COLORADO SUPREME COURT
STANDING COMMITTEE ON THE RULES OF PROFESSIONAL CONDUCT

Minutes of Meeting of February 26, 2010

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4. <u>New business</u>

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

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

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

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

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

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

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

3. <u>Subcommittee Report</u>

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

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

Rule 1.5

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

Rule 1.8

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

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

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

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

The subcommittee voted unanimously to accept the ancillary changes.

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

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

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

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

Meeting adjourned.