COLORADO SUPREME COURT

STANDING COMMITTEE ON THE RULES OF PROFESSIONAL CONDUCT

Approved Minutes of Meeting of the Full Committee
On October 11, 2013
(Thirty-Seventh Meeting of the Full Committee)

The thirty-seventh meeting of the Colorado Supreme Court Standing Committee on the Rules of Professional Conduct was convened at 9:00 a.m. on Friday, October 11, 2013, 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 Justices Nathan B. Coats and Monica M. Márquez, were Committee members Federico C. Alvarez, Michael H. Berger, Helen E. Berkman, Gary B. Blum, Cynthia F. Covell, Thomas E. Downey, Jr., John M. Haried, Judge William R. Lucero, Christine A. Markman, Cecil E. Morris, Jr., Neeti Pawar, Judge Ruthanne Polidori, Henry R. Reeve, Alexander R. Rothrock, Marcus L. Squarrell, Boston H. Stanton, Jr., David W. Stark, James S. Sudler III, Anthony van Westrum, Lisa M. Wayne. Present by conference telephone were members Judge John R. Webb and E. Tuck Young. Excused from attendance were members Nancy L. Cohen, James C. Coyle, and Eli Wald. Also absent was member David C. Little.

Present as guests were Diana M. Poole, the director of the Colorado Lawyers Trust Account Foundation; Philip E. Johnson, of the law firm of Bennington Johnson Biermann & Craigmile, LLC, the president of the board of directors of the Foundation; and William A. Bianco, of the law firm of Davis, Graham & Stubbs, a member of that board of directors.

I. *Meeting Materials; Minutes of July 26, 2013 Meeting.*

The Chair had provided a package of materials to the members prior to the meeting date, and she apologized for the large size — approximately 285 pages — of the package. The material included submitted minutes of the thirty-sixth meeting of the Committee, held on July 26, 2013, and those minutes were approved as submitted.

The secretary noted that he has occasionally inserted footnotes in the minutes — sometimes with and sometimes without attribution to the secretary — that he felt added to the discussion but which might contain information that has not been presented, or even alluded to, by the participants to the discussion; and he asked for a sense of the Committee as to whether or not that was appropriate. The Committee members voiced their approval of such notes.

II. *Amendment of Rule 1.15.*

The Chair requested James S. Sudler III, chair of the subcommittee considering revisions to Rule 1.15 — including revisions intended to obtain comparability in the rates paid by banks on COLTAF accounts — to report on the subcommittee's recommendations. At its thirty-sixth meeting, on July 26, 2013, the Committee had received a preliminary report from Sudler on the subcommittee's activities and, after a lengthy discussion, had approved the direction that the subcommittee had taken in its proposal but had directed the subcommittee to incorporate the points discussed by the Committee at that July meeting.

Sudler began by noting that, at the Committee's July meeting, the Chair asked that Committee members send to Sudler their comments on the subcommittee's proposal as it stood at the time of that meeting. The subcommittee had received comments from just one member, and Sudler said it had considered but determined not to incorporate any of those comments in its current proposal, except that, pursuant to the member's suggestion, the subcommittee moved the all of the comments — which are intended to apply generally to the entire "series" of trust account rules, Rule 1.15A through Rule 1.15E — up to the front of the group, following Rule 1.15A.

At the last meeting, Sudler noted, the Committee had directed the subcommittee to consider the issue of whether a lawyer should give some notice to the client when drawing earned legal fees from the client's trust account funds. Sudler said the issue, and the wording expressing the principle, had been extensively debated by the subcommittee following the July meeting, and a majority of the subcommittee approved of the following addition to Rule 1.5(f) to deal with the issue (reflecting changes to the current text of the provision):

> (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)**~~ ***1.15A*** 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)**~~ ***1.15A***. ***The lawyer shall give written notice to the client that i) fees have been earned and ii) funds will be or have been transferred from the lawyer's trust account, or property other than funds will be transferred to pay earned amounts, within a reasonable time before or after the transfer.***

Sudler commented that the subcommittee's discussion had included the questions of whether the provision should be lodged in new Rule 1.15C and whether the required notice should be given before, after, or contemporary with the transfer of the funds or property from the trust account or other location to the lawyer in payment of the earned fees. The discussion even included the basic question of whether such notification provision should be made explicit, it not being found in current Rule 1.5 or Rule 1.15. Sudler added that a minority of the subcommittee had felt that the imposition of a notification requirement simply burdened the lawyer unnecessarily, particularly when the client has agreed to a flat-fee arrangement.

Sudler distributed to the Committee new text for Rule 1.15B(i) that the subcommittee proposed to substitute for that which had been included in the meeting materials package, text that deals with the "lookback" provision that enables a lawyer to recover, from the Colorado Lawyers Trust Account Foundation, interest that had been earned on COLTAF trust account deposits that, in hindsight, did not meet the COLTAF criteria of being funds that are nominal in amount or are expected to be held for a short period of time.[1]

Sudler noted that a member of the subcommittee had suggested that, in the event a refund from the Colorado Lawyers Trust Account Foundation would be due upon such a lookback request, the refund could simply be made by a Foundation deposit into the lawyer's COLTAF account from which the interest had originally been drawn under the COLTAF program. At this point, Diana Poole, the director of the Foundation, spoke to explain to the Committee that such a redeposit could not be done in practice. She explained that the Foundation makes a refund by a check issued to the lawyer or law firm that requests the refund and that it is left to the lawyer or law firm to give those funds to the proper recipient and to provide the recipient with any required tax form — a Form 1099 — to report the interest or

1. *See* current Rule 1.15(h)(2) and proposed Rule 1.15B(b). The text that Sudler distributed at the meeting is attached to these minutes as an appendix.

dividends earned and now received by the refund from the Foundation. She explained that, ordinarily, Forms 1099 are issued by the bank holding the lawyer's COLTAF account or any separate trust account that may have been established for the benefit of a particular client or third person; but she added that a bank that received a refunding deposit from the Foundation into a lawyer's COLTAF account as the member had proposed would not know what to do with the deposit, as it would not then be interest that had been paid by the bank itself. And, she pointed out, the member's proposal would still obligate the lawyer to withdraw the refunding deposit from that COLTAF account and direct it to the proper recipient and to issue a Form 1099 for interest earnings the deposit represents.

With no further discussion on the correction to Rule 1.15B(i) and the manner of handling "lookback" refunds from the Colorado Lawyers Trust Account Foundation, the Committee turned to the balance of the subcommittee's report.

A member questioned the parenthetical cross-reference that the subcommittee had inserted after the caption to Rule 1.15A and before its first words of text, reading, "(See also Rules 1.15B, 1.15C 1.15D and 1015E)." A member who had been a member of the subcommittee commented that it served the purpose of flagging that the "Rule 1.15 series of Rules" is different in structure from all of the other Rules — consisting of five separate rules of equal status with each other and with all of the other Rules but all part of an overall context of a lawyer's responsibilities for the funds and properties of others — and should be considered together when questions arise under that context.

The Chair asked Sudler whether he wished the Committee to vote first on the Rule 1.15 Series and then consider the subcommittee's proposed amendment to Rule 1.5(f) or, rather, to consider them all together. Sudler asked that the Chair do the latter, noting the inter-dependency of the amendment to Rule 1.5(f) and the other changes that the subcommittee has proposed to current Rule 1.15, where the concept of "severance" that is now behind the proposed amendment to Rule 1.5(f) is currently found in Rule 1.15(c). Sudler said that, if the Rule 1.15 Series were approved but the amendment to Rule 1.5(f) were defeated, the Office of Attorney Regulation would return to the Committee with some further proposal for a required client notification when a lawyer draws earned fees from a trust account. He explained, further, that the second sentence of proposed Rule 1.15A(c) now deals only with disputes over trust funds and does not require, as does current Rule 1.15(c),"an accounting and severance of . . . interests" for undisputed withdrawals. Regulation Counsel has relied on that "accounting" requirement to support its position that some contemporaneous notice must be given to the client upon a withdrawal of earned fees from a trust account, but that phrasing would be deleted from proposed Rule 1.15A(c). Under the subcommittee's proposal, it would be preserved but relocated to Rule 1.5(f).

Despite Sudler's request that all of the proposals be considered at one time, another member, who had been a member of the subcommittee suggested that the consideration could be bifurcated as the Chair had proposed; and the Chair determined to proceed in that manner.

A member who had experience with the analyses of the Office of Attorney Regulation differed with Sudler's explanation of the importance of the Rule 1.15(c) provision for an "accounting." She said that the crux of the matter — the flat fee — implicates the *Sather*[2] case, where a lawyer had not properly

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2. *In re* Sather, 3 P.3d 403 (Colo. 2000). In its opening paragraph, he Court outlined the circumstances of the case as follows:

> In this attorney regulation proceeding, we address the conduct of the attorney-respondent, Larry D. Sather, who spent and failed to place into a trust account $20,000 he received as a "non-refundable" advance fee for a civil case. Because Sather treated these funds as his own property before earning the fee, Sather's conduct violated Colo. RPC 1.15(a). Sather labeled the $20,000 fee "non-refundable" even though he knew that the fee was subject to refund under certain circumstances, thereby violating Colo. RPC 8.4(c). After being discharged by his client, Sather failed

provided for his "flat fee" in his fee agreement and had claimed unearned fees as "non-refundable" rather than placing them in his trust account until they were earned or returned to the client upon discharge of the lawyer.

This member said she was not aware of any disciplinary case that has involved the earning of stated fees upon the accomplishment of stated milestones — for example, a lawyer's fee agreement that provides for an initial draw of $1,000 upon conclusion of discovery. In her view, if the client in that arrangement has been advised in the fee agreement of the "milestone" by which the lawyer has earned a flat $1,000 upon the conclusion of discovery, there is no practical need for the client to get further, contemporaneous notice that the milestone has been reached and the fee will be drawn from the trust account. She added that, for a lawyer who has many clients with many such milestones, the burden of giving contemporaneous notice of the draws would be substantial. She added that the burden could be felt not only by lawyers engaged in criminal law practices but also by lawyers with commercial and transactional practices. Why, she asked, impose the burden? What is the benefit, if the fee agreement adequately advises the client of the bases — the milestones — for earning increments of fees?

That member concluded by referring to the question of whether a lawyer must give notice to the client contemporaneously with his destruction of the client's files after a period of time that had been identified and agreed to in the fee agreement. It is understood, she said, that no contemporaneous notice need be given if the engagement agreement has provision for file destruction.[3] Why, she asked, should the fee withdrawal be treated differently, particularly when the client is more likely to have a contemporaneous understanding of the state of the case than he would have about file destruction some years after the conclusion of the case? In her view, a requirement of some contemporaneous notice in addition to a statement of the fee arrangement in the fee agreement would simply be a trap of lawyers without significant benefit to clients. She said it would also be a change in the Rules; in that case, she asserted, we should need a particularly strong case before imposing the requirement. She concluded by saying that the subcommittee should include lawyers who regularly utilize flat fees in their practices.

Another member disagreed with those comments. In his view, the client should be told when the lawyer is spending the client's money to pay the lawyer's fee. When the lawyer sends monthly invoices, the lawyer should advise the client about the handling of the flat fee funds that had been deposited in the trust account. This member was surprised to find that there could be any question about that procedure, for this is what lawyers actually do in practice. He was opposed to changing the subcommittee's proposal for Rule 1.5(f).

Another member expressed her concern that the message that would be read in a lawyer's contemporaneous notice that she was about to withdraw, or just had, withdrawn, fees from the trust account would be, "now is your time to object to my taking those fees." That, she posited, would raise a lot of problems.

Another member agreed with those comments, The notice requirement would especially burden the sole practitioner who had a lot of "small clients." If the lawyer has given adequate disclosure of the payment arrangement in the fee agreement, the lawyer should have no further burden to report the actual

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to return all of the unearned portion of the $20,000 promptly, in violation of Colo. RPC 1.16(d).

3. Rule 1.16A(d) provides—

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

draws as they occur; and she noted that the burden would be especially onerous for the lawyer who does not have the administrative backup of a large law firm. Surely the lawyer should be clear about his entitlement to payment by using a well-drafted engagement agreement, but that should be sufficient and contemporaneous notice of the draws should not be required.

To the last comments, another member asked whether it is common for a lawyer to rely on a "comprehensive fee agreement" that enunciates the milestones upon which fees will be earned, and then simply draw the funds without further, contemporaneous notice of the draws. The member who had previously spoken about the special burden that would be placed on the sole practitioner said that is commonly done — she establishes milestones in the initial agreement and then draws funds from her trust account, without further notice, as the milestones are reached. On the other hand, when she undertakes an engagement on an hourly basis, she sends monthly bills and then draws the earned fees, returning any unearned fees from the trust account at the end of the engagement.

Sudler asked why it would actually be more unduly burdensome to give the client written notice of the drawing of earned fees in the flat-fee, milestone case than it would be to issue periodic invoices as hours are accrued and fees are earned. He saw no difference in the "burden" between the two modes of charging for services.

To that, the member who had previously spoken replied that the hourly-fee engagement is a "limited situation," in which the client will want to know whether the accrual of fees is getting out of hand. To the contrary, in the flat fee situation, the maximum fee is already defined. The hourly fee, she asserted, is usually much larger than the flat fee. In answer to Sudler's question of why it was more burdensome to give notice in the flat fee case than in the hourly fee case, she said it is not more burdensome, it is just unnecessary: The client has agreed to the flat fee arrangement, to the earning and taking of the flat fee as the milestones are reached, and needs to hear nothing more about the fees.

The member who had referred to the *Sather* case pointed out that the lawyer who is billing on an hourly rate has not typically agreed to a limit on the fee amount, and the amount of the bill depends on the accrual of time. Thus, the billing statement says, "This is how much of your money I've spent so far." The client has no idea, in advance, of what the fee will be. On the other hand, in a flat-fee case — whether it is a criminal matter, a transactional matter, or perhaps an undertaking such as the preparation of a will — when the lawyer has reached the established milestone, the lawyer has earned the agreed fee. Flat fees, the member asserted, are a benefit to clients, providing certainty about legal fees. That's not easy for the lawyer to provide in a matter of civil litigation or a complex transaction, but in other circumstances the lawyer can make decisions about the likely nature and extent of the work that will be done and can agree to a fixed payment for the work that is done, whether it is the same as, or has varied from, what the lawyer expected. That is beneficial to the client, who has anticipated the milestone and agree to the fee for reaching it.

A member who supported the proposal that notice be given of draws from advanced fee deposits said he was not suggesting that the notice needed to be given in advance of the draw, contemplating that it could be give after the draw but would in any case be given near the time of the draw. He said he could not square the argument that such contemporaneous notification need not be given with the principle that the lawyer is a fiduciary to the client and has a duty always to report and account for funds given to the lawyer in that trust relationship.

To that, the member who had previously spoken about the special burden that would be placed on the sole practitioner responded that the lawyer could anticipate the client's desire for information about the status of the fee and its relation to the agreed milestones by simply noting, in the fee agreement,

that the client is free to, and should, ask questions when in doubt about those matters. That being possible, the Rules should not mandate that contemporaneous notice be given as draws actually occur.

The member who had not been able to square an omission of notification with the lawyer's fiduciary duty to account commented that the fee agreement should not only clearly explain that the deposit toward legal fees will be held in a trust account but, also, how and when the funds will flow from that account to the lawyer in payment of services. When another member pointed out that the fee agreement alone can provide sufficient notice of how and when fees will be earned and paid from the trust account, the first member responded that it's an ordinary practice for lawyers to send invoices for their services and that all that can be explained in a fee agreement can also easily be reflected on the actual invoices.

Sudler took the discussion back to the distinction between flat and hourly fee arrangements and pointed out that the distinction is not actually controlling; the issue, he said can arise also for lawyers who are billing on the basis of accrued time. If it were an issue that just implicated the flat fee, an exception could be designed to take care of that. But, if that would not quell the objections, then there must be more to the matter than just the fixedness of the flat fee. By a billing, he notes, the client is advised that the lawyer has decided that she has earned the stated fee.

But one of the members who had spoken about the flat fee pointed out that, while the client has a right to know what services have been provided by the lawyer, that can be known by the accomplishment of an established milestone.

Another member, who had not previously spoken, contrasted that flat-fee/milestone situation from the hourly rate situation; in the latter, the client has no idea — until receiving a statement — how much the lawyer thinks the lawyer has earned. In the former, that lack of knowledge is not a problem, but the client might well question whether the milestone has in fact been accomplished.

This member said that he would want to see whatever clarification is thought necessary be lodged in Rule 1.5(f) — commenting that he was blindsided by Sudler's explanation of the importance to Attorney Regulation Counsel of the "accounting" requirement in current Rule 1.15(c). For him, the only matter of dispute was whether a statement of the timing of draws from the deposit to pay earned fees could be sufficient explanation of an objective event. That event is stated as a milestone in the fee agreement, which says that the lawyer will be entitled to draw a stated amount upon the accomplishment of the stated event. Should the lawyer also have to notify the client when the stated event has actually occurred? He was of the view that such additional notice was not necessary if the fee agreement had stated clearly enough that, upon the event, a stated amount of fees would be withdrawn from the deposit. Yet, the catch was whether the client would always know whether the event had occurred; he suggested — as a circumstance in which the client might not know — the completion of the discovery process as a stated milestone.

To that, the member who had said that the client would know of the earning of fees by the accomplishment of milestones acknowledged that that would depend on the quality of the other communications between the lawyer and the client, noting that, in a federal, case entailing lots of discovery and discovery issues, the conclusion of discovery might not be apparent to the client without some additional communication from the lawyer. In answer to a question from the member who had just spoken, this member said that she bills separately for accrued expenses and does not draw them from the client's deposit as if pursuant to a milestone attained.

The member who had asked that question concluded by saying that the essence of the matter is that the client should know that the lawyer has become entitled to draw the fee for performed services;

if attainment of the milestone is sufficiently self-evident to provide that knowledge, contemporaneous notice of the fact is not necessary, but, if the nature of the milestone does not provide that knowledge, then the lawyer should give the client specific notice, contemporaneous with the event, that a fee has been earned and will be drawn from the deposit.

A member who had not previously spoken pointed out that clients want fast and efficient service. To the extent that lawyers can provide that kind of service with flat fee structures, the Rules should accommodate and encourage that. The Rules should not unduly burden the process.

A member who had not previously spoken asked whether the lawyer could establish, as the milestones the discussion has been contemplating, the earning of a stated amount of fee: "I will make a withdrawal from the deposit when my hourly accrual has reached $10,000." A member who had argued that milestone-based withdrawals should not require contemporaneous notice to the client said that kind of milestone was not what she had in mind and would not assure the client had adequate knowledge of the right to withdrawal, without some further explanation of the work that had been done to earn that fee.

The member who had been a member of the subcommittee and who had agreed with the Chair that the discussion could be bifurcated to deal first with the subcommittee's proposed amendment to Rule 1.5(f) commented that the subcommittee had discussed whether the contemplated notice of draw could be given before, with, or after the actual draw. The subcommittee intended that the draw not be a "gotcha" event from the client's viewpoint. It was to be part of a flow of communication between the lawyer and the client and thus expected by the client. On that basis, the member had voted for the notification proposal of the subcommittee, but she commented that communication can be difficult and noted that she has trouble getting the lawyers who serve under her to keep their clients well-informed about their cases. She added that there is usually a lot of communication going on in emails and that notice of draws can be provided in that ongoing communication or can regularly be given at the end of each month.

A member who had not previously spoken said that he agreed with both sides of the discussion. And that, he added, got him to considering the practical application of integrated software for billing, trust accounting, and the like. The argument that draws can be based on the accomplishment of previously agreed to milestones sounded good, but what happened when the lawyer missed the milestone? His understanding was that the milestone billing event could be programed into software billing packages so the milestone event would not be missed. Upon the occurrence of the milestone event, the software would trigger an internal notice that the draw could now be made, and also generate a billing statement to the client providing "notice" that the draw had been made. While the concept of constantly giving notices as milestones are reached might sound daunting, the software packages might make compliance easy as a practical matter.

To that, a member who is a solo practitioners said that she thought herself unusual in being a solo practitioner who employed that kind of software, given that it is expensive, requires a good deal of "IT support," and can be a "rabbit hole." Solo practitioners are not typically handling cases for very wealthy clients; they are handling small cases, each of which is not likely to accrue as much as $5,000 in aggregate fees. A requirement of contemporaneous notice of draws of those fees from deposits would be a lot for the Committee to expect of those lawyers. The flat fee simplifies office overhead and billing structures. She said that, when she offers a flat fee, the client is able to question the fee, and the answer should be easy: "You agreed that I could draw $Y when I accomplished Milestone X; I accomplished Milestone X at such-and-such time." An additional requirement of contemporaneous notice seems merely to be the addition of a gratuitous risk for the lawyer, to be added to the bundle of charges if a grievance is filed.

The Chair asked for a summation: What do we think, as a whole?

A member said he was concerned about the issue that had been under discussion, although he did not personally encounter the problem in his mode of practice. He thought it unwise to make a matter of good billing practice a matter of discipline by elevating it to a requirement contained in the Rules. And, he noted, the problem would be compounded by requiring the retention of billing and trust files for seven years, as is currently required by Rule 1.15(c) and would be continued by Rule 1.15D(a). That compounded requirement seemed to him to be an excessive burden to lay on the many practitioners who serve clients who are not wealthy, whose legal fees, while large in their eyes, do not justify the imposition of expensive timekeeping, billing, and notice obligations. The flat fee mechanism is one reason for saying this requirement is unnecessary, but, to this member, the contemporaneous notice requirement was an excessive burden to lay on lawyers no matter what the fee arrangement, a burden that did not provide a worthwhile benefit. This should be regarded as a matter of good billing practice, not a disciplinary matter.

The Chair asked for a vote on the concept. A member responded by suggesting a two-tiered vote, first on whether any contemporary notice was needed for withdrawals from advance fee deposits, and second, whether, in the flat fee situation, sufficient notice could be given in the fee agreement's specification of the arrangement.

The Chair rejected that suggestion, asking why, if a notice of the time and basis for any draw should be mandated by a rule, a statement in the fee agreement could suffice for that notice. The member who had suggested the two-tiered vote responded with the example that had been given before, where the lawyer's policies regarding the destruction of the client's files may be stated and agreed to in the engagement agreement, without the need for further, contemporaneous notice at the time the files are actually destroyed. But the Chair rejected the analogy, because the proposal for notice of specific fee draws could be given before or after the actual draws — within the ongoing representation — so long as it was contemporaneous therewith.

In answer to a member's question, Sudler said that his research has not uncovered a similar rule in any other state's disciplinary regulations.

A member asked whether any other state has any case law agreeing with the proposition that an accounting requirement akin to that found in current Rule 1.15(c) includes a requirement that notice be given to each client contemporaneously with a draw of an earned fee from a deposit. Sudler said that the Office of Attorney Regulation Counsel has had many cases in which this matter has been raised, none of which has resulted in a sanction for failure to give the contemplated notice. He commented that it is not realistic to think that the Office can prosecute all lawyers engaged in bad practices in this regard, but the matter is taught by the Office in its educational programs about trust accounts, where lawyers are told that they should give that contemporaneous notice. And Sudler said, firmly, that the Office believes that contemporaneous notice should be given and that the Rules should, somewhere, require that notice.

In the ensuing straw vote, the proposition that the Rules should require that notice of the draw of earned fees from advance fee deposits should be mandated was defeated.

To the Chair's question of where Sudler would like the Committee to turn next, he asked that it turn to a consideration of the remainder of the subcommittee's Rule 1.15 Series proposal, with the expectation that we would return later to a more refined consideration of the matter of contemporaneous notice of fee draws.

A member who had been a member of the subcommittee remarked that the concept contained in the proposed change to Rule 1.5(f) that the lawyer "shall give written notice to the client that i) fees have been earned and ii) funds have been or will be transferred from the lawyer's trust account . . ." covers a lot of ground and that our difficulty seems to be over the words requiring that notice to be given "within a reasonable time before or after the transfer." He asked whether the proposed change to the rule would be sufficient if the latter phrase, regarding the timing of the notice, were omitted? If that change were made, he believed, a statement in the fee agreement establishing milestones and associated fee payments would suffice.

To that, another member, who had also been a member of the subcommittee, said the subject phrase about the timing of the required notice was the only reason he had voted against the proposal when it was considered by the subcommittee. This member believed that, if the lawyer is billing by the hour and fails to provide a notice contemporaneously with the drawing of his fee from the trust account, then Regulation Counsel would conclude that no statement about the billing arrangement in the fee agreement could suffice for the requisite notice of the subsequent draw, and Regulation Counsel would charge that Rule 1.5(f) had been violated, even if the rule did not contain the timing phrase.

The member who had spoken previously said that he would not think such a charge would be justified in that case.

Another member said he could not agree that, under the language proposed by the subcommittee but excluding any statement of the timing of the required notice, a statement in the fee agreement could be sufficient, unless the subcommittees' proposal were modified in some way to make that apparent.

Another member asked how a notice that fees have been earned could be given in advance, in the fee agreement itself.

To that, another member responded that, with a rule requiring that written notice be given to the client that fees have been earned and funds have been or will be transferred from the lawyer's trust account but omitting any requirement about when that notice must be given, that would just mean that lawyers must adapt their fee procedures to meet that first requirement; if their billing methods are such that the required information can be given in an initial fee agreement, then they may do that, but, if their billing methods are not amenable to that approach, then they might have to provide a contemporaneous notice in order to comply with the rule's simply-stated mandate.

The Chair noted that the conversation had returned to the proposed changes to Rule 1.5(f) rather than to balance of the subcommittee's recommendations, regarding the Rule 1.15 series of rules. After some discussion, the Committee decided not to deal further with Rule 1.5(f) at this meeting, and the Chair asked that Sudler consider the question further and check what other states have done with respect to the matter of giving clients adequate notice about when and how much fees will be withdrawn from trust account deposits.

To the Chair's request, Sudler noted that Colorado's *Sather* case had been at the cutting edge of the issue among all the licensing jurisdictions in 2005, but he agreed to check further as the Chair had requested.

A member, who practiced at a large law firm, commented that her colleagues there are constantly reminded that they need to find ways to bill other than on an hourly rate. This is, she said, an important

and timely matter. Another member noted that Jim Calloway, of the Oklahoma bar, has gathered information about fees and billing practices for the American Bar Association.[4]

Upon a vote, without dissent, the Committee approved recommending to the Court that current Rule 1.15 be replaced by the subcommittee's proposed Rules 1.15A through 1.15E.

The Chair thanked the members of the subcommittee for their efforts, and Diana Poole, speaking as the director for the Colorado Lawyer Trust Account Foundation, thanked the subcommittee and the whole Committee for their work on the changes.

III. *Consideration of Rules Changes to Recognize Colorado Changes Regarding Marijuana Sale and Usage*.

The Chair turned the Committee's attention to the pending proposals to amend the Rules to accommodate the recent amendments to the Colorado Constitution regarding marijuana use and commerce by noting that, at its thirty-sixth meeting, on July 26, 2013, the Committee had agreed to adopt the proposal submitted to the Committee by the marijuana amendments subcommittee at that meeting, with some limited changes to be made thereafter by the subcommittee under instruction from the whole Committee. The expectation had been that the additional changes could then be approved by the whole Committee by email communications. But the subcommittee's work turned out to be more extensive and time-consuming than had been anticipated, and the email approval of further changes was never undertaken. Part of that delay, the Chair said was attributable to the comments that Committee member Anthony van Westrum, who had not been a member of the subcommittee, emailed to the subcommittee. The Chair added that there was a conflict between speed and getting it right; she noted that the Committee needed to get a proposal to the Court quickly but also needed to consider any further, helpful, comments.

The Chair asked Judge Webb, the chair of the marijuana amendments subcommittee, to lead the discussion from there.

Webb pointed the members to page 50 of the meeting package for the subcommittee's Second Supplemental Report, noting that van Westrum's email to the subcommittee begins at page 56 of the package.

Following the thirty-sixth meeting of the Committee, Webb said, the subcommittee had two pending tasks, dealing with proposed Rule 8.6 and with proposed changes to Rule 8.4.

With respect to proposed Rule 8.6, the whole Committee had approved changes to the subcommittee's earlier proposal, which moved references to specific marijuana provisions in the Colorado Constitution out of the comments and into to the text of Rule 8.6, worded in a way that would accommodate future amendments that might be made to the Constitution. That was a mechanical process that involved dropping what had been proposed as Comment 2 to Rule 8.6. In the course of that drafting, the Chair, though not a subcommittee member, had spotted an ambiguity that might be read to require the lawyer to assure that proposed activity by a client actually complied with the state's applicable marijuana laws, an ambiguity that was resolved by insertion of a "reasonable belief" qualifier.[5]

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4. *See, e.g.,* http://www.americanbar.org/publications/law_practice_magazine/2013/may-june/practice-management-advice.html.

5. *See* the subcommittee's report at page 53 of the materials provided to the Committee members for this thirty-seventh meeting.

Webb noted that van Westrum objected, in his email, to what he perceived as an unnecessary and misleading paraphrasing of Rule 8.6 in the proposed comment to it, as revised by the subcommittee.[6]

As to the proposed changes to Rule 8.4, Webb explained that the subcommittee believed that, at the Committee's thirty-sixth meeting, on July 26, 2013, the Committee had approved the subcommittee's submission subject to a concern that the safe harbor that would be provided to Colorado lawyers with regard to marijuana activities that conformed to Amendments § 14 and § 16 of Colorado Constitution should extend only to the lawyer's personal use, not also to the lawyer's participation in commercial activities that are provided for in Amendment § 16(1)(b). After the Committee's July 26, 2013, the subcommittee worked through several iterations of changes to provide that limitation, acting by email. Again, van Westrum objected, as stated in the email that is included in the meeting package, to the use, in proposed Comment [2A], of the phrases "medical use" and personal use" to characterize activities that are thereafter specifically delineated in the comment by direct citation to particular provisions within the two constitutional amendments, Amendment § 14 and Amendment § 16. Van Westrum had noted that the constitutional text extends "use" beyond its common limitations to include such things as cultivation, transport, and gifts, even without regard to the amendment's reach into commercial activities, suggesting that the paraphrasing in the comment might be deemed to limit the activities that lawyers may engage in to a narrower subclass than the full breadth of activities permitted by the actual constitutional provisions. Additionally, van Westrum pointed out that the amendments permit marijuana activities in care-giving roles that might not be included in the subcommittee's paraphrasing about a "lawyer's 'medical use' or 'personal use' of marijuana"; that, Webb said, was a swamp the subcommittee chose not to wade into.

Webb reported that the third issue van Westrum had raised with the subcommittee was the distinction between a lawyer's personal use of marijuana and the lawyer's engagement in marijuana commerce. The members of the subcommittee believed that the matter had been closed by the vote of the whole Committee at its thirty-sixth meeting, in July. Van Westrum had pointed out to the subcommittee that some of the commercial activities permitted by Amendment § 16(4)(a) through (e) do not require licensure; included in these activities are selling marijuana accessories — which might include implements for growing marijuana — and leasing property to others for lawful marijuana activities. These are activities that some Colorado lawyers are likely to want to engage in, particularly if they own and lease cropland. But the subcommittee viewed the distinction between personal use and commercial use to be a bright line that could be utilized in the proposed comment. Underlying the subcommittee's view, Webb said, was the feeling that, if the Federal government were to begin actively to enforce Federal anti-marijuana law in Colorado, it would likely target commercial activities. He questioned whether the Court would want to take a public stand permitting lawyers to engage in those commercial activities, even if they are permitted to other Colorado citizens under the state's laws.

Webb then asked van Westrum to state his position, which he did largely by repeating what he had said in the email that had been provided to the members in the meeting package.

In partial answer to van Westrum's concern that the paraphrasing "medical use" and "personal use" were unnecessarily narrowing, Webb pointed out that the phrase "personal use" — while not defined in Amendment § 16 nor used in its text[7] — is the caption for Amendment § 16(3). Webb agreed that

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6. *See* page 59 of the materials provided to the Committee members for this thirty-seventh meeting.

7. Amendment § 16(2)(b) uses the term "personal use" in the definition of "consumer": "'Consumer' means a person twenty-one years of age or older who purchases marijuana or marijuana products for personal use by persons twenty-one years of age or older, but not for resale to others." And the section is captioned "Personal use and regulation of marijuana."

headings are not sufficient to determine the meaning of a provision but he felt that it would be inaccurate to say that "personal use" is without meaning in Amendment § 16.

A member said that she saw an additional issue, after reading van Westrum's email. She asked whether the Committee should revisit the whole matter. The change in Colorado law regarding the use of marijuana is in a complete state of flux, she said, with lots of state deadlines not being met. Legislation is needed to implement the voters' amendments to the Constitution, and the state will be working on the issues for years to come. The proposals that are before the Committee, she felt, have not helped at all to deal with the many issues. The proposed comment stresses that we would protect only activities that are permitted under Colorado marijuana law, notwithstanding that those activities will remain violative of Federal marijuana laws. But workers in the marijuana industry will be stepping on lots of law besides the specific Federal law criminalizing marijuana activities — she mentioned tax law and credit card and banking laws as examples. All of those laws are implicated in marijuana commerce, in which commercial lawyers are trying to provide legal services. Many federal laws, besides the marijuana criminal laws, will be violated in that activity, but the comment does not protect the lawyer against advice that implicates those other violations.

The Chair responded to those comments by saying she did not know what the member intended. Would she like to see a safe harbor for government lawyers?

The member said she was not seeking special treatment for government lawyers. Rather, she favored protecting lawyers' personal use of marijuana, permitting them to engage, without fear of discipline, in marijuana activities as others can do, personally, in Colorado. But that activity is not the activity that lawyers engage in when they provide legal services. The Committee, she said, was not addressing the commercial side of marijuana activities, though that may entail the kinds of activities that lawyers engage in as lawyers. We are just addressing personal use.

To the Chair's comment that Rule 8.6 has been written to permit lawyers to counsel and assist clients with respect to their commercial marijuana activities, the member countered that government lawyers do not counsel or assist *their* clients to engage in the conduct that is covered by references to Amendments § 14 and § 16. The proposal before the Committee does not protect government lawyers in the kinds of services they provide to their government clients regarding marijuana laws.

A member said that he agreed with the Chair, that proposed Rule 8.6 covers all activities in which lawyers may counsel or assist others regarding marijuana laws, including counseling or advising governmental entities about matters that relate to marijuana commerce or the development of laws and regulations for that industry.

A member spoke to say that the member who first spoke about government lawyers had effectively made a motion to table the discussion, and this member seconded that motion. This is the wrong forum, she commented, for these issues to be considered; she added that the Colorado Attorney General is considering these issues.

The member who now found that her comments had been taken as a motion to table the discussion, a motion that had been seconded, agreed that the Chair could take her comments as that motion. She asked that the subcommittee take a second look at all of the matter; and she clarified, in an answer to another member's inquiry, that her motion went to the entirety of the subcommittee's proposals, including the proposed Comment [2A] to Rule 8.4 as well as proposed Rule 8.6 and its comment.

The member who had said that he agreed that proposed Rule 8.6 covers all activities in which a lawyer may counsel or assist others regarding marijuana laws commented that he disagreed with the

proposition that this Committee should do nothing with respect to the situation created by the amendments to the Colorado Constitution that liberalized marihuana usage; he understood the proposition, he added, but he did not agree with it. He did not see why, given the comments about government lawyers, the proposed Rule 8.6 should be questioned. It is urgent, he said, that lawyers be permitted to provide counsel and assistance to those in the state who will now be engaged in marijuana commerce or in regulating that commerce, and to provide that counsel free from discipline by the Office of Attorney Regulation Counsel.

Webb added that he strongly opposed tabling of the matter, given the resources that the Committee and its subcommittee had devoted to it. He added that he had not anticipated such a backsliding from where the Committee had gotten to at its thirty-sixth meeting, in July. He noted that the subcommittee's initial report had spoken of a chilling effect on lawyers in the absence of particular treatment of the matter in the rules.

Van Westrum added that, although he had concerns about the details of the proposals, as he had expressed in his email, he did not want to see the matter tabled. Noting the state's need for lawyers' counsel and assistance if the commercialization of marijuana is to be accomplished as contemplated by the constitutional amendments, he asked for positive action on both of the proposals, on Rule 8.4 and on Rule 8.6.

On a vote of the members, the motion to table was defeated.

A member moved approval of the subcommittee's proposal for Rule 8.6 and its comment, saying that he would ask for a vote on Rule 8.4 after Rule 8.6 w as dealt with.

A member said she was concerned about the statement in the comment to Rule 8.6 that "[t]he phrase 'standing along' clarifies that this rule does not preclude disciplinary action" The comment's reference then to "federal law other than those prohibiting use, possession, cultivation, or distribution of marijuana" is, she said, too limiting, because it implies that a lawyer may be disciplined for counseling conduct that violates laws other than "those prohibiting use, possession, cultivation, or distribution of marijuana"

The member who had expressed concern for the impact of the proposals on government lawyers said she was concerned, too, that the proposed comment to Rule 8.6 left open the possibility that the lawyer could be subject to "disciplinary action" for counseling or assisting a client with respect to marijuana-related conduct that violated "federal law other than those prohibiting use, possession, cultivation, or distribution of marijuana," such as Federal tax law, credit and banking law, and the like. The words, she said, cut back on what we intend to be protection for lawyers who advise clients about all aspects of marijuana commerce.

Another member said she agreed with that observation. The text found in Rule 8.6 itself did not present that problem, she said, because, there, the "standing alone" phrase was not a limiting phrase. The comment, however, used the phrase in a different sentence structure, causing the problem that the other member had noted.

A member asked whether the problem could be resolved by deleting the phrase "a lawyer reasonably believes to be permitted" and leave the text dealing only with conduct that is in fact permitted by the Colorado Constitution.

To that, another member said that the concern had been directed toward the marijuana dealer who wants to open a bank account but finds that doing so would violate Federal law proscribing the deposit of drug-sourced money in a federally insured deposit account.

The member who had raised the issue said that she did not believe the issue was found in the text of Rule 8.6 but only in the wording of its comment.

To that observation, a member proposed that the Committee strike the proposed comment to Rule 8.6 in its entirety, leaving just the text of the rule itself, as proposed by the subcommittee. In his view, the identified problem was a troublesome one and that solution would work, because the paraphrasing of the comment was not useful. He added that, in this one instance, he would agree with van Westrum's concerns about paraphrasing, as expressed in his email.

On a vote, the Committee approved recommending to the Court the text of Rule 8.6 as proposed by the subcommittee, omitting any comment to the rule.

On a vote, the Committee then approved recommending to the Court Comment [2A] to Rule 8.4, as proposed by the subcommittee.

IV. *ABA Model Rules Changes.*

The Committee then turned briefly to the recent changes proposed to a number of the Model Rules of Professional Conduct by the American Bar Association, but it decided to leave discussion of its subcommittee's report on those changes to the next meeting of the whole Committee.

A member asked for a brief summary of those changes. Michael Berger, the chair of the subcommittee that has been considering them explained that, in 2012 and 2013, the ABA House of Delegates approved some of the amendments to the ABA's Model Rules that had been recommended by its "20/20 Commission." The impetus for those amendments had been the expansion of electronically stored and distributed information within the legal profession, an expansion that had become prominent since the ABA's last significant revisions to the Model Rules in 2002 and 2003 — the Model Rules that served as the basis for the Rules of Professional Conduct that became effective in Colorado in 2008. The subcommittee has studied these most recent amendments to the Model Rules in order to recommend which, if any, should be adopted in Colorado. The subcommittee's charge, Berger added, included proposing or rejecting any of those ABA changes or proposing other changes to the Colorado Rules.

Berger said that the subcommittee approached the task similarly to the manner by which a subcommittee of the Committee had considered the 2002 and 2003 amendments to the ABA Model Rules, which led to the recommended amendments to the Colorado Rules that the Court adopted in 2008. The subcommittee first divided the recent ABA amendments between the many that are minor and non-controversial, and those that are more substantive and deserving of more consideration. Working groups then studied in depth the latter group of the ABA amendments. Those working groups then reported to the whole subcommittee, which considered and acted upon their recommendations.

In addition to that activity, Berger said, a number of the subcommittee members believe that there are problems with Colorado Rules 4.4(b) and 4.4(c), regarding the inadvertent disclosure of documents — problems that the ABA had not addressed because the ABA Model Rules do not have provisions similar to those Colorado provisions. The subcommittee tasked with considering the ABA changes had recommended that another subcommittee be formed to give special consideration to Rules 4.4(b) and 4.4(c), but the Chair asked the subcommittee itself to do that work. Berger said the subcommittee would

have one more meeting, to consider Rules 4.4(b) and 4.4(c), and would provide a supplemental report to the Committee after that meeting.

Berger commented that the subcommittee's extant report on the ABA changes is found at page 68 of the meeting package for this meeting. The report is, he said, just twenty pages long, and the reader need not review all of the supporting material to understand the subcommittee's proposals.

Berger recommended that the whole Committee consider the subcommittee's report at its next meeting, at which time it can vote, serially, on the recommendations.

V. *Model Fee Agreements; Typo.*

James Sudler noted to the Committee that, during a break in the discussion at this meeting, a number of members had discussed the prospect of providing model fee agreements, or model provisions for engagement agreements regarding fee structures, for Colorado lawyers. Such models might, he noted, be added to the Rules by appendix, as the Recommended Model Pro Bono Policy for Colorado Licensed Attorneys and Law Firms are now appended to Rule 6.1.

Another member suggested, instead, that the Colorado Bar Association be urged to develop such models. He was joined in that suggestion by another member, who noted that the development of such models could be a very large undertaking; that member suggested that the work product of such an effort should not be issued under the Court's imprimatur.

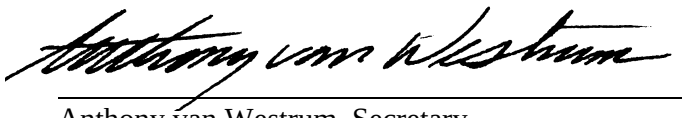
Another member noted that the Court already provides a model contingent fee agreement,[8] but he agreed that this new undertaking should not be pursued by this Committee for adoption by the Court.

The Chair remarked to Sudler that there is a typographical error in current Rule 1.5(f): The text refers to Rule 1.15(f)*(1)*, but it should refer simply to Rule 1.15(f), for that provision has no subdivisions.

VI. *Adjournment; Next Scheduled Meeting.*

The meeting adjourned at approximately 12:00 p.m. The next scheduled meeting of the Committee will be on Friday, December 6, 2013, 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 thirty-ninth meeting, on March 14, 2014.]

8. *See* Colorado Rules of Civil Procedure, Chapter 23.3, Rules Governing Contingent Fees, Rule 7, Forms.

The substitution distributed to the Committee at the meeting, by James S. Sudler III, regarding the "lookback provisions" of Rule 1.15B read as follows:

> Substitute the following as the text of Rule 1.15B(i), presently found on p. 4 of Exhibit A to the report of the Rule 1.15 Subcommittee dated October 2, 2013, p. 28 of the Meeting Materials provided by the Chair for the Thirty-seventh Meeting of the Supreme Court Standing Committee on Rules of Professional Conduct on October 11, 2013:
>
> > (i) If the lawyer or law firm discovers that funds of a client or third person have mistakenly been held in a COLTAF account in a sufficient amount or for a sufficiently long time so that interest or dividends on the funds being held in such account exceeds the reasonably estimated cost of establishing, maintaining, and accounting for a trust account for the benefit of such client or third person (including without limitation administrative costs of the lawyer or law firm, bank service charges, and costs of preparing tax reports of such income to the client or third person), the lawyer shall request, or shall cause the law firm to request, a refund from COLTAF of the interest or dividends, for the benefit of such client or third persons, in accordance with written procedures that COLTAF shall publish and make available through its website and shall provide to any lawyer or law firm upon request.
>
> The substitution differs from the text contained in the report as follows:
>
> > (i) If the lawyer or law firm discovers that funds of a client or third person have mistakenly been held in a COLTAF account in a sufficient amount or for a sufficiently long time so that interest or dividends on the funds being held in such account exceeds the reasonably estimated cost of establishing, maintaining, and accounting for a trust account for the benefit of such client or third person (including without limitation administrative costs of the lawyer or law firm, bank service charges, and costs of preparing tax reports of such income to the client or third person), the lawyer shall request, or shall cause the law firm to request, a refund from COLTAF ~~**to the COLTAF account**~~ of the interest or dividends***, for the benefit of such client or third persons,*** in accordance with written procedures that COLTAF shall publish and make available through its website and shall provide to any lawyer or law firm upon request.
>
> The substitution changes the text of Current Rule 1.15(h)(3) as follows:
>
> > If ~~**a**~~ ***the*** lawyer or law firm discovers that funds of ~~**any**~~ ***a*** client or third person have mistakenly been held in a ~~**trust**~~ ***COLTAF*** account ~~**for the benefit of COLTAF**~~ in a sufficient amount or for a sufficiently long time so that interest ***or dividends*** on the funds being held in such account exceeds the reasonably estimated cost of establishing, maintaining***,*** and

accounting for a trust account for the benefit of such client or third person (including without limitation administrative costs of the lawyer or law firm, bank service charges, and costs of preparing tax reports of such income to the client or third person)***,*** the lawyer ~~**or**~~ ***shall request, or shall cause the*** law firm ~~**shall request COLTAF to calculate and remit trust account**~~ ***to request, a refund from COLTAF of the*** interest ~~**already received by it to the lawyer or law firm**~~ ***or dividends,*** for the benefit of such client or third ~~**person**~~ ***persons,*** in accordance with written procedures that COLTAF shall publish and make available through its website and shall provide to any lawyer or law firm upon request.