COLORADO SUPREME COURT

STANDING COMMITTEE ON THE RULES OF PROFESSIONAL CONDUCT

Approved Minutes of Meeting of the Full Committee
On June 5, 2015
(Fortieth Meeting of the Full Committee)

The fortieth meeting of the Colorado Supreme Court Standing Committee on the Rules of Professional Conduct was convened at 9:15 a.m. on Friday, June 5, 2015, 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 Michael H. Berger, Helen E. Berkman, Gary B. Blum, Nancy L. Cohen, Cynthia F. Covell, James C. Coyle, Thomas E. Downey, Jr., David C. Little, Judge William R. Lucero, Cecil E. Morris, Jr., Judge Ruthanne Polidori, Henry R. Reeve, David W. Stark, Anthony van Westrum, Eli Wald, Lisa M. Wayne, and E. Tuck Young. Present by conference telephone were members John M. Haried and Judge John R. Webb. Excused from attendance were members Federico C. Alvarez, Christine A. Markman, Justice Monica M. Márquez, Alexander R. Rothrock, and James S. Sudler III. Also absent were members Marcus L. Squarrell and Boston H. Stanton, Jr.

I. *Meeting Materials; Minutes of March 14, 2014 Meeting.*

The Chair had provided a package of materials to the members prior to the meeting date. The package did not contain submitted minutes of the last preceding meeting of the Committee, the thirty-ninth, held more than a year previously on March 14, 2014, a lapse for which the secretary apologized to the Committee. The Chair gave cover to the secretary by noting that the topics for this meeting did not carry over from that prior meeting.

II. *Miscellaneous Matters.*

The Chair noted that a long time, nearly fifteen months, had passed since the Committee's last meeting, and she explained that part of the delay in scheduling the current meeting was the time that had been required to put all of the changes that the Committee had proposed to the Supreme Court, based on the Committee's review of the amended ABA Model Rules that had been proposed by the ABA's "20/20 Commission."

The Chair reported that Melissa Meirink has joined as a staff attorney to the Supreme Court, working with Christine Markman, who has been a regular support to the Committee. The Chair expects to rely on both these lawyers as good resources for the Committee.

The Chair also thanked staff attorney Jenny Moore for her assistance in getting into the Court's preferred format and style the Committee's recent proposals for changes in the Colorado Rules of Professional Conduct.

As to the status of the Committee's proposed changes to those Rules,[1] the Chair said that she has been told by the Court that it has not yet taken action on them, although they are proceeding along the Court's internal schedule. It is likely that the Court will not hold hearing on the proposals until after this summer.

III. *Subcommittee on Pro Bono Services by In-House and Government Lawyers.*

The Chair asked David Stark, chair of the Committee's subcommittee formed to consider pro bono services by in-house and government lawyers, to report on the subcommittee's activities.[2]

Stark began by noting that the subject before the subcommittee had a long and twisted history. He recalled that the Committee had previously talked about amendments to the comments to Rule 6.1and had determined that it should establish a subcommittee to work with the Attorney Regulation Advisory Committee of the Supreme Court on the topic. The participants in the combined effort included, in addition to Stark, Helen Berkman, James Coyle, Marcy Glenn, Carolyn Powell, Richard Reeve, Judge Daniel Taubman, and Mimi Tsankov.

The subcommittee met numerous times and considered numerous proposals; and it ran into lots of resistance, most of which came with respect to the provision of pro bono services by government lawyers, there being little opposition from in-house counsel.

Stark explained that government lawyers had — wrongly — gotten the impression that the subcommittee was seeking to impose a pro bono service requirement upon them, with policies defining how such services were to be rendered. In fact, the subcommittee learned that one size could not fit all agencies and that no single policy could be adopted.

In the midst of the group's effort, Stark received an email from Kristen Burke, counsel to Chief Justice Rice, suggesting the addition of the following as a comment to Rule 6.1:

> Individual government attorneys may provide pro bono legal services in accordance with their respective organization's internal rules and policies. Government organizations may adopt pro bono policies at their discretion.

The materials provided to the Committee for this meeting contain an email chain that began with that email from Burke. The chain includes an email from Stark to Burke that expresses his view that one size of policy cannot fit all needs, so that a short, pithy statement that the adoption of policies by government agencies is a good alternative to promulgation of a model pro bono policy for such agencies. Stark's email also outlines some of the concerns that government lawyers have raised about their providing pro bono legal services, including problems with providing such services on agency time, using agency facilities for those services, and the lack of professional negligence insurance to cover the risk attendant to providing those services.

The outcome of the subcommittee's efforts, then, has been the Court's proposal for the addition of its short comment to Rule 6.1.

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1. The Chair's May 22, 2015 cover letter to the Supreme Court, with the attachments setting forth the Committee's proposals, is included in the materials provided to the Committee for this fortieth meeting.

2. The report of the Subcommittee on Recommended Pro Bono Policies for In-House and Government Attorneys is included in the materials provided to the Committee for this fortieth meeting.

The subcommittee found that the Federal governmental agencies have a good and well-developed pro bono policy; the subcommittee worked with the Department of Justice and other agencies to obtain their inputs.

In Stark's view, the Court's suggested comment, which the subcommittee now proposes be added to Rule 6.1 to deal with pro bono services by in-house and government lawyers, is as much as can be done to establish a workable "rule" on the matter.

A member asked Stark about the word "may" contained in the second sentence of the proposed comment, wondering whether the word should instead be "should": "Individual government attorneys *should* provide pro bono services . . . ." Stark replied that, although the subcommittee certainly wanted to push the point, there was a great deal of push-back, resulting in the subcommittee's decision to use the word "may." He, personally, would be willing to change the word to "should."

A member noted that the comment already also uses the word "discretion," and she asked whether the comment should refer, perhaps by a link, to the policy of the Department of Justice.

In reply, Stark noted that every agency has its own issues and restrictions. For example, a county attorney reported that she must satisfy her county commissioners about any such policy, so the development of such policies would likely require action by numerous county commissions across the state.

The member who had noted the use of the word "discretion" also said that she was concerned generally about the comment. Why, she asked, did it not just say that government agencies are encouraged to adopt pro bono service policies for their lawyers, period?

Another member introduced her comments with the warning that she had lots to say. She noted, first, that this Committee did not develop the Recommended Model Pro Bono Policy for Colorado Licensed Attorneys and Law Firms that appears at the end of the comments to Colorado Rule 6.1 nor propose it to the Court. Rather, it was promoted by the Access to Justice Commission. Second, she noted, the Rule and its comments do not make any parallel statement that law firms should establish pro bono policies. In her view, the matter of adoption of pro bono policies does not belong within the Rules of Professional Conduct and would better be handled by a Chief Justice Directive. In the absence of a policy statement for law firms, it would be strange to urge government agencies to adopt such a policy.

Further, this member said, the reason for pursuing the matter of pro bono services by in-house and government lawyers was to remedy the fact that the Model Policy currently included at the end of the comments to Rule 6.1, covering only private practitioners and law firms, leaves out a large number of lawyers, those practicing in-house or with governmental agencies. To this member, the subcommittee's proposal seems like a step backwards. Rule 6.1 already says that "[e]very lawyer has a professional responsibility to provide legal services to those unable to pay" A comment that referred only to government lawyers would seem to take the urgency out of the rule. This member was "not keen" on this comment for all the reasons she expressed. She realized that the comment may reflect the views of the Chief Justice; yet, she felt, that should not preclude the Committee from reporting to the Court that it does not feel that addition of the comment is a good idea.

To those comments, another member pointed to the last provision of Rule 6.1 — "Where constitutional, statutory or regulatory restrictions prohibit government and public sector lawyers or judges from performing the pro bono services outlined in paragraphs (a)(1) and (2), those individuals should fulfill their pro bono publico responsibility by performing services or participating in activities outlined in paragraph (b)" — as a provision that recognized that government lawyers are in a special

situation. In this member's view, it is reasonable to encourage government agencies to figure out how their lawyers might provide the contemplated services.

The member who had challenged the special statement of policies for government agencies agreed that the last provision of Rule 6.1, to which her attention had been directed, did alleviate her concern about the special call for such policies for government agencies. She added, however, that, if government agencies are to be encouraged to adopt pro bono policies, then perhaps the comments ought also to encourage law firms to adopt such policies. In reply to a comment by Stark, this member agreed that Rule 6.1 does currently make reference to law firms, but she added that the new comment calls out only government agencies, and not law firms or even in-house legal departments, for their adoption of pro bono policies. When Stark recited the second sentence of the preface to the Model Policy that currently follows the comments to Rule 6.1 — "Adoption of a law firm pro bono policy will commit the firm to this professional value and assure attorneys of the firm that their pro bono work is valued in their advancement within the firm" — the member suggested that the concept that is included in that sentence should perhaps be referred to in an additional sentence conjoined with the suggested new comment about government agencies.

Another member asked whether lawyers within the Department of Justice were actually providing pro bono services, and Stark replied emphatically that they were doing that. The member said she was surprised; she was herself working on a pro bono project at this time but had found that no one in government service seemed to have time to work with her on the project. She wondered whether government lawyers actually work on pro bono matters or just talk about doing that.

Another member observed that, because the project the member had spoken of involved criminal law, it might be that the special ethical issues arising in that field might have precluded assistance by government lawyers.

Another member added that he is aware that many government lawyers are providing pro bono services and often step out of their comfort zones to do so.

The member who questioned the pro bono activity of government lawyers said she was now satisfied that government lawyers do provide pro bono services, adding that the overlay of criminal law in the matter she referred to might explain the unwillingness of government lawyers to assist there.

A member who had not previously spoken said that he saw no harm in adding the proposed comment, just to remind all lawyers of the urgency of the need for pro bono services.

Returning to the question of whether the word "may" that is used in the proposed comment should be changed to "should," a member said she believed that "should" would more directly tell individual government lawyers of the value of pro bono services and perhaps encourage them to encourage their agencies to adopt policies that would facilitate their provision of those services.

Another member approved of that but added that the organization of the two sentences of the proposal could be improved.

The switch from "may" to "should" was approved by the Committee.

The Committee turned back to the question of whether this comment or another one should deal with the adoption of pro bono service policies by law firms or for in-house lawyers, as this comment would do for government lawyers.

To the comment that in-house lawyers may face conflicts of interest, a member noted that it is easy for lawyers to provide non-conflicted services of one kind or another to the indigent. The member was concerned that discussion of alternative services would draw away from the main goal of providing legal services to the indigent.

To the question of policies for law firms, a member suggested this addition: "Law firms and in-house legal departments are encouraged to develop pro bono publico policies to guide their lawyers." That, the member said, would match the subcommittee's provision for government lawyers.

The Chair asked that the Committee first determine what should be said with respect to government lawyers, from which a coherent package could be developed by the subcommittee for all three classifications of lawyers.

To that, a member said he saw no need for a reference to lawyers working in-house or in law firms, because Rule 6.1 is already structured to recognize that every lawyer has the duty to provide pro bono services, while the last provision of the existing rule, as had been noted earlier, already speaks to the special circumstance of lawyers who are employed within government agencies, recognizing that "constitutional, statutory or regulatory restrictions [may] prohibit government and public sector lawyers or judges from performing the pro bono services" that are outlined in the preceding provisions of the rule. The member reiterated that the only thing the additional comment need deal with is that special circumstance of the government lawyer.

Stark asked the Chair whether she was suggesting changes to the subcommittee's proposed comment. She replied that she was not suggesting the adoption, within the comments, of a model pro bono policy. Rather, she said, we are talking about encouraging government agencies to adopt such policies, and she was suggesting the addition of another comment to make the same point for law firms. She agreed with the prior comment that Rule 6.1 already clearly enunciates the duty that is imposed on every lawyer, but she believed it useful to expand the discussion of the adoption of policies to include law firms. That would, in part, connect the concept of a model policy to law firms, and it would be consistent with what is proposed to be said about government lawyers.

To that, another member asked that the Committee restrict its consideration to the matter that had been referred to the subcommittee and developed by it with the assistance of the Attorney Regulation Advisory Committee of the Supreme Court. That matter is, he noted, the matter of in-house and government lawyers. He asked that the Committee concentrate on that matter; if it found parallels to lawyers in private law firms, it could offer those parallels to the Chief Justice for her further consideration. But the Committee should not delay sending to the Chief Justice its conclusions about in-house and government lawyers while it sorts out its thinking about law firms.

Another member added her concurrence to that position, noting that there was no need to morph the matter from government lawyers to all lawyers as there has never been a concern about lawyers in private practice. She noted that more than 290 law firms and lawyers have committed to fifty hours or more of pro bono service per year. Model policies are already encouraged and being adopted by law firms. There is no need for this discussion to be extended to lawyers in private practice.

The Chair asked for a motion, and a member responded by moving that the Committee adopt the subcommittee's proposal for in-house and government lawyers, but with the word "may" changed to "should" and the two sentences being reversed in order.

A member asked whether the Committee should "retain jurisdiction" to consider further the issue of law firm pro bono policies or should ask the Court whether it would wish us to consider those matters.

To that the Chair noted that the Committee is never limited in the matters it chooses to consider, so that no such retention of jurisdiction need be claimed nor advice need be sought from the Court in this case.

The pending motion was then adopted by the Committee.

The Chair noted that Stark remains chair of the subcommittee, and she requested the subcommittee to look further at the matter of pro bono policies for law firms.

IV. *The Gilbert Case.*

The Committee then turned its attention to the recent discipline case, *Gilbert,*[3] a case which member James Coyle argued as Attorney Regulation Counsel and member Nancy Cohen argued on behalf of the respondent. In the case, Gilbert had engaged to provide three specific tasks for her clients in an immigration matter, for which she would be paid a flat fee of $3,550. The engagement agreement did not identify milestones of performance, state an hourly rate — although the clients had been given a copy of the lawyer's regular hourly fee schedule showing a regular rate of $250 per hour — or disclose that a portion of the fee would be retained if the engagement were terminated before completion of the identified tasks. The clients terminated the engagement before completion of all the identified tasks but after they had paid $2,950 in installments toward the total fee of $3,550.

A majority of the Supreme Court found that the lawyer did not violate Rule 1.16(d) — requiring the refund of "any advance payment of fee . . . that has not been earned" — as charged by Attorney Regulation Counsel when she returned only $1,835.86 of the advanced fees, retaining $1,114.14 for 4.41 hours of work actually spent on the case and $11.64 of incurred expenses. Although the determination of her entitlement was made by the lawyer unilaterally, rather than by a court in an action to recover from the clients the quantum meruit of her services after a full refund of all that the clients had paid toward the full flat fee, the majority of the Court found that she had not violated the refund obligation of Rule 1.16(d) "by failing to return that portion of the fee to which she was entitled in quantum meruit."

A minority of the Court, Chief Justice Rice writing for herself and Justices Coats and Eid, thought the majority misapplied quantum meruit principles, finding that quantum meruit is a remedy to be sought as a claimant before a court in a proceeding in which the claimant must prove the conferring of a benefit at the claimant's expense in circumstances that would make it unjust for the defendant to retain that benefit without payment of the reasonable value of the services rendered by the claimant. In the absence of such process and proof, the lawyer, in this case, could not establish that she had "earned" any part of the fee as contemplated by Rule 1.16(d).

As Committee member Rothrock noted to the Chair in his email of April 7, 2015, included at page 110 of the materials provided to the Committee for this meeting, both the majority and the minority in *Gilbert* referred to the Rules of Professional Conduct and invited a clarifying amendment or comment regarding flat fees. What kind of clarification would that be, the Chair asked. Would the Committee be restricted to established law, including *Gilbert,* in its work?

Contemporaneously, the Chair received an inquiry[4] from Steven Jacobson, chair of the Supreme Court's Attorney Regulation Committee, asking this Committee to consider amendments to the Rules

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3. In re Gilbert, 346 P.3d 1018, decided April 6, 2015. The opinion is found beginning at p. 112 of the material provided to the Committee for this fortieth meeting.

4. The Jacobson letter is found beginning at p. 152 of the material provided to the Committee for this fortieth meeting.

"setting certain minimal standards for written fee agreements in Colorado" and listing aspects of the lawyer's engagement that the Attorney Regulation Committee believes should be addressed in such an amendment.

A member suggested that a subcommittee be formed to address the panoply of issues raised by the *Gilbert* case and the Jacobson letter, commenting that, perhaps, an approach similar to Chapter 23.3 of the Colorado Rules of Civil Procedure, which specifically addresses contingent fee agreements, is needed for flat fee agreements.

Another member emphasized that the majority opinion in Gilbert specifically mentioned amendment of the Rules, and not necessarily just the addition of a comment, as a means by which the needed clarification might be obtained. In answer to another member's question, this member explained that an *ad hoc* committee worked on the development of the contingent fee provisions of Chapter 23, C.R.C.P. and made its resultant proposal to the Civil Rules Committee — an odd procedure at the time, the member noted.

The Chair said that, if a subcommittee is appointed for this purpose, its membership should include a good representation of those who use flat fee agreements, including lawyers engaged in immigration or criminal law fields.

A member noted that, if all of the fee that was actually earned must be returned and a claim then made for recovery in quantum meruit, "We all know that money will not be available and that suing to recover is an invitation to a malpractice lawsuit." Another member pointed to the opposing view expressed in the minority opinion, that "the majority permits Gilbert and similarly situated attorneys to put the cart before the horse and declare fees as earned under quantum meruit when no quantum meruit proceedings have been held."

A member who had relevant experience of her own agreed that a subcommittee should be formed as had been suggested. When she read the *Gilbert* opinion, she sensed that a number of things were "going on" that led to the lawyer's "harsh treatment" but were not apparent on the faces of the opinions. She felt that the case offered many things to be talked about at a continuing legal education seminar for criminal law lawyers.

A member observed that the position of Attorney Regulation Counsel is that, if the lawyer has a flat fee arrangement, the lawyer will violate Rule 1.5(f), Rule 1.16(d), and Rule 8.4, and will commit conversion of client property, if the lawyer retains a portion of the fee in an early termination of the matter, if the engagement agreement has not established benchmarks to identify the portion that has been earned at the time of termination. The question for the subcommittee to consider is whether there should be a rule that spells out what is needed for a flat-fee engagement. The issues are different from those involved in a contingency fee engagement, in part because the lawyer in the latter case is not likely to be holding, in advance, the fee that may eventually be earned upon the contingency, while the lawyer may well be holding, from the beginning of the engagement, some or all of the agreed flat fee in that kind of engagement.

The Chair appointed Cohen and Sudler to co-chair a subcommittee to consider these matters.

V. *Coyle Report.*

James Coyle reported to the Committee that he had attended conferences of the American Bar Association Center for Professional Responsibility in Denver, with about 450 other lawyers, on the topics of professional responsibility and on client protection. At one of the conferences, issues of

multijurisdictional practice were considered with lawyers from the Canadian Bar participating. The topics included "proactive risk-based management regulation" by lawyer regulatory agencies, a concept that Coyle described as agencies going beyond claims-based, proscriptive rules of conduct and becoming "more proactive in the regulation of lawyers." The concept is being implemented in New South Wales, Australia, and in England. Coyle said it included the appointment of "ethics compliance officers" within law firms who would certify to the regulatory agencies their law firms' compliance with applicable conduct rules.

The Attorney Regulation Advisory Committee of the Supreme Court, chaired by member David Stark, has formed a subcommittee to consider these issues and what Coyle called "regulatory justice." It is, Coyle said, a different approach, one that is not based on "discipline" but that seeks a better way to regulate lawyers than by disciplining them for breaches of rules of professional conduct.

Coyle also reported that the American Association of Professional Responsibility Lawyers is reviewing the existing lawyer advertising rules, with a view toward consolidating Rule 71 through Rule 7.5 into a single rule.

A member noted that Washington State has recently established a class of "legal technician," authorized to provide some functions that are normally provided only by licensed lawyers. Coyle replied that the Office of Attorney Regulation Counsel is looking at that development, with member Alec Rothrock heading that effort. A presentation on that development was made a couple of weeks before the is meeting, and the Rothrock subcommittee will be meeting at the offices of the Colorado Bar Association on June 26, 2015.

VI. *Adjournment; Next Scheduled Meeting.*

The meeting adjourned at approximately 10:30 p.m. The next scheduled meeting of the Committee will be on Friday, October 16, 2015, beginning at 9:00 a.m., in the Court of Appeals Full Court Conference Room.

RESPECTFULLY SUBMITTED,

Anthony van Westrum, Secretary

[These minutes are as approved by the Committee at its forty-first meeting, on October 16, 2015.]