VOLUME 9

MATERIALS PROVIDED TO MEMBERS OF THE COLORADO SUPREME COURT STANDING COMMITTEE ON THE RULES OF PROFESSIONAL CONDUCT

FOR THE TWENTIETH, TWENTY-FIRST, AND TWENTY-SECOND MEETINGS

COLORADO SUPREME COURT STANDING COMMITTEE ON THE COLORADO RULES OF PROFESSIONAL CONDUCT

AGENDA

April 18, 2008, 9:00 a.m.
Supreme Court Conference Room

---

1. Approval of minutes [pages 1-6]
2. Updated report on U.S. District Court's adoption of CRPC, with exceptions [pages 32-35 from November 30, 2007 packet] – Marcy Glenn
3. Report on status of recommended amendments to CRPC 1.0 and 5.4, and CRCP 265 – David Stark
4. Report from Rule 1.15 Subcommittee [pages 36-37 from November 30, 2007 packet; attached page 7] – Alec Rothrock
5. Possible revisions to CRPC 1.5(b) – Marcy Glenn [pages 8-9]
6. Amendments to ABA Model Rule 3.8 – Judge Webb [pages 10-19]
7. Report from Housekeeping Subcommittee – John Gleason
8. Administrative matters - Select next meeting date
9. Adjournment (by noon)

Chair
Marcy G. Glenn
Holland & Hart LLP
P.O. Box 8749
Denver, Colorado 80201
(303) 295-8320
mglenn@hollandhart.com

FILE NOTE

The "submitted minutes" of the prior meeting that were provided to Committee members in advance of the current meeting have been omitted from this file.

See the files containing the *approved* minutes of the Supreme Court Standing Committee on the Rules of Professional Conduct, which are available on the Supreme Court's website.

Burns Figa & Will P.C.

MEMORANDUM

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

FROM: Alec Rothrock

DATE: April 15, 2008

SUBJECT: Proposed Modification of Colo. RPC 1.15(i)(6)

The expanded subcommittee that now includes Nancy Cohen and John Gleason recommends that Colo. RPC 1.15(i)(6) read 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).

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?

105B

AMERICAN BAR ASSOCIATION

CRIMINAL JUSTICE SECTION
DEATH PENALTY REPRESENTATION PROJECT
SECTION OF INDIVIDUAL RIGHTS AND RESPONSIBILITIES
SECTION OF LITIGATION
SECTION OF STATE AND LOCAL GOVERNMENT LAW
STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY
GOVERNMENT AND PUBLIC SECTOR LAWYERS DIVISION
COMMISSION ON DOMESTIC VIOLENCE
NEW YORK STATE BAR ASSOCIATION
ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK
NATIONAL ORGANIZATION OF BAR COUNSEL

REPORT TO THE HOUSE OF DELEGATES

RECOMMENDATION

RESOLVED, That Rule 3.8 of the Model Rules of Professional Conduct be amended to add new paragraphs (g) and (h) as follows:

....

(g) When a prosecutor knows 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 prosecutor shall:

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

(2) if the conviction was obtained in the prosecutor's jurisdiction,

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

(B) undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit.

(h) When a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction.

FURTHER RESOLVED, That the Comment [1] to 3.8 of the Model Rules of Professional Conduct be amended as follows:

10

[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 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.

FURTHER RESOLVED, that the Comment to 3.8 of the Model Rules of Professional Conduct be amended by adding the following new paragraphs:

[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 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, 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.

[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, 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.

[9] A prosecutor's 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), though subsequently determined to have been erroneous, does not constitute a violation of this Rule.

REPORT

In Achieving Justice: Freeing the Innocent, Convicting the Guilty, the ABA's Section of Criminal Justice explored the systemic causes for wrongful convictions in our criminal justice system. Its report made numerous recommendations for systemic remedies to better ensure that individuals will not be convicted of crimes that they did not commit and that the innocent will be exonerated. [1] That report did not address the well established ethical obligations of a prosecutor toward innocent persons.

The United States Supreme Court recognized in *Imbler v. Pachtman*, 424 U.S. 409, 427 n. 25 (1976), that prosecutors are "bound by the ethics of [their] office to inform the appropriate authority of after-acquired or other information that cases doubt upon the correctness of the conviction."[2] Further, when a prosecutor concludes upon investigation of such evidence that an innocent person was convicted, it is well recognized that the prosecutor has an obligation to endeavor to rectify the injustice. These obligations have not, however, been codified in Rule 3.8 of the ABA Model Rules of Professional Conduct, which identifies the "Special Responsibilities of a Prosecutor." Proposed Rules 3.8(g) and (h), and the accompanying Comments would rectify this omission.

Proposed Rules 3.8(g) and (h) and the accompanying Comments are based on provisions adopted by the House of Delegates of the New York State Bar Association on November 4, 2006 in the course of its comprehensive review of the state's disciplinary code.[3] The rules had their genesis in a 2006 Report of the Association of the Bar of the City of New York ("ABCNY"),[4] which considered various aspects of prosecutors' duties. Among other provisions, against the background of recent knowledge about the fallibility of the criminal justice process, the Report proposed a rule regarding the prosecutor's obligation when a convicted defendant may be innocent. The report stated: "In light of the large number of cases in which defendants have been exonerated...it is appropriate to obligate prosecutors' offices to"...consider "credible post - conviction claims of innocence."[5] The premise of the proposal was that prosecutors have ethical responsibilities upon learning of new and material evidence that shows that it is likely that a convicted person was innocent. These responsibilities include a duty to disclose the evidence, to

---

[1] *Achieving Justice: Freeing the Innocent, Convicting the Guilty*, Report of the ABA Criminal Justice Section's Ad Hoc Innocence Committee to Ensure the Integrity of the Criminal Process, 2006.

[2] Other courts and commentators have echoed this understanding. *See, e.g., Thomas v. Goldsmith*, 979 F.2d 746 (9th Cir. 1992); *Houston v. Partee*, 978 F.2d 362 (7th Cir. 1992); *Monroe v. Butler*, 690 F. Supp. 521 (E.D. La. 1988).

[3] The proposed provisions are expected to be presented to the judiciary in 2008 as part of proposed comprehensive amendments to the New York Code of Professional Responsibility. The proposed Rules were adopted with the support of local bar associations and with virtually no opposition in the state bar's House of Delegates after a drafting process that involved significant input from state and federal prosecutors and representatives of the criminal defense bar.

[4] 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).

[5] *Id* at 73.

conduct an appropriate investigation, and, upon becoming convinced that a miscarriage of justice occurred, to take steps to remedy it.

The ABCNY proposal was presented to the state bar's Committee on Standards of Attorney Conduct ("COSAC"),[6] which agreed with the premise of the ABCNY proposal and drafted provisions that captured the substance of the proposal, and circulated them for a lengthy period of public comment. COSAC's original proposed Rules 3.8(g) and (h) received comment from a wide range of state and federal prosecutors and district attorneys' organizations, defense organizations and bar associations, and revised its proposals in light of suggestions received from around the state.[7]

The version adopted by the New York State Bar Association was closely examined and refined by the ABA Section of Criminal Justice, which drew on the experience and expertise of prosecutors, criminal defense lawyers and legal academics in its leadership, including those who serve as representatives of other national organizations such as the National District Attorneys Association. It was then further refined in collaboration with the ABA Standing Committee on Ethics and Professional Responsibility, to ensure its general consistency with the philosophy, purposes, structure and style of the ABA Model Rules of Professional Conduct.

As the proposed provisions reflect, it is important to codify prosecutorial duties upon learning of possible false convictions. The obligations in the proposed rule are triggered when a prosecutor either "knows" of new, credible and material evidence creating a reasonable likelihood of a convicted defendant's innocence or "knows" of clear and convincing evidence establishing the convicted defendant's innocence. The ABA Model Rules define "knows" to "denote[] actual knowledge of the fact in question"; therefore, indirect or imputed knowledge will not suffice.

The obligation to avoid and rectify convictions of innocent people, to which the proposed provisions give expression, is the most fundamental professional obligation of criminal prosecutors. The inclusion of these provisions in the rules of professional conduct, rather than only in the provisions of the ABA Standards Relating to the Administration of Justice, which are not intended to be enforced, will express the vital importance that the profession places on this

---

[6] COSAC is chaired by a former state bar president, Steven Krane, who now also chairs the ABA Standing Committee on Ethics and Professional Responsibility , and includes in its membership a diverse group of practitioners and academics from around the state with expertise in legal ethics. It was appointed to review the existing New York Code of Professional Responsibility in light of the 2002 amendments to the ABA Model Rules of Professional Conduct and to propose comprehensive revisions.

[7] ABCNY and the New York County Lawyers Association supported the rule as did many prosecutorial and defense organizations, albeit with various suggested drafting changes. No one took issue with the underlying premise that prosecutors have professional duties upon learning that a wrongful conviction may have occurred. The comments were duly considered by COSAC, which then conducted a day-long meeting attended by representatives of more than thirty prosecutor, defender and bar association representatives. Extensive discussion during that meeting resulted in revisions to Rules 3.8(g) and (h) and the accompanying Comments.

obligation. Further, it is important not simply to educate prosecutors but to hold out the possibility of professional discipline for lawyers who intentionally ignore persuasive evidence of an unjust conviction. Prosecutors' offices have institutional disincentives to comport with these obligations[8] and, as courts have recognized, their failures are not self-correcting by the criminal justice process.[9] Codification of these obligations, which are meant to express prosecutors' minimum responsibilities, will help counter these institutional disincentives.

The proposed Rules 3.8(g) and (h) and Comments in the proposal would be additions to current Rule 3.8 with the exception of Comment [1]. Comment [1] is currently included in Rule 3.8 but would be amended to add two sentences and to delete one sentence as reflected in the following redlined version:

[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 and that guilt is decided upon the basis of sufficient evidence, and that special precautions are taken to prevent and to rectify the conviction of innocent persons. The extent of mandated remedial action is a matter of debate and varies in different jurisdictions. ~~Precisely how far the prosecutor is required to go in this direction 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 ~~in turn~~ 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.

The Rule and Comments are designed to provide clear guidance to prosecutors concerning their minimum disciplinary responsibilities,[10] with the expectation that, as ministers of justice, prosecutors routinely will and should go beyond the disciplinary minimum. In many instances, a prosecutor will receive information about a defendant that does not trigger the rule's disclosure obligation and will be called upon to decide whether that information is nevertheless

---

[8] *See generally* Daniel S. Medwed, The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence, 8 B.U. L. Rev. 125 (2004).

[9] *See, e.g.*, *Houston v. Partee*, 978 F.2d 362 (7th Cir. 1992).

[10] Prosecutors and their representative organizations involved in the drafting process generally agreed on the need to identify specific measures to be taken upon learning of new evidence of a convicted defendant's innocence. Accordingly, the proposed provisions specifically identify when a prosecutor's disciplinary obligations are implicated regarding disclosure, investigation, and remedial measures. Recognizing, however, that individual cases and jurisdictions differ, the rule does not prescribe particular investigative steps and remedial measures that must be pursued. Although the proposed Comments identify steps that might be taken when necessary to remedy a wrongful conviction, the list is not exclusive. Sometimes disclosure to the defendant or the court, or making or joining in an application to the court, will suffice, whereas in jurisdictions where courts lack jurisdiction to release an innocent individual, the appropriate step may be to make, or join in, an application for executive clemency.

sufficient to require some investigation. The quality and specificity of the information received by a prosecutor often will vary dramatically, and it is expected that a prosecutor will decide whether and how to investigate based upon a good faith assessment of the information received. In some cases, the prosecutor may recognize the need to reinvestigate the underlying case; in others, it may be appropriate to await development of the record in collateral proceedings initiated by the defendant.

With the understanding that prosecutors should be presumed to take their ethical and professional obligations seriously, the Comment specifically notes that good faith exercises of judgment are not disciplinary violations under the proposed provisions. A convicted defendant might easily complain that a prosecutor "knows" that the defendant is innocent. Indeed, the defendant may support a complaint by relying on much the same evidence that might have been presented at trial. We are confident, however, that disciplinary authorities will not assume that prosecutors ignore substantial evidence of innocence and will not burden prosecutors with the need to respond to and defend ethics charges that are not supported by specific and particular credible evidence that the prosecutor violated his or her disciplinary responsibilities.

The provisions build upon the ABA's historic commitment to developing policies and standards designed to give concrete meaning to the "duty of prosecutors to seek justice, not merely to convict,"[11] and, in particular, to prevent and rectify the conviction of innocent defendants.[12] For example, the ABA has endorsed draft legislation that would generally ensure the preservation of material evidence for post-conviction review,[13] and that would require the preservation of DNA evidence in particular until the convicted defendant has completed his sentence.[14] These prior resolutions implicitly recognized the need to reexamine convictions in light of newly discovered, material exculpatory evidence. The proposed additions to the ABA Model Rules will codify public prosecutors' obligations to conduct such reexaminations.

Respectfully submitted,

Stephen J. Saltzburg
Chair, Section of Criminal Justice
February 2008

---

[11] ABA Standards Relating to the Administration of Criminal Justice, Standard 3-1.2(c); accord Berger v. United States, 295 U.S. 78 (1935).
[12] See generally *Achieving Justice: Freeing the Innocent, Convicting the Guilty*, Report of the ABA Criminal Justice Section's Ad Hoc Innocence Committee to Ensure the Integrity of the Criminal Process, 2006.
[13] Resolution 111F, approved August 2004.
[14] ABA Standards on DNA Evidence, Standard 2.6(b).

105B

GENERAL INFORMATION FORM

To Be Appended to Reports with Recommendations
(Please refer to instructions for completing this form.)

Submitting Entity: American Bar Association Section of Criminal Justice

Submitted By: Stephen Saltzburg, Chair Section of Criminal Justice

1. Summary of Recommendation(s).
The Recommendation calls for the amendment of Rule 3.8 of the ABA Model Rules of Professional Conduct to identify prosecutors' obligations when they know of new evidence establishing a reasonable likelihood that a convicted defendant did not commit the offense of which he was convicted. The amendments address the circumstances in which a prosecutor has a disclosure obligation, a duty to investigate, and a duty to take steps to remedy the conviction of an innocent individual.

2. Approval by Submitting Entity. The recommendation was approved by the Criminal Justice Section Council at its May 12, 2007 meeting.

3. Has this or a similar recommendation been submitted to the House or Board previously?
This is an addition to Model Rule 3.8 (titled "Special Responsibilities of a Prosecutor") previously passed by the ABA.

4. What existing Association policies are relevant to this recommendation and how would they be affected by its adoption? Model Rule 3.8 already exists. This recommendation will add two provisions in order to strengthen the responsibility of prosecutors to take action when confronted with evidence of innocence. The provisions build upon the ABA's historic commitment to developing policies and standards designed to give concrete meaning to the "duty of prosecutors to seek justice, not merely to convict" (ABA Standards Relating to the Administration of Criminal Justice, Standard 3-1.2(c)); and, in particular, to prevent and rectify the conviction of innocent defendants. For example, the ABA has endorsed draft legislation that would generally ensure the preservation of material evidence for post-conviction review (Resolution 111F, approved August 2004), and that would require the preservation of DNA evidence in particular until the convicted defendant has completed his sentence (ABA Standards on DNA Evidence, Standard 2.6(b)).

105B

5. What urgency exists which requires action at this meeting of the House?
The number of wrongly convicted persons for various reasons is alarming. Every step must be taken to free the innocent and thereby preserve respect for the rule of law and the legal system.

6. Status of Legislation. (If applicable.) N. A.

7. Cost to the Association. (Both direct and indirect costs.) No Costs
The recommendation's adoption would not result in direct costs to the Association. The only anticipated costs would be indirect costs that might be attributable to lobbying to have the recommendation adopted or implemented at all levels of government. These indirect costs cannot be estimated, but should be negligible since lobbying efforts would be conducted by existing staff members who already are budgeted to lobby Association policies.

8. Disclosure of Interest. (If applicable.)

No known conflict of interest exists.

9. Referrals.
Concurrently with submission of this report to the ABA Policy Administration Office for calendaring on the February 2008 House of Delegates agenda, it is being circulated to the following:

Sections, Divisions and Forums:

All Sections and Divisions

The Recommendation is co-sponsored by the ABA Standing Committee on Ethics and Professional Responsibility, The ABA Section of Individual Rights and Responsibilities, The ABA Section of Litigation, The ABA Section of State and Local Government Law, The ABA Commission on Domestic Violence, The ABA Government and Public Sector Lawyers Division, The ABA Death Penalty Representation Project, The Association of the Bar of the City of New York, The New York State Bar Association, and the National Organization of Bar Counsel.

10. Contact Person. (Prior to the meeting.)

Bruce A. Green
Fordham University
140 W 62nd St Room 221
New York, NY 10023-7407
(212) 636-6851
Fax: (212) 636-6899
Email: bgreen@law.fordham.edu

11. Contact Person. (Who will present the report to the House.)

Stephen Saltzburg
George Washington University
2000 H St NW
Washington, DC 20052-0001
(202) 994-7089
Fax: (202) 994-7143
Email: ssaltz@law.gwu.edu

105B

EXECUTIVE SUMMARY

A. Summary of Recommendation.

The Recommendation calls for the amendment of Rule 3.8 of the ABA Model Rules of Professional Conduct to identify prosecutors' obligations when they know of new evidence establishing a reasonable likelihood that a convicted defendant did not commit the offense of which he was convicted. The amendments address the circumstances in which a prosecutor has a disclosure obligation, a duty to investigate, and a duty to take steps to remedy the conviction of an innocent individual.

B. Issue Recommendation Addresses.

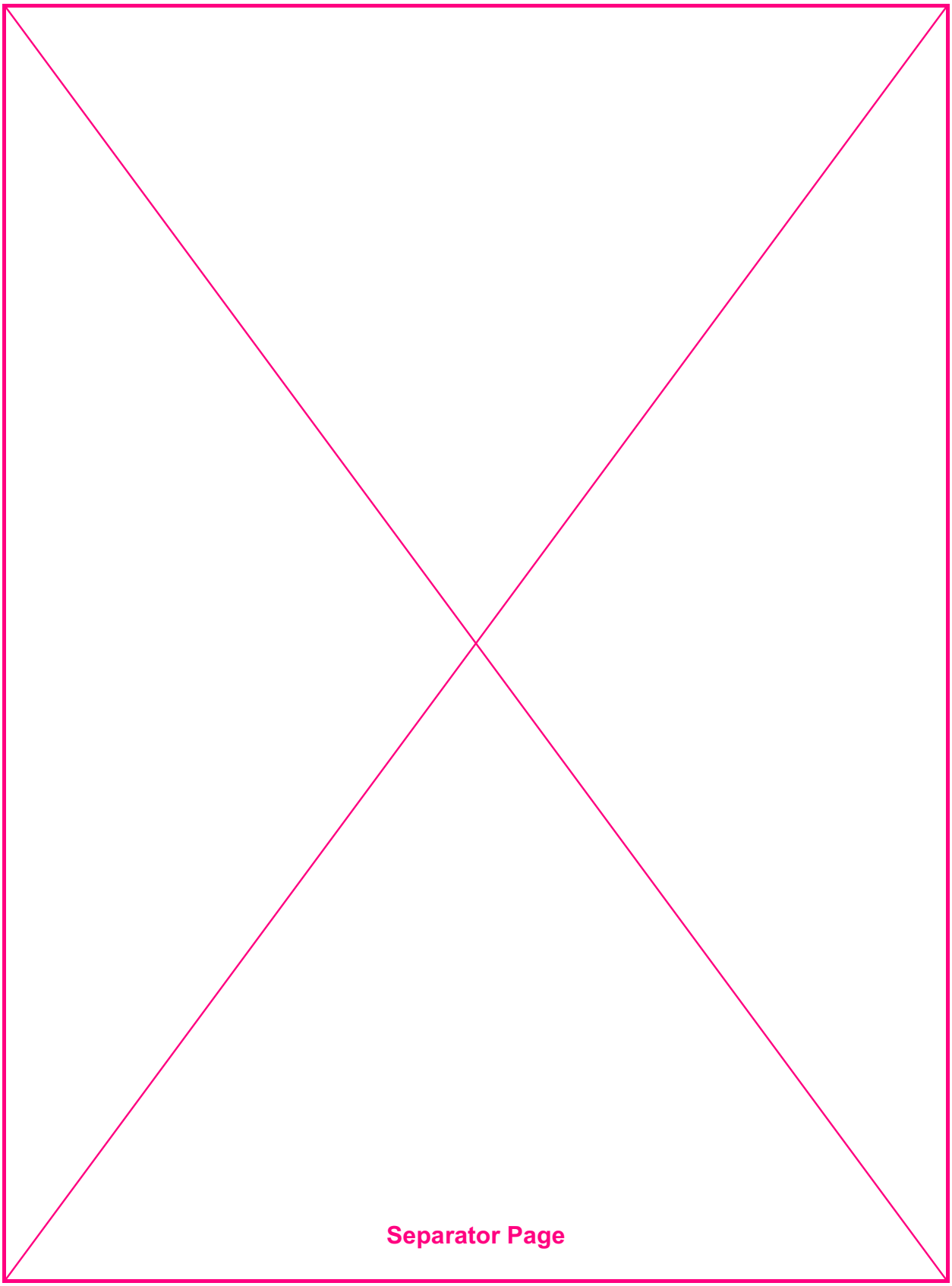
The Recommendation addresses prosecutors' disciplinary obligations when they know that an innocent person has been, or may have been, convicted. This is an issue of tremendous significance in the criminal justice system, given that evidence of innocence sometimes is not known until after a conviction is obtained.

C. How Proposed Policy Will Address the Issue.

The provisions build upon the ABA's historic commitment to developing policies and standards designed to give concrete meaning to the duty of prosecutors to "seek justice," not merely to convict, and, in particular, to prevent and rectify the conviction of innocent defendants. The amendments will establish a prosecutor's obligation, in specified circumstances, to disclose new evidence of innocence after a conviction is obtained, to investigate the new evidence, and, if there is clear and convincing evidence of the defendant's innocence, to take remedial measures. The provisions will educate prosecutors about their obligations and serve as a basis of discipline when prosecutors act in bad faith in violation of the provisions.

D. Minority Views or Opposition.

No opposition to this recommendation is known to exist at this time.



Separator Page

COLORADO SUPREME COURT STANDING COMMITTEE ON THE COLORADO RULES OF PROFESSIONAL CONDUCT

AGENDA

August 21, 2008, 9:00 a.m.
Supreme Court Conference Room

---

1. Approval of minutes of April 18, 2008 meeting [pages 1-8]
2. Subcommittee reports:
   a. Housekeeping – John Gleason
   b. ABA Model Rule 3.8 – Judge Webb
   c. Prospective or Retroactive Application of the CRPC – Alec Rothrock [pages 9-11]
   d. Frequently Asked Questions re: the New CRPC – Alec Rothrock
   e. Rule 1.5(b) – Alec Rothrock
3. Administrative matters - Select next meeting date
4. Adjournment (well before noon)

Chair
Marcy G. Glenn
Holland & Hart LLP
P.O. Box 8749
Denver, Colorado 80201
(303) 295-8320
mglenn@hollandhart.com

FILE NOTE

The "submitted minutes" of the prior meeting that were provided to Committee members in advance of the current meeting have been omitted from this file.

See the files containing the *approved* minutes of the Supreme Court Standing Committee on the Rules of Professional Conduct, which are available on the Supreme Court's website.

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

---

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 Southwick,* 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. **For all clients, a lawyer shall follow the provisions of Rule 1.8(a) in the event of a change to the basis**

or rate of the fee, except that a lawyer is not required to follow 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.

Standing Committee RPC---Housekeeping Subcommittee (Gleason/Rothrock)

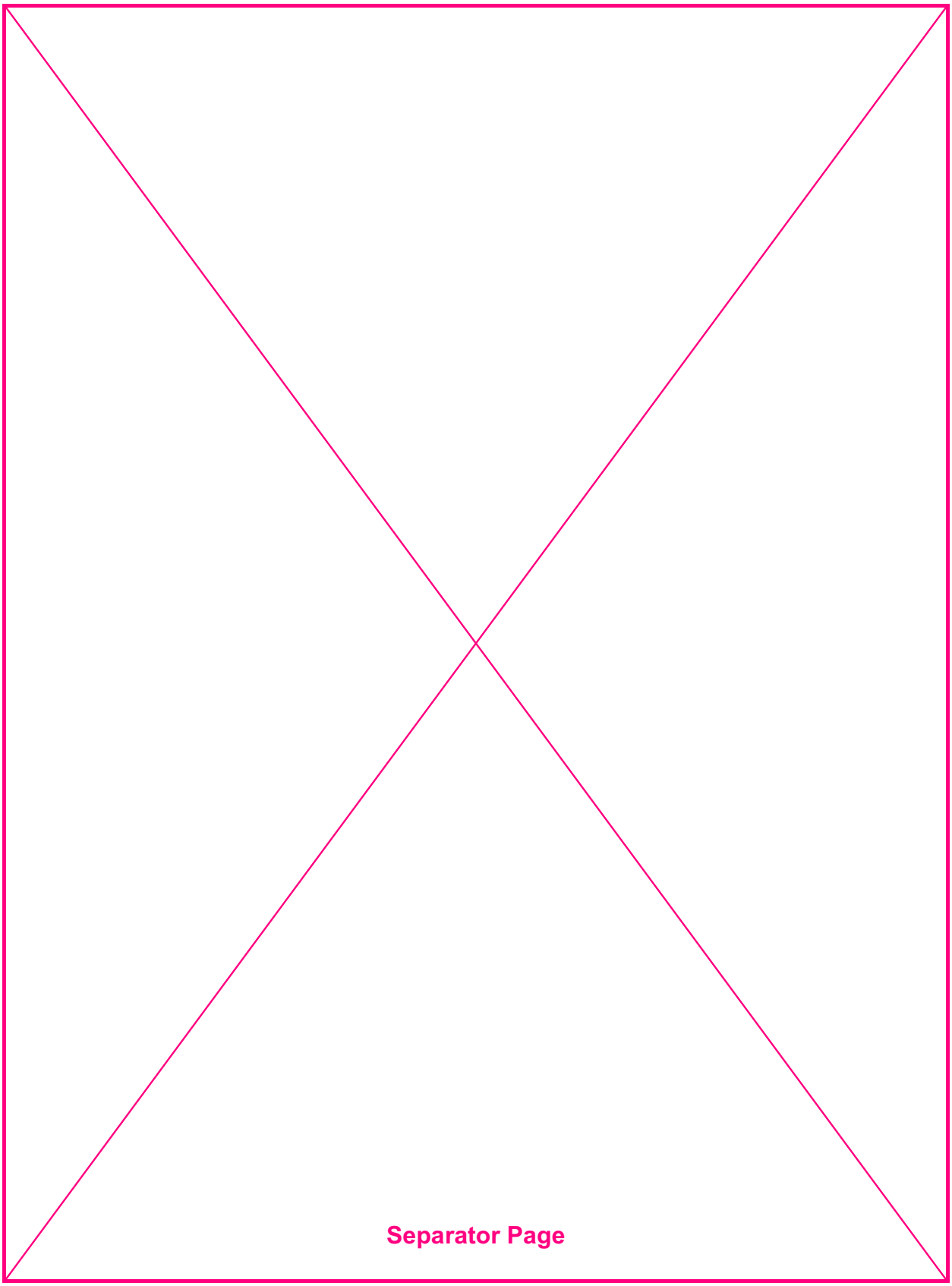
Colo. RPC 1.6(b)(2): "A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary . . . to reveal the client's intention to commit a crime and the information necessary to prevent a crime." {Proposed change: "Reveal" is overused so we suggest a different word.

1.15(d)(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". {Proposed change: Add "or an operating account".}

1.15(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. {Proposed change: Add "off-site storage".}

Colo. RPC 1.17, Comment [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)." {Proposed correction: Rule 1.5 (c) to Rule 1.5(d).}

Colo. RPC 7.2, Comment [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 Rule 2.1 and 5.4(c). Except as provided in Rule 1.5(c), 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." {Proposed correction: Rule 1.5(c) to Rule 1.5(d)}.



Separator Page

COLORADO SUPREME COURT STANDING COMMITTEE ON THE COLORADO RULES OF PROFESSIONAL CONDUCT

AGENDA

October 31, 2008, 9:00 a.m.
Supreme Court Conference Room

---

1. Welcome to new members Neeti Pawar and Marcus Squarrell
2. Approval of minutes of August 21, 2008 meeting [to be distributed separately]
3. Subcommittee reports:
   a. Housekeeping – Marcy Glenn
   b. ABA Model Rule 3.8 – Judge Webb [pages 1-15]
   c. Rule 1.15(k) – Alec Rothrock [page 16]
   d. Rule 1.5(b) – Alec Rothrock
   e. Lawyers Giving Advice in Other Than Client Representation – Tony van Westrum [materials to be distributed separately]
4. New business:
   a. Rule 1.15 – CBA-proposed amendments to address retention of client files [pages 17-20]
   b. ABA Journal article on potential future changes to ABA Model Rules [page 21]
5. Administrative matters - Select next meeting date
6. Adjournment (before noon)

Chair
Marcy G. Glenn
Holland & Hart LLP
P.O. Box 8749
Denver, Colorado 80201
(303) 295-8320
mglenn@hollandhart.com

FILE NOTE

The "submitted minutes" of the prior meeting that were provided to Committee members in advance of the current meeting have been omitted from this file.

See the files containing the *approved* minutes of the Supreme Court Standing Committee on the Rules of Professional Conduct, which are available on the Supreme Court's website.

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.

---

[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 which~~undertake 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;

Rule 1.15(k)

Current Rule

(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.

Proposed Rule

(k) The 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. The method used shall be consistently applied. 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. All records required to be maintained by subparagraphs (a) and (j) of this Rule that are not maintained in electronic form shall be located in Colorado.

COLORADO BAR ASSOCIATION
ESTABLISHED IN 1897

Marcy G. Glenn, Chair
Colorado Supreme Court Standing Committee on the Colorado Rules of Professional Conduct
P.O. Box 8749
Denver, CO 80201-8749

Re: Proposed Amendment to Colorado Rules of Professional Conduct

Dear Ms. Glenn:

Enclosed with this letter is a proposed amendment to Rule 1.15 of the Colorado Rules of Professional Conduct and an explanatory letter from the Colorado Bar Association's Ethics Committee. The Colorado Bar Association ("CBA") requests consideration of the proposed amendment by the Colorado Supreme Court Standing Committee on the Colorado Rules of Professional Conduct.

The proposed amendment was drafted by the Ethics Committee after it concluded that Rule 1.15 does not establish clear rules for the retention and disposition of client files. The proposed amendments were approved by the CBA Ethics Committee and submitted to the Executive Council of the CBA, which approved submission of the proposed amendments to the Supreme Court Standing Committee on the Colorado Rules of Professional Conduct.

Thank you for the attention to this matter.

Very truly yours,

William E. Walters, President
Colorado Bar Association

1900 GRANT STREET, NINTH FLOOR
DENVER, COLORADO 80203-4336
303/860-1115 FAX 303/894-0821 WATS 800/332-6736
WWW.COBAR.ORG

AMENDMENTS TO COLO. RPC 1.15. SAFEKEEPING PROPERTY

General Duties of Lawyers Regarding Property of Clients and Third Parties

* * * *

(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) ***Client File Retention.*** *Except as provided in a written agreement signed by a client, a lawyer shall maintain 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 returned them to the client or disposed of them in accordance with the client's instructions, or the client already possesses them. 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. 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.*

(m) ***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 subsections (j) and (l) of this Rule. 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 subsections (j) and (l) of this Rule.*

(n) 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.

Comment

[9] Rule 1.15(l) provides definitive standards regarding the recurring question of how long a lawyer must maintain client's files before destroying them. Rule 1.15(l) 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 1.15(l), 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 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 1.15(j) is governed exclusively by those rules. Similarly, Rule 1.15(l) 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).

[10] Rule 1.15(l) does not require multiple lawyers in the same law firm to maintain duplicate client files or to maintain 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 represent such corporation or entity as employees and the client's files would be considered to be in the possession of the client. 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 1.15(l) 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.

[11] The two-year period under Rule 1.15(l) 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. Many lawyers base retention periods on applicable statutes of limitations or on future events that implicate the legal services. 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. The exception to Rule 1.15(l), where the client maintains possession of the files, is not intended to include the client's receipt of papers forwarded from time to time by the lawyer during the course of the representation.

[12] 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 1.15(l). 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. If these preconditions exist, 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.

Work in Progress

Change is becoming the byword that characterizes the legal ethics field

BY JAMES PODGERS

THE ABA FIRST DREW UP ETHICS GUIDELINES for lawyers a century ago—and they've been a work in progress ever since.

During those 100 years, the ABA has replaced the original Canons of Professional Ethics twice. The association has also adopted Model Rules for Lawyer Disciplinary Enforcement and a Model Code of Judicial Conduct.

Indeed, the ABA has done just about everything in the professional conduct field over the past 100 years except actually discipline lawyers. The association always has recognized that as a province of the state supreme courts and their designated agencies (often the state bar associations).

Most of this action has taken place over the past 25 years or so. But if experts' comments at a program commemorating the ABA's work in the ethics field are any indication, a lot more changes could be on the horizon.

Panelists at the Center for Professional Responsibility's August program at the annual meeting in New York City cited factors familiar to many practicing lawyers: the pressures of a competitive business environment, specialization, the growth of global practice, and intrusions by government and even clients into the profession's long-standing structure of self-regulation.

"If anybody thinks foreign lawyers aren't here already, I don't know where they've been," said William P. Smith III, general counsel of the State Bar of Georgia. "If we cannot develop a system that will bend under the pressure of the international economy, we will break."

As a result of these pressures, speakers said, it may be time to take another hard look at the Model Rules, which serve as the basis for most of the conduct codes that govern lawyers at the state level.

"We need a re-examination of where we are and how we regulate ourselves," said Carolyn B. Lamm of Washington, D.C., who became ABA president-elect at the close of the annual meeting.

On ABAJournal.com
Links to papers written for the ABA's ethics centennial

ONE SIZE MAY NOT FIT ALL

DEBORAH L. RHODE, A PROFESSOR AT STANFORD LAW School, set the tone for much of the panel's discussion when she identified some key issues:

- Does one regulatory structure really work best for a profession in which there are so many differences among practice settings and substantive fields?
- Does the current framework ensure access to justice, especially for low- or middle-income people?
- Should the profession continue to engage in self-regulation, or will government and even private entities play a larger role?

"There is something fundamentally wrong with the way we regulate ourselves," said Steven C. Krane, a partner at Proskauer Rose in New York City and the outgoing chair of the Standing Committee on Ethics and Professional Responsibility. He argued for the profession to abandon what he called "the fallacy of the monolithic client-lawyer relationship"—the notion that all lawyers work in essentially the same way on behalf of clients with often drastically different needs. He called for a more flexible regulatory approach that recognizes the growing variety of practice settings and client-lawyer relationships.

The profession also must recognize that the way it sees itself, especially in terms of independence, isn't necessarily shared by other groups, said Laurel S. Terry, a law professor at Penn State University in Carlisle and a member of the ABA Standing Committee on Professional Discipline. "We need to look at lawyer regulation through a broader lens than we already do," she said. ■

A Busy 100

Highlights of the ABA's activity in the ethics field since adopting the Canons of Professional Ethics in 1908:

1913 Standing Committee on Professional Ethics formed.
1964 Special Committee on Evaluation of Ethics Standards (Wright committee) formed.
1969 Model Code of Professional Responsibility adopted.
1972 Code of Judicial Conduct adopted.
1977 Commission on Evaluation of Professional Standards (Kutak commission) formed.
1978 Center for Professional Responsibility opens.
1983 Model Rules of Professional Conduct adopted.
1989 Model Rules for Lawyer Disciplinary Enforcement adopted.
1992 McKay commission issues *Lawyer Regulation for a New Century.*
1997 Ethics 2000 Commission formed.
2002 Revisions to Model Rules of Professional Conduct adopted.
2007 Revised Model Code of Judicial Conduct adopted.

Lisa Podsiadlik

From: Marcy Glenn
Sent: Wednesday, October 29, 2008 10:39 AM
To: Lisa Podsiadlik
Subject: Fw: Minutes of 8/21/08 SCSCRPC meeting; memo

Attachments: ahvm102808.pdf; ahqd091008.SCSCRPC.pdf


ahvm102808.pdf (287 KB)


ahqd091008.SCSCRPC.pdf (77 KB)...

Ppa

----- Original Message -----
From: Anthony van Westrum <avwllc@attglobal.net>
To: Federico C. Alvarez <falvarez@khgk.com>; Michael Bender <michael.bender@judicial.state.co.us>; Michael H. Berger <mberger@jacobschase.com>; Gary B. Blum <blumg@s-d.com>; Nathan B. Coats <nathan.coats@judicial.state.co.us>; Nancy L. Cohen <nancy.cohen@arc.state.co.us>; Cynthia F. Covell <cfc@alpersteincovell.com>; Thomas E. Downey, Jr. <ted@downeymurray.com>; John S. Gleason <john.gleason@arc.state.co.us>; Marcy Glenn; John M. Haried <john.haried@usdoj.gov>; David C. Little <dlittle@mlmpc.com>; William R. Lucero <w.lucero@pdj.state.co.us>; Cecil E. Morris <cmorris@penberg.com>; Neeti Pawar <"Neeti Pawar, at np"@dimanna-Jackson.com>; Kenneth B. Pennywell <pennywellk@fdazar.com>; Ruthanne Polidori <randiepolidori@comcast.net>; Helen Echardt Raabe <helen.raabe@diadenver.net>; H. Richard Reeve <hrr@denverda.org>; Alexander R. Rothrock <arothrock@bfw-law.com>; Marcus L. Squarrell <msquarrell@duckerlaw.com>; Boston H. Stanton, Jr. <bostonhs@aol.com>; David W. Stark <dstark@faegre.com>; Eli Wald <ewald@law.du.edu>; Lisa M. Wayne <lmonet20@aol.com>; John R. Webb <john.webb@judicial.state.co.us>; E. Tuck Young <tyoung@kyklaw.com>
Sent: Wed Oct 29 10:25:38 2008
Subject: Minutes of 8/21/08 SCSCRPC meeting; memo

Date: October 29, 2008
Subject: Minutes of 8/21/08 SCSCRPC meeting; memo

To: Members of the Colorado Supreme Court Standing Committee on Rules of Professional Conduct-- Federico C. Alvarez, at falvarez@khgk.com; Michael L. Bender, at michael.bender@judicial.state.co.us; Michael H. Berger, at mberger@jacobschase.com; Gary B. Blum, at blumg@s-d.com; Nathan B. Coats, at nathan.coats@judicial.state.co.us; Nancy L. Cohen, at nancy.cohen@arc.state.co.us; Cynthia F. Covell, at cfc@alpersteincovell.com; Thomas E. Downey, Jr., at ted@downeymurray.com; John S. Gleason, at john.gleason@arc.state.co.us; Marcy G. Glenn, at mglenn@hollandhart.com; John M. Haried, at john.haried@usdoj.gov; David C. Little, at dlittle@mlmpc.com; William R. Lucero, at w.lucero@pdj.state.co.us; Cecil E. Morris, Jr., at cmorris@penberg.com; Neeti Pawar, at np@dimanna-Jackson.com; Kenneth B. Pennywell, at pennywellk@fdazar.com; Ruthanne Polidori, at randiepolidori@comcast.net; Helen Eckhardt Raabe, at helen.raabe@diadenver.net; Henry R. Reeve, at hrr@denverda.org; Alexander R. Rothrock, at arothrock@bfw-law.com; Marcus L. Squarrell, at msquarrell@duckerlaw.com; Boston H. Stanton, Jr., at bostonhs@aol.com; David W. Stark, at dstark@faegre.com; Eli Wald, at ewald@law.du.edu; Lisa M. Wayne, at lmonet20@aol.com; John R. Webb, at john.webb@judicial.state.co.us; E. Tuck Young, at tyoung@kyklaw.com

cc: Ms. Valerie Dewey, at valerie.dewey@judicial.state.co.us
Bcc: Anthony van Westrum, at avwllc@attglobal.net

email. If you have received this communication in error, please do not read beyond this confidentiality notice but immediately notify Anthony van Westrum by telephone at 303-295-1515 or email at avwpc@worldnet.att.net and destroy all copies of this message and all attachments hereto. Thank you.
^^

Dear Colleagues:

I am attaching minutes of the meeting of our committee on August 21, 2008, for your review. Marcy will ask for their approval at our meeting this coming Halloween morning.

I'm also attaching a memo I wrote following a very pleasant lunch I had with Prof. Scott Peppet in September to talk about the application of the Ethics Rules to lawyers when they are spewing advice around but don't think they have a lawyer-client relationship with anyone who's listening. You will recall that I've been talking about this from time to time over the last couple of years and that I've accomplished nothing about it yet. Well, Scott agrees with me that there are significant risks for that lawyer, and that one area we might do some rule-making to deal with him is where he is serving as a neutral as contemplated by Rule 2.4. We had a good lunch, and a great conversation, and we generated lots of positive intentions -- though nothing is accomplished yet. The memo is just to convince you that there's a real basis for concern.

Yours,

--Tony--

Files attached: ahvm102808.pdf [the minutes] and ahqd091008.SCSCRPC.pdf [the memo]

^^^^^^^^^^^^^^^^^^^^^^^^^^^^

Anthony van Westrum
Anthony van Westrum LLC
Counselor and Attorney at Law
1 Seventeenth Street, Suite 1515
Denver, Colorado 80293-1501
(v) 303-295-1515 -- (f) 303-295-1456 or -1602 -- (e) avwpc@worldnet.att.net

To: SCSCRPC
From: Anthony van Westrum
Date: September 10, 2008
Re: Notes following lunch meeting with Scott R. Peppet to discuss "lawyers giving advice to persons other than clients"

Prof. Scott R. Peppet and I had lunch at noon today at Carelli's in Boulder, to talk about the ethical implications of "lawyers giving advice to persons other than clients." This memo is notes from a random recollection of our conversation. [I use the term "mediator" throughout where "neutral" might be more appropriate, although any Rule that resulted from our proposals would need to distinguish appropriately between mediators on the one hand and arbitrators in binding arbitration on the other hand, as their roles are quite different.]

1. We noted issues surrounding the lawyer's attempt to say "I am not your lawyer" in the mediation (and other) contexts.

    a. If the lawyer gives that disclaimer but subsequently begins to give advice of the kind that would implicate *People v. Bennett* and *Denver Bar Ass'n v. Public Utilities Commission* (see Item 3.d), why isn't the analysis this: Despite his disclaimer, he has violated his own game rules and has become the lawyer — entered into a lawyer client relationship with the mediating parties or others to whom he directs the advice — as soon as he starts to advise about the law..

    b. Even if we countenance some kind of written agreement that initially clarifies that the lawyer will not be in a lawyer-client relationship notwithstanding that he will provide legal advice, how long should that be effective before it has to be reiterated for further effectiveness?

        i. If, as discussed further below, we modify Rule 2.4 so that it applies to this situation all of the Rules that have continued practical and principled application to the situation — such as rules regarding competency, avoidance of third-party conflicts, confidentiality, fee regulation, and the like — do we really care about this?

2. We decided to concentrate on a revision of Rule 2.4, Lawyer Serving as Third-Party Neutral, rather than to tackle the whole set of issues of lawyers giving advice when they don't think they are in a lawyer-client relationship (such as consulting experts, form-drafters, cocktail-party conversants, etc.) but are not serving as "neutrals."

3. The essential risk for lawyers serving as mediators for two unrepresented mediating parties is the potential for being charged with having two clients and being in direct violation of Rule 1.7 because of the clients' direct adversity.

    a. On its face, Rule 2.4 begs the question of whether the lawyer-mediator 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.

b. *People v. Bennett* is regularly cited for the proposition that a person who *reasonably* thinks that a person who is a lawyer is *his* lawyer has a client-lawyer relationship with that person. Accordingly, a mediating party who thinks the lawyer-mediator is his lawyer may be able to cram the lawyer-mediator into a lawyer-client relationship — "He was a lawyer; I asked him questions about the law, and he answered them." (It would be more reasonable, of course, for the mediating party to come to that conclusion if the mediating party is not represented by another lawyer and if the lawyer-mediator is "evaluating" or otherwise advising about the law in the sense of *Denver Bar Ass'n v. Public Utilities Commission.*) If the mediating party succeeds in making that argument, then the lawyer will be in trouble under Rule 1.7 vis-à-vis both mediating parties and will also have the other duties of a lawyer to a client (or to both clients), such as competence and confidentiality. That is, unless Rule 2.4 prevents that conclusion.

c. But note that Rule 2.4 itself — or at least its commentary — speaks of *evaluative* mediation as being within its purview. Presumably it is contemplating the kind of mediation in which the mediator gives the parties her evaluation of the law as it applies to the facts. That is, the Rule itself contemplates that the lawyer-mediator, in an evaluative mediation, will be giving advice about the law and its application to facts. Accordingly, Rule 2.4 has some useful negative implication to help the lawyer-mediator fend off the risk that the mediating parties will be her clients.

4. Scott and I agreed that it would be reasonable for the Colorado Supreme Court to subject the lawyer-mediator to certain of the Rules *as if* the relationship with the mediating parties were a lawyer-client relationship.

a. We noted that the Court has exercised its authority to regulate conduct that is outside of a formal lawyer-client relationship. It has regulated the sexual conduct of lawyers with their clients; it has, in Rule 5.7, exercised authority when lawyers provide services in "law-related" matters notwithstanding that nonlawyer can provide the same services free of its regulation. So, the Court probably would not shy away on jurisdictional grounds from exerting its authority over lawyers who are acting as mediators if it otherwise chose to do so.

b. Scott and I agreed that Court regulation of lawyers providing mediation services should not be used as vehicle for lawyerizing the provision of mediation services generally. The world needs all of the mediation services it can get, and we would not advocate a regimen for lawyer-mediators that would result in the regulation or prohibition of the "unauthorized practice of mediation" by nonlawyers akin to its proscriptions on the unauthorized practice of law by nonlawyers..

c. Would the ability of nonlawyer mediators to provide mediation services unfettered by an expanded Rule 2.4 give rise to lawyers' claims of unequal protection under the law? Compare Rule 5.7 on law-related services.

d. To the contrary, we noted that lawyers might claim the fact of the Court's regulation of their services as mediators as an advantage they have over other mediator service providers: "We are regulated providers who are subject to clearer and probably more onerous regulation for your benefit as a service-user than are nonlawyer mediators."

5. Adhering to the decision that we should concentrate on lawyers' services as neutrals and build on the foundation of Rule 2.4, we talked about expanding Rule 2.4 to include those aspects of the other Rules that have logical and principled application to the lawyer-mediator.

a. We saw a need to negate the prohibitory effects of Rule 1.7 as between the two mediating parties — by definition, they are in direct adversity, and our goal is to regulate the lawyer who seeks to advise them, not to prohibit that advice by a strict application of Rule 1.7. But we recognized that Rule 1.7 could properly be applied between either or both of the mediating parties on the one hand and all of lawyer-mediator's *clients* on the other hand. Likewise, Rule 1.8 and Rule 1.9, etc. seem to have useful application in that context. And we recognized that the lawyer-mediator should not be allowed to have unconsented-to factual conflicts between the mediating parties, such as an undisclosed familial relationship with one of the mediating parties.

b. And we thought Rule 1.6 on confidentiality had useful application, subject to refinement to permit the disclosure of one mediating party's confidential information to the other party in the course of the mediation (and perhaps with recognition that the lawyer could agree even then to abide by a mediating party's direction that particular information not be given to the other party). Thus, Rule 1.6 would be applied to preserve the confidentiality of "information relating to the mediation" vis-à-vis third parties.

c. That left, of the Big Three (conflict, confidentiality, and competency), the question of whether an expanded Rule 2.4 should say anything about competency.

i. We agreed that a lawyer-mediator who gives advice to the mediating parties should do so competently. Competence is probably an aspect of the duty of care owed by any agent to his principal, and the mediating parties may be in a principal-agent relationship with the lawyer-mediator.

ii. For a lawyer vis-à-vis a client, the standard of care is one of negligence, per *Hopp & Flesch LLC v. Backstreet*:[1]

> An attorney owes his client a duty "to employ that degree of knowledge, skill, and judgment ordinarily possessed by members of the legal profession in carrying out the services for his client." [*Bebo Constr. Co. v. Mattox & O'Brien, P.C.*, 990 P.2d 78, 83 (Colo.1999).] We have noted that, in determining whether a lawyer has exercised judgment ordinarily possessed by members of his profession, the relevant focus is on what a lawyer would have done at the time, excluding "the benefit of hindsight." [*Stone v. Satriana*, 41 P.3d 705, 712 (Colo. 2002)]

That standard can easily be transformed into a standard of care for a lawyer-mediator.

iii. Rule 1.1 recites its own form of a duty of competency, but it appears that questions of competency are more likely to arise in private malpractice litigation than in disciplinary actions.

iv. Yet, while the establishment of a lawyer-mediator's duty of competency might be left to the law outside the Rules — and a comment might express that — it

---

1. *Hopp & Flesch LLC v. Backstreet*, 123 P.3d 1176 (Colo. 2005).

could be useful to make statement that the lawyer-mediator owes a duty of competence to the mediating parties. Query whether it would be like Rule 1.1: "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."

d. Rule 1.5 on the reasonableness of fees might have application. (Scott has written about the use of contingent fees in mediation.)

   i. Given that the fees of nonlawyer mediators — who compete with lawyer-mediators in the market for mediation services — are unregulated, the Court might be chary about regulating the fees of the lawyer-mediators in that market. Would "reasonableness" be a proper regulation that would not distort the market?

e. Other fee issues would include referral fees and the sharing of fees with other lawyers and with nonlawyers. Clearly lawyer-mediators should be permitted to share their mediation fees with nonlawyers; indeed, they often do that now, both with service providers like the American Arbitration Association and in partnerships with social workers and other nonlawyer professionals. Referral fees might also deserve different treatment from such fees in the lawyer-client context.

f. Scott also noted that many mediations may involve one party — the husband or employer — paying the mediation fees and that questions are often raised about this, the concern being about bias. Compare Rule 5.4(c): "A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services."

g. As a matter of process, we thought our task of revising and expanding Rule 2.4 would entail reviewing each of the other Rules to see which ones had practical and principled application to the lawyer-mediator and could be applied to him, with or without modifications to fit the situation (as the Conflicts Rules would be tweaked; see Items 6.a and 6.b).

6. We noted, in several contexts, the need to identify with clarity the mediating or neutral activity that would be encompassed by a modified Rule 2.4 and contrast it with other situations that should not be given the benefits of our expanded rule. In particular, we would not want a lawyer to claim, as to one or more "real clients," that he was acting only as a mediator and was therefore entitled to use in that context the additional flexibility and permissions granted by a modified Rule 2.4. The Rule would, thus, need to distinguish between mediation parties and real clients.

7. Scott thought that an expanded Rule 2.4 might profitably be proposed to the Colorado Supreme Court for adoption while also being promoted nationally. The adopted Colorado Rule could be used as a laboratory experiment for wider consideration. He noted that Rule 2.4 as found in the Ethics 2000 Rules (and in Colorado) was a well-watered-down version of earlier proposals coming out of the Georgetown Law Center. That is, others have already thought about these things, so there might be an existing base for us to build upon.

8. We agreed to develop, in separate but parallel efforts, outlines of what an expanded Rule 2.4 would look like, and then compare the outlines to develop a second-level proposal. (This memorandum is not intended to be such an outline.)