This file,
acse022406 - All SCSCRPC minutes, Vol. 1,
contains the minutes of the first meeting,
on 9/30/2003, through the minutes of the
nineteenth meeting, on 11/30/2007.

COLORADO SUPREME COURT

STANDING COMMITTEE ON THE RULES OF PROFESSIONAL CONDUCT

Approved Minutes of Meeting of the Full Committee
On September 30, 2003
(First Meeting of the Full Committee)

The first meeting of the Colorado Supreme Court Standing Committee on the Rules of Professional Conduct was convened at 9:00 a.m. on Tuesday, September 30, 2003, by Chair Marcy G. Glenn. The meeting was held in the Supreme Court Conference Room on the fifth floor of the Colorado State Judicial Building.

Present at the meeting, in addition to Marcy Glenn and Justices Michael L. Bender and Nathan B. Coats, were Michael H. Berger, James A. Casey, Nancy L. Cohen, Cynthia F. Covell, John S. Gleason, David C. Little, William R. Lucero, Kenneth B. Pennywell, William D. Prakken, Henry Richard Reeve, John M. Richilano, Alexander R. Rothrock, Boston H. Stanton, Jr., Bryan S. VanMeveren, Anthony van Westrum, Eli Wald, James E. Wallace, Lisa M. Wayne, Judge John R. Webb, and E. Tuck Young. Absent were Richard T. Casson, Peggy E. Montaño, Cecil F. Morris, Jr., Judge Edward W. Nottingham, Scott R. Peppet, and David W. Stark.

Introductions.

The Chair reviewed the general concepts behind the Court's formation of the Committee, including formation of a standing committee to receive and consider proposals for changes in the rules that govern lawyer conduct in Colorado, from whatever sources such ideas may be generated, with the committee to perform its functions through subcommittees formed as needed.

The attendees then introduced themselves.

Administrative Matters.

The Chair suggested that quarterly meetings of the Full Committee would be appropriate. After discussion, 1:30 p.m. on Friday, January 9, 2004, was selected as the time and date for the next meeting of the Committee. Thereafter meeting dates will be determined as convenient to the greatest number of members on essentially a quarterly schedule.

Without objection, the Chair appointed Anthony van Westrum secretary to the Full Committee.

The Chair noted that members will be able to attend meetings by telephone conferencing. She requested two days' prior notice from those who need to attend via telephone.

Sources of Proposals for Rules Changes.

The Chair turned to the identification of groups and others from which proposals for changes to the Rules of Professional Conduct may be received:

1. *Colorado Bar Association Ethics Committee.* The CBA Ethics Committee regularly studies the Colorado Rules of Professional Conduct and makes recommendations to the CBA Board of Governors, which in turn, often makes recommendations to the Supreme

Court concerning potential rule amendments. The Chair reported that she, as chair of the Committee, had sent a memo to the current chair of the CBA Ethics Committee identifying this Committee and pointing out that there is no design on the Supreme Court's part toward displacing the Ethics Committee in its endeavors. The letter welcomed suggestions from the Ethics Committee with respect to changes in the Rules of Professional Conduct and pointed out that the meetings of the Committee will be public and may be attended by members of the Ethics Committee.

2. *Other Bar Association Committees and Task Forces*. Bar association committees and task forces in addition to the CBA Ethics Committee occasionally consider potential rule amendments. The Chair noted that a committee of the Colorado Bar Association / Denver Bar Association Joint Task Force on Multidisciplinary Practice had reviewed and revised the existing Rules of Professional Conduct with a view toward permitting multidisciplinary practice while preserving the core values of the legal profession, following a determination by the task force to view multidisciplinary practice favorably and consider the implications for lawyers' conduct. A report on that committee's efforts would be provided later during the meeting.

3. *Court-Appointed Task Forces and Committees.* The Supreme Court occasionally forms task forces or committees to study particular ethics issues and make recommendations to the Court regarding potential rule amendments.

   (a) The Chair noted that the Supreme Court has established an *ad hoc* committee (the "Ethics 2000 Committee") to consider the amendments to the Model Rules of Professional Conduct that were adopted by the American Bar Association at the end of its "Ethics 2000" review process. A report on that committee's efforts would be provided later during the meeting.

   (b) There is also an *ad hoc* committee operating under the Supreme Court's auspices known as the "Family Law Ethics Committee."

4. *Supreme Court.* The Supreme Court occasionally proposes amendments to the Rules of Professional Conduct *sua sponte*. The Chair noted that the Court has recently proposed an amendment to Rule 5.5, RPC; the specific change would be discussed later during the meeting.

5. *Other Attorneys and Private Parties*. Finally, the Chair pointed out that any lawyer or other private party can make suggestions to the Committee that it consider changes to the Rules.

In short, there is no restriction on the sources from which the Committee might take ideas to consider revisions to the Rules of Professional Conduct.

Ethics 2000.

John Gleason, Attorney Regulation Counsel, reviewed the status of a study by the Ethics 2000 Committee of the ABA's Ethics 2000 amendments to the Model Rules. He reported that in 1997 the ABA appointed a commission to review the existing Model Rules of Professional Conduct, which model rules had by then been adopted by forty-four states. The announced reasons for such a review included a concern about the growing number of disparities among the various states' treatment of particular issues, ambiguities that were known to exist in the text of the Model Rules, and the development of new fields and modes of law practice. The commission studied the rules off and on for five years and issued

its report, proposing an amended set of Model Rules ("Ethics 2000 Rules") in 2002. Among other changes, the Ethics 2000 Rules clarify a lawyer's duties with respect to client communications, reflect modifications in the structures within which lawyers practice law, and enhance protections of third parties when dealing with lawyers.

In August of 2002, Mr. Gleason collected a diverse group of lawyers to study the Ethics 2000 Rules for adoption in Colorado. The members of the *ad hoc* committee are, besides himself and Nancy L. Cohen as co-chairs, Cynthia F. Covell, Robert R. Keatinge, Steven K. Jacobson, Cecil E. Morris, Jr., Henry Richard Reeve, Alexander R. Rothrock, Daniel Vigil, and Anthony van Westrum. The committee has been meeting for nearly a year, ordinarily every other week for two or three hours, and will have its final meeting October 2, 2003.

The Ethics 2000 Committee has looked not only at the Ethics 2000 package as first adopted by the ABA but also at the few amendments that the ABA has made since that adoption, including changes to Rule 1.6 and Rule 1.13. A working presumption of the committee has been that it will accept the text of the ABA's Ethics 2000 Rules (as amended) unless there is a contrary Colorado Supreme Court opinion or a Colorado Rule that has specifically and purposefully diverged from the preexisting, Kutak Commission Model Rules, thereby indicating a differing Colorado policy.

As the work of the Ethics 2000 Committee draws to a close, it appears the members are unanimous about the desirability of the Model Rules, as the committee has modified them, for adoption in Colorado.

It appears that the work product of the Ethics 2000 Committee will be available for distribution to this Committee prior to its next meeting on January 9, 2004. In anticipation of the Standing Committee's receipt of that report, the Chair formed a subcommittee to study the Ethics 2000 Committee's report and make recommendations to the Committee.

It was noted that the example of the Ethics 2000 review (which has already been accomplished by the *ad hoc* Ethics 2000 Committee) raises an issue that may be seen again by the Committee: When another group has given a matter a thorough review, will this Committee need to duplicate that review in order to satisfy its obligations to the Court or will it be able to rely to some degree on the work done by the first group, while still being able to make an independent recommendation to the Court?

Multidisciplinary Practice.

Nancy Cohen, Deputy Attorney Regulation Counsel, reported on the activity of the CBA / DBA Joint Task Force on Multidisciplinary Practice. The subject of multidisciplinary practice, or "MDP," came before the ABA in the late 1990s, as large accounting firms pressed into the area of law practice in an effort to provide their business clients with "full-service" business representation. An ABA commission studied MDP and eventually recommended that the ABA support changes that would permit lawyers to work, and share legal fees, with practitioners of other disciplines, such as accounting or social work. However, the ABA House of Delegates resoundingly rejected the commission's recommendations.

Notwithstanding the ABA's rejection of MDP, a number of states and local bar associations continued to look at the issue, using the ABA commission's report as guide and inspiration. In Colorado, that work was undertaken by a joint task force established by the Colorado Bar Association and the Denver Bar Association. After a year or two of general study of the issue, the task force determined that there was sufficient reason to proceed with an in-depth review of the existing Colorado Rules of Professional Conduct to see whether they could be modified to permit MDP while preserving the core legal principles including client confidentiality and the avoidance of improper lawyer conflicts of interest. The task force therefore formed a committee, under the leadership of Nancy Cohen and John

Lebsack, to undertake that review; other members included James G. Benjamin, Mark Boscoe, Susan Smith Fisher, Marcy G. Glenn, David C. Little, and Anthony van Westrum. The subcommittee worked on the matter for a couple of more years, going through the Colorado Rules line by line to see what adjustments would be necessary to accomplish the task force's goals of permitting MDP while preserving those core values.

Eventually, the committee issued a report on which all of its members agreed, notwithstanding that they had come at the issue from a number of different perspectives, some originally in favor of the idea of MDP and others initially opposed. Only the issue of whether a law practice could have passive investors split the committee. A copy of the Executive Summary to the MDP Rules Committee's report had been provided to the members in advance of this Committee meeting.

The Joint Task Force accepted the MDP Committee's report and forwarded it to the CBA and the DBA. Those bodies (recognizing that the momentum in favor of MDP has subsided in light of recent high-profile incidents involving corporate and accountant malfeasance) determined not to recommend the MDP concept to the Court but, instead, to present the draft MDP Rules to the public at large for analysis and comment. It was recognized that the concept is a radical one deserving of careful study by legal ethicists and others before it is adopted by any court. In addition to the desirability of getting a full debate of the societal issues raised by the MDP concept, the CBA and DBA understood that independent review of the specific language in the MDP rules as recommended by the MDP Rules Committee would be useful.

The Joint Task Force's draft MDP rules are available on the websites of the CBA and of the DBA.

Rule 5.5, Regarding Practice of Law Without a License.

The Supreme Court has proposed amendments to Rule 5.5 to prohibit out-of-state lawyers from practicing law in Colorado if they are not licensed in Colorado, except as authorized under specific CRCP rules. The CBA Ethics Committee has reviewed the Court-proposed rule amendment and has made one additional suggested amendment, which the CBA has recommended to the Court. The Chair formed a subcommittee to examine all the proposed amendments and make recommendations to the Committee.

It was noted that the *ad hoc* Ethics 2000 Committee has incorporated the proposed amendment to Rule 5.5 in the version of Ethics 2000 that it will be recommending.

Rule 1.4 Regarding Disclosure of Malpractice Insurance.

The Colorado Supreme Court Advisory Committee has proposed changes to 1.4 and its comment to require lawyers to disclose to clients if they do not have malpractice insurance at or above specified minimum coverage levels. The Chair formed a subcommittee to examine the proposed amendments and make recommendations to the Committee.

Housekeeping Amendments.

The Chair noted that the current Colorado Rules have several typographical or drafting errors that should be corrected. The Chair formed a subcommittee to consider housekeeping changes and to make recommendations to the Committee.

Standing Subcommittee on Model Rule Amendments

The Chair formed a standing subcommittee to monitor, study, and report to this Committee on future amendments to the ABA Model Rules.

Other Changes for Consideration.

The Chair asked whether any of the attendees presently had suggestions for changes to the Colorado Rules. In response, a suggestion was made that the Committee reconsider Rule 3.7, which was characterized in need of clarification.

It was noted, in further response to the Chair's request, that consideration of a new set of rules, in the form of Ethics 2000, will give an opportunity for full review; it may be found that Ethics 2000 resolves a number of problems in the current Rules. That comment caused the Chair to question what the Committee's role will be with respect to Ethics 2000: Should the Committee use the occasion of a consideration of Ethics 2000 to embark on a wholesale revision of the Rules or should it adhere closely to the ABA's Ethics 2000 Rules?

A Committee member pointed out that the primary basis for the decision of the *ad hoc* Ethics 2000 committee to stick closely to the ABA's Ethics 2000 Rules was a belief that Colorado could benefit from having rules that were identical, to the extent practicable, to the ABA Model Rules and the ethics rules of other states, so that practitioners could look to ABA and other states' rulings on particular rules in the absence of existing Colorado authority.

It was said that the states seem to be adopting the ABA Ethics 2000 Rules with few changes, apparently with the goal of developing national uniformity where appropriate. And the Committee was reminded of the value of national uniformity when multijurisdictional practice is considered, for uniformity will minimize conflicts among jurisdictions whose rules may be applicable to individual lawyers as they practice across state lines.

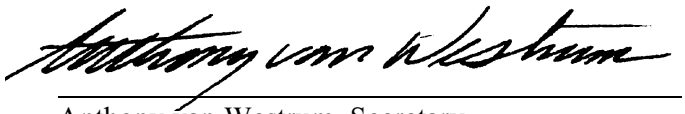
Subcommittee Assignments.

The Chair circulated sign-up sheets for the various subcommittees that had been identified in the course of the meeting. The subcommittee assignments (with chairs selected by the Chair at the conclusion of the meeting) as of November 17, 2003, are listed on Appendix A to these minutes. The Chair notes that members should feel free to sign up for any of the established subcommittees by contacting the subcommittee chair and the Chair.

Adjournment; Next Scheduled Meeting.

The meeting adjourned at 9:50 a.m. As noted above, the next scheduled meeting of the Committee will be on Friday, January 9, 2004, at 1:30 p.m., in the Supreme Court Conference Room.

RESPECTFULLY SUBMITTED,



Anthony van Westrum, Secretary

[These minutes are as approved by the Committee at its meeting on January 9, 2004.]

SUBCOMMITTEE ASSIGNMENTS AS OF NOVEMBER 17, 2003

Subcommittee on Ethics 2000

Michael H. Berger, Chair – mberger@wckblaw.com
John S. Gleason
Marcy G. Glenn
David C. Little
Cecil E. Morris, Jr.
Henry Richard Reeve
John M. Richilano
Alexander R. Rothrock
Anthony van Westrum
Eli Wald
James E. Wallace

Subcommittee on Rule 1.4

Eli Wald, Chair – ewald@law.du.edu
James A. Casey
Nancy L. Cohen
Cynthia F. Covell
David C. Little
William D. Prakken
Lisa M. Wayne
E. Tuck Young

Subcommittee on Rule 5.5

Nancy L. Cohen, Chair – Nancy.Cohen@arc.state.co.us
William R. Lucero
Boston H. Stanton
Bryan S. VanMeveren

Subcommittee on Housekeeping

John S. Gleason, Chair – John.Gleason@arc.state.co.us
Marcy G. Glenn
James E. Wallace

Subcommittee to Track Changes in ABA Model Rules

John R. Webb, Chair - john.webb@judicial.state.co.us
Michael H. Berger
Nancy L. Cohen
Kenneth B. Pennywell

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COLORADO SUPREME COURT

STANDING COMMITTEE ON THE RULES OF PROFESSIONAL CONDUCT

Approved Minutes of Meeting of the Full Committee
On January 9, 2004
(Second Meeting of the Full Committee)

The second meeting of the Colorado Supreme Court Standing Committee on the Rules of Professional Conduct was convened at 1:30 p.m. on Friday, January 9, 2004, by Chair Marcy G. Glenn. The meeting was held in the Supreme Court Conference Room on the fifth floor of the Colorado State Judicial Building.

Present in person at the meeting, in addition to Marcy Glenn and Justices Michael L. Bender and Nathan B. Coats, were Michael H. Berger, Nancy L. Cohen, Cynthia F. Covell, John S. Gleason, David C. Little, William R. Lucero, Cecil F. Morris, Jr., Kenneth B. Pennywell, Scott R. Peppet, Henry Richard Reeve, John M. Richilano, Alexander R. Rothrock, Boston H. Stanton, Jr., David W. Stark, Anthony van Westrum, Eli Wald, James E. Wallace, Lisa M. Wayne, Judge John R. Webb, and E. Tuck Young. Richard T. Casson and Bryan S. VanMeveren participated by telephone. Absent were James A. Casey, Peggy E. Montaño, Judge Edward W. Nottingham, and William D. Prakken.

I. *Meeting Materials; Minutes of September 30,2003 Meeting; Additional Introductions.*

The Chair had provided a package of materials to the members prior to the meeting date, including submitted minutes of the first meeting of the Committee, held on September 30,2003. Those minutes were approved with one correction.

Members Cecil F. Morris, Jr., Scott R. Peppet, and David W. Stark, who had not been present at the first meeting of the Committee, introduced themselves to the Committee.

II. *Ethical Issues for Lawyers Providing Alternative Dispute Resolution Services*.

Scott Peppet made a presentation to the Committee on ethical issues encountered by lawyers who provide alternative dispute resolutions ("ADR") services as neutrals. He pointed out that arbitration and mediation service providers are generally unregulated — it is harder, he noted, in many states to gain legal permission to be a manicurist than to undertake to provide a neutral's services. The sources of regulation, limited as they are, include federal and state court rules regarding mediation services provided under court auspices; intra-organizational rules that have been developed by various ADR service organizations but which are not binding upon persons who provide ADR services outside of those organizations; and the Rules of Professional Conduct as they may apply to a lawyer who provides ADR services.

Within the set of regulation consisting of court rules, there is a jumble of federal rules that may be applicable in the federal court context, and California, Florida, and Texas are examples of states in which specific ADR rules have been adopted by the courts. Colorado, Peppet noted, is in a funny position, for it is known to be a leader in providing good mediation services but unlike some other states — he mentioned Massachusetts — it does not emphasize judicial regulation of ADR services.

Peppet characterized the American Bar Association's Ethics 2000 Rules of Professional Conduct as "punting" the matter of regulating lawyers in the provision of ADR services. Absent the consent of the other parties to the matter, Ethics 2000 Rule 1.12 precludes a lawyer neutral from representing a person in a matter in which the lawyer had served as an arbitrator or mediator; and the rule precludes a lawyer from negotiating for employment with a party, or a party's lawyer, during the pendency of an arbitration or mediation in which the lawyer is serving as a neutral. Ethics 2000 Rule 2.4 clarifies that a lawyer is not "representing a client" when providing services as a neutral; apart from that clarification, Peppet said, Rule 2.4 is confusing and indicates the reluctance of the drafters to delve into the issues raised by a lawyer's service as a neutral, although it does acknowledge that the lawyer neutral is not beyond the reach of the other Ethics 2000 Rules. As Peppet put it, Rule 2.4 specifies only that the lawyer neutral must disclose to ADR parties who are not represented by lawyers that the lawyer neutral is not their lawyer and implies that, apart from the question of representation, the lawyer neutral is "within the grasp" of the Rules. He noted that Rule 2.4 does not answer, for example, the question of whether Rule 8.4(c), barring "dishonesty, fraud, deceit or misrepresentation," precludes a lawyer neutral from lying to an ADR party about what the other side is saying about issues raised in the matter.

Peppet also noted that the Ethics 2000 Rules do not address the concept of "collaborative law" wherein the lawyers and parties in a dispute agree that the lawyers will work toward settlement of the dispute but will not represent the parties in ensuing litigation if the dispute cannot be settled. In essence, this agreement empowers each side of the dispute to fire opposing counsel by forcing the dispute to litigation. Peppet believes that,under the Ethics 2000 Rules, the opposing counsel may ethically withdraw upon the commencement of litigation rather than breach his agreement not to represent his client in litigation.

Peppet labeled the "manicurist problem" — the absence of legal regulation of mediation services — as the big issue. He was aware of but one malpractice case against a mediator in all of the United States. On the other hand, when Florida created a grievance board for the hearing of grievances against mediators in court-referred mediations, the public immediately responded by filing grievances, indicating that mediation services can in fact generate problems for which there is no adequate forum for redress. But the courts are likely to have jurisdiction to sanction mediators only in court-connected mediations.

In answer to a question whether the public perceives there to be need for regulating the providers of mediation services, Peppet said it appeared to depend on who was asked that question; neutrals would say there is no problem, lawyers representing clients in ADR proceedings would say there is a problem, and the parties who have participated in ADR proceedings might say they do not know.

Anthony van Westrum reported that the Colorado Bar Association's Ethics Committee has appointed a subcommittee to consider ethical issues for lawyer neutrals. Among the issues the subcommittee has been considering is whether the lawyer neutral can be considered to be practicing law, both for purposes of the Rules of Professional Conduct and for purposes of Rule 265. The subcommittee may await the adoption of some version of the Ethics 2000 Rules in Colorado before finalizing an opinion.

III. *Committee on Ethical Issues in Family Law*.

The package of materials that had been provided to Committee members in advance of the meeting included a memorandum dated September 23, 2003, authored by Committee member Alexander Rothrock and addressed to the chair of the *Ad Hoc* Supreme Court Committee on Ethical Issues in Family Law, accompanying which were proposals for amendments to Rules 1.2, 2.1, and 3.1, CRPC, and the addition of a new Rule 4.6, regarding cases involving "the welfare of a child."

Rothrock reported to the Committee on the current status of this matter. He said he joined the *ad hoc* committee after its initial meetings in 2002; at the time he started participating on the committee, its focus was on the question of parenting time with minor children in marriage dissolutions and, in particular, a parent's effort to utilize parenting time as an offset to child support obligations. The essence of the issue being considered by the committee was the conflict between the parent's interests in reducing a financial burden and the child's interests in both parenting time and financial support — and whether a lawyer's representation of the parent should be diluted by consideration of the unrepresented child's interests. In the mix was § 14-10-115, CRS, regarding the treatment of "overnights" with children in determining child support obligations. Included in the membership of the committee were nonlawyer mental health workers and members of other disciplines.

A subcommittee of lawyer members of the *ad hoc* committee was established to consider possible amendments to the Colorado Rules of Professional Conduct or to Rule 11 or other rules within the Colorado Rules of Civil Procedure to preclude lawyers from "misusing" the rules in the course of representing their clients, the parents. The full *ad hoc* committee determined to focus on the Rules of Professional Conduct, and from the resulting effort came the proposed changes to the Rules that were included in the package of materials for this meeting of the Standing Committee on the Rules of Professional Conduct. The proposed changes were prepared in two alternative versions, one set establishing aspirational "should" standards and the other imposing mandatory "shall" requirements.

Rothrock said the lawyers on the rules subcommittee saw problems with the proposed amendments. They recognized that manipulating children for financial advantage was pernicious but concluded that the lawyers were not the proper persons to bear the duty of determining the child's best interests — especially when the lawyers were already obligated to represent their parent-clients and were at the risk of discipline from with the attorney regulation system for misconduct in the course of that representation. Rather, they felt, it is the judge who is best equipped to make the decisions related to the child's welfare in this regard. Accordingly, the subcommittee recommended against both sets of proposed changes to the Rules of Professional Conduct.

Ultimately, the *Ad Hoc* Committee determined to pass the issues to this Standing Committee on the Rules of Professional Conduct.

Following Rothrock's report, Justice Bender pointed out that the proposals for changes to the Rules of Professional Conduct that were considered by the *ad hoc* committee had been developed by the American Academy of Matrimonial Lawyers and have not been adopted by any state. Justice Bender pointed out that the issues reach beyond just that of child support to include also other parental rights that may be in conflict with the welfare of the children involved in marital dissolutions. The overarching issue is that of the lawyer's duties, if any, to the welfare of the child versus that of the lawyer's client, the parent.

The Chair concluded that a subcommittee of the full Committee should be established to consider these matters. There were at least two phases to consider: First, the wisdom of dealing with the issue by making changes to the Rules of Professional Conduct; and, second, if modifications should be made to the Rules' current requirement that a lawyer act on behalf of the lawyer's parent-client without conflict as to the interests of another person, what modifications should be made. The Chair noted that the Committee would benefit by soliciting the views of experts from outside the Committee's membership, given that there are not many members — Boston Stanton being an exception — who specialize in family law.

It was noted that the issue seems to be a relatively narrow one — the welfare of a child in a custody matter — but the proposed Rules changes seem to cover a wider scope — cases involving "the welfare of a child." Justice Bender responded that the intended scope was only that of custody.

IV. *"Ethics 2000" Rules of Professional Conduct.*

John Gleason, who, with Nancy Cohen, has chaired an *ad hoc* committee of the Supreme Court that has been reviewing the American Bar Association's "Ethics 2000" Commission's revisions of the Model Rules of Professional Conduct for possible adoption in Colorado, reviewed the status of the *ad hoc* committee's efforts. He said that the *ad hoc* committee is very nearly ready to issue its report on the Ethics 2000 Rules, planning one further meeting to finalize that report.

Michael Berger, who will chair the Standing Committee's Ethics 2000 Rules subcommittee, said that it is his expectation that the subcommittee would not seek to reinvent this wheel but would work from the *ad hoc* committee's product. He anticipated that the subcommittee would quickly relay the noncontroversial issues to the full Committee but would form subgroups to consider controversial topics and to make reports thereon to the full Committee as they were developed.

V. *Subcommittee on Rule 5.5 and the Unauthorized Practice of Law.*

Nancy Cohen, chair of the subcommittee considering Rule 5.5, the unauthorized practice of law, and multijurisdictional practice rules, reported on the subcommittee's activities.

Cohen noted that, effective January 1, 2003, the Supreme Court adopted Rules 220, 221, 221.1, and 222, CRCP, dealing with multijurisdictional law practice. Her subcommittee looked additionally at the pending proposal for the Ethics 2000 Rules and at law-related activities of disbarred and suspended lawyers. The subcommittee proposed that disbarred and suspended lawyers should be permitted to work in law firms — *other* than the firms in which they were practicing at the time of disbarment or suspension — but only under lawyer supervision. Further, disbarred lawyers should be barred from having client contact and suspended lawyers should be permitted to have client contact only under supervision and only on condition that the client is first advised that the lawyer is not allowed to practice law. Neither the disbarred nor the suspended lawyer should be permitted to handle client funds.

The Chair noted that the Rule 5.5 subcommittee initially had been established only to consider the topic of multijurisdictional practice and, in particular, Rule 5.5(a) precluding the practice of law "in a jurisdiction where doing so violates the regulations of the legal profession in that jurisdiction." That, the Chair noted, was a topic which already had received the attention of the Colorado Bar Association's Ethics Committee. Subsequently, however, the Supreme Court Advisory Committee on Attorney Regulation suggested that the Standing Committee also consider the issue of what law-related activities disbarred and suspended lawyers should be permitted to engage in.

In response to a suggestion that the proposed changes belonged in the "220 series" of the Rules of Civil Procedure, Cohen said that the subcommittee had considered that possibility but determined to deal with the matter through Rule 5.5 instead, in part because that would permit them also to regulate the conduct of lawyers who hire disbarred and suspended lawyers.

A member asked what were the principles behind the conclusion that a disbarred or suspended lawyer should not be permitted to serve in any capacity from within the law firm in which the lawyer was practicing law at the time of disbarment or suspension. In response, Cohen noted that the prohibition would apply only to disbarred lawyers and to lawyers who would be required to petition for permission to resume their law practice upon conclusion of their suspension — that is, to lawyers who were suspended for a year and a day or more. The principles included not only the thought that it would be easier to enforce the restrictions on activities if disbarred or suspended lawyers were limited to service in law firms other than the ones they had practiced in before disbarment or suspension but also (1) that clients of the law firms would be less confused as to the disbarred or suspended lawyers' capacities if they had not previously encountered those lawyers as practicing lawyers in the same firms and (2) that

suspended lawyers would more easily be able to show rehabilitation at the end of their suspensions if they had been serving in law firms other than the ones in which they had practiced in before suspension.

In answer to the more directed question of why a lawyer who had practiced in a large law firm could not be retained by that law firm as a law clerk during the lawyer's disbarment or suspension, Cohen said that it could be particularly difficult for others in that law firm to supervise the lawyer's activities if the lawyer had previously held an equity interest in the law firm. She noted that the subcommittee had compromised on this point by permitting the lawyer who was suspended for less than a year and a day to remain in service in the law firm from which the lawyer previously practiced law.

Another member asked whether the subcommittee had considered letting the matter of whether the suspended lawyer could remain in the law firm be one to be resolved *ad hoc* in the suspension process. Other members evinced support for the idea that a suspended lawyer could remain in the law firm, one noting that the prospect of rehabilitation might be enhanced if that were permitted and another noting that a lawyer practicing in a small town might have little opportunity to find another firm willing to accept the lawyer for service during the suspension. (It was not clear from the discussion whether a distinction was being made between a disbarred lawyer and a suspended lawyer.)

One member pointed out that any rule change should avoid getting trapped within the question of what is the "practice of law," since that is what any law firm does. Rather than proscribe the "practice of law" by the disbarred or suspended lawyer, the rule might specify prohibited activities, such as giving advice to clients. Perhaps the line could be drawn along the line governing activities that paralegals may engage in. Later in the discussion another member spoke in opposition to this proposal to specify particular prohibited activities rather than refer to "the practice of law."

A member acknowledged the need to assist in rehabilitation of the suspended lawyer but pointed out the need to avoid client confusion: "My lawyer is still in that office." Another member responded that this concern should be resolved by requiring a detailed notice to former clients as to the limitations imposed by the terms of the suspension on the suspended lawyer. (Again, it was not clear whether a distinction was being made between a disbarred lawyer and a suspended lawyer.)

A member of the subcommittee pointed out that all of the issues raised in this discussion had been considered by the subcommittee in its deliberations.

Yet another member questioned whether the subcommittee's proposal contained a punitive element. He pointed out that a paralegal would be given more leeway than the disbarred or suspended lawyer, such as the ability to handle client funds. Cohen acknowledged that there are limitations on the disbarred or suspended lawyer that would not be imposed on a paralegal — such as to the handling of client funds and the exclusion of service from the former law firm — but said the intention was to permit the disbarred or suspended lawyer generally to do what a paralegal, a law clerk, or an administrative assistant could do.

A member who noted that he has served as counsel to lawyers petitioning for readmission after suspension spoke in favor of bright-line rules in this area, if not all of the components of the subcommittee's proposals, but said he, too, felt the prohibition against service in the former law firm during the suspension is "punitive." In his experience, this was not an area in which abuse has been a widespread problem, and there seemed to be few actual cases where lawyers were charged with practicing law while suspended. Further, he thought, prohibitions against continued equity interests in law firms were overly broad and amounted to "throwing the baby out with the bath water."

Cohen pointed out that a number of states have flatly prohibited a disbarred or suspended lawyer from serving in any capacity in a law firm.

At the request of the Chair to narrow and conclude the discussion, one member summarized the matter as follows: The goal is to preclude the continued, surreptitious practice of law by disbarred lawyers and by suspended lawyers during their suspensions. It appeared to this member that California's Rules 1-300 and 1-311 deal directly and effectively with the matter, providing bright-line tests. He also suggested that the suspension agreement provide for the designation of a specific supervising lawyer; Cohen questioned the mechanics of such an arrangement.

One member pointed out that the Supreme Court Advisory Committee on Attorney Regulation has frequently faced these questions, including in situations where the disbarred or suspended lawyer continued to participate in direct meetings with clients. In his perception, this is a real problem even if there have been few reported cases.

At the Chair's question, there was no opposition to the proposition that the subcommittee should continue its consideration of the issues. Several members spoke in favor of the California approach, one favorably comparing its prohibition against any "professional contact" with former clients to the concept of prohibiting *all* client contact.

A member spoke in support of the idea that the regulatory provisions should be included in the Rules of Professional Conduct, in order to extend their reach to employing lawyers, but she found the proposal to be overly broad in some aspects and too narrow in others. She questioned in particular a blanket prohibition against handling client funds, even if the reason for disbarment or suspension had nothing to do with mishandling clients' funds. On the other hand, she noted, there may be, in a given case, other activities that should be barred to the disbarred or suspended lawyer on account of the conduct that caused the disbarment or suspension; the proposal does not admit of that kind of adjustment.

Cohen noted that the appropriate remedy to use against the disbarred lawyer who thereafter engages in the practice of law is to prosecute under the rules governing the unauthorized practice of law, not under the Rules of Professional Conduct. In the case of a suspended lawyer, however, both the unauthorized practice of law rules and the ethics rules may be used by the prosecution. Accordingly, there may be redundancies under the current proposal, but one might worry as well about activities that should be proscribed but that might be missed in a listing.

A member pointed out that the signature powers of a suspended lawyer on a COLTAF account would have to be withdrawn upon suspension. Another noted that the process of transferring existing client relationships and obligations to another lawyer would require the disbarred or suspended lawyer to have *some* contact with the client, so that a complete prohibition against "any contact" with a client would be overly broad.

On motion, the Committee determined to send the matter back to the subcommittee for further consideration and proposing of a rule consistent with the California model, spelling out specific activities in which the disbarred or suspended lawyer may not engage.

VI. *Subcommittee on Rule 1.4, Communications with Clients Regarding Malpractice Insurance Coverage*.

Eli Wald, chair of the subcommittee considering changes to Rule 1.4 regarding disclosure of a lawyer's malpractice insurance coverage, began the discussion of the subcommittee's report by thanking the subcommittee members for their work.

Wald noted that the subcommittee had not attempted to take a position for or against some form of disclosure requirement but determined, rather, to provide the full Committee with concise summaries of the various considerations for and against the proposed disclosure requirement.

If it were determined to require some form of disclosure to clients regarding insurance coverage, the subcommittee would want it clarified that the lawyer has no continuing disclosure duty after the termination of the lawyer-client relationship. Wald believed this position to be consistent with the recommendation of the Advisory Committee's subcommittee.

The subcommittee requested more time to study the issue of whether the attorney registration statement should be modified by adding a question about malpractice insurance coverage and the issue of mandatory insurance. Wald noted that the subcommittee wants to look in particular at the matter of public (website) disclosure of malpractice coverage, and he pointed out, first, that it is not clear at this time who may actually be concerned about the matter and, second, that the subcommittee would not want to replace one false client assumption — that the lawyer has malpractice coverage when in fact there is none — with another false client assumption — that coverage will also be in effect at some time in the future, when the client actually files a malpractice claim. Issues here include (1) whether to provide for continuous public disclosure or only for annual disclosure at the time of license renewal and (2) how to disclose the implications of "claims made" insurance.

Wald noted that imposition of a disclosure requirement would have the benefit of generating statistics, now missing, as to the extent of malpractice coverage and, perhaps, as to the effects of that coverage on client recoveries for malpractice.

Wald said the subcommittee had two additional concerns about disclosure. First, a negative disclosure, that the lawyer did not carry malpractice insurance, could give rise to a negative impression that the lawyer was not a competent lawyer; however, there are a number of areas of legal practice for which carriers are not writing coverage, so that non-coverage cannot actually serve as a reliable measure of competence. Second, the added incentive to carry insurance that a disclosure requirement would create could lead to an increase in insurance premiums — by way of increased demand — and to the "regulation" of the legal profession by the insurance carriers, which would be in an enhanced position to impose practice limitations and requirements as a condition to obtaining insurance. These difficulties — already perceived to be problems with mandated insurance coverage — can thus be foreseen even in an ostensibly less burdensome disclosure regimen.

Justice Bender asked the blunt question: Why should the Court not simply require the carrying of insurance coverage? He noted that an assigned risk pool could be established for those who cannot obtain the coverage. In reply, Wald stated that the subcommittee had not been given a mandate to consider mandating insurance coverage. He noted that at least one state, Oregon, does require insurance coverage.

Nancy Cohen reported (as was noted also in the memorandum of the Advisory Committee's subcommittee) that 7,700 Colorado lawyers had returned a recent survey on the question of insurance coverage, with sixty percent of the respondents claiming insurance coverage. Additionally, the Office of Attorney Regulation has tried to determine what the carriers' understanding is of market penetration and has received responses indicating the carriers believe eighteen to twenty percent of Colorado attorneys do not have coverage. Cohen also noted that the American Bar Association has called for financial disclosures on licensing registration statements. Wald commented, with respect to the survey, that one would question whether there was a bias in that lawyers not carrying coverage might be disinclined to respond to the survey.

The Chair noted her confusion as to the scope of the subcommittee's inquiry. She had understood that the subcommittee would look only at issues that impacted upon the Colorado Rules of Professional Conduct and not at issues implicating the "200 Series" of the Rules of Civil Procedure. Cohen responded that the Advisory Committee had forwarded two matters, disclosures under Rule 1.4 and the treatment of insurance coverage in the annual registration process. She noted that this presents a jurisdictional

question for the Standing Committee: Can it deal with matters that relate to attorney regulation and conduct but that are external to the Rules of Professional Conduct?

One member of the subcommittee noted that its members felt it would be appropriate for the Standing Committee to make a recommendation to the Court concerning disclosure in the annual registration process. John Gleason pointed out that the Office of Attorney Regulation was just thirteen months away from the next registration cycle and that implementation of changes as to insurance disclosure could delay that registration effort.

Another member of the subcommittee expressed her opposition to the proposal.

A member of the subcommittee spoke in response to Justice Bender's question, including offering the following comments: (1) There is a legitimate concern that the insurance industry will "regulate the profession" if insurance is mandated, particularly in light of the underwriting decisions that are made by the carriers on the basis of such factors as lawyer income and practice areas. By controlling such things as the availability of coverage for particular kinds of practice — the representation of financial institutions came to mind — or practices and procedures to be followed to qualify for coverage, carriers could place much of the legal profession under their control. (2) Given thinness in the insurance market, there should also be a concern about the disruptions that might occur when a carrier withdraws from offering coverage within the state. In short, while mandatory insurance coverage might have surface appeal, there are many problems with it. Imposition of a disclosure requirement can be the first step down a slippery slope.

Others spoke in agreement with this expression of concern and in agreement with the possibility that the public could be misled by the disclosures themselves, where confusion could exist regarding the nature of claims-made insurance, the possibility of exhaustion of coverage by competing claimants, and the risks attendant to high deductibles. The proposal for disclosure was characterized as a panacea which would create more problems than those it was perceived to solve.

The Chair asked for the sense of the Standing Committee. In reply, one member asked why the question was one of ethics as opposed to regulation and discipline. To that, another noted that the ethics rules do deal analogously with the matter of continuing legal education (see, for example, the comment to Rule 1.1, CRPC, suggesting continuing legal education to maintain competence as a lawyer).

A member noted that the subcommittee had begun with a proposal for disclosure, and he wondered whether there had been adequate consideration of whether there was a problem in need of the proposed solution. Cohen responded that the Office of Attorney Regulation gets calls asking whether lawyers are required to carry malpractice insurance, and she stated that the trend is toward disclosure.

In response to a question whether the Advisory Committee had collected anecdotal evidence on the disclosure issue, John Gleason said the disclosure issue had come to the Advisory Committee through its dealing with the issue of compensating victims of malpractice committed by uninsured attorneys; it is a problem frequently seen by the Advisory Committee, he said. He also said clients often assume that there is a requirement that a lawyer be insured against malpractice and are surprised to find there is no such requirement.

Wald noted that statistics simply are not available on the topic and that mandating disclosure could be the beginning of collecting those statistics.

A member pointed out that the essential goal must be to protect the public. With that in mind, an appropriate response might be to educate the public of the fact that lawyers are not required to carry malpractice insurance and might not be carrying it. Thereafter, the reaction in the market place might

induce more lawyers to carry coverage. In any event, any required disclosure must be meaningful and not misleading. Accordingly, the subcommittee should give careful consideration to what disclosure is required.

To the Chair's request for a show of hands, most but not all of the members indicated they favored continuation of the subcommittee's study both of the issue of public disclosure and the issue of requiring malpractice insurance coverage.

VII. *Adjournment; Next Scheduled Meeting.*

The meeting adjourned at approximately 3:40 p.m. The next scheduled meeting of the Committee will be on Friday, April 16, 2004, beginning at 10:00 p.m., in the Supreme Court Conference Room.

RESPECTFULLY SUBMITTED,

Anthony van Westrum, Secretary

[These minutes are as approved by the Committee at its meeting on April 16, 2004.]

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COLORADO SUPREME COURT

STANDING COMMITTEE ON THE RULES OF PROFESSIONAL CONDUCT

Approved Minutes of Meeting of the Full Committee
On April 16, 2004
(Third Meeting of the Full Committee)

The third meeting of the Colorado Supreme Court Standing Committee on the Rules of Professional Conduct was convened at 10:00 a.m. on Friday, April 16, 2004, by Chair Marcy G. Glenn. The meeting was held in the Supreme Court Conference Room on the fifth floor of the Colorado State Judicial Building.

Present in person at the meeting, in addition to Marcy Glenn and Justice Michael L. Bender were Michael H. Berger, James A. Casey, Cynthia F. Covell, John S. Gleason, David C. Little, Peggy E. Montaño, Cecil E. Morris, Jr., Judge Edward W. Nottingham, Kenneth B. Pennywell, Scott R. Peppet, William D. Prakken, Henry Richard Reeve, John M. Richilano, Alexander R. Rothrock, Boston H. Stanton, Jr., David W. Stark, Bryan S. VanMeveren, Anthony van Westrum, James E. Wallace, Lisa M. Wayne, Judge John R. Webb, and E. Tuck Young. Richard T. Casson and Eli Wald participated by telephone. Absent were Justice Nathan B. Coats, Nancy L. Cohen, and William R. Lucero.

Also present, by invitation, were Nancy Moore, Professor of Law at Boston University and Chief Reporter for the American Bar Association's Ethics 2000 Commission, and Charlotte ("Becky") Stretch, Associate Director of and Special Counsel for the ABA's Center for Professional Responsibility.

I. *Minutes of January 9, 2004 Meeting.*

Minutes of the second meeting of the Committee, held on January 9, 2004, followed by a correction to the minutes, had been provided to the Committee by electronic mail prior to the meeting, and copies were available at the meeting. Those minutes, as thus corrected, were approved.

II. *Alteration of Regular Meeting Schedule.*

The Chair noted that the Committee has a substantial number of matters pending before it and proposed that regular meetings of the Committee be scheduled every two months rather than quarterly, to be held on the first Friday of the respective month and running from 1:00 p.m. to 3:00 p.m. With the members' assent to that arrangement, the next two meetings were scheduled for June 4, 2004, and August 6, 2004.

III. *Appointment of William Lucero to Position of Presiding Disciplinary Judge.*

The Chair congratulated Committee member William Lucero upon his appointment as Presiding Disciplinary Judge for the State of Colorado.

IV. *Consideration of "Ethics 2000."*

The Chair introduced the main topic for the meeting, a background presentation on the American Bar Association's revised Model Rules of Professional Conduct, commonly known as "the Ethics 2000 Rules," and on the recently-issued proposal of the *Ad Hoc* ABA Ethics 2000 / Colorado Rules of Professional Conduct Committee (the *Ad Hoc* Colorado Committee") for adoption of a modified version of the Ethics 2000 Rules in Colorado.

The Chair also introduced Nancy Moore and Becky Stretch. The Chair proposed that Moore and Stretch and the Committee members have an open discussion of the Ethics 2000 Rules.

A. *Moore Report on Content of ABA Ethics 2000 Rules.*

Moore began with a review of the development of the Ethics 2000 Rules, noting that the effort began in 1997 with the appointment of the Ethics 2000 Commission to take a comprehensive look at the existing "Kutak" Model Rules of Professional Conduct and consider changes to those rules. A consensus was immediately reached, she said, that both the format of the existing Model Rules — with the statement of "black letter" rule followed by comment — and their substance were very successful but that some up-dating was needed to cover a number of developments in the nature of law practice in the twenty years since they had been formulated. The Commission—

1. Determined to look at the variations that the adopting states had made to the Model Rules, to see what improvements might be found in those variations that could be incorporated in the Model Rules to enhance uniformity.

2. Recognized that the American Law Institute had, in The Restatement of the Law Governing Lawyers (the "Restatement"), dealt with a number of specific ethical issues that deserved the Commission's consideration, as well as with matters of substantive law that had implications for rules of professional conduct.

3. Saw a need to respond to changes in the way law is practiced, such as the increased mobility of lawyers among law firms, changes in the legal and organizational structures of law firms, and the increased use of various technologies by lawyers and law firms.

The ABA's Ethics 2000 Commission held quarterly meetings to develop the Ethics 2000 Rules from its formation in 1997 to the submission of a report to the ABA House of Delegates at the August 2001 Annual Meeting. The report was debated at the August 2001 Annual and February 2002 Midyear Meetings, and the Ethics 2000 Rules were adopted at the end of the February 2002 Midyear Meeting. Those Rules were further amended in August 2002 based on House debate of Reports and Recommendations by the Multijurisdictional Practice Commission (Rules 5.5 and 8.5) and the Standing Committee on Ethics and Professional Responsibility (Rules 7.2 and 7.5). Post-Enron, additional amendments were made in August 2003 based on House debate of the Report and Recommendation of the Task Force on Corporate Responsibility, dealing with confidentiality (Rule 1.6) and organizational clients (Rule 1.13).

It appears that the *Ad Hoc* Colorado Committee based its work on the most fully-amended, up-to-date version of the ABA's Model Rules.

Moore gave the following overview of changes made by the ABA Ethics 2000 Rules to the existing Kutak rules and commented on some proposals that were not adopted by the ABA but are being considered by some state review committees:

1. *Strengthening protection of the lawyer-client relationship*.

The ABA is concerned that lawyers do not communicate adequately with their clients, and it made modifications to strengthen the duty to provide such communication, adopting new requirements for writings in two areas where clients are frequently confused: legal fees and conflict waivers. Moore noted that Colorado's existing Rule 1.5(b) requires a *written* statement regarding the fees: "When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, in writing, before or within a reasonable time after commencing the representation." Although the Ethics 2000 Commission had noted the existence of the Colorado provision, the ABA adopted a more lenient provision: "The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, *preferably in writing*, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client."

As to conflicts, the ABA drafters were surprised to find that the ABA did adopt an absolute — as distinguished from "it is preferable" — requirement for a writing, after declining to do so with regard to fees. Rule 1.7(b)(4) requires that "each affected client [give] informed consent, confirmed in writing," before the lawyer may provide representation in a matter involving a "concurrent conflict of interest," and the Colorado *Ad Hoc* Colorado Committee has adopted this approach. Moore noted that a minority of the Ethics 2000 Commission had sought to require that the consent bear the client's signature. She also noted that current rules in California, Oregon, and Wisconsin already require written confirmation of conflict consent, although she did not say whether any of those states requires the client's signature.

2. *Prohibition of sexual relationships in most lawyer-client relationships*.

Noting that the topic of sex with clients has gotten "increasing treatment" by the various states, Moore pointed out that ABA Ethics 2000 Rule 1.8(j) provides that a "A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced."

3. *Clients with Diminished Capacities*.

Moore pointed out that both the text of Rule 1.14 — regarding the special duties a lawyer may have with respect to a client with diminished capacity (referred to as a "client under a disability" in the Kutak rules) — and its comments have been modified to provide more guidance to the lawyer.

4. *Changes Regarding Lawyers Providing Services as Neutrals*.

Turning to a number of ABA Ethics 2000 Rules that she said reflect changes that have occurred in the way in which law is practiced, Moore noted the example of new Rule 2.4. This rule — which she characterized as a "minimalist" rule providing few details — deals specifically with lawyers providing "third party neutral" services. The Commission had considered adding more content to the Rule but in the end decided not do so. Subjects that might have been dealt with, but weren't, include the extent to which the neutral might give legal advice or provide information to the parties as to legal rights and obligations and the issue of whether the neutral might prepare the agreement reached by the parties in the course of a mediation. Noting that these activities look like the practice of law but have implications for non-lawyer neutrals as well, Moore said the Commission decided not to deal with them, leaving their resolution "to other arbitration provider organizations."

However, Rule 2.4(b) does make clear the lawyer-neutral's duty to ensure that the parties to the neutral services understand that the lawyer-neutral is not serving as counsel: "A lawyer serving as a

third-party neutral shall inform unrepresented parties that the lawyer is not representing them. When the lawyer knows or reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client." The comment clarifies the nature of the information that must be given, depending on the circumstances, including, in the appropriate circumstance, specific information regarding the absence of the attorney-client privilege.

Changes were also made to Rule 1.12 regarding conflicts of a lawyer who previously served as a neutral in a matter. The text of the rule was amplified to clarify its application to mediators and other forms of neutrals, and the rule specifies that all of the parties to a neutral proceeding must give informed consent, after disclosure, confirmed in writing, to a lawyer-neutral's subsequent representation of any one of those parties in connection with the matter.

5. *Lateral Hires and Screening.*

Another issue that reflects changes in the way law is practice is that of "screening" lateral hires to avoid conflicts between their new law firms and their former clients. Although the Commission recommended that screening provisions be added to Rule 1.10, the ABA declined to adopt the recommendation. Moore pointed out that some states already permit screening through their discipline rules and in rules providing for lawyer disqualification, to the end that a court may refuse to disqualify a law firm from representing a client if the conflicted lawyer is screened out of the case.

As is the case under the Kutak rules, screening may be used under Rules 1.11 and 1.12 to accommodate former government lawyers and judges and neutrals; and the ABA Ethics 2000 Rules also provide for screening in the context of the "prospective client", a new topic dealt with in new Rule 1.18. Definitions are provide in the new "Terminology" rule, Rule 1.0, to assist in determining what is an effective "screen."

6. *Accommodations to New Technologies*

In an effort to accommodate new modes of communication, ABA Ethics 2000 Rule 1.0(n) clarifies that a writing may be in electronic form, including "e-mails".

Rule 4.4 has been amended to add some guidance for lawyers regarding receipt of an "inadvertent" fax or email, a problem that had previously been addressed by some state ethics committees but not by the ABA Rules. Moore characterized Rule 4.4 as "minimalist," noting that the versions adopted by the various states have varied as to the effect that an inadvertent fax or email may have on the attorney-client privilege. Rule 4.4(b) provides, "A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender."

7. *Legal Services for the Poor.*

As a response to what she described as "the ever-present need to provide services to low and minimal income persons," Moore pointed to new ABA Ethics 2000 Rule 6.5, which — in the case of a lawyer "who, under the auspices of a program sponsored by a nonprofit organization or court, provides short-term limited legal services to a client without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter" — obligates the lawyer to analyze conflicts of interest under Rules 1.7, 1.9, and 1.10 only if he or she "knows" of the conflicts. The rule is intended to accommodate the lawyer who is providing limited legal services through a "day-at-the-courthouse" or Bar-sponsored "law hotline" or similar program, where there is not the normal opportunity to do a full conflict search.

Moore said the Commission discussed the issue of mandatory *pro bono publico* service and found itself to be evenly split, perhaps with a majority leaning in favor of such a requirement. Ultimately, however, the Commission was persuaded by those within the ABA community who actively render *pro bono* services: Those lawyers urged against such a requirement, saying that it would not be well accepted by the bar and would, as a result, adversely affect voluntary participation. But the Commission added a sentence of aspiration in Rule 6.1: "A lawyer should aspire to render at least (50) hours of pro bono publico legal services per year." That sentence, of course, was added to the Colorado Rules in 2000. Moore pointed out that this sentence in Rule 6.1 is one of the few examples of an aspirational statement to be found in the ABA Ethics 2000 Rules and noted in passing that some lawyers and commentators have felt that "professionalism" was diminished by the shift in the Kutak Rules from the prior concept of "ECs" or "ethical considerations" as statements of "best practices" to the detailed statement of proscriptive and mandatory rules. The Commission has, however, for the most part continued the Kutak approach of providing for "hard discipline rules" rather than aspirational statements.

8. *Guidance on Compliance.*

Moore commented that the Rules are "not just for discipline," although that is an important role. Rather, she said, if lawyers know the rules, they will largely comply with them, avoiding the need for discipline; but they need to know what the rules are.

To that end, the Commission revamped Rule 1.7 on conflicts of interest to make the rule more understandable; the rewording was not intended to effect significant substantive change, other than as to the matter of written confirmation of conflict waiver, discussed previously. She said the most common complaint about the Kutak rules was that it was difficult to determine how they worked. Accordingly, the Commission rewrote the comments to the rule to explain as clearly as possible the steps for analyzing a conflict situation and to address common problems that have often been considered by state ethics committees, such as securing advance waiver of conflicts and revoking consents previously given.

Speaking generally about the comments to all of the rules, Moore said the Commission had been attentive to making sure they expressed the purpose of the respective rules and identified the coverage and scope of those rules, in order to aid lawyers in making good judgments about how to perform in conformity with the rules. In response to Professor Geoffrey Hazard's admonition, the Commission sought to provide "bookend" examples to identify what is and is not permitted under a rule.

9. *Elimination of Ambiguities.*

Having noted before that the Kutak Rules shifted away from "ethical considerations" to hard disciplinary rules, Moore pointed out that a number of "aspirations" had nevertheless been left to creep into the Kutak comments, resulting in a number of ambiguities as to the meaning of the substantive rules. In contrast, the Ethics 2000 Commission sought to ensure that every comment to an Ethics 2000 Rule contained nothing that was not based upon a requirement set forth in the substantive rule itself.

Further, the Commission tried to reference overlapping legal principles, as in the case of a substantive rule that was less onerous or demanding than the common law or law governing fiduciaries might be, pointing out that there may be other law, besides a particular rule, for the lawyer to consider. She cited gifts to lawyers (Rule 1.8) as an example, wherein Comment 9 states, "In addition to conflicts with other current clients, a lawyer's duties of loyalty and independence may be materially limited . . . by the lawyer's responsibilities to other persons, such as fiduciary duties arising from a lawyer's service as a trustee, executor or corporate director."

10. *State Variations*.

The Commission focused intently on Kutak rules that had been subject to divergent treatment by the states.

A good example of this, Moore said, is Rule 1.6 regarding disclosures of confidential client information. The final Kutak version of the rule had permitted such a disclosure only "to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm" or in connection with the collection of legal fees. But only nine states adopted this model text without change. Colorado and some other states retained the pre-Kutak rule, while New Jersey and yet other states adopted what had been proposed by the Kutak Commission but rejected by the ABA as a whole, permitting disclosures not only of crimes, but also fraudulent acts, that could lead to bodily injury or death. In the meantime, the Restatement permitted the disclosure of a client's fraud only if the lawyer's services had been used in perpetrating the fraud.

The Ethics 2000 version of Rule 1.6, in this regard, is in line with the ALI's approach. This approach, permitting but not requiring disclosure in the indicated circumstances, was first rejected by the ABA but was adopted in August 2003, post-Enron. It is the Commission's hope, Moore said, that the ABA's "leadership" will lead to some uniformity among the states on the issue.

11. *Uniformity among the States*.

Moore turned to a more general discussion of the matter of uniformity of professional conduct rules among the states. The Commission fully recognizes, she said, that there will not be complete uniformity and that there is, no doubt, a number of local concerns — such as the matter of handling client funds — as to which the states will differ. She saw no difficulty with that kind of variation. And she agreed that there would also be differences of policy among the states, leading to differences in other rules. Further, she acknowledged, it is useful for various states to "experiment" with their rules of professional conduct, as that is a way for the rules to evolve generally across the nation.

But, she said, there is a cost to variety and there are reasons to secure uniformity where it is appropriate. For example, there is — as the *Ad Hoc* Colorado Committee has noted — a value to textual uniformity because it enhances the transportability of case law and ethics opinions from one jurisdiction to another.

And the most important reason for uniformity, as she saw it, is the increasingly common phenomenon of "multijurisdictional practice." Even practitioners with local practices are experiencing increasing contacts with other states. Multijurisdictional practice and multiple licensing can lead to problems with reciprocal discipline, but those problems can be alleviated by uniformity in the rules.

Under Rule 8.5, when a lawyer provides legal services in a jurisdiction in which he or she does not hold a license — whether that conduct is authorized or unauthorized in that jurisdiction (Moore noted at this point that the new Colorado rule on multijurisdictional practice is the most "liberal" in the country) — the lawyer will be subject to the professional conduct rules of that jurisdiction, as well as the jurisdiction in which he or she holds a license. Uniformity, then, is useful to that lawyer; even differences in the numbering systems that are used in the codifications of the rules can lead to confusion for the lawyer who earnestly researches the rules to ensure compliance. Moore pointed out that Texas numbers its rules uniquely, while Rhode Island has put them off by one with the addition of a new Rule 1.16.

Finally, uniformity among the states may hold off what Ethics 2000 Commission chair Judge Norman Vesey has warned of: the possibility of Federal encroachment on the state courts' right to

regulate the practice of law. Moore said the U.S. Department of Justice has cited state variations in Rule 4.2 as a basis for that department having a "federal rule" as to its lawyers practicing in multiple jurisdictions. (She referred to a case involving conflicts between New Mexico and District of Columbia rules.) Similarly, the Sarbanes-Oxley legislation and resultant Securities and Exchange Commission regulations dealing with "upstream" reporting by lawyers may preempt Rule 1.6 as adopted by the various states. Uniformity among the states may alleviate pressures for differing or preempting Federal rules.

12. *Availability to Assist Colorado Drafting Efforts*.

In concluding her review of the ABA Ethics 2000 Rules, Moore stressed her willingness, and that of colleague Becky Stretch, to work with the Committee as it considers those rules for adoption in Colorado.

B. *Rothrock Report on* Ad Hoc *Colorado Committee's Review of the ABA Ethics 2000 Rules*.

Following Moore's remarks on the ABA efforts with respect to the Ethics 2000 Rules, Alexander Rothrock reviewed the work of the *Ad Hoc* Colorado Committee.

The *Ad Hoc* Colorado Committee conducted its review of the ABA Ethics 2000 Rules over an eighteen month period. Early in the process, Rothrock said, the committee adopted the "if-it-ain't-broke-don't-fix-it" presumption that it would not alter the ABA model rules unless there was a good reason to do so, seeking instead to remain with the uniform text in the absence of a real need to change it. However, the committee also presumed that, if the existing, analogous Colorado rule represented a well-tailored approach to a particular issue, it should be inserted into or substituted for the ABA model. Examples of such a rule are found in Colorado Rules 1.2 (as to unbundling of legal services), 1.5 (as to the requirement that the basis for legal fees be identified in writing), 1.15, 5.5, and 7.1. Rothrock noted in passing that the Colorado committee did not give much consideration to the issue of screening lateral hires, of which Moore had spoken.

The Colorado committee studied all of the ABA Ethics 2000 Rules and has provided its recommendations, with an executive summary, to this Standing Committee.

C. *Stretch Report on States' Action with Respect to ABA Ethics 2000 Rules*.

Becky Stretch then reported on what other states are doing with the ABA Ethics 2000 rules. She began by calling the Colorado committee's work product a wonderful report, one which provides great detail regarding the reasons behind the variations that proposed to the model rules; she noted that such detail is very important to the overall "learning process" that is being undertaken nationally with respect to the Ethics 2000 Rules.

Stretch characterized the model comments to the Ethics 2000 Rules as being extremely well crafted, putting the Hazard concept of "bookend" examples to good use. Those bookends serve as good substitutes for the older approach of providing aspirational goals, since they identify what is surely acceptable, and surely not acceptable, under the respective rules.

Stretch noted that nine states still used the pre-Kutak Code of Professional Responsibility when the Ethics 2000 Commission began its review of the Kutak Rules in 1997. It is likely, she thought, that all of those states would now leapfrog the Kutak Rules and adopt the Ethics 2000 Rules in some form. Even New York "is trying to adhere to the model rules," she noted.

Nineteen states are farther along in the review process than is Colorado, having reviewed the Ethics 2000 Rules and issued proposals to their bars; several of those did not consider or adopt the changes made to the Model Rules by the ABA in 2003. The majority of the states, however, are further behind in the process than is Colorado.

Stretch pointed out that the ABA Model Rules have "elevated" terminology from the "Scope" section of the rules to the status of a full rule, Rule 1.0. "Screening" and "informed consent" are newly defined terms which, she noted, the Colorado committee has recommended adopting without change.

The *Ad Hoc* Colorado Committee has recommended modifying Rule 1.2, as Rothrock had noted, to deal with the unbundling of legal services; and Stretch noted with approval Colorado's continuing ban on referral fees.

Stretch described Rule 1.4 as a concentration of communications requirements. She said that the states are readily accepting the ABA's reformatting of Rule 1.7 on conflicts of interest; she noted that Moore's expertise in the area of conflicts is reflected in the revised rule. Indiana has adopted the Commission's suggestion that waivers of conflicts of interest be signed by the client; some other states, on the other hand, have dropped the model requirement for even a written confirmation of the waiver.

Twelve of the nineteen extant state proposals have provided for screening of lateral hires, notwithstanding the ABA's rejection of the concept. Most of the acting states have accepted new Rule 6.5 limiting the conflict burden when rendering limited legal services, and most are also adopting Rule 2.4 regarding lawyers serving as neutrals.

Very few states have proposed to adopt Rule 7.6, governing "pay-to-play" political contributions ("A lawyer or law firm shall not accept a government legal engagement or an appointment by a judge if the lawyer or law firm makes a political contribution or solicits political contributions for the purpose of obtaining or being considered for that type of legal engagement or appointment"). The Colorado committee, she noted, has accepted the provision. Stretch was not certain why the other states have not accepted it, suggesting that perhaps they have simply missed its existence.

Rule 4.2 ("In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order") is being widely accepted, which she characterized as an "important" development. Only Arizona has not adopted the ABA model's change of term from "party" to "person." Four states have not accepted the ABA model's addition of "court order" to the text of the rule.

Stretch noted that the Center for Professional Responsibility, of which she is the executive director, has a great deal of information on state variations, which she would be pleased to provide to the Committee for its deliberations. The material includes, for example, comparisons of the various versions of Rules 1.6 and 1.13.

In answer to a member's question, Stretch reported that Arizona, Delaware, Louisiana, Montana, New Jersey, North Carolina, South Dakota, and Virginia have already formally adopted the Ethics 2000 rules in some form. She noted that several of the adopting states have not formally included the model comments, although a few of those have referred to them for guidance.

A member asked for Stretch's view on whether the effort would result in uniformity among the states. Stretch replied that at first she had been concerned that uniformity would be lessened but that she no longer felt that would be the case and, indeed, the impact of the new rules was likely to be enhanced uniformity, especially given the widespread concern about federalization.

Moore noted that Colorado's timing is "in the middle" and indicated that was a good place for it to be. She contrasted New Jersey, an early actor but one which had not adopted the presumption favoring uniformity and which, accordingly, has many variations from the model text. She felt that those who more recently take up the project are more likely to pursue uniformity. Rule 1.7 may be found to be very uniformly adopted, while Rule 1.6 may see more variation among the states in such matters as the level of crime or activity that can be disclosed and its imminence or remoteness.

A member pointed out that Rule 1.6 has historically been subjected to variations among the states. Stretch responded that she expected less variation in the future, with the Ethics 2000 version, although, she noted, some states may mandate disclosure of activity that might result in death. Variation may also be found as to whether the lawyer's services must be implicated before disclosure is permitted. Many states, she predicted, will stay with their current rules, if those are more permissive than the current ABA version; while the ABA seems pleased with its text, the Commission has not been surprised to find that these states are not "stepping back." In response to the member's comment, Moore said she believed the *extent* of variations in Rule 1.6 will be diminished, although the number of states with some form of variation, however minor, may be high.

A member questioned the distinction between Rule 1.6(b) — which permits disclosure of client confidences upon the lawyer's *reasonable belief* that the elements of the rule have been satisfied — and Rule 1.13 — which requires *knowledge* before the lawyer is obligated to proceed as is "reasonably necessary in the best interest of the organization" to deal with a "person associated with the organization [who] is engaged in action . . . that is a violation of a legal obligation to the organization . . . and that is likely to result in substantial injury to the organization." Moore responded that the Ethics 2000 Commission first looked at Rule 1.13 before the Enron scandal and the enactment of the Sarbanes-Oxley Federal legislation. At that time there was "little concern" about the knowledge standard in Rule 1.13 — which is the same standard as is found in the Kutak version of the rule — and no pressure to change it. The Commission considered a proposal to require up-the-ladder reporting but declined to adopt it. Stretch added that the Commission felt that the changes to Rule 1.6 accommodated the situation, albeit permissively rather than by mandate.

Moore made the important observation that there are variations in the required levels of scienter throughout the ABA Ethics 2000 Rules, ranging from strict liability to should-have-known to "knows." She acknowledged that these variations have not been well thought out; rather, the existing Kutak standards were left in place unless there was a special impetus to change a particular one.

With particular regard to the scienter requirement in Rule 1.13, Moore explained that the Commission understood the rule to be disciplinary, rather than a matter for civil malpractice liability, and thus to justify a higher level of misconduct before a disciplinary sanction would be imposed. She characterized the scope of the rule as one involving the lawyer acting to protect the lawyer's client and not one involving interests of the public at large. Perhaps, she noted, the analysis was mistaken.

A member added that Rule 1.13 is a mandatory provision, while Rule 1.6 is permissive. Moore agreed, commenting that Rule 1.6 would permit the lawyer's disclosure of information to the client's "outside shareholders" but not require the lawyer to "go up the ladder." Moore also claimed that Rule 1.6 requires *knowledge* as to the crime itself and that the rule's *reasonableness* standard only applies to the belief that disclosure is necessary to preclude the crime.

In answer to a member's question, Moore and Stretch noted that Rule 1.13 is not exclusively applicable in a given situation, requiring up-the-ladder reporting within the organization; Rule 1.6 will also be available, to permit disclosure outside the organization.

Another member asked whether the Ethics 2000 Commission had given thought to changing the scope of Rule 1.6 from "the extraordinarily broad" field of all "information relating to the representation of a client" to something narrower, such as a client's "secrets" or confidences. Moore said she agreed with him that the scope is unrealistically broad and that there is much that a lawyer could feasibly be allowed to discuss without damaging the client. However, there appeared to be no sentiment for a change in the terminology, and the rule at least has the advantage of providing a "bright line," avoiding the need for judgment. "In questionable cases," she said, "this requires balancing in favor of the client."

That member also noted that the *Ad Hoc* Colorado Committee has called for a continuation of this state's existing Rule 4.1(b) ("make a false or misleading statement of fact or law to a third person"), which does not require that a misrepresentation be of a *material* fact to come within the ambit of the rule. That is in contrast to the ABA Ethics 2000 text ("make a false statement of material fact or law to a third person"). Respondents' counsel, he noted, might want to see materiality added to the Colorado, as in the ABA model; Moore made no comment to this suggestion.

The member compared Rule 4.1 to Rule 8.4(c) ("engage in conduct involving dishonesty, fraud, deceit or misrepresentation"). Noting that there is no clear authority in Colorado about whether the misrepresentation must be material to be actionable — and citing Professor Hode for the observation, "three cheers for lying about immaterial matters" — he asked Moore and Stretch how these two rules might be reconciled. Stretch replied that no other state has deleted materiality from Rule 4.1 to conform it to Rule 8.4(c). Moore added that there had been a proposal to that effect but no sentiment in favor of it and said that Stretch could provide some background material on the point.

Moore continued the discussion by noting that the comment to Rule 4.2 states that literally true, but misleading, statements are subject to the rule's proscription — "Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements." However, she noted, the actual rule does not say that. She compared the situation to Rule 3.3 ("A lawyer shall not knowingly . . . make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer . . . .") and wondered whether the variations in the wording will lead to arguments that different things are intended in different rules. A member noted that these ambiguities are already present in the existing Kutak rules.

Moore said she did not personally have "strong feelings" about the presence or absence of a materiality standard in this area. It was, to her, a question of what convention the court wanted to have for lawyers — how should the courts treat the statement, "My client would never accept an offer that low"? As fact? As material fact?

As to Rule 8.4(c), Moore noted that its scope extends beyond the provision of professional services and asked whether one would actually want to discipline a lawyer for lying about his or her age or for telling the lawyer's child there is a tooth fairy. One member of the Committee remarked that the rule has changed the way Colorado lawyers play poker.

The Chair noted that the Standing Committee is considering an amendment to Rule 1.4 to add requirements regarding malpractice insurance. Moore said such a proposal was being circulated among the ABA drafters. Stretch added that the Commission had made a recommendation on the matter but subsequently withdrew the recommendation because of a lack of support. In substitution, they have suggested disclosures regarding malpractice insurance with the annual renewal of licenses, which disclosures would be available to the public, but would not require direct disclosures to clients. She noted that the model form for annual license renewal contains insurance questions but added that not many states have adopted that form.

Stretch also reported that the ABA's standing committee on court rules does not support the policy of mandating insurance disclosures to clients. At the committee's meeting in August of this year, it will consider requiring disclosures in the license renewal process, with an added requirement for subsequent notification to the court if the last-reported status changes.

A member noted that the ABA (and Colorado) Code of Professional Responsibility had taken a *per se* approach to conflicts of interest, while the Kutak Rule 1.7(b) changed the standard to prohibit (absent direct adversity) only conflicts whereby "the representation of [a] client may be materially limited by the lawyer's responsibilities to another client . . . ." Now, the ABA Ethics 2000 Rules moves the bar yet lower, to preclude a representation (again, absent direct adversity) only if "there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client . . . ." He asked what discussion there had been at the ABA level with regard to this shift, noting that Professor Hazard and the Restatement both speak about "reasonable risk." Moore replied that, in practice, the rule is applied as the American Law Institute has it, saying that the Institute tried to draft its restatement on the matter to reflect how the disciplinary rule was being interpreted in actual cases. The mere possibility of a conflict (as in representation of both a husband and a wife in an automobile accident case, where there may be a risk of a subsequent divorce) is not reason to decline the case. Moore pointed out that the ABA Ethics 2000 version of Rule 1.7(b) has stepped back from the Institute's "substantial risk" to "significant risk," but she did not elaborate on the reason for that step.

Stretch pointed out to the Committee that the reporter's notes on this matter are available on the website for the Center for Professional Responsibility.[1]

A member asked Moore and Stretch to discuss the issue of regulation of law firms as distinguished from lawyers. Moore said the Commission had given some thought to imposing conflict-checking requirements upon law firms, but the Ethics 2000 Rules do not do that. Stretch added that the ABA Standing Committee on Professional Discipline had drafted such a proposal but withdrew it in recognition that the rules are — and should be — directed only toward the conduct of an individual lawyer. She noted, however, that New Jersey and New York have adopted some disciplinary rules that apply directly to law firms.

That member also asked Moore and Stretch to discuss the prospect of rules having specific application to particular practice areas. Moore said that the Commission had rejected all such suggestions, such as "bankruptcy conflicts are different."

A member noted that attempts are frequently made to utilize the disciplinary rules as bases for malpractice actions, as if the rules codified the applicable standard of care. He noted that the Scope section of the ABA Ethics 2000 Rules indicates that a violation of a rule can be used as evidence of the "standard of conduct" in a malpractice action. However, he pointed out, the issue in a malpractice case is whether the lawyer has violated the applicable "standard of care," which is a different from a "standard of conduct." As an example of the difference, the member suggested a cocktail party discussion between a lawyer and a fellow guest. The standard of conduct set forth in Rule 4.3 suggests the lawyer should tell the guest to get a lawyer — "The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel. . ." — but, if the lawyer is or should be aware that the statute of limitations applicable to the guest's circumstance may soon run, the applicable standard of care may require the lawyer to tell the guest of that problem. The member noted that Colorado's Rules have heretofore made it clear that the Rules are *not* to be used to establish the applicable standard of care; the ABA Ethics 2000 Rules change that.

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1. http://www.abanet.org/cpr/e2k-report_home.html

Moore responded to these comments by saying that the Commission recognized that the courts have been utilizing some of the rules in determining what is the applicable standard of care in malpractice actions and that the Commission changed the pertinent discussion in the Scope section to reflect that. In acknowledgment that not all of the Rules might be applied to that end, the discussion says "may" rather than "will": "[A] lawyer's violation of a Rule *may* be evidence of breach of the applicable standard of conduct." She noted that her prior experience lay in an era when the courts perceived that the rules could not be used in malpractice actions; however, she noted as an example, it is not possible to discuss conflict cases without referring to Rule 1.7. As to the cocktail party example, she added, Rule 4.3 will allow the lawyer to give casual advice to the guest if the lawyer is not in fact aware of a conflict with an existing client.

The member responded to Moore's comments by remarking that the important question is whether the Rule's standards of conduct should be regarded as codifications of standards of care. Juries, he noted, can be advised that speeding is evidence of negligence, and he wondered whether we will see that with respect to the Rules.

A member noted that, in the Restatement, the American Law Institute has taken the position that rules of discipline can be used as evidence of standards of care.

D. *Conclusion of Discussion of Ethics 2000 Rules*.

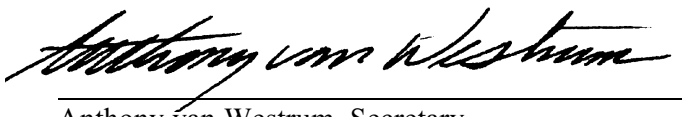
Moore concluded this discussion by remarking that the *Ad Hoc* Colorado Committee's report was "a great report."

Upon motion, the Committee determined to post that report, as well as the approved minutes of the Committee's meetings, on the Committee's website.

V. *Adjournment; Next Scheduled Meeting.*

The meeting adjourned at approximately noon. The next scheduled meeting of the Committee will be on Friday, June 4, 2004, beginning at 1:00 p.m., in the Supreme Court Conference Room.

RESPECTFULLY SUBMITTED,



Anthony van Westrum, Secretary

[These minutes are as approved by the Committee at its meeting on June 11, 2004.]

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COLORADO SUPREME COURT

STANDING COMMITTEE ON THE RULES OF PROFESSIONAL CONDUCT

Approved Minutes of Meeting of the Full Committee
On June 11, 2004
(Fourth Meeting of the Full Committee)

The fourth meeting of the Colorado Supreme Court Standing Committee on the Rules of Professional Conduct was convened at 1:00 p.m. on Friday, June 11, 2004, by Chair Marcy G. Glenn. The meeting was held in the Supreme Court Conference Room on the fifth floor of the Colorado State Judicial Building.

Present in person at the meeting, in addition to Marcy Glenn and Justices Michael L. Bender and Nathan B. Coats, were Michael H. Berger, Nancy L. Cohen, David C. Little, Cecil F. Morris, Jr., John M. Richilano, Alexander R. Rothrock, David W. Stark, Anthony van Westrum, Eli Wald, Lisa M. Wayne, Judge John R. Webb, and E. Tuck Young. William D. Prakken participated by telephone. Excused from attendance were Cynthia F. Covell, John S. Gleason, Judge William R. Lucero, Scott R. Peppet, Henry Richard Reeve, Boston H. Stanton, Jr., and James E. Wallace. Also absent were James A. Casey, Richard T. Casson, Peggy E. Montaño, Judge Edward W. Nottingham, Kenneth B. Pennywell, and Bryan S. VanMeveren.

I. *Meeting Materials; Guests.*

The Chair had provided a package of materials to the members prior to the meeting date, including submitted minutes of the third meeting of the Committee, held on April 16, 2004. Approval of those minutes was postponed until the end of the meeting.

The Chair introduced two guests to the meeting: Daniel Harpole, a Duke University law student serving as a summer clerk at Holland & Hart LLP; and Stephanie Izaguirre, a University of Denver law student serving as a research assistant to Committee member Eli Wald.

II. *Scheduling of Next Meeting.*

After discussion, including consideration of the time it will take the Ethics 2000 subcommittee to prepare its first reports to the whole Committee on those proposed rules, it was determined that the next meeting of the Committee will be held on Friday, October 1, 2004. (Subsequent to the meeting, the Chair informed the members by email that the October meeting will convene at 9:30 a.m. that day and will continue as late as noon if necessary.)

III. *Committee Website.*

The Chair informed the members that the Committee's website has been launched.[1] The agendas and minutes of the meetings, as well as selected additional materials that are considered by the

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1. The address for the Committee's website is—

http://www.courts.state.co.us/supct/committees/profconductcomm.htm

Committee, will be regularly posted on the website. Among the additional material that can already be found on the website are the Executive Summary and other documents comprising the proposal of the *Ad Hoc* ABA Ethics 2000 / Colorado Rules of Professional Conduct Committee regarding the Ethics 2000 rules.

IV. *Subcommittee on Rule 5.5 — Unauthorized Practice of Law by Disbarred, Suspended, and Disabled Lawyers*.

Nancy Cohen reported to the Committee on the further deliberations of the Subcommittee on Rule 5.5, which provides requirements regarding a lawyer's association with a person who is a disbarred, suspended, or disabled lawyer (all three categories being referred to in these minutes collectively as a "sanctioned lawyer" below). The latest version of the subcommittee's revision of the rule had been provided to the whole Committee under her memorandum of May 28, 2004, addressed to the Chair.

Cohen noted that, at the April 16, 2004 meeting of the whole Committee, Committee members had expressed concern that the draft proposal would unfairly restrict the activities of sanctioned lawyers who wished to continue, during the sanction period, to work (albeit not as lawyers) in the law firms in which they had formerly practiced law. This was thought to be particularly true for sanctioned lawyers who resided in small towns, where they would face practical limitations on their ability to find work in law firms other than the ones in which they had practiced law before being sanctioned. Cohen also noted that members of the Committee had urged the subcommittee to conform its proposal to the format of the California model.

In response to the first concern, Cohen said the subcommittee has amended the proposal to eliminate the restriction precluding sanctioned lawyers from continuing to work in their old law firms. Further, the subcommittee has modified the provisions regarding the notice that would be required to be given to clients by the lawyer or law firm that employed the sanctioned lawyer.

Cohen noted that the question of whether sanctioned lawyers could handle client funds — which had also generated discussion at the April 16, 2004 meeting — had been reconsidered by the subcommittee but that the subcommittee continued to feel that this should not be permitted.

In response to a member's question whether the notice to clients must specify the *fact* of sanction, Cohen clarified that the notice need not say *why* the sanctioned lawyer cannot practice law nor otherwise specify that he has been sanctioned — but need only say that he cannot practice law. She pointed out, however, that Rule 251.28 already provides, "An attorney against whom an order of disbarment, suspension, or transfer to disability inactive status has been entered shall promptly notify in writing by certified mail each client whom the attorney represents in a matter still pending of the order entered against the attorney and of the attorney's consequent inability to act as an attorney after the effective date of such order, and advising such clients to seek legal services elsewhere."

Another member questioned Rule 5.5(4)[2] of the proposed rule, which provides—

> (4) A lawyer shall not allow a disbarred, suspended, or disabled lawyer to have any professional contact with clients of the lawyer or of the lawyer's firm unless the lawyer:
>
> (a) Gives written notice to the client for whom the work will be performed that the disbarred, suspended or disabled lawyer may not practice law; and

2. Rule 5.5 as submitted by the subcommittee numbers the first level of sub-rule with parenthetical numbers — *e.g.*, "(4)" — and the second level of sub-rule with parenthetical letters, *e.g.*, "(4)(b)." The Colorado Rules of Professional Conduct, like the ABA Model Rules, reverses numbers and letters. These minutes use the numbering system reflected in the subcommittee's proposal.

(b) Provides such written notice to the client prior to the work. [*sic*]

(c) Retains written notification for no less than two years following completion of the work.

Cohen indicated this provision has been drawn from California's rule, which, like a number of other states' rules, requires written notice to the clients. She said that the reason for the rule is that the sanctioned lawyer, remaining an employee of the firm from which he used to practice law, will be known to a lot of people who may have dealt with him in the past. In larger law firms, the sanctioned lawyer is typically terminated upon a disbarment or suspension, but in smaller firms, he may stay on as an employee and his role may be misunderstood by those who then come in contact with him; this situation, she said, has arisen in the cases, typically involving smaller firms. Cohen recognized that Rule 251.28 already provides for a particular notice (see above), but pointed out that the Rule 251.28 notice only goes to those who were the lawyer's clients at the time of disbarment or suspension. The notice called for by Rule 5.5(4) may go to persons not included within the reach of the Rule 251.28 notice.

In response to that reply, the inquiring member said this notice smacks of a "scarlet letter," and he suggested that the problem it was intended to address was merely anecdotal. He opposed the provision as being punitive.

Another member expressed a similar view, pointing out that a lawyer need not advise her clients that some work will be done by a nonlawyer paralegal or law clerk and wondering why she would have to advise that some work would be done by a sanctioned lawyer. Cohen responded that the lawyer has a duty to avoid confusion even when she utilizes paralegal or law-clerk assistance, let alone a sanctioned lawyer; and Cohen characterized the sanctioned lawyer as a different situation not encompassed within the paralegal / law clerk analogy.

A third member, supporting Rule 5.5(4) as proposed by the subcommittee, pointed out that it addresses the circumstance of a sanctioned lawyer who may be meeting with the law firm's clients outside the presence of a licensed lawyer or other person. How in that circumstance — absent notice — would the client know that the sanctioned lawyer's status had changed from the day before, when he was a practicing lawyer?

A member expressed concern for the "appearance of impropriety." He pointed out that, if the sanctioned lawyer had been an experienced lawyer — the member used five years of practice as an example — clients of the law firm may easily assume that the person is acting as a lawyer and may not be sufficiently warned by some more general disclosure of the person's status. This member also suggested that, if the rule did not mandate notice, the law firm's partners might be reluctant to spell out the exact situation to their clients, out of a concern about maintaining collegiality — especially, perhaps, if the sanctioned lawyer had been a senior partner in the law firm. Accordingly, this member saw a benefit to a mandated notice such as Rule 5.5(4) would require.

In response to a question, Cohen clarified that Rule 5.5(4) applies in all instances, whether the sanctioned lawyer remains as a nonlawyer employee in the law firm in which he used to be a partner or has been hired by another law firm to provide paralegal or other nonlawyer services. It was pointed out that the California rule requires that this kind of notice be given in all circumstances, whether or not the services that the sanctioned lawyer provides to the law firm involve contact with clients. The proposed Colorado rule would require notice only in the event of "professional contact with clients."

In response to another question, Cohen said that there is an intended difference between Rule 5.5(2) — which precludes a lawyer from permitting a person to provide certain services if the lawyer "knows or reasonably should know" that the person is a sanctioned lawyer — and Rule 5.5(4) — which does not contain a similar scienter provision. The latter provision applies specifically to an

employment situation, where it is appropriate to say that the hiring lawyer should be required to ascertain the status of all persons hired to provide services to the law firm's clients. That explanation led another member to ask whether the two provisions were not in fact out of synch, because Rule 5.5(2) contemplates that the hiring lawyer might not know of the sanctioned lawyer's status in a situation in which Rule 5.5(4) contemplates that the hiring lawyer *should* know of that status and is "strictly liable" if she does not. Another member suggested that there is no need for differing treatments under the two provisions, so that the hiring lawyer should be strictly liable in either circumstance. Yet another member found that suggestion to be unreasonable, pointing out that the sanction may have been imposed in another jurisdiction and the sanctioned lawyer may have taken employment in the Colorado law firm without an honest disclosure of that sanction in the other jurisdiction. Still another member suggested that Rule 5.5(4) contemplates activities that no nonlawyer paralegal should be performing anyway, giving advice to clients. But it was noted that the provision also encompasses activities that are permissible for nonlawyers, such as "handling" client funds.

In a dialogue with yet another member, Cohen agreed that Rule 5.5(4) could be modified along the lines of Rule 5.5(2) to limit its application to a lawyer who hires the sanctioned lawyer as an employee. The problem is that, as presently drafted, Rule 5.5(4) applies to any lawyer who "allows" the sanctioned lawyer to have certain kinds of contact with the lawyer's clients, whether or not that contact is as the lawyer's employee. There may be many relationships in which a sanctioned lawyer may have contact with a lawyer's clients without the lawyer having a right to preclude the contact — indeed, the lawyer would probably be able to preclude the contact *only* if the sanctioned lawyer were subject to that lawyer's instruction as an employee of that lawyer — but the provision is not limited facially to that situation.

It was also suggested that there is overlap between Rule 5.5(4)(a) and Rule 5.5(4)(b), which could be resolved by amending Rule 5.5(4)(a) to read, "Before the work will be performed, gives written notice to the client for whom the work will be performed that the disbarred, suspended or disabled lawyer may not practice law," and dropping Rule 5.5(4)(b). This suggestion prompted a question about how many times the notice need be given to a particular client — must it be given each time work is to be performed by the sanctioned lawyer for that client?

A member stated his general view of the proposed additions to Rule 5.5 as follows: Clients should know the status of the persons who are working with them, but the additions to Rule 5.5 are over-inclusive. If the rule's assumption is that clients will be misled if the service-provider is a sanctioned lawyer but will not be misled if the service-provider is a paralegal or law clerk, that seems to be unfair. In this member's experience representing lawyers in the disbarment and suspension process, he has found the subjects to be "absolutely horrified" by the process they have been through. While it is possible to regard them all as "scumbags," they are, in this member's view, humans who will be called upon to wear a badge of shame. This member would adopt the substance of Rule 4.3 and require the hiring lawyer to "make reasonable efforts to correct [her client's] misunderstanding" of the sanctioned lawyer's role only "when the lawyer knows or reasonably should know that the [client] misunderstands the [sanctioned] lawyer's role in the matter" The humiliation that will be visited on the sanctioned lawyer (and perhaps the discomfort that will be experienced by the hiring lawyer) each time the Rule 5.5(4) notice is given is too substantial to justify these provisions — particularly because the notice must be given even at times when it is not necessary to avoid a misunderstanding of the sanctioned lawyer's status. The member summarized, "Let's make sure the clients are not be misled, but let's not assume they *will* be misled."

A member spoke to support the prior suggestion that the scienter provision of Rule 5.5(2) be added as well to Rule 5.5(4). Cohen indicated her agreement with that suggestion.

A member suggested that Rule 5.5(1)(c) as proposed suffers a problem of circularity — it provides that a lawyer shall not assist a person who is not authorized to practice law in the performance of any activity that constitutes the unauthorized practice of law. Another member suggested that the provision may be broader than the situation of the sanctioned lawyer that we had been discussing. The provision may apply, for instance, to the partner in a the Colorado office of a multi-state law firm whose partner comes from another state and engages in the unauthorized practice of law in Colorado without the local partner being aware. The first member agreed that the provision may have this broader scope but still found the wording to have a circularity. Another member pointed out that Rule 55.(1)(b) has similar wording — a lawyer may not practice law in a jurisdiction where doing so violates the regulations of the legal profession in that jurisdiction.

The member who questioned the circularity of Rule 5.5(1)(c) also asked what Rule 5.5(2)(d) means when it uses the words "appear as a representative of a client." Would it apply to a sanctioned lawyer who is also a certified public accountant and who is serving the client not as a lawyer but as an accountant? In response to Cohen's suggestion that the wording could be changed to "legal representation," this member noted that the rule uses terminology that is drawn from the Ethics 2000 Rules that are separately under consideration by another subcommittee of the whole Committee, and he suggested that the matter of amending Rule 5.5 be postponed until it can be considered as a part of the Ethics 2000 Rules. Cohen noted that the Rule 5.5 proposals have already suffered the fate of bouncing from committee to committee.

With reference to the dialog regarding the Ethics 2000 Rules, another member also suggested that the Rule 5.5 changes be held over for consideration with the rest of the Ethics 2000 Rules rather than be approved separately now. He asked, too, whether there might not be unforeseen negative implications for other existing rules if this particular use of the phrase "representative of a client" were changed to "legal representative of a client"; he suggested that the change should be considered in context with the Rules as a whole. [Note, for example, that the comments to Rule 1.14 speak of a "legal representative" in the nature of a guardian or guardian *ad litem*, while the Preamble to the rules speaks of the lawyer being a "representative of clients."]

A member suggested that, to limit the problem of repetitive notices, the text could be modified to provide that notice previously given to a client, under any rule, as to the sanctioned lawyer's status as such would suffice also as the notice contemplated by Rule 5.5(4)(b). Cohen agreed with that proposal.

A member said that it was his understanding that he could hire a sanctioned lawyer and send him to a deposition to take notes, so long as the sanctioned lawyer did not give advice to the deponent or any other person, just as he could a paralegal, because note-taking is not a "legal representation." Another member responded that, actually, he could not do that under present law, although there might be other examples that would focus better on the distinction between "legal representation" and other services. Cohen noted that, in any event, the goal is that there should be no confusion about the role to be played by the sanctioned lawyer.

The Chair pointed that the Committee had continued to discuss the details of the Rule 5.5 changes after the suggestion had been made that the matter be postponed until the Ethics 2000 Rules were on the table. But she suggested that, because review of the Ethics 2000 Rules is underway, the changes to Rule 5.5 might indeed be put on the shelf to await consideration in conjunction with the Committee's consideration of the Ethics 2000 Rules. That idea was seconded by another member, who would similarly treat the proposed Rule 4.1 changes and other changes to specific rules.

In the ensuing discussion, it was noted that the presumption has been that the ABA Model Ethics 2000 Rules would be considered with a minimum of changes, the Committee being restrained not to make purely stylistic changes and to retain uniformity with the model rules unless there is good reason

for change. But the consensus seemed to be that specific changes — such as changes to Rule 5.5 of the kind discussed at this meeting — could be taken up when appropriate notwithstanding the general desire to retain uniformity in the Ethics 2000 Rules.

It was also noted that what is "the practice of law" has long been a mystery in Rule 5.5 and that little additional harm is likely to occur if we wait a while longer to resolve the matter in conjunction with the Ethics 2000 Rules. In reply to that, Cohen pointed out that the subcommittee that proposed these changes to Rule 5.5 did not attempt to define what is "the practice of law." And she noted that the Colorado concept of "the practice of law" is already quite different from that of other states and is likely to remain so, given that both the existing Colorado rules (as recently amended) and those rules as they would exist after the adoption of the Ethics 2000 Rules would both countenance "multijurisdictional practice." The changes that the subcommittee has proposed for Rule 5.5, which are drawn from California, would add guidance as to what sanctioned lawyers are not supposed to be doing and what those who employ them should be doing. She saw no need to delay action on the Rule 5.5 changes while the Ethics 2000 Rules are under consideration.

Upon a vote pursuant to a motion, it was determined to postpone further consideration of these Rule 5.5 changes until they can be incorporated into the Ethics 2000 proposal and, further, that the Ethics 2000 subcommittee consider these specific Rule 5.5 changes in the course of its consideration of the Ethics 2000 Rules. The existing Rule 5.5 subcommittee will continue in existence, however, to serve as a resource to the Ethics 2000 subcommittee.

V. *Subcommittee on Rule 1.4 — Malpractice Insurance Disclosures*

Eli Wald reported on the further deliberations of the Rule 1.4 Subcommittee. He had previously directed a discussion of the subcommittee's work at the Committee's meeting on January 9, 2004, following which the subcommittee had been directed by the whole Committee to continue its work.

The subcommittee's report of June 3, 3004, had been provided to the Committee members in advance of this meeting. In that report, the subcommittee stated that it did *not* endorse a proposal from the Attorney Regulation Advisory Committee of the Supreme Court to amend Rule 1.4 to require client disclosure if a lawyer does not maintain malpractice insurance of at least $100,000 per claim and $300,000 annual aggregate. (Attached to the subcommittee's report was a copy of the Advisory Committee's proposal, stating its view that the "absence of professional liability insurance is a material fact that may bear upon a client's decision to hire a lawyer.")

Wald noted that the Ethics 2000 Rules do not contain any changes that are relevant to the malpractice disclosure issue and thus have had no direct impact on the subcommittee's views. He reported that the American Bar Association's Client Protection Committee has issued two proposals for disclosure, one ("Type A") which calls for direct disclosure to clients and the other ("Type B") which requires "public" disclosure on annual license renewal applications. Ten states have addressed the question, and to date Delaware, Nebraska, North Carolina, Michigan, and Virginia have adopted requirements for disclosure in connection with annual license renewal applications. Four states, Alaska, New Hampshire, Ohio, and South Dakota, have adopted direct disclosure provisions.[3] Oregon, standing alone, mandates malpractice insurance as a condition to practice.

3. At the suggestion of Prof. Eli Wald, this sentence was added by the secretary following approval of these minutes by the Committee on October 1, 2004.

Noting that a majority of the subcommittee opposes any rule regarding malpractice insurance disclosure, Wald said the subcommittee's report nevertheless provided a summary of the arguments for and against disclosure:

- Those that argue for disclosure are of the view that the absence of malpractice insurance is a "material fact" and that most clients assume that lawyers carry malpractice insurance, while perhaps only sixty percent actually do, so that disclosure is necessary to correct the misconception.

- Those that argue against disclosure are of the view that there is no evidence to suggest that the presence or absence of malpractice insurance actually influences clients' choice of lawyers.

Wald indicated that there is no hard evidence of the percentage of lawyers who do not carry malpractice insurance; estimates range from fifteen to forty percent.

The subcommittee's report provides a detailed review of the nature and scope of malpractice insurance coverage as it is actually written by carriers. The topic is complex, and many lawyers themselves do not understand the intricacies, including the differences between claims-made and claims-incurred coverage. In light of these complexities, it would be difficult to determine what kind of disclosure would be meaningful and difficult for lawyers to comply.

Summarizing the report's details, Wald noted these issues:

- If the absence of malpractice insurance is a material fact to a person looking for a lawyer, then the absence should be disclosed. But there is not enough evidence to draw a conclusion about this.

- Is the scope of a meaningful disclosure so complex that mandated disclosure would simply add a second level of confusion to the existing confusion as to whether or not "all lawyers carry insurance"?

- What are the costs that a rule mandating insurance might create — including the possible cost of a general rise in malpractice insurance premiums if all lawyers were required to carry it?

- What are the "distributional effects" of a rule mandating disclosure? Would the mandate primarily impact solo practitioners and new lawyers, putting them at a competitive disadvantage vis-à-vis larger law firms?

- Might the requirement of disclosure effectively mandate insurance and put the carriers in a position, by controlling the terms of their policies and by their underwriting decisions, to play a substantive role in the regulation of law practice?

Wald said that four of the subcommittee members opposed any requirement of disclosure; one — himself — thought that the subcommittee needed more information before it could make a judgment about the merits of disclosure.

One of the members of the subcommittee, who opposes the disclosure requirement, spoke of his concern that, behind the proposal, there seems to be an assumption that the uninsured attorney is creating a risk of loss to clients for which clients do not have protection in the absence of insurance. But there is no evidence of that loss; maybe the problem exists and evidence of it can be found, but that is not

known at present. If harm to clients is the underlying concern, then disclosure would not be the solution; rather, mandated insurance would be the solution if that were the case, he felt.

A member noted that only eleven states have taken action regarding malpractice insurance, while nearly forty have not taken any action. He asked whether any state is known to have considered action and then determined not to act. Wald responded that perhaps a half dozen have looked at one or the other "types" of disclosure and yet not taken any action. Another member said he understood that California had had a disclosure requirement for some years and had then dropped the requirement.

In answer to a question, Wald said that the subcommittee was not aware of any statistical evidence about how clients really view the matter of malpractice coverage; there is only the anecdotal evidence that clients assume lawyers carry insurance. The questioner had suggested that clients don't think about the issue unless and until a problem arises in fact. Another member argued that the issue of clients' expectations is a false issue: Whether or not clients actually think about malpractice coverage when engaging a lawyer, it is a matter that, in this member's view, they *should* consider.

A member of the subcommittee spoke to give an overview of what malpractice insurance really is, noting that there are many misconceptions about it. The thought, he said, that a lawyer purchases insurance to protect her client is incorrect; the lawyer purchases insurance to protect her own assets from loss to clients. As soon as a malpractice claim is filed, the carrier will take a position that is *hostile* to the client. Clearly, that is an indication that insurance does *not* exist for the client's benefit. If the presence or absence of malpractice insurance coverage is thought to be a material fact that should be disclosed to potential clients, we would certainly be mandating the making of material, misleading statements to them about what the insurance is. If the lawyer does not make a disclosure that he does not have malpractice insurance, that will be ruled to be a misrepresentation that he *does* have such insurance. And yet the existence of insurance coverage at the critical time is an uncertain matter, since the insurance is *claims made* and may not be in place at a later date, when the client actually makes a claim. The client would have been misled, by a statement that insurance existed at the time of engagement or at the time of the last annual license renewal, into believing that there would be coverage if and when a claim arose, only to find that there was none in fact at that later date. The mandated disclosure would have misled the client.

Another, agreeing with that analysis and noting that the problem might be resolved if a mandate to carry "tail insurance" were added, asked how the bar is to protect the public if mandated disclosure is not the answer. He noted that only Oregon has chosen to mandate insurance coverage and pointed out that it has a smaller, and integrated, bar. The member who had spoken at length about the nature of insurance coverage replied that the answer lies in enhancing the competency of the profession and in assisting the Office of Regulation Counsel in its efforts to remove incompetent lawyers from the bar.

It was noted that one place the existence of lawyers who are not covered by insurance is manifested is under the Client Protection Fund, where claims against that fund typically involve solo practitioners. Another member pointed out, however, that the Client Protection Fund covers dishonest conduct and defalcations, which are not covered by insurance.

The member who had noted the need to eliminate incompetent lawyers from the bar reiterated that insurance is not the key to the problem; joking that he might be reluctant "to espouse the work of Regulation Counsel," he said that office's efforts are clearly a necessary part of the solution. Another part is improvement of lawyer competency, including by improving the law school experience so that law schools graduate competent lawyers who do not require an additional five years of on-the-job training.

A member noted her skepticism that insurance could really provide protection for clients. At the levels presently called for by Rule 265, defense costs can often eat up coverage limits, leaving little for client recoveries. Another member responded that the Oregon experience indicates that many claims are small, of $4,000 or $5,000 amounts. The Oregon system avoids defense cost burdens by promptly assessing claims and paying most small claims without defense. In her view, Colorado is simply not ready for that kind of program. A member noted that Colorado doctors have the COPIC system, which plays a similar role to the lawyer malpractice program in Oregon, but that organization has a limitation on losses and can thus do a proper actuarial analysis of the claims cost that is going to be borne by the system. Similarly, in Oregon the coverage that is provided is actually very small, and many lawyers carry additional insurance to protect their assets.

A member, agreeing that the topic is complex, concluded that mandatory disclosure is unlikely. He asked, then, whether it is logical to conclude that, if the lawyer does have insurance to cover the claim, the client is more likely to obtain a recovery eventually. If that is true, then there is value in requiring the lawyer to say whether or not she has insurance. In response, another member saw a slippery slope toward mandated insurance coverage and cautioned against putting the carriers in the position of practical regulation of the legal profession by the terms of their policies. He stated that he carries insurance for his own protection, not for the protection of the public, and he said that the carriers see it the same way. An Oregon system might be possible in Colorado, he thought, although he noted that the Colorado Bar Association, which had studied that possibility, found difficulties in capitalizing such a program. He thought the state legislature was not likely to capitalize such a program, even though legislators "would like us to have malpractice insurance." It was noted that the Client Protection Fund has been capitalized, which took about a year and a half to accomplish.

Concluding the discussion, Wald expressed his view that Colorado should move to a mandatory insurance program, although he knew that would take time to accomplish. In the meantime, he proposed, it should adopt a Type B disclosure requirement — disclosure of coverage at the time of license renewal.

The Chair called for a continuation of the discussion at the October meeting of the Committee.

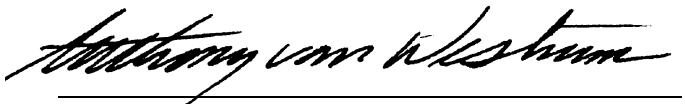
VI. *Approval of Minutes of April 16, 2004 Meeting*

After discussion, the minutes of the April 16, 2004 meeting of the Committee were approved as submitted.

VII. *Adjournment; Next Scheduled Meeting.*

The meeting adjourned at approximately 3:00 p.m. The next scheduled meeting of the Committee will be on Friday, October 1, 2004, beginning at 9:30 a.m., in the Supreme Court Conference Room.

RESPECTFULLY SUBMITTED,



Anthony van Westrum, Secretary

[These minutes are as approved by the Committee at its meeting on October 1, 2004.]

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COLORADO SUPREME COURT

STANDING COMMITTEE ON THE RULES OF PROFESSIONAL CONDUCT

Approved Minutes of Meeting of the Full Committee
On October 1, 2004
(Fifth Meeting of the Full Committee)

The fifth meeting of the Colorado Supreme Court Standing Committee on the Rules of Professional Conduct was convened at 9:30 a.m. on Friday, October 1, 2004, by Chair Marcy G. Glenn. The meeting was held in the Supreme Court Conference Room on the fifth floor of the Colorado State Judicial Building.

Present in person at the meeting, in addition to Marcy Glenn and Justices Michael L. Bender and Nathan B. Coats, were Michael H. Berger, Nancy L. Cohen, Cynthia F. Covell, John S. Gleason, David C. Little, William R. Lucero, Cecil F. Morris, Jr., Kenneth B. Pennywell, Henry Richard Reeve, John M. Richilano, Alexander R. Rothrock, Boston H. Stanton, Jr., David W. Stark, Bryan S. VanMeveren, Anthony van Westrum, Eli Wald, James E. Wallace, Judge John R. Webb, and E. Tuck Young. William D. Prakken was excused from attending. Also absent were James A. Casey, Peggy E. Montaño, Judge Edward W. Nottingham, Scott R. Peppet, and Lisa M. Wayne.

I. *Meeting Materials; Minutes of June 11, 2004 Meeting.*

The Chair had provided a package of materials to the members prior to the meeting date, including submitted minutes of the fourth meeting of the Committee, held on June 11, 2004. Those minutes were approved as written.

II. *Resignation*.

The chair read a letter of resignation received from Richard T. Casson by which Mr. Cassen resigned from the Committee in conjunction with his withdrawal from private practice to serve as in-house counsel.

III. *ABA Model Court Rule on Insurance Disclosure.*

Justice Bender distributed to the members copies of materials regarding the Model Court Rule on Insurance Disclosure, as adopted by the American Bar Association House of Delegates on August 9, 2004. The model rule would require lawyers to disclose on their annual registration statements whether they maintain professional liability insurance. The materials had been provided to the Chief Justice by the ABA Standing Committee on Client Protection and were distributed to the members for their information. The issue of insurance disclosure remains under consideration by a subcommittee of this Committee.

IV. *Initial Report from Subcommittee on Ethics 2000 Rules.*

A. *Overview of Review of Subcommittee's Reports.*

The Chair called for an initial report from the Subcommittee on the Ethics 2000 Rules. She noted that the Committee will give priority to the reports from this Subcommittee as they are received at the ensuing meetings but would also find time to take up reports from other subcommittees as they are received.

The Chair reminded the members that their packets of materials for the meeting contained several documents from the Ethics 2000 Subcommittee comparing the three versions of the Preamble, the Scope, and Rules 1.0 through 1.6 of the Ethics 2000 Rules, as they have been proposed by the ABA Ethics 2000 Commission, the ABA Ethics 2000 / Colorado Rules of Professional Conduct Committee (the "*Ad Hoc* Committee") and this Committee's Subcommittee on the Ethics 2000 Rules.

B. *Zealousness.*

The Chair explained that Steve C. Briggs, formerly a member of the Colorado Court of Appeals and currently president of the Colorado Bar Association, had sent to the Chair a letter requesting that the word "zeal" and its derivatives be deleted from the Ethics 2000 Rules as they might be adopted in Colorado; a copy of that letter had been provided to the members in their meeting materials. The Chair had arranged with Mr. Briggs for him to join the meeting by telephone, and he did so at this point in the meeting. The Chair noted that Mr. Briggs would speak for himself and not as a representative of the Colorado Bar Association.

Mr. Briggs began by noting that his letter fully stated his position, save for the need to add that he recognized the importance of maintaining uniformity with the ABA Ethics 2000 Rules to the extent feasible. Despite the value of uniformity, however, he felt that the modifications he proposed were modest and appropriate, and he noted that they went only to the preamble to the Rules and to comments, not to the black letter of any individual rule.

Mr. Briggs also noted that his proposal had been considered and accepted in the course of the Colorado Bar Association's Professional Reform Initiative, even with that initiative's determination to make very few changes to the rules of professional conduct and to abide by the Hippocratic directive to "do no harm."

Mr. Briggs referred to the American Law Institute's *The Law Governing Lawyers*, quoted in his letter, which equates the directive to be "zealous" with the prescriptions of Rule 1.1 and Rule 1.3 to be competent and diligent. If the requirement of competency is already in the Rules, there can be no harm in deleting the equivalent term "zeal," he said.

Mr. Briggs was not under any illusion that deleting references to zealousness would do great good. He understood that the term is not actually used by lawyers in defense against the disciplinary process, so its deletion would not have an impact there. He pointed out that research indicates, however, that the directive to be zealous is used by lawyers outside the disciplinary process as an excuse for their conduct when it is questioned by others and to justify to themselves conduct that they take in their professional lives which they would not condone in their personal lives.

Mr. Briggs saw the removal of the concept of zealousness from the rules as a stepping stone that bar leaders, for example, might use when discussing "professionalism" with the bar: the lawyer must not lie, should not abuse witnesses, etc. and could no longer justify that kind of conduct by claiming that

the rules require it as an aspect of zealousness, since that concept would have been pointedly deleted from the Ethics 2000 Rules.

Mr. Briggs cited research to the effect that "local rules" or exhortations have no real impact on lawyers' conduct. Rather, it is the black letter of the rules of professional conduct that establish the limits, and lawyers continually walk up to the edge of those rules in rendering professional services.

Mr. Briggs closed his comments with the statement that deletion of the directive to be zealous from the Ethics 2000 Rules would be a small and modest — but important — change.

Michael Berger, who chairs the Committee's Ethics 2000 Subcommittee, reminded the members that the term "zeal" is mentioned four times in the Ethics 2000 Rules, three times in the preamble and once in the comment to Rule 1.3.[1] He also reported that, although the Subcommittee had not discussed Mr. Briggs' proposal in its meetings, he had polled the members via email. In that poll, five had favored the proposal, four were opposed, and four had not responded; Berger's guess was that it would have carried if all had responded.

Mr. Briggs pointed out how modest the changes would be:

1. Preamble Paragraph [2] could read, "As advocate, a lawyer ~~**zealously**~~ asserts the client's position . . . ."

2. Preamble Paragraph [8] could read, "[A] lawyer can be a ~~**zealous**~~ ***forceful*** advocate on behalf of a client . . . ."

3. Preamble Paragraph [9] could read: "These principles include the lawyer's obligation ~~**zealously**~~ to protect and pursue a client's legitimate interests, within the bounds of the law . . . ."

4. Comment [1] to Rule 1.1 could read, "A lawyer must also act with commitment and dedication to the interests of the client and with ~~**zeal**~~ ***competence and diligence*** in advocacy upon the client's behalf."

A member agreed that the changes appeared to be minor in scope but noted that they should be accompanied by a special comment to the Court explaining why they were made. Mr. Briggs agreed with this, noting that such a comment would assist in maintaining general uniformity with the ABA Ethics 2000 Rules by noting the reasons for the deviations and would also serve to educate the bar as to the purpose behind the deletion of the zealousness terminology. He thought that two or three sentences would do, to the effect that the principles of competency and diligence, which are embodied in the word

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1. Preamble, Paragraph [2]: "As advocate, a lawyer *zealously* asserts the client's position under the rules of the adversary system." Preamble, Paragraph [8]: "A lawyer's responsibilities as a representative of clients, an officer of the legal system and a public citizen are usually harmonious. Thus, when an opposing party is well represented, a lawyer can be a *zealous* advocate on behalf of a client and at the same time assume that justice is being done." Preamble, Paragraph [9]: "[Difficult conflicts between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living, calling for professional discretion even within the framework of the Rules,] must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules. These principles include the lawyer's obligation *zealously* to protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system." Comment [1] to Rule 1.1: "A lawyer must also act with commitment and dedication to the interests of the client and with *zeal* in advocacy upon the client's behalf. A lawyer is not bound, however, to press for every advantage that might be realized for a client." [Emphases added.]

"zealous," are already used in the rules and thus suffice in its absence. The analysis in *The Law Governing Lawyers* might be cited.

Another member moved to refer the issue raised by Mr. Briggs to the Subcommittee on the Ethics 2000 Rules, which motion was seconded.

Berger requested that the matter not be sent to his committee, noting that the issues are close and well-defined, that debate within the Subcommittee would not be likely to further illuminate the issues, and that the Subcommittee would be diverted from its significant remaining work on the Ethics 2000 Rules.

The member who had made the motion argued that the fundamental problem with the proposal is that it further's the profession's unnecessary self-deprecation.

Another member, following Berger's lead, noted that the issue is sufficiently substantive that it should be considered by the whole Committee and not relegated to a subcommittee for a decision, particularly since any subcommittee decision would likely be re-debated by the whole Committee.

Yet another member, however, suggested that the matter has been put forward prematurely and should not be considered by the whole Committee so promptly. But the member who had supported Berger's position noted that the whole Committee can postpone its consideration until another day and need not take it up immediately.

Berger agreed with the latter position, noting that what the Subcommittee might have to say about the issue upon a preliminary review would not matter, anyway, inasmuch as the whole Committee could and would come to its own conclusion.

The member who had made the motion agreed with Berger's views — but noted, too, that it might be appropriate for another subcommittee to consider the matter and develop some background information, including how the concept of zealousness appears in the disciplinary process.

Nancy Cohen responded that Regulation Counsel would not have any pertinent statistics to provide on the issue. The member who had made the motion asked whether the concept of zealousness showed up in grievance complaints. Cohen said the grievance is typically expressed as "opposing counsel lied in court," not as "opposing counsel was too zealous." On the other hand, she said, the concept may arise more frequently in the civil litigation context as distinguished from criminal cases, where it is rarely discussed.

The member who had made the motion suggested that problems with the concept of zealousness do not appear to arise in practice and asked to see more research as to whether it really constituted a problem.

John Gleason said that his office of Regulation Counsel occasionally sees complaining parties using the concept, arguing that their lawyers had failed to zealously represent them; they argue that the existence of the term in the rules indicates that their lawyers were allowed to do more for their cases than was done in fact.

Another member noted the flip side, that, if the directive to be zealous is removed from the Rules, a lawyer may feel and argue that he or she need only "go through the motions" without the additional sense of commitment that the term "zeal" implies.

The Chair renewed the matter of the motion, that the issue of deletion of the concept of zealousness be referred to the Subcommittee on the Ethics 2000 Rules. The motion was then amended to provide for the whole Committee to consider the issue at a later date, without referral to any committee. That motion was adopted.

The Chair invited Mr. Briggs to prepare for a further discussion of his proposal at a future time. She also pointed out to him that the discussion that was just concluded indicated that there may be members on the Committee who share his views on the issue.

C. *Subcommittee Process in Review of Ethics 2000 Rules*

Berger outlined the process that the Subcommittee on the Ethics 2000 Rules has adopted. He noted that the Ethics 2000 Rules originated with the American Bar Association, which, in the late 1990s, realized that the existing "Kutak Rules" had not been changed in the almost twenty years since their adoption in 1983. The ABA wisely decided that it was time to look at all of the Kutak Rules in a general review and appointed the Ethics 2000 Commission to do so. The Commission was composed of a number of distinguished authorities on legal ethics, including Professor Nancy Moore, who spoke to this Committee at its meeting on April 16, 2004. The Commission's work product, the Ethics 2000 Rules, received initial ABA approval in 2000 and was revised and adopted by the ABA in August 2003.

The Colorado Supreme Court established the *Ad Hoc* Committee in 2003 to consider the adoption of the ABA Ethics 2000 Rules in Colorado. The *Ad Hoc* Committee was drawing near the end of review as the Supreme Court established this Committee as a standing committee of the Court. At the initial meeting of this Committee on September 30, 2003, the Subcommittee on the Ethics 2000 Rules was established in anticipation of receipt of the *Ad Hoc* Committee's report. Berger pointed out that seven of the members of the *Ad Hoc* Committee are members of this Committee, and six of those are also members of the Subcommittee on the Ethics 2000 Rules.

The Subcommittee felt, Berger said, that it would be foolish to repeat all that the *Ad Hoc* Committee had done to review the ABA Ethics 2000 Rules, for that committee had issued a very comprehensive report. Accordingly, the Subcommittee adopted the protocol of taking a first look at each rule; unless a Subcommittee member raised an issue with the rule as reported by the *Ad Hoc* Committee, the presumption would be that the rule as reported by the *Ad Hoc* Committee would be reported by the Subcommittee to the whole Committee. Yet, in practice, the Subcommittee has actually looked in depth at all of the rules it has considered to date, and, accordingly, it has only gotten through Rule 1.6.

If an issue was raised with respect to any rule, the Subcommittee member who raised the issue undertook to review the issue further and report back to the Subcommittee. With receipt of that report, the full Subcommittee would debate the issue and determine whether to accept the *Ad Hoc* Committee's version of the rule or propose changes. The materials provided to the members of the whole Committee for this meeting contain the results of this process to date — the Subcommittee's recommendations through Rule 1.6.

Berger noted that he had hoped the Subcommittee would have completed a review of all the "One Series" of rules — Rules 1.0 through 1.18 — by this point, but that hope has proved to be wildly optimistic; he now knows that he cannot make a prediction as to the future pace of the Subcommittee's work.

Berger said that the Subcommittee regards uniformity with the ABA Ethics 2000 Rules to be a very important goal. There may be good reasons for a change to a particular rule, but the Subcommittee members have agreed that the reason should be very good indeed before the model rule is modified. A mere quibble as to the wording of a rule will not suffice to justify a change. The Subcommittee

recognizes that uniformity is valuable to ethics experts and lawyers who specialize in disciplinary practice, in order that they can easily use the resources in the ABA/BNA Lawyers' Manual on Professional Conduct and from other states' experience with the ABA Ethics 2000 Rules. In short, the Subcommittee has opted for uniformity; but, it has proposed some changes, too.

Berger noted that the Subcommittee is also attempting to adhere to the suggestion of Robert A. Creamer, ¿, that deviations from the ABA Ethics 2000 Rules be identified with special numbering or by placement following the end of the model text and his suggestion that comments be added to explain the purposes behind the deviations. (Mr. Creamer's article entitled "Form Over Federalism: The Case for Consistency in State Ethics Rules Formats," from the Spring 2002 issue of The Professional Lawyer, was included in the packet of material provided to the members in advance of the meeting.)

As to the comments to the Rules, Berger noted that they serve a different function than, say, that served by the Advisory Committee comments to the Federal Rules of Civil Procedure. The comments to the Ethics 2000 Rules will be the words of the Supreme Court itself as the adopter of the Rules. He suggested that perhaps a Colorado committee comment explaining the purpose behind a Colorado deviation should be treated differently from the "official" comments.

Lastly as to process, Berger suggested that the whole Committee should not send any of the Rules to the Supreme Court until it has finished consideration of all of the Rules. He noted, first, that the Rules are interrelated and that we might find that an initial decision about a particular rule might be modified after subsequent consideration of some related rule. Secondly, he pointed out, it is inconceivable that the Court would adopt the Rules in pieces rather than as a complete package.

D. *The Preamble*.

The only change to the ABA's text of the Preamble to the Rules that has been considered is the matter of zealousness that Mr. Briggs raised earlier in this meeting.

E. *The Scope — Applicability of the Rules in Civil Actions*.

As is evident in the Subcommittee's report, there is some controversy regarding the use of the Rules in non-disciplinary civil proceedings such as malpractice actions. This controversy turns on the text in Paragraph [20] of the Scope section of the Rules. The text in question reads as follows (showing changes made by the ABA Ethics 2000 Commission to the existing text of the passage as found in both the model Kutak version of the Rules and in the Colorado Rules of Professional Conduct):

> ***[20]*** ~~Violations~~ ***Violation*** of a Rule should not ~~**in and of**~~ itself give rise to a cause of action ***against a lawyer*** nor should it create any presumption ***in such a case*** that a legal duty has been breached. ***In addition, violation of a Rule does not necessarily warrant any other nondisciplinary remedy, such as disqualification of a lawyer in pending litigation.*** The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a Rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule. ~~**Accordingly, nothing in the Rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such a duty.**~~ ***Nevertheless, since the Rules do establish standards of conduct by lawyers, a lawyer's violation of a Rule may be evidence of breach of the applicable standard of conduct***.

Berger pointed out that the existing version of this passage may imply that use of the Rules is to be limited to disciplinary cases, a reading that has been adopted by some courts and criticized by other courts and commentators. Whether that is a proper reading of the existing passage, and whether the ABA Ethics 2000 changes should be adopted in Colorado are discussed in the written arguments of members Cecil Morris and David Little that were included in the materials provided to the members for this meeting.

The *Ad Hoc* Committee had adopted the ABA Ethics 2000 version without change. After an extensive debate, the Subcommittee also recommended the ABA version, but with an addition to make it clear that use of a rule as evidence of a breach of an applicable standard of care would not be automatic but, rather, would be permitted "in appropriate cases." The report's discussion reads as follows:

> A majority of the Subcommittee recommends the addition of the words "in appropriate cases" in the last sentence of the paragraph such that the sentence, as now recommended by the Subcommittee, reads: "Nevertheless, since the Rules do establish standards of conduct by lawyers, *in appropriate cases* a lawyer's violation of a Rule may be evidence of breach of the applicable standard of conduct." The addition of the phrase "in appropriate cases" is intended to negate a construction of the sentence recommended by ABA Ethics 2000 (and the Colorado Committee) that would hold that evidence of a rules violation is always admissible in a civil action for legal malpractice. The Subcommittee believes that the admission of evidence in an adjudicatory proceeding is highly fact intensive and should be evaluated by a trial court (and appellate courts) in the same manner that other evidence is evaluated. No hard and fast rule of admissibility, or even a presumption of admissibility, is warranted. [Emphasis added in these minutes.]

Berger also noted that, at the conclusion of the Subcommittee's consideration of the issue, a question arose about whether the Court should be adopting a substantive rule of evidence in the course of making rules governing professional conduct. The view that this was a problem, he said, was held only by a minority of the Subcommittee.

A member interjected that, while it was helpful to the whole Committee to learn of the process used by the Subcommittee, he also wanted to hear of the substance of the Subcommittee's debates — why, for instance, there were three points of view on this particular matter. It may be, he pointed out, that the Subcommittee's ultimate recommendation on this or any other matter might be unimportant and overridden by the whole Committee, but the analyses of the Subcommittee members would be of interest to the members of the whole Committee.

A member who opposed the new text of the Scope section — with or without the Subcommittee's addition — voiced his fundamental concern that the text failed to distinguish between a standard of conduct and a standard of care, despite the fact that some of the malpractice cases make such a distinction in determining whether the Rules can be used to determine a breach of the standard of care in such a case. The Rules surely establish a standard of conduct, but this new invitation to use them in a case in which a standard of care is at issue confuses roles. As an illustration, he suggested the case of a lawyer who feels very strongly about the client's case, so strongly that he is led to violate the duty of candor to the court. Although that would be a violation of the standard of conduct established by Rule 3.3, would it also be a violation of the lawyer's duty of care owing to the client? We should, the member said, be very careful and say straightforwardly that these Rules are also standards of care, if that is what we really mean. We may, otherwise, be inviting confusion in the cases.

Another member noted that the standards of conduct stated in the Rules may establish standards of conduct for application to lawyers as fiduciaries. A lawyer may breach a rule of conduct as a fiduciary and yet not breach a standard of care, not be acting negligently as to the client.

A member who favored the new text in the Scope section argued that the problem that had been encountered with the prior text was that courts had caused confusion by interpreting it to say that violation of a rule could not serve as a *per se* basis for a civil claim — that the purpose of the Rules was disciplinary and not to *establish* civil claims. These interpretations, while correct, led other courts to question whether the rules could have any application in civil cases. A majority determined that they could, that there was no *per se* barrier against using the Rules in civil actions where appropriate and that there was a whole host of cases where that would be appropriate. This member argued that the ABA's changes in the text were intended simply to clarify that the Rules could be used as evidence of a standard of conduct in the appropriate civil case. He cited, for example, the case of *Miami Int'l Realty Company v. Paynter*, 841 F.2d 348 (10th Cir. 1988), in which the Tenth Circuit upheld Judge Matsch's allowance of use of the Rules as evidence in a case involving conflicts of interest — the trial judge had apparently noted that one cannot advise the jury about conflicts issues without referring to the Rules governing them. That this is the case is confirmed by the reporter's notes to the Rules, which say, "These changes reflect the decisions of courts on the relationship between these Rules and causes of action against a lawyer, including the admissibility of evidence of violation of a Rule in appropriate cases."[2]

That member also noted that it is wrong to conclude that it would be an incursion into the rules of evidence — and beyond its jurisdiction — for this Committee to include in the Scope section the text that is under discussion; indeed, it is necessary to do so to correct the effect of the current text, which is wrongly to exclude use of the Rules as evidence of standards of conduct in civil cases.

The member also questioned the concern that the Rules would transmogrify into bases for malpractice claims. In his view, this would not be a practical problem, because the Rules do not have much application to malpractice cases. But they do have a proper application to breaches of fiduciary duties, such as the duty of loyalty — to which the conflicts rules apply — and must necessarily be talked about in the context of such a case. The same is true of Rule 1.5 in a fees dispute. He noted that the Rules do not *establish* a standard of care; rather they may simply be evidence of what the standard of care may be in a particular case. The text merely permits the court to consider, for example, whether a standard of care exists that matches the standard of conduct set forth in Rule 4.1. The text merely reverses the apparent bar to such usage that was read into the prior text.

Another member pointed out that the sentence added by the ABA Ethics 2000 Commission reading, "In addition, violation of a Rule does not necessarily warrant any other nondisciplinary remedy, such as disqualification of a lawyer in pending litigation," should alleviate concern about the Rules use as the bases for civil claims, concern that they may now expose lawyers to greater duties.

A member of the Subcommittee focused attention on the sentence reading, "Nevertheless, since the Rules do establish standards of conduct by lawyers, a lawyer's violation of a Rule may be evidence of breach of the applicable standard of conduct." That sentence was ambiguous, he felt, and might be read simply to be a warning to the practitioner that, "Even though we've said all this, you need to know that some courts may use the rules as evidence." He recognized that there was another possible interpretation, that the word "may" meant that courts are in fact permitted to use the Rules as evidence of a standard where in cases where they have application. That alternative interpretation would have the sentence say, "Courts are permitted to do this," rather than, "Here's what courts actually have done or might actually do in the future." That alternative interpretation had led to the Subcommittee's addition of the words "in appropriate cases" as a compromise, this member recalled, to assure that the Rules would not constitute substantive rules of evidence; he felt that the added language watered down the meaning of the amended sentence to meaninglessness.

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2. The quoted language is contained in Cecil Morris' position statement as provided to the members in advance of the meeting.

But, this member said, his third reading of the ABA text, which identifies it as a warning about what courts may do with the Rules, avoids the issue of whether the Rules deal with substantive evidence law. In his view, the Court should not be saying anything in the Rules as to specific evidence in civil actions.

Another member questioned the example in which the duty of candor to the court under Rule 3.3 might be claimed to establish a standard of care, and he asked for a clarification about the difference between a standard of conduct and a standard of care. The member who had used that example replied with another example: Leaving aside the proximate cause issue, the law's edict that "you shall not go over forty miles per hour in this stretch of highway" establishes a standard of conduct but not necessarily a standard of care — one might go faster than forty miles per hour and still be acting carefully. He expressed his concern that the idea of "informed consent" — which is in fact a newly expressed concept in the Ethics 2000 Rules — will blossom in legal malpractice cases as it has in medical malpractice cases: What will it constitute; what rituals will be attendant to it? In the medical malpractice context, he pointed out, there are at least four different categories of "informed consent," and every medical malpractice case involves some issue with respect to "informed consent." His concern is that these Rules will be introducing an "informed consent" concept into legal malpractice cases and that the standards of conduct established by the Rules will become both swords to use against lawyers in malpractice cases and shields raised by lawyers in malpractice cases. He repeated that we should not mince words if we mean the Rules to establish standards of care: We should say that they do. But he questioned whether the Supreme Court had the authority to establish standards of care applicable to civil actions by the rule-making process. He concluded by saying that a standard of care is different from a standard of conduct and the two should not be mixed, because they are not compatible. One cannot simply make a standard of conduct into a standard of care. There are too many other things that need to be accounted for in a standard of care that are not contained in the Rules.

A member proposed another example for consideration, referring to Rule 1.9's requirements regarding conflicts of interest with former clients. The standard of conduct established by that rule protects the confidences that a client may disclose to the lawyer and, by doing so, protects the client's expectation that the lawyer will remain loyal even after the representation has ended. If an organization was formerly represented by Lawyer X, and if Lawyer X's partner then accepts representation of another person in a case directly adverse to the organization on the same matter in which Lawyer X had formerly provided representation, it may be — because of changing personnel — that the organization has in fact no "institutional memory" of the prior representation by Lawyer X and, therefore, that there is no actual sense within the organization of Lawyer X's disloyalty. And it may also be a fact that no confidences are actually disclosed by Lawyer X to the partner, so that there is no actual abuse of confidential information. In short, there may be no real impact on the organization, notwithstanding that Rule 1.9 had been violated. If, subsequently, the organization commenced a malpractice action against Lawyer X for some misfeasance that allegedly occurred during the former representation, it would, under these facts, be inappropriate for the organization to interject the subsequent violation of Rule 1.9 into the action, since that violation would have had no bearing on the alleged misfeasance. In that case, as this member reads the text of the Scope that is under examination, there would be no *requirement* that the court allow the subsequent Rule 1.9 violation to be considered in the case. Accordingly, the text in question would not have improperly skewed the application — or non-application — of the Rules to the civil action.

With respect to that example, a member noted that, if the organization's confidential information had been disclosed by Lawyer X to the partner, then the text in question would allow the Rule 1.9 violation to be considered in a civil action arising because of that disclosure. In short, the application or non-application of Rule 1.9 would depend on the facts of the matter in dispute.

A member asked whether the additional language "in appropriate cases" should be deleted if, as had been suggested, it was meaningless. In this member's view, it would not be appropriate in rule-making to deal with rules of evidence. He referred to the reporter's statement that "These changes reflect the decisions of courts on the relationship between these Rules and causes of action against a lawyer, including the admissibility of evidence of violation of a Rule in appropriate cases."

A member who supported the thrust of the ABA's change felt that the added phrase "in appropriate cases" was not necessary but did not hurt. It does not say that application of the Rules is *always* appropriate; it simply overturns the prior, minority view that the Rules can never be referred to in civil actions. Another member indicated his concurrence with this and added that he did not believe the ABA text could properly be read as merely a warning to practitioners that they may find courts making use of the Rules in civil actions.

Another member noted that everyone seemed to be in agreement that nothing in the Rules should preclude a court from applying a Rule in an appropriate civil case as evidence of a standard of care. She suggested that the sentence be modified to read, "Nothing herein in is intended to preclude courts from determining, on a case-by-case basis, that a lawyer's violation of a Rule may be evidence of a breach of a standard of care."

A member quoted from the reporter's notes to the ABA Ethics 2000 Rules stating, "These changes reflect the decisions of courts on the relationship between these Rules and causes of action against a lawyer, including the admissibility of evidence of violation of a Rule in appropriate cases." This member thought that the suggested modification of the sentence to read, "Nothing herein in is intended to preclude courts from determining, on a case-by-case basis, that a lawyer's violation of a Rule may be evidence of a breach of a standard of care," very nicely captures that idea.

Another member noted that Rule 1.1, on competency, might not be an appropriate expression of a lawyer's standard of care — although, he felt, it tracked the concept pretty well. He liked the example that used Rule 1.9, since that Rule is applicable to a breach of fiduciary duty, which involves a standard of conduct. He thought, as Cecil Morris had proposed, that the verb "may" in the text under discussion simply clarifies that a court is permitted to use, for example, Rule 1.9 in an appropriate case.

The member who had authored the sentence, "Nothing herein in is intended to preclude courts from determining, on a case-by-case basis, that a lawyer's violation of a Rule may be evidence of a breach of a standard of care," took the preceding comment to be an indication that the sentence was too narrow, in that it only referred to standards of care and not also standards of conduct. She suggested that the sentence be altered to read, "Nothing herein in is intended to preclude courts from determining, on a case-by-case basis, that a lawyer's violation of a Rule may be evidence of a breach in a civil action." Another member suggested, "Nothing herein in is intended to preclude courts from determining, on a case-by-case basis, that a lawyer's violation of a Rule may be evidence of a breach in a nondisciplinary action," but yet another member noted that the preceding sentence in the text of the Scope paragraph already contained that idea; she suggested combining the two sentences.

A member asked what the legal import was of a Committee comment and was told that they would be "nonbinding." Another member remarked that, as had been noted, the courts have used the existing text in the Scope to limit the application of the Rules in civil cases, and that new ABA language would clarify the matter, consistently with the majority view that the Rules may be used as evidence.

Another member expressed his discomfort with this Committee telling a court, in an advisory work, how it should handle the Rules in a particular case; this Committee does not, he said, craft rules of evidence. Further, he felt that the language contained in the Subcommittee's report covers the position

expressed in the reporter's notes. He proposed that this Committee accept the text as proposed by the Subcommittee and move forward. Another endorsed this proposal.

The Chair pointed out that there were five alternatives that could be considered:

1. Leave the text as found in the current Scope section of the Colorado Rules of Professional Conduct;

2. Adopt the new text proposed by the ABA Ethics 2000 Commission and adopted by the *Ad Hoc* Committee;

3. Adopt the Subcommittee's proposal, which adds the words "in appropriate cases" to the ABA / *Ad Hoc* Committee text;

4. Change the last sentence of the Subcommittee's proposal to read, "Nothing herein in is intended to preclude courts from determining, on a case-by-case basis, that a lawyer's violation of a Rule may be evidence of a breach in a civil action."

5. Do not include any provision on the use of the Rules in civil actions.

A member said that, since we are dealing with the portion of the Rules that is dedicated to explaining their "scope," it is appropriate to explain what the Rules are meant to be, even though it would be inappropriate to give "advisory opinions" on their application in particular cases. This, he noted, was not just a matter of semantics; rather, the question goes to the desired scope of the Rules. He was strongly in favor of the ABA version of the text. All it says, he pointed out, was that violations of the Rules could be used — even should be used — in appropriate cases to inform the decision-making process as to standards of care. The proposed alternative language, "Nothing herein in is intended to preclude courts from determining, on a case-by-case basis, that a lawyer's violation of a Rule may be evidence of a breach in a civil action," did not go far enough; instead, the guidance in the Scope section should be that the Rules may in fact be relevant in particular cases. The compromise language, "nothing is meant to preclude . . . " does not go far enough.

Another member noted that he recently spoke to an audience of prosecutors, who expressed concern that the Rules might be used to change substantive law. They noted that the Tenth Circuit permits prosecutors to make direct contact with represented persons, despite Rule 4.2. What, they asked, controls their conduct, substantive law as interepreted by the Tenth Circuit or Rule 4.2? They wondered who would be the sacrificial lamb to test the issue. So, this member noted, the issue under discussion goes far beyond the question of application of a standard of care. The text in the present Scope — "Accordingly, nothing in the Rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such a duty" — gives the prosecutors something to hold on to.

On the Chair's call for a straw vote to test whether something — or nothing — should be said, a majority favored some kind of statement.

Upon a call for a vote upon the Subcommittee's recommendation, thirteen voted in favor of the recommendation and three voted in opposition. The Subcommittee's text was thus approved.

The members agreed that this vote established a proper way to proceed with the remainder of the Subcommittee's recommendations on the Ethics 2000 Rules, recognizing that a vote on any particular Rule can later be re-taken if changes are proposed to accommodate Rules that are subsequently considered.

F *The Scope — Governmental Lawyers*.

Berger explained that the ABA Ethics 2000 Commission determined that the sentence in the Scope section of the existing rules reading, "[Governmental lawyers] also may have authority to represent the 'public interest' in circumstances where a private lawyer would not be authorized to do so," was both inaccurate and un-useful, and the commission deleted the sentence. That change had been recommended by the *Ad Hoc* Committee and was also adopted by the Subcommittee. Although he agreed with the change, a member pointed out that the sentence had been relied upon by the Supreme Court in *People ex rel. Salazar v. Davidson*, 79 P.3d 1221(Colo. 2003).

Upon motion and second, the deletion of the sentence was approved.

With this and the preceding vote, the Committee, in essence, approved the Preamble and the Scope sections of the Ethics 2000 Rules, as proposed by the ABA Ethics 2000 Commission and the *Ad Hoc* Committee but with the one change recommended by the Subcommittee adding "in appropriate cases" to Paragraph [20] of the Scope.

G. *Rule 1.0 — Definitions*.

Berger explained that the Ethics 2000 Rules contain a new Rule, numbered Rule 1.0, setting forth the definitions for a number of terms, some old and some new or revised. The *Ad Hoc* Committee and the Subcommittee recommended the adoption of the rule without change.

A member noted that one of the new definitions is of the term "informed consent." He said he agreed with the definition but pointed out its existence in view of the earlier discussion about the incursion of the concept of informed consent into the rules governing lawyers' conduct. Another member suggested withholding an analysis of the definition itself until the review came to its first use in the context of a substantive Rule. Berger noted that the ABA Ethics 2000 Commission had spent some time on the concept of informed consent in an effort to eliminate the ambiguity of the terminology of the existing rules. He liked the additional guidance and regarded it as a major improvement.

Upon motion and second, the Subcommittee's recommendation to adopt Rule 1.0 as proposed by ABA Ethics 2000 Commission and approved by the *Ad Hoc* Committee was approved.

H. *Rule 1.1 — Competence*.

Berger reported that no changes were made to the substance of Rule 1.1 under any of the proposals; the ABA Ethics 2000 Commission made minor changes to the comments to the Rule, which both the *Ad Hoc* Committee and the Subcommittee approved.

Upon motion and second, the Subcommittee's recommendation to adopt Rule 1.1 as proposed by the ABA Ethics 2000 Commission and the *Ad Hoc* Committee was approved.

I. *Rule 1.2 — Scope of Representation and Allocation of Authority between Client and Lawyer*.

Berger reported that Rule 1.2 raised some issues. The ABA Commission had recommended the existing text of Rule 1.2 with two changes. Colorado's existing version of the Rule, however, includes text accommodating the allowance of the "unbundling" of legal services under Rules 11(b) and 311(b) of the Colorado Rules of Civil Procedure, and the *Ad Hoc* Committee had recommended modifying paragraph (c) of the ABA Ethics 2000 version to retain the Colorado text regarding unbundling. The Subcommittee recommended the rule as proposed by the *Ad Hoc* Committee, Berger said.

Berger also reported that the Subcommittee believed that the substance of Rule 1.2(e) — which the *Ad Hoc* Committee proposed to add to the ABA version of the rule to retain existing Rule 1.2(f) relating to bias — should be moved from Rule 1.2 to Rule 8.4, in part because it did not fit under the caption of Rule 1.2. Another member noted that New Jersey has taken a similar course and thought that the change was a good one.

A member questioned the absence of existing Rule 1.2(e), reading "When a lawyer knows that a client expects assistance not permitted by the rules of professional conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer's conduct." Prof. Wald noted that the provision has been moved to Rule 1.4(a)(5); another member thanked the professor for thus saving the Committee from wasting what might have been a considerable amount of time trying to figure out what had happened to the provision.

A member wondered whether the Colorado unbundling provision, Rule 1.2(c), might be misleading to the practitioner in view of the fact that the Federal courts in Colorado do not recognize the lawyer's and client's right to agree to a limitation on the scope or objectives of the representation. Other members concluded that it is not likely that practitioners would misled by the provision, because it specifically cites the Colorado rules under which the unbundling may occur and practitioners can be expected to understand that those rules do not have application in the Federal courts. To the suggestion that a warning be added in the comment referencing the local Federal court rule on the matter, it was answered that the Federal rule might change, leaving a gap in the Colorado comment until the comment were repaired to match that change. There was little likelihood that a similar gap could occur should the Colorado rules that are referenced in the current and proposed text of Rule 1.2(c) be changed, because all are under the control of the Supreme Court, which undoubtedly would modify Rule 1.2(c) to track any change in C.R.C.P. 11(b) or 311(b).

Upon motion and second, the Subcommittee's recommendation to adopt Rule 1.2 as proposed by the *Ad Hoc* Committee — but with a move of the substance of proposed Rule 1.2(e) to Rule 8.4 — was approved.

J. *Rule 1.3 — Diligence.*

Berger explained that existing Colorado Rule 1.3 differs from Kutak Rule 1.3 by the addition of a second sentence reading, "A lawyer shall not neglect a legal matter entrusted to that lawyer." The ABA Ethics 2000 Commission continued the existing Kutak text, which, of course, does not have that Colorado addition. The *Ad Hoc* Committee proposed retaining the Colorado sentence as in the present Colorado Rules. The Subcommittee, however, was unable to determine why Colorado had thought it necessary to add the extra sentence when the Colorado version was adopted in 1993, and, with the goal of maintaining uniformity in the absence of good reason for change, the Subcommittee determined that the model ABA Ethics 2000 text should be adopted in Colorado, without the Colorado addition as proposed by the *Ad Hoc* Committee.

Upon motion and second, the Subcommittee's recommendation to adopt Rule 1.3 as proposed by the ABA Ethics 2000 Commission — and without the addition of the second sentence proposed by the *Ad Hoc* Committee — was approved.

K. *Rule 1.4 — Communication.*

Berger reported that the *Ad Hoc* Committee had proposed adoption of the ABA Ethics 2000 Commission text of Rule 1.4 with one Colorado addition to the comments, adding a new Comment [8] cross-referencing the special Colorado additions to Rule 1.5 on fees. The additional comment would read—

> [8] Information provided to the client under Rule 1.4(a) should include information concerning fees charged, costs, expenses, and disbursements with regard to the client's matter. Additionally, the lawyer should promptly respond to the client's reasonable requests concerning such matters. It is strongly recommended that all these communications be in writing. As to the basis or rate of the fee, see Rule 1.5.

The Subcommittee recommended acceptance of the *Ad Hoc* Committee' version of the rule and comments.

It was noted that the *Ad Hoc* Committee's addition of the comment cross-referencing Rule 1.5 accords with the suggestions of Mr. Creamer because the comment is placed as a new, last comment.

A member questioned the use of the adverb "strongly" in the last sentence of the added comment, asking what level of scienter was intended by that term and whether it called for a written communication of the basis for the fee or also applied to the lawyer's responses to the client's requests. A member who had served on the *Ad Hoc* Committee replied that the intention was that it apply to all aspects of the fee, pointing out that the basis or rate of fee is already required to be set forth in a writing by Rule 1.5(b), so — because the comment is referring to items that are not already required to be in writing — this must be referring to other aspects of the fee.

A member noted that the comment in question had been added to the Colorado Rules in 1999. Another member pointed out that the Rules do not in any other place use a phrase such as "it is recommended" to which a "strong" recommendation in this comment to Rule 1.4 would be contrasted and that there is also no other "strong recommendation" in the Rules so that, accordingly, the Committee could write here as it wished without a need to stay consistent with other text.

It was noted that this Rule 1.4 provided the first occasion to consider the substantive use of the concept of informed consent, the definition of which in Rule 1.0 had been previously noted. There was no objection to the use of the defined term in this instance.

Upon motion and second, the Subcommittee's recommendation to adopt Rule 1.4 as proposed by the *Ad Hoc* Committee was approved.

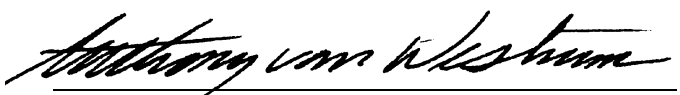
L. *Postponement of Further Discussion on Subcommittee's Report*

The vote on Rule 1.4 took the meeting to the noon hour. After a short discussion, it was agreed that the Committee would not meet to consider Rules 1.5 and 1.6, which the Subcommittee has already reported upon, prior to the next scheduled Committee meeting on December 3, 2004.

V. *Adjournment; Next Scheduled Meeting.*

The meeting adjourned at noon. The next scheduled meeting of the Committee will be on Friday, December 3, 2004, from 9:00 a.m. to noon, in the Supreme Court Conference Room.

RESPECTFULLY SUBMITTED,



Anthony van Westrum, Secretary

[These minutes are as approved by the Committee at its meeting on December 3, 2004.]

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COLORADO SUPREME COURT
STANDING COMMITTEE ON THE RULES OF PROFESSIONAL CONDUCT
MINUTES OF MEETING
(Sixth Meeting of the Full Committee)
December 3, 2004

Chair Marcy Glenn called the meeting to order at 9:10 a.m. Present: Justice Michael L. Bender, Michael H. Berger, James A. Casey, Cynthia F. Covell, Marcy Glenn, Cecil F. Morris, Jr., Kenneth B. Pennywell, William D. Prakken, Henry Richard Reeve, John M. Richilano, Boston H. Stanton, Jr., David W. Stark, Bryan S. Van Meveren, Eli Wald, James E. Wallace, Judge John R. Webb, E. Tuck Young. Those absent who had contacted Marcy Glenn were Nancy Cohen, John Gleason, David Little, Judge William Lucero, and Anthony van Westrum. Bill Prakken and Bryan Van Meveren were present by telephone.

Minutes: The minutes of the meeting of October 1, 2004 were approved unanimously.

Meeting Dates: The Chair recommended meeting every other month, and scheduled the next meeting for February 4, 2005 from 9:00 a.m. - noon.

Discussion of Ethics 2000 Revisions to Rules of Professional Conduct:

Rule 1.5 (Fees)

Subcommittee Chair Michael Berger reported that the Ad Hoc Committee had conformed the Ethics 2000 version of Rule 1.5 to include Colorado provisions re: contingent fees and greater protection to the client that derived from the *Sather* case. The Subcommittee basically agreed with the Ad Hoc Committee with a couple of changes. The Ad Hoc Committee said if a lawyer makes a change to the fee basis or rate, the lawyer must comply with Rule 1.8(a) (business transaction with client). The Subcommittee doesn't think the business transaction rules should apply to the initial fee agreement or if the fee is changed to the client's benefit (e.g., fee reduction). Rule 1.8(a) should apply to fee increases. The Subcommittee changed the title to add "and expenses" and limited the requirement of Rule 1.8(a) compliance to circumstances in which a change may reasonably be expected to increase the fees/expenses.

The members discussed the Subcommittee's recommendation, including fee-splitting and "joint responsibility," how annual fee increases should be addressed, other changes in the rate or basis of the fee during the course of representation, when a change in the fee agreement "bestows an additional benefit" on the lawyer, and what happens when the client gets behind in payments. Members expressed concern that the Subcommittee's formulation requires the lawyer to subjectively evaluate each case for a "material change."

Other members noted that if you have a fee agreement letter with a client, and the client is not in breach, you are stuck with that arrangement or must comply with Rule 1.8(a). The lawyer must address changes in advance to avoid the application of Rule 1.8(a).

Berger summarized the options as (1) amend the comment, (2) amend the language of Rule 1.5(b), or (3) no change at all.

It was moved and seconded that Rule 1.5(b) be adopted with most of the changes the Subcommittee had recommended, so that the second sentence would read as follows:

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 language proposed by the Subcommittee which reads, "which may reasonably be expected to increase the fees or expenses payable by the client" would be moved to the comment along with discussion of what is material.

Discussion followed.

> Motion: "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)." Comment to state that changes are those reasonably expected to increase fees/expenses; changes in basis or rate; changes clearly anticipated to benefit client so substantially that they merit being memorialized (a small writeoff not being material); any material changes to Fee Agreement generally.

The motion passed unanimously.

Informed Consent.

Another member expressed concern about the concept of informed consent, which is found throughout the rules, and should be discussed further. The Chair recommended that "informed consent" issues be reviewed whenever the phrase is used.

Rule 1.6 (Confidentiality of Information)

The Subcommittee decided to recommend no changes to Rule 1.6(a). It has been in effect for a number of years without problems.

Rule 1.6(b) never requires disclosure adverse to a client. Rather, it permits certain disclosures. Some states have mandatory disclosure but Colorado does not and the ABA does not.

The members discussed "permissive" disclosure vs. mandatory disclosure at length, including how the public views lawyers who withhold information, and the effect on the system. Rule 1.6(a) reflects the view that clients should be encouraged to tell their lawyers everything relevant to the representation without fear of disclosure to third parties.

The Committee discussed revising Rule 1.6(b)(2) to include permissive disclosure to "prevent a client from committing a crime" or "prevent a client from committing a fraud that is reasonably certain to result in substantial interests or property of another…"

The Committee discussed concern about uniformity among states especially because lawyers have corporate and individual clients engaged in the same conduct in different states.

The Subcommittee recommendation was moved and seconded, discussed and amended.

Extensive discussion followed, regarding the following subjects: the meaning of "crimes" and "fraud"; misuse of the lawyer's services; revealing the intention of the lawyer's client to commit a crime vs. revealing that a non-client intends to commit a crime; intention to commit a crime vs. commission of a crime; serious crime vs. death/bodily injury crime; felony vs. misdemeanor.

A motion was made and seconded, to table and send the rule back to the Subcommittee to work on comments for the rule as proposed in the motion.

The motion to table passed.

The Committee directed the Subcommittee as follows:

1. Revise Rule 1.6(b)(1) to read: "to prevent reasonably certain death, substantial bodily harm or the commission of a serious crime;"

2. Explain the meaning of a "serious" crime in new comment language;

3. Delete "fraud" in Rule 1.6(b)(2);

The Committee determined that use of the phrase "informed consent" in Rule 1.6 not a problem.

Rule 1.7 (Conflict of Interest: Current Client)

The Subcommittee endorses the Ad-Hoc Committee's approval of Rule 1.7 in the interest of uniformity. The Reporter's Comment to Ethics 2000 Rule 1.7 says it is not supposed to be a significant change. However, some Committee members perceived certain differences from the substance of the current rule.

It was moved and seconded to adopt the Subcommittee's recommendation to adopt the ABA amendments to Rule 1.7. In addition, the comment should be revised to state that this rule is not intended to be a substantive change from the former Rule 1.7.

The motion passed.

Rule 1.8 (Conflict of Interest: Current Clients: Specific Rules)

Berger stated that the Subcommittee wanted to adopt the Ad Hoc Committee recommendation, but was concerned about imputing a Rule 1.8(a) prohibition to a lawyer who has nothing to do with the business relationship with the client. The Subcommittee also made minor revisions to the comments.

It was moved and seconded to adopt the Subcommittee's recommendation.

The Committee discussed the risks under Rule 1.8(f)(1) to which the client must give informed consent. A member inquired how "informed consent" differs from "consult" or "after consultation." "Informed consent" is defined in the medical context and carries with it an entire body of law. This body of law might be imported into the legal field based on the use of "informed consent" in the Rules. The public has a perception of "informed consent" from the medical field, and expects it to be a comprehensive list of all the bad things that could happen. Also it may impose a broader duty than actually exists. However, the ABA Reporter's Comments note that the phrase is intended to be a consistent way of dealing with different formulations in the rules – "consent after consultation" "in writing" etc., so "informed consent" might not be read as creating a new duty in the lawyer.

Discussion of Rule 1.8(e)(1). The proposed amendment will allow some lawyers to take on cases they would not otherwise take because it allows advancement of costs and expenses. A member stated that this is an access to justice issue. Another member stated that the rule validates existing practice. There is no evidence that the rule change would result in a larger number of frivolous lawsuits.

This is not a change from the prior ABA Model Rules. The Colorado rule is more restrictive than the old Model Rules.

A motion to approve the Subcommittee's recommendations regarding Rule 1.8 was seconded and the motion passed.

Rule 1.9 (Duties to Former Clients)

Berger stated that the ABA Ethics 2000 Commission made almost no changes to Rule 1.9. The amended rule retains the "same or substantially related" standard for former client conflicts, although the case law varies in different jurisdictions as to what the phrase means.

The Ad Hoc Committee and the Subcommittee recommended adoption of the Ethics 2000 amendments.

It was moved and seconded to adopt the Subcommittee recommendation. The motion passed.

The meeting was adjourned at approximately 12:00 p.m.

Minutes Prepared by Cynthia Covell and John Webb

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COLORADO SUPREME COURT

STANDING COMMITTEE ON THE RULES OF PROFESSIONAL CONDUCT

Approved Minutes of Meeting of the Full Committee
On January 21, 2005
(Seventh Meeting of the Full Committee)

The seventh meeting of the Colorado Supreme Court Standing Committee on the Rules of Professional Conduct was convened at 1:00 p.m. on Friday, January 21, 2005, by Chair Marcy G. Glenn. The meeting was held in the Supreme Court Conference Room on the fifth floor of the Colorado State Judicial Building.

Present in person at the meeting, in addition to Marcy Glenn and Justice Michael L. Bender, were Michael H. Berger, Nancy L. Cohen, Cynthia F. Covell, John S. Gleason, David C. Little, Judge William R. Lucero, Cecil F. Morris, Jr., Kenneth B. Pennywell, John M. Richilano, Henry Richard Reeve, Alexander R. Rothrock, Anthony van Westrum, Eli Wald, James E. Wallace, Judge John R. Webb, and E. Tuck Young. Excused from attendance were Justice Nathan B. Coats, David W. Stark, Bryan S. VanMeveren, and Lisa M. Wayne. Also absent were James A. Casey, Peggy E. Montaño, Judge Edward W. Nottingham, Scott R. Peppet, and Boston H. Stanton, Jr.

I. *Meeting Materials; Minutes of December 3, 2004 Meeting.*

The Chair had provided a package of materials to the members prior to the meeting date. Minutes of the sixth meeting of the Committee, held on December 3, 2003, were, however, not available for review and approval.

II. *Subcommittee on Ethics 2000 Rules.*

The Chair invited Michael Berger, chair of the Subcommittee on the Ethics 2000 Rules, to report on the Subcommittee's activities to date. Berger has been providing the Committee members with a running Interim Report, grown to nearly sixty pages at this stage.

A. *Overview of Subcommittee Deliberations.*

Berger reported that, following the meeting of the full Committee on December 3, 2004, the Subcommittee returned to Rule 1.6, on confidentiality, to incorporate the decisions made by the full Committee. One of those decisions was to expand the model Ethics 2000 exception that would permit a lawyer to disclose information relating to the representation of a client [sometimes referred to in these minutes as disclosure of a client's confidences or of client information] if the lawyer reasonably believed that disclosure was necessary to prevent a crime (or fraud) "that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services." Unlike the 1983 Kutak Model Rules, the existing Colorado rule permits a lawyer to "reveal the intention of the lawyer's client to commit a crime and the information necessary to prevent the crime," and the Committee had determined at its December 3, 2004 meeting to turn in that direction, although it would

narrow the existing Colorado exception to just "serious crime." As so amended, Rule 1.6(b)(1) would read—

> A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary . . . to prevent reasonably certain death, substantial bodily harm, or the commission of a serious crime;

—and the narrower reference to "crime" in Rule 1.6(b)(2) would be deleted.

The Subcommittee also added Comment 6A to Rule 1.6 to explain the parameters of the "crime" exception. As Berger noted, the comment makes it clear that whether a crime is "serious" is not dependent on the crime's classification as a felony but, rather, on its potential to cause injury to third persons. The comment reads as follows:

> [6A] Paragraph (b)(1) also permits disclosure reasonably necessary to prevent the commission of a "serious crime." For purposes of Paragraph (b)(1), a "serious crime" is a crime that is reasonably likely to result in death, substantial bodily injury or substantial injury to the financial interests or property of another. Whether a crime is a "serious" crime within the meaning of Paragraph (b)(1) is not determined exclusively on the basis of whether the crime constitutes a felony. Certain misdemeanors, such as driving under the influence of alcohol or controlled substances may have a great potential for harm to others and may, under appropriate circumstances, constitute a "serious crime." Other crimes, classified under the law as felonies, may not have the potential to cause such harm to others and thus, for the purpose of Paragraph (b)(1), would not be considered to be "serious crimes."

In the course of the Subcommittee's deliberations, one of its members raised the issue of what client disclosures a lawyer might make in the course of checking conflicts when joining a law firm. Disclosing what matters the lawyer and his former firm have handled is a common practice in that context, mandated as a practical matter by the conflicts rules — Rules 1.7, 1.9, and 1.10, — but no rule or comment speaks to it, and it appears that no other jurisdiction has dealt with the question. The Subcommittee was unable to craft an additional exception to the black letter text of Rule 1.6 for such conflict-checking but added the following comment to characterize such checking as "impliedly authorized":

> [5A] Similarly, a lawyer is impliedly authorized to disclose certain limited non-privileged information protected by Rule 1.6 in order to conduct a conflicts check to determine whether a current representation may be continued or a new representation may be accepted consistent with Rules 1.7-1.12. Thus, for conflicts checking purposes, a lawyer usually may disclose, without express client consent, the identity of the client and the basic nature of the representation to insure compliance with Rules such as Rules 1.7, 1.8, 1.9, 1.10, 1.11 and 1.12. Even this basic disclosure, when such disclosures are made between firms for the purpose of complying with Rules 1.10, 1.11 and 1.12, may materially prejudice the interests of the client or former client. In those circumstances, disclosure is prohibited without client consent. In all cases, the disclosures must be limited to the information essential to conduct the conflicts check, and the confidentiality of this information must be agreed to in advance by all lawyers who receive the information.

Berger admitted that the position that such disclosure is "impliedly authorized" by the existing text of Rule 1.6 was "a bit of a stretch." All would agree that a lawyer who is considering undertaking a new matter can make the appropriate disclosures to other lawyers within his existing law firm in order to clear conflicts; but it is quite a different matter when the disclosure to make those kinds of disclosures to lawyers in another law firm, with whom the disclosing lawyer is not yet affiliated. While there was some opposition within the Subcommittee to adding any room, even in a comment, for an exception countenancing such disclosure, a majority of the Subcommittee had approved the addition of Comment 5A to Rule 1.6, quoted above.

The Subcommittee also expanded Comment 15 to Rule 1.6 to enlarge the discussion of how the disclosure provisions — Rules 1.6, 3.3, 4.1, etc. — interrelate. Rule 1.6 itself does not mandate any disclosure; although it permits some disclosures in the lawyer's discretion, there is no discipline of the lawyer chooses not to disclose. Some of the other rules similarly permit disclosure in the lawyer's discretion, while yet others mandate disclosure. And some of those which mandate disclosure do so only if the disclosure would be permitted by Rule 1.6(b), while others mandate disclosures that Rule 1.6 would itself otherwise prohibit. Expanded Comment 15 is intended to warn lawyers of these complexities. As amended, Comment 15 would read—

> [15] Paragraph (b) permits but does not require the disclosure of information relating to a client's representation to accomplish the purposes specified in paragraphs (b)(1) through (b)(6). In exercising the discretion conferred by this Rule, the lawyer may consider such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction and factors that may extenuate the conduct in question. A lawyer's decision not to disclose as permitted by paragraph (b) does not violate this Rule. Disclosure may be required, however, by other Rules. Some Rules require disclosure only if such disclosure would be permitted by paragraph (b). For example, Rule 4.1(b) requires a lawyer to disclose material facts to third persons when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6. See also Rules 1.2(d), 8.1 and 8.3. Other rules permit or require disclosure regardless of whether such disclosure is permitted by this Rule. For example, Rule 1.13(c) permits certain disclosures even when such disclosures would otherwise be prohibited by this Rule. And, Rule 3.3 requires disclosure in some circumstances regardless of whether such disclosure is permitted by this Rule. See Rule 3.3(c).

Berger then turned to Rule 1.6(b)(4), which permits a lawyer to make disclosures of client information to the extent the lawyer believes is reasonably necessary "to secure legal advice about the lawyer's compliance with these Rules." This exception had been added by Ethics 2000 and was approved by the ABA Ethics 2000 / Colorado Rules of Professional Conduct Committee (the "*Ad Hoc* Committee"). He noted that, as drafted, the exception ostensibly applies only to legal advice about compliance with *the Rules* and does not permit the lawyer to make any disclosures of client information in the course of seeking legal counsel to ensure the lawyer's compliance with other law outside the Rules. David Little has questioned that limitation, both as a member of the Subcommittee and by way of a letter, dated January 13, 2005, which the Chair had separately provided to the Committee members. Berger described the majority view of the Subcommittee on this point as follows: There was some sentiment for Little's concern, but the Subcommittee was generally of the view that, when a client engages a lawyer for a representation, the client probably does not anticipate that the lawyer will turn around and disclose the client's confidences to a second lawyer — who, although perhaps having more expertise on a particular matter than the first lawyer, has not been engaged for the benefit of the client. Accordingly, the Subcommittee

decided not to provide a blanket rule permitting such disclosure and rejected Little's proposal; it stayed with the ABA's Ethics 2000 text without expansion.

B. *The "Serious Crime" Exception of Rule 1.6(b)(1).*

Following Berger's overview of the Subcommittee's action to date, one member returned the discussion to the "serious crime" exception that has been added to Rule 1.6(b)(1). While stating that he had no philosophical concern or other quarrel with the obvious intention of the proposed changes, the member noted that the ABA's model version of Rule 1.6(b)(1) and (2) makes a substantive distinction between death or bodily harm to a person (Rule 1.6(b)(1)) on the one hand and, on the other hand, harm, by way of a crime or fraud, to a person's financial interests or property (Rule 1.6(b)(2)): For a risk of injury to financial interests or property to be disclosable under Rule 1.6(b)(2), the lawyer's own services must be implicated, but that is not a factor if death or bodily harm is at issue under Rule 1.6(b)(1). The changes proposed by the Subcommittee to the black letter of the Rule — shifting "crime" from Rule 1.6(b)(2), with its requirement that the crime involve financial interests or property and the lawyer's own services, to Rule 1.6(b)(1), where those additional elements need not be present — extinguish all of those elements in the concept of a disclosable crime, yet Comment 6A still speaks of a crime involving substantial harm to the financial or property interests of another person as if that were still an element of the exception. This member asked, in essence, for further work on the comment to provide better guidance about what elements are or are not required for disclosures under the two sub-rules as they have been modified from the ABA model. (A further comment by this member, noted below in connection with the discussion of a continuing crime, indicated his preference would be for the concept of "serious crime" in Rule 1.6(b)(1) to be re-limited to those crimes that injure financial interests or property.)

That same member also expressed his concern about hiding the complex issue of the interplay between the disclosure requirements of the various Rules away in revised Comment 15 to Rule 1.6. He noted that Rule 1.6(b)(1) and Rule 1.6(b)(2) give a great deal of discretion to the lawyer to make disclosure about a crime or fraud while Rule 4.1(b) *requires* disclosure in that same context — "[A] lawyer shall not knowingly . . . fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client" — unless the disclosure is prohibited by Rule 1.6. But, as noted, Rule 1.6 does not impose much restriction in that context, so Rule 4.1(b) is in fact a broad mandate: If something must be said to avoid assisting a criminal or fraudulent act by a client, the lawyer must say it, because Rule 1.6 is not like to prohibit the lawyer from doing so. The member believed that this interplay between these two Rules is not well-understood by lawyers and needed to be highlighted more effectively than is done in revised Comment 15.

That member had a third point to make, as well. The ABA model version of Rule 1.6 does not apply easily to past criminal acts that have continuing effects. For example, a lawyer may negotiate a loan package and later learn that the client, a borrower, made false statements regarding its financial condition. When the lawyer seeks the client's voluntary correction of the statements, the client terminates the lawyer's services. But, at the time the lawyer's services are terminated by the client, the loan commitment is only partially drawn down, and the lender will continue to rely on the fraudulent disclosures as it permits further draws. Rule 1.6 (b) does not permit a lawyer to make disclosures about past fraud but, rather, only disclosures that may stave off future fraud. Yet the fraudulent statements here have already been made, though there may yet be future harm to the lender as it makes further advances on the basis of those statements. It is not clear that the lawyer can make

a disclosure under Rule 1.6(b)(2) to protect the lender against those advances. In short, this is an example of a past act that has future consequences. The Rule should, this member said, give the lawyer discretion to make the disclosures reasonably necessary to avoid the future harm. The member understood that ethics commentators have agreed that the Rule probably does not now give that discretion but should.

Another member noted that similar past-crimes-future-consequences examples can be found in connection with environmental crimes involving past discharges of hazardous wastes. He agreed that it should be made clear in the Rule that the lawyer can make disclosures to avoid the future harm.

Berger agreed that Rule 1.6(b) as drafted contemplates the avoidance of a future crime or fraud, not the avoidance of future harm from a prior criminal or fraudulent act. A member suggested that the text be clarified to refer to "future acts" as distinguished from past or present acts. Another member suggested that the Subcommittee's version of Rule 1.6(b)(1) be amended by inserting the concept of continuation, so that it read, "to prevent reasonably certain death, substantial bodily harm, or the commission or continuation of a serious crime." The member who had begun this discussion — and who had also sought to reattach the concepts of financial and property injury to the concept of "serious crime" in its new location in Rule 1.6(b)(1) — agreed but again noted that those concepts, too, should be added to "serious crime."

A member responded that he had no view on whether a financial crime is necessarily "serious." But, as a critique of the Subcommittee's proposed Comment 6A to Rule 1.6(b)(1) — "Certain misdemeanors, such as driving under the influence of alcohol or controlled substances may have a great potential for harm to others and may, under appropriate circumstances, constitute a 'serious crime.'" — he agreed that certain crimes statutorily ranked as misdemeanors may nevertheless have serious consequences and thus be "serious crimes" for purposes of that provision. Clearly, driving under the influence, as suggested by the just-quoted portion of the comment, can have serious consequences — automobile accidents — but that, he said, is not a good example to use here. That crime is a "status crime"; it is caused by the illness of alcoholism. How does a lawyer prevent it from happening again, in the future? Assume, he suggested, that the lawyer's client drove drunk to the DUI hearing; is the lawyer required or permitted to present evidence of the client's current drunkenness against the client's interests at that very hearing? This member thought it would be better not to use that example in the comment but, rather, to say merely that some misdemeanors may have serious consequences and thus be serious crimes. He also suggested that, as officers of the law, we drafters might conclude that we should leave it to the Legislative Branch to decide — by its classification of crimes as felonies or misdemeanors — to determine what is a "serious crime" worthy of disclosure by the lawyer and to provide a bright line in the Rule itself by referring to "felony" instead of "serious crime."

A member who had not previously spoken noted that Rules 1.6(b)(1) and (2) speak of "preventing" a crime or fraud and thus necessarily carry the concept of futurity. She argued that adding "continuation," as another had suggested, would in fact muddy the existing concept of futurity. She also asked whether it is intended that the Rule no longer require a belief that the client truly intends to cause death or bodily injury, or truly intend to take an act that would be criminal or fraudulent, as opposed to just "shooting off his mouth"? And, are we talking about "serious" financial misconduct? What financial crime could there be that was not a felony?

In response, another member, who is a member of the Subcommittee and noted that he was in the minority on the question of adding "serious crime" to Rule 1.6(b)(1), argued that we have created a "redundant ambiguity": The ABA model text already includes acts leading to death or serious bodily injury, so it already encompasses serious crimes that end in those results. Necessarily, then, the addition of the words "serious crime" to Rule 1.6(b)(1) expands its coverage to crimes other than those involving death or bodily injury, and logically those other categories of crimes would be those which involve injury to financial interests or property. That expansion is reflected in the second sentence of the Subcommittee's suggested Comment 6A: "For purposes of Paragraph (b)(1), a "serious crime" is a crime that is reasonably likely to result in death, substantial bodily injury *or substantial injury to the financial interests or property of another*." But Rule 1.6(b)(2), although now limited to "fraud that is reasonably certain to result in substantial injury to the financial interests or property of another," must still cover serious crimes involving fraudulent acts; yet unlike Rule 1.6(b)(1), it does so only if those crimes involve the lawyer's services. In short, said this member, where we need precision we have sown confusion. He suggested that we revert to this division: Rule 1.6(b)(1) should cover acts leading to death or bodily injury and acts that are serious crimes, while Rule 1.6(b)(2) should cover fraud involving the lawyer's services. To another member's rejoinder that, with that structure, the lawyer would not be permitted to disclose fraud in which the lawyer's services were not used, the member responded that the cure would be to strike the element of the lawyer's services from Rule 1.6(b)(2).

A member noted that, at its December 3, 2004 meeting, the full Committee had decided not to retreat from the existing Colorado rule as to crime — which is more permissive than the ABA model Ethics 2000 version — except for the addition of the adjective "serious."

Berger expressed his opposition to a member's suggestion that these topics be sent back to the Subcommittee for more consideration.

The member who had pointed out the "redundant ambiguity" of the proposed rule suggested returning to the ABA model Ethics 2000 structure for both Rule 1.6(b)(1) and (2) but deleting the required element of the lawyer's services. That is, he would have the two provisions read as follows:

> (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
>
> (1) to prevent reasonably certain death or substantial bodily harm;
>
> (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another;

That suggestion found favor with at least one other member.

Another member examined the ABA's structure, noting that the ABA required that the lawyer's services be implicated for fraudulent acts and crimes involving financial interests or property but not for acts that risk death or substantial bodily harm. The Subcommittee' proposal is broader than the ABA's version only as to non-personal crimes but not as to fraudulent acts. We need, she said, to understand our options: Do we want to continue the existing Colorado rule permitting disclosure as to any crime, or do we want to narrow that to include only crimes involving injury to financial interests or property and in which the lawyer's services have been used (crimes involving personal injury or death being separately covered by Rule 1.6(b)(1) although without use of the word "crime")? She

noted that it had already been suggested that the latter approach be taken although with an abandonment of the limitation to crimes that involve the lawyer's services.

The member who suggested abandonment of the limitation to crimes that involve the lawyer's services expressed his belief that the current Colorado rule was too broad — it would permit "disclosure of the client's intention to put slugs in the parking meter." But determining whether a particular pending crime was "serious" or not is too troublesome to interject into the Rule. Putting "serious crime" in Rule 1.6(b)(1) and deleting "crime" from Rule 1.6(b)(2) just creates ambiguity, as he had noted before, since, if the "serious crime" involves a financial or property injury, it is gets covered both by Rule 1.6(b)(1) and — if it involves fraud and the lawyer's services — by Rule 1.6(b)(2) as well. We have created a "redundant ambiguity."

A member remarked that she had not previously focused on how broad the existing Colorado rule was — covering slugs in parking meters — and accordingly she felt it was appropriate to narrow that exception. Another, however, said that he had thought the full Committee had determined at its December 3, 2004 meeting to permit disclosure of "serious" financial crimes even if the lawyer's services were not implicated.

A member suggested separating "crime" from "serious fraud" in the ABA's model version of Rule 1.6(b)(2).

Another member asked whether the proposal to strike the requirement that the lawyer's services be involved included Rule 1.6(b)(3) — "to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services" — as well as Rule 1.6(b)(2).

A member asked what was intended with respect to the discrete circumstance where a client discloses to the lawyer that a friend of the client's intends to commit a crime: Do we intend to permit disclosure of that information, too? Another suggested that to do so would be to broaden the scope of the exceptions in Rule 1.6(b) too much. But a third member asked, if the purpose is to protect third persons, what the difference would be if the harm is to come from the client or from the client's friend. In response a member suggested this example: Perhaps the client has disclosed to the lawyer that the client's child is bent on harming another person and the client is seeking the lawyer's assistance in stopping that harm. The client would not want the matter disclosed by the lawyer to law enforcement authorities and would not have disclosed the matter to the lawyer if that were likely to occur. To permit such a disclosure under Rule 1.6(b) would be a further, incremental, unwarranted cutback in the duty confidentiality owed to one's client.

The member who had expressed that concern about an incremental chipping away at the duty of confidentiality proposed that the Committee go back to the ABA model Ethics 2000 proposal. He noted the need to avoid ambiguity in this important rule and pointed out that the element of the lawyer's services has been thought to be very important to the existence of the Rule 1.6(b) exceptions. He suggested that we do not want to permit the lawyer to become a "free-ranging cop" regarding the client's activities. Confidentiality is the key to the lawyer-client relationship, and we should be careful about the dents we permit in that relationship. The ABA has taken the proper approach, this member thought. It properly permits the lawyer to act to protect life and body regardless of the circumstances from which harm might come to them. But, as to financial interests and property, the ABA

version is properly limited to circumstances in which the lawyer's services have been involved.

But another member noted the recent examples involving massive public-company fraud and suggested the example where such a wrong-doer makes a disclosure of pending corporate fraud to his divorce lawyer, who has no role to play in the corporation's affairs or the wrong-doer's actions as a corporate officer. The ABA version would not permit the divorce lawyer to disclose the pending fraud, even if he has learned all of its details. The member who had suggested going back to the ABA version of the Rule's exceptions responded that other lawyers are often already involved in the circumstances surrounding the pending corporate fraud and can be relied upon to make their own disclosures of that fraud under the ABA version of Rule 1.6(b)(2).

Another member remarked that we have identified serious problems with the ABA version but now find ourselves talking about going back to it as a compromise. Rather, he thought, we should try to solve the problems we have seen rather than be defeated by them. A third member, however, expressed his view that to return to the ABA version would not be a compromise but, rather, the right answer: Confidentiality should trump harm to purely financial interests or property, unless the lawyer's services have been used to cause that harm. A fourth member spoke up in agreement that the ABA has taken the right way on this matter.

Upon motion, the Committee determined to revert to the ABA model Ethics 2000 text for Rule 1.6(b)(1) and Rule 1.6(b)(2).

Seeing the result of that motion, a member said he was mystified by this retreat from the decision clearly reached at the December 3, 2004 meeting to preserve the breadth of the existing Colorado rule that permits the disclosure of any pending crime. He asked if we really intended to abandon the attempt to clear up the admitted ambiguity as to a continuing crime and noted that the decision on the motion means that the Subcommittee's propose Comment 6A would be deleted. It was agreed that this was so.

C. *Consultation about a Lawyer's Duties under Rule 1.6(b)(4).*

The Chair then asked that the Committee take up David Little's concerns about Rule 1.6(b)(4) and his letter of January 13, 2005.

Little told the Committee that his concern was with the relative narrowness of Rule 1.6(b)(4), which excepts from the general rule of confidentiality only a lawyer's consultation with another lawyer about compliance with "these rules." By negative implication, this narrow statement may now preclude what has been historically accepted as an exception to the rule of confidentiality: That lawyers may secure legal advice about their other obligations to clients and about their own obligations to comply with laws generally, even if those obligations do not arise under the Rules of Professional Conduct. Examples are common law obligation, regulatory obligation, and the like that are not addressed in the Rules themselves. This is a practical concern for Little, who, for the last ten years, has participated in a lawyers' malpractice advice hotline sponsored by a malpractice insurance carrier. The lawyers who have provided advice through that hotline have carefully considered how the callers deal with necessary client disclosures in the course of obtaining that kind of consultation. The advisors wonder, "Have I interfered with the independence of the caller's representation of the client, or are there mistakes that can mitigated?" More than 10,000 lawyers have obtained consultation through the hotline.

That's a lot, Little noted. He added that most of the callers are lawyers who are in solo practice and have no opportunity to discuss their issues with law partners who are within the client's bounds of confidentiality. These callers have no support mechanism other than the hotline.

Little pointed out that, if the caller and the consulting lawyer did not establish a lawyer-client relationship by the fact of the call to the hotline service, then the consulting lawyers would be obligated to report the callers to Regulation Counsel pursuant to Rule 8.3(a). Accordingly, care is taken by the hotline consultants to establish a formal lawyer-client relationship between themselves and the callers, "with a lot of rigamarole." That process includes a careful conflict check for each inquiry, and that requires disclosure of the identity of the person who is calling lawyer's own client and of opposing parties. Little remarked that only on one occasion has an actual conflict been discovered.

Little's concern is that Rule 1.6(b)(4) is too limited in scope. The Rule, by negative implication, clearly excludes consultation on any legal obligation that a lawyer may have, outside these Rules, such as fiduciary obligations, avoidance of negligence, etc. Little expressed his fear that someone will read and adopt that negative implication. He noted, by way of contrast, that the next provision, Rule 1.6(b)(5), expressly permits a lawyer to disclose client information in order to mount the lawyer's defenses against the client's claims after the fact, and found it odd that the lawyer cannot make the same disclosures before the fact and thereby avoid harm to the client in the first place. That is, pre-harm disclosure for the purpose of avoidance would seem to be an *a fortiori* case for permitting disclosures, but the Rule has it backwards. Little added that in neither of the cases covered by Rule 1.6 (b)(4) and Rule 1.6 (b)(5) has the client actually anticipated that the lawyer will be disclosing any information regarding the representation for the lawyer's own purposes.

Little proposed that either Rule 1.6(b)(4) be dropped and the state of play be left as it is under the current Rules — with no statement from which to find the negative implication that is contained in Rule 1.6(b)(4) — or that the Rule be modified to read, "A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary . . . to secure legal advice about the lawyer's compliance with these Rules or other obligations to the client." Little made a motion to that effect, which was seconded.

Another member referred the ABA's reporter's notes on this rule, which speak of an "implied authorization" for a lawyer to seek advice about the lawyer's "legal obligations" and claim that the intention of Rule 1.6(b)(4) is to "clarify" that authorization. Those notes, this member noted, say more than does the rule itself, which is clearly limited to advice concerning obligations under the Rules of Professional conduct and does not include other obligations. That is, the rationale expressed in the notes does not support the text of Rule 1.6(b)(4).

Little asked this question: If, as it does, Rule 1.6(b)(4) gives the lawyer discretion to make disclosures necessary to obtain advice about obligations under the Rules, is a third party who is injured by the lawyer's failure to obtain that advice entitled to sue the lawyer for failure to exercise that discretion? Another member responded that he was aware of cases in which that claim has been made. If that is the case, Little argued, then the lawyer should be permitted to disclose client information to the extent necessary to get advice on whether the lawyer has a duty under tort law to exercise the discretion to disclose, say, a pending crime, even if failure to make such a disclosure would not be a violation *of these rules* and, therefore, the question of disclosure would not fall within Rule 1.6(b)(4).

A member referred to Comment 10 to Rule 1.6(b), which attempts to explain Rule 1.6(b)(5):

> . . . . Paragraph (b)(5) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend also applies, of course, where a proceeding has been commenced.

In this member's view, the ABA had tried to strike a balance between disclosure for the lawyer's benefit and the protection of clients' confidences and struck the balance in favor of the latter. Another member, however, disagreed with that analysis and said she did not see any application of the quoted commentary to Rule 1.6(b)(4). Little's situation, she noted, arises earlier in time — before the client is even aware of a problem — than is contemplated by this commentary.

A member suggested that Rule 1.6(b)(4) be amended to read, " . . . to secure legal advice about the lawyer's compliance with law."

Another member said he was troubled by several aspects. Little's proposed revision would use new language that would require the addition of a definition to the comments: what are the lawyer's "other obligations to the lawyer's client"? But, in this member's view, expansion to include all "law" would be too broad and would destroy confidentiality. He suggested that the matter be dealt with in a lawyer's engagement agreement. His suggestion related only to the question of competency and was that the engagement agreement advise the client that, to the extent the representation required legal expertise outside the lawyer's competency, the client agreed that the lawyer could make the disclosures necessary to consult with those who had the required expertise. To that suggestion, Little replied that his concern is different and — as had been suggested by another member in discounting the application of Comment 10 to Rule 1.6(b)(4) — arises before the client is even aware that there is a problem but is not of a kind that can be forecast at the time of engagement.

The member who had suggested amending Rule 1.6(b)(4) to permit any consultation regarding "the law" asked whether Little's amendment would cover the situation where a lawyer has a concern about obligations owed to a third person, such as not being negligent in the exercise of the discretion to disclose a client's confidences to avoid bodily injury to that third person. This member suggested striking the text in Little's proposal that limited the consultation to the lawyer's other obligations *to the client*; as modified, Rule 1.6(b)(4) would read, " . . . to secure legal advice about the lawyer's compliance with these Rules or other obligations."

A member asked about the lawyer who says to herself, "I am not competent to advise on this matter, so I consult with an expert in this area of the law." In reply, another member said that implicates Rule 1.1 and competency and thus is covered by the ABA's model text. Yet another member asked, however, whether that was actually the case: Rule 1.6(b)(4) would permit the lawyer to seek advice about whether the lawyer was acting competently as required by Rule 1.1, but that is not the same thing as saying Rule 1.6(b)(4) permits the lawyer to supplement her own range of competency by adding the competency of another lawyer without the client's express consent.

Little pointed out that these Rules are not the only rules governing a lawyer's duties. The lawyer must be able to obtain counsel as to any duty the lawyer owes, not just those that can be found within some one of the Rules of Professional Conduct.

The member who had asked about competency asked Little for an example of a duty that could not be found within the Rules. She pointed out, as her own example to the contrary, that, when she and her client stand before the court and the client is mute when asked by the judge about other DUI occurrences, she has an affirmative duty of candor to the court under Rule 3.3 that will require her to disclose what she knows about such other occurrences and will not be violating her duty *to the client* under Rule 1.6 when she makes those disclosures.

A member pointed out that Paragraph 15 of the Scope section of the Rules itself indicates that there are other laws in addition to the Rules that govern a lawyer's conduct, as Little has pointed out. That provision of the Scope section reads—

> The Rules presuppose a larger legal context shaping the lawyer's role. That context includes court rules and statutes relating to matters of licensure, laws defining specific obligations of lawyers and substantive and procedural law in general. The Comments are sometimes used to alert lawyers to their responsibilities under such other law.

With that recognition of other, extra-Rules duties, this member thought it strange that Rule 1.6(b)(4) would seem to be limited just to the duties that can be identified within the Rules and not include those duties that the Scope admits exist outside the Rules. This member stated his agreement with Little and his concern that — although the members have felt relief as they have been able to find, with each example that they have been able to think of in the course of this meeting's discussion, some basis for saying that this Rule or that Rule contains a relevant duty and thus Rule 1.6(b)(4) would permit the disclosure — there are likely to be other possible examples that involve duties that cannot be found within the Rules and which simply have not been thought of this day. As to those duties, Rule 1.6(b)(4) would preclude disclosures even though the lawyer would clearly be in need of advice.

A member concluded that Rule 1.6(b)(4) as written covers Little's hotline situation. This member felt that, in a "brainstorming situation," the lawyer should obtain the client's consent before making disclosures to another lawyer, and the member could not think of an example of a duty that would not be included within Rule 1.6(b)(4) as written, that is, found within the Rules.

A member replied, however, that Little's concerns were valid and that we wanted to be sure that Rule 1.6(b)(4) accommodated the hotline and the kinds of advice lawyers sought over it. If, however, we adopted Little's alternative suggestion and deleted the model text of Rule 1.6(b)(4), there would be an implication from the "legislative history" that, in Colorado, a lawyer is not permitted to disclose client confidences even when seeking advice about the lawyer's duties *under the Rules*. The member noted that there is case law from other jurisdictions holding that a lawyer's discussion about a client's case with another lawyer within the same law firm is not privileged and the only way to maintain privilege is to take the problem to an outside lawyer as a client of that lawyer.

A member suggested that we add a Colorado comment to Rule 1.6 confirming that disclosures over a hotline are permitted under Rule 1.6(b)(4).

Another member, responding to the competency issue and Rule 1.1, noted that Comment 1 to Rule 1.1 specifically contemplates consultation "with, a lawyer of established competence in the field in question."

A vote was taken on Little's amended motion to amend Rule 1.6(b)(4) to read, "A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary . . . to secure legal advice about the lawyer's duties to the client or compliance with these Rules." The motion failed.

A member's suggestion that the Subcommittee deal with Little's concerns by way of an additional comment was approved by the Committee.

D. *Comments to Rule 1.6.*

Having thus approved the black letter of Rule 1.6 as contained in the ABA's model Ethics 2000 rules, the Committee turned its attention to the comments to that Rule.

The Committee discussed the redundancy found in Comment 13 and Comment 13A on the one hand and Comment 15 on the other hand, both of which cross-reference to Rule 4.1. Berger noted that the redundancy was not created by the Subcommittee, which had merely broken out into a new Comment 13A the *Ad Hoc* Committee's addition of the sentence reading, "Similarly, Rule 4.1(b) requires a disclosure when necessary to avoid assisting a client's criminal or fraudulent act, if such disclosure will not violate this Rule 1.6."

On motion, the Committee adopted the Subcommittee's amended version of Comment 15, quoted above in Section IIA of these minutes. The Committee decided to delay consideration of the Subcommittee's proposed Comment 5A — dealing with disclosures in the course of conflict-checking preparatory to changing law firms — until the Committee had discussed Rule 1.10.

E. *Permitted Screening under Rule 1.10 — in General.*

Berger pointed out that the ABA model Ethics 2000 Rules do not permit a conflicted lawyer to be screened from a case when the lawyer moves from one law firm to another. Instead, if a conflict would be imputed to the lawyer, the lawyer cannot make the move to the other firm. That, he noted, is in contrast to Rule 1.11, which permits such screening when a lawyer who was formerly "a public officer or employee of the government" joins a law firm.

The question of screening arises because of the interplay between the conflicts provisions of Rule 1.7(a)—

> Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
> (1) the representation of one client will be directly adverse to another client; or
> (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

— and Rule 1.9(a)—

> A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests

> of the former client unless the former client gives informed consent, confirmed in writing.

— with the imputation rule of Rule 1.10(a)—

> While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.

Thus, if the lawyer is moving from Firm A — which had represented Client X in a matter and as to which matter the lawyer had, in the words of Rule 1.9(b)(2), "acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter"— to Firm B — which is representing Client Y directly adversely to Client X in the same matter — then the lawyer will be impermissibly conflicted under Rule 1.9(b) because Rule 1.10 will impute Firm B's representation of the opposing party, Client Y, to the lawyer even if the lawyer has no actual involvement on the matter while in the new law firm.[1]

Berger noted that some members of the Subcommittee disfavored any screening provision. Others would permit screening if the lawyer had no substantial participation on Client X's behalf while the lawyer was in Firm A. A third group would permit screening even if the lawyer had substantial participation in the matter on behalf of Client X before shifting to Client Y; Berger characterized the third group as comprising a majority of the Subcommittee.

Berger noted that the ABA's Ethics 2000 Commission had also proposed a screening provision for Rule 1.10, which was rejected by the ABA as a whole and thus is not included in the ABA model Ethics 2000 Rules. The Commission's screening proposal served as the model for the Subcommittee's draft of a screening exception in Rule 1.10(e), although, Berger noted, the Subcommittee looked to the best of the states' modifications and used them to strengthened the requirements for the notice that must be given to Client X. The Subcommittee's proposal reads as follows:

> (e) When a lawyer becomes associated with a firm, no lawyer associated in the firm shall knowingly represent a person in a matter in which that lawyer is disqualified under Rule 1.9 unless:
> (1) the personally disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom;
> (2) the personally disqualified lawyer gives prompt written notice (which shall contain a general description of the personally disqualified lawyer's prior representation and the screening procedures to be employed) to any affected former client and the former client's current lawyer, if known to the personally disqualified lawyer, to enable the former client to ascertain compliance with the provisions of this Rule; and
> (3) the personally disqualified lawyer and the members of the firm with which the personally disqualified lawyer is now associated, reasonably believe that the steps taken to accomplish the screening of material information are likely to be effective in preventing material information from being disclosed to the firm and its client.

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1. The designations "Firm A," "Firm B," "Client X," and "Client Y" are used in these minutes for ease of reference. The terms were not actually used in the course of the discussion, but the minutes that follow using those designations accurately reflect the substance of the reported comments of the members. —Secretary

A member opened the discussion by stating that she understood why Colorado wants such screening: to permit lawyer mobility. But she expressed her concern about the extension of the screening possibility from (a) the lawyer who happened to have been in a firm that had represented Client X but had not herself been involved on the matter to (b) the lawyer who actually rendered services to Client X in the matter. As propose, the screening rule would only require notice to Client X and would not permit Client X to make an objection that the lawyer could not answer simply by saying, "tough beans, I'm making the move." This member understood that Client X might be "a total jerk" and might object without good reason, but the proposed screening rule simply locks Client X out of the issue. She understood that this might be appropriate when Firm B is a mid- to large-size law firm, but the proposal does not distinguish between that situation and the one where Firm B was a two-person law firm. She did not understand how a screen could be effective in the latter case.

Another member noted, however, that giving Client X a veto over the move would do more than merely preclude the lawyer's move to Firm B. It would also give Client X the power to take the position that it will terminate Firm A's representation of it in the matter, thereby damaging Firm A while still preventing the lawyer from moving to Firm B..

A member pointed out that Client X is likely always to feel betrayed by the lawyer's move, even if there is no real risk of disclosures that would benefit Client Y and harm Client X, and she noted that this might be the case in a transactional matter as well as in litigation. She felt that the Subcommittee's proposal struck the proper balance between a client's concerns and the lawyer's interest in mobility, by assuring that the client got notice of the move but could not veto the lawyer's career decision.

A member of the Subcommittee also voice his approval of the proposal, noting that a rule is needed one way or the other, so that the issue is not left to motions to disqualify Firm B. He noted that a motion to disqualify Firm B will be denied by a Federal court if Firm B has instituted adequate screening procedures; and yet the lawyer may still face discipline, as discussed in the Subcommittee's report. He added that there is no clear Colorado law on the efficacy of screening and that opinion that was issued by the Colorado Bar Association Ethics Committee is really out of date. The member referred to a Justice Bender's "pregnant footnote" on the point in the *Peters* case,[2] and reiterated that he favored the proposed screening provision.

Another member of the Subcommittee responded to the previous comment that the issues addressed by the screening proposal can be found in the transactional as well as the

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2. The reference was to footnote 6 in *People ex rel. Peters v. District Court*, 951 P.2d 926 (Colo. 1998), which reads as follows:

> The question of whether this presumption [on which the treatment of attorneys in a firm as one attorney for purposes of loyalty and confidentiality[, which] is based on the presumption that those attorneys have access to confidential information about each other's clients] is rebuttable is beyond the scope of this opinion. Other jurisdictions have held that the presumption of imputed disqualification may be rebutted under certain circumstances. See Atasi Corp. v. Seagate Tech., 847 F.2d 826, 829 (Fed.Cir.1988) (discussing the "peripheral representation" standard); English Feedlot, Inc. v. Norden Lab., Inc., 833 F.Supp. 1498, 1506-07 (D.Colo.1993); Skokie Gold Standard Liquors, Inc. v. Joseph E. Seagram & Sons, Inc., 116 Ill.App.3d 1043, 72 Ill.Dec. 551, 561-62, 452 N.E.2d 804, 814-15 (1983). We have held that under the former Code of Professional Responsibility, the presumption of imputed disqualification is rebuttable in the context of government employees. See Cleary v. District Court, 704 P.2d 866, 873 (Colo.1985).

—Secretary

litigation context by noting that the proposal is, as written, not limited to the litigation context.

Yet another member of the Subcommittee was of the view that more should be required than just notice to the client: The lawyer's move to Firm B should not be permitted unless Client X has affirmatively consent to it after disclosure. He was of the view that the Rule should affirm the primacy of a lawyer's duty of loyalty to the client. In this member's view, clients will not believe that screening will actually protect them, and he would retain the ABA's model approach to the issue, precluding screening as a solution in the absence of client consent. While Firm B and the moving lawyer may say, "We believe this will all be hunky dory," the client is given no choice but to accept that rosy picture.

Another member felt that permitting screening will lead to "the hottest anger" among clients; they will never accept the disloyalty, and he would stick with the ABA's approach, rejecting un-consented-to screening. He felt that the screening proposal was solely for the benefit of the lawyer, not the client. If the Committee is writing rules with the public's and clients' interests in mind, this will not work. Clients are often willing to spend $5,000 to $10,000 to obtain disqualification in these circumstances and will always be angry when these kinds of moves occur.

A member responded to this by noting that, while it is true that clients will never understand the moves, elimination of the possibility of screening will not solve the problem of the highly-specialized lawyer, who is effectively bound by Rules 1.9 and 1.10 to remain with his original law firm because conflicts will always prevent his move to another law firm. In this member's view, it must be possible to design effective screens, and a screening rule, rather than give up and say the moves simply cannot occur.

A member who practices from within a large law firm commented that the law firm has had to forego many desirable lateral hires because of conflicts that clients would not waive. Often the clients were sophisticated parties who could understand the efficacy of a properly designed screen but who were simply saying "we will not do anything to help you out." Yet that is often a matter of strategy; and the member recounted an occasion in which Client X, who had failed to pay Firm A's fees and was therefore no longer being represented by Firm A, nevertheless recalcitrantly refused to consent to a lawyer's move to Firm B. Yet, this member noted, there are counter examples of clients who will lie awake at night worrying that important disclosures will be made to or for the benefit of their opponent, Client Y, despite the screening procedures, if a move from Firm A to Firm B is permitted.

That member also noted that the tension between mobility and improper disclosure is also present in the governmental-service context of Rule 1.11; but that rule has been crafted in recognition of the need to encourage lawyers to provide public and governmental service, or, rather, not to discourage such service by making reentry into private practice unduly difficult.

The member was of the view that the question did not just affect large law firms. While it might be difficult to comprehend an effective screen in a two-lawyer law firm, the rule could provide effective relief in a town having two ten-lawyer law firms. The Committee, this member felt, had an interest in not making inter-firm mobility too difficult.

A member stated her preference for the majority's position on screening over the minority positions, one of which would require affidavits as to the screening procedures

and the other of which would draw a line between litigation and transactional situations. In reply, Berger noted that the Subcommittee had reviewed and rejected those states who had imposed "unbelievable" procedural requirements on the screening.

In response to a Subcommittee member's suggestion that the matter be remanded to the Subcommittee, another member of the Subcommittee said it had already spent a great deal of time on the issue and should not be asked to do more. Either, this member said, the full Committee decides to permit screening without client consent or it doesn't. In his view, screening should be permitted and Client X should not be given a veto.

There are, that member noted, many other states that have adopted a screening rule, and to that Berger added that a clear majority of states that have considered the matter under the Ethics 2000 rules have adopted some screening rule. Another noted that sixteen states permit screening and another five are presently considering doing so.

A motion was made and seconded to approve the Subcommittee's proposal for Rule 1.10(e).

A member then spoke in favor of the minority's position that screening not be permitted for the lawyer who had had a "substantial role" in Firm A's representation of Client X. In this member's view, the concern really is limited to large law firms, and in those law firms the "substantial role" qualifier properly screens out those who should not be permitted to make the move to Firm B without the consent of Client X.

At another member's suggestion, a straw vote was taken to determine whether there was a general consensus to consider some kind of screening procedure, before time was spent considering the minority's position regarding lawyers who had had a substantial role in the representation of Client X by Firm A. On that vote, some kind of screening, without client consent, was favored by ten members and opposed by six

F. *Permitted Screening under Rule 1.10 — the Lawyer with a Substantial Role in the Representation.*

The Committee then took a vote on a motion to adopt the Subcommittee's majority position, which would permit the screening exception even as to a lawyer who had had a "substantial role" in Firm A's representation of Client X. The motion failed, and the Committee then turned to a consideration of that "substantial role" limitation.

A Subcommittee member expressed his concern about the level of complexity that would be injected by the need in many cases to determine whether the moving lawyer had had a "substantial role" to play in Client X's representation. What is the "substantial role" that would preclude reliance on screening? Already the interplay among Rules 1.7, 1.9, and 1.10 disqualifies the lawyer who has acquired "material information" about Client X's matter; no lawyer is precluded from moving from Firm A to Firm B unless the lawyer has that kind of information. Under the minority's position, however, the lawyer who, by definition, has no "material information" about Client X is nevertheless not allowed to move to Firm B if the lawyer had a "substantial role" in Client X's matter. This layering adds up to confusion. Even a low-level associate in a law firm can have a "substantial role" in the handling of Client X's matter. This member opposed the addition of the "substantial role" limitation.

A member who favored the "substantial role" limitation stated that he thought that characterization misread the requirements of Rule 1.9. He did not think that Rule 1.9 involved the "substantial role" issue.

But another member agreed that the "substantial role" limitation would create another evidentiary argument — this one would be about what constituted a "substantial" role as distinguished from an insubstantial role. The member noted that New Jersey uses a "lead counsel" or "primary responsibility" limitation where the minority report would use a "substantial role" limitation, and he thought that was a superior solution. It would avoid an argument over whether fifty hours of library research on a parole evidence issue was "substantial" in a case that involved 100,000 hours of accrued time researching various issues.

Two other members stated that a "primary responsibility" limitation was acceptable to them, in lieu of the "substantial role" limitation, and, on a vote on a motion to that effect, the "primary responsibility" limitation was accepted.

It was noted that the proposed comments to Rule 1.10 no longer match Rule 1.10(e) as the full Committee has amended it, and the Committee decided to send those comments back to the Subcommittee for further consideration in light of the changes to the text of the rule.

G. *Reconsideration of Comment 5A to Rule 1.6 in Light of Rule 1.10.*

As proposed by the Subcommittee, new Comment 5A to Rule 1.6 would read as follows:

> [5A] Similarly, a lawyer is impliedly authorized to disclose certain limited non-privileged information protected by Rule 1.6 in order to conduct a conflicts check to determine whether a current representation may be continued or a new representation may be accepted consistent with Rules 1.7-1.12. Thus, for conflicts checking purposes, a lawyer usually may disclose, without express client consent, the identity of the client and the basic nature of the representation to insure compliance with Rules such as Rules 1.7, 1.8, 1.9, 1.10, 1.11 and 1.12. Even this basic disclosure, when such disclosures are made between firms for the purpose of complying with Rules 1.10, 1.11 and 1.12, may materially prejudice the interests of the client or former client. In those circumstances, disclosure is prohibited without client consent. In all cases, the disclosures must be limited to the information essential to conduct the conflicts check, and the confidentiality of this information must be agreed to in advance by all lawyers who receive the information.

A motion was made and seconded to approve this comment as written.

A member expressed her concern that the comment was broader than the black letter text of Rule 1.6. She was certain that she could make disclosures within her own law firm, in the course of checking conflicts for a new matter, without violating Rule 1.6. Accordingly, she saw no need for the references to Rule 1.7 and Rule 1.8 in this comment. She was concerned about the comment's focus on conflicts-checking within the lawyer's own law firm, as to which no discussion was in fact necessary because the authorization is abundantly clear; and she thought that this focus might raise unintended negative implications that other intra-firm disclosures are not permitted. Other members amplified this concern by pointing to existing Comment 5, which states, "Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of

the firm, unless the client has instructed that particular information be confined to specified lawyers."

Another member questioned whether an unintended implication was created by the statement in the first sentence of the proposed Comment 5A that certain *non-privileged* information may be disclosed for conflict-checking purposes while the second sentence specifically countenanced disclosure of (1) the client's identity and (2) the basic nature of the representation. He asked whether the information that can be disclosed under the second sentence is then, by definition, *non-privileged*.

In reply to the view that it was unnecessary to refer to Rule 1.7 in the comment, a member pointed out that the reference would cover the situation where the moving lawyer was taking his existing Client X with him from Firm A to Firm B, a situation that would not implicate the former-client conflict provisions of Rule 1.9 but did implicate Rule 1.7.

Another member pointed out that the mere disclosure of the identity of a client can cause problems. He suggested that the third and fourth sentences be sharpened to read, "If such disclosure would prejudice a client or former client, it is prohibited without client consent." But that comment led another member to argue that the whole of the comment relates to Rules 1.10 through 1.12 and not to current-client, intra-firm conflict-checking for purposes of Rule 1.7. If one were to strike the references to Rules 1.10, 1.11, and 1.12 in the third sentence, as had been suggested, one would have stated a broader concept, but that would be inappropriate inasmuch as the whole comment is intended to deal only with a lawyer's move from Firm A to Firm B and not intra-firm disclosures. To that, the earlier commentator claimed that he had himself drafted the comment for the Subcommittee and did not read it to be limited to the situation where a lawyer is moving between firms.

Yet another member interjected that he had actually drafted the comment and that he had intended first to state the obvious right of a lawyer to make intra-firm disclosures and to add to that accepted concept a statement that authority is also implied for the disclosure of (1) the client's identity and (2) basic information regarding the representation in the context of a move from Firm A to Firm B and under Rules 1.10, 1.11, and 1.12. To this another member voiced agreement and added the refinement that the comment precludes even that limited disclosure if it would prejudice the client.

Further discussion revealed that all of these members were in agreement that there could be no disclosure of even basic information if it would prejudice the client and, further, that the purpose of the comment is only to add a discussion of the implied authority to make limited disclosures in the moving-firms context, there being no need to discuss the clear authority to make intra-firm disclosures.

The Committee determined to return this comment to the Subcommittee for further work.

H. *Rules 1.11 and 1.12.*

Berger reported that the Subcommittee had modified Rule 1.11 and Rule 1.12 only as required to conform to the changes that had been made to Rule 1.10.

On motion, the Committee approve the Subcommittee's versions of Rule 1.11 and Rule 1.12.

I. *Rule 1.13.*

Berger commented that Rule 1.13 is a complex rule, involving modifications that were adopted by the ABA in the aftermath of the enactment of the Sarbanes-Oxley Federal legislation. As amended, the Rule requires a lawyer to report "up the chain" of the organizational client as far as is necessary to avoid harm to the organization itself. In that respect, Rule 1.13 differs from Rule 1.6, which permits disclosures to prevent harm to third persons.

Subrule (c) of Rule 1.13 is the most controversial of the ABA's modifications to the Kutak version, but, as modified, the Rule still does not require the lawyer to make disclosures outside of the organization. Berger noted, however, that this does not preclude the application of other rules that may mandate disclosures, as the Committee had previously discussed in connection with the Subcommittee's proposed Comment 15 to Rule 1.6.

Berger pointed out that Rule 1.13 contains complex language regarding the lawyer's mental state with respect to the duty to report up the chain of the organization. He reminded us that Reporter Nancy Moore had candidly admitted to us, in her presentation the Committee at its third meeting, on April 16, 2004, that the ABA has not carefully sorted out the various mental states contemplated by the various rules. He indicated the Subcommittee had not undertaken that kind of task, either, with respect to Rule 1.13 but, rather, had adopted the ABA's model text without modification. There is, he noted, a real value to uniformity in this particular rule, where the circumstances at hand with respect to a single organization may span several jurisdictions.

On motion, the unamended text of Rule 1.13 was adopted.

J. *COLTAF Changes.*

The Chair advised the Committee of pending changes to the COLTAF rules to assure conformity to the United States Supreme Court's recent ruling on the IOLTA property-taking argument. As chair of the Ethics 2000 Subcommittee, Berger recommended that the full Committee take up consideration of those changes separately from its consideration of the Ethics 2000 Rules, inasmuch as the latter may not be ready for adoption for some extended period of time yet.

It was noted that one of the proposed changes to the COLTAF rules would permit a lawyer to advance funds to a client to meet living costs; it has been suggested that a standing committee or other organization be formed to review particular cases to determine whether the client's needs were sufficiently dire to warrant the advance.

After some discussion, the Committee decided not to decide now whether to form a separate subcommittee to consider these changes, to send the changes to the Ethics 2000 Subcommittee, or to consider them as a committee-of-the-whole.

III. *Adjournment; Next Scheduled Meeting.*

The meeting adjourned at approximately 4:00 p.m. The next scheduled meeting of the Committee will be on Wednesday, March 23, 2005, beginning at 1:00 p.m., in the Supreme Court Conference Room.

RESPECTFULLY SUBMITTED,

Anthony van Westrum, Secretary

[These minutes are as approved by the Committee at its meeting on March 23, 2005.]

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COLORADO SUPREME COURT

STANDING COMMITTEE ON THE RULES OF PROFESSIONAL CONDUCT

Approved Minutes of Meeting of the Full Committee
On March 23, 2005
(Eighth Meeting of the Full Committee)

The eighth meeting of the Colorado Supreme Court Standing Committee on the Rules of Professional Conduct was convened at 1:00 p.m. on Wednesday, March 23, 2005, by Chair Marcy G. Glenn. The meeting was held in the Supreme Court Conference Room on the fifth floor of the Colorado State Judicial Building.

Present in person at the meeting, in addition to Marcy Glenn and Justices Michael L. Bender and Nathan B. Coats, were Michael H. Berger, Nancy L. Cohen, Cynthia F. Covell, David C. Little, Judge William R. Lucero, Cecil F. Morris, Jr., Henry Richard Reeve, Alexander R. Rothrock, Boston H. Stanton, Jr., David W. Stark, Bryan S. VanMeveren, Anthony van Westrum, James E. Wallace, Judge John R. Webb, and E. Tuck Young. William D. Prakken participated by telephone. Excused from attendance were John S. Gleason, John M. Richilano, and Eli Wald. Also absent were James A. Casey, Judge Edward W. Nottingham, Kenneth B. Pennywell, Scott R. Peppet, and Lisa M. Wayne.

Also in attendance for the initial portion of the meeting was attorney David Butler, vice-president of Colorado Lawyer Trust Account Foundation ("COLTAF").

I. *Meeting Materials; Minutes of December 3, 2004 and January 21, 2005 Meetings.*

The Chair had provided a package of materials to the members prior to the meeting date, including submitted minutes of the sixth meeting of the Committee, held on December 3, 2004, and its seventh meeting, held on January 21, 2005. Those minutes were approved as submitted.

II. *Resignation of Member; Membership Terms.*

The Chair announced that Peggy E. Montaño had resigned from the Committee. The Chair also noted that the initial terms of those members who were appointed to two year terms will expire in the summer of 2005. The Chair intends to recommend that the terms of those members who have been active participants in the first two years of the Committee's existence be renewed, noting the special importance of continuity as the Committee works on the Ethics 2000 project. She will check with individual members in that two-year-term category to determine their willingness to continue on the Committee. The Chair asked for recommendations of others who might be made members to fill vacancies.

III. *Subcommittee on Ethics 2000 Rules.*

The Committee returned to consideration of the Ethics 2000 Rules and took up Interim Report Nº 4 of the Ethics 2000 Subcommittee.

A. *Rule 1.15.*

The Chair suggested that Michael Berger, chair of the Subcommittee, begin the discussion with Rule 1.15 — Safekeeping Property — in view of Mr. Butler's attendance for that discussion.

Berger reported that the Subcommittee was aware of the Fifth Amendment, due process, "takings" issues that had recently been before the United States Supreme Court regarding "IOLTA" ("interest on lawyer trust accounts") accounts and of the amendments proposed by the COLTAF board of directors for changes to Rule 1.15 to deal with those issues. These concerns had not been raised before the ABA Ethics 2000 / Colorado Rules of Professional Conduct Committee (the "*Ad Hoc* Committee") and are not dealt with in the *Ad Hoc* Committee's report that is guiding the Subcommittee's consideration of Ethics 2000. The *Ad Hoc* Committee had opted to retain Colorado's existing Rule 1.15 in view of its substantial tailoring over the years, although the *Ad Hoc* Committee drew on Model Ethics 2000 Rule 1.15, for some minor, nonsubstantive revisions for clarification. Berger said the Subcommittee recommended the *Ad Hoc* Committee's version of Rule 1.15, with the modifications proposed by the COLTAF board of directors.

Berger said the Subcommittee also understood that the Office of Attorney Regulation Counsel was developing further amendments to accommodate changes made by recent Federal legislation to check-cashing processes.

A member suggested changing the word "earn" to "earned" in Rule 1.15(e)(2)(b) as proposed by the Subcommittee. With that change, the Subcommittee's version of Rule 1.15 was approved, subject, however, to consideration of specific changes when they are proposed by the Office of Attorney Regulation Counsel.

B. *Rule 1.6, Comment [5A] and Conflicts Disclosure.*

Berger then turned back to Rule 1.6, noting that, at the Committee's meeting on January 21, 2005, it had adopted the ABA model Ethics 2000 text for the Rule but had directed the Subcommittee to look again at Comments 5A and 6A as they had been added by the Subcommittee. A member had noted that there is no clear authority in the Rules themselves permitting a lawyer to make disclosures of client information, which is otherwise protected by Rule 1.6, when the lawyer contemplates joining a law firm and is identifying conflicts of interest; and it seemed that a comment on the point would be appropriate. As set forth in Interim Report No. 4, Comment 5A reads—

> [5A] A lawyer moving (or contemplating a move) from one firm to another is impliedly authorized to disclose certain limited nonprivileged information protected by Rule 1.6 in order to detect conflicts of interest. Thus, a lawyer usually may disclose, without express client consent, the identity of the client and the basic nature of the representation, in order to insure compliance with Rules 1.7, 1.8, 1.9, 1.10, 1.11 and 1.12. Under unusual circumstances, where even this basic disclosure could materially prejudice the interests of a client or former client, disclosure is prohibited without client consent. In all cases, the disclosures must be limited to the information essential to conduct the conflicts check, and all lawyers who receive the information must agree in advance to its confidentiality.

Berger noted that the comment clearly does not apply to intra-firm conflict checking, which has always been understood to be impliedly permitted because the lawyer's client is imputed to the lawyer's current law firm.

A member noted that this proposed comment, and its finding of implied authority for conflicts disclosure, is a new and dramatic concept; this member would make the authority clear by amending the text of Rule 1.6 itself, rather than relegating the discussion to a comment. The member noted that the Colorado Bar Association Ethics Committee has previously opined that these conflicts disclosures cannot be made without the client's consent and that, in the discussion of this concept at the January 21, 2005 meeting of this Committee, it had been noted that even the disclosure of a client's identity can be damaging to the client's interests. In this member's view, it would be intellectually dishonest to tuck the matter away in a comment that is unsupported by Rule text.

Those views were seconded by another member, who added that, although these kinds of disclosures have in fact been made by lawyers for many years, clients may not expect or desire them. This member noted, however, that ethics opinions in other jurisdictions have found implied authority for the disclosures. In his view, too, the authority should be added to the text of Rule 1.6.

To these observations Berger replied that the proposed comment would permit the disclosure only of information that, although otherwise confidential under Rule 1.6, is not within the attorney-client privilege. To a member's question, Berger said the comment would cover disclosures relating to adverse parties as well as to clients.

A member of the Subcommittee noted that it had attempted to draft an addition to Rule 1.6 itself but had not been successful. Berger added that the Subcommittee had worried that its proposed Rule text was subject to misinterpretation and noted that the Subcommittee has been reluctant to make changes to the actual text of the Rules except when such changes were absolutely essential.

A motion to adopt new Comment 5A to Rule 1.6 was seconded and approved.

C. *Rule 1.6(b)(4) and Comment [9].*

Berger then turned to Comment 9 to Rule 1.6. At the Committee's January 21, 2005 meeting, a proposal to amend Rule 1.6(b)(4) to read, "A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary . . . to secure legal advice about the lawyer's duties to the client or compliance with these Rules," had failed, but the Committee had asked the Subcommittee to return with a comment that would recognize that these Rules of Professional Conduct are not the only rules governing a lawyer's duties and that the lawyer is permitted to obtain counsel as to any duty the lawyer owes, not just those that can be found in some particular Rule within the Rules of Professional Conduct. Berger reported that the Subcommittee had struggled mightily to come up with such a comment that would permit lawyers to consult to be sure they are complying with all of their duties, and not just those prescribed by these Rules, while not giving carte blanche to disclose client confidences in informal settings. A majority of the Subcommittee thus proposed to amend Comment [9] to Rule 1.6 as follows:

> [9] A lawyer's confidentiality obligations do not preclude a lawyer from securing confidential legal advice about the lawyer's personal responsibility to comply with these Rules. In most situations, disclosing information to secure such advice will be impliedly

> authorized for the lawyer to carry out the representation. Even when the disclosure is not impliedly authorized, paragraph (b)(4) permits such disclosure because of the importance of a lawyer's compliance with the Rules of Professional Conduct. ***For example, Rule 1.6(b)(4) authorizes disclosures that the lawyer reasonably believes are necessary to seek advice involving the lawyer's duty to provide competent representation under Rule 1.1. In addition, this Rule permits disclosure of information that the lawyer reasonably believes is necessary to secure legal advice concerning the lawyer's broader duties, including those addressed in Rules 3.3, 4.1 and 8.4.***

The member who had expressed the most concern about the negative implication found in the text of Rule 1.6(b)(4) spoke again now to say that the proposed addition to the comment adds something substantive that is not actually provided by the Rule itself. Rule 1.6(b)(4) says the lawyer can seek advice about compliance with "these Rules," while the modification to the comment purports to allow disclosures attendant to getting "advice involving the lawyer's duty to provide competent representation" — that is, the comment purports to cover advice about a lawyer's standard of care as distinguished from the applicable standard of conduct.

As an example of his concern, this member referred to a recent case from the Court of Appeals for the Seventh Circuit dealing with the Fair Debt Collection Act. The different Federal circuits have differing rules regarding whether the initial notification that is served upon the debtor is to be included in the complaint filed under the act. If the lawyer does it incorrectly in the particular circuit, the case will encounter procedural difficulties and the lawyer may become personally liable both to the debtor and to the client for whom the lawyer pursues the debt. Similar issues can arise regarding confidentiality in shareholder derivative actions or with respect to the lawyer's liability for negligent misrepresentation when relying on the client's representations in an opinion given to a third party.

Each of these examples of issues in which a lawyer may wish to have counsel relates to a duty that is not prescribed by the Rules of Professional Conduct — there is no Rule that deals with the issue of whether notification to the debtor must be included with the complaint, for instance — and thus each example is one in which the lawyer is not specifically authorized to disclose client information when seeking counsel, by the terms of Rule 1.6(b)(4). In this member's view, it is imperative that Colorado expand the text of Rule 1.6(b)(4) itself. He noted that Maryland has solved the problem by adding, at the end of the provision, the words, "or the lawyer's other obligations." Our attempt to solve the problem — a problem the existence of which we clearly have recognized by the mere fact of our proposed changes to Comment [9] — is inadequate; the cure must be applied to the text of the Rule itself.

In reply to another member's question, this member said he did not oppose the principle expressed in the proposed modification to the comment but merely felt that the concept was put in the wrong place.

Berger noted that the Subcommittee had been sensitive to the need not to put substantive law in a comment but said it could not in fact find an example of a duty that could not be characterized as coming from within the Rules. In his view, all of the examples that had been proposed of duties that arise outside of the Rules were in fact duties that can be found within the Rules — including most importantly by reference to Rule 1.1 and its duty to "provide competent representation to a client." Under that analysis, he said,

a majority of the Subcommittee determined that the modification to Comment [9] just fleshed out a concept that is indeed included in the text of Rule 1.6(b)(4) itself.

To this another member responded that she agreed with the view that the substance of Rule 1.6(b)(4) does not go as far as the comment implies. She added that there is no statement in the current Rules either way about this kind of disclosure, although lawyers clearly assume they can disclose client confidences to the extent necessary to secure advice about their own obligations. She noted that an existing comment already concludes that existing Rule 1.6 impliedly permits disclosures in connection with consultations about the lawyer's duties under the Rules and that Rule 1.6(b)(4) has been added as a specific clarification of that implied authority. A similar expansion should be made to clarify the implication that we are finding in Ethics 2000. But there is now a more powerful negative implication that can be drawn from fact that the expansion effected by Ethics 2000 is a limited one.

This member was not as sure as Berger that all of the proferred examples can be found within the Rules. She proposed this example as one that cannot be found there: The lawyer has concluded the representation but has not been paid in accordance with the terms of the engagement; the lawyer thus wants to file an attorney's lien but does not know about that complex process and would like to have advice on how to go about filing the lien. There seems to be no Rule applicable to that situation — it does not involve competent representation of the client. Accordingly, it seems the lawyer cannot disclose any information about the client — including even the client's identity — when seeking advice on what to do. If the Committee believes client disclosures can be made to obtain that advice, it should make that matter clear in the Rule.

To that point, another member argued that Rule 1.6(b)(5) — permitting disclosure "to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client" — permits such disclosure. But the member who had given the example questioned whether it involved a "controversy" within the contemplation of Rule 1.6(b)(5).

The member who had initiated the discussion modified the example to eliminate all "controversy" by positing a lawyer representing a client in a divorce who may not have funds to cover the legal fees but does not begrudge the lawyer her fees. The client may be quite willing to permit the lawyer's lien to preclude the spouse's claim to the liened assets. While it might be argued that the client will willingly consent to the disclosures necessary to get advice on how to put the lien in place, the lawyer may be concerned that the client's lack of sophistication may preclude getting "informed consent" to the disclosure under Rule 1.6(a).

But the seesawing continued back and forth between those members who felt that some areas in which a lawyer may properly seek advice are beyond the Rules and thus not covered by Rule 1.6(b)(4) and those who felt that all duties are either encompassed within the Rules and thus covered by Rule 1.6(b)(4) or that the other exceptions contained in Rule 1.6(b) apply, with another member expressing his view that the lien examples are encompassed by Rules 1.6(b)(5) and 1.6(b)(6), yet another member agreeing that the narrow wording of Rule 1.6(b)(4) will prevent lawyers from getting appropriate advice, and a fourth saying that no good examples falling outside of Rule 1.6(b)(4) have been found and there is no need to rewrite the provision.

Yet another member added to the discussion by noting that the Committee has been engaging in a game, with some finding examples that appear to be outside Rule 1.6(b)(4)

and others finding reasons why the example fails. He argued that the effort to avoid expansion of the permitted disclosure is misplaced, because the expansion will be limited in any case: The disclosure of client information by the lawyer to his own counsel will not mean that the client information has become public, because the lawyer's lawyer will herself be bound by Rule 1.6, and the disclosure will stop there. There is great risk of disciplinary action against the lawyer who seeks advice about some duty and finds that the duty cannot be found "in these Rules" and great risk if the lawyer does not seek the advice, because of the restrictions of Rule 1.6(b)(4), and finds that he has misperformed that duty. As this member put it, it appears that only lawyers cannot have lawyers.

A member who had already spoken in favor of modification of the text of Rule 1.6(b)(4) said that he liked the proposed amended comment but agreed that some duties can't be found in the Rules. This member did not agree that there is an implied authority to seek advice without the client's informed consent, unless the duty about which advice is sought is clearly within "these Rules". But, as he saw it, we are not precluding consultation but, instead, are merely saying that the lawyer must either first get the client's consent to the consultation or avoid disclosing client information in the course of the consultation. He concluded that the need for consultation on the application of other law to a lawyer's conduct is among the minority of real-world problems lawyers face.

Another member agreed that all of the duties around which people have crafted examples seem to be encompassed by Rule 1.1 and its requirement that the lawyer represent the client competently. To this, however, a member responded that, under Rule 1.6(b)(4) as written, a lawyer can get advice only on "the duty of being competent" and not on what the lawyer should do in a particular situation in order to ensure that the representation be competent. For example, the lawyer may not seek advice on how the securities laws apply to the client's proposed stock offering, if the lawyer is representing a client in a stock offering; without the client's consent, the lawyer cannot seek advice on the substantive matter as to which the lawyer is to be competent.

The member who had initiated the discussion suggested that the problem might be solved by eliminating the words "secure legal advice," so that Rule 1.6(b)(4) read, "A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary . . . about the lawyer's compliance with these Rules." As amended, he suggested, the provision would look more like Rule 1.6(b)(5) and Rule 1.6(b)(6).

A member of the Subcommittee commented that, if he were not concerned that the Maryland approach would "open a cottage industry" of lawyers advising other lawyers about substantive law to assure competent representation, he would agree to that revision. But, he noted, the Subcommittee had been unsuccessful in its attempt to draft limiting language.

A member who had not previously spoken said he agreed with the sentiment that we seem to be saying lawyers cannot have lawyers to advise them about their duties — unless the advice is limited to the application of the Rules. In his view, the Rules should offer clear demarcations about what is permitted, but we see among ourselves that we do not have a clear understanding about the scope of Rule 1.6(b)(4). He practices, he noted, in a small firm and does not have the opportunity to go down the hall, still within the imputed client relationship (and within the protection of the last sentence of Comment [5] to Rule 1.6, which clarifies that "[l]awyers in a firm may . . . disclose to each other information relating to a client of the firm"), to get advice about his substantive-law duties from a partner. But,

he said, the Rules should permit that kind of advice, for the good of the lawyers and, ultimately, for the good of the clients they represent.

Another member who had not previously spoken remarked that the "hotline" for ethics advice run by the Colorado Bar Association Ethics Committee wrestles with the issue of disclosure of client confidences. Lawyers serving on the hotline make sure that they do *not* establish a lawyer-client relationship with the inquiring callers and make sure that the callers do not disclose their clients' confidential information.

The member who had raised the lawyer's lien example was of the view that trying to "plug" the examples into Rule 1.1 was precisely not what she was seeking as a solution. If the lawyer does not know the substantive law sufficiently to carry out the representation competently, the lawyer should be required to obtain the client's consent before seeking consultation that requires disclosure of client information. As another member had noted, it is not proper to assume that Rule 1.6(b)(4) permits that consultation without the client's consent simply because the lawyer has a Rule 1.1 duty to be competent. The purpose of the Maryland modification is to permit the lawyer to seek advice on issues that are *not* germane to the area of competency for which the lawyer's services have been engaged but arise collateral to that area. An example is the duty to report large amounts of cash received in payment of fees or as retainer deposits, under the tax laws. This member would want our comment to make it clear that we are permitting advice about the lawyer's duties under other law but not that which is the subject of the representation itself.

To that, another member said he would be troubled if the comment attempted to limit the import of the comment's broadening implication.

A member who is no longer in private practice noted that, when he was, he frequently sought consultation on substantive law but simply did so without disclosing client information that is protected by Rule 1.6. He saw no need to deal with that issue. Others agreed that there is no problem under Rule 1.6 if client information is not disclosed, although it was noted that Rule 1.6's coverage of "information relating to the representation of a client" is very broad. But one member noted that we are not talking about "hypotheticals," which all agree can be used without a problem under Rule 1.6, yet, he pointed out, a lawyer may be involved in such a prominent case that any question about it would be likely to tip the consultant off about who the client was and what the matter was.

The member who had initiated the discussion warned that, if we are to conclude that everything a lawyer does is within the Rules, so that no modification of Rule 1.6(b)(4) is needed, then it would follow that every malpractice case implicates a violation of one or another of the Rules. If that were true, then every lawyer who commences a malpractice law suit against another lawyer would have a duty to report the defending lawyer to the Office of Attorney Regulation Counsel pursuant to Rule 8.3.

The Chair commented that the Committee had had a good discussion of Rule 1.6(b)(4) and the modification offered by the Subcommittee to Comment [9], and she invited a motion for action on the comment. With five members voting in opposition, the comment was approved as modified by the Subcommittee.

D. *Rule 1.10, Screening Lateral Hires; Rule Text.*

Berger pointed out that, at its January 21, 2005 meeting, the Committee had directed the Subcommittee to redraft Rule 1.10 so that it would (1) permit "screening" of a "personally disqualified lawyer" who has joined a law firm, bringing with him information about a former client who is or becomes adverse to a client of the new law firm in a matter in which the personally disqualified lawyer would himself be precluded by Rule 1.9 from providing representation, but (2) permit such screening only if the lawyer's involvement in the prior representation of the former client was not so extensive that the risk of inadvertent disclosure by the lawyer to the new law firm and the client's justified, subjective, negative feelings about the lawyer's switching sides are too great to ignore. The phrase the Committee had used in describing the level of involvement that would be too great to permit screening was "primary responsibility" for the prior representation.

The Subcommittee considered many proposals but settled upon a simple one which, Berger noted, conceals the complexity of the underlying issues. The Subcommittee's proposal includes a new Rule 1.10(e) and a comment thereto. The text of the proposed Rule reads as follows:

> (e) When a lawyer becomes associated with a firm, no lawyer associated in the firm shall knowingly represent a person in a matter in which that lawyer is disqualified under Rule 1.9 unless:
>
> (1) the matter is not one for which the personally disqualified lawyer had primary responsibility. Primary responsibility denotes substantial participation in the management and direction of the matter.
>
> (2) the personally disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom;
>
> (3) the personally disqualified lawyer gives prompt written notice (which shall contain a general description of the personally disqualified lawyer's prior representation and the screening procedures to be employed) to any affected former client and the former client's current lawyer, if known to the personally disqualified lawyer, to enable the former client to ascertain compliance with the provisions of this Rule; and
>
> (4). the personally disqualified lawyer and the partners of the firm with which the personally disqualified lawyer is now associated, reasonably believes that the steps taken to accomplish the screening of material information are likely to be effective in preventing material information from being disclosed to the firm and its client.

A member who serves on the Subcommittee apologized for not having raised the issue during the Subcommittee's work but now asked whether the proposal adequately covers the "contract lawyer" or "temporary lawyer" situation, in which a lawyer engages with a law firm to provide services as an independent contractor or on some temporary basis and where the lawyer may have several such engagements with different law firms at the same time or in series. This, the member noted, is an increasingly common form of law practice. Frequently, the lawyer carries "baggage" from one engagement and firm to another; the lawyer may have gained material client information in the first engagement and, accordingly, carry disqualification issues to the next engagement.

In response, another member noted that there was no definition of when a lawyer becomes "associated with a firm" within the meaning of Rule 1.10(a). A third member pointed out that Regulation Counsel has seen some conflicts problems arising out of contract lawyering situations.

A member pointed out that Rule 1.9 is clear: A lawyer — including a contract lawyer — cannot shift from representing a client to representing an adverse party in the same matter without the former client's informed, written consent. In the circumstance to be covered by the proposed addition to Rule 1.10, however, the "personally disqualified" lawyer does not undertake to represent the adverse party but merely has joined — or contracted with — the law firm that is providing legal services to the adverse party through other lawyers and will himself be providing legal services only on unrelated matters. But for screening under the Subcommittee's proposed addition, the lawyer's prior representation would be imputed to the law firm itself under Rule 1.10, even if he had no involvement in the current representation.

But another member said he read the phrase "associated in a firm" in Rule 1.10(a) narrowly, to exclude the contract lawyer, thus placing the contract lawyer outside the imputation problem.

A member suggested that the proposed addition should more precisely reference Rule 1.9(b)—"A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client . . . " — rather than make a general reference to all of Rule 1.9. By this change, the member argued, Rule 1.10(e) would not apply to the contract lawyer, which, she said, it should not.

Berger suggested that the Committee had gotten ahead of itself and suggested that it first determine whether the Subcommittee's proposal was generally satisfactory before tackling the contract lawyer situation.

A member asked whether the principle behind the proposal is that it is okay for a lawyer who has gained full knowledge about a client's case while associated with the law firm that represented that client, but who did not have responsibility for handling that representation — for example, a lawyer who learned all about the case being handled entirely by another lawyer simply because they shared a two-person law partnership — to move to another law firm that is handling the case for the opposing party, so long as the screening requirements were observed. Other members agreed that this was precisely the principle. Berger suggested as an example that, under the Subcommittee' proposal, a lawyer who had been an associate in the first law firm can be screened from the case in the second law firm, regardless of how much information she gained about the case while at the first law firm, if, in her role at the first law firm, the associate did not have primary responsibility for the management or direction of the case.

A member noted that the point behind the proposal is "client loyalty." The proposal assumes that screening is in fact an effective way to prevent the client's interests from being damaged by disclosure to its opponent. If that is true, then it should be as effective in fact to prevent disclosures by a lawyer who had been "primarily responsible" for the client's representation at the first law firm, when the lawyer switches to the opposing law firm, as it would be to prevent disclosures by a lawyer who, although not "primarily responsible," had perhaps been the one who uncovered by document review or legal research the key to the client's case. Given that, then, the reason for permitting screening of the latter lawyer but not of the former lawyer is simply the policy decision that the Rules should protect the client's sense that the lead lawyers on the client's case should be loyal to the client while recognizing that the client has no right to claim such loyalty from other lawyers on the case. This, in a situation in which "disloyalty" has already occurred by the fact that the lawyer

has already terminated the representation of the client for whom we are concerned by departing from the first firm.

Another member agreed with this analysis and said that we are, for policy reasons, just drawing a line to protect client sensibilities, having already determined that we have adequately protected client information by Rule 1.6 and Rule 1.9.

Berger pointed to the second sentence of Rule 1.10(e)(1) as the statement of policy decision: "Primary responsibility denotes substantial participation in the management and direction of the matter." He asked the Committee whether that is a proper expression of what it wanted.

A member asked whether his understanding of the proposal was correct: The "personally disqualified lawyer" referred to in Rule 1.10(e)(1) is the lawyer who is barred by Rule 1.9 from representing any party opposed to that lawyer's former client. Rule 1.10(e) operates to say that the lawyer's personal disqualification shall not be imputed to the new law firm if the lawyer is properly screened and if the lawyer had not had "primary responsibility" for the matter at the former law firm, that is, had not had "substantial participation in the management and direction of the matter" at the former law firm. Berger said this understanding was correct.

Another member suggested that, if a lawyer was an associate in the former law firm, rather than a partner, but ran the client's case on a day-to-day basis, that lawyer would have "primary responsibility" within the meaning of the proposal and could not be effectively screened out by the new law firm. A member noted that this was the correct answer, that we do not intend to preclude screening of the associate who labored in the law library, regardless of her knowledge, while others determined case strategy, even if that associate discovered the "crown jewel" of the client's case.

A member moved that the conjunctive "and" in the phrase "substantial participation in the management and direction of the matter" be changed to "or," so that it read, "substantial participation in the management or direction of the matter." To that, another member pointed out that the disjunctive would indicate an intended distinction between "management" and "direction" but said he could not understand what the distinction might be.

A third member suggested that we were overanalyzing the matter; our goal is to protect client sensibilities, and, while he was not enamored of that endeavor, if that is all we are doing, we did not need this level of detail. To him, "manage" refers, in a large law firm, to the lawyer at the top who generally handles the law firm's engagements with the client but who may not have detailed knowledge about the particular case, while "direct" refers to the lawyer who assigns particular tasks with respect to the particular case. The third group includes the lawyers who are told what to do and do it, even if they have substantial substantive knowledge about the client and the case. The third group comprises those who may be screened under proposed Rule 1.10(e).

Berger commented that this characterized the "big firm" model. In a small firm, a "junior lawyer" might have done most of the work on the case, under the supervision of a senior lawyer. We have not tried to draw such a precise line that it can be clearly determined whether that junior lawyer can or cannot be screened.

In response to Berger's comment, a member pointed out that, to determine whether the junior lawyer "managed" or "directed" the representation at the former law firm and can or cannot be screened in the new law firm, the new law firm would need to know more about what the junior lawyer's role had been in the prior representation than we have permitted to be disclosed in connection with conflict checking under Rule 1.6 as we have interpreted it in our addition to its Comment [9]. Must the new law firm — not being given the disclosures necessary for it to make its own determination, rely on the personally disqualified junior lawyer to make the call whether screening is appropriate under Rule 1.10(e)?

To that, another member suggested that we could let the matter play out in motions to disqualify, at least as to situations involving proceedings before a court. But what should be done in transactional matters, where there is no judge to whom a disqualification motion can be put? This member was certain that lawyers must be permitted to change law firms in the courses of their careers but noted the difficulties presented by the interplay of Rule 1.6, Rule 1.9, and Rule 1.10. She referred to a Texas case in which a very large law firm had been disqualified from an important environmental case because it had absorbed a small law firm in a merger.

A member interjected that proposed Rule 1.10 did not implicate the question of whether law firms are subject to motions to disqualify because they have laterally hired a lawyer who brings baggage. A lawyer may violate Rule 1.9 and a law firm may violate Rule 1.10 whether or not a motion to disqualify has or can be filed or would be successful. In this member's view, the Committee could go to a more precise "lead counsel" concept or simply adopt the ABA model Ethics 2000 approach and exclude the screening solution altogether. In any case, the limitations on conflicts disclosures found in Rule 1.6 will make the application of proposed Rule 1.10 more difficult.

Another member pointed out that language is necessarily an imprecise tool. He suggested that the comment be augmented to say that Rule 1.10(e) sets the outer limits for screening and then "bookmark" that boundary by examples of lawyers who clearly had "primary responsibility" and those — such as the associate who merely researched assigned topics — who did not have that kind of responsibility.

A member who practices in a large law firm said he encounters these kinds of problems every day. The issue is whether the incoming lawyer has confidential information about a former client who is adverse to a client of the law firm; if she does, the law firm has a problem. One can effectively screen only the lawyer who does not have substantial information about the former client. This member believed that the Committee would be creating many problems by adopting proposed Rule 1.10 and suggested that it should stick with the ABA model Rule, which does not recognize screening.

Another member echoed that position, saying that angry clients contact the Office of Attorney Regulation Counsel to express their concerns in these situations. The concept of loyalty is embodied in the Rules and, as long as it is, there will be problems. The member recounted a complex situation involving rights under a trust instrument, in which a specialized tax lawyer who had been involved in the representation of the trust moved to the opposing law firm. The clients in such cases feel that "the lawyer is just chasing money, and I've spent a lot of money on him." In the clients' minds, it is just a money issue for the lawyers.

A member asked whether we had determined that the lawyer can generally move to a new law firm that represents an adverse party. Another member responded that the answer depends on what we do on this issue. The existing Rules of Professional Conduct and the ABA model Ethics 2000 rules clearly limit lawyer mobility by linking "material information" with the application of Rule 1.9(b) and the imputation principles of Rule 1.10.

Another lawyer who has seen these issues arise in the disciplinary process commented that, when clients think that their lawyers are looking out only for the lawyers' interests — and when they think that lawyers are designing rules of conduct for lawyers' advantage and not to protect clients — it damages their perceptions of the lawyer-client relationship and of the profession. The rule-makers need a sense of balance, this member said, noting the absence of lay members on this Committee.

In reply, another member noted that loyalty cannot mean "forever." Rule 1.16 provides in great detail for the termination of the lawyer-client relationship. We are, as had been noted before, dealing only with client perceptions in proposed Rule 1.10(e): Should the client be permitted to say, about a junior-level lawyer, "She's suddenly very precious to me, now that she is joining the opposing law firm"?

A member recounted the historical course of this exception, from full lawyer mobility to constricted mobility. He understood that this Committee had already adopted the principle of screening, as least as to lower-level lawyers but noted that it now appeared to be stumbling over whether some more substantial level of participation short of full responsibility for management and direction of the representation should be enough to preclude screening.

In amplification of that observation, another member noted that there are four possible positions concerning a lawyer's move from a firm in which she had represented a client on a matter to a firm that is representing an adverse party in the same matter: (1) The lawyer may move firms without client consent if properly screened. (2) The lawyer may move firms without client consent if properly screened and if the lawyer had not had substantial participation in the management and direction of the former representation. (3) The ABA model position, that the lawyer may move firms only with the client's informed consent. And (4) this newly articulated position that the lawyer may move firms if properly screened and if the lawyer had neither participated in the management and direction of the prior representation nor had other substantial participation in that representation. She asked whether the fourth position is the one the Committee is really reaching for.

A member spoke in favor of this position, where screening could not solve the problem if the moving lawyer had "represented" the client — had any part in the representation of the client — in the matter in which the new law firm was representing an opposing party.

These members were thus establishing the position that screening would not be permitted if the moving lawyer had any substantial information about the matter by reason of his position in the former law firm, whereas the Subcommittee's proposal — at the Committee's prior direction — would have permitted screening for the lawyer who had gained substantial information at the former firm — as by doing research — but did not play a substantial role in managing or directing the representation.

At that point the Committee approved a motion to amend proposed Rule 1.10(e)(1) to read, "The matter is not one in which the lawyer has substantially participated." And it determined not to add a comment about what "substantial participation" means.

A member asked whether it is really necessary that notice be given both to the former client and to the former client's current lawyer, as provided in proposed Rule 1.10(e)(3). He agreed that Rule 4.2, governing communications with persons who are represented by counsel, is not relevant to this question, since the specificity of Rule 1.10(e)(3) would override the general limitations of Rule 4.2. But he questioned whether the requirement that notice be given to the former client's current lawyer was really necessary. Another member noted that the former client might not even have a current lawyer, or one known to the moving lawyer. The member who had raised the matter moved that the notice provision be altered to require notice to either the former client or to the former client's lawyer but not to both. He then amended that motion to state only that notice must be given to "any affected former client," making no mention of the alternative of giving notice to the former client's lawyer and leaving it to Rule 4.2 to direct the moving lawyer to give the notice to each affected former client's current lawyer if known to the moving lawyer.

It was generally agreed that this was a point that should be resolved. One member asked how notice is to be given to a client whom the moving lawyer had ceased to represent many years before the move — is the lawyer just to give the best notice possible under the circumstances? Another responded that the lawyer must give notice but would not be responsible for assuring that the former client got the notice. A third pointed out, for comparative analysis, that Rule 1.9(a) requires the lawyer to get the former client's informed consent in the circumstances contemplated by that provision, which necessarily involves actual communication with the former client. We did not worry, with regard to that rule, whether that communication could be directly with the former client or had to be through the former client's current lawyer per Rule 4.2; why, she asked, would we need to deal with that detail in Rule 1.10(e)(3)?

The Committee decided to remand this issue of notice to the Subcommittee for further consideration. But the Committee confirmed that it had previously determined to amend proposed Rule 1.10(e)(1) to read, "The matter is not one in which the personally disqualified lawyer substantially participated" and that that issue was not being remanded to the Subcommittee.

E. *Rule 1.10, Screening Lateral Hires; Comment Text.*

The Committee then turned to Subcommittee's draft of the comment that would accompany proposed Rule 1.10. That proposed comment, Comment [5A], reads as follows:

> [5A] Screening is permissible under this Rule only if the partners of the firm and the personally disqualified lawyer reasonably believe that the screening procedures will be effective. In a small firm it may be difficult to successfully screen the personally disqualified lawyer.

Berger noted that the Subcommittee had considered many versions before adopting this proposal. H pointed out that the first sentence essentially restates the Rule itself, which is something the Committee has generally tried not to do in the comments. The second sentence merely states the obvious: In a small law firm, with one secretary to handle all the mail, one might not be able to screen effectively.

A member of the Subcommittee commented that it had thought the first sentence of the comment to be a necessary preamble to the second sentence.

Another member of the Subcommittee suggested that the first sentence could be improved, asking which "firm" is "the firm" that is referred to there. He would either track the Rule text or substitute the phrase "the new firm." He also questioned whether any comment is needed if the only purpose it is to serve is to say that screening might be difficult in a small firm.

The Committee voted to strike the proposed comment entirely

F. *Rule 1.10, Screening Lateral Hires; Reconsideration of Rule Text.*

A member directed the Committee's attention back to the text of proposed Rule 1.10 and in particular to Rule 1.10(e)(4), noting that the phrase "reasonably believes" — second person singular — should in fact be "reasonably believe" for the plural subjects "the personally disqualified lawyer" and "the partners of the [new] firm."

This return to the text of the Rule led the Committee to reconsider its remand of the notice issue to the Subcommittee, and it determined not to do that. Rather, the Committee decided to let stand the Subcommittee's proposed text, "gives prompt written notice . . . to any affected former client and the former client's current lawyer . . . ."

The Committee also made these further changes:

1. It deleted the comma after the word "associated" in Rule 1.10(e)(4), so that the provision reads, "the personally disqualified lawyer and the partners of the firm with which the personally disqualified lawyer is now associated reasonably believe . . . ."

2. It changed Rule 1.10(e)(3) from the ambiguous wording "any former affected client" to "the former affected clients" and carried that change through so that the entire provision reads, "to the affected former clients and the former clients' current lawyers, if known to the personally disqualified lawyer, to enable the former clients to ascertain compliance with the provisions of this Rule".

With these changes, the Committee concluded its consideration of Rule 1.10.

G. *Rules 1.11, 1.12, and 1.13.*

Berger reminded the Committee that it had considered Rule 1.11, Rule 1.12, and Rule 1.13 at its January 21, 2005 meeting.

H. *Rule 1.14, Client with Diminished Capacity.*

Berger reported that the Subcommittee was concerned that Comment [9] and Comment [10] to Rule 1.14 purport to provide substantive authorization for conduct that the Rule itself does not permit. Comment [9] permits "a lawyer [to] take legal action [in an emergency] on behalf of a person [with seriously diminished capacity] even though the person is unable to establish a client-lawyer relationship or to make or express considered judgments about the matter." The Subcommittee concluded that, although the Rule itself

was not that broad, the Subcommittee would not propose any changes to the Rule or the comments and would propose that the Committee adopt the ABA model Ethics 2000 Rule and comments without change. Berger noted that the Subcommittee had found a comprehensive review of the matter of emergency action on behalf of a person of diminished capacity in an article published in the Georgetown Journal of Legal Ethics that did not discuss the fact that the comments clearly exceeded the scope of the Rule itself; it appeared to the Subcommittee that no one is concerned about the issue and, accordingly, that it is probably safe for that lawyers to rely on the authorization set forth in the comments.

A member of the Subcommittee noted the following additional divergence of the comments from the Rule itself: The Rule applies only to a lawyer's "client," while the comments deal with any "person of diminished capacity," whether or not that person is a client.

The Chair suggested that lawyers whose regular practice is impacted by Rule 1.14 might come forth with suggestions for change when and if these Rules are put forth for public comment.

Another member of the Subcommittee apologized for not having raised the matter before the Subcommittee but now expressed a concern about the difference between Rule 1.14(a), which speaks of a capacity "to make adequately considered decisions in connection with a *representation*," and Comment [9], which deals with the person's capacity to make or express "considered judgments about the *matter*." This member noted that lawyers are facing an increasing number of disputes between themselves and either their clients — who do not want their help — or their client's family members who attempt to intercede in the representation. How, he asked, is the lawyer to determine when the client can take care of himself? Are these two phrasings — "considered decisions in connection with a representation" and "considered judgments about the matter" — intended to be equivalents or do they imply differing analyses? This member found the latter expression to be more "practical" and the former to be more "esoteric."

To this another member suggested that the legal standard for appointment of a conservator or guardian ad litem may be relevant. She noted that these kinds of questions are raised on the CBA Ethics Committee hotline and reiterated the hope that practitioners in this area of law will come forth with comments at the public comment stage.

It was determined that the issue would not be sent back to the Subcommittee for further analysis but that the Chair would seek comment from practitioners.

I. *Rule 1.16, Termination of Representation*.

Berger reported that the *Ad Hoc* Committee had proposed adoption of the ABA model Ethics 2000 text of Rule 1.16 without change. The Subcommittee had concurred but for the suggestion that the phrase "optional withdrawal" in the caption before Comment [7] of Rule 1.16 be changed to "permissive withdrawal."

Berger characterized Rule 1.16 as a good rule, being unchanged substantively from the existing Rule.

A member who was also a member of the Subcommittee expressed his satisfaction with Rule 1.16 as proposed but noted that new Rule 1.16(b)(1) — ". . . a lawyer may

withdraw from representing a client if . . . withdrawal can be accomplished without material adverse effect on the interests of the client" — expanded permissive withdrawals to include any which can be accomplished without harm to the client. That is, he said, a much more lenient standard than is found in the existing rule, although he regarded it as the right choice.

The Committee approved Rule 1.16 and its comments as proposed by the Subcommittee.

J. *Rule 1.17, Sale of a Law Practice.*

Berger reported that the Committee had not completed its review of Rule 1.17, dealing with sales of law practices. He noted that Colorado's existing Rule contains differences from the 1984 Kutak Rules which the Subcommittee had not yet resolved with respect to the Ethics 2000 Rules.

K. *Rule 1.18, Duties to a Prospective Client.*

Berger reported that the Subcommittee favored this new Rule, as proposed in Ethics 2000, as had the *Ad Hoc* Committee. Another member of the Subcommittee noted that the new Rule deals with important issues that are not covered by the existing Rules.

The Committee approved Rule 1.17 as contained in the ABA model Ethics 2000 Rules.

L. *Rule 2.1, the Lawyer as Advisor.*

Berger reported that the Subcommittee recommended adoption of the Ethics 2000 version of Rule 2.1 with the addition of a last sentence reading "In a matter involving or expected to involve litigation, a lawyer should advise the client of alternative forms of dispute resolution which might reasonably be pursued to attempt to resolve the legal dispute or to reach the legal objective sought." This sentence is found in the existing Colorado Rule as an addition to the Kutak Rules, and it remains appropriate in the Ethics 2000 Rules. Berger noted that the *Ad Hoc* Committee had also suggested its retention.

A member pointed out that it is actually this Rule that establishes the lawyer's independence and duty to exercise independent professional judgment. Perhaps rhetorically, he suggested that this Rule, rather than Rule 5.1, should bear the caption "Professional Independence of a Lawyer."

The Committee approved Rule 2.1 as proposed by the Subcommittee, without changing its caption.

M. *Omitted Rule 2.2, Intermediary.*

Berger pointed out that Ethics 2000 deletes existing Rule 2.2, which permits a lawyer to serve as an "intermediary" in narrow circumstances. The ABA drafters concluded that the conflicts analysis that a lawyer should undertake when contemplating such a role are better articulated by Rule 1.7. The *Ad Hoc* Committee agreed with this deletion, and so did the Subcommittee.

The Committee approved the deletion of Rule 2.2.

IV. *Proposal to Amend Rule 1.8(e) to Permit Advancement of Living Expenses.*

The Chair noted that the meeting materials contained a letter from Bennett S. Aisenberg proposing that Rule 1.8(e) — "a lawyer shall not advance or guarantee financial assistance to the lawyer's client" — be amended to permit a lawyer to advance necessary living expenses or medical assistance. Aisenberg's specific proposal is that the Rule provide either that an independent committee be established and authorized, or that the Attorney Regulation Committee or the Office of Attorney Regulation Counsel be authorized, to review requests by plaintiffs' counsel and authorize counsels' payment of living expenses, medical bills for necessary medical treatment, and the like upon proper showings, under appropriate standards to assure "that the situation must really be compelling before a deviation from Rule 1.8(e) would be permitted."

A member asked whether this Committee had authority to impose obligations on Regulation Counsel as this proposal suggested.

Another suggested that a subcommittee be formed to consider Aisenberg's proposal. The Chair ruled that no motion was needed for her to appoint such a subcommittee. She appointed Alexander Rothrock to chair such a subcommittee and invited other members to join it.

A member pointed out that the topic involves the litigation finance business, in which commercial enterprises, through participating lawyers, ferret out major personal injury litigation, fund the litigation, including living expenses and the lawyer's case expenses, and share in the recovery.

V. *Administrative Matter: Emailed Materials.*

At the Chair's prompting, the members confirmed that they would be satisfied if meeting materials were provided to them by email rather than in hardcopy by mail.

VI. *Adjournment; Next Scheduled Meeting.*

The meeting adjourned at approximately 3:50 p.m. The next scheduled meeting of the Committee will be on Friday, May 20, 2005, beginning at 9:00 a.m., in the Supreme Court Conference Room.

RESPECTFULLY SUBMITTED,

Anthony van Westrum, Secretary

[These minutes are as approved by the Committee at its meeting on May 20, 2005.]

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COLORADO SUPREME COURT

STANDING COMMITTEE ON THE RULES OF PROFESSIONAL CONDUCT

Approved Minutes of Meeting of the Full Committee
On May 20, 2005
(Ninth Meeting of the Full Committee)

The ninth meeting of the Colorado Supreme Court Standing Committee on the Rules of Professional Conduct was convened at 9:00 a.m. on Friday, May 20, 2005, by Chair Marcy G. Glenn. The meeting was held in the Supreme Court Conference Room on the fifth floor of the Colorado State Judicial Building.

Present in person at the meeting, in addition to Marcy Glenn and Justices Michael L. Bender and Nathan B. Coats, were Michael H. Berger, Nancy L. Cohen, Cynthia F. Covell, John S. Gleason, David C. Little, Judge William R. Lucero, Kenneth B. Pennywell, Alexander R. Rothrock, David W. Stark, Anthony van Westrum, James E. Wallace, Lisa M. Wayne, Judge John R. Webb, and E. Tuck Young. Eli Wald participated by telephone. Excused from attendance were Cecil F. Morris, Jr., William D. Prakken, Henry Richard Reeve, John M. Richilano, and Boston H. Stanton Jr. Also absent were James A. Casey, Judge Edward W. Nottingham, Scott R. Peppet, and Bryan S. VanMeveren.

I. *Meeting Materials; Minutes of March 23, 2005 Meeting.*

The Chair had provided a package of materials to the members prior to the meeting date, and the secretary had separately provided the members with submitted minutes of the eighth meeting of the Committee, held on March 23, 2005. Those minutes were approved as submitted.

II. *Subcommittee on Ethics 2000 Rules.*

The Committee returned to consideration of the Ethics 2000 Rules and took up Interim Report Nº 5 of the Ethics 2000 Subcommittee.

A. *Rule 1.15 — Safekeeping Property.*

The Chair suggested that the Committee postpone discussion of Rule 1.15 until a subsequent meeting, inasmuch as the Committee has recently received outside comments that should be reviewed by the Subcommittee before review by the whole Committee.

B. *Rule 1.17 — Sale of Law Practice.*

Michael Berger, chair of the Subcommittee, noted that proposed Rule 1.17 of the American Bar Association's Ethics 2000 Rules, dealing with the sale of a law practice, differs from the existing Colorado Rule by no longer requiring the sale of the entire practice but permitting the sale of "an area of law practice." For example, a lawyer may sell the lawyer's personal injury practice while remaining in practice in the area of criminal law. Berger noted that the ABA Ethics 2000 / Colorado Rules of Professional Conduct Committee (the "*Ad Hoc* Committee") agreed with this change, as did the Subcommittee.

Berger also reported that the *Ad Hoc* Committee recommended that the length of the time that must pass after notice of the impending sale before a client's consent to a transfer of the client's file to the purchasing lawyer will be presumed to have been given, if the client has not actually objected to the transfer, be reduced from the ninety days provided for in the Ethics 2000 Rules to sixty days. The Subcommittee recommended adoption of that suggestion.

A member of the Subcommittee noted that it had not considered the alternatives offered by the ABA Ethics 2000 Rule drafters for Rule 1.17(a) to describe *where* a seller must cease to engage in the private practice of law after a sale of an practice or an "area of practice" — either a described geographic area or a "jurisdiction." The Committee determined that the provision would refer to Colorado in its entirety, reading, "The seller ceases to engage in the private practice of law, or in the area of practice that has been sold, in Colorado."

Another member of the Subcommittee expressed concern about the ambiguity of Rule 1.17(c)(3), which requires that the seller give "written notice to each of the seller's clients regarding . . . the fact that the client's consent to the transfer of the client's files will be presumed if the client does not take any action or does not otherwise object within sixty (60) days of receipt of the notice." That member and another noted that it is often difficult to determine when a notice is "received," even with the use of postal return receipts, but the Committee determined not to adopt their proposal to amend the provision to require only that notice be given to the last known address.

But it was pointed out that the draft contemplates the assistance of a court if a client cannot be given notice of the pending file transfer. In such a case, "the representation of that client may be transferred to the purchaser only upon entry of an order so authorizing by a court having jurisdiction. The seller may disclose to the court in camera information relating to the representation only to the extent necessary to obtain an order authorizing the transfer of a file." It was suggested that such a procedure was not likely to be acceptable to the Colorado courts, and the Committee sent back to the Subcommittee the issues of notice and inability to effectuate notice.

C. *Rule 2.3 — Evaluation for Use by Third Persons.*

Berger noted that, under the Ethics 2000 version of Rule 2.3 — approved by the *Ad Hoc* Committee and the Subcommittee — a lawyer who gives an evaluation of a matter to a third party on behalf of a client need not obtain the client's "informed consent" to do so unless the evaluation may be materially adverse to the client's interest. The existing Rule requires the client's consent, after consultation, in all circumstances. The Committee considered the common example of a lawyer's response to an annual auditor's inquiry and agreed that the model Rule establishes the correct balance between protecting the client's interests and permitting efficient representation by allowing the lawyer to give an evaluation if the lawyer reasonably believes it will not be damaging to the client.

One member suggested that, in the circumstance where consent must be given because the evaluation may be damaging, it should be in writing. Several other members resisted that requirement, and one of them pointed to the circumstance of a contractual negotiation, where an evaluation of a matter might be given to the opposing party immediately after the lawyer caucused with the client; in such a case a requirement that the client's consent be written down might be overlooked in the excitement of the negotiations,

but the client and the lawyer would have been in full agreement that the evaluation was needed for the negotiations to proceed.

The Committee approved Rule 2.3 and its comments as proposed in the ABA Ethics 2000 Rules.

D. *Rule 2.4 — Lawyer Serving as Third-Party Neutral.*

Berger told the Committee that Rule 2.4 is a new rule and that it has been recommended by both the *Ad Hoc* Committee and the Subcommittee without change from the Ethics 2000 version.

The Committee found the Rule and its comments to be acceptable but turned briefly to a discussion of the implications under Rule 265, C.R.C.P., of a lawyer's provision of neutral services — arbitration or mediation — from a "professional company" contemplated by that rule. Rule 265 requires that all professional companies "be established solely for the purpose of conducting the practice of law," and yet the provision of neutral services as an arbitrator or a mediator is not the practice of law, as evidenced both by the fact that the neutral does not have a client and by the fact that many neutrals are not lawyers and yet are not deemed to be engaged in the unauthorized practice of law when they serve as neutrals.

Ostensibly, then, a lawyer who serves as a neutral from within a professional company, taking fees for that service into the accounts of the professional company, violates Rule 265; and yet it is apparent that many lawyers presently do just that and have not established separate entities from which to provide that kind of service. Cognizant that its jurisdiction extends only to the Colorado Rules of Professional Conduct and not to the Rules of Civil Procedure, the Committee determined that its report on Rule 2.4 would note the problem and suggest that Rule 265 be changed to clarify that lawyers may provide neutral services from their professional companies.

E. *Rule 3.1 — Meritorious Claims and Contentions.*

Berger pointed out that Ethics 2000 Rule 3.1 requires that there be a non-frivolous basis in both law and fact before a lawyer brings or defends a proceeding, or asserts or controverts an issue; the existing Rule 3.1 does not call out both "law" and "fact." The Subcommittee, he said, saw no material difference in the revision and recommended the adoption of the Ethics 2000 version of the Rule.

A member pointed out that the Ethics 2000 version of Rule 3.1 omits the first comment of the existing Rule — which is a general statement of every person's right "to have his or her conduct judged and regulated in accordance with the law; to seek any lawful objective through legally permissible means; and to present for adjudication any lawful claim, issue or defense" — and adds a new, third, comment clarifying that a "lawyer's obligations under [Rule 3.1] are subordinate to federal or state constitutional law that entitles a defendant in a criminal matter to the assistance of counsel in presenting a claim or contention that otherwise would be prohibited by" the Rule. A discussion ensued about whether that comment was inconsistent with the text of the Rule itself; it was decided that, because no one has a constitutional right to mount a fraudulent defense, there was no conflict.

A member asked what was included as a "proceeding" within the meaning of the Rule; in particular, would it include testimony at a legislative hearing? The term

"proceeding" is used frequently throughout the Rules, sometimes modified by "judicial,""administrative," or "nonadjudicative," but it is not defined. However, the related term "tribunal" is defined in Rule 1.0(m) to distinguish between a legislative body acting in an "adjudicative capacity" or in some other capacity; it acts in an adjudicative capacity when a "binding judgment [will be rendered] directly affecting a party's interests in a particular matter." It is reasonable to conclude that Rule 3.1 does not apply to a legislative hearing when the legislature is not acting in an adjudicative capacity, particularly given Rule 3.9's specific provisions relating to legislative bodies acting in "nonadjudicative proceedings." In this regard, another member pointed out that the second sentence of Rule 3.1 goes on to deal with criminal proceedings and proceedings that could result in incarceration, further indicating that the "proceedings" contemplated by Rule 3.1 are adjudicative proceedings and would not include hearings in the legislative process.

The Committee approved Rule 3.1 and its comments as proposed in the ABA Ethics 2000 Rules.

F. *Rule 3.2 — Expediting Litigation.*

Berger explained that Rule 3.2 in Ethics 2000 is unchanged from the existing Rule and that the Subcommittee recommended its approved.

The Committee approved Rule 3.2 and its comments as proposed in the ABA Ethics 2000 Rules.

G. *Rule 3.3 — Candor Toward the Tribunal.*

Turning to Rule 3.3, Berger noted that the Committee was now in for some tougher stuff. The Rule as proposed by the ABA prohibits knowingly making a "false statement of fact or law" to a tribunal, in contrast to the existing Rule, which prohibits knowingly making "a false statement of a *material* fact or of law" to a tribunal. Berger reported that, while a minority of the members on the Subcommittee wanted to retain the materiality limiter, the majority approved the ABA's version. The majority, he said, agreed that it is indeed easy to make mistakes as to facts and law but noted that the Rule proscribes such statements only if they are made knowingly.

Berger pointed out that the Subcommittee's analysis of the Rule as proposed by the ABA was made complex by the line of Colorado cases that equate recklessness with knowledge. Despite the definition of "knowledge" in the existing Rules — as in Ethics 2000 — to mean "actual knowledge of the fact in question," the Colorado Supreme Court has ruled repeatedly that recklessness is good enough except in cases of conversion. That is, when the ABA Rule omits a requirement for materiality, it does so in a Rule that will not impose a sanction unless the immaterial statement of fact was made with actual knowledge of its falsity. On the other hand, the existing Colorado Rule has included a requirement that the fact be material, but, as interpreted by the Colorado Supreme Court, it would impose a sanction even if the statement was made without actual knowledge of its falsity, so long as the lawyer was reckless in making it. Accordingly, unless the meaning of knowledge were affirmatively restricted to actual knowledge in the Ethics 2000 Rules as they are to be applied in Colorado, a Colorado lawyer would face a greater risk of sanction under Rule 3.3 than would a lawyer in a state that adhered to the ABA's definition of knowledge. The Colorado lawyer could be sanctioned for a reckless statement of an immaterial fact.

A member explained his understanding of the development of the recklessness-is-as-good-as-knowledge line of cases as beginning with *People v. Rader,*[1] a case holding that something more than mere negligence was required for the imposition of a sanction under Disciplinary Rule 1-102(A)(4), which, on its face, had no scienter requirement. In subsequent disciplinary cases, the Court read *Rader* — where a substantial scienter requirement, recklessness, had been glossed on to a Rule having no scienter requirement — to mean that recklessness would suffice where a higher level of scienter, knowledge, was called for by the Rules.

Berger reported that the Subcommittee considered two alternative proposals if the Court determines to continue its equating of recklessness and knowledge: The definition of knowledge in Rule 1.0(f) could be modified specifically to include recklessness or a Colorado comment could be added to Rule 3.3 (and other similarly-impacted Rules) warning of *Rader* and its progeny. Whichever of those two alternatives the Court chose to adopt, the Subcommittee recommended the adoption of the ABA version of Rule 3.3 without the inclusion of the materiality requirement.

A member spoke to characterize the omission of materiality with the addition of an emphasis confirming the equating of recklessness and knowledge as a serious problem. He suggested the possibility that the Office of Attorney Regulation Counsel would say that recklessness in fact-checking in a brief would violate Rule 3.3 in Colorado. He noted that the Court drastically reduces the level of scienter required for the state of knowledge when it says reckless will do. He argued that, if the Court wants to continue to equate recklessness with knowledge, then it is important to reinsert materiality into Rule 3.3 as is done in the current Colorado version of the Rule.

Another member added that, even if steps are taken to end the equating of recklessness with knowledge, the requirement for materiality should be reinserted in Rule 3.3 to avoid excessive prosecutorial discretion.

A member agreed that it is too dangerous merely to solve Colorado's Rule 3.3 problem by reinserting materiality, since that leaves the *Rader* problem in other Rules, such as Rule 3.4 and its prohibition of knowingly disobeying an obligation under the rules of a tribunal. She believed that the Office of Attorney Regulation Counsel has in fact sought sanctions for reckless conduct, clearly not done knowingly, under Rules requiring knowledge, using the *Rader* line of cases.

Two members reminded the Committee that our process is one of "legislating" and that, as such, we can propose Rules that abandon prior precedent; and, in particular, we can clarify that, under the new Rules, knowledge means actual knowledge and the prior concept that reckless would suffice is no longer in effect.

A member referred to *People v. Bertagnolli*,[2] in which a lawyer was publicly censured for making a false statement of fact in his closing argument in an arbitration proceeding, thus violating the disciplinary rule that served as the antecedent of Rule 3.3.[3] The member characterized the case as being one establishing a lawyer's duty to go back to

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1. 822 P.2d 950 (Colo. 1992).

2. 861 P.2d 717(Colo. 1993).

3. (DR 7-102(A)(5) — in representing a client, a lawyer shall not knowingly make a false statement of law or fact.

correct the record if the lawyer's testimony was false, even though the falsity did not in fact prejudice the proceeding because the arbitrators had learned of the falsity from another source before rendering their opinion.

The member who had expressed concern about excessive prosecutorial discretion if there were no materiality requirement noted that the reference to the *Bertagnolli* case amplified his concern. He negatively compared a Rule without materiality to Rule 10b-5 under the Federal Securities Laws, where materiality has always been an essential element of a violation, so that a party cannot say, "I relied on an immaterial misstatement."

The member who had said the omission of materiality, coupled with the addition of an emphasis confirming the equating of recklessness and knowledge, was a serious problem moved to reinsert the materiality requirement as to a false statement of fact.

A member asked whether the reinsertion of materiality in Rule 3.3 would require similar insertions elsewhere, such as in Rule 4.1, where the *Ad Hoc* Committee has stricken it from the Ethics 2000 version. To that, another member responded that materiality was deleted from the Colorado version of the Kutak model for Rule 4.1 a dozen years ago.

After further discussion about the implications of the presence or absence of a materiality limiter and the *Rader* line of cases, it was noted that serious questions have been posed, and it was requested that the Committee provide the Court with a detailed analysis of the interrelationship between required levels of scienter — knowledge or recklessness — and the presence or absence of a requirement of materiality. If the Committee wished to separate recklessness from knowledge in the new Rules, it should provide the Court with a thorough argument for doing so.

The Chair asked whether the Committee was prepared to act on the materiality issue without resolving the question of whether recklessness should suffice for knowledge.

Before that question was answered, a member asked about the separate issue of false statements of *law*: What, she asked, is a false statement of law, given that lawyers spend their professional lives arguing about the meaning of cases. In reply, another member suggested that making up a case to support a legal proposition would be an example of a false statement of law. The member who had raised the issue saw that example as being different in kind from a "false statement of law."

Berger suggested that the Committee defer further consideration of the materiality question until it had resolved the matter of recklessness and knowledge.

To that, a member said he did not want to leave the recklessness-and-knowledge issue to another time without resolving to reinsert a requirement for materiality. He was concerned that the Committee might now agree to omit materiality from Rule 3.3 on a mere assumption that the Court would eventually determine that recklessness does not equate with knowledge, only to find that the assumption was not fulfilled. Another member urged that the Committee act now on the tough question of whether a person can be sanctioned for immaterial misstatements, even if made knowingly.

On motion, the Committee voted to insert materiality into Rule 3.3(a)(1), so that it would read, "A lawyer shall not knowingly . . . (1) make a false statement of ***material*** fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer."

With that addition, the Committee approved Rule 3.3 and its comments as recommended by the Subcommittee.

H. *Rule 1.0 — The Meaning of "Knowledge."*

The Chair returned the Committee to a consideration of what "knowledge" should mean in the Colorado Rules.

A member suggested that, because the existing definition of "knowledge" in the terminology section of the Rules and the definition of that term in Ethics 2000 Rule 1.0(f) contain an express recognition that "[a] person's knowledge may be inferred from circumstances," there is enough leeway to include recklessness as knowledge if the Court wishes to do that. Another member objected, however, arguing that inference of actual knowledge from circumstances is a different concept from recklessness. The Rules' permission to infer simply means that actual knowledge can be proven from circumstantial evidence, but the Rules still require actual knowledge for any offense in which knowledge is established as the required level of scienter — or they would do so if the Court clarified that recklessness is no longer the equivalent of knowledge in Colorado.

A member moved the adoption of a new comment, Comment [7A], to Rule 1.0(f), reading as proposed in the Subcommittee's Interim Report Nº 5:

> [7A] The Colorado Supreme Court has held that "with one important exception [involving knowing misappropriation of property], we have considered a reckless state of mind, constituting scienter, as equivalent to 'knowing' for disciplinary purposes." *In the Matter of Egbune*, 971 P.2d 1065, 1069 (Colo.1999). *See also People v. Rader*, 822 P.2d 950 (Colo. 1992); *People v. Small*, 962 P.2d 258, 260 (Colo.1998), both apparently reducing the "knowledge" standard to one of "recklessness" even when "knowledge" is expressed as the required level of scienter.

But another member objected to this, pointing out that it amounted to the Court saying, in its own Rule, that the Rule may not mean what it says on its face. He asked whether the comment should, instead, say that *Rader* is overruled. To that suggestion, a member proposed the alternative of expressly stating, in the definition of knowledge found in Rule 1.0(f), that knowledge requires more than mere recklessness.

After further discussion, it was again requested that the Committee provide the Court with a substantive memorandum that lays out the problem. The Court does not need assistance in drafting a comment, it was said; rather, the Committee should make its best case, in something intended for consideration by the Court that is more persuasive than the mere text of a proposed comment would be.

The Committee then approved a motion to add a comment to Rule 1.0(f) stating that the Court will no longer follow the *Rader* line of cases that have equated recklessness with knowledge and to provide the Court, with a memorandum analyzing the cases and the text of Rule 1.0(f) and supporting the Committee's recommendation that the *Rader* line be overruled.

I. *Rule 1.8(e) Subcommittee.*

The Chair circulated a sign-up sheet for members to use to join a subcommittee to be chaired by Alexander Rothrock for the purpose of considering modifications in Rule 1.8(e) to permit some financial assistance to clients, as had been proposed by Bennett

S. Aisenberg and considered briefly by the Committee at its Eighth Meeting on March 23, 2005.[4]

J. *Rule 3.4 — Fairness to Opposing Party and Counsel*

Berger began discussion of Rule 3.4 by noting that Rule 16, Part III(a), of the Colorado Rules of Criminal Procedure prohibits a lawyer from advising persons (other than a defendant) "having relevant material or information . . . to refrain from discussing the case with opposing counsel or showing opposing counsel any relevant material . . . ." He said that both the *Ad Hoc* Committee and the Subcommittee proposed to acknowledge that admonition by amending Rule 3.4(f)(1) to permit a lawyer to request a person other than a client to refrain from voluntarily giving relevant information to another party if the person is a relative or an employee or other agent of a client, but only if the lawyer is not prohibited by other law from making such a request.

More complex, Berger said, was the issue of whether a lawyer may compensate a lay witness, a matter that is discussed in Comment [3] to the Ethics 2000 Rules: "[I]t is not improper to pay a witness's expenses or to compensate an expert witness on terms permitted by law. The common law rule in most jurisdictions is that it is improper to pay an occurrence witness any fee for testifying and that it is improper to pay an expert witness a contingent fee." In its review of this comment, the Subcommittee considered Formal Opinion 103 of the Colorado Bar Association Ethics Committee, which determined that it is permissible for a lawyer to compensate a lay ["occurrence"] witness for time spent in preparing for and attending a proceeding in a civil case. Berger said that no one on the Subcommittee could remember why the Ethics Committee had considered the issue.

The Subcommittee discussed the expansion of the concept of compensation for a witness's time to the criminal arena and asked whether, if the prosecution were permitted to pay such compensation, might an indigent criminal defendant demand that the state also bear the cost of such compensation for the defendant's witnesses. There was, said Berger, a visceral sense among the Subcommittee members that neither the prosecution nor the defense should be making payments to fact witnesses in criminal cases. Ultimately, however, the Subcommittee determined that this is a matter of criminal justice policy and not an ethics issue. Accordingly, the Subcommittee recommended that Comment [3] to Rule 3.4 be modified to speak in general terms, ostensibly covering both criminal and civil cases, while acknowledging that a substantive rule might preclude such compensation — and thereby make it also unethical to pay such compensation — in a criminal case. In short, Berger said, the Subcommittee chose not to address the issue of compensation of fact witnesses in criminal cases. As modified by the Subcommittee, Comment [3] would read as follows:

> [3] With regard to paragraph (b), it is not improper to pay ~~**an expert or nonexpert's**~~ ***a witness's*** expenses or to compensate an expert witness on terms permitted by law. ~~**The common law rule in most jurisdictions is that it is improper to pay an occurrence witness any fee for testifying and that it is improper to pay an expert witness a contingent fee.**~~ ***It is improper to pay any witness a contingent fee for testifying. A lawyer may reimburse a non-expert witness not only for expenses incurred in testifying but also for the reasonable value of the witness's time expended in testifying and preparing to testify, so long as such reimbursement is not prohibited by law. The amount of such compensation must be reasonable based on all relevant circumstances, determined on a case-by-case basis.***

4. See Item IV of the minutes of the Eighth Meeting.

A member noted that the *Ad Hoc* Committee and the Subcommittee had both recommended the addition of a sentence to Comment [4] to Rule 3.4 acknowledging that Rule 16 of the Criminal Procedure Rules, may, in a criminal matter, preclude a lawyer from asking a relative or employee to refrain from giving testimony. She asked whether the sentence should be broadened to track the language of Rule 3.4 itself, which covers "other law" and not just Rule 16 of the Criminal Procedure Rules. She proposed that it read,"However, other law may preclude such a request. See, for example Rule 16, Colorado Rules of Criminal Procedure. Berger agreed with this proposal.

On motion, the Committee approved Rule 3.4 and its comments as proposed by the Subcommittee, with the amendment to the last sentence of Comment [4] as indicated in the immediately preceding paragraph.

K. *Rule 3.5 – Impartiality and Decorum of the Tribunal.*

Berger reported that the Subcommittee stirred some controversy over what types of restrictions should be imposed on communications with jurors after their discharge from a case.

The Subcommittee, Berger said, felt that both existing Rule 3.5 and the Ethics 2000 proposal were insufficient and agreed with the *Ad Hoc* Committee that an additional provision was needed to deal with post-discharge communications. But the Subcommittee preferred language that differed from that recommended by the *Ad Hoc* Committee for a new Rule 3.5(c)(4); the Subcommittee's provision would preclude any post-discharge communication that "is intended to or is reasonably likely to demean, embarrass, or criticize the jurors or their verdicts."

But there was disagreement within the Subcommittee about whether further provisions were needed to reflect dictum in *Stewart v. Rice*,[5] which, Berger said, harshly criticized as unprofessional conduct the use of post-discharge affidavits in an effort to obtain a new trial where such affidavits were not consistent with Rule 606(b) of the Colorado Rules of Evidence, a rule which permits a juror to testify only "on the question whether extraneous prejudicial information was improperly brought to the jurors' attention or whether any outside influence was improperly brought to bear upon any juror." Based on *Stewart*, varying minorities of the Subcommittee sought to add one or both of the following provisions to Rule 3.5, precluding post-discharge communications if—

> (5) the communication is for the purpose of soliciting juror testimony, affidavits, or statements to impeach the verdict without a basis under Rule 606(b) of the Colorado Rules of Evidence.

and

> (6) the lawyer or the lawyer's agent does not inform the juror, at the onset of the communication, that any information provided by the juror may be presented to the court for purposes of setting aside the jury's verdict.

The issue, Berger explained, is what should be the ethical standard covering post-discharge communications, given that there is some value in allowing a lawyer to gather evidence justifying the overturning of a jury's verdict. Where is the line to be drawn between a

5. 47 P.3d 316 (Colo. 2002).

communication that is intended to get that kind of information and one that merely harasses the ex-juror? A majority of the Subcommittee felt that its proposed new provision, Rule 3.5(c)(4) struck the proper balance, without the need for either of the two additional provisions.

A member who is also a member of the Subcommittee spoke in support of proposed Rule 3.5(c)(6). He did not see a problem under that proposal if the lawyer communicated with an ex-juror simply to find out how the lawyer could have tried a better case. Likewise, there would be no problem under that proposal if the lawyer were in fact seeking information that could be used to overturn the verdict. But the proposal properly required the lawyer to put the juror on notice that, if the juror chose to speak to the lawyer, the juror might become involved in a proceeding that would be difficult for the juror. This member referred to the "understatement," in *People v. Harlan*,[6] of the jury's resentment at having to testify, years after discharge, at a hearing held to consider whether they had heard extraneous prejudicial information in the jury room. He suggested that efforts to overturn jury verdicts also involve a substantial expenditure by the state and expressed his view that jurors should be warned that speaking out about their deliberative process may give ammunition to a lawyer who wants to attack their verdict, a warning that proposed Rule 3.5(c)(6) would require. He added — after what he characterized as a breathtaking silence from the Committee upon his prior remarks — that the federal court simply prohibits post-discharge communications with juries.

A member asked what those members whose practices include jury trial work think about these issues. One whose practice involves much jury trial work replied that, in her view, the proposed provisions would chill all conversation with jurors, a horrible result, she said, especially in criminal cases. In her view, the thrust of the provisions was simply to advise the juror not to talk to anyone about the case; yet, she said, those conversations are valuable. By definition, she noted, the matter will arise only in those cases in which criminal defendants were found guilty at trial and in which substantial penalties were imposed. It is in just those kinds of cases, she said, that these conversations have saved lives.

A member remarked that she had just served on a jury in a criminal trial and, as a result of that experience, agreed with the previous comment. She believed that it is important that the criminal justice system be transparent. Proposed Rule 3.5(c)(4), she felt, served that transparency. Lawyers need to be able to talk to the jury after its discharge and should not be impeded by the chilling effect of the additional proposals.

Another member joined in agreement with the member who had initially expressed concern about the chilling effect of the additional proposals. She had had a limited experience with the issue, working with another lawyer on a retrial following a mistrial. In that case, the lawyers had wanted to speak to the jurors from the first trial about how they had evaluated the testimony of witnesses. Half, she noted, were unwilling to talk, even without the impact of the warnings that would be required by proposed Rule 3.5(c)(6); if its chill had been added to the situation, the other half would also not have discussed the case.

A member noted that the perceived dangers of post-discharge communications with jurors will be minimized by the judge's instruction to the jurors to report any harassment to the court.

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6. 2005 WL 697020 (Colo. 2005).

A member moved the adoption of the Subcommittee's recommendation, with its Rule 3.5(c)(4) but omitting the minorities' proposals for Rules 3.5(c)(5) and (c)(6).

Before that motion was acted upon, a member asked why the *Ad Hoc* Committee's proposal prohibiting communications that were "likely to influence the juror or the potential juror in future jury service" was deleted. Berger answered that the Subcommittee had not been able to determine what it meant. The member remarked that it was useful in avoiding instilling in a jury the feeling that they had been manipulated by the evidentiary process or by some other factor in the case. Berger said the Subcommittee's view was that the lawyer should be permitted to explain to the jury the constrictions of the system and that it would be patronizing to preclude a truthful discussion about those matters. The member replied that the lawyer might slant his comments to the jury; to that Berger replied that indeed he might do so, but that the lawyer should not be subjected to the risk of discipline simply because of how he phrased his comments. The member — who had been the one first voicing concern about the chilling effect of the minority proposal for Rule 3.5(c)(6) — said she would prefer a bar on all post-discharge communications except those intended to develop evidence of jury misconduct. To that comment another member asked whether the proscriptions should not more properly be located in the rules of evidence for civil or criminal trials. But the first member replied that she would also subject the lawyer to sanction under these rules of ethics.

The Committee approved Rule 3.5 and its comments as recommended by the Subcommittee, with Rule 3.5(c)(4) but without the minorities' proposed Rules 3.5(c)(5) and (c)(6).

L. *Rule 3.6 — Trial Publicity.*

Berger noted that Rule 3.6 had been added a number of years ago to balance a criminal defendant's right to a fair trial with a lawyer's first amendment rights, in accordance with rulings from the United States Supreme Court. The Ethics 2000 Rules continue the provision without substantive change, and both the *Ad Hoc* Committee and the Subcommittee recommend adoption of the Ethics 2000 version.

Berger pointed out that a Subcommittee member had spotted an inconsistency between the text of Rule 3.6(b)(2) and its Comment [5](1) — the Rule permits a lawyer to state anything that is contained in a public record, while the comment points out that statements regarding a person's criminal record — surely a matter of "public record" — may be "more likely than not to have a material prejudicial effect on a proceeding." But, Berger said, the Subcommittee recommended the provision as written notwithstanding that inconsistency.

The Committee approved Rule 3.6 and its comments as proposed in the ABA Ethics 2000 Rules.

M. *Rule 3.7 — Lawyer as Witness.*

Berger reported that both the *Ad Hoc* Committee and the Subcommittee recommended that Colorado adopt Rule 3.7 as contained in the Ethics 2000 Rules rather than continue the existing Colorado Rule, which differs from the Kutak model. The difference lies in Rule 3.7(b): The existing Colorado Rule provides that "[a] lawyer shall not act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless the requirements of Rule 1.7 or Rule 1.9 have been met"; while

the Ethics 2000 version reverses the presumption, saying, " A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9." That is, the presumption of the Ethics 2000 version is that, when a lawyer has another lawyer in her firm who is a necessary witness, the lawyer may proceed with the case unless the conflicts rules mandate otherwise.

Both committees, Berger explained, felt that the earlier Colorado changes unnecessarily deviated from the model text without effecting any real difference in outcome. It is time now, the committees believed, to correct the matter and get Colorado back in line with the model text.

The Committee approved Rule 3.7 and its comments as proposed in the ABA Ethics 2000 Rules.

N. *Rule 3.8 — Special Responsibilities of a Prosecutor.*

Berger reported that the Ethics 2000 version of Rule 3.8 is substantively identical with the existing Colorado Rule and that both the *Ad Hoc* Committee and the Subcommittee recommended adoption of the ABA version.

The Committee approved Rule 3.8 and its comments as proposed in the ABA Ethics 2000 Rules.

O. *Rule 3.9 — Advocate in Nonadjudicative Proceedings.*

Berger reported that the Subcommittee agreed with the *Ad Hoc* Committee that the Ethics 2000 version of Rule 3.9 is misstated, because it incorporates into the nonadjudicative setting principles that have application only in an adjudicative setting. For example, it seems to require a lawyer to disclose, say, to a legislative committee "legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel" per Rule 3.3(a)(2). The *Ad Hoc* Committee revised the Rule to avoid inclusion of principles that are not applicable to nonadjudicative proceedings, and the Subcommittee approved of those revisions.

In answer to a member's question of how the incorporation is to work, a member of the Subcommittee explained that, in Rule 3.9's incorporation of other provisions referring to a "tribunal," one is to apply the incorporated provision *as if* the legislative body or administrative agency were the "tribunal" referred to in the incorporated provision.

Another member asked why Rule 3.9 even existed, inasmuch as it does not deal with courts and adjudicative proceedings. A member replied that lawyers frequently appear before legislatures and administrative agencies in the law-making and rule-making process, on behalf of clients. And another added that it is appropriate for the Rules to make it clear that a lawyer cannot lie in these circumstances, even though they are not "adjudicative."

The Committee approved Rule 3.9 and its comments as recommended by the Subcommittee.

III. *Adjournment; Next Scheduled Meeting.*

The meeting adjourned at approximately 12:00 p.m. The next scheduled meeting of the Committee will be on Tuesday, July 19, 2005, beginning at 9:00 a.m., in the Supreme Court Conference Room.

RESPECTFULLY SUBMITTED,

Anthony van Westrum, Secretary

[These minutes are as approved by the Committee at its meeting on July 19, 2005.]

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COLORADO SUPREME COURT

STANDING COMMITTEE ON THE RULES OF PROFESSIONAL CONDUCT

Approved Minutes of Meeting of the Full Committee
On July 19, 2005
(Tenth Meeting of the Full Committee)

The tenth meeting of the Colorado Supreme Court Standing Committee on the Rules of Professional Conduct was convened at 9:00 a.m. on Tuesday, July 19, 2005, by Chair Marcy G. Glenn. The meeting was held in the Supreme Court Conference Room on the fifth floor of the Colorado State Judicial Building.

Present in person at the meeting, in addition to Marcy Glenn and Justices Michael L. Bender and Nathan B. Coats, were Michael H. Berger, Nancy L. Cohen, David C. Little, Judge William R. Lucero, Kenneth B. Pennywell, Henry Richard Reeve, John M. Richilano, Alexander R. Rothrock, Boston H. Stanton, Jr., David W. Stark, Anthony van Westrum, James E. Wallace, Lisa M. Wayne, and Judge John R. Webb. E. Tuck Young participated by telephone. Excused from attendance were Cynthia F. Covell, and John S. Gleason. Also absent were Cecil F. Morris, Jr., Judge Edward W. Nottingham, and Eli Wald.

I. *Administrative Matters: Ends of Membership Terms; Meeting Materials; Minutes of May 20, 2005 Meeting; Scheduling; Guests.*

The Chair noted that there are presently six vacancies on the Committee, because of the expiration of the terms of four members at June 30, 2005 and the earlier resignations of two members.[1] She asked the members to give her suggestions of persons the Supreme Court might consider appointing as new members.

The Chair had provided a package of materials to the members prior to the meeting date, and the secretary had separately provided the members with submitted minutes of the ninth meeting of the Committee, held on May 20, 2005. The approval of those minutes was delayed to a point later in the meeting, to give additional time for review, but were then approved with two corrections in members' names.

The Chair discussed the scheduling of additional Committee meetings to consider the remainder of the Ethics 2000 Rules, noting that the Committee will have reviewed through the Five Series of the Rules by the end of this meeting, with only Rule 4.4 and Rule 5.5 being skipped. The Subcommittee has yet to consider and report upon the Six Series, she said, but that would be an easy series. The Subcommittee faces some substantive modifications in the Seven and Eight Series, however, so it is unlikely that the Subcommittee could finish its work in just one more meeting, although it could do so in two meetings. If the Committee delayed its next meeting long enough to permit the Subcommittee to have two meetings, then the Committee could consider all of the remaining Rules in one further meeting, perhaps in late September. Then, after giving the

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1. The current membership is as indicated in the second paragraph of these minutes.

Subcommittee time to put together its Final Report, the Committee could meet in early November to approve that report and prepare for its submission to the Supreme Court.

The chair remarked that, once the Final Report on the Ethics 2000 Rules is submitted to the Supreme Court, the Committee's heavy lifting will have been completed. Yet, she noted, the Committee will remain in existence for such further activities as may be useful to the Court, including considering other proposals for changes to the Rules from time to time.

Checking calendars with the members, the Chair scheduled the next meeting of the Committee for 1:30 p.m. on Tuesday, September 27, 2005, assuming availability of the Supreme Court Conference Room on that day.

The Chair introduced to the members two guests, Steve C. Briggs, former member of the Colorado Court of Appeals and Immediate Past President of the Colorado Bar Association, and Tasha Newland, a second year law student at the University of Denver who is serving as a summer clerk at the law firm of Holland & Hart LLP.

II. *Consideration of Deletion of the Concept of "Zealousness" from the Rules.*

The Chair reminded the Committee that it had previously heard[2] a proposal from Mr. Briggs that the term "zealous" be removed from the Rules of Professional Conduct. The term is mentioned four times in the Ethics 2000 Rules — three times in the Preamble and once in the comment to Rule 1.3.[3] Mr. Briggs returned to urge, again, that this Committee recommend that deletion, and he used the opportunity to update the Committee on action taken in other states.

Mr. Briggs referred the Committee to his letter of July 19, 2004, in which he quoted a number of scholars on the deleterious impact of the use of the word "zealous" in the Rules. He noted that his experience since then has been much like that which one has when one begins to drive around neighborhoods looking for a house to buy: Suddenly one sees many house-for-sale signs where none had been noticed before. Similarly, he has suddenly seen a lot of activity concerning "zealousness." At about the time he wrote his 2004 letter to the Committee, he attended the then-concluding session of the Supreme Court's professionalism course for new lawyers and heard Jonathan Asher encourage the attendees to read *The Moral Compass of the American Lawyer*.[4] That book contained a number of

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2. See Item IV.B of the minutes of the Fifth Meeting of the Committee, held on October 1, 2004.

3. Preamble, Paragraph [2]: "As advocate, a lawyer *zealously* asserts the client's position under the rules of the adversary system." Preamble, Paragraph [8]: "A lawyer's responsibilities as a representative of clients, an officer of the legal system and a public citizen are usually harmonious. Thus, when an opposing party is well represented, a lawyer can be a *zealous* advocate on behalf of a client and at the same time assume that justice is being done." Preamble, Paragraph [9]: "[Difficult conflicts between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living, calling for professional discretion even within the framework of the Rules,] must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules. These principles include the lawyer's obligation *zealously* to protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system." Comment [1] to Rule 1.1: "A lawyer must also act with commitment and dedication to the interests of the client and with *zeal* in advocacy upon the client's behalf. A lawyer is not bound, however, to press for every advantage that might be realized for a client." [Emphases added.]

4. Richard A. Zitrin and Carol M. Langford, *The Moral Compass American Lawyer: Truth, Justice, Power and Greed,* Ballantine Books Publishing Co., 1999, ISBN: 0449006719.

examples of inappropriate lawyer conduct, and in each example "zealous advocacy" was the lawyer's defense to discipline. The book, Mr. Briggs said, renounced that defense. Similarly, during his service as president of the Colorado Bar Association, Mr. Briggs was introduced to the book *The Betrayed Profession: Lawyering at the End of the Twentieth Century*,[5] in which Ambassador Linowitz described quitting the profession because of the frustration he had come to feel when dealing with zealous lawyers who pushed the professionalism envelope.

Mr. Briggs said that a member of the Committee had asked him, after his appearance at the Committee's meeting in October 2004, whether any state had removed the word "zealous" from the Rules. To check, Briggs asked Charlotte ("Becky") Stretch, of the American Bar Association's Center for Professional Responsibility, for information; she informed him that Montana and Arizona had deleted the word "zealous" from the Rules' Preamble. Later, when he was serving as a co-presenter at the Western States Bar Convention, Mr. Briggs learned that Montana's deletion had come on that state's supreme court's own motion, and that the deletion had caused not a ripple of dissension. Montana deleted "zealous" from Paragraph [2] of the Preamble and changed the word in Paragraph [8] to "dedicated," as follows: "A lawyer can be a ~~zealous~~ *dedicated* advocate on behalf of a client . . . ." More recently, Mr. Briggs met with the five justices of the Arizona supreme court and learned that they had deleted the word, at the urging of the state's disciplinary counsel, because the word had been used inappropriately as an extra-legal argument to justify inappropriate behavior. Arizona combined the event of the word's deletion with a statewide educational focus on professionalism.

Mr. Briggs argued that today's legal culture is different from that of the 1820's when the words "zealous advocacy" were first used in the British Parliament. As he had noted, Colorado would not be the first state to remove the word from its Rules and thus would run less risk of doing something wrong as the first state to act. He remarked that Elaine Johnson, former president of the Boulder County Bar Association, had reminded him that language is important to culture and that a change of this kind could be a first step in changing the culture of the legal profession for the better; such a step could be combined with an educational program as Arizona did.

In reply to a member's question, Mr. Briggs noted that Montana overlooked the additional usage of the word "zealous" in Comment [1] to Rule 1.3. Arizona deleted the reference from the comment.

After Mr. Briggs concluded his remarks, a member spoke in opposition to the deletion of the concept of zealousness from the Rules. He noted that he and Mr. Briggs had recently talked about the issue. He cautioned that one should not confuse "zealousness" with the very different concept of a "zealot." Zealousness should not be equated with unprofessional conduct. It is an enthusiasm for the interests of the client, a willingness to promote the client's position in litigation or in negotiation, all within the rules of conduct. When we give examples of lawyers suborning perjury, hiding documents in the discovery process, and the like, where the challenged lawyer tries to defend his conduct by saying it was necessary in order to be properly zealous, that is a misuse of the word by the lawyer, not a reason to abandon the word. The word does not actually enable or enhance a defense

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5. Sol M. Linowitz, with Martin Mayer, *The Betrayed Profession: Lawyering at the End of the Twentieth Century*, Charles Scribner's Sons, 1994, ISBN 0-684-19416-3. Ambassador Linowitz was the negotiator of both the Panama Canal Treaty and the Camp David Accords during the Carter Administration and, as a Rochester, New York attorney, was the first general counsel for Xerox Corporation.

of unprofessional conduct. This member subscribes to a newsletter of developments in professional liability that reviews recent disciplinary cases. Reading those cases, one can see that, when a lawyer is disciplined for some twisted use or abuse of the discovery rules, the lawyer was being a zealot instead of acting zealously. The legal profession, this member said, has a bigger problem than zealousness. We have lost a proper sense of professionalism among lawyers. The member recalled speaking with a colleague decades ago about the developing loss of collegiality and its deleterious effect on the discovery process, for both of them could remember an earlier time when a lawyer could call another lawyer and easily obtain an extension of time to produce documents. Now there is a problem with such a collegial extension of time, because the client might have gotten a tactical advantage if the lawyer had refused to give the extension, and, if the lawyer does not take every such advantage, he may be sued by the client for malpractice. But zealousness is something different. A lawyer can be zealous and yet remain within the bounds of the Rules, because the problem is a lack of professionalism, not an excess of zealousness. The clients are right to expect zealousness; they want advocates. But if we were to eliminate zealousness, we would need also to eliminate "advocate" — perhaps we should just call ourselves "dispute resolvers." In this member's view, Mr. Briggs is really talking about the problem of zealots, not about zealousness. The former is where no quarter is given; it's about winning at any cost. Removing the word "zealous" will not tackle that problem.

Mr. Briggs responded to those comments as follows: It is a matter of culture, and it simply is different today from the days when the other member, and his colleagues (here a tongue was firmly in cheek) John Adams and John Marshall, all rode circuit together and shared the inns together in the evenings. Mr. Briggs thought that the lawyers who today use the admonition to be zealous to justify their misconduct are not sitting on this Committee. But the client today expects the lawyer to be zealous; the client, he noted, is not educated about the refinements of the Rules of Professional Conduct and thus is not informed of the limitations on zealousness — the client expects the lawyer to "do what's necessary" to win. Accordingly, there is merit in taking away the word that gives rise to the client's thinking that we have a duty of aggressiveness that exceeds what is in fact permitted by the rules of conduct. Colorado, he noted, can take the Arizona lead and substitute the word "dedicated."

A member noted that the examples given by Mr. Briggs and by the member who had first spoken in opposition to the proposal to delete the word "zealous" from the Rules "are the problem." The Rules do not deal with the gray areas in the civil law arena. He said the procedural rules applicable to the criminal law arena are clearer: If a prosecutor or defense lawyer oversteps the discovery bounds there, there is no reward for the transgression. He did not think the problem could be resolved by changes to any particular Rule; rather, we need to deal with the problem by talking about it, by education. Many books have been written about the Enron situation, in an effort to understand its causes. The similar Colorado case from the 1980s, involving the collapse of the Silverado savings and loan association, involved a "very creative use of a statute." We need to deal with this type of conduct in a direct way. In contrast, in the criminal law arena, the concern is that the lawyers are not zealous enough. The criminal defense bar is under-compensated and is becoming merely "an arm of the state." We need to articulate the proper role of a lawyer by education, not by way of the Rules. To date, there has been no formal articulation of "professionalism." We need something that would articulate what it is that "professionalism" embodies.

Mr. Briggs responded to these comments by referring to the Colorado Bar Association's Professional Reform Initiative, and he suggested that it should be used to roll out a statewide educational program.

A member spoke to join with the first member in opposing the removal of the word "zealous" from the Rules. He doubted that many lawyers even know the word is actually used in the Preamble and in the comment to Rule 1.3. The problem is "legal Rambo-ism." It is incorrect to claim that the pedagogical use of the redhead to sway the jury and the *Zimmerman* case[6] are attributable to encouragement of bad behavior found in the wording of the Rules. There are, instead, other factors. The new discovery rules may not quite be no-holds-barred, but they encourage obfuscation. Displaying copies of telephone directory advertisements, this member pointed to those that proclaim the attributes of aggressiveness, bulldoggedness. Further, it appears that avoiding malpractice charges from clients requires a lawyer to "go the full ten yards." We need an educational program; we cannot solve the problem by changing a word in the Preamble. Quoting in full from the Preamble,[7] this member pointed out that the text makes it clear that the lawyer's conduct is still subject to, and limited by, "the rules of the adversary system."

This member also quoted from Canon 15 of the 1908 ABA Canon of Professional Ethics: "The lawyer owes 'entire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights and the exertion of his utmost learning and ability,' to the end that nothing be taken or be withheld from him, save by the rules of law, legally applied. . . . But it is steadfastly to be borne in mind that the great trust of the lawyer is to be performed within and not without the bounds of the law. The office of attorney does not permit, much less does it demand of him for any client, violation of law or any manner of fraud or chicane. He must obey his own conscience and not that of his client."[8] He remarked that this is "good stuff" and that we, as lawyers, should be zealous. "I want my lawyer to be on my side." We need zealousness. This member disagreed with the proposal to remove the four references to zealousness. He agreed that part of the problem we have

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6. *Spaulding v. Zimmerman*, 263 Minn. 346, 116 N.W.2d 704 (Minn. 1962).

7. "As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system" and "A lawyer's responsibilities as a representative of clients, an officer of the legal system and a public citizen are usually harmonious. Thus, when an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done." Preamble, Paragraph [2], Ethics 2000 Rules of Professional Conduct.

8. The full text of Canon 15 is as follows:

> 18. How Far a Lawyer May Go in Supporting a Client's Cause. Nothing operates more certainly to create or to foster popular prejudice against lawyers as a class, and to deprive the profession of that full measure of public esteem and confidence which belongs to the proper discharge of its duties than does the false claim, often set up by the unscrupulous in defense of questionable transactions, that it is the duty of the lawyer to do whatever may enable him to succeed in winning his client's cause.
>
> It is improper for a lawyer to assert in argument his personal belief in his client's innocence or in the justice of his cause.
>
> The lawyer owes "entire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights and the exertion of his utmost learning and ability," to the end that nothing be taken or be withheld from him, save by the rules of law, legally applied. No fear of judicial disfavor or public unpopularity should restrain him from the full discharge of his duty. In the judicial forum the client is entitled to the benefit of any and every remedy and defense that is authorized by the law of the land, and he may expect his lawyer to assert every such remedy or defense. But it is steadfastly to be borne in mind that the great trust of the lawyer is to be performed within and not without the bounds of the law. The office of attorney does not permit, much less does it demand of him for any client, violation of law or any manner of fraud or chicane. He must obey his own conscience and not that of his client.

been discussing is a hangover from former Canon 7 of the Code of Professional Responsibility — "A lawyer should represent a client zealously within the bounds of the law" — but, he noted that requirement of zealousness was contained by "the bounds of the law." The problem we have been discussing arises from the prostitution of the words to justify improper conduct, conduct that is outside the bounds of the law.

Another member agreed that the word "zealous" should be retained in the Preamble but asked whether we could add a sentence explaining what that principle does not mean and what it does not condone.

Mr. Briggs commented that those who are not fully informed hear the word "zealous" and do not investigate the deeper meaning of its use in the Rules. "Let your conscience be your guide" is a principle that is expressed in the Rules,[9] but most lawyers are not aware of that. The American Law Institute has looked at the word "zealous" and characterized it as a willingness to work through the night. But adding an explanatory sentence, as has been suggested here, will not eliminate the word "zealous" and thus will not effect a change in the culture.

A member who specializes in criminal law urged that we not delete the word "zealous." She acknowledged that there may be a difference between the fields of civil and criminal law, as another member had suggested, but she perceived the effort to delete the word as an attack on us as lawyers, part of a conservative movement to attack the judiciary. She, she said, was proud to be a lawyer and a zealous advocate for her clients. She did not want to back down from that stance. She sees, instead, an omission in the law schools, where young lawyers will soon be pressured to make a lot of money to pay back student loans and are not becoming lawyers for the reasons that many of us had. The law schools need to address the problem, perhaps with a requirement from the Court that lawyers have more hours of ethics and professionalism training before they may be licensed. Changes to the Preamble will not address the problem.

Another member remarked that he had previously believed, on principle, that the word "zealous" should not be removed from the Rules. But he had come to believe that it has become a code word for conduct that most of us find to be unacceptable. There is no good reason to retain it, now that it has gained its bad connotation. No one has said that its deletion will cause harm, particularly if the deletion is accompanied by an explanation of why we have taken it out. It should go, because it does not serve a good purpose.

A member said that seasoned lawyers, not just new ones, use "zealousness" as a defense for bad conduct. Surveys from large and small civil practice firms in New York have returned comments from associates that their supervising partners expect excessive "zeal." These partners are not young lawyers needing to repay student loans but lawyers who want to push the envelope as much as possible to aid their clients. Most people do think that "zealous" means "zealot," although this member recognizes that in fact it does not. She referred the Committee to the American Bar Association Center for Professional Responsibility for information on this survey. She also noted that Indiana has removed the word from its Rules.

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9. "However, a lawyer is also guided by personal conscience and the approbation of professional peers." Preamble, Paragraph [7], Ethics 2000 Rules.

Mr. Briggs pointed out that it is interesting that many of the articles that have been written to suggest deletion of the word "zealous" have been written by law school professors. He added that he had not found any articles urging the word's retention.

Another member, whose practice was also largely in the criminal law field, asked what removing the word would do to "change the culture" within a lawyer's group of peers.

Mr. Briggs replied that, to the next generation of lawyers, there would be no experience with the word "zealous" and thus no cause to use it to justify bad conduct. The substituted word "diligence" would imply working through the night but would not connote practices that are in fact beyond professionalism. We have, he noted, just one set of Rules, not divided between those for civil practice and those for criminal practice. But there is case after case in which the Office of Attorney Regulation Counsel hears "zealousness" used as a cultural justification.

Following a seconded motion to delete the word "zealous" from the Rules, a member spoke to say she had heard good reasons for thinking that "zealous" means something other than "zealot." Accordingly, and because "zealousness" is not actually a requirement of any substantive rule, she said she would vote against the motion. She felt that it is a misconception to think that the problem we've been discussing can be addressed through education — even if the word were deleted, it would remain a ghost like the phrase "an appearance of impropriety," a phrase that has remained in the culture of at least older lawyers although it has been omitted from the Rules. The proposal to delete "zealous" is a nice gesture, but the issue can be dealt with more effectively in the law schools and through the disciplinary activities of the Office of Attorney Regulation and the Presiding Disciplinary Judge. There is no good reason to omit the word.

The member who had referred to the survey of New York law firms asked whether the motion could be amended to add a sentence to the Preamble noting the need for a lawyer to be enthusiastic in representing a client and defining the concept of an "advocate." That amendment to the motion was accepted, but the motion, as amended, failed.

The Chair thanked Mr. Briggs for his presentation and pointed out that he can take the issue directly to the Court when and if the Ethics 2000 Rules are released for public comment.

A member suggested that the Subcommittee be asked to consider adding a phrase to the Preamble defining the meaning of zealousness. After discussion, that suggestion was made a motion, and the motion carried.

III. *Subcommittee on Ethics 2000 Rules*.

Michael Berger, chair of the Subcommittee on the Ethics 2000 Rules, returned the Committee to a consideration of those Rules and to the Subcommittee's Interim Report No. 6.

A. *Rule 1.15 — Safekeeping Property*.

Berger reported that the ABA Ethics 2000 / Colorado Rules of Professional Conduct Committee (the "*Ad Hoc* Committee") had suggested retaining the existing text of Rule 1.15 and that the Subcommittee had agreed with that proposal, because the Rule has seen a number of Colorado-specific amendments. More recently, the COLTAF Board of Directors had proposed some amendments to reflect decisions from the United States Supreme Court

on the "takings" issue, and the Office of Attorney Regulation Counsel had proposed amendments to reflect changes in Federal banking law effected by the "Check 21" legislation. Additionally, a member of the Subcommittee had suggested that the structure of the Rule had become unduly complex; as a result, the Subcommittee re-ordered the Rule without making substantive change. All of these changes are included in the Rule as proposed by the Subcommittee in its Interim Report No. 6.

A member noted the need to delete the remaining, bracketed, drafting instruction, in Rule 1.15(e)(4), to "confirm [the] correct cite"; the Rule as drafted correctly refers to Rule 1.15(j).

A member described the amendments made to accommodate "Check 21" as follows: That legislation eliminated the obligation of banks to supply customers with the originals of cancelled checks, although customers may still request copies of such checks showing both the front and the back of each check. Accordingly, Rule 1.15(j)(7) (as numbered in the revised text) is changed as follows: "(7) All bank statements and ~~**prenumbered**~~ ***photo static copies or electronic copies of all*** canceled checks." What is numbered Rule 1.15(i)(1) is added to make it clear that automatic teller and debit cards are not permitted; this is, she noted, consistent with the prohibition of cash withdrawals from COLTAF accounts and checks drawn on COLTAF accounts made payable to "cash," a prohibition that is now found in Rule 1.15(i)(3). The latter prohibition, she noted, had previously been buried in the text of the Rule and was hard to find. The member pointed out that further changes in banking laws over the next seven or eight years will undoubtedly require further changes to Rule 1.15.

A member pointed out that the Rule now comprises seven pages of detail, micro-managing the accounting process; he asked whether it was all necessary. The member who had explained the "Check 21" changes assured him that it was absolutely necessary. The Rule as proposed by the Subcommittee is a combination of the Ethics 2000 version of the Rule and the model bookkeeping rules that a number of states have adopted. Lots of lawyers, she remarked, forget that lawyers are fiduciaries with respect to the property they take into custody for their clients and third persons. She has often heard lawyers complain that "the Court thinks we are fiduciaries," and she has been shocked thus to learn that lawyers do not know that indeed they are fiduciaries as to their trust accounts. The Office of Attorney Regulation Counsel receives 350 trust account problem notifications from the banks each year; some large percentage of those notifications arise from bank error, but a significant number are attributable to lawyers and is an amazing indication of how much lawyers don't understand trust account maintenance. Only if the Court determined that lawyers are not fiduciaries would you not need such detail, she quipped.

The Committee approved Rule 1.15 and its comments as recommended by the Subcommittee.

B *Rule 1.17 — Sale of Law Practice.*

Berger noted that Rule 1.17 had been considered at the Committee meeting on May 20, 2005, but the Committee had left unresolved the issue of what is to be done when notice of intention to transfer a client's file in connection with a sale of a law practice cannot be given to the client. The ABA Model Ethics 2000 Rules preclude transfer of the file from the selling lawyer to the buying lawyer absent a court order permitting the transfer, but the Committee had determined not to burden Colorado courts with such matters. Accordingly, the Subcommittee has returned the Rule to the Committee with a

recommendation that the client's consent to the transfer of the file be presumed if the client has not objected within sixty days after notice is given to the client's address as last known to the lawyer.

Berger noted that this resolution of the problem is sensible, both because each client bears the reasonable duty of keeping his or her lawyer informed about where the client can be reached for communication and because the client's file will be transferred to a buying lawyer who will be subject to the same duties, with respect to that client, as were imposed on the selling lawyer by the Rules and the law governing lawyers.

A member asked whether Comment [7] and Comment [8] to Rule 1.17 as recommended by the Subcommittee were consistent with the text of the Rule that the Subcommittee has recommended. He was correct in his observation, for those comments continued to refer to the giving of "actual written notice" to the client — which might mean something other than written notice to the last known address — and continue to refer to the prospect of obtaining a court order regarding the file's transfer or other disposition when notice cannot be given.

Recognizing the need to bring the comments into line with the Subcommittee's text of the Rule, Berger asked for approval only of the text at this time, with the Subcommittee to reconsider the comments. As he requested, the Committee approved the text of the Rule as recommended by the Subcommittee.

C. *Rule 4.1 — Truthfulness in Statements to Others.*

Berger warned the Committee that Rule 4.1 will again raise the issue of materiality of false statements that the Committee dealt with in its consideration of Rule 3.3 at its May 20, 2005 meeting. At that time, the Committee had determined to add a requirement of materiality in Rule 3.3(a)(1), so that the Rule proscribed knowingly making a false statement to a tribunal regarding a fact only if the fact in question was material.[10] Having determined to add a materiality requirement in Rule 3.3, it is logical that the Committee apply the same standard with respect to statements made to third persons, and that is the recommendation of the Subcommittee.

[It should be noted that the discussion that follows deals with the making of false statements of fact, not the correction of false statements previously made — in the latter case, all versions of the Rules require that the statement be materially false before correction is required.]

To assist the Committee in its consideration of the issue, Berger distributed a document comparing the text of the various versions of Rule 3.3 and of Rule 4.1 as found in the existing Colorado Rules, the Kutak versions of the model Rules, the ABA Ethics 2000 versions, and the versions recommended by the Subcommittee. The document demonstrated that materiality has been a requirement of the current Colorado Rule 3.3 and the Kutak version of Rule 3.3 but is not a requirement in the ABA Ethics 2000 version of

10. As an aside, Berger noted that the Subcommittee's Interim Report Nº 6 erroneously implies that the ABA Model Ethics 2000 version of Rule 3.3 contains a materiality requirement, stating, "At its last meeting, the full Committee voted to approve ABA Ethics 2000 Rule 3.3, which contains a materiality requirement." In fact, the ABA version of Rule 3.3 does not require materiality, although its version of Rule 4.1 does include that requirement.

Rule 3.3.[11] By the Committee's action taken at its previous meeting, materiality is a requirement under proposed Colorado Rule 3.3. In contrast, the current Colorado version of Rule 4.1 does not contain a materiality requirement, although the Kutak and ABA Ethics 2000 versions of Rule 4.1 do require materiality. As Berger noted, the Subcommittee recommends that the Colorado version of the Ethics 2000 Rule 4.1 also contain the requirement of materiality.

Berger pointed out that the *Ad Hoc* Committee had recommended the retention of the existing Colorado version of Rule 4.1(a), reading [showing differences from the Ethics 2000 version], "In the course of representing a client a lawyer shall not knowingly: (a) make a false ***or misleading*** statement of ~~**material**~~ fact or law to a third person; or . . . ." The Subcommittee rejected that approach, noting as it did so that Comment [1] to Rule 4.1 in the ABA Ethics 2000 version makes it clear that "misleading statements" can be false in some circumstances.

As to that Comment [1], Berger said the Subcommittee disapproved of its interjection of the concept of a "misrepresentation," a concept not found in the text of the Rule itself. The Subcommittee recommends a modification of that comment to focus it on "falsity," a modification that does not change the substance of the comment. The Subcommittee's modifications are as follows:

> ~~**Misrepresentation**~~ ***False Statements***
>
> [1] A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A ~~**misrepresentation**~~ ***false statement*** can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. ~~**Misrepresentations can also occur by**~~ ***Omissions or*** partially true but misleading statements ~~**or omissions that are**~~ ***can be*** the equivalent of affirmative false statements. For dishonest conduct ~~**that does not amount to a false statement or for misrepresentations by a lawyer other than in the course of representing a client**~~ ***generally***, see Rule 8.4.

A member who is a member of the Subcommittee noted that the"materiality" limiter has been absent from the Colorado Rule for a dozen years; she did not recall the discussion that led to its deletion in Colorado but guessed that it related to the comparative duty of honesty and candor to third persons. She noted that the existing Colorado Rule requires materiality in the related provision, Rule 4.1(b), governing failures to disclose, as distinguished from statements actually made.

Another member of the Subcommittee agreed with that historical review and commented that a lawyer should be honest when dealing with third persons, and no games should be played with what is honest.

The first Subcommittee member continued her review of the historical version, admitting that Colorado is one of the few states not to have the materiality requirement but stating that its omission in Colorado does not appear to have been an issue in actual disciplinary cases in the state. In her view, Colorado should continue with the omission of

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11. See the discussion of Rule 3.3 in the minutes of the Committee's Ninth Meeting on May 20, 2005. There it is noted that the concept of a knowingly false statement is understood in the ABA version to be a statement made with actual knowledge of the falsity. In contrast, under the *Rader* line of cases, the Colorado courts have heretofore equated knowledge with recklessness, so that a lawyer can be sanctioned for a false statement that is made with reckless disregard for its falsity.

the materiality requirement in Rule 4.1. She accepted all of the other recommendations made by the Subcommittee with respect to Rule 4.1.

The member who had confirmed the historical review added that the "fudge factor" is found in Comment [2] to the Rule, which points out that whether "a particular statement should be regarded as one of fact can depend on the circumstances." This, he said, was the crack in the shield: One can argue whether something is a statement of fact in a particular circumstance. He would tighten up the text of the Rule itself.

A third member of the Subcommittee said he spoke for the majority of the Subcommittee when he urged the adoption of the ABA Ethics 2000 version, with the materiality limiter, both to be consistent with Rule 3.3, regarding candor to the tribunal, and to minimize prosecutorial discretion in this area. He recounted that, in defense of the existing Colorado version of Rule 4.1, which has no requirement of materiality, he had heard representatives of the Office of Attorney Regulation cite silly examples of immaterial falsities and claim that they would never prosecute for such errors. In his view, this trust-us,-we'll-not-prosecute-the-silly-cases point of view left the Office with too big a club in its hands. He said that only two other states, including Minnesota, do not have a materiality requirement; he did not know what their experiences had been.

A member observed that, since the existing Colorado text does not require materiality for a violation of Rule 4.1(a), it is not surprising that attorneys have not attempted defenses based on the immateriality of their false statements. Another, however, pointed out that immateriality has been argued in mitigation of violations. The first member added that she agreed that the existing Colorado version of the Rule could be used by the Office of Attorney Regulation as an additional weapon, piling on with a "gotcha." In her view, it should not be a disciplinary offense to make a false statement of an immaterial fact.

Countering this, the member who had pointed to Colorado's dozen years without a materiality requirement argued that a lawyer should be even more truthful in dealing with third persons than when dealing with a court and subject to Rule 3.3. Third persons, she said, assume lawyers are truthful, while the experience from actual disciplinary cases is that the courts will chastize the Office of Attorney Regulation if it prosecutes for silly violations of Rule 4.1(a). She admitted that the Rule, without a materiality limiter, can be mis-applied by the prosecutors, that it can be a "gotcha" rule, but she argued that other rules, such as Rule 8.4, are subject to the same theoretical risk, so that is not a sound basis on which to argue for materiality. Rather, she said, the Committee should consider what is the philosophy that it wants to adopt for lawyers going forward from here.

A member who was not a member of the Subcommittee was reminded of the *Pautler*[12] decision and asked whether an insertion of a materiality requirement would have affected the outcome of that case, which this member thought of as a good case.

Another member replied that he believed the Office of Attorney Regulation and the courts will have two thresholds of materiality. Pautler, he said, could not successfully argue that his statements to the man he was attempting to induce to surrender to the police were immaterial. In this member's view, all that is at issue before this Committee are immaterial falsehoods, the "gotchas." The substantive effect of the Rule would be unchanged. He commented,"Think about it: If a lawyer is really considering making a

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

false statement to another person, he will have to ask himself, would a court consider this immaterial?" In this member's view, as soon as the lawyer asked himself that question, he would decide not to take the risk, not to make the statement. As was said during the Committee's discussion of Rule 3.3, let's not waste our time on immaterial stuff. Lawyers will not be looking for ways to make immaterial statements.

The Committee approved Rule 4.1 and its comments as recommended by the Subcommittee.

D. *Rule 4.2—Communication with Person Represented by Counsel.*

Berger said the Subcommittee generally recommends the ABA Ethics 2000 version of Rule 4.2 but agrees with the *Ad Hoc* Committee that Comment [4] to the Rule should be amended to use, as an example for the point that a lawyer may have an independent justification for communicating directly with a represented person, the case of a notice given by a lawyer directly to a contract party pursuant to a contract right or obligation to give such notice to that party. The Subcommittee did not believe that ghostwriting such a notice and directing the client to send it was an appropriate solution and that the risks of such a communication were small.

A member looked at the placement of the Subcommittee's addition to Comment [4] and suggested that it be moved to an earlier position in the comment, so that, as amended, the last sentence of the comment would read, "Also, a lawyer having independent justification or legal authorization for communicating with a represented person***, such as a contractually-based right or obligation to give notice,*** is permitted to do so."

The Committee approved Rule 4.2 and its comments as recommended by the Subcommittee, with the change noted immediately above.

E. *Rule 4.3—Dealing with Unrepresented Person.*

Berger told the Committee that the ABA Ethics 2000 modifications to Rule 4.3 introduce a new concept, not found in the Kutak and existing Colorado Rules: It is, under the ABA Ethics 2000 version, permissible for a lawyer to give advice to an unrepresented person so long as the lawyer has no reason to know of a conflict of interest between the lawyer's client and the unrepresented person. In Berger's view, this means that a lawyer may have a frank discussion with an unrepresented person so long as the lawyer does not have reason to know of an interest adverse to those of his client. The alternative, Berger said, is for the lawyer to be extraordinarily careful in all communications with unrepresented persons in order to avoid a violation of the existing Rule. The ABA and the Subcommittee did not think that was necessary, but the *Ad Hoc* Committee had recommended against adoption of the ABA's liberalization.

Berger reported that the Subcommittee's discussion of Rule 4.3 had raised the possibility that, once a lawyer gives advice to an unrepresented person that person is no longer unrepresented — she now has that lawyer as her lawyer — and the lawyer has the full panoply of Rule 1.7 conflicts issues to consider, as well as the issue of the confidentiality owed to his new client under Rule 1.6. But, despite these and some other issues, the Subcommittee recommended the ABA's version of Rule 4.3.

In response to Berger's observation that the Office of Attorney Regulation did not favor that version of Rule 4.3, a member commented that the Office would not see it as a

particular problem for the prosecutors. Rather, it is the lawyer who chooses to communicate with an unrepresented person who faces issues if he "crosses the line," issues that may arise under Rule 4.3 and the other Rules. But that, this member said, is the lawyer's problem, not a problem for the Office of Attorney Regulation.

Berger agreed with this comment, pointing out that the ABA's view is that there should be an opportunity to communicate with an unrepresented person in an appropriate context. A member pointed out that such a context would be negotiations in connection with a transaction; Berger agreed but added that litigation may also be such a context. It does no good to tell a person to "get a lawyer" when one knows the person cannot afford to do so.

A member who regularly defends lawyers in malpractice cases commented that he, too, wanted to "give the lawyer the chance to make the mistake." Requiring the lawyer to say, "I can't talk to you about this, you must get a lawyer," may not permit enough to be said that could be of use to the unrepresented person without harm to his, or the client's, interests because of conflict. For example, in a transactional situation, the lawyer should be able to explain to the four about-to-be partners why they each need to get a lawyer, because he represents only the resulting partnership. It is useful to permit the lawyer to explain *why* they should get their own lawyers, and what kinds of issues they may want separate counsel on, without running afoul of Rule 4.3.

Another member noted that, in a criminal case, a judge may tell an unrepresented person to go out into the hallway and discuss the matter with the prosecutor. That, he noted, will make the prosecutor very nervous, but it is often necessary; disposition of the case may be very clear, but, without the change made in the ABA Ethics 2000 version of Rule 4.3 and recommended by the Subcommittee, the prosecutor is in a very difficult spot.

Another member offered as an example the deposition of an unrepresented third-person witness who has been subpoenaed by an opposing party. That person may turn to another lawyer, who is monitoring the deposition for her own client, and inquire whether he has to answer tough questions. In the absence of a conflict between the interests of that witness and the lawyer's own client, she saw no reason why the lawyer could not respond to that inquiry. But, in response, another member noted the risk that advice from the monitoring lawyer might impair the unrepresented witness's legal privileges.

A member asked for a more conservative approach, using, as an example, the criminal proceeding; she would want the advising lawyer — particularly if he were the district attorney — be required to disclose to the court and participating counsel, "I have advised this witness as follows . . . ."

But to that suggestion, another member suggested that the proposed obligation to disclose to the court and participating counsel what advice was given might infringe on the newly-established confidentiality obligation running from the advising lawyer to the unrepresented person. This member moved adoption of the subcommittee's proposal, without expansion to include the just-suggested disclosure obligation.

Before action was taken on that motion, a member asked the moving member about the conflict issues that are presented: Is the advising lawyer obligated by Rule 1.4 to advise his engaging client of the advice he has given to the unrepresented person? The moving member responded that the limitation contained in the proposed Rule — the advising lawyer must do no more than advise the unrepresented person to secure counsel "if the lawyer

knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client" — is intended to cover that situation. The member who had raised the question felt, however, that, despite that limitation, the advising lawyer might be misled, by the apparent freedom of Rule 4.3, not to give proper consideration to the requirements of Rule 1.4 and of Rule 1.7 governing conflicts of interest.

A member suggested that part of the problem is the general assumption, given an overly-aggressive reading of *People v. Bennett*,[13] that an attorney-client relationship is created whenever a lawyer speaks to a person. This member, who had been a member of the *Ad Hoc* Committee, recommended that this Committee adopt the ABA Ethics 2000 version rather than limit the Rule to the more restrictive text of the present Colorado rule as the *Ad Hoc* Committee had suggested. He commented that the risk of conflict is often, at most, but a low-grade risk and that much benefit may come from permitting a lawyer to "give legal advice" to "an unrepresented person" if there is no conflict.

The Committee approved Rule 4.3 and its comments as recommended by the Subcommittee.

F. *Rule 4.4—Respect for Rights of Third Persons.*

Berger reported that the Subcommittee has not completed its consideration of Rule 4.4, to which the ABA has made extensive changes, and thus has not included it in the Subcommittee' Interim Report No. 6.

G. *Rule 4.5—Threatening Prosecution.*

Berger noted that Colorado is one of only a few states to include Rule 4.5, dealing with threats of prosecution, in its ethics rules; there is, he noted, no ABA analog either in the Kutak Rules or the ABA Ethics 2000 Rules. The *Ad Hoc* Subcommittee recommended retention of the Colorado rule, with minor changes, and the Subcommittee agrees.

To that introduction, a member responded that the proposed change — from barring the presentation of criminal charges "solely to obtain an advantage in a civil matter" to barring such a presentation "principally to obtain" such an advantage — was not just a "minor change." Now, she suggested, the matter is more of a "judgment call," and she asked whether the change would make the question of whether to present criminal charges too difficult, lacking a safe harbor. Berger agreed that the change is not insignificant but suggested that, without the change, the second half of Rule 4.5(a) — in which the "solely" limitation is found — is essentially meaningless, since a lawyer can always have some other reason, in addition to gaining an advantage, for presenting criminal charges.

The member who had suggested that the change from "solely" to "principally" is significant read from the report of the *Ad Hoc* Committee: "The Colorado Committee recommends the retention of this Rule and its Comment in their entirety, except for one substantive change in the Rule itself. Specifically, the Colorado Committee recommends expansion of the prohibition against presenting criminal, disciplinary or administrative charges to include those instances in which the charges are presented 'primarily' to gain an advantage in a civil matter, not the more-difficult-to-prove standard reflected in the current term 'solely.'"

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13. 810 P.2d 661 (Colo. 1991).

A member asked how often the Office of Attorney Regulation Counsel saw the issue of lawyers' "retaliatory charges" of ethical violations, and he was told that the Office sees "lawyers acting like kids in a sandbox all the time," throwing charges and countercharges. The Office has seen cases where the principal object of a disciplinary charge is probably to gain an advantage in other litigation and is often made in the last paragraph of a letter to opposing counsel, violating the "threaten charges" part of the Rule.

To that comment, Berger said the matter had become more difficult for him and that he was leaning toward returning to the "solely" standard of the existing Colorado rule.

A member noted, too, that the Colorado comment would need to be modified in several respects to reflect the change from "solely" to "principally," if that change were made to the text of the Rule.

Against this tide, another member spoke to argue that the existing word "solely" denudes the Rule. In his view, if the lawyer has mixed motives for presenting a charge, and one of them is to gain an advantage in another matter, the lawyer should simply refrain from making the threat to present charges. In this member's view, the lawyer should just go ahead and file the complaint. Others spoke against this view as a misreading of the two halves of Rule 4.5(a), wherein the "solely" or "principally" limitation applies only to the second half, the actual "presentation" of charges.

A member asked whether it would be a defense, to a charge that a lawyer had violated Rule 4.5, for the lawyer to say that she had a second motive for presenting charges — the motive of seeing a very bad person be prosecuted for his wrongful acts — even when, for example, she also sought to gain an advantage, by the presentation of charges, in collecting a debt. In that case, the lawyer's motive would not be "solely" for the advantage, while it might be "principally" for the advantage.

Another member noted that there is an "aspirational" Colorado statute requiring the reporting of crimes, a statute that has no penalty for failing to do so.[14]

The Committee approved Rule 4.5 and its comments as recommended by the Subcommittee but with the reinsertion of the word "solely" in place of "principally."

H. *Rule 5.1—Responsibilities of a Partner or Supervisory Lawyer.*

Berger explained to the Committee that the ABA Ethics 2000 version of Rule 5.1(a) expands its coverage to include lawyers who are not "partners"[15] but who "individually or together with other lawyers possesses comparable managerial authority in a law firm." The

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14. § 18-8-115. Duty to report a crime--liability for disclosure:

> It is the duty of every corporation or person who has reasonable grounds to believe that a crime has been committed to report promptly the suspected crime to law enforcement authorities. Notwithstanding any other provision of the law to the contrary, a corporation or person may disclose information concerning a suspected crime to other persons or corporations for the purpose of giving notice of the possibility that other such criminal conduct may be attempted which may affect the persons or corporations notified. When acting in good faith, such corporation or person shall be immune from any civil liability for such reporting or disclosure. This duty shall exist notwithstanding any other provision of the law to the contrary; except that this section shall not require disclosure of any communication privileged by law.

15. Defined in Rule 1.0(g) to "[denote] a member of a partnership, a shareholder in a law firm organized as a professional corporation, or a member of an association authorized to practice law."

Ad Hoc Committee had recommended adoption of the ABA version and the Subcommittee does as well.

The Committee approved Rule 5.1 and its comments as recommended by the Subcommittee.

I. *Rule 5.2—Responsibilities of a Subordinate Lawyer.*

Berger noted that the recommendation of the Subcommittee is to adopt Rule 5.2, which, as included in the ABA Ethics 2000 version and recommended also by the *Ad Hoc* Committee, is unchanged from Colorado's existing Rule.

The Committee approved Rule 5.2 and its comments as recommended by the Subcommittee.

J. *Rule 5.3—Responsibilities Regarding Nonlawyer Assistants.*

Berger explained that the ABA Ethics 2000 version of Rule 5.3 contains the same expansion of coverage — to include not only "partners" but also other lawyers who "individually or together with other lawyers possesses comparable managerial authority in a law firm." — that the Committee had just approved with its adoption of the Subcommittee's recommendation of Rule 5.1. The ABA version had been recommended by the *Ad Hoc* Committee and is also recommended by the Subcommittee.

The Committee approved Rule 5.3 and its comments as recommended by the Subcommittee.

K. *Rule 5.4—Professional Independence of a Lawyer.*

Berger told the Committee that the *Ad Hoc* Committee recommended a version of Rule 5.4 that is a combination of the ABA Ethics 2000 version and the existing Colorado Rule, and the Subcommittee makes the same recommendation. Rather than retaining the ABA's substantive discussion of the characteristics of a professional corporation from which a lawyer may practice law, the recommended version of the Rule makes a cross-reference to Rule 265, CRCP, in which the Court has specified the characteristics of a "professional company" and which deals specifically with issues alluded to in the ABA Ethics 2000 version.

A member commented that he had always been curious about why Rule 5.4 is captioned "Professional Independence of a Lawyer" when it is Rule 2.1 that actually deals with that topic and Rule 5.4 that covers the economic issues that affect independence. But, he said, he was not proposing changing the caption to some nonuniform alternative.

To that comment, Berger noted that the Subcommittee has recommended a number of changes making the text of the Rule nonuniform, so the Committee might feel comfortable providing a nonuniform caption, too. But there was no motion to change the caption.

The Committee approved Rule 5.4 and its comments as recommended by the Subcommittee.

L. *Rule 5.5—Unauthorized Practice of Law; Multijurisdictional Practice of Law.*

Berger reported that the Subcommittee has not completed its consideration of Rule 5.5. It will make a recommendation to the Committee before the next Committee meeting.

M. *Rule 5.6—Restrictions on the Right to Practice.*

Berger said the Subcommittee, like the *Ad Hoc* Committee, recommends adoption of the ABA Ethics 2000 version of Rule 5.6, which contains only some nonsubstantive changes from the existing Colorado Rule.

The Committee approved Rule 5.6 and its comments as recommended by the Subcommittee.

N. *Rule 5.7—Responsibilities Regarding Law-Related Services.*

Berger reported that Rule 5.7 would be a new Rule for Colorado. He characterized it as a good rule, which provides some guidance, not presently existing, as to when a lawyer with a second occupation needs to comply with the Rules as to her activities in that second occupation. That has been a "dicey question" and is now answered. He said Rule 5.7 does not govern whether a lawyer may have another occupation but just what happens if she does.

A member provided a bit of history, explaining that, when Colorado considered adoption of the Kutak Rules, those Rules did not then contain Rule 5.7 — an earlier version had been removed from the Kutak Rules by the time of Colorado's review. Colorado did not later consider the Rule when it was added back to the Kutak Rules.

In response to a member's request for an explanation of how Rule 5.7 worked, Berger gave this example: If, in addition to a law practice, a lawyer conducts a real estate agency business, and if it appears that the services offered in the real estate agency business "might reasonably be performed in conjunction with and in substance are related to the provision of legal services," then, when providing services as a real estate agent, the lawyer is subject to the Rules if the provisions of Rule 5.7(a) apply. That is, the lawyer will be subject, in her real estate agent's capacity, to all of the Rules if either (1) the "circumstances" in which the lawyer directly provides the agency's services are "not distinct" from her lawyering services or (2) the services are provided by a separate entity that the lawyer controls, alone or with others, and the lawyer does not take reasonable measures to assure that the agency's customers know that the agency's services "are not legal services and that the protections of the client-lawyer relationship do not exist."

Another member used the example of a lawyer's ancillary business of providing document production services for use by other lawyers in litigation. The lawyer would be well advised to establish a separate physical entrance for customer's access to the document production services facility, use a name that is distinct from that used by the lawyer for legal services, and take other steps to make sure that customers of the document production services business understand that those services do not constitute a law practice. If the lawyer fails to do those things and thus is not covered by the exclusions provided by Rule 5.7(a)(1) and (a)(2), he will be subject to the Rules in his dealings with the customers of the document production services business, including the Rules governing conflicts of

interest and confidentiality, and Rules such as those governing conflicts of interest and confidentiality may apply with respect to the persons who are parties to the litigation as to which the document production services are rendered.

This member said her view has been that, even without Rule 5.7, Colorado lawyers have acted as if it were in effect when establishing "ancillary businesses."

A member expressed his concern about the application of Rule 5.7 to lawyers who provide arbitration and mediation services. A lawyer-mediator may frequently advise a mediating party that the party is not likely to prevail in a trial on the arguments that he has made to the mediator. That sounds like the giving of legal advice, and yet the lawyer-mediator does not believe that the parties to the mediation are his clients or that he is subject to the Rules governing confidentiality and conflicts of interest when he provides his mediation services to them.

Another member responded to this concern by noting some of the complexities it raises. As to arbitration, it is probably the case, he suggested, that the arbitrator does not have clients and is not giving legal advice: The arbitrator listens to the parties' arguments and determines which one has won. Further, it is clear that persons who are not lawyers may serve as arbitrators without being thought to engage in the unauthorized practice of law. But a lawyer who undertakes to mediate a dispute between two persons who are not represented by their own counsel runs a distinct risk that he will be found to have two clients, each with interests that, by definition, conflict with the interests of the other. This member noted that he regularly provides mediation services to two parties who have their own counsel in attendance — so that, after explaining how he thinks a judge might respond to a party's legal argument, he can say, "but I am not your lawyer, and you should ask your own lawyer whether she evaluates the matter as I do" — but that he will not provide mediation services to unrepresented parties for fear of becoming their lawyer. He noted that his mediation engagement letter, always entered into with the lawyers who are representing the mediating parties and not directly with those parties themselves, is replete with provisions clarifying that, as a mediator, he will not be acting as any party's lawyer.

To that, a member noted that Rule 5.7 would not prohibit a lawyer from providing services as a "neutral." Rather, the Rule would apply the remainder of the Rules to those neutral services, and the remainder of the Rules includes Rule 2.4 regarding neutral services. Rule 2.4 in fact mirrors the requirements of Rule 5.7: "When the lawyer [serving as a neutral] knows or reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client."

This member suggested that the existence of Rule 2.4 itself implies that a neutral's services are "law-related" services. Three other members responded by noting that Rule 2.4 and Rule 5.7 do not together mean that a lawyer who is providing neutral services is subject to the Rules — including conflicts and confidentiality — but, rather, that the lawyer-neutral must ensure that the parties understand that no lawyer-client relationship is created.

A member referred to Comment [9] to Rule 5.7[16] and noted its application to many "small town" lawyers who provide ancillary services — such as real estate, notary, financial counseling services — in addition to their law practice. Rule 5.7 will subject them to all of the Rules as to those services, unless they take precautions clearly to distinguish those services from their law practice.

A member who had participated in the drafting of Opinion 98 on "dual practice," issued by the Colorado Bar Association Ethics Committee, said he has decided that Rule 5.7 is a good addition. But he cautioned that, under the Rule, a lawyer must be careful when she is in a "law-related" situation. Many of the Rules apply only when a lawyer is acting in the "representation of a client." How do those Rules apply, then, if the lawyer is providing law-related services to a person and has not distinguished those services from legal services as contemplated by Rules 5.7(a)(1) and (a)(2)? Has the person receiving those law-related services become a "client" under the other Rules?

In response, a member pointed to Comment [3] to Rule 5.7 and suggested that the Rule places a heavy burden on the lawyer either to make sure that he has provided the distinctiveness that precludes application of the Rules to the law-related services or that he understands which of the Rules apply to those law-related services and what the implications of that application are. She and other members agreed that a person receiving law-related services in circumstances in which Rule 5.7(a) applies the remainder of the Rules to those services is a "client" for purposes of those other Rules.

In response to a suggestion that the Committee consider drafting a rule that dealt specifically with the ethical obligations of lawyers when providing neutral services, the member who had commented on the complexities faced by lawyers who attempt to mediate between unrepresented persons suggested that the task would be a big one, necessitating an analysis not just of the duties of a lawyer-neutral but also of the implications for non-lawyer neutrals who might be engaged in the unauthorized practice of law when they "advise" the mediating parties about legal requirements or outcomes.

The Committee approved Rule 5.7 and its comments as recommended by the Subcommittee.

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16. Comment [9] provides—

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

IV. *Adjournment; Next Scheduled Meeting.*

The meeting adjourned at approximately 11:50 a.m. The next scheduled meeting of the Committee will be on Tuesday, September 27, 2005, beginning at 1:30 p.m., in the Supreme Court Conference Room, subject to determination that the Conference Room is then available to the Committee.

RESPECTFULLY SUBMITTED,

Anthony van Westrum, Secretary

[These minutes are as approved by the Committee at its meeting on September 27, 2005.]

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COLORADO SUPREME COURT

STANDING COMMITTEE ON THE RULES OF PROFESSIONAL CONDUCT

Approved Minutes of Meeting of the Full Committee
On September 27, 2005
(Eleventh Meeting of the Full Committee)

The eleventh meeting of the Colorado Supreme Court Standing Committee on the Rules of Professional Conduct was convened at 1:30 p.m. on Tuesday, September 27, 2005, by Chair Marcy G. Glenn. The meeting was held in the Supreme Court Conference Room on the fifth floor of the Colorado State Judicial Building.

Present in person at the meeting, in addition to Marcy G. Glenn and Justices Michael L. Bender and Nathan B. Coats, were Michael H. Berger, Nancy L. Cohen, Cynthia F. Covell, John S. Gleason, David C. Little, Judge William R. Lucero, Cecil E. Morris, Jr., Henry R. Reeve, Alexander R. Rothrock, Anthony van Westrum, James E. Wallace, Judge John R. Webb, and E. Tuck Young. Excused from attendance were John M. Richilano, Boston H. Stanton, Jr., and David W. Stark. Also absent were Kenneth B. Pennywell, Judge Edward W. Nottingham, Eli Wald, and Lisa M. Wayne.

In attendance as guests were Thomas E. Downey, Jr. and John M. Haried. (Messrs Downey and Haried were subsequently appointed to the Committee, with terms expiring June 30, 2008, by the Court's order of September 29, 2005, *nunc pro tunc* July 1, 2005.)

I. *Meeting Materials; Minutes of July 19, 2005 Meeting.*

The Chair had provided a package of materials to the members prior to the meeting date, including submitted minutes of the tenth meeting of the Committee, held on July 19, 2005. Those minutes were approved as written.

II. *Scheduling of Next Meeting.*

The Chair noted that the Committee's work reviewing the ABA "Ethics 2000" Model Rules of Professional Conduct was nearing its end and that one more meeting should be planned to review the Ethics 2000 Subcommittee's draft of a Committee Report on the Rules and to finalize and approve that report for submission to the Court, accompanied by the Ethics 2000 Rules as they have been modified by the Committee and are proposed for adoption in Colorado.

The Chair anticipated that the Committee Report would summarize the Committee's discussions and conclusions about the Ethics 2000 Rules, similarly to the Executive Summary that was provided to the Court in April 2004 by the ABA Ethics 2000 / Colorado Rules of Professional Conduct Committee (the "*Ad Hoc* Committee") and utilized by this Committee in its review of the Ethics 2000 Rules over the last year and a half. She proposed that "redline" comparisons be provided with the Committee Report, comparing the Committee's recommendations against (1) the existing Colorado Rules of Professional Conduct and (2) the ABA's version of the Ethics 2000 Rules.

The Chair expressed her hope that the Committee's further discussions in the process of finalizing the Committee Report would not be seen as an opportunity to re-open matters that have been thoroughly debated and decided, although she noted that certainly nothing was final until it was all final. Thus she asked for the members' discretion in reconsidering decided matters. She pointed out, however, that there would be room in the Committee Report for the expression of dissenting opinions on issues; and Michael Berger, chair of the Subcommittee, said that he would try to provide a fair description of dissenting views in the body of the draft of the Committee Report that he would prepare and circulate to the Committee's members before its next meeting.

The Committee selected a couple of alternative dates in December for that next meeting, subject to availability of the conference room, and, following the meeting, the Chair advised the Committee that the meeting would be held on Friday, December 9, 2005, beginning at 9:00 a.m.

III. *Subcommittee on Ethics 2000 Rules.*

Michael Berger, chair of the Subcommittee on the Ethics 2000 Rules, returned the Committee to a consideration of those Rules and to the Subcommittee's first draft of the Committee Report, which had been provided to the members in advance of the meeting.

A. *Preamble — "Zealous" Conduct.*

Berger reminded the Committee that, at its July meeting, it had directed the Subcommittee to amend the Preamble of the Ethics 2000 Rules to make it "as clear as can be" that the Rule's recognition of the merits of zealousness cannot be used to justify unprofessional conduct. He reported that the Subcommittee had looked, essentially afresh, at the existing sentence in Paragraph [9] of the Preamble reading, "These principles include the lawyer's obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system." A slim majority of the Subcommittee prevailed in splitting that sentence in two, to make it clear that this is not to be a warrant to act like Rambo; a minority would have made no change to the model text. As split, the sentences would read, "These principles include the lawyer's obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law. Zealousness does not, under any circumstances, justify conduct that is unprofessional, discourteous or uncivil toward any person involved in the legal system."

A member of the Subcommittee said that she was satisfied that the non-uniform treatment of the concept of zealousness in the proposed Colorado version of Paragraph [9] could not be used to justify a claim that a lawyer was misled about what the Rules require. However, that member questioned the word "obligation" at the beginning of the sentence that was under examination, because there is in fact no Rule that uses the word "zealous" or otherwise *obligates* a lawyer to be zealous in any circumstance, as the sentence implies. She proposed substitution of the word "aspiration" for "obligation." She also referred the Committee to Comment [1] to Rule 1.3, reading, "A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf." She proposed that the sentence be amended to read, "A lawyer must also act with commitment and dedication to the interests of the client and ***should also act*** with zeal in advocacy upon the client's behalf."

Another member commented that, if the word "zealously" were removed from the subject sentence, the balance of the sentence *would* refer to an obligation, the obligation to protect and pursue a client's legitimate interests. If the word "obligation" were downgraded to "aspiration," she wondered whether that would diminish the importance of the duty to pursue a client's legitimate interests? The member who had made that suggestion agreed that this might be the result, one she did not intend.

From the other side of coin came another member's concern that, if the sentence were split in two, the result would be to exalt professionalism, civility, and courtesy to the level of obligations, as if they were mandated by the black letter text of the Rules. Berger responded that that had not been the intention of those proposing to split the sentence into two separate sentences.

Another member suggested that the Committee accept the ABA model language and not make any changes to the subject sentence. To that suggestion, a member asked whether the word "zealous" could not be removed without making further changes.

Yet another member focused the Committee on the context in which the sentence is found. He suggested that the sentence refers to all of the previous paragraphs and clearly includes the requirement that the lawyer act only within the bounds of the law. He said he had been in the minority that had opposed any changes to the model act in response to the "zealousness" issue, and he suggested that, if the Committee were tinker with Comment [9], it would need carefully to consider the impact on all of the preceding comments.

A member who had not previously spoken on the matter commented that the Committee was "overthinking" the issue of zealousness, noting that that may have been the thrust of the previous comments, too. In his view, the word "zealous" had gotten a bad rap. In his view, too, the ABA model text did not go far enough. He thought the Subcommittee's proposal to split the last sentence of Comment [9] was an appropriate change, one that strengthened the ABA's intended idea. He did not want to delete the word "zealously" from the text; it is, he argued, a part of a lawyer's duty of diligence and is, therefore, an obligation.

Another member joined the discussion to note that no combination of words could ensure civil behavior. The combination of words proposed by the Subcommittee was appropriate for its purpose, he felt.

The Committee then voted upon the Subcommittee's proposal that the last sentence of Comment [9] of the Preface be split to read, "These principles include the lawyer's obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law. Zealousness does not, under any circumstances, justify conduct that is unprofessional, discourteous or uncivil toward any person involved in the legal system." The motion was adopted.

The member who had suggested substitution of "aspiration" for "obligation" withdrew that suggestion. Pursuant to an additional comment she made, however, the Committee looked at the variance in the Subcommittee's proposal as contained in the narrative on page 20 of the Subcommittee's report and in the attachment on page 27 and agreed that the disjunctive "or" should be used rather than the conjunctive "and" in the phrase "unprofessional, discourteous or uncivil," because, with the split of the point into two sentences, the context has been switched from a listing of positive attributes, all of which

are desirable, to one of negative attributes, none of which is encompassed in the concept of zealousness.

B. *Rule 1.17—Sale of Law Practice.*

Berger reported that, as directed by the Committee at its meeting on July 19, 2005, the Subcommittee conformed Comment [7] and Comment [8] of Rule 1.17 to the text of that Rule as it was approved by the Committee at that meeting. Those comments had continued to refer to the giving of "actual written notice" to the client — which might mean something other than written notice to the last known address — and to refer to the prospect of obtaining a court order regarding the file's transfer or other disposition when notice could not be given. Berger characterized the conforming changes as clarifying that the client bears the burden of keeping her lawyer informed of the client's address for communications.

The Committee approved the revised comments to Rule 1.17 as recommended by the Subcommittee.

C. *Rule 4.4—Respect for Rights of Third Persons.*

Berger then turned the Committee's attention to Rule 4.4, which had not previously been considered by the Committee. He prefaced the discussion by noting that the Rule posed a substantial issue: What obligation does a lawyer have when he receives information that was not intended for him to see, especially if the information is privileged or confidential for the benefit of another person? Berger reported that the Subcommittee had gone round and round on this matter. The requirement of the ABA Ethics 2000 version of Rule 4.4 is that the lawyer "who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender." The understanding behind that Rule is that, upon the required notification to the sender of the receipt of the information, principles other than those found in the Rules will determine what are the relative rights of sender and receiver — and of their clients — to retention and use of the information by the receiver.

Berger pointed out that the Colorado Bar Association's Ethics Committee and other ethics committees have taken a more expansive view of the receiving lawyers' obligation than does Ethics 2000 Rule 4.4. Opinion 108 of the CBA Ethics Committee provides that, if the receiving lawyer knows, before reading the information, that it was not intended for that lawyer, then that lawyer is required not only to notify the sender of its receipt but also to avoid reading the information and to abide by the sender's subsequent instructions for disposition of the information unless a court orders otherwise.[1]

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1. The conclusion stated in Opinion 108, "Inadvertent Disclosure of Privileged or Confidential Documents," Colorado Ethics Committee, May 20, 2000, is as follows:

> The ethical obligations of a lawyer who receives from an adverse party or an adverse party's lawyer documents that are privileged or confidential and that were inadvertently disclosed depend on whether the receiving lawyer knows of the inadvertence of the disclosure before examining the documents.
>
> In the situation where a party or a sending lawyer inadvertently discloses to an adverse party or an adverse party's lawyer documents that on their face appear to be privileged or confidential, the Committee concludes that the receiving lawyer, upon recognizing their privileged or confidential nature, has an ethical duty to notify the sending lawyer that he or she has the documents. Although the only ethical obligation of the receiving lawyer in this situation is to give notice, other considerations also come into play, including professionalism and the applicable substantive and procedural law. Once the receiving lawyer has notified the sending lawyer, the lawyers may, as a matter of professionalism, discuss whether waiver of privilege or confidentiality has occurred. In some instances, the lawyers may be able to agree on how to handle the matter. If this is not possible, then the sending lawyer or the receiving lawyer may seek a determination from a court or other tribunal as to the proper disposition of the documents, based

Berger said a minority of the Subcommittee wanted to incorporate into the Rule the requirements enunciated by the CBA Ethics Committee opinion; a "narrow majority" voted to utilize the ABA Ethics 2000 text without change. He commented that he had been among the minority and felt that the Subcommittee's recommendation was unsatisfactory.

Berger added that the result was made even worse by Comment [3] to the Rule, which proclaims a safe harbor for the lawyer who chooses to return the inadvertently-received document to the sender rather than utilize it for the benefit of his client. The comment provides that such a decision is within the lawyer's professional discretion.

As Berger saw it, if Opinion 108 of the CBA Ethics Opinion were correct, then Comment [3] would be incorrect, and the decision to return — or not to return — the information to the sender would not be within the lawyer's professional discretion. The comment, he said, would be in conflict with that ethics opinion.

Berger and another member of the Subcommittee then sorted out a variance in the Subcommittee's report. Page 41 of the Report did not include Comment [3], while page 43 did include it. Berger confirmed that the majority of the Subcommittee had recommended inclusion of the comment.

Berger clarified his observations about the apparent conflict with Opinion 108 by saying that there really is not a "conflict" in fact, because the new Rule would nullify an opinion issued under the previous Rules. But, he added, if there are ethical considerations beyond the text of Rule 4.4, as Opinion 108 suggests, then Rule 4.4 should not be written short of the larger obligation, it being up to the Court, in adopting some version of Rule 4.4, to determine whether such a larger obligation exists. Berger would prefer that the Committee recommend to the Court a Rule that resolved the entire problem of the inadvertently disclosed information rather than adopt the Subcommittee's recommendation.

A member who had recently attended a seminar on legal ethics commented that the panel and audience in that seminar had been all over the board on this issue. Some worried that they could be the subjects of malpractice suits brought by angry clients if they returned the information unread rather than made use of it for their clients' benefits. Others worried that they would be in trouble with opposing counsel and subject to discipline if they did not return the information unread.

To this, Berger said his concern was a different one. He liked the safe harbor that is seemingly granted by Comment 3 of the ABA Ethics 2000 Rule, but he felt that the Rule as a whole was in conflict with the wisdom of Opinion 108. He preferred to include the requirements of Opinion 108 in Colorado's version of the Rule.

In response to a member's question, Berger said he did not know whether other states had made any changes to the model text

Another member agreed with Berger that the Ethics 200 text as recommended by the Subcommittee did not deal with all of the permutations. What, he asked, is a receiving

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on the substantive law of waiver.

However, the receiving lawyer has additional duties if he or she actually knows of the inadvertence of the disclosure before examining the privileged or confidential documents. In this situation, as a matter of legal ethics, the receiving lawyer also must not examine the documents and must abide by the sending lawyer's instructions as to their disposition.

lawyer to do if she learns about the inadvertence of the disclosure only after reading it, after seeing the substance of it. A rule that required return of the information to the sender and a preclusion of its use would improperly shift the burden of the problem from the lawyer who created the problem by his mistaken transmission to the innocent recipient of the information, who could not clear her mind of the information she had gained by the reading. On the other hand, if the lawyer received telephonic notification — before the courier arrived with the mistakenly-sent package — that the package had been sent by mistake, the ABA's version of the Rule would permit the recipient to read and use the information, requiring only that the recipient send a silly notice to the sender that the package had arrived as expected.

This member believed that the circumstances could be split and handled in turn in the Rule, first by dealing with the only circumstance that is truly contemplated by the ABA Ethics 2000 version — the circumstance that the receiving lawyer cannot recognize the inadvertence of the disclosure until after the information has been received and read — and then by dealing with the situation where the recipient knows, before reading the information, that it was not intended for his eyes.

A member who was also a member of the Subcommittee said he respected Opinion 108 but that it was not an accurate statement of the law. He noted that Comment [2] recognizes that the Rule itself does not provide a complete answer; that comment says—

> If a lawyer knows or reasonably should know that such a document was sent inadvertently, then this Rule requires the lawyer to promptly notify the sender in order to permit that person to take protective measures. Whether the lawyer is required to take additional steps, such as returning the original document, is a matter of law beyond the scope of these Rules, as is the question of whether the privileged status of a document has been waived.

This member noted that there is a role for a court to play in resolving the situation. He thought the Committee could work to tighten up the scienter requirement — "knows or reasonably should know that the document was inadvertently sent" — but, he felt, it should not incorporate Opinion 108 and thereby legislate a result that the Court has not heretofore determined to be the law. He would retain the safe harbor of Comment [3] and leave the rest of the Rule as in the ABA Ethics 2000 version, awaiting decisions by the courts as to particular situations.

Another member, who was also a member of the Subcommittee, concurred with those remarks. It would be, he said, a slippery slope to try to deal with all of the permutations as had been suggested in previous comments. At best, the Committee would come up with heavily nuanced language that would nevertheless not effectively resolve all of the problems that could arise in practice.

Yet another member of the Subcommittee said that, for all these reasons, his preference would be to drop Rule 4.4(b) and Comment [3] altogether, leaving the Rule essentially unchanged from current Colorado Rule 4.4. But, he said, he would not reduce that to a motion.

Both Berger and the member who had proposed splitting the Rule in two, to deal separately with the circumstance in which the recipient knows of the inadvertent disclosure before reading it and the circumstance in which he does not, said they would rather drop Rule 4.4(b) and Comment [3] than adopt them as stated in the ABA Ethics 2000 version.

A member asked for clarification of the first sentence of Comment [3], reading, "Some lawyers may choose to return a document unread, for example, when the lawyer learns before receiving the document that it was inadvertently sent to the wrong address." He asked whether that applied to the circumstance where the recipient knew, before reading the information, that it was privileged.

To that, another member said she did not read Rule 4.4(b) as making any distinction between inadvertently-sent information that was privileged and that which was not privileged. As she read it, the Rule applied whenever the lawyer received something she knew was not intended for her, whether or not it was privileged or confidential to another person. In any such circumstance, the safe harbor permitted the lawyer to return the information to the sender unread.

The member who had characterized Opinion 108 as a misstatement of the law reiterated that the Committee was overlooking Comment [2],[2] which explained the matter well: Whether or not the lawyer must return the inadvertent disclosure is beyond the scope of the Rule. That, he said, set the stage for Comment [3] and its safe harbor.

Berger argued that such a reading disavowed Opinion 108, which says that the issue is one of ethics; such a reading would say that the issue is not one of ethics but only one that might raise other, non-ethics legal principles.

The member who had proposed splitting the Rule in two argued that the first sentence of Comment [2] was inaccurate. As he saw it, the Rules *do* address the situation in which the recipient is told, before he receives the inadvertent disclosure, that he is about to do so, and those Rules say that he is not permitted to look at the disclosure when he does receive it. This member analogized the situation to one in which the lawyer has inadvertently left his closed briefcase in the conference room of opposing counsel's law offices. That opposing counsel is not permitted to examine the contents of the briefcase.

The Chair summarized, noting that there were three possibilities before the Committee: (1) Adopt the ABA Ethics 2000 version of Rule 4.4, with its comments; (2) adopt only Rule 4.4(a) and Comment [1], deleting Rule 4.4(b), Comment [2], and Comment [3]; and (3) adjusting Rule 4.4(b) and its comments to reflect Opinion 108 of the CBA Ethics Committee. She noted that there was as yet no motion before the Committee.

A member who was also a member of the Subcommittee and had been in its majority with respect to these issues, moved that the Committee adopt the Ethics 2000 version of Rule 4.4 and its comments. He commented that he was not generally a proponent of uniformity and ordinarily did not think that uniformity should drive the Committee's decisions. But, he felt, this particular Rule is one that will affect lawyers in other jurisdictions, perhaps more so than will most of the other Rules. The debate today before the Committee was but a microcosm of the fierce debate that had engulfed the CBA Ethics Committee in its consideration of Opinion 108. Many there felt that sending lawyer's mistake should not impose any duty on the receiving lawyer, particularly at the expense of the receiving lawyer's client. That committee had come up with the notion of notification: It is decent to advise the other side that it has made a mistake and sent you something you don't think it intended to send to you. If the matter is already before a court, the court can be asked to make a ruling on the use of the inadvertently disclosed information. But it is a dicier question in the transactional world, where the receiving lawyer may have a real

2. Comment [2] is quoted above in these minutes.

conflict between her sense of professionalism and her duty to put whatever information she has fully to use for the best interests of her client. The ABA Ethics 2000 version clarifies that she has a duty to give notice of the receipt, but, under the Rules, only that duty. It is then up to the sender to take action, if any. The member characterized the situation where the recipient has knowledge of the inadvertence before actually receiving the information as being an unusual situation. Ordinarily, the information will come by way of the inadvertently-sent email or burial in a delivery of a massive pile of documents in discovery. That kind of inadvertence is inevitable today. The Rule, he said, needs to provide a bright-line statement of the recipient's duty, and that bright line in Colorado should be the same as the one established in the ABA Ethics 2000 version of the Rule, even if that might not be the best answer in all possible circumstances. He argued that the Committee should avoid the little nuances that were possible but not useful.

Two other members seconded that motion and those views.

Another member also pointed to unwieldiness of a nuanced Rule and asked the two Justices on the whether they perceived problems with that kind of approach. One Justice responded that he could perceive difficulties applying a nuanced Rule, which imposed burdens on the receiving lawyer who was defending a client in a criminal matter. An ethical obligation to return exculpatory information, rather than utilize it in the defense of the client, could pose Sixth Amendment issues. Another member commented that, in such a case, the lawyer who chose to return the information would be protected by the safe harbor in Comment [3], but the defendant might then have a Sixth Amendment defense of ineffective assistance of counsel.

The member who made the motion that was then before the Committee flipped the example upside down, asking what would be the result if it was defense counsel who inadvertently disclosed some damaging information to the prosecution. He thought that situation was similar to the lawyer who, in the course of a transactional representation, receives information that the seller is willing to sell Blackacre to his client for half of the price that was then being discussed between the parties. If, he said, the receiving lawyer was not permitted to tell the buyer that fact, he might as well advise his malpractice carrier right away of the existence of a potential claim against him.

A member renewed the alternative proposal to delete Rule 4.4(b), Comment [2], and Comment [3]. But, by a seven-to-six vote on the pending motion, the Committee narrowly rejected the Subcommittee's recommendation to adopt the ABA Ethics 2000 version of Rule 4.4 and its comments.

A motion was then made to modify Rule 4.4(b) to read, "A lawyer who receives a document relating to the representation of the lawyer's client and***, upon reviewing the document,*** knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender." The moving member explained that he intended, by the addition, to distinguish between the situation in which the recipient is not aware of the inadvertent transmission until she has read it and the situation in which she knows, before reading it, that it was not intended for her. The was general agreement that, although this was a well-intentioned effort to accomplish the incorporation of Opinion 108, it did not work. In particular, it did not say that the recipient was bound to do what the sender then instructed. The motion failed for want of a second.

Another motion was made to revert to the existing Colorado Rule by deleting Rule 4.4(b), Comment [2], and Comment [3]. That, the moving member said, would reflect

a decision of this Committee and the Court, if it adopted that version of the Rule, that Opinion 108 is correct. To that, another member suggested that this was an attempt to create legislative history that would not in fact exist. An outsider would instead read the result to be a rejection of the ABA's requirement that the recipient give notice of receipt of the inadvertently disclosed information; the reader would not conclude that Colorado was back to the existing-Rule-*cum*-Opinion-108.

In response to a request for clarification of the alternative, Berger said the Rule would be to the effect that, if, prior to receipt of the information, the lawyer learned that information was being sent to him that was not intended for him, the lawyer would be required only to notify the sender of receipt of that information but also to abide by the sender's instructions about how to handle the information, subject to a court's contrary ruling.

At the Chair's request, a member moved to send Rule 4.4 back to the Subcommittee with instructions to revise it to incorporate the conclusions of Opinion 108 of the CBA Ethics Committee. That motion was adopted.

D. *Rule 5.5— Unauthorized Practice of Law; Multijurisdictional Practice of Law.*

Berger reminded the Committee that the only remaining issue to consider in Rule 5.5 is what notification must be given to clients by the lawyer who employs a disbarred lawyer as a paralegal or in another staff position. A minority of the Subcommittee had argued that any requirement for notice was "overkill," since the employing lawyer had a duty to make sure no client would think that the disbarred lawyer was acting as a lawyer, just as every lawyer who utilizes paralegals must ensure that the paralegals do not practice law. A one-vote majority, however, agreed with the position of the Office of Attorney Regulation Counsel that some notification must be given in order to protect the public.

A member argued that a notification requirement would ensure that no lawyer would ever hire a disbarred lawyer, and that would deprive disbarred lawyers of the opportunity to remain connected with the law during the period of disbarment with a view toward rehabilitation and re-licensing. In her view, the Rule might as well say that a disbarred lawyer cannot work for a lawyer.

Another member responded that the Subcommittee considered that point of view, but it appears that experience in other states does not support it. In other states with similar rules, he said, lawyers are simply more careful about the contact that they permit the disbarred lawyer to have with clients. He said that the experience of the Office of Attorney Regulation Counsel is that clients are regularly confused: "He looked like a lawyer; I did not know that he was not a lawyer." Given that experience and the indications from other states that a notification requirement will not eliminate the hiring of disbarred lawyers to provide paralegal or other appropriate services, this member felt that the requirement would be appropriate.

A member noted that the matter arises only in the context where the disbarred lawyer has contact with clients. If she is only working in the law library or in a back room drafting interrogatories, there is no need for notification. In her view — disputed by another member — the trend in other states is to prohibit any employment of disbarred lawyers in law firms.

That member also remarked that the disbarred lawyer is simply different from a paralegal. The disbarred lawyer was once a lawyer and will find it hard to restrain impulses that were well-developed while in practice.

In reply to another member's question, that member said it was her understanding that the notification requirement did not apply to work that did not involve contact with clients and thus would not apply, for example, to the mere preparation of legal memoranda. When the questioner suggested that the term "professional contact" is not defined, so that this understanding is not clear within the Rule, the proponent of notification agreed that the Rule or its comments could be modified to reflect the intention that the notification requirement apply only in the context of actual contact with the client.

A member who had opposed draconian prohibitions on employment of disbarred lawyers, as are found in New Jersey and California, said that he approves of the Subcommittee's resolution and believes the Committee should adopt the Subcommittee's recommendation. He remarked, however, that he was uncertain about what the phrase "prior to commencement of the work" meant; did it require a new notification each time the ex-lawyer sat down with the same client to review interrogatories? Apart from that minor issue, he would vote in favor of the recommendation.

A member asked whether the notification must specify that the ex-lawyer is disbarred (or suspended, as the case may be) or whether it was sufficient to give notice that she "is not a lawyer"? The Subcommittee had decided, he said, that all that is required is notification that the ex-lawyer is "not authorized to practice law."

Berger said that he could read the requirement either way, including the way that would require the notification to specify that the ex-lawyer was disbarred or suspended. The other members of the Committee disagreed with that reading, however, and believed it was clear that the notification need only inform the client that the ex-lawyer was not authorized to practice law.

The Chair noted that the ABA Ethics 2000 version of Rule 5.5 also deals with issues of multijurisdictional practice, issues that in Colorado are dealt with by Rules 220, 221, and 221.1, C.R.C.P., and, therefore, omitted from Rule 5.5.

The Committee approved Rule 5.5 and its comments as recommended by the Subcommittee.

E. *Rule 6.1— Voluntary Pro Bono Publico Service; Rule 6.2—Accepting Appointments; Rule 6.3—Membership in Legal Services Organization; Rule 6.4—Law Reform Activities Affecting Client Interests; Rule 6.5—Nonprofit and Court-annexed Limited Legal Services Programs.*

Berger reported that no issues had been raised in the Subcommittee concerning any of the "Six Series" of Rules as recommended by the *Ad Hoc* Committee. That committee had recommended retention of Colorado's version of Rule 6.1, because it has previously received specific attention by the Court. The *Ad Hoc* Committee had recommended adoption of all of the remaining Six Series of Rules as contained in the ABA Ethics 2000 model. The Subcommittee recommends adoption of all of the Six Series as proposed by the *Ad Hoc* Committee.

The Committee approved Rule 6.1 through Rule 6.5, and their comments, as recommended by the Subcommittee.

F. Rule 7.1—*Communications Concerning a Lawyer's Services*.

Berger noted that the *Ad Hoc* Committee had recommended retention of Colorado's existing Rule 7.1 — which was based on Kutak Rule 7.1 but was extensively supplemented in 1997 — rather than adoption of the "looser"version contained in the ABA Ethics 2000 Rules. The Subcommittee agrees with the *Ad Hoc* Committee's recommendation, with two variations:

1. The *Ad Hoc* Committee had recommended deletion of existing Rule 7.1(a)(2) — "A communication is false or misleading if it: . . . is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the Rules of Professional Conduct or other law" — because the concept has been moved to Rule 8.4(e) in the ABA Ethics 2000 Rules. The Subcommittee recommends instead that the "unjustified expectations" part of that provision be retained among the other provisions relating to advertising that are found in Rule 7.1 — as Rule 7.1(a)(3).

2. The *Ad Hoc* Committee had recommended retention, in Rule 7.3(d)(2), of Colorado's existing provision prohibiting communications that "resemble legal pleadings or other documents" when made by a lawyer engaged in the targeted solicitation of work. The Subcommittee agreed with the retention of that Colorado concept — which is not spelled out in the ABA Ethics 2000 Rules — but recommends that it should be moved to Rule 7.1(c), to locate it among the general provisions governing marketing communications rather than leaving it in the Rule that specifically deals only with direct solicitation.

A member noted that a comma should be inserted after the words "restricted delivery" in Rule 7.1(c) as recommended by the Subcommittee.

The Committee approved Rule 7.1, and its comments, as recommended by the Subcommittee but with the addition of the comma as noted above.

G. Rule 7.2—*Advertising*.

Berger explained that the ABA Ethics 2000 Rules contain no substantive changes to Rule 7.2 as found in the existing Colorado Rules. Like the *Ad Hoc* Committee, the Subcommittee recommends adoption of the ABA Ethics 2000 version of the Rule.

With tongue lightly placed in cheek, one member suggested the prohibition of all advertising by lawyers — or at least the limitation of all advertising in telephone directories to six column inches.

The Committee approved Rule 7.2, and its comments, as recommended by the Subcommittee.

H. Rule 7.3—*Direct Contact with Prospective Clients*.

Berger reported that the *Ad Hoc* Committee had recommended the ABA Ethics 2000 version of Rule 7.3 but with the addition of the provisions of the existing Colorado Rule 7.3(c) limiting direct solicitation in personal injury and wrongful death cases, requiring identification of the communication as "Advertising Material," and requiring retention of copies of advertising material for four years. The Subcommittee generally agrees with those recommendations, but the Subcommittee recommends deletion of the cross-references to other Rules that were included in Rule 7.3(c) as proposed by the *Ad Hoc* Committee, because the style of the Rules does not include such cross-referencing and inclusion of cross-referencing in this particular Rule could serve as a basis for misguided arguments about the application or non-application of the cross-referenced Rules, or other Rules, in other cases.

Berger reminded the Committee that it had already approved the Subcommittee's recommendation that the provisions of Rule 7.3(d)(2) as proposed by the *Ad Hoc* Committee, governing solicitations that resemble legal pleadings, be moved to Rule 7.1(c).[3]

Berger noted that the Subcommittee agrees with the *Ad Hoc* Committee's recommendation that the fifteen day "cooling off" period of existing Colorado Rule 7.3(c) be retained in the new Rule, but he added that a member of the Subcommittee had recently pointed out to him that § 12-5-115.5 of the Colorado Revised Statutes prescribes a cooling off period of thirty days in such a case.

After some discussion, the Committee determined that the Rule should be consistent with the statute, agreeing to set the period at thirty days.

A member who is also a member of the Subcommittee wondered about the application of Rule 7.3(c) to both potential claimants and potential defendants in personal injury or wrongful death cases; she noted that the perceived problem of "ambulance chasing" would not seem to exist with respect to prospective defendants. Her comment did not generate any discussion, and no change was proposed.

A motion was made to adopt Rule 7.3 as recommended by the Subcommittee but with a cross-reference to § 12-5-115.5 in its comments. A member expressed concern, however, that this cross-reference would be unique in the Rules, notwithstanding that there were other statutes that apply to lawyers and for which similar cross-references could be added. He also noted that the Court has exclusive jurisdiction over the conduct of lawyers and questioned whether such a cross-reference would improperly imply a recognition that the General Assembly has some authority over lawyers' conduct. Another member said he shared those concerns.

The Committee approved Rule 7.3, and its comments, as recommended by the Subcommittee but with a thirty day cooling off period rather than a fifteen day period.

I. Rule 7.4—*Communication of Fields of Practice*.

Berger reported that, like the *Ad Hoc* Committee, the Subcommittee generally recommends adoption of ABA Ethics 2000 Rule 7.4 but recommends retention of the existing Colorado provision, in Rule 7.4(a), that expressly permits a lawyer to communicate

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3. See the discussion of Rule 7.1 at Item IIIF, above

specialization in particular fields of law, so long as such communication complies with Rule 7.1. Both the *Ad Hoc* Committee and the Subcommittee would also retain, in Rule 7.4(e), the existing Colorado requirement that communications regarding claims of certification (as distinguished from specialization) contain a disclaimer that Colorado does not certify attorneys as specialists in any field.

A member questioned the implication of proposed Rule 7.4(d), which permits a lawyer to state or imply certification as a specialist if the certifying organization "has been approved by an appropriate state authority or . . . has been accredited by the American Bar Association." His question highlighted the fact that the provision would seem to permit a lawyer who has been "certified," say, by an integrated bar association of another state — a "state authority" — to claim such certification in connection with her practice in Colorado, subject only to the requirement that she also note that Colorado does not itself certify attorneys as specialists. Another member, familiar with disciplinary issues in this area, agreed that this is becoming an issue with the expansion of multijurisdictional practice.

A member noted that there would be First Amendment free speech implications if the Rules were to flatly preclude truthful statements of certification or specialization. The member who had raised the issue replied that this Rule would give an advantage to out-of-state lawyers who could advertise a certification that would not be available to other Colorado lawyers.

Seeking clarification, another member asked whether the Texas lawyer would have to state that he is not certified by the State of Colorado, under Rule 7.4(e). Others agreed that such was the case.

The Committee approved Rule 7.4, and its comments, as recommended by the Subcommittee.

J. Rule 7.5—*Firm Names and Letterheads*.

Berger explained to the Committee that a major policy change is contained in Rule 7.5 as it has been recommended by both the *Ad Hoc* Committee and the Subcommittee, each of which has recommended adoption of the ABA Ethics 2000 Rule that would permit lawyers to practice law under trade names. He noted that some may point out that the present rule permits law firms to retain the names of deceased former partners, but he suggested that this is nevertheless a substantial change.

A member pointed out that the Kutak Rules permitted the use of trade names but that Colorado decided not to adopt that liberalization when it adopted the Kutak Rules in 1993. Others remembered that the question of permitting practice under a trade name had been a big issue for the Colorado committee that reviewed the Kutak Rules for adoption in Colorado.

A member asked what advantage this Rule would provide to the public. In reply, one member noted that a lawyer would still be precluded from using a misleading trade name, and another member noted that trade names can impart useful information regarding an attorney's specialization, such as specialization in a bankruptcy practice.

A member who was familiar with disciplinary issues in this area noted that trade names may well be seen that will have religious connotations or that will imply a particular style of practice, such as "Tough Guy Law Firm."

In reply to a member's question, another member reported that opinions from other state bar associations have concluded that Internet URLs[4] and domain names are not themselves "trade names." A third member noted, however, that URLs and domain names are themselves communications that must be truthful. She also prophesied that the new permission to use trade names will mean some additional work for the Office of Attorney Regulation Counsel.

A member asked whether a continued prohibition against trade names in Colorado would adversely impact firms that have a multijurisdictional practice. Others agreed that this is an area where uniformity is an appropriate goal, for that reason.

The Committee approved Rule 7.5, and its comments, as recommended by the Subcommittee.

K. Rule 7.6—*Political Contributions to Obtain Legal Engagements or Appointments by Judges*.

Berger reported that Rule 7.6 would be new to Colorado and would govern "pay to play." He noted that it had been adopted by the American Bar Association after Colorado adopted the Kutak Rules and that the Colorado Court had not thereafter considered adding it to the Colorado Rules. It is, he said, a good Rule and has been recommended by both the *Ad Hoc* Committee and the Subcommittee.

The Committee approved Rule 7.6, and its comments, as recommended by the Subcommittee.

L. Rule 8.1—*Bar Admission and Disciplinary Matters*.

Berger explained that Rule 8.1 as contained in the ABA Ethics 2000 Rules is substantively unchanged from the current Colorado Rule, although it does not contain the assurance, expressed at the end of existing Colorado Rule 8.1(b), that the Rule does not preclude a good faith challenge to any demand for the disclosure of information that might be protected by Rule 1.6. The Subcommittee recommends adoption of the ABA Ethics 2000 version but with the *Ad Hoc* Committee's alternative phraseology at the beginning of the Rule regarding who is covered by its provisions — "An applicant for admission, readmission, or reinstatement to the bar," etc. — and with the *Ad Hoc* Committee's recommendation that Comment [2] be amended to note that "Rule 8.1(b) does not prohibit a good faith challenge to the demand for such information."[5]

The Committee approved Rule 8.1, and its comments, as recommended by the Subcommittee.

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4. "Uniform Resource Locator" or email address.

5. Berger did not explain what the antecedent would be to the words "such information" in this addition to Comment [2], and the issue was not raised by any member. Presumably the antecedent is "information otherwise protected by Rule 1.6" as stated in Rule 8.1(b) itself. —*Secretary*

M. Rule 8.2—*Judicial and Legal Officials*.

Berger reported that Rule 8.2 of the ABA Ethics 2000 Rules is substantively unchanged from the existing Colorado Rule, although the existing Colorado Rule specifies the "retention" process as well as the election or appointment process for judges. Like the *Ad Hoc* Committee, the Subcommittee recommends adoption of the ABA Ethics 2000 text.

The Committee approved Rule 8.2, and its comments, as recommended by the Subcommittee, perhaps overlooking the deletion of the existing Rule's reference to the retention process, which is a principal feature of Colorado's procedures for determining who its judges will be.

N. Rule 8.3—*Reporting Professional Misconduct.*

Berger told the Committee that Rule 8.3 as contained in the ABA Ethics 2000 Rules is substantively the same as the existing Colorado Rule, except that it does not contain the provisions found in existing Colorado Rule 8.3(c) dealing with information "gained by a lawyer or a judge" while serving in an approved peer assistance program. The Subcommittee agrees with the recommendation of the *Ad Hoc* Committee that the ABA Ethics 2000 version be adopted, but with the addition of the existing Colorado text regarding peer assistance programs.

A member suggested that the Rule be revised to excuse a lawyer from the duty to report misconduct that the lawyer knows has already been reported to the disciplinary authorities by some other person. He noted that it is a concern that arises frequently, particularly for lawyers who participate in the "hotline" service of the Ethics Committee of the Colorado Bar Association, where the question is frequently asked whether the caller must report misconduct of opposing counsel that he is sure his client has already reported to the Office of Attorney Regulation Counsel. Another member who is familiar with the disciplinary process agreed that it is a common problem and that, because of the confidentiality obligation imposed on the Office of Attorney Regulation Counsel, that office cannot openly respond when a caller asks whether a matter of misconduct has already been reported.

Another member who is familiar with the disciplinary process commented that multiple reportings can be beneficial in that they may impart more information than a single report would do. But this member also noted that the Office of Attorney Regulation Counsel has only had one prosecution for non-reporting in the past eighteen years.

A member cited the recent example in a Western Slope courtroom where a lawyer disobeyed a direct court order and departed from the courtroom. She asked whether the reporting requirement required every lawyer who was in the courtroom at the time to report the incident.

Another member noted that lawyers in fact do not report misconduct that they know has already been reported. Further, he said, given the lack of prosecutorial interest in the matter, it should not be of practical concern to lawyers.

A member who is also a member of the Subcommittee noted that the language that the Subcommittee had considered to deal with the issue proved to be more complex than the issue warranted.

The member who had raised the issue moved that the Rule be amended to provide that a lawyer who knows that the misconduct has been reported has no duty also to report the misconduct. The motion failed for want of a second.

The Committee approved Rule 8.3, and its comments, as recommended by the Subcommittee.

O. Rule 8.4—*Misconduct.*

Berger began the discussion of Rule 8.4 by noting that the existing Colorado Rule is not uniform and that one of the differences, even from the Kutak Rules, is the prohibition, in Rule 8.4(g), of "conduct which violates accepted standards of legal ethics." He noted that the *Ad Hoc* Committee had recommended the deletion of that prohibition, because no one knows what it means. The Rules are themselves the "accepted standards of legal ethics," and there are no other standards, outside of those Rules, that should serve as predicates for disciplinary action. Berger said the Subcommittee wholeheartedly agreed with the *Ad Hoc* Committees recommendation that Rule 8.4(g) of the existing Colorado Rule be deleted.

Berger then turned to a second nonuniformity, one which he said had proved to be more difficult issue for the Subcommittee. The issue is whether the existing, nonuniform Colorado Rule 8.4(h), prohibiting "any other conduct that adversely reflects on the lawyer's fitness to practice law," should be retained. He reported that a minority of the Subcommittee would delete that provision, believing that it is "very, very broad," that it invests an inappropriate amount of prosecutorial discretion in Attorney Regulation Counsel, and that it is too vague (although, he noted, its constitutionality has been upheld by the Colorado Court).

Berger said the Subcommittee had reviewed every reported case in which the Court or the Presiding Disciplinary Judge had applied Rule 8.4(h) in the imposition of discipline. (Another member interjected that *People v. Lowery*[6] would be the most relevant case.) After that examination, the Subcommittee determined to modify Rule 8.4(h) to require that, to be proscribed by the Rule, conduct must include both the aspect of unfitness to practice law *and* direct, intentional, and wrongful infliction of harm to another person.

Lastly, Berger noted, the Subcommittee recommended inclusion of new text in 8.4(g) proscribing discriminatory conduct, moving to that position the text currently found in existing Colorado Rule 1.2(f).

A member who is also a member of the Subcommittee remarked that the infliction-of-harm language that is proposed to be added to Rule 8.4(h) is drawn directly from *People v. Lowery*.

Another member remarked that the *Lowery* case involved sexual harassment that was not then a crime. The goal, then, of Rule 8.4(h) as recommended by the Subcommittee, as this member saw it, is to provide a sanction for conduct of the described kind that inflicts harm, whether or not the conduct is criminal. There is, he noted, no Rule that directly proscribes all "illegal conduct," and Rule 8.4(b) proscribes criminal acts only if they "reflect adversely on the lawyer's honest, trustworthiness or fitness as a lawyer in other respects."

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6. 894 P.2d 758 (Colo. 1995).

The Committee then considered a motion to approve the Subcommittee's recommendations as to all of Rule 8.4 except Rule 8.4(h), leaving Rule 8.4(h) for further discussion. The motion was adopted.

Turning back to Rule 8.4(h), a member stated that he respected the Subcommittee's effort to tighten up the provision but that he felt the risk of excessive prosecutorial zeal was still too great. He noted that, if this concept were presented in the Legislature for adoption as a general penal statute, all of the Committee members would take turns denouncing it for its breath and vagueness. But, to him, the potential for loss of a lawyer's right to pursue his livelihood under such a broad and vague provision was reason enough to eliminate it. He commented that, of necessity, we are considering conduct that is not sufficiently criminal to sanction under Rule 8.4(b), nor sufficiently manifesting of the lawyer's unfitness to practice law to sanction under that Rule 8.4(b), nor sufficiently prejudicial to the administration of justice to sanction under Rule 8.4(d). In short, Rule 8.4(h) contains no standard for its application, and yet it can be applied to take away a lawyer's livelihood. As to the *Lowery* case, he said, under the reported facts of that case one could probably have found actual criminal conduct, such as the crime of assault. If the conduct were less than that which would constitute such a crime, is it really appropriate for the Court to say to the lawyer you can no longer practice your chosen profession? This member thought not.

A member who was familiar with the disciplinary process commented that Rule 8.4(h) was drawn from the old Disciplinary Rules and covers the cases that "the other Rules finesse." This member noted that the risk of prosecutorial misuse is tempered by the filters consisting of the Advisory Committee and of the processes before the Presiding Disciplinary Judge and, ultimately, the Court itself. The member felt that there were not likely to be a lot of cases which could be pursued under Rule 8.4(h) but which did not implicate any of the other Rules, but there would be some that would involve conduct that should be sanctioned but that the other Rules would not cover.

Another member understood the need for some narrowly-applied rule of this type to serve as a catch-all for conduct that is "totally inappropriate" but not otherwise sanctionable. But, he noted, the principal underlying Rule 8.4(h) has been omitted from the ABA Model Rules since the days of the Kutak Rules. He is not aware of any other jurisdiction that has continued it. To this member, the problem is how Rule 8.4(h) is used in the Colorado disciplinary process. He said he counted 154 case "hit" in a digital search for cases raising Rule 8.4(h), a search that would not have picked up additional cases that would have been disposed of by conditional admission, etc. In his view, this record does not indicate the "surgical precision" in the prosecutor's application of Rule 8.4(h) that others have claimed.

This member also referred to *In re Thompson*,[7] in which the Court noted that Rule 8.4(h) is properly applied only if no other Rule has been violated. The member also recalled an indication by Presiding Judge Keithley that Rule 8.4(h) was to be used at all only if the lawyer evinced a lack of the personal and moral qualifications to practice law,

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7. 991 P.2d 820 (Colo. 1999). In fn. 1 of the opinion, the Court said, "The [hearing] board did not identify which of Thompson's conduct violated Colo. RPC 8.4(h) that did not also violate Colo. RPC 8.4(c) or 8.4(g). Colo. RPC 8.4(h) provides that '[i]t is professional misconduct for a lawyer to engage in any other conduct that adversely reflects on the lawyer's fitness to practice law.' . . . . When a lawyer violates a rule other than 8.4(h), it is not necessary or, in a strict sense, proper to charge a violation of 8.4(h). Any error in this case is harmless, however, because in determining the proper level of discipline, we do not simply add up the number of rules violated, but focus instead on the nature and seriousness of the conduct itself."

although the member also added that the Court has made it clear that the reported opinions of hearing boards were not to be cited as precedent. And, he said, we have the Office of Attorney Regulation Counsel saying that the provision has been applied only in *Lowery* and a few other egregious cases. Yet a search will indicate at least 154 reported cases involving its application. So, this member summarized, it is a broad and vague rule and has been used indiscriminately.

In reply, another member said that Rule 8.4(h) is often used by both the lawyer and Attorney Regulation Counsel as an agreed-upon, plea-bargained violation, to avoid a sanction for dishonesty under Rule 8.4(c) that might be perceived as more damaging to the lawyer's reputation. Given the proposed narrowing of the provision, lawyers will find fewer occasions in which they can use it in this manner, and this will be to their detriment.

In answer to another member's question, a member who is familiar with the disciplinary process said that Rule 8.4(h), or it predecessor, was use "more indiscriminately" before 1990 but that it has been given much more restricted use since that time.

Picking up on the theme of settlement potential, this member also commented that the proposed modification might have as adverse an impact on lawyers as on the Office of Attorney Regulation Counsel, for it has indeed been used like the "obstructed windshield" or "defective taillight" charge in plea-bargained traffic cases, or in cases "when you can't quite fit it into another Rule. To the last remark, another member quipped that that is when the case should be dropped.

The Committee then voted to approve Rule 8.4(h) as recommended by the Subcommittee and, with that vote and the prior vote on the balance of the Rule, had approved all of Rule 8.4 and its comments as recommended by the Subcommittee.

P. Rule 8.5—*Disciplinary Authority; Choice of Law*.

Berger explained the changes to Rule 8.5 as being changes that bring modern choice of law principles to the Rules. Looking particularly at Rule 8.5(b)(2), he noted that Comment [5] explains that that provision recognizes that there may be situations in which it is difficult to determine which of two or more jurisdictions' rules of professional conduct should be applied and that a lawyer should not be disciplined in such a case if the lawyer conformed his conduct to "the rules of a jurisdiction in which the lawyer reasonably [believed] the predominate effect of her conduct would occur." Berger explained that "it would be unfair to discipline if the lawyer reasonably believed that his conduct conformed to at least one of the jurisdictions" having an interest in that conduct.

A member asked, by way of example, whether lawyer licensed in Colorado and practicing immigration law before a specialized court having its own set of ethics rules would be protected from Colorado discipline if his conduct were in compliance with those rules. Berger and another member agreed that Rule 8.5(b)(1) would protect the lawyer in that case. In further explanation to another member who had pointed out that the immigration lawyer would still be a Colorado lawyer subject to Colorado discipline, Berger remarked that, if the lawyer complied with all of the rules of the specialty court, he would not be subject to Colorado discipline; however, if the specialty court's rules did not cover the questioned conduct, and if that conduct violated the Colorado Rules, then the lawyer would remain subject to discipline in Colorado pursuant to Rule 8.5(b)(1). Another

member added that the lawyer would also be subject to discipline under the Colorado Rules if the conduct violated both the Colorado Rules and the ethics rules of the specialty court.

The Committee approved Rule 8.5, and its comments, as recommended by the Subcommittee.

Q. Rule 9—*Title — How Known and Cited.*

With no discussion and little difficulty, the Committee approved Rule 9 as recommended by the Subcommittee.

R. Summary.

The Chair noted that the Subcommittee had now completed its action on the Ethics 2000 Rules, excepting only the need for further deliberation by the Subcommittee and then the Whole Committee on Rule 4.4.

IV. *Adjournment; Next Scheduled Meeting.*

The meeting adjourned at approximately 4:25 p.m. The next scheduled meeting of the Committee will be on Friday, December 9, 2005, beginning at 9:00 a.m., in the Supreme Court Conference Room.

RESPECTFULLY SUBMITTED,

Anthony van Westrum, Secretary

[These minutes are as approved by the Committee at its meeting on December 9, 2005.]

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COLORADO SUPREME COURT

STANDING COMMITTEE ON THE RULES OF PROFESSIONAL CONDUCT

Approved Minutes of Meeting of the Full Committee
On December 9, 2005
(Twelfth Meeting of the Full Committee)

The twelfth meeting of the Colorado Supreme Court Standing Committee on the Rules of Professional Conduct was convened at 9:00 a.m. on Friday, December 9, 2005, by Chair Marcy G. Glenn. The meeting was held in the Supreme Court Library on the second floor of the Colorado State Judicial Building.

Present in person at the meeting, in addition to Marcy G. Glenn and Justices Michael L. Bender and Nathan B. Coats, were Michael H. Berger, Gary B. Blum, Nancy L. Cohen, Cynthia F. Covell, Mac V. Danford, Thomas E. Downey, Jr., John M. Haried, Cecil F. Morris, Jr., Kenneth B. Pennywell, Judge Ruthanne Polidori, Helen E. Raabe, Henry R. Reeve, John M. Richilano, Boston H. Stanton, Jr., David W. Stark, Anthony van Westrum, James E. Wallace, Judge John R. Webb, and E. Tuck Young. Excused from attendance were John S. Gleason, David C. Little, Judge William R. Lucero, Alexander R. Rothrock, and Lisa M. Wayne. Also absent were Judge Philip S. Figa and Eli Wald.

I. *Welcome to New Members.*

The Chair welcomed seven new members to the Committee: Gary B. Blum, Mac V. Danford, Thomas E. Downey, Jr., Judge Philip S. Figa, John M. Haried, Judge Ruthanne Polidori, and Helen E. Raabe.

The Chair remarked to the new members that, with the review of the ABA Ethics 2000 Model Rules of Professional Conduct nearing completion, much of the Committee's heavy lifting was now behind it. But, she noted, the Committee is a standing committee of the Court, and she forecast in particular that the Committee would have further service to render to the Court following public comment on the Committee's proposed version of those Ethics 2000 Rules. She also noted that there are other organs within the bar that might from time to time raise ethical issues that might implicate the Rules of Professional Conduct and thus present new tasks for the Committee.

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

The Chair had provided a package of materials to the members prior to the meeting date, including submitted minutes of the eleventh meeting of the Committee, held on September 26, 2005. Those minutes were approved with one correction.

III. *Next Meeting Date.*

The Chair expressed her hope that the Committee would have its version of the Ethics 2000 Rules finalized and submitted to the Court before the end of 2005, with herself and Michael H. Berger, chair of the Ethics 2000 Subcommittee, doing the final polishing of the Rules for the submission. At her suggestion, the Committee selected March 3, 2006, as the date for the next meeting, beginning at 1:00 p.m.

IV. *Review of Draft Report on Ethics 2000 Rules*.

Michael Berger then directed the Committee's attention to the draft of its Report to the Court on the Ethics 2000 Rules, which had been included in the materials provided for the meeting.

Berger noted that, with the Chair's editing skills, the Report had been reduced from over one hundred pages in length to about sixty-seven pages. He then directed the Committee's attention, in turn, to a number of corrections, additions, deletions, and other issues in the Report and in the proposed Rules.

A. *Scienter*

At its ninth meeting, on May 20, 2005, the Committee had considered the line of Colorado cases that had equated the Rules' term "knowledge" with "recklessness" for most purposes, and the Committee had determined to add a comment to Rule 1.0(f) stating that the Court will no longer follow that line of cases. Additionally, it determined to provide to the Court a "memorandum" analyzing the cases and the text of Rule 1.0(f) and supporting the Committee's recommendation that the line of cases be overruled. Accordingly, Comment [7A] has been added to the Scope section of the Rules to advise practitioners that the line of cases developed under the current Rules, which found recklessness to be the equivalent of knowledge for most purposes under the Rules, would no longer represent the law in Colorado. As currently proposed, the comment reads—

> In considering the prior Colorado Rules of Professional Conduct, the Colorado Supreme Court has stated that "with one important exception [involving knowing misappropriation of property] we have considered a reckless state of mind, constituting scienter, as equivalent to "knowing" for disciplinary purposes." *In the Matter of Egbune*, 971 P.2d 1065, 1069 (Colo.1999). See also *People v. Rader*, 822 P.2d 950 (Colo. 1992); *People v. Small*, 962 P.2d 258, 260 (Colo. 1998). For purposes of applying the ABA Standards for Imposition of Sanctions, and in determining whether conduct is fraudulent, the Court will continue to apply the *Egbune* line of cases. However, where a rule of professional conduct specifically requires the mental state of "knowledge," recklessness will not be sufficient to establish a violation of that rule and to that extent, the *Egbune* line of cases will not be followed.

The "memorandum" of the case law begins at the bottom of page 12 of the Report. It identifies three options that are available to the Court with regard to the recklessness/knowledge matter—

> *First*, it can adopt the New Model Rule definition and, in the interests of uniformity and other policy considerations, can clarify in new comment language that it will not follow its prior precedents equating "recklessness" with "knowledge" for the purpose of establishing a substantive violation of a rule that expressly requires knowledge. *Second*, as a matter of policy, the Court can modify the New Model Rule definition to include reckless conduct within its ambit. *Third*, the Court can adopt New Model Rule 1.0(f) but not address whether prior decisions equating recklessness and knowledge remain applicable.

It concludes with the Committee's recommendation that the Court adopt the first such option.

Berger pointed out that Comment [7A] warns that, "For purposes of applying the ABA Standards for Imposition of Sanctions, and in determining whether conduct is fraudulent, the Court will continue to apply the *Egbune* line of cases." The "memorandum" explains that, even where particular Rules may impose ethical duties regardless of the lawyer's state of mind, the appropriate sanction may depend to a great extent upon that state of mind, under the ABA Standards for Imposing Lawyer Sanctions.

On motion, Comment [7A] and the "memorandum" in the Report on "knowledge" and "recklessness" were approved.

B. *Screening*

A member noted the need to add, to the discussion of the concept of "screening" in Comment [8] to the Scope section of the Rules, a cross-reference to Rule 1.10(e), which the Committee has proposed adding to the ABA Ethics 2000 version of the Rules to permit the screening out of a lawyer who has moved to a law firm that is handling a matter from which the lawyer herself would be barred by Rule 1.9, provided the lawyer had not herself "substantially participated" on that matter while at the previous law firm.

On motion, the Committee approved the two additions suggested by the member.

C. *Client-Favoring Change in Fee or Fee Structure under Rule 1.5(b)*

Berger noted that the Committee had at one time considered modifying the text of Rule 1.5(b) — which states that any material change to the basis or rate of the lawyer's fee or expenses is subject to Rule 1.8(a) — to clarify that changes that favor the client, such as a reduction in hourly billing rates, do not require the client's written consent before being effectuated. Ultimately, the Committee had determined to deal with that matter merely by comment, and Comment [3A] has been added for that purpose, stating that "when a change in the basis or rate of the fee or expenses is reasonably likely to benefit the client . . . the change is not material for these purposes and compliance with Rule 1.8(a) is not required."

On motion, the Committee approved added Comment [3A] to Rule 1.5.

D. *Correction of Phrasing in Comment [5A] to Rule 1.6*

Berger noted that the Chair had suggested modification of the opening sentence of the Committee's added comment [5A] to Rule 1.6 as follows: "A lawyer moving (or ~~**contemplating to**~~ ***contemplating a*** move) from one firm to another is impliedly authorized to disclose certain limited non-privileged information protected by Rule 1.6 in order to conduct a conflicts check to determine whether the lawyer or the new firm is or would be disqualified."

On motion, the Committee approved the change.

E. *Cohabitation Added to Conflict-Producing Relationships under Rule 1.7*

Berger pointed out that the Committee had failed to include, in Comment [11] to Rule 1.7, cohabitation among the kinds of relationships that trigger conflicts between lawyers representing different clients in a matter. The Chair noted that the Committee had previously determined to move to Rule 1.7 the current Colorado comment to Rule 1.8 —

which includes cohabitation in the list of triggering relationships — but had inadvertently dropped the cohabitation language in the course of the move.

On motion, the Committee approved the addition of cohabitation to Comment [11] of Rule 1.7.

F. *Comment on Absence of Substantive Change in Revised Rule 1.7*

At the Committee's sixth meeting, on December 3, 2004, it approved the addition to Rule 1.7 of a Colorado comment stating that, while the text of the Rule "is quite different than the text of the prior version of Rule 1.7 . . . no changes in substance are intended." That comment has been included in the version of the Rules included in the materials for this meeting, as Comment [36]. But Berger said he was personally opposed to inclusion of the comment, which at best added but a confusing gloss to the Rule. Other members indicated their agreement with Berger.

On motion, the Committee determined to drop Comment [36] from the comments to Rule 1.7.

G. *Wording Correction in Rule 1.13(e)*

Berger pointed out that the phrase "paragraphs (b) or (c)" has been corrected to "paragraph (b) or (c)" in Rule 1.13(e).

On motion, the Committee approved that change.

H. *Reinsertion of References to Unbundling in Rule 4.2*

Berger told the Committee that it had inadvertently left out of the comments to Rule 4.2 the existing Colorado comment referencing Rules 11 and 311 of the Colorado Rules of Civil Procedure, which permit the "unbundling" of legal services. Those rules of civil procedure, in effect, treat a person who receives "unbundled" services as an unrepresented person, with the result that lawyers representing opposing parties may communicate directly with those unrepresented persons. (A parallel reference is included in Rule 4.3 of the proposed Rules as it is in existing Colorado Rule 4.3)

On motion, the Committee approved the addition of the following as Comment [9A] to Rule 4.2:

> A *pro se* party to whom limited representation has been provided in accordance with C.R.C.P. 11(b), or C.R.C.P. 311(b), and Colo. RPC 1.2 is considered to be unrepresented for purposes of this Rule unless the lawyer has knowledge to the contrary.

I. *Receipt of Information Known to Be Misdirected*

Berger reminded the Committee that it had a long discussion about whether to incorporate into the proposed Rules the substance of Opinion 108 of the Colorado Bar Association Ethics Committee, which provides that a lawyer who receives material he knows, before reviewing it, to have been misdirected to him has a duty not to look at the substance of the material, to notify the sender of his receipt of the material, and to abide by the sender's instructions as to the disposition of the material. Although there remain dissenters on the Committee, Berger believed a majority of the Committee generally

approves of the Ethics Committee's opinion and thinks it should be reflected in Rule 4.4, which has been done by the addition of Rule 4.4(c).

Berger pointed out that the Committee has modified Comment [2] of Rule 4.4 to reflect added Rule 4.4(c). It has also retained Comment [3] but with a modification to reflect the existence of new Rule 4.4(c); Berger pointed out that the ABA Ethics 2000 / Colorado Rules of Professional Conduct Committee (the "*Ad Hoc* Committee") had determined to delete Comment [3] entirely but that this Committee had determined to retain it, with that modification.

A member commented that Comment [3] as modified is inconsistent with the text of Rule 4.4(c). The latter requires a receiving lawyer to abide by the sender's instructions for disposition of the misdirected material, while the comment suggests that the receiving lawyer may still have options where he "learns before receiving the document that it was inadvertently sent to the wrong address."

That observation generated a number of suggestions and comments. One member suggested the addition of a prepositional cross-reference. Another suggested the deletion of all of the first sentence of Comment [3], to which suggestion another member objected, arguing that the sentence is uniform language and serves as a valuable safe harbor against client complaint against the lawyer who chooses to return misdirected material, even in the case where she did not learn of the misdirection until after reading it.

A new member to the Committee, admitting that she had not heard the debate of previous meetings, expressed a concern that the sender of the material might be, for example, a doctor sending a patient's medical records, rather than the patient's lawyer, and that doctor might not be aware of the need to issue instructions directed toward preserving the doctor-patient privilege. Another member agreed that the Rule should not be directing the receiving lawyer to notify the "sender" but, rather, the person, whoever it is, who has the privilege — or that person's lawyer.

Another member also suggested dropping the first sentence and added a suggestion to modify the second sentence to read, "Where a lawyer is not required by applicable law or subparagraph (c) to ~~**do so**~~ ***return the document***, the decision to voluntarily return such a document is a matter of professional judgment ordinarily reserved to the lawyer." He acknowledged that his suggestion would not solve the problem of how to get notice of the fact of the misdirection of the material to the person holding a privilege with respect to that information, or to that person's lawyer.

But to that suggestion another member pointed out that there would be no meaningful antecedent for the "decision" referred to in the second sentence if the first sentence were deleted. There would need to be something said about why there was a "decision" to be made. Further, there needs to be a statement that says a lawyer may choose to return the misdirected material even if he has examined it before learning that it was mistakenly sent to him. That is the safe harbor that protects the lawyer who chooses, perhaps out of a sense of professionalism, voluntarily to return the misdirected material. The proposed changes to the comment are merely confusing that safe harbor.

It was suggested that the "example" could be deleted from the first sentence, as well as the unnecessarily limiting word "unread," so that the comment would read—

> Some lawyers may choose to return a document ~~**unread, for example, when the lawyer learns before receiving the document that it was inadvertently sent to the wrong address**~~. Where a lawyer is not required by applicable law or subparagraph (c) to do so, the decision to voluntarily return such a document is a matter of professional judgment ordinarily reserved to the lawyer. See Rules 1.2 and 1.4.

But a member complained that this approach did not adequately describe the document that was being returned — the "inadvertently-sent document."

A member reminded the Committee that the purpose of the comment was to provide the safe harbor to the lawyer who chooses to return a misdirected document in a circumstance where the lawyer is not actually required to return the document. Another member suggested that sometimes one must read the document before discovering that it was misdirected to him; to which another suggested that that circumstance is not covered by the comment, which as originally written deals only with unread documents.

Another new member to the Committee said he had already been concerned about Ethics Committee Opinion 108 for this reason: "Let's assume a defense lawyer receives medical records regarding the plaintiff's broken leg, records that are apparently properly sent in response to a discovery request. The plaintiff has claimed that the broken leg has caused him loss of wages. But the lawyer reads the medical records and realizes they contain other information, that the plaintiff could not have expected him to see, which expose that the plaintiff has other medical problems and indicate a shortened life expectancy. The defense lawyer had to read through all of the records to see that implication. What position is he in? Does he go to court? Does he keep silent?" The member had that concern with Opinion 108 and has that concern with proposed Rule 4.4 (c).

To this, a member explained that the Rule imposes a duty to give notice to the sender only when the lawyer has read the medical records without prior notice that they were misdirected to him. The lawyer cannot be expected to purge from his mind the information indicating a shortened life expectancy and need not do more than give notice if he knows or reasonably should know it was not intended that he receive all of the records. If the recipient believes the sender had in fact intended to send all of the records, then Rule 4.4(b) and Rule 4.4 (c) are not implicated at all, and the receiving lawyer has no duty under them.

Another member concurred that the comment in question provides a safe harbor permitting a lawyer to go beyond the notice requirement and, in his professional judgment, return the misdirected material, without fear that his client will pursue a claim for malpractice — for giving up a tactical advantage — or seek sanctions under Rule 1.2 or other Rules. That is what Comment [3] provides, and it should not be impaired.

A member pointed out that our drafting difficulty is caused by the fact that Model Comment [3] is for a Rule that does not have our added Rule 4.4(c), which adds a requirement that the lawyer abide by the sender's instructions if, before examining the material, she has received warning that it was misdirected to her.

The member who had last spoken about the safe harbor role of the comment then reiterated the prior suggestion that the word "unread" be deleted, inasmuch as the safe harbor should apply whether or not the lawyer had read the misdirected document.

Berger interjected that the Committee had resolved not do deal with this issue — the handling of misdirected documents — as a standard of care for malpractice; this Rule deals with ethics and discipline, only.

The member who had last spoken about the safe harbor role of the comment next suggested adding a reference to "an inadvertently disclosed document." Another suggested clarifying that the first sentence is intended to deal only with the situation contemplated in Rule 4.4(b), not with that covered by Rule 4.4 (c), and that this clarification be accomplished by adding an opening clause. Combined, those two suggestions would have amended Comment [3] to read—

> ~~**Some**~~ ***In the circumstances of Paragraph (b), some*** lawyers may choose to return ~~**a**~~ ***an inadvertently disclosed*** document ~~**unread, for example, when the lawyer learns before receiving the document that it was inadvertently sent to the wrong address**~~. Where a lawyer is not required by applicable law or subparagraph (c) to do so, the decision to voluntarily return such a document is a matter of professional judgment ordinarily reserved to the lawyer. See Rules 1.2 and 1.4.

To a member who asked whether the safe harbor did not also have application in the circumstances contemplated by Rule 4.4(c), another explained that it did not, because in those circumstances the receiving lawyer must (absent court order) abide by the sender's instructions, and the assumption is that the instructions will include "return the document to me."

Another member added that the tension between "zealousness" — and the concern that the receiving lawyer's client will complain that his decision to return the document disadvantaged the client — and return of the document is found only in Rule 4.4(b), where the lawyer is given discretion, and not in Rule 4.4 (c), where the lawyer has no choice (other than to take the issue to court). Another member confirmed this view: There is no need for a safe harbor in the circumstances contemplated by Rule 4.4 (c).

To a member's suggestion that the Committee simply delete Comment [3], another member replied that the Committee should not do that, for it was essential to retain the safe harbor concept.

A member who had served on the *Ad Hoc* Committee outlined its reasons for recommending the deletion of Model Comment [3]. As explained in the Executive Summary provided by the *Ad Hoc* Committee—

> New Model Rule 4.4 adds a paragraph requiring a lawyer to notify the sender of any document (including emails) a lawyer receives that appears to have been sent inadvertently. The Comment goes further and states that it is up to the lawyer whether to return the document unread. The Colorado Committee recommends keeping the textual revision and rejecting the corresponding Comment. The Comment may be inconsistent with a lawyer's duty to the client, as discussed in Formal Opinion 108 of the CBA Ethics Committee, "Inadvertent Disclosure of Privileged or Confidential Documents," dated May 20, 2000. The Colorado Committee agrees with Formal Opinion 108. Apart from that change, the Colorado Committee recommends New Model Rule 4.4 and its Comment.

On motion, the Committee revised Comment [3] to read as follows:

> In the circumstances of paragraph (b), some lawyers may choose to return an inadvertently sent document. Where a lawyer is not required by

> applicable law or subparagraph (c) to do so, the decision to voluntarily return such a document is a matter of professional judgment ordinarily reserved to the lawyer. See Rules 1.2 and 1.4.

In answer to a member's question, it was noted that Rule 1.0 defines "writing" to include emails. That should be sufficient to imply the inclusion of emails within the concept of a "document." It was pointed out that the Rules use the undefined words "document" and "documents" at least thirty-five times, in addition to the numerous uses of the defined term "writing" — the latter typically being used in conjunction with a client's consent to some action by a lawyer.

To the suggestion that the matter be clarified by adding a statement that, for purposes of Rule 4.4, "document" means a "writing" as defined in Rule 1.0, a member noted that the effect of such a statement would be to include voicemails and other "electronic record[s] of communication" within the scope of Rule 4.4, which, the member noted, might not be a bad thing, although it might be difficult to "return" a voicemail.

That same member, to a comment by another, pointed out that Rule 4.4 deals with inadvertently disclosed documents and does not deal with "metadata" contained within an electronically-transmitted document. To that comment, another member, somewhat older than thirty years of age, noted that there is probably a world of related issues here that might be appropriately directed to a committee made up of persons who were under thirty and presumably more attuned to the issues of an electronic age. The Chair responded that she would appoint a subcommittee specifically to consider ethical issues engendered by evolving technology.

Another member stated his belief that there was no need for a sentence equating "document" with "writing" for purposes of Rule 4.4. It is, he said, appropriate to use differing terms with differing meanings in different Rules, particularly here where the word "writing" has been defined primarily for use in the concept of informed client consent, confirmed in writing. But, although the words were different, that should not preclude application of similar principles to them where the principles fit, such as implicitly including electronic communications within the undefined concept of a "document" just as they are included within the defined concept of a "writing."

No further action was taken by the Committee as a result of these remarks.

J. *Cooling-Off Period in Rule 7.3(c)*

Berger explained that he had listed among the things to be considered at this meeting the question of whether the "cooling-off period" prescribed by Rule 7.3(c) for solicitations in personal injury and wrongful death cases should be fifteen days or thirty days. But the minutes of the eleventh meeting of the Committee, on September 27, 2005, disclose that the Committee had already determined to utilize the thirty-day period prescribed by § 12-5-115.5 of the Colorado Revised Statutes, so no further action was required of the Committee.

The minutes of the eleventh meeting of the Committee also reflect that it had rejected a proposal to include a non-uniform cross-reference to § 12-5-115.5 in the comment to Rule 7.3.

K. *Inclusion of "Retention in Judicial Office" in Rule 8.2(b)*

Berger pointed out that the Committee had approved the ABA Ethics 2000 version of Rule 8.2(b) without modifying it to refer to the Colorado method of "retaining" judges in office, as is done in the current language of Colorado Rule 8.2(b). He believed that the failure to use the current Colorado text was an oversight and asked the Committee to rectify it.

On motion, the Committee amended Rule 8.2(b) to read, "A lawyer who is a candidate for retention in judicial office shall comply with the applicable provisions of the Code of Judicial Conduct."

The Chair noted that, with that vote, the Committee had finished all of the items that had been included for action in the agenda for the meeting. She then turned the Committee to consideration of a few other issues concerning the Rules that had been raised by individual members.

L. *Reordering the List in Rule 5.5(b)*

A member had noted that the catch-all "otherwise engage in activities that constitute the practice of law" found as Item (6) in Rule 5.5(b) might infer that all the preceding items — including Item (1) on handling client funds — are the practice of law, when it is understood that law office administrators and other non-lawyers regularly handle client funds as agents for their law firms. The member suggested that Item (1) be placed at the end of the list, renumbered as Item (6), with the other items renumbered accordingly.

On motion, the Committee reordered the list of items in Rule 5.5(b) as suggested.

M. *Change of Wording from "Attorneys" to "Lawyers" in Rule 7.4(e)*

A member had noticed that the word "attorneys" had been used instead of "lawyers" in Rule 7.4(e), in the required advertising caveat that "Colorado does not certify attorneys as specialists in any field." The Rules consistently use the term "lawyer" rather than "attorney" (except when referring to the attorney-client privilege) and the word "lawyers" was, this member suggested, also appropriate for the advertising caveat.

On motion, the Committee changed the word "attorneys" to "lawyers" in Rule 7.4(e).

N. *Minor Corrections to Rule 5.5(d); Wordsmithing Authority*

After a brief discussion, on motion, the Committee corrected Rule 5.5(d) as follows:

> A lawyer shall not allow a person the lawyer knows or reasonably should know is ~~a~~ disbarred, suspended, or on disability inactive status, to have any professional contact with clients of the lawyer or of the lawyer's firm unless the lawyer:
>
> (1) Prior to the commencement of the work, gives written notice to the client for whom the work will be performed that the disbarred~~,~~ ***or*** suspended lawyer or ~~a~~ ***the*** lawyer on disability inactive status, may not practice law; and

This change led to a proposal, approved by the Committee, that the Chair and Berger be granted authority to make other, similar, wordsmithing changes as they may determine in finalizing the Report for submission to the Court.

O. *Use of the Rules as Evidence of a Standard for Civil Liability*

The Chair noted that David Little was not able to attend the meeting but, in anticipation of that, had sent her a letter, included in the meeting materials as Exhibit F, in which he asked for reconsideration of two issues that had troubled him during the course of the Committee's consideration of the Ethics 2000 Rules.

The first of those issues was the last sentence of Paragraph [20] of the Scope section of the Rules, reading (as previously amended by the Committee), "Nevertheless, since the Rules do establish standards of conduct by lawyers, in appropriate cases, a lawyer's violation of a Rule may be evidence of breach of the applicable standard of conduct." Little's letter restates his objections to that sentence as follows:

> First of all, we are creating confusion with respect to the utilization of these Rules in civil litigation. The standards of conduct are not the measure by which civil liability is determined.
>
> Civil liability is based upon breach of the standards of care. Conduct generally refers to the mode of personal behavior based on moral principles. Care, on the other hand, refers to concern for the interest of the client and the attention a lawyer gives to achieving the client's objectives. A lawyer can breach of [*sic*] the standards of conduct while at the same time exercising all due concern and attention for the client's interest. . . . I maintain that a lawyer can breach a Rule of Conduct and not necessarily be in breach of the acceptable standard of care.

The Chair remarked that the Committee had "softened" the impact of that sentence, as found in the ABA Ethics 2000 version, by the addition of the words "in appropriate cases," clarifying that the Rules are not themselves standards of care for all cases but, rather, some Rules may be evidence of a standard of care in some cases.

A member expressed his support for Little's position, pointing out that the Committee's prior debate had been heated and had resulted in a close vote to retain the ABA Ethics 2000 sentence, modified only as the Chair had indicated. In this member's view, the sentence could have an impact on the private practice of law and on malpractice issues, "opening the door" and changing "the Colorado rule." The sentence constituted a new theory of care and provided a format for a new argument of evidence, in this member's view. The sentence would have a long-term impact for those in private practice, for every time one lawyer is sued for malpractice on any theory the malpractice insurance premiums of all lawyers go up. The member noted that some of these matters had not previously been raised before the Committee, perhaps because they were too sensitive.

Another member sought to rebut these views, stating that there are many Rules which simply have no application to the standard of care to be applied in civil malpractice cases. Others are necessarily implicated in particular malpractice contexts; for example, the Rules governing conflicts of interest are clearly relevant in measuring a lawyer's care in cases involving conflicts of interest. The member reminded the Committee of its meeting at which Professor Nancy Moore was in attendance and noted that it is not possible to discuss conflicts in malpractice cases without referring to Rule 1.7.[1]

1. *See* minutes of the third meeting of the Committee, held on April 16, 2004.

Cecil Morris referred the Committee to his August 19, 2004 memorandum on this matter, which had been included in the meeting materials as Appendix D. In that memorandum, he had stated—

> [A]n objection has been raised that the proposed amendment makes the violation of a Rule available to the claimant in a civil action for breach of the standard of care and that this is a dramatic change in the practical utilization of the Rules. In reality, the proposed amendment to the Scope section of the Rules does not reflect a dramatic change at all; rather the proposed amendment simply reflects what the courts are actually doing.

Morris urged the Committee to step back and look at the context: The purpose of the Rules is for lawyer discipline. The sentence in question "bookmarks" that by noting the other half, liability to clients. Violation of a Rule does not create a presumption of civil liability. There is no *per se* civil liability for the violation of any Rule. But the reality is that, because lawyers are required to abide by the Rules, subject to sanction when they do not, the Rules will, in the proper context, be evidence of the level of care ordinarily exercised by lawyers. Morris agreed with the prior comment that it is not possible to analyze a lawyer's duties of loyalty without reference to Rule 1.7.

A member seconded the motion implicit in Little's letter that the Committee "remove the sentence entirely so that we continue to have the same limitation on the use of these Rules in the process of civil litigation as we presently have." On the ensuing vote, the motion failed.

P. *Rule 1.6(b)(4) and the Lawyer's Ability to Disclose Client Confidences When Seeking Her Own Counsel*

Little's letter also restated his concern about Rule 1.6(b)(4), which expressly permits a lawyer to disclose client confidences in connection with the lawyer's securing advice for herself about her compliance with "these Rules." The negative implication of that provision, he argued, is that "it may not allow disclosure of privileged information by a lawyer in order to explore the lawyer's compliance with laws or legal obligations other than those addressed in the conduct rules themselves." By his letter, Little again asked the Committee to consider expansion of the provision (utilizing the wording found in Rule 1.6(b)(6)) to read, "A lawyer may reveal information . . . to secure legal advice about the lawyer's compliance with these rules or compliance with other law or a court order."

The Chair explained, for the benefit of the Committee's new members, the prior discussion on Little's proposal to expand Rule 1.6(b)(4), a discussion that she characterized as "very compelling."

At the Chair's request, another member summarized the prior discussion, as follows: As stated in the ABA Ethics 2000 version, Rule 1.6(b)(4) permits a lawyer to disclose client confidences to another lawyer to the extent the disclosing lawyer reasonably believes necessary to obtain advice from the other lawyer about her obligations under the Rules. But the negative implication is that a lawyer may not seek advice about her compliance with other law, such as, for example, Federal law governing currency transactions — "The client has brought his $20,000 retainer to me in hundred dollar bills; do I have a reporting duty under currency laws?" Those members who have opposed expansion of the text as Little has requested have not actually been opposed to a lawyer making disclosures in order to obtain advice regarding compliance with other law but simply are of the view that the Rules can be read expansively enough so that any appropriate inquiry would implicate not only

the "other law" but also one or more of the Rules and thus would be permitted by Rule 1.6(b)(4) even in the shortened form of the ABA Ethics 2000 version, which does not refer to "other law." But this member, Little, and some other members are not convinced that the Committee can be sure that all circumstances in which it would be appropriate for a lawyer to disclose client confidences in order to gain advice as to the lawyer's proper conduct can be fit into one Rule or another; thus, they want the wording to be expanded to expressly include what the majority has said is, because of the expansiveness of the Rules, already included in practical effect.

The Chair expressed her personal agreement with Little's request. She quoted with approval another member's observation that it would seem, without that expansion, that among all persons only lawyers are not permitted to seek legal advice before they act. She also noted the distorting effect of the limitation on disclosure that is implied in Rule 1.6(b)(4): A lawyer who practices in a large law firm may have other lawyers at hand who have expertise in the area in which she seeks advice; because those lawyers are already imputedly representing the client, they can answer her questions about her own legal obligations without concern under Rule 1.6. But a solo practitioner, or a lawyer practicing in a small firm that does not have another lawyer versed in the law governing the issue that concerns him, does not have that opportunity to obtain advice in-house.

The member who had reviewed the prior discussion amplified the point: Little's request would not suddenly open a client's confidences to public view — in every case, the confidences would be disclosed only to another lawyer, who would be under a similar duty under Rule 1.6 to preserve them in confidence.

A member asked whether Little's expansion would permit the lawyer, who has undertaken a representation in an area of law in which he needs more expertise than he actually has, to "hire a shadow lawyer" to add that expertise and shield him from an incompetency charge. Provoked by that thought, another member argued Little's language was too broad and that he had failed to come up with appropriate limitations on its reach. In her view, any lawyer seeking a second point of view about a client's issue can gain that by using hypotheticals without disclosing client confidences.

And another member argued that it was not sufficient to say that, because the lawyer who is consulted is bound by Rule 1.6, the original client's confidences remain protected. The Rule should not allow even that one additional level of exposure of the client's confidences, from the client's lawyer to the client's lawyer's lawyer.

To all of this the lawyer who had provided the review of the prior discussion responded that the example of the shadow lawyer was misplaced. The Rule as Little would expand it would not permit consultation with a "shadow lawyer" about the *client's* legal issues; it would only permit disclosures to gain advice about the lawyer's own legal issues. The Committee, in this member's view, risked throwing out a proper expansion of the text of Rule 1.6(b)(4) based on an absurd example.

A member who has served on the "Calling Subcommittee" of the Colorado Bar Association's Ethics Committee suggested that the members needed "to come into the real world," and added that the issue had been ducked during Colorado's consideration of the Kutak Rules in the early 1990s. At that time, he recalled, the Colorado drafters had considered the example of the new law graduate who was in fact probably not competent to do anything yet, as she had no experience under her belt. The young lawyer who was employed by a law firm could get intra-firm advice, but what was the young solo lawyer to

do? Or, he suggested, maybe the lawyer's client was threatening him with a malpractice claim. In such a case the lawyer could not, as a practical matter, obtain the client's consent to his consultation with a malpractice lawyer. Accordingly, this member saw Little's expansion as benefitting clients as well as lawyers, for it is always to the clients' advantage that their lawyers be as well informed as possible. This member valued the fact that the consulting lawyer would himself have a Rule 1.6 duty of confidentiality to the lawyer and, effectively, to the lawyer's client as well. Summarizing, he said that the members of the Ethics Committee's Calling Subcommittee have worried about this issue for a long time, inasmuch as they are often exposed by the calling lawyers to confidences belonging to those lawyers' clients. He believed this was an important issue.

To that, another member responded that, carefully read, Comment [9] to Rule 1.6 covers this point: "A lawyer's confidentiality obligations do not preclude a lawyer from securing confidential advice about the lawyer's personal responsibility to comply with these Rules. . . . Even when the disclosure is not implied authorized, Paragraph (b)(4) permits such disclosure because of the importance of the lawyer's compliance with the Rules of Professional Conduct. For example, Rule 1.6(b)(4) authorizes disclosures that the lawyer reasonably believes are necessary to seek advice involving the lawyer's duty to provide competent representation under Rule 1.1" This member was "sensitive to Little's concerns" but felt that the Comment, as expanded by the Committee from the ABA Ethics 2000 version, covered them.

Berger noted that another way to approach the matter would be to put the substance of Comment [9] into Rule 1.6(b)(4), utilizing Little's suggested text, and clarify in new comment language that the permission to seek advice regarding the lawyer's compliance with his obligations, whether arising under the Rules or other law, did not include permission to engage shadow counsel for the client's issues without the client's consent.

A member argued that Berger's approach would "put the client second," but another member challenged that view. The client would be disadvantaged, or "put second," only if the client had to bear the second lawyer's bill for the consultation, which the client could control either by withholding consent to the consultation or demanding that it be done at the principal lawyer's own cost. This member noted that "consultation" often occurs within the principal lawyer's own law firm, where the lawyer may walk down the hall for an informal, unbilled consultation or where the time accrued by both the principal and the consulting lawyer may be included in the law firm's billings to the client. In either case, the client is benefitted by the second look at his issues, whether he is charged for that consultation or not.

The Chair called for a vote on Little's motion to amend Rule 1.6(b)(4) to read, "to secure advice about the lawyer's compliance with these Rules, other law or a court order." The Committee voted to make the amendment.

On the Chair's further motion, the Committee amended Comment [9], applicable to Rule 1.6(b)(4), as follows:

> [9] A lawyer's confidentiality obligations do not preclude a lawyer from securing confidential legal advice about the lawyer's personal responsibility to comply with these Rules***, other law, or a court order***. In most situations, disclosing information to secure such advice will be impliedly authorized for the lawyer to carry out the representation. Even when the disclosure is not impliedly authorized, paragraph (b)(4) permits such disclosure because of the importance of a lawyer's compliance with these Rules***, other law, or a court order***. For example, Rule 1.6(b)(4) authorizes disclosures that the

> lawyer reasonably believes are necessary to seek advice involving the lawyer's duty to provide competent representation under Rule 1.1. In addition, this rule permits disclosure of information that the lawyer reasonably believes is necessary to secure legal advice concerning the lawyer's broader duties, including those addressed in Rules 3.3, 4.1 and 8.4.

Berger moved that Comment [9] be further amended by deleting the sentence reading, "For example, Rule 1.6(b)(4) authorizes disclosures that the lawyer reasonably believes are necessary to seek advice involving the lawyer's duty to provide competent representation under Rule 1.1" On a vote, the Committee rejected that amendment.

Q. *Final Approval of the Report*

On motion, the Committee approved the entire Report, as submitted to the meeting and modified during it, and directed its submission to the Court as the Committee's report on the ABA Ethics 2000 Model Rules of Professional Conduct.

On further motion, the Committee warmly applauded the Chair, Marcy Glenn, and the chair of the Ethics 2000 Subcommittee, Michael Berger, for their unstinting efforts to bring the Committee's review of the ABA Ethics 2000 Model Rules of Professional Conduct to a successful conclusion with the production of a thorough and scholarly Report and the accompanying proposal for adoption of the ABA Ethics 2000 Rules as modified by the Committee.

V. *Adjournment; Next Scheduled Meeting.*

The meeting adjourned at approximately 12:00 p.m. The next scheduled meeting of the Committee will be on Friday, March 3, 2006, beginning at 1:00 p.m., in the Supreme Court Conference Room.

RESPECTFULLY SUBMITTED,

Anthony van Westrum, Secretary

[These minutes are as approved by the Committee at its meeting on March 3, 2006.]

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COLORADO SUPREME COURT

STANDING COMMITTEE ON THE RULES OF PROFESSIONAL CONDUCT

Approved Minutes of Meeting of the Full Committee
On March 3, 2006
(Thirteenth Meeting of the Full Committee)

The thirteenth meeting of the Colorado Supreme Court Standing Committee on the Rules of Professional Conduct was convened at 9:00 a.m. on Friday, March 3, 2006, by Chair Marcy G. Glenn. The meeting was held in the Supreme Court Conference Room on the fifth floor of the Colorado State Judicial Building.

Present in person at the meeting, in addition to Marcy G. Glenn and Justices Michael L. Bender and Nathan B. Coats, were Michael H. Berger, Cynthia F. Covell, Thomas E. Downey, Jr., David C. Little, Judge Philip S. Figa, Judge William R. Lucero, Cecil E. Morris, Jr., Kenneth B. Pennywell, Judge Ruthanne Polidori, Helen E. Raabe, Henry R. Reeve, Alexander R. Rothrock, Boston H. Stanton, Jr., David W. Stark, Anthony van Westrum, Eli Wald, James E. Wallace, Judge John R. Webb, and E. Tuck Young. Excused from attendance were Nancy L. Cohen, Mac V. Danford, John S. Gleason, and John M. Haried. Also absent were Gary B. Blum, John M. Richilano, and Lisa M. Wayne.

I. *Welcoming New Member.*

The Chair welcomed the Honorable Philip S. Figa, of the United States District Court for the District of Colorado to the meeting and to the Committee.

II. *Meeting Materials; Minutes of December 9, 2005 Meeting.*

The Chair had provided a package of materials to the members prior to the meeting date, including submitted minutes of the twelfth meeting of the Committee, held on December 9, 2005. Those minutes were approved as submitted.

III. *Scheduling of Next Meeting, in View of Public Comment on Proposed Ethics 2000 Rules.*

The Chair noted that the Supreme Court has scheduled for June 15, 2006, at 1:30 p.m., a public hearing to take comments on the "Ethics 2000" Rules of Professional Conduct as this Committee proposed them to the Court in December 2005. The Court has set Thursday, May 25, 2006, as the last day for taking written comments on the proposal. The Chair proposed that the Committee meet in advance of that public hearing, suggesting that at such a meeting the Committee could consider proposals to amend Rule 265, C.R.C.P. (to be discussed substantively later during the current meeting); discuss proposals to amend Rule 1.4 to deal with malpractice insurance disclosures; and to prepare, if necessary, for participation at the June 15th hearing.

Justice Bender noted that it is customary for the proponent of a rules change to provide a summary of the proposal at the public hearing on the change. The Chair added that members of this Committee may be making comments on the Committee's proposal at the hearing.

At the suggestion of a couple of members, the decision whether to have a further Committee meeting in advance of the public hearing on the Ethics 2000 proposal was postponed until the end of the meeting.

IV. *Consideration of "Recommended Model Pro Bono Policy for Colorado Attorneys and Law Firms" Comment to Rule 6.1.*

The Committee members then discussed the processes that had led to the recent adoption of a change to the existing Colorado Rules of Professional Conduct — the addition of a recommended *pro bono* policy as a comment to Rule 6.1 — without the Standing Committee on the Rules of Professional Conduct being aware of the addition. It was not clear to the Committee whether the Court specifically did not intend this Committee to consider the substance of the addition, newly adopted as it was, notwithstanding that the Court has generally assigned to the Committee the task of weighing all of the existing Rules against the content of the ABA Ethics 2000 model. Would it be presumptuous for the Committee to comment upon the substance of the addition, given that the Court has just adopted it? Or did the matter "just fall through the cracks"?

Berger and the Chair noted that there is at least one inconsistency between the recommended policy and Rule 1.8(e) as it would be modified in the Committee's proposed Ethics 2000 Rules: Under the Committee's recommendation, Rule 1.8(e) would permit a lawyer and her client to agree that the lawyer would *not* seek reimbursement from the client for litigation costs in a contingent fee case. The newly adopted recommended *pro bono* policy, on the other hand, reflects the requirement of existing Rule 1.8(e) that the client initially agree to repay costs.[1]

The Chair voiced her agreement with Berger that, because of its length, the recommended *pro bono* policy would be better placed as an appendix to the Rules than included with the other comments to Rule 6.1.

A member pointed out that the recommended policy, as adopted by the Court, modifies the continuing legal education requirements of Rule 260.8, C.R.C.P. As amended about a year and a half ago, that rule permits the accumulation of up to nine hours of continuing legal education credits in each three-year reporting period "for providing uncompensated pro bono legal representation to an indigent or near-indigent client or clients in a civil legal matter, or mentoring another lawyer or a law student providing such representation." In this member's view, this Committee and the Court's Continuing Legal Education Board should work to standardize the process by which continuing legal education credits are awarded for this kind of activity.

A member spoke to the substance of the recommended *pro bono* policy, noting as he began that he has been an active provider of *pro bono* services to indigent persons, exceeding the fifty-hours-per-year guideline contained in the recommended policy. But, he said, he has been opposed to mandatory *pro bono* service, and he noted that the recommended *pro bono* policy under discussion, albeit not mandatory, was promoted by the same group that had sought mandatory service in a proposal it made several years ago, a proposal that had been roundly rejected by the membership of the Colorado Bar Association

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1. Section V.H. of the recommended *pro bono* policy states—

> The firm may advance or guarantee payment of incidental litigation expenses, provided the client agrees to be ultimately responsible for them. However, the firm may later forego repayment of such expenses if such repayment would cause the client substantial financial hardship. (Colo. Rule of Professional Conduct 1.8(e)).

and had not been adopted by the Court. In his view, the newly adopted recommended policy sought the same goal from a different standpoint.

The member noted that, in response to the mandatory proposal, the Colorado Bar Association had concluded that it is society's burden, not that of the private attorney, to pay the cost of universal access to justice. No other profession, he said, imposes similar requirements on its practitioners — not doctors, pharmacists, dentists, etc.

The member argued that, when the court pushes toward *pro bono* legal services directed toward indigents, it deters lawyers from other worthy activities, including other activities that are intended to aid the poor such as service in soup kitchens, etc., doing so simply because the promoters of the recommended *pro bono* policy personally believe that *pro bono* legal services are more important than such other services and wish to impose that viewpoint on other lawyers, who may feel differently.

This recommended policy, the member argued, is the wrong direction to go. But, if the Court determines that it is the right direction to go, it should "level the playing field" by making it an economic requirement, rather than one based on hours of service, and by applying it to all lawyers, including judges and those in governmental positions. "If it is a burden to be carried by the bar, it should be carried not just by private practitioners," he said.

The member proposed the following example to illustrate his point: If one assumes the lawyer charges $200 per hour, a fifty hour commitment under the recommended *pro bono* policy asks each member of the private bar to make a $10,000 charitable contribution each year to indigent legal services, although any individual lawyer may in fact choose to direct her charitable contributions to other causes. This member reiterated his question of why, if this burden must be imposed, it is not imposed on all licensed lawyers in the state, rather than just on private attorneys.

The member concluded by noting that the recommended *pro bono* policy is but the next step to mandatory *pro bono* service. There are, he said, many lawyers who are very upset with the policy. He said that he personally did not feel compelled to provide *pro bono* services to the poor; he provided many hours of such service in fact but did it not because he had a "duty" to do so but because he had personally determined it was worthwhile to do so.

Another member commented that she well understood the need to find ways for both the indigent and the middle class to obtain legal services. She could not, herself, easily afford a lawyer if she needed one. Her concern with the recommended *pro bono* policy was that it was directed at law firms. She believed that solo practitioners and small law firms provide a great deal of *pro bono* services to the poor, particularly in the "trench work" of landlord/tenant disputes and the like, while large law firms gain applause for their marquee cases. In her view, a proper *pro bono* policy must be broader-based than the one adopted by the Court and should reflect the differences between small and large law firms.

A member spoke to the question of format, agreeing that the recommended policy should not be set forth in the comments to Rule 6.1; he suggested that perhaps the Rule could contain a cross-reference to the policy as a separate document.

The member also spoke to the substance of the recommended policy, noting that, although he did not disagree with the criticism that the other member had leveled against

the policy, he approved of the extension of existing Rule 6.1's aspirational concepts from the individual lawyer to law firms.

A member characterized the recommended *pro bono* policy as a "done deal," but another noted that the Committee could, logically, treat it as just another element of the existing Rules to be weighed by the Committee in considering its recommendation for an entirely new set of Rules, the Ethics-2000-based Rules. The only reason for not doing that is the fact of the recentness of the Court's adoption of the recommended policy, but, if the Committee wished to express its views on the merits of the policy, there was no logical reason why it should not do so.

The Chair asked for a discussion of whether the Committee should direct the Subcommittee to consider the merits of the recommended *pro bono* policy or should just consider formatting and stylistic issues. Berger said that his view was that the Court has made a contemporaneous determination about the merits of the policy and that the only appropriate role for the Subcommittee and the Committee is to consider fitting the policy into the format of the Rules.

Another member agreed that the Subcommittee and Committee should deal only with the formatting issues but thought, too, that they should point out the inconsistencies — such as that between the policy and Rule 1.8(e) as it would be revised — in the policy.

Upon motion, the Committee directed the Subcommittee to identify inconsistencies between the recommended *pro bono* policy and the other provisions of the Ethics 2000 Rules, to consider the formatting issues, such as restructuring the policy as an appendix to the Rules, and to prepare a supplement to the Committee's report on the Ethics 2000 Rules dealing with those matters.

V. *Consideration of Amendment to Rule 265 Regarding Its Limitation of Professional Company Activity to "The Practice of Law."*

David Little, who serves on the Court's Standing Committee on the Rules of Civil Procedure as well as on this Committee, asked the Committee to consider an amendment of Rule 265, C.R.C.P. to eliminate its apparent prohibition against the provision of arbitration, mediation, expert witness and other such services by lawyers from within professional companies formed pursuant to the rule.

Little said the history of Rule 265 is obscure, driven by the tax laws of the 1960s and not by any goal of defining or confining permitted modes of law practice. At the time of its adoption, the Legislature was modifying the statutes governing other professions to allow those professionals to practice from within corporations so that they could gain the benefit of special tax laws governing retirement programs. Because the Court, not the Legislature, regulates lawyers in the practice of law, it was incumbent on the Court to fashion a similar rule to permit lawyers to practice law from within corporations and thus obtain the same tax benefits.

But corporate law provided limited liability to the corporate shareholders, whereas lawyers practicing in the traditional partnership mode had borne joint and several liability for each partner's malpractice. The Court could not alter the statutory grant of limited liability to corporate shareholders, but it could require lawyers, as a condition to practicing from within corporations, to agree to continue to bear joint and several liability for malpractice claims against their corporations unless they caused the corporation to maintain

certain minimums of insurance coverage. Thus, adoption of Rule 265 enabled the Court to encourage lawyers generally to obtain professional liability insurance.

In drafting Rule 265, the Court limited the permitted conduct of "professional corporations" formed pursuant to it to "the practice of law."[2] In Little's view, the Court added that limitation principally as a definition, as a recognition that that is what law firms do, and not as a conscious prohibition against activities that lawyers have traditionally provided but which are not "the practice of law."

But, over time, with the growing propensity for lawyers to provide alternative dispute resolution services, such as arbitration and mediation, and to serve as expert witnesses, a concern has developed that Rule 265's limitation on the activities of lawyers who practice from within professional companies to "the practice of law" might preclude their provision of those services, which are generally conceded not to be the practice of law. In short, a lawyer in a professional corporation or other professional company governed by Rule 265 might, by a literal reading of the rule, not be permitted to provide such services through that entity. And yet it is commonly understood by the lawyers in such a law firm that fees generated by such activities will be shared among the equity owners as are fees from legal services.

Little noted that lawyers who practice in general partnerships are not similarly precluded from rendering these other kinds of services from those entities, and lawyers practicing as sole proprietors may render those services along with legal services.

Contemporaneously with the recognition of the unintended consequences of the limitation to "the practice of law," it has been recognized that the form of professional liability insurance that is made available by the carriers has changed from "occurrence"-based coverage offered in the 1960s to "claims-made" coverage. But the rule continues to contemplate the occurrence-based coverage and has not been revised to accommodate claims-made coverage. As a result, a lawyer can comply with the insurance requirements of the rule by having malpractice insurance coverage at the time he commits malpractice but may thereafter drop coverage and be uncovered at the time the claim for that malpractice is made. Thus, the benefit to the public of the insurance requirements of the rule are illusory.

These two issues — the ostensible preclusion of alternative dispute resolution, expert witness, and similar services from within law firms organized as professional companies and the failure to recognize current insurance structure — have led to suggestions for a reexamination of Rule 265.

Little pointed out that Rule 265 has traditionally been within the purview of the Court's Standing Committee on the Rules of Civil Procedure. But, he noted, Rule 5.7 as proposed by this Committee as a part of its Ethics 2000 recommendations, will recognize that lawyers may provide "law-related services" and will regulate their conduct when they

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2. Rule 265.I (which now encompasses limited liability companies and other entities in addition to corporations, in the phrase "professional company) provides—

> All professional companies conducting the practice of law in Colorado shall comply with the following requirements:
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> . . . .
>
> 2. The professional company shall be established solely for the purpose of conducting the practice of law, and the practice of law in Colorado shall be conducted only by persons qualified and licensed to practice law in the State of Colorado.

do so. Clearly, Rule 265 does not contemplate "law-related services." Adoption of Rule 5.7 would create a conflict between that Rule and Rule 265, one which ostensibly could be resolved only by not practicing from within a professional company but, rather, as a general partner or as a sole proprietor.

Little noted that Rule 265 is not really a rule of civil procedure. Rather, it is a rule of conduct or status. Little has asked the chair of the Civil Rules Committee to transfer "jurisdiction" of Rule 265, and that chair has agreed to do so. The Chair, however, interjected that she has spoken with the chair of the Civil Rules Committee and together they have agreed not to a transfer of jurisdiction but to a joint effort to revise Rule 265. As she put it, because of the impact of Rule 265 on Rule 5.7, and vice versa, it makes sense for both committees to look at the issues.

Little suggested that this Committee take no action on Rule 265 until after the Court has acted upon its Ethics 2000 proposal. He noted that the Civil Rules Committee already has a subcommittee considering Rule 265, comprised of several members of this Committee (Little, Berger, and Judge John Webb) and one other person; that subcommittee is awaiting action on Ethics 2000 before acting on Rule 265.

A member responded to Little's discussion by stating his agreement with the need to change Rule 265 as Little had indicated, but he asked, why wait? Lawyers are already providing what Rule 5.7 would characterize as ancillary services — services such as title insurance, real estate brokerage, alternative dispute resolution, and expert witness services. This member saw reasons to act now on the Rule 265 update rather than wait for the impetus of Rule 5.7 if and when it is adopted by the Court with the other Ethics 2000 rules changes.

At the Chair's request, Little moved that the Committee postpone any consideration of an update of Rule 265 until after the Court has acted on the Committee's proposal for adoption of the Ethics 2000 Rules. The motion was seconded.

The member who had asked why wait renewed his objection to delay in the Committee's consideration of Rule 265 and was joined in that objection by another member.

Yet another member questioned whether Rule 265 was within the purview of the Committee, and a member pointed out that the Court has charged the Committee "with the responsibility of periodic review, correcting, updating and improvement of the Colorado Rules of Professional Conduct." Another member suggested that there is obvious overlap between the rules formally grouped together as the "Rules of Professional Conduct" and other rules, such as Rule 265, that govern a lawyer's "professional conduct"; he suggested that the Committee weigh in on issues arising within these areas of overlap when its expertise is relevant to those issues.

A member questioned the basis of Rule 265, stating his understanding that it regulated "multidisciplinary practice" by lawyers. Little replied that that was incorrect and reiterated his earlier discussion of the historical reason for the rule's adoption.

Little added that, in the course of setting up the structure under which lawyers could secure the tax benefits by incorporating their law firms, the Court just happened to say, in Rule 265, that the law firms had to be organized to render legal services. That was not required for the goals of Rule 265, and the limitations on what lawyers can do — including the limitations effected by the limitations on sharing legal fees — could have been left to

the Rules of Professional Conduct, as is the case for solo practitioners and for lawyers who practice in general partnerships.

The member who had asked about the origins of Rule 265 said that he supported the proposed changes and thought they should be taken up sooner rather than later.

Little's motion to postpone consideration of Rule 265's update until consideration of the Ethics 2000 Rules is completed was defeated.

The motion of another member for the Committee to proceed more immediately with the updating of Rule 265 to resolve the issues identified by Little was seconded and passed. The Committee sent the issues to the existing Ethics 2000 Rules Subcommittee.

VI. *Technology Subcommittee Report.*

Richard Reeve reported that both members of the Technology Subcommittee, himself and Boston Stanton, have undertaken a review of the Committee's Ethics 2000 Rules to see what, if any, modifications would be appropriate to take into account the technology that lawyers are employing in their practices.

The Chair noted that the Court needs to know soon of any tweaks that the Technology Subcommittee might suggest.

VII. *Proposal Regarding Rule 1.8(e) and Financial Assistance to Clients.*

The Chair noted that Bennett S. Aisenberg had joined the meeting for the purpose of proposing that the Committee consider amending Rule 1.8 to permit lawyers to provide certain financial assistance to their clients. She explained that the bases of Rule 1.8(e)[3] are the principles of champerty and maintenance, and that presently Rule 1.8(e) permits a lawyer to advance "the expenses of litigation, including court costs, expenses of investigation, expenses of medical examination, and costs of obtaining and presenting evidence," so long as the client remains ultimately liable for their payment or reimbursement to the lawyer. She pointed out that, pursuant to the suggestions of the Ethics 2000 Rules Subcommittee, the Committee's Ethics 2000 Rules proposal would adopt the ABA's model provision.[4]

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3. Rule 1.8(e) provides—

> While representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to the lawyer's client, except that a lawyer may advance or guarantee the expenses of litigation, including court costs, expenses of investigation, expenses of medical examination, and costs of obtaining and presenting evidence, provided the client remains ultimately liable for such expenses. A lawyer may forego reimbursement of some or all of the expenses of litigation if it is or becomes apparent that the client is unable to pay such expenses without suffering substantial financial hardship.

4. The Committee's proposal for adoption of the ABA Ethics 2000 text would have Rule 1.8(e) read as follows:

> (e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:
>
> (1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and
>
> (2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

The Chair directed the Committee to Aisenberg's letter to her dated February 3, 2005, which had been provided to the Committee among the materials for its Eighth Meeting, on March 23, 2005. Aisenberg proposes that, in defined circumstances, a lawyer be permitted to advance a client's living and medical expenses. The circumstances would include review of each such case by an independent body established for that purpose.

Alexander Rothrock reported to the Committee that his subcommittee on Rule 1.8(e) had researched the accommodations that have been made by some states in this area, research that indicated Louisiana has perhaps the most liberal rules on the subject. Some of the states permit such advancements so long as they did not serve as an inducement for the client's engagement of the lawyer. Some states permit a lawyer to guaranty loans made to her clients for living expenses.

Rothrock pointed out that the Colorado Bar Association Ethics Committee issued Formal Opinion Nº 34 in 1965 and added an addendum to the opinion in 1995, both to the effect that "It is improper for a lawyer in a personal injury case to advance living expenses to or for the benefit of his injured client."

Rothrock added that the issue has recently been complicated by third-party lenders seeking to make litigation-related loans through lawyers. The materials provided for this meeting contain some sample literature issued by such lenders.

The Chair noted that Kenneth Pennywell, in particular, had views to express about Aisenberg's proposal. She proposed that the Committee hear first from Aisenberg and then from Pennywell, with a view toward airing the policy questions and, at least not immediately, for consideration of any specific text for a rule change.

Aisenberg began his remarks by noting one can best understand the issue by practicing law in the personal injury arena and having a client with a meritorious lawsuit but not enough cash on which to live and pay medical expenses while the case is pending. Aisenberg had first made his proposal for liberalization of the applicable rules in 1992, but his proposal had been met by opposition from plaintiffs' lawyer associations that worried that law firms would advertise their willingness to advance living and medical expenses for the purposes of getting clients. Since 1992, seven states have joined Kansas and Louisiana in permitting some kinds of expense advancements. He cited the case of a plaintiff who had to return to South Dakota to secure such financing, although she would have preferred to remain in Colorado in order to be able to continue Colorado support services for her child. For another example, Aisenberg explained the case of a father who suffered a brain injury while golfing with his son: The son's golf club head had separated during a swing and hit the father. Even after summary judgment for the father on the issue of liability, notwithstanding the offer to specify that such advancement would not be used as evidence against the manufacturer, and despite the argument that it would mitigate damages, the club manufacturer and its product liability carrier had declined to advance funds for medical expenses during the damages phase of the trial. The father, Aisenberg said, was unable to work and eventually lost his trailer home to foreclosure; fortunately, he moved in with a companion, who totally subsidized his expenses during the trial. Early rehabilitation and psychiatric care, Aisenberg said, would have mitigated his damages, but that care was not available without some financing. A jury verdict favoring the father was returned in January of this year, and the father has received high-interest loan offers from lenders during the pendency of the appeal.

Regarding such third-party loan arrangements, Aisenberg noted the potential for adverse impact on a lawyer's professional judgment regarding the handling of the case, if the lender pressures the client for settlement on terms that would enable the client to repay the loan but may be well below the intrinsic value of the case.

Clearly, Aisenberg said, his proposal would sanction "champerty." But it is appropriate to consider exceptions to the bar against champerty. Montana, he noted, has set up an independent body to determine when advancement of expenses is appropriate and the terms on which it may be done. The state has defined certain conditions in which advancements may be made without the need to show special circumstances. Missouri, on the other hand, has taken a "special circumstances" approach to the problem and, in the appropriate case, permits the lawyer either to advance the funds or guaranty third-party loans.

Aisenberg asked why the bar was so cautious in this area. Aren't we here to serve the public, he asked. A proper rule would alleviate the pressure on a strapped client to accept a lowball settlement offer. Under strict guidelines, Aisenberg wondered, couldn't lawyers perform the financing service?

Pennywell spoke in opposition to Aisenberg's proposal. He began by noting that the issue is an important one, particularly with the sunsetting of Colorado's no-fault laws in 2003 and, with that, the loss of the statutory $400-per-week income protection provision. Pennywell indicated that his own personal injury practice gave him personal familiarity with the client exigencies that Aisenberg detailed; many of his clients are "living paycheck to paycheck."

Pennywell noted that the proposal will disproportionately affect personal injury lawyers and, to some degree, those specializing in workers' compensation cases.

He emphasized that he could not disagree more with Aisenberg's proposal. Alluding to clients in Texas — where such advancement is permitted — lined up outside lawyers' doors to get their periodic advancement checks, he argued that, if the Court opens this door it will create one more adversarial fault line in the lawyer-client relationship. The lawyer will also be banker; and, he noted, a banker is one's best friend until the first payment is missed on the loan. The ending is a happy one when the case is won with a large recovery of money. Aisenberg's proposal, however, does not deal with the unhappy case, the one in which the client loses. Clients typically focus on the question "what is my net recovery going to be," without understanding that cases can be lost for any number of reasons, such as the undisclosed prior injury. When a lawyer advances expenses and then loses the case, Pennywell suggested, the client will pressure the lawyer for relief from the repayment obligation. What is the lawyer to do? Sue the client? This, Pennywell argued, is a proposal based on bad policy.

Pennywell noted that no state that has ventured into this area has even placed a limit on the amount that the lawyer can advance. The only condition is the client's promise to repay. In Louisiana, the advancements can include assistance to the client's spouse and children, not only for living expenses but also for things such as education. How far, he asked, might it go?

Pennywell noted that the proposal envisions initial screening by the lawyer before the matter is referred to the independent body. Who within the law firm will do that screening; what overhead will be incurred in providing it?

Pennywell asked about the countervailing effect to that cited by Aisenberg: What pressures will the client, who is getting "a free ride," impose on the lawyer to reject even a fair settlement and press on for a victory? In the meantime, the carrier covering the defendant's case will have an incentive to prolong the case, knowing the burden that will place on the plaintiff's lawyer.

Pennywell distributed some sample third-party loan literature. Rather than altering the Rules to permit the lawyer's advancement of such costs, he argued, the Legislature should act to place caps on litigation-based lending, reducing the loan costs so that clients could afford the loans and not need to turn to their lawyers.

Pennywell pointed to loan provisions that increased the repayment amounts by (in the example) 2.99 percent for each thirty-day period repayment is extended beyond half a year; that, he suggested, would increase the client's pressure on the lawyer to secure a settlement of the case. Pennywell also showed the Committee some samples of "favors" offered by such lenders to lawyers to participate in their programs. He noted that some lenders take a flat fee plus a percentage of the eventual case recovery. Again, he suggested that what is needed is statutory regulation of the lenders, not an amendment to Rule 1.8(e) to permit lawyers to advance such expenses.

Aisenberg responded to Pennywell by arguing that Pennywell was making Aisenberg's case for him: If lawyers cannot advance these expenses, the scavengers will take advantage of their clients.

Aisenberg argued that it would be wrong to leave the issue to the Legislature, which, if it were to regulate the litigation-based lenders at all, would probably drive them out of business. In the absence of that kind of regulation, however, he predicted the situation where the lenders would inappropriately control the lawyer's handling of the litigation, which, he argued, would be the wrong result.

Aisenberg discounted Pennywell's arguments about the introduction of an adversarial fault line between lawyer and client. He admitted the adversariness of the lending relationship between the two parties but argued that the Court has already permitted a similar adversariness with its allowance of contingent fees.

Aisenberg said it would be incumbent on the lawyer to make the initial decision: Does this case compel some kind of financial assistance? If the lawyer determines that it does, then the matter would be put to the independent review body for approval. There would be, he said, a real service, a huge benefit, to our clients. That, he argued, is what lawyers are here for.

Pennywell responded that there would always be compelling circumstances for such advances. How, he asked, could this be restricted to litigation? Further, word would spread about those lawyers who were willing and able to make such advances; how could the new lawyer, or a small firm, compete for services if he or it did not have the capital to make the loans? Potential clients would certainly shop for the best deals on expense advances. The bar, he said, needs to stay out of this business.

Pennywell asked what the lawyer is to do if the expenses advances exceed the value of the case — sue the client? Aisenberg asked in response what the difference would be between living and medical expenses on the one hand and large litigation expenses on the other hand.

A member commented that Aisenberg had put his finger on the basic problem, the one that is also found in the contingent fee arrangement: The lawyer is given an interest in the result of the case, creating a conflict of interest between himself and his client. The member added that the conflict would be even greater in the case of expense advances than in the contingent fee case, given that the lawyer will actually be out of pocket substantial amounts of money, not just time.

Another member said he shared the concerns raised by Pennywell and by the member who had just spoken. He asked what data might be available from the states that permit such advances about the impact on the lawyer-client relationship. Rothrock indicated that none was presently available to the Committee but suggested that it might be obtainable.

A member who handles cases for both plaintiffs and defendants characterized the inherent contingency fee conflict as one that can take over a case. His own experience included a contingency fee case involving a catastrophic injury, which took more than eight years to resolve; the family pressured for resolution, the Internal Revenue Service was at their door, and it was a very difficult situation for the lawyer. Even if the lawyer is successful at trial, appeal may prolong the pressure and present the possibility of defeat at that level. Every case involves continuous assessment of the possibility of defeat, and that is exacerbated when it goes up on appeal. The lawyer must be clear-headed in assessing the prospects on appeal, versus settlement, an assessment that will be clouded if he personally has an increased financial stake in the outcome because he has advanced living and medical expenses.

On the other hand, this member noted, we need to consider the issue of access to justice. Very often clients are denied their chance in the batter's box because of their economic exigencies. This member did not know yet how the matter ought to be resolved by the Committee, but he believed Aisenberg's proposal deserved further study. He pointed out that the question of medical expenses was particularly significant and noted that the medical expenses might be unrelated to the underlying case, such as when a client has had a stroke in the course of the litigation. He asked whether the lawyer should be free to provide assistance or be required leave the client to the forces of the lending industry. The matter is fraught with difficulties but, he said, deserves study.

Another member noted with interest that the states that have permitted such advances — Louisiana, Montana, North Dakota — are not states with high costs of living. She would like data from these states, including the impact of expenses advances on the attorney regulation system and disciplinary cases. She moved that the Committee direct Rothrock's subcommittee to obtain that kind of information.

The member who had connected the expense-advance issues with the conflicts inherent in contingency fees said he saw this as a systemic problem, based in part on the fact that it can take eight years to get a case resolved. It is not, he argued, a matter to be resolved based on how other states are dealing with it. Rather it is a matter of policy for this state: How much conflict of interest between the lawyer and the client will we tolerate in Colorado?

A member asked where the lawyer is to employ her resources. Are we to advance the law or to become bankers to our clients? Banking, she said, is not the lawyer's task. She thought the suggestion that the Committee gather data was of the same ilk: The Committee should not spend its time on the issue; it should get back to legal issues.

A member spoke to say he would prefer that the Committee not consider the matter any further. He pointed to the situation pending when the lawyer has advanced considerable expenses but the case remains unresolved. Terrible controversies can arise between lawyer and client, he said, when the lawyer then seeks repayment of the advances. Whenever the law permits the lawyer to be tied to the outcome of the case, whether by permitting contingency fees or, now, by permitting expenses advancements, it creates inherent and sometimes irreconcilable conflicts. The lawyer's personal need to recover the advances conflicts with his duty to give unbiased advice on whether to accept settlement or press on. That kind of pressure drives the lawyer toward settlement — the member alluded by analogy to the recently decided case of *Crowe v. Tull*.[5] He reiterated that he would prefer not to seek data from other states but, rather, to terminate consideration of the proposal.

The member who had made the motion to obtain more data said she was not sure how she would vote on the proposal itself, if and when it is subsequently considered by the Committee. But she noted that the law already permits some conflicts between lawyer and client, such as the contingency fee or permitting lawyers to hold equity interests in client enterprises, because of perceived good, and she would like to know how the states that permit expenses advancements have handled the conflicts we have been discussing.

The motion to obtain data from those states that permit a lawyer to advance living and medical expenses to his client passed.

The Chair thanked Aisenberg and Pennywell for their able point-counterpoint.

VIII. *Rule 1.4 Subcommittee on Disclosure of Malpractice Insurance Coverage*

In response to an inquiry from the Chair, Eli Wald, chair of the subcommittee that had been appointed to consider *mandatory* malpractice insurance coverage, reminded the Committee that a proposal for such coverage had been defeated in the subcommittee and by the whole Committee.[6]

Subsequently, the Committee directed the subcommittee to consider annual reporting of the insurance, if any, carried by a lawyer, to be included with the annual application for license renewal and to be made available to the public. This, Wald noted, was no longer a matter for resolution in the text of Rule 1.4 but, rather, would be a licensing issue.

He concluded that the subcommittee would proceed to consider the disclosure proposal.

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5. *Crowe v. Tull*, 126 P.3d 196 (Colo. 2006).

6. See Item VI of the minutes of the Second Meeting of the Committee, held on January 9, 2004; Item IV.C of the minutes of the Third Meeting, held on April 16, 2004; Item V of the minutes of the Fourth Meeting, held on June 11, 2004; and Item III of the minutes of the Fifth Meeting, held on October 1, 2004. The Committee has not finally acted upon the issue of mandated malpractice insurance. —*Secretary*

IX. *Adjournment; Next Scheduled Meeting.*

The Chair noted that the Committee has more work to do.

The meeting adjourned at approximately 11:30 a.m. The next scheduled meeting of the Committee will be on Thursday, April 27, 2006, beginning at 2:00 p.m., in the Supreme Court Conference Room.

RESPECTFULLY SUBMITTED,

Anthony van Westrum, Secretary

[These minutes are as approved by the Committee at its meeting on April 27, 2006.]

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COLORADO SUPREME COURT

STANDING COMMITTEE ON THE RULES OF PROFESSIONAL CONDUCT

Approved Minutes of Meeting of the Full Committee
On April 27, 2006
(Fourteenth Meeting of the Full Committee)

The fourteenth meeting of the Colorado Supreme Court Standing Committee on the Rules of Professional Conduct was convened at 2:00 p.m. on Thursday, April 27, 2006, by Chair Marcy G. Glenn. The meeting was held in the Supreme Court Conference Room on the fifth floor of the Colorado State Judicial Building.

Present in person at the meeting, in addition to Marcy G. Glenn and Justices Michael L. Bender and Nathan B. Coats, were Michael H. Berger, Gary B. Blum, Nancy L. Cohen, Cynthia F. Covell, Mac V. Danford, Judge Philip S. Figa, Thomas E. Downey, Jr., John S. Gleason, John M. Haried, David C. Little, Judge William R. Lucero, Cecil E. Morris, Jr., Kenneth B. Pennywell, Judge Ruthanne Polidori, Helen E. Raabe, Henry R. Reeve, Alexander R. Rothrock, Boston H. Stanton, Jr., David W. Stark, Anthony van Westrum, Eli Wald, James E. Wallace, Lisa M. Wayne, Judge John R. Webb, and E. Tuck Young.

I. *Meeting Materials; Minutes of March 3, 2006 Meeting; Commendations; Resignation.*

The Chair had provided a package of materials to the members prior to the meeting date, and the secretary had subsequently provided the members with submitted minutes of the thirteenth meeting of the Committee, held on March 3, 2006. Those minutes were approved as written.

On James Wallace's motion, the Committee warmly commended the Chair and Michael H. Berger for their services in steering the Committee through a thorough and efficient review of the American Bar Association's model "Ethics 2000" Rules of Professional Conduct, resulting in the Committee's submission to the Colorado Supreme Court, on December 30, 2005, of its proposal for revision of the Colorado Rules of Professional Conduct. The Committee also commended the secretary for the minutes of the Committee's deliberations.

The Chair announced that John M. Richilano, who had served on the Committee since its inception, had resigned from the Committee because of the demands of a heavy caseload. A copy of Mr. Richilano's letter of resignation had been included in the meeting materials previously distributed to the members.

II. *Consideration of New Comment to Rule 6.1 Regarding* Pro Bono *Service.*

Michael Berger referred the Committee to the April 11, 2006 draft "Supplemental Report and Recommendations Concerning the American Bar Association Ethics 2000 Model Rules of Professional Conduct" that was included in the materials provided for this meeting.

He reminded the Committee that, at its Thirteenth Meeting on March 3, 2006, it had directed the Subcommittee on the Ethics 2000 Rules (a) to identify inconsistencies between

(1) the *pro bono* policy statement — the "Recommended Model *Pro Bono* Policy for Colorado Attorneys and Law Firms" — that the Court had added as commentary to existing Rule 6.1 and (2) the other provisions of the Ethics 2000 Rules, (b) to consider the formatting issues, such as restructuring the Policy statement as an appendix to the Rules, and (c) to prepare a supplement to the Committee's report on the Ethics 2000 Rules dealing with those matters. Berger noted that the Committee's direction had been *not* to address policy issues but only to consider consistency with our other recommendations and formatting, so that the Policy as so recently adopted by the Court could be included in the Committee's recommended form of the Ethics 2000 Rules.

He reported that the Subcommittee unanimously concluded that the Policy statement should not be included in the formal Comments to the Rules but, instead, should be contained in an appendix to the Rules, with the insertion of a new, brief Comment [12] to Rule 6.1 that directed the reader to the appendix. The Subcommittee concluded that the lengthy Policy statement did not fit well into the structure of the Rules and Comments.

Additionally, the Subcommittee recommends that a single term, "persons of limited means" be substituted throughout the Policy statement for the mix of phrases such as "indigent persons" and "low income persons" used in the current Policy statement. Those other terms, he noted, are not themselves synonyms and may fail to include some classifications of persons who need *pro bono* legal services and are included in the broader phrase "persons of limited means."

The Subcommittee also recommends that the quotation in the Policy statement drawn from the Rules' Preamble to identify the "core principles" enunciated in the Rules be modified to match the Preamble text as it would be changed if the Court were to adopt the Committee's recommended Ethics 2000 proposal.

The Subcommittee noted that the Committee's proposed Rule 1.8(e) would modify the existing Rules to permit a lawyer to bear litigation costs of the client, and the Subcommittee recommends, accordingly, that the Part V.H of the Policy Statement, captioned "Disbursements in *Pro Bono* Matters," be modified to reflect the change in the governing Rule. The change would substitute the words "[the firm] may agree that the repayment of such expenses may be contingent upon the outcome of the matter in accordance with Colo. RPC 1.8(e)" for existing text.

Berger reported that a number of the members of the Subcommittee had felt there were inconsistencies between the definition of "pro bono activities" in Rule 6.1 itself and that term as it is used in the Court's current statement of the Policy: The Rule itself classifies certain activities, such as "participation in activities for improving the law, the legal system or the legal profession" among those classified as "*pro bono publico* legal services," but those classes of services are not referenced in the Policy statement's list of "*pro bono* services." But, because the Subcommittee was not sure whether those inconsistencies were intended by the Court, its report merely points them out and does not propose alternate text.

Following Berger's presentation of the Subcommittee's draft supplemental report to the Committee, a member noted the adoption of Rule 260.8 of the Rules of Civil Procedure at the beginning of 2005 to permit a lawyer to earn up to nine hours of continuing legal education credits in each three-year reporting period for *pro bono* service. That rule change had been sponsored by the Metropolitan Volunteer Lawyers and was adopted after much discussion within and among the Court's Board of Continuing Legal Education, several

interested agencies, and the Court itself. Rule 260.8 is, this member noted, quite specific as to the methodology and mechanics of earning such credits, and there are inconsistencies between Rule 260.8 and the methodologies and mechanics contained in the recent *Pro Bono* Policy that remain unaddressed by the Subcommittee. This Committee would not be helping the practicing bar if it did not undertake to address the inconsistencies it has spotted, either by recommending changes to Rule 260.8 or to the Policy statement. The member predicted that the Board of Continuing Legal Education will, of necessity, adhere to the requirements of Rule 260.8 and will not consider a model Pro Bono Policy adopted by law firms pursuant to a comment in or appendix to the Rules of Professional Conduct. At the least, the Committee should call the Court's attention to the inconsistencies and, while it were doing so, could call the Court's attention to the inconsistent definitions of *pro bono* activities that are contained in Rule 6.1 and the Policy statement.

Berger noted that the Subcommittee had considered these concerns but had determined that they were beyond its purview. Another member suggested, however, that the inconsistencies should be rectified and noted that it is the recent addition of the Policy statement to Rule 6.1 that has created the differences. That member suggested that it is this Committee, having perhaps the most significant experience in the matter, that should deal with the issue, rather than leaving it for chance consideration by another body.

Expanding on the differences between the two statements — Rule 260.8 and the Policy statement — the member who had raised the issue noted that, under Rule 260.8, there must be an agency that assigns the creditable *pro bono* work and monitors its progress, and there must be a report to the Board of Continuing Legal Education confirming that the *pro bono* work was completed and credits are owing. The Rule 6.1 Policy statement contains no such requirements; rather, all monitoring is done from within the participating law firms. The member also noted that the Faculty of Federal Advisors had recently altered its processes in order to qualify as an agency under Rule 260.8 for *pro bono* representation in the Federal Courts. Again, this member stressed that he had not made his own determination of which of the two sources of CLE credits — Rule 260.8 or the Rule 6.1 Policy statement — should be changed and was only urging that this Committee call attention to the discrepancies so that the practicing bar is not misled.

But another member wondered who it was who would offer up solutions to the problem if this Committee did not. It was suggested that the member who had raised the issue should provide the Court with a short memorandum outlining the issue; he noted that the issue could be dealt with by the Court on a different, and shorter, track than its consideration of the Committee's overall proposal for revision of the Colorado Rules of Professional Conduct will take.

The Chair then requested that the member who had raised the issue here raise it with the Board of Continuing Legal Education. She noted that it is likely that the drafters of the Rule 6.1 Policy statement sought merely to use a shorthand expression for granting CLE credits for *pro bono* services and were not trying an "end run" on Rule 260.8. Perhaps, she suggested, all that is needed in the Policy Statement is a reference to Rule 260.8. The other member agreed to write such a letter and noted that Justice Nancy Rice is currently the Court's liaison to the Board of Continuing Legal Education. To that, Justice Coats noted that he would soon be replacing Justice Rice in that liaison and suggested that the letter be directed to him.

With that discussion concluded the Committee adopted the Subcommittee's draft of the "Supplemental Report and Recommendations Concerning the American Bar Association Ethics 2000 Model Rules of Professional Conduct."

III. *Planning for Programs to Educate the Bar about the Ethics 2000 Rules.*

The Chair noted that the Committee should consider continuing legal education programs to inform the state's lawyers about the "Ethics 2000" version of the Colorado Rules of Professional Conduct, assuming they are adopted by the Court. She noted that there had been a blitz of such programs upon the 1992 adoption of the "Kutak Rules" in Colorado, and that they had been well attended. She has already received requests from various bar groups for such programs.

One question, then, is whether this Committee should participate in such programs and, if so, should it start preparing for them now, anticipating passage of some form of revised Rules.

A member who had already participated in such programs pointed out that she had been urging the attendees to watch the Court's website to monitor the adoption process. She asked whether information about the pendency of the Rules amendment had been included in the Colorado Bar Association's publication *The Colorado Lawyer*; other members responded that good information has already been provided in that magazine.

The Chair reported that she would be reporting on the Committee's activities and the status of its proposal to the regular meeting of the Colorado Bar Association's Board of Governors in mid-May.

Another member, who is also a member of the Colorado Bar Association's Ethics Committee, said that the Ethics Committee would be conducting seminars on the proposed rules. A discussion of dates and the interest of groups in addition to the Colorado Bar Association in such programming followed.

But it was generally agreed that it would be a mistake for the Committee to "get too far out in front of Court" in such programming until the Court had adopted some version of the revised Rules.

On motion, the Committee formed a subcommittee to provide for educational programs on the revised "Ethics 2000" Rules of Professional Conduct in conjunction with the Colorado Bar Association's Ethics Committee, with the Chair and Judge Ruthanne Polidori to co-chair the subcommittee.

IV. *Interim Activities for the Committee.*

The Chair asked the Committee members for their thoughts on what the Committee should direct its efforts toward while the Court considers its proposed revision of the Rules — in addition, obviously, to marshalling its efforts for the educational activities just discussed.

A member asked how long one might expect the Court to take before it acted upon the Committee's Rules proposal. The Chair said she had inquired and was told that no prediction could be made. But, she was assured, the Court would provide a reasonable

period of time between acting to adopt revisions and putting them into effect, so that the lawyers of the state could be educated about the changes before they became binding.

It was agreed by all that, while the Committee should be a source for speakers and educational information for groups that want presentations on the pending revisions, we should not embark on a wholesale push in that regard until the Court has adopted the revisions. In the meantime, the Chair said, the Colorado Bar Association's Continuing Legal Education arm should be assured that there will be ample time between adoption and effectiveness of any revisions for the educational effort.

V. *Rule 265 Issues.*

The Chair noted that, at its Thirteenth Meeting on March 3, 2006, the Committee had discussed consideration of amendments to Rule 265 regarding two issues: (1) the provision of alternative dispute resolution services (which are not the practice of law) by lawyers from within law firms that are "professional companies" as defined in the rule and in which companies, by that rule, lawyers are ostensibly limited just to practicing law; and (2) the failure of Rule 265 to provide for the kind of malpractice insurance that is currently being provided by insurance carriers — "claims-made" insurance. She noted that she and Berger had agreed that these topics are not within the purview of Berger's Subcommittee on the Ethics 2000 Rules.

Accordingly, she had formed a new Rule 265 Subcommittee, to be chaired by David Stark, and she and Stark were soliciting members to participate on the subcommittee. Another member noted that there are a number of Colorado lawyers who have thought at length about these issues but who are not members of this Committee, and he suggested that many of them would want to be members of the Rule 265 Subcommittee if that were permitted. He added that there is no particular hurry to deal with the insurance issue, inasmuch as most practitioners ignore it and assume the Court would not deprive individual law firm members of Rule 265's limitations on liability merely because the insurance maintained by their law firms was of "claims-made" rather than "claims-occurred" coverage. He added, however, that there may be a higher perceived urgency about the alternative dispute resolution issue, at least among some lawyers who provide such services, although most of them, too, have assumed the Court would not actually sanction them because they provide such services from their law firms.

The Chair noted that subcommittees of the Committee may include among their members persons who are not members of the full Committee.

VI. *Issues of Status When a Lawyer "Gives Advice" in an Alternative Dispute Resolution or Other Context.*

Anthony van Westrum noted that he and others who provide mediation services as neutral mediators have expressed concern about the risk of establishing lawyer-client relationships with the mediating parties when, for example, they "evaluate" the parties' respective legal positions. He noted that he, personally, does not undertake to mediate legal disputes between persons who are not themselves represented in the mediation process by their own designated lawyers, to whom he can direct the parties for advice about whether his own evaluations are sound and worthy of consideration by the parties. His fear, he said, is that, having engaged his mediating services at least in part because he is a lawyer and comes to the procedure "knowing the law," the parties will rely on his evaluations of the merits of their cases, or his suggestions on how their dispute might be resolved, as if it were

advice given to them by "their lawyer," thus establishing a lawyer-client relationship with one, and probably both, of the mediating parties, with all of the ensuing responsibilities regarding competency and conflicts — to both of them — that a lawyer undertakes when formally engaging to advise or advocate for a client.

Yet, van Westrum noted, many lawyers are indeed well-suited by training, experience, and temperament to serve as mediators, and it is clearly good for society at large that disputes among its members be competently and efficiently mediated, without undue expense maintaining a multitude of lawyers in the process. He noted, too, that the issue of whether a lawyer has, by giving "advice," established a lawyer-client relationship can be found in other contexts, such as the drafting of a settlement agreement upon a successful mediation or the provision of "pure" escrow services (although, he noted, it is probably not present in an arbitration, where the arbitrator does not give advice that the parties can accept or reject but, instead, rules on their dispute). If the general rule is that

> [i]f a person in respect to his business affairs, or troubles of any kind, consults with an attorney in his professional capacity, with the view to obtaining professional advice or assistance, and the attorney voluntarily permits or acquiesces in such consultation, then the professional employment must be regarded as established[1]

and if an engagement of a lawyer as a mediator for the sake of getting his informed evaluation of the parties' positions (for example), can be seen as an engagement in "his professional capacity" — then the mediator is well advised to make no evaluations and otherwise to stay away from anything that looks like legal advice, at least so long as the parties do not have their own attorneys to whom the mediator can direct them to for confirmation or rejection of his musings.

Van Westrum asked that a subcommittee be formed to see whether rules of professional conduct can be crafted to accommodate evaluative mediation and other similar activities, exempting their lawyer practitioners from the conflicts and other such rules, without adversely impacting the core principles governing lawyers when they render services to persons who have sought those services because of the their skills and capacities as lawyers.

The Chair agreed that such a subcommittee should be formed and appointed van Westrum to chair it.

VII. *Technology Subcommittee.*

The Chair had provided to the members, before the commencement of the meeting, a report from the Technology Committee on the adequacy of the definitions of "writing" and related terms in Rule 1.0 "in the face of technology and the real world in 2006 and a little beyond." The report noted that email and email addresses seem to have less of a sense of permanency or stability than physical addresses used for U.S. mail or private courier and can be (but are not always) more transient and less certain or predicable than the physical world.

Richard Reeve, chair of the Technology Subcommittee, began his review of the subcommittee's report by noting a number of issues that it had *not* taken up. For example, it did not reexamine whether the term "writing," defined as it is in Rule 1.0(n) to include

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1. *Denver Tramway Co. v. Owens*, 36 P. 848 (Colo. 1894). [Secretary's note.]

"e-mail," was sufficient, in all its usage within those Rules, to encompass email communications or, alternatively, whether there were certain important "written communications" contemplated by the Rules for which something more substantial than mere email should be required. For example, is an email sufficient as a matter of policy to confirm an "informed consent" to a conflict under Rule 1.7? And the subcommittee did not consider whether, if a lawyer is obligated — as is stated by Comment [4] to Rule 1.4 — to respond promptly to a client's telephone calls, an emailed follow-up would be sufficient.

The subcommittee did, however, consider the task a lawyer faces when arguing that he provided his client with information — he "communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct," to use the definition found in Rule 1.0(e) — sufficient to support an "informed consent" to a conflict of interest. Given the uncertainties of Internet and emailed communications, will the lawyer and the Office of Attorney Regulation be fighting over issues of electronic receipt?

In the subcommittee's view, if the lawyer intends that communications of consent be by email or other form of electronic communication, she should obtain the client's approval for that form of communication and establish a suitable method — such as affirmative answer-backs — for confirmation of receipt of such communications. But, as the American Bar Association's model Ethics 2000 Rules do not mandate obtaining the client's consent to use of electronic communications, so the Subcommittee did not suggest it be mandated in the Colorado version.

A member noted the importance of including consent to email and other electronic communications in the engagement agreement between lawyer and client, but she agreed that, given the rapidity with which electronic communications are developing, the Rules cannot, as a practical matter, include much detail.

A member who has dealt with lawyer discipline noted that in such cases, when computer information is at issue, it is not uncommon to find that some disaster has occurred and such information is no longer available. This is, he believed, more of a "practice" than an "investigative" or "prosecutorial" issue: The good lawyer has a need to maintain his records so that he can show compliance with the Rule's requirements for writings and disclosures.

Another member, in agreement that the Rules cannot provide much detail here, noted that it would be silly, for example, to require a written confirmation back to the client that the client's own use of email to communicate with the lawyer is evidence of his acceptance of email as a form of communication.

Yet another member agreed that the generality contained in the present version of the proposed Ethics 2000 Rules is sufficient. He noted that the Court might have dealt specifically with "fax" transmissions at the time it adopted the Kutak Rules, since that seemed to be the cutting edge of communications at the time, but that such specificity would have turned out to have been counterproductively exclusive of email, which subsequently became such a common form of communicating between lawyer and client. Other members expressed similar views.

The Chair said she had been hoping that the Technology Subcommittee would have come back with some recommendations for specific changes, such as a modification of the too-narrow reference to "telephone calls" in Rule 1.4.

In accordance with the Technology Subcommittee's written report, Reeve moved the addition of a Comment [2] to Rule 1.0(n)'s definition of "writing," reading as follows:

> [2] Where compliance with these Rules is predicated on a writing or written matter being communicated by e-mail, informed consent concerning the use of e-mail should be obtained from the intended recipient. Even where consent is given it is strongly recommended, where practicable, that a lawyer seek confirmation of receipt of the writing transmitted by e-mail. For general provisions regarding maintaining the confidentiality of information see Rule 1.6.

Reeve's motion generated questions about whether the term "e-mail" would include, for example, "text messaging," and others suggested reference instead to "electronic communication." One member suggested that these ephemeral forms of communication defeated the goal, in Rule 1.7, to obtain physical evidence of the client's consent to a directly adverse conflict of interest, after being informed of its risks and alternatives; another member replied by noting that the requirement of a physical form of consent would be inconsistent with the trend to "paperless offices."

On motion, the proposed addition of the comment was tabled.

VIII. *Rule 1.8(e) and Financial Assistance to Clients.*

Alexander Rothrock reminded the Committee of the point – counterpoint presentation of Kenneth Pennywell and Bennett S. Aisenberg at the Thirteenth Meeting of the Committee on March 3, 2006, and that he had been requested to research other states, such as Louisiana, Montana, and North Dakota, where lawyers have been permitted to advance clients' living expenses, to determine the impact of such expense advances on the attorney regulation system and disciplinary cases. Rothrock reported that he could locate only one article on the issues, that being an article entitled "Helping Clients with Living Expenses: 'No Good Deed Goes Unpunished,'" in *The Professional Lawyer*,[2] an article that Rothrock characterized as "wildly in favor" of permitting lawyers to advance living expenses to their clients. The author of that article, Rothrock noted, had heard from Bar Counsel for the District of Columbia that, in his twenty-one years in that position, he could not recall a single complaint of lawyer over-reaching under the District's rule permitting such advances.

Rothrock noted that there is a wide variety of rules permitting lawyers to advance clients's expenses of one kind or another but that reported "violations" of such rules are few. Rothrock's inquiries, through Internet list-servs, of litigators in states where such advances are permitted generated only a "no-big-deal" response. In sum, of the few states from which he could gather information, it appears that permitting the advancing of living expenses has not caused problems.

The Chair noted that no action had been taken at the Thirteenth Meeting on Mr. Aisenberg's proposal to permit Colorado lawyers to advance their clients' living expenses because of the Committee's desire to learn more about other states's experiences. Now that Rothrock has reported, she asked how the Committee wanted to deal with the matter.

On motion, the Committee determined to defeat the proposal. The Chair said she would notify Mr. Aisenberg of that action.

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2. Vol. 13, Issue Nº 2, p. 1 (Winter 2002). [Secretary's note.]

A member asked whether there were other avenues Mr. Aisenberg might pursue to get a solution to his issue, noting that the member sympathized with Mr. Aisenberg. Such solutions, he suggested, might include systemic changes to the way litigation is handled in the state, or the establishment of a funding entity by the Colorado Bar Association.

In reply, the Chair said this Committee's only task was to consider a formal rule on the matter, which it had just determined not to pursue. Accordingly, there was nothing further for the Committee to do; although Mr. Aisenberg could certainly look down other avenues for a solution.

IX. *Public Comment on the Proposed Ethics 2000 Rules; Public Understanding of Role of Comments.*

In answer to a member's question, Justice Bender reported that the Court had not, at that date, received any comments from the public on the Ethics 2000 Rules as they had been proposed to the Court at the end of 2005.

The Chair said she intended to coordinate with the Court and circulate comments to the Committee as they are received from the public.

Two members who had recently attended a seminar on the proposed Rules that was conducted by the Business Law Section of the Colorado Bar Association noted the confusion evidenced by some attendees regarding the impact of the Comments on the blackletter text of the Rules. In particular, in a discussion of Rule 4.2 and its limitations on a lawyer's communications with a person the lawyer knows to be represented by another lawyer, some in the audience felt that the concept found in Comment [4] to the Rule — "This Rule does not prohibit communication with a represented person, or an employee or agent of such a person, concerning matters outside the representation" — should be moved from the Comment to the text of the Rule. While both of these members agreed that the suggestion was incorrect, one of them noted that the question itself indicated that some lawyers are apt to disregard the Comments to their detriment, while others fear that judges will ignore particular commentary on the grounds that the content of the commentary is not found within the related Rule. In his view, the entire substance of Rule 4.2 is to be found in its comments rather than in its blackletter text.

In answer to that member's question whether the Court explicitly adopts the Comments as well as the Rules, another member pointed out that, as indicated in the Preface and the Scope of the Rules, the Rules and their Comments are inseparable.[3]

X. *End of Members' Terms.*

The Chair noted that the terms of thirteen of the members of the Committee will expire at the end of July. She asked that they let her know whether they wish to have their terms extended.

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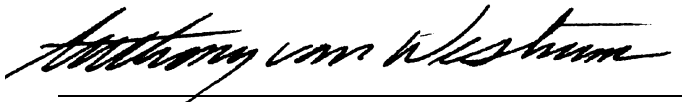
3. "The Comment accompanying each Rule explains and illustrates the meaning and purpose of the Rule. The Preamble and this note on Scope provide general orientation. The Comments are intended as guides to interpretation, but the text of each Rule is authoritative." Scope, ¶ 21. [Secretary's note.]

XI. *Adjournment; Next Scheduled Meeting.*

After some discussion about the uncertainties of the schedule for the Court's consideration of the Committee's proposed Ethics 2000 Rules after the public hearing scheduled for June 15, 2006, and discussion of the possibility that the Court might refer public comments to the Committee for its further consideration, it was agreed that the next meeting of the Committee would be scheduled for September 22, 2006, subject to an earlier call if events justified.

The meeting adjourned at approximately 4:00 p.m. The next scheduled meeting of the Committee will be on Friday, September 22, 2006, beginning at 9:00 a.m., in the Supreme Court Conference Room.

Respectfully submitted,



Anthony van Westrum, Secretary

[These minutes are as approved by the Committee at its meeting on September 22, 2006.]

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COLORADO SUPREME COURT

STANDING COMMITTEE ON THE RULES OF PROFESSIONAL CONDUCT

Approved Minutes of Meeting of the Full Committee
On September 22, 2006
(Fifteenth Meeting of the Full Committee)

The fifteenth meeting of the Colorado Supreme Court Standing Committee on the Rules of Professional Conduct was convened at 9:00 a.m. on Friday, September 22, 2006, by Chair Marcy G. Glenn. The meeting was held in the Supreme Court Conference Room on the fifth floor of the Colorado State Judicial Building.

Present in person at the meeting, in addition to Marcy G. Glenn and Justices Michael L. Bender and Nathan B. Coats, were Federico C. Alvarez, Michael H. Berger, Nancy L. Cohen, Cynthia F. Covell, Judge Philip S. Figa, John S. Gleason, David C. Little, P. Kathleen Lower, Judge William R. Lucero, Cecil E. Morris, Jr., Judge Ruthanne Polidori, Helen E. Raabe, Henry R. Reeve, Alexander R. Rothrock, Boston H. Stanton, Jr., David W. Stark, Anthony van Westrum, James E. Wallace, Lisa M. Wayne, and E. Tuck Young. Excused from attendance were Gary B. Blum, Mac V. Danford, Thomas E. Downey, Jr. and Judge John R. Webb. Also absent were John M. Haried, Kenneth B. Pennywell, and Eli Wald.

I. *Introduction of New Members; Reappointments.*

The chair welcomed to the meeting the two newest members of the Committee, Federico C. Alvarez, and P. Kathleen Lower. Going around the table, the other members introduced themselves to Alvarez and Lower.

All of the incumbent members whose initial terms on the Committee expired on June 30, 2006, had been reappointed to the Committee by the Court and had accepted those appointments.

II. *Meeting Materials; Minutes of April 27, 2006 Meeting.*

The Chair had provided a package of materials to the members prior to the meeting date, including submitted minutes of the fourteenth meeting of the Committee, held on April 27, 2006. Those minutes were approved as written.

III. *Public Comment on Ethics 2000 Rules; Status of Court's Review of Proposal.*

The Chair noted that the meeting materials included copies of two letters that had been received by the Court, and one email that the Chair had received and forwarded to the Court, commenting upon the Committee's proposal for adoption of the "Ethics 2000 Rules." The Chair suggested that, because the Committee had performed its task with the submission of its Ethics 2000 proposal to the Court, there did not appear to be any need for it to take action on these comments. The members agreed with that position and did not discuss the substance of any of the comments.

Justice Bender responded to the Chair's inquiry by saying that he could not provide any information about the status of the Court's review of the Committee's proposal for adoption of the Ethics 2000 Rules. He assured the Committee that it would hear promptly when the Court did take action on the proposal.

IV. *Rule 265 Issues.*

The Chair called David Stark to give a report from the subcommittee considering Rule 265 issues. That subcommittee had been appointed at the fourteenth meeting of the Committee on April 27, 2006, to consider amendments to Rule 265, CRCP, regarding two issues: (1) the provision of alternative dispute resolution services (which are not the practice of law) by lawyers from within law firms that are "professional companies" as defined in the rule and in which companies, by that rule, lawyers are ostensibly limited just to practicing law; and (2) the failure of Rule 265 to provide for the kind of malpractice insurance that is currently being provided by insurance carriers — "claims-made" insurance. The Chair noted that she and Michael Berger had agreed that these topics are not within the purview of Berger's Subcommittee on the Ethics 2000 Rules.

Stark reported that the subcommittee had met on several occasions; while it has not yet prepared a formal report for the Committee, it is, he said, well on the way to making recommendations. Because the issues that it is considering are at the intersection of Rule 265 and Rule 5.4 of the Rules of Professional Conduct, the recommendations will likely involve amendments to both rules.

In answer to a member's question, the Chair noted that Stark's subcommittee is working with a subcommittee of the Supreme Court Standing Committee on Rules of Civil Procedure with respect to the issues. Stark confirmed that the two subcommittees are working closely on the issues. It is anticipated that, because of the likelihood that there will be recommendations for amendments to both rules, the two committees — this Committee and the Supreme Court Standing Committee on Rules of Civil Procedure — will be making their proposals to the Court in tandem, with this Committee's proposal relating to Rule 5.4 and the other committee's proposal dealing with Rule 265.

V. *Subcommittee on Malpractice Insurance and Rule 1.4.*

The Chair called on Nancy Cohen to give a report from the Subcommittee on Rule 1.4 regarding malpractice insurance disclosure. A copy of the Subcommittee's written report, dated September 22, 2006, was included in the materials provided to the Committee members in advance of this meeting.

Cohen reminded the Committee that, two years ago, the Subcommittee had proposed to amend Rule 1.4 regarding mandatory advisement of clients in the event a lawyer did not maintain malpractice insurance coverage. At that time, the Committee determined not to propose to the Court any amendments to Rule 1.4 regarding malpractice insurance coverage but also determined to reconsider the issue within a couple of years. Cohen remarked that she was not sure why the Committee had determined upon a such a reconsideration, but the Subcommittee has complied with the request for reconsideration and considered the matter anew. The Subcommittee had before it, in its reconsideration, the "Model Court Rule on Insurance Disclosure" that the American Bar Association adopted in August of 2004, a rule that the ABA intends be included in a state's rules of civil procedure rather than in its rules of professional conduct. The ABA's Model Rule has been provided to the Colorado Supreme Court through separate channels.

The Subcommittee now recommends that no change be made to Rule 1.4 regarding malpractice insurance coverage or communications to clients regarding a lawyer's non-coverage. However, the Subcommittee recommends that, if the Court is interested in the matter, it refer the ABA's Model Rule to the Supreme Court Advisory Committee on Attorney Regulation, the group from which the issue had first been referred to this Committee.

The Subcommittee's report contains a chart[1] reflecting action taken by the states regarding insurance coverage and insurance disclosures. The chart shows that five states have adopted rules requiring that disclosures be made directly to clients and that fourteen states have adopted requirements for reporting in connection with annual license renewal; Oregon mandates insurance coverage. Cohen noted that, subsequent to the chart's date, three more states have adopted requirements for reporting in connection with annual license renewal.

A member asked why the matter should not be covered by a rule located within the Rules of Professional Conduct, such as Rule 1.4, rather than relegated to a rule of civil procedure.

In response, a member noted that there is a tension created by the very nature of what malpractice insurance is. In principle, malpractice insurance is not acquired for the purpose of protecting the client who is (allegedly) injured by a lawyer's malpractice but, rather, to protect the lawyer from claims made against the lawyer by the client. The tension arises immediately upon the client's claim, because, as soon as the claim is made, the carrier's interests are opposed or adverse to those of the client. The carrier's goal is to defeat the client's claim, for the benefit of itself and of the insured lawyer. To say that the carrying of malpractice insurance is an ethical matter benefitting clients, then, would be misleading. It is not a matter of ethics for a lawyer to decide to carry malpractice insurance to protect himself from clients' claims. But it is within the realm of the Court's regulation of the practice of law — a matter of *procedure* — to require that lawyers disclose the presence or absence of malpractice insurance coverage. That is, insurance coverage disclosure is a fit subject for a rule of procedure but not for a rule of ethics. There is no ethical component to the matter; rather, it is a matter of procedure for imposition on lawyers just as an annual license fee is imposed upon them. These are administrative processes, not ethical matters.

Another member agreed with that analysis and added that there are policy reasons precluding insertion of the concept into the Rules of Professional Conduct. A requirement for disclosure of insurance coverage would undoubtedly impose confusing, additional duties on the lawyer, raising issues such as how to comply with the details of the required disclosures, making accurate disclosures, etc. If the duty to disclose is seen as an ethical obligation connected to the duty under Rule 1.4 to keep the client reasonably informed about the representation, the lawyer must necessarily become an expert on malpractice insurance. What is covered and what is not covered (such as theft of clients' funds) by an insurance policy, and how do you accurately explain those matters to your clients? Do you have to explain claims-made versus claims-occurred coverage? Malpractice insurance differs from casualty insurance. And how is the lawyer to deal with disclosure regarding post-representation lapses in claims-made coverage? This member noted that he had been responsible for his firm's recent renegotiation of its malpractice insurance and had quickly learned that he was not an expert on the details of malpractice insurance coverage. Perhaps the basics are understandable — the amount of the deductible, whether defense expenses

1. The chart begins on page 23 of the materials provided to the Committee members for this meeting.

are included within or in addition to liability limits, and the like — but the details of those and other issues can be abstruse. When he was young, he remarked, he had learned that "insurance covers every eventuality except that which happened"; is he to disclose that limitation to his clients under an ethical duty? In short, to impose an ethical duty upon him to make a complete and accurate disclosure of coverage terms to his clients would not be reasonable.

A member asked whether the Subcommittee itself believed that some level of insurance coverage — as distinguished from disclosure about coverage— should be mandated.

In response, Cohen noted that she is not herself within the group of lawyers who would be affected by such a requirement. But, looking at the nationwide trends, she believed the Court would have to take the approach taken by Oregon — establish only a minimal requirement intended to deal with small claims (and, she said, most client claims are in fact small ones) and set up a broad-based committee comprised of malpractice insurance experts to regulate compliance.

A member pondered the experience of medical doctors. It was his understanding that, when one of the big medical malpractice carriers withdrew coverage from Colorado, the Legislature mandated that each doctor carry $1,000,000 in coverage but found that it had to fund the initial insurance exposure — the state had to underwrite initial coverage for doctors who could not get coverage in order to provide protection for claims made in the first years after coverage was mandated.

A member noted that Oregon has established a state-based fund for clients' claims against lawyers.

Another member pointed out that Rule 265 already addresses some aspects of malpractice insurance coverage and suggested, if the requirements are to be extended, that the work be done in that Rule of Civil Procedure.

A member suggested that, if asked, the Office of Attorney Regulation would say most of the problems that arise are small claims, lacking "litigation value."

A member pointed out that, when the Committee first discussed insurance coverage a couple of years ago, a concern was that inclusion of a disclosure requirement in the ethics rules would necessarily lead to the involvement of the insurance companies in the realm of legal ethics. She suggested that, if the Court is interested in pursuing the matter, it should consider self-insurance by the bar, as distinguished from development of programs that would entice insurance carriers to participate. The medical system, "COPIC," is, she pointed out, self-funded.

The member who had first raised the issue of whether the topic was an appropriate one for an ethics rule said that he was troubled because lawyers are not talking about the topic, though they should be. He remarked that all of the members on the Committee most likely carried malpractice insurance, even those who were not required to do so to gain the limited-liability protections of Rule 265. Certainly there are lots of difficulties regarding disclosure requirements. Yet, he was sure, most clients assume that their lawyers carry malpractice insurance. The Colorado bar, he said, has some responsibility to deal with the matter. He realized that Oregon has a mandatory bar association, as distinguished from Colorado's voluntary associations, and that alters the dynamics. Some, he said, think

mandatory insurance works well for some kinds of clams while not for others. What bothered him was that Colorado lawyers were not trying to find solutions to the underlying problems.

The Chair responded to these comments by noting that this Committee's purview was to determine whether insurance disclosure should be the subject of a rule of ethics; and, she noted, a majority of the Committee has consistently said no to that question. She added that an additional reason to exclude the topic from the Rules of Professional Conduct is the impracticability of implementing a client disclosure requirement. The Rules of Professional Conduct deal with a lawyer's representation of a client. Whether or not a lawyer is insured against malpractice is not a question about the nature of the representation of the client; instead, it is about what is the remedy if the representation falls below the standard of care. She wondered whether, if the ethics rules regarding disclosure of matters pertinent to the representation were expanded to include disclosures regarding insurance coverage, they might not also be expanded to require disclosure about prior disciplinary actions or other factors that might bear on whether a potential client picks this lawyer or another for her representation.

A member who sees the issues arise in the disciplinary context noted that she was in the minority on the subject. She sees the surprise of clients, and of legislators, who learn that lawyers are not required to carry malpractice insurance. She did not agree that the mere fact that insurance-related disclosures might be difficult was a good reason not to require the disclosures, for, she noted, lawyers are required to make, at or near the commencement of a representation, disclosures about the arrangements for fees and expenses, arrangements that can often be complex and difficult to explain. As to the disclosure of prior disciplinary actions, that was a separate matter that need not preclude an insurance coverage disclosure requirement.

This member added that, because there is an assumption among clients that their lawyers carry malpractice insurance coverage, it is logical to require the lawyer to tell the client when that insurance is not maintained. In her view, the question of coverage was a core issue for clients when deciding whether or not to engage a particular lawyer, much like the amount or rate of the lawyer's fees for the representation. Most sophisticated clients, she felt, would ask the question. But this member has to deal with the angry people, and that is why she sees the need for disclosure. The American Bar Association, she noted, has not proposed that its Model Rule be added to the ethics rules but, rather, compromised and put it in another location. The ABA's proposal is includes the idea that the Court will provide some public explanation, perhaps on an official website, regarding the nature of malpractice insurance and issues such as non-coverage for theft and other intentional acts.

A member who had not previously spoken about the matter said that she assumed the kinds of complaints that are made to legislators relate to small claims, not to large claims or the claims of sophisticated clients. Small claims were within her own malpractice insurance policy's $20,000 deductible and not subject to insurance coverage in any case. Thus, she suggested, if the Court were to undertake to deal with the insurance issue, it should deal with the small claims, the claims of those clients who were likely to be surprised to find an absence of coverage. Can the bar associations, or some independent organization, fund a pool for such claims? Taking that kind of approach would be better than inserting a disclosure requirement in an ethics rule; the latter approach would only exacerbate client confusion when, for example, they filed a claim a year or more after the conclusion of a representation only to find that there was then no coverage for claims made. The general topic is worthy of consideration, this member felt, but not as an ethics rule.

Further, if the Court were to embark on an insurance program of some kind, it would need to deal with areas of legal practice, such as securities work, for which coverage is not available at any premium.

A member reiterated that, if the Court were to impose mandatory insurance coverage in the absence of a self-funded program, it would be turning control of law practice over to the insurance industry, which would determine who practices in what fields of law and how they conduct those practices. The industry, he noted as an aside, is exempt from antitrust regulation.

Another member who had not previously spoken agreed that the Committee's purview is professional conduct: The practice of law by a professional. Insurance disclosure is not a matter of professional conduct. If the Court were to move the Rules of Professional Conduct toward such things as insurance coverage disclosure, it might as well require disclosure of a lawyer's net worth. He noted that the Subcommittee has made no recommendation to the Committee. Accordingly, the matter should just die before this Committee, and there is no call for this Committee to make any suggestion to the Advisory Committee on Attorney Regulation concerning the matter.

A member moved that the matter of insurance disclosure be referred to the Subcommittee on Rule 265, commenting that that subcommittee is working with the Civil Rules Committee regarding Rule 265, that malpractice insurance is already a topic within Rule 265, and that the matter of insurance disclosure should be considered there. The motion died for lack of a second. (Subsequently, the moving member noted that Rule 265 does not cover solo practitioners or those practicing in general partnership that are not registered for limited liability and thus would be an inappropriate vehicle for a broad-based insurance rule.)

Another member reflected on the history of this subject. Disclosure, he said, has been one of two issues, the other being whether to mandate malpractice insurance coverage as a condition of the law license. The Advisory Committee on Attorney Regulation had looked at the issues for two years and had found that the inability of some lawyers to get some coverage for some areas of law practice made a mandate of coverage too difficult. The Advisory Committee concluded that the proper topic for consideration is whether to require disclosure of malpractice insurance coverage; and that, the Advisory Committee concluded, is a matter of professional conduct and a fit subject for the ethics rules. This Standing Committee on the ethics rules has determined instead that those rules are not the proper place for any such regulation. The Advisory Committee can thus take the matter up again for its own consideration; there are members on this Committee who are also members of the Advisory Committee and can see that this message is informally carried back to the Advisory Committee.

The Chair responded to those comments by noting that, now that both the Advisory Committee and this Committee have looked at the matter and determined not to take action, the Court can consider those negative responses. To this, another member commented that the Advisory Committee has not decided that it is not a matter for consideration but only that it is a matter for consideration as a rule of conduct. The Chair, however, pointed out that this Committee has determined to the contrary, that the topic is not fit for the rules of conduct, the ethics rules. To that, the other member responded that the Advisory Committee can now take the issue back and consider other alternatives.

The Chair noted that formal action must first be taken by the Committee to adopt the Subcommittee's position that mandatory insurance coverage and insurance coverage disclosure are not appropriate topics for a rule of professional conduct. She commented that the failed motion previously made did not deal with those matters.

The member who had expressed an inclination to include an insurance coverage disclosure requirement as a component of Rule 1.4 said she was sure that such a requirement was not favored by the Committee as a whole and thus was not worth pursuing. To this, another member responded that the preliminary question is not whether such a requirement should be included in Rule 1.4 but whether it should be included anywhere in the Rules of Professional Conduct.

The member who had expressed an inclination to include some insurance coverage disclosure requirement moved that the Committee determine that some rule within the Rules of Professional Conduct mandate insurance coverage disclosure if the insurance carried was less than that which would be required by Rule 265 to obtain the benefit of limited liability, assuming Rule 265 were applicable to the subject lawyer.

A member asked, as a matter of clarification, where a rule incorporating the American Bar Association's Model Rule would be placed if it were to be proposed by the Advisory Committee. The moving member replied that such a rule would go within the rules for attorney regulation, because the Advisory Committee politically cannot make recommendations for the Rules of Professional Conduct. The member who had asked the question then seconded the outstanding motion.

Upon a vote, the motion was soundly defeated.

The Chair asked for another motion setting some other course for action or to advise the Court where the Committee's discussion had taken it. To that request, a motion was made to adopt the Subcommittee's report of September 22, 2006 and to report to the Court that this Committee does not believe the subjects of insurance coverage fit within the Rules of Professional Conduct.

That motion was seconded and adopted.

The Chair extended her thanks to Cohen and the Subcommittee for its work on the matter.

VI. *Subcommittee on Education.*

Judge Ruthanne Polidori reported to the Committee about the efforts to be made to educate the Colorado bar concerning the changes wrought by the revised Rules of Professional Conduct if the Committee's recommendations for the Ethics 2000 Rules are adopted by the Court. Twenty speakers have volunteered for that service. She has communicated with some of the interested organizations suggesting that they refrain from conducting seminars on the Ethics 2000 Rules until the Court makes its determination. David Little and Judge Polidori have been talking with the Colorado Bar Association and its continuing legal education arm to coordinate the education effort at the CLE and local bar association level if and when the Court adopts revised Rules, and they are looking in particular for persons who can make presentations to lawyers outside the metropolitan Denver area. She welcomed all who would join in the speaking effort.

The Subcommittee on Education is also developing a bank of written materials for access by the practicing bar. At present, Judge Polidori noted, that consists of material covering the proposed Rules and would have to be updated to cover the Rules as actually adopted by the Court.

VII. *Rule 6.1 and* Pro Bono Publico *CLE Credits.*

Following up on the report he gave at the fourteenth meeting of the Committee on April 27, 2006, David Little reminded the Committee that revised Rule 6.1 includes provision for awarding limited CLE credits for the performance of *pro bono publico* service. However, the administrative staff of the Board of Continuing Legal Education has determined that the CLE accreditation provisions contained in Rule 6.1 do not agree with the procedures prescribed by CRCP 260.8 for such accreditation. Justice Coats, who is liaison justice to the Board, asked Little, as a member of that Board, to write an explanation of the issues for the Court's consideration. Little has done so, and the letter has been given to the Colorado Access to Justice Commission at the direction of Justice Hobbs. Little did not know the current status of that commission's consideration of the issues.

VIII. *New Business.*

A member directed the Committee to the letter from William Gray, of Purvis Gray & Murphy LLP, that had been included at page 10 of the materials provided to the members for this meeting. That letter had proposed the addition of a rule, such as is found in Rule 7.2 of the Missouri Rules of Professional Conduct, requiring that lawyer televison advertisements contain a disclosure stating, "The choice of a lawyer is an important decision and should not be based solely on advertisements." The member asked for the Committee's views on that suggestion.

Another member noted that such a suggestion had been considered in connection with the drafting of the current Colorado Rules of Professional Conduct in 1993 but was not proposed to the Court by the 1993 drafting committee. The thought at the time was that "anyone who was so stupid to think that hiring a lawyer is not important would not change his view because of a disclosure in an advertisement that hiring a lawyer is an important decision."

The Chair noted that the Committee's Subcommittee on the Ethics 2000 Rules had not given detailed consideration to the American Bar Association's model rules on advertising because the existing Colorado rules are quite different, reflecting different decisions by the Colorado Supreme Court.

Another member remarked that he did not want to burden Colorado lawyers with unnecessary additional requirements for disclosures, but, he felt, this particular proposal was not too troublesome. He was, he said, "not mildly enthusiastic" about the proposal, but it was not such a bad idea.

A member inquired what priority the Office of Attorney Regulation gave to advertising issues and was told that those issues are not high priority. There are other, more pressing, issues for that office. It was noted that, in one "diversion" disciplinary case involving lawyer advertising, the subject lawyer presented to the Office similarly offending, "yellow-page" advertising maintained by other lawyers. His point was taken by the Office, which followed up by advising the other lawyers to change their advertisements in the next editions of the telephone directories. It was said that the Office has not been

presented with a case involving actual misrepresentation in an advertisement; the offenses have been more technical violations of the "Seven Series" of rules governing advertising and other communications with prospective clients.

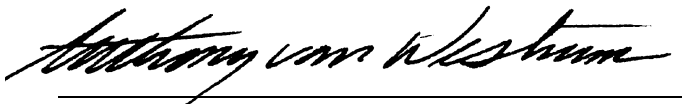
Another member commented that the problem areas are not newspaper advertisements but television, such as Mr. Gray's letter suggests. In television advertising there is a "drive to the bottom." Practitioners need further guidance about what is acceptable.

A member noted that, if the sense is that television is where the real problems lie, then we should look to states such as Florida that have undertaken to regulate television advertising. In this member's view, a disclosure such as required by the Missouri rule would merely be silly, not effective.

IX. *Adjournment; Next Scheduled Meeting.*

The meeting adjourned at approximately 10:00 a.m. The next scheduled meeting of the Committee will be on Friday, January 26, 2007, beginning at 9:00 a.m., in the Supreme Court Conference Room.

RESPECTFULLY SUBMITTED,



Anthony van Westrum, Secretary

[These minutes are as approved by the Committee at its meeting on January 26, 2007.]

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COLORADO SUPREME COURT

STANDING COMMITTEE ON THE RULES OF PROFESSIONAL CONDUCT

Approved Minutes of Meeting of the Full Committee
On January 26, 2007
(Sixteenth Meeting of the Full Committee)

The sixteenth meeting of the Colorado Supreme Court Standing Committee on the Rules of Professional Conduct was convened at 9:00 a.m. on Friday, January 26, 2007, by Acting Chair Michael H. Berger in the absence of the Chair, Marcy G. Glenn. The meeting was held in the Supreme Court Conference Room on the fifth floor of the Colorado State Judicial Building.

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

I. *Meeting Materials; Minutes of September 22, 2006 Meeting; Resignation.*

The Chair had provided a package of materials to the members prior to the meeting date, including submitted minutes (amended by a subsequent email to the members) of the fifteenth meeting of the Committee, held on September 22, 2006. The amended minutes were approved without further change.

The Acting Chair announced that Mac V. Danford had resigned from the Committee because of other demands upon his time.

II. *Status of Supreme Court's Review of Committee's Proposal for Adoption of Ethics 2000 Rules.*

Justices Bender and Coats declined to provide the Committee with a timetable for the Supreme Court's action on the Committee's proposal that the Court adopt the American Bar Association Ethics 2000 Rules of Professional Conduct with the modifications recommended by the Committee. That proposal had been formally submitted to the Court by the Chair on December 30, 2005.

III. *Education Subcommittee.*

Judge Ruthanne Polidori reported, for the Education Subcommittee, that the necessary work has been done to develop a "speakers bureau" and to coordinate with the Colorado Bar Association and local bar associations in preparation for the effort to educate Colorado lawyers about the Ethics 2000 Rules if and when the Court adopts them. She noted that, among the pending presentations is one scheduled in Steamboat Springs on

June 23, 2007, at which Justice Bender has agreed to appear and speak about the Ethics 2000 Rules. Justice Bender confirmed that he has agreed to be on the program.

David Little, who has been working with Judge Polidori on the education effort, confirmed that the effort is in a holding pattern, ready to go when the time comes.

IV. *Rule 265 Issues.*

David Stark reported that the subcommittee considering Rule 265 issues continues its work, having met for two and a half hours on January 23, 2007. A number of issues and details have been raised in the effort to meld Rule 265 and Rule 5.4 of the Ethics Rules, and it is simply taking time for the subcommittee to work its way through them. There were no issues sufficiently troublesome that they deserved the consideration of the whole Committee at this time. Stark predicted that the subcommittee would be able to make recommendations for amendments to both Rule 265 and Rule 5.4 to the whole Committee at the next Committee meeting.

A member of the subcommittee added that the principle underlying the subcommittee's work is the separation of the mechanics of electing to conduct the practice of law through a professional company (those mechanics to be located in Rule 265) from "professional conduct" aspects such as who can own or control a professional company (those aspects to be dealt with in Rule 5.4).

David Little, who is on the subcommittee and is also a member of the Supreme Court Standing Committee on the Rules of Civil Procedure, noted that the latter committee would be meeting later that day and that he would give that committee a report on the subcommittee's work.

It was noted by several members that the Committee had determined, at a prior meeting, to work in tandem with the Standing Committee on the Rules of Civil Procedure on the development of the proposal for amendment of Rule 265 and that, in addition to Little, there were other members of the subcommittee who were also members of the Civil Rules Committee, which should facilitate the joint effort.

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

Anthony van Westrum, chair of the subcommittee formed at the fourteenth meeting of the Committee, on April 27, 2006, to — as he described the concept at that meeting — "see whether rules of professional conduct can be crafted to accommodate evaluative mediation and other similar activities, exempting their lawyer practitioners from the conflicts and other such rules, without adversely impacting the core principles governing lawyers when they render services to persons who have sought those services because of the their skills and capacities as lawyers," said that he had no report to make for the Subcommittee at this time but expected to be able to make a preliminary report at the Committee's next meeting.

Justice Bender recommended that the subcommittee consider the writings of Professor Scott R. Peppet on this topic, and Eli Wald added that Susan P. Shapiro, of the American Bar Foundation, has also written pertinent material.

VI. *Rule 6.1 and* Pro Bono Publico *CLE Credits*.

David Little spoke again of the matter he had raised at the fifteenth meeting of the Committee on September 22, 2006, regarding conflicts he perceived between the comment that was recently added by the Court to Rule 6.1 of the Rules of Professional Conduct and Rule 260.8 of the Rules of Civil Procedure, both of which provide for the awarding of continuing legal education credits for *pro bono publico* services. The materials provided to the Committee members in advance of the meeting included a copy of Little's May 12, 2006 letter to Justice Coats, in which Little described conflicts he saw between the rules and the comments, as follows:

> C.R.C.P. 260.8 has several qualifying requirements that are not addressed or described in the 6.1 Comment. Rule 260.8 (2) unequivocally requires that the work that would be eligible for CLE credit "must have been assigned to the lawyer by: a court; a bar association or Access to Justice Committee-sponsored program; an organized non-profit entity, such as Colorado Legal Services and Metro Volunteer Lawyers, whose purpose is or includes the provisions of pro bono representation to indigent or near-indigent persons in civil legal matters; or a law school". The Comment to C.R.C.P. 6.1 does not contemplate any assigning authority at all. Under the 6.1 Comment the work is by and large generated by the lawyer and is more or less administered by a pro bono committee or coordinator in a law firm or by the lawyer him or herself. There appears to be an immediate conflict between the two pronouncements. One requires assignment to the lawyer by an independent third party agency and the other allowing the lawyer to self-generate the pro bono activity.
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> The second problem deals with confusion over the methodology of obtaining the CLE credit. If credit is to be awarded under C.R.C.P. 260.8 a form denominated Form 8 must be completed by the assigning agency and submitted to the CLE Board. The 6.1 pronouncement is not at all clear about this. It refers to an "assigning court, program or law school", but there is no such assigning agency involved.
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> Finally the original pronouncement of the comment to C.R. C.P. 6.1 made consistent reference to "indigent or near indigent clients". This language tracks Rule 260.8 (1) that requires the pro bono work to be performed for an indigent or near indigent client. Now, a proposal has been submitted by the Standing Committee to change the designation of the qualified client from indigency or near indigency to "of limited means". There is no corresponding phraseology in Rule 260 and consequently if the Court accepts the proposal by the Standing Committee there could be a significant difference in the qualifying characteristic of the client for whom the pro bono work is done. There does not seem to be any explanation why the phrase "indigent or near indigent" was changed to of limited means or why the denomination "limited means" has any special significant or greater definition.[1]

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1. The Committee's Supplemental Report and Recommendations Concerning the American Bar Association Ethics 2000 Model Rules of Professional Conduct," submitted to the Supreme Court on April 27, 2006, explains the matter as follows:

> The Pro Bono Policy defines the recipients of the pro bono services in several different, and conflicting, ways. The Preface speaks of "indigent persons". The Pro Bono Policy itself describes the recipients alternately as "persons of limited means," "indigent members of the community," "near-indigent members of the community," and "low income persons". None of these terms is defined. The text of Rule 6.1, as promulgated by the ABA, and as recommended to the Court by the Standing Committee, speaks of "persons of limited means." The Standing Committee believes that the terms "indigent" and "near indigent" are underinclusive of the universe of persons that may need pro bono legal services. Accordingly, the Standing Committee recommends that the term "persons of limited means" be used uniformly throughout the Comment to Rule 6.1 and the Pro Bono Policy.

Little reported that the matter was then referred to the Colorado Access to Justice Commission. On October 10, 2006, Justice Coats sent Little a copy of that commission's reply regarding the matter (which reply was also included in the meeting materials). In the commission's view, no further action need be taken by the Court with respect to the matter. Justice Coats's cover letter to Little noted that the Court now has the information it needs to deal with the issues raised by Little.

Little pointed out to the Committee that, to date, no application for *pro bono* CLE credit has been received by the Board of Continuing Legal Education. But he added that the Board is concerned that, when the first application is eventually made, the Board will not be allowed to award any *pro bono* CLE credits under the directives of the new comment to Rule 6.1 because of the strictures of Rule 260.8. He predicted that the Board will direct the applicant to appeal the matter to the Court.

VII. *Adjournment; Next Scheduled Meeting.*

The meeting adjourned at approximately 9:35 a.m. The next scheduled meeting of the Committee was tentatively set for Friday, April 27, 2007, beginning at 9:00 a.m., in the Supreme Court Conference Room.

RESPECTFULLY SUBMITTED,

Anthony van Westrum, Secretary

[These minutes are as approved by the Committee at its meeting on April 27, 2007.]

The full report is available at http://www.courts.state.co.us/supct/committees/profconductdocs/sup_rep_060920.pdf.

— Secretary's Note

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COLORADO SUPREME COURT

STANDING COMMITTEE ON THE RULES OF PROFESSIONAL CONDUCT

Final Minutes of Electronic Virtual Meeting of the Full Committee
Conducted between March 29, 2007 and April 4, 2007
(Following Sixteenth Meeting of the Full Committee)

An electronic, virtual meeting of the Colorado Supreme Court Standing Committee on the Rules of Professional Conduct was conducted by emailed communications among the members of the Committee beginning on March 29, 2007 and concluding on April 4, 2007.

Actively participating in the virtual meeting were the following members: Chair Marcy G. Glenn, Justice Michael L. Bender, Michael H. Berger, Gary B. Blum, Nancy L. Cohen, Cynthia F. Covell, John S. Gleason, John M. Haried, David C. Little, P. Kathleen Lower, Judge William R. Lucero, Cecil E. Morris, Jr., Judge Ruthanne Polidori, Helen E. Raabe, Henry R. Reeve, Alexander R. Rothrock, Boston H. Stanton, Jr., David W. Stark, Anthony van Westrum, Eli Wald, James E. Wallace, Judge John R. Webb, and E. Tuck Young. It may be presumed that most or all of the other members of the Committee observed the emailed communications of the active participants listed above.

By email {Email Nº 1} to the Committee on March 29, 2007, the Chair informed the members as follows:

> Dear Committee Members:
>
> I write concerning two important matters.
>
> First, I trust that most of you have heard by now that our colleague Phil Figa has undergone surgery for a serious medical condition. I suspect that Phil has better things to do these days than read long emails on the Rules of Professional Conduct, but I do want to convey, on behalf of the entire Committee, our best wishes for his swift recovery.
>
> Second, during my absence from the office last week, Justice Bender contacted Michael Berger with a request. The Court is apparently making progress on the proposed rules but Justice Bender requested limited redrafting of Proposed Rule 1.6 and, as necessary, its comment and other rules. Specifically, Justice Bender asked for a version of Proposed Rule 1.6 that includes the substance of Current Rule 1.6(b), which reads: "A lawyer may reveal the intention of the lawyer's client to commit a crime and the information necessary to prevent the crime."
>
> As you will recall, both the Rules Subcommittee and the full Committee debated at some length the wisdom of maintaining the exception in Current Colorado Rule 1.6(b). Ultimately, the Committee recommended adoption of the Model Rule approach, which permits disclosure in three circumstances that are both broader and narrower than Current Colorado Rule 1.6(b). Our report fully explains the Committee's deliberations and the arguments for and against Current Colorado Rule 1.6(b). Leaving those policy questions aside, we have been requested to assist in revising Proposed Rule 1.6 to reinsert the substance of Current Colorado Rule 1.6(b).
>
> Justice Bender has advised us that he would like to distribute the revised proposed rule in advance of the Court's April 12 conference -- before our next Committee meeting on April 27. Therefore, Michael and I have taken a stab at revising the rule and comment consistent with Justice Bender's request. The purpose of this email is to solicit the full Committee's input. Attached are clean and redline versions of drafts of Proposed Rule 1.6, as revised to incorporate Current Colorado Rule 1.6(b). In this memo, I refer to the attached draft as "Draft Revised Proposed Rule 1.6." The changes can be summarized as follows:

1. Draft Revised Proposed Rule 1.6(b)(2) is new, in order to insert the substance of Current Colorado Rule 1.6(b). It permits a lawyer to reveal information to the extent the lawyer believes reasonably necessary "to prevent the client from committing a crime." Note that Current Colorado Rule 1.6(b) permits disclosure of "the intention of the lawyer's client to commit a crime and the information necessary to prevent the crime." The attached draft deletes the "intention" reference for two reasons. First, we had trouble working it into the textual format of Proposed Rule 1.6(b); and second, we believe that the phrase "to prevent the client from committing a crime" captures both the "intention" and "commit a crime" concepts in Current Colorado Rule 1.6(b), but more succinctly. Note that the new draft comment (summarized below) more closely tracks the language of Current Colorado Rule 1.6(b).

2. Draft Revised Proposed Rule 1.6(b)(3) addresses only "a fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services." Previously it had addressed "a crime or fraud" meeting those criteria, but we have deleted the words "a crime" because Draft Revised Proposed Rule 1.6(b)(2) would broadly permit disclosures related to client crimes.

3. The draft changes paragraph numbers for Draft Revised Proposed Rule 1.6(b)(3)-(7), and associated Comments [7]-[13] and [15], to reflect the insertion of the new exception requested by the Court.

4. Draft Revised Proposed Comment Paragraph [6A] addresses Draft Revised Proposed Rule 1.6(b)(2) -- the new insert to cover the substance of Current Colorado Rule 1.6(b). The new draft comment states that "Paragraph (b)(2) permits disclosures regarding a client's intention to commit a crime in the future and authorizes the disclosure of information required to prevent the crime. This paragraph does not apply to completed crimes." It also incorporates text that appears in Current Proposed Comment Paragraph [7], which notes that (a) Draft Revised Proposed Rule 1.6(b)(2) does not require the lawyer to reveal the client's intention to commit a crime, and (b) other rules may require, permit, or preclude the lawyer from taking particular action with respect to the client's intended criminal conduct. This language continues to appear in Comment Paragraph [7], too, but because that paragraph now addresses only client fraud (and not crimes of a client), we thought it should be repeated in Draft Revised Proposed Comment Paragraph [6A], which does address client crimes.

5. As noted above, Comment Paragraph [7] now deletes its two prior references to crimes, as opposed to fraudulent conduct.

Justice Bender asked us to confirm that the requested changes will not create inconsistencies with other rules. Michael and I have reviewed the rules, and the following additional rule change would be necessary if the Court adopts Draft Revised Proposed Rule 1.6(b)(2) and the other revisions summarized above: In Proposed Comment Paragraph [6] to Rule 1.13, the reference to "the provisions of Rule 1.6(3)(1) - (6)" should be changed to "the provisions of Rule 1.6(b)(1) - (7)." Later in that paragraph, the reference to "Rules 1.6(b)(2) and 1.6(3)(3)" should be changed to "Rules 1.6(b)(2), 1.6(b)(3) and 1.6(b)(4)." (Even absent the draft proposed revisions summarized above, there were two typographical errors in the quoted language -- reference to "1.6(3)" instead of "1.6(b)" -- that should be corrected.)

In light of the Court's schedule, I'd like everyone to review these proposed changes as soon as possible, and forward your comments to the entire Committee no later than Wednesday April 4. Based on our email dialogue, Michael and I will do our best to make revisions and summarize the Committee's views for the Court. Thanks in advance!

Marcy

The Chair's email was accompanied by two attachments, one being a version of Rule 1.6 and its Comment as she and Berger proposed to change them to comply with the Court's request and the second being a redline identifying the proposed changes from the Rule and Comment as they had been submitted to the Court in December 2005. Those attachments are attached to these minutes as Appendices A and B.

The first member to respond {Email Nº 2} approved of the proposed revisions but suggested that reference in the fifth line of proposed Comment [6A] to the "client's misconduct" be characterized as the "client's *proposed* misconduct," commenting that he understood that mere intent to commit a crime but unaccompanied by steps to prepare is neither criminal nor otherwise wrongful. That proposal was specifically approved by four members in ensuing emails.

Another member commented as follows {Email Nº 3}:

> If I understand correctly, the addition of the word "contemplated" in line 5 of Comment 6A would modify and remedy an implied "intent" in the phrase "client's misconduct," as if the proposed language read "client's intended misconduct." I don't interpret "client's misconduct" to include an implied intent. If "client's misconduct" carries no implication of intent, then adding the word "contemplated" actually creates the very problem it was designed to avoid; I see no difference between a client's "contemplated misconduct" and a client's "intended misconduct." I vote to keep "client's misconduct" the way it is, except that, for clarity, we should change "misconduct" to "criminal conduct."
>
> Two other points. The first line of 6A uses the phrase "client's intention to commit a crime." Should the word "intention" be changed here? To what, I don't know.
>
> Finally, we should consider modifying the language after Rule 1.16 as follows: "with respect to the lawyer's obligation or right to withdraw, or to request withdrawal from a tribunal, in such circumstances." This would add the italicized phrase and eliminate the phrase "from the representation of the client," which I feel is unnecessary here.

To that comment, another member emailed {Email Nº 4}, "Yes, 'intent' is the correct word."

Yet another member responded as follows {Email Nº 5}:

> But note that the Rule itself would state, "A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary . . . to prevent the client from committing a crime." That embodies no element of intent. Contrast that with current Rule 1.6(b): "A lawyer may reveal the intention of the lawyer's client to commit a crime and the information necessary to prevent the crime." That clearly includes the element of intent. And surely it should. If the client is about to commit a crime that she does not intend, the lawyer should be warning her of the risk, so she will avoid the crime, not turning her in.
>
> So, I would start by considering changing proposed 1.6(b)(2) to read, "to prevent the client from committing an intended crime." This would adjust the rule to match the comment, which, one way or another, is going to refer to intention. But note that we have now only permitted the lawyer do just one thing, to disclose "information necessary to prevent the client from committing a crime." Under the current rule, the lawyer can do two things: (1) reveal the intention to commit the crime and (2) reveal the information necessary to prevent that crime. Given the current rule as legislative history, someone will argue that the lawyer can disclose information designed to prevent the crime — "Here's what you need to do to stop something" — but cannot say, "A crime is intended, and here's what you need to do to stop it."
>
> So, I'd revise proposed 1.6(b)(2) to read, à la the current rule, "to reveal the client's intention to commit a crime and information necessary to prevent the crime." Note that the addition now matches the text of the rule to what proposed Comment 6A says the paragraph says.
>
> And I'd follow through with a similar change to the fraud provision, 1.6(b)(3): "to reveal the client's intention to commit a fraud and information necessary to prevent the fraud . . . ."
>
> Note that I've dropped the definite article "the" before "information," because this shouldn't be an all-or-nothing requirement on the lawyer, where he would remain in jeopardy if what he said was not sufficient to prevent the crime or fraud. (I am, for the same reason, concerned about the phrase "required to prevent" in proposed Comment 6A; something like "information that may be useful in preventing the crime" would be better.)

> And then I would have Comment 6A read, "Paragraph (b)(2) *is a limited exception to the rule of confidentiality that* permits disclosure ~~regarding~~ *of* a client's intention to commit a crime in the future and authorizes the disclosure of information ~~required to prevent~~ *that may be useful in preventing* the crime. Although paragraph (b)(2) does not require the lawyer to reveal the client's ~~misconduct~~ *criminal intention*, the lawyer may not . . . ."
>
> Note that I've begun the revised comment with the same prefatory phrase as is already in the comment regarding revelation of fraud. With that thought moved up one paragraph, the fraud paragraph could begin ""Paragraph (b)(3) is another limited exception to the rule of confidentiality . . . ."

Responding to the first comment [see Email Nº 2], suggesting that Comment [6A] refer to the client's *contemplated* misconduct," a member wrote as follows {Email Nº 6}:

> First, I agree with [the] suggested change to Cmt 6A to Rule 1.6, but I would revise it to "client's contemplated criminal conduct" as [a member] suggested and [another member] joined in, in order to distinguish criminal conduct from attorney misconduct. Second, I suggest that the "see also" cite to CRPC 1.13 in the draft revision to Cmt 6A should be eliminated. 1.13 deals with a separate problem from past v. future crimes under 1.6, and citing to it in the cmt to 1.6 will create confusion rather than clarity. 1.13 does not distinguish between past conduct and ongoing or future conduct, so it doesn't help the analysis here. Rather, a central part of 1.13 is that the entity is the client, not its constituents, and a corollary of this is that the lawyer has a duty to the entity client if one of its constituents is engaged in action OR intends to engage in action that is a violation of legal obligation to the entity or a violation of law that might be imputed to the organization. Furthermore, unlike the disclosure of future crimes under rule 1.6, the disclosure under rule 1.13 occurs WITHIN the entity client first and foremost and thus ordinarily does not get to external disclosure. In the situation addressed by Rule 1.13 (that is, one of the constituents of the entity client is engaged in action OR intends to engage in action that is a violation of legal obligation to the entity or a violation of law that might be imputed to the organization), the lawyer for the entity client must first remonstrate with the constituent, then if necessary report up the ladder to a higher authority for the organization to correct the problem, then withdraw if that does not remedy the problem (under current Rule 1.13(c)), OR under very limited circumstances, disclose if reporting up the ladder does not remedy the problem and if substantial harm to the entity client would result absent disclosure (under proposed E2K revision to 1.13(c)).

A member expressed concurrence {Email Nº 7} with the proposal either to leave the phrase in Comment [6A] as "client's misconduct" or to change it to "client's criminal conduct." This member added,

> If you analyze the first three sentences of Comment 6A, the first sentence is addressing the "future crimes" situation. The second sentence is addressing the past crimes situation. The third sentence is, I believe, trying to address the in-between or fluid situation, where there is some criminal conduct that has occurred but some that is still occurring. So, the comment is stating that you don't reveal the criminal conduct but don't do anything to assist a continuing crime, including remaining silent if you could prevent it.
>
> Then the first line should remain the same.

At this stage in the exchange of communications, the Chair commented {Email Nº 8}—

> Thanks to everyone for your attention to these potential changes. Not surprisingly, our email dialogue is raising a number of important points. It remains to be seen whether we will be able to reach consensus via email, which makes it hard to respond promptly to particular concerns and suggestions without flooding everyone's email boxes. Michael Berger and I are going to review the incoming comments and attempt to send an email summarizing what we see as the outstanding issues and attempting to clarify a few things. Stay tuned and thanks again.

A member emailed {Email Nº 9} to emphasize the earlier comment [see Email Nº 4] that "'intent' is the correct word" and to voice his concurrence with the suggestions made in Email Nº 5.

Another member also emailed {Email Nº 10} his concurrence with the suggestions made in Email Nº 5 and expressed the concern " that this Rule 1.6 may become a basis for claims against lawyers by non-clients."

The Chair then submitted to the Committee a revision of the initial proposal, in redline. That revision is attached to these minutes as Attachment C. The Chair's email {Email Nº 11} read as follows:

> Dear Committee Members:
>
> Another day, and more revisions to consider. Attached is a new redlined version of Rule 1.6, reflecting currently proposed changes to Proposed Rule 1.6. These changes now fall into two categories. First, the attached redline represents Michael Berger's and my joint follow-up to the many thoughtful comments we received on Draft Revised Proposed Rule 1.6(b) and Comment Paragraph [6A], to incorporate Current Colorado Rule 1.6(b), regarding permissive disclosure of the client's intent to commit a crime, etc.; below I address the sundry suggested revisions we received, and explain why we did or did not include those changes in the attached draft. Second, the redline includes a new Draft Proposed Comment Paragraph [15A], to address distinct concerns shared by Justice Bender this week; I also summarize those proposed changes below.
>
> "INTENTION TO COMMIT A CRIME" REVISIONS
>
> Draft Revised Proposed Rule 1.6(b)(2). The only suggested change to our proposed draft of the rule itself came from [a member] who observed that our proposal does not accurately track Current Colorado Rule 1.6(b) because, whereas the current rule permits disclosure of both the client's intention to commit a crime and information necessary to prevent the crime, the proposed draft permits disclosure only "to prevent the client from committing a crime." In my initial email last week, I noted that difference and said that Michael and I believed that our suggested language captures both the "intention" and "commit a crime" concepts. On further reflection, we agree . . . that the current rule contemplates permissive disclosure of two distinct categories of information -- both a client's intention to commit a crime and information necessary to prevent the client from committing a crime -- and we would not be fully incorporating the current rule if we suggest that a lawyer may not reveal the client's intention to commit a crime. So we have revised the rule to read: "to reveal the client's intention to commit a crime and the information necessary to prevent the crime."
>
> At first we were concerned about redundancy, since the word "reveal" now appears in both Draft Revised Proposed Rule 1.6(b) ("A lawyer may reveal information."), and in Draft Revised Proposed Rule 1.6(b)(2) ("to reveal the client's intention."). As currently revised, the rule permits the lawyer to "reveal information . . . to reveal the client's intention". But we are satisfied that the word "reveal" as used in these two parts of the rule has distinct meanings. The subject of one is the general category of otherwise confidential information a lawyer may reveal, while the subject of the other is the specific type of confidential information a lawyer may reveal, i.e., the client's intention to engage in criminal misconduct, etc. The wording is a little bit awkward but we think it's okay.
>
> Michael and I disagreed with some of [the suggested] more minor tweaking of the rule. We saw no need to remove the word "the" before "information." [The member who suggested that] was concerned that the phrase "the information" imposes "an all-or-nothing requirement on the lawyer, where he would remain in jeopardy if what he said was not sufficient to prevent the crime or fraud." We disagree because there in no "requirement" on the lawyer, since the rule is permissive. [That member] also suggested a parallel revision to Proposed Rule 1.6(b)(3), changing "to prevent the client from committing a fraud." to "to reveal the client's intention to commit a fraud and information necessary to prevent the fraud." We would not make this change for two reasons. First, because Existing Colorado Rule 1.6 does not extend to client fraud, there is no need to revise Proposed Rule 1.6(b)(3) to render it consistent with an existing Colorado rule, which is the sole reason for the Draft Revised Proposed Rule 1.6(b)(2).

Second, we do not think we should change the Model Rule language in Proposed Rule 1.6(b)(3) other than we already have (by removing "crime or" from "crime or fraud").

Draft Revised Proposed Comment Paragraph [6A].

[A member] suggested insertion of the word "contemplated" before misconduct. [Two other members] disagreed with this approach. We don't agree with [the] reading that the third sentence in Draft Revised Proposed Comment Paragraph [6A] is "trying to address the in-between or fluid situation, where there is some criminal conduct that has occurred but some that is still occurring." That sentence, like Proposed Revised Draft Rule 1.6(b)(2), is addressing only future crimes (a category that includes, but is not limited to, ongoing crimes). However, we concluded that we can avoid this issue by revising the comment to use the exact language in the new rule provision, so the third sentence of the Draft Revised Proposed Comment begins: "Although paragraph (b)(2) does not require the lawyer to reveal the client's intention to commit a crime,."

[A member] suggested insertion of the word "criminal" before misconduct. This issue drops out if we use the language of the rule itself, quoted above.

[That member] asked whether we should drop the word "intention" from the phrase "client's intention to commit a crime" in the first sentence of the comment. We don't understand the basis for his suggestion and have left "intention" in the first sentence.

[That member also] suggested modifying the sentence: "See also Rule 1.16 with respect to the lawyer's obligation or right to withdraw from the representation of the client in such circumstances." He would delete the phrase "from the representation of the client" as surplusage, and he would add "or to request withdrawal from a tribunal" before "in such circumstances." We have not made either change because this language comes from Paragraph [7], which in turn comes from the Model Rules, and we don't see a need to improve upon the Model Rule language here. We believe that the concept of seeking the permission of the tribunal is implicit in the concept of withdrawal, and we don't think the arguably surplus language needs tinkering.

[A member] suggested two comment revisions, but Michael and I do not think that they are necessary. First, [that member] suggests adding intro language that appears in Proposed Comment Paragraph [7] to the effect that the relevant rule paragraph "is a limited exception to the rule of confidentiality that permits." This language is in Proposed Comment Paragraph [7] because it is in the Model Rules, but Michael and I just don't see the need to add this language to our Colorado-specific Draft Revised Proposed Comment Paragraph [6A]. But this is not a big issue one way or the other. Second, [that member] suggests changing the phrase authorizing "disclosure of information required to prevent the crime" to "disclosure of information that may be useful in preventing the crime." Michael and I liked the idea of getting away from the "required" concept -- which seems wrong in a rule that permits, but does not mandate, disclosure. However, we thought it could be better stated as "disclosure of information that may prevent the crime." In the end, however, we realized that that would be inconsistent with the proposed new text of the rule, which allows the lawyer to "to reveal the client's intention to commit a crime and the information necessary to prevent the crime." So we suggest merely changing the word "required" in the first sentence of the comment to "necessary," to be consistent with the rule's language.

Finally (I hope!), [a member] suggested deleting all discussion of Rule 1.13 in Draft Revised Proposed Comment Paragraph [6A] because the circumstances triggering mandatory and permissive disclosure under that rule are different from those set forth in Proposed Rule 1.6, and there are restrictions on to whom the lawyer may/must disclose under Proposed Rule 1.13. We agree that those differences are real and important but we do not believe that is a reason to omit reference to Rule 1.13. The point of the "See also" cite is to reference other rules where lawyers may have the right or obligation to make disclosures with respect to client criminal conduct. Rule 1.13 is one such rule, even if the circumstances triggering that right or duty are different from the triggering circumstances under Proposed Revised Draft Rule 1.6(b)(2). In addition, this language is in Model Rule Comment Paragraph [7], which was our source for including this language in Draft Revised Proposed Comment Paragraph [6A].

NEW DRAFT PROPOSED COMMENT PARAGRAPH [15A]

[A concern has been expressed] about the complexity of the various rules that relate to disclosure of client information, and their interrelationship. [It has been] suggested that we beef up Proposed Comment Paragraph [15] to further educate lawyers about the

difficulty of the issue and the need to refer to multiple rules in resolving these issues. The attached Draft Proposed Comment Paragraph [15A] is Michael's and my effort at responding to [that member's] concerns, which we agree are valid.

As background, please recall that Proposed Comment Paragraph [15] already included language proposed by the Committee in addition to the more limited language in Model Rule Comment Paragraph [15]. Specifically, the Committee recommended adding the sentences that begin "For example, Rule 4.1(b)" and "For example, Rule 1.13(c)" to illustrate how other rules interrelate with Rule 1.6. The new Draft Proposed Comment Paragraph [15A] separates into a new paragraph all of our discussion of other rules that may be applicable to whether and under what circumstances a lawyer may disclose client information. It also begins with the following new, draft language: "The interrelationships between this Rule and Rules 1.2(d), 1.13, 3.3, 4.1, 8.1, and 8.3, and between those rules, are complex and require careful study by lawyers in order to discharge their sometimes conflicting obligations to their clients and the courts, and more generally, to our system of justice. The fact that disclosure is permitted, required, or prohibited under one rule does not end the inquiry. A lawyer must determine whether and under what circumstances other rules or other law permit, require, or prohibit disclosure. While disclosure under this Rule is always permissive, other rules of law may require disclosure."

I sense that the Court might be getting close to completing its review of the proposed rules, and I appreciate your continued commitment to the task! Please respond as soon as possible and separately indicate your views on the "intention to commit a crime" revisions and Draft Proposed Comment Paragraph [15A].

The member who had written Email Nº 5 would not relent. He responded to the Chair's revisions as follows {Email Nº 12}:

Marcy, I applaud your endurance, and Mike's too. I'll impose on it a bit more.

I want to renew my proposal to eliminate the definite article "the" before "information" for I remain concerned that the phrase "the information" imposes an all-or-nothing requirement on the lawyer. I understand Rule 1.6 is permissive, but, to avail oneself of that permission, one must comply. And complying would seem to mean revealing "the information necessary to prevent the crime." If less than all of that information is revealed (and the crime goes down for want of the rest), the Rule has not been complied with. It's easy enough to avoid the issue by simply dropping "the."

And I want to renew my proposal to make the parallel revision to Proposed Rule 1.6(b)(3), changing "to prevent the client from committing a fraud." to "to reveal the client's intention to commit a fraud and information necessary to prevent the fraud." With our clarification that one can disclose two elements relate to a crime — the intention and information (or "the information") necessary to prevent it — we have identified the difference between an intention and an action. Failure to carry that through to the fraud situation must logically mean that one can reveal the oncoming fraud, but not the intention to commit it. Again, it's easy enough to make the correction. Though I realize that would stray from uniform language regarding the fraud case, the reason for the straying is apparent from our addition of the crime case and thus there should be no interpretative confusion notwithstanding the divergence from uniformity.

And I'll just point out that not moving the explanation that we are dealing merely with is a "limited exception[s] to the rule of confidentiality" from the comment for the fraud case to the comment for the crime case, and then ditto-ing that for the fraud case, as I had suggested, leaves open the argument that the crime case may be a wider kind of exception than is the fraud case. It's easy enough to solve, and, again, the reason for the deviation from the uniform language will be clear and will not lead to interpretation issues.

And an easier one: I think the second "between" in the phrase reading, "The interrelationships between this Rule and Rules 1.2(d), 1.13, 3.3, 4.1, 8.1, and 8.3, and between those rules. . ." should be "among."

But another member wrote to approve the revisions proposed by the Chair's and Berger, stating {Email Nº 13}—

> Well done! I've been struggling to work through everyone's thoughtful comments on this, and you've already done it and committed it to a detailed explanation.
>
> I agree with your latest assessment below, and you have my vote.
>
> I would not change a thing you've said. I do have one general observation from this exercise and from my very short time on the committee. The committee members have poured enormous thought into these rules and have parsed the words accordingly, sometimes opting for a short, elegant expression because it conforms to their belief about how a rule should be interpreted and applied. In my experience, the vast majority of lawyers are not nearly so sophisticated, either on these rules or as interpreters of the rules. I think many of the nuances that the committee sees in the language are missed by most lawyers simply because they don't have much experience with the rules until they hurriedly whip them out to look for a quick answer. Obviously, the Model Rules and Colorado Rules get longer and longer with each revision, but, as a consumer of the rules, I find the more detailed rules and commentary helpful.

A second member agreed {Email Nº 14} with that assessment, commenting, "I agree 100%. You have taken each issue, handled it very deftly, and explained it very succinctly."

A third member also agreed but added the following suggestion {Email Nº 15}: "In cmt 7, I think that the phrase 'criminal or' should not be deleted. That phrase relates to rule 1.2, not 1.6(b)(3)." To that comment, the Chair responded {Email Nº 16}—

> Thanks. . . . Michael and I actually discussed this. You are right that Rule 1.2(d) covers both "criminal and fraudulent" conduct by a client. We took "criminal" out of Comment [7] because that comment addresses only client fraud. In Comment [6A], which addresses client crimes, we left in "criminal" but took out "fraudulent" when we referenced Rule 1.2(d). With that further background, can we count on your vote? (Can you tell I really want to put these issues to bed?)

The member who had made the suggestion then confirmed {Email Nº 17} his agreement with the Chair's explanation.

The member whose suggestion [see Email Nº 3] to drop the word "intention" from the phrase "client's intention to commit a crime" in the first sentence of the comment, which had puzzled the Chair and Berger, wrote {Email Nº 18} to express his approval of the revised version of the Rule and Comment and to note that his suggestion had been mooted.

Another member wrote {Email Nº 19}, "Although I tend to agree with [the suggestion to remove] the "the" in front of "information" [see Email Nº 5], I don't feel so strongly about it as to withhold my vote in favor of the changes proposed in your April 3 draft. You have my vote."

But a member suggested {Email Nº 20} a further revision, to the last sentence in Comment 15, to read, "A lawyer's decision either not to disclose as permitted by paragraph (b) or to limit a disclosure permitted by paragraph (b) does not violate this Rule."

To that suggestion, the member who had written Email Nº 5 wrote {Email Nº 21}, "I like [that] suggestion, for it alleviates my concern about an 'all-or-nothing' requirement, although I don't think it is an entirely sufficient substitute for deleting that 'the' that troubles me."

Four other members wrote to express their approval of the revisions as proposed by the Chair in Email Nº 11.

The Chair then summarized the discussion as follows {Email Nº 22}:

> Hello, everyone,
>
> I have heard from 17 Committee members in less than 24 hours -- thank you for your prompt responses. (Some responses came only to me, or only to Michael Berger and me.) Of the 17 responses:
>
> - 13 . . . were unqualified votes in favor of all the changes made in yesterday's draft;
>
> - [One] proposed additional changes that he described by email yesterday evening;
>
> - [Another] was persuaded by [the] reasons for making [those] additional suggested changes but ultimately deferred to Michael Berger and me;
>
> - [Another] "tend[ed] to agree" with . . . removing the word "the" before "information," but did not feel strongly enough about that change to withhold her yes vote for the package without [those] changes; and
>
> - [A member] suggested a new sentence to Comment Paragraph [15].
>
> If we treat [the votes of the two members who are not insistent on the suggested further changes] as, essentially, votes in favor of yesterday's draft without [those] changes, we have 15 of 17 responses in favor of that draft. That is the overwhelming majority of those who have participated in this email exchange (and back-burnered all their other work in the process!), and therefore I plan to submit yesterday's draft, without [either of the two sets of] suggested substantive changes, to the Court. However, one of [the] proposed changes -- changing the second "between" to "among" in the "The interrelationships." sentence in new Proposed Comment Paragraph 15[A] -- was grammatical rather than substantive, and I have made that change. Of course, Justices Bender and Coats have been privy to [the] additional suggested changes and they can convey them to the full Court if they wish.
>
> One last thank you for the hard work and hustle that went into these most revisions. . . .

With the conclusion of the virtual meeting, the Chair sent the following email to Justices Bender on April 4, 2007:

> Dear Justice Bender,
>
> Attached is Revised Proposed Rule 1.6 of the Colorado Rules of Professional Conduct (CRPC), as approved by a majority of the Court's Standing Committee on the CRPC. As you have requested, Revised Proposed Rule 1.6(b)(2) adds the exception that appears in Current Colorado Rule 1.6(b), which permits a lawyer to reveal a client's intention to commit a crime and the information necessary to prevent the crime. Revised Proposed Comment Paragraph [6A] is new, and corresponds to the new Revised Proposed Rule 1.6(b)(2). In addition, the insertion of Revised Proposed Rule 1.6(b)(2) required several other changes (mostly numbering changes) to Revised Proposed Rule 1.6(b)(3)-(7) and associated Comment Paragraphs [7]-[13] and [15].
>
> Revised Proposed Comment Paragraph [15A] is new. It draws in part from language that was previously in Proposed Comment Paragraph [15] but expands on the discussion of the various rules related to disclosure of client information, emphasizing their interrelationships and complexity, and the need for attorneys' careful attention to disclosure issues.
>
> Attached are clean copies of the revised proposed rule, in both pdf and Word versions, as well as a redline showing changes from the initially proposed rule. Please let me know if the Committee can further assist the Court as it proceeds with its consideration of the proposed CRPC revisions.

The email was accompanied by the final version of the Committee's proposal for revised Rule 1.6, a copy of which is attached to these minutes as Appendix D, and a redline comparing that to Rule 1.6 as originally proposed by the Committee, a copy of which is attached to these minutes as Appendix E.

With the submission of the revision to the Court on April 4, 2007, the virtual meeting concluded.

Respectfully submitted,

Anthony van Westrum, Secretary

[These minutes are as approved by the Committee at its meeting on April 27, 2007.]

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COLORADO SUPREME COURT

STANDING COMMITTEE ON THE RULES OF PROFESSIONAL CONDUCT

Final Minutes of Electronic Virtual Meeting of the Full Committee
Conducted between April 12, 2007 and April 16, 2007
(Second Virtual Meeting Following Sixteenth Meeting of the Full Committee)

An electronic, virtual meeting of the Colorado Supreme Court Standing Committee on the Rules of Professional Conduct was conducted by emailed communications among the members of the Committee beginning on April 12, 2007 and concluding on April 16, 2007.

Actively participating in the virtual meeting were the following members: Chair Marcy G. Glenn, Justice Michael L. Bender, Federico C. Alvarez, Michael H. Berger, Gary B. Blum, Thomas E. Downey, Jr., John S. Gleason, John M. Haried, David C. Little, P. Kathleen Lower, Judge William R. Lucero, Cecil E. Morris, Jr., Helen E. Raabe, Henry R. Reeve, Alexander R. Rothrock, Boston H. Stanton, Jr., David W. Stark, Anthony van Westrum, James E. Wallace, Lisa M. Wayne, Judge John R. Webb, and E. Tuck Young. It may be presumed that most or all of the other members of the Committee observed the emailed communications of the active participants listed above.

By email on April 12, 2007, the Chair advised the Committee that she had been informed by Justice Michael L. Bender that the Court had approved the proposed Ethics 2000 Rules in their entirety as proposed by the Committee in December 2005, including the Rule 1.6 revisions the Committee had proposed on April 14, 2007. Justice Bender had indicated that there would be but one modification to the Committee' proposal — adding commentary for Rule 3.8 in response to comments filed by a number of district attorneys — and that the Court would make that modification without the Committee's assistance. (Justice Bender later clarified that the Court also rejected the Committee's April 2006 recommendations for amendments to the Comment to Rule 6.1 and the Model Recommended Pro Bono Policy included in that comment.) Justice Bender had also advised the Chair that the Court was likely to announce the adoption of the Ethics 2000 Rules in the near future, with an effective date of July 1, 2007.

The Chair's message pointed out that the July 1, 2007 effective date would mean that the Committee would have to mobilize quickly to make the continuing legal education presentations that it had planned and to provide materials for other groups that might wish to hold seminars on the Ethics 2000 Rules. She added that, since the Court has approved such minimal changes to the Ethics 2000 Rules as the Committee had proposed them, the Committee should not have to do a lot of retooling and should find its initial Report to be very useful in identifying the major amendments and the thinking behind them. She expected the question of continuing legal education to be a main agenda item for the Committee's next meeting on April 27, 2007.

To the Chair's message, a member responded as follows:

> Although bringing this to fruition is a great accomplishment for all, I am seriously concerned that an effective date of July 1, 2007 is unnecessary and unwise. The practicing bar, as a whole, should be given sufficient time to study and understand the numerous and complex issues concerning the new rules. July 1, 2007 is insufficient time.
>
> The committee should recommend to the Supreme Court that an effective date of no less than 6 months after adoption and publication.

Other members indicated that they, too, believed the effective date of the Ethics 2000 Rules should be delayed in order to allow time to educate the practicing bar about them.

In response to the emails, the Chair wrote—

> Since Justices Coates and Bender are receiving these emails concerning the effective date of the amendments, I think we can count on them to forward the concerns expressed to the full Court if they think that is appropriate. [To the members who have expressed concern about the effective date], are you suggesting that the committee should make a recommendation regarding the effective date? My own view is that that is probably not appropriate but I am interested in hearing other views.
>
> For context, I note that the Supreme Court initially adopted the CRPC on May 7, 1992, with an effective date of January 1, 2003. However, the changes made at that time were much more substantial than those being made now, although I recognize that the current amendments are extensive and not insignificant.

One of the members who had expressed concern responded to the Chair's inquiry, "Yes, I suggest that if the Committee believes that Colorado lawyers need training on the changes before they become effective, through CLEs, Colorado Lawyer articles, or other means, then the Committee should make that recommendation to the court."

Another added, "YES, the committee should and may have an obligation to recommend to the Supreme Court that additional time is necessary to inform and educate Colorado lawyers. In my opinion, an effective date 6 months after date of adoption and publication should be reasonable."

Upon those comments, the Chair concluded that an electronic motion had been made and seconded, and she asked the Committee members to vote "on whether the Committee should recommend to the Court that it defer the effective date to sometime after July 1 -- whether that be January 1, 2008, September 1, 2007, or some other date."

When the electronic tally reached a majority of fifteen affirmative votes for delay — with no negative votes — the Chair noted the motion had carried and stated that she would prepare a short email to the Chief Justice conveying the view of a majority of the voting members of the Committee, that the Court should defer the effective date until sometime after July 1, 2007, preferably no earlier than September 1, 2007.

The Chair's message to the Court, sent by email on April 16, 2007, read as follows:

> Good evening, Chief Justice Mullarkey,
>
> I write to you as Chair of the Court's Standing Committee on the Colorado Rules of Professional Conduct. Justice Bender notified me last week that the Court has voted to adopt the proposed amendments recommended by the Standing Committee, with only a few exceptions. That is wonderful news. The Standing Committee is pleased to have assisted the Court on this important project and looks forward to participating in efforts to educate lawyers about the amendments.
>
> I understand that the Court anticipates a July 1, 2007 effective date for the amendments. Members of the Standing Committee have serious concerns that a July 1 effective date would provide inadequate time to notify lawyers of the new rules, much less for lawyers to apprise themselves of the changes, which in many circumstances will significantly affect their ethical responsibilities. For example, CLE in Colorado does not anticipate being able to publicize and sponsor statewide-available programs on the rule amendments until June 27 and July 6. Moreover, it is unlikely that The Colorado Lawyer will be able to publish the amendments until its June issue.
>
> In light of the breadth and importance of the changes, a majority of the voting members of the Standing Committee recommend that the Court defer the effective date of the amendments until at least September 1, 2007. Based on the email responses I have

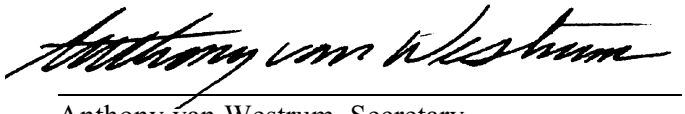
received thus far, no member of the Standing Committee is in favor of a July 1 effective date.

Respectfully,

Marcy G. Glenn

With the submission to the Court of the Committee's recommendation that the effective date of the Ethics 2000 Rules be delayed until at least September 1, 2007, the virtual meeting concluded.[1]

Respectfully submitted,



Anthony van Westrum, Secretary

[These minutes are as approved by the Committee at its meeting on April 27, 2007.]

1. Subsequently, the Court notified the Chair that the effective date of the Ethics 2000 Rules would be January 1, 2008. —Secretary

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COLORADO SUPREME COURT

STANDING COMMITTEE ON THE RULES OF PROFESSIONAL CONDUCT

Approved Minutes of Meeting of the Full Committee
On April 27, 2007
(Seventeenth Meeting of the Full Committee)

The seventeenth meeting of the Colorado Supreme Court Standing Committee on the Rules of Professional Conduct was convened at 9:00 a.m. on Friday, April 27, 2007, by Chair Marcy G. Glenn. The meeting was held in the Supreme Court Conference Room on the fifth floor of the Colorado State Judicial Building.

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

I. *Meeting Materials; Minutes of January 26, 2007 Meeting and of Electronic, Virtual Meetings in April 2007.*

The Chair had provided to the members, prior to the meeting date, submitted minutes of the sixteenth meeting of the Committee, held on January 26, 2007. Those minutes were approved as submitted.

The Chair had also provided to the members, prior to the meeting date, submitted minutes of an electronic, virtual meeting of the Committee that was conducted by emailed communications among the members of the Committee beginning on March 29, 2007 and concluding on April 4, 2007. The action taken in that manner were modifications to Rule 1.6 of the Ethics 2000 Rules, as that Rule had been submitted by the Committee to the Court in December 2005, which modifications had been requested of the Committee by the Court. Those submitted minutes were approved with (1) the addition of the names of other members who had participated in the virtual meeting; (2) the addition of a clarification regarding the Court's response to the proposal made by the Committee in April 2006 concerning the inclusion of a *pro bono* policy to the Rule 6.1 comments, and (3) other minor corrections.

And the Chair had provided to the members, prior to the meeting date, submitted minutes of an electronic, virtual meeting of the Committee that was conducted by emailed communications among the members of the Committee beginning on April 12, 2007 and concluding on April 16, 2007. The action taken at that virtual meeting was the proposal to the Court that it delay the effective date of the Ethics 2000 Rules to at least September 2007. Those submitted minutes were approved with the addition of the names of other members who had participated in the virtual meeting.

Justice Coats commented that the Court had found the minutes of the Committee's meetings to be very important to it during its review of the Ethics 2000 Rules as the Committee had proposed them for adoption in Colorado.

II. *Finalizing the Ethics 2000 Rules as Adopted by the Court.*

As reflected in the minutes of the electronic, virtual meeting of the Committee conducted between April 12 and April 16, 2007—

> [T]he Court had approved the proposed Ethics 2000 Rules in their entirety as proposed by the Committee in December 2005, including the Rule 1.6 revisions the Committee had proposed on April 14, 2007. Justice Bender had indicated that there would be but one modification to the Committee' proposal — adding commentary for Rule 3.8 in response to comments filed by a number of district attorneys — and that the Court would make that modification without the Committee's assistance. (Justice Bender later clarified that the Court also rejected the Committee's April 2006 recommendations for amendments to the Comment to Rule 6.1 and the Model Recommended Pro Bono Policy included in that comment.)

And, at the Committee's urging, the Court had delayed the effective date of the Ethics 2000 Rules until January 1, 2008.

The Chair reported to the Committee that the Court has directed the Office of Attorney Regulation Counsel to carefully review the proposed Rules for accuracy, cross-reference matching, and stylistic consistency, utilizing that office's proven expertise in such an endeavor, which it has developed by frequent checking of other proposed disciplinary rules. The expectation is that this effort will be completed by the end of May 2007, with the finalized Rules being posted on the Court's website at that time. The Chair and Michael Berger, chair of the Ethics 2000 Subcommittee, will work with OARC in this effort.

The Chair expressed her concerns about the continued website posting of the Rules as proposed by the Committee, given that they are likely to differ in some respects from the final, official version. The Chair also noted that it would be presumptuous for the Committee itself to announce, on the website, the official adoption of the Rules and their effective date.

With respect to modifications made by the Court, Justice Coats commented that the Court had not rejected all of the Committee's proposals for changes to the comments to Rule 6.1 as the minutes quoted above stated. Rather, the Court only rejected (1) changes the Committee had proposed to the *pro bono* policy statement itself, (b) the Committee's suggestion that the policy statement be moved out of the body of the Rules and into an appendix, and (3) reconciliation of terminology used in the Rule with Rule 260.8 governing the allocation of continuing legal education credits. The Justice noted that, because the Court did adopt some of the proposals for changes in Rule 6.1, there is some need for re-coordination of the related comments. The Court, he said, would work with the Office of Attorney Regulation Counsel to get those changes made.

Justice Coats also noted that a number of mistakes were made in the Committee's redlining of the changes proposed for Rule 6.1 and its comments; the redlining shows as new some changes that were actually made at the beginning of the century.

To the Chair's request for clarification, Justice Coats reported that the Court did adopt all of the changes originally proposed by the Committee for Rule 6.1 before its *pro bono* amendment. His and Justice Bender's references to rejection of the Committee's proposals for Rule 6.1 related only to the changes the Committee proposed in April 2006 to the Rule as it had been modified by the Court in November 2005 to add the *pro bono* policy statement.

The members proceeded to discuss what should be retained or deleted on the Committee's website.

In answer to a member's question about the redlining mistakes, Justice Coats said Appendix B to the Committee's report overstates the changes made, indicating that some text is new text when in fact it is a continuation of text from the current Rules.

A member recalled that participants in the 1992-93 effort to educate the Colorado bar about the changes wrought by the Kutak Rules had made substantive mistakes in their presentations, and he noted that those participating in the effort to educate the bar about the Ethics 2000 Rules will have to be careful about what they claim is "legislative history" and what is official and not just their personal views.

Another member suggested that the Committee remove Appendix B — the apparently overstated redline of the Ethics 2000 Rules — from the website and that it put up a corrected Appendix A consisting only of a "clean" set of the Rules.

Michael Berger, chair of the Ethics 2000 Rules Subcommittee agreed with that suggestion, noting that there are so many changes from the current Rules that the redlining is not particularly useful anyway.

Justice Coats noted that it had been appropriate for the Committee to post its proposals for public examination, because the process was in the drafting-and-comment phase when it did so. But, now that we are considering posting something reflecting the official, adopted version of the Rules, the Committee should not take action until the Court has put its approval on the final text.

In further discussion, one member suggested the redline would not be useful to most reviewers anyway; and another worried that the posting of too many tentative, temporary items would prove to be confusing. Some members favored simply adding a notice to the website explaining the Court's action. Some favored retaining Appendix B as is and still others sought its removal, noting that it does not itself serve any purpose as legislative history that is not served by Appendix A, the Committee's report, and the minutes.

Eventually, the Committee determined to post a notice, explaining that the material contained on the website is as it was proposed to the Court but that it is not the final text as approved by the Court, and to delete Appendix B. A member noted that this would salutarily reduce the confusion, explain what is retained, and refrain from saying what the new, official Rules are.

Accordingly, a motion was made, seconded, and adopted that a statement be posted on the Committee's website advising (1) that the Supreme Court announced on April 12, 2007, that it has repealed and reenacted the Colorado Rules of Professional Conduct, effective January 1, 2008; (2) that the reenacted Rules will differ in some respects from the proposal made by the Standing Committee on December 27, 2005; and (3) that the official text of the reenacted Rules will be posted on or about May 30, 2007. Appendix B will be deleted from the website.

III. *Education Subcommittee.*

The Chair noted that Judge Ruthanne Polidori, chair of the Ethics 2000 Rules education subcommittee, was not able to attend the meeting but had reported to the Chair that many lawyers are signing up with Judge Polidori to spread the word about the Ethics 2000 Rules, including at seminars conducted by members of the Colorado Bar Association Ethics Committee. A member of the Bar Association staff is maintaining a list of speakers for presentations at meetings of local bar associations and the like.

The Chair reported that Justice Bender, Committee member Cynthia Covell, Judge Shelley Hill, and others are speaking about the new Rules in Steamboat Springs at a combined meeting of the Agricultural Law and the Water Law Sections of the Colorado Bar Association in June. The Colorado

Trial Lawyers Association will cover the new Rules at a meeting in August, she said, and the Colorado Bar Association's Continuing Legal Education arm is planning programs, too.

The Chair noted that the Committee had previously discussed the prospect of putting together written materials directed toward education about the Ethics 2000 Rules, such as a prototype seminar outline; but she asked whether that was in fact a good use of our resources. Instead, she proposed, the Committee might serve as a repository for its report, making that available for use by presenters from various organizations. The Committee was in general agreement with that approach.

The Chair reported that she and Michael Berger had spoken together about writing an article for *The Colorado Lawyer* regarding the new Rules. She noted that their list of highlights for such an article had grown from ten to more than forty. The Chair said that Susan Bernhardt, editor of the Colorado Bar Association's Ethics Committee monthly column in *The Colorado Lawyer*, plans to run that article in that column and then follow up with future articles focusing on particular topics.

A member cautioned that the authors of those articles should not assume that lawyers have an intimate knowledge of the current Rules and need only be advised of the changes made in the Ethics 2000 Rules. Others agreed with that observation.

Another member added that the bar needs to be made aware that the Court's adoption of the new Rules will not automatically make them the Rules that are applicable in the Federal courts.

To that comment the Chair added that she is going to formally advise the Federal Committee on Conduct of the Colorado adoption of the new Rules. As in the past, she would expect the Federal system to choose not to implement the Colorado provisions permitting a lawyer to "unbundle" her services.

IV. *Proposal Regarding Advertising Rules*.

The Chair reported that she had received a call from a representative of the Colorado Trial Lawyers Association indicating that the CTLA will propose changes to the Ethics Rules governing advertising to make them more restrictive, as New York has recently done. She noted that the New York changes have been substantive and substantial, leading to ongoing litigation with a law firm known for its "outlandish advertising." The Chair summarized the New York changes as including some that Colorado has already made and others that are "extensive."

She told the Committee that she has invited the CTLA to make a proposal to the Committee if it wishes the Committee to consider the matter. She was told by the representative that the CTLA intended to do so and that it also intended to form its own committee to consider such changes.

V. *Members' Terms*.

The chair commented that there are no members whose terms will expire this year and, therefore, no need to consider extension of terms or the installation of new members.

VI. *More Discussion regarding the New Rules and the Federal Courts*.

A member asked which of the Ethics 2000 Rules, in addition to the unbundling provisions, might disturb the Federal courts. He noted that it can take the Federal courts some time to determine such matters, and he wondered whether it would be appropriate to give them particular notice of provisions that might trouble them.

The Chair noted that Judge Nottingham and, after him, Judge Figa have served on the Committee, so she was sure that the Federal courts will not be blind-sided by the Colorado Court's adoption of the new Rules. We have kept the Federal courts advised, she said, and she does not see other Rule changes giving rise to the same kind of concern that the unbundling rule change had caused.

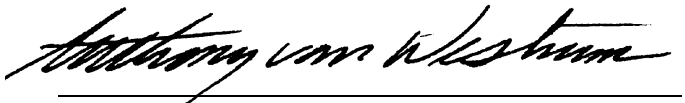
VII. *Rule 265 Issues.*

David Stark, chair of the subcommittee considering modifications to Rule 265 reported that the subcommittee is continuing to meet and work on some sticky issues. He anticipated one more such meeting before the subcommittee reports to the Committee at its next meeting.

VIII. *Adjournment; Next Scheduled Meeting.*

The meeting adjourned at approximately 10:05 a.m. The next scheduled meeting of the Committee will be on Friday, July 20, 2007, beginning at 9:00 a.m., in the Supreme Court Conference Room.

RESPECTFULLY SUBMITTED,



Anthony van Westrum, Secretary

[These minutes are as approved by the Committee at its meeting on July 20, 2007.]

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COLORADO SUPREME COURT

STANDING COMMITTEE ON THE RULES OF PROFESSIONAL CONDUCT

Approved Minutes of Meeting of the Full Committee
On July 20, 2007
(Eighteenth Meeting of the Full Committee)

The eighteenth meeting of the Colorado Supreme Court Standing Committee on the Rules of Professional Conduct was convened at 9:00 a.m. on Friday, July 20, 2007, by Chair Marcy G. Glenn. The meeting was held in the Supreme Court Conference Room on the fifth floor of the Colorado State Judicial Building.

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

I. *Initial Comments, Resignation of James E. Wallace.*

The Chair noted that, with the completion of the Committee's long effort with respect to the Ethics 2000 Rules, this and future meetings should be briefer than those of the past. This meeting, she said, would be devoted to Rule 265 of the Colorado Rules of Civil Procedure.

The Chair reported that she had received a resignation letter from James E. Wallace, who has been a member of the Committee from its inception. She thanked him for his service, noting specifically that he had brought important continuity to the Committee's Ethics 2000 Rules project from his service on the committee that labored on the Kutak Rules in the early 1990s. Prof. Wallace's letter referred to the completion of the Ethics 2000 effort as a basis for his decision to resign now from the Committee.

II. *Meeting Materials; Minutes of April 27, 2007 Meeting.*

Submitted minutes of the seventeenth meeting of the Committee, held on April 27, 2007, had been provided to the members in advance of the meeting. Those minutes were approved as written.

III. *Education Subcommittee.*

In the absence of Judge Polidori, the chair of the Education Subcommittee, the Chair reported that Judge Polidori has been busy overseeing the many requests for continuing legal education speakers on the Ethics 2000 Rules. Judge Polidori has assured the Chair that the effort is moving ahead at full force, with service to local bar associations and the Colorado Bar Association's Continuing Legal Education, Inc. No request has yet gone unfulfilled, although, the judge noted, there is a request from the Four Corners Bar Association that remains pending.

Cheryl Law, on the staff of the Colorado Bar Association, is serving as a liaison with the local bar associations in the education effort, and she has provided a list of speaking opportunities from the present through early September. The Chair solicited speakers from the Committee for such programs.

The Chair noted that she, Michael H. Berger, and David C. Little have already participated in two well-attended seminars on the Ethic 2000 Rules; the first of them had over 250 registrants.

The Chair estimated that 400 or 500 Colorado lawyers have already heard presentations concerning the Ethics 2000 Rules. Continuing Legal Education, Inc. is seeking speakers for a "long program" on September 14, 2007. The Chair noted that she and Berger have prepared written materials that are available for speakers' use, including an outline Berger has extracted from the article that will run in the August issue of *The Colorado Lawyer*.

That *Colorado Lawyer* article will include a full copy of the new Colorado Rules of Professional Conduct. Susan Bernhardt, the chair of the Colorado Bar Association's Ethics Committee and editor of its regular column in *The Colorado Lawyer*, will solicit extended articles on particular rules and topics related to the new CRPC for subsequent issues of that publication.

IV. *Rule 265 Subcommittee.*

The Committee's Rule 265 Subcommittee had been formed at the Committee's fourteenth meeting, on April 27, 2006, following an explanation by David Little, at the Committee' thirteenth meeting, on March 3, 2006, of the interplay between Colorado Rule of Civil Procedure 265 and the arbitration, mediation, and other neutral services often rendered by lawyers from within the professional companies governed by Rule 265. In addition to considering the implications of Rule 265's limitation of activities from within professional companies to the "practice of law," the Subcommittee was charged with review of the professional liability insurance provisions contained in Rule 265, which have often been characterized as obsolete in view of the products sold by the insurance industry.

At the Chair's invitation, David Stark, chair of the Rule 265 Subcommittee, reported on the Subcommittee's work over the intervening year and a quarter. He referred the members to the Subcommittee's written report that had previously been distributed to the members, a copy of which is appended to these minutes.

Stark reminded the members that Rule 265 currently permits lawyers to practice law through "professional companies" but states that such professional companies may be formed "solely for the purpose of conducting the practice of law." Yet many lawyers in professional companies provide other services in addition to those that are contained within the concept of "the practice of law" — services such as arbitration, mediation, and other "alternative dispute resolution" services, expert witness services, services as consulting experts, and the like. Some of them have recognized that those services technically cannot be rendered through a professional company; they have frankly relied on a sense that the Attorney Regulation Counsel would not choose to shut down those practices. Other lawyers have simply been unaware that Rule 265 presents a problem.

And, Stark noted, Rule 265 arbitrarily distinguishes between lawyers practicing law from within professional companies — which are the only lawyers covered by its strictures — and those who practice as solos or in general partnerships that are not professional companies.

Early in its deliberations, Stark reported, the Subcommittee determined that there was no need for Rule 265 to say anything at all about what lawyers can do from within professional companies. The ethics rules are the proper locale for rules governing the conduct of lawyers, and all that Rule 265 might say about lawyers' conduct can be put in the ethics rules, leaving Rule 265 to deal only with the issue of vicarious liability among lawyers within professional companies and the minimum professional liability insurance coverage that might be required as a condition to escaping vicarious liability. In particular, he noted, the Subcommittee decided not to consider what, if any, restrictions might be placed upon

alternative dispute resolution services, expert witness services, and other such services that lawyers might provide.

Stark noted that the Subcommittee wrestled with the question of whether — to avoid vicarious liability — professional companies should carry insurance that protects against acts occurring, or claims made, within the policy periods. It is understood that the insurance industry now writes only policies that contain "claims made" provisions, although the Subcommittee recognized that the Rule could be written to require the professional company to have in effect a claims-made policy that would cover any particular claim if the lawyers who had practiced within that professional company, at the time the act occurred on which that particular claim was based, were to be absolved of vicarious liability for it — in effect, a requirement for long "tail" coverage.

But the Subcommittee determined *not* to impose such a requirement and, instead, to continue the existing Rule's less onerous requirement that the professional company need have insurance covering a claim only at the time the act occurred on which the claim might be based and not later when the claim might actually be made.

Stark said the Subcommittee was principally concerned about the impact the alternative requirement would have on lawyers, given their mobility and the fragility of the professional companies through which they practice law. In that context, the alternative requirement would leave lawyers exposed to vicarious liability long after they departed from professional companies in which they had been members, if, after their departure, the professional company was dissolved or failed, through no fault of their own, to maintain insurance covering the claim.

Stark noted that the Subcommittee understood that this determination might create a misconception among the public — they might expect that their claims would be covered by insurance whenever the claims were made — but the Subcommittee determined that misconception was unavoidable, and it concluded that the current provision in Rule 265 should remain unchanged.

The Subcommittee has, however, proposed some modifications to Rule 265, shifting to Colorado Rule of Professional Conduct (CRPC) 5.4 all provisions prohibiting nonlawyer ownership of professional companies, regulating lawyer conduct, and the like. And it has proposed the addition of some definitions of terms in Rule 265 and in CRPC 1.0 to accommodate the proposed changes.

The Subcommittee's report, Stark pointed out, includes (a) extracts from minutes, (b) the proposed revised Rule 265, (c) a redline comparison of the proposed revision against the current text of Rule 265, with comments, and (d) proposed revisions to CRPC 1.0 and CRPC 5.4.

Recognizing that the Subcommittee's decisions to which he had referred regarding the insurance provisions were among the most significant of its recommendations, Stark asked Michael Berger to amplify on the Subcommittee's deliberations and how it "broke the logjam."

Berger first pointed out that current Rule 265 does not alter or limit the general, direct liability of the lawyer who commits professional misconduct. The rule only speaks to the vicarious liability of other lawyers who are equity owners in the professional company through which that lawyer renders legal services.

Like other members of the Subcommittee, Berger had opposed alteration of Rule 265 to require, as a condition to escaping that vicarious liability, the maintenance of professional liability insurance at the time a claim for the lawyer's misconduct is made. He noted, as an example of the difficulties such a change would entail, the problem of stale claims being made in a probate or real estate context perhaps decades after the professional misconduct occurred and years after the professional company from which

the professional misconduct occurred was dissolved. To subject the other lawyers who had been equity owners of that professional company to vicarious liability decades after they had severed their relationship with the acting lawyer would be unreasonable. Not only might they have no actual knowledge of the misconduct, they also might have no practical way to ensure that "tail insurance" be maintained to cover the claim through all the intervening years.

The Chair pointed out that the Subcommittee's written report — and in particular its commentary in the redline comparison of its proposal to existing Rule 265 — provides a detailed explanation of the matters Stark and Berger had spoken to. She asked for comments from the Committee members about the proposal.

A member — who had been a member of the Subcommittee — reminded the Committee that the Supreme Court's Standing Committee on the Rules of Civil Procedure has co-jurisdiction over these issues and is interested in both the "practice of law" issue and the insurance issue. The member noted that Stark will submit this Committee's proposal to that Civil Rules Committee for its consideration. In essence, there will be a "hybrid" committee composed of both entities that will consider the issues. But, he noted, the Civil Rules Committee will not consider the matter until its August meeting, at the earliest.

This member forecast that the Civil Rules Committee will thoroughly discuss the insurance issues but will, in the end, adopt the position that the Subcommittee has proposed, as explained by Stark and Berger.

In answer to the Chair's inquiry about how the Committee should proceed in light of the existence of another committee with an interest in the same topic, the members decided to proceed with the Committee's own deliberations, expecting the Civil Rules Committee to do the same independently and expecting the two committees then to reconcile their positions much as the house and senate of a legislative body do in their processes.

A member asked for a clarification of vicarious liability versus direct liability in the context of Rule 265. In reply, another member — who had been a member of the Subcommittee — explained that professional liability insurance policies cover claims that meet two conditions: (1) The claims must *occur* during the "prior acts" period of coverage specified in the policies and (2) the claims must be made during the current policy period. In underwriting an attorney or law firm, he explained, the carrier wants current information — what kind of practice does the lawyer or law firm now have. The carrier does not want to cover twenty-year old claims under a policy written under today's conditions. The policy is thus narrowly written to cover only claims made during the current policy period, but the policy is, in a sense, *extended* back in time by providing "prior acts coverage" back to the period when the lawyer or law firm first began a chain of continuous coverage. As a result, any particular claim can be thought of as having been underwritten under "current information" throughout the period of its pendency.

Further, because the policies are written to cover all of the lawyers in the law firm, they cover both the direct liability of the lawyer whose acts created the professional liability and the vicarious liability of the other owners of the professional company, who are made jointly and severally liable by Rule 265 (or who would be jointly and severally liable under the Rule but for the carrying of insurance applicable to claims against them).

The member explained that, in its original formulation of Rule 265, the Supreme Court wanted to maintain — for the professional corporation in which applicable legislation provided limited liability to all shareholders — the idea of the traditional practice of lawyers in general partnerships, where the law governing general partnerships created joint and several liability for all partners. The Supreme Court accomplished this goal by providing that the lawyers who wished to practice through professional corporations would have to agree to joint and several liability for professional misconduct

notwithstanding the limited liability afforded to them by the laws governing corporations, unless their professional corporations maintained minimum levels of professional liability insurance.

In summary, he said, each claim presents direct liability to the acting lawyer and vicarious liability to the co-equity-owners of her professional company. Rule 265 does not alter the direct liability but both extends vicarious liability to the co-equity-owners and cuts off that vicarious liability if sufficient professional liability insurance is maintained.

The member went on to explain that the Subcommittee had considered shifting the Rule 265 insurance requirements to the "claims made" concept, since that is the way insurance is actually written. But, he recounted, Berger had pointed out the adverse impact that such a change could have on a person who left a professional company to become a solo practitioner: Years later he might become liable for the acts of other lawyers who had practiced through his former law firm just because that former law firm had not maintained continuous coverage until the present time. Such a structuring of Rule 265 would expose a departed lawyer to unlimited liability for everything the lawyers in his former law firm had done "way back when," without a concomitant ability to protect against that liability by maintaining his own insurance, because his "prior acts coverage" would not reach back to cover claims accrued by other lawyers with whom he had earlier associated. Any possible "tail coverage" to cover such claims would be excessively expensive.

In answer to the Chair's question about whether the Subcommittee had considered altering the coverage amounts of insurance that the Rule would require to be maintained as a condition to avoiding vicarious liability, Stark replied that it had discussed the amounts of insurance but determined not to recommend any change to the currently stated amounts.

With respect to coverage amounts, the member who had expounded on the insurance issues added that members of the Subcommittee had spoken informally with agents for a couple of the carriers writing professional liability insurance for Colorado lawyers. Those agents were of the view that, if the Court increased the coverage requirements, some fraction of those lawyers who carry only the current minimum amounts would drop their coverage rather than acquire more expensive coverage. On the other hand, those who now choose to maintain higher levels of coverage for their own protection would not alter their coverages because of the change. The net effect, then, of imposing an increase in coverage amounts would be simply to reduce the number of lawyers who carry any coverage whatsoever. The member said that the goal of the Subcommittee's recommendation, in light of these considerations, was to get the maximum amount of coverage, net, for all Colorado lawyers combined.

As an aside, this member noted that some carriers have suggested dropping the duality of policies that state separate coverages for individual and aggregate claims made during a policy period. He said that, although that idea was intriguing, the Subcommittee did not tackle it and, instead, continued to reflect the duality in the text of Rule 265.[2]

Stark pointed out that the Attorney Regulation Advisory Committee is considering the issue of mandatory professional liability insurance coverage for lawyers, and he suggested that that is a better forum for consideration of the amounts required for policies.

Alexander Rothrock, who had also served on the Subcommittee, then explained the Subcommittee's proposal for changes to CRPC 5.4 and corresponding changes to the definitions rule, CRPC 1.0. He characterized these proposals as dealing with "straightforward ethical issues." Overall, he noted, CRPC 5.4 as contained in the repealed and reenacted Rules of Professional Conduct was amenable to modification to take over the ethical issues that are currently implicated by Rule 265. The

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2. See CRCP 265(a)(3)(iii) as set forth in Attachment B to the Subcommittee's report. —*Secretary*

shifting of those matters from obscurity in Rule 265 to more prominence in the ethics rules was a salutary result.

Rothrock pointed out that Paragraph II.C of current Rule 265 permits a professional company to have directors or managers who are not themselves lawyers, so long as they do not "exercise any authority whatsoever over any of the professional company's activities relating to the practice of law." That is contrary to Rule 5.4 as contained in the American Bar Association's Model Rules of Professional Conduct, but it has not caused difficulties in Colorado; thus, the Subcommittee proposed carrying the Colorado concept over to CRPC 5.4(d)(2).

Rothrock noted that the Subcommittee determined to drop altogether — from both Rule 265 and CRPC 5.4 — the provision in existing Paragraph II.D of Rule 265 requiring that a lawyer dispose of her equity interest in her professional company when she ceased to be eligible to hold that equity interest under the terms of the Rule. The Subcommittee determined that the rules as it proposed them to be modified inherently require such a disposition, so that it need not be expressed in those rules.

Rothrock pointed out that the Subcommittee's proposed revisions to CRPC 5.4 extend its reach to a lawyer's affiliation with "nonlawyers" and precludes ownership of interests in professional companies by nonlawyers. The term "nonlawyer" is already used in a number of other Rules, without definition. Accordingly, the Subcommittee created, in CRPC 5.4(f), a definition of the term but for application only in CRPC 5.4.

The Subcommittee defined the term "nonlawyer" to include a disbarred lawyer and a lawyer who has been suspended for a term sufficient to require an application for reinstatement. If a lawyer has been suspended for a period in excess of a year, he will probably have to petition for reinstatement. As a result of the "nonlawyer" definition, that lawyer will become a "nonlawyer" and will not be permitted to maintain his equity interest in any law firm during the period of suspension. Rothrock noted that this will impact both the suspended lawyer and the other lawyers in the firm. Similarly, the definition of "nonlawyer" will include any lawyer who has, for six months or more, been placed on disability inactive status (whether because of physical injuries in an auto accident, alcoholism, or other cause) or suspended for nonpayment of child support, failing to maintain his attorney registration or to meet his continuing legal education requirements, or failing to cooperate in an investigation conducted by Attorney Regulation Counsel. Rothrock noted that the resulting obligation to dispose of the lawyer's investment in his law firm may well be unfair; and he added that there was no magic to the six month cutoff time that was selected by the Subcommittee. These were "policy decisions" made by the Subcommittee, and Rothrock commented that one might conclude that divestment should be required from the start of any administrative disability.

Rothrock added that these obligations to dispose of equity interests in professional companies will present real problems to lawyers who are the sole or majority equity owners of law firms employing a number of other lawyers. Nevertheless, the Subcommittee determined that there would be practical difficulties, as well as issues of public perception, if disbarred lawyers were permitted to continue ownership of law firms. It is but a slope from the disbarred lawyer to the lawyer who is suspended for a mere six months for a physical disability, but that was a slope the Subcommittee felt a need to descend.

A member asked whether the terminology would be clearer if expressed affirmatively as "A lawyer practicing with or in the form of a professional company shall comply with C.R.C.P. 265," rather than as the Subcommittee has put it in CRPC 5.4(e): "A lawyer shall not practice with or in the form of a professional company except in compliance with C.R.C.P. 265." Rothrock pointed out that the Subcommittee's version is a continuation of the current language found in CRPC 5.4(d).

A motion was made and seconded that the Subcommittee's recommendations for changes to Rule 265 and CRPC 5.4 be accepted without change and be proposed to the Court following consideration by the Standing Committee on the Rules of Civil Procedure and any required conferring between the two committees. That motion carried.

The Chair thanked the Subcommittee members for their work.

V. *Lawyers' Manual on Professional Conduct Article on Colorado Adoption of Ethics 2000 Rules.*

The Chair referred the members to a recent issue of "Current Reports" in the American Bar Association / BNA publication *Lawyers' Manual on Professional Conduct,*[3] which contains an article reviewing the Ethics 2000 Rules as they have been adopted by the Colorado Supreme Court. The article highlights the Colorado modification permitting law firms "to use screening to prevent imputation of conflicts from a lawyer's work at a prior law firm if the lawyer did not participate substantially in the former client's representation."

VI. *Notification of Federal Courts of Colorado Adoption of Ethics 2000 Rules.*

The Chair reported that, on June 20, 2007, she sent a letter to Chief District Court Judge Nottingham advising him that the Colorado Supreme Court has repealed and reenacted the Colorado Rules of Professional Conduct with a January 1, 2008 effective date. Her letter reminded Judge Nottingham that the current CRPC have been adopted for application in the United States District Court for the District of Colorado, excluding only the rule related to the "unbundling" of legal services. Unless and until the District Court adjusts its adoption of pre-2008 Colorado Rules of Professional Conduct, those rules, rather than the new CRPC, will continue to apply in the District Court; the Chair commented that, among the difficulties that may cause, it will be difficult for lawyers to secure copies of those out-of-date rules. The Chair noted that she is a member of the United States District Court Committee on Conduct, which committee has recommended to the District Court that it adopt the new CRPC, subject to whatever action that court chooses to take with respect to "unbundling" and other specific issues. It is to be hoped that the District Court takes action before the effective date for the new CRPC at the state level.

VII. *Issue Regarding Interpretation of CRPC 1.15(i)(6).*

The Chair reported that a lawyer who is not a member of the Committee has questioned whether, under CRPC 1.15(i)(6), a lawyer — rather than a nonlawyer staff member of a law firm — must actually reconcile the law firm's COLTAF bank statements. The provision in question reads, "No less than quarterly, a 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)." The members noted that this language is to be compared with other references in CRPC 1.15 (such as CRPC 1.15(i)(2)) that contemplate action by "a person supervised by [a] lawyer"; the difference creates a fair basis for reading CRPC 1.15(i)(6) to indeed require direct lawyer action and not merely indirect supervision of the reconciliation process.

The Committee was not of one mind about whether it was proper or a mistake to require direct lawyer participation in the reconciliation process, with at least one member expressing the view that a lawyer *should* be doing the reconciliation or, at least, that the Committee should consider the matter carefully before concluding that there is a mistake in CRPC 1.15(i)(6) that needs fixing.

The Chair and several other members pointed out that this example raises the question of how the Committee should deal with errors or questions that are spotted or raised in the future concerning the

3. Vol. 23, Nº 13, *Lawyers' Manual on Professional Conduct*, June 27, 2007.

text of the new CRPC. The Chair noted that the Ethics 2000 Rules Subcommittee has not been constituted a standing subcommittee of the whole Committee; thus all such issues will initially come before the whole Committee. A suggestion from another member that a such standing subcommittee be considered was not adopted.

The discussion led to a more general discussion about the Committee's role in future amendments to the new CRPC as those rules have been adopted by the Court. It was noted that, historically, Regulation Counsel has communicated directly with the Supreme Court when Regulation Counsel has proposed changes to the CRPC. But it was also noted that the Committee is a new creation of the Court, now standing available to consider proposals for changes whether coming from Regulation Counsel or other quarters. The Committee has particular expertise in all of the CRPC, which might be applied to advantage in the case of any particular suggestion for amendment; that expertise, for example, might enable the Committee to spot hidden, unintended consequences that others might miss when making or considering proposals for change. The members clearly thought that the Committee should be involved whenever anyone proposes CRPC amendments to the Court.

As to the immediate issue of CRPC 1.15(i)(6), the Chair appointed Rothrock to chair an *ad hoc* subcommittee to look into the matter.

VIII. *Adjournment; Next Scheduled Meeting.*

The meeting adjourned at approximately 10:20 a.m. The next scheduled meeting of the Committee will be on Friday, October 19, 2007, beginning at 9:00 a.m., in the Supreme Court Conference Room.

RESPECTFULLY SUBMITTED,

Anthony van Westrum, Secretary

[These minutes are as approved by the Committee at its meeting on November 30, 2007.]

REPORT OF THE RULE 265 SUBCOMMITTEE TO THE SUPREME COURT STANDING COMMITTEE ON THE RULES OF PROFESSIONAL CONDUCT JULY 20, 2007

Attached to this report are—

Attachment A: Extracts from Minutes of the Standing Committee regarding Rule 265
Attachment B: Subcommittee Proposal for Modifications to Rule 265
Attachment C: Comparison of Subcommittee Proposal to Current Rule 265, with Commentary
Attachment D: Comparison of Subcommittee Proposal to Current Rule 265

The Rule 265 Subcommittee was established by the Chair of the SCSCRPC following the thirteenth meeting of the Committee on March 3, 2006. The Subcommittee is chaired by David W. Stark, and its other members from the SCSCRPC are Michael H. Berger, Nancy L. Cohen, Thomas H. Downey, Jr., David C. Little, Alexander Rothrock, Anthony van Westrum, and Judge John Webb. In addition, James E. Bye, Charles Kall, and Robert R. Keatinge participated from the bar at large.

The Subcommittee was formed to review two aspects of current Rule 265, CRCP: (1) its limitation of the permitted activities of "professional companies" to "the practice of law" and (2) its provisions for the insurance coverage that must be maintained if the owners of professional companies are to avoid vicarious, joint and several, liability for the conduct of other lawyers practicing law through the professional company.

Attachment A to this report contains extracts from the minutes of the SCSCRPC wherein the members discussed the need to consider amendments to Rule 265 with respect to those aspects.

The Practice of Law

Rule 265.I.A.2 currently provides, "The professional company shall be established solely for the purpose of conducting the practice of law . . .," yet a large number of lawyers who are partners in professional companies provide services as neutrals in arbitrations, mediations, and other alternative dispute resolution processes; services as consulting experts and testimonial experts regarding legal and professional conduct topics; and other services that are not "the practice of law." Many have done so without awareness that those services may be technically beyond the scope of services that may be provided from within a "professional company" under current Rule 265. Others have done so with awareness of the issue but in hope that the disciplinary authorities would regard the issue as a technical "glitch" and would not pursue sanctions for their ostensibly impermissible activities. And Rule 265 creates an unjustified divide between the kinds of services that may be rendered by solo practitioners or by lawyers who are partners within law firms formed as general partnerships — and therefore are not subject to the Rule — and those that may be provided by lawyers who are owners or employees of "professional companies."

At the March 3, 2006 meeting of the SCSCRPC, David Little recounted the drafting history of Rule 265 and noted that,"In [his] view, the Court added [the existing limitation of activities to 'the practice of law'] principally as a definition, as a recognition that is what law firms do, and not as a conscious prohibition against activities that lawyers have traditionally provided but which are not "the practice of law."

From the commencement of its work, the Subcommittee was in agreement that Rule 265 did not need to restrict the activities of professional companies to the practice of law. Rather, the Subcommittee agreed, the kinds of activities that lawyers may engage in, whether from within professional companies or otherwise, are properly a subject for the Rules of Professional Conduct rather than Rule 265. Rule 265 need only deal with the liability undertaken by lawyers who practice through professional companies, providing that such liability will be joint and several unless insurance of the stated characteristics is maintained.

The Subcommittee also agreed that it need not consider whether lawyers should be permitted to provide ADR, expert witness, or other such services. Those matters are adequately provided for by what will be new Ethics 2000 Rule 2.4 (Lawyer Serving as Third-Party Neutral) and Rule 5.7 (Responsibilities Regarding Law-related Services), and by the other provisions of the Rules of Professional Conduct that deal with such related matters as the sharing of legal fees with nonlawyers.

Insurance

The second focus of the subcommittee's work concerned the aspects of Rule 265 that concern professional liability insurance. Under the current Rule, the owners of a professional company are shielded against vicarious, joint and several, liability for professional acts, errors, and omissions of the lawyers rendering legal services through that professional company only if the professional company maintains professional liability insurance coverage at the time the professional act giving rise to the liability claim is committed.

The Subcommittee members discussed at great length the concern that requiring coverage to exist at the time the act, error, or omission occurs, but not at the time at which a claim is made or reported, creates an illusion that the conduct for which liability is claimed would continue to be covered simply because it was covered at the time the conduct occurred. This concern emanated from the nature of the claims-made form of professional liability coverage. Professional liability policies are not issued on an occurrence-only basis. Rather, these policies require notice of a claim to be reported during the period of time the policy is in effect and also require that the conduct giving rise to the claim of liability have occurred during the policy period or during any endorsed extensions of that policy period (known as prior acts coverage).

In practice, it is common for an act, error, or omission to occur during a policy year but not be discovered or reported until several years later. When the claim is subsequently made, the policy under which coverage is sought is not the same policy as the one that existed when the conduct occurred; indeed, when the claim is subsequently made, there may be no insurance coverage at all. For the conduct to be covered, there must be a policy in place that cover the claim at the time the claim is reported.

The Subcommittee thoroughly discussed this conundrum and eventually concluded that the Rule should *not* be changed so as to require coverage to exist at the time the claim is reported. After extended discussion of potential claims and circumstances, the Subcommittee concluded that a change in the Rule to require coverage at the time the claim is reported created far more difficulty and greater inequities then are inherent in the present Rule. Not the least of these was the concern for lawyer mobility and the fragility of professional companies, which tend to expose lawyers to uninsured claims upon departing from existing professional companies without any means of ensuring professional coverage at the time, later, when a claim might be made. Since the entire focus of the insurance requirement of Rule 265 is on the vicarious liability of one lawyer for another's conduct and does not limit the acting lawyer's own, direct liability, the Subcommittee felt it was appropriate to leave the Rule in its present configuration.

Conforming Modifications to the Ethics 2000 Rules

As noted above, a guiding principle for the Subcommittee was that the Rules of Professional Conduct, and not Rule 265, should govern the conduct of lawyers. In general that is already the case, but current Rule 265 contains some specific conduct-related provisions, particularly those in Part II that limit the controlling persons of professional companies to licensed attorneys. The Subcommittee's solution was to propose the addition to Rule 5.4 of provisions (a) precluding nonlawyer ownership of professional companies and (b) precluding the control of lawyer's conduct within professional companies by nonlawyers (Rule 5.4(d)(2)). These provisions fit neatly in with the existing provisions of Rule 5.4, which govern the relationship between a lawyer and other persons that may restrict the lawyer's professional independence.

Use in modified Rule 5.4 of the term "professional company" required the addition of the term as a definition in Rule 1.0 and modification of the existing definitions of "firm" and "partner."

Commentary

Attachment C is a comparison of Rule 265, as the Subcommittee recommends it be modified, with the current Rule. The attachment contains provision-by-provision commentary outlining the reasons for specific changes.

EXTRACTS FROM MINUTES
OF THE
SUPREME COURT STANDING COMMITTEE ON THE RULES OF PROFESSIONAL CONDUCT
REGARDING RULE 265

1. *January 9, 2004 — Second Meeting of the Full Committee*

[A member] reported that the Colorado Bar Association's Ethics Committee has appointed a subcommittee to consider ethical issues for lawyer neutrals. Among the issues the subcommittee has been considering is whether the lawyer neutral can be considered to be practicing law, both for purposes of the Rules of Professional Conduct and for purposes of Rule 265. The subcommittee may await the adoption of some version of the Ethics 2000 Rules in Colorado before finalizing an opinion.

2. *June 11, 2004 — Fourth Meeting of the Full Committee*

[Discussing the issue of mandatory malpractice insurance.] A member noted her skepticism that insurance could really provide protection for clients. At the levels presently called for by Rule 265, defense costs can often eat up coverage limits, leaving little for client recoveries. Another member responded that the Oregon experience indicates that many claims are small, of $4,000 or $5,000 amounts. The Oregon system avoids defense cost burdens by promptly assessing claims and paying most small claims without defense. In her view, Colorado is simply not ready for that kind of program. A member noted that Colorado doctors have the COPIC system, which plays a similar role to the lawyer malpractice program in Oregon, but that organization has a limitation on losses and can thus do a proper actuarial analysis of the claims cost that is going to be borne by the system. Similarly, in Oregon the coverage that is provided is actually very small, and many lawyers carry additional insurance to protect their assets.

3. *May 20, 2005 — Ninth Meeting of the Full Committee*

[Discussing Rule 2.4, Lawyer Serving as Third Party Neutral.] The Committee found the Rule and its comments to be acceptable but turned briefly to a discussion of the implications under Rule 265, C.R.C.P., of a lawyer's provision of neutral services — arbitration or mediation — from a "professional company" contemplated by that rule. Rule 265 requires that all professional companies "be established solely for the purpose of conducting the practice of law," and yet the provision of neutral services as an arbitrator or a mediator is not the practice of law, as evidenced both by the fact that the neutral does not have a client and by the fact that many neutrals are not lawyers and yet are not deemed to be engaged in the unauthorized practice of law when they serve as neutrals.

Ostensibly, then, a lawyer who serves as a neutral from within a professional company, taking fees for that service into the accounts of the professional company, violates Rule 265; and yet it is apparent that many lawyers presently do just that and have not established separate entities from which to provide that kind of service. Cognizant that its jurisdiction extends only to the Colorado Rules of Professional Conduct and not to the Rules of Civil Procedure, the Committee determined that its report on Rule 2.4 would note the problem and suggest that Rule 265 be changed to clarify that lawyers may provide neutral services from their professional companies.

4. *July 19, 2005 — Tenth Meeting of the Full Committee*

[Discussing Rule 5.4, Professional Independence of a Lawyer.] Berger told the Committee that the Ad Hoc Committee recommended a version of Rule 5.4 that is a combination of the ABA Ethics 2000 version and the existing Colorado Rule, and the Subcommittee makes the same recommendation. Rather than retaining the ABA's substantive discussion of the characteristics of a professional corporation from which a lawyer may practice law, the recommended version of the Rule makes a cross-reference to Rule 265, CRCP, in which the Court has specified the characteristics of a "professional company" and which deals specifically with issues alluded to in the ABA Ethics 2000 version.

5. *March 3, 2006 — Thirteenth Meeting of the Full Committee*

V. *Consideration of Amendment to Rule 265 Regarding Its Limitation of Professional Company Activity to "The Practice of Law."*

David Little, who serves on the Court's Standing Committee on the Rules of Civil Procedure as well as on this Committee, asked the Committee to consider an amendment of Rule 265, C.R.C.P. to eliminate its apparent prohibition against the provision of arbitration, mediation, expert witness and other such services by lawyers from within professional companies formed pursuant to the rule.

Little said the history of Rule 265 is obscure, driven by the tax laws of the 1960s and not by any goal of defining or confining permitted modes of law practice. At the time of its adoption, the Legislature was modifying the statutes governing other professions to allow those professionals to practice from within corporations so that they could gain the benefit of special tax laws governing retirement programs. Because the Court, not the Legislature, regulates lawyers in the practice of law, it was incumbent on the Court to fashion a similar rule to permit lawyers to practice law from within corporations and thus obtain the same tax benefits.

But corporate law provided limited liability to the corporate shareholders, whereas lawyers practicing in the traditional partnership mode had borne joint and several liability for each partner's malpractice. The Court could not alter the statutory grant of limited liability to corporate shareholders, but it could require lawyers, as a condition to practicing from within corporations, to agree to continue to bear joint and several liability for malpractice claims against their corporations unless they caused the corporation to maintain certain minimums of insurance coverage. Thus, adoption of Rule 265 enabled the Court to encourage lawyers generally to obtain professional liability insurance.

In drafting Rule 265, the Court limited the permitted conduct of "professional corporations" formed pursuant to it to "the practice of law."[4] In Little's view, the Court added that limitation principally as a definition, as a recognition that that is what law firms do, and not as a conscious prohibition against activities that lawyers have traditionally provided but which are not "the practice of law."

But, over time, with the growing propensity for lawyers to provide alternative dispute resolution services, such as arbitration and mediation, and to serve as expert witnesses, a concern has developed

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4. Rule 265.I (which now encompasses limited liability companies and other entities in addition to corporations, in the phrase "professional company) provides—

> All professional companies conducting the practice of law in Colorado shall comply with the following requirements:
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> . . . .
>
> 2. The professional company shall be established solely for the purpose of conducting the practice of law, and the practice of law in Colorado shall be conducted only by persons qualified and licensed to practice law in the State of Colorado.

that Rule 265's limitation on the activities of lawyers who practice from within professional companies to "the practice of law" might preclude their provision of those services, which are generally conceded not to be the practice of law. In short, a lawyer in a professional corporation or other professional company governed by Rule 265 might, by a literal reading of the rule, not be permitted to provide such services through that entity. And yet it is commonly understood by the lawyers in such a law firm that fees generated by such activities will be shared among the equity owners as are fees from legal services.

Little noted that lawyers who practice in general partnerships are not similarly precluded from rendering these other kinds of services from those entities, and lawyers practicing as sole proprietors may render those services along with legal services.

Contemporaneously with the recognition of the unintended consequences of the limitation to "the practice of law," it has been recognized that the form of professional liability insurance that is made available by the carriers has changed from "occurrence"-based coverage offered in the 1960s to "claims-made" coverage. But the rule continues to contemplate the occurrence-based coverage and has not been revised to accommodate claims-made coverage. As a result, a lawyer can comply with the insurance requirements of the rule by having malpractice insurance coverage at the time he commits malpractice but may thereafter drop coverage and be uncovered at the time the claim for that malpractice is made. Thus, the benefit to the public of the insurance requirements of the rule are illusory.

These two issues — the ostensible preclusion of alternative dispute resolution, expert witness, and similar services from within law firms organized as professional companies and the failure to recognize current insurance structure — have led to suggestions for a reexamination of Rule 265.

Little pointed out that Rule 265 has traditionally been within the purview of the Court's Standing Committee on the Rules of Civil Procedure. But, he noted, Rule 5.7 as proposed by this Committee as a part of its Ethics 2000 recommendations, will recognize that lawyers may provide "law-related services" and will regulate their conduct when they do so. Clearly, Rule 265 does not contemplate "law-related services." Adoption of Rule 5.7 would create a conflict between that Rule and Rule 265, one which ostensibly could be resolved only by not practicing from within a professional company but, rather, as a general partner or as a sole proprietor.

Little noted that Rule 265 is not really a rule of civil procedure. Rather, it is a rule of conduct or status. Little has asked the chair of the Civil Rules Committee to transfer "jurisdiction" of Rule 265, and that chair has agreed to do so. The Chair, however, interjected that she has spoken with the chair of the Civil Rules Committee and together they have agreed not to a transfer of jurisdiction but to a joint effort to revise Rule 265. As she put it, because of the impact of Rule 265 on Rule 5.7, and vice versa, it makes sense for both committees to look at the issues.

Little suggested that this Committee take no action on Rule 265 until after the Court has acted upon its Ethics 2000 proposal. He noted that the Civil Rules Committee already has a subcommittee considering Rule 265, comprised of several members of this Committee (Little, Berger, and Judge John Webb) and one other person; that subcommittee is awaiting action on Ethics 2000 before acting on Rule 265.

A member responded to Little's discussion by stating his agreement with the need to change Rule 265 as Little had indicated, but he asked, why wait? Lawyers are already providing what Rule 5.7 would characterize as ancillary services — services such as title insurance, real estate brokerage, alternative dispute resolution, and expert witness services. This member saw reasons to act now on the Rule 265 update rather than wait for the impetus of Rule 5.7 if and when it is adopted by the Court with the other Ethics 2000 rules changes.

At the Chair's request, Little moved that the Committee postpone any consideration of an update of Rule 265 until after the Court has acted on the Committee's proposal for adoption of the Ethics 2000 Rules. The motion was seconded.

The member who had asked why wait renewed his objection to delay in the Committee's consideration of Rule 265 and was joined in that objection by another member.

Yet another member questioned whether Rule 265 was within the purview of the Committee, and a member pointed out that the Court has charged the Committee "with the responsibility of periodic review, correcting, updating and improvement of the Colorado Rules of Professional Conduct." Another member suggested that there is obvious overlap between the rules formally grouped together as the "Rules of Professional Conduct" and other rules, such as Rule 265, that govern a lawyer's "professional conduct"; he suggested that the Committee weigh in on issues arising within these areas of overlap when its expertise is relevant to those issues.

A member questioned the basis of Rule 265, stating his understanding that it regulated "multidisciplinary practice" by lawyers. Little replied that that was incorrect and reiterated his earlier discussion of the historical reason for the rule's adoption.

Little added that, in the course of setting up the structure under which lawyers could secure the tax benefits by incorporating their law firms, the Court just happened to say, in Rule 265, that the law firms had to be organized to render legal services. That was not required for the goals of Rule 265, and the limitations on what lawyers can do — including the limitations effected by the limitations on sharing legal fees — could have been left to the Rules of Professional Conduct, as is the case for solo practitioners and for lawyers who practice in general partnerships.

The member who had asked about the origins of Rule 265 said that he supported the proposed changes and thought they should be taken up sooner rather than later.

Little's motion to postpone consideration of Rule 265's update until consideration of the Ethics 2000 Rules is completed was defeated.

The motion of another member for the Committee to proceed more immediately with the updating of Rule 265 to resolve the issues identified by Little was seconded and passed. The Committee sent the issues to the existing Ethics 2000 Rules Subcommittee.

6. *April 27, 2006 — Fourteenth Meeting of the Full Committee*

V. *Rule 265 Issues*.

The Chair noted that, at its Thirteenth Meeting on March 3, 2006, the Committee had discussed consideration of amendments to Rule 265 regarding two issues: (1) the provision of alternative dispute resolution services (which are not the practice of law) by lawyers from within law firms that are "professional companies" as defined in the rule and in which companies, by that rule, lawyers are ostensibly limited just to practicing law; and (2) the failure of Rule 265 to provide for the kind of malpractice insurance that is currently being provided by insurance carriers — "claims-made" insurance. She noted that she and Berger had agreed that these topics are not within the purview of Berger's Subcommittee on the Ethics 2000 Rules.

Accordingly, she had formed a new Rule 265 Subcommittee, to be chaired by David Stark, and she and Stark were soliciting members to participate on the subcommittee. Another member noted that there are a number of Colorado lawyers who have thought at length about these issues but who are not

members of this Committee, and he suggested that many of them would want to be members of the Rule 265 Subcommittee if that were permitted. He added that there is no particular hurry to deal with the insurance issue, inasmuch as most practitioners ignore it and assume the Court would not deprive individual law firm members of Rule 265's limitations on liability merely because the insurance maintained by their law firms was of "claims-made" rather than "claims-occurred" coverage. He added, however, that there may be a higher perceived urgency about the alternative dispute resolution issue, at least among some lawyers who provide such services, although most of them, too, have assumed the Court would not actually sanction them because they provide such services from their law firms.

The Chair noted that subcommittees of the Committee may include among their members persons who are not members of the full Committee.

7. *September 22, 2006 — Fifteenth Meeting of the Full Committee*

IV. *Rule 265 Issues*.

The Chair called David Stark to give a report from the subcommittee considering Rule 265 issues. That subcommittee had been appointed at the fourteenth meeting of the Committee on April 27, 2006, to consider amendments to Rule 265, CRCP, regarding two issues: (1) the provision of alternative dispute resolution services (which are not the practice of law) by lawyers from within law firms that are "professional companies" as defined in the rule and in which companies, by that rule, lawyers are ostensibly limited just to practicing law; and (2) the failure of Rule 265 to provide for the kind of malpractice insurance that is currently being provided by insurance carriers — "claims-made" insurance. The Chair noted that she and Michael Berger had agreed that these topics are not within the purview of Berger's Subcommittee on the Ethics 2000 Rules.

Stark reported that the subcommittee had met on several occasions; while it has not yet prepared a formal report for the Committee, it is, he said, well on the way to making recommendations. Because the issues that it is considering are at the intersection of Rule 265 and Rule 5.4 of the Rules of Professional Conduct, the recommendations will likely involve amendments to both rules.

In answer to a member's question, the Chair noted that Stark's subcommittee is working with a subcommittee of the Supreme Court Standing Committee on Rules of Civil Procedure with respect to the issues. Stark confirmed that the two subcommittees are working closely on the issues. It is anticipated that, because of the likelihood that there will be recommendations for amendments to both rules, the two committees — this Committee and the Supreme Court Standing Committee on Rules of Civil Procedure — will be making their proposals to the Court in tandem, with this Committee's proposal relating to Rule 5.4 and the other committee's proposal dealing with Rule 265.

* * * *

[Discussing Rule 1.4 and mandatory insurance.] Another member pointed out that Rule 265 already addresses some aspects of malpractice insurance coverage and suggested, if the requirements are to be extended, that the work be done in that Rule of Civil Procedure.

. . . .

A member moved that the matter of insurance disclosure be referred to the Subcommittee on Rule 265, commenting that that subcommittee is working with the Civil Rules Committee regarding Rule 265, that malpractice insurance is already a topic within Rule 265, and that the matter of insurance disclosure should be considered there. The motion died for lack of a second. (Subsequently, the moving member noted that Rule 265 does not cover solo practitioners or those practicing in general partnership

that are not registered for limited liability and thus would be an inappropriate vehicle for a broad-based insurance rule.)

8. *January 26, 2007 — Sixteenth Meeting of the Full Committee*

IV. *Rule 265 Issues*.

David Stark reported that the subcommittee considering Rule 265 issues continues its work, having met for two and a half hours on January 23, 2007. A number of issues and details have been raised in the effort to meld Rule 265 and Rule 5.4 of the Ethics Rules, and it is simply taking time for the subcommittee to work its way through them. There were no issues sufficiently troublesome that they deserved the consideration of the whole Committee at this time. Stark predicted that the subcommittee would be able to make recommendations for amendments to both Rule 265 and Rule 5.4 to the whole Committee at the next Committee meeting.

A member of the subcommittee added that the principle underlying the subcommittee's work is the separation of the mechanics of electing to conduct the practice of law through a professional company (those mechanics to be located in Rule 265) from "professional conduct" aspects such as who can own or control a professional company (those aspects to be dealt with in Rule 5.4).

David Little, who is on the subcommittee and is also a member of the Supreme Court Standing Committee on the Rules of Civil Procedure, noted that the latter committee would be meeting later that day and that he would give that committee a report on the subcommittee's work.

It was noted by several members that the Committee had determined, at a prior meeting, to work in tandem with the Standing Committee on the Rules of Civil Procedure on the development of the proposal for amendment of Rule 265 and that, in addition to Little, there were other members of the subcommittee who were also members of the Civil Rules Committee, which should facilitate the joint effort.

Subcommittee Proposal for
Modifications to Current Rule 265

RULE 265. PROFESSIONAL COMPANIES

(a) RENDERING LEGAL SERVICES THROUGH A PROFESSIONAL COMPANY. One or more attorneys who are licensed to practice law in Colorado may render legal services in Colorado through a professional company, as that term is defined in Section (e), provided that such professional company is established and operated in accordance with the provisions of this Rule and the Colorado Rules of Professional Conduct.

(1) PROFESSIONAL COMPANY NAME. The name of the professional company shall comply with the provisions of the Colorado Rules of Professional Conduct regarding the names of law firms.

(2) OWNERS' LIABILITY FOR PROFESSIONAL ACTS, ERRORS, OR OMISSIONS. Each of the owners of the professional company shall be deemed to agree, by reason of the rendering of legal services by any attorney through the professional company, that each of them who is an owner at the time of the commission of any act, error, or omission in the rendering of legal services by any owner or other person for whose acts, errors, or omissions the professional service company is liable assumes, jointly and severally, to the extent provided by this Rule, the liability of the professional company for such act, error, or omission. Notwithstanding the preceding sentence, any owner who has not directly participated in the act, error, or omission in the rendering of legal services for which liability is incurred by the professional company does not assume such liability, except as provided in subparagraph (a)(3)(iv), if, at the time the act, error, or omission occurs, the professional company has professional liability insurance that meets the minimum requirements stated in paragraph (a)(3).

(3) PROFESSIONAL LIABILITY INSURANCE POLICY REQUIREMENTS. The professional liability insurance contemplated in paragraph (a)(2) shall meet the following minimum requirements:

(i) PROFESSIONAL ACTS COVERAGE. The professional liability insurance shall insure the professional company against liability imposed upon it arising out of the rendering of legal services by any attorney through the professional company and against the liability imposed upon it arising out of the acts, errors and omissions of all nonattorney employees assisting in the rendering of legal services by any attorney through the professional company.

(ii) POLICY LANGUAGE. The policy or policies for the professional liability insurance may contain reasonable provisions with respect to policy periods, territory, claims, conditions, and other matters.

(iii) LIMITS OF COVERAGE. The professional liability insurance shall be in an amount for each claim of at least the lesser of $100,000 multiplied by the number of attorneys who render legal services through the professional company or $500,000. If the policy or policies for the professional liability insurance provide for an aggregate top limit of liability per year for all claims, the top limit shall not be less than the lesser of $300,000 multiplied by the number of the number of attorneys who render legal services through the professional company or $2,000,000.

(iv) DEDUCTIBLES AND DEFENSE COSTS. The policy or policies for the professional liability insurance may provide for a deductible or self-insured retained amount and may provide for the

payment of defense or other costs out of the stated limits of the policy. The liability assumed by each owner of the professional company who has not directly participated in the act, error, or omission in the rendering of legal services for which liability is incurred by the professional company shall be the lesser of the actual liability of the professional company in excess of insurance available to pay such damage or the sum of the following:

[1] such deductible or retained self-insurance; and

[2] the amounts, if any, by which the payment of defense costs has reduced the insurance remaining available for the payment of damages incurred by reason of the liability of the professional company below the minimum limit of insurance required by subparagraph (a)(3)(iii).

(v) DETERMINATION OF COVERAGE. An act, error, or omission in the rendering of legal services shall be deemed to be covered by professional liability insurance for the purpose of this Rule if the policy or policies include such act, error, or omission as a covered activity, regardless of whether claims previously made against the policy have exhausted the aggregate top limit for the applicable time period or whether the individual claimed amount or ultimate liability exceeds either the per claim or aggregate top limit.

(vi) LIMITATION OF VICARIOUS LIABILITY. The liability assumed by the owners of a professional company under this Rule is limited to the liability of the professional company for acts, errors, or omissions incurred in the rendering of legal services by any owner or other person for whose acts, errors, or omissions the professional service company is liable and shall not extend to any other liability incurred by the professional company. Liability, if any, for any and all acts, errors, and omissions, other than acts, errors, or omissions incurred in the rendering of legal services by any owner or other person for whose acts, errors, or omissions the professional service company is liable, shall be as otherwise provided by law and shall not be changed, affected, limited, or extended by this Rule.

(b) COMPLIANCE WITH RULES OF PROFESSIONAL CONDUCT. Nothing in this Rule shall be deemed to diminish or change the obligation of each attorney rendering legal services through a professional company to comply with the Colorado Rules of Professional Conduct promulgated by this Court.

(c) VIOLATION OF RULE; TERMINATION OF AUTHORITY. Any violation of or failure to comply with any of the provisions of this Rule by the professional company may be grounds for this Court to terminate or suspend the right of any attorney who is an owner of such professional company to render legal services in Colorado through a professional company.

(d) PROFESSIONAL COMPANY CONSTITUENCIES. A professional company may have one or more owners that are professional companies, so long as each such owner that is a professional company and the professional company of which they are owners are both established and operated in accordance with the provisions of this Rule.

(e) "PROFESSIONAL COMPANY" DEFINED. For purposes of this Rule, a professional company is a corporation, limited liability company, limited liability partnership, limited partnership association, or other entity that may be formed under Colorado law to transact business or any entity that can be formed under the law of any other jurisdiction and through which attorneys may render legal services in that jurisdiction, except that the term excludes a general partnership that is not a limited liability partnership and excludes every other entity the owners of which are subject to personal liability for the obligations of the entity.

RULE 265. PROFESSIONAL ~~SERVICE COMPANIES~~ *COMPANIES*

~~I.~~

COMMENT: The Subcommittee's modifications alter the paragraph numbering system to conform to that of other Rules.

The Subcommittee did not switch the term "attorney" in Rule 265 to the term "lawyer" that is used throughout the Rules of Professional Conduct.

~~A.~~*(a) RENDERING LEGAL SERVICES THROUGH A PROFESSIONAL COMPANY.* ~~Attorneys~~ *One or more attorneys* who are licensed to practice law in Colorado may ~~do so in the form of professional corporations, limited liability companies, limited liability partnerships, registered limited liability partnerships, or joint stock companies, herein collectively referred to as "professional companies," permitted by the laws of Colorado to conduct the practice of law~~ *render legal services in Colorado through a professional company, as that term is defined in Section (e)*, provided that such professional ~~companies are~~ *company is* established and operated in accordance with the provisions of this Rule and the Colorado Rules of Professional Conduct.

COMMENT: The listing of permitted entities has been dropped and a cross-reference substituted to the new definition of "professional company" in § (e)

~~The provisions of this Rule shall apply to all professional companies having as shareholders, officers, directors, partners, employees, members, or managers one or more attorneys who engage in the practice of law in Colorado, whether such professional companies are formed under Colorado law or under laws of another state or jurisdiction. All professional companies conducting the practice of law in Colorado shall comply with the following requirements:~~

COMMENT: The foregoing paragraph is rendered redundant by the other modifications.

~~1~~*(1) PROFESSIONAL COMPANY NAME.* The name of the professional company shall ~~contain the words "professional company," "professional corporation," "limited liability company," "limited liability partnership," or "registered limited liability partnership" or abbreviations thereof such as "Prof. Co.," "Prof. Corp.," "P.C.," "L.L.C.," "L.L.P.," or "R.L.L.P." that are authorized by the laws of the State of Colorado or the laws of the state or jurisdiction of organization. In addition, the name of the professional company shall always meet the ethical standards established by the Colorado Rules of Professional Conduct for the names of law firms.~~ *comply with the provisions of the Colorado Rules of Professional Conduct regarding the names of law firms.*

COMMENT: Rule 7.5, CRPC, sets forth limitations upon the names under which attorneys can practice. And, necessarily, any professional company will have to comply with the statutes regarding the naming of entities of the type chosen for the professional company. (For Colorado entities the naming requirements are found in § 7-90-601 *et seq.)* There is no need for Rule 265 to deal further with the names of professional companies.

~~2. The professional company shall be established solely for the purpose of conducting the practice of law, and the practice of law in Colorado shall be conducted only by persons qualified and licensed to practice law in the State of Colorado.~~

Comment: The deletion of the foregoing provision was a principal goal of the Subcommittee's effort. The Rules of Professional Conduct adequately deal with attorneys' conduct, whether it be related to the practice of law, to service as a neutral in alternative dispute resolution procedures, as a testifying or consulting expert witness, as one rendering "law-related" activities, or otherwise. No additional conduct-related provisions need be included in Rule 265, particularly in view of the fact that Rule 265 only governs attorneys who chose to render legal services through "professional companies" and not to solo practitioners or members of general partnerships.

Issues relating to licensure and the practice of law are adequately governed by other rules, including Rule 201.1 *et seq*., CRCP

~~3. The professional company may exercise all of the powers and privileges conferred upon such types of entities by the laws of the State of Colorado or other state or jurisdiction of organization but only for the purpose of conducting the practice of law pursuant to this rule and the Colorado Rules of Professional Conduct.~~

COMMENT: See the preceding comment.

~~4.~~ *(2) OWNERS' LIABILITY FOR PROFESSIONAL ACTS, ERRORS, OR OMISSIONS. Each of the owners of the professional company shall be deemed to agree, by reason of the rendering of legal services by any attorney through the professional company, that each of them who is* ~~The articles of incorporation, partnership agreement, operating agreement, or other governing document or agreement of the professional company shall provide, and each of the shareholders, partners, or members shall agree, that each of them who is a shareholder, partner, or member of the professional company~~ *an owner* at the time of the commission of any ~~professional~~ act, error, or omission ~~by any of the shareholders, officers, directors, partners, members, managers, or employees of the professional company shall be~~ *in the rendering of legal services by any owner or other person for whose acts, errors, or omissions the professional service company is liable assumes,* jointly and severally ~~liable~~*,* to the extent provided by this Rule ~~for the damages caused by~~*, the liability of the professional company for* such act, error, or omission~~; provided, however, that the governing document or agreement may provide that any such shareholder, partner, or member~~. *Notwithstanding the preceding sentence, any owner* who has not directly ~~and actively~~ participated in the act, error, or omission *in the rendering of legal services* for which liability is ~~claimed shall not be liable~~ *incurred by the professional company does not assume such liability*, except as provided in ~~clause (c) of this~~ subparagraph ~~I.A.4, for any of the damages caused thereby if~~ *(a)(3)(iv), if,* at the time the act, error, or omission occurs*,* the professional company has professional liability insurance ~~which meets~~ *that meets the minimum requirements stated in paragraph (a)(3).*

COMMENT: As before, this provision continues the basic "deal" of Rule 265. Recognizing that the Court cannot modify the statutory grant of limited liability accorded to corporations, limited liability companies, limited liability partnerships, and other such entities that may be used for the formation of professional companies, but that it can regulate the conduct of attorneys even to the extent of prohibiting their use of professional companies for their legal services, the Court offers attorneys the opportunity to render legal services through professional companies *if* they agree to remain vicariously liable, jointly and severally, for

the "acts, errors, or omissions" of other attorneys for which the professional service company is itself vicariously liable. The Court, further, offers those attorneys the option of avoiding such vicarious, joint and several, liability if they cause the professional company to maintain insurance coverage of at least the minimum standards set forth elsewhere in the Rule.

The structure of the provision has been altered toward an "implied consent" approach: The provision no longer requires specific terminology in the constituent documents of a professional company as a condition to obtaining limited liability: The owners of the professional company are "deemed to agree," by their rendering of legal services through the professional company, to be jointly and severally liable whether or not they have spelled out that agreement in the entity's constituent documents.

The prior terminology speaking of *the commission of any professional act, error, or omission by any of the shareholders, officers, directors, partners, members, managers, or employees of the professional company* has been deleted in favor of terminology that encompasses all the liability incurred by any of the attorneys owning or employed by the professional company for *committing an act, error, or omission in the rendering of legal services* if that act, error, or omission is one for which the professional company itself is vicariously liable. The principles of *respondeat superior* would be applied to determine the existence of that liability.

Note that the foregoing provision, coupled with the new definition of "professional company" in § (e), is broad enough to enmesh the owner of a barber shop, himself not an attorney, if one of the barbers, an attorney, dispenses legal services to a customer while cutting the customer's hair.

(3) PROFESSIONAL LIABILITY INSURANCE POLICY REQUIREMENTS. The professional liability insurance contemplated in paragraph (a)(2) shall meet the following minimum ~~standards.~~ *requirements:*

COMMENT: This § (3) sets forth the requirements applicable to the insurance that must be maintained for the owners of the professional company to avoid vicarious, joint and several, liability

~~(a)~~ *(i) PROFESSIONAL ACTS COVERAGE.* The *professional liability* insurance shall insure the professional company against liability imposed upon it arising out of the ~~practice of law by attorneys employed by~~ *rendering of legal services by any attorney through* the professional company *and against the* ~~in their capacities as attorneys. (b) Such insurance shall insure the professional company against~~ liability imposed upon it ~~by law for damages~~ arising out of the ~~professional~~ acts, errors~~,~~ and omissions of all ~~nonprofessional employees.~~ *nonattorney employees assisting in the rendering of legal services by any attorney through the professional company.*

COMMENT: The current provision covers only "the practice of law by attorney's employed by the professional company" and, accordingly, fails to require coverage of the partners in limited liability partnerships, members in limited liability companies, and other owners of professional companies who are not themselves "employees" of those companies. The modifications correct this defect. The modifications also utilize the standardized terminology *rendering legal services through the professional company*.

~~(c)~~ *(ii) POLICY LANGUAGE.* The policy *or policies for the professional liability insurance* may contain reasonable provisions with respect to policy periods, territory, claims, conditions, and other matters.

COMMENT: Reference is consistently made, above and below in § (a)(3), to "policy or policies" in recognition that the requisite insurance need not be provided through a single "policy" of insurance.

~~(d)~~ *(iii) LIMITS OF COVERAGE.* The *professional liability* insurance shall be in an amount for each claim of at least *the lesser of* $100,000 multiplied by the number of attorneys ~~employed by~~ *who render legal services through* the professional company~~, and, if the policy provides~~ *or $500,000. If the policy or policies for the professional liability insurance provide* for an aggregate top limit of liability per year for all claims, the *top* limit shall not be less than *the lesser of* $300,000 multiplied by the number of *the number of* attorneys ~~employed by~~ *who render legal services through* the professional company~~; provided, however, that no professional company shall be required to carry total limits of insurance in excess of $500,000 for each claim or be required to carry an aggregate top limit of liability for all claims per year of more than $2,000,000.~~ *or $2,000,000.*

COMMENT: Changes are made to utilize the standard terminology "render legal services through the professional company."

The amounts of insurance have not been changed.

~~(e)~~ *(iv) DEDUCTIBLES AND DEFENSE COSTS.* The policy *or policies for the professional liability insurance* may provide for a deductible or self-insured retained amount and may provide for the payment of defense or other costs out of the stated limits of the policy. ~~In either or both such events, the~~ *The* liability assumed by ~~the shareholders, partners, or members~~ *each owner* of the professional company ~~shall include the amount of~~ *who has not directly participated in the act, error, or omission in the rendering of legal services for which liability is incurred by the professional company shall be the lesser of the actual liability of the professional company in excess of insurance available to pay such damage or the sum of the following:*

COMMENT: As modified, the provision more clearly states an unchanged principle: An owner — not directly participating in the act, error, or omission — remains vicariously liable to the extent deductibles or defense cost erosions reduce the insurance that is actually available to the claimant below the limits specified in § (a)(3)(iii).

[1] such deductible or retained self-insurance*;* and

[2] ~~shall include~~ the ~~amount~~ *amounts*, if any, by which the payment of defense costs ~~may reduce~~ *has reduced* the insurance remaining available for the payment of ~~claims~~ *damages incurred by reason of the liability of the professional company* below the minimum limit of insurance required by ~~this Rule if the ultimate liability for the claim exceeds the amount of insurance remaining to pay for it.~~ *subparagraph (a)(3)(iii).*

~~(f)~~ *(v) DETERMINATION OF COVERAGE.* ~~A professional~~ *An* act, error, or omission ~~is considered~~ *in the rendering of legal services shall be deemed* to be covered by professional liability insurance for the purpose of this ~~subparagraph I.A.4~~ *Rule* if the policy ~~includes~~ *or policies include* such act, error, or omission as a covered activity, regardless of whether claims previously made against the

policy have exhausted the aggregate top limit for the applicable time period or whether the individual claimed amount or ultimate liability exceeds either the per claim or aggregate top limit.

COMMENT: The foregoing is largely unchanged, except as to conform to the terminology "rendering of legal services."

~~5~~*(vi) LIMITATION OF VICARIOUS LIABILITY.* The liability assumed by the ~~shareholders, partners, or members~~ *owners of a professional company under this Rule is limited to the liability* of the professional company ~~pursuant to subparagraph I.A.4 is limited to liability for professional~~ *for* acts, errors, or omissions ~~which constitute the practice of law~~ *incurred in the rendering of legal services by any owner or other person for whose acts, errors, or omissions the professional service company is liable* and shall not extend to ~~actions or undertakings that do not constitute the practice of law. The liability assumed by the shareholders, partners, or members of the professional company pursuant to subparagraph I.A.4 may be pursued only by a citation brought under C.R.C.P. 106(a)(5) after entry of a judgment against~~ *any other liability incurred by* the professional company. Liability, if any, for any and all ~~actions or undertakings,~~ *acts, errors, and omissions,* other than ~~professional~~ acts, errors, or omissions~~, shall be as generally~~ *incurred in the rendering of legal services by any owner or other person for whose acts, errors, or omissions the professional service company is liable, shall be as otherwise* provided by law and shall not be changed, affected, limited, or extended by this Rule.

COMMENT: The modifications accommodate the deletion of references to "the practice of law" but otherwise do not extend the scope of the provision beyond that of limiting the effect of Rule 265's provisions for vicarious liability to "acts, errors, or omissions incurred in the rendering of legal services" and not, for example, to contract liability as on an office lease.

~~B.~~ *(b) COMPLIANCE WITH RULES OF PROFESSIONAL CONDUCT. Nothing in this Rule shall be deemed to diminish or change the obligation of each attorney rendering legal services through* ~~Each attorney practicing law in Colorado as a shareholder, director, officer, member, manager, partner, or employee of~~ a professional company~~, whether formed under the laws of the State of Colorado or under the laws of any other state or jurisdiction, shall comply with the following standards of professional conduct: 1. No such attorney shall act or fail to act in a way which would violate any of~~ *to comply with* the Colorado Rules of Professional Conduct ~~adopted by this Court~~ *promulgated by this Court.* ~~The professional company shall also comply at all times with all standards of professional conduct established by this Court and with the provisions of this Rule. Any violation of or failure to comply with any of the provisions of this Rule by the professional company may be grounds for this Court to terminate or suspend the right of any attorney who is a shareholder, director, officer, member, manager, or partner of such professional company to practice law in Colorado in the form of a professional company.~~

COMMENT: The modifications simplify the stating of, but do not substantively change, the current Rule's admonition that the Rules of Professional Conduct apply to lawyers rendering legal services through professional companies.

The last deleted sentence of the current provision has been moved to new § (c), below.

~~2. Nothing in this Rule shall be deemed to diminish or change the obligation of each attorney employed by the professional company to conduct that attorney's practice in accordance with the Colorado Rules of Professional Conduct promulgated by this Court. Any attorney who by act or omission causes the professional company to act or fail to act in a way which violates such standards of~~

~~professional conduct or any provision of this Rule shall be deemed personally responsible for such act or omission and shall be subject to discipline therefor.~~

COMMENT: See the first paragraph of the preceding comment.

(c) VIOLATION OF RULE; TERMINATION OF AUTHORITY. Any violation of or failure to comply with any of the provisions of this Rule by the professional company may be grounds for this Court to terminate or suspend the right of any attorney who is an owner of such professional company to render legal services in Colorado through a professional company.

COMMENT: This provision was formerly found as the third sentence of § B.1.

~~II.~~

~~Any professional company established for the purpose of conducting the practice of law must comply with all of the following additional requirements:~~

COMMENT: Paragraphs II.A, B, C, D, and E of the current Rule cover topics that are adequately covered by other rules, including Rule 5.4 of the Rules of Professional Conduct as the Subcommittee has proposed it be amended to read:

RULE 5.4 PROFESSIONAL INDEPENDENCE OF A LAWYER

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

(1) an agreement by a lawyer with the ~~lawyers~~ *lawyer's* firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;

(2) a lawyer who undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer that proportion of the total compensation which fairly represents the services rendered by the deceased lawyer;

(3) a lawyer who purchases the practice of a deceased, disabled, or disappeared lawyer may, pursuant to the provisions of Rule 1.17, pay to the estate or other representative of that lawyer the agreed-upon purchase price;

(4) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement; and

(5) a lawyer may share court-awarded legal fees with a nonprofit organization that employed, retained or recommend employment of the lawyer in the matter.

(b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.

(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.

(d) A lawyer shall not practice with or in the form of a professional ~~corporation, association, or limited liability company, authorized to practice law for a profit, except in accordance with C.R.C.P. 265 and any successor rule or action adopted by the Colorado Supreme Court~~ *company, if*

(1) A nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration; or

(2) A nonlawyer has the right to direct or control the professional judgment of a lawyer.

(e) A lawyer shall not practice with or in the form of a professional company except in compliance with C.R.C.P. 265.

(f) For purposes of this Rule, a "nonlawyer" includes (1) a lawyer who has been disbarred, (2) a lawyer who has been suspended and who must petition for reinstatement, (3) a lawyer who has been immediately suspended pursuant to C.R.C.P. 251.8 or 251.20(d), (4) a lawyer who is on inactive status pursuant to C.R.C.P. 227(A)(6), and (5) a lawyer who, for a period of six months or more, has been (i) on disability inactive status pursuant to C.R.C.P. 251.23 or (ii) suspended pursuant to C.R.C.P. 251.8.5, 227(A)(4), 260.6, or 251.8.6.

~~A. Except as provided in paragraph H.B and H.C, all officers, directors, shareholders, partners, members, or managers of the professional company shall be individuals who are duly licensed by either the Supreme Court of the State of Colorado or some other state or jurisdiction to practice law either in the State of Colorado or in such other state or jurisdiction and who at all times own shares or other equity interests in the professional company in their own right. In addition, all other employees or representatives of the professional company who practice law shall be duly licensed by either the Supreme Court of the State of Colorado or some other state or jurisdiction to practice law in the State of Colorado or in such other state or jurisdiction.~~

> COMMENT: The Rules of Professional Conduct, by such provisions as Rule 5.4(a) prohibiting the sharing of legal fees with nonlawyers, effectively accomplish for all forms of legal practice what the foregoing provision has heretofore, redundantly, accomplished for professional companies.

~~B. A professional company may have one or more shareholders, partners, or members which are professional companies so long as each such shareholder, partner, or member is established and operated in accordance with the provisions of this Rule and the Colorado Rules of Professional Conduct.~~

> COMMENT: The foregoing provision has been renumbered § (d), below.

~~C. A professional company may have directors, officers, or managers who do not have the qualifications described in paragraph H.A, but no director, officer, manager, or employee of a professional company who is not licensed to practice law either in the State of Colorado or elsewhere shall exercise any authority whatsoever over any of the professional company's activities relating to the practice of law.~~

~~D. Provisions shall be made requiring any shareholder, partner, or other member who withdraws from or otherwise ceases to be eligible to be a shareholder, partner, or member of the professional company to dispose of all shares or other equity interests therein as soon as practicable either to the professional company or to any person having the qualifications described in paragraph H.A. Provisions may be made for the redemption or disposition of shares or other equity interests over a reasonable period of time so long as the withdrawing shareholder, partner, or member does not exercise any management or professional function during such period of time.~~

> COMMENT: The issues raised by a professional company owner ceasing to be qualified, as a lawyer, to share in the legal fees of the other lawyers in the professional company have been shifted to Rule 5.4 of the Rules of Professional Conduct as the Subcommittee has proposed it be amended. See the third preceding comment.

~~E. A professional company may adopt retirement, pension, profit-sharing (whether cash or deferred), health and accident insurance, or welfare plans for all or some of its employees, including lay employees, provided that such plans do not require or result in the sharing of specific or identifiable fees with lay employees and provided that any payments made to lay employees or into any such plan on behalf of lay employees are based upon their compensation or length of service or both rather than upon the amount of fees or income received.~~

> COMMENT: The Rule need not specifically authorize a professional company to do things that the statutes otherwise permit entities to do. To the extent limitations on such activities are appropriate, they can be provided in the Rules of Professional Conduct.

(d) PROFESSIONAL COMPANY CONSTITUENCIES. A professional company may have one or more owners that are professional companies, so long as each such owner that is a professional company and the professional company of which they are owners are both established and operated in accordance with the provisions of this Rule.

COMMENT: The foregoing provision was formerly numbered II.C.

(e) "PROFESSIONAL COMPANY" DEFINED. For purposes of this Rule, a professional company is a corporation, limited liability company, limited liability partnership, limited partnership association, or other entity that may be formed under Colorado law to transact business or any entity that can be formed under the law of any other jurisdiction and through which attorneys may render legal services in that jurisdiction, except that the term excludes a general partnership that is not a limited liability partnership and excludes every other entity the owners of which are subject to personal liability for the obligations of the entity.

COMMENT: The definition is new.

Subcommittee Proposal for
Modifications to "Ethics 2000" Rules of Professional Conduct
As They Were Proposed to the Court December 2005

RULE 1.0: TERMINOLOGY

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(c) "Firm" or "law firm" denotes a ~~**lawyer or lawyers in a law**~~ partnership, professional ~~**corporation**~~ ***company***, ~~**sole proprietorship,**~~ or other ~~**association**~~ ***entity or a sole proprietorship*** ~~**authorized to practice law**~~ ***through which a lawyer or lawyers render legal services***; or lawyers employed in a legal services organization or the legal department of a corporation or other organization.

* * * *

(g) "Partner" denotes a member of a partnership, ~~**a shareholder in a law firm organized as a professional corporation**~~ ***an owner of a professional company***, or a member of an association authorized to practice law.

(g-1) "Professional company" has the meaning ascribed to the term in C.R.C.P. 265.

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RULE 5.4 PROFESSIONAL INDEPENDENCE OF A LAWYER

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

(1) an agreement by a lawyer with the ~~**lawyers**~~ ***lawyer's*** firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;

(2) a lawyer who undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer that proportion of the total compensation which fairly represents the services rendered by the deceased lawyer;

(3) a lawyer who purchases the practice of a deceased, disabled, or disappeared lawyer may, pursuant to the provisions of Rule 1.17, pay to the estate or other representative of that lawyer the agreed-upon purchase price;

(4) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement; and

(5) a lawyer may share court-awarded legal fees with a nonprofit organization that employed, retained or recommend employment of the lawyer in the matter.

(b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.

(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.

(d) A lawyer shall not practice with or in the form of a professional ~~**corporation, association, or limited liability company, authorized to practice law for a profit, except in accordance with C.R.C.P. 265 and any successor rule or action adopted by the Colorado Supreme Court**~~ ***company, if***

(1) A nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration; or

(2) A nonlawyer has the right to direct or control the professional judgment of a lawyer.

(e) A lawyer shall not practice with or in the form of a professional company except in compliance with C.R.C.P. 265.

(f) For purposes of this Rule, a "nonlawyer" includes (1) a lawyer who has been disbarred, (2) a lawyer who has been suspended and who must petition for reinstatement, (3) a lawyer who has been immediately suspended pursuant to C.R.C.P. 251.8 or 251.20(d), (4) a lawyer who is on inactive status pursuant to C.R.C.P. 227(A)(6), and (5) a lawyer who, for a period of six months or more, has been (i) on disability inactive status pursuant to C.R.C.P. 251.23 or (ii) suspended pursuant to C.R.C.P. 251.8.5, 227(A)(4), 260.6, or 251.8.6.

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Comment to RULE 5.4 PROFESSIONAL INDEPENDENCE OF A LAWYER

[1] The provisions of this Rule express traditional limitations on sharing fees. These limitations are to protect the lawyer's professional independence of judgment on behalf of the lawyer's client. Moreover, since a lawyer should not aid or encourage a nonlawyer to practice law, the lawyer should not practice law or otherwise share legal fees with a nonlawyer. This does not mean, however, that the pecuniary value of the interest of a deceased lawyer in the lawyer's firm or practice may not be paid to the lawyer's estate or specified persons such as the lawyer's spouse or heirs. In like manner, profit-sharing retirement plans of a lawyer or law firm which include nonlawyer office employees are not improper. These limited exceptions to the rule against sharing legal fees with nonlawyers are permissible since they do not aid or encourage nonlawyers to practice law. Where someone other than the client pays the lawyer's fee or salary, or recommends employment of the lawyer, that arrangement does not modify the lawyer's obligation to the client. As stated in paragraph (c) such arrangements should not interfere with the lawyer's professional judgment on behalf of the lawyer's client. A lawyer should, however, make full disclosure of such arrangements to the client; and if the lawyer or client believes that the effectiveness of lawyer's representation has been or will be impaired thereby, the lawyer should take proper steps to withdraw from representation of the client.

[2] To assist a lawyer in preserving independence, a number of courses are available, For example, a lawyer may practice law in the form of a professional ~~**legal corporation**~~ ***company***, if in doing so the lawyer complies with all applicable rules of the Colorado Supreme Court. Although a lawyer may be employed by a business corporation with nonlawyers serving as directors or officers, and they necessarily have the right to make decisions of business policy, a lawyer must decline to accept direction of the lawyer's professional judgment from any nonlawyer. Various types of legal aid offices are administered by boards of directors composed of lawyers and nonlawyers. A lawyer should not accept employment from such an organization unless the board sets only broad policies and there is no interference in the relationship of the lawyer and the individual client the lawyer serves. Where a lawyer is employed by

an organization, a written agreement that defines the relationship between the lawyer and the organization and provides for the lawyer's independence is desirable since it may serve to prevent misunderstanding as to their respective roles. Although other innovations in the means of supplying legal counsel may develop, the responsibility of the lawyer to maintain the lawyer's professional independence remains constant, and the legal profession must insure that changing circumstances do not result in loss of the professional independence of the lawyer.

[3] As part of the legal profession's commitment to the principle that high quality legal services should be available to all, lawyers are encouraged to cooperate with qualified legal assistance organizations providing prepaid legal services. Participation should at all times be in accordance with the basic tenets of the profession: independence, integrity, competence, and devotion to the interests of individual clients. A lawyer so participating should make certain that a relationship with a qualified legal assistance organization in no way interferes with the lawyer's independent professional representation of the interests of the individual client. A lawyer should avoid situations in which officials of the organization who are not lawyers attempt to direct lawyers concerning the manner in which legal services are performed for individual members, and should also avoid situations in which considerations of economy are given undue weight in determining the lawyers employed by an organization or the legal services to be performed for the member or beneficiary rather than competence and quality of service. A lawyer interested in maintaining the historic traditions of the profession and preserving the function of a lawyer as a trusted and independent advisor to individual members of society should carefully assess those factors when accepting employment by, or otherwise participating in, a particular qualified legal assistance organization, and while so participating should adhere to the highest professional standards of effort and competence.

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COLORADO SUPREME COURT

Standing Committee on the Rules of Professional Conduct

Approved Minutes of Meeting of the Full Committee
On November 30, 2007
(Nineteenth Meeting of the Full Committee)

The nineteenth meeting of the Colorado Supreme Court Standing Committee on the Rules of Professional Conduct was convened at 9:10 a.m. on Friday, November 30, 2007, by Chair Marcy G. Glenn. The meeting was held in the Supreme Court Conference Room on the fifth floor of the Colorado State Judicial Building.

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

I. *Meeting Materials; Minutes of July 20, 2007 Meeting.*

The Chair had provided a package of materials to the members prior to the meeting date, including submitted minutes of the eighteenth meeting of the Committee, held on July 20, 2007. Those minutes were approved as submitted.

II. *Adoption of Most Colorado "Ethics 2000" Rules by United States District Court for Colorado*.

The Chair recounted that she had met in mid-summer 2007 with judges of the United States District Court for Colorado to discuss the implications for the District Court of the Colorado Supreme Court's adoption of the "Ethics 2000" Rules, in view of the fact that the District Court has typically adopted the State Rules for application to proceedings in the District Court. Following that meeting, the District Court adopted most, but not all, of the Colorado Supreme Court's "Ethics 2000" Rules by its Administrative Order 2007-6, which it entered on October 15, 2007. As in the Colorado state courts, the adopted Rules will become effective in the United States District Court on January 1, 2008.[1]

In the past, the District Court had declined to adopt the State rules permitting "unbundled" legal services — most particularly Rule 1.2(c). The Chair explained that the District Court has again declined to adopt those unbundling rules (and associated comments), concluding in Administrative Order 2007-6 that"[t]hey are not consistent with Fed. R. Civ. P. 11 and are also inconsistent with the view of the judges of this court concerning the ethical responsibility of members of the bar to this court." The District Court also declined to adopt several other Rules that are not related to the unbundling concept.

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1. Administrative Order 2007-6 is available at http://www.cod.uscourts.gov/Documents/Orders/AdminOrder_2007-6.pdf.

The Chair reviewed for the Committee the Ethics 2000 Rules that the District Court specifically declined to adopt and noted some apparent confusion in the administrative order:

A. The Chair noted that, in her summer meeting with the District Court judges, she had commented upon Rules 4.4(b) and 4.4(c), which address a lawyer's duties upon receipt of inadvertently transmitted documents.[2] The Chair alerted the District Court judges to the conflict between the requirements imposed by those Rules and those imposed by Rule 26(b)(5)(B) of the Federal Rules of Civil Procedure, which govern the responsibility of parties (and their lawyers) when privileged or work-product-protected information is inadvertently produced in discovery. The Chair had suggested to the District Court judges that they might want to clarify that FRCP 26(b)(5)(B), rather than Rules 4.4(b) and 4.4(c), controls information inadvertently produced in discovery. However, the District Court's administrative order states, "This court will not require adherence to Rule 4.4(b). Rule 26 of the Federal Rules of Civil Procedure and interpretive case law provide comprehensive procedures regarding the issue of inadvertent production of privileged and protected information."

The discussion revealed that the administrative order is both over- and under-inclusive. It is over-inclusive in rejecting Rule 4.4(b) in its entirety, even though FRCP 26(b)(5)(B) applies only to a limited sub-category of inadvertently produced information; thus, under the District Court's local rules, a lawyer who receives an inadvertently-transmitted document outside the discovery process may not invoke Rule 4.4(b). It is under-inclusive by declining to adopt only Rule 4.4(b) and not also Rule 4.4(c), at least insofar as those Rules apply to documents inadvertently produced in discovery.

B. In the District Court's view, Rule 1.16(b)(1)[3] "is inconsistent with D.C.COLO.LCivR 83.3D and D.C.COLO.LCivR 57.5D, Withdrawal of Appearance," and, therefore, was not adopted by the District Court. With the District Court's elimination of the Rule that would withdrawal for any reason so long as the "withdrawal can be accomplished without material adverse effect on the interests of the client," a lawyer will be permitted to withdraw from representation in a Federal case only if she is able to fit her circumstances into one of the remaining six, less permissive, categories.

C. The District Court continued its existing refusal to permit the "unbundling of services" for *pro se* parties that is permitted by Colorado Rule 1.2(c), but it did so by refusing "to incorporate or accept" *all* of that subsection and not just the second sentence dealing with limited services to *pro se* parties. The full text of the two sentences of the subsection reads—

> (c) A lawyer may limit the scope or objectives, or both, of the representation if the limitation is reasonable under the circumstances and the client gives informed consent. A lawyer may provide limited representation to pro se parties as permitted by C.R.C.P. 11(b) and C.R.C.P. 311(b).

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2. Rule 4.4(b) states, "A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender." Rule 4.4(c) states, "Unless otherwise permitted by court order, a lawyer who receives a document relating to the representation of the lawyer's client and who, before reviewing the document, receives notice from the sender that the document was inadvertently sent, shall not examine the document and shall abide by the sender's instructions as to its disposition.

3. Rule 1.16(b)(1) is one of seven independent bases upon which a lawyer may withdraw from a representation; it permits withdrawal if the "withdrawal can be accomplished without material adverse effect on the interests of the client."

By excluding the first sentence as well as the second, the District Court seemingly has precluded any agreement between the lawyer and the client regarding the scope of the representation, even in a formal representation that does not involve the unbundling of legal services for a *pro se* litigant that is contemplated by the second sentence. While the second sentence is a Colorado addition to the Model Rules, the first sentence (with a Colorado addition of the word "objectives") is a Model Rules provision.[4]

D. It is also unclear what the District Court had in mind by its refusal to "incorporate or adopt" Rule 6.5, dealing with nonprofit and court-annexed limited legal services programs. The District Court's concern with respect to Rule 6.5 seems to be a continuation of its concern about unbundled services for *pro se* parties, because its Administrative Order 2007-6 specifically quotes Comment [2] of Rule 6.5, reading in part,"[2] A lawyer who provides short-term limited legal services pursuant to this Rule must secure the client's informed consent to the limited scope of the representation. See Rule 1.2(c)." But Rule 6.5 does not deal with unbundled services for a *pro se* party; rather, it contemplates formal representation of a "client," and its comment's reference to Rule 1.2(c) is a reference to the first sentence of that subsection, which, as noted above, permits agreements restricting the scope of representations.

III. *Speakers and Presentations on New Rules*.

The Chair again praised Judge Ruthanne Polidori, as she had done at the July meeting of the Committee, for her marvelous work in tracking presentations on the newly-adopted Rules of Professional Conduct. Although the judge was not able to attend this meeting, she had advised the Chair beforehand that "the saturation has been great," with many educational programs being provided by the Colorado Bar Association's Continuing Legal Education programs and by its local bar associations, as well as by various Sections within the CBA structure, by the Colorado Trial Lawyers Association, the Faculty of Federal Advocates, and other such groups, and internally by law firms for their own lawyers. The Chair noted additionally that a number of articles had been published about the new Rules, "some more accurate than others."

IV. *Subcommittee on Rule 265*.

David Stark reported that the Colorado Supreme Court's Civil Rules Committee has considered and approved without change the proposal this Committee approved at its Eighteenth Meeting on July 20, 2007. The Civil Rules Committee action was taken on August 30, 2007.

Accordingly, with both Committees having approved the proposed amendments, the Chair said that she would coordinate the next steps with the chair of the Civil Rules Committee; she anticipated that they would submit to the Supreme Court a joint letter proposing the changes to Rule 265 and the associated changes to the Rules of Professional Conduct as they are to become effective January 1, 2008.

V. *Subcommittee Considering Amendments to Rule 1.15*.

Alexander Rothrock reported that a subcommittee is considering an issue that has arisen regarding Rule 1.15 and the effort made therein to coordinate the regulation of lawyer trust accounts under the prior version of the Rule with the Federal "Check 21" law. Practicing lawyers have found that Rule 1.15(i)(6) as set forth in the Committee's proposal and adopted by the Court does not permit a lawyer to delegate to a person under the lawyer's supervision the periodic reconciliation of the lawyer's

4. The text of the first sentence, as found in the American Bar Association's Model Rules of Professional Conduct, reads, "A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent."

trust account that is required by the Rule. "Delegation" language is found in other portions of the Rule but not with respect to reconciliation, and the implication is that the lawyer must do the actual reconciliation.

Rothrock noted that some other portions of Rule 1.15(i) (such as (i)(4)) also lack delegation language, while yet other portions (such as (i)(1)) contain proscriptions that are directed to lawyers only; but it was his view that corresponding changes were not needed in those provisions because of the general concepts of delegation and supervision expressed in Rule 5.3 and Rule 8.4(a). Yet, despite those general delegation concepts, it seemed important, at the time the new Rules were promulgated, to clarify the lawyer's authority to delegate certain trust-related activities, as was done, for example, in Rule 1.15(i)(2) and (i)(5). Given those specific authorizations of delegation within the confines of Rule 1.15, the omission of delegation language in Rule 1.15(i)(6) stands out pregnantly and invites an inference that delegation is not permitted in the matter of account reconciliation.

While one approach to the matter might be to clarify, in *all* of the portions of Rule 1.15 where delegation might be contemplated but is not specified — such as Rule 1.15(i)(4) — that delegation is permitted, Rothrock felt that was not really necessary. But Rule 1.15(i)(6) stands out in such a way, and has raised such concern, that a correction there seems justified.

Rothrock reiterated his belief that it had not been intended that the reconciliation process uniquely required actual performance by the lawyer without the possibility of delegation.

Rothrock suggested, accordingly, that Rule 1.15(i)(6) be amended as follows:

> Reconciliation of Trust Accounts. No less than quarterly, a lawyer ***or a person supervised 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).

Nancy Cohen, who with John Gleason of the Office of Attorney Regulation Counsel had been the drafter of the Colorado modifications to Rule 1.15 in the Ethics 2000 proposal, concurred that it was *not* intended the Rule preclude a lawyer's delegation of the reconciliation process to another person, under the lawyer's supervision and responsibility.

A member expressed a concern that this and other references to "supervision by the lawyer" might imply direct oversight that would preclude, say, a solo practitioner's delegation of trust account withdrawals and transfers, trust account reconciliation, and signatory authority to a contract bookkeeper located outside the office. (This member was quick to acknowledge that even if she were to use an outsourced bookkeeper for such functions, she was certainly responsible for the results and for any mistakes or defalcations.)

Another member noted that lawyers, out of caution, will parse the Rules carefully. She was certain that the Rules' several references to a lawyer's supervision of other persons, or to a lawyer's supervisory authority over other lawyers and nonlawyers, are not intended to imply direct, in-the-office, hands-on oversight. Accordingly, any correction to the provision in question must not be made in such a way as to narrow the concepts of supervision and delegation as found in this and in other portions of Rule 1.15 or in other Rules.

Several other members voiced their agreement that any modification should be done carefully to avoid unintended implications for other provisions in the Rules.

A member suggested that the matter might be dealt with by the addition of a comment speaking generally to what is intended by a supervisory duty.

Rothrock commented that he felt a direct modification to Rule 1.15(i)(6) was needed, as he had suggested, but that he was not averse to the addition of some explanatory comment as well. He pointed out that the reconciliation obligation had been obscured in the previous version of the Rule and had probably been overlooked by many lawyers. The added specificity of the new version is helpful, but mischief lies in its omission of delegation language that is found in other portions of the Rule.

The Committee determined that Rothrock's subcommittee should examine the issues further and report to the next meeting of the full Committee.

VI. *Process Considerations.*

The Chair noted that the discussion about ambiguity in Rule 1.15(i)(6) and the suggestion that an amendment might been appropriate raised the more general question of the Committee's process for proposing amendments to the Rules and dealing with suggestions made by others for amendments.

John Gleason thought it was appropriate that the Office of Attorney Regulation Counsel serve as a central repository of proposals for amendments to the Rules. He noted that the Executive Director of the Colorado Bar Association had already forwarded a few such proposals to him — he characterized those as minor matters not involving immediate attention. Gleason indicated that he intended to accumulate those proposals — those he has received so far are, he reiterated, just language issues — and at some point, perhaps mid-next-year, make a proposal directly to the Court for an omnibus amendment to the Rules. He noted that he is also in liaison with the American Bar Association about such changes. Amplifying, Gleason asked that all such suggestions for modifications be directed to him, so that he might accumulate them and subsequently make a submission for amendment *first* to the Committee and then through it to the Court.

The Chair and the Secretary asked that Gleason keep the Chair informed of all such suggestions for modification as they were received by Gleason, and he agreed to do so.

The Chair was reminded of Judge John Webb's offer, at the first meeting of the Committee, on September 30, 2003, to chair a subcommittee that would track modifications as they were proposed to or through the American Bar Association's Center for Professional Responsibility to the Model Rules of Professional Conduct. Judge Webb agreed to continue in that capacity and to coordinate his monitoring of ABA activity with Gleason.

A member commented that, if many persons were to express concern about the meaning of some provision in the Rules, even if the provision itself appeared to be of minor import, the Committee should consider a more immediate response than might be the case if the matter were to be postponed for an omnibus amendment.

Another member sought and received clarification that any "wait process" would not encumber the Committee's pending proposal for modifications to Rule 265.

The Chair specifically requested that Gleason advise her as he learns of proposed modifications to the Model Rules of Professional Ethics from his liaison with the American Bar Association. He agreed to do so.

VII. *Adjournment; Next Scheduled Meeting.*

The meeting adjourned at approximately 10:00 p.m. The next scheduled meeting of the Committee will be on Friday, April 18, 2007, beginning at 9:00 a.m., in the Supreme Court Conference Room.

RESPECTFULLY SUBMITTED,

Anthony van Westrum, Secretary

[These minutes are as approved by the Committee at its meeting on April 18, 2008.]