 1.15E — guiding the lawyer to those provisions with respect to "funds and other property, and to accounts, held or maintained by the lawyer, or caused by the lawyer to be held or maintained by a law firm through which the lawyer renders legal services, in connection with a representation."

Proposed Rule 1.15B delineates the accounts that the lawyer, or the lawyer's law firm, must maintain.

Proposed Rule 1.15B(a) characterizes the two types of accounts that the lawyer or the lawyer's law firm must maintain: trust accounts (Rule 1.15A(a)(1)) and business accounts (Rule 1.15A(a)(2)). The business account provision expands, beyond current Rule 1.15(d)(2), the list of terms that may be used to designate the account into which the lawyer must deposit funds received for legal services by permitting — in addition to"business account," "office account,""operating account," or "professional account" — any "similarly descriptive term that distinguishes the account from a trust account and a personal account."

Proposed Rule 1.15B(b) defines "COLTAF account," using the "pooled" account, "nominal amounts" and "short periods of time" terminology of current Rule 1.15(h)(2) for the definition; but, unlike current Rule 1.15(h)(2), the proposal leaves to another provision — Rule 1.15B(e) — the details about interest and insurance. The proposal abandons the odd structure of current Rule 1.15(h)(2), which states that the lawyer "shall establish" a COLTAF account if "the funds" are not held in accounts in which interest is paid to clients or third persons but which does not also mandate that "the funds" shall be deposited in such COLTAF account — the closest the current rule comes to such a mandate being found in Rule 1.15(h)(2)(b), which requires that the COLTAF account "shall include" client and third person funds that are nominal in amount or are to be held for a short period of time. In the proposal, the deposit requirement is affirmatively stated in proposed Rule 1.15B(g), which directs all entrusted fund

either into a COLTAF account or into a trust account that, as required by proposed Rule 1.15B(h), complies with all of the specifications for trust accounts found in Rule 1.15B(c) through Rule 1.15B(e).

Proposed Rule 1.15B(c) requires that each lawyer trust account be designated a "trust account," with a COLTAF account to be designated a "COLTAF Trust Account." Unlike the current rule, though, the proposal would also permit any "additional descriptive designation that is not misleading."

Proposed Rule 1.15B(d) generally requires that each trust account be maintained in an approved institution — that is, one listed by Regulation Counsel pursuant to the provisions of Rule 1.15E — *unless* the persons whose funds are to be held in trust agree otherwise under these conditions: they are "informed in writing that Regulation Counsel will not be notified of any overdraft on the account" and, additionally, they give their "informed consent" to the holding of their funds in unapproved institutions. Sudler commented that the subcommittee had wrestled with this matter but concluded that there might be circumstances where the entrusting persons had reasons of their own for wanting the funds held in institutions that were not on the approved list and that they should be permitted to do so if they had been warned that Regulation Counsel would not be notified of overdrafts in such cases.

Similarly to the choice offered by proposed Rule 1.15B(d) for use of unapproved institutions, proposed Rule 1.15B(e) permits entrusting persons to decide that their funds will be held in non-insured accounts. That, of course, might be the case where the entrusting persons' preferences are, say, for a foreign institution.

Proposed Rule 1.15B(f), like current Rule 1.15(g), permits the lawyer to make deposits of the lawyer's own funds into a trust account to cover "anticipated service charges or other fees for maintenance or operation" of the account.

Proposed Rule 1.15B(g), as Sudler had indicated earlier, directs all entrusted fund into COLTAF accounts by default — all entrusted funds "shall be deposited in a COLTAF account unless . . . " — but permits use of non-COLTAF accounts if they comply with proposed Rule 1.15B(h). Sudler pointed out that this has been drafted with a view toward compliance with the requirements of judicial opinions regarding the permitted use of "IOLTA" accounts.

Proposed Rule 1.15B(h), permits the use of non-COLTAF accounts if the accounts meet all of the requirements contained in Rule 1.15B(c) through Rule 1.15B(e). There is no requirement that the entrusting persons agree to the use of either a COLTAF or a non-COLTAF account — the choice lies with the lawyer unless the entrusting parties participate in the choice by their agreement with the lawyer. But, Sudler noted, it is likely that lawyers will want to use COLTAF accounts because of the administrative ease of doing so, with the "nominal" interest earnings being distributed to the COLTAF Foundation by the bank without the lawyer's need to participate in accounting and distribution of the earnings. [Later in his remarks, Sudler raised as an open issue the question of whether a lawyer could ever be entitled to share in interest or dividends earned on any trust account; like current Rule 1.15(h)(1), proposed Rule 1.15B(h) provides that the "lawyer and the law firm shall have no right or claim to such interest or dividends."]

Proposed Rule 1.15B(i) contains a "look-back" provision that is very similar to current Rule 1.15(h)(3), directing the lawyer to request a refund from the COLTAF Foundation of interest paid on funds if the funds have "mistakenly" been held so long, or are of such amount, "that interest or dividends on the funds . . . exceeds the reasonably estimated cost of establishing, maintaining, and accounting" for a trust account in which the interest would have gone to the entrusting parties in the first instance.

Proposed Rule 1.15B(j), like the ninth sentence of current Rule 1.15, contains the lawyer's "deemed consent" to the financial institutions' reporting and production in accordance with the agreement reached with Regulation Counsel pursuant to Rule 1.15E and the lawyer's undertaking to "indemnify and hold harmless the financial institution for its compliance with such reporting and production requirement."

Sudler described proposed Rule 1.15C as the easiest of the proposed rules. It continues the provisions currently found in Rule 1.15(i), which are applicable not just to COLTAF accounts but to all trust accounts, such as the proscription against the use of debit cards, and the requirement for lawyer supervision of trust account transactions and reconciliation.

Proposed Rule 1.15D contains the record-keeping requirements; like the provisions of current Rule 1.15(j) and Rule 1.15(k), the provisions are drawn from ABA Model Rule 1.15. But, Sudler noted, changes have been made to match other Colorado rules changes, such as speaking of "copies of written communications setting forth the basis or rate for the fees charged by the lawyer as required by Rule 1.5(b))" in the provision requiring retention of copies, as well as " copies of all writings, if any, stating other terms of engagement for legal services." In that regard, Sudler pointed out that current Rule 1.15(j)(3) might itself be read to require full-blown "retainer and compensation agreements with clients" when in fact the only writing required by the Rules in that regard is the "writing setting forth the basis or rate for the fees charged by the lawyer" required by Rule 1.5(b). The subcommittee also modified the record-keeping requirements to accommodate banking practices, such as those that now make individual copies of canceled checks available only electronically and not by "photo static" copy.

Proposed Rule 1.15E contains the provisions governing the approval of financial institutions for lawyers' trust accounts. Sudler stressed that the proposal does not give Regulation Counsel any leeway to modify the requirements: The requirements must be met by any agreement with any financial institution if the institution is to be "approved." He added that adoption of proposed Rule 1.15E will necessitate Regulation Counsel pursuing new agreements with the financial institutions with which it currently has agreements, since the existing agreements will not contain all of the proposed requirements.

Sudler commented that the subcommittee had discussed the question of the geographic location of lawyer's trust accounts: Currently, Rule 1.15 provides that trusts account must be "maintained in the state where the lawyer's office is situated . . . ." But what does it mean for an account to be "maintained" in a specific geographical location? Ultimately, the subcommittee decided to require that the account be in a financial institution that does business in Colorado. In discussing this aspect of the rule, the subcommittee focused on the circumstances of a multi-state law firm: The subcommittee agreed that it would be preferable for Colorado-based funds to be positioned where the interest accruals would benefit the Colorado Lawyers Trust Account Foundation, but it recognized that it is difficult, in some cases, to determine the "locale" of a representation or the situs of funds held in connection with the representation. As Sudler put it, the subcommittee wanted "Colorado funds to be held in COLTAF accounts"; it thrashed this question for a long time and, he hoped, its solution is a good one.

Sudler explained that the major conceptual change wrought by the subcommittee's revision is found in proposed Rule 1.15E(c)(7), which provides for "rate comparability" and reads as follows:

> (7) The financial institution agrees to pay on any COLTAF account not less than (i) the highest interest or dividend rate generally available from the financial institution on non-COLTAF accounts when the COLTAF account meets the same eligibility requirements, if any, as the eligibility requirement for non-COLTAF accounts; or (ii) the rate set forth in subparagraph (c)(9) below. In determining the highest interest or dividend rate generally available from the financial institution to its non-COLTAF customers, the financial institution may consider factors customarily considered by the financial institution when setting interest or dividends rates for its non-COLTAF accounts, including account balances,

> provided that such factors do not discriminate between COLTAF accounts and non-COLTAF accounts. The financial institution may choose to pay on a COLTAF account the highest interest or dividend rate generally available on its comparable non-COLTAF accounts in lieu of actually establishing and maintaining the COLTAF account in the comparable highest interest or dividend rate product.

The language is precisely worded, he said, to require that the rate of interest or dividend on a COLTAF account be the same as on a "comparable account" and to establish what is a "comparable account." But, he said, the beauty of the proposal is that the banks do not need to perform the calculation of their "comparable rate"; they can choose, instead, to utilize proposed Rule 1.15E(c)(9) and pay the "benchmark rate, which COLTAF is authorized to set periodically, but not more frequently than every six months, to reflect an overall comparable rate offered by financial institutions in Colorado . . . ."

Proposed Rule 1.15E(c)(8) delineates the four types of accounts that may be used for COLTAF accounts.

Proposed Rule 1.15E(c)(10) lists the "allowable reasonable COLTAF fees" that a bank may charge, under its agreement with Regulation Counsel, against interest and dividends earned on COLTAF accounts. The deductible fees must be computed on a per-account basis; a bank may not deduct fees accrued on one COLTAF account from earnings from another COLTAF account. But a bank is not limited to earnings in determining all of its fees with respect to COLTAF accounts; although other fees cannot be deducted from the COLTAF earnings, "[a]ny fee other than allowable reasonable COLTAF fees are the responsibility of, and the financial institution may charge them to, the lawyer or law firm maintaining the COLTAF account."

Proposed Rule 1.15E(c)(12) leaves it to COLTAF to monitor bank compliance with the COLTAF agreements with Regulation Counsel that give them "approved financial institution" status; Regulation Counsel and lawyers need not perform that task.

Turning to the proposed comments for the revised series of Rule-1.15 rules, Sudler pointed out that the subcommittee omitted current Comment [1] to Rule 1.15, which exceeds the substantive content of the rule itself by gratuitously stating that "[a] lawyer should hold property of others with the care required of a professional fiduciary." The subcommittee also omitted current Comment [7] and its irrelevant reference to a "client's security fund."

The first of the comments that the subcommittee has retained for its revised series of Rule-1.15 rules describes a lawyer's obligation to exercise a "good faith judgment in determining initially whether funds are of such nominal amount or are expected to be held by the lawyer for such a short period of time that the funds should not be placed in an interest-bearing account for the benefit of the client or third person." This text is, Sudler noted, pertinent to the legality of IOLTA accounts under constitutional caselaw; he said that he was not aware of any disciplinary action in Colorado arising in this connection.

The second comment for the revised series of Rule 1.15 Rules deals with the multistate-practice situation. The subcommittee identified two issues that it felt needed to be addressed by the whole Committee, issues that it identified on page 5 of its report to the Committee (page six of the meeting materials): (1) May the person whose funds are held in a trust account consent to the account being one that does not bear interest; and (2) may a lawyer share in the earnings on funds held in a trust account in proportion to the interest that the lawyer may have in those funds?

As to the first of those issues, a number of subcommittee members felt that, if funds need not be in interest-bearing accounts, there would be a disincentive against the holding of funds in accounts from which the interest would flow to the COLTAF Foundation.

The subcommittee's report provided this example of a situation presenting the second issue, a lawyer's entitlement to a share of earnings on a trust account:

> An example of this situation is when a lawyer represents a plaintiff in a personal injury case. The matter settles with a settlement check made to both lawyer and client which may be deposited in non-COLT AF trust account. The lawyer through a contingent fee agreement is entitled to a percentage of the settlement. After the settlement funds are received by the lawyer, but before those funds are disbursed, they may earn interest. Current Rule 1.15 and Proposed Rule 1.15B(h) provide that a lawyer cannot take any of the interest earned on those funds while they are in trust.

Sudler explained that the delay in disbursal might be caused by the need to get an insurance-proceeds check cleared through the trust account institution. Current Rule 1.15 denies the lawyer the right to receive any share of the account earnings, even on that portion that will eventually be disbursed to the lawyer.[1]

The subcommittee could not determine what recommendation to make to the Committee with regard to either of these issues, Sudler said, as he concluded his presentation.

The Chair noted that, at its thirty-fourth meeting, on February 1, 2013, the Committee approved the subcommittee's proposal that current Rule 1.15 be broken into a series of five co-equal rules in an effort to make the provisions regarding the safekeeping of property, including the various account requirements, more comprehensible than they are presently. That division, she added, seems now to be something the Committee could assume had been approved and would not be reversed at this stage of the revision.

Outlining the discussion to follow Sudler's report, the Chair commented that there was a lot in the subcommittee's report and proposal and noted that the Committee members may have made a number of notes in marking up the proposal prior to the meeting. She asked that, given the plethora of changes made by the subcommittee, the members restrict their comments during the meeting to matters of substance and direct wordsmithing to Sudler by email and other communication after the meeting; the subcommittee could review all of the comments and provide, with revised text at the next Committee meeting, a redline reflecting all of the changes made to the draft that was submitted to this meeting.

The Chair opened the floor to questions and immediately took the floor to ask questions of her own.

In response to the Chair's inquiry whether the numbering of the first of the new 1.15 series should simply be "Rule 1.15" rather than "Rule 1.15A," with the second of the series to be numbered "Rule 1.15A," a subcommittee member defended the numbering system that the subcommittee had proposed, both because it recognizes that each of the rules in the series is of equal dignity with each of

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1. Rule 1.15(h)(2), C.R.P.C., provides in part [emphasis added]—

(h) COLTAF Accounts:

(1) Except as may be prescribed by subparagraph (2) below, interest earned on accounts in which the funds are deposited (less any deduction for service charges or fees of the depository institution) *shall belong to the clients or third persons whose funds have been so deposited; and the lawyer or law firm shall have no right or claim to such interest*.

(2) If the funds are not held in accounts with the interest paid to clients or third persons as provided in subsection (h)(1) of this Rule, a lawyer or law firm shall establish a COLTAF account, which is a pooled interest-bearing insured depository account for funds of clients or third persons that are nominal in amount or are expected to be held for a short period of time in compliance with the following provisions:

(a) *No interest from such an account shall be payable to a lawyer or law firm.*

the others, as well as with all of the other rules within the Rules of Professional Conduct, and because it identifies the Colorado lawyer account rules, including the trust account rules, as uniquely different from ABA Model Rule 1.15.

The Chair questioned the shortening of the phrase that opens current Rule 1.15(b) — "Upon receiving funds or other property in which a client or third person has an interest," — to "Upon receiving funds or other property of a client or third person" in the correlate, proposed Rule 1.15A(b), deleting the words "has an interest." The Chair suggested that the current phrasing identifies a difference between knowledge that the property belongs to a person and just a mere claim that the person may have a claim to the property. The change, the Chair said, suggests that ownership must now be an objective fact.

Sudler responded that the subcommittee found the current phrasing too ambiguous, seemingly allowing any claimant, by his claim, to create an immediate requirement that the property to which he has made his claim be segregated. Another member of the subcommittee pointed out that the provision deals with the obligation to distribute property promptly to those who are entitled to it — the only implication being that there is no alternative claim to what is to be distributed — leaving it to the next provision, proposed Rule 1.15A(c), to deal with contending claims to property.

The Chair noted that, like current Rule 1.15, the proposal repeatedly uses the term "Regulation Counsel"; the Chair suggested that, if the term is not defined somewhere in the existing Rules,[2] a definition should now be added.

The Chair noted that current Rule 1.15(d)(3) requires a lawyer who has discovered that funds have been held in a COLTAF account "in a sufficient amount or for a sufficiently long time" such that it would have been feasible to hold the funds in a trust account created for the benefit of the persons to whom the funds belong — the Chair characterized the provision as the "look-back" provision — to request COLTAF "to calculate and remit trust account interest already received by it to the lawyer or law firm for the benefit of such client or third person in accordance with written procedures" established by COLTAF. The provision specifically states that the remittance is for the benefit of the person to whom the funds held in the COLTAF account belong. She contrasted that with proposed Rule 1.15B(i), which merely requires the lawyer to request a refund from COLTAF in accordance COLTAF's procedures but omits to note that the lawyer will then hold the remittance for the benefit of the person to whom the funds belong.

Sudler and other subcommittee members agreed with this observation and agreed that reference to the remittance being held for the benefit of the owner of the funds should be reinserted, if only to prevent an unintended adverse inference from the "legislative history" of the texts.

The Chair asked whether the benchmark rate, which proposed Rule 1.15E(c)(9) contemplates may be fixed by COLTAF from time to time, will be posted on the Internet; the draft rule does not require that posting as an aspect of the contemplated agreement between Regulation Counsel and an approved financial institution. Sudler pointed out that the proposal requires Regulation Counsel to "maintain a list of approved financial institutions," but it does not require a posting of the benchmark rate. Philip Johnson, attending the meeting as president of the board of directors of the COLTAF Foundation, agreed that such a posting would be a good idea; the Chair agreed that it need not be made a requirement under proposed Rule 1.15E.

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2. In the current Rules of Professional Conduct, the term "Regulation Counsel" is used only in Rule 1.15, without definition.

The Chair asked about the location of the six comments that have been proposed by the subcommittee for the entire proposed series of Rule 1.15 rules. Sudler suggested that they might be moved up to follow proposed Rule 1.15A, with a notation that they apply to all of the rules in the series.

The Chair concluded her series questions with the observation that the subcommittee's work product was marvelous, the result of a huge effort.

Referring to proposed Rule 1.15C(c), a member commented that he has represented lawyers who have not known what is required by the "reconciliation" of trust accounts. In response, a member of the subcommittee noted that it had wrestled with what more might be said in that provision but, in the end, had decided "to leave the matter to trust account school." It is, he noted, hard to write accounting rules into these rules of conduct; he suggested that Regulation Counsel might consider making the trust account manual used by the Office of Attorney Regulation Counsel available to the bar without charge. Another member of the subcommittee suggested that it might survey what, if anything, other states have added to their correlative provisions for guidance.

The Chair introduced Cynthia F. Fleischner. Fleischner applauded the proposal that a trust account manual, if indeed Regulation Counsel has one, be made available to the bar; she said the manual would be valuable to law office staff and would more efficiently inform the bar about what reconciliation entails than would an article in a bar publication.

A member approved the earlier statement that the numbering system proposed by the subcommittee was appropriate, as it would flag that the Colorado provisions on lawyer accounts, including trust accounts, are very different from ABA Model Rule 1.15. The Colorado Rules of Professional Conduct will generally follow the ABA numbering system, and the lawyer account rules, with their different numbering, will stand out as being different in substance from the ABA rules. The member added the suggestion that something might be said at the beginning of the series of Rule-1.15 rules to advise the reader about the nature of the package that follows — that this series is different in kind from the other rules.

That member, though, added that he was concerned about proposed Rule 1.15E. He asked whether it was appropriate to include in the Rules of Professional Conduct provisions that do not apply to lawyers. He noted that, in a number of provisions, the Rules make cross-references to substantive provisions lodged elsewhere in the Court's rules of civil procedure;[3] and he suggested that perhaps we could lodge the substance of proposed Rule 1.15E in some other location and make a similar cross-reference to it in these rules.

Sudler responded that the subcommittee had considered that suggestion at some length and then rejected it, in part because this Committee has no authority to deal with other areas of the Court's rules. It realized that the provisions guiding Regulation Counsel in reaching agreements with "approved financial institutions" do not directly apply to lawyers but are relevant to them in that they may maintain accounts only in such institutions, subject to the specific exceptions that the subcommittee has proposed.

A member of the subcommittee added that inclusion of the requirements for Regulation Counsel's agreement with approved financial institutions in this series of proposed rules has the simple advantage of providing for a coherent whole. Another member of the subcommittee agreed, commenting that she

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3. *See, e.g.*, the cross-reference in the definition of "professional company" in Rule 1.0(1) to a full definition of that term in C.R.C.P. 265; *and see* the reference in Rule 1.2(c) to the unbundling rules of by C.R.C.P. 11(b) and C.R.C.P. 311(b).

would have preferred lodging this detail in a chief justice directive, but that had not proved feasible and this solution provides for accessibility to the requirements.

Poole added that, while the requirements for agreements between Regulation Counsel and participating financial institutions do not directly apply to lawyers, the Court's only ability to enforce those requirements is by requiring lawyers to place their accounts only with financial institutions that have voluntarily agreed with what the Court thinks are necessary for those accounts, that is, with accounts that meet those requirements.

A member said that he found the subcommittee's recommendation to be a "phenomenal job" and that he liked a lot of the changes that had been made. But he seconded the earlier proposal that something be said at the outset of the series of rules to tell the reader what "these rules mean and why."

That member added that he wanted to clarify the meaning of "severance" and the handling of disputes in proposed Rule 1.15A(c), which compares to current Rule 1.15A(c) as follows:

> (c) When in connection with a representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer until there is ~~**an accounting and**~~ ***a resolution of the claims and, when necessary, a*** severance of their interests. If a dispute arises concerning their respective interests, the portion in dispute shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.

He noted that the current rule calls for "an accounting and a severance" of the claimants' interests, while the proposal calls for "a resolution of the claims" and, when necessary, a severance of their interests. The second sentences of the respective provisions, in identical language, calls for separation of the disputed portion of the property until the dispute is resolved. It has been his understanding, he said, that Regulation Counsel believes that "severance" must occur contemporaneously with the withdrawal of funds from a trust account — for example, for the lawyer to withdraw a now-earned "retainer" from a trust account, he must send an invoice "severing" the entitlement to the funds from the client who deposited them there. The member understood that Regulation Counsel believed that the funds could not be withdrawn until the severance — the sending of the invoice — had occurred. Now, he noted, the proposed wording is "until there is an accounting and a resolution of the claims and, when necessary, a severance of their interests." When, he asked, is severance "necessary"? He referred then to the description contained on page 7 of the subcommittee's report (page 8 of the materials provided to the members for this meeting):

> 4. Proposed Rule l.I5A(c) is basically the same as Current Rule l.15(c) but has been changed to clarify that claims of a lawyer, client or third party may be resolved short of some sort of formalized severance proceeding.

He was, he said, confused about when severance is needed — indeed, he was confused about the whole provision.

Another member said the provision had confused her, too; when she compared the Colorado provisions to ABA Model Rule 1.15(e),[4] she found the latter simply said, "until the dispute is resolved.

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4. Rule 1.15(e) of the ABA Model Rules of Professional Conduct read—

> (e) When in the course of representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.

Sudler began his response to these comments by exhaling, "Where to begin . . . ?" He summarized how lawyers at Regulation Counsel deal with these questions — which he characterized as "what should a lawyer do?" and "what does 'severance' mean?" — by saying he was not sure that they all dealt with the questions in the same way. He has, himself, been uncomfortable with the interpretation that leads to the requirement that an invoice be sent before an earned retainer be withdrawn from a trust account deposit. The proposed revision, he said, was the subcommittee's attempt to deal with the matter. Perhaps, he noted, a better solution would be to adopt the ABA terminology, as the other member had suggested, leaving the provision to deal solely with the resolution of disputes to funds and not include the circumstance of allocation when entitlements change — such as occurs when a retainer has been earned — without dispute.

A member who had been a member of the subcommittee noted that the proposed text would cover not only the earning of a retainer but also, for example, the action by which shares of stock are transferred on the books of a corporation and certificates issued in new names. Perhaps that is a "severance" of the kind contemplated by the proposed language.

Yet another member who had been a member of the subcommittee commented on the similar debate that had occurred in the subcommittee's deliberations. Claiming that he was not burdened by the fact of his having been on the subcommittee, he now proposed that the aberrant text be omitted and the provision restored to the ABA model, which deals only with the resolution of disputes and not to other severance actions. The member who had raised the issue approved of that solution.

That member, who had raised the severance issue, commented as an aside that he intended to raise, in the future after the adoption of these rule changes, a proposal to deal with "unclaimed funds" in trust accounts — funds as to which the lawyer either knows the identity of the owner but cannot locate that person or funds as to which, because of, say, an accounting mistake, the owner cannot be identified. This member's purpose would be, he said, to amend the rule to permit such funds to be transferred to the COLTAF Foundation. Another member pointed out that the proposal might implicate the State's escheat laws. When the Chair asked whether the proposer wished to make his proposal at this time, the proposer replied that he felt the current Rule 1.15 project should be completed first, before his proposition was pursued, and that perhaps it could then be pursued by the same subcommittee. He added that he felt the COLTAF Foundation was "leaving money on the table," subject to whatever might be required by escheat law.

Sudler pointed out to the Committee that, just the week of this meeting, a hearing board in a disciplinary case had noted that there is no Colorado commentary or case law establishing what is required by the "full accounting" provision within current Rule 1.15(b).[5] That is in contrast to other states' rules, which deal comprehensively with that concept. He asked that the subcommittee be directed to look into the concept with a view toward clarifying its meaning.

A member who had not spoken previously also commended the subcommittee's work product and added that he felt the Committee should recommend prompt action by the Court on the proposal. But he added, with respect to trust funds in which a person "claims an interest," that the current rule and the subcommittee's proposal both retain that terminology from the ABA model provision; and he noted that the topic is the subject of Opinion Nº 94 of the Colorado Bar Association's Ethics Committee. He

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5. Rule 1.15(b), C.R.P.C., states—

(b) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall, promptly or otherwise as permitted by law or by agreement with the client or third person, deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, promptly upon request by the client or third person, render a full accounting regarding such property.

did not regard the phrase "claims an interest" to be surplusage and felt the matter should be considered further.

The Chair asked that members of the Committee send to Sudler, by not later than the end of August, any comments that they might have about the subcommittee's proposal. But she also asked for a straw vote to gain the Committee's general view about the proposed series of Rule 1.15 rules.

Before that vote was taken, a member noted that the Committee had not yet considered two questions that the subcommittee had left for deliberation by the Committee: May a lawyer use, with the consent of those having interest in funds, a non-interest-bearing, non-dividends-bearing trust account?[6] May a lawyer share in the interest or dividend earnings of a trust account holding funds in which she has an interest? The Chair agreed that those questions needed discussion.

A member who had been a member of the subcommittee said that he was comfortable with the idea that funds could be held in non-earning accounts, noting that clients and other funds owners may have reasons for avoiding reportable income. As to the second of the questions, this member said that, in some cases, the lawyer may have, as a matter of law, a claim on a portion of the funds, albeit subject to conditions precedent to withdrawal or to unresolved disputes. The member postulated the case in which the lawyer's representation is "terminated on the courthouse steps" after funds are deposited in a settlement. It is a fiction, the member said, to assume that the lawyer can never have an interest in the deposited funds.

To those comments, another member who had been a member of the subcommittee asked that the two questions be considered one at a time. As to the first question, this member said that permitting funds to be held in non-earning accounts would create a loophole disadvantaging COLTAF. In her view, there should be earnings, and they should go either to the persons owning the funds or to COLTAF. The COLTAF possibility comes only when the funds are small in amount or are to be held for a short time. She likened the matter to the prudent-man standard of fiduciaries holding funds, suggesting that the funds should not be put under the bed, with no earnings. If the persons owing the funds do not want the earnings, they should go instead to COLTAF.

Another member of the subcommittee said that he had come down on the other side of this particular question when it was being discussed by the subcommittee. If the client or another person is putting the funds in the lawyer's trust, that person should be able to decide how the funds are to be handled. The member noted that, at the subcommittee's discussion, others had suggested that clients and others may have legitimate reasons for avoiding income that might entail reporting to United States or state tax authorities if earned. What, he asked, would be the reason for denying these persons the right to make that decision?

A member asked Poole for the COLTAF Foundation's position on the question. Poole replied that the Foundation would be concerned that permission within the rule to put funds in non-earning

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6. The question was posed on page 5 of the subcommittee's report as follows:

> The Subcommittee considered a similar issue: whether a client who is receiving the interest on the account should be allowed to consent to funds being held in a noninterest bearing account. Neither the Current Rule nor the Proposed Rule contains such a provision. The Committee as whole should determine whether to allow such a provision. The Subcommittee recognizes that theoretically a client should be allowed to consent to client funds being held in a non-interest bearing account when the client would otherwise be entitled to the interest. However, a significant amount of discussion by the Subcommittee concerned whether allowing such consent might undermine the use of COLTAF accounts for those funds that are appropriate for COLT AF accounts. Several members of the Subcommittee were opposed to permitting a client to consent to non-interest-bearing accounts.

accounts might become standard in lawyers' engagement agreements simply to avoid the need to maintain COLTAF accounts. The Foundation would prefer that the default be that funds be deposited in interest-bearing COLTAF accounts, if they are not held in accounts from which earnings are paid to those having interests in the funds.

The member who had expressed his comfort with the idea of non-earning accounts said he shared Poole's concern, but he noted that, if the proposal were amended to permit funds to be held in an non-earning account, it would require the owner's "informed consent" for the use such an account. The matter, he thought, could not just be hidden away in a fee agreement. To that, a guest asked how a regulator would be able to discern whether the consent had been properly obtained or simply made a part of an engagement form.

Another member of the subcommittee simply said that he found it exceedingly strange that the Court would preclude a property owner from deciding that his funds would not be invested in an interest- or dividend-earning account.

Two guests noted that questions have been raised about the taxability of earnings that might have gone to funds owners but are diverted to COLTAF.

The member who had expressed his skepticism about the court precluding an owner from deciding to put funds in a non-earning account added that he thought that the loss of funds to COLTAF because of a rule permitting the use of non-earning accounts would be small, as a practical matter.

A member who had not been a member of the subcommittee expressed his concern about what he saw as a loophole. He agreed, he said, that an engagement agreement provision could not, of itself, be the requisite "informed consent" to the use of a non-earning account; but that just meant the lawyer would have to proceed to give the information required to obtain "informed consent"[7] — and that would result in the loophole that he was concerned about. To a member's suggestion that a comment be included to deal with this possibility, given informed consent, this member replied that it would have to be a very complicated comment. He concluded by saying that he desired that clients have control over their own money but that he thought the default here should be that interest would be earned on that money while it is in the lawyer's trust.

Another member expressed his concern that permitting non-earning accounts could undermine the "mandatory nature" of the COLTAF account, to the disadvantage of the interests of the bar. The argument for client autonomy, he thought, was a false one; that autonomy could be attained in other ways. In his view, the COLTAF account was proper (a) for small amounts, (b) for amounts to be held for short periods of time, and (c) when the client did not want earnings.

The discussion then shifted to the second question that the subcommittee had posed, the lawyer's right to share in interest or dividends earned on funds in which the lawyer has a claim.[8]

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7. "Informed consent" is defined in Rule 1.0(e), C.R.P.C. as follows:

"Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

8. The question was posed on page 5 of the subcommittee's report as follows:

It is not unusual for a lawyer to hold funds in trust for a period of time in which the lawyer has an interest. An example of this situation is when a lawyer represents a plaintiff in a personal injury case. The matter settles with a

A member who had been a member of the subcommittee commented that she had been the major opponent to the idea that a lawyer could share in account earnings in proportion to the lawyer's interest in the deposited funds. She was of the view that it was absolutely not possible for the lawyer to have an interest in the deposited funds, under the Court's rules, bankruptcy principles, and the like.[9] She said that Tenth Circuit Court decisions have been to the effect that settlement funds are entirely the funds of the parties to the settlement, with their lawyers having no property interest in those funds. A lawyer might have a lien on his client's funds, she agreed, but no part of the funds themselves was the lawyer's property. Any indication that the lawyer could have an interest in deposited settlement funds would be contrary to those principles. If one owns the principal, one owns the interest thereon, she said.

To that, another member pointed out that creditor law recognizes equitable claims as property interests. Bankruptcy law will not get to where the previous member wished her argument to go, he said.

To all of that, another member asked how apportionment might be administered. Sudler answered that the situation could apply only to funds that were not in a COLTAF account, for, in a COLTAF account, all earnings would go to the COLTAF Foundation.

On a straw vote, the concept of amending the rules to permit a lawyer to share in earning from trust account funds in which he had an interest was defeated.

A member asked whether a lawyer's engagement agreement could specify that the lawyer was entitled to share in trust account earnings in proportion to his interest in the account principal. Sudler replied that such sharing would violate both current Rule 1.15(h)(1) and the subcommittee's proposal. A member pointed out that the argument that had been made — that no part of the funds in a trust account can, as a matter of law, belong to the lawyer — was a question of law; the member asked whether our vote would be a modification of law. A second straw vote was taken and, again, the Committee determined not to change the proposal to permit a lawyer to share in earnings from trust account funds.

The Committee then approved the direction that the subcommittee had taken in its proposal, with incorporation of the points discussed by the Committee at this meeting.

VI. *Consideration of Rules Changes to Recognize Colorado Changes Regarding Marijuana Sale and Usage.*

After a short break, the Chair turned the discussion over to Judge Webb and the further report of the Amendment 64 subcommittee, the subcommittee considering what, if any, changes might be made

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settlement check made to both lawyer and client which may be deposited in non-COLT AF trust account. The lawyer through a contingent fee agreement is entitled to a percentage of the settlement. After the settlement funds are received by the lawyer, but before those funds are disbursed, they may earn interest. Current Rule 1.15 and Proposed Rule 1.15B(h) provide that a lawyer cannot take any of the interest earned on those funds while they are in trust. The subcommittee discussed the issue that the lawyer may be entitled to interest on the portion of the settlement that belongs to the lawyer. The Proposed Rule I.15B(h) does not allow that. The Subcommittee discussed this issue at some length There was significant support for either resolution.

9. Current Rule 1.15(c) recognizes that a lawyer may have an interest in deposited funds; it provides, in part, "When in connection with a representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer until there is an accounting and severance of their interests."

to the Rules of Professional Conduct to reflect that the Colorado Constitution has been changed to permit both medical and recreational use of marijuana.[10]

Webb began by referring the members to page 48 of the materials that the Chair had provided for this meeting for the beginning of the subcommittee's supplemental report. On that initial page, the subcommittee had summarized the charge it had received from the Committee at its thirty-fifth meeting, on May 3, 2013, as follows:

> - Review and, as necessary, revise proposed Rule 8.6 and the accompanying comments to implement the Standing Committee's vote, which took out the phrase "for engaging in conduct," and then approved, but only in principle, the concept of a safe harbor for lawyers who advise clients · concerning their conduct involving marijuana, which is compliant with state law but violates federal law.
> - Prepare an alternative, narrower version of Comment [2A] to Rule 8.4 so that the safe harbor would protect only a lawyer's private conduct involving cultivation, possession, and use of marijuana, compliant with the Colorado Constitution, but would not exempt a lawyer's commercial conduct involving marijuana, such as owning or operating a licensed distribution facility. The Standing Committee did not take a straw vote on this question, but directed the subcommittee to present this alternative, based on concerns expressed by some members of the Standing Committee about lawyers who might become entrepreneurs in this industry.

As directed by the Committee at its thirty-fifth meeting on May 3, 2013, the subcommittee deleted from its proposal for Rule 8.6 the phrase "for engaging in conduct" — the change being shown on the redline provided to the Committee on page 5 of the subcommittee's report (page 51 of the meeting materials) — but the subcommittee proposed no other changes to the text of that rule. It did, however, propose changes to the accompanying comment, the thrust of which would be to clarify that the rule applies only to lawyers' advice to clients and does not apply to a lawyer's personal conduct.

As to Rule 8.4, Webb said the subcommittee responded not to any particular Committee vote but, rather, to the tenor of the Committee's discussion at the prior meeting. He noted that there had been strong views that, perhaps, the "safe harbor" provided by that rule should be limited to a lawyer's personal conduct and not extend to a lawyer's commercial, for-profit activities. To that end, the subcommittee had made some changes to its proposed additional comment to Rule 8.4, changes that were set forth on pages 6 and 7 of its report (pages 52 and 53 of the meeting materials). Webb noted that the changes to the comment do not reflect any principled basis for them, referring to the discussion on the fourth page of the subcommittee's report (page 50 of the meeting materials).[11]

At the Chair's request, Webb turned back to proposed Rule 8.6, noting that he would have more to say about Rule 8.4 later but asking the Committee first to discuss proposed Rule 8.6.

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10. As stated in the minutes of the Thirty-Fourth Meeting of the Committee, on February 1, 2013, the Committee "determined to form a subcommittee to consider such issues relating to the legalization of marijuana in Colorado as the subcommittee chooses to consider."

11. The subcommittee's report states—

> A majority of the subcommittee recognizes that the dilemma of state-law-compliant conduct which violates federal law exists in both private, noncommercial and commercial conduct. Although distinguishing between them does not have a principled basis under the constitutional amendments, it has a pragmatic one. And presenting a pragmatic approach may assist the Supreme Court, when it considers a recommendation from the Standing Committee.

A member noted that the text of proposed Rule 8.6 does not actually refer to the specific, marijuana, provisions of Article XVIII of the Colorado Constitution but, rather, refers to *any* "specific provision of the Colorado Constitution . . . [by which conduct] is either (a) permitted, or (b) within an affirmative defense to prosecution under state criminal law, solely because that same conduct, standing alone, may violate federal criminal law." Yet, the member pointed out, the proposed Comment [1] characterizes the rule itself as one that "specifically addresses" the two marijuana provisions of the Constitution. Webb replied that, to his knowledge, only the marijuana provisions in the constitution have the state/Federal dichotomy that has led to the proposal for the changes to the rules, In the future, he said, there might be other such dichotomies, and he agreed that those could be dealt with as they arose and that the current proposal for the text of the rule could be changed to deal only with the marijuana amendments to the Constitution.

A member said the proposal seems to give the "illusion" to lawyers that it offers a safe harbor and protects the lawyer from the wider risks of advising about marijuana issues. He suggested this example: A banking client calls a lawyer for assistance in making a loan to a land owner for a marijuana grow facility, a facility that the owner/borrower will lease to a licensed marijuana grower. Any lawyer undertaking to provide that advice to the bank will find that she must consider Federal law as well as Colorado law. This member asked how far one might go with this, noting that our rule and comment would not discuss the Federal consequences of such a legal representation. He suggested that, in the example, the lawyer would have to advise the bank that the grow facility might be subject to Federal forfeiture, with the consequent loss of security to the bank for the loan. Or, the lawyer might find herself subpoenaed by a grand jury. With these kinds of possible consequences, the member asked, what kind of advice must the lawyer give to the client; he added that his concern was that our text might lead the practitioner to feel that all was well and there could be no adverse consequences from providing advice in a case such as the member posed. While it might not be a disciplinary issue, because of the accommodating changes made to the Rules of Professional Conduct, there may be other, serious consequences from giving advice in this fraught area of the law, risks about which those Rules would not give warning.

A member noted that the subcommittee's new proposal for Comment [1] to proposed Rule 8.6 characterizes the proposed rule as "specifically address[ing] the need for legal advice in connection with" the two constitutional amendments, implying, perhaps, that the rule does not encompass legal advice that might be given about the marijuana activities that are permitted by those amendments, such as advice about contract law that might be needed by a licensed marijuana establishment. To avoid such an implication, the member suggested deleting that phrasing.

Webb replied that the subcommittee had added that phrasing in response to the strong comments made at the prior Committee meeting and that it was in accord with the medical marijuana ethics opinion that had been issued by the Colorado Bar Association Ethics Committee.

The member who had earlier noted that the proposed text of Rule 8.6 itself did not distinguish between the marijuana amendments and any constitutional provision that might be at variance from Federal law said he would like to see the text be limited to the marijuana amendments.

Responding to the comment by a member that Comment [1] to proposed Rule 8.6 referred specifically to advice about the two constitutional amendments and not to other legal advice about marijuana-related conduct, a guest noted that the text of Rule 1.2(d)[12] has not been clear to many lawyers.

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12. The provision reads—

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or

The comment, he suggested, could be revised to say that Rule 8.6 specifically addresses the need for legal advice "because of the ambiguity of Rule 1.2," without stating more.

The member who had made the earlier comment agreed that the guest's suggestion might help alleviate the problem, but he asked why it would not, then, be placed as a comment to Rule 1.2.

Webb replied to these remarks by saying the subcommittee had proposed that a comment be added to Rule 1.2 to provide a cross-reference to Rule 8.6, with its provisions permitting counseling and assisting clients in connection with conduct involving marijuana.

To all of that discussion, a member provided a different reading of the subcommittee's Comment [1] to proposed Rule 8.6: The text of the proposed rule, he noted, does not itself say that the advice is limited only to advice *about* the two constitutional amendments. Rather, it specifically permits

> counseling or assisting a client to engage in conduct, that by virtue of a specific provision of the Colorado Constitution (and in implementing legislation or regulations) is either (a) permitted, or (b) within an affirmative defense to prosecution under state criminal law, solely because that same conduct, standing alone, may violate federal criminal law.

The comment, the member said, does not constrict that counsel and assistance to questions about the meaning of the two constitutional amendments but merely gives an example of why there may be a need for such counsel and assistance.

A member who had been a member of the subcommittee said he agreed that the proposal would permit lawyers to give counsel and assistance generally about marijuana use and commerce and not just be limited to advice about the meaning of the two constitutional amendments. He had no doubt about that. He said the subcommittee had backed away from inclusion of the concept within Rule 1.2 or its commentary because it would be hard to delineate between the context at hand — the dichotomy created by the marijuana amendments between Colorado and Federal law — without using a "forty page article" on the nuances between counsel and assistance. Accordingly, he said, the subcommittee determined to use a comment to proposed Rule 8.6 and a cross-reference with Rule 1.2.

A member who had not previously spoken commented on the prior observation that lawyers might be misled, by these rules, into ignoring applicable Federal law when giving advice and assistance to their clients. The member pointed out that the opening sentence of proposed Rule 8.6 begins, "Notwithstanding any other provision of these rules . . . ," and he suggested that, perhaps, the text should make it clear that the leeway given relates only to Colorado discipline, not to other rules, including other rules of discipline applicable in the Federal courts. Another member suggested that the point be made by referring specifically to discipline meted out by Colorado Regulation Counsel. To that suggestion, another member objected, pointing out that the Federal authorities know how to distinguish their rules from local rules; and yet another member noted that a specific reference here to discipline by Colorado Regulation Attorney would simply raise questions about whether *other* rules had some different reach.

Webb asked for a vote on the subcommittee's proposed Rule 8.6 and comments, with the amendments that the Committee had thus far discussed.

The member who had earlier noted that the text of the proposed rule does not distinguish between the specific, marijuana, provisions of the Colorado Constitution and any other "specific provision of the

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fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

Colorado Constitution" that might condone conduct that is violative of Federal law asked that the language be changed from that generality to a reference only to the two marijuana provisions. He wished to see the provision actually refer only to what the Committee had actually been discussing. He added that he was speaking just as a member of the Committee and not as the representative of any particular authority.

A member who was also a member of the subcommittee moved the adoption of the subcommittee's proposal for Rule 8.6 and its comments; he added that he could support the narrowing from the proposal's generality to specific references to the marijuana amendments, noting that the concept had been discussed by the subcommittee.

After some discussion about the proper form of the motion, it was agreed that the motion up for approval was the subcommittee's text of Rule 8.6 — without consideration of the proposed comments — but with a narrowing of the rule's text to references only to the marijuana amendments to the Colorado Constitution. The motion was narrowly adopted.

A member then moved for the adoption of the subcommittee's proposed comments to its proposed Rule 8.6.

Two members, who had been members of the subcommittee, said that, with the change to the text of proposed Rule 8.6 itself to specify the two marijuana amendments, it would be unnecessary, confusing, and repetitive to retain proposed Comment [1] specifying those two amendments. In response, the movant remarked that he liked that portion of Comment [1] that highlighted the need for lawyers to be able to give counsel and assistance, but he withdrew his motion.

Another member then proposed the deletion of proposed Comment [1], the renumbering of proposed Comment [2] as Comment [1] and its adoption. That motion passed.

The Chair invited guest Fleischner to review the deliberations of the Colorado Bar Association Ethics Committee regarding the marijuana issues. Fleischner began by commenting that, as Judge Taubman had explained at the Committee's previous meeting on May 3, 2013, the CBA Ethics Committee had contemplated direct changes to Rule 1.2(d) regarding a lawyer's counseling and advising a client about marijuana-related conduct; but, she noted, this Committee had determined not to take that course. In its Opinion Nº 124, the CBA Ethics Committee concluded that a lawyer's personal, medical use of marijuana that complied with Colorado law adopted under Article XVIII, § 14, of the Colorado Constitution would not violate Rule 8.4(b). At its meeting in June 2013, the CBA Ethics Committee determined to extend Opinion Nº 124, by an addendum, to include a lawyer's personal, recreational use of marijuana under the constitutional amendment adopted by the voters in November 2013, Article XVIII, § 16. The CBA Ethics Committee is also working on an opinion, to be issued as Opinion Nº 125, that would conclude that a lawyer does not violate Rule 1.2(d) by counseling a client in activity that is within the scope of the constitutional amendments, although it would not countenance "negotiating" for a client in that context. Fleischner noted that the latter opinion had been considered further at the committee's July 2013 meeting and was likely to be considered further at its September 2013 meeting.

Judge Taubman added that, at the annual meeting of the American Bar Association House of Delegates to be held in August, a resolution from the King County, Washington, Bar Association will be proposed by which the American Bar Association would urge lawyer disciplinary authorities not to take disciplinary action against lawyers who counsel and assist clients about compliance with state laws legalizing the possession and use of marijuana.

Webb then turned the Committee's attention to the proposals for addition of a Comment [2A] to current Rule 8.4. He said that, as originally proposed by the subcommittee, the comment would have precluded discipline for *any* marijuana activity by a lawyer that was permitted by the Colorado Constitution. But, at its thirty-fifth meeting, on May 3, 2013, the Committee had directed the subcommittee to narrow the safe harbor to personal, non-commercial use,[13] and, in response, the subcommittee's current proposal for Comment [2A] is limited to "private, non-commercial conduct of a lawyer" under the specified marijuana amendments to the Colorado Constitution.

Webb and other members of the subcommittee had looked for other words to substitute for "non-commercial" such as "non-profit." But, Webb said, on the eve of this Committee meeting, a member, who had not been a member of the subcommittee, had suggested to the subcommittee that, instead of looking for words to characterize the permitted conduct, the comment could simply refer to the specific constitutional provisions establishing the Colorado law on marijuana use. The member's proposal was that Comment [2A] read as follows:

> [2A] Conduct of a lawyer which, by virtue of either of the provisions of the Colorado Constitution that are cited below, is either (a) permitted, or (b) within an affirmative defense to prosecution under state criminal law, and which is in compliance with legislation or regulations implementing such provisions, does not reflect adversely on the lawyer's honesty, trustworthiness, or fitness in other respects, solely because that same conduct, standing alone, may violate federal criminal law. The provisions referred to above are the following: Article XVIII. Miscellaneous, Section 14, Medical use of marijuana for persons suffering from debilitating medical conditions, Subsection 14(4); and Article XVIII, Miscellaneous, Section 16, Personal use and regulation of marijuana, Subsection 16(3). The phrase "solely because" clarifies that a lawyer's personal, noncommercial use of marijuana, while itself permitted under state law, may cause a lawyer to violate other state laws, such as prohibitions upon driving while impaired, and other rules, such as the lawyer's duties of competence and diligence, which may subject the lawyer to discipline. See Rules1.1 and 1.3. The phrase "standing alone" is explained in Comment [2] to Rule 8.6.

A member referred to the proposals from the subcommittee and from the other member, each of which would refer to conduct "which may violate federal criminal law." But, this member said, the conduct in question *clearly* would violate Federal law, and he asked whether that would change the meaning of the proposals. In response, another member said he understood that the intent of the proposals was that even a conviction proving violation of Federal law would not be subject to Colorado discipline. The member who had raised the point said he would want to see the language be clarified to that end.

Webb said the intent of the proposals is to recognize a distinction between permitted personal use of marijuana and other, entrepreneurial, activity. He observed that the possibility of a lawyer being prosecuted for personal marijuana use within the constitutional permissions was vanishingly small, but that, he added, is aided by the decision not to protect entrepreneurial use. The proposals, he confirmed, would preclude discipline for personal use permitted under Colorado law, even if that resulted in a conviction under Federal law.

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13. The minutes of the thirty-fifth meeting of the Committee, on May 3, 2031, state—

> Webb said that, if the direction of the Committee was to make a distinction between a lawyer's personal use of marijuana (permitted) and his personal involvement in commercial marijuana activities (disciplinable), that could be done.
>
> Upon a vote, the Committee determined to return the matter to the subcommittee to develop alternatives on how to deal with a lawyer's personal use of marijuana and a lawyer's personal involvement in commercial marijuana activities.

A member suggested that the phrasing be "private, not-for-profit" conduct, and Webb indicated his approval of that language — if the lawyer's conduct is not for profit, it would be permitted. A sale, however, would be different.

The member who had proposed, as an alternative, that Comment [2A] simply refer to § 14(4) and § 16(3) of Article XVIII explained the reasoning behind his proposal: He had considered, he said, other available statutory language that distinguishes between personal and other activities, such as the phrasing "personal, family, or household use" that is found in consumer legislation. But, he realized, the marijuana amendments themselves make the necessary distinctions, and further characterization by additional adjectives in the comment was unnecessary.

A member approved of the suggested alternative to Comment [2A], saying that the effort to distinguish between permitted nonprofit activity and disciplinable profit activity was a trap that the alternative avoided. Another member added his approval.

But another member said she thought that the member's proposed alternative for Comment [2A] was not likely to be understood by lawyers; they would, she said, simply conclude by the comment that they can engage in marijuana activity as can any other person under Colorado law. This member suggested that some additional indication of restriction, such as that the lawyer cannot provide a marijuana "establishment," be added.

To that, the member who had suggested the alternative replied that he thought that any lawyers who wished to conduct commercial activities, activities that we feel a lawyer should not engage in, would surely look beyond the text of the comment to the cited constitutional provisions as they planned their conduct and that they, therefore, would be very well informed about what was permitted and what was disciplinable.

The Chair put to the Committee the general question of whether it supported the broad approach, which would permit a Colorado lawyer to engage in any marijuana-related activity condoned by Colorado law. By a vote, the Committee determined that it did not support such a rule.

Webb then moved for the adoption of the proposal that Comment [2A] to Rule 8.4 simply refer to § 14(4) and § 16(3) of Article XVIII, as the member had proposed. Before action was taken on his motion, a member who had been a member of the subcommittee said he would like to look at text that incorporated some statement highlighting that a lawyer could not engage in commercial activity.

The member who had made the proposal that the comment contain only the sectional references suggested that the Committee let the subcommittee consider whether such additional text was "worth the candle." He suggested that the matter be sent back to the subcommittee with the flexibility to decide whether an indication of prohibited activity — that is, activity that would not be permitted by Article XVIII, § 14(4) or § 16(3) but was commercial activity permitted only under Article XVIII, § 16(4) — would be useful.

A member questioned the delay that would result from sending the matter back to the subcommittee. The Chair replied by noting that the subcommittee's subsequent deliberations could be circulated and approved by emails before the next meeting of the Committee. She added that perhaps the phrasing "personal, non-commercial use" could be changed to "personal or medical" use.

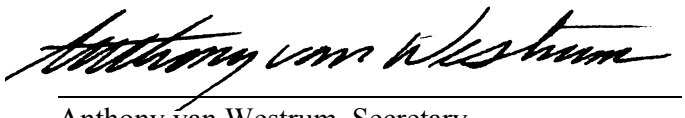
By a vote, the suggestion to return the matter to the subcommittee for consideration of language that might be added, to the proposed references in Comment [2A] to § 14(4) and § 16(3) of

Article XVIII, to indicate the range of permitted or precluded activity was approved, the supposition being that the subcommittee's further deliberations might then be subject to email approval.

VII. *Adjournment; Next Scheduled Meeting.*

The meeting adjourned at approximately 12:00 p.m. The next scheduled meeting of the Committee will be on Friday, October 11, 2013, beginning at 9:00 a.m., in the Supreme Court Conference Room.

RESPECTFULLY SUBMITTED,



Anthony van Westrum, Secretary

[These minutes are as approved by the Committee at its Thirty-seventh Meeting, on October 11, 2013.]

COLORADO SUPREME COURT

STANDING COMMITTEE ON THE RULES OF PROFESSIONAL CONDUCT

Approved Minutes of Meeting of the Full Committee
On October 11, 2013
(Thirty-Seventh Meeting of the Full Committee)

The thirty-seventh meeting of the Colorado Supreme Court Standing Committee on the Rules of Professional Conduct was convened at 9:00 a.m. on Friday, October 11, 2013, by Chair Marcy G. Glenn. The meeting was held in the Supreme Court Conference Room on the fourth floor of the Ralph L. Carr Colorado Justice Center.

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

Present as guests were Diana M. Poole, the director of the Colorado Lawyers Trust Account Foundation; Philip E. Johnson, of the law firm of Bennington Johnson Biermann & Craigmile, LLC, the president of the board of directors of the Foundation; and William A. Bianco, of the law firm of Davis, Graham & Stubbs, a member of that board of directors.

I. *Meeting Materials; Minutes of July 26, 2013 Meeting.*

The Chair had provided a package of materials to the members prior to the meeting date, and she apologized for the large size — approximately 285 pages — of the package. The material included submitted minutes of the thirty-sixth meeting of the Committee, held on July 26, 2013, and those minutes were approved as submitted.

The secretary noted that he has occasionally inserted footnotes in the minutes — sometimes with and sometimes without attribution to the secretary — that he felt added to the discussion but which might contain information that has not been presented, or even alluded to, by the participants to the discussion; and he asked for a sense of the Committee as to whether or not that was appropriate. The Committee members voiced their approval of such notes.

II. *Amendment of Rule 1.15.*

The Chair requested James S. Sudler III, chair of the subcommittee considering revisions to Rule 1.15 — including revisions intended to obtain comparability in the rates paid by banks on COLTAF accounts — to report on the subcommittee's recommendations. At its thirty-sixth meeting, on July 26, 2013, the Committee had received a preliminary report from Sudler on the subcommittee's activities and, after a lengthy discussion, had approved the direction that the subcommittee had taken in its proposal but had directed the subcommittee to incorporate the points discussed by the Committee at that July meeting.

Sudler began by noting that, at the Committee's July meeting, the Chair asked that Committee members send to Sudler their comments on the subcommittee's proposal as it stood at the time of that meeting. The subcommittee had received comments from just one member, and Sudler said it had considered but determined not to incorporate any of those comments in its current proposal, except that, pursuant to the member's suggestion, the subcommittee moved the all of the comments — which are intended to apply generally to the entire "series" of trust account rules, Rule 1.15A through Rule 1.15E — up to the front of the group, following Rule 1.15A.

At the last meeting, Sudler noted, the Committee had directed the subcommittee to consider the issue of whether a lawyer should give some notice to the client when drawing earned legal fees from the client's trust account funds. Sudler said the issue, and the wording expressing the principle, had been extensively debated by the subcommittee following the July meeting, and a majority of the subcommittee approved of the following addition to Rule 1.5(f) to deal with the issue (reflecting changes to the current text of the provision):

> (f) Fees are not earned until the lawyer confers a benefit on the client or performs a legal service for the client. Advances of unearned fees are the property of the client and shall be deposited In the lawyer's trust account pursuant to Rule ~~**1.15(f)(1)**~~ ***1.15A*** until earned. If advances of unearned fees are In the form of property other than funds, then the lawyer shall hold such property separate from the lawyer's own property pursuant to Rule ~~**1.15(a)**~~ ***1.15A***. ***The lawyer shall give written notice to the client that i) fees have been earned and ii) funds will be or have been transferred from the lawyer's trust account, or property other than funds will be transferred to pay earned amounts, within a reasonable time before or after the transfer.***

Sudler commented that the subcommittee's discussion had included the questions of whether the provision should be lodged in new Rule 1.15C and whether the required notice should be given before, after, or contemporary with the transfer of the funds or property from the trust account or other location to the lawyer in payment of the earned fees. The discussion even included the basic question of whether such notification provision should be made explicit, it not being found in current Rule 1.5 or Rule 1.15. Sudler added that a minority of the subcommittee had felt that the imposition of a notification requirement simply burdened the lawyer unnecessarily, particularly when the client has agreed to a flat-fee arrangement.

Sudler distributed to the Committee new text for Rule 1.15B(i) that the subcommittee proposed to substitute for that which had been included in the meeting materials package, text that deals with the "lookback" provision that enables a lawyer to recover, from the Colorado Lawyers Trust Account Foundation, interest that had been earned on COLTAF trust account deposits that, in hindsight, did not meet the COLTAF criteria of being funds that are nominal in amount or are expected to be held for a short period of time.[1]

Sudler noted that a member of the subcommittee had suggested that, in the event a refund from the Colorado Lawyers Trust Account Foundation would be due upon such a lookback request, the refund could simply be made by a Foundation deposit into the lawyer's COLTAF account from which the interest had originally been drawn under the COLTAF program. At this point, Diana Poole, the director of the Foundation, spoke to explain to the Committee that such a redeposit could not be done in practice. She explained that the Foundation makes a refund by a check issued to the lawyer or law firm that requests the refund and that it is left to the lawyer or law firm to give those funds to the proper recipient and to provide the recipient with any required tax form — a Form 1099 — to report the interest or

1. *See* current Rule 1.15(h)(2) and proposed Rule 1.15B(b). The text that Sudler distributed at the meeting is attached to these minutes as an appendix.

dividends earned and now received by the refund from the Foundation. She explained that, ordinarily, Forms 1099 are issued by the bank holding the lawyer's COLTAF account or any separate trust account that may have been established for the benefit of a particular client or third person; but she added that a bank that received a refunding deposit from the Foundation into a lawyer's COLTAF account as the member had proposed would not know what to do with the deposit, as it would not then be interest that had been paid by the bank itself. And, she pointed out, the member's proposal would still obligate the lawyer to withdraw the refunding deposit from that COLTAF account and direct it to the proper recipient and to issue a Form 1099 for interest earnings the deposit represents.

With no further discussion on the correction to Rule 1.15B(i) and the manner of handling "lookback" refunds from the Colorado Lawyers Trust Account Foundation, the Committee turned to the balance of the subcommittee's report.

A member questioned the parenthetical cross-reference that the subcommittee had inserted after the caption to Rule 1.15A and before its first words of text, reading, "(See also Rules 1.15B, 1.15C 1.15D and 1015E)." A member who had been a member of the subcommittee commented that it served the purpose of flagging that the "Rule 1.15 series of Rules" is different in structure from all of the other Rules — consisting of five separate rules of equal status with each other and with all of the other Rules but all part of an overall context of a lawyer's responsibilities for the funds and properties of others — and should be considered together when questions arise under that context.

The Chair asked Sudler whether he wished the Committee to vote first on the Rule 1.15 Series and then consider the subcommittee's proposed amendment to Rule 1.5(f) or, rather, to consider them all together. Sudler asked that the Chair do the latter, noting the inter-dependency of the amendment to Rule 1.5(f) and the other changes that the subcommittee has proposed to current Rule 1.15, where the concept of "severance" that is now behind the proposed amendment to Rule 1.5(f) is currently found in Rule 1.15(c). Sudler said that, if the Rule 1.15 Series were approved but the amendment to Rule 1.5(f) were defeated, the Office of Attorney Regulation would return to the Committee with some further proposal for a required client notification when a lawyer draws earned fees from a trust account. He explained, further, that the second sentence of proposed Rule 1.15A(c) now deals only with disputes over trust funds and does not require, as does current Rule 1.15(c),"an accounting and severance of . . . interests" for undisputed withdrawals. Regulation Counsel has relied on that "accounting" requirement to support its position that some contemporaneous notice must be given to the client upon a withdrawal of earned fees from a trust account, but that phrasing would be deleted from proposed Rule 1.15A(c). Under the subcommittee's proposal, it would be preserved but relocated to Rule 1.5(f).

Despite Sudler's request that all of the proposals be considered at one time, another member, who had been a member of the subcommittee suggested that the consideration could be bifurcated as the Chair had proposed; and the Chair determined to proceed in that manner.

A member who had experience with the analyses of the Office of Attorney Regulation differed with Sudler's explanation of the importance of the Rule 1.15(c) provision for an "accounting." She said that the crux of the matter — the flat fee — implicates the *Sather*[2] case, where a lawyer had not properly

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2. *In re* Sather, 3 P.3d 403 (Colo. 2000). In its opening paragraph, he Court outlined the circumstances of the case as follows:

> In this attorney regulation proceeding, we address the conduct of the attorney-respondent, Larry D. Sather, who spent and failed to place into a trust account $20,000 he received as a "non-refundable" advance fee for a civil case. Because Sather treated these funds as his own property before earning the fee, Sather's conduct violated Colo. RPC 1.15(a). Sather labeled the $20,000 fee "non-refundable" even though he knew that the fee was subject to refund under certain circumstances, thereby violating Colo. RPC 8.4(c). After being discharged by his client, Sather failed

provided for his "flat fee" in his fee agreement and had claimed unearned fees as "non-refundable" rather than placing them in his trust account until they were earned or returned to the client upon discharge of the lawyer.

This member said she was not aware of any disciplinary case that has involved the earning of stated fees upon the accomplishment of stated milestones — for example, a lawyer's fee agreement that provides for an initial draw of $1,000 upon conclusion of discovery. In her view, if the client in that arrangement has been advised in the fee agreement of the "milestone" by which the lawyer has earned a flat $1,000 upon the conclusion of discovery, there is no practical need for the client to get further, contemporaneous notice that the milestone has been reached and the fee will be drawn from the trust account. She added that, for a lawyer who has many clients with many such milestones, the burden of giving contemporaneous notice of the draws would be substantial. She added that the burden could be felt not only by lawyers engaged in criminal law practices but also by lawyers with commercial and transactional practices. Why, she asked, impose the burden? What is the benefit, if the fee agreement adequately advises the client of the bases — the milestones — for earning increments of fees?

That member concluded by referring to the question of whether a lawyer must give notice to the client contemporaneously with his destruction of the client's files after a period of time that had been identified and agreed to in the fee agreement. It is understood, she said, that no contemporaneous notice need be given if the engagement agreement has provision for file destruction.[3] Why, she asked, should the fee withdrawal be treated differently, particularly when the client is more likely to have a contemporaneous understanding of the state of the case than he would have about file destruction some years after the conclusion of the case? In her view, a requirement of some contemporaneous notice in addition to a statement of the fee arrangement in the fee agreement would simply be a trap of lawyers without significant benefit to clients. She said it would also be a change in the Rules; in that case, she asserted, we should need a particularly strong case before imposing the requirement. She concluded by saying that the subcommittee should include lawyers who regularly utilize flat fees in their practices.

Another member disagreed with those comments. In his view, the client should be told when the lawyer is spending the client's money to pay the lawyer's fee. When the lawyer sends monthly invoices, the lawyer should advise the client about the handling of the flat fee funds that had been deposited in the trust account. This member was surprised to find that there could be any question about that procedure, for this is what lawyers actually do in practice. He was opposed to changing the subcommittee's proposal for Rule 1.5(f).

Another member expressed her concern that the message that would be read in a lawyer's contemporaneous notice that she was about to withdraw, or just had, withdrawn, fees from the trust account would be, "now is your time to object to my taking those fees." That, she posited, would raise a lot of problems.

Another member agreed with those comments, The notice requirement would especially burden the sole practitioner who had a lot of "small clients." If the lawyer has given adequate disclosure of the payment arrangement in the fee agreement, the lawyer should have no further burden to report the actual

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to return all of the unearned portion of the $20,000 promptly, in violation of Colo. RPC 1.16(d).

3. Rule 1.16A(d) provides—

(d) A lawyer may satisfy the notice requirements of paragraph (a)(2) of this Rule by establishing a written file retention policy consistent with this Rule and by providing a notice of the file retention policy to the client in a fee agreement or a in writing delivered to the client not later than thirty days before destruction of the client's file or incorporated into a fee agreement.

draws as they occur; and she noted that the burden would be especially onerous for the lawyer who does not have the administrative backup of a large law firm. Surely the lawyer should be clear about his entitlement to payment by using a well-drafted engagement agreement, but that should be sufficient and contemporaneous notice of the draws should not be required.

To the last comments, another member asked whether it is common for a lawyer to rely on a "comprehensive fee agreement" that enunciates the milestones upon which fees will be earned, and then simply draw the funds without further, contemporaneous notice of the draws. The member who had previously spoken about the special burden that would be placed on the sole practitioner said that is commonly done — she establishes milestones in the initial agreement and then draws funds from her trust account, without further notice, as the milestones are reached. On the other hand, when she undertakes an engagement on an hourly basis, she sends monthly bills and then draws the earned fees, returning any unearned fees from the trust account at the end of the engagement.

Sudler asked why it would actually be more unduly burdensome to give the client written notice of the drawing of earned fees in the flat-fee, milestone case than it would be to issue periodic invoices as hours are accrued and fees are earned. He saw no difference in the "burden" between the two modes of charging for services.

To that, the member who had previously spoken replied that the hourly-fee engagement is a "limited situation," in which the client will want to know whether the accrual of fees is getting out of hand. To the contrary, in the flat fee situation, the maximum fee is already defined. The hourly fee, she asserted, is usually much larger than the flat fee. In answer to Sudler's question of why it was more burdensome to give notice in the flat fee case than in the hourly fee case, she said it is not more burdensome, it is just unnecessary: The client has agreed to the flat fee arrangement, to the earning and taking of the flat fee as the milestones are reached, and needs to hear nothing more about the fees.

The member who had referred to the *Sather* case pointed out that the lawyer who is billing on an hourly rate has not typically agreed to a limit on the fee amount, and the amount of the bill depends on the accrual of time. Thus, the billing statement says, "This is how much of your money I've spent so far." The client has no idea, in advance, of what the fee will be. On the other hand, in a flat-fee case — whether it is a criminal matter, a transactional matter, or perhaps an undertaking such as the preparation of a will — when the lawyer has reached the established milestone, the lawyer has earned the agreed fee. Flat fees, the member asserted, are a benefit to clients, providing certainty about legal fees. That's not easy for the lawyer to provide in a matter of civil litigation or a complex transaction, but in other circumstances the lawyer can make decisions about the likely nature and extent of the work that will be done and can agree to a fixed payment for the work that is done, whether it is the same as, or has varied from, what the lawyer expected. That is beneficial to the client, who has anticipated the milestone and agree to the fee for reaching it.

A member who supported the proposal that notice be given of draws from advanced fee deposits said he was not suggesting that the notice needed to be given in advance of the draw, contemplating that it could be give after the draw but would in any case be given near the time of the draw. He said he could not square the argument that such contemporaneous notification need not be given with the principle that the lawyer is a fiduciary to the client and has a duty always to report and account for funds given to the lawyer in that trust relationship.

To that, the member who had previously spoken about the special burden that would be placed on the sole practitioner responded that the lawyer could anticipate the client's desire for information about the status of the fee and its relation to the agreed milestones by simply noting, in the fee agreement,

that the client is free to, and should, ask questions when in doubt about those matters. That being possible, the Rules should not mandate that contemporaneous notice be given as draws actually occur.

The member who had not been able to square an omission of notification with the lawyer's fiduciary duty to account commented that the fee agreement should not only clearly explain that the deposit toward legal fees will be held in a trust account but, also, how and when the funds will flow from that account to the lawyer in payment of services. When another member pointed out that the fee agreement alone can provide sufficient notice of how and when fees will be earned and paid from the trust account, the first member responded that it's an ordinary practice for lawyers to send invoices for their services and that all that can be explained in a fee agreement can also easily be reflected on the actual invoices.

Sudler took the discussion back to the distinction between flat and hourly fee arrangements and pointed out that the distinction is not actually controlling; the issue, he said can arise also for lawyers who are billing on the basis of accrued time. If it were an issue that just implicated the flat fee, an exception could be designed to take care of that. But, if that would not quell the objections, then there must be more to the matter than just the fixedness of the flat fee. By a billing, he notes, the client is advised that the lawyer has decided that she has earned the stated fee.

But one of the members who had spoken about the flat fee pointed out that, while the client has a right to know what services have been provided by the lawyer, that can be known by the accomplishment of an established milestone.

Another member, who had not previously spoken, contrasted that flat-fee/milestone situation from the hourly rate situation; in the latter, the client has no idea — until receiving a statement — how much the lawyer thinks the lawyer has earned. In the former, that lack of knowledge is not a problem, but the client might well question whether the milestone has in fact been accomplished.

This member said that he would want to see whatever clarification is thought necessary be lodged in Rule 1.5(f) — commenting that he was blindsided by Sudler's explanation of the importance to Attorney Regulation Counsel of the "accounting" requirement in current Rule 1.15(c). For him, the only matter of dispute was whether a statement of the timing of draws from the deposit to pay earned fees could be sufficient explanation of an objective event. That event is stated as a milestone in the fee agreement, which says that the lawyer will be entitled to draw a stated amount upon the accomplishment of the stated event. Should the lawyer also have to notify the client when the stated event has actually occurred? He was of the view that such additional notice was not necessary if the fee agreement had stated clearly enough that, upon the event, a stated amount of fees would be withdrawn from the deposit. Yet, the catch was whether the client would always know whether the event had occurred; he suggested — as a circumstance in which the client might not know — the completion of the discovery process as a stated milestone.

To that, the member who had said that the client would know of the earning of fees by the accomplishment of milestones acknowledged that that would depend on the quality of the other communications between the lawyer and the client, noting that, in a federal, case entailing lots of discovery and discovery issues, the conclusion of discovery might not be apparent to the client without some additional communication from the lawyer. In answer to a question from the member who had just spoken, this member said that she bills separately for accrued expenses and does not draw them from the client's deposit as if pursuant to a milestone attained.

The member who had asked that question concluded by saying that the essence of the matter is that the client should know that the lawyer has become entitled to draw the fee for performed services;

if attainment of the milestone is sufficiently self-evident to provide that knowledge, contemporaneous notice of the fact is not necessary, but, if the nature of the milestone does not provide that knowledge, then the lawyer should give the client specific notice, contemporaneous with the event, that a fee has been earned and will be drawn from the deposit.

A member who had not previously spoken pointed out that clients want fast and efficient service. To the extent that lawyers can provide that kind of service with flat fee structures, the Rules should accommodate and encourage that. The Rules should not unduly burden the process.

A member who had not previously spoken asked whether the lawyer could establish, as the milestones the discussion has been contemplating, the earning of a stated amount of fee: "I will make a withdrawal from the deposit when my hourly accrual has reached $10,000." A member who had argued that milestone-based withdrawals should not require contemporaneous notice to the client said that kind of milestone was not what she had in mind and would not assure the client had adequate knowledge of the right to withdrawal, without some further explanation of the work that had been done to earn that fee.

The member who had been a member of the subcommittee and who had agreed with the Chair that the discussion could be bifurcated to deal first with the subcommittee's proposed amendment to Rule 1.5(f) commented that the subcommittee had discussed whether the contemplated notice of draw could be given before, with, or after the actual draw. The subcommittee intended that the draw not be a "gotcha" event from the client's viewpoint. It was to be part of a flow of communication between the lawyer and the client and thus expected by the client. On that basis, the member had voted for the notification proposal of the subcommittee, but she commented that communication can be difficult and noted that she has trouble getting the lawyers who serve under her to keep their clients well-informed about their cases. She added that there is usually a lot of communication going on in emails and that notice of draws can be provided in that ongoing communication or can regularly be given at the end of each month.

A member who had not previously spoken said that he agreed with both sides of the discussion. And that, he added, got him to considering the practical application of integrated software for billing, trust accounting, and the like. The argument that draws can be based on the accomplishment of previously agreed to milestones sounded good, but what happened when the lawyer missed the milestone? His understanding was that the milestone billing event could be programed into software billing packages so the milestone event would not be missed. Upon the occurrence of the milestone event, the software would trigger an internal notice that the draw could now be made, and also generate a billing statement to the client providing "notice" that the draw had been made. While the concept of constantly giving notices as milestones are reached might sound daunting, the software packages might make compliance easy as a practical matter.

To that, a member who is a solo practitioners said that she thought herself unusual in being a solo practitioner who employed that kind of software, given that it is expensive, requires a good deal of "IT support," and can be a "rabbit hole." Solo practitioners are not typically handling cases for very wealthy clients; they are handling small cases, each of which is not likely to accrue as much as $5,000 in aggregate fees. A requirement of contemporaneous notice of draws of those fees from deposits would be a lot for the Committee to expect of those lawyers. The flat fee simplifies office overhead and billing structures. She said that, when she offers a flat fee, the client is able to question the fee, and the answer should be easy: "You agreed that I could draw $Y when I accomplished Milestone X; I accomplished Milestone X at such-and-such time." An additional requirement of contemporaneous notice seems merely to be the addition of a gratuitous risk for the lawyer, to be added to the bundle of charges if a grievance is filed.

The Chair asked for a summation: What do we think, as a whole?

A member said he was concerned about the issue that had been under discussion, although he did not personally encounter the problem in his mode of practice. He thought it unwise to make a matter of good billing practice a matter of discipline by elevating it to a requirement contained in the Rules. And, he noted, the problem would be compounded by requiring the retention of billing and trust files for seven years, as is currently required by Rule 1.15(c) and would be continued by Rule 1.15D(a). That compounded requirement seemed to him to be an excessive burden to lay on the many practitioners who serve clients who are not wealthy, whose legal fees, while large in their eyes, do not justify the imposition of expensive timekeeping, billing, and notice obligations. The flat fee mechanism is one reason for saying this requirement is unnecessary, but, to this member, the contemporaneous notice requirement was an excessive burden to lay on lawyers no matter what the fee arrangement, a burden that did not provide a worthwhile benefit. This should be regarded as a matter of good billing practice, not a disciplinary matter.

The Chair asked for a vote on the concept. A member responded by suggesting a two-tiered vote, first on whether any contemporary notice was needed for withdrawals from advance fee deposits, and second, whether, in the flat fee situation, sufficient notice could be given in the fee agreement's specification of the arrangement.

The Chair rejected that suggestion, asking why, if a notice of the time and basis for any draw should be mandated by a rule, a statement in the fee agreement could suffice for that notice. The member who had suggested the two-tiered vote responded with the example that had been given before, where the lawyer's policies regarding the destruction of the client's files may be stated and agreed to in the engagement agreement, without the need for further, contemporaneous notice at the time the files are actually destroyed. But the Chair rejected the analogy, because the proposal for notice of specific fee draws could be given before or after the actual draws — within the ongoing representation — so long as it was contemporaneous therewith.

In answer to a member's question, Sudler said that his research has not uncovered a similar rule in any other state's disciplinary regulations.

A member asked whether any other state has any case law agreeing with the proposition that an accounting requirement akin to that found in current Rule 1.15(c) includes a requirement that notice be given to each client contemporaneously with a draw of an earned fee from a deposit. Sudler said that the Office of Attorney Regulation Counsel has had many cases in which this matter has been raised, none of which has resulted in a sanction for failure to give the contemplated notice. He commented that it is not realistic to think that the Office can prosecute all lawyers engaged in bad practices in this regard, but the matter is taught by the Office in its educational programs about trust accounts, where lawyers are told that they should give that contemporaneous notice. And Sudler said, firmly, that the Office believes that contemporaneous notice should be given and that the Rules should, somewhere, require that notice.

In the ensuing straw vote, the proposition that the Rules should require that notice of the draw of earned fees from advance fee deposits should be mandated was defeated.

To the Chair's question of where Sudler would like the Committee to turn next, he asked that it turn to a consideration of the remainder of the subcommittee's Rule 1.15 Series proposal, with the expectation that we would return later to a more refined consideration of the matter of contemporaneous notice of fee draws.

A member who had been a member of the subcommittee remarked that the concept contained in the proposed change to Rule 1.5(f) that the lawyer "shall give written notice to the client that i) fees have been earned and ii) funds have been or will be transferred from the lawyer's trust account . . ." covers a lot of ground and that our difficulty seems to be over the words requiring that notice to be given "within a reasonable time before or after the transfer." He asked whether the proposed change to the rule would be sufficient if the latter phrase, regarding the timing of the notice, were omitted? If that change were made, he believed, a statement in the fee agreement establishing milestones and associated fee payments would suffice.

To that, another member, who had also been a member of the subcommittee, said the subject phrase about the timing of the required notice was the only reason he had voted against the proposal when it was considered by the subcommittee. This member believed that, if the lawyer is billing by the hour and fails to provide a notice contemporaneously with the drawing of his fee from the trust account, then Regulation Counsel would conclude that no statement about the billing arrangement in the fee agreement could suffice for the requisite notice of the subsequent draw, and Regulation Counsel would charge that Rule 1.5(f) had been violated, even if the rule did not contain the timing phrase.

The member who had spoken previously said that he would not think such a charge would be justified in that case.

Another member said he could not agree that, under the language proposed by the subcommittee but excluding any statement of the timing of the required notice, a statement in the fee agreement could be sufficient, unless the subcommittees' proposal were modified in some way to make that apparent.

Another member asked how a notice that fees have been earned could be given in advance, in the fee agreement itself.

To that, another member responded that, with a rule requiring that written notice be given to the client that fees have been earned and funds have been or will be transferred from the lawyer's trust account but omitting any requirement about when that notice must be given, that would just mean that lawyers must adapt their fee procedures to meet that first requirement; if their billing methods are such that the required information can be given in an initial fee agreement, then they may do that, but, if their billing methods are not amenable to that approach, then they might have to provide a contemporaneous notice in order to comply with the rule's simply-stated mandate.

The Chair noted that the conversation had returned to the proposed changes to Rule 1.5(f) rather than to balance of the subcommittee's recommendations, regarding the Rule 1.15 series of rules. After some discussion, the Committee decided not to deal further with Rule 1.5(f) at this meeting, and the Chair asked that Sudler consider the question further and check what other states have done with respect to the matter of giving clients adequate notice about when and how much fees will be withdrawn from trust account deposits.

To the Chair's request, Sudler noted that Colorado's *Sather* case had been at the cutting edge of the issue among all the licensing jurisdictions in 2005, but he agreed to check further as the Chair had requested.

A member, who practiced at a large law firm, commented that her colleagues there are constantly reminded that they need to find ways to bill other than on an hourly rate. This is, she said, an important

and timely matter. Another member noted that Jim Calloway, of the Oklahoma bar, has gathered information about fees and billing practices for the American Bar Association.[4]

Upon a vote, without dissent, the Committee approved recommending to the Court that current Rule 1.15 be replaced by the subcommittee's proposed Rules 1.15A through 1.15E.

The Chair thanked the members of the subcommittee for their efforts, and Diana Poole, speaking as the director for the Colorado Lawyer Trust Account Foundation, thanked the subcommittee and the whole Committee for their work on the changes.

III. *Consideration of Rules Changes to Recognize Colorado Changes Regarding Marijuana Sale and Usage*.

The Chair turned the Committee's attention to the pending proposals to amend the Rules to accommodate the recent amendments to the Colorado Constitution regarding marijuana use and commerce by noting that, at its thirty-sixth meeting, on July 26, 2013, the Committee had agreed to adopt the proposal submitted to the Committee by the marijuana amendments subcommittee at that meeting, with some limited changes to be made thereafter by the subcommittee under instruction from the whole Committee. The expectation had been that the additional changes could then be approved by the whole Committee by email communications. But the subcommittee's work turned out to be more extensive and time-consuming than had been anticipated, and the email approval of further changes was never undertaken. Part of that delay, the Chair said was attributable to the comments that Committee member Anthony van Westrum, who had not been a member of the subcommittee, emailed to the subcommittee. The Chair added that there was a conflict between speed and getting it right; she noted that the Committee needed to get a proposal to the Court quickly but also needed to consider any further, helpful, comments.

The Chair asked Judge Webb, the chair of the marijuana amendments subcommittee, to lead the discussion from there.

Webb pointed the members to page 50 of the meeting package for the subcommittee's Second Supplemental Report, noting that van Westrum's email to the subcommittee begins at page 56 of the package.

Following the thirty-sixth meeting of the Committee, Webb said, the subcommittee had two pending tasks, dealing with proposed Rule 8.6 and with proposed changes to Rule 8.4.

With respect to proposed Rule 8.6, the whole Committee had approved changes to the subcommittee's earlier proposal, which moved references to specific marijuana provisions in the Colorado Constitution out of the comments and into to the text of Rule 8.6, worded in a way that would accommodate future amendments that might be made to the Constitution. That was a mechanical process that involved dropping what had been proposed as Comment 2 to Rule 8.6. In the course of that drafting, the Chair, though not a subcommittee member, had spotted an ambiguity that might be read to require the lawyer to assure that proposed activity by a client actually complied with the state's applicable marijuana laws, an ambiguity that was resolved by insertion of a "reasonable belief" qualifier.[5]

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4. *See, e.g.*, http://www.americanbar.org/publications/law_practice_magazine/2013/may-june/practice-management-advice.html.

5. *See* the subcommittee's report at page 53 of the materials provided to the Committee members for this thirty-seventh meeting.

Webb noted that van Westrum objected, in his email, to what he perceived as an unnecessary and misleading paraphrasing of Rule 8.6 in the proposed comment to it, as revised by the subcommittee.[6]

As to the proposed changes to Rule 8.4, Webb explained that the subcommittee believed that, at the Committee's thirty-sixth meeting, on July 26, 2013, the Committee had approved the subcommittee's submission subject to a concern that the safe harbor that would be provided to Colorado lawyers with regard to marijuana activities that conformed to Amendments § 14 and § 16 of Colorado Constitution should extend only to the lawyer's personal use, not also to the lawyer's participation in commercial activities that are provided for in Amendment § 16(1)(b). After the Committee's July 26, 2013, the subcommittee worked through several iterations of changes to provide that limitation, acting by email. Again, van Westrum objected, as stated in the email that is included in the meeting package, to the use, in proposed Comment [2A], of the phrases "medical use" and personal use" to characterize activities that are thereafter specifically delineated in the comment by direct citation to particular provisions within the two constitutional amendments, Amendment § 14 and Amendment § 16. Van Westrum had noted that the constitutional text extends "use" beyond its common limitations to include such things as cultivation, transport, and gifts, even without regard to the amendment's reach into commercial activities, suggesting that the paraphrasing in the comment might be deemed to limit the activities that lawyers may engage in to a narrower subclass than the full breadth of activities permitted by the actual constitutional provisions. Additionally, van Westrum pointed out that the amendments permit marijuana activities in care-giving roles that might not be included in the subcommittee's paraphrasing about a "lawyer's 'medical use' or 'personal use' of marijuana"; that, Webb said, was a swamp the subcommittee chose not to wade into.

Webb reported that the third issue van Westrum had raised with the subcommittee was the distinction between a lawyer's personal use of marijuana and the lawyer's engagement in marijuana commerce. The members of the subcommittee believed that the matter had been closed by the vote of the whole Committee at its thirty-sixth meeting, in July. Van Westrum had pointed out to the subcommittee that some of the commercial activities permitted by Amendment § 16(4)(a) through (e) do not require licensure; included in these activities are selling marijuana accessories — which might include implements for growing marijuana — and leasing property to others for lawful marijuana activities. These are activities that some Colorado lawyers are likely to want to engage in, particularly if they own and lease cropland. But the subcommittee viewed the distinction between personal use and commercial use to be a bright line that could be utilized in the proposed comment. Underlying the subcommittee's view, Webb said, was the feeling that, if the Federal government were to begin actively to enforce Federal anti-marijuana law in Colorado, it would likely target commercial activities. He questioned whether the Court would want to take a public stand permitting lawyers to engage in those commercial activities, even if they are permitted to other Colorado citizens under the state's laws.

Webb then asked van Westrum to state his position, which he did largely by repeating what he had said in the email that had been provided to the members in the meeting package.

In partial answer to van Westrum's concern that the paraphrasing "medical use" and "personal use" were unnecessarily narrowing, Webb pointed out that the phrase "personal use" — while not defined in Amendment § 16 nor used in its text[7] — is the caption for Amendment § 16(3). Webb agreed that

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6. *See* page 59 of the materials provided to the Committee members for this thirty-seventh meeting.

7. Amendment § 16(2)(b) uses the term "personal use" in the definition of "consumer": "'Consumer' means a person twenty-one years of age or older who purchases marijuana or marijuana products for personal use by persons twenty-one years of age or older, but not for resale to others." And the section is captioned "Personal use and regulation of marijuana."

headings are not sufficient to determine the meaning of a provision but he felt that it would be inaccurate to say that "personal use" is without meaning in Amendment § 16.

A member said that she saw an additional issue, after reading van Westrum's email. She asked whether the Committee should revisit the whole matter. The change in Colorado law regarding the use of marijuana is in a complete state of flux, she said, with lots of state deadlines not being met. Legislation is needed to implement the voters' amendments to the Constitution, and the state will be working on the issues for years to come. The proposals that are before the Committee, she felt, have not helped at all to deal with the many issues. The proposed comment stresses that we would protect only activities that are permitted under Colorado marijuana law, notwithstanding that those activities will remain violative of Federal marijuana laws. But workers in the marijuana industry will be stepping on lots of law besides the specific Federal law criminalizing marijuana activities — she mentioned tax law and credit card and banking laws as examples. All of those laws are implicated in marijuana commerce, in which commercial lawyers are trying to provide legal services. Many federal laws, besides the marijuana criminal laws, will be violated in that activity, but the comment does not protect the lawyer against advice that implicates those other violations.

The Chair responded to those comments by saying she did not know what the member intended. Would she like to see a safe harbor for government lawyers?

The member said she was not seeking special treatment for government lawyers. Rather, she favored protecting lawyers' personal use of marijuana, permitting them to engage, without fear of discipline, in marijuana activities as others can do, personally, in Colorado. But that activity is not the activity that lawyers engage in when they provide legal services. The Committee, she said, was not addressing the commercial side of marijuana activities, though that may entail the kinds of activities that lawyers engage in as lawyers. We are just addressing personal use.

To the Chair's comment that Rule 8.6 has been written to permit lawyers to counsel and assist clients with respect to their commercial marijuana activities, the member countered that government lawyers do not counsel or assist *their* clients to engage in the conduct that is covered by references to Amendments § 14 and § 16. The proposal before the Committee does not protect government lawyers in the kinds of services they provide to their government clients regarding marijuana laws.

A member said that he agreed with the Chair, that proposed Rule 8.6 covers all activities in which lawyers may counsel or assist others regarding marijuana laws, including counseling or advising governmental entities about matters that relate to marijuana commerce or the development of laws and regulations for that industry.

A member spoke to say that the member who first spoke about government lawyers had effectively made a motion to table the discussion, and this member seconded that motion. This is the wrong forum, she commented, for these issues to be considered; she added that the Colorado Attorney General is considering these issues.

The member who now found that her comments had been taken as a motion to table the discussion, a motion that had been seconded, agreed that the Chair could take her comments as that motion. She asked that the subcommittee take a second look at all of the matter; and she clarified, in an answer to another member's inquiry, that her motion went to the entirety of the subcommittee's proposals, including the proposed Comment [2A] to Rule 8.4 as well as proposed Rule 8.6 and its comment.

The member who had said that he agreed that proposed Rule 8.6 covers all activities in which a lawyer may counsel or assist others regarding marijuana laws commented that he disagreed with the

proposition that this Committee should do nothing with respect to the situation created by the amendments to the Colorado Constitution that liberalized marihuana usage; he understood the proposition, he added, but he did not agree with it. He did not see why, given the comments about government lawyers, the proposed Rule 8.6 should be questioned. It is urgent, he said, that lawyers be permitted to provide counsel and assistance to those in the state who will now be engaged in marijuana commerce or in regulating that commerce, and to provide that counsel free from discipline by the Office of Attorney Regulation Counsel.

Webb added that he strongly opposed tabling of the matter, given the resources that the Committee and its subcommittee had devoted to it. He added that he had not anticipated such a backsliding from where the Committee had gotten to at its thirty-sixth meeting, in July. He noted that the subcommittee's initial report had spoken of a chilling effect on lawyers in the absence of particular treatment of the matter in the rules.

Van Westrum added that, although he had concerns about the details of the proposals, as he had expressed in his email, he did not want to see the matter tabled. Noting the state's need for lawyers' counsel and assistance if the commercialization of marijuana is to be accomplished as contemplated by the constitutional amendments, he asked for positive action on both of the proposals, on Rule 8.4 and on Rule 8.6.

On a vote of the members, the motion to table was defeated.

A member moved approval of the subcommittee's proposal for Rule 8.6 and its comment, saying that he would ask for a vote on Rule 8.4 after Rule 8.6 w as dealt with.

A member said she was concerned about the statement in the comment to Rule 8.6 that "[t]he phrase 'standing along' clarifies that this rule does not preclude disciplinary action" The comment's reference then to "federal law other than those prohibiting use, possession, cultivation, or distribution of marijuana" is, she said, too limiting, because it implies that a lawyer may be disciplined for counseling conduct that violates laws other than "those prohibiting use, possession, cultivation, or distribution of marijuana"

The member who had expressed concern for the impact of the proposals on government lawyers said she was concerned, too, that the proposed comment to Rule 8.6 left open the possibility that the lawyer could be subject to "disciplinary action" for counseling or assisting a client with respect to marijuana-related conduct that violated "federal law other than those prohibiting use, possession, cultivation, or distribution of marijuana," such as Federal tax law, credit and banking law, and the like. The words, she said, cut back on what we intend to be protection for lawyers who advise clients about all aspects of marijuana commerce.

Another member said she agreed with that observation. The text found in Rule 8.6 itself did not present that problem, she said, because, there, the "standing alone" phrase was not a limiting phrase. The comment, however, used the phrase in a different sentence structure, causing the problem that the other member had noted.

A member asked whether the problem could be resolved by deleting the phrase "a lawyer reasonably believes to be permitted" and leave the text dealing only with conduct that is in fact permitted by the Colorado Constitution.

To that, another member said that the concern had been directed toward the marijuana dealer who wants to open a bank account but finds that doing so would violate Federal law proscribing the deposit of drug-sourced money in a federally insured deposit account.

The member who had raised the issue said that she did not believe the issue was found in the text of Rule 8.6 but only in the wording of its comment.

To that observation, a member proposed that the Committee strike the proposed comment to Rule 8.6 in its entirety, leaving just the text of the rule itself, as proposed by the subcommittee. In his view, the identified problem was a troublesome one and that solution would work, because the paraphrasing of the comment was not useful. He added that, in this one instance, he would agree with van Westrum's concerns about paraphrasing, as expressed in his email.

On a vote, the Committee approved recommending to the Court the text of Rule 8.6 as proposed by the subcommittee, omitting any comment to the rule.

On a vote, the Committee then approved recommending to the Court Comment [2A] to Rule 8.4, as proposed by the subcommittee.

IV. *ABA Model Rules Changes.*

The Committee then turned briefly to the recent changes proposed to a number of the Model Rules of Professional Conduct by the American Bar Association, but it decided to leave discussion of its subcommittee's report on those changes to the next meeting of the whole Committee.

A member asked for a brief summary of those changes. Michael Berger, the chair of the subcommittee that has been considering them explained that, in 2012 and 2013, the ABA House of Delegates approved some of the amendments to the ABA's Model Rules that had been recommended by its "20/20 Commission." The impetus for those amendments had been the expansion of electronically stored and distributed information within the legal profession, an expansion that had become prominent since the ABA's last significant revisions to the Model Rules in 2002 and 2003 — the Model Rules that served as the basis for the Rules of Professional Conduct that became effective in Colorado in 2008. The subcommittee has studied these most recent amendments to the Model Rules in order to recommend which, if any, should be adopted in Colorado. The subcommittee's charge, Berger added, included proposing or rejecting any of those ABA changes or proposing other changes to the Colorado Rules.

Berger said that the subcommittee approached the task similarly to the manner by which a subcommittee of the Committee had considered the 2002 and 2003 amendments to the ABA Model Rules, which led to the recommended amendments to the Colorado Rules that the Court adopted in 2008. The subcommittee first divided the recent ABA amendments between the many that are minor and non-controversial, and those that are more substantive and deserving of more consideration. Working groups then studied in depth the latter group of the ABA amendments. Those working groups then reported to the whole subcommittee, which considered and acted upon their recommendations.

In addition to that activity, Berger said, a number of the subcommittee members believe that there are problems with Colorado Rules 4.4(b) and 4.4(c), regarding the inadvertent disclosure of documents — problems that the ABA had not addressed because the ABA Model Rules do not have provisions similar to those Colorado provisions. The subcommittee tasked with considering the ABA changes had recommended that another subcommittee be formed to give special consideration to Rules 4.4(b) and 4.4(c), but the Chair asked the subcommittee itself to do that work. Berger said the subcommittee would

have one more meeting, to consider Rules 4.4(b) and 4.4(c), and would provide a supplemental report to the Committee after that meeting.

Berger commented that the subcommittee's extant report on the ABA changes is found at page 68 of the meeting package for this meeting. The report is, he said, just twenty pages long, and the reader need not review all of the supporting material to understand the subcommittee's proposals.

Berger recommended that the whole Committee consider the subcommittee's report at its next meeting, at which time it can vote, serially, on the recommendations.

V. *Model Fee Agreements; Typo.*

James Sudler noted to the Committee that, during a break in the discussion at this meeting, a number of members had discussed the prospect of providing model fee agreements, or model provisions for engagement agreements regarding fee structures, for Colorado lawyers. Such models might, he noted, be added to the Rules by appendix, as the Recommended Model Pro Bono Policy for Colorado Licensed Attorneys and Law Firms are now appended to Rule 6.1.

Another member suggested, instead, that the Colorado Bar Association be urged to develop such models. He was joined in that suggestion by another member, who noted that the development of such models could be a very large undertaking; that member suggested that the work product of such an effort should not be issued under the Court's imprimatur.

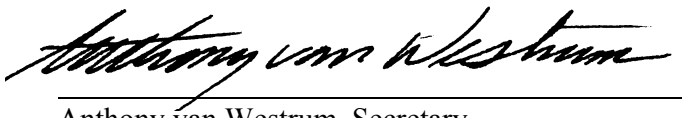
Another member noted that the Court already provides a model contingent fee agreement,[8] but he agreed that this new undertaking should not be pursued by this Committee for adoption by the Court.

The Chair remarked to Sudler that there is a typographical error in current Rule 1.5(f): The text refers to Rule 1.15(f)*(1)*, but it should refer simply to Rule 1.15(f), for that provision has no subdivisions.

VI. *Adjournment; Next Scheduled Meeting.*

The meeting adjourned at approximately 12:00 p.m. The next scheduled meeting of the Committee will be on Friday, December 6, 2013, beginning at 9:00 a.m., in the Supreme Court Conference Room.

RESPECTFULLY SUBMITTED,



Anthony van Westrum, Secretary

[These minutes are as approved by the Committee at its thirty-ninth meeting, on March 14, 2014.]

8. *See* Colorado Rules of Civil Procedure, Chapter 23.3, Rules Governing Contingent Fees, Rule 7, Forms.

The substitution distributed to the Committee at the meeting, by James S. Sudler III, regarding the "lookback provisions" of Rule 1.15B read as follows:

> Substitute the following as the text of Rule 1.15B(i), presently found on p. 4 of Exhibit A to the report of the Rule 1.15 Subcommittee dated October 2, 2013, p. 28 of the Meeting Materials provided by the Chair for the Thirty-seventh Meeting of the Supreme Court Standing Committee on Rules of Professional Conduct on October 11, 2013:
>
> > (i) If the lawyer or law firm discovers that funds of a client or third person have mistakenly been held in a COLTAF account in a sufficient amount or for a sufficiently long time so that interest or dividends on the funds being held in such account exceeds the reasonably estimated cost of establishing, maintaining, and accounting for a trust account for the benefit of such client or third person (including without limitation administrative costs of the lawyer or law firm, bank service charges, and costs of preparing tax reports of such income to the client or third person), the lawyer shall request, or shall cause the law firm to request, a refund from COLTAF of the interest or dividends, for the benefit of such client or third persons, in accordance with written procedures that COLTAF shall publish and make available through its website and shall provide to any lawyer or law firm upon request.
>
> The substitution differs from the text contained in the report as follows:
>
> > (i) If the lawyer or law firm discovers that funds of a client or third person have mistakenly been held in a COLTAF account in a sufficient amount or for a sufficiently long time so that interest or dividends on the funds being held in such account exceeds the reasonably estimated cost of establishing, maintaining, and accounting for a trust account for the benefit of such client or third person (including without limitation administrative costs of the lawyer or law firm, bank service charges, and costs of preparing tax reports of such income to the client or third person), the lawyer shall request, or shall cause the law firm to request, a refund from COLTAF ~~**to the COLTAF account**~~ of the interest or dividends***, for the benefit of such client or third persons,*** in accordance with written procedures that COLTAF shall publish and make available through its website and shall provide to any lawyer or law firm upon request.
>
> The substitution changes the text of Current Rule 1.15(h)(3) as follows:
>
> > If ~~**a**~~ ***the*** lawyer or law firm discovers that funds of ~~**any**~~ ***a*** client or third person have mistakenly been held in a ~~**trust**~~ ***COLTAF*** account ~~**for the benefit of COLTAF**~~ in a sufficient amount or for a sufficiently long time so that interest ***or dividends*** on the funds being held in such account exceeds the reasonably estimated cost of establishing, maintaining**,** and

accounting for a trust account for the benefit of such client or third person (including without limitation administrative costs of the lawyer or law firm, bank service charges, and costs of preparing tax reports of such income to the client or third person)***,*** the lawyer ~~**or**~~ ***shall request, or shall cause the*** law firm ~~**shall request COLTAF to calculate and remit trust account**~~ ***to request, a refund from COLTAF of the*** interest ~~**already received by it to the lawyer or law firm**~~ ***or dividends,*** for the benefit of such client or third ~~**person**~~ ***persons,*** in accordance with written procedures that COLTAF shall publish and make available through its website and shall provide to any lawyer or law firm upon request.

COLORADO SUPREME COURT

STANDING COMMITTEE ON THE RULES OF PROFESSIONAL CONDUCT

Approved Minutes of Meeting of the Full Committee
On December 6, 2013
(Thirty-Eighth Meeting of the Full Committee)

The thirty-eighth meeting of the Colorado Supreme Court Standing Committee on the Rules of Professional Conduct was convened at 9:00 a.m. on Friday, December 6, 2013, by Chair Marcy G. Glenn. The meeting was held in the Supreme Court Conference Room on the fourth floor of the Ralph L. Carr Colorado Justice Center.

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

I. *Meeting Materials.*

The Chair had provided a package of materials to the members prior to the meeting date. The secretary confessed to technical incompetencies that prevented him from getting submitted minutes of the thirty-seventh meeting of the Committee, held on October 11, 2013, distributed to the members in time for their review and approval. He promised that they would be available before the next meeting of the Committee.

II. *Submissions from Committee to Court.*

The Chair reported that the Committee's recent proposals for the addition of a Comment [2A] to Rule 8.4 and the addition of a new Rule 8.6 — both in response to amendments to the Colorado Constitution permitting marijuana use and commerce — have been submitted to the Supreme Court for its consideration. The Court will hold a hearing on the proposals at 1:30 p.m. on March 6, 2014, and it has set February 25, 2014 as the deadline for the submission of comments on the proposals. The Chair encouraged members of the Committee to submit to the Court their own comments on the proposals.

The Chair also reported that the Committee's proposal for a complete revision of Rule 1.15, regarding a lawyer's safekeeping of others' property and the use of Colorado Lawyer Trust Account Foundation ("COLTAF") accounts, will be soon submitted to the Court. She had received some suggestions from the Court's librarian for a reformatting of the proposal — which proposal splits existing Rule 1.15 into five rules of co-equal status — to conform with the Court's formatting policies, and she is in the process of making the necessary revisions.

III. *Pro Bono Policy*.

The Chair directed the members to the fifth item on the agenda for the meeting and to the accompanying material, provided by member David W. Stark, relating to the development of additional attachments to Rule 6.1, which attachments would provide recommended model pro bono policies for lawyers employed in government service or in in-house legal departments. The two model policies have been developed by the Chief Justice's Commission on the Legal Profession.

The Chair explained that she did not wish to take up the details of the proposed policies at this meeting but wanted to establish a process by which the Committee might subsequently consider the proposals. She acknowledged the importance of the proposed additional model policies to accommodate the differing circumstances in which lawyers are engaged in practicing law, but she did not want to put the Committee's consideration of the proposed policies ahead of its pending consideration of the amendments to the Rules that have been proposed by the American Bar Association as the "20/20 Amendments" and which have been under study by a subcommittee of the Committee. The ABA amendments are the fourth item on this meeting's agenda, and the Chair expects the Committee to devote at least this and the next meeting to them, meaning it will not be able to consider the pro bono policies until some later meeting.

The Chair reminded the Committee that it did not review, before adoption, the existing model pro bono policy — the Recommended Model Pro Bono Policy for Colorado Licensed Attorneys and Law Firms — that is currently found following Comment [11] to Rule 6.1. Rather, the Court adopted the model pro bono policy, and placed it following the commentary to Rule 6.1, without consultation with or notice to the Committee. She recalled that some Committee members had been concerned about the placement of that model policy within the Rules themselves. The current proposal for government and in-house lawyers also originates from outside this Committee and would essentially triple the length of the insertion into the Rules if placed adjacent to the current model policy. She has suggested to Stark that all of the model policies might be more appropriately placed in some other location, outside of the Rules.

In response to the Chair's comments, Stark spoke to set the context for the current proposed model policies. They are the product of the Chief Justice's Commission on the Legal Profession and have been developed in the course of that commission's effort to increase the participation of lawyers in pro bono publico activities. Past efforts had led to increased participation, but it was realized that lawyers who practice in governmental agencies and in in-house legal departments are likely to find that their employing legal departments have not adopted pro bono policies to guide them. Justice Gregory J. Hobbs suggested the addition of the two additional models. Stark said he has no personal preference as to where the policies are located, so long as they are available to lawyers.

A member noted that an effort could also be made to reach the 700 lawyers who practice as prosecutors within the state.

Another member agreed with that suggestion, noting that other states have focused on pro bono participation by government lawyers, offering policies that are better fitted to those lawyers' circumstances. Without tailoring to those needs, model policies will be ignored by those lawyers.

To that discussion the Chair added that an appropriate vehicle for considering such policies might be a group composed of a subcommittee of this Committee together with groups from the Court's Criminal Rules Committee and Civil Rules Committee.

A member noted the problem, commenting that the location of the proposals in, say, the Rules of Civil Procedure would seem to evade the notice of lawyers accustomed to looking, instead, to the Rules of Criminal Procedure.

The Chair reiterated her desire that participation include those from all areas of law practice, but she suggested that this Committee's participation with the Civil Rules Committee and no other group might be sufficient, since, she noted, the latter group handles all issues of lawyer regulation. She then refined her thought by suggesting that the appropriate three groups to staff the effort might be this Committee and the Court's Civil Rules Committee and Advisory Committee to the Office of Attorney Regulation Counsel.

To a member's comment that the Civil Rules Committee does not deal with the regulation of lawyers, the Chair recalled that that committee had been involved in the revisions to Rule 265 dealing with the practice of law by lawyers from within professional companies. Another member explained that the mid-1990s revisions to Rule 265 preceded the establishment of this Committee; at that time, in the absence of this Committee, the Civil Rules Committee undertook the task of that revision. Yet another member suggested that, if the matter arose today in the absence of this Committee, revisions to Rule 265 would probably be assigned to the OARC's Advisory Committee; he suggested that we not let history dictate the selection of appropriate participants now.

Stark pointed out that the proposed model pro bono policies would not constitute rules but, instead, would merely be suggestions and guidelines for lawyers' conduct. The Supreme Court will not be issuing orders prescribing what actual pro bono policies should look like. The effort is simply to develop models that will help lawyers make and meet commitments for fifty hours of pro bono service each year.

Stark noted that there are statutory limitations restricting pro bono service by Colorado prosecutors, and he thought the same kinds of restrictions might exist for Colorado public defenders and for Federal prosecutors and public defenders as well He added that we should not get concerned that the proposals will amount to impositions directing that, and how, every lawyer is to provide pro bono services.

A member noted, and Stark confirmed, that the provisions now found in the Rules following Rule 6.1 contain a continuing legal education component.[1] The member suggested that the CLE component indicates that the Board of Continuing Legal Education, or its advisory committee, should also be involved in the development of the policies.

The Chair resisted the addition of the Continuing Legal Education board or its advisory committee to the development group, noting that the granting of CLE credits for pro bono services has already been established in connection with the present model policy. She noted, again, that the existing model policy is just a policy, not a rule, and that no proposal has been made to change any of the Rules. She did not want to see the matter blown up into a big deal. And she added that, when some group is actually formed to deal with these proposals, it can determine whom else to invite to the effort.

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1. Item VI of the Model Pro Bono Policy, found after Rule 6.1, advises—

C.R.C.P. 260.8 provides that attorneys may be awarded up to nine (9) hours of CLE credit per three-year reporting period for: (1) performing uncompensated pro bono legal representation on behalf of clients of limited means in a civil legal matter, or (2) mentoring another lawyer or law student providing such representation.

Stark and the members generally agreed that the effort should go forward with members of the Committee and members of the OARC Advisory Committee, co-chaired by a member of this Committee and of that committee. Stark added that he is the chair of the OARC Advisory Committee.

IV. *Second Supplemental Report of the Amendment 64 [Marijuana] Subcommittee.*

Referring the members to the first page of the materials that had been provided for the meeting, the Chair asked Judge Webb — who was attending the meeting by conference telephone — to discuss the addition of a comment, to be numbered [12A], to Rule 1.2 to cross-reference proposed Rule 8.6.

Webb noted that the members might have determined that the effort to amend the Rules to deal with the questions of lawyers advising clients with respect to marijuana use and commerce, and to the use of marijuana by lawyers themselves, in the light of the amendments to the Colorado Constitution dealing with marijuana use and commerce, had been concluded with the proposals that the Committee has already made to the Court, to which the Chair had referred earlier in the meeting.

However, that effort had overlooked the addition of some reference in Rule 1.2 — which provides that a "lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal" — to Rule 8.6, which, if adopted, would permit counseling clients with respect to marijuana use or commerce that, while now (or soon to be) lawful under Colorado law, remains illegal under Federal law.

To cure the omission, the subcommittee that had been assigned the task of dealing with the marijuana issues now recommended the addition of the following comment to Rule 1.2:

> [12A] Paragraph(d) should be read in conjunction with Rule 8.6.

The addition of a new comment to Rule 1.2 would highlight the unique, non-uniform addition of Rule 8.6 to Colorado's version of the Model Rules of Professional Conduct.

Webb pointed out that those on the subcommittee who have had reservations or opposition to the substance of the Rule 8.4 and Rule 8.6 proposals regarding marijuana have not changed those views but nevertheless believe that, if Rule 8.6 is to be added, the cross-reference should also be added to Rule 1.2.

Webb pointed out that a member of the subcommittee, Eli Wald, preferred instead that a last sentence be added to existing Comment [12] to Rule 1.2, reading, "In appropriate circumstances, paragraph (d) should be read in conjunction with Rule 8.6." The other members of the subcommittee preferred the addition of the new comment that Webb had read.

Wald spoke to Webb's comment about his view, saying that his concern was merely one of form; he simply felt that the cross-reference could be accomplished without the need for an additional numbered comment.

Upon a vote, the Committee approved the proposal that it recommend to the Court that Comment [12A] be added to Rule 1.2 as the subcommittee proposed.

V. *ABA Model Rules Changes.*

The Chair turned the Committee's attention to the Report and Recommendation of the New ABA Model Rules Subcommittee that had been included in the meeting materials for the Committee's thirty-seventh meeting, on October 11, 2013, beginning on page 68 of those materials.

As she invited the subcommittee's chair, Michael Berger, to guide the discussion of the subcommittee's proposals, the Chair congratulated Berger for his recent nomination to a seat on the Colorado Court of Appeals.[2]

Berger said that his process would be to present a summary of each change to rule or comment of the ABA's Model Rules of Professional Conduct that has been proposed by the American Bar Association's Commission on Ethics 20/20 and would then seek Committee discussion and vote on the changes as they were taken up. He would use the Report to which the Chair had referred the members as his guide.

A. *Rule 1.0, Definitions.*

The ABA Commission proposed an expansion of the definition of "writing" to include "electronic communications", deleting "e-mail."[3]

The last sentence of Comment [9] to Rule 1.0, regarding the defined term "screened," would be modified to include information that is in electronic form.[4]

Berger reported that the subcommittee supported both of these changes. The members approved them as proposed changes to the Colorado Rules.

B. *Rule 1.1. Competency.*

The ABA proposed a new Comment [6][5] to existing Rule 1.1 that would suggest that an existing client's informed consent be obtained before a lawyer engaged the services of additional lawyers, from outside of the lawyer's own law firm, to work on an existing representation. Berger explained that the imposition is sensible, inasmuch as the client will be paying for the additional services and inasmuch as

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2. Michael H. Berger was appointed to the Colorado Court of Appeals by Governor John Hickenlooper on December 18, 2013. His investiture was conducted on January 24, 2014. —Secretary

3. The first sentence of the definition of "writing" in Rule 1.0 would be amended as follows: "Writing" or "written" denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or videorecording, and ~~e-mail~~ *electronic communications*.

4. The last sentence of Comment [9] to Rule 1.0 would be amended as follows:

> To implement, reinforce and remind all affected lawyers of the presence of the screening, it may be appropriate for the firm to undertake such procedures as a written undertaking by the screened lawyer to avoid any communication with other firm personnel and any contact with any firm files or other **~~materials~~** ***information, including information in electronic form,*** relating to the matter, written notice and instructions to all other firm personnel forbidding any communication with the screened lawyer relating to the matter, denial of access by the screened lawyer to firm files or other **~~materials~~** ***information, including information in electronic form,*** relating to the matter, and periodic reminders of the screen to the screened lawyer and all other firm personnel.

5. New Comment [6] to Rule 1.1 would read—

> [6] Before a lawyer retains or contracts with other lawyers outside the lawyer's own firm to provide or assist in the provision of legal services to a client, the lawyer should ordinarily obtain informed consent from the client and must reasonably believe that the other lawyers' services will contribute to the competent and ethical representation of the client. See also Rules 1.2 (allocation of authority), 1.4 (communication with client), 1.5(e) (fee sharing), 1.6 (confidentiality), and 5.5(a) (unauthorized practice of law). The reasonableness of the decision to retain or contract with other lawyers outside the lawyer's own firm will depend upon the circumstances, including the education, experience and reputation of the nonfirm lawyers; the nature of the services assigned to the nonfirm lawyers; and the legal protections, professional conduct rules, and ethical environments of the jurisdictions in which the services will be performed, particularly relating to confidential information.

it is not appropriate for the lawyer "to hire all his friends" if their services are not actually needed for the representation.

A new Comment [7] to Rule 1.1 would suggest that lawyers who come together from more than one firm to provide "legal services to a client on a particular matter" confer among themselves and with the client as to the allocation of their responsibilities. Although the point is common-sensical, Berger said, the subcommittee recommended the addition of the comment to the Colorado rules as a matter of uniformity.

An amendment to Comment [6] (which would be renumbered as Comment [8]) to Rule 1.1 would specify that a lawyer should keep abreast not only of changes in the law but also of "changes in communications and other relevant technologies." Berger pointed out that the subcommittee was troubled by the ABA's reference to the "benefits and risks" of new technology; it wondered whether a risk analysis would be required anew with each sending of an email to a client. Berger said that all authorities believe the use of email to be appropriate in most cases; rare would be the case where the risks were so great that email should not be used. Accordingly, the subcommittee struck the "benefits and risks" analysis.[6] As an aside, Berger commented that it is common for engagement agreements to address and authorize the use of email for communications.

To these comments about the use of email to communicate with clients, a member noted that many clients use the email addresses that they are provided in the course of their employment. The member referred to a New York case that spoke of the lawyer's obligation to confer with the client about the risks associated with that usage. Many employers take the positions that email communications on their facilities belong to them and that they merely permit the employee to utilize their facilities. The member asked whether revised Comment [8] should also note the benefit of reviewing with the client these aspects of the technology that both lawyer and client might use in the representation. She suggested that these kinds of concerns may be why the ABA version referred to a risk/benefit analysis.

Berger said that the ABA proposed changes to comments to Rule 1.6, dealing with confidentiality, which might address some of this concern, although not specifically with regard to discussion of risks with clients. Berger referred to the ABA's proposed changes to Comment [16] (to be renumbered as Comment [18]) of Rule 1.6, which would specify that Rule 1.6(c) requires a lawyer to "make reasonable measures to safeguard information relating to the representation of a client against unauthorized access by third parties."

A member noted that the text Berger quoted from the proposed comment to Rule 1.6 would not apply to emails sent from a lawyer to a client using the client's employer's email service that were subsequently accessed by the employer, because that access would not be "unauthorized" under an employer policy claiming ownership of all emails utilizing its service.

To this discussion, the member who had initiated the conversation by noting the risks attendant to using employer email services said that communication with an employed client should be addressed in Rule 1.6 rather than Rule 1.1, inasmuch as the issues specifically deal with confidentiality, the topic of Rule 1.6 rather than with competency, the topic of Rule 1.1. Berger agreed and referred to an ABA

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6. The subcommittee's proposal for changes to existing Comment[6] to Rule 1.1 (to be renumbered as Comment [8]) differs from the ABA proposal as follows:

> [6] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law **~~and its practice, including the benefits and risks associated with relevant technology~~** ***and changes in communications and other relevant technologies,*** engage in continuing study and education, and comply with all continuing legal education requirements to which the lawyer is subject.

opinion noting the lawyer's duty to counsel the client about the potential lack of confidentiality when using employer email service. He also suggested that there is caselaw on the point and added that he thought the Committee should specifically deal with the matter.

To that suggestion another member said he would prefer to retain the ABA's proposal for Comment [8].to Rule 1.1, with its reference to both the benefits and the risks of technologies. He believed that a case raising the issue has reached the United States Supreme Court and suggested there was merit in retaining uniformity with the ABA model in this instance. He added that issues of benefits and risks may arise in technological contexts other than communications and suggested that the ABA's text more appropriately identifies the breadth of the issues.

A member who had not previously spoken countered, saying that the text proposed by the subcommittee was sufficiently parallel to the ABA's version and suggesting that, if more need be said, it should be said in the context of confidentiality under Rule 1.6. Rule 1.1 deals with competency about the law, not about cryptology, he said. To the extent that we are specifically concerned about the maintenance of confidentiality in the face of technological risks, we should tackle the problem in Rule 1.6, whether or not we retain or delete the ABA's risk/benefits language in the comment to Rule 1.1.

Berger asked — he said that he did so in order to defend the subcommittee's position — what could be meant by "changes in the . . . practice [of law], including the benefits and risks associated with relevant technology"? What would "benefits and risks" mean, practically speaking, in the context of the practice of law?

The member who had favored the ABA's model said this is not a question that arises every time an email is sent but, rather, is one that should be considered "more globally": What are the risks of using email or faxes? He moved for the adoption of the ABA's version of renumbered Comment [8] of Rule 1.1. The motion was not seconded.

A member noted that the ABA's text went beyond communications, and another member added to that the suggestion that it would encompass "cloud-based" technologies, in which information is transferred to storage on third-party systems.

The member who had initiated the conversation by noting the risks attendant to using employer email services suggested that this addition be made to renumbered Comment [8]: "Technology is continually changing, and the lawyer needs to be aware of the risks as he adopts that technology and needs to discuss the risks and benefits with the client as appropriate" She suggested that this be done by the addition of a separate paragraph to the comment, one that would make the statement sufficiently broad that we would not need to come back to it as the technological possibilities expanded.

Berger repeated his concern that the meaning of "benefits and risks" is unclear; if we do not understand it, he said, we should reject it. But he would agree with the addition of a new Comment [8A] that would speak more directly to all kinds of technology.

The member who had suggested the addition of text to the comment pointed out that technological risks may develop at any state of a representation, so that our additional commentary should deal with that prospect, too, and not just be associated with the commencement of a representation.

A member who had not previously spoken said he believed the appropriate place to deal with these matters would be in renumbered Comment [18] to Rule 1.6, governing confidentiality, where the implications of email access to communications, cloud-basing client information, and the like could be

dealt with. Among the considerations, he suggested, should be claims of waiver. He would adopt the subcommittee's recommendations for renumbered Comment [8] in 1.1 and add more to Rule 1.6.

To that, a member suggested that there may be technological issues that raise other hazards besides those impairing confidentiality.

A member who had not previously spoken agreed that the subcommittee's proposal for renumbered Comment [8] should be adopted and that a more general statement should be added to Rule 1.6 in line with the text previously suggested about continually-changing technology.

Noting that the motion to adopt the ABA's version of renumbered Comment [8] of Rule 1.1 had not been seconded, a member asked for discussion of the subcommittee's proposal to strike the words "and its practice" following "keep abreast of changes in the law." But Berger returned instead to the comments suggesting that these matters be dealt with in the context of confidentiality and Rule 1.6. He said there is a direct relationship between competency and confidentiality; the two principles go together, and some cross-reference should be added between the two expressions of the principles in the two rules — Rule 1.1 and Rule 1.6 — to reflect that relationship.

The member who had proposed adherence to the ABA model commented that a large part of ethical conduct is to keep abreast of dangers to client-lawyer confidentiality. He advised that we not get overly technical in our analysis, pointing out that we speak of "risks" all the time in the context of professional conduct and suggesting that we need not avoid the term as the subcommittee proposed.

A member who had not previously spoken expressed a concern that the ABA's indication that a lawyer should keep abreast of technological changes that impact modes of law practice — quite apart from the adverse impact of such changes on confidentiality — could be burdensome for those who like the ways they have been practicing law.

To that Berger said that all that the revised comment speaks to is the need for those lawyers to "stay abreast" of changes in technologies in the course of doing what the existing comment says they should already be doing: keeping abreast of "changes in the practice of law."

A member who had not previously spoken suggested that the Committee accept the subcommittee's proposal for renumbered Comment [8] to Rule 1.1 and added that he thought the Committee would find that renumbered Comment [18] Ito Rule 1.6 would prove to be the right place to deal with concerns about the impact of technology on confidentiality, as it already says a lot in that respect.

Another member agreed with those comments and with the prior comments that had directed the Committee's attention to renumbered Comment [18] to Rule 1.6.

The member who had initiated the conversation by noting the risks attendant to using employer email services moved that the subcommittee be directed to expand the commentary in the light of the discussion and decide where the expanded commentary should be inserted in the comments to the Rules. She noted her agreement that the phrase "and its practice" and the phrase "benefits and risks" should be omitted from renumbered Comment [8] to Rule 1.1 as the subcommittee proposed. Her motion was seconded.

In the discussion that followed, the member who had made the unseconded motion to retain the ABA's version of renumbered Comment [8] to Rule 1.1 commented that *all* of the ABA 20/20 changes have been motivated by the perception that the Rules need to accommodate changes in the technologies

that impact lawyers in their practice of law. In that light, he said, reference to technology is necessary in both Rule 1.1 — Competency — and Rule 1.6 — Confidentiality. He again proposed retention of the ABA's text for the renumbered comment.

The member who had commented that Rule 1.1 deals with competency about the law, not about cryptology, agreed with the member who had suggested that the Committee would find that renumbered Comment [18] to Rule 1.6 was the right place to deal with concerns about the impact of technology on confidentiality. He referred to the text of renumbered Comment [19] to Rule 1.6—

> . . . Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule. . . .

—and said that he understood the pending motion to be to consider whether or not some change should be made to capture the concerns of the Committee but was not a mandate to the subcommittee to make any change.

Berger said he would consider it friendly to the subcommittee's proposal to retain the phrase "or its practice" in renumbered Comment [8], but he continued to reject the phrase "benefits and risks."

A member asked for a restatement of the pending motion, and the member who had made the motion restated it as follows: Accept renumbered Comment [8] to Rule 1.1 as proposed by the subcommittee — but with the retention of the phrase "and its practice" — and let the subcommittee reconsider whether renumbered Comments [18] and [19] of Rule 1.6 deal adequately with the implications of changing technology or should be expanded and, also, consider whether an appropriate cross-reference to any of the additions should be added to a comment in Rule 1.1.

A member, describing his comment to be unrelated to the discussion that had just occurred, pointed out that new Comment [6], dealing with "the lawyer who hires his friends to work on the matter," has application to the phenomenon of lawyers outsourcing legal services to oversees providers. He found that comment to be particularly valuable, perhaps the most important change to be made by the ABA modifications.

Speaking against the pending motion, a member argued that the Committee kept adding more and more text to the commentary, making it more and more complex. She urged the subcommittee to consider that problem if it returns to the commentary upon adoption of the pending motion.

Upon a call for the question, the pending motion was adopted.

Following adoption of the motion, a member lamented that the text, as proposed by the subcommittee, had been found acceptable. Another member replied that the subcommittee has been given broad authority and might conclude that what it had proposed was indeed sufficient. But the member who had made the motion pointed out that the cross-referencing portion of the motion had been mandated and was not left to the discretion of the subcommittee.

Upon a motion, the Committee approved the subcommittee's recommendations for changes to Rule 1.1, subject to the possible reworking of renumbered Comment [8] in the context of renumbered Comments [18] and [19] of Rule 1.6 pursuant to the previously adopted motion.

C. *Rule 1.2. Scope of Representation and Allocation of Authority Between Client and Lawyer.*

Berger directed the Committee's attention to the subcommittee's proposal to add two comments, numbered [5A] and [5B], to Rule 1.2 for the purpose of cross-referencing to the two comments — Comments [6] and [7] — that are to be added to Comment 1.1 regarding consultation with the client before engaging the services of additional lawyers and coordination of efforts by lawyers from different law firms engaged on a matter. The subcommittee proposed adding the same cross-referencing comments to Rule 1.4 as well.

Upon a motion, the Committee approved the subcommittee's proposals regarding Rule 1.2.

A member asked why these concepts (consultation with the client before engaging the services of additional lawyers and coordination of efforts by lawyers from different law firms engaged on a matter) should be added to the competency provision — Rule 1.1, as previously amended — as well as to the scope-of-representation provision, Rule 1.2. He pointed out that both of the concepts deal with communications — with clients and among lawyers — and are seemingly unrelated to competency.

To that, Berger replied that the ABA and the subcommittee had felt the concepts implicated both competency and scope of representation. In any event, he urged that the cross-references be retained in Rule 1.4, which deals specifically with client communication.

A member noted that the Committee had just approved the addition of Comments [5A] and [5B] to Rule 1.2, but she now questioned whether the phrase that is used to open both of the comments — "Regarding communications with clients" — should be changed.

The member who had raised the question that the Committee had just considered, about the location of the consultation and coordination concepts, said he found the wording not only to be redundant but to be confusing, because it is the scope of the representation — rather than communications with the client — that Rule 1.2 "regards." Perhaps, he suggested, the two comments might begin "In determining, with the client, the . . . ."

The Committee determined to retain some cross-reference in the comments to Rule 1.2 back to the concepts expressed in new Comments [6] and [7] to Rule 1.1 but to give the subcommittee permission to reconsider the introductory wording of the cross-referencing.

D. *Rule 1.4. Communication.*

Berger characterized the modification that the ABA made to Comment [4] to Rule 1.4 — to recognize that a lawyer should promptly "respond to or acknowledge" communications from the client, whether they arrived by telephone or otherwise — as not being controversial.

And Berger pointed out that the subcommittee proposed the addition, to Rule 1.4, of the same cross-referencing comments, referring back to new Comments [6] and [7] of Rule 1.1, that were to be added to Rule 1.2 and had been the discussion of the Committee's preceding conversation.

A member asked why cross-referencing comments back to new Comments [6] and [7] of Rule 1.1 were needed in both Rule 1.2 and in Rule 1.4. Berger replied that he did not have strong feelings about the matter.

The Committee approved the subcommittee's further consideration of whether the cross-referencing comments were appropriate for both Rule 1.2 and Rule 1.4 or could be omitted from the latter rule.

E. *Rule 1.6. Revelation of Client Confidentiality to Resolve Conflicts of Interest.*

Berger pointed the Committee to the ABA's addition of a new clause (b)(7) to Rule 1.6 to permit a lawyer, under limited circumstances, to reveal limited client information in the course of a "lawyer's change of employment or from changes in the composition or ownership of a firm." He reminded the Committee that Comment [5A] to the Colorado Rule[7] speaks of a lawyer's "implied authorization" by her client to make disclosures of the client's information in that context, but he noted that the concept embodied in that comment has never really worked — there is in fact no "implied authorization," because clients do not actually contemplate the occurrence in which the authorization would be needed.[8]

The ABA's changes would insert the concept directly into the text of the Rule rather than relegating it to a comment. The subcommittee considered, Berger said, all of the substantive differences between the existing Colorado comment and the ABA's text of new clause (b)(7) of Rule 1.6 and determined that it was sensible to insert, directly in the rule's text, this exception to the obligation to maintain client confidentiality. Further, Berger noted, the ABA's language is worded better than the Colorado comment and appropriately covers law firm mergers as well as a lawyer's "lateral move."

But the subcommittee did not approve of the ABA's decision to permit disclosure of client information in the law-firm-merger or lateral-move context "if the revealed information would not compromise the attorney-client privilege or otherwise materially prejudice the client." The subcommittee recommended, instead, that such disclosure be permitted "only if the revealed information is not protected by the attorney-client privilege and its revelation is not reasonably likely to otherwise materially prejudice the client." In the subcommittee's view, if the subject information is indeed privileged, the lawyer should not be permitted to breach that privilege in the context of either a law firm merger or a lateral move between firms. The subcommittee felt that *any* breach of the privilege in either of those contexts would be a "compromise" of the privilege, so that the ABA's suggestion that some breaches of privilege could be something less than "compromises" was not comprehensible.

Berger noted that the subcommittee was also troubled by the ABA's use of "would," implying that an actuality of prejudice to the client is required before the disclosure is prohibited. The subcommittee felt that a risk analysis — "not reasonably likely" — should be utilized. If there is risk to the client because of a disclosure in the context of a law firm merger or a lateral move, the client's

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7. Colorado Rule 1.6, Comment [5A], reads as follows:

> [5A] A lawyer moving (or contemplating a move) from one firm to another is impliedly authorized to disclose certain limited non-privileged information protected by Rule 1.6 in order to conduct a conflicts check to determine whether the lawyer or the new firm is or would be disqualified. Thus, for conflicts checking purposes, a lawyer usually may disclose, without express client consent, the identity of the client and the basic nature of the representation to insure compliance with Rules such as Rules 1.7, 1.8, 1.9, 1.10, 1.11 and 1.12. Under unusual circumstances, even this basic disclosure may materially prejudice the interests of the client or former client. In those circumstances, disclosure is prohibited without client consent. In all cases, the disclosures must be limited to the information essential to conduct the conflicts check, and the confidentiality of this information must be agreed to in advance by all lawyers who receive the information.

8. At page 10 of the subcommittee's written report to the Committee dated October 3, 2013, found at page 77 of the materials for the Committee's thirty-seventh meeting, on October 11, 2013, the subcommittee noted that the change from comment to rule "[makes] clear that it is an express exception rather than merely an impliedly authorized disclosure. That rationale has never really worked because 1.6(a) permits disclosures that are 'impliedly authorized to can·y out the representation,' not to allow a lawyer to change firms." —Secretary

information should not be disclosed — no matter how troublesome nondisclosure might be to the lawyers who desire the merger or the lateral move — unless the client has consented to the disclosure.

Accordingly, the subcommittee recommended that the added clause (b)(7) to Rule 1.6 read as follows:

> (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
>
> . . .
>
> (7) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information is not protected by the attorney-client privilege and is not reasonably likely to otherwise materially prejudice the client; or. . . .

A member noted that this proposal and Berger's explanation took the Committee back to the risk/benefit matter that had underlain its earlier discussion about email communications and other technology issues. In the context of this addition of a new Rule 1.6(b)(7), she asked whether the subcommittee has sufficiently justified its proposal to stray from the model language.

To that question, Berger responded that the subcommittee felt that the language goes to the heart of the duty to maintain client confidentiality The subcommittee saw the matter of the lawyer's breach of a client confidence to serve the lawyer's own interest differently that did the ABA.

A member noted that he was gratified to see the subcommittee's revision to the ABA text, since it tracked the position that he had, himself, proposed to the ABA Committee on Professional Responsibility years ago. He approved of the subcommittee's approach. But he noted that the ABA's model does not use the adjective "material" before the word "prejudice" as does the subcommittee's proposal.

Berger explained the insertion of the "material" qualifier this way: If the impact on the client is small, it is not worth stopping the lawyer from making the immaterial disclosure in the law firm merger or lateral move context.

The member who had noted the subcommittee's addition of the "material" qualifier said he liked the outcome, and he noted that, if the prejudice would be "material," the lawyer may seek the client's "informed consent" to the disclosure under existing Rule 1.6(a).

A member asked about the word "otherwise" in the phrase "not reasonably likely to otherwise materially prejudice the client." She observed that, if the information is protected by privilege, it is by definition "protected" by that privilege; what, she asked, could "otherwise materially prejudice the client" mean?

Two members expressed their agreement with that observation, but a third objected that the second part of the clause's structure deals not with privilege but with other aspects of confidentiality.

But one of the two members who had agreed with the initial observation pointed out that the word "otherwise" had been used in the ABA construction — "not compromise the attorney-client privilege or otherwise prejudice the client" — with the verbs "compromise" and "prejudice" to distinguish the circumstances of those two different actions. Dropping the two verbs, she said, changes the structure and eliminates the need for "otherwise/"

To that, another member agreed but argued that removal of the word "otherwise" would not alter the application of the clause as the objecting member had pointed out was necessary.

On a motion, the subcommittee's text was approved as amended to strike the word "otherwise."

The Chair pointed out that the Committee's approval of the insertion of clause (b)(7) to the text of Rule 1.6 required that the existing Colorado comment to the rule, Comment [5A], be deleted. The Committees approved that deletion.

F. *Rule 1.18. Prevention of Unauthorized Disclosure of Client Confidentiality.*

Berger referred the Committee to the ABA's proposal for a short new Rule 1.6(c), requiring that a lawyer take "reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client." The subcommittee recommended that addition.

Berger then turned the Committee's attention to Comment [16] of Rule 1.6, which, with the ABA's other changes, would be renumbered as Comment [18], and which is the comment that had been mentioned earlier in the Committee's consideration of the principle that lawyers be competent with respect to technology, particularly that which impacts client confidentiality. Berger referred to the ABA's "conflation" of confidentiality with the need to be competent in preventing breaches of confidentiality.

Berger explained that the subcommittee decided to track, in renumbered [16], the actual text of the correlative provision in Rule 1.6 itself. Rather than use the ABA's shorthand construction in the comment — "Paragraph (c) requires a lawyer must act competently to safeguard information . . ." — the subcommittee's version would more closely adhere to the text of new Rule 1.6(c), " Paragraph (c) requires a lawyer to take reasonable measures to safeguard information . . . ."

Berger reported that the subcommittee had sensed an unnecessary duplication in the ABA's Comment [19] to Rule 1.6 (renumbered and amended Comment [17] of the current rule). Ultimately, however, it determined to adopt the ABA version of the comment because, even though it is duplicative, it accurately discusses the lawyer's duty to comply with state and Federal data privacy and other such laws. Berger observed that every time the Colorado rules deviate from the ABA Model Rules, particularly by way of an omission of ABA text, readers wonder what the deviation implies. He said there is no reason to send the reader on a wild goose chase by omitting the ABA's proposed addition to renumbered Comment [19].

The Chair noted that, on page 12 of the subcommittee's report — page 79 of the meeting materials for the thirty-seventh meeting of the Committee, on October 11, 2013 — the subcommittee's proposed version of renumbered Comment [18] to Rule 1.6 is introduced as if it were the *ABA* proposal While, as said there, the ABA did renumber Comment [16] to be Comment [18], the textual revision that follows that statement is the revision as proposed by the subcommittee.

A member referred back to the point that had been made earlier about the risk/benefit analysis that is applicable in the context. He said that a client might "authorize" a lawyer's measures to protect the client's information — such as by authorizing the use of email for communications between the lawyer and the client — and yet the authorized measures might nevertheless not be "reasonable" for the purpose.

Upon a motion, the Committee approved the changes to Rule 1.6 and its comments as recommended by the subcommittee.

G. *Rule 1.17. Prevention of Unauthorized Disclosure of Client Confidentiality.*

Berger explained that the ABA made changes to Rule 1.17 — dealing with the sale of a law practice — to clarify Comment [7] and to add a cross-reference in Comment [7] to the similar circumstances that may be encountered in a law firm merger or a lateral move, which would be addressed in new Rule 1.6(b)(7).

Upon a motion, the Committee approved the subcommittee's recommendation to adopt the ABA's changes to Comment [7] of Rule 1.17.

H. *Rule 1.18. Prospective Clients.*

Berger reported that the ABA had made a number of helpful changes to Rule 1.18, the rule dealing with a lawyer's duties to "prospective clients." He described the changes as follows:

1. The term "consult" had been substituted for the word "discuss" in the set-up of the context for Rule 1.18: "A person who *consults* with a lawyer *about* the possibility of forming a client-lawyer relationship . . . ."

2. The ABA revised Comment [2], which provides guidance for distinguishing the "prospective client" who is the subject of the rule from others who may communicate with a lawyer in contexts that do not make them "prospective clients." In providing that guidance, the revised comment would distinguish between communications in response to a lawyer's invitation to provide information about a potential representation and communications that are uninvited but may be received by a lawyer in response to the lawyer's advertising of practice areas, contact information, and the like or in response to the lawyer's public provision of "legal information of general interest." Berger noted that the use of lawyer blogs presents difficult issues in this context.

3. And the ABA added to the comment the statement that "a person who communicates with a lawyer for the purpose of disqualifying the lawyer is not a 'prospective client.'" Berger noted that it is not unheard of for potential litigants to make contact with law firms that they would not wish to have on the other side of the eventual litigation, merely to disqualify those law firms from representing their opponents. A member noted that this is not uncommon in Colorado in the domestic relations field, and another noted that it is not uncommon in small communities having few lawyers. Berger pointed out that commentators have, for some time, argued that such contacts, not made in good faith, do not give rise to "prospective client" status; the ABA change simply adds that conclusion to the comment. The subcommittee liked the addition.

Berger said the subcommittee recommended the adoption of all of the ABA's changes.

A member commented that, as revised, Comment [2] appeared to turn on an analysis of the communication from the communicant's viewpoint, not from the lawyer's viewpoint. How can the lawyer know whether the person is responding to a generic advertisement — and thus is not a "prospective client" — or is communicating for the purpose of disqualifying the lawyer from representing the communicant's opponents?

Berger responded that it would not be impossible to draw a conclusion about the inquirer's purpose: One can make a judgment based on the circumstances; there is no other way to deal with the situation but to make such a judgment.

Another member quoted from the existing text of Comment [2] — "A person who communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, is not a 'prospective client' . . . ."

But the member who had raised the point noted that even that existing construction implicates "the reasonable mind" in the making of the necessary judgment.

Both Berger and the member who had quoted the existing text of the comment pointed out that it would be difficult to resolve the problem in any other way but that of judgment, since the mind of the potentially prospective client cannot be examined. And another member noted that the question of what is in another's mind, even a client's mind, is found throughout the rules, such as in the matter of implied consent.

A member who serves on the staff of the Office of Attorney Regulation Counsel said that, when the OARC determines to prosecute a matter under the Rules, it often finds the comments to be aspirational statements rather than useful guides to the meaning of the texts of the rules. In this case, when a complainant might say that she spoke with the lawyer at a party, that will seem much less "prospective" than, "I went to his office." The circumstances are indicative.

To that, the member who had noted that the "prospective client" question often arises in domestic relations practice commented that the divorcing party will often actually visit four or five different lawyers for the purpose of disqualifying them.

Upon a motion, the Committee approved the subcommittee's recommendations for Comment [7] to Rule 1.18.

I. *Rule 4.4. Respect for Rights of Third Persons.*

Berger asked that the Committee postpone discussion of the ABA's changes to Rule 4.4 until the next Committee meeting.

J. *Rule 5.3. Responsibilities Regarding Nonlawyer Assistants*

Berger explained to the Committee that Rule 5.3, dealing with the lawyer's responsibilities for the conduct of nonlawyer assistants, differs from the situation previously considered, the employment of other lawyers. The ABA's changes to Rule 5.3 include a reversal of the order of the two existing comments and the addition of two comments. The subcommittee generally approved of the ABA's changes but rejected the ABA's insertion in new Comment [4] of the concept of "monitoring" outside nonlawyer services that are utilized at the client's direction; the comment states that the lawyer should reach an agreement with the client about the "allocation of responsibility for monitoring [the outside service] as between the client and the lawyer." The problem the subcommittee identified is that Rule 5.3 does not itself contain the concept of "monitoring" any nonlawyer assistant's conduct, whether "inside" or "outside."

Accordingly, the subcommittee substituted, for the ABA's "allocation of responsibility for monitoring," the clause:"allocation of responsibility, as between the client and the lawyer, for the supervisory activities described in Comment [3] above," relative to the provider whose service the client has required to be used.

A member asked how the subcommittee's formulation would work when the lawyer, rather than the client, selected the outside assistant. Berger replied that proposed Comment [4] deals with the

increasingly frequent circumstance in which a sophisticated client requires that law firms use the services of particular outside providers — as an example, forcing the lawyer to outsource document review to service providers in a foreign country. The comment is intended to suggest that the lawyer and the client should reach agreement on which of them will be responsible for finding out what is going on in the offices of the service provider in that foreign country.
[These minutes are as approved by the Committee at its Thirtieth Meeting, on May 6, 2011.] It is reasonable, he said, to expect that the client will assume that responsibility if it is the client who has mandated use of the foreign provider. Berger confirmed that the suggestion in proposed Comment [4] that the client may assume responsibility for an outside provider is *not* intended to apply to the circumstance in which it is the lawyer who has chosen the outside provider, even if the lawyer has done so in response to the client's request or direction that the lawyer obtain the services from outside the law firm.

Another member referred the Committee to proposed new Comment [3] to Rule 5.3, which deals with the lawyer's responsibilities when it is the lawyer who has engaged the services of the outsider assistant. He added that his law firm has had experiences with outside service providers selected by the firm's clients — and he remarked that those experiences have not been good ones.

A member commented that the problems that the rule and these comments contemplate often arise in the client's selection of other lawyers to do cite-checking and the like.

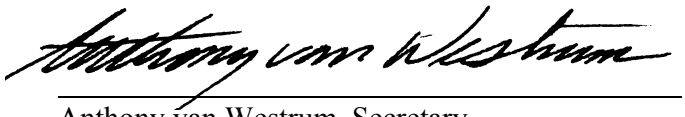
Another member asked those who reported experience with client-selected outside service providers whether they do, in fact, utilize written allocations of the selection process. Responding members said that they do so, as a matter of their own protection, at least by laying an "email trail."

Upon a motion, the Committee approved the subcommittee's recommendations for Rule 5.3.

VI. *Adjournment; Next Scheduled Meeting.*

The meeting adjourned at approximately 12:00 p.m. The next scheduled meeting of the Committee will be on Friday, March 14, 2014, beginning at 9:00 a.m., in the Supreme Court Conference Room.

RESPECTFULLY SUBMITTED,



Anthony van Westrum, Secretary

[These minutes are as approved by the Committee at its thirty-ninth meeting, on March 14, 2014.]

COLORADO SUPREME COURT

STANDING COMMITTEE ON THE RULES OF PROFESSIONAL CONDUCT

Approved Minutes of Meeting of the Full Committee
On March 14, 2014
(Thirty-Ninth Meeting of the Full Committee)

The thirty-ninth meeting of the Colorado Supreme Court Standing Committee on the Rules of Professional Conduct was convened at 9:00 a.m. on Friday, March 14, 2014, by Chair Marcy G. Glenn. The meeting was held in the Supreme Court Conference Room on the fourth floor of the Ralph L. Carr Colorado Justice Center.

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

Present as guests was Benjamin T. Figa, of the Governor's Office of Legal Counsel.

I. *Meeting Materials; Minutes of Meetings of October 11, 2013, and December 6, 2013.*

The Chair had provided a package of materials to the members prior to the meeting date, including submitted minutes of the thirty-seventh and thirty-eighth meetings of the Committee, held on October 11, 2013, and December 6, 2013, respectively. Those minutes were approved as submitted.

II. *Chair's Report on Supreme Court's Consideration of Rules Relating to Marijuana Commerce*.

The Chair reported to the Committee on the hearing conducted by the Supreme Court on March 6, 2014, to consider the Committee's proposals for, and to adopt, rules governing lawyers' conduct with respect to marijuana use and counseling in light of changes in Colorado law to permit medical and recreational use of marijuana, usage that remains a violation of Federal law. The Committee's proposals had been sent to the Court following the Committee's thirty-seventh meeting, on October 11, 2013.[1]

At the hearing, the Chair made the first presentation to the Court; she was joined by Committee member Judge Michael H. Berger and by Cynthia F. Fleischner, Gerald D. Pratt, and Judge Daniel A. Taubman, each of whom is a member of the Colorado Bar Association Ethics Committee. Following https://www.courts.state.co.us/Courts/Supreme_Court/Committees/Committee.cfm?Committee_ID=24

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1. The Chair noted that information concerning the proceedings are available through links on the Committee's page on the Supreme Court's website, at https://www.courts.state.co.us/Courts/Supreme_Court/Committees/Committee.cfm?Committee_ID=24, specifically links found after the heading "2013 RECOMMENDED CHANGES TO COLORADO RULES OF PROFESSIONAL CONDUCT SUBMITTED BY THE COLORADO SUPREME COURT STANDING COMMITTEE ON THE CRPC."

presentations by several private practitioners, Attorney Regulation Counsel James C. Coyle made the final presentation on behalf of the Office of Attorney Regulation Counsel.[2]

The Chair's presentation to the Court included a discussion of changes proposed to the professional conduct rules in Washington State to accommodate that state's legalization of marijuana activities. She said that King County, Washington, had proposed amendments to that state's rules of professional conduct drawn from our Committee's drafts of an added Rule 8.6 and an added Comment [2A] to Rule 8.4. The Ethics Committee of Washington State's integrated bar association had issued an interim opinion that took the position that, under that state's existing Rule 1.2, lawyers may advise clients regarding marijuana activities under Washington law notwithstanding the continued illegality of those activities under Federal law. That approach, the Chair noted, was not within the proposals made by our Committee to the Colorado Supreme Court nor within Opinion 125 issued by the CBA Ethics Committee. The Washington state bar association then proposed to omit the addition of a Rule 8.6, to add a comment to Rule 1.2, and to add a comment to Rule 8.4 equivalent to our Committee's proposed Comment [2A] to Colorado's Rule 8.4. But the Washington approach would remain quite distinct from our Committee's proposals, for it would contain references to Federal enforcement policies and would note that those policies could be changed, thereby instigating changes in Washington's rules; indeed, the Washington proposal would cross-refer to a very detailed state bar association opinion on the topic.

The Chair noted that information about the Washington approach is included as a part of the materials that were provided to members of the CBA Ethics Committee for its March 15, 2014 meeting.

The Chair said she had received nine questions from the justices at the Supreme Court's hearing, with questions also being asked of other presenters.

The Chair reported that Chief Justice Rice had, the day before this thirty-ninth Committee meeting, asked her and Committee members Webb and Coyle to attend a meeting on March 19, 2014; she was not able to make predictions about that meeting.

James Coyle declined the Chair's invitation to give the Committee his own view of the hearing before the Supreme Court.

III. *Subcommittee on ABA Amendments to Model Rules*.

The Chair returned the Committee's attention to the Report and Recommendations of the New American Bar Association Model Rules Subcommittee, which had been included in the meeting materials for the Committee's thirty-seventh meeting, on October 11, 2013, beginning on page 68 of those materials. She invited Berger, chair of that subcommittee, to resume the Committee's consideration of the Report and Recommendations.

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2. The Supreme Court issued an amendment to the Colorado Rules of Professional Conduct regarding marijuana on the date of this Committee meeting. The Court declined to adopt the proposals of the Committee and, instead, added the following as Comment [14] to Rule 1.2:

> A lawyer may counsel a client regarding the validity, scope, and meaning of Colorado constitution article XVIll, secs. 14 & 16, and may assist a client in conduct that the lawyer reasonably believes is permitted by these constitutional provisions and the statutes, regulations, orders, and other state or local provisions implementing them. ln these circumstances, the lawyer shall also advise the client regarding related federal law and policy.

Its order is found at https://www.courts.state.co.us/userfiles/file/Court_Probation/Supreme_Court/Rule_Changes/2014/2014%2805%29%20redlined.pdf. —*Secretary*

Berger indicated that, as at the prior meeting, his approach would be to present a summary of each change to rule or comment in the ABA's Model Rules of Professional Conduct that has been proposed by the American Bar Association's Commission on Ethics 20/20 and then seek Committee discussion and vote on the changes as they were taken up. He would use as his guide the Report to which the Chair had referred the members.

A. *Rule 5.5, Unauthorized Practice of Law; Multijurisdictional Practice of Law.*

Berger began by noting that the subcommittee did not recommend acceptance of any of the ABA's proposed changes to Rule 5.5. The Committee did not specifically review any of those changes but accepted the subcommittee's recommendation that they not be adopted.

B. *Rule 7.1, Communications Concerning a Lawyer's Services.*

The ABA proposed the adoption of a new Comment [8] to Rule 7.1 (the existing comment to be renumbered [9]) that discusses advertisements that "truthfully [report] a lawyer's achievements on behalf of clients" but may nevertheless lead a reasonable person to an unjustified expectation that the same results might be obtained in another matter and discusses advertisements that make "unsubstantiated" comparisons of the lawyer's fees or services to those of other lawyers, noting that appropriate disclaimers might avoid those problems The subcommittee recommended that the ABA addition be adopted, and the Committee agreed.[3]

C. *Rule 7.2, Advertising.*

Berger reported that the ABA proposed useful modifications in the terms used in the comments to Rule 7.2 regarding email addresses, websites, and Internet and other forms of electronic communication. More substantively, the ABA proposed changes to Comment [5] to Rule 7.2 regarding lawyers' use of third party services to "generate client leads," establishing guidelines within which such services may be used. Berger commented that, while there are many concerns about lawyer advertising, it is constitutionally protected speech and the advertising rules must by updated to reflect present practices. The subcommittee felt that the ABA's proposals are also appropriate in view of the multi-state aspects of lawyer advertising and the resulting benefit of uniformity in the various states' advertising rules. The Committee approved the subcommittee's recommendation that the ABA's proposed changes to the Rule 7.2 be adopted.

D. *Rule 7.3, Direct Contact with Prospective Clients.*

Berger then turned to the ABA's proposed changes to Rule 7.3, regarding a lawyer's solicitation of clients. He began by noting that the Colorado version of Rule 7.3 is substantively different from the ABA Model Rules, because the Supreme Court has inserted into the Colorado Rule 7.3(c), mandating a thirty-day cooling-off requirement for solicitations in personal injury matters. The subcommittee did not propose that the cooling-off period be deleted, but it did recommend that the other changes proposed by the ABA be adopted—

1. The title of Rule 7.3 would be changed from "Direct Contact with Prospective Clients" to "Solicitation of Clients," reflecting the terminology that is commonly used in practice.

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3. The Chair noted that the Committee had approved the subcommittee's recommendation regarding the addition of the new Comment [8] to Rule 7.1 at its thirty-eighth meeting, on December 6, 2013, but that the approval had not been noted in the minutes of that thirty-eighth meeting. —*Secretary*

2. The term "prospective client" would be dropped at several points within the text of the rule, to be replaced by more general terms such as "the target of the solicitation" or even "anyone." Those changes acknowledge the specific use of the term "prospective client" in Rule 1.18, which prescribes specific duties to "[a] person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter" — that is, "a prospective client." The solicitation contemplated by Rule 7.3 may target a broader grouping, as the textual change indicates.

3. Berger noted that the ABA considered further changes to deal with the development of technology that can permit interaction with digital devices that are, in Berger's words, "nearly like a live exchange"; he referred to the movie "Her."[4] But the ABA chose not yet to undertake revisions to Rule 7.3 to deal with those "nearly real personal interactions," and the subcommittee appreciated that restraint; changes can be made when actual abuses of this kind of technology are subsequently developed.

With the retention of Colorado's unique Rule 7.3(c), the subcommittee recommended the adoption of these other changes the ABA proposed to the rule.

A member pointed out that Colorado's existing Rule 7.3(c)(1) — probably erroneously — refers to a petulant lawyer; it reads, "[N]o such communication may be made if the lawyer knows or reasonably should know that the person to whom the communication is directed is represented *resented* by a lawyer in the matter . . . ."

The Committee approved of the subcommittee's recommendations regarding Rule 7.3 and agreed that reference to the lawyer's resentment should be removed from Rule 7.3(c)(1).

E. *Rule 8.5, Disciplinary Authority; Choice of Law.*

Berger reported that the ABA proposed modification of Rule 8.5 to permit a lawyer to contract around the application of the Rules in a limited context, by the addition of text to Comment [5] to Rule 8.5 as follows:

> [5] When a lawyer's conduct involves significant contacts with more than one jurisdiction, it may not be clear whether the predominant effect of the lawyer's conduct will occur in a jurisdiction other than the one in which the conduct occurred. So long as the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect will occur, the lawyer shall not be subject to discipline under this Rule. ***With respect to conflicts of interest, in determining a lawyer's reasonable belief under paragraph (b)(2), a written agreement between the lawyer and client that reasonably specifies a particular jurisdiction as within the scope of that paragraph may be considered if the agreement was obtained with the client's informed consent confirmed in the agreement.***

The comment refers to Rule 8.5(b)(2) which specifies that, for conduct that is *not* connected to a matter pending before a tribunal, "the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct." The proposition reflected in the ABA's proposal is that many legal services are now provided by lawyers across jurisdictions and, as an accommodation, a lawyer should be able to contract with the client as to which of the rules within the various jurisdictions covered by the principle expressed in Rule 8.5(b)(2) are to govern the lawyer's conduct.

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4. *See* https://en.wikipedia.org/wiki/Her_%28film%29 —*Secretary*

Berger reported that a majority of the subcommittee did not accept the ABA's addition to the comment. The concern was that no rule should indicate that a lawyer may contract around any of the rules. The question of what rules should control the lawyer's conduct — which is itself a question of law — should be left to resolution under the principles of conflicts of law, as outlined in Rule 8.5(b)(2), and not to the lawyer's and the client's deal. Berger noted that a minority of the subcommittee wanted to expand the ABA's approach, to provide that the lawyer and the client could contract for the application of any of the sets of conflicts-of-interest rules spanned by the possible jurisdictions, rather than state that just those of the jurisdiction "reasonably specified," could be chosen.

A member who had served on the subcommittee noted that she could not recall what her position had been when the subcommittee considered the ABA's addition to Comment [5], but she now was concerned that there might be a negative implication to be drawn from a Colorado rejection of the ABA's addition. Her concern was that one might conclude, by that rejection, that a lawyer and a client may never contract as to the meaning of any of the rules of professional conduct.

Although other members expressed their view that no such negative implication could properly be drawn from a rejection of this addition to this comment, the member expressed her view that the ABA's proposal contained adequate safeguards — the provision applied only to the conflicts-of-interest rules; and the contracted-for choice must be "reasonably specified" and, even if specified with the client's informed consent, nevertheless would be merely a basis for consideration of whether the lawyer's belief that the selected jurisdiction was appropriate for application of Rule 8.5(b)(2) was reasonable — and that the proposal dealt with what can be a significant problem for lawyers practicing in large, multi-state law firms.

A member asked whether the comment could be augmented by a statement indicating no negative implication was to be drawn with respect to other rules and principles; others noted that the negative implication had been claimed to exist only with respect to a Colorado rejection of the ABA proposal. A member suggested that, as the entire matter was found only in a comment, and not in rule text, there was little possibility that a negative implication would be drawn from a Colorado rejection of the addition to the comment; in this member's view, the ABA addition only added confusion.

When another member spoke to support acceptance of the ABA's addition to the comment, yet another member said he felt the subcommittee's rejection of the addition, based on the proposition that a lawyer cannot contract around the Rules, was the better decision.

Berger directed the Committee to the text of the subcommittee's report, as found on page 85 of the materials provided for the thirty-seventh meeting, on October 11, 2013:

> The Subcommittee considered several courses of action with respect to this ABA change. Some members favored expanding the new ABA sentence to eliminate the apparent limitation on the use of such agreements to conflicts issues. A majority of the Subcommittee concluded that such an expanded sentence would be ill-advised because it would invite lawyers to contract around numerous ethical rules. (The ABA Report specifically stated that such agreements would be considered only to resolve conflicts issues, precisely to avoid contracting around other ethics rules.)
>
> A majority of the Subcommittee also concluded that the ABA amendment to Comment [5] was improperly underinclusive. There may be situations in which an agreement between a lawyer and a client may be relevant to resolving choice of law issues relating to matters other than conflicts; the Subcommittee was not comfortable absolutely prohibiting (through negative inference) the use of such an agreement in situations addressing ethical issues other than conflicts.

Berger focused the Committee on the second quoted paragraph, noting that a comment that referred only to a client-lawyer contract for purposes of the conflicts-of-interest provisions seemingly precludes such contracts in other circumstances where they may be reasonable and acceptable. While a Colorado omission of the ABA addition may carry a negative implication that even waivers of conflicts are not permitted, as the member who had first raised the matter suggested, Berger felt that inclusion of the ABA addition to Comment [5] would leave the negative implication that the subcommittee had seen. Perhaps, Berger suggested, the solution was to add yet more text that would disclaim that negative implication, that implication that the lawyer could not seek to clarify other issues arising under the Rules by way of contract with the client.

Another member, who had not yet spoken, expressed his general dislike for the idea of contracting around the application of the rules, but he added that this particular provision does not say the contract is binding but only that it may be "considered" in determining the underlying choice of law matter. Maybe that worked, he suggested.

To yet another member's observation that the ABA's proposed addition merely permits the lawyer and the client to enter into a "written agreement" that may be considered by the court in determining what conflicts rules actually to apply — and thus doesn't add anything to the fact that the court could consider such an agreement even in the absence of the added text in the comment — Berger responded that the mere expression, in any fashion in any of the rules or comments, that the lawyer and the client may contract as to their application has significant implications.

At the request of a member who had not spoken on the matter, the Chair called for a vote on the matter. The subcommittee's recommendation was approved, and the ABA addition to Comment [5] of Rule 8.5 was rejected.

F. *Miscellaneous Corrections.*

It was noted that the existing Comment [1] to Colorado Rule 4.3 contains a cross-reference to Rule 1.13(d) that should be to Rule 1.13(f). The Committee approved the correction of that error.

It was also noted that both Comment [7] and Comment [8] to Rule 1.5 erroneously refer to Paragraph (e) of that Rule 1.5; the references should be to Paragraph (d) of the rule. The Committee approved the correction of those errors.

G. *Rule 4.4, Respect for Rights of Third Persons.*

The Chair asked Berger to lead the Committee through a discussion of the New ABA Model Rules changes to Rule 4.4.

Berger began that discussion by commenting that he would not have anticipated that this provision would generate the extensive discussion that it actually caused among the subcommittee members, as is indicated in the subcommittee's report.[5] The approach taken by the ABA is a simple one: If the lawyer receives a document that was inadvertently sent to the lawyer, the lawyer need only give notice of that receipt to the sender. Other, further responses may be required by other law, but the ABA's rule, standing alone, would itself require nothing more. For example, it would not mandate that the lawyer not read or use the received document.

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5. The report of the New ABA Model Rules Subcommittee on the ABA's changes to Rule 4.4 begin on p. 18 of the materials provided to the Committee for this thirty-ninth meeting.

But such a rule would not be consistent with the ethical principles expressed by the CBA Ethics Committee in its published opinions and would be a change from existing Colorado Rule 4.4(c), which provides—

> (c) Unless otherwise permitted by court order, a lawyer who receives a document relating to the representation of the lawyer's client and who, before reviewing the document, receives notice from the sender that the document was inadvertently sent, shall not examine the document and shall abide by the sender's instructions as to its disposition.

Berger recalled that, when the Committee considered Rule 4.4 in its initial review of all the ABA Ethics 2000 Rules for adoption in Colorado,[6] it had a lengthy discussion about the receiving lawyer's duties with respect to a document that had been inadvertently sent to the lawyer. Were there ethical constraints limiting the lawyer's freedom to use the document for the benefit of the lawyer's client? Many on the Committee, as on the CBA Ethics Committee, felt that there should be some constraints. Rule 4.4(c) was the result of that discussion. Berger summarized the provision this way: If, before you start reading, you know the document was not intended for you, you should not read it unless and until a court determines that you may do so.

In their review of the matter, Berger and Judge Ruthann Polidori had felt that the current Colorado version of Rule 4.4 did not sufficiently deal with the ethical dimensions presented by the situation. They would expand the rule's coverage to include a document that the lawyer would know, from the nature of the document and the circumstances and even without notice from the sender, was not intended for the lawyer — "it would be obvious to anyone."

But, Berger noted, one should be careful in what one wishes for. Several subcommittee members responded to Berger's and Polidori's move to expand Rule 4.4(c) by seeking to delete the entire subparagraph, retaining only the ABA version of Rule 4.4. The result was the subcommittee's inability to reach agreement, reporting out, instead, six different alternatives for the full Committee to consider.[7] Berger noted that only one of the alternatives had received support from a majority of the subcommittee's members, a majority that lasted for only an hour. There are many possibilities: Leave Rule 4.4(c) as currently stated in the Colorado Rules; delete it in a reversion to the ABA's approach; strengthen it as Berger and Polidori suggested; or drop both it and Rule 4.4(b)[8] on the theory that the innocent receiving lawyer should have no duty at all to the erring sender, no duty that would prevail over the use of the mistakenly sent document for the benefit of the lawyer's own client, leaving the party that was damaged by the inadvertent transmission with a malpractice claim against the erring lawyer.

As reported out by the subcommittee, Alternative № 1 would modify the existing text of Rule 4.4(c) as follows:

> (c) Unless otherwise permitted by court order, a lawyer who receives a document relating to the representation of the lawyer's client and who, ~~**before reviewing the document**~~ ***within a reasonable time thereafter also*** receives notice from the sender that the document was inadvertently sent,

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6. *See* Part III.C of the minutes of the Committee's eleventh meeting, on September 27, 2005.

7. *See* beginning on p. 9 of the subcommittee's report, page 26 of the materials provided to the Committee for this thirty-ninth meeting.

8. Rule 4.4(b) reads, "A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender." It does not itself preclude use of the document.

shall not ~~**examine**~~ ***make any use of*** the document and shall abide by the sender's ***reasonable*** instructions as to its disposition.

As explained in the subcommittee's report, this alternative would extend the receiving lawyer's duties — to not make use of the document and to abide by the sender's instructions as to its disposition — beyond the circumstance where the receiving lawyer has received notice of the inadvertent transmission before reviewing the document to the circumstance where such notice is received within "a reasonable time" after receipt of the document, even if the lawyer had reviewed the document before receipt of that notice. The purpose of the change is to reduce the perceived perverse incentive for the receiving lawyer to conduct a "review" before notice of the inadvertent transmission arrives. Those opposing this alternative wondered how the lawyer who did review the document within that period of time would purge knowledge of its contents when the notice of inadvertent transmission eventually arrived.

Alternative № 2 would leave Rule 4.4(c) unchanged but add text to Comment [2] to Rule 4.4 to explain that the phrase "reviewing the document" includes "any examination of the document by the [recipient] lawyer," so that even "[opening] an email, or [looking] at the letterhead, address field, or subject line of a document or email" before receiving notice of its inadvertent transmission would thereby eliminate any obligation under Rule 4.4(c). Those opposing this alternative felt that the expanded comment would be inconsistent with the intent of the subparagraph itself, as it would permit use of received information that was obviously intended to be confidential, such as when the email subject line read, "Here is your confidential psychiatric assessment," unless the notice of inadvertence was received before the email was downloaded and its subject line exposed to the recipient's view.

Alternative № 3 would revert the text of Rule 4.4 to that of the ABA model rule, dropping Rule 4.4(c) and reducing the ethical obligation of the lawyer who receives a document that the receiving lawyer knows or should know was sent inadvertently — even if the inadvertence were obvious by the nature of the document — to that expressed in Rule 4.4(b), that is, merely advising the sending party of the receipt of the document. Those who oppose Alternative № 3 note that it was rejected by the whole Committee when it first considered the matter in 2005 and by the Supreme Court when it accepted the recommendation of the whole Committee and adopted Rule 4.4(c).

Alternative № 4 would make the usage prohibition of Rule 4.4(c) apply only to documents that are protected within the statutory attorney-client privilege or as trial-preparation material, recognizing that the Supreme Court has, by its recent amendments to Colorado Rule 45(d)(2)(B), permitted clawback of privileged material that is inadvertently disclosed pursuant to a subpoena.[9] While some members of the subcommittee felt that this approach would at least provide for certainty, Berger believed that no member of the subcommittee now promoted the cumbersome alternative.

Alternative № 5 would extend the reach and requirements of Rule 4.4(c) by prohibiting the receiving lawyer from using a document that the lawyer knows was inadvertently sent, whether or not notice of the inadvertence is ever given; that lawyer must notify the sender of the receipt and abide by

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9. C.R.P.C. 45(d)(2)(B) reads—

(B) *Information Produced*. If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

the sender's instructions regarding return or destruction of the document. The explanation given by the proponents of this alternative is that the use of confidential or privileged information based upon an error made by the sending lawyer before a court has a reasonable opportunity to adjudicate claims of waiver is not right and therefore could not be ethical conduct by the receiving lawyer. But such an approach would entirely protect the inadvertence of the sending party at the expense and burden of the receiving lawyer.

Alternative № 6 would remove all discussion of the inadvertent transmission from the Colorado Rules, the argument being that any such rule distorts the judicial process of examination of facts and requires special conduct of the innocent receiving lawyer that is intended to relieve the erring lawyer of the consequences of the error. Logically, this alternative could also include repeal of Rule 4.4(b), although the lone proponent of this alternative on the subcommittee would retain the notice requirement of Rule 4.4(b).

With that review, Berger concluded his report for the subcommittee.

A member who had been a member of the subcommittee said she did not believe that all is fair in love, war, and litigation. In her view, the subcommittee could write a proper Rule 4.4 if the whole Committee gave guidance on these matters:

1. As now written, both Rule 4.4(b) and Rule 4.4(c) are directed toward information that is inadvertently sent by a lawyer or an opposing party — the first sentence of Comment [2] to Rule 4.4 recognizes "that lawyers sometimes receive documents that were mistakenly sent or produced by opposing parties or their lawyers." In recognition of the scope of the title to the rule — "Respect for Rights of Third Persons" — should the comment be clarified to cover information that was inadvertently sent by someone other than an opposing party or her lawyer, such as by an opposing party's doctor or accountant or by some other class of person, professional or otherwise, to protect not only of the opposing party but also of the person who sent it? An example would be that of the wife in a divorce, who has locked her computer, and the husband who, visiting the children, breaks the code, opens the computer, retrieves the wife's private emails and other documents, and provides the information to the lawyer who represents the husband in the divorce. Another example, of which this member was actually familiar, is that of a wife who has received temporary custody of the couple's minor child because of the husband's sexual misconduct, where the husband has recovered the wife's mental health records from her mental health counselor and disclosed those records to his lawyer.

To that second example, another member pointed to C.R.S. 18-4-412, making theft of medical records a Class 6 felony. Subsection (1) of that statute reads—

> (1) Any person who, without proper authorization, knowingly obtains a medical record or medical information with the intent to appropriate the medical record or medical information to his own use or to the use of another, who steals or discloses to an unauthorized person a medical record or medical information, or who, without authority, makes or causes to be made a copy of a medical record or medical information commits theft of a medical record or medical information.

The member who directed the Committee's attention to that section recalled that it was added to the statutes in the 1970s in response to the conduct of some lawyers defending clients against personal injury claims. There was a hew and cry; people care about this kind of conduct, that member noted. The member who was compiling the list of matters on which the Committee might be given guidance for a re-written Rule 4.4 asked whether the rule might also refer to that criminal law provision.

2. As had been noted earlier, C.R.C.P. 45 was amended recently to deal with the inadvertent disclosure of privileged information in response to a subpoena. The member who was compiling the list of matters on which the Committee might be given guidance for a re-written Rule 4.4 asked whether reference should be made to that rule.

Another member reminded the Committee that the first section of the preamble to the Colorado Rules states, "A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice." He urged the Committee to keep the lawyer's tripartite role, as manifested in that provision, in sight as it modified the Rules, including this one regarding the integrity of the informational process in litigation. This member "did not disagree that not all is fair in litigation" — a field he characterized as nevertheless far from love. We must be aware, he said, that our brothers and sisters who apply the rules governing lawyers' conduct need our guidance.

To the example of the mis-sent email that contains the subject line, "Here is your confidential psychiatric assessment," this member responded that that was an easy one; the lawyer receiving that email should recognize that it was sent inadvertently and should notify the sender of the error. But what about the email that just says, "the attached document kills our case"? What is the receiving lawyer to do in that situation? That lawyer's client is entitled to know that the other side has suddenly seen the weakness of its case, and yet our Rule 4.4(c) would seem to say that information — or at least the document in which it was contained, depending upon the alternative that the Committee now adopts — cannot be used by the receiving lawyer. This member would not oppose an obligation for the receiving lawyer to notify the sender of the receipt of the document but would not want the receiving lawyer to be precluded from using the information contained therein for that lawyer's client's benefit. It would be the sending lawyer who was at fault for the inadvertent transmission, not the recipient; the sending lawyer should not be able to say to Attorney Regulation Counsel, "It was the recipient who had the last best chance to avoid the harm from my error." This member urged the Committee to remember the need for balance; in his view, some version of Rule 4.4(c) is necessary, but the Committee should not shift the burden too dramatically upon the receiving lawyer.

Another member expressed his view that it was not appropriate for the Committee or the courts to assign to the innocent receiving lawyer any responsibility for protecting the interests of the sending lawyer and that lawyer's client. This member had represented lawyers on each side of the problem and found that the erring senders had to live with the consequences of the inadvertent disclosures of information: It was appropriate to assign to the receiving lawyer the duty of notifying the sending lawyer of the mistake, as Rule 4.4(b) does, for that approach affords the erring sending lawyer an opportunity to take some action to protect the client's interest. But there should be no other obligation on the receiving lawyer, such as having to comply with the sending lawyer's instructions. This member felt that, as the member who had just previously spoken had said, the rights of the receiving lawyer's client are at least as strong, in this situation, as those of the sending lawyer's client.

The member continued: Thus, the only obligation of the receiving lawyer should be to give notice of the receipt to the sending lawyer. But that is a different burden than is now mandated by Rule 4.4(c); furthermore, there really is no recognized process, at present, for the receiving lawyer to follow. The member said, as an example, that he had recently received a response to his request for admissions that, somehow, had inadvertently disclosed the instructions that the client had given to the responding lawyer about how to answer the requests. Those instructions from the client, inadvertently sent along with the answers to the requests for admission, disclosed the opponent's entire case. The member had felt it was appropriate for him to give the other lawyer notice that he'd received those instructions, asking what the sending lawyer now wanted him to do with the information and thereby giving that erring lawyer an opportunity to seek the court's protection.

A member who had served on the subcommittee responded to those comments by expressing his discomfort with any rule that required the receiving lawyer to abide by the instructions of the erring sending lawyer. He noted that sometimes the receiving lawyer needs to "push back," and he felt that the better course was for the rule to require a sequestration of the inadvertently sent document until the matter could be resolved by the court. That course, he felt, would be consistent with caselaw and struck the right balance between the interests of the respective parties.

Another member who had served on the subcommittee spoke to Alternative Nº 3, which would revert Rule 4.4 to the ABA Model Rule, dropping Rule 4.4(c) but retaining Rule 4.4(b) and requiring only that the receiving lawyer — if that lawyer knows or should know the document was inadvertently sent — advise the sending party of the receipt of the document. In this member's view, the foundations of Colorado's Rule 4.4(c) were shaky and the provision was in fact a house of cards. The provision, she noted, had been included in our Committee's initial recommendation to the Supreme Court covering the ABA's Ethics 2000 Rules only because of the existence of the CBA Ethics Committee's Opinion 108, adopted by that committee in May 2000. Yet, although our Committee had cited the Colorado ethics opinion in its recommendation of Rule 4.4(c) to the Supreme Court, its explanation to the Court had erred by stating that the CBA Ethics Committee had relied on existing Rule 4.4 in arriving at that opinion; in fact, the Ethics Committee had not referred to the then-existing rule — which did not then impose any burden on the receiving lawyer — but found, principally by looking at the prohibition against dishonest conduct that is stated in Rule 8.4(c), not only a duty to give notice of the receipt of the inadvertently-sent document but also to abide by the sending lawyer's instructions as to the disposition of the document. In sum, this member said, the proponents for retention of Rule 4.4(c) are wrong to cite adherence to the CBA Ethics Committee's Opinion 108 as a reason for that retention, because the provision does not parallel that opinion.

The member continued by noting that the CBA Ethic Committee's Opinion 108 was itself based in part upon Formal Opinion 92-368 of the ABA Standing Committee on Ethics and Professional Conduct, which opinion has been withdrawn by the ABA committee, with its issuance of Formal Opinion 05-437, in recognition of the fact that the ABA's Model Rule 4.4(b) had only required notice to the sender and did not require non-examination and non-use of the document nor compliance with the sending lawyer's instructions about disposition of the document. In subsequent opinions, the ABA Standing Committee had recognized that the rule should not express "principles involving the protection of confidentiality, the inviolability of the attorney-client privilege, the law governing bailments and missent property, and general considerations of common sense, reciprocity, and professional courtesy," because the application of other law is beyond the scope of the ethics rules and not a proper basis for a formal opinion on professional conduct.[10] In this member's view, if such law is not a proper basis for an ethics opinion, it is not a proper basis for an ethics rule; such law should be left to separate, independent application. This member commented that she was in favor of courtesy but must think about her obligations to her client when she is the lawyer who has received inadvertently-sent material that is relevant to her representation of that client; while she would be subject to a court's instructions, she should not be subject to the instructions of the erring sending lawyer.

The member said the impact of the current rule is to turn a disclosure matter, a matter of court procedure, into a disciplinary matter. The member agreed with the point that Berger had made in his review of the subcommittee's alternatives — that the circumstances covered by the rule are exacerbated by the advent of electronic communication. She felt, however, that this was one more reason for leaving the entire matter to other law, outside the disciplinary context.

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10. *See* the discussion of the history of ABA Formal Opinion 92-368 and its successor, Formal Opinion 05-437, at p. 5 of the subcommittee's report on Rule 4.4, found at p. 22 of the materials provided to the Committee for this thirty-ninth meeting.

The member added that the ABA Standing Committee has devoted much attention and effort to these issues — as is evidenced by the recounting of its various opinions in the subcommittee's report on Rule 4.4 — and has determined only to impose a duty of notice upon the receiving lawyer. Twenty-nine other states have adopted that position. She suggested that the subcommittee could aid the Committee in its consideration of the rule by charting what other states have done, some of which have provided for cooling-off periods, court resolution and the like; although, she added, such a chart might be much like a Chinese restaurant, offering too many choices.

Wherever the Committee came out, this member hoped that it would avoid reference to privileged and confidential material, for the interjection of those specialized concepts would only lead to confusion and unintended consequences by adding to the receiving lawyer burden the need to consider and resolve the application of those concepts when determining what course of action to take in response to the inadvertently received document.

Another member, who had also been a member of the subcommittee, said his concerns with the existing rule and with all of the proposals reflected two dramatically different scenarios. In the first, the sender has hit the wrong button on the email service, or a doctor has misdirected a report. In that scenario, he felt, it was appropriate to put some slight burden on the receiving lawyer. In the second scenario, the document has inadvertently been included in a response to a formal discovery request. In that scenario, if the rule were written as some members proposed then the sending lawyer could take the position that there was no need to exercise care to protect the client's confidential information in the discovery response because inadvertently-disclosed information could be clawed back. In that scenario, this member felt, there should in fact be no ethical imposition on the receiving lawyer.

To those comments, another member said that Rule 1.6 establishes the principle obligation of the erring lawyer: Do not disclose confidential client information unless disclosure is impliedly authorized to carry out the representation. If, by Rule 4.4, we send a second message to lawyers — that breaches of the duty of confidentiality can be mitigated by shifting burdens to receiving lawyers — we have weakened the fundamental mandate of Rule 1.6.

That member continued by suggesting that, outside the litigation context, there is not likely to be a court available to determine the outcome, although, if the mistake is big enough and the stakes high enough, the matter might end up in court. The structure of the rule will determine which lawyer would be obligated to take the matter to court for that resolution, the sender or the recipient. If the sending lawyer rushed to court for protection, that could well spell the spoiling of a pending transaction. This member saw a need for something in the rule to "set the tone" for how the parties might resolve the inadvertent disclosure without having to resort to court; in his view, the rule should be written with more than just the litigation scenario in mind.

Another member responded to several of the comments that others had made by noting that lawyers are not just warriors on a battle field. Referring again to the preamble to the Rules, he pointed out that lawyers have additional responsibilities to the judicial system itself. In his view, the ABA approach is dead wrong; there are ethical implications when a lawyer receives things that should not have been sent; those are not just matters for other law, such as the law governing legal privileges, but are matters that should be dealt with also in the rules of professional conduct.

Whatever restrictions are provided for, this member noted, will merely be temporal, as the rule will spell out procedures to be followed to resolve the situation. None of the proposals is an absolute barrier to use of inadvertently-disclosed information by the receiving lawyer; the proposals just say go to court to see whether there has been a waiver of a privilege or other right to confidentiality existing under law external to the rules of professional conduct. The fact that the receiving lawyer must wait for

a resolution should not control the situation. It may be a very specific situation in which the inadvertently-disclosed information might greatly affect the parties' respective rights and the outcome of the case. Why should the rule not provide for an opportunity for the court to resolve the matter?

This member noted, with respect to the earlier comment that the result might be different in the context of a response to a formal discovery request, that the Supreme Court's Civil Rules Committee would soon be considering a change to C.R.C.P. 26 to adopt the clawback rule found in Federal Rule of Civil Procedure 26. He noted that litigants in the Federal courts have been dealing with that rule for a long time without problem. That provision, he said, requires as a matter of procedure what Alternative Nº 3 would require as an ethical principle. Further, he said, the Colorado Supreme Court, by its adoption of changes to C.R.C.P. 45, has accepted that clawback might be appropriate.

A member spoke in favor of Alternative Nº 2, which would leave Rule 4.4(c) unchanged (but clarify by comment that any observation of the mis-sent document would constitute the receiving lawyer's "review" sufficient to avoid any further obligation to respond to the sending lawyer's instructions regarding use of the document). In addition to the virtue that it would retain the provision that has been in effect since 2008, this alternative has a very narrow scope: When, before "review" of the document, the receiving lawyer is notified that the document was inadvertently sent, the receiving lawyer must not examine the document and must abide by the sender's instructions for disposition. That's a very narrow burden, he felt, to impose on the receiving lawyer in a very narrow circumstance. It is not, in his view, a "balancing act," but, rather, a barrier to examination that can exist only where the receiving lawyer has notice of the inadvertence of the transmission before the lawyer has been exposed to any bit of information contained in the transmission.

That member said he had previously been in favor of the Colorado version of the rule and had played a role in the adoption of CBA Ethics Committee Opinion 108; he remained in favor of them. Both deal only with the situation where notice of the inadvertent transmission is received before the content of the transmission becomes known to the receiving lawyer. He noted that Rule 1.15(a) covers property that belongs to another, requiring the lawyer to hold such property separate from the lawyer's own property and appropriately safeguarding that property until it is returned pursuant to Rule 1.15(b). Existing Rule 4.4 is much narrower, only requiring notice to the sending lawyer and compliance with the sending lawyer's disposition instructions. The opponent's open briefcase in the conference room is not to be examined; it is as appropriate to say the mis-directed Federal Express package is also not to be opened when it arrives tomorrow after today's notice of its inadvertent dispatch.

As to what's fair in litigation — as distinguished from what's fair in love — the rules of professional conduct are the appropriate place to deal with these problems.

In this member's view, all that is needed is the suggested comment, which is a part of Alternative Nº 2, refining the nature of what constitutes a "review" of the mis-sent document sufficient to cut off a duty to comply with the sending lawyer's instructions.

A member pointed out that the rule in question would apply to criminal cases as well as to civil litigation. She directed the Committee's attention to CBA Ethics Committee Opinion 102, which, similarly to Opinion 108, would preclude use of information inadvertently disclosed in response to a subpoena.[11]

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11. The syllabus of CBA Ethics Committee Opinion 102, issued in 1998, expresses the matter as follows:

> If information, documents, photographs or other objects are inadvertently received from a witness on whom a subpoena duces tecum has been served that the lawyer knows to be, or that appear on its face to be privileged or

Another member said he supported Alternative № 2 for all the reasons that had been expressed by the member who had just spoken about that alternative before the reference to Opinion 102. In this member's view, Alternative № 2 was right in the middle between the harsh ABA "caveat emptor" rule and, at the other end of the spectrum, the proposals that would impose more significant burdens on the receiving lawyer and that are themselves inconsistent with the changes that are being made to the civil procedure rules.

The Chair spoke to say that it was no more clear now than before about which way the Committee would go. She asked for a straw vote on the matter, noting that there was not a sufficient number of members in attendance to make a final decision about Rule 4.4.

After discussion directed to restating the alternatives, the first vote was on deleting Rule 4.4(c) and adding a comment that referred the duty expressed in Rule 3.4(c) to comply with court rules. That proposal failed, with the result, as the Chair noted, that some version of Rule 4.4(c) would be retained.

After further discussion about approaches that might be taken toward the remaining alternatives, it was decided, by vote, just to leave Rule 4.4(c) as it is currently stated in the existing rules.

H. *Other ABA Changes; Commendation of the Subcommittee Chair.*

Berger reported that New ABA Model Rule 4.4 would add the concept of "electronically stored information" to the concept of a "document" in the context of the inadvertent disclosures that are covered by Rule 4.4. The subcommittee agreed with that addition but felt that the term "document" should be defined in Rule 1.0 to include electronically stored information so that such information would be included in each reference to a "document" within any of the rules.

ABA Model Rule 4.4(b) also now defines "electronically stored information" to include "embedded data (commonly referred to as metadata)," so that the usage principles of Rule 4.4 would apply to metadata as they do to overt information within a "document," precluding usage only if the metadata were inadvertently included in the transmission and were then the subject of a notice given as contemplated by the rule.

These changes were approved by the Committee.

With that action, the Committee concluded its review of the revised ABA Model Rules. The Chair commended Judge Berger for his work, and that of the subcommittee, in guiding the Committee through that review.

IV. *Next Committee Meeting.*

The Chair noted that the Committee's work load was presently pretty light. A subcommittee chaired by David Stark is considering pro bono policies for in-house and governmental attorneys, and

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confidential, then the lawyer receiving such information has an ethical obligation to refrain from reviewing the information after becoming aware of the privileged or confidential nature of the information. The lawyer then has an ethical duty to notify the adverse party, if unrepresented, or the adverse party's lawyer and the producing witness. A lawyer must also take reasonable steps to notify the person entitled to invoke the privilege with respect to the information that the lawyer possesses such information and either follow the instructions of the person who is entitled to invoke the privilege with respect to the information or refrain from reviewing the information until a definitive resolution is obtained from the court or other tribunal.

a subcommittee chaired by Cynthia Covell is considering a revision to Comment [3] to Rule 3.1 to alert lawyers to the decision in *A.L.L. v. People ex rel. C.Z.*, 226 P.3d 1054 (Colo. 2010).

Given that level of workload, the Chair felt that the next meeting could be put off for four months or so, to late July 2014. She said she would check with the Court and advise the members of the actual date of the next meeting.

V. *Adjournment.*

The meeting adjourned at approximately 11:50 a.m. The next meeting of the Committee will be announced at a later date.

RESPECTFULLY SUBMITTED,

Anthony van Westrum, Secretary

[These minutes are as approved by the Committee at its forty-first meeting, on October 16, 2015.]

COLORADO SUPREME COURT

STANDING COMMITTEE ON THE RULES OF PROFESSIONAL CONDUCT

Approved Minutes of Meeting of the Full Committee
On June 5, 2015
(Fortieth Meeting of the Full Committee)

The fortieth meeting of the Colorado Supreme Court Standing Committee on the Rules of Professional Conduct was convened at 9:15 a.m. on Friday, June 5, 2015, by Chair Marcy G. Glenn. The meeting was held in the Supreme Court Conference Room on the fourth floor of the Ralph L. Carr Colorado Justice Center.

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

I. *Meeting Materials; Minutes of March 14, 2014 Meeting.*

The Chair had provided a package of materials to the members prior to the meeting date. The package did not contain submitted minutes of the last preceding meeting of the Committee, the thirty-ninth, held more than a year previously on March 14, 2014, a lapse for which the secretary apologized to the Committee. The Chair gave cover to the secretary by noting that the topics for this meeting did not carry over from that prior meeting.

II. *Miscellaneous Matters.*

The Chair noted that a long time, nearly fifteen months, had passed since the Committee's last meeting, and she explained that part of the delay in scheduling the current meeting was the time that had been required to put all of the changes that the Committee had proposed to the Supreme Court, based on the Committee's review of the amended ABA Model Rules that had been proposed by the ABA's "20/20 Commission."

The Chair reported that Melissa Meirink has joined as a staff attorney to the Supreme Court, working with Christine Markman, who has been a regular support to the Committee. The Chair expects to rely on both these lawyers as good resources for the Committee.

The Chair also thanked staff attorney Jenny Moore for her assistance in getting into the Court's preferred format and style the Committee's recent proposals for changes in the Colorado Rules of Professional Conduct.

As to the status of the Committee's proposed changes to those Rules,[1] the Chair said that she has been told by the Court that it has not yet taken action on them, although they are proceeding along the Court's internal schedule. It is likely that the Court will not hold hearing on the proposals until after this summer.

III. *Subcommittee on Pro Bono Services by In-House and Government Lawyers.*

The Chair asked David Stark, chair of the Committee's subcommittee formed to consider pro bono services by in-house and government lawyers, to report on the subcommittee's activities.[2]

Stark began by noting that the subject before the subcommittee had a long and twisted history. He recalled that the Committee had previously talked about amendments to the comments to Rule 6.1and had determined that it should establish a subcommittee to work with the Attorney Regulation Advisory Committee of the Supreme Court on the topic. The participants in the combined effort included, in addition to Stark, Helen Berkman, James Coyle, Marcy Glenn, Carolyn Powell, Richard Reeve, Judge Daniel Taubman, and Mimi Tsankov.

The subcommittee met numerous times and considered numerous proposals; and it ran into lots of resistance, most of which came with respect to the provision of pro bono services by government lawyers, there being little opposition from in-house counsel.

Stark explained that government lawyers had — wrongly — gotten the impression that the subcommittee was seeking to impose a pro bono service requirement upon them, with policies defining how such services were to be rendered. In fact, the subcommittee learned that one size could not fit all agencies and that no single policy could be adopted.

In the midst of the group's effort, Stark received an email from Kristen Burke, counsel to Chief Justice Rice, suggesting the addition of the following as a comment to Rule 6.1:

> Individual government attorneys may provide pro bono legal services in accordance with their respective organization's internal rules and policies. Government organizations may adopt pro bono policies at their discretion.

The materials provided to the Committee for this meeting contain an email chain that began with that email from Burke. The chain includes an email from Stark to Burke that expresses his view that one size of policy cannot fit all needs, so that a short, pithy statement that the adoption of policies by government agencies is a good alternative to promulgation of a model pro bono policy for such agencies. Stark's email also outlines some of the concerns that government lawyers have raised about their providing pro bono legal services, including problems with providing such services on agency time, using agency facilities for those services, and the lack of professional negligence insurance to cover the risk attendant to providing those services.

The outcome of the subcommittee's efforts, then, has been the Court's proposal for the addition of its short comment to Rule 6.1.

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1. The Chair's May 22, 2015 cover letter to the Supreme Court, with the attachments setting forth the Committee's proposals, is included in the materials provided to the Committee for this fortieth meeting.

2. The report of the Subcommittee on Recommended Pro Bono Policies for In-House and Government Attorneys is included in the materials provided to the Committee for this fortieth meeting.

The subcommittee found that the Federal governmental agencies have a good and well-developed pro bono policy; the subcommittee worked with the Department of Justice and other agencies to obtain their inputs.

In Stark's view, the Court's suggested comment, which the subcommittee now proposes be added to Rule 6.1 to deal with pro bono services by in-house and government lawyers, is as much as can be done to establish a workable "rule" on the matter.

A member asked Stark about the word "may" contained in the second sentence of the proposed comment, wondering whether the word should instead be "should": "Individual government attorneys *should* provide pro bono services . . . ." Stark replied that, although the subcommittee certainly wanted to push the point, there was a great deal of push-back, resulting in the subcommittee's decision to use the word "may." He, personally, would be willing to change the word to "should."

A member noted that the comment already also uses the word "discretion," and she asked whether the comment should refer, perhaps by a link, to the policy of the Department of Justice.

In reply, Stark noted that every agency has its own issues and restrictions. For example, a county attorney reported that she must satisfy her county commissioners about any such policy, so the development of such policies would likely require action by numerous county commissions across the state.

The member who had noted the use of the word "discretion" also said that she was concerned generally about the comment. Why, she asked, did it not just say that government agencies are encouraged to adopt pro bono service policies for their lawyers, period?

Another member introduced her comments with the warning that she had lots to say. She noted, first, that this Committee did not develop the Recommended Model Pro Bono Policy for Colorado Licensed Attorneys and Law Firms that appears at the end of the comments to Colorado Rule 6.1 nor propose it to the Court. Rather, it was promoted by the Access to Justice Commission. Second, she noted, the Rule and its comments do not make any parallel statement that law firms should establish pro bono policies. In her view, the matter of adoption of pro bono policies does not belong within the Rules of Professional Conduct and would better be handled by a Chief Justice Directive. In the absence of a policy statement for law firms, it would be strange to urge government agencies to adopt such a policy.

Further, this member said, the reason for pursuing the matter of pro bono services by in-house and government lawyers was to remedy the fact that the Model Policy currently included at the end of the comments to Rule 6.1, covering only private practitioners and law firms, leaves out a large number of lawyers, those practicing in-house or with governmental agencies. To this member, the subcommittee's proposal seems like a step backwards. Rule 6.1 already says that "[e]very lawyer has a professional responsibility to provide legal services to those unable to pay" A comment that referred only to government lawyers would seem to take the urgency out of the rule. This member was "not keen" on this comment for all the reasons she expressed. She realized that the comment may reflect the views of the Chief Justice; yet, she felt, that should not preclude the Committee from reporting to the Court that it does not feel that addition of the comment is a good idea.

To those comments, another member pointed to the last provision of Rule 6.1 — "Where constitutional, statutory or regulatory restrictions prohibit government and public sector lawyers or judges from performing the pro bono services outlined in paragraphs (a)(1) and (2), those individuals should fulfill their pro bono publico responsibility by performing services or participating in activities outlined in paragraph (b)" — as a provision that recognized that government lawyers are in a special

situation. In this member's view, it is reasonable to encourage government agencies to figure out how their lawyers might provide the contemplated services.

The member who had challenged the special statement of policies for government agencies agreed that the last provision of Rule 6.1, to which her attention had been directed, did alleviate her concern about the special call for such policies for government agencies. She added, however, that, if government agencies are to be encouraged to adopt pro bono policies, then perhaps the comments ought also to encourage law firms to adopt such policies. In reply to a comment by Stark, this member agreed that Rule 6.1 does currently make reference to law firms, but she added that the new comment calls out only government agencies, and not law firms or even in-house legal departments, for their adoption of pro bono policies. When Stark recited the second sentence of the preface to the Model Policy that currently follows the comments to Rule 6.1 — "Adoption of a law firm pro bono policy will commit the firm to this professional value and assure attorneys of the firm that their pro bono work is valued in their advancement within the firm" — the member suggested that the concept that is included in that sentence should perhaps be referred to in an additional sentence conjoined with the suggested new comment about government agencies.

Another member asked whether lawyers within the Department of Justice were actually providing pro bono services, and Stark replied emphatically that they were doing that. The member said she was surprised; she was herself working on a pro bono project at this time but had found that no one in government service seemed to have time to work with her on the project. She wondered whether government lawyers actually work on pro bono matters or just talk about doing that.

Another member observed that, because the project the member had spoken of involved criminal law, it might be that the special ethical issues arising in that field might have precluded assistance by government lawyers.

Another member added that he is aware that many government lawyers are providing pro bono services and often step out of their comfort zones to do so.

The member who questioned the pro bono activity of government lawyers said she was now satisfied that government lawyers do provide pro bono services, adding that the overlay of criminal law in the matter she referred to might explain the unwillingness of government lawyers to assist there.

A member who had not previously spoken said that he saw no harm in adding the proposed comment, just to remind all lawyers of the urgency of the need for pro bono services.

Returning to the question of whether the word "may" that is used in the proposed comment should be changed to "should," a member said she believed that "should" would more directly tell individual government lawyers of the value of pro bono services and perhaps encourage them to encourage their agencies to adopt policies that would facilitate their provision of those services.

Another member approved of that but added that the organization of the two sentences of the proposal could be improved.

The switch from "may" to "should" was approved by the Committee.

The Committee turned back to the question of whether this comment or another one should deal with the adoption of pro bono service policies by law firms or for in-house lawyers, as this comment would do for government lawyers.

To the comment that in-house lawyers may face conflicts of interest, a member noted that it is easy for lawyers to provide non-conflicted services of one kind or another to the indigent. The member was concerned that discussion of alternative services would draw away from the main goal of providing legal services to the indigent.

To the question of policies for law firms, a member suggested this addition: "Law firms and in-house legal departments are encouraged to develop pro bono publico policies to guide their lawyers." That, the member said, would match the subcommittee's provision for government lawyers.

The Chair asked that the Committee first determine what should be said with respect to government lawyers, from which a coherent package could be developed by the subcommittee for all three classifications of lawyers.

To that, a member said he saw no need for a reference to lawyers working in-house or in law firms, because Rule 6.1 is already structured to recognize that every lawyer has the duty to provide pro bono services, while the last provision of the existing rule, as had been noted earlier, already speaks to the special circumstance of lawyers who are employed within government agencies, recognizing that "constitutional, statutory or regulatory restrictions [may] prohibit government and public sector lawyers or judges from performing the pro bono services" that are outlined in the preceding provisions of the rule. The member reiterated that the only thing the additional comment need deal with is that special circumstance of the government lawyer.

Stark asked the Chair whether she was suggesting changes to the subcommittee's proposed comment. She replied that she was not suggesting the adoption, within the comments, of a model pro bono policy. Rather, she said, we are talking about encouraging government agencies to adopt such policies, and she was suggesting the addition of another comment to make the same point for law firms. She agreed with the prior comment that Rule 6.1 already clearly enunciates the duty that is imposed on every lawyer, but she believed it useful to expand the discussion of the adoption of policies to include law firms. That would, in part, connect the concept of a model policy to law firms, and it would be consistent with what is proposed to be said about government lawyers.

To that, another member asked that the Committee restrict its consideration to the matter that had been referred to the subcommittee and developed by it with the assistance of the Attorney Regulation Advisory Committee of the Supreme Court. That matter is, he noted, the matter of in-house and government lawyers. He asked that the Committee concentrate on that matter; if it found parallels to lawyers in private law firms, it could offer those parallels to the Chief Justice for her further consideration. But the Committee should not delay sending to the Chief Justice its conclusions about in-house and government lawyers while it sorts out its thinking about law firms.

Another member added her concurrence to that position, noting that there was no need to morph the matter from government lawyers to all lawyers as there has never been a concern about lawyers in private practice. She noted that more than 290 law firms and lawyers have committed to fifty hours or more of pro bono service per year. Model policies are already encouraged and being adopted by law firms. There is no need for this discussion to be extended to lawyers in private practice.

The Chair asked for a motion, and a member responded by moving that the Committee adopt the subcommittee's proposal for in-house and government lawyers, but with the word "may" changed to "should" and the two sentences being reversed in order.

A member asked whether the Committee should "retain jurisdiction" to consider further the issue of law firm pro bono policies or should ask the Court whether it would wish us to consider those matters.

To that the Chair noted that the Committee is never limited in the matters it chooses to consider, so that no such retention of jurisdiction need be claimed nor advice need be sought from the Court in this case.

The pending motion was then adopted by the Committee.

The Chair noted that Stark remains chair of the subcommittee, and she requested the subcommittee to look further at the matter of pro bono policies for law firms.

IV. *The Gilbert Case.*

The Committee then turned its attention to the recent discipline case, *Gilbert,*[3] a case which member James Coyle argued as Attorney Regulation Counsel and member Nancy Cohen argued on behalf of the respondent. In the case, Gilbert had engaged to provide three specific tasks for her clients in an immigration matter, for which she would be paid a flat fee of $3,550. The engagement agreement did not identify milestones of performance, state an hourly rate — although the clients had been given a copy of the lawyer's regular hourly fee schedule showing a regular rate of $250 per hour — or disclose that a portion of the fee would be retained if the engagement were terminated before completion of the identified tasks. The clients terminated the engagement before completion of all the identified tasks but after they had paid $2,950 in installments toward the total fee of $3,550.

A majority of the Supreme Court found that the lawyer did not violate Rule 1.16(d) — requiring the refund of "any advance payment of fee . . . that has not been earned" — as charged by Attorney Regulation Counsel when she returned only $1,835.86 of the advanced fees, retaining $1,114.14 for 4.41 hours of work actually spent on the case and $11.64 of incurred expenses. Although the determination of her entitlement was made by the lawyer unilaterally, rather than by a court in an action to recover from the clients the quantum meruit of her services after a full refund of all that the clients had paid toward the full flat fee, the majority of the Court found that she had not violated the refund obligation of Rule 1.16(d) "by failing to return that portion of the fee to which she was entitled in quantum meruit."

A minority of the Court, Chief Justice Rice writing for herself and Justices Coats and Eid, thought the majority misapplied quantum meruit principles, finding that quantum meruit is a remedy to be sought as a claimant before a court in a proceeding in which the claimant must prove the conferring of a benefit at the claimant's expense in circumstances that would make it unjust for the defendant to retain that benefit without payment of the reasonable value of the services rendered by the claimant. In the absence of such process and proof, the lawyer, in this case, could not establish that she had "earned" any part of the fee as contemplated by Rule 1.16(d).

As Committee member Rothrock noted to the Chair in his email of April 7, 2015, included at page 110 of the materials provided to the Committee for this meeting, both the majority and the minority in *Gilbert* referred to the Rules of Professional Conduct and invited a clarifying amendment or comment regarding flat fees. What kind of clarification would that be, the Chair asked. Would the Committee be restricted to established law, including *Gilbert,* in its work?

Contemporaneously, the Chair received an inquiry[4] from Steven Jacobson, chair of the Supreme Court's Attorney Regulation Committee, asking this Committee to consider amendments to the Rules

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3. In re Gilbert, 346 P.3d 1018, decided April 6, 2015. The opinion is found beginning at p. 112 of the material provided to the Committee for this fortieth meeting.

4. The Jacobson letter is found beginning at p. 152 of the material provided to the Committee for this fortieth meeting.

"setting certain minimal standards for written fee agreements in Colorado" and listing aspects of the lawyer's engagement that the Attorney Regulation Committee believes should be addressed in such an amendment.

A member suggested that a subcommittee be formed to address the panoply of issues raised by the *Gilbert* case and the Jacobson letter, commenting that, perhaps, an approach similar to Chapter 23.3 of the Colorado Rules of Civil Procedure, which specifically addresses contingent fee agreements, is needed for flat fee agreements.

Another member emphasized that the majority opinion in Gilbert specifically mentioned amendment of the Rules, and not necessarily just the addition of a comment, as a means by which the needed clarification might be obtained. In answer to another member's question, this member explained that an *ad hoc* committee worked on the development of the contingent fee provisions of Chapter 23, C.R.C.P. and made its resultant proposal to the Civil Rules Committee — an odd procedure at the time, the member noted.

The Chair said that, if a subcommittee is appointed for this purpose, its membership should include a good representation of those who use flat fee agreements, including lawyers engaged in immigration or criminal law fields.

A member noted that, if all of the fee that was actually earned must be returned and a claim then made for recovery in quantum meruit, "We all know that money will not be available and that suing to recover is an invitation to a malpractice lawsuit." Another member pointed to the opposing view expressed in the minority opinion, that "the majority permits Gilbert and similarly situated attorneys to put the cart before the horse and declare fees as earned under quantum meruit when no quantum meruit proceedings have been held."

A member who had relevant experience of her own agreed that a subcommittee should be formed as had been suggested. When she read the *Gilbert* opinion, she sensed that a number of things were "going on" that led to the lawyer's "harsh treatment" but were not apparent on the faces of the opinions. She felt that the case offered many things to be talked about at a continuing legal education seminar for criminal law lawyers.

A member observed that the position of Attorney Regulation Counsel is that, if the lawyer has a flat fee arrangement, the lawyer will violate Rule 1.5(f), Rule 1.16(d), and Rule 8.4, and will commit conversion of client property, if the lawyer retains a portion of the fee in an early termination of the matter, if the engagement agreement has not established benchmarks to identify the portion that has been earned at the time of termination. The question for the subcommittee to consider is whether there should be a rule that spells out what is needed for a flat-fee engagement. The issues are different from those involved in a contingency fee engagement, in part because the lawyer in the latter case is not likely to be holding, in advance, the fee that may eventually be earned upon the contingency, while the lawyer may well be holding, from the beginning of the engagement, some or all of the agreed flat fee in that kind of engagement.

The Chair appointed Cohen and Sudler to co-chair a subcommittee to consider these matters.

V. *Coyle Report.*

James Coyle reported to the Committee that he had attended conferences of the American Bar Association Center for Professional Responsibility in Denver, with about 450 other lawyers, on the topics of professional responsibility and on client protection. At one of the conferences, issues of

multijurisdictional practice were considered with lawyers from the Canadian Bar participating. The topics included "proactive risk-based management regulation" by lawyer regulatory agencies, a concept that Coyle described as agencies going beyond claims-based, proscriptive rules of conduct and becoming "more proactive in the regulation of lawyers." The concept is being implemented in New South Wales, Australia, and in England. Coyle said it included the appointment of "ethics compliance officers" within law firms who would certify to the regulatory agencies their law firms' compliance with applicable conduct rules.

The Attorney Regulation Advisory Committee of the Supreme Court, chaired by member David Stark, has formed a subcommittee to consider these issues and what Coyle called "regulatory justice." It is, Coyle said, a different approach, one that is not based on "discipline" but that seeks a better way to regulate lawyers than by disciplining them for breaches of rules of professional conduct.

Coyle also reported that the American Association of Professional Responsibility Lawyers is reviewing the existing lawyer advertising rules, with a view toward consolidating Rule 71 through Rule 7.5 into a single rule.

A member noted that Washington State has recently established a class of "legal technician," authorized to provide some functions that are normally provided only by licensed lawyers. Coyle replied that the Office of Attorney Regulation Counsel is looking at that development, with member Alec Rothrock heading that effort. A presentation on that development was made a couple of weeks before the is meeting, and the Rothrock subcommittee will be meeting at the offices of the Colorado Bar Association on June 26, 2015.

VI. *Adjournment; Next Scheduled Meeting.*

The meeting adjourned at approximately 10:30 p.m. The next scheduled meeting of the Committee will be on Friday, October 16, 2015, beginning at 9:00 a.m., in the Court of Appeals Full Court Conference Room.

RESPECTFULLY SUBMITTED,

Anthony van Westrum, Secretary

[These submitted minutes have not yet been approved by the Committee.]