Approved by the Committee
September 25, 2020

COLORADO SUPREME COURT

STANDING COMMITTEE ON THE RULES OF PROFESSIONAL CONDUCT

Approved Minutes of the Full Committee
On April 3, 2020
(Fifty-sixth Meeting of the Full Committee)

The fifty-sixth meeting of the Colorado Supreme Court Standing Committee on the Rules of Professional Conduct was convened at 9:00 a.m. on April 3, 2020, by Chair Marcy G. Glenn. Due to the coronavirus pandemic, the meeting was held remotely by WebEx videoconference.

In attendance at the meeting, in addition to Chair Marcy G. Glenn and liaison Justice Monica Màrquez, were Committee members Judge Michael H. Berger, Gary B. Blum, Nancy L. Cohen, Cynthia F. Covell, Thomas E. Downey, Jr., Judge Adam J. Espinosa, Margaret Funk, John M. Haried, Judge Lino S. Lipinsky de Orlov, Cecil E. Morris, Jr., Noah C. Patterson, Judge Ruthanne N. Polidori, Henry Richard Reeve, Alexander R. Rothrock, Marcus L. Squarrell, James S. Sudler, Frederick R. Yarger, and Jessica E. Yates. J.J. Wallace also attended. Guests attending were Frank Hill, Stan Kent, Marianne Luu-Chen, Herb Tucker and John Lebsack.

Justice William W. Hood III and members David W. Stark, Eli Wald, Judge John R. Webb and Tuck Young were excused.

Introductions and Announcements

Chair Glenn introduced guests. She announced that Marcus Squarrell retired from his firm at the end of 2019, and Judge John Webb retired from the bench in February 2020. Judge Webb will be serving as a Senior Carr Fellow with the Colorado Attorney General's office.

Approval of Minutes

The minutes of the fifty-fifth meeting of the full Committee, held January 10, 2020, were approved.

Report on Status of Proposed Advertising Amendments

The proposed amendments to Rules 7.1 – 7.5, regarding advertising, were sent to the Supreme Court on March 3, 2020. The deadline for comments is June 9, 2020. The Supreme Court will determine based on comments whether to schedule a hearing of these amendments.

Report from Diversity Subcommittee

Judge Espinosa reported on the subcommittee's efforts to broaden the diversity of the Committee.

Report from Abandoned Estate Planning Documents Subcommittee

Fred Yarger reported that the subcommittee was formed after the Committee was given an overview at the January meeting of recent legislation that allows lawyers to file abandoned estate planning documents electronically with the State Court Administrator's Office ("SCAO") after attempting to locate the client. [The statute is the Colorado Electronic Preservation of Abandoned Estate Planning Documents Act ("Act").] Ethical issues relate to confidentiality and dealing with client property. The subcommittee had 10 members, five of whom were estate planning lawyers who had worked on the legislation. The subcommittee had to work speedily because the legislation becomes effective in early 2021.

Rule 1.6 issues: In order for a lawyer to take advantage of the statute, he or she must make disclosures to the SCAO and provide the abandoned estate planning document(s). The SCAO is required to compile a public database containing limited information about the document(s) submitted. The document itself is released under certain specific circumstances. Rule 1.6 is thus implicated.

Rule 1.15(A) issues: This rule defines a lawyer's general obligations with respect to client property. Rule 1.16A, comment 1 specifically identifies wills as "property".

Rules 1.6 and 1.15(A) as written do not bar use of the Act and may in fact encourage it. The subcommittee determined comment revisions would be helpful, however. It proposed a revision to Comment 5 of Rule 1.6 ("Authorized Disclosure") to reference the Act. It also proposed a new Comment 8 to Rule 1.15A to address safekeeping of client property generally and to reference the Act.

Several members applauded the work of the subcommittee. The Committee voted to send the comment revisions to the Supreme Court for consideration. Chair Glenn thanked the subcommittee for its extremely efficient work, noting that such a fast subcommittee recommendation had never before happened on this Committee. She said she would send the recommendation to the Court right away, would point out the time constraints, and would recommend that the Court not hold a hearing.

Report from the Contingent Fee Subcommittee

Alec Rothrock reported that the subcommittee had spent considerable time following the January meeting further considering whether the contingent fee rules should be in the Rules of Professional Conduct, and ultimately decided they should be. The redlined revisions to Rule 1.5(c) are largely self-explanatory. The subcommittee also concluded it was not necessary to break up Rule 1.5 into separate rules (such as 1.5A, 1.5B, etc.) All of the comments regarding

contingent fees are together in Comment 6, which includes subsections 6A – 6F. An appendix contains two forms of contingent fee agreement. Alec asked that the Committee discuss inclusion of the contingent fee rules in Rule 1.5 and provide its input on the proposed language.

A member asked why the subcommittee decided not to break Rule 1.5 into several rules as had been done with Rule 1.15 (regarding attorney bank accounts and handling money). The subcommittee initially considered this but decided against it. Rule 1.5 is not overly unwieldy as the parts of Rule 1.15 were. Other states address contingent fees in Rule 1.5(c), so the subcommittee proposal promotes uniformity.

Another member asked whether the third sentence in Comment 6F intentionally deleted "relatively" in describing the sophisticated client. Alec explained that it was intentionally removed as is a "weak" word that does not add helpful guidance.

Other members discussed whether "sophisticated client" should be defined and whether an unsophisticated client should be allowed to agree to a conversion clause after consultation (or a recommendation of consultation) with independent counsel. The subcommittee determined that "sophisticated client" should be defined by the courts; the concept is based on CBA Ethics Opinion 100 ("Use of Conversion Clauses in Contingent Fee Agreements"). Another member stated that the conversion clause is an extraordinary exception; typically, a lawyer whose representation is terminated prior to completion of the representation in a contingent fee case doesn't get paid, per the *Feiger Collison* case. This should be a very limited exception available to a very sophisticated client.

Committee members discussed further whether the exception should be available to an unsophisticated client with a recommendation to consult with independent counsel. A member noted that the "sophisticated client" is discussed only in the comment. How would this be enforced? Another member stated it is covered by 1.5(a), requiring that fees be reasonable. The Committee could add that conversion clauses in contingent fee agreements are unreasonable unless the client is sophisticated. Alec explained that a conversion clause is only available in limited circumstances. The word "such" in Comment 6F ("Such a conversion clause is appropriate only if the client is sophisticated…") refers to a conversion clause that requires payment of an alternate fee upon termination of the lawyer.

The Chair summarized the issues as follows:

(1) Should conversion clauses be available only to sophisticated clients, and should "sophisticated" be defined?
(2) Can this be enforced?
(3) Are there some kinds of conversion clauses any client can agree to?

Alec suggested referencing Opinion 100, but the Chair thought the Supreme Court may not want to cite a CBA Ethics Opinion. A member noted that the Contingent Fee Agreement forms state the law: a discharged lawyer is entitled to quantum meruit. Payment of an alternate fee immediately upon termination is a special kind of conversion clause. The Committee discussed further, and supported a revision to the third sentence of Comment 6F to read, "A

conversion clause that requires payment of an alternate fee immediately upon termination of the lawyer is appropriate only if the client is sophisticated…"

Another member asked if the average lawyer knows what a conversion clause is and what variations exist.

Alec provided the following language to the Committee via email during the meeting:

A conversion clause is a provision in a contingent fee agreement that notifies clients they may be liable for attorney's fees in quantum meruit if the contingent fee agreement is terminated before the occurrence of the contingency. See Appendix, Form 1, Contingent Fee Agreement, ¶ (4). A conversion clause that requires payment of the alternate fee immediately upon termination, and regardless of the occurrence of the contingency, would discourage most clients from discharging their lawyer. Few clients have the financial means to pay a contingent fee from their own resources, with no guarantee of replenishment by a recovery from a third party. A conversion clause that requires payment of the alternate fee immediately upon termination may be appropriate only if the client is sophisticated in legal matters, has the means to pay the fee regardless of the occurrence of the contingency, and has specifically negotiated the conversion clause; and, the contingent fee agreement expressly requires payment of the alternate fee immediately upon termination. See Appendix, Form 1, Contingent Fee Agreement, ¶ (4) ("Any such fee shall be payable only out of the gross recovery obtained by or on behalf of the Client . . .").

A member requested the reference to the Appendix be deleted and Alec agreed. Further edits were suggested, including stating "quantum meruit or on another basis" in the first sentence. Some additional revisions and some additional wordsmithing were discussed, as was enforceability. Alec stated that ultimately both the Court and OARC will have to determine if a client was sufficiently notified in accordance with case law, including the *Norton Frickey* case. The proposed changes were approved.

A member asked about advancing costs as provided in Rule 1.5(c)(1)E. Should it say "including but not limited to those expenses appropriately necessary to prosecute the case"? Another member felt this was covered by Rule 1.8(e). The Chair stated that Rule 1.5(c) should not authorize the lawyer to advance expenses necessary to prosecute the litigation because the whole point is to put sideboards on the expenses. Other members agreed. The Chair also proposed reversing the order of (i) and (ii) in Rule 1.5(c)(1)E. Alec and other members agreed.

A member stated that paragraph 4 of the form contingent fee agreement is inconsistent with Comment 6F. The form agreement does not cover conversion clauses other than quantum meruit. Alec did not favor changing the form agreement; it is not possible to consider everything in a form agreement. The members discussed further and concluded that the revisions to Comment 6F are sufficient and the form agreements need not be revised.

The Committee voted to send the rule, comment and forms to the Court after Chair Glenn and Alec Rothrock confirm that all the agreed-upon changes have been made. The Chair thanked Alec and the subcommittee for their hard work.

New Business: Potential addition of "scope of representation" to information required to be communicated under Rule 1.5(b).

John Lebsack's letter of November 6, 2019 asks that the Committee consider adding a requirement that the "scope of representation" be included in the required written communication of the rate and basis of fee. This would make the Colorado rule more consistent with ABA Model Rule 1.5, and, based on John's practice representing lawyers in malpractice cases, would be helpful to lawyers. Chair Glenn formed a subcommittee to look into this request and make a recommendation to the full Committee. John Lebsack and Chair Glenn will be members of the subcommittee along with Alec Rothrock, Jessica Yates, Cynthia Covell, Adam Espinosa, and Noah Patterson. Noah will chair the subcommittee.

Next Meeting Date

The committee agreed to hold the next meeting in late September. It will be scheduled by email.

The meeting adjourned at 11:50 a.m.

Respectfully submitted

Cynthia F. Covell, acting secretary