COLORADO SUPREME COURT

STANDING COMMITTEE ON THE RULES OF PROFESSIONAL CONDUCT

Approved Minutes of Meeting of the Full Committee
On January 10, 2020
(Fifty-Fifth Meeting of the Full Committee)

The fifty-fifth meeting of the Colorado Supreme Court Standing Committee on the Rules of Professional Conduct was convened at 9:00 AM on Friday, January 10, 2020, by Chair Marcy G. Glenn. The meeting was held in the Supreme Court Conference Room on the fourth floor of the Ralph L. Carr Colorado State Judicial Building.

Present in person at the meeting, in addition to Marcy G. Glenn and Justice William W. Hood, III, were Judge Michael H. Berger, Cynthia F. Covell, Thomas E. Downey, Jr., Judge Adam J. Espinosa, Margaret Funk, John M. Haried, Judge Lino S. Lipinsky de Orlov, Judge William R. Lucero, Cecil E. Morris, Jr., Noah C. Patterson, Henry Richard Reeve, Alexander (Alec) R. Rothrock, Marcus L. Squarrell, David W. Stark, Jamie S. Sudler, III, Eli Wald, Judge John R. Webb, Frederick R. Yarger, and Jessica E. Yates. Persons attending the meeting by telephone were Justice Monica M. Marquez, Judge Ruthanne N. Polidori and Tuck Young. Excused from attendance were Gary B. Blum, Nancy L. Cohen, and Boston Stanton. Tim Bounds, Herbert Tucker, Stan Kent and Frank Hill attended as guests to address the Abandoned Estate Planning Documents Statute. Supreme Court Staff Attorney and Committee liaison Jennifer J. Wallace also attended the meeting.

1. Meeting Materials: Minutes of January 10, 2020 Meeting.

The Chair had provided a package of materials to the members prior to the meeting date, including submitted minutes of the fifty-fourth meeting of the Committee, held on October 4, 2019. Those minutes were approved.

2. Report Re: Supreme Court's Amendment to Rule 8.4(c).

The Chair reported that the Colorado Supreme Court had adopted the Full Committee's recommendation not to adopt a comment to address the meaning of the words "lawful investigative activities" as it appears in Rule 8.4(c).

3. Report from Diversity Subcommittee.

Judge Espinosa provided an update on the activities of the Diversity Subcommittee. Judge Espinosa advised that the subcommittee had met by telephone and that written materials,

including a letter to the various specialty bars to advise of opportunities for service on the Committee, were being prepared for review by the subcommittee and the Chair.

4. Report from ABA Advertising Amendments Subcommittee.

Professor Eli Wald, chair of the ABA Advertising Amendments Subcommittee, presented the subcommittee's report, which appeared in the meeting materials at pages 37-58. Professor Wald reported that the subcommittee had addressed all the comments raised by the Committee at its meeting on October 4, 2019 and that changes had been incorporated into the meeting materials. Professor Wald then opened the floor for comment.

A member suggested that the exclusionary language set forth in Rule 7.3(f)(1) ("… unless the recipient of the communication is a person specified in paragraph (b)(1), (b)(2) or (b)(3):…") should also be included in subsections (2) and (3) of proposed Rule 7.3(f). In response, one member suggested that the language should remain as drafted while another member suggested that the exclusionary language should also be included in subsection (3) but not in subsection (2). Professor Wald advised that he did not believe that the exclusionary language of (1) was applicable to subsection (2). Other comments suggested that some potential grammatical revisions to subsections (1) through (3) were necessary. Another member suggested that the word "shall" in subsection (f) should be changed to "must." The discussion concluded with Professor Wald agreeing to change the word "shall" to "must," and to add the language "unless the recipient of the communication is a person specified in paragraphs (b)(1), (b)(2) or (b)(3)" as an introductory clause to proposed Rule 7.3(f)(3).

The Chair suggested that another draft of Rule 7.3(f) be prepared. A motion to approve the recommendations of the subcommittee, subject to the discussed changes to Rule 7.3(f) being made, was made and seconded. The motion was approved with all members voting in favor of adoption. The Chair, together with various members of the Committee, thanked Professor Wald and the members of the subcommittee for their work on this important matter.

5. Report from Contingent Fee Subcommittee.

Alec Rothrock, chair of the Contingent Fee Subcommittee, initiated the discussion of the subcommittee's work with a brief overview of the proposed addition to Rule 1.5 and comments on the proposed form of Contingent Fee Agreement and Disbursement Statement. The subcommittee's materials were included at pages 59-75 of the meeting materials.

Member Rothrock reviewed and commented upon the key substantive points of the subcommittee's proposal as follows:

1. The subcommittee is proposing that the current Rules Governing Contingent Fees, contained in Chapter 23.3 of the Rules of Civil Procedure, be eliminated and that all contingent fee-related rules, comments and forms be incorporated into proposed Rule 1.5. Member Rothrock noted that the proposed revisions would add substantial volume to existing Rule 1.5 and suggested that the Committee consider possible reorganization of that rule for clarity and ease of reading.

2. The proposal would eliminate the existing mandatory Disclosure Statement and would move the required disclosures into the actual language of Rule 1.5.

3. The proposal leaves undisturbed the substantial compliance standard for enforceability of a contingent-fee agreement and the disclosures necessary to preserve the lawyer's eligibility to recover attorney's fees on a *quantum meruit* basis if the attorney-client relationship is terminated before the event triggering a right to a fee occurs.

4. The proposal eliminates formalistic requirements of the current rule such as (a) the attestation by witnesses of the parties' signatures on the contingent fee agreements, (b) the creation of duplicate fully-executed agreements, and (c) the transmission by mail of one fully-executed agreement to the client at client's postal address within 10 days of execution.

5. The proposal contains provisions designed to protect clients by (a) alerting lawyers to the potential impropriety of provisions requiring clients to reimburse the lawyer for all sanctions awarded against a lawyer, and (b) requiring lawyers to inform clients that they may disapprove the hiring of associated counsel and discharge associated counsel if one is hired.

6. The proposal seeks to clarify that contingent fee agreements may be used in situations where the contingency does not involve the recovery of money, but allows the recovery of contingent fees on the amount of money the lawyer saves the client (a reverse contingent fee).

7. The proposal borrows language from ABA Model Rule 1.5(c) and its comments to expand the body of legal authority available to interpret common provisions.

8. The proposal also seeks to encourage lawyers to consider language (a) clarifying the lawyer's rights and obligations with respect to the defense of counterclaims and the handling of appeals; (b) clarifying who receives money awarded by the court as sanctions against an opposing party; and (c) addressing the possibility that the lawyer is ethically required to decline a client's request to receive funds subject to third-party claims.

The discussion on the language of the proposed rule itself was relatively brief. A member questioned the statement in subsection (7) that the form of Contingent Fee Agreement "… shall be sufficient." After further discussion, however, the member expressed agreement with the proposed language. The Chair later suggested that the language of the first sentence of subparagraph 7 be revised to state: "The form Contingent Fee Agreement provided in Appendix __ may be used for contingent fee agreements and shall be sufficient to communicate the matters set forth in Rule 1.5(c)(1)(A) through (H)." A member questioned the definition of the term "contingent fee" in proposed Rule 1.5(c). After some discussion, member Rothrock and the Chair noted their view that the language of the definition was sufficient and that it could not possibly address all situations in which a contingent fee agreement might apply. Several members suggested that language be added to a comment noting that reverse contingent fee agreements are included within the definition of "contingent fee."

The Committee then addressed comments relating to the language of the form Contingent Fee Agreement. Questions were raised with respect to certain language contained in paragraphs 4, 7 and 8 of the form. In addition, an overall question was raised with respect to the utilization of the terms "shall" and "must" throughout the provisions of proposed Rule 1.5 and the form Contingent Fee Agreement.

A member questioned whether the last sentence of paragraph 4 of the form Contingent Fee Agreement would allow an attorney to enter into an agreement for immediate payment if the attorney were terminated prior to the contingent event. Member Rothrock responded noting that the member's concerns were addressed in *Law Offices of Losavio v. Law Offices of McDivitt*, 865 P.2d 934 (Colo.App. 1993), and are addressed by proposed comment [12]. He noted that the language of comment [12] is derived from CBA Ethics Opinion 100 and that the last sentence of paragraph 4 of the form Contingent Fee Agreement incorporates language of the existing Chapter 23.3 Rules Governing Contingent Fees. There was additional discussion of the meaning of "sophisticated" as used in proposed comment [12].

Discussion on paragraph 7 of the form Contingent Fee Agreement centered on the impact of hiring associated counsel and its effect on the amount of the agreed-upon contingent fee. The discussion of this issue also highlighted the need to address the language of the proposed rule in subsection (1)(H). A member suggested changing the word "amount" to "allocation." Member Rothrock indicated that the amount of the agreed-upon contingent fee should not change with the addition of associated counsel. Any proposed amendment to the amount of the fee occurring by virtue of the hiring of associated counsel is governed by the existing rules relating to midstream modification of fee agreements. Member Rothrock further advised that issues relating to allocation are governed by existing Rule 1.5(d) and suggested that a cross-reference to that rule might be appropriate.

The discussion with respect to paragraph 8 of the form Contingent Fee Agreement centered on whether the language "… so the client may handle these claims" from the third sentence of that paragraph should be deleted. Member Rothrock expressed his disagreement with the suggestion, stating that the language was there to protect attorneys and was consistent with CBA Ethics Opinion 94. The Chair questioned whether the language of the rule should discuss in more detail the calculation of amounts payable under the agreement, but member Rothrock advised that he believed that the language of subsection (1)(C) adequately addresses the issue.

A member then suggested that the word "shall" be changed to "must" throughout the proposed rule and form Contingent Fee Agreement. A second member suggested that the terms "shall" and "must" were inconsistently used throughout the proposed rule and form of agreement. These comments led to a larger discussion of the ongoing debate on the usage of "shall" and "must" and the experiences of several members addressing that issue in other standing rules committees. A member suggested that Rule 1.1 be amended to provide that the terms "shall" and "must" are used interchangeably throughout the rules. The Chair suggested that perhaps a subcommittee be appointed to address the larger style and drafting issue, but no action was taken on that point. The Chair did suggest, however, that the language being considered for the new Advertising and Contingent Fee Rules be drafted in accordance with existing statutory provisions.

Further discussion on how to incorporate the proposed Contingent Fee Rules into existing Rule 1.5 was held. The Chair requested that the subcommittee consider the issue and report back to the Committee.

The issues raised with respect to the language of proposed Rule 1.5(c)(7) and paragraphs 4, 7 and 8 of the form Contingent Fee Agreement discussed at the meeting were referred back to the subcommittee for additional consideration and further report to the Committee.

6. New Business: Abandoned Estate Planning Documents Statute.

In response to a letter from Tim Bounds and Pete Bullard dated December 6, 2019 (meeting materials at pages 80-81), the Chair invited Mr. Bounds, Mr. Bullard and other interested persons to attend the Committee meeting to discuss the potential ethical impacts of the recently enacted Colorado Electronic Preservation of Abandoned Estate Planning Documents Act, which has been codified as C.R.S. § 15-23-101, *et seq.* with conforming amendments to the Colorado Probate Code at C. R. S. §§ 15-12-304 and 15-12-402. Mr. Bounds, Mr. Tucker, Stan Kent and Frank Hill attended the meeting to address these issues.

Tim Bounds and Herbert Tucker led the discussion of this issue before the Committee and reviewed the materials contained at pages 80-111 in the meeting packet. They explained the issues relating to abandoned estate planning documents and the recent legislative response thereto, which will become effective January 1, 2021. Mr. Bounds reviewed a hypothetical problem (meeting materials at pages 108-09) as a way to introduce the potential ethical implications for practicing attorneys. He then reviewed a number of the Rules, which he believed would require revision in order to provide a safe harbor to practicing attorneys. *See* meeting materials at pages 110-11.

The discussion of the legislation and the proposed impact to the Rules raised a number of questions from members relating to provisions of the legislation itself, the hypothetical problem presented and the language of some of the proposed conforming amendments. The Chair inquired as to whether there were any ABA Model Rule provisions dealing with the issues raised by the legislation. Mr. Bounds and Mr. Tucker indicated that while other states (Illinois, California and Indiana) have similar legislation, they were not aware of any professional conduct rule provisions to address the perceived ethical concerns. The discussion concluded with the Chair forming a subcommittee to consider proposed amendments to the Rules necessitated by virtue of the legislation. The Chair circulated a sign-up sheet for Committee members to volunteer to serve on the subcommittee and expressed her hope that Mr. Bounds, Mr. Tucker, and others with interest in the subject also would volunteer to serve. The Chair thanked the meeting guests for bringing the new statute and associated ethics issues to the Committee's attention.

7. Administrative Matters.

   a. The next meeting of the full Committee was scheduled for April 3, 2020.

   b. The meeting was adjourned at 11:34 AM.

Respectfully submitted,

Thomas E. Downey, Jr., Secretary