COLORADO SUPREME COURT

STANDING COMMITTEE ON THE RULES OF PROFESSIONAL CONDUCT

Approved Minutes of Meeting of the Full Committee
On July 22, 2016
(Forty-fourth Meeting of the Full Committee)

The forty-fourth meeting of the Colorado Supreme Court Standing Committee on the Rules of Professional Conduct was convened at 9:00 a.m. on Friday, July 22, 2016, 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 Justice Center.

Present in person at the meeting, in addition to Marcy G. Glenn and Justice Nathan B. Coats, were Committee members Federico C. Alvarez, Judge Michael H. Berger, Nancy L. Cohen, James C. Coyle, David C. Little, Cecil E. Morris, Jr., Judge Ruthanne Polidori, Alexander R. Rothrock, Marcus L. Squarrell, David W. Stark, James S. Sudler III, Anthony van Westrum, and Judge John R. Webb. Present by conference telephone were members Gary B. Blum, Cynthia F. Covell, Lisa M. Wayne, and E. Tuck Young. Excused from attendance were Justice Monica M. Márquez and members Helen E. Berkman, Thomas E. Downey, Jr., John M. Haried, Judge William R. Lucero, Christine A. Markman, Henry R. Reeve, Matthew A. Samuelson, Boston H. Stanton, Jr., and Eli Wald. Also present was Supreme Court staff attorney Melissa C. Meirink and guests Melinda Harper and Joan H. McWilliams.

I. *Meeting Materials; Minutes of April 29, 2016 Meeting.*

The Chair had provided a package of materials to the members prior to the meeting date, including submitted minutes of the forty-third meeting of the Committee, held on April 29, 2016. Those minutes were approved with one correction.

II. *Acknowledgment of Retirement of James S. Sudler III as Chief Deputy Regulation Counsel.*

The Chair reported to the Committee that James S. Sudler III will retire at the end of the month from his position as Chief Deputy Regulation Counsel of the Colorado Office of Attorney Regulation Counsel, retiring after twenty-four years of service to that office. She said that Sudler will remain in practice as a private lawyer and will remain a member of this Committee.

The Chair said more about Sudler, taking his initials, *JSS*, as her motif:

- *J* she drew into "just great," "just so smart," "just *just.*" To be sure the Committee understood the last reference, she added, "He is *just*, a good quality in a prosecutor."

- The Chair noted that Sudler has given her two *S*'s to work with and said they stand for lots of things: One of them can stand for "steady," for bringing a calm, steady temperament both to handling a lawyer who has gotten in trouble and to leading our Committee in the drafting of changes to complex Rules of Professional Conduct, such as in the wholesale revision of the COLTAF Rules. Although it did not fit her *S* motif to say so, she added that Sudler does not hold grudges.

- And the Chair pointed out that the *S*'s are squared, giving an exponential quality to Sudler's attributes. Having him on this Committee is, the Chair said, like having several of him doing what he says he will do: It gets done; the Chair need not push him to get done whatever he undertakes to do.

The Committee knew the man of whom Glenn spoke, and it gave him warm applause.

III. *Subcommittee on Flat Fees*.

The Chair asked Sudler and Nancy L. Cohen to report to the Committee on the further consideration of lawyers' flat fees by the subcommittee formed at the fortieth meeting of the Committee on June 25, 2015.

Sudler named, for the Committee, the members of the subcommittee, including lawyers who are not members of this Committee, characterizing them all as diligent participants in the subcommittee's work: Sudler, Cohen, Gary B. Blum, Thomas N. Downey, Nancy B. Elkind, Melinda M. Harper, Ericka L. Holmes, Steven K. Jacobson, Jeffrey D. Joseph, David C. Little, Joan H. McWilliams, Cecil E. Morris, Martha L. Ridgway, Matthew A. Samuelson, and Lisa M. Wayne.

Sudler directed the Committee to his memorandum dated July 22, 2016, which was included in the materials for this meeting. He said the subcommittee had revised its proposal, editing it from the version that had been considered by the Committee at its forty-third meeting on April 29, 2016. Following the style of the Rules of Professional Conduct, the word "attorney" was changed to "lawyer" throughout the draft. The definition of "flat fee arrangement" was streamlined:

> The term "flat fee arrangement" refers to an arrangement for legal services of a lawyer under which the client agrees to pay a specified maximum amount for a legal service to be performed by the attorney. Each flat fee arrangement shall be in writing and shall contain the following: . . . .

That definition, he noted, now uses the term "arrangement" rather that "agreement," reflecting that, under Rule 1.5(b), it is "the basis or rate of the fee and expenses [that] shall be communicated to the client, in writing . . . ."

All of the subcommittee members are in favor of the proposal — although no vote had been taken, he noted — except that there is disagreement about what should happen if the lawyer does not comply with the requirements of the proposed rule, this Rule 1.5(h). He suggested to the Chair that his memorandum, included within this meeting's materials, might be used in the Committee's discussion of the proposal.

And, lastly, Sudler noted that the proposal contains a suggested form for a lawyer's flat fee arrangement that would comply with the proposed rule.

In addition to providing a version of the rule in which no provision is made for a lawyer's noncompliance, the subcommittee's proposal contains three alternatives fixing a remedy for a flat fee arrangement that is not in substantial compliance with the rule — or, if the rule contains a flat fee arrangement form, that is not in substantial compliance with that form. Those alternatives are listed in Sudler's memorandum as follows:

> [Alternative 1 - No subparagraph (v.) addressing non-compliance]

[Alternative 2]:

v. If a flat fee arrangement is not in substantial compliance [*sic*] this Rule then it is unenforceable.

[Alternative 3]:

v. If a flat fee arrangement is not in substantial compliance with this Rule and the attorney client relationship is terminated before the representation is completed, the lawyer must refund all fees to the client upon termination. However, nothing in this rule prohibits the lawyer from pursuing recovery in the event the lawyer asserts that the client has been unjustly enriched.

[Alternative 4]:

v. If a flat fee arrangement is not in substantial compliance with the Flat Fee Arrangement form [refer to where from is placed] and the attorney client relationship is terminated before the representation is completed, the lawyer must refund all fees to the client upon termination. However, nothing in this rule prohibits the lawyer from pursuing recovery in the event the lawyer asserts that the client has been unjustly enriched.

Those alternatives are up for debate, he said.

The subcommittee's proposal for a form of flat fee arrangement is not yet fully developed. Sudler said the subcommittee's intention is that the form would be a suggested form set forth fully in Chapter 23, C.R.C.P. He added that he had suggested this form to the enforcement agencies in other states and that they were receptive to the idea of making such a form available for the lawyer's use.

Cohen added that most of the members of the subcommittee had accepted all of the first four subsections of proposed Rule 1.5(h) — subsections 1.5(h)i. through 1.5(h)iv.[1] If the Committee favors inclusion of a form of flat fee arrangement, it should return the matter to the subcommittee for more work on the content of that form.

A member noted his objection to the phrase "flat fee arrangement" as being a phrase that would foster resistance among many lawyers. When one has a fee deal, it is in fact a contract. Lawyers customarily use the term "arrangement" only to refer to deals — arrangements — between lawyers to split fees. This concept of a flat fee, he said, is a contract and should thus be called an "agreement."

To that, Cohen recalled that the Court had rejected this Committee's initial proposal for Rule 1.5(b), which would have referred to a "written fee agreement."[2] She commented that the deal "I

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1. The numbering style used in the Rules of Professional Conduct would have the subprovisions of a Rule 1.5(h) be numbered by consecutive arabic numerals contained in parentheses, such as Rule 1.5(h)(1). These minutes use the numbering scheme adopted in the proposed rule, as stated on the third page of subcommittee's report to the Committee that was included in the materials for this forty-fourth meeting, in which the subprovisions are enumerated with lower-case roman numerals without parentheses.

—Secretary

2. As proposed by this Committee to the Court on December 30, 2005, Rule 1.5(b) would have read [emphasis added]—

> (b) When the lawyer has not regularly represented the client, the basis or rate of the fee and expenses shall be communicated to the client, in writing, before or within

(continued...)

will charge you $500 for a will" is a contract but that implies that both parties must sign the contract. But Rule 1.5(b) requires — if the lawyer has not regularly represented the client — only that the lawyer communicate the basis and rate of fee to the client "in writing"; it does not refer to a "contract" or "agreement" or require that any other aspect of the engagement be stated in writing.

To that, the member who had characterized the flat fee "arrangement" as an "agreement" responded by noting that Rule 1.5(a) provides broadly that "A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses." And, he noted, contracts need not be in writing nor signed by both parties.

Another member agreed with that position, saying it makes no sense to put a flat fee deal in writing and yet not call it an "agreement." The phrase used in the proposed rule, he said, should be "flat fee agreement."

Another member also agreed, saying that, although the "ethics world" avoids the term "agreement" or "contract" — because Rule 1.5(b) says only that the "the basis or rate of the fee and expenses shall be communicated to the client, in writing" — at least the remainder of the lawyer's deal with the client is an agreement between them, whether or not reduced to a writing.

Yet another member agreed, saying that he would use the term "contract" for this purpose, although he suggested that all of the rules should be examined so that a consistent terminology — "agreement" or "contract" — is used. And another member expressed his agreement with that, noting that Rule 1 of Chapter 23.3, C.R.C.P., governing contingent fees, requires a "written agreement" for a "contingent fee agreement."

Cohen suggested that, if the phrase is switched from "flat fee arrangement" to "flat fee agreement," then a comment should be added to clarify that the agreement need not be signed by the client. Existing Comment [2] already provides, "A written communication must disclose the basis or rate of the lawyer's fees, but it need not take the form of a formal engagement letter or agreement, and it need not be signed by the client."

Sudler said he agreed with the change from "flat fee arrangement" to "flat fee agreement," saying the subcommittee had been dancing around the terminology for a long time because of a concern about the avoidance of the word "agreement" in Rule 1.5(b). In fact, the term "flat fee agreement" had initially been favored within the OARC.

A member who had not previously spoken on the matter said he agreed with use of the phrase "flat fee agreement." And he felt that, if the rule is going to set forth criteria for an acceptable agreement, then it should provide a form for such an agreement. But he asked how proposed Rule 1.5(h) would fit alongside existing Rule 1.5(b), which contains no requirement regarding fees when the lawyer *has* "regularly represented the client." If it is intended that no "written communication" is required for a flat fee within a regular representation, that should be stated.

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2. (...continued)

> a reasonable time after commencing the representation. *Except as provided in a written fee agreement*, any material changes to the basis or rate of the fee or expenses are subject to the provisions of Rule 1.8(a).

—Secretary

A member questioned the characterization of a "flat fee" arrangement or agreement as one in which the client agrees to pay "a specified maximum amount" for a legal service. She questioned whether an agreement by which a lawyer agreed to prepare a will for $2,000 — a fee that was fixed regardless of whether the lawyer's bill computed at the lawyer's nominal hourly rate would be higher or lower than $2,000 — would be an agreement for a "flat fee" under this definition, as it did not specify a "*maximum* amount" but, rather, just a set fee. She said she was confused by this terminology.

To that, Cohen said the subcommittee intended both; she directed the member to the comments to the rules, which speak both about "flat" fees and "fixed" fees, and she suggested looking at Rule 2 of Chapter 23.3 for alternatives. The subcommittee had gone both ways, but its intent is to cover both maximum-fee arrangements and fixed-fee arrangements — that is, to cover both the agreement to charge based on an hourly rate but with a cap and the agreement to charge a stated fee regardless of the time accrued for the services. Comment [12] is intended, she said, to explain the point. In any event, the subcommittee's intention is to cover both types of arrangements.

The member who had questioned the application of the definition to the fixed fee then asked about the consequences of non-compliance with the requirements of the proposed rule in a circumstance in which the fees, computed at the lawyer's normal hourly rate, would be less than the agreed fixed fee because the time actually accrued to render the services turned out to be less than the estimate upon which the agreed fixed fee had been calculated. In that case, she thought, the lawyer would argue that the arrangement had not been for a "maximum fee" as contemplated by the proposed definition of a "flat fee agreement" and, therefore, the lawyer's arrangement with the client had not been within the scope of the proposed rule.

To that, a member who had served on the subcommittee said the subcommittee's intention was to cover both situations, intention being the guideline. Thus, a flat fee arrangement for a case involving a small crime, in which the client "pled out" early, so that the lawyer's fee based on an hourly rate computation would have been lower than the agreed fixed fee, would be covered by the proposed rule.

The member who had questioned the application of the rule to the case of a regular representation said he, too, was concerned with the implications of the word "maximum" in the definition of the "flat fee agreement." He suggested that the word simply be deleted from that definition, so that it would read, "The term 'flat fee arrangement' refers to an arrangement for legal services of a lawyer under which the client agrees to pay a specified amount for a legal service to be performed by the attorney." In his view, an agreement that the fee would not exceed a maximum amount was not a "flat fee agreement" and the rule, with his modification, would not cover that agreement. But, he added, there was no need for the client's protection in the maximum-fee situation, since the statement of the maximum amount of the fee was entirely to the client's benefit, the fee otherwise being calculated based on the accrual of time as contemplated by existing Rule 1.5(b).

To that, another said that such an arrangement might not be just about a maximum, a cap, as when the lawyer and the client have agreed to a representation that anticipates various stages of services. The member who had raised the question, though, characterized the staged-representation situation as a variety of the flat fee agreement, in which the fee for each stage, determined by the agreement of the lawyer and the client, was fixed, not limited by a "maximum amount." In effect, the agreement is that, if the lawyer accomplishes a defined stage, the lawyer is to be paid a stated fee for that accomplishment, rather than be paid a fee determined by the number of hours accrued to accomplish that stage multiplied by an agreed rate, subject to a maximum which the fee could not exceed.

The member who had first questioned whether a fixed fee agreement would be included within the proposed definition of a "flat fee agreement," with its reference to a "maximum" fee, agreed with that

analysis of the staged-services arrangement and agreed that the problem could be fixed by deleting the word "maximum" from the proposed definition.

Cohen asked that member whether a definition that read, "The term 'flat fee arrangement' refers to an arrangement for legal services of a lawyer under which the client agrees to pay a specified amount for a legal service to be performed by the attorney," would be acceptable. The member agreed that it would be acceptable. And, in answer to Sudler's follow-up question, that member said that definition would cover the fixed fee situation.

To all of this, another lawyer said, "We sound like a bunch of lawyers." If, he said, a client came in to the lawyer's office and said, "I want you do to this for that fee," we would have no problem writing the contract for those services at that fee. In his view, the subcommittee and this Committee have danced around the matter because of the initial use of the word "arrangement" and the erroneous thought that lawyers have arrangements for fees rather than agreements for fees. Why, he asked, have we been so concerned to avoid saying that the rule applies both to an agreement for legal services at a specified fee and to an agreement for legal services at a fee not that would not exceed a specified maximum amount? If we drop reference to an "arrangement" and forthrightly call it an "agreement," lawyers will draft appropriate contracts to express their deals with their clients. He added a reference to an ethics opinion from Ohio that, in his view, did a good job of saying that fixed fees and maximum fees have different connotations. Flat fees are part of the fixed-fee concept. He suggested that the first paragraph of the proposed rule be rewritten to "call it what it is": an agreement in writing.

The member who had questioned the application of the rule to the case of a regular representation said he liked the direction in which the discussion was now headed, because it simplified things. But, he asked, what is the meaning of the reference to "a portion of them" in proposed Rule 1.5(h)iv, reading, "The amount, if any, of the fees the lawyer is entitled to keep upon termination of the representation before the specified legal services or *a portion of them* have been performed." To the suggestion that this was intended to cover the circumstance where the lawyer has provided some, but not all, of the services agreed to be rendered to the client, the member responded that the text covered even the case where the lawyer had done nothing. It was, he thought, an incorrect phrasing.

The member who had characterized the discussion as if it were among a bunch of lawyers suggested sending the entire matter back to the subcommittee for further consideration and refinement.

A member who had not previously spoken said that, if the matter is as complex as the Committee has been making it in this discussion, then it should be dealt with by way of comment and not just by the presentation of a prescribed form of agreement.

Cohen asked her subcommittee co-chair Sudler what the subcommittee had understood to be the difference between Alternative 3 and Alternative 4 for proposed Rule 1.5(h)v.[3] In response, Sudler

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3. The two proposed alternatives read—

> [Alternative 3]:
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> > v. If a flat fee arrangement is not in substantial compliance with this Rule and the attorney client relationship is terminated before the representation is completed, the lawyer must refund all fees to the client upon termination. However, nothing in this rule prohibits the lawyer from pursuing recovery in the event the lawyer asserts that the client has been unjustly enriched.

(continued...)

recalled that one of the issues the subcommittee had dealt with is what should happen if a representation is terminated midway between the accomplishment of two milestones or stages. In such a situation, the agreement might provide that the lawyer's fee for the partially completed stage would be computed by application of a stated hourly rate to the time actually accrued working on the uncompleted stage.

But a member characterized the two alternatives this way: Alternative 3 deals with the question of when the lawyer may transfer the client's advanced deposit from the COLTAF account to the lawyer's account as earned fees, while Alternative 4 states what must happen in the event the representation is terminated before completion of the agreed services. Alternative 3 is all about the accomplishment of milestones; Alternative 4 is the new concept that is intended to clarify, in light of *Gilbert*, what happens upon a premature termination of the representation.

Another member agreed with that characterization of the alternatives, saying that Alternative 4 is about quantum meruit recovery upon a premature termination of the representation. In that respect, Alternative 4 is akin to the contingency fee rules, found in Chapter 23.3, C.R.C.P. Alternative 3 invites the lawyer to determine, by agreement, what happens in the event of premature termination: The lawyer can pick and choose and write the contract as he and the agree.

A member said that he was struggling with the mix of concepts — flat fees, fixed fees, lump-sum fees. He felt the rule needed to be very clear in stating its requirements, so that lawyers could successfully comply with those requirements. The rule cannot be useful just for sophisticated corporate general counsel writing forms for retainer agreements with outside lawyers; the OARC does not deal with those kinds of cases. Rather, we need to consider lawyers who are dealing with clients who lack sophistication in their engagements of lawyers for legal services. The Committee, he said, is dancing around that issue, trying to write a rule that protects the general public when entering into what may be a financially expensive arrangement; understandably, we want to write such a rule while not adversely impacting agreements between sophisticated clients and their lawyers.

To that, Cohen asked, how do we do that? The rule will nevertheless apply both to the sophisticated client and the unsophisticated client. And, she added, the rule may well impact law firms that work across lots of enforcement jurisdictions, inside and outside Colorado.

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3. (...continued)

[Alternative 4]:

> v. If a flat fee arrangement is not in substantial compliance with the Flat Fee Arrangement form [refer to where from is placed] and the attorney client relationship is terminated before the representation is completed, the lawyer must refund all fees to the client upon termination. However, nothing in this rule prohibits the lawyer from pursuing recovery in the event the lawyer asserts that the client has been unjustly enriched.

The alternatives differ as follows (comparing Alternative 4 over Alternative 3):

> v. If a flat fee arrangement is not in substantial compliance with ~~the Flat Fee Arrangement form [refer to where from is placed]~~ *this Rule* and the attorney client relationship is terminated before the representation is completed, the lawyer must refund all fees to the client upon termination. However, nothing in this rule prohibits the lawyer from pursuing recovery in the event the lawyer asserts that the client has been unjustly enriched.

—Secretary

The member replied to Cohen that, even if our focus is limited to legal service arrangements governed only by Colorado laws and rules, there will be a fundamental difference between the sophisticated client and the unsophisticated client. The examples given of the cases seen by the OARC involve the general public, the unsophisticated client. But, he added, perhaps it simply must be accepted that the proposed rule will apply to the agreement for legal services for a sophisticated client and the agreement with the general public, the unsophisticated client. Yet the rule needs to be very clearly stated. He himself did not know what the terms mean: What is the difference between a "specified maximum amount" and a "specified amount"? They both state a maximum.

The member who was clearly still thinking that the Committee was sounding like a bunch of lawyers asked whether the proposed rule would apply to the agreement that contemplated the client making payment only at the end of the engagement rather than by making an initial deposit into the lawyer's COLTAF account. He asked whether this proposed rule ought to apply only to the latter case, that of an up-front deposit toward subsequently earned fees.

A member made this motion:

(1) That the phrase be changed from "flat fee arrangement" to "flat fee agreement" throughout the proposed rule.

(2) That proposed Rule 1.5(h)iii be revised to read, "A description of when or how fees are deemed to be earned by the lawyer during the course of the representation."

(3) And that the phrase "or a portion of them" be deleted from proposed Rule 1.5(h)iv, so that it would read, "The amount, if any, of the fees the lawyer is entitled to keep upon termination of the representation before the specified legal services have been performed."

To Cohen's question, the movant clarified that the word "arrangement" — found in the phrase "refers to an arrangement" in the introductory portion of the proposal — should also be changed to "agreement."

A member said he was intrigued by another member's comment that the proposal is a solution to a problem that exists only when the client has made a deposit into a COLTAF account to cover future fees. That, he said is the context to which we should be limiting the proposal, and such a limitation would remove the sophisticated corporate client's agreement for legal services of a flat-fee or a maximum-fee type.

To that, another member said she thought we were attempting to deal not only with the advance deposit toward future fees but also with the situation where, even absent such a deposit, the lawyer has not yet done what was agreed to be done — for a fixed fee rather than one computed by application of an hourly rate to accrued time — before the engagement was terminated.

The member who had raised the concern about the proposal's application to the sophisticated client said that we had been led to consider the case of an advanced deposit against future fees — the case where the client has put his last dollars into the lawyer's COLTAF account and cannot afford to pay another lawyer for a continuation of the services when the engagement of the first lawyer is terminated but the client's funds remain tied up in his COLTAF account; and, he prophesied, we could write a rule that dealt only with that situation, one that spoke of "advanced fees." To that, Sudler responded that it would be harder than it sounds to write such a rule.

Sudler added that the subcommittee's intention is to deal with both that circumstance of the advanced deposit against future fees and the circumstance where the lawyer's services are terminated before completion and the lawyer seeks payment for the work done before termination when the agreement stated only a single amount for fully completed services.

A member advocated that the Committee write a rule "that avoided what the lawyer would argue in court" for recovery of fees for services partially rendered up to a premature termination of the representation, whether or not there was an advanced deposit against future fees. We need, she said, a "rule for good hygiene." That would be an accomplishment in itself, even if it were not limited just to flat fees. She asked, if we are to cover only the circumstance of the advanced deposit against future fees, why would that not also include, in addition to the flat fee, the advance deposit against future fees that are to be determined on the basis of a hourly rate, where the client disputes the claimed accrual of time.

A member added that the lynchpin of the problem is the advanced deposit against future fees, and he asked that we not lose track of the *Sather* case that dealt with the lawyer who took an advanced payment into his operating account and then did not perform the agreed services. He added that member Alexander R. Rothrock has written an entire article on that issue.

A member made a substitute motion that the proposed rule be sent back to the subcommittee, to be considered further using this discussion as fertilizer. The motion was seconded. The movant noted his agreement that the rule should be written to cover both the case of premature termination of services where there has been an advanced deposit against a flat fee for future services and the case of premature termination of services, to be charged on a flat fee, but where there has been no such advanced deposit.

A member said he read the existing proposal as already dealing with the flat fee case that does not call for an advanced deposit. He added that many fee agreements do not require advance deposits: "I will provide discovery services in this case for $100,000, fixed." That kind of agreement gives the client the benefit of certainty in budgeting for litigation. This rule should provide for that situation as well as for the situation involving the advanced deposit against future fees.

The Chair asked for, and received, a withdrawal of the pending motion so that she could take a straw poll on the prior motion, with its four elements. The straw poll that was then taken resulted in Committee approval of all four of the elements.

Cohen noted her sense that the Committee believes that the rule — which apparently will cover fee deals that can be quite complex when the clients are sophisticated — should deal only with "the small firm," not with those lawyers that have sophisticated clients and practices. A member who was participating by conference telephone concurred with that assessment: The rule should protect the "small-practice" lawyer and that lawyer's clients.

A member asked, if the proposal were going back to the subcommittee, that it deal with the concepts of unjust enrichment — referred to in the third and fourth alternatives to Rule 1.5(h)v of the existing proposal — and quantum meruit, mentioned in the course of the Committee's discussion. He asked how the lawyer could argue that he benefitted the client if the engagement were terminated before completion of the services. What is the benefit to the client in an engagement for the drafting of a will if the engagement is terminated after the lawyer accrues time receiving necessary information from the client but before there is a drafting product? If we provide a rule for that circumstance, and the lawyer can show compliance with that rule, then the rule will be of value to the lawyer, too, and not just to the ex-client.

The Chair noted that the subcommittee will not be bound by this discussion that the Committee has had of the proposal in its existing form, when the proposal is returned to the subcommittee for further work.

The Chair asked for the members' straw poll on the question of whether the rule should cover any "flat fee" or only "flat fees" against which an advance deposit has been taken.

By way of a discussion of the matter put to the straw poll, a member said that the rule should apply without regard to who holds the money — it should not turn on whether there was an advanced deposit against future fees. The member suggested that a comment could be added to clarify that some of the rule's requirements would not apply if there were no advanced deposit against future fees, if there were, indeed, some such provisions in the final version of the rule. And, he added, there could be a comment's reference to Rule 1.5(f).[4]

The straw vote was taken, the members voting that the subcommittee should draft the rule to cover all flat fee agreements rather than just those requiring an advanced deposit against future fees. A member who was participating by conference telephone expressed his disagreement with that result, saying any coverage of the case where there had been no advanced deposit would be over-regulation. A member who was present in the room added his agreement with that position.

A member asked that the subcommittee give special consideration to consistency in terminology among the comments to Rule 1.5, noting that existing Comments [12], [14], and [15] speak of "'flat fees'" and "'lump-sum' fees."

Upon that warning, Cohen asked Michael H. Berger, who chairs the Court's standing committee on the Rules of Civil Procedure, whether this Committee should be coordinating with that committee, given the different terminology that is used in the rules governing contingency fees found in Chapter 23.3, C.R.C.P. Berger responded first by noting the oddity of having the contingency fee rules placed in the C.R.C.P. rather than the Rules of Professional Conduct but then adding that this Committee should confer with the other committee if it sees need for changes to coordinate terminology.

Responding to Berger's observations, the Chair said that a part of her sees a need for a joint subcommittee of the two Rules Committees to look together at both the fixed/flat fee case and the contingent fee case. But she added that this highly-functioning subcommittee of this Committee should continue its useful work of developing a rule to deal with fixed/flat fees — while keeping its eye on the contingency fee rules of Chapter 23.3.

The Chair added that the subcommittee certainly should also be looking at consistency within the Rule 1.5 comments.

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4. Rule 1.5(f) reads—

1.5 Fees

> (f) Fees are not earned until the lawyer confers a benefit on the client or performs a legal service for the client. Advances of unearned fees are the property of the client and shall be deposited in the lawyer's trust account pursuant to Rule 1.15(f)(1) until earned. If advances of unearned fees are in the form of property other than funds, then the lawyer shall hold such property separate from the lawyer's own property pursuant to Rule 1.15(a).

—Secretary

Sudler asked whether the Committee had yet developed a sense about whether the proposed rule should provide a form for the fixed fee agreement; was that a premature question? Cohen added that, if the Committee thinks a form should be included, then it should consider the content of that form.

James C. Coyle, Attorney Regulation Counsel, responded by referring to an existing proactive management group and its awareness that small-firm practitioners want guidance in this area. It would help them to provide them with forms for these kinds of agreements.

The Chair asked for the Committee's response to the question of whether the Committee should now seek a joint effort with the Standing Committee on the Rules of Civil Procedure. Berger, the chair of that other committee, suggested that the two committees ask the Court to move the contingency fee rules from the C.R.C.P. to the C.R.P.C.; they are wholly out of place in the Rules of Civil Procedure. Berger recalled, without characterizing the occasion, that once before this Committee belatedly went to the other committee with concerns about the contingency fee rules.

The Chair and Berger agreed that they would jointly write a request to the Court to move the contingency fee rules from the C.R.C.P. to the C.R.P.C.

To the Chair's question, Sudler suggested that this Committee should not now take up the content of a proposed form for flat fee agreements; the subcommittee has this Committee's comments on the form from earlier Committee meetings, from which it can work. The Chair concurred, noting that the content of any proposed form might well depend on decisions still to be made about the substantive content of proposed Rule 1.5(h), including whether or not the rule will deal only with agreements that require advanced deposits against future fees.

A member said she thinks there should be an alternative to deal with the case in which the client does not dispute a portion of the fees claimed by the lawyer upon a premature termination of the engagement but does dispute other parts of the lawyer's claim. In that circumstance, may the lawyer retain the undisputed portion and pursue quantum meruit for the balance? She reads the *Gilbert* decision to say that the lawyer may do so in that case, but she does not see that circumstance covered in the subcommittee' proposed rule.

The Chair responded by recalling that, at the Committee's forty-third meeting, on April 29, 2016, it had determined that the lawyer should be permitted to retain — or collect — the undisputed portion in that case. A member recalled having thus proposed that the lawyer could take the undisputed portion of the fees into the operating accounts as payment.

As the discussion drew to a close, the Chair invited each of the members to communicate with subcommittee chairs Cohen and Sudler if they had ideas to contribute to the subcommittee as it worked further on the proposal.

IV. *Status of COLTAF Rules Amendments*

The Chair reported that she has submitted to the Court the Committee's proposal for a new Rule 1.15B(k), a new Comment [7] to Rule 1.15A, and new Rule 1.15D(a)(1)(C), as approved at the Committees' forty-third meeting, on April 29, 2016. The proposal would permit lawyers to continue to hold "orphaned funds" in their trust accounts or give them to COLTAF under certain circumstances. The Court has asked that comments on the proposal be submitted to the Court by September 15, 2016.

The Chair noted that Diana M. Poole, director of the Colorado Lawyers' Trust Account Foundation, had sent her a gracious note of thanks for the Committee' proposal.

Both the Chair's submittal letter to the Court and Diana M. Poole's letter to the Chair were included in the materials provided to the members for this meeting of the Committee.

V. *Rule 1.6 and Information Regarding Legal Fees of Public Entities*

At the Chair's request, David W. Stark reported that a subcommittee has been formed to consider the addition of a comment to Rule 1.6 that would except, from the Rule 1.6 prohibition of a lawyer's revealing client information, information regarding the totals of attorney fee billings and expenses devoted to individual clients by public entities. Stark said that the subcommittee has had two meetings and has formed working groups to consider various facets of the proposal. He noted that legislation or court rules regarding this matter have been proposed in Colorado and other jurisdictions, including the submission of legislation in the 2016 Colorado General Assembly that was not enacted, and that the matter has been considered in legal cases in other jurisdictions and in legal writings. Among the issues are whether such a principle would be properly located within the Rules of Professional Conduct; perhaps the matter should be dealt with by statute and then automatically included within the exception of Rule 1.6(b)(7) permitting disclosure of client information "to comply with other law."

Stark said the subcommittee has had "spirited discussion" and added that he has requested input from the Colorado Attorney General and from the State Public Defender.

VI. *Proposed Amendments to Rule 2.1 and Its Comment[5] Regarding Consideration of Children in Parenting Disputes.*

The Chair introduced Joan H. McWilliams, of McWilliams Mediation Group Ltd., to the Committee, to discuss proposals to amend Rule 2.1 and its Comment [5].[5] The proposed amendment to Rule 2.1 would cause it to read (the proposed amendment is in italics) as follows:

> In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation. *In a matter involving the allocation of parental rights and responsibilities, an attorney should advise the client of the importance of minimizing the adverse impact that parental conflict can have on the minor children.* In a matter involving or expected to involve litigation, a lawyer should advise the client of alternative forms of dispute resolution that might reasonably be pursued to attempt to resolve the legal dispute or to reach the legal objective sought.

And the proposed amendment to Comment [5] to Rule 2.1 would cause it to read (the proposed amendment is in italics) as follows:

> [5] In general, a lawyer is not expected to give advice until asked by the client. However, when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, the lawyer's duty to the client under Rule 1.4 may require that the lawyer offer advice if the client's course of action is related to the representation. Similarly, *when a matter involves the allocation of parental rights and responsibilities, it may be necessary under Rule 1.4 to inform the client of the importance of minimizing the adverse impact that parental conflict can have on minor children. Likewise,* when a matter is likely to involve litigation, it may be

5. McWilliams proposal was set forth in a memorandum that was included with the materials the Chair provided to the Committee for this meeting, beginning on p. 15 of the materials.

—Secretary

> necessary under Rule 1.4 to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation. A lawyer ordinarily has no duty to initiate investigation of a client's affairs or to give advice that the client has indicated is unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client's interest.

McWilliams began her discussion with the statement that a lawyer engaged in a matter involving conflict between parents of minor children should advise the lawyer's client of the adverse impact that the conflict may have on those children, notwithstanding it is the parent, and not those children, who is the lawyer's client in the engagement. Many practitioners in matrimonial practice, she said, consider only the interests of their client, the parent, and do not undertake to provide cautions for the benefit of the minor children.

The proposed amendment would tell such practitioners that they "should" advise their clients of "the importance of minimizing the adverse impact' of the parental conflict on the children. McWilliams stressed that the amended rule would not establish an absolute requirement that such advice be given.

McWilliams reported that the concept contained in the proposals was adopted by the American Academy of Matrimonial Lawyers in 2000 and that the specific proposals were approved by the Colorado Bar Association Family Law Section executive council in March 2016. As explained in her memorandum, which was included in the materials provided to the Committee for this meeting, the Colorado Bar Association Ethics Committee considered the proposals in May 2016 and, although disapproving of any amendment to the text of Rule 2.1, approved an amendment to Comment [5] of the rule such as that she now proposed to this Committee.[6]

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6. From the approved minutes of the meeting of the Colorado Bar Association Ethics Committee on May 21, 2016 [the proposed amendments to Rule 2.1 and its Comment [5] that the Ethics Committee considered are the same as those considered by this Committee at this forty-fourth meeting]:

> Joan McWilliams was here as a guest and representative of the Family Law Section to ask the Committee's approval to proposed amendment to Colo. RPC 2.1. This proposed amendment was discussed in the section for over a year. It was tabled because of concerns about third party liability, or reduction of the strict privity rule. The Colorado Supreme Court decided the Baker v. Wood, Ris & Hames case and affirmed the strict privity rule. So that may be less of a concern now. The proposed amendment would change Rule 2.1 to include language providing: "In a matter involving the allocation of parental rights and responsibilities, an attorney should advise the client of the importance of minimizing the adverse impact that parental conflict can have on the minor children." Ms. McWilliams discussed the bases for the proposed changes of the rule and the need for the proposed changes. She believes that the proposed amendment covered the previous objections to the proposal. There was a discussion about whether these proposed changes were needed. Discussion among many members of the committee that the language was good. Others discussed why this was needed if this was a best practice, as opposed to an ethical requirement. In response, a member suggested that there are many lawyers who are just hanging their shingle out of law school and this gives those kind of lawyers good guidance. Others discussed the fact that the language would fit better in a comment to the rule rather than in the black letter of the rule. Some discussed how divorce cases are handled and that there are courses ordered to attempt to ensure that parents minimize the adverse impact of the divorce on the family. The paper here in the ethics packet, which has underlining, is just for illustrative purposes. It is not part of the proposal. Motion was made to approve the changes to the comment, but not changes to the rule. Motion was seconded. Discussion about whether the language in the proposed comment, which suggests that informing the client "may be necessary under Colo. RPC 1.4" should be removed and the language in the rule should be moved to the comment. Members discussed whether "should" is equivalent to "may be necessary." Another member believed that the word "should" should remain and the provision should be in the comment rather than the rule.
>
> Another proposed amendment would be to cross-reference Colo. RPC 1.1. This

(continued...)

Following McWilliams' presentation, a member asked whether the proposals were intended to require lawyers to take an action they would not be likely to take otherwise — give their clients the referenced advice about the harm of conflict to minor children — or were intended, instead, to give lawyers permission to take that action when they now feel they may not do so under the current rule. McWilliams said she appreciated the distinction contained in the question and responded that she believes it is the latter. In her view, the Supreme Court's decision in *Baker v. Wood, Ris & Hames*,[7] affirming the "strict privity rule," clarified that lawyers may provide such advice to a parent without incurring liability to the non-client, the child, so that the proposals, if contained in the Rules of Professional Conduct issued by the Court, would confirm that the specified advice might be given without incurrence of liability to the children.

A member asked the Chair whether a subcommittee would be appointed to consider these proposals, so that discussion would not be appropriate at this time. The Chair indicated that current discussion of the proposals would be appropriate now, and the member proceeded to state her objection to the proposals. The proposals would deviate from the Model Rules of Professional Conduct that have been the base for the Colorado rules; and it would inject an unenforceable concept that a lawyer "should" take a specific action, "should" give specific advice to a client in a particular circumstance. Additionally, the member thought it inappropriate to burden the rules with a specificity that applied to only one practice area within the legal profession, as this would apply only to family law practice.

Further, the member said, the proposals were directed at changing the conduct of clients, not regulating the conduct of lawyers: It is the parent who might adversely affect the child by inappropriate behavior. She noted that jurisdictions commonly provide parenting classes to follow divorces and added that the adverse effects on children that can come from parental strife are not dependent not the existence of a marriage but can come, too, from unwed parents. The member believed that the proposals would not be effective to change the behavior of those — the parents — whose behavior was of concern. The parenting programs already exist; those parents who do not take advantage of those programs are the ones likely to behave improperly, with or without this advice from the lawyers. The member concluded her remarks by noting that over seventy percent of marriage dissolution cases are filed *pro se* and, so, do not present the possibility for such advice from counsel.

Another member clarified that sixty-five percent of cases involving parenting issues proceed with neither party being represented by counsel.

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6. (...continued)

> was a friendly amendment. Motion proposed to amend the motion to include language that in interacting with other counsel in a divorce matter, the lawyer should minimize the impact that parental conflict can have on minor children in the lawyer's interactions with other counsel in the divorce proceeding. Others expressed the concern that this dilutes the obligations to clients. Specifically, the proposed amendment would be to take the proposed 1 language in the rule and: (1) change it to say: "in a matter involving the allocation of parental rights and responsibilities an attorney should attempt to minimize the adverse impact that parental conflict can have on the minor children;" and (2) move that language to the comment. There was a discussion that maybe the proposal should be to another rule.
>
> Motion to table because there are multiple, potentially conflicting alternatives that are being discussed. Motion to table was carried.

—Secretary

7. Baker v. Wood, Ris & Hames, Professional Corporation, 364 P.3d 872, 874 (Colo. 2016).

—Secretary

To these points, McWilliams agreed that the proposals would not "catch all cases," but she noted that many cases do proceed with counsel and concluded that, in those cases, the suggestion contained in the "should" admonition could be helpful. She added that the term "should" is already found in Rule 2.1, in its admonition that, "In a matter involving or expected to involve litigation, a lawyer should advise the client of alternative forms of dispute resolution that might reasonably be pursued to attempt to resolve the legal dispute or to reach the legal objective sought."

A member expressed his desire that the Chair appoint a subcommittee to consider the proposals, and the Chair said that she would do so, in part in recognition of the limited attendance of members at this meeting. She had concluded that, given the breadth of outside support for the proposals, it was incumbent on this Committee to give the matter due consideration. If, as had been suggested, this is not appropriate for a rule or comment but might, instead, be the subject of an opinion of an ethics committee, that could be the result of such due consideration. The Chair said she would circulate a sign-up sheet for membership on such subcommittee and would welcome the participation of non-Committee members such as McWilliams.

VII. *Proposed Amendment to C.R.C.P. Rule 121 Adding § 1-27, "Judicial Expectations for Professionalism and Civility."*

The Chair invited Judge Michael H. Berger, who chairs the Colorado Supreme Court's standing committee on the Colorado Rules of Civil Procedure, to discuss a proposal to add a new section, § 1-27, to Rule 121 of the Rules of Civil Procedure. The proposal was set forth in the materials provided to the Committee for this meeting.

Berger began by saying the proposal had been submitted to the C.R.C.P. standing committee just a couple of weeks preceding this forty-third meeting of this Committee, although it had begun within a joint effort of the Colorado Bar Association and the Denver Bar Association Professionalism Coordinating Council. The C.R.C.P. standing committee has itself scheduled what Berger characterized as a "philosophical discussion" of the matter at its September 2016 meeting. Berger said that Judge John R. Webb would chair the C.R.C.P. consideration, which would be fortunate because of Webb's participation on both rules committees.

But, Berger added, he wanted to know what this committee thought, preliminarily, of the addition of this unusual concept within the C.R.C.P. He said he had met with Judge Jonathon Shamis, who had chaired the subcommittee of the CBA/DBA Professionalism Coordinating Council, to gather as much information as he could in advance of the September meeting of the C.R.C.P. standing committee. And, he said, at the Office of Attorney Regulation Counsel, Coyle is aware of the proposal

Coyle then said that the proposal has been discussed at the national level of bar regulators for a long time, for the professional conduct rules do not provide for "civility" and the bar regulators do not have jurisdiction to respond to the complaints they receive about lawyers' incivility. The best response they can now offer is the advice to "go to your professional group" and discuss the problem there. Coyle spoke about this matter at a conference in Wyoming in 2014, finding there that the judges wanted something in the rules applicable to cases in their courtrooms by which they could quickly and effectively respond to incivility, something that would enable them to apply sanctions for incivility in their courtrooms, without entry of the matter into a record or required forwarding of the matter to the disciplinary regulators. Wyoming has had such a rule of civil procedure for four years, enabling judges to make reference to the rule in case management orders and to cite the rule when dealing with incivility in their courtrooms; Wyoming judges have said that the rule has had a positive effect.

Coyle added that this proposal was taken before the CBA/DBA Professionalism Coordinating Council and there received broad approval; he noted that the council has about 140 members, of whom about thirty participate at its monthly meetings. He added that the proposal is not intended to be invoked in specific cases pending before the OARC and is not intended to impose a reporting requirement under Rule 8.3 on judges who encounter uncivil conduct in their courtrooms.

A member asked what is the problem that the proposal is intended to solve: Do judges believe they do not have the authority to sanction or admonish lawyers for uncivil behavior? If a lawyer receives such a sanction in the course of the proceeding, would the OARC believe that it had an obligation to commence disciplinary proceedings against the lawyer?

Noting those are good questions, Coyle said he has learned from chief judges that they are seeking some base that is uniform, a base that they can comfortably apply as a matter of protocol. The judges are concerned about establishing their own, differing protocols for their courtrooms. He added that, to his surprise, there is also a concern about the adverse implications, to the judges themselves within the judicial performance review system, of their criticism of lawyer misconduct — the concern of adverse effect on judicial performance ratings. There is a belief that the uniformity offered by a statement of a standard in a rule would permit the judges to deal with civility issues in their courtrooms without being singled out for subsequent criticism in the ratings process.

The member who had asked what was the problem to be solved then noted that, if a judge has ruled that the lawyer has violated this rule, as proposed, by inappropriate conduct, that must necessarily result in a "knowing violation" of Rule 3.4(c)[8] and subject the lawyer to discipline by the OARC. The member understood the judges' concerns about the adverse impact of sanctions for incivility in their courtrooms, absent a rule to point to as the basis for such sanction, but the member would be concerned that this proposal could have unintended consequences of this sort.

Coyle replied that he appreciated the reference to Rule 3.4(c), but the OARC cannot pursue discipline without proof of the lawyer's requisite knowledge of the violation; accordingly, cases of this sort would not be of high priority for that office. He added that, "If a judge says, 'Stop that,' we already review those cases."

Another member followed up on the concerns just expressed, asking Coyle whether this rule, if adopted, would just be a "back door" into the OARC for a lawyer who did not like the conduct of opposing counsel. Coyle replied that he hoped that would not occur and that, if it did, the proposed comment, reading—

> Action taken under this practice standard does not constitute discipline as contemplated by C.R.C.P. 251.6, nor does imposition of a sanction under this practice standard preclude the reporting of an attorney's misconduct to the Office of Attorney Regulation Counsel. The sanctions applicable under this practice standard may be imposed independently or in conjunction with other available remedies.

—would enable the office easily to resolve the matter.

To that, the member who had asked the question suggested that the comment Coyle cited says just the opposite of his proposition: It says that the imposition of a sanction by the judge would not preclude the reporting of misconduct to the OARC. Should, he asked, the cited text instead read,

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8. The referenced subrule reads, "A lawyer shall not: . . . (c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists . . . ." —Secretary

"imposition of a sanction under this practice standard is not intended to lead to a reporting of an attorney's misconduct to the OARC"?

Another member, who had not previously spoken to the proposal, acknowledged that his own strong feelings about rules of "professionalism" and "civility" were well known and then said that he strongly opposed this proposal. If, as Coyle has said, this proposal is intended to address conduct that is not now subject to discipline under the Rules of Professional Conduct, then we should address that conduct within the discipline context of those Rules and not under the procedural context of the Rules of Civil Procedure. He added that he sees enough bad conduct among judges, and he suggested that such a rule be applied first to them, then maybe to lawyers. He added that C.R.P.C. 8.4(d), stating that "It is professional misconduct for a lawyer to: . . . (d) engage in conduct that is prejudicial to the administration of justice," should suffice to take care of the problems posited as reasons for this proposal. He could not support this proposal unless and until he was convinced that there is an "absolute hole" in the Rules of Professional Conduct in this regard.

To that, Coyle replied that the OARC has no intention of making "civility" or "professionalism" of this sort a topic within the Rules of Professional Conduct. It is not the OARC's goal to become involved in professionalism issues.

The member who had just articulated his strong opposition to the proposal said that he had twice been held in contempt of court for pushing the boundaries and not being courteous when serving as a public defender in his youth. He could envision a judge who would apply this rule of civil procedure when the judge did not like the course counsel was taking with a case, and that would harm both clients and justice; in his view, this rule's potential for abuse by a judge would be too dangerous to permit the rule to exist.

Another member who had not previously spoken to the proposal added the observation that the greater the substance of the dispute being litigated the more the lawyers are contentious; and, when counsel are being loud or vigorous, they fail to monitor themselves, but they can observe their opponents acting inappropriately and will invite the court to sanction those opponents under the proposed rule if it is adopted. The rule would be invoked in very subjective circumstances, and, therefore, it would be difficult to assure that the rule would be appropriately applied. He agreed that it would be dangerous to invite judges to use such a rule for "mere discourtesy." Judges can control their courtrooms; they are already given training in how to use their powers and to use those powers sparingly. He recalled a case arising in Colorado Springs in which a judge had issued an order on a matter; when the opposing counsel raised the matter of courtesy, the judge was confronted with whether he was thereby precluded from reconsidering his prior order.

Another member recalled a case in which the judge understood that a filing could be struck for its offending language, while the filing lawyer was given leave to refile without the offending language. The member noted that judges are overworked and could use this proposed rule to "act out."

The member who had referred to the Colorado Springs case pointed to the references in the proposal to taking up undue amounts of time and forecast that the proposal would permit judges to deny particular filings by saying, "That is a waste of time; I already know where I stand on that matter," depriving the lawyer of the opportunity to perform his duty to his client to make the specific argument to the judge.

Noting that the Committee would not be able to give any specific input about the proposal to the C.R.C.P. standing committee before the latter committee's September meeting, the Chair asked Berger what response he would like from the Committee at this meeting. Berger replied that he simply had

wanted to collect ideas from this kind of discussion before that September meeting. The Chair said she would emphasize to absent members of this Committee that the matter had been discussed and suggest to them that, if they had pertinent comments, to pass those comments on to Berger.

Webb spoke to encourage members to participate in the Berger/Webb subcommittee of the Civil Rules Committee when it takes up the proposal. Berger confirmed that suggestion, noting that there will be a lengthy consideration of the proposal before the C.R.C.P. standing committee: Should this be a rule at all? If so, what should it say?

VIII. *Adjournment; Next Scheduled Meeting.*

The meeting adjourned at approximately 11:40 a.m. The next scheduled meeting of the Committee will be on Friday, November 4, 2016, beginning at 9:00 a.m., in the Supreme Court Conference Room.

RESPECTFULLY SUBMITTED,

Anthony van Westrum, Secretary

[These minutes are as approved by the Committee at its forty-fifth meeting, on November 4, 2016.]