Colorado Supreme Court Standing Committee On The Colorado Rules Of Professional Conduct

Revised Agenda

August 19, 2010, 9:00 a.m.
Colorado Supreme Court Interim Space, in the Denver Post Building
Panorama Conference Room, 101 W. Colfax, 8th Floor

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1. Approval of minutes:
   a. August 21, 2009 meeting [to be provided prior to or at meeting]
   b. June 7, 2010 meeting [pages 72-79]
2. Report from file-retention subcommittee on proposed amendments to CRPC 1.15 and new CRPC 1.16A [Marcus Squarrell]:
   a. January 20, 2010 letter from John Gleason to the Supreme Court, with proposed changes [February 26, 2010 packet, pages 1-19]
   b. June 2, 2010 letter from District Attorneys' Council, with proposed amendments to proposed CRPC 1.16A [June 7, 2010 packet, pages 1-4]
   c. August 2010 subcommittee report [pages 41-71]
3. Report on status of proposed amendments to CRPC 1.5(b) [Marcy Glenn]
4. Report from CRPC 8.4(b) and CRCP 251.5(b) subcommittee [Alec Rothrock]:
   a. April 14, 2010 letter from Alec Rothrock to Marcy G. Glenn and David W. Stark [June 7, 2010 packet, pages 7-11]
   b. August 11, 2010 subcommittee report [pages 1-6]
5. Report from CRPC 3.6/3.8 subcommittee [David Stark]
   a. September 29, 2009 letter from Kory A. Nelson [February 26, 2010 packet, pages 29-34]
   b. August 11, 2010 subcommittee report [pages 7-20]

6. New business:

   a. Request from CBA Real Estate Section Council for potential rule or comment amendment related to provision of legal services to persons involved in the medical marijuana industry [Marcy Glenn, pages 21-25]

   b. Potential new comment to CRPC in light of *A.L.L. v. People, in the Interest of C.Z.*, 226 P.3d 1054 (Colo. 2010) [Marcy Glenn] [pages 26-40]

7. Administrative matters:

   a. Select next meeting date

8. Adjournment (before noon)

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MEMORANDUM

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

David W. Stark, Chair, Colorado Supreme Court Attorney Regulation Advisory Committee (Advisory Committee)

FROM: Alec Rothrock, Chair, Joint C.R.C.P. 251.5(b)/ Colo. RPC 8.4(b) Subcommittee

DATE: August 11, 2010

SUBJECT: Proposed Reconciliation of Conflict between C.R.C.P. 251.5(b) and Colo. RPC 8.4(b)

(Recommendation)

1. The Joint C.R.C.P. 251.5(b)/ Colo. RPC 8.4(b) Subcommittee recommends (a) no revision to Colo. RPC 8.4(b) or the accompanying Comment [2] and (b) the following revision to C.R.C.P. 251.5(b) to conform that rule to Colo. RPC 8.4(b):

RULE 251.5. GROUNDS FOR DISCIPLINE

Misconduct by an attorney, individually or in concert with others, including the following acts or omissions, shall constitute grounds for discipline, whether or not the act or omission occurred in the course of an attorney-client relationship:

. . .

(b) Any criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects~~act or omission which violates the criminal laws of this state or any other state, or of the United States~~; provided that conviction thereof in a criminal proceeding shall not be a prerequisite to the institution of disciplinary proceedings, and provided further that acquittal in a criminal proceeding shall not necessarily bar disciplinary action;

. . .

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(Joint Subcommittee History and Procedure)

2. By letter dated April 14, 2010, the undersigned requested that the Standing Committee and the Advisory Committee resolve a conflict between C.R.C.P. 251.5(b) and Colo. RPC 8.4(b). Each Committee appointed a subcommittee, and at a joint meeting of the subcommittees, they voted to merge into one subcommittee. The Joint Subcommittee met twice, on June 29, 2010 and on August 3, 2010. In addition to the undersigned, the members of the Joint Subcommittee were Nancy L. Cohen, Thomas E. Downey, Richard F. Hennessey, Steven K. Jacobson, Helen E. Raabe, Boston H. Stanton, Jr., James S. Sudler, Judge John R. Webb, and Anthony van Westrum.

(The Conflict)

3. The conflict between C.R.C.P. 251.5(b) and Colo. RPC 8.4(b) is that under the former, any criminal conduct engaged in by a lawyer constitutes grounds for lawyer discipline. Under the latter, however, only criminal conduct that "reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects" constitutes grounds for lawyer discipline.[1] Comment [2] of Colo. RPC 8.4 indeed describes the nature of the criminal conduct that "reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects" within the meaning of Colo. RPC 8.4(b).[2] The unqualified nature of C.R.C.P. 251.5(b) renders superfluous and misleading the "reflects adversely" qualifying language in Colo. RPC 8.4(b) and Comment [2].

(Joint Subcommittee's Analysis)

[1] Colo. RPC 8.4(b), with emphasis added, states that it is professional misconduct for a lawyer to:

> (b) commit a criminal act *that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects*. . . . .

Colo. RPC 8.4(b) is identical to ABA Model Rule 8.4(b) and to DR 1-102(A)(3) of the former Colorado Code of Professional Responsibility.

[2] "[2] Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offenses carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation." Cmt. [2], Colo. RPC 8.4. Comment [2] is identical to Comment [2] of ABA Model Rule 8.4 and, for all relevant purposes, identical to a paragraph in the 2007 version of the Comment to Colo. RPC 8.4.

4. The options considered by the Joint Subcommittee were as follows: (1) recommend no change, (2) recommend a change to C.R.C.P. 251.5(b) to make it conform to Colo. RPC 8.4(b), and (3) recommend a change to Colo. RPC 8.4(b) to make it conform to C.R.C.P. 251.5(b). The consensus was to recommend the second option.

5. It is unclear how much practical impact the second option would have on lawyer discipline cases involving criminal conduct. As one court observed, "To some extent, every criminal act shows lack of support for our laws and diminishes public confidence in lawyers, thereby reflecting adversely on a lawyer's fitness to practice." *In re Conduct of White*, 815 P.2d 1257, 1265 (Ore. 1991). Although several cases in other jurisdictions have acknowledged the qualifying language in Rule 8.4(b) and endeavored to describe the practical effect of it,[3] very few courts have found no disciplinary violation on this basis.[4]

6. Nonetheless, the Joint Subcommittee reached a consensus that option two was preferable to option one. The former resolves a conflict in the rules, a worthy goal all by itself. Option two also gives life and meaning to the "reflects adversely" language in Colo. RPC 8.4(b) and the entirety of Cmt. [2], Colo. RPC 8.4, which are otherwise superfluous and misleading.

7. The Joint Subcommittee also reached a consensus that option two (making C.R.C.P. 251.5(b) conform to Colo. RPC 8.4(b)) was preferable to option three (making Colo. RPC 8.4(b) conform to C.R.C.P. 251.5(b)). Rule 8.4(b) represents a national standard. Colo. RPC 8.4(b) and Comment [2] are identical to corresponding provisions in the ABA Model Rules. They are also identical or very similar to provisions in the vast majority of other jurisdictions. C.R.C.P. 251.5(b) is not a uniform provision. A uniform rule provides the benefit of other states' interpretations of it.

8. In addition, a majority of the Joint Subcommittee preferred option two on the grounds that not all criminal conduct implicates a lawyer's "honesty, trustworthiness or fitness as a lawyer in other respects." Some criminal conduct should not subject a lawyer to professional discipline. "For example, a misdemeanor assault arising from a private dispute would not, in and of itself, violate [a rule virtually identical to Colo. RPC 8.4(b)]." *Iowa Supreme Court Attorney Discipline Board v. Templeton,* ___ N.W.2d ___, 2010 WL

[3] *E.g., In re Stults,* 644 N.E.2d 1239, 1241 (Ind. 1994); *Iowa Supreme Court Attorney Discipline Board v. Templeton,* ___ N.W.2d ___, 2010 WL 2629834 * 5 (Iowa July 2, 2010); *In re Conduct of White*, 815 P.2d 1257, 1265 (Ore. 1991); *In re Curran,* 801 P.2d 962, 972 (Wash. 1990).

[4] *E.g., In re Beren,* 874 P.2d 320 (Ariz. 1994) (affirming dismissal of Rule 8.4(b) and one other charge based on conviction of 12 counts of misdemeanor "facilitation of money laundering"); *Attorney Grievance Comm'n v. Post,* 710 A.2d 935 (Md. 1998) (reversing finding of Rule 8.4(b) violation based on "failing timely to file withholding tax returns and/or to remit the taxes reportedly withheld, and to hold in trust those taxes," but affirming violation of Rule 8.4(d) (conduct prejudicial to administration of justice based on same conduct).

2629834 * 5 (Iowa July 2, 2010) (quoting *In re Conduct of White*, 815 P.2d 1257, 1265 (Ore. 1991)). A majority believed that lawyers should be subject to discipline only if there is a "nexus between the criminal act and one of the three personal qualities set forth in [Rule] 8.4(b), to-wit: honesty, trustworthiness, or fitness as an attorney." *In re Stults,* 644 N.E.2d 1239, 1241 (Ind. 1994). *E.g., Templeton, supra* (misdemeanor "peeping Tom" conduct reflected adversely under Rule 8.4(b) because it showed that lawyer did not understand concept of privacy or respect law protecting privacy rights) (citing similar Indiana case).

(Explanation for the Proposed Language in C.R.C.P. 251.5(b))

9. The language change recommended above (option two) removes the operative phrase in C.R.C.P. 251.5(b) and replaces it with the operative phrase in Colo. RPC 8.4(b). The standard under the two rules would be identical. Conforming C.R.C.P. 251.5(b) to Colo. RPC 8.4(b) would narrow the nature of the criminal conduct that subjects a lawyer to discipline under C.R.C.P. 251.5(b). More subtly, it would also eliminate the somewhat arbitrary limitation of C.R.C.P. 251.5(b) to criminal conduct that violates state or federal law—grounds for discipline includes an "act or omission which violates the criminal laws of this state or any other state, or of the United States." Colo. RPC 8.4(b) contains no limitation on the jurisdiction of the criminal law violated by the lawyer's conduct.

10. The Joint Subcommittee did not believe it was necessary to cross-reference each rule to the other.

11. The recommended change would leave undisturbed the second phrase in C.R.C.P. 251.5(b), to wit: "provided that conviction thereof in a criminal proceeding shall not be a prerequisite to the institution of disciplinary proceedings, and provided further that acquittal in a criminal proceeding shall not necessarily bar disciplinary action." This language has appeared in the procedural rules governing attorney discipline cases for at least forty years. The legal principle behind it dates back to the turn of the last century. *People ex rel. Colorado Bar Ass'n v. Mead,* 29 Colo. 344, 68 P. 241 (1902).

and that the junior associate pay $5,000. It also issued a formal reprimand to Girardi, an informal reprimand to the junior associate, and a six-month suspension from the Ninth Circuit bar to Lack and Traina.

Girardi's misconduct does not warrant a suspension, the court said, because there was no evidence that he played any role in crafting the briefs. Girardi's practice of authorizing the Lack firm to sign his name on briefs that turned out to contain falsehoods was reckless and may even raise separate ethics questions, but it didn't rise to the same level of culpability shared by Lack and Traina, the court concluded.

The unnamed junior associate deserves more leniency, the court said, due to his lack of experience and his effort, albeit unsuccessful, to convince his superiors to pull the plug on the appeal.

Girardi, Traina, and the junior associate represented themselves along with Howard B. Miller of Girardi & Keese, Los Angeles. Michael P. Fordas of Kirkland & Ellis, Chicago, appeared for Dow Chemical Co.

Full text at http://op.bna.com/mopc.nsf/r?Open=kswn-87brvw.

Criminal Conduct

Iowa Expounds on Meaning of Rule 8.4 In Ethics Case of 'Peeping Tom' Lawyer

The Iowa Supreme Court July 2 indefinitely suspended the license of an inactive attorney after he was convicted of peeping into the bedroom and bathroom windows of a house occupied by several women (*Iowa Supreme Court Attorney Disciplinary Bd. v. Templeton*, Iowa, No. 10-0255, 7/2/10).

In an opinion by Justice David S. Wiggins, the court said that the lawyer may seek reinstatement after three months, but it added that any such petition would need to be accompanied by a certificate from a health care professional verifying the lawyer's fitness to practice law.

Rule's Phrases. The decision is significant in that the court clarified the reach of the disciplinary rule on criminal conduct, and addressed what "fitness to practice" and "conduct prejudicial to the administration of justice" mean.

It also announced that henceforward the disciplinary board need not file a separate charge alleging a violation of Iowa Rule of Professional Conduct 8.4(a), which indicates that it is misconduct to violate an ethics rule. "Proof of a violation of another rule is sufficient for us to consider the proper sanction," the court said.

Moving away from previous decisions, the court rejected the grievance commission's finding that the lawyer engaged in conduct prejudicial to the administration of justice. Such prejudice occurs only when a lawyer violates the well-understood norms and conventions of the practice of law, not whenever a lawyer commits a crime, it said.

Nor does the commission of a criminal act necessarily reflect adversely on a lawyer's fitness to practice, the court said, although it found a negative impact here in light of the evidence that the lawyer had not fully appreciated the concept of privacy and the laws protecting individual privacy rights.

Not So Plain View. According to the court, Mark A. Templeton received his law license in 1987 and practiced until 2000, when he began managing a newspaper distribution business. While making newspaper deliveries, the court said, Templeton became aware of a house where three single women lived and on numerous occasions peered into the home's bathroom and bedroom windows late at night.

After he was caught, Templeton said he always had a problem with "window peeping" and he pleaded guilty to six counts of "invasion of privacy—nudity," a misdemeanor. He was put on probation for six years and directed to complete sex-offender treatment.

The ensuing disciplinary board complaint charged Templeton with violating Iowa Rules of Professional Conduct 32:8.4(a) (violating or attempting to violate rules); 32:8.4(b) (criminal act reflecting adversely on honesty, trustworthiness, or fitness to practice); and 32:8.4(d) (conduct prejudicial to administration of justice). The grievance commission found that Templeton violated all three rules and recommended a two-year suspension without possibility of reinstatement during that time.

On appeal, the supreme court concluded that an indefinite suspension with a possibility of reinstatement after three months was more appropriate. It agreed that Templeton had engaged in conduct that reflected adversely on his fitness to practice law, but found insufficient evidence that he did anything that prejudiced the administration of justice.

Connection Between Fitness and Crime. As a threshold matter, the court observed that it had jurisdiction to discipline Templeton regardless of his inactive status and even though his conduct was unrelated to the representation of clients.

Addressing the Rule 8.4(b) charge, the court stressed that a criminal conviction does not automatically reflect adversely on a lawyer's fitness to practice. It found persuasive the decision in *In re White*, 815 P.2d 1257 (Or. 1991), which stated that there must be some rational connection between the criminal conduct and the lawyer's fitness to practice law before a Rule 8.4(b) violation can be established.

"Pertinent considerations include the lawyer's mental state; the extent to which the act demonstrates disrespect for the law or law enforcement; the presence or absence of a victim; the extent of actual or potential injury to a victim; and the presence or absence of a pattern of criminal conduct," the court said, quoting *White*.

Pointing to Templeton's pattern of criminal conduct and his intentional invasion of privacy, the court found ample evidence that his pattern of repeatedly invading the victims' privacy and causing them to suffer emotional distress reflected adversely on his fitness to practice, thus establishing the Rule 8.4(b) violation.

'Well-Understood Norms.' The court moved away from some of its prior decisions interpreting Rule 8.4(d)'s predecessor, DR 1-102(A)(5), however, and concluded that Templeton had not engaged in conduct prejudicial to the administration of justice simply by committing a crime. When Iowa adopted, without change, ABA Model Rule 8.4(d), the court said, it also embraced the intent of the model rule as reflected in the ABA debates which indicated that the rule was designed "to address violations of well understood norms and conventions of practice only."

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There is nothing in the record to suggest that Templeton deviated from the well-understood norms and conventions of law practice, the court said, noting that the lawyer complied with every order and time deadline in the criminal case against him. "He did nothing to impede the progress of his criminal proceeding and did not make any statements falsely impugning the integrity of the judicial system," it observed.

The court also took the opportunity to make clear that Rule 8.4(a) is not a standalone violation and should no longer be charged as such. The purpose of including this provision in the rules, it explained, is to put lawyers on notice that they are subject to discipline for violating the other rules.

The disciplinary board was represented by Assistant Director for Attorney Discipline Charles L. Harrington and Amanda K. Robinson, Des Moines, Iowa. Templeton was represented by Mark McCormick, Belin McCormick, Des Moines.

Full text at http://op.bna.com/mopc.nsf/r?Open=kswn-874htg.

Criminal Conduct

Mom Who Flouted Limits on School Visits Must Get Mental Screening to Keep License

A mother who violated her probation after being convicted of trespassing on school property must receive a mental health evaluation and undergo any recommended treatment in order to avoid suspension of her law license, the Louisiana Supreme Court declared July 2 (*In re LaMartina*, La., No. 10-B-0093, 7/2/10).

In a per curiam opinion, the court emphasized that the lawyer entered school property several times when the conditions of her probation prohibited that conduct. Finding that her intransigent pattern of conduct raised questions about the state of the lawyer's mental health, the court imposed a suspension of one year and one day but deferred it on condition that the lawyer submit to a mental health screening and any prescribed treatment.

Back to School—Again and Again. During the 2004-05 school year, the court said, Elise Mary Beth LaMartina often showed up at her child's public school and disregarded the school administration's rules and regulations for visitors.

Frequently, the court recounted, LaMartina did not sign in at the office to get permission to be on school grounds, went in areas that were off-limits to visitors, summoned her child's teacher into the hall two or three times a week while class was in session, and drove in the zone reserved for school buses. LaMartina physically threatened her child's teacher at a parent-teacher conference and asked another pupil to get off a swing so that her child could use it, the court added.

Believing that LaMartina's conduct presented safety concerns, school administrators twice called the police, who warned the lawyer on the first occasion and arrested her the next time. After a trial, the lawyer was found guilty on charges of resisting arrest and unauthorized access to a public school. The judge sentenced LaMartina to jail on both charges, but suspended the jail time and put her on probation for two years with the condition that she stay off school property in the school district without obtaining prior authorization and pay a $50 monthly supervision fee.

LaMartina was in law school during some of these events. In October 2006, about seven months after her criminal trial, she was admitted to the Louisiana bar.

Several months after her admission to the bar, the court said, LaMartina entered school grounds without authorization on three occasions, and she also failed to pay the monthly supervision fee. She stipulated to violating the conditions of her probation. The trial judge sentenced LaMartina to 20 days in jail, with credit for time served, and terminated her probation as unsatisfactory.

Conspiracy Theory Rejected. These events led to disciplinary charges against LaMartina for violating the Louisiana Rules of Professional Conduct.

A hearing committee and the disciplinary board found that by violating the terms of her criminal probation, LaMartina contravened Rule 3.4(c) (knowing disobedience of obligation under tribunal's rules); Rule 8.4(b) (criminal act that reflects adversely on lawyer's honesty, trustworthiness, or fitness as a lawyer), and Rule 8.4(a) (violation of professional conduct rules).

LaMartina claimed that she misunderstood what school areas were off limits under her probation, and that school board personnel were conspiring against her. The committee and the board did not credit these arguments but found no evidence that LaMartina had mental health problems. The board recommended that she receive a fully deferred three-month suspension, subject to one year of probation.

Although neither LaMartina nor the Office of Disciplinary Counsel challenged the board's recommended sanction, the court itself ordered briefing on that issue. It also instructed the parties to address whether the lawyer's conduct warranted mental health screening and treatment.

'Tenacious Behavior.' The court stated without much elaboration that LaMartina committed misconduct, as alleged in the formal charges, based on her violation of the terms of her probation following her admission to the bar.

On the question of what sanction to impose, the court said that LaMartina acted at least knowingly, if not intentionally, in entering school grounds without authorization when the conditions of her probation clearly prohibited her from doing so. She caused actual harm to the legal system and potential harm to the public by creating a potentially unsafe situation for students and staff at the school, the court found. It identified a period of suspension as the base sanction for this misconduct.

As aggravating factors, the court found a dishonest or selfish motive, a pattern of misconduct, multiple offenses, and refusal to acknowledge the wrongful nature of the conduct. In mitigation, the court observed that LaMartina had no prior disciplinary record, made full and free disclosure to the disciplinary board, displayed a cooperative attitude toward the proceedings, and had already received other penalties.

The court found that the board's recommendation of a deferred three-month suspension was unduly lenient. In reaching this conclusion, the court relied on *In re Katner*, 15 So. 3d 52 (La. 2009), which imposed a suspension of one year and one day upon an attorney who stalked someone and had her probation for that offense

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REPORT OF RPC 3.6/3.8 SUBCOMMITTEE

I. Introduction

The subcommittee reviewed and considered four options to address the issues raised by the interplay of Colo. RPC 3.6 and 3.8. We recommend changes to Rules 3.6(b), 3.6(c), 3.8(f), and Comment [5] that would give clear guidance to public prosecutors by stating that Rule 3.8(f)'s prohibition against extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused is modified by the safe harbor provisions of Colo. RPC 3.6(b) and 3.6(c). This approach furthers the objectives of the Rules, provides needed clarity and minimizes First Amendment issues.

II. The Purpose of the Subcommittee

Our charter was framed by a nonmember's request for the committee to consider whether Rule 3.6(b)(2) – which permits extrajudicial statements of "information contained in a public record" – should be limited to preclude a prosecutor from adding unnecessary information to the public record and, on that basis, justifying extrajudicial statements that repeat such information, although those statements prejudice the defendant. The nonmember provided an example of a case where a prosecutor had made extrajudicial statements that portrayed a defendant negatively by drawing on a very detailed probable cause affidavit.

III. Background

The public record exception in Rule 3.6(b)(2) has been broadly construed. *Attorney Grievance Comm'n v. Gansler*, 835 A.2d 548, 567 (Md. 2003). Nevertheless, it "could become a license for the prosecutor to read from a detailed indictment at a news conference." *See, e.g.*, 2 G. Hazard & W. Hodes, *The Law of Lawyering*, § 32.6 (3d. ed.) Likewise, "defense counsel may file pleadings and other papers with the court that tell the story from the defendant's perspective." A. Bernabe-Riefkohl, *Symposium, Silence is Golden: The New Illinois Rules on Attorney Extrajudicial Speech*, 33 Loy. U. Chi. L.J. 323, 373 (Winter 2002) (footnotes and internal citations omitted). Further, this area of attorney regulation has significant First Amendment implications. *See, e.g.*, R. Cassidy, *The Prosecutor and the Press: Lessons (Not) Learned from the Mike Nifong Debacle*, Boston College Law School Faculty Papers (2008) (suggesting that discipline for violating Rule 3.8(f) would not survive First Amendment scrutiny).

IV. Applicable Rules

Initially, the subcommittee considered whether such abuse could be regulated under Rule 3.8(f), which obligates a prosecutor to "refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused," unless the statement is "necessary to inform the public of the nature and extent of the prosecutor's action" or "serve[s] a legitimate law enforcement purpose." Repeating public

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record information could heighten "public condemnation of the accused." Unfortunately, the interplay between Rule 3.6 and Rule 3.8 is unclear.

The first sentence of Comment [5] to Rule 3.8 provides that "Paragraph (f) supplements Rule 3.6." However, according to the last sentence in this comment, "Nothing in this comment is intended to restrict the statements which a prosecutor may make which comply with Rule 3.6(b) or (c)." No authority was found relying on the first sentence of the Comment [5] to subordinate the safe harbors in Rule 3.6 to the prohibition of Rule 3.8(f). Indeed, substantial contrary authority exists. *See, e.g., The Law of Lawyering,* § 34.9 (2009 Supp., 3d. ed.) ("Nonetheless, Comment [5] to Rule 3.8 reminds that Rule 3.6 lists some pretrial statements that are permitted to be made, and that this Rule is not intended to negate Rule 3.6.").

V. Our Process

The subcommittee addressed four options: (1) doing nothing; (2) attempting to close the public record loophole; (3) clarifying that Rule 3.8(f) trumps Rule 3.6(b) and (c); and (4) clarifying that Rule 3.6(b) and (c) trump Rule 3.8(f).

A. Doing Nothing

The subcommittee rejected this option, for several reasons. First, as elected officials to whom the press frequently turns, district attorneys need clear standards. Second, public trust in the judicial process is eroded when

elected officials take a "no comment" approach, which could be due to lack of clear standards. Third, a subcommittee member offered that within the Office of Attorney Regulation Counsel (OARC), some disagreement has existed over the relationship between Rule 3.6 and Rule 3.8.

B. Closing the Loophole

Next, the subcommittee considered and rejected various proposals of language that might prevent a prosecutor or a defense attorney from including extraneous information in the public record solely as a foundation to make extrajudicial statements permissible under Rule 3.6(b)(2). From a drafting standpoint, each proposal had significant problems. Additionally, some members suggested that imposing discipline under these proposals would be difficult based on attorney-client privilege, executive privilege, and work product protection for communications between a prosecutor and the police officer or investigator who had prepared the questioned public record. Other members rejected this view. Most agreed that OARC would face a challenging task in pursuing a disciplinary complaint because of the need to prove the intent of the lawyer, whether prosecutor or defense counsel, who caused allegedly extraneous information to be included in the public record. No member of the subcommittee sought to present a minority report on such language.

C. Prioritizing Rule 3.8(f)

The subcommittee then considered changes to Rule 3.6 and Comment [8] to clarify that the restriction in Rule 3.8(f) prevails over the safe harbors in Rule 3.6(b) and (c). Although these changes seemed workable as a matter of drafting, from a policy perspective, the subcommittee was not persuaded to recommend them for reasons, including those discussed above under the "doing nothing" option, as well as recognition that prosecutors often have a legitimate reason for using public record information to educate the public. One member referred to a case in which a convicted rapist had been released on bond because the focal point of a postconviction proceeding was recantation by the victim.

Members also expressed concern that giving Rule 3.8(f) priority over Rule 3.6(b) and (c) would exacerbate First Amendment problems in imposing discipline. In addition, the subcommittee was not persuaded that a systemic problem of abuse among prosecutors in Colorado, state or federal, had been identified.

D. Prioritizing Rule 3.6(b) and (c)

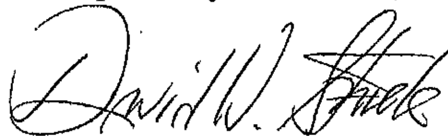
Finally, the subcommittee considered and agreed to recommend changes to Rules 3.6(b), 3.6(c), 3.8(f), and Comment [5] that would clearly subordinate the prohibition in Rule 3.8(f) to the safe harbors in Rule 3.8(b) and 3.8(c). This approach furthers the objectives discussed above and minimizes First Amendment issues. And, even if this recommendation were

adopted, a lawyer who includes clearly superfluous and prejudicial information in a public record might still be disciplined under Rule 8.4(d) ("engage in conduct that is prejudicial to the administration of justice"). Although no member opposed this recommendation, several members abstained.

The recommended language, Version B, redlined against the current Rules and Comments, is attached as an appendix to this report. The language discussed in subsection C that was considered and rejected, Version A, is also attached, as are the current versions of the Rules and Comments.

DATED this 9th day of August, 2010.

Respectfully submitted,



David W. Stark
Subcommittee Chair

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Appendix

Version B

Proposed Revisions if Rule 3.8(f) does not Narrow Rule 3.6(b) or Rule 3.6(c)

Colo. RPC 3.6

(b) Notwithstanding paragraph (a) and Rule 3.8(f), a lawyer may state:

(1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;

(2) information contained in a public record;

(3) that an investigation of a matter is in progress;

(4) the scheduling or result of any step in litigation;

(5) a request for assistance in obtaining evidence and information necessary thereto;

(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and

(7) in a criminal case, in addition to subparagraphs (1) through (6):

(i) the identity, residence, occupation and family status of the accused;

(ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;

(iii) the fact, time and place of arrest; and

(iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

(c) Notwithstanding paragraph (a) and Rule 3.8(f), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

. . .

Comment to Colo. RPC 3.6

[8] See Rule 3.8(f) for additional duties of prosecutors in connection with extrajudicial statements about criminal proceedings.

Colo. RPC 3.8

The prosecutor in a criminal case shall:

. . . .

(f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused unless such comments are permitted under Rule 3.6(b) or 3.6(c) and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.

Comment to Colo. RPC 3.8

[5] Paragraph (f) supplements ~~Rule 3.6, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding.~~ the prohibition in Rule 3.6, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding, but does not limit the protection of Rule 3.6(b) or Rule 3.6(c). In the context of a criminal prosecution, a prosecutor's extra judicial statement can create the additional problem of increasing public condemnation of the accused. Although the announcement of an indictment, for example, will necessarily have severe consequences for the accused, a prosecutor can, and should, avoid comments which have no legitimate law enforcement purpose and have a substantial likelihood of increasing public opprobrium of the accused. Nevertheless, a prosecutor shall not be subject to disciplinary action on the basis that the prosecutor's statement violated paragraph (f), if the statement was permitted by Rule 3.6(b) or Rule 3.6(c).~~Nothing 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).~~

Appendix

Version A

Proposed Revisions if Rule 3.8(f) Narrows Rule 3.6(b) and Rule 3.6(c)

Colo. RPC 3.6

(b) Notwithstanding paragraph (a) but subject to Rule 3.8(f), a lawyer may state:

(1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;

(2) information contained in a public record;

(3) that an investigation of a matter is in progress;

(4) the scheduling or result of any step in litigation;

(5) a request for assistance in obtaining evidence and information necessary thereto;

(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and

(7) in a criminal case, in addition to subparagraphs (1) through (6):

(i) the identity, residence, occupation and family status of the accused;

(ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;

(iii) the fact, time and place of arrest; and

(iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

(c) Notwithstanding paragraph (a) but subject to Rule 3.8(f), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

. . . .

[8] See Rule 3.8(f) for additional duties of prosecutors in connection with extrajudicial statements about criminal proceedings.

Colo. RPC 3.8

The prosecutor in a criminal case shall:

. . . .

(f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused even if the prosecutor would otherwise be permitted to make such comments under Rule 3.6(b) or Rule 3.6(c) and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.

[5] Paragraph (f) limits~~supplements~~ Rule 3.6, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding. In the context of a criminal prosecution, a prosecutor's extra judicial statement can create the additional problem of increasing public condemnation of the accused. Although the announcement of an indictment, for example, will necessarily have severe consequences for the accused, a prosecutor can, and should, avoid comments which have no legitimate law enforcement purpose and have a substantial likelihood of increasing public opprobrium of the accused. A prosecutor is subject to disciplinary action for a statement that violates paragraph (f), even though the statement would be permitted by Rule 3.6(b) or 3.6(c).~~Nothing 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).~~

(a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;

(b) communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order;

(c) communicate with a juror or prospective juror after discharge of the jury if:

(1) the communication is prohibited by law or court order;

(2) the juror has made known to the lawyer a desire not to communicate;

(3) the communication involves misrepresentation, coercion, duress or harassment; or

(4) the communication is intended to or is reasonably likely to demean, embarrass, or criticize the jurors or their verdicts; or

(d) engage in conduct intended to disrupt a tribunal.

Repealed and readopted April 12, 2007, effective January 1, 2008.

Comment

[1] Many forms of improper influence upon a tribunal are proscribed by criminal law. Others are specified in the Colorado Code of Judicial Conduct, with which an advocate should be familiar. A lawyer is required to avoid contributing to a violation of such provisions.

[2] During a proceeding a lawyer may not communicate ex parte with persons serving in an official capacity in the proceeding, such as judges, masters or jurors, unless authorized to do so by law or court order.

[3] A lawyer may on occasion want to communicate with a juror or prospective juror after the jury has been discharged. The lawyer may do so unless the communication is prohibited by law or a court order but must respect the desire of the juror not to talk with the lawyer. The lawyer may not engage in improper conduct during the communication.

[4] The advocate's function is to present evidence and argument so that the cause may be decided according to law. Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. A lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge's default is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.

[5] The duty to refrain from disruptive conduct applies to any proceeding of a tribunal, including a deposition. See Rule 1.0(m).

RULE 3.6. TRIAL PUBLICITY

(a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

(b) Notwithstanding paragraph (a), a lawyer may state:

(1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;

(2) information contained in a public record;

(3) that an investigation of a matter is in progress;

(4) the scheduling or result of any step in litigation;

(5) a request for assistance in obtaining evidence and information necessary thereto;

(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and

(7) in a criminal case, in addition to subparagraphs (1) through (6):

(i) the identity, residence, occupation and family status of the accused;

(ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;

(iii) the fact, time and place of arrest; and

(iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

(c) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

(d) No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

Repealed and readopted April 12, 2007, effective January 1, 2008.

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Comment

[1] It is difficult to strike a balance between protecting the right to a fair trial and safeguarding the right of free expression. Preserving the right to a fair trial necessarily entails some curtailment of the information that may be disseminated about a party prior to trial; particularly where trial by jury is involved. If there were no such limits, the result would be the practical nullification of the protective effect of the rules of forensic decorum and the exclusionary rules of evidence. On the other hand, there are vital social interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves. The public has a right to know about threats to its safety and measures aimed at assuring its security. It also has a legitimate interest in the conduct of judicial proceedings, particularly in matters of general public concern. Furthermore, the subject matter of legal proceedings is often of direct significance in debate and deliberation over questions of public policy.

[2] Special rules of confidentiality may validly govern proceedings in juvenile, domestic relations and mental disability proceedings, and perhaps other types of litigation. Rule 3.4(c) requires compliance with such rules.

[3] The Rule sets forth a basic general prohibition against a lawyer's making statements that the lawyer knows or should know will have a substantial likelihood of materially prejudicing an adjudicative proceeding. Recognizing that the public value of informed commentary is great and the likelihood of prejudice to a proceeding by the commentary of a lawyer who is not involved in the proceeding is small, the Rule applies only to lawyers who are, or who have been involved in the investigation or litigation of a case, and their associates.

[4] Paragraph (b) identifies specific matters about which a lawyer's statements would not ordinarily be considered to present a substantial likelihood of material prejudice, and should not in any event be considered prohibited by the general prohibition of paragraph (a). Paragraph (b) is not intended to be an exhaustive listing of the subjects upon which a lawyer may make a statement, but statements on other matters may be subject to paragraph (a).

[5] There are, on the other hand, certain subjects that are more likely than not to have a material prejudicial effect on a proceeding, particularly when they refer to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration. These subjects relate to:

(1) the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness, or the expected testimony of a party or witness;

(2) in a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant or suspect or that person's refusal or failure to make a statement;

(3) the performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;

(4) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration;

(5) information that the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and that would, if disclosed, create a substantial risk of prejudicing an impartial trial; or

(6) the fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.

[6] Another relevant factor in determining prejudice is the nature of the proceeding involved. Criminal jury trials will be most sensitive to extrajudicial speech. Civil trials may be less sensitive. Non-jury hearings and arbitration proceedings may be even less affected. The Rule will still place limitations on prejudicial comments in these cases, but the likelihood of prejudice may be different depending on the type of proceeding.

[7] Finally, extrajudicial statements that might otherwise raise a question under this Rule may be permissible when they are made in response to statements made publicly by another party, another party's lawyer, or third persons, where a reasonable lawyer would believe a public response is required in order to avoid prejudice to the lawyer's client. When prejudicial statements have been publicly made by others, responsive statements may have the salutary effect of lessening any resulting adverse impact on the adjudicative proceeding. Such responsive statements should be limited to contain only such information as is necessary to mitigate undue prejudice created by the statements made by others.

[8] See Rule 3.8(f) for additional duties of prosecutors in connection with extrajudicial statements about criminal proceedings.

RULE 3.7. LAWYER AS WITNESS

(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:

(1) the testimony relates to an uncontested issue;

(2) the testimony relates to the nature and value of legal services rendered in the case; or

(3) disqualification of the lawyer would work substantial hardship on the client.

(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be

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called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

Repealed and readopted April 12, 2007, effective January 1, 2008.

COMMENT

[1] Combining the roles of advocate and witness can prejudice the tribunal and the opposing party and can also involve a conflict of interest between the lawyer and client.

Advocate–Witness Rule

[2] The tribunal has proper objection when the trier of fact may be confused or misled by a lawyer serving as both advocate and witness. The opposing party has proper objection where the combination of roles may prejudice that party's rights in the litigation. A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. It may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof.

[3] To protect the tribunal, paragraph (a) prohibits a lawyer from simultaneously serving as advocate and necessary witness except in those circumstances specified in paragraphs (a)(1) through (a)(3). Paragraph (a)(1) recognizes that if the testimony will be uncontested, the ambiguities in the dual role are purely theoretical. Paragraph (a)(2) recognizes that where the testimony concerns the extent and value of legal services rendered in the action in which the testimony is offered, permitting the lawyers to testify avoids the need for a second trial with new counsel to resolve that issue. Moreover, in such a situation the judge has firsthand knowledge of the matter in issue; hence, there is less dependence on the adversary process to test the credibility of the testimony.

[4] Apart from these two exceptions, paragraph (a)(3) recognizes that a balancing is required between the interests of the client and those of the tribunal and the opposing party. Whether the tribunal is likely to be misled or the opposing party is likely to suffer prejudice depends on the nature of the case, the importance and probable tenor of the lawyer's testimony, and the probability that the lawyer's testimony will conflict with that of other witnesses. Even if there is risk of such prejudice, in determining whether the lawyer should be disqualified, due regard must be given to the effect of disqualification on the lawyer's client. It is relevant that one or both parties could reasonably foresee that the lawyer would probably be a witness. The conflict of interest principles stated in Rules 1.7, 1.9 and 1.10 have no application to this aspect of the problem.

[5] Because the tribunal is not likely to be misled when a lawyer acts as advocate in a trial in which another lawyer in the lawyer's firm will testify as a necessary witness, paragraph (b) permits the lawyer to do so except in situations involving a conflict of interest.

Conflict of Interest

[6] In determining if it is permissible to act as advocate in a trial in which the lawyer will be a necessary witness, the lawyer must also consider that the dual role may give rise to a conflict of interest that will require compliance with Rules 1.7 or 1.9. For example, if there is likely to be substantial conflict between the testimony of the client and that of the lawyer the representation involves a conflict of interest that requires compliance with Rule 1.7. This would be true even though the lawyer might not be prohibited by paragraph (a) from simultaneously serving as advocate and witness because the lawyer's disqualification would work a substantial hardship on the client. Similarly, a lawyer who might be permitted to simultaneously serve as an advocate and a witness by paragraph (a)(3) might be precluded from doing so by Rule 1.9. The problem can arise whether the lawyer is called as a witness on behalf of the client or is called by the opposing party. Determining whether or not such a conflict exists is primarily the responsibility of the lawyer involved. If there is a conflict of interest, the lawyer must secure the client's informed consent, confirmed in writing. In some cases, the lawyer will be precluded from seeking the client's consent. See Rule 1.7. See Rule 1.0(b) for the definition of "confirmed in writing" and Rule 1.0(e) for the definition of "informed consent."

[7] Paragraph (b) provides that a lawyer is not disqualified from serving as an advocate because a lawyer with whom the lawyer is associated in a firm is precluded from doing so by paragraph (a). If, however, the testifying lawyer would also be disqualified by Rule 1.7 or Rule 1.9 from representing the client in the matter, other lawyers in the firm will be precluded from representing the client by Rule 1.10 unless the client gives informed consent under the conditions stated in Rule 1.7.

RULE 3.8. SPECIAL RESPONSIBILITIES OF A PROSECUTOR

The prosecutor in a criminal case shall:

(a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;

(b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;

(c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;

(d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor,

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except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;

(e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:

(1) the information sought is not protected from disclosure by any applicable privilege;

(2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and

(3) there is no other feasible alternative to obtain the information;

(f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.

Repealed and readopted April 12, 2007, effective January 1, 2008.

COMMENT

[1] A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence. Precisely how far the prosecutor is required to go in this direction is a matter of debate and varies in different jurisdictions. Many jurisdictions have adopted the ABA Standards of Criminal Justice Relating to the Prosecution Function, which in turn are the product of prolonged and careful deliberation by lawyers experienced in both criminal prosecution and defense. Applicable law may require other measures by the prosecutor and knowing disregard of those obligations or a systematic abuse of prosecutorial discretion could constitute a violation of Rule 8.4.

[2] In some jurisdictions, a defendant may waive a preliminary hearing and thereby lose a valuable opportunity to challenge probable cause. Accordingly, prosecutors should not seek to obtain waivers of preliminary hearings or other important pretrial rights from unrepresented defendants. Paragraph (c) does not apply, however, to a defendant appearing pro se with the approval of the tribunal. Nor does it forbid the lawful questioning of an uncharged suspect who has knowingly waived the rights to counsel and silence.

[3] The exception in paragraph (d) recognizes that a prosecutor may seek an appropriate protective order from the tribunal if disclosure of information to the defense could result in substantial harm to an individual or to the public interest.

[4] Paragraph (e) is intended to limit the issuance of lawyer subpoenas in grand jury and other criminal proceedings to those situations in which there is a genuine need to intrude into the client-lawyer relationship.

[5] Paragraph (f) supplements Rule 3.6, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding. In the context of a criminal prosecution, a prosecutor's extra judicial statement can create the additional problem of increasing public condemnation of the accused. Although the announcement of an indictment, for example, will necessarily have severe consequences for the accused, a prosecutor can, and should, avoid comments which have no legitimate law enforcement purpose and have a substantial likelihood of increasing public opprobrium of the accused. Nothing 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).

[6] Like other lawyers, prosecutors are subject to Rules 5.1 and 5.3, which relate to responsibilities regarding lawyers and nonlawyers who work for or are associated with the lawyer's office. Paragraph (f) reminds the prosecutor of the importance of these obligations in connection with the unique dangers of improper extrajudicial statements in a criminal case. In addition, paragraph (f) requires a prosecutor to exercise reasonable care to prevent persons assisting or associated with the prosecutor from making improper extrajudicial statements, even when such persons are not under the direct supervision of the prosecutor. Ordinarily, the reasonable care standard will be satisfied if the prosecutor issues the appropriate cautions to law-enforcement personnel and other relevant individuals.

RULE 3.9. ADVOCATE IN NONADJUDICATIVE PROCEEDINGS

A lawyer representing a client before a legislative body or administrative agency in a nonadjudicative proceeding shall disclose that the appearance is in a representative capacity. Further, in such a representation, the lawyer:

(a) shall conform to the provisions of Rules 3.3(a)(1), 3.3(a)(3), 3.3(b), 3.3(c), and 3.4(a) and (b);

(b) shall not engage in conduct intended to disrupt such proceeding unless such conduct is protected by law; and

(c) may engage in ex parte communications, except as prohibited by law.

Repealed and readopted April 12, 2007, effective January 1, 2008.

Marcy Glenn

From: Mark Boscoe [mboscoe@ir-law.com]
Sent: Tuesday, June 29, 2010 11:24 AM
To: Marcy Glenn
Subject: Marijuana

Please review.

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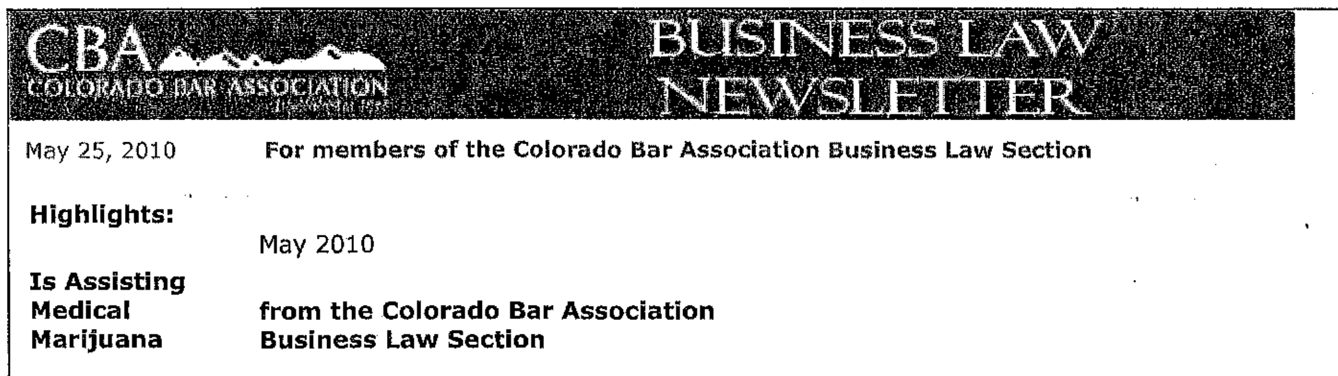
From: cobar@cobar.org [mailto:cobar@cobar.org]
Sent: Wednesday, May 26, 2010 3:08 PM
To: Mark Boscoe
Subject: CBA Business Law Member Newsletter -- May 26, 2010



May 25, 2010 **For members of the Colorado Bar Association Business Law Section**

Highlights:

May 2010

Is Assisting Medical Marijuana

from the Colorado Bar Association Business Law Section

Dispensaries Hazardous To A Lawyer's Professional Health?

OFFICERS AND DIRECTORS BEWARE: CERCLA LIABILITY

Don't be a Name Without a Face!

BUSINESS LAW SECTION ACTIVITIES

Bankruptcy Subsection

CLE INFORMATION

View Harvey Pitt's Recent Presentation in Denver Compliments of the CBA Business Law Section

8th Annual Rocky Mountain Intellectual Property & Technology Institute

Business Law Institute

CBA-CLE Business Law Publication

The Practitioner's Guide to Colorado Business Organizations – Revised Edition: Now Available!

Ed Naylor, Editor

s Assisting Medical Marijuana Dispensaries Hazardous To A Lawyer's Professional Health?

Alec Rothrock, Burns, Figa & Will, P.C.

In relevant part, Colorado Rule of Professional Conduct 1.2(d) states that a lawyer shall not "counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal." Colo. RPC 1.16(a)(1) requires a lawyer to decline or withdraw from representation if the representation would violate Colo. RPC 1.2(d) or "other law."

A lawyer who provides legal services to a medical marijuana dispensary does not assist in his client's violation of Colorado criminal laws banning the possession and sale of marijuana as long as the dispensary qualifies as a caregiver under article 18, section 14 of the Colorado Constitution and complies with that section and other legal requirements. Does that mean the lawyer does not violate Colo. RPC 1.2(d)? The answer is "no," not if the same conduct violates federal criminal law.

I. Is Medical Marijuana Legal?

In 2000, Colorado voters passed an amendment to the Colorado Constitution creating limited exemptions from C.R.S. § 18-18-406, which makes unlawful the possession, use and sale of marijuana. Since that time, hundreds of medical marijuana dispensaries have opened for business in the State of Colorado.

As with any new business owner, a lawyer may be engaged to provide a variety of legal services incident to the creation of the business, including forming the business entity and preparing formation and governance documents; drafting and negotiating financing, lease, and asset purchase documents; assisting in preparing applications for required licenses; registering trademarks; and furnishing an opinion letter regarding the client's legal rights and risks. And that is just to get the business up and running, to say nothing of the need for legal services to the ongoing business.

Yet 21 U.S.C. § 841(a)(1) continues to make the possession, use, and sale of marijuana unlawful. Through the Commerce Clause, this federal law prohibits these activities. *Gonzales v. Raich,* 545 U.S. 1, 22 (2005). Indeed, guidelines adopted in October 2009 by the United States Department of Justice, which direct federal prosecutors to focus their resources elsewhere than on "individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana," confirm that the conduct remains illegal under federal law. Memorandum for Selected United States Attorneys from David W. Ogden (Oct. 19, 2009), http://blogs.usdoj.gov/blog/archives/192.

II. Colo. RPC 1.2(d) Deconstructed

A. *Colo.RPC 1.2(d) Applies to Conduct Made Criminal under any Law*

Colo. RPC 1.2(d) applies to conduct made criminal under any law. It states as follows:

> A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

Colo.RPC 1.2(d).

If the conduct is criminal under any jurisdiction's law, the fact that it is not criminal under the concurrently applicable law of another jurisdiction's law is irrelevant. And a federal no-prosecution policy is not a change in the law, and by its nature it is temporary.

Colo. RPC 1.2(d) addresses the distinct activities of (1) counseling a client to engage in criminal conduct and (2) assisting a client in criminal conduct. It also requires the lawyer to "know" that the client's conduct is criminal. These terms are discussed below.

B. *The Counseling Prohibition*

Colo. RPC 1.2(d) distinguishes between the prohibited activity of counseling a client to engage in criminal conduct and the permitted activity of "discuss[ing] the legal consequences of any proposed course of conduct with a client." It permits a lawyer to give an "honest opinion about the actual consequences that appear likely to result from a client's conduct." Colo. RPC 1.2 Cmt. [9]. "There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity." *Id.*

The Comment to Rule 1.2 goes on to assure lawyers that "the fact that a client uses advice in a course of action that is criminal or fraudulent of itself [does not] make a lawyer a party to the course of action." Colo. RPC 1.2 Cmt. [9]. The Comment also states that a lawyer's responsibility may be "especially delicate" when the "client's course of action has already begun and is continuing." Colo. RPC 1.2 Cmt. [10]. A lawyer may not "continue assisting a client in conduct that the lawyer originally supposed was legally proper but then discovers is criminal or fraudulent." *Id.*

Yet the line between permitted and prohibited counseling can be a fine one. One legal authority defines prohibited counseling as "providing advice to the client about the legality of contemplated activities with the intent of facilitating or encouraging the client's action." Restatement (Third) of the Law Governing Lawyers § 94 cmt. a (2000). Another authority states that the rule requires an assessment of "not only the passive versus active quality of the lawyer's conduct, but the level of certainty that the client will actually misuse the information." 1 Geoffrey C. Hazard, Jr. & W. William Hodes, *The Law of Lawyering,* § 5.13, at 5-40 (Supp. 2003). Classic law school examples illustrating prohibited counseling include the client who asks her lawyer which countries do not have extradition treaties with the United States and the client with "a large amount of undeclared income in cash who wants to know how *small* a cash transaction must be before banks are relieved of the duty to report it." *Id.* at 5-40.1 (emphasis in original). *See also People v. Gifford,* 76 P.3d 519, 520 (Colo.O.P.D.J. 2003) (advising client to offer real estate in exchange for recantation by client's ex-wife and another witness in a pending criminal matter).

C. *The Assisting Prohibition*

The Comment to Colo. RPC 1.2 offers limited help in describing prohibited assistance. "The lawyer is required to avoid assisting the client, for example, by drafting or delivering documents that the lawyer knows are fraudulent or by suggesting how the wrongdoing might be concealed." Colo. RPC 1.2 Cmt. [10]. This sentence could just as well have referred to documents reflecting criminal conduct and advice to a client about concealment of criminal wrongdoing.

One legal authority defines "assisting" in this context as "providing"--with the "intent of facilitating or encouraging the client's action"--"other professional services, such as preparing documents, drafting correspondence, negotiating with a nonclient, or contacting a governmental agency." Restatement (Third) of the Law Governing Lawyers § 94 cmt. a (2000). There are several Colorado attorney discipline cases involving prohibited assistance. *See People v. Casey,* 948 P.2d 1014 (Colo. 1997) (assisting client

in criminal impersonation by failing to disclose true identity in criminal trespass case against client); *People v. Chappell,* 927 P.2d 829 (Colo. 1996) (assisting client in emptying bank accounts preparatory to fleeing with child to avoid child custody order, a violation of state criminal law, and arranging to supply fugitive client with money).

A leading treatise states that both the counseling and assisting prohibitions in Rule 1.2(d) track "standard principles of accessorial liability." Hazard, *supra,* § 5.12 at 5-36. "Pursuant to 18 U.S.C. § 2, a defendant may be charged as a principal in the commission of a substantive criminal offense whenever he 'aids, abets, counsels, commands, induces or procures its commission. . . .' In order to prove a crime of aiding and abetting, the government must prove that the defendant associated with the criminal venture, that he purposefully participated in it, and that he sought by his actions to bring it about." *U.S.v. Wang,* 898 F. Supp. 758, 761 (D. Colo. 1995); *see also* C.R.S. § 18-1-603 ("A person is legally accountable as principal for the behavior of another constituting a criminal offense if, with the intent to promote or facilitate the commission of the offense, he or she aids, abets, advises, or encourages the other person in planning or committing the offense."). Engaging in criminal conduct is itself disciplinable conduct, whether or not the lawyer is convicted. C.R.C.P. 251.5(b); Colo. RPC 8.4(b). Improper assistance under Colo. RPC 1.2(d) may apply to a broader range of conduct than even the wide net cast by the "complicity" statutes.

D. *Knowledge of Criminal Conduct*

With respect to both the counseling and assisting prohibitions, the lawyer must "know" that the client's conduct is criminal. Knowledge means actual knowledge of the fact in question and may be inferred from the circumstances. Colo. RPC 1.0(f). It is not clear from Colo. RPC 1.2(d) whether the emphasis of the knowledge requirement is on the lawyer's awareness of the client's activities or on the lawyer's awareness of their criminal nature. It may be both, although it is doubtful that a lawyer's ignorance of the law would excuse a violation of Colo. RPC 1.2(d). *But cf. In re Tocco,* 984 P.2d 539, 542-43 & n. 3 (Ariz. 1999) (showing that attorney reasonably should have known her conduct violated Rule 1.2(d) was insufficient, otherwise knowledge requirement would be a nullity).

Nor is willful ignorance of a client's activities likely to serve as a valid defense to a Rule 1.2(d) violation. In a 1981 informal opinion, the American Bar Association Committee on Ethics and Professional Responsibility construed a virtually identical rule in the ABA Model Code of Professional Responsibility to mean that "[a] lawyer must be satisfied, on the facts before him and readily available to him, that he can perform the requested services without abetting . . . criminal conduct and without relying on past client crime . . . to achieve results the client now wants. Otherwise, the lawyer has a duty of further inquiry." ABA Informal Opinion 1470, *"Duty of Lawyer to Inquire into Fraudulent or Criminal Conduct and Disclose Past Activities of a Prospective Client"*(July 16, 1981). This language is not inconsistent, at least according to some commentators, with a lawyer's operating assumption that a client is using the lawyer's counsel for lawful purposes. Michael M. Mustokoff, Jonathan L. Swichar, Cheryl R. Herzfeld, *The Attorney/Client Privilege: A Fond Memory of Things Past An Analysis of the Privilege Following United States v. Anderson*, 9 Annals Health L.107, 118 (2000).

III. Reality

In most instances, a lawyer will know when a client is engaging a lawyer's services to establish a medical marijuana dispensary. That may well be the client's stated purpose in consulting the lawyer, and the client needs no encouragement from the lawyer to embark on the venture. The client may even request that the lawyer analyze the laws, state and federal, that apply to the operation of the proposed business. So far, so good under Colo. RPC 1.2(d). For the lawyer, the delicate ethical concern is likely to be whether and when the lawyer's services in helping to establish the business constitute "assistance" in conduct that the lawyer knows is criminal under federal law.

It is possible to draw distinctions under Colo. RPC 1.2(d) between conduct that does and does not assist a client's federal criminal conduct. With the exception of the legal opinion, all of the legal service activities described above would likely fall under the vague definition of assistance, unless perhaps dispensary activities are only one possible business activity of the enterprise. The proximity of the lawyer's services to the dispensary's core activities is likely to be a critical factor, so helping a small dispensary is more ethically risky than helping a far flung enterprise whose activities may or may not include these core activities.

It is readily apparent that drawing lines over "assistance" is largely a self-defeating analysis, especially if Colorado's Office of Attorney Regulation Counsel (OARC) treats Colo. RPC 1.2(d) like the Commerce Clause in federal Constitutional jurisprudence. Here lies the reality.

Colorado's attorney discipline system is complaint-driven. OARC does not look for cases to prosecute. Notwithstanding media coverage and continuing legal education programs that feature pioneering medical marijuana lawyers, it would take a "request for investigation" for OARC to develop a prosecutorial position. In Colorado, there is no "standing" requirement for filing a request for investigation—anyone can file one.

At that point, the respondent lawyer's disciplinary fate would be left to OARC's tender mercies. In view of the serious misconduct that that office deals with on a daily basis, as well as the political momentum generated by the medical marijuana industry in this state, it seems unlikely that OARC would stand in the way of this phenomenon by choosing to prosecute dispensary-assisting lawyers, at least those lacking ties to any major cartels. Even if OARC felt duty-bound not to ignore what it considered a clear violation of Colo. RPC 1.2(d) for assisting a client to commit a federal crime, it would be within that office's discretion to, for example, dismiss the matter if the offending lawyer agreed to attend its day-long, seven-CLE-ethics-credit "Ethics School" as part of the Alternatives to Discipline Program. C.R.C.P. 251.13. OARC might also dismiss the complaint outright.

Lawyers who assist medical marijuana dispensaries may well violate Colo. RPC 1.2(d) and should not delude themselves by indulging fine distinctions over the degree of their assistance or knowledge of a client's criminal conduct. The risk of a violation is high and cannot be eliminated. The likelihood of significant adverse disciplinary consequences, on the other hand, seems low indeed. The real issue that Colorado lawyers should ponder is not disciplinary prosecution but ethical purity.

H

Supreme Court of Colorado,
En Banc.
A.L.L. and D.Z., Petitioners
v.
The PEOPLE of the State of Colorado, Respondent.
C.Z., In the Interest of Minor Child.
No. 09SC621.

March 1, 2010.

Background: In dependency and neglect proceeding, the District Court, Lake County, Karen Romero, J., ordered parental rights of mother and father terminated. Mother and father directed their court-appointed trial attorneys to appeal. The Court of Appeals granted trial attorneys' motion to withdraw, and appointed new appellate counsel who submitted briefing as to whether Colorado should adopt procedures under *Anders v. California* for dependency and neglect appeals in which counsel determines there are no meritorious legal arguments. The Supreme Court accepted prejudgment certiorari.

Holdings: The Supreme Court, Martinez, J., held that:
(1) practice in criminal cases of accepting an *Anders*-style brief in conjunction with an attorney's motion to withdraw where an attorney determines her client's appeal is without merit is disapproved of in Colorado; disapproving *People v. Marquez*, 37 Colo.App. 441, 548 P.2d 939; and
(2) appointed lawyer for an indigent parent during dependency and neglect proceedings cannot withdraw solely because she reasonably concludes an appeal to without merit, but must file petition with a statement of nature of the case, concise statements of facts and legal issues presented on appeal, and a description and application of pertinent sources of law; disapproving *People ex rel. D.M.*, 186 P.3d 101.

Remanded with directions.

Eid, J., filed a dissenting opinion in which Rice, J., joined.

West Headnotes

[1] Criminal Law 110 🔑1833(1)

110 Criminal Law
110XXXI Counsel
110XXXI(B) Right of Defendant to Counsel
110XXXI(B)9 Choice of Counsel
110k1831 Withdrawal by Counsel
110k1833 Anders Withdrawal on Appeal
110k1833(1) k. In general. Most Cited Cases
Procedure under *Anders* for criminal appeals in which court-appointed counsel determines that an appeal is without merit is not obligatory upon the states, but merely sets forth the minimum requirements to protect the defendant where the withdrawal is allowed.

[2] Criminal Law 110 🔑1833(1)

110 Criminal Law
110XXXI Counsel
110XXXI(B) Right of Defendant to Counsel
110XXXI(B)9 Choice of Counsel
110k1831 Withdrawal by Counsel
110k1833 Anders Withdrawal on Appeal
110k1833(1) k. In general. Most Cited Cases
Where a court does not allow the appointed attorney to withdraw from representation solely because he concludes the appeal to be without merit, the defendant's rights are protected through the normal course of appellate review.

[3] Criminal Law 110 🔑1833(1)

110 Criminal Law
110XXXI Counsel
110XXXI(B) Right of Defendant to Counsel
110XXXI(B)9 Choice of Counsel
110k1831 Withdrawal by Counsel
110k1833 Anders Withdrawal on Appeal
110k1833(1) k. In general. Most

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Cited Cases
An appointed attorney cannot shirk her duty to represent her client and instead serve as the court's fact-finder.

[4] Criminal Law 110 ⚷1833(1)

110 Criminal Law
110XXXI Counsel
110XXXI(B) Right of Defendant to Counsel
110XXXI(B)9 Choice of Counsel
110k1831 Withdrawal by Counsel
110k1833 Anders Withdrawal on Appeal
110k1833(1) k. In general. Most Cited Cases
Practice in criminal cases of accepting an *Anders*-style brief in conjunction with an attorney's motion to withdraw where an attorney determines her client's appeal is without merit is disapproved of in Colorado; disapproving *People v. Marquez,* 37 Colo.App. 441, 548 P.2d 939.

[5] Infants 211 ⚷245

211 Infants
211VIII Dependent, Neglected, and Delinquent Children
211VIII(F) Review
211k244 Proceedings for Transfer, and Effect
211k245 k. Proceedings in forma pauperis. Most Cited Cases
An appointed lawyer for an indigent parent during dependency and neglect proceedings cannot withdraw solely because she reasonably concludes an appeal to without merit, but must nonetheless file petitions on appeal in accordance with appellate rule requiring a statement of the nature of the case, concise statements of the facts and legal issues presented on appeal, and a description and application of pertinent sources of law; disapproving *People ex rel. D.M.,* 186 P.3d 101. Rules App.Proc., Rule 3.4.

[6] Infants 211 ⚷205

211 Infants
211VIII Dependent, Neglected, and Delinquent Children
211VIII(D) Proceedings
211k205 k. Counsel or guardian ad litem. Most Cited Cases

Infants 211 ⚷242

211 Infants
211VIII Dependent, Neglected, and Delinquent Children
211VIII(F) Review
211k242 k. Right of review, parties, and decisions reviewable. Most Cited Cases
A parent's rights to counsel and an appeal in dependency and neglect proceedings are statutory, rather than constitutional, in nature. West's C.R.S.A. §§ 19-1-105, 19-1-109(2)(b), 19-3-202(1).

[7] Criminal Law 110 ⚷2050

110 Criminal Law
110XXXI Counsel
110XXXI(E) Duties and Obligations of Defense Attorneys
110k2050 k. In general. Most Cited Cases
Once an indigent litigant has been appointed counsel, the Supreme Court refers to its constitutional jurisprudence to determine the scope of the obligation borne by the appointed attorney.

[8] Infants 211 ⚷205

211 Infants
211VIII Dependent, Neglected, and Delinquent Children
211VIII(D) Proceedings
211k205 k. Counsel or guardian ad litem. Most Cited Cases

Infants 211 ⚷245

211 Infants
211VIII Dependent, Neglected, and Delinquent Children
211VIII(F) Review
211k244 Proceedings for Transfer, and Effect
211k245 k. Proceedings in forma pauperis. Most Cited Cases
The obligation of court-appointed attorneys to advocate for indigent parents in termination of rights proceedings is no different from the obligation imposed

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on counsel appointed to represent criminal defendants on appeal.

[9] Infants 211 245

211 Infants
211VIII Dependent, Neglected, and Delinquent Children
211VIII(F) Review
211k244 Proceedings for Transfer, and Effect
211k245 k. Proceedings in forma pauperis. Most Cited Cases

The legal issues presented in a brief by an indigent parent's court-appointed attorney who wishes to withdraw based on determination that an appeal is without merit can be either those identified and developed by the attorney, or, if she can find none, those points the parent wants argued. Rules App.Proc., Rule 3.4.

***1055** J. Barry Meinster, Conifer, Colorado, Attorney for Petitioner, A.L.L.

Deborah Gans, Denver, Colorado, Attorney for Petitioner, D.Z.

Joseph Fattor, County Attorney, Alison D. Casias, Special Assistant County Attorney, Dillon, Colorado, Attorneys for Respondent, The People of the State of Colorado.

Robert G. Tweedell, Delta, Colorado, Paula Constantakis Young, Denver, Colorado, Guardians Ad Litem for C.Z.

William Louis, County Attorney, Laura C. Rhyne, Deputy County Attorney, Colorado Springs, Colorado, Attorneys for Amicus Curiae, The El Paso County Department of Human Services.

Sarah Ehrlich, Sheri Danz, Denver, Colorado, Attorneys for Amicus Curiae, The Colorado Office of the Child's Representative.

N. Lawrence Hoyt, County Attorney, Toni Jo Gray, Assistant County Attorney, Boulder, Colorado, Attorneys for Amicus Curiae, The Boulder County Department of Housing and Human Services.

Justice MARTINEZ delivered the Opinion of the Court.

This case arises from a dependency and neglect (D & N) proceeding after which the trial court ordered the parental rights of A.L.L. and D.Z. terminated. The parents directed their court-appointed attorneys to appeal the trial court's order. After reviewing the decision and the record, the attorneys for both parents determined that there were no meritorious arguments to pursue on appeal. At the request of the court of appeals, counsel submitted briefs arguing that Colorado should adopt a procedure under *Anders v. California,* 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967), for D & N appeals. We accepted prejudgment certiorari under C.A.R. 50 to clarify the duties of court-appointed counsel when their client exercises an appeal by right and yet cannot identify a meritorious legal argument to support their claim for relief.[FN1] We conclude that, where a court-appointed attorney represents a litigant with a right to an appeal, she has an obligation to advocate on her client's behalf. We determine that a parent's rights are better protected by full appellate review than by an *Anders* briefing procedure, and so we remand this case for further consistent proceedings.

FN1. The issue on which we granted certiorari read as follows:

> Whether Colorado should adopt a procedure under *Anders v. California,* 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967), for dependency and neglect appeals that would apply to an indigent parent's appeal of an order terminating parental rights when appointed counsel believes there are no viable issues for appeal. *See, e.g., Linker-Flores v. Ark. Dep't of Human Servs.,* 359 Ark. 131, 194 S.W.3d 739, 745-48 (2004) (compiling cases).

I. Procedural Posture

Prior to certifying the case to this court, the court of appeals struck the petitions on appeal that outlined substantive issues concerning the termination order that is being challenged here. As the merits of this appeal***1056** have neither been briefed nor argued, we cannot finally resolve this matter. The only issue before us is whether and in what ways the United States Supreme Court's decision regarding criminal

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appeals in *Anders v. California* should be applied to D & N proceedings in Colorado. After resolving that issue, we remand the case to the court of appeals for further proceedings consistent with this opinion.

After all appropriate D & N proceedings, the trial court ordered the parental rights of A.L.L. and D.Z. terminated with respect to their child, C.Z. Electing to exercise their statutory rights to counsel and appeal, A.L.L. and D.Z. directed their court-appointed attorneys to appeal the termination of their parental rights. *See* §§ 19-1-105, 19-3-202(1), C.R.S. (2009) (right to counsel); § 19-1-109(2)(b), C.R.S. (2009) (right to an appeal).

Counsel for both A.L.L. and D.Z. during the termination hearing subsequently submitted petitions on appeal to the court of appeals. The petitions were crafted to comply with those procedures outlined by the Supreme Court in *Anders* to protect a client's rights while simultaneously respecting an attorney's ethical bar against bringing frivolous claims before a court. *See* 386 U.S. at 744, 87 S.Ct. 1396. The petitions identified potential legal issues arising from the termination hearing that might be challenged on appeal. The parents' trial counsel then described why, with each identified legal issue, they felt the trial court had properly considered applicable law and relevant facts. Counsel concluded that there were no viable issues on appeal and requested that they be allowed to withdraw from their respective roles representing the parents.

The court of appeals granted the trial attorneys' motions to withdraw and appointed new appellate counsel for each parent. The original petitions on appeal filed by trial counsel were ordered stricken. Appellate counsel were given time to file amended petitions on appeal. However, the court of appeals ordered that if new counsel also concluded that there were no viable issues for appeal, appellate counsel should instead submit supplemental petitions "explaining whether Colorado should adopt a procedure under [*Anders*] for dependency and neglect appeals." *See* 386 U.S. at 744, 87 S.Ct. 1396 (describing a briefing procedure).

Court-appointed appellate counsel for both A.L.L. and D.Z. agreed with the trial attorneys' determinations that there were no viable issues on appeal, and so submitted briefs arguing that Colorado should adopt procedures under *Anders* for dependency and neglect appeals. Thereafter, the court of appeals referred the case to this court pursuant to section 13-4-109(a), (b), and (c), C.R.S. (2009). We accepted pre-judgment certiorari under C.A.R. 50 to clarify the duties of court-appointed counsel when their client exercises an appeal-by-right and yet cannot identify a meritorious legal argument to support their claim for relief.

II. Analysis

The parties here argue that a procedure such as the one set forth by the Supreme Court in *Anders* for criminal appeals is necessary to address those situations where court-appointed attorneys are asked by their clients to pursue an appeal they feel is wholly without merit. We disagree.

We begin with a discussion of the Supreme Court's decision in *Anders*, then discuss how the issues in that opinion have been addressed in Colorado, and finally turn to the D & N context. We conclude that a lack of merit neither renders an appeal of a termination order frivolous nor constitutes sufficient grounds to allow an attorney's withdrawal. As such, we remand this case to the court of appeals for further consistent proceedings.

A. *Anders*

In *Anders v. California*, the Supreme Court held that a criminal defendant's right to counsel must be protected even where his court-appointed attorney determines that an appeal is without merit. 386 U.S. at 744, 87 S.Ct. 1396. There, the defendant was convicted of marijuana possession and sought an appeal. After reviewing the record, his court-appointed attorney filed a letter with the District Court of Appeal in California ***1057** stating he was of the opinion that there was "no merit in the appeal." *Id.* at 742, 87 S.Ct. 1396. Anders' request for new counsel was denied, and he continued pro se. His conviction was affirmed, and all subsequent challenges were summarily dismissed by reviewing courts. *Id.* at 740-41, 87 S.Ct. 1396. The Supreme Court reversed and remanded the case after concluding California's "no-merit letter" procedure "did not furnish [Anders] with counsel acting in the role of an advocate nor did it provide that full consideration and resolution of the matter as is obtained when counsel is acting in that capacity." *Id.* at 743, 87 S.Ct. 1396.

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To address the failings of California's procedure, the Court went on to outline another procedure that would be an "adequate substitute for the right to full appellate review" and that protected a criminal defendant's right to counsel in the event that court-appointed counsel determined there were no viable issues for appeal and moved to withdraw from the case. *See* id. at 742, 744, 87 S.Ct. 1396. Specifically, where a court-appointed attorney determines his client's appeal to be "wholly frivolous," he may inform the court of that determination and request to withdraw from the case. *Id.* at 744, 87 S.Ct. 1396. However, the request to withdraw must be "accompanied by a brief referring to anything in the record that might arguably support the appeal," and the litigant must be given an opportunity to raise any further points not presented by her attorney. *Id.* The reviewing court then proceeds to determine whether the appeal is "wholly frivolous." *Id.* If the court identifies legal points arguable on the merits, the litigant must be afforded new counsel to argue the appeal. *See id.*

The Supreme Court's opinion in *Anders* is best viewed as comprising two distinct components: the first addresses a problem; the second outlines a procedure. The first component of *Anders* considers the threat to a criminal defendant's constitutional rights where his court-appointed attorney concludes his appeal is without merit. The Court answers this threat simply: "The constitutional requirement of substantial equality and fair process can only be attained where counsel acts in the role of an active advocate [on] behalf of his client." *Id.* at 744, 87 S.Ct. 1396. The Court recognized that court-appointed counsel must act as an advocate for his client and not "merely review the case and cast aside the points urged by [his client] as being without merit." *McClendon v. People,* 174 Colo. 7, 12, 481 P.2d 715, 717-18 (1971) (discussing *Anders*). A court-appointed attorney cannot abandon her duties to her clients in favor of her duties to the court; where a defendant has rights to counsel and an appeal, his court-appointed lawyer must protect those rights in accordance with due process and equal protection in spite of any misgivings she may have about the merits of the appeal. *See Anders,* 386 U.S. at 741, 87 S.Ct. 1396.

As the second component of its opinion in *Anders,* the Supreme Court outlined a procedure to protect the defendant's rights where his lawyer feels the appeal is "wholly frivolous" and moves to withdraw. Of course, within the boundaries of due process and equal protection, the details of attorney regulations are left to a state's sovereign control. *See Hoover v. Ronwin,* 466 U.S. 558, 569 n. 18, 104 S.Ct. 1989, 80 L.Ed.2d 590 (1984) (stating that "regulation of the bar is a sovereign function of the [state]" because "[f]ew other professions are as close to the core of the State's power to protect the public ... [or] as essential to the primary governmental function of administering justice" (internal quotations and citations omitted)).[FN2] Thus, just what constitutes a "wholly frivolous" appeal is a matter of state law. As a corollary, the preliminary determination in *Anders* as to whether the defendant's attorney should be allowed to withdraw after concluding that his client's appeal was without merit was left to California. The Supreme Court never addressed whether a lawyer's determination that an appeal entirely lacked merit constituted a "wholly frivolous" action. Rather, ***1058** the Court assumed that to be the case, as directed by the determinations of California's courts. Thus, the second component of the *Anders* opinion essentially holds that *if* a court deems it necessary to allow withdrawal in such circumstances, *then* it must erect procedures to protect the client's rights to counsel and an appeal such as the one sketched out there. *Id.* at 744, 87 S.Ct. 1396.

> FN2. This court's plenary power to regulate the bar is well established. *See* C.R.C.P. 251.1; *In re Cardwell,* 50 P.3d 897, 904 (Colo.2002) ("[A]s part of our constitutional and inherent powers, this court has exclusive jurisdiction over lawyers, and possesses the plenary authority to regulate and supervise the practice of law in Colorado.").

Unfortunately, courts and commentators have often conflated these distinct components of the Supreme Court's opinion, confusing the problem addressed in *Anders* and the role of the procedure outlined therein. Furthermore, the Supreme Court never clearly identified the line between when a court-appointed attorney has satisfied the constitutional mandate of advocacy and when he has unilaterally donned the role of amicus curiae and thereby rendered constitutionally deficient representation. *See id.* at 744, 87 S.Ct. 1396; *Haines v. People,* 169 Colo. 136, 145, 454 P.2d 595, 599 (1969) (discussing *Anders'* "intendment ... that an indigent defendant shall have counsel who is an Ad-

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vocate rather than Amicus curiae"). The confusion is made worse by the plain fact that briefs by amici to the court often appear indistinguishable from those of the parties in the way arguments are structured and presented. However, as we read *Anders,* the gravamen of the Supreme Court's opinion there targets the *role* of a court-appointed lawyer rather than the substance of her brief to the court. *See Anders,* 386 U.S. at 742-44, 87 S.Ct. 1396. Arguments may vary widely in their effectiveness in pursuing a client's desired outcome in a case. What equal protection does not allow is for court-appointed attorneys to abandon their role as careful and compassionate advocates for their clients where a richer client would be able to buy a lawyer's efforts even when a case seemed hopeless, just to ensure their arguments were heard. *See id.* at 742, 745, 87 S.Ct. 1396.

[1][2][3] In Colorado, we address the two components of *Anders* separately. First, the problem addressed in *Anders* is a salient one and its resolution-that the client's rights must be protected in spite of his lawyer's conclusions-is binding upon us. An appointed attorney cannot shirk her duty to represent her client and instead "serve as the court's fact-finder." *People v. Breaman,* 939 P.2d 1348, 1351 (Colo.1997). However, the procedure contained in *Anders* is not obligatory upon the states; other state-crafted procedures or policies that adequately protect the rights of indigent criminal defendants need not adhere to its details. *See Smith v. Robbins,* 528 U.S. 259, 272-76, 120 S.Ct. 746, 145 L.Ed.2d 756 (2000). The procedure outlined by the Supreme Court merely set forth the "minimum requirements" to protect the defendant where the withdrawal is allowed. *See McCoy v. Wis. Ct.App.,* 486 U.S. 429, 442, 108 S.Ct. 1895, 100 L.Ed.2d 440 (1988). Despite the Supreme Court's comment in *McCoy* that an attorney has an "ethical obligation to refuse to prosecute a frivolous appeal," 486 U.S. at 436, 108 S.Ct. 1895, the Court has since emphasized that it is up to the states to regulate attorney conduct, *Smith,* 528 U.S. at 273-76, 120 S.Ct. 746, and indeed has approved of alternatives to the *Anders* procedure in which the appellate counsel does not withdraw from a case that could be described as frivolous under *Anders, see id.* at 280, 120 S.Ct. 746. *See also State v. Balfour,* 311 Or. 434, 814 P.2d 1069, 1079 (1991) (noting despite *McCoy* that the U.S. Supreme Court "is not the arbiter of ordinary questions of ethical practices for attorneys in state court," and concluding that Oregon attorneys are under no mandatory ethical obligation to withdraw upon concluding their clients' cases to be frivolous). Where, as in Colorado, a court does not allow the appointed attorney to withdraw from representation solely because he concludes the appeal to be without merit, the defendant's rights are protected through the normal course of appellate review.[FN3]

FN3. For a review of the numerous practices among the states addressing the *Anders* problem, *see* James E. Duggan & Andrew W. Moeller, *Make Way for the ABA: Smith v. Robbins Clears a Path for Anders Alternatives,* 3 J. App. Prac. & Process 65 (2001).

B. Colorado's Practice in Criminal Appeals

In our decision in *McClendon v. People* in 1971, we approved of the American Bar Association's***1059** approach to the *Anders* problem as outlined in its Standards for Criminal Justice-an approach that faithfully addresses the constitutional and ethical concerns at play when a court-appointed attorney concludes his client's appeal entirely lacks merit but that renders unnecessary the cumbersome procedure outlined in *Anders* for those states that have not otherwise addressed the issue. 174 Colo. at 12, 481 P.2d at 717-18. The Standards state, "[c]ounsel for a defendant-appellant should not seek to withdraw from a case because of counsel's determination that the appeal lacks merit." *ABA Standards for Criminal Justice: Criminal Appeals* § 21-3.2(b) (3d ed.1993). Rather, "[i]f the client chooses to proceed with an appeal against the advice of counsel, counsel should present the case, so long as such advocacy does not involve deception of the court." *ABA Standards for Criminal Justice: Prosecution Function & Def. Function* § 4-8.3 (3d ed.1993). Comments to Standard 4-8.3 (3d ed.) further elaborate this approach:

> Before the merits of an appeal are determined by an appellate court, the defendant is entitled to the zealous advocacy of a lawyer in fact as well as in name.... When a client seeks to prosecute an appeal against the advice of counsel that there is no hope for success, counsel should present the case but cannot deceive or mislead the court on behalf of the client.

By requiring a lawyer to present her client's case, even where the attorney feels the appeal is meritless, the defendant's rights are protected through the nor-

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mal course of appellate review rather than by some "substitute" therefor. *Cf.* Anders, 386 U.S. at 742, 87 S.Ct. 1396.[FN4]

FN4. Any argument that the approach developed by the ABA and taken by this court in *McClendon* is but a limited component of the *Anders* procedure applying only where the claim lacks merit but could still be reasonably presented is groundless. Even the Supreme Court implicitly recognized that the ABA approach is an alternative to-rather than a subsidiary of-the procedure sketched out in *Anders.* *See* *Smith v. Robbins,* 528 U.S. 259, 276 & n. 7, 120 S.Ct. 746, 145 L.Ed.2d 756 (indicating that states had already crafted "procedures that, in terms of policy, are superior to, or at least as good as, that in *Anders,*" and citing Martha C. Warner, *Anders in the Fifty States: Some Appellants' Equal Protection is More Equal than Others,* 23 Fla. St. U.L.Rev. 625, 642-62 (1996) (hereinafter "*Anders in the Fifty States* "), which argues extensively that the ABA approach satisfies the *Anders* requirements and better serves the purposes of equal protection, and identifies numerous courts that have adopted the approach).

Underlying this approach is the determination that, despite the parties' arguments to the contrary, a court-appointed attorney who determines her client's desired appeal lacks merit does not face an intractable ethical dilemma: where a client enjoys rights to an attorney and an appeal, the action is not frivolous merely because it appears hopeless.[FN5]

FN5. As the Supreme Court noted in *McCoy,* the terms "wholly frivolous" and "without merit" are often used interchangeably in the context of *Anders*-type problems. 486 U.S. at 438 n. 10, 108 S.Ct. 1895. This likely accounts for the ABA's subsequent abandonment of the notion that the Supreme Court's decision in *Anders* rested on the narrow distinction between "complete frivolity" and an "absence of merit." *Cf. ABA Standards Relating to the Prosecution Function & the Def. Function* § 8.3 cmt. b, p. 297 (1971).

The parties here contend that disparate provisions of the Colorado Rules of Professional Conduct give rise to conflicting mandates where court-appointed counsel are directed by their clients to pursue an appeal they feel is without merit. Specifically, the parties note that, on the one hand, the preamble to the Colorado Rules of Professional Conduct states that, "[a]s [an] advocate, a lawyer zealously asserts the client's position under the rules of the adversary system." Furthermore, Colo. RPC 1.2(a) requires that a lawyer "abide by a client's decisions concerning the objectives of representation." *See also ABA Standards for Criminal Justice: Prosecution Function & Def. Function* § 4-8.2 (3d ed. 1993) ("The decision whether to appeal must be the defendant's own choice."). On the other hand, though, the rules state that "[a] lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous." Colo. RPC 3.1. Moreover, attorneys have a duty of candor to the court which prohibits them from knowingly making false ***1060** statements of material fact or law, or knowingly failing to disclose adverse controlling legal authority. *See* Colo. RPC 3.3. The parties here urge that when a court-appointed attorney is directed by her client to pursue an appeal that the attorney feels is without merit, the attorney is put in the difficult situation of disregarding her client's wishes, presenting a frivolous appeal, or violating her duty of candor.

We perceive no such dilemma. The ethical duties of a court-appointed attorney tasked with what she concludes to be a meritless appeal are not so incompatible as the parties insist. As the Arizona Court of Appeals noted:

> The duty of candor requires that an attorney not make a false statement of fact or law to a court, offer false evidence, or fail to disclose a material fact or controlling legal authority. None of those duties directly affects the task of arguing issues on appeal so long as counsel does not misstate the facts or the law.

Denise H. v. Ariz. Dep't of Econ. Sec., 193 Ariz. 257, 972 P.2d 241, 244 (Ct.App.1998) (citations omitted) (discussing analogous state rules of ethics). So long as the attorney does not misstate the facts or controlling law, she is free to present her client's arguments to the court as well as her client's desire to prevail.

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Moreover, an utter lack of merit does not render an appeal by right "wholly frivolous." Comment 2 to the Colorado RPC 3.1 concerning meritorious claims describes a frivolous action as follows:

> [A]n action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail. The action is frivolous, however, if the client desires to have the action taken primarily for the purpose of harassing or maliciously injuring a person or if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law.

By approving of the ABA approach in *McClendon,* we implicitly held that, while the merit of an appeal may be related to a determination of its frivolity, a lack of merit alone is not sufficient to render a criminal defendant's appeal by right "wholly frivolous." To the contrary, an appointed attorney cannot be held to have violated her ethical duties by presenting apparently meritless claims where her client's right to take the appeal is protected by law. If a defendant is not entitled to prevail on appeal, that conclusion will quickly become evident upon review of the controlling law and examination of the defendant's best arguments.

Contrary to this approach, the Colorado Bar Association Ethics Committee has indicated that counsel may seek to withdraw where it is impossible to "make a good faith argument for reversal." Colo. Bar Ass'n Ethics Comm., Formal Op. 114 (2006). However, this assertion undervalues the *role* of an advocate in an appeal by right and equates advocacy with the requirement of a specific conclusion. *Contra Anders,* 386 U.S. at 743-44, 87 S.Ct. 1396. Certainly advocates are required to pursue good faith arguments on their client's behalf. Colo. RPC 3.1 cmt. 2. But a good faith argument need not conclude with the lawyer's assertion that her client is entitled to prevail. A legal argument is but a discussion of pertinent facts and the application of controlling law that highlights those components more favorable to the client. In those instances where it is possible, and with widely varying levels of success, a lawyer strives to calibrate her arguments such that they lead to the conclusion that her client's desired outcome is also the just and logical one. Indeed, where it is possible to do so, it is the lawyer's duty to do so. Of course, where it is impossible to reasonably assert that her client is entitled to prevail, we will not require her to so conclude, but neither will we entirely discount the value of the advocate's role merely because she cannot assert this final conclusion within her ethical bounds. A limitation on the substance of the advocacy does not undermine the value of an advocate's role, which remains-even without an assertion that the defendant is entitled to prevail-valuable to both the defendant and the court. Rather, where the facts and law leave no other option, a lawyer's conscientious and ***1061** sensitive efforts to locate viable issues, honestly represent her client's impressions of injustice, and navigate the appellate process on her client's behalf are sometimes all that can be asked of a zealous advocate making a good faith argument. And where the client's rights to an appeal and to appellate counsel are protected by law, that role is not merely asked, it is mandated.

An attorney has discretion to choose which arguments to make on appeal, *see Jones v. Barnes,* 463 U.S. 745, 751, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983); what the attorney cannot do is choose not to pursue the appeal at all. If an attorney cannot discern a meritorious legal argument in support of her client's appeal, she must present those issues her client wishes to be addressed. Where neither law nor facts can be framed in support of her indigent client, a court-appointed attorney's obligation as a zealous advocate is fulfilled by accurately describing the facts of the case, locating and applying controlling law, and presenting the issues her client wishes to be considered. Of course, "in determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change." Colo. RPC 3.1 cmt. 1.

Zealous advocacy may not allow the lawyer to make persuasive arguments in every instance, nor does it require the lawyer make a plea for a particular result.[FN6] Indeed, the *substance* of an advocate's brief in such an instance may differ only slightly from a so-called *Anders* brief. But the *role* of that advocate throughout the appellate process is crucial, and indeed guaranteed wherever the constitution or General Assembly has extended a litigant the rights to counsel and an appeal. In those rare instances where the law and the facts of a case conspire to confine the role of

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an advocate to helping her client locate the client's best arguments, even if apparently hopeless, the sensitive and compassionate representation of her client's best arguments, assisting the client in navigating the procedures of appeal, and directing the appellate court to the controlling law that should direct its review, the attorney will have fulfilled her duties and upheld her ethical obligations in doing so.

> FN6. Early commentary to the ABA Standard 21-3.2 noted that,
>
> > [b]y some measures, this is demeaning of the professional role of an attorney. The Code of Professional Responsibility declares that "[a] lawyer should have pride in his professional endeavors." Given the circumstances, counsel should be able to take pride in accomplishing a difficult professional task. The appellate court is better able to accomplish its duties when a case is presented by counsel rather than by an untutored layperson. If the lawyer has done the work competently, the client's interest has been served as well. Having accomplished the dual mission of serving court and client, counsel need not want for professional satisfactions.
> >
> > *ABA Standards for Criminal Justice* § 21-3.2 cmts. (2d ed. 1986) (quoting ABA, Code of Professional Responsibility EC6-).

Importantly, the ABA approach better protects a defendant's rights. As Judge Warner noted after her extensive review of state courts' implementation of the *Anders* decision, "If the ultimate fairness of the proceeding is determined by the effectiveness of counsel in representing the defendant, then the goal should be to compel full representation through appeal and not to allow for that representation to be avoided." *Anders in the Fifty States,* 23 Fla. St. U.L.Rev. at 661-62. Warner argues those states that refuse to allow attorneys to withdraw because they deem the appeal wholly meritless more effectively provide for the right to counsel than states that allow withdrawal. *See id.; see also State v. Cigic,* 138 N.H. 313, 639 A.2d 251, 254 (1994) (noting that the ABA approach "preserves the adversarial nature of criminal appeals, which 'is much to be preferred over [the *Anders*] process in which the appellate judge feels obliged to act as a lawyer and the appellate lawyer feels constrained to rule as a judge.' " (quoting *Gale v. United States,* 429 A.2d 177, 182 (D.C.App.1981) (Ferren, J., dissenting))); *State v. Gates,* 466 S.W.2d 681, 683-84 (Mo.1971) (adopting the ABA approach and noting that *Anders*-style procedures "put defense counsel in the awkward position of arguing against his client"). Indeed, the Idaho Supreme Court deemed it clear that appellate counsel's "mere submission" of a motion to withdraw under *Anders* "cannot but result in prejudice" to her client. ***1062***State v. McKenney,* 98 Idaho 551, 568 P.2d 1213, 1214 (1977). As Warner concluded, "the real problem with [the *Anders* procedure] is that it creates two distinct classes of appellate review for criminal defendants and results in a failure of equal protection." *Anders in the Fifty States,* 23 Fla. St. U.L.Rev. at 663.

[4] Our approval of the ABA approach in *McClendon* notwithstanding, divisions of the court of appeals have indicated that they would accept an *Anders*-style brief in conjunction with an attorney's motion to withdraw where an attorney determines her client's appeal is without merit. *See, e.g., People v. Marquez,* 37 Colo.App. 441, 548 P.2d 939 (1976). We here disapprove of that practice. Even where a court-appointed attorney feels her client's appeal is without merit, she must nonetheless abide by both her duties as an advocate and as an officer of the court. "It is not the lawyer's role to pass judgment on a client's cause." *ABA Standard for Criminal Justice* 21-3.2 cmts. (2d ed. 1986).

Finally, any claim that this court "adopted" the *Anders* procedure in *Breaman* in place of the ABA approach misreads that case. *Breaman* concerned post-conviction relief proceedings under Crim. P. 35(c), a context in which this court has not recognized a right to counsel. *See* 939 P.2d at 1350. There, the trial court appointed a lawyer for the defendant to review a defendant's claims and determine whether they were frivolous. In the process of disapproving of the trial court's actions confining the appointed lawyer to serving as a fact-finder rather than the defendant's representative, we recognized in a footnote that, while an *Anders*-style motion to withdraw is appropriate in criminal cases in some jurisdictions, it was unneeded for Crim. P. 35(c) proceedings. *See id.* at 1351 n. 1. The footnote-far from central to our ultimate holding-focuses on those contexts where the

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defendant does not have a right to counsel, unlike the situation in *Anders* and unlike the situation presented here. Thus, the passing comment in *Breaman* neither controls nor informs our consideration in this case. *Breaman* does unequivocally state, though, that appointed counsel must act in the role of advocate and cannot act as a friend of the court. *See id.* That holding is consistent both with the Supreme Court's concern with the role played by appointed attorneys in *Anders* and with our conclusion here.

Thus, an attorney appointed to a client with an appeal by right who concludes her client's appeal is without merit does not face an intractable ethical dilemma and so should not be allowed to withdraw from the case on that basis alone. Furthermore, due process and equal protection are best served through the normal course of appellate review, and an indigent defendant's rights are best protected where counsel presents her client's best arguments as an advocate. Thus, the procedure outlined in *Anders* is unnecessary in Colorado where the defendant's rights are protected through the normal course of appellate review notwithstanding his lawyer's misgivings about the merit of the appeal.

C. D & N Proceedings

[5][6][7][8] Unlike the constitutional right to counsel at issue in *Anders*, a parent's rights to counsel and an appeal in D & N proceedings are statutory in nature. *See* *C.S. v. People*, 83 P.3d 627, 636 (Colo.2004) ("A parent's right to appointed counsel in termination proceedings is secured by statute...." (citing § 19-1-105 and § 19-3-202(1))); *People ex rel. A.E.*, 994 P.2d 465, 466 (Colo.App.1999) (parents have a right to an immediate appeal of an order terminating their parental rights (citing § 19-1-109(2)(b), C.R.S. (2009))). However, as with the criminal proceedings at issue in *Anders*, 386 U.S. at 744, 87 S.Ct. 1396, termination proceedings cue constitutional due process concerns. *See* *Santosky v. Kramer*, 455 U.S. 745, 753-54, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982) ("When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures."); *People ex rel. M.B.*, 70 P.3d 618, 622 (Colo.App.2003) ("Termination of the parent-child legal relationship is a drastic remedy and a parent is entitled to procedural due process before termination occurs."). Furthermore, once an indigent litigant has been appointed counsel, we refer to our constitutional jurisprudence to determine the scope of the obligation ***1063** borne by the appointed attorney. *See, e.g.*, *Breaman*, 939 P.2d at 1351 (stating that, even where a defendant did not have a right to appointed counsel, "[h]aving made the decision to appoint such counsel ... the district court was not entitled to deny [the defendant] effective representation of that counsel"). Thus, the obligation of court-appointed attorneys to advocate for indigent parents in termination proceedings is no different than the obligation imposed on counsel appointed to represent criminal defendants on appeal.

Furthermore, proceedings for the termination of parental rights implicate a number of important interests, including "the interests of the parent and child in a continuing family relationship; the interests of the parent in preserving the integrity and privacy of the family unit; [and] the interest of the child in a permanent, secure, stable, and loving environment." *People ex rel. C.A.K.*, 652 P.2d 603, 607 (Colo.1982). Extending a parent facing such proceedings the rights to counsel and an appeal demonstrates a decision that, so abhorrent to our notions of justice is the possibility of wrongfully terminating a parent's rights, the parent must be able to seek meaningful review of the order, whatever the specific circumstances of his case. Therefore, pursuit of such an appeal-with the guaranteed aid of court-appointed counsel-serves an important function and cannot be said to be "wholly frivolous" for lack of merit alone.

The parties and amici also underscore the interests of the child in obtaining a swift and final resolution in termination proceedings and suggest that an *Anders*-style, no-merits briefing procedure better fits with the mandate that these matters be quickly resolved. *See, e.g.*, § 19-1-102(1)(c), C.R.S. (2009) (directing courts to proceed with "all possible speed" to a legal determination). We are not persuaded.

The procedure outlined in *Anders* does little for judicial economy. To properly consider an appointed appellate attorney's motion to withdraw, an appellate court must both thoroughly review the record in order to ensure counsel has not missed any appealable issues and consider-at least to some extent-the merits of any issues the court identifies in the record or that the attorney has identified in her briefs. *See* *McCoy*, 486 U.S. at 442, 108 S.Ct. 1895; *see also* *Penson v. Ohio*, 488 U.S. 75, 83, 109 S.Ct. 346, 102 L.Ed.2d

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300 (1988) (concluding the state court erred when it failed to appoint new counsel after determining the record supported "several arguable claims" (citing *Anders*, 386 U.S. at 744, 87 S.Ct. 1396; *McCoy*, 486 U.S. at 444, 108 S.Ct. 1895)). Such a searching review that requires appellate courts to play the roles of both advocate and tribunal cannot be considered the swifter path to resolution of the issues. *See State v. McKenney*, 98 Idaho 551, 568 P.2d 1213, 1214 (Idaho 1977) ("[L]ess of counsel and the judiciary's time and energy will be expended in directly considering the merits of the case in its regular and due course as contrasted with a fragmented consideration of various motions, the consideration of which necessarily involves a determination of merits.").

Moreover, termination proceedings must be just in addition to being swiftly executed. *See* § 19-1-102(1)(b) (directing the preservation of family ties wherever possible); *People ex rel. M.B.*, 70 P.3d 618, 622 (Colo.App.2003). Full appellate review-rather than some substitute therefore-better protects a parent's rights, thereby bolstering the integrity and stability of the final termination order, and is consistent with protecting the child's interest in permanency.

[9] As such, we conclude that an appointed lawyer for an indigent parent during D & N proceedings cannot withdraw solely because she determines the appeal to be without merit.[FN7] Rather, an appointed appellate lawyer who reasonably concludes a parent's appeal is without merit must nonetheless file petitions on appeal in accordance with C.A.R. 3.4, which requires that petitions on appeal from D & N proceedings include, *inter alia*, a statement of the nature of the case, concise statements of the facts and legal issues presented on appeal, and a description and application***1064** of pertinent sources of law. *See* C.A.R. 3.4(g)(3). The legal issues presented in the brief can be either those identified and developed by the attorney, or, if she can find none, those points the parent wants argued. The petition in such instances, though perhaps wholly unpersuasive, is not wholly frivolous. In so doing, even where the parent's attorney concludes the appeal is meritless, she abides by her dual obligations to her client and to the court, and remains an advocate in fact as well as in name.

FN7. To the extent that it suggests that withdrawal would be available so long as accompanied by an *Anders* brief, we here disapprove of *People ex rel. D.M.*, 186 P.3d 101 (Colo.App.2008).

In Colorado, *Anders* briefs are inappropriate and unnecessary in the context of D & N proceedings, just as in criminal appeals. Appellate review of a parent's best arguments-however weak-made with the assistance of counsel best protects the parent's rights, supports the child's interests in permanency and finality, and avoids the injection of unnecessary confusion and delay into the reviewing process.

III. Conclusion

We remand this case to the court of appeals with directions to order appellate counsel to brief their case in accordance with this opinion.

Justice EID dissents and Justice RICE joins in the dissent.
Justice EID, dissenting.
Today the majority finds that an appointed lawyer, when faced with an indigent client who wishes to proceed with an appeal but who has nothing but frivolous arguments in support of his position, cannot seek to withdraw from the representation even though such representation will violate the Colorado Rules of Professional Conduct. *See* Colo. RPC 3.1 ("A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous...."); *People v. Breaman*, 939 P.2d 1348, 1351 n. 2 (Colo.1997) ("If appointed counsel ... determines that [her client's] case is wholly frivolous ... she should so advise the court and request permission to withdraw."). Instead, "[w]here neither law nor facts can be framed in support of her indigent client," the lawyer *must proceed* with the frivolous appeal, doing her best to convey her "client's desire to prevail." Maj. op. at 1060, 1061. In my view, the majority's "my client would like to prevail" approach places the appointed attorney in the untenable position of making wholly frivolous arguments, and provides little corresponding benefit for the respondent parent whose wishes to prevail are expressed to the court. I therefore respectfully dissent from the majority's opinion.

The lawyers in this case faced a potential ethical dilemma. They were appointed by the court to represent the respondent parents in this case pursuant to sections 19-1-105 and 19-3-202(1), C.R.S. (2009),

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which provide that indigent parents in dependency and neglect actions are entitled to counsel at state expense. The parents instructed their lawyers that they wished to appeal the district court's order terminating their parental rights. Under Colo. RPC 1.2(a), a lawyer must "abide by a client's decision concerning the objectives of representation...." The lawyers filed the notices of appeal. After delving into the case, however, the lawyers stated that that they could make no argument on the parents' behalf urging reversal of the district court's order. Under Colo. RPC 3.1, a lawyer "shall not ... assert ... an issue [in an appeal], unless there is a basis in law and fact for doing so that is not frivolous...." An argument is "frivolous" "if the lawyer is unable either to make a good faith argument on the merits [of the appeal] or to support [the appeal] by a good faith argument for an extension, modification or reversal of existing law." Colo. RPC 3.1 cmt. 2. Here, the lawyers concluded that such a "good faith argument" could not be made. Accordingly, the lawyers sought to withdraw from the case. *See* Colo. RPC 1.16(a)(1) (lawyer must seek to withdraw when representation would result in violation of the Colorado Rules of Professional Conduct).

Given the apparent dilemma faced by the lawyers in this case (namely, a direction from the client to pursue an appeal that could be supported only by frivolous arguments), the lawyers pursued the only course available under the Colorado Rules of Professional Conduct (namely, to seek to withdraw). As ***1065** the Ethics Committee of the Colorado Bar Association concluded:

> In such circumstances, an attorney who determines that a parent's claims on appeal lack merit may so inform the court and request permission to withdraw. However, ... an attorney may not request permission to withdraw ... unless, among other things, the client insists upon presenting a claim or defense that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law....

Colo. Bar Ass'n Ethics Comm., Formal Op. 114 (2006) (hereinafter "CBA, Formal Op. 114"). Indeed, in the criminal context, we have stated: "If appointed counsel in the first appeal from a criminal conviction determines that the defendant's case is wholly frivolous, after a conscientious examination of it, he or she should so advise the court and request permission to withdraw." *Breaman*, 939 P.2d at 1351 n. 2 (citing *Anders v. California*, 386 U.S. 738, 744, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967)). If a client has instructed his lawyer to appeal under Colo. RPC 1.2(a) but the lawyer cannot make a good faith argument to support that appeal as required under Colo. RPC 3.1, she cannot continue with such a "representation [that] will result in violation of the Rules of Professional Conduct" and accordingly must withdraw. Colo. RPC 1.16(a)(1).

The majority resolves this potential dilemma by simply denying that a dilemma could exist in the first place. According to the majority, "a court-appointed attorney who determines her client's desired appeal lacks merit does not face an intractable ethical dilemma: where a client enjoys rights to an attorney and an appeal, the action is not frivolous merely because it appears hopeless." Maj. op. at 1059. But the majority's approach to the problem in this case is the classic straw man. The majority concludes that there could be no dilemma in this case because there is no ethical violation in filing an appeal that "lacks merit" or where a case appears "hopeless." I wholeheartedly agree. As comment 2 to Colo. RPC 3.1 expressly recognizes, an appeal "is not frivolous even though the lawyer believes that the client's position ultimately will not prevail." *See also Breaman*, 939 P.2d at 1351 n. 1 (noting that a lawyer may make any argument that, "although unlikely to prevail, may be reasonably advanced"). As the ABA Project on Standards for Criminal Justice concluded, *Anders* itself "appears to rest narrowly on the distinction between complete frivolity" (in which withdrawal is appropriate) and "absence of merit" (in which withdrawal is not). *ABA Standards Relating to the Prosecution Function & the Def. Function* § 8.3 cmt. b, p. 297 (1971).

In sum, the problem in this case is not, as the majority frames it, what a lawyer should do when she believes her client's argument lacks merit. The answer to that question is well-settled: she must proceed. *See Breaman*, 939 P.2d at 1351 n. 1; *Anders*, 386 U.S. at 744, 87 S.Ct. 1396; CBA, Formal Op. 114 (citing *Breaman*, 939 P.2d at 1351 n. 1). The lawyer confronts an ethical dilemma only when she determines that an appeal cannot be supported by an argument with "a basis in law and fact" nor "a good faith ar-

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gument for an extension, modification or reversal of existing law." Colo. RPC 3.1; CBA, Formal Op. 114 (lawyer cannot proceed when "the client insists upon presenting [an argument] that is not warranted under existing law and cannot be supported by a good faith argument for an extension, modification, or reversal of existing law"). In other words, a lawyer cannot present an appeal that is "wholly frivolous." *Breaman,* 939 P.2d at 1351 n. 2; *see also McCoy v. Court of Appeals,* 486 U.S. 429, 436-37, 108 S.Ct. 1895, 100 L.Ed.2d 440 (1988) ("An attorney, whether appointed or paid, *is ... under an ethical obligation to refuse to prosecute a frivolous appeal* "; when faced with filing a frivolous appeal, appointed counsel has a "duty to withdraw") (emphasis added).

In my view, we should remand this case to the court of appeals, with instructions to respondent parents' counsel to determine the status of this case under the standards articulated above. If counsel believe that an argument consistent with Colo. RPC 3.1 standards can be made in support of the appeal, they should proceed. If counsel, however, ***1066** conclude that the appeal cannot be supported by an argument that meets Colo. RPC 3.1 standards, they should again seek to withdraw.[FN1]

> FN1. The withdrawal motion would be accompanied by an *Anders* brief or other filing that meets constitutional requirements. *See generally Smith v. Robbins,* 528 U.S. 259, 273-76, 120 S.Ct. 746, 145 L.Ed.2d 756 (2000) (holding that *Anders* is a prophylactic measure and that states may adopt alternative approaches as long as those approaches meet constitutional standards).

Despite the fact that an attorney is "under an ethical obligation to refuse to prosecute a frivolous appeal," *McCoy,* 486 U.S. at 436, 108 S.Ct. 1895, the majority mandates that the lawyers in this case-and in all cases involving court-appointed attorneys, including criminal appeals, maj. op. at 1064-go forward with the appeals, however frivolous they may be. Indeed, "[w]here neither law nor facts can be framed in support of her indigent client"-that is, where an appeal is wholly frivolous-the court should "not allow the appointed attorney to withdraw from representation...." *Id.* at 1058, 1061; *see id.* at 1059 (in such a situation, the attorney is "require [ed] ... to present her client's case"); *id.* at 1061 (attorney "must present those issues her client wishes to be addressed," even if wholly frivolous). Instead, if the lawyer's "conscientious and sensitive efforts to locate viable issues" fail, she must proceed with the appeal, "honestly represent[ing] her client's impressions of injustice" as well as "her client's desire to prevail." *Id.* at 1060, 1060-61; *see also id.* at 1060 (requiring the "sensitive and compassionate representation of her client's best arguments," even if frivolous). In my view, regardless of how "honest," "conscientious," "sensitive," and "compassionate" the lawyer might be, she is still being put in the untenable position of making frivolous arguments to the court.

The majority seems to believe that respondent parents' counsel must continue the representation despite the frivolous nature of the appeal because "the client's rights to an appeal and to appellate counsel are protected by law." Maj. op. at 1061. Yet, as the United States Supreme Court has made clear, the right to counsel "does not include the right to bring a frivolous appeal and, concomitantly, does not include the right to counsel for bringing a frivolous appeal." *Smith v. Robbins,* 528 U.S. 259, 278, 120 S.Ct. 746, 145 L.Ed.2d 756 (2000). As the *Smith* Court continued, "[a]lthough an indigent whose appeal is frivolous has no right to have an advocate make his case to the appellate court, such an indigent does, in all cases, have the right to have an attorney, zealous for the indigent's interests, evaluate his case and attempt to discern nonfrivolous arguments." *Id.* at 278 n. 10, 120 S.Ct. 746. If that zealous evaluation yields only frivolous arguments, however, counsel should be permitted to seek to withdraw.

In addition, the majority cites *McClendon v. People,* 174 Colo. 7, 481 P.2d 715 (1971), and the ABA Standards on Criminal Justice that it adopts, in support of its position. Maj. op. at 1058-59 (noting that Colorado has adopted an approach that "renders unnecessary the cumbersome procedure outlined in [*Anders*]"). Yet there is nothing in *McClendon* or the ABA Standards that suggests that an appointed attorney is relieved of her ethical obligation to refuse to proceed with a frivolous appeal. On the contrary, *McClendon* begins by stating that the ABA Standards "g[i]ve full recognition to the points raised in *Anders* ... and at the same time define[ ] the obligations of defense counsel in representing a defendant on appeal when the case is without merit." 174 Colo. at 12, 481 P.2d at 718.[FN2] The ABA Standards reiterate that

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there is a distinction between a case that lacks merit and one that is wholly frivolous, remind counsel that she need only make a good faith argument for the extension of law to support her client's position, and encourage counsel to remain on the case if at all possible. *ABA Standards for Criminal Justice: Criminal Appeals* § 21-3.2(b) (3d ed.1993); *ABA Standards for Criminal Justice: Prosecution Function & Def. Function* § 4-8.3 (3d ed.1993). As *McClendon* noted, ***1067** "it is better for counsel to present the case, so long as his advocacy does not involve deception or misleading of the court." 174 Colo. at 12, 481 P.2d at 718 (quoting standards). But notably *McClendon* does not except appointed attorneys from the obligations of Colo. RPC 3.1, nor do the ABA Model Rules of Professional Conduct. *See ABA Model Rules of Prof'l Conduct R.* 3.1 (2009); *see also ABA Standards for Criminal Justice: Prosecution Function & Def. Function* § 4-8.3 cmt., p. 241 (3d ed. 1993) ("*In an appeal that is not entirely frivolous in counsel's estimate,* the problem may arise of the appellant's insisting upon including in the appeal a point despite counsel's protest that it is frivolous.... In this situation, it is proper for the lawyer to brief and argue only the points he or she believes are supportable ....") (emphasis added). *Compare State v. Cigic,* 138 N.H. 313, 639 A.2d 251, 254 (1994) (requiring appointed attorney to proceed with frivolous appeal and making an exception to state's analog to Colo. RPC 3.1). And as we noted most recently in *Breaman,* if an appointed attorney determines that an appeal is "wholly frivolous," she must seek to withdraw. 939 P.2d at 1351 n. 2; [FN3] *see also* C.A.R. 38(d) (permitting appellate courts to sanction "frivolous" appeals).

FN2. The *McClendon* opinion was authored by Colorado Supreme Court Justice William Erickson, who at the time chaired the ABA Criminal Law Section and also served on the ABA Committee to implement the ABA standards. *See* Hon. William H. Erickson, *The ABA Standards for Criminal Justice,* Appendix A at n.* and n. 192 (Matthew Bender 1972).

FN3. The majority cites *Breaman* affirmatively for two propositions, *see* maj. op. at 1058, 1062-63, but then goes to great lengths to discount the case, noting, among other things, that it dealt with post-conviction proceedings. Maj. op. at 1062. While it is true that *Breaman* concluded that an *Anders*-style brief would not be required in a post-conviction setting, the case plainly states that an attorney must seek to withdraw from a representation if she determines that her arguments are wholly frivolous. 939 P.2d at 1351 n. 2.

Finally, the majority concludes that its approach "best protect[s]" the interests of respondent parents. Maj. op. at 1062. Yet it is difficult to see how this could be so. According to the majority, an appointed attorney-who, after today's opinion, must proceed with a frivolous appeal-should "describ[e] the facts of the case," "direct[ ] the appellate court to the controlling law that should direct its review," "present[ ] the issues her client wishes to be considered," and ultimately convey her "client's desire to prevail." Maj. op. at 1060, 1061. The majority's "my client would like to prevail" approach, however, bears little resemblance to the "zealous" advocacy envisioned by the Colorado Rules of Professional Conduct. *See* Colo. RPC pmbl. 2, 9. The majority admits as much, stating that the sort of "advocacy" that it proposes may "differ only slightly from a so-called *Anders* brief." Maj. op. at 1061. But there is an important difference between the withdrawal remedy recognized in *Anders* (and *Breaman*) and the "my client would like to prevail" approach adopted by the majority. Under *Anders* and *Breaman,* the attorney is no longer in the position of acting as an advocate on behalf of her client, as she has sought to withdraw. In contrast, under the majority's proposal, the attorney continues to serve as an advocate while-to use the majority's own phrase-simply "directing the appellate court to the controlling law that should direct its review." *Id.* I fear that the majority's proposal comes perilously close to the sort of "friend of the court" role condemned in both *Anders* and *Breaman. See Anders,* 386 U.S. at 744, 87 S.Ct. 1396 ("The constitutional requirement of substantial equality and fair process can only be attained where counsel acts in the role of an active advocate in behalf of his client, as opposed to that of amicus curiae."); *Breaman,* 939 P.2d at 1352 (appointed attorney must represent client, not "serve as the court's fact-finder"); maj. op. at 1064 (respondent parent's counsel must act as "an advocate in fact as well as name").

The majority's "my client would like to prevail" approach places the appointed attorney in the untenable

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position of making wholly frivolous arguments, and provides little corresponding benefit for the respondent parent whose wishes to prevail are expressed by counsel to the court. Moreover, the approach-by requiring appointed counsel for indigent respondent parents to proceed with wholly frivolous appeals and by redefining what it means to provide zealous advocacy in that context-marks a significant step in the slippery slope toward a two-tiered ethical code that differs according to whether the client is indigent or not. In my view, this is a ***1068** path down which we do not want to travel. I therefore respectfully dissent from the majority's opinion.

I am authorized to say that Justice RICE joins in this dissent.
Colo.,2010.
A.L.L. v. People
226 P.3d 1054

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To: Standing Committee on the Rules of Professional Conduct

From: Marcus Squarrell

Date: August 13, 2010

Re: Report on the Reconstituted Subcommittee on Rule 1.16A

This memorandum summarizes the work of a subcommittee formed to consider the CDAC's revisions to proposed Rule 1.16A. The subcommittee included members of the Standing Committee's subcommittee on file retention and participants in the informal committee that worked on the CDAC proposal. The Standing Committee's proposal and the CDAC proposal are attached as Item 1.

The subcommittee met on July 30 and August 9. Several drafts and many emails were circulated in between the meetings and following the second meeting. Clean and redlined versions of a revised Rule 1.16A and Comments that is intended to embody the "consensus" of the subcommittee are attached as Item 2. The redlining shows changes from the CDAC proposed Rule. It is unlikely anyone on the subcommittee views this draft as ideal although the majority probably views it as better than the Standing Committee's proposed Rule.

The retention periods for criminal files that were proposed by the CDAC were not controversial within the subcommittee. The discussions centered on provisions in the Standing Committee's proposed Rule 1.16A that were not altered by the CDAC's proposed Rule. Specifically, the obligation under the proposed Rule to retain files for a minimum of 2 years and to give notice to clients before destroying a file after two years were considered unreasonable by subcommittee members associated with public defender offices and the ADC because those lawyers handle huge case loads and their representations of clients arise without an engagement letter or any opportunity to give notice of file retention policies and may end quickly. The subcommittee also considered the Standing Committee's Rule confusing as to whether the two-year retention requirement applied when a client had authorized the destruction of a file prior to the end of a representation. Item 2A contains an email summarizing the discussion at the first meeting and emails from subcommittee members that identify significant issues with the Standing Committee's Rule and the draft in Item 2.

Alec Rothrock's alternative proposed Rule 1.16A and Comment and his explanatory email are attached as Item 3. Alec's draft retains the two-year retention and notice requirements and makes exceptions to those provisions for public defenders and alternative defense counsel.

ITEM 1

Rule 1.16A. Client File Retention

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

COMMENT

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

[2] A lawyer may comply with Rule 1.16A by maintaining a client's file in, or converting it to, a purely electronic form, provided the lawyer is capable of producing a paper version if necessary. Rule 1.16A does not require multiple lawyers in the same law firm to retain duplicate client files or to retain a unitary file located in one place. "Law firm" is defined in Rule 1.0 to include lawyers employed in a legal services organization

or the legal department of a corporation or other organization. Rule 5.1(a) addresses the responsibility of a partner in a law firm to "make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct." Generally, lawyers employed by a private corporation or other entity as in-house counsel represent such corporation or entity as employees and the client's files are considered to be in the possession of the client and not the lawyer, such that Rule 1.16A would be inapplicable. Where lawyers are employed by a legal services organization or government agency to represent third parties under circumstances where the third party client's files are considered to be files and records of the organization or agency, the lawyer must take reasonable measures to ensure that the client's files are maintained by the organization or agency in accordance with this rule.

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

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

Colorado District Attorneys' Council

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June 2, 2010

Ms. Susan Festag
Clerk of the Colorado Supreme Court
101 West Colfax Avenue
Suite 800
Denver, Colorado 80202

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21st Judicial District
PRESIDENT

Rodney Fouracre
16th Judicial District
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EXECUTIVE DIRECTOR

Mark Randall
LEGISLATIVE DIRECTOR

Craig S. Evans
CHIEF INFORMATION OFFICER

Re: Proposed Amendments to Rule of Professional Conduct 1.16A

Dear Ms. Festag:

As you may be aware, CDAC proposed legislation during this year's legislative session that would have created a requirement regarding the length of time a criminal defense attorney is required to retain his or her file in a criminal matter. The goal was to better be able to assess and respond to claims in subsequent challenges to the conviction, such as a rule 35(c) claim of ineffective assistance of counsel, as to what the defense attorney had obtained in discovery and work product, and the steps taken to plan and implement defense of the case. In response to opposition from the Judicial Department, and in particular the Office of Attorney Regulation, CDAC agreed to work with that office to convene a working group of stakeholders to offer amendments to proposed Rule of Professional Conduct 1.16A. That working group included the Office of Attorney Regulation and representatives from CDAC, the U.S. Attorney's office, the Office of the State Public Defender, the Office of the Federal Public Defender, the Office of Alternative Defense Counsel, and the Colorado Criminal Defense Bar.

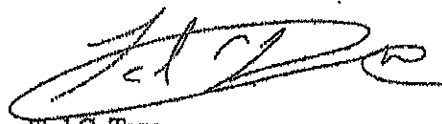
I am enclosing herewith the product of the discussions of that working group. This is a redline version of our proffered changes to the current proposed language of Rule 1.16A. These changes are intended to account for the unique situation presented by the criminal law as it relates to file retention needs, and the needs of the criminal justice system to ensure and verify that effective assistance of counsel has been provided. The proposal also represents a balancing of those interests with the financial impact of the proposal on the attorneys affected.

We largely avoided making any changes to the specifics established in the proposed rule, instead offering additional language as a paragraph (2), we have suggested two modifications to the existing proposal. First, we suggest reducing the current ten year requirement to eight years, in order to remain consistent with the eight year requirement for appealed felony convictions in our suggested paragraph (2). This proposal is based on a recognition that some private attorneys handle both civil and

criminal matters, sometimes arising out of the same transaction and occurrence, and thus the time restraints should be consistent. Second, we suggest removing the requirement of specific notice after termination of the representation. Such a requirement may prove unduly burdensome to a large office like the State Public Defender, who would be in the position of having to keep tabs on upwards of 50,000 former clients, sometimes for several years, in order to provide them the required notice. In addition, to the extent this requirement would impose a burden of notice on a District Attorney, that burden would be logistically impossible to satisfy: how can one who is acting in the name of "the People of the State of Colorado" give notice "to the client." With the proposed change, a public posting in the office or on an office website of the file retention policy would satisfy any notice requirement that may be imposed.

We appreciate the Office of Attorney Regulation taking the time to facilitate this discussion, and thank the rules committee for taking the time to consider these suggestions.

Sincerely,



Ted C. Tow
Executive Director

c.c. John Gleason
Marcy Glenn

Colo.RPC 1.16A. Client File Retention

(a) Except as provided in a written agreement signed by a client, the lawyer shall retain a client's files respecting a matter for a period of not less than two years following the termination of representation in the matter, unless the lawyer previously delivered the files to the client or disposed of the files in accordance with the client's instructions. Notwithstanding any agreement to the contrary, a lawyer shall not destroy a client's files after termination of the lawyer's representation in the matter unless:

(1) ~~after such termination,~~ the lawyer has given written notice to the client of the lawyer's intention to do so on or after a date stated in the notice, which date shall not be less than thirty days after the date ~~the notice was given~~ of termination of representation, and

(2) there are no pending or threatened legal proceedings known to the lawyer that relate to the matter. At any time following the expiration of a period of ~~ten~~ eight years following the termination of representation in a matter, a lawyer may destroy a client's files respecting the matter without notice to the client, provided there are no pending or threatened legal proceedings known to the lawyer that relate to the matter and the lawyer has not agreed to the contrary. This Rule does not supersede or limit a lawyer's obligations to retain a file that are imposed by law, court order, or rules of a tribunal.

(b) Notwithstanding the requirements set forth in 1.16A(a) above, a lawyer in a criminal matter shall maintain a copy of all notes and work product related to that matter for the following time period:

(1) for the life of the client, if the matter resulted in a conviction and a sentence of death, life without parole, or an indeterminate sentence, including a sentence pursuant to the Colorado Sex Offender Lifetime Supervision Act of 1988, 18-1.3-1001et seq., C.R.S.;

(2) for eight years from the date of sentencing, if the matter resulted in a conviction for any other felony and the conviction and/or sentence was appealed;

(3) for five years from the date of sentencing, if the matter resulted in a conviction for any other felony and neither the conviction nor the sentence was appealed.

ITEM 2

RULE 1.16A. CLIENT FILE RETENTION

(a) A lawyer in private practice shall retain a client's files respecting a matter unless:

(1) the lawyer delivers the file to the client or the client authorizes destruction of the file in a writing signed by the client and there are no pending or threatened legal proceedings known to the lawyer that relate to the matter; or

(2) the lawyer has given written notice to the client of the lawyer's intention to destroy the file on or after a date stated in the notice, which date shall not be less than thirty days after the date of the notice and there are no pending or threatened legal proceedings known to the lawyer that relate to the matter.

(b) At any time following the expiration of a period of ten years following the termination of a representation in a matter, a lawyer may destroy a client's files respecting the matter without notice to the client, provided there are no pending or threatened legal proceedings known to the lawyer that relate to the matter and the lawyer has not agreed to the contrary.

(c) Notwithstanding paragraphs (a) and (b) above, a lawyer in a criminal matter shall retain a client's file for the following time periods:

(1) for the life of the client, if the matter resulted in a conviction and a sentence of death, life without parole, or an indeterminate sentence, including a sentence pursuant to the Colorado Sex Offender Lifetime Supervision Act of 1998, 18-1.3-1001 et seq., C.R.S.

(2) for eight years from the date of sentencing, if the matter resulted in a conviction for any other felony and the conviction and/or sentence was appealed;

(3) for five years from the date of sentencing, if the matter resulted in a conviction for any other felony and neither the conviction nor the sentence was appealed.

(d) A lawyer may satisfy the notice requirements of paragraph (a)(2) of this Rule by establishing a written file retention policy consistent with this Rule and by providing a notice of the file retention policy to the client in a fee agreement or a in writing delivered to the client not later than thirty days before destruction of the client's file or incorporated into a fee agreement.

(e) This Rule does not supersede or limit a lawyer's obligations to retain a client's file that are imposed by law, court order, or rules of a tribunal.

Comment

[1] Rule 1.16A is not intended to impose an obligation on a lawyer to preserve documents that the lawyer would not normally preserve, such as multiple copies or drafts of the same document. A client's files, within the meaning of Rule 1.16A, consist of those things, such as papers and electronic data, relating to a matter that the lawyer would usually maintain in the ordinary course of practice. A lawyer's obligations with respect to client "property" are distinct. Those obligations are addressed in Rules 1.16(d), 1.15(a) and 1.15(b). "Property" generally refers to jewelry and other valuables entrusted to the lawyer by the client, as well as documents having intrinsic value or directly affecting valuable rights, such as securities, negotiable instruments, deeds, and wills.

[2] A lawyer may comply with Rule 1.16A by maintaining a client's files in, or converting the file to, electronic form, provided the lawyer is capable of producing a paper version if necessary. Rule 1.16A does not require multiple lawyers in the same law firm to retain duplicate client files or to retain a unitary file located in one place. "Law firm" is defined in Rule 1.0 to include lawyers employed in a legal services organization or the legal department of a corporation or other organization. Rule 5.1(a) addresses the responsibility of a partner in a law firm to "make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct." Generally, lawyers employed by a

private corporation or other entity as in-house counsel represent such corporation or entity as employees and the client's files are considered to be in the possession of the client and not the lawyer, such that Rule 1.16A would be inapplicable. Where lawyers are employed by as public defenders or by legal services organization or government agency to represent third parties under circumstances where the third-party client's files are considered to be files and records of the organization or agency, the lawyer must take reasonable measures to ensure that the client's files are maintained by the organization or agency in accordance with this rule.

[3] Rule 1.16A does not supersede obligations imposed by other law, court order or rules of a tribunal. The maintenance of law firm financial and accounting records covered by Rule 1.15(a) and 1.15(j) is governed exclusively by those rules. Similarly, Rule 1.16A does not supersede specific retention requirements imposed by other rules, such as Rule 5.5(d)(2) (two-year retention of written notification to client of utilization of services of suspended or disbarred lawyer), Rule 4, Chapter 23.3 C.R.C.P.(six-year retention of contingent fee agreement and proof of mailing following completion or settlement of the case) and C.R.C.P. 121, §1-26(7) (two year retention of signed originals of e-filed documents). A document may be subject to more than one retention requirement, in which case the lawyer should retain the document for the longest applicable period. Rule 1.16A does not prohibit a lawyer from maintaining a client's files beyond the periods specified in the Rule.

[4] A lawyer may not destroy a client's file when the lawyer has knowledge of pending or threatened proceedings relating to the matter. The Rule does not affect a lawyer's obligations under Rule 1.16(d) with respect to the surrender of papers and property to which the client is entitled upon termination of the representation. A client's receipt of papers forwarded from time to time by the lawyer during the course of the representation does not alleviate the lawyer's obligations under Rule 1.16A.

[4] The destruction of a client's files under paragraph (a) of Rule 16A is subject to two sets of preconditions. First, the lawyer must have given written notice to

the client of the lawyer's intention to destroy the files on or after a date certain, which date is not less than thirty days after the date the notice was given or the client has authorized the destruction of the files in a writing signed by the client. As provided in paragraph (d), the notice requirement in paragraph (a) can be satisfied by timely giving the client a written statement of the applicable file retention policy; that policy could for example, contained in a written fee agreement. A lawyer should make reasonable efforts to locate a client for purposes of giving written notice when such notice was not provided during the representation. If the lawyer is unable to locate the client, written notice sent to the client's last known address is sufficient under paragraph (a) Rule 1.16A. Second, the lawyer may not destroy the files if the lawyer knows that there are legal proceedings pending or threatened that relate to the matter for which the lawyer created the files, if the file is subject to paragraph (c) of this Rule, or if the lawyer has agreed otherwise. If these preconditions are satisfied, the lawyer may destroy the files in a manner consistent with the lawyer's continuing obligation to maintain the confidentiality of information relating to the representation under Rules 1.6 and 1.9. Nothing in this Rule is intended to mandate that a lawyer destroy a file in the absence of a client's instruction to do so. Notwithstanding a client's instruction to destroy or return a file, a lawyer may retain a copy of the file or any document in the file.

RULE 1.16A. CLIENT FILE RETENTION

(a) ~~Except as provided in a written agreement signed by a client, a~~ A lawyer in private practice shall retain a client's files respecting a matter ~~for a period of not less than two years following the termination of a representation in the matter,~~ unless:

(1) the lawyer ~~has previously delivered~~delivers the ~~files~~file to the client or ~~disposed of the files in accordance with the client's instructions. Notwithstanding any agreement~~the client authorizes destruction of the file in a writing signed by the client and there are no pending or threatened legal proceedings known to the lawyer that relate to the ~~contrary, a lawyer shall not destroy a client's files after termination of the lawyer's representation in the matter unless:~~matter; or

~~(1) after such termination,~~(2) the lawyer has given written notice to the client of the lawyer's intention to ~~do so~~destroy the file on or after a date stated in the notice, which date shall not be less than thirty days after the date of the notice ~~was given of termination of the representation,~~ and

~~(2)~~ there are no pending or threatened legal proceedings known to the lawyer that relate to the matter.

(b) At any time following the expiration of a period of ten years following the termination of a representation in a matter, a lawyer may destroy a client's files respecting the matter without notice to the client, provided there are no pending or threatened legal proceedings known to the lawyer that relate to the matter and the lawyer has not agreed to the contrary. ~~This Rule does not supersede or limit a lawyer's obligations to retain a file that are imposed by law, court order, or rules of a tribunal.~~

(~~b~~c) Notwithstanding ~~the requirements set forth in 1.16A~~paragraphs (a) and (b) above, a lawyer in a criminal matter shall ~~maintain a copy of all notes and work product related to that matter for the~~retain a client's file for the following time ~~period~~periods:

(1) for the life of the client, if the matter resulted in a conviction and a sentence of death, life without parole, or an indeterminate sentence, including a sentence pursuant to the Colorado Sex Offender Lifetime Supervision Act of ~~1988~~1998, 18-1.3-1001 et seq., C.R.S.

(2) for eight years from the date of sentencing, if the matter resulted in a conviction for any other felony and the conviction and/or sentence was appealed;

(3) for five years from the date of sentencing, if the matter resulted in a conviction for any other felony and neither the conviction nor the sentence was appealed.

~~Comment~~

~~[1] Rule 1.16A provides definitive standards regarding the recurring question of how long a lawyer must maintain a client's files before destroying them.~~ (d) A lawyer may satisfy the notice requirements of paragraph (a)(2) of this Rule by establishing a written file retention policy consistent with this Rule and by providing a notice of the file retention policy to the client in a fee agreement or a in writing delivered to the client not later than thirty days before destruction of the client's file or incorporated into a fee agreement.

(e) This Rule does not supersede or limit a lawyer's obligations to retain a client's file that are imposed by law, court order, or rules of a tribunal.

Comment

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[4] A lawyer may not destroy a client's file when the lawyer has knowledge of pending or threatened proceedings relating to the matter. The Rule does not affect a lawyer's obligations under Rule 1.16(d) with respect to the surrender of papers and property to which the client is entitled upon termination of the representation. A client's receipt of papers forwarded from time to time by the lawyer during the course of the representation does not alleviate the lawyer's obligations under Rule 1.16A.

~~[4] Except with respect to files maintained by a lawyer for ten or more years, there are three preconditions to the lawyer's actual destruction of the client's files. First, the two-year maintenance period, or such shorter period as the client may have agreed to in a signed written agreement, must have expired. Second, sometime after the termination of representation in the matter~~ [4] The destruction of a client's files under paragraph (a) of Rule 16A is subject to two sets of preconditions. First, the lawyer must have given written notice to the client of the lawyer's intention to destroy the files

on or after a date certain, which date is not less than thirty days after the date the notice was given. The purpose of the timing of the notice is to give or the client has authorized the destruction of the files in a meaningful opportunity to recoverwriting signed by the client. As provided in paragraph (d), the notice requirement in paragraph (a) can be satisfied by timely giving the client a written statement of the applicable file retention policy; that policy could for example, contained in a written fee agreement. A lawyer should make reasonable efforts to locate a client for purposes of giving written notice. when such notice was not provided during the representation. If the lawyer is unable to locate the client, written notice sent to the client's last known address is sufficient under paragraph (a) Rule 1.16A. Third, Second, the lawyer may not destroy the files if the lawyer knows that there are legal proceedings pending or threatened that relate to the matter for which the lawyer created the files, if the file is subject to paragraph (c) of this Rule, or if the lawyer has agreed otherwise. If these three preconditions are satisfied, the lawyer may destroy the files in a manner consistent with the lawyer's continuing obligation to maintain the confidentiality of information relating to the representation under Rules 1.6 and 1.9. Nothing in this Rule is intended to mandate that a lawyer destroy a file in the absence of a client's instruction to do so. Notwithstanding a client's instruction to destroy or return a file, -a lawyer may retain a copy of the file or any document in the file.

ITEM 2A

From: Marcus Squarrell
Sent: Friday, July 30, 2010 1:11 PM
To: 'Alec Rothrock'
Subject: FW: Revised Rule 1.16A
Attachments: RULE 1.16A 7-30-2010.docx

From: Marcus Squarrell
Sent: Friday, July 30, 2010 12:59 PM
To: 'Alec Rothrock'; 'avwllc@comcast.net'; 'Boston Stanton'; 'cainmoya@aol.com'; 'cohen@wtotrial.com'; 'Diana May'; 'dick@easonrohde.com'; 'dlittle@mlmpc.com'; 'Frances.Brown@coloradodefenders.us'; 'jolsen'; 'lindy@coloradoadc.com'; 'Matthew.Kirsch@usdoj.gov'; 'nmueller@hmflaw.com'; 'Phil Cherner'; 'ted@downeymurray.com'; 'Virginia Grady'
Cc: 'Marcy Glenn'
Subject: Revised Rule 1.16A

Counsel:

To summarize the meeting for those who were not in attendance, the discussion began with the revisions proposed by the DAs and expanded into a broader discussion of the Standing Committee's proposed Rule. Those who were not on the Standing Committee and a few of us who were, questioned whether the first two sentences of the Rule were consistent. The Standing Committee's intent was that the second sentence overrode the first sentence in all cases. Comment 4 made the priority of the second sentence clear, but the Rule was confusing. We discussed whether the Rule should require notice after termination when the client previously had consented to destruction of the file in an engagement letter or another writing. The criminal attorneys questioned whether it is feasible to give notice after termination to a criminal defendant, especially defendants represented by public defenders or alternative defense counsel.

The majority agreed that the Rule should be revised to eliminate the need for notice after termination of the representation in all cases. I volunteered to generate a draft. I also tried to clear up ambiguities in the Rule. I added a concept in paragraph (d) that was not discussed in the meeting. The new paragraph is an attempt to deal with the situation of public defenders and alternative defense counsel who do not enter into agreements with their clients. I recognize that the paragraph, as drafted, would apply to all lawyers.

Alec is drafting an alternative that requires notice for after termination with an exception for criminal defense attorneys or public defenders.

Please do not hesitate to rip the attached draft apart.

Marcus

Marcus L. Squarrell
Ducker, Montgomery, Lewis & Bess, P.C.
1560 Broadway, Suite 1400
Denver, Colorado 80202
msquarrell@duckerlaw.com

Direct: 303-228-2538
Firm: 303-861-2828
Fax: 303-861-4017

Marcus Squarrell

From: Brown, Frances [Frances.Brown@coloradodefenders.us]
Sent: Thursday, August 05, 2010 2:55 PM
To: Alec Rothrock; Anthony van Westrum; Thomas E. Downey, Jr.; David Little; Boston Stanton; Matthew.Kirsch@usdoj.gov; jolsen@13thdistrictattorney.com; phil@philcherner.com; calnmoya@aol.com; lindy@coloradoadc.com; nmueller@hmflaw.com; Cohen, Nancy; dick@easonrohde.com; Virginia_grady@fd.org; Marcus Squarrell; dianamay@elpaso.com; James Sudler
Cc: Marcy Glenn; John Gleason
Subject: RE:
Attachments: File Retention Policy 2010.doc

I, too, had a revelation this weekend which was that once I understood what section (a) of Rule 1.16A actually meant, I realized that there was no way the Public Defenders could, without substantial fiscal impact, comply with a requirement to keep all client files for a minimum of 2 years. I have attached a copy of our own file retention policy which, as you see, allows for file destruction of some cases in as little as 6 months after the case is closed. I know there is a reluctance to do separate rules for separate groups but there is a very good reason for excluding Public Defenders (and other government attorneys) from these rules as outlined in Alec's email below. I know you are all probably sick of hearing me say this but we closed about 100,000 cases last year and in many of these cases there is simply no reason to keep the file for 2 years. Nor is there any funding for doing so. For that reason I support Alec's version of the Rule.

I can be at the meeting on Monday.

Frances Smylie Brown
Chief Deputy Public Defender
1290 Broadway, Suite 900
Denver CO. 80203
303.764.1400 - Phone
303.764.1455 - Fax

CONFIDENTIALITY NOTICE: This email contains confidential information and is intended only for the named individual. If you are not the intended recipient, you should not read, disseminate, distribute or copy this email. Please notify the sender immediately if you received this email by mistake and delete this email from your system.

From: Alec Rothrock [mailto:arothrock@bfw-law.com]
Sent: Thursday, August 05, 2010 11:20 AM
To: Anthony van Westrum; Thomas E. Downey, Jr.; David Little; Boston Stanton; Matthew.Kirsch@usdoj.gov; Brown, Frances; jolsen@13thdistrictattorney.com; phil@philcherner.com; calnmoya@aol.com; lindy@coloradoadc.com; nmueller@hmflaw.com; Cohen, Nancy; dick@easonrohde.com; Virginia_grady@fd.org; Marcus Squarrell; dianamay@elpaso.com; James Sudler
Cc: Marcy Glenn; John Gleason
Subject:

All,

Over the weekend it occurred to me that I had been operating under a flawed assumption insofar as the notice issue was concerned. The notice requirement was never intended to apply to public defenders or any other "government lawyers."

The public defender falls within the class of lawyers who are, within the meaning of existing Comment [2], "employed by a legal services organization or government agency to represent third parties under circumstances where the third party client's files are considered to be files and records of the organization or agency. . . ." This sentence was intended to make such lawyers akin to in-house counsel, whom the prior sentence in Comment [2] expressly exempts from Rule 1.16A: "Generally, lawyers employed by a private corporation or other entity as in-house counsel represent such

60

From: Cohen, Nancy [cohen@wtotrial.com]
Sent: Tuesday, August 10, 2010 3:47 PM
To: Marcus Squarrell; bostonhs@aol.com; Ted; Anthony van Westrum
Cc: Alexander R. Rothrock; Richard L. Eason; MLM - Little, David; James Stewart Sudler, III; Thomas E. Downey, Jr.; cainmoya@aol.com; dianamay@elpasoco.com; Frances.Brown@coloradodefenders.us; jolsen@13thdistrictattorney.com; lindy@coloradoadc.com; Matthew.Kirsch@usdoj.gov; Norman R. Mueller; Philip A. Cherner; Virginia_grady@fd.org; Marcy Glenn
Subject: RE: Re: Revised Rule 16.A

Marcus,

Do you need the following language in both 1(a) and (b):

and there are no pending or threatened legal proceedings known to the lawyer that relate to the matter.

I have a vague recollection that even if the client agreed to destruction, if the client knows there is a pending or threatened legal proceeding that relates to the matter, the lawyer cannot destroy the file. Maybe you discussed this issue again at the meeting I could not attend or maybe I am remembering this wrong. What is our intention?

Nancy

From: Marcus Squarrell [mailto:msquarrell@duckerlaw.com]
Sent: Tuesday, August 10, 2010 3:31 PM
To: bostonhs@aol.com; Ted; Cohen, Nancy; Anthony van Westrum
Cc: Alexander R. Rothrock; Richard L. Eason; MLM - Little, David; James Stewart Sudler, III; Thomas E. Downey, Jr.; cainmoya@aol.com; dianamay@elpasoco.com; Frances.Brown@coloradodefenders.us; jolsen@13thdistrictattorney.com; lindy@coloradoadc.com; Matthew.Kirsch@usdoj.gov; Norman R. Mueller; Philip A. Cherner; Virginia_grady@fd.org; Marcy Glenn
Subject: RE: Re: Revised Rule 16.A

Everyone,

I reinserted "in private practice" and added the majority of Tony van Westrum's changes to my last draft. Please send any additional comments. I will include any comments on this draft in the packet for the Standing Committee. If you would like your prior emails included in the packet that will be sent to the Supreme Court, please resend the email.

Thanks for your input.

Marcus

Marcus L. Squarrell
Ducker, Montgomery, Lewis & Bess, P.C.

From: bostonhs@aol.com
Sent: Tuesday, August 10, 2010 12:19 PM
To: Ted; Marcus Squarrell; Cohen, Nancy; Anthony van Westrum
Cc: Alexander R. Rothrock; Richard L. Eason; MLM - Little, David; James Stewart Sudler, III; Thomas E. Downey, Jr.; cainmoya@aol.com; dianamay@elpasoco.com; Frances.Brown@coloradodefenders.us; jolsen@13thdistrictattorney.com; lindy@coloradoadc.com; Matthew.Kirsch@usdoj.gov; Norman R. Mueller; Philip A. Cherner; Virginia_grady@fd.org
Subject: Re: Revised Rule 16.A

My $ .02,

Court appointed attorney would be inclusive of CJA attorney s in federal court that are also private attorneys - this would not limit the reference to only ADC attorneys in state court.

Boston.

Sent from my HTC on the Now Network from Sprint!

------ Reply message ------
From: "Ted" <ted@cdac.state.co.us>
Date: Tue, Aug 10, 2010 11:47 pm
Subject: Revised Rule 16.A
To: "Marcus Squarrell" <msquarrell@duckerlaw.com>, "Cohen, Nancy" <cohen@wtotrial.com>, "Anthony van Westrum" <avwllc@comcast.net>
Cc: "Alexander R. Rothrock" <arothrock@bfw-law.com>, "Boston H. Stanton, Jr." <bostonhs@aol.com>, "Richard L. Eason" <dick@easonrohde.com>, "MLM - Little, David" <dlittle@mlmpc.com>, "James Stewart Sudler, III" <j.sudler@csc.state.co.us>, "Thomas E. Downey, Jr." <ted@downeymurray.com>, "cainmoya@aol.com" <cainmoya@aol.com>, "dianamay@elpasoco.com" <dianamay@elpasoco.com>, "Frances.Brown@coloradodefenders.us" <Frances.Brown@coloradodefenders.us>, "jolsen@13thdistrictattorney.com" <jolsen@13thdistrictattorney.com>, "lindy@coloradoadc.com" <lindy@coloradoadc.com>, "Matthew.Kirsch@usdoj.gov" <Matthew.Kirsch@usdoj.gov>, "Norman R. Mueller" <nmueller@hmflaw.com>, "Philip A. Cherner" <phil@philcherner.com>, "Virginia_grady@fd.org" <Virginia_grady@fd.org>

Marcus (et al.)

My memory was that the first obligation (under (a)) was to apply to attorneys in private practice (which actually would still include ADC lawyers, but not the public defenders), while the obligations in (c) would apply to the public defenders. The last discussion, about the fact that the ADC lawyer's files already in existence might have to be kept 10 years (since no notice had been given), even if they were misdemeanors, ended with, as I recall, an acknowledgement that such an outcome was simply unavoidable. I think if you simply add back into (a) the "a lawyer IN PRIVATE PRACTICE" you would accomplish what was discussed yesterday.

Ted

-----Original Message-----

From: BostonHS@aol.com
Sent: Wednesday, August 11, 2010 1:03 PM
To: Marcus Squarrell; cohen@wtotrial.com; ted@cdac.state.co.us; avwllc@comcast.net
Cc: arothrock@bfw-law.com; dick@easonrohde.com; dlittle@mlmpc.com; j.sudler@csc.state.co.us; ted@downeymurray.com; cainmoya@aol.com; dianamay@elpasoco.com; Frances.Brown@coloradodefenders.us; jolsen@13thdistrictattorney.com; lindy@coloradoadc.com; Matthew.Kirsch@usdoj.gov; nmueller@hmflaw.com; phil@philcherner.com; Virginia_grady@fd.org; MGlenn@hollandhart.com
Subject: Re: Revised Rule 16.A

Marcus,

I believe that CJA court appointed attorneys should receive the same treatment as public defenders or alternate defense counsel attorneys as they do the same work - just on a federal level. The way this reads in comment two it leaves cja attorneys out. Could it include CJA attorneys as well?

In a message dated 8/11/2010 11:41:32 A.M. Mountain Daylight Time, msquarrell@duckerlaw.com writes:

Everyone,

The attached draft incorporates Nancy's suggestion.

Lindy and Frances,

Does the reinsertion of "in private practice" address your concerns with this version?

Thanks to all,

Marcus

From: Cohen, Nancy [mailto:cohen@wtotrial.com]
Sent: Tuesday, August 10, 2010 3:47 PM
To: Marcus Squarrell; bostonhs@aol.com; Ted; Anthony van Westrum
Cc: Alexander R. Rothrock; Richard L. Eason; MLM - Little, David; James Stewart Sudler, III; Thomas E. Downey, Jr.; cainmoya@aol.com; dianamay@elpasoco.com; Frances.Brown@coloradodefenders.us; jolsen@13thdistrictattorney.com; lindy@coloradoadc.com; Matthew.Kirsch@usdoj.gov; Norman R. Mueller; Philip A. Cherner; Virginia_grady@fd.org; Marcy Glenn
Subject: RE: Re: Revised Rule 16.A

Marcus Squarrell

From: Lindy Frolich [lindy@coloradoadc.com]
Sent: Thursday, August 12, 2010 7:18 AM
To: Marcus Squarrell
Subject: RE: Re: Revised Rule 16.A

Marcus: I know you had to turn this in yesterday – but I just looked at the comments, and did not understand number 2 where it again includes Alternate defense counsel, since we don't employ any lawyers. I thought we were going to leave that out?

Lindy Frolich
Alternate Defense Counsel
1580 Logan, Suite 330
Denver, CO 80203
303-832-5306
lindy@coloradoadc.com
www.coloradoadc.org

From: Marcus Squarrell [mailto:msquarrell@duckerlaw.com]
Sent: Wednesday, August 11, 2010 11:40 AM
To: Cohen, Nancy; bostonhs@aol.com; Ted; Anthony van Westrum
Cc: Alexander R. Rothrock; Richard L. Eason; MLM - Little, David; James Stewart Sudler, III; Thomas E. Downey, Jr.; cainmoya@aol.com; dianamay@elpasoco.com; Frances.Brown@coloradodefenders.us; jolsen@13thdistrictattorney.com; Lindy Frolich; Matthew.Kirsch@usdoj.gov; Norman R. Mueller; Philip A. Cherner; Virginia_grady@fd.org; Marcy Glenn
Subject: RE: Re: Revised Rule 16.A

Everyone,

The attached draft incorporates Nancy's suggestion.

Lindy and Frances,

Does the reinsertion of "in private practice" address your concerns with this version?

Thanks to all,

Marcus

From: Cohen, Nancy [mailto:cohen@wtotrial.com]
Sent: Tuesday, August 10, 2010 3:47 PM
To: Marcus Squarrell; bostonhs@aol.com; Ted; Anthony van Westrum
Cc: Alexander R. Rothrock; Richard L. Eason; MLM - Little, David; James Stewart Sudler, III; Thomas E. Downey, Jr.; cainmoya@aol.com; dianamay@elpasoco.com; Frances.Brown@coloradodefenders.us; jolsen@13thdistrictattorney.com; lindy@coloradoadc.com; Matthew.Kirsch@usdoj.gov; Norman R. Mueller; Philip A. Cherner; Virginia_grady@fd.org; Marcy Glenn
Subject: RE: Re: Revised Rule 16.A

Marcus,

Do you need the following language in both 1(a) and (b):

ITEM 3

Marcus Squarrell

From: Alec Rothrock [arothrock@bfw-law.com]
Sent: Thursday, August 05, 2010 11:20 AM
To: Anthony van Westrum; Thomas E. Downey, Jr.; David Little; Boston Stanton; Matthew.Kirsch@usdoj.gov; Frances.Brown@coloradodefenders.us; jolsen@13thdistrictattorney.com; phil@philcherner.com; cainmoya@aol.com; lindy@coloradoadc.com; nmueller@hmflaw.com; Cohen, Nancy; dick@easonrohde.com; Virginia_grady@fd.org; Marcus Squarrell; dianamay@elpaso.com; James Sudler
Cc: Marcy Glenn; John Gleason
Attachments: Rule 1 16A and Comment (ARR 8-10).doc^

All,

Over the weekend it occurred to me that I had been operating under a flawed assumption insofar as the notice issue was concerned. The notice requirement was never intended to apply to public defenders or any other "government lawyers."

The public defender falls within the class of lawyers who are, within the meaning of existing Comment [2], "employed by a legal services organization or government agency to represent third parties under circumstances where the third party client's files are considered to be files and records of the organization or agency. . . ." This sentence was intended to make such lawyers akin to in-house counsel, whom the prior sentence in Comment [2] expressly exempts from Rule 1.16A: "Generally, lawyers employed by a private corporation or other entity as in-house counsel represent such corporation or entity as employees and the client's files are considered to be in the possession of the client and not the lawyer, *such that Rule 1.16A would be inapplicable*."

I realized that the inapplicability of government lawyers from Rule 1.16A was not clear from the rule or comment.

This distinction must be clarified. So, I have attached another draft of the rule and comment. It is different from the one I circulated Friday night. The attached draft expressly exempts from both the two-year file retention and notice provisions any "government lawyer or an employee of a client organization or an affiliate of a client organization." I also added a nonexclusive definition of "government lawyer" that makes it clear that public defenders (and D.A.'s, U.S. Attorneys, etc.) fall within it. Government lawyers would nonetheless be subject to the new file retention requirement in certain criminal cases.

By the way, it is not a stretch for public defenders to be considered "government lawyers." In *People v. Shari*, 204 P.3d 453, 459 n. 5 (Colo. 2009), the Colorado Supreme Court held that public defenders were "government attorneys" for purposes of the inapplicability of Rule 1.10 on imputation of conflicts of interest. Justice Coats dissented from that proposition, but it is the law. In any event, for purposes of Rule 1.16A, the court can define a government lawyer pretty much any way it wants. By analogy, the court included a nonexclusive definition of "nonlawyer" in Rule 5.4 for purposes of the prohibition against nonlawyer ownership in law firms.

Comment [2] as currently drafted goes on to say that a lawyer "employed by a legal services organization or government agency to represent third parties" "must take reasonable measures to ensure that the client's files are maintained by the organization or agency in accordance with this rule." The quoted language makes Comment [2] ambiguous, because government lawyers are exempt from the Rule (except for the new file retention requirement in certain criminal cases). For this reason, I deleted the language requiring government lawyers to "take reasonable measures to

ensure that the client's files are maintained by the organization or agency in accordance with this rule."

Apropos of Dave Little's comment about writing in "plain English," I moved around the paragraphs in the rule to place related paragraphs together.

I agree with Jamie Sudler's comment about "carve-outs." The Standing Committee drafted Rule 1.16A to avoid carve-outs. I don't consider the exclusion of government lawyers from the rule a "carve-out," because the intent was to treat them like in-house counsel, whose clients possess the file all along. Comment [2] extended this concept to U.S. Attorneys, D.A.'s and others who "represent third parties under circumstances where the third party client's files are considered to be files and records of the organization or agency. . . ." The extended file retention requirement in certain criminal cases constitutes a type of "carve-out," but I, for one, am willing to live with it, especially if the private criminal defense bar is okay with it.

As we discussed at the meeting last week, the consensus of the Standing Committee was to require lawyers subject to the notice requirement to give notice of file destruction only after termination of the representation in the matter. Marcus's draft eliminates this concept and thus permits lawyers to give "notice" in the bowels of a fee agreement (or other writing) at the outset of the representation. If it is clear that government lawyers aren't subject to the notice requirement anyway, then the practical burden of a separate, post-termination notice falls only on private practitioners.

I propose the attached for the subcommittee's consideration as the recommended version to present to the Standing Committee.

Alec

Rule 1.16A. Client File Retention

(a) A lawyer shall retain a client's files in a matter for at least two years following the termination of the representation in the matter, unless:

(1) A written agreement signed by the client states otherwise;

(2) The lawyer has previously delivered the files to the client;

(3) The lawyer has previously disposed of the files at the client's direction; or

(4) The lawyer is a government lawyer or an employee of a client organization or an affiliate of a client organization.

(b) Notwithstanding paragraph (a) above, a lawyer shall retain a client's files for the following periods of time in the following types of matters:

(1) For the life of the client, if the matter resulted in a conviction and a sentence of death, life without parole, or an indeterminate sentence, including a sentence pursuant to the Colorado Sex Offender Lifetime Supervision Act of 1988, 18-1.3-1001 et seq., C.R.S.

(2) For eight years after the date of sentencing, if the matter resulted in a conviction of any felony other than those described in subparagraph (1) above and the conviction or sentence was appealed; and

(3) For five years after the date of sentencing, if the matter resulted in a conviction for any felony other than those described in subparagraph (1) above and neither the conviction nor the sentence was appealed.

(c) After termination of the lawyer's representation in a matter, a lawyer shall not destroy a client's files unless:

(1) After the termination of the lawyer's representation in the matter, the lawyer has sent notice in writing to the client that the lawyer may destroy the client's files on or after a date certain that is no less than thirty days after the date the notice is sent;

(2) A period of no less than thirty days has elapsed since the date the notice is sent;

(3) There are no pending or threatened legal proceedings known to the lawyer that relate to the matter; and

(4) There is no agreement to the contrary.

(d) Paragraph (c) is inapplicable to a government lawyer or an employee of a client organization or an affiliate of a client organization.

(e) Paragraphs (c)(1) and (2) above are inapplicable if at least ten years have passed since the termination of the representation in a matter.

(f) This Rule does not supersede or limit a lawyer's obligations to retain a file that are imposed by law, court order, or rules of a tribunal.

COMMENT

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

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

client organization as an employee or ~~Where lawyers are employed by a legal services organization or government agency to~~ represents third parties under circumstances where the third party client's files are considered to be files and records of the government organization. For purposes of Rule 1.16A, government lawyers include not only lawyers employed in the law department of a government organization but also lawyers employed in the office of the U.S. Attorney, Justice Department or Attorney General, or of a county attorney, district attorney, city attorney, town attorney, or legal aid or legal services organization such as a public defender. ~~or agency, the lawyer must take reasonable measures to ensure that the client's files are maintained by the organization or agency in accordance with this rule.~~

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

[4] Except with respect to files maintained by a lawyer for ten or more years, there are three preconditions to the lawyer's actual destruction of the client's files. First, the two-year maintenance period, or such shorter period as the client may have agreed to in a signed written agreement, must have expired. Second, sometime after the termination of representation in the matter, the lawyer must have given written notice to the client of the lawyer's intention to destroy the files on or after a date certain, which date is not less than thirty days after the date the notice was given. A file destruction provision in a fee agreement does not comply with Rule 1.16A(c)(1). The purpose of the timing of the notice is to give the client a meaningful opportunity to recover the file. A lawyer should make reasonable efforts to locate a client for purposes of giving written notice. If the lawyer is unable to locate the client, written notice sent to the client's last known address is sufficient under Rule 1.16A. Third, the lawyer may not destroy the files if the lawyer knows that there are legal proceedings pending or threatened that relate to the matter for which the lawyer created the files, or if the lawyer has agreed otherwise. If these three preconditions are satisfied, the lawyer may destroy the files in a manner consistent with the lawyer's continuing obligation to maintain the confidentiality of information relating to the representation under Rules 1.6 and 1.9. Nothing in this Rule is intended to mandate that a lawyer destroy a file in the absence of a client's instruction to do so. Notwithstanding a client's instruction to destroy or return a file, a lawyer may retain a copy of the file or any document in the file.

[5] Rule 1.16A(e) eliminates the notice requirement if ten years have passed since the end of the representation in the matter. This exception reflects an assumption that the client has effectively abandoned the files and that the likelihood that their destruction will cause harm to the client is remote. It also may be difficult if not impossible after ten years for the lawyer to notify the client in writing of an intention to destroy the files.

COLORADO SUPREME COURT

STANDING COMMITTEE ON THE RULES OF PROFESSIONAL CONDUCT

Submitted Minutes of Meeting of the Full Committee
On June 7, 2010
(Twenty-seventh Meeting of the Full Committee)

The twenty-seventh meeting of the Colorado Supreme Court Standing Committee on the Rules of Professional Conduct was convened at 9:00 a.m. on Monday, June 7, 2010, by Chair Marcy G. Glenn. The meeting was held in a conference room of the Office of Attorney Regulation Counsel on the nineteenth floor of 1560 Broadway.

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

I. *Welcome of New Member.*

The Chair welcomed James S. Sudler III as a new member of the Committee.

II. *Meeting Materials; Minutes of February 26,2010 Meeting.*

The Chair had provided materials to the members prior to the meeting date, including submitted minutes of the twenty-sixth meeting of the Committee, held on February 26,2010, prepared by secretary *pro tem* Cynthia F. Covell. Those minutes were approved with one correction.

III. *Rule 1.16A.*

The Chair opened the discussion of further changes to Rule 1.16A by noting that there were both procedural and substantive aspects that the Committee should consider.

A. *Process.*

As was reported in the minutes of the twenty-sixth meeting of the Committee on February 26, 2010, legislation was introduced in the 2010 Colorado General Assembly[1] at the instigation of the Colorado District Attorneys' Council ("CDAC"), to establish minimum periods for the retention of files by "attorneys of record" in criminal matters. By the time that legislation had been introduced, this Committee had submitted to the Supreme Court its proposal for the adoption of a new Rule 1.16A,

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1. H.B. 10-1251, "Concerning file retention by attorneys of record in felony criminal cases," available at http://www.leg.state.co.us/Clics/CLICS2010A/csl.nsf/BillFoldersHouse?openFrameset.

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

As indicated in the minutes of the February 26th meeting, the Committee authorized its member, John Gleason, to communicate with the CDAC and the sponsor of H.B. 10-1251 with a view toward ending the effort to legislate lawyer file retention requirements and to bring the matter to the Committee for development of a rule covering the topic. At the February meeting, it was thought that the matter could be dealt with by modifications to the Committee's proposed Rule 1.16A, which could have been considered at the hearing on that proposed Rule that the Court had already scheduled for June 10, 2010.

As explained in a June 2, 2010 letter[2] to the Clerk of the Supreme Court from Ted Tow, Executive Director of the CDAC, the matter progressed differently than the Committee had expected at its February 26th meeting. As indicated in that letter, the proponents of H.B. 10-1251 — then facing opposition from the Office of Attorney Regulation Counsel ("OARC") — obtained the bill sponsor's agreement to withdraw the bill[3] in the House Judiciary Committee; and a "Working Group" consisting of representatives from the CDAC, OARC, the United States Attorney's Office, the Office of the State Public Defender, the Office of the Federal Public Defender, the Office of Alternative Defense Counsel, and the Colorado Criminal Defense Bar Association was formed to consider the file retention matter. With that June 2nd letter, Mr. Tow submitted the Working Group's proposal directly to the Supreme Court. That proposal would, among other changes, add a new subrule to Rule 1.16A as it was proposed by the Committee to the Court on January 20, 2010, which new subrule would set specific retention periods for a "lawyer in a criminal matter." None of the participants on the working committee sought the participation of the Committee or advised it of their activity, despite the Chair's inquiries to the OARC about what drafting efforts might be occurring.

The Chair remarked that this episode provided a "teachable moment" for the Committee. She noted that the Committee has interests that might differ, on any issue, from those of any particular constituency, including in particular the OARC. However, it might be that others are sometimes not aware of the Committee's separate status and might think, for example, that it is represented by the OARC.

The Chair noted, also, that the Committee approaches its tasks regarding the Rules of Professional Conduct in an open and transparent manner, welcoming all interested persons to participate in or observe its deliberative processes; and, she added, the Committee takes the time needed to give a full, refined analysis of the substantive matters it takes up. Its processes differ in significant respects from the legislative process, which is subject to constitutional deadlines and in which interest groups may develop proposals without the transparent deliberation that characterizes the Committee's approach. The Chair made it clear that she would not want to see the Committee's processes compromised by activities that lie outside the bounds of transparency.

The members then discussed, at some length, the Committee's role in the rule-making process and the activities of other entities — such as specific interest groups and the General Assembly — that impact upon, or substitute for, rule-making. They recognized that some of them, such as those members who also participate in the legislation-monitoring functions of various bar associations and groups, are in positions to keep the Chair and the Committee informed of outside activities that may impinge upon rule-

2. A copy of which letter, together with the Working Group's proposed version of Rule 1.16A, was included in the materials provided to the Committee for this meeting.

3. *See* http://www.leg.state.co.us/clics/clics2010a/csl.nsf/fsbillcont3/22A44EB61BDA912B872576A80026BA85?Open&file=HB1251_C_001.pdf for indefinite postponement of H.B. 10-1251 in the House Judiciary Committee.

making or lead to legislation in lieu of rule-making. And they saw a need to educate the practicing bar about the Committee's role and processes.

But the members also understood that the 2010 legislative effort with respect to file retention requirements for criminal law matters had been terminated in that session on an understanding that the issue would be considered in the Supreme Court's rule-making process, so that it was now incumbent on the Committee to look again at its proposed Rule 1.16A and determine what changes, if any, might be proposed to deal with the particular concerns of the criminal law bar. The Committee would be constrained in that process by the fact that the General Assembly will convene again in January and that the General Assembly's own processes generally require that proposed legislation, such as any further proposal for file retention legislation in the absence of a Court Rule, be developed prior to that convening.

It was agreed that the issues raised by the Working Group should be considered by the subcommittee, chaired by Marcus L. Squarrell, that had developed the Committee's existing proposal for Rule 1.16a, and that the subcommittee should invite the participation of members of the Working Group.

B. *Substance*

The Committee then turned to the substance of the Working Group's proposal, as it had been submitted to Court with the June 2, 2010 letter from the CDAC, and to the task of deciding whether further changes should be made to Rule 1.16A as it had been submitted to the Court. It was understood that the Squarrell subcommittee would take the Committee's deliberations into account in its further consideration of the Rule with the Working Group.

A member noted that the structure of the Rule as proposed by the Working Group was confusing, jumping from requirements of apparently universal application to requirements specific to a criminal law file. Another member agreed, commenting that this Rule, which will be a recipe that lawyers will look to in the course of establishing specific file procedures, must be an understandable and usable guideline.

A member who was familiar with the advice typically given by the OARC about file retention requirements commented that, under the present state of the Rules and law, the advice is simple: There is no Rule; be aware of the possibility of a malpractice action if you destroy a client's files too soon. He added that the Working Group's proposal, and H.B. 10-1251 before it, are dominated by concerns that are specific to criminal law practice.

A member explained that the OARC had expressed the concern that H.B. 10-1251 would impose a new burden on that office to enforce file retention requirements. This member suggested that that concern could be eliminated by retaining the Rule's references, in the Committee' proposal, to the file retention requirements of "other law," whatever those other requirements might be. In that case, legislation could be adopted specifically covering files generated in criminal matters, and the Rule would not need to deal specifically with those matters. But it was noted that such a move might lead other practice groups, such as probate and real estate lawyers to seek similar, specific legislative solutions to their file retention dilemmas.

Another member agreed that it would be good to adhere to the principle that the Rules of Professional Conduct apply generally to all lawyers without practice classifications. But, he suggested, the Colorado comments could be expanded to explain the application of the Rule to specific practice areas. Then, only when appropriate guidance could not be obtained through such commentary, would it be necessary to add specific substantive provisions to accommodate particular practice areas in particular regards. Other members found that approach to be unsatisfactory.

A member noted that the issue of the application of the Rules to specific practice areas has arisen before. The Presiding Disciplinary Judge has dealt with the question of whether Rule 3.8, establishing special responsibilities of prosecutors, apply to Federal prosecutors, and immigration lawyers have argued that the Rules do not apply to their Federal practice. The member prophesied that soon lawyers with law degrees obtained in foreign jurisdictions will be "practicing" in Colorado — like the "flat earth," he said, the world of law is arguably "flat"; and, if we do not respond with appropriate Rules, particular practice areas will seek legislative solutions to their perceived special concerns. In short, he cautioned, this is a very complicated area.

A member asked whether the American Bar Association has provided guidance on the matter we are considering. The member who had just noted that the legal world is flattening noted that the Court has adopted Rule 220 dealing with out-of-state lawyers practicing in Colorado. Some of those lawyers, he said, come to the state to practice in its Federal courts under their licenses from other states, raising the question of whether the Colorado Court's ethics rules apply to their conduct here in the Federal cases. He pointed out that the prior Colorado rule that prosecutors disclose all exculpatory facts to grand juries was deleted because of its conflict with Federal principles.

The members turned to a consideration of the time available for the Committee's further work on Rule 1.16A. A member suggested that the Court be asked to postpone the hearing, presently scheduled for June 10, 2010, on the Committee's existing proposal for Rule 1.16A, with a view toward a meeting of the Squarrell subcommittee with the Working Group and a further meeting of the Committee in September to make a final determination about any changes to the proposed Rule 1.16A. In that manner, a modified Rule could be adopted in advance of the 2011 General Assembly and thereby preclude a legislative substitute.

The members were in general agreement that the Squarrell subcommittee should work with the Working Group to develop some modification to proposed Rule 1.16A that would accommodate the agreement that the district attorneys and the public defenders seem to have reached. There was a consensus that the task could be accomplished (although it might result in special provisions for criminal law matters) in a way that met the Committee's desire for a comprehensible guideline on file retention. And the members confirmed their agreement that the Chair could communicate directly with the other stakeholders to inform them about how the Committee intended to deal with the matter.

With regard to the pending June 10, 2010 hearing on Rule 1.16A — which hearing is also scheduled to cover proposed amendments to Rule 1.15 and Rule 3.8 — it was noted that no comments had been received regarding Rule 3.8. It was forecast that the Court would adopt Rule 3.8 as proposed and would cancel the hearing as to both Rule 1.15 and Rule 1.16A.[4]

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

The Chair referred the members to the letter dated April 14, 2010, that Alexander R. Rothrock had addressed to her as chair of this Committee and to David W. Stark as chair of the Supreme Court's Attorney Regulation Advisory Committee, which letter had been included in the meeting materials. In that letter, Rothrock pointed out that Rule 251.5(b) of the Colorado Rules of Civil Procedure states that "[a]ny act or omission which violates the criminal laws of this state or any other state, or of the United States," while Rule 8.4(b) of the Rules of Professional Conduct states that it is professional misconduct for a lawyer to "commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects."

4. Following the meeting, the Court canceled the scheduled hearing.

Rothrock noted that the Attorney Regulation Advisory Committee, to which he had also directed his letter and of which he is also a member, has appointed him to chair a subcommittee of that group to look into the matter. That subcommittee has not acted, pending consideration of the matter by this Committee.

Rothrock commented that the discrepancy between the two rules has been relevant to his law practice, which includes defense of lawyers in disciplinary matters. In short, he said, the apparent requirement of Rule 8.4(b) that there be a nexus is illusory, because discipline can be imposed under Rule 251.5(b) without regard to nexus.

Rothrock pointed out that Rule 8.4(b) was not changed in the 2008 adoption of the Ethics 2000 Rules; likewise, Rule 251.5(b) is a long-existing rule.

Rothrock cited the *DeRose*[5] disciplinary case, in which the hearing board found a guilty plea to a Federal crime to be grounds for discipline under Rule 251.5(b) and also under Rule 8.4(b), with disbarment being the appropriate sanction. To Rothrock, it was bizarre that the hearing board found it necessary to establish the requisite Rule 8.4(b) nexus and to find the Rule 8.4(b) violation, when the simple fact of the guilty plea would suffice for discipline, without further analysis, under Rule 251.5(b).

Rothrock's review of cases from other jurisdictions identified some in which the requisite nexus between the crime and the elements of Rule 8.4(b) was found and others in which it was not; Rothrock could find no rhyme or reason to the varying results. In similar circumstances in Michigan, he noted, the courts there have determined that the general provision of Michigan's analog to Rule 251.5(b) trumps the nexus requirement of its version of Rule 8.4(b). Rothrock's letter summarized his examination of Colorado cases: 121 cases finding violations of both Rules, fifty-two cases finding violations of Rule 8.4(b) but not of Rule 251.5(b) (a majority of them involving conditional admissions), and ninety-four cases finding violations of Rule 251.5(b) but not of Rule 8.4(b).[6] He commented that he did not

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5. *In re DeRose,* 55 P.3d 126 (Colo. 2002). In that case, the lawyer pled guilty to a Federal charge of aiding and abetting in structuring a transaction to avoid Federal financial institution reporting requirements. The Court upheld the hearing board's easy finding that the felony plea was grounds for discipline under Rule 251.5(b); the court also accepted the hearing board's determination that the lawyer's knowledge that his actions were illegal and the fact that he aided and abetted his client's illegal activities evidenced a "willingness to wrongfully circumvent, if not flout, the mandatory provisions of a federal law," and thereby constituted a violation of Rule 8.4(b). The hearing board determined that disbarment was the appropriate discipline, under § 5.11 of the American Bar Association's sanction guidelines, which prescribed disbarment where "the lawyer engages in any other intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that *seriously* adversely reflects on the lawyer's fitness to practice.." [Emphasis added.] The Court agreed:

> The crime of structuring and aiding and abetting to which DeRose pled guilty is a felony. Therefore, the crime is a serious crime . . . .
>
> DeRose intentionally and dishonestly structured transactions to avoid reporting requirements imposed by federal law. An attorney has a special duty to respect, abide by and uphold the law. DeRose's criminal offense adversely reflects on his fitness to practice law.
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> DeRose argues that his conviction is not sufficient to warrant disbarment because the crime of structuring does not necessarily involve fraud or moral turpitude. Whether or not structuring is a crime involving fraud or moral turpitude under federal law, DeRose's conduct involved dishonesty and deceit which adversely reflects on his fitness to practice law. The Hearing Board rejected his contention that his conduct was innocent and not intentional. Based upon the record, the Hearing Board's finding is not clearly erroneous.

6. The counts included cases arising under prior analogs of the Rules; those cases finding violations of one or the other, but not both, of the Rules did not generally find *non*-violations of the other Rule but simply did not consider that other Rule.

have any information about OARC'S application of prosecutorial discretion — when and why they choose to proceed under one or the other or both provisions.

In short, the problem is that the apparently narrowing language of Rule 8.4(b), requiring a nexus between the crime and the lawyer's "honesty, trustworthiness or fitness as a lawyer in other respects," is misleading, since it promises a defense to discipline that is not available under the alternative Rule 251.5(b).[7]

In Rothrock's view, the Committee should consider the matter to be one of policy: Should the two provisions be reconciled now — they have stood side by side for many years — and, if so, in which direction should the two provisions be reconciled — with or without the requirement of a nexus? The Committee could determine that any violation of any criminal law is grounds for discipline, as is now the case under Rule 251.5(b), or it could make sure that the requirement of a nexus is preserved, either by proposing the deletion of Rule 251.5(b) or its amendment either to simply cross-reference Rule 8.4(b) or to repeat its wording.

The Chair appointed Rothrock to chair a subcommittee of the Committee to work with the subcommittee that the Advisory Committee has already appointed, with him as its chair, to consider the matter, with the expectation that the subcommittee would report to the Committee at its next meeting.

A member noted that the subcommittee should discern whether the ranges of "criminal conduct" covered by the two provisions are congruous — for example, do they both cover misdemeanor conduct?

Another member added that the subcommittee should also consider the differences as to a second lawyer's reporting duty, since the reporting duty of Rule 8.3 applies only to conduct that violates a Rule of Professional Conduct and does not apply to conduct that violates a Rule of Civil Procedure such as Rule 251.5(b).

V. *Code of Judicial Conduct.*

The Chair pointed out that the Colorado Code of Judicial Conduct has recently been repealed and reenacted. She appointed Judge John Webb to chair a subcommittee to review the interrelationships between that revised code and the Rules of Professional Conduct to determine what impact, if any, the revision has upon the Rules that are within the Committee's purview

A member agreed with the Chair's assessment that there may be differences, suggesting that the provisions governing *ex parte* communications between lawyer and judge may differ between the Code and the Rules: There are communications that the Code permits a judge to pursue that would cause a lawyer, at the other end of the communications, to violate Rule 3.5. This member noted that Oregon specifies, in its Rules of Professional Conduct, that an *ex parte* communication with a lawyer that is permitted to a judge is thereby permitted to the lawyer also.

Another member added that the Code's imposition of a reporting duty on judges for misconduct in their courts differs from the reporting requirements of Rule 8.3.

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7. To that, a member jokingly commented that the distinction would seem to be important only to the lawyer who was thinking about whether to commit a crime.

VI. *Lateral Hires.*

Eli Wald raised, as a new matter for the Committee's consideration, the question of "lateral hires." He explained the matter as follows: A seasoned lawyer, licensed in New York, joins a Colorado law firm in April. Because of the schedule of the Board of Law Examiners, the lawyer is not able to take the Colorado bar examination until July and must wait until October for admission to the Colorado bar. Until that admission, he is not authorized to practice law in Colorado; because he has taken domicile in Colorado, he cannot look to Rule 220 for interim authority to practice. This problem, Wald noted, is serious enough for a law firm associate; it is likely to be even more troublesome for a lawyer who practice for years at a partner level and comes to Colorado with a substantial "book of business" that he must attend to.

Another member commented that her law firm has experienced exactly this problem, one that involved a lateral hire of a senior-level associate who had passed the Colorado bar examination and was awaiting the October admission. She reported that the OARC investigated his pre-admission conduct and even extended its investigation to the lawyer within the law firm who supervised the newly hired lawyer. The matter was resolved with a diversion under the OARC processes.

But, this member noted, the problem lies within Chapter 18 of the Rules of Civil Procedure, governing admission to practice law in Colorado, and not with any Rule of Professional Conduct, other than Rule 5.5(a)(3) governing a lawyer's assistance of the unauthorized practice of law.

Joining the discussion, another member pointed out that Colorado is at a tipping point regarding these jurisdictional issues. This member is a participant on the Calling Committee of the Colorado Bar Association's Ethics Committee and, from that vantage point, sees the issue raised by callers in inquiries such as, "I am moving from Pennsylvania to Colorado with my wife and family, and I wish to continue to practice law, from Colorado, on my computer for my Pennsylvania-based clients." The existing rules do not permit that, she noted.

A member commented that the Court is aware of these kinds of issues, and he suggested that this Committee join with the Supreme Court Attorney Regulation Advisory Committee to consider them "at a deep level." He pointed out that the issues also implicate the concept of inter-state reciprocity, a concept that has been discussed but not really implemented.

A member who had participated in the efforts in the early 2000s that led to C.R.C.P. 220 commented that it had been a "hard sell" to get that out-of-state practice rule adopted.

Another member noted that similar questions are raised with regard to international aspects, such as the provision of legal services to Colorado lawyers by lawyers located in other countries, notably India.

The Chair agreed that a subcommittee should be appointed to consider these questions; she dubbed it the "Subcommittee on Cross-Border Practice." She appointed Wald to chair the subcommittee. And she agreed with a member's comment that Wald should invite the participation of lawyers who had participated in the Colorado Bar Association's C.R.C.P. 220 activities in the early 2000s, which had been alluded to previously.

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

to Wald and the subcommittee to determine what it would consider and whether to return to the Committee for further guidance in that regard if that was thought necessary.

VII. *Adjournment; Next Scheduled Meeting.*

The meeting adjourned at approximately 11:00 p.m. The next scheduled meeting of the Committee will be on Thursday, August 19, beginning at 9:00 a.m., in a conference room at the Office of Attorney Regulation Counsel.

RESPECTFULLY SUBMITTED,

Anthony van Westrum, Secretary