COLORADO SUPREME COURT STANDING COMMITTEE ON THE COLORADO RULES OF PROFESSIONAL CONDUCT

AGENDA

October 27, 2023, 9:00 a.m.
The Supreme Court Conference Room and via Webex

Webex link:
https://judicial.webex.com/judicial/j.php?MTID=m0f1902ca771af06bbdfefc06bcd65fc9

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1. Call to Order [Judge Lipinsky].

2. Approval of minutes for July 28, 2023, meeting [attachment 1].

3. Old business:

   a. Report on the patent harmonization initiative [Judge Lipinsky] [attachment 2].

   b. Report on the proposed amendments to Rule 1.4 and the comments thereto [Judge Lipinsky] [attachment 3].

   c. Report on the proposed amendments to Rules 1.5 and 1.8 [Judge Lipinsky] [attachment 4].

   d. Report on the proposed amendments to comment [14] to Rule 1.2 [Judge Lipinsky].

   e. Report from the Rule 5.5 subcommittee [Cecil Morris].

   f. Report from the PALS II subcommittee [Judge Espinosa] [attachment 5].

   g. Report from the reproductive health subcommittee [Nancy Cohen] [attachment 6].

   h. Report from the AI subcommittee [Julia Martinez].

4. New business.

   a. Proposal to form a Rule 1.2 subcommittee [Judge Lipinsky] [attachment 7].

   b. Intentional misgendering and Rule 8.4 [Judge Lipinsky].

   c. Report on ABA Resolution 100 and adoption of amendments to Rule 1.16 [Mr. Masciocchi] [attachment 8].

5. Adjournment.

Upcoming meeting dates: January 26, 2024; April 26, 2024; July 26, 2024; September 27, 2024; and January 25, 2025.

Judge Lino Lipinsky, Chair
Colorado Court of Appeals
lino.lipinsky@judicial.state.co.us

Attachment 1

COLORADO SUPREME COURT

STANDING COMMITTEE ON THE RULES OF PROFESSIONAL CONDUCT

Approved Minutes of Meeting of the Full Committee
on
July 28, 2023
Sixty-Seventh Meeting of the Full Committee

The sixty-eighth meeting of the Colorado Supreme Court Standing Committee on the Rules of Professional Conduct was convened at 9:03 a.m. on Friday, July 28, 2023, by Chair Judge Lino Lipinsky de Orlov.

Present at the meeting, in addition to Judge Lipinsky and liaison Justice Maria Berkenkotter, were Nancy Cohen, Cynthia Covell, Katyoun Donnelly, Judge Adam Espinosa, Scott L. Evans, Margaret Funk, Erika Holmes, April Jones, Judge Bryon M. Large, Julia Martinez, Stephen G. Masciocchi, Noah Patterson, Henry R. Reeve, Libby Truitt (guest), Jennifer Wallace, Frederick Yarger, and Jessica Yates.

Present for the meeting by virtual appearance were Christy DiMaria (guest), Thomas E. Downey, Jr., Marcy Glenn, April Jones, Matthew Kirsch, Molly Kocialski (guest), Cecil E. Morris, Jr., Troy R. Rackham, Alexander R. Rothrock, Marcus L. Squarrell, and Judge John Webb. Committee members excused were Marianne Luu-Chen, Justice Monica Márquez, David Stark, Robert Steinmetz, James Sudler, and Eli Wald.

1. CALL TO ORDER. Judge Lipinsky called the meeting to order at 9:03 a.m. He welcomed those attending in person or virtually. He reviewed the names of all attendees and noted those having excused absences. Judge Lipinsky also welcomed the three new members to the Committee — Ms. Donnelly, Mr. Evans, and Mr. Masciocchi.

2. APPROVAL OF MINUTES FOR APRIL 14, 2023, MEETING. The Committee reviewed the minutes from the April 14, 2023, meeting. Mr. Reeve moved to approve the minutes without amendment. The Committee unanimously voted to approve the minutes.

3. REPORT FROM THE PALS II COMMITTEE. Judge Espinosa reported on the PALS II subcommittee's work. The subcommittee provided a nine-page memorandum regarding recommendations of rule changes. There is a redlined version, as well. The subcommittee believes that it has addressed all of the concerns previously expressed. The majority of the changes were to the 5 series Rules, although there were also some others. Judge Espinosa suggested that it would be most efficient to focus on the Rule 5 series first. Judge Lipinsky agreed.

Mr. Reeve asked whether the proposed amendments address a lawyer (or firm) employing licensed legal paraprofessionals (LLPs) compared to LLPs practicing independently outside of a law firm. The committee discussed the issue of whether the LLPs likely will be working in a firm or working in their own firm. The intent of these Rules is to make sure that LLPs will comply with their own Rules and that lawyers would still work under the Rules of Professional Conduct.

Lawyers need to be cognizant of the fact that LLPs will have a limited scope of practice. A lawyer could not ask an LLP to take an expert deposition, for example. A member suggested, however, that an LLP could provide some administrative supervision of a lawyer. The Rules do not get into administrative supervision. As a result, a member suggested that the Rules need to be clear that an LLP could be subordinate for some issues but a supervisor for other issues (e.g., administrative issues). For example, if an LLP owned the firm, the firm could hire an attorney and the LLP could provide the administrative supervision in terms of approving time off, handling administrative matters, etc. The LLP could not supervise the actual practice of law, such as taking expert depositions, making final decisions on a case, or developing strategy. The key is that the lawyer needs to have the independent judgment.

Judge Espinosa noted that there is a link to all of the Rules being discussed at the end of the materials from the PALS II subcommittee circulated together with the meeting agenda. Judge Lipinsky displayed the Rules on the screen. Rule 5.1(b) of the LLP Rules clarifies that an LLP shall not have direct supervisory responsibilities over a lawyer. The LLP Rules are outside of the scope of what this Committee is doing. We are trying to harmonize the Rules of Professional Conduct with the LLP Rules to ensure that they work consistently and together. One member suggested that the Rule 5.0 series changes are appropriate and work in harmony with the LLP Rules.

One member raised a concern about Rule 5.4(f). Rule 5.4(f) provides, in part, that a lawyer cannot hire and use an LLP who has been suspended or disbarred. The member wanted to make sure that the Rules synchronize with the LLP to make sure that the cross-references are correct. The Committee compared the Rules of Professional Conduct with the LLP Rules. They appear to harmonize.

One member suggested that it would be important to state in the Rules of Professional Conduct that lawyers cannot be supervised in the practice of law by a nonlawyer. One member suggested that this is covered by 5.4(c), which provides "[a] lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services."

A member suggested that the Rules of Professional Conduct should be clear in Rule 5.1(b) that LLPs are always subordinates and cannot supervise lawyers in the practice of law. A lawyer should always have to supervise LLPs or take responsibility for the conduct of LLPs. Another member suggested that the Supreme Court's idea behind the LLPs is that they practice independently, in a limited fashion, like nurse practitioners or physician assistants. The Court explicitly rejected the model that LLPs would have to be supervised by lawyers in every circumstance. The policy reasons for that decision included the need to provide legal services in rural areas and other areas where the supply of legal services is scarce. The Court acted intentionally to allow LLPs to practice independently for these reasons. It is not this Committee's prerogative to change that fundamental policy choice. Although we are likely to see LLPs practicing in firms, the Court made an independent decision to allow LLPs to practice independently in areas where they would need to do so.

A member suggested that the current draft treats LLPs as lawyers in some Rules and nonlawyers in other parts of the Rules. It is important to define LLPs in the same way. They are nonlawyers. Rule 5.1 requires an LLP to act consistent with the LLP Rules. The Committee discussed the potential for confusion from Rule 5.3(b) because the rule suggests that, in all cases, a lawyer has the responsibility to ensure that the LLP conforms his or her conduct to an LLPs professional obligations. That would not be accurate or applicable to an LLP practicing independently. The member suggested that Rule 5.3(b) should say something like, "[a] lawyer having direct supervisory authority over the nonlawyer or LLP ***if the LLP is acting outside the scope of an LLP's practice*** shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer."[1]

A member suggested that there are two concepts. The first is whether a lawyer has direct supervisory authority over an LLP, which would require the lawyer to supervise the LLP to ensure that the LLP conforms his conduct to the LLP Rules. The second is whether a lawyer has direct supervisory authority over an LLP to ensure that the lawyer conforms his conduct to the Rules of Professional Conduct. Judge Lipinsky suggested that perhaps a change to the title of Rule 5.1 could address the issue.

Another member suggested that, if we took the reference to LLPs out of Rule 5.1, it could address the issue because Rule 5.3(c) directly addresses it. It is perhaps the redundancy that gives rise to the confusion. Another member suggested that it would help to remove the redundancy between Rule 5.1 and Rule 5.3. Members suggested that the potential for confusion could perhaps be avoided if Rule 5.3 provided that there are instances where a lawyer needs to ensure that subordinate lawyers adhere to the Rules of Professional Conduct and there are instances where a lawyer needs to ensure that LLPs conform their conduct to the LLP Rules.

Another member suggested that the simplicity and clarity of Rule 5.3 is beneficial. It makes it clear that a lawyer with supervisory responsibility must supervise all nonlawyers within that ambit of supervisory responsibility. LLPs are simply a subset of nonlawyer staff. The simplicity works. Another member noted that Rule 1 specifically defines an LLP and the roles and responsibilities of an LLP. That definition then is incorporated into all of the proposed LLP Rules, so the definition should resolve the issues. The objective of the subcommittee was to make minimal changes to the Rules of Professional Conduct and keep them largely in the condition that they were in. Judge Espinosa thought it would be helpful to the subcommittee to identify a few Rules.

A member moved to: (1) remove all of the references to LLPs in the proposed Rule 5.1; (2) amend proposed Rule 5.3(b) to state a lawyer having direct supervisory authority over the nonlawyer or LLP ***that is compatible with the practice of an LLP*** shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and (3) remove the phrase "in addition to the lawyer's responsibilities for an LLP's conduct under Rule 5.1(c)" contained in draft Rule 5.3(c). The motion was seconded. A discussion ensued.

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[1] The proposed revisions are in bold and italic font to delineate the difference.

Another member suggested that the current proposal, particularly Rule 5.1, is clear and provides appropriate guidance. Another member questioned what would be lost if the term LLPs is eliminated from Rule 5.1. The member explained that the only concept that would be lost is the idea that lawyers are responsible for requiring LLPs to comply with the LLP Rules of Professional Conduct.

Another member suggested that revisions need to be made to clarify that an LLP cannot supervise a lawyer over the practice of law. The member suggested that we should add a second sentence to Rule 5.4(b) that says "A lawyer shall not be supervised by an LLP." Another member suggested revising Rule 5.4(d)(1) to remove the phrase "other than an LLP." The Committee discussed the fact that this phrase is contained in proposed Rule 5.4(f) and is needed because the two subsections work together in the proposed Rules to avoid confusion.

Judge Lipinsky asked whether there are any comments to the Rule 8 series of the proposed changes. A member suggested that the proposed Rule 8.3 contains confusing language because if references "the Lawyer Rules of Professional Conduct." The member suggested that the proposed Rule should delete the term "Lawyer" immediately preceding the term "Rules of Professional Conduct." That proposed change would also apply to 5.4(d)(2), which would not permit an LLP to direct or control the professional independence of a lawyer.

A member suggested that we create a new subsection to proposed Rule 5.3 (e.g., Rule 5.3(d.1)) that breaks out the language to make it clear that a lawyer shall not be supervised by a nonlawyer. It is important to break out that language in a different section so it is clear that this is a departure from the Model Rules and unique to Colorado.

Another member suggested that C.R.C.P. 265 needs to be revised as well. The Committee discussed whether this Committee had that authority. Several members suggested that this Committee does not have jurisdiction over C.R.C.P. 265, but supported the proposition that this Committee should make a suggestion to the Standing Rules Committee because that Committee has jurisdiction over the Rules of Civil Procedure.

Regarding Rule 3.4, a member suggested that the title of the Rule be changed. The current title in the proposed Rules is "Fairness to Opposing Party, Counsel or LLPs." The member suggested changing the word "or" should be "and" so that the proposed Rule includes situations where an LLP supervises another LLP and situations where a lawyer supervises an LLP.

Another member suggested that we are rushing through this, so perhaps we should table the discussion. The Committee has covered a lot of great topics and there are a lot of good revisions in these proposed Rules, but the Committee needs to review and evaluate some of the details and not rush through them. This member's comment raised the question of when this Committee has to provide the proposed amendments to the Court for review and revision so that the amendments can be implemented sufficiently before LLPs become licensed. Ms. Yates explained that the first LLP bar exam will be in April 2024, so the amendments would need to be in place by June 1, 2024.

Judge Lipinsky steered the Committee back to the motion, which was to approve certain amendments to the draft LLP Rules. The first proposed amendment was to remove all references to LLPs in Rule 5.1. The second proposed amendment would revise Rule 5.3(b) to include the phrase "is compatible with the professional obligations of a lawyer or is compatible with the professional obligations of an LLP." The Committee took a straw vote. Eleven members voted in favor of this. Eight members voted against the proposal. The motion carried.

The third proposed amendment would be to have a new subsection under Rule 5.4 that would mirror Rule 5.4(d) but makes it clear that an LLP "shall not direct or control the independent judgment of a lawyer." This would be Rule 5.4(d-1). The Committee took a straw vote on the proposed amendment. A majority of the members voted in favor of the proposed amendment.

The fourth proposed amendment was to remove the phrase "in addition to the lawyer's responsibilities for an LLP's conduct under Rule 5.1(c)" contained in the proposed draft Rule 5.3(c) to remove the same phrase in proposed Rule 8.4(1). A majority of the members voted in favor of the proposed amendment.

4. REPORT FROM THE COMMENT [14] TO RULE 1.2 SUBCOMMITTEE. Mr. Patterson presented the proposed amendment to comment [14] of Rule 1.2. The subcommittee recommends revising comment [14] as follows (proposed revisions in red):

> A lawyer may counsel a client regarding the validity, scope, and meaning of Colorado constitution article XVIII, secs. 14 & 16, and Proposition 122, which established the Colorado Natural Medicine Act of 2022, and may assist a client in conduct that the lawyer reasonably believes is permitted by these constitutional provisions and statutes, and the statutes, regulations, orders, and other state or local provisions implementing them (including amendments to these statutes, regulations, orders and provisions). In these circumstances, the lawyer ~~shall~~ should also advise the client regarding related federal law and policy.

Mr. Patterson and others on the subcommittee explained that some of the substances approved by the Colorado Natural Medicine Act of 2022 are, like marijuana, illegal under federal law. The intention of the proposed comment is to follow a similar pattern as to the revisions to Rule 1.2 to align them with the comments relating to marijuana. A motion was made to approve these proposed revisions. The motion was seconded. A discussion ensued.

One member suggested that the comment is inconsistent with Rule 1.2(d), so the proposed comment should be a rule rather than a comment. The member suggested that this was a flaw in comment [14] to begin with. It should have been a new rule from the start. A member also suggested that the term "reasonably believes" is confusing because that standard is not applied in other portions of the Rules of Professional Conduct.

Another member inquired as to whether there would be a limiting principle to the proposed comment revisions. There are many circumstances where state law conflicts with federal law. What is the principle that allows the Committee to draw a line and make it clear when Colorado lawyers can advise and assist clients on crimes. What if Colorado law permitted carjacking while

federal law did not? It would be a problem to allow a lawyer to assist a client in carjacking even if state law did not criminalize the conduct.

Judge Lipinsky noted the history behind comment [14]. The Court insisted, as a compromise, on placing the cannabis language in a comment rather than in a black letter Rule. The Court did not appear comfortable with having an independent rule. The Court ultimately adopted the comment as a practical compromise. Given this history, it may be prudent to leave the comment as a comment because that is likely the only way the Court would approve it. Other members of the Committee noted that the composition of the Court has changed since the marijuana revisions, so the Court may now have an appetite to put the permission in a Rule rather than in a comment.

Several members noted that another subcommittee is considering revisions to Rule 1.2 relating to reproductive health. The Committee discussed whether it was reasonable to consider the proposals together. Ultimately the Committee elected to consider the proposals differently. A vote was taken on the proposed amendment to comment [14] of Rule 1.2, as reflected on page 17 of the materials circulated together with the meeting agenda. The motion carried. Judge Lipinsky will send a letter to the Court along with the proposed revisions to comment [14] to Rule 1.2.

5. REPORT ON THE STATUS OF THE PROPOSED AMENDMENTS TO RULE 1.4 AND THE COMMENTS THERETO. Judge Lipinsky noted that the Court has set a hearing date on the proposed changes to Rule 1.4 of the Colorado Rules of Professional Conduct. The hearing will be on September 20, 2023, at 3:30 p.m. Any person wishing to submit a comment on the proposed rule should submit it in writing on or before September 4, 2023, at 4:00 p.m. Comments and speaking requests may be emailed to supremecourtrules@judicial.state.co.us. More information about the hearing, the deadline to submit comments, and the format of comments can be found at the Court's website: https://www.courts.state.co.us/Courts/Supreme_Court/Rule_Changes.cfm.

6. REPORT FROM THE PATENT PRACTITIONER HARMONIZATION SUBCOMMITTEE. Mr. Rothrock reported on the patent practitioner harmonization subcommittee. The ultimate question is whether the Court wants to broaden the proposal beyond patent practitioners. The Committee needs an answer on this question to determine next steps. Mr. Rothrock will prepare a letter that Judge Lipinsky can send to the Court to gauge the Court's interest on whether it desires expansion of the Rule beyond patent practitioners.

7. REPORT FROM THE REPRODUCTIVE HEALTH SUBCOMMITTEE. Ms. Cohen reported on the proposed revision to Rule 1.2 relating to reproductive rights. The subcommittee has not formed a consensus about whether to revise the rule and if so, how to revise it. Mr. Masciocchi commented that this issue is different from the marijuana and mushroom issue because it involves opining on conduct in another state. A discussion ensued as to whether the rule needs to be revised at all given the differences in issues between reproductive rights and the marijuana/mushrooms issue.

Ms. Cohen suggested that this issue is more nuanced and that the conduct often would be in Colorado, even if the actions are taken by another state. Judge Lipinsky framed the issue as a

Colorado lawyer being exposed to criminal charges or discipline charges in another state that has more restrictive laws on reproductive rights. The objective is to provide guidance to Colorado lawyers to ensure that they would not be subject to reciprocal discipline in Colorado for providing advice to a client who goes to a different state where the conduct would be illegal. Mr. Masciocchi and Mr. Evans volunteered to join the subcommittee.

8. REPORT FROM THE RULE 1.5(E) SUBCOMMITTEE. Mr. Rothrock presented on Rule 1.5(e). Those present at prior meetings approved removing Rule 1.5(e) regarding referral fees because it conflicts with Rule 7.2(b). The proposed rule and comment would be limited to a lawyer's receipt of referral fees, rather than payment of referral fees. A lawyer cannot receive a referral fee from a nonlawyer when the referral is for nonlegal services for a client. A lawyer could receive a referral fee from a vendor for a referral of a former client or nonclient to the vendor. The question was where to put the revisions.

Mr. Rothrock noted that his memo describing the issue is included in the materials circulated together with the meeting agenda. The Memo starts on page 66 of the meeting materials. The main substantive issue is whether the conflict of interest represented by this Rule should be imputed to other lawyers in the firm. The subcommittee believes that the conflict should be imputed – e.g., if one partner in a firm cannot receive a referral fee from a vendor for referring a client to the vendor, no other partners in the firm ought to be able to receive a referral fee for the same conduct. Members discussed where the proposed rule should be placed.

A member took a straw poll from lawyers involved with providing ethical advice or representing lawyers relating to ethics issues. Seventy five percent of the lawyers who responded believed that the revisions should be in Rule 1.5 because that is the intuitive place where the lawyers would look for guidance on this issue. A member suggested that this data may not be aligned with what we are discussing because a referral fee is not an attorney fee. So while it may make sense to put a revision to any Rules relating to attorney fees in Rule 1.5, it would be confusing to put any new rule relating to ***referral*** fees (which are not attorney fees) in Rule 1.5. This proposal would eliminate the current reference to referral fees in Rule 1.5, which may result in clarity of the issue.

A member asked how imputation of a conflict from receiving a referral fee would work, particularly for larger firms. Mr. Rothrock suggested that the imputation would work the same way as the imputation of a conflict arising from receipt of a gift, which is contained in Rule 1.8(j). The subcommittee thought that this is similar enough to the issue of receiving a gift such that receipt of a referral fee should be imputed.

Another member suggested that, if the revision goes into Rule 1.8, it should be put at the end of the Rule rather than replacing Rule 1.8(j), which is the ban on sex with clients. It is better not to change the Rule structure because there are many PDJ opinions and other opinions that specifically reference Rule 1.8(j). Members suggested that the revision would be better after Rule 1.8(k).

One member suggested that it would be impossible to screen for conflicts relating to receipt of referral fees at a law firm. This would have to be addressed through training rather than through

conflict checking or anything else. Mr. Rothrock discussed the proposed comment, as well. If the Committee elects to put the new rule at the end of Rule 1.8, it would be reasonable to put the comment at the end of Rule 1.8's comments. The comment also should include a letter to demonstrate that it is different from the Model Rules. The comment would either be comment [24] or comment [23a].

A motion was made to adopt the Rule and comment with the reflected modifications in it, as redlined, but not to place them exactly where they are indicated to be placed, but to instead place the proposed Rule at Rule 1.8(l) and the proposed comment as Comment [24]. A member moved to revise the proposal to adopt the Rule as Rule 1.8(c)(2) and make current Rule 1.8(c) Rule 1.8(c)(1). The comment then would be comment [8a]. The motion carried.

Another motion was made to amend the proposal to place the proposed amendments under the umbrella of Rule 1.5 rather than Rule 1.8. The motion did not receive a second.

9. NEW BUSINESS.

A. Artificial Intelligence. The Committee discussed artificial intelligence and whether the Rules of Professional Conduct should be revised to address use and misuse of artificial intelligence by lawyers. The Committee was advised of a recent reported instance where a lawyer used artificial intelligence to come up with case citations to support an argument in his brief, which involved a misuse of ChatGPT and impacted the lawyer's ethical obligation. Another lawyer in southern Colorado recently was in the press for doing something similar. The Committee discussed the fact that artificial intelligence has been present for some time. Westlaw and Lexis use artificial intelligence, but the tools are different than ChatGPT.

Judge Lipinsky included in the materials for the committee meeting an article that addresses some of the issues and nuances involved with a lawyer using ChatGPT. The Supreme Court would like this Committee to form a subcommittee to address a lawyer's use of tools such as ChatGPT and whether the Unauthorized Practice of Law Rules also need amendments relating to use of artificial intelligence. There is an overlap with the Unauthorized Practice of Law Rules and we do not have jurisdiction over those Rules. Currently, there is a drafting subcommittee in the Unauthorized Practice of Law Committee that could work with our subcommittee to avoid duplication of efforts. Our subcommittee would work on possible amendments to the Rules of Professional Conduct, but it would work hand-in-hand with the Unauthorized Practice of Law subcommittee to identify uniform amendments to both the Rules of Professional Conduct and the Unauthorized Practice of Law Rules.

A member moved to form a subcommittee, which was duly seconded. The Committee took a vote on whether to form this subcommittee, as requested by the Colorado Supreme Court. The motion carried. If you would like to participate on the subcommittee, please email Judge Lipinsky by close of business on July 31, 2023. If any member would like to serve as chair of the subcommittee, please email Judge Lipinsky by July 31, 2023.

B. Remote Practice. Mr. Rothrock presented on remote practice. Think about a lawyer in Indiana who wants to live full time in Telluride but wants to continue his practice in

Indiana full time while residing in Colorado. Is that lawyer engaged in the unauthorized practice of law in Colorado? Different authorities have different opinions on this issue. The issue boils down to whether the lawyer is practicing law in Colorado even though he is representing Indiana clients on Indiana matters despite being physically present in Colorado. A motion was made to form a subcommittee to examine this issue and consider amendments to Rule 5.5 to address unique issues involved with remote practice. The motion carried. If any member would like to serve as chair of the subcommittee, please email Judge Lipinsky by July 31, 2023.

9. ADJOURNMENT. A motion to adjourn was made at 12:05 pm and was duly seconded. The motion carried. The next meeting of the Committee will be on October 27, 2023, at 9 a.m.

Respectfully submitted,

Troy R. Rackham, Secretary

Attachment 2

Supreme Court of Colorado

2 EAST 14TH AVENUE
DENVER, COLORADO 80203
(720) 625-5410

MARIA E. BERKENKOTTER
JUSTICE

September 8, 2023

The Honorable Lino S. Lipinsky de Orlov
Colorado Court of Appeals
Chair of the Standing Committee
2 East 14th Avenue
Denver, CO 80203
lino.lipinsky@colorado.judicial.state.co.us

VIA EMAIL

Re: Patent Practitioner Harmonization

Dear Judge Lipinsky,

The Court has considered the July 31, 2023 letter from the Standing Committee on the Colorado Rules of Professional Conduct (the Standing Committee) requesting some guidance regarding the request by the National Association of Patent Practitioners (NAPP) to harmonize the Colorado Rules of Professional Conduct (Colorado Rules) with the United States Patent and Trademark Office's (USPTO) Rules of Professional Conduct (the USPTO Rules). The Standing Committee asked if the Court would like the Committee to proceed with a full exploration of the NAPP's harmonization proposal without waiting for the American Bar Association (ABA) to act first.

The Court shares the Standing Committee's view that the issues raised by the NAPP are important, particularly given the presence of a USPTO here in Colorado. However, given the complexity of these issues and the significant time commitment this work would require, the court would like the Standing Committee to wait for these issues to develop further—either through action by the ABA or some other development which would shed light on how best to address the multitude of issues that the request raises—before the Committee embarks on a full exploration of the NAPP's proposal.

Our response is not intended to suggest that the court has any particular view with respect the NAPP's request, but rather simply reflects the Court's concern about asking Committee members to commit significant periods of time to consider issues that, for now, arise in an undeveloped legal landscape.

Very truly yours,

Maria E. Berkenkotter
Colorado Supreme Court

Attachment 3

Supreme Court of Colorado

2 EAST 14TH AVENUE
DENVER, COLORADO 80203
(720) 625-5410

MARIA E. BERKENKOTTER
JUSTICE

September 28, 2023

The Honorable Lino S. Lipinsky de Orlov
Colorado Court of Appeals
Chair of the Standing Committee
2 East 14th Avenue
Denver, CO 80203
lino.lipinsky@colorado.judicial.state.co.us

VIA EMAIL

Re: Proposed amendment to Colo. R.P.C. 1.4

Dear Judge, Lipinsky,

The Court has considered the proposed amendment to Colo. R.P.C. 1.4 as well as the comments we received during the notice and comment period following the publication of the proposed rule. The Court recognizes and appreciates the efforts that went into crafting the proposed amendment but has decided not to adopt the amendment.

Very truly yours,

Maria E. Berkenkotter
Colorado Supreme Court

Attachment 4

Alexander R. Rothrock
Attorney at Law
arothrock@bfwlaw.com

MEMORANDUM

TO: Honorable Lino S. Lipinsky de Orlov

FROM: Alec Rothrock, Chair, Rule 1.5(e) Subcommittee

DATE: October 13, 2023

SUBJECT: Proposed Rule on Lawyers' Receipt of Fees for Referring Clients to Third Parties for Nonlegal Services or Products

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1. Colo. RPC 1.5(e) states, "Referral fees are prohibited." Adopted in 1993 on the recommendation of the Barnhill Committee, Colo. RPC 1.5(e) is a non-ABA Model Rule that creates an absolute prohibition on a lawyer's receipt or payment of all referral fees. Colo. RPC 7.2(b), in contrast, is an ABA Model Rule that prohibits a lawyer's payment of most but not all referral fees.

2. Insofar as they regulate a lawyer's payment of a referral fee for the referral of legal business to the lawyer, these rules are somewhat inconsistent. For example, Colo. RPC 1.5(e) prohibits lawyers from paying any referral fees, whereas Colo. RPC 7.2(b)(2) permits lawyers to pay fees to not-for-profit referral services.

3. The inconsistency between these rules could be eliminated by simple expedient of repealing Colo. RPC 1.5(e), which would leave the more nuanced Colo. RPC 7.2(b) to regulate exclusively lawyers' payment of referral fees.

4. However, without more, the repeal of Colo. RPC 1.5(e) would leave unregulated one aspect of that rule that Colo. RPC 7.2(b) does not cover: the propriety of a lawyer's *receipt* of a fee for referring clients and non-clients to third parties (who may or may not be lawyers) for non-legal services or products. For example, an informal CBA Ethics Committee opinion concludes that Colo. RPC 1.5(e) prohibits a lawyer from receiving compensation for referring law clients to an investment advisor.[1] Colo. RPC 7.2(b) is not mentioned in the opinion because it does not regulate the receipt of such referral fees. In general, this type of referral fee is most commonly associated with estate planning practice and may be common in other jurisdictions.

[1] Abstract 96/97-13, https://www.cobar.org/For-Members/Committees/Ethics-Committee/Abstracts-of-Responses-to-Letter-Inquiries/1996-1997-Archive-Letter-Abracts#13.

5. Many other jurisdictions' ethics committees have issued opinions that address, under familiar conflicts of interest rules, whether a lawyer may receive a fee from a third party for referring a current client for nonlegal services. J. Dzienkowski and R. Peroni, "Conflicts of Interest in Lawyer Referral Arrangements with Nonlawyer Professionals, 21 *Geo. J. Legal Ethics* 197, 209-10 (Spring 2008). About half conclude the conflict is waivable. The other half conclude that the conflict is not waivable because referral fee arrangements "compromise the referring attorney's professional independence" and create a financial conflict of interest for the referring attorney that undercuts the attorney's duty of loyalty to his or her client. These opinions generally do not address a lawyer's receipt of compensation from a third party for the referral of *non-clients*, including former clients, probably because Rules 1.7(a)(2) and 1.8(a) do not apply in these circumstances.

6. If the Court did nothing but eliminate Colo. RPC 1.5(e), I and perhaps other members of the CBA Ethics Committee would urge that committee to issue a formal opinion on this subject. If the CBA Ethics Committee agreed to take up the issue, it likely would agree with the consensus in other states that the question turns largely if not entirely on an application of Rules 1.7(a)(2) and 1.8(a). It is anyone's guess whether that opinion would side with those states that consider the conflict waivable or with those states that consider it nonwaivable. This is a classic policy issue.

7. Rather than leave it to the CBA Ethics Committee to address this conduct under existing rules, the Standing Committee chose to recommend a specific rule. That is what the Court has before it. Except for nominal gifts given as an expression of appreciation, the proposed rule would prohibit a lawyer from receiving a fee for referring current clients, but not former clients or others, to a third party for nonlegal services or products.

8. The Standing Committee's recommendation includes placing the new rule in Colo. RPC 1.8 among the assortment of specific conflicts of interest rules involving current clients, and, more specifically, alongside the conceptually analogous rule regulating a lawyer's acceptance of gifts from a client. As proposed, this conflict of interest would be imputed to other lawyers in the lawyer's law firm or legal department by operation of Colo. RPC 1.8(k).

Attachment 5

Memorandum

To: Standing Committee on the Rules of Professional Conduct

From: Adam J. Espinosa, Chair of the LLP Subcommittee

Date: October 11, 2023

Re: Potential Changes to Colorado Lawyer Rules of Professional Conduct based on the Licensed Legal Paraprofessional (LLP) Program

Summary

The LLP Subcommittee has set forth our recommendations for amendments to the Colorado Rules of Professional Conduct in summary fashion and with proposed edits of the current rule. Our focus was primarily on rules that might need to be amended. As you will see, many of the Rules of Professional Conduct will not be affected by the proposed LLP Rules of Professional Conduct and the primary set of rules that would need amendment are the Rule 5 Series set of Rules of Professional Conduct.

On the last page of this memorandum, you will find links to the LLP rules adopted by the Court. Also, I have included an attachment to this memorandum that includes a redline copy of our proposed amended rules. Our ask of the Standing Rules Committee is to vote to approve our recommendations for amendments to the Rules of Professional Conduct in order to further implement the LLP program.

Background

The LLP subcommittee of the Standing Committee on the Rules of Professional Conduct was asked to review the proposed LLP Rules of Professional Conduct and make recommendations to this committee for possible changes to the Colorado Rules of Professional Conduct based on the proposed LLP rules. Our task was not to evaluate the proposed LLP Rules of Professional Conduct nor make recommendations to those rules because a separate Colorado Supreme Court Committee was tasked with that responsibility. Our subcommittee is comprised of Erika Holmes, Esq., April Jones, Esq., Matthew Kirsch, Esq., Marcus Squarrell, Esq., Professor Eli Wald, Dave Stark, Esq., Jessica Yates, Esq., and Judge Adam J. Espinosa.

At the outset, our subcommittee was provided a full set of the proposed LLP Rules of Professional Conduct, the LLP Memorandum to the Supreme Court, and the Court's order regarding the implementation of an LLP program. The subcommittee met and decided to do a complete review of each Rule of Professional Conduct, the scope, and the preamble to those rules to determine if the proposed LLP rules would necessitate a change to any of the rules. We divided ourselves into smaller groups where we were each assigned to review a particular set of rules and make recommendations. Those recommendations comprise this memo and are below.

Rules

Preamble

In the preamble to the lawyer rules of professional conduct, we propose an amendment to paragraph 5 to include a reference to LLPs as set forth below.

Preamble: A Lawyer's Responsibilities

[5] A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs. A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers, licensed legal paraprofessionals, and public officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process.

Rule 1 Series

We found no relevant rules in the Rule 1 Series set of rules that need amendment, but we did identify Colo. RPC 1.0(c) and the definition of "firm" or "law firm" as a definition that would need to be amended to include LLPs. As background, the proposed LLP definition for "firm" is as follows:

> "Firm" denotes a partnership, professional company, or other entity or a sole proprietorship through which a lawyer or lawyers, an LLP or LLPs, or a combination of lawyers and LLPs render legal services.

We recommend amending the definition of "firm" or "law firm" in Colo. RPC 1.0(c) of the lawyer rules to include reference to LLPs. Our proposed amendment is below:

> "Firm" or "law firm" denotes a partnership, professional company, or other entity or a sole proprietorship through which a lawyer, lawyers, or combination of lawyers and LLPs render legal services; or lawyers employed in a legal services organization or the legal department of a corporation or other organization.

Last, the Standing Rules Committee will also want to consider adding a cross-reference to the definition of an LLP in the definitional section of the lawyer rules in Colo. RPC 1.0. We recommend adding a cross reference to the definition of an LLP in the terminology section of the rules by adding a new Colo. RPC 1.0(g) that states as follow:

> "Licensed legal paraprofessionals" ("LLPs") are individuals licensed by the Supreme Court pursuant to C.R.C.P. 207 to perform certain types of legal services only under the conditions set forth by the Court. They do not include individuals with a general license to practice law in Colorado. LLPs are subject to the Colorado Licensed Legal Paraprofessional Rules of Professional Conduct.

Adding a new Colo. RPC 1.0(g) would require the re-lettering of the current Colo. RPC 1.0(g)-(n), inclusive.

Rule 2 Series

We found no relevant rules in the Rule 2 Series set of rules that need amendment.

Rule 3 Series

We found a few minor instances where we are recommending amendments to the Rule 3 Series rules. Specifically, we recommend changing the title of Rule 3.4 to include LLPs and a few minor amendments to Rule 3.7 as reflected below.

Rule 3.4. Fairness to Opposing Party, Counsel, and LLPs

Rule 3.7. Lawyer as Witness

(b) A lawyer may act as advocate in a trial in which another lawyer or LLP in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

Rule 4 Series

We recommend amendments to a few Rule 4 Series rules. The proposed amendments would presume people being assisted by LLPs are represented rather than unrepresented. Further, we presume that an LLP privilege would be created and recognized. We understand the larger LLP Rules Committee is recommending a statutory client-LLP privilege as part of their proposed statutory rules changes needed to implement the program. Below are our recommendations for amendments.

Rule 4.2. Communication with Person Represented by Counsel or an LLP

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer or LLP in the matter, unless the lawyer has the consent of the other lawyer or LLP or is authorized to do so by law or a court order.

Rule 4.3. Dealing with Unrepresented Person

In dealing on behalf of a client with a person who is not represented by counsel or an LLP, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel or an LLP, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

Rule 5 Series

We found several instances where we are recommending changes to the Rule 5 Series rules. Our recommended amendments are below.

Rule 5.1. Responsibilities of a Partner or Supervisory Lawyer

(a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

(c) A lawyer shall be responsible for another lawyer’s violation of the Rules of Professional Conduct if:

(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Rule 5.3. Responsibilities Regarding Nonlawyer Assistance[1]

With respect to nonlawyers employed or retained by or associated with a lawyer:

(a) a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

COMMENT

[2A] In addition, lawyers may employ as assistants in their practice LLPs acting in a capacity outside of the scope of the LLPs' licensure. For example, a lawyer may ask an LLP to perform paraprofessional services that LLPs are not authorized to perform. Such LLPs, whether employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services. When employing an LLP outside the scope of the LLP's licensure, a lawyer must treat the LLP as a nonlawyer and make reasonable efforts to ensure that the LLP's services are provided in a manner that is compatible with the lawyer's professional obligations. A lawyer must give such LLPs appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client, and should be responsible for their work product.

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[1] The subcommittee initially believed the title of 5.3 should be changed to "Responsibilities Regarding Nonlawyers". After receiving some feedback, a concern was that title might be overbroad and a recommendation was made to revert back to the language in Colo. RPC 5.3 and include "Assistants" in the title or use the ABA Model Rule language in 5.3 that includes "Assistance". Our subcommittee was split on whether to change from our initial title. This memo reflects the use of the ABA Model Rule word "Assistance", which seemed to garner more support than the use of the word "Assistants", if the initial title would not be used for the rule.

Rule 5.3A Responsibilities Regarding LLPs

(a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all LLPs in the firm conform to the LLP Rules of Professional Conduct and that each LLP's conduct is compatible with the professional obligations of the lawyer.

(b) A lawyer having direct supervisory authority over an LLP shall make reasonable efforts to ensure that the LLP conforms to the LLP Rules of Professional Conduct and that LLP's conduct is compatible with the professional obligations of the lawyer.

(c) A lawyer shall be responsible for an LLP's violation of the LLP Rules of Professional Conduct if:

(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the LLP practices, or has direct supervisory authority over the LLP, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

COMMENT

[1] This Rule applies when a lawyer is working with an LLP in the lawyer's firm who is performing services within the scope of the LLP's licensure. *See also* Rule 5.3 (responsibilities regarding nonlawyer assistance).

Rule 5.4. Professional Independence of a Lawyer

(a) A lawyer or law firm shall not share legal fees with a nonlawyer other than an LLP, except that:

(1) an agreement by a lawyer with the lawyer's firm, partner, LLP, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's or the LLP's death, to the lawyer's or the LLP's estate or to one or more specified persons;

(2) a lawyer who undertakes to complete unfinished legal business of a deceased lawyer or LLP may pay to the estate of the deceased lawyer or LLP that proportion of the total compensation which fairly represents the services rendered by the deceased lawyer or LLP;

(3) a lawyer who purchases the practice of a deceased, disabled, or disappeared lawyer or LLP may, pursuant to the provisions of Rule 1.17, pay to the estate or other representative of that lawyer or LLP the agreed-upon purchase price;

(4) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even

though the plan is based in whole or in part on a profit-sharing arrangement; and

(5) a lawyer may share court-awarded legal fees with a nonprofit organization that employed, retained or recommend employment of the lawyer in the matter.

(b) A lawyer shall not form a partnership with a nonlawyer other than an LLP if any of the activities of the partnership consist of the practice of law.

(c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

(d) A lawyer shall not practice with or in the form of a professional company that is authorized to practice law for a profit, if:

(1) A nonlawyer other than an LLP owns any interest therein, except that a fiduciary representative of the estate of a lawyer or LLP may hold the stock or interest of the lawyer or LLP for a reasonable time during administration; or

(2) A nonlawyer has the right to direct or control the professional judgment of a lawyer.

(d-1) An LLP shall not have the right to direct or control the professional judgment of a lawyer.

(e) A lawyer or LLP shall not practice with or in the form of a professional company that is authorized to practice law for a profit except in compliance with C.R.C.P. 265.

(f) For purposes of this Rule, a "nonlawyer other than an LLP" includes (1) a lawyer or LLP who has been disbarred, (2) a lawyer or LLP who has been suspended and who must petition for reinstatement, (3) a lawyer or LLP who is subject to an interim suspension pursuant to C.R.C.P. 242.22, (4) a lawyer or LLP who is on inactive status pursuant to C.R.C.P. 227(A)(6), (5) a lawyer or LLP who has been permitted to resign under C.R.C.P. 227(A)(8), or (6) a lawyer or LLP who, for a period of six months or more, has been (i) on disability inactive status pursuant to C.R.C.P. 243.6 or (ii) suspended pursuant to C.R.C.P. 227(A)(4), 242.23, 242.24, or 260.6.

Rule 5.5. Unauthorized Practice of Law; Multijurisdictional Practice of Law

(a) A lawyer shall not:

(1) practice law in this jurisdiction without a license to practice law issued by the Colorado Supreme Court unless specifically authorized by C.R.C.P. 204, *et seq.* or federal or tribal law;

(2) practice law in a jurisdiction where doing so violates the regulations of the legal profession in that jurisdiction;

(3) assist a person who is not authorized to practice law pursuant to subpart (a) of this Rule in the performance of any activity that constitutes the unauthorized practice of law; or

(4) allow the name of a disbarred lawyer or LLP or a suspended lawyer or LLP who must petition for reinstatement to remain in the firm name.

(b) A lawyer shall not employ, associate professionally with, allow or aid a person the lawyer knows or reasonably should know is a disbarred, suspended, or on disability inactive status to perform the following on behalf of the lawyer's client:

(1) render legal consultation or advice to the client;

(2) appear on behalf of a client in any hearing or proceeding or before any judicial officer, arbitrator, mediator, court, public agency, referee, magistrate, commissioner, or hearing officer;

(3) appear on behalf of a client at a deposition or other discovery matter;

(4) negotiate or transact any matter for or on behalf of the client with third parties;

(5) otherwise engage in activities that constitute the practice of law; or

(6) receive, disburse or otherwise handle client funds.

(c) Subject to the limitation set forth below in paragraph (d), a lawyer may employ, associate professionally with, allow or aid a lawyer or LLP who is disbarred, suspended (whose suspension is partially or fully served), or on disability inactive status to perform research, drafting or clerical activities, including but not limited to:

(1) legal work of a preparatory nature, such as legal research, the assemblage of data and other necessary information, drafting of pleadings, briefs, and other similar documents;

(2) direct communication with the client or third parties regarding matters such as scheduling, billing, updates, confirmation of receipt or sending of correspondence and messages; and

(3) accompanying an active member in attending a deposition or other discovery matter for the limited purpose of providing assistance to the lawyer who will appear as the representative of the client.

(4) An LLP who is disbarred, suspended or on disability status may only perform the above services subject to the limitations imposed by Rule 242.32.

(d) A lawyer shall not allow a person the lawyer knows or reasonably should know is disbarred, suspended, or on disability inactive status to have any professional contact with clients of the lawyer or of the lawyer's firm unless the lawyer:

(1) prior to the commencement of the work, gives written notice to the client for whom the work will be performed that the disbarred or suspended lawyer or LLP, or the lawyer or LLP on disability inactive status, may not practice law; and

(2) retains written notification for no less than two years following completion of the work.

(e) Once notice is given pursuant to C.R.C.P. 242.32 or this Rule, then no additional notice is required.

Rule 5.6. Restrictions on Right to Practice

A lawyer shall not participate in offering or making:

(a) a partnership, shareholders, operating, employment, or other similar type of agreement that restricts the right of a lawyer or LLP to practice after termination of the relationship, except an agreement concerning benefits upon retirement; or

(b) an agreement in which a restriction on the lawyer's or LLP's right to practice is part of the settlement of a client controversy.

Rule 6 Series

We found no relevant rules in the Rule Chapter 6 Series rules that need amendment.

Rule 7 Series

We found only one relevant rule in the Rule 7 Series rules that we recommend amending. Specifically, we recommend adding Licensed Legal Paraprofessionals to the list of persons who can be solicited by a lawyer in Rule 7.3(b). A proposed redline amendment is below.

Rule 7.3. Solicitation of Clients

(b) A lawyer shall not solicit professional employment by live person-to-person contact when a significant motive for the lawyer's doing so is the lawyer's or law firm's pecuniary gain, unless the contact is with a:

(1) lawyer;

(2) person who has a family, close personal, or prior business or professional relationship with the lawyer or law firm;

(3) person who routinely uses for business purposes the type of legal services offered by the lawyer; or

(4) an LLP.

Rule 8 Series

We found two instances in the Rule 8 series rules that we are recommending amendment. We recommend Rule 8.3 be amended to include a lawyer's duty to report another lawyer or LLP that has violated their respective rules of professional conduct. Also, we are recommending that 8.4(a) be amended to make it clear that a lawyer commits misconduct if the lawyer assists another lawyer or LLP in violating their respective rules of professional conduct. Proposed redline amendments are below.

Rule 8.3. Reporting Professional Misconduct

(a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct or that an LLP has committed a violation of the LLP Rules of Professional Conduct that raises a substantial question as to that lawyer's or LLP's honesty, trustworthiness or fitness as a lawyer or LLP in other respects, shall inform the appropriate professional authority.

Rule 8.4. Misconduct

It is professional misconduct for a lawyer to:

(a-1) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(a-2) knowingly assist or induce an LLP to violate the LLP Rules of Professional Conduct, or do so through the acts of another;

Links to LLP Rules Adopted by the Court

1. Rule 207 series defining LLPs, their scope of practice, and admission requirements:

   https://www.courts.state.co.us/userfiles/file/Court_Probation/Supreme_Court/Rule_Changes/2023/Rule%20Change%202023(06).pdf

2. LLP Rules of Professional Conduct:

   https://www.courts.state.co.us/userfiles/file/Court_Probation/Supreme_Court/Rule_Changes/2023/Rule%20Change%202023(08).pdf

3. Rules of Attorney Discipline amended to bring LLPs within those rules and changes to CLE rules to impose CLE requirements on LLPs:

   https://www.courts.state.co.us/userfiles/file/Court_Probation/Supreme_Court/Rule_Changes/2023/Rule%20Change%202023(09).pdf

Redline Attachment

Preamble

Preamble: A Lawyer's Responsibilities

[5] A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs. A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers, licensed legal paraprofessionals, and public officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process.

Rule 1 Series

Colo. RPC 1.0(c)

"Firm" or "law firm" denotes a partnership, professional company, or other entity or a sole proprietorship through which a lawyer, lawyers, or combination of lawyers and LLPs render legal services; or lawyers employed in a legal services organization or the legal department of a corporation or other organization.

New Colo. RPC 1.0(g)

"Licensed legal paraprofessionals" ("LLPs") are individuals licensed by the Supreme Court pursuant to C.R.C.P. 207 to perform certain types of legal services only under the conditions set forth by the Court. They do not include individuals with a general license to practice law in Colorado. LLPs are subject to the Colorado Licensed Legal Paraprofessional Rules of Professional Conduct.

Adding a new Colo. RPC 1.0(g) would require the re-lettering of the current Colo. RPC 1.0(g)-(n), inclusive.

Rule 3 Series

Rule 3.4. Fairness to Opposing Party, Counsel, and LLPs

Rule 3.7. Lawyer as Witness

(b) A lawyer may act as advocate in a trial in which another lawyer or LLP in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

Rule 4 Series

Rule 4.2. Communication with Person Represented by Counsel or an LLP

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer or LLP in the matter, unless the lawyer has the consent of the other lawyer or LLP or is authorized to do so by law or a court order.

Rule 4.3. Dealing with Unrepresented Person

In dealing on behalf of a client with a person who is not represented by counsel or an LLP, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel or an LLP, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

Rule 5 Series

Rule 5.1. Responsibilities of a Partner or Supervisory Lawyer

(a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

(c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Rule 5.3. Responsibilities Regarding Nonlawyer Assistance

With respect to nonlawyers employed or retained by or associated with a lawyer:

(a) a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

COMMENT

[2A] In addition, lawyers may employ as assistants in their practice LLPs acting in a capacity outside of the scope of the LLPs' licensure. For example, a lawyer may ask an LLP to perform paraprofessional services that LLPs are not authorized to perform. Such LLPs, whether employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services. When employing an LLP outside the scope of the LLP's licensure, a lawyer must treat the LLP as a nonlawyer and make reasonable efforts to ensure that the LLP's services are provided in a manner that is compatible with the lawyer's professional obligations. A lawyer must give such LLPs appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client, and should be responsible for their work product.

Rule 5.3A Responsibilities Regarding LLPs

(a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all LLPs in the firm conform to the LLP Rules of Professional Conduct and that each LLP's conduct is compatible with the professional obligations of the lawyer.

(b) A lawyer having direct supervisory authority over an LLP shall make reasonable efforts to ensure that the LLP conforms to the LLP Rules of Professional Conduct and that LLP's conduct is compatible with the professional obligations of the lawyer.

(c) A lawyer shall be responsible for an LLP's violation of the LLP Rules of Professional Conduct if:

(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the LLP practices, or has direct supervisory authority over the LLP, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

COMMENT

[1] This Rule applies when a lawyer is working with an LLP in the lawyer's firm who is performing services within the scope of the LLP's licensure. *See also* Rule 5.3 (responsibilities regarding nonlawyer assistance).

Rule 5.4. Professional Independence of a Lawyer

(a) A lawyer or law firm shall not share legal fees with a nonlawyer other than an LLP, except that:

(1) an agreement by a lawyer with the lawyer's firm, partner, LLP, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's or the LLP's death, to the lawyer's or the LLP's estate or to one or more specified persons;

(2) a lawyer who undertakes to complete unfinished legal business of a deceased lawyer or LLP may pay to the estate of the deceased lawyer or LLP that proportion of the total compensation which fairly represents the services rendered by the deceased lawyer or LLP;

(3) a lawyer who purchases the practice of a deceased, disabled, or disappeared lawyer or LLP may, pursuant to the provisions of Rule 1.17, pay to the estate or other representative of that lawyer or LLP the agreed-upon purchase price;

(4) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement; and

(5) a lawyer may share court-awarded legal fees with a nonprofit organization that employed, retained or recommend employment of the lawyer in the matter.

(b) A lawyer shall not form a partnership with a nonlawyer other than an LLP if any of the activities of the partnership consist of the practice of law.

(c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

(d) A lawyer shall not practice with or in the form of a professional company that is authorized to practice law for a profit, if:

(1) A nonlawyer other than an LLP owns any interest therein, except that a fiduciary representative of the estate of a lawyer or LLP may hold the stock or interest of the lawyer or LLP for a reasonable time during administration; or

(2) A nonlawyer has the right to direct or control the professional judgment of a lawyer.

(d-1) An LLP shall not have the right to direct or control the professional judgment of a lawyer.

(e) A lawyer or LLP shall not practice with or in the form of a professional company that is authorized to practice law for a profit except in compliance with C.R.C.P. 265.

(f) For purposes of this Rule, a "nonlawyer other than an LLP" includes (1) a lawyer or LLP who has been disbarred, (2) a lawyer or LLP who has been suspended and who must petition for reinstatement, (3) a lawyer or LLP who is subject to an interim suspension pursuant to C.R.C.P. 242.22, (4) a lawyer or LLP who is on inactive status pursuant to C.R.C.P. 227(A)(6), (5) a lawyer or LLP who has been permitted to resign under C.R.C.P. 227(A)(8), or (6) a lawyer or LLP who, for a period of six months or more, has been (i) on disability inactive status pursuant to C.R.C.P. 243.6 or (ii) suspended pursuant to C.R.C.P. 227(A)(4), 242.23, 242.24, or 260.6.

Rule 5.5. Unauthorized Practice of Law; Multijurisdictional Practice of Law

(a) A lawyer shall not:

(1) practice law in this jurisdiction without a license to practice law issued by the Colorado Supreme Court unless specifically authorized by C.R.C.P. 204, *et seq.* or federal or tribal law;

(2) practice law in a jurisdiction where doing so violates the regulations of the legal profession in that jurisdiction;

(3) assist a person who is not authorized to practice law pursuant to subpart (a) of this Rule in the performance of any activity that constitutes the unauthorized practice of law; or

(4) allow the name of a disbarred lawyer or LLP or a suspended lawyer or LLP who must petition for reinstatement to remain in the firm name.

(b) A lawyer shall not employ, associate professionally with, allow or aid a person the lawyer knows or reasonably should know is a disbarred, suspended, or on disability inactive status to perform the following on behalf of the lawyer's client:

(1) render legal consultation or advice to the client;

(2) appear on behalf of a client in any hearing or proceeding or before any judicial officer, arbitrator, mediator, court, public agency, referee, magistrate, commissioner, or hearing officer;

(3) appear on behalf of a client at a deposition or other discovery matter;

(4) negotiate or transact any matter for or on behalf of the client with third parties;

(5) otherwise engage in activities that constitute the practice of law; or

(6) receive, disburse or otherwise handle client funds.

(c) Subject to the limitation set forth below in paragraph (d), a lawyer may employ, associate professionally with, allow or aid a lawyer or LLP who is disbarred, suspended (whose suspension is partially or fully served), or on disability inactive status to perform research, drafting or clerical activities, including but not limited to:

(1) legal work of a preparatory nature, such as legal research, the assemblage of data and other necessary information, drafting of pleadings, briefs, and other similar documents;

(2) direct communication with the client or third parties regarding matters such as scheduling, billing, updates, confirmation of receipt or sending of correspondence and messages; and

(3) accompanying an active member in attending a deposition or other discovery matter for the limited purpose of providing assistance to the lawyer who will appear as the representative of the client.

(d) A lawyer shall not allow a person the lawyer knows or reasonably should know is disbarred, suspended, or on disability inactive status to have any professional contact with clients of the lawyer or of the lawyer's firm unless the lawyer:

(1) prior to the commencement of the work, gives written notice to the client for whom the work will be performed that the disbarred or suspended lawyer or LLP, or the lawyer or LLP on disability inactive status, may not practice law; and

(2) retains written notification for no less than two years following completion of the work.

(e) Once notice is given pursuant to C.R.C.P. 242.32 or this Rule, then no additional notice is required.

Rule 5.6. Restrictions on Right to Practice

A lawyer shall not participate in offering or making:

(a) a partnership, shareholders, operating, employment, or other similar type of agreement that restricts the right of a lawyer or LLP to practice after termination of the relationship, except an agreement concerning benefits upon retirement; or

(b) an agreement in which a restriction on the lawyer's or LLP's right to practice is part of the settlement of a client controversy.

Rule 7 Series

Rule 7.3. Solicitation of Clients

(b) A lawyer shall not solicit professional employment by live person-to-person contact when a significant motive for the lawyer's doing so is the lawyer's or law firm's pecuniary gain, unless the contact is with a:

(1) lawyer;

(2) person who has a family, close personal, or prior business or professional relationship with the lawyer or law firm;

(3) person who routinely uses for business purposes the type of legal services offered by the lawyer; or

(4) an LLP.

Rule 8 Series

Rule 8.3. Reporting Professional Misconduct

(a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct or that an LLP has committed a violation of the LLP Rules of Professional Conduct that raises a substantial question as to that lawyer's or LLP's honesty, trustworthiness or fitness as a lawyer or LLP in other respects, shall inform the appropriate professional authority.

Rule 8.4. Misconduct

It is professional misconduct for a lawyer to:

(a-1) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(a-2) knowingly assist or induce an LLP to violate the LLP Rules of Professional Conduct, or do so through the acts of another;

Redline Attachment

Preamble

Preamble: A Lawyer's Responsibilities

[5] A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs. A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers, licensed legal paraprofessionals, and public officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process.

Rule 1 Series

Colo. RPC 1.0(c)

"Firm" or "law firm" denotes a partnership, professional company, or other entity or a sole proprietorship through which a lawyer, ~~or~~ lawyers, or combination of lawyers and LLPs render legal services; or lawyers employed in a legal services organization or the legal department of a corporation or other organization.

New Colo. RPC 1.0(g)

"Licensed legal paraprofessionals" ("LLPs") are individuals licensed by the Supreme Court pursuant to C.R.C.P. 207 to perform certain types of legal services only under the conditions set forth by the Court. They do not include individuals with a general license to practice law in Colorado. LLPs are subject to the Colorado Licensed Legal Paraprofessional Rules of Professional Conduct.

Adding a new Colo. RPC 1.0(g) would require the re-lettering of the current Colo. RPC 1.0(g)-(n), inclusive.

Rule 3 Series

Rule 3.4. Fairness to Opposing Party, ~~and~~ Counsel, and LLPs

Rule 3.7. Lawyer as Witness

(b) A lawyer may act as advocate in a trial in which another lawyer or LLP in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

Rule 4 Series

Rule 4.2. Communication with Person Represented by Counsel or an LLP

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer or LLP in the matter, unless the lawyer has the consent of the other lawyer or LLP or is authorized to do so by law or a court order.

Rule 4.3. Dealing with Unrepresented Person

In dealing on behalf of a client with a person who is not represented by counsel or an LLP, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel or an LLP, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

Rule 5 Series

Rule 5.1. Responsibilities of a Partner or Supervisory Lawyer

(a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

(c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Rule 5.3. Responsibilities Regarding Nonlawyer ~~Assistants~~Assistance

With respect to nonlawyers employed or retained by or associated with a lawyer:

(a) a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

COMMENT

[2A] In addition, lawyers may employ as assistants in their practice LLPs acting in a capacity outside of the scope of the LLPs' licensure. For example, a lawyer may ask an LLP to perform paraprofessional services that LLPs are not authorized to perform. Such LLPs, whether employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services. When employing an LLP outside the scope of the LLP's licensure, a lawyer must treat the LLP as a nonlawyer and make reasonable efforts to ensure that the LLP's services are provided in a manner that is compatible with the lawyer's professional obligations. A lawyer must give such LLPs appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client, and should be responsible for their work product.

Rule 5.3A Responsibilities Regarding LLPs

(a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all LLPs in the firm conform to the LLP Rules of Professional Conduct and that each LLP's conduct is compatible with the professional obligations of the lawyer.

(b) A lawyer having direct supervisory authority over an LLP shall make reasonable efforts to ensure that the LLP conforms to the LLP Rules of Professional Conduct and that LLP's conduct is compatible with the professional obligations of the lawyer.

(c) A lawyer shall be responsible for an LLP's violation of the LLP Rules of Professional Conduct if:

(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the LLP practices, or has direct supervisory authority over the LLP, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

COMMENT

[1] This Rule applies when a lawyer is working with an LLP in the lawyer's firm who is performing services within the scope of the LLP's licensure. *See also* Rule 5.3 (responsibilities regarding nonlawyer assistance).

Rule 5.4. Professional Independence of a Lawyer

(a) A lawyer or law firm shall not share legal fees with a nonlawyer other than an LLP, except that:

(1) an agreement by a lawyer with the lawyer's firm, partner, LLP, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's or the LLP's death, to the lawyer's or the LLP's estate or to one or more specified persons;

(2) a lawyer who undertakes to complete unfinished legal business of a deceased lawyer or LLP may pay to the estate of the deceased lawyer or LLP that proportion of the total compensation which fairly represents the services rendered by the deceased lawyer or LLP;

(3) a lawyer who purchases the practice of a deceased, disabled, or disappeared lawyer or LLP may, pursuant to the provisions of Rule 1.17, pay to the estate or other representative of that lawyer or LLP the agreed-upon purchase price;

(4) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement; and

(5) a lawyer may share court-awarded legal fees with a nonprofit organization that employed, retained or recommend employment of the lawyer in the matter.

(b) A lawyer shall not form a partnership with a nonlawyer other than an LLP if any of the activities of the partnership consist of the practice of law.

(c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

(d) A lawyer shall not practice with or in the form of a professional company that is authorized to practice law for a profit, if:

(1) A nonlawyer other than an LLP owns any interest therein, except that a fiduciary representative of the estate of a lawyer or LLP may hold the stock or interest of the lawyer or LLP for a reasonable time during administration; or

(2) A nonlawyer has the right to direct or control the professional judgment of a lawyer.

(d-1) An LLP shall not have the right to direct or control the professional judgment of a lawyer.

(e) A lawyer or LLP shall not practice with or in the form of a professional company that is authorized to practice law for a profit except in compliance with C.R.C.P. 265.

(f) For purposes of this Rule, a "nonlawyer other than an LLP" includes (1) a lawyer or LLP who has been disbarred, (2) a lawyer or LLP who has been suspended and who must petition for reinstatement, (3) a lawyer or LLP who is subject to an interim suspension pursuant to C.R.C.P. 242.22, (4) a lawyer or LLP who is on inactive status pursuant to C.R.C.P. 227(A)(6), (5) a lawyer or LLP who has been permitted to resign under C.R.C.P. 227(A)(8), or (6) a lawyer or LLP who, for a period of six months or more, has been (i) on disability inactive status pursuant to C.R.C.P. 243.6 or (ii) suspended pursuant to C.R.C.P. 227(A)(4), 242.23, 242.24, or 260.6.

Rule 5.5. Unauthorized Practice of Law; Multijurisdictional Practice of Law

(a) A lawyer shall not:

(1) practice law in this jurisdiction without a license to practice law issued by the Colorado Supreme Court unless specifically authorized by C.R.C.P. 204, *et seq.* or federal or tribal law;

(2) practice law in a jurisdiction where doing so violates the regulations of the legal profession in that jurisdiction;

(3) assist a person who is not authorized to practice law pursuant to subpart (a) of this Rule in the performance of any activity that constitutes the unauthorized practice of law; or

(4) allow the name of a disbarred lawyer or LLP or a suspended lawyer or LLP who must petition for reinstatement to remain in the firm name.

(b) A lawyer shall not employ, associate professionally with, allow or aid a person the lawyer knows or reasonably should know is a disbarred, suspended, or on disability inactive status to perform the following on behalf of the lawyer's client:

(1) render legal consultation or advice to the client;

(2) appear on behalf of a client in any hearing or proceeding or before any judicial officer, arbitrator, mediator, court, public agency, referee, magistrate, commissioner, or hearing officer;

(3) appear on behalf of a client at a deposition or other discovery matter;

(4) negotiate or transact any matter for or on behalf of the client with third parties;

(5) otherwise engage in activities that constitute the practice of law; or

(6) receive, disburse or otherwise handle client funds.

(c) Subject to the limitation set forth below in paragraph (d), a lawyer may employ, associate professionally with, allow or aid a lawyer or LLP who is disbarred, suspended (whose suspension is partially or fully served), or on disability inactive status to perform research, drafting or clerical activities, including but not limited to:

(1) legal work of a preparatory nature, such as legal research, the assemblage of data and other necessary information, drafting of pleadings, briefs, and other similar documents;

(2) direct communication with the client or third parties regarding matters such as scheduling, billing, updates, confirmation of receipt or sending of correspondence and messages; and

(3) accompanying an active member in attending a deposition or other discovery matter for the limited purpose of providing assistance to the lawyer who will appear as the representative of the client.

(d) A lawyer shall not allow a person the lawyer knows or reasonably should know is disbarred, suspended, or on disability inactive status to have any professional contact with clients of the lawyer or of the lawyer's firm unless the lawyer:

(1) prior to the commencement of the work, gives written notice to the client for whom the work will be performed that the disbarred or suspended lawyer or LLP, or the lawyer or LLP on disability inactive status, may not practice law; and

(2) retains written notification for no less than two years following completion of the work.

(e) Once notice is given pursuant to C.R.C.P. 242.32 or this Rule, then no additional notice is required.

Rule 5.6. Restrictions on Right to Practice

A lawyer shall not participate in offering or making:

(a) a partnership, shareholders, operating, employment, or other similar type of agreement that restricts the right of a lawyer or LLP to practice after termination of the relationship, except an agreement concerning benefits upon retirement; or

(b) an agreement in which a restriction on the lawyer's or LLP's right to practice is part of the settlement of a client controversy.

Rule 7 Series

Rule 7.3. Solicitation of Clients

(b) A lawyer shall not solicit professional employment by live person-to-person contact when a significant motive for the lawyer's doing so is the lawyer's or law firm's pecuniary gain, unless the contact is with a:

(1) lawyer;

(2) person who has a family, close personal, or prior business or professional relationship with the lawyer or law firm; ~~or~~

(3) person who routinely uses for business purposes the type of legal services offered by the lawyer; or~~.~~

(4) an LLP.

Rule 8 Series

Rule 8.3. Reporting Professional Misconduct

(a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct or that an LLP has committed a violation of the LLP Rules of Professional Conduct that raises a substantial question as to that lawyer's or LLP's honesty, trustworthiness or fitness as a lawyer or LLP in other respects, shall inform the appropriate professional authority.

Rule 8.4. Misconduct

It is professional misconduct for a lawyer to:

(a-1) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(a-2) knowingly assist or induce an LLP to violate the LLP Rules of Professional Conduct, or do so through the acts of another;

Attachment 6

PROPOSED COMMENT [15] TO RULE 1.2

[15] A lawyer may counsel a client regarding the validity, scope, and meaning of Colorado law, and may assist a client who engages in conduct the lawyer reasonably believes is legal in Colorado even if the conduct may be illegal in another jurisdiction. For example, a lawyer may advise and assist a client who contemplates seeking or providing reproductive health care services that are legal in Colorado but that may be illegal under the law of another jurisdiction. The lawyer should consider advising the client that the client's proposed conduct may be unlawful in another relevant jurisdiction and regarding the possible legal consequences of engaging in that conduct. The lawyer should also consider advising the client to seek legal advice from counsel admitted in the other relevant jurisdiction.

Attachment 7

Rule 5. Entry of Appearance and Withdrawal

(a) - (d) [NO CHANGE]

(e) Limited ~~Representation Entry of Appearance and Withdrawal.~~ Legal Services. An attorney may ~~undertake to~~ provide limited ~~representation~~legal services to a ~~pro se~~self-represented party involved in a civil appellate proceeding~~. Upon the request and with the consent of a pro se party, an~~ in accordance with Colo. R.P.C. 1.2(c) and the following provisions.

(1) **Limited Legal Services Requiring Entry of Appearance and Withdrawal.** An attorney may make a limited appearance for ~~the pro se party to file a notice of appeal and designation of transcripts in the court of appeals or the supreme court, to file or oppose a petition or cross-petition for a writ of certiorari~~a self-represented party in ~~the supreme court, to respond to an order to show cause issued by the supreme court or the court of appeals, or to participate in one or more specified motion proceedings in either court,~~a civil appellate proceeding if the attorney files and serves with the court and the other parties and attorneys (if any) a notice of the limited appearance prior to or simultaneous with the part(s) of the proceeding~~(s)~~ for which the attorney appears. At the conclusion of such part(s) of the proceeding~~(s)~~, the attorney's appearance terminates without the necessity of leave of court, upon the attorney filing a notice of completion of limited appearance ~~in the appellate court in which the attorney appeared, a copy of which may be filed in any other court, except that an attorney filing a notice of appeal or petition or cross-petition for writ of certiorari is obligated, absent leave of court, to respond to any issues regarding the appellate court's jurisdiction.~~. Service on an attorney who makes a limited appearance for a party ~~shall~~will be valid only in connection with the specific part(s) of the proceeding~~s(s)~~ for which the attorney appears. ~~The provisions of this C.A.R. 5(e) shall not apply to an attorney who has filed an opening or answer brief pursuant to C.A.R. 31~~

(2) **Limited Legal Services Requiring Disclosure of Attorney Assistance without Entry of Appearance.** An attorney may provide drafting assistance to a self-represented party involved in a civil appellate proceeding without filing a notice of limited appearance. Documents filed by the self-represented party that were prepared with the drafting assistance of the attorney must include the attorney's name, address, telephone number, e-mail address, and registration number. The attorney must provide a signed attorney disclosure certification to the self-represented party for the self-represented party to file with the court as an attachment to the document(s). The certification must indicate whether the attorney provided drafting assistance for the entire document or for specific sections only, and if for specific sections, indicate which sections. The certification also must contain the following statement: "In helping to draft the document filed by the self-represented party, the attorney certifies that, to the best of the attorney's knowledge, information, and belief, this document, or specified section(s), is (A) well-grounded in fact based upon a reasonable inquiry of the self-represented party by the attorney, (B) warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and (C) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." The attorney in providing such drafting assistance may rely on the self-represented party's

representation of facts, unless the attorney has reason to believe that such representations are false or materially insufficient, in which instance the attorney must make an independent reasonable inquiry into the facts. The attorney's violation of this subsection (e)(2) may subject the attorney to sanctions provided by C.A.R. 38. Providing limited legal services to a self-represented party under this subsection (e)(2) does not constitute an entry of appearance by the attorney for purposes of this rule and does not authorize or require the service of papers upon the attorney.

(3) **Limited Legal Services Not Requiring Entry of Appearance or Disclosure of Attorney Assistance.** An attorney may provide the following forms of assistance to a self-represented party in a civil appellate proceeding without satisfying the requirements of subsections (e)(1) and (2) of this rule: (A) assistance in filling out pre-printed or electronically published forms that are issued by the judicial branch; (B) oral assistance or advice given to the self-represented party regarding the self-represented party's case; and (C) short-term legal assistance offered to a self-represented party on a pro bono basis, including but not limited to assistance through a nonprofit or court-sponsored program, that does not create an expectation by either the client or the lawyer that legal assistance will continue. Providing limited legal services to a self-represented party under this subsection (e)(3) does not authorize or require the service of papers upon the attorney.

(f) Termination of Representation. When an attorney has entered an appearance, other than a limited appearance pursuant to C.A.R. 5(e)(1), on behalf of a party in an appellate court without having previously represented that party in the matter in any other court, the attorney's representation of the party ~~shall~~will terminate at the conclusion of the part(s) of the proceeding~~s~~ in the appellate court in which the attorney has appeared, unless otherwise directed by the appellate court or agreed to by the attorney and the party represented. Counsel may file a notice of such termination of representation in any other court.

COMMENT

The purpose of C.A.R. 5(e)(1) is to establish a procedure similar to that set forth in C.R.C.P. ~~olorado Rule of Civil Procedure~~ 121 Section 1-1(5). ~~This procedure provides assurance that an attorney who makes a limited appearance for a pro se party in a specified appellate case proceeding(s), at the request of and with the consent of the pro se party, can withdraw from the case upon filing a notice of completion of the limited appearance, without leave of court.~~The purpose of C.A.R. 5(e)(2) and (3) is to establish a procedure similar to that set forth in C.R.C.P. 11(b). ~~The purpose of C.A.R. 5(f) is to make clear that when an attorney appears for a party, whom he or she has not previously represented, in an appellate court and the proceedings in that court have concluded, the attorney is not obligated to represent the party in any other proceeding on remand or in any review of the appellate court's decision by any other court. Nothing in this provision would prevent the attorney from entering a limited or general appearance on behalf of the party in another court (for example, on a writ of certiorari to the supreme court), if agreed to by the attorney and the party.~~

Colo. RPC 1.2: Scope of Representation and Allocation of Authority Between Client and Lawyer

(c) A lawyer may limit the scope or objectives, or both, of the ~~representation~~ legal services provided to a client if the limitation is reasonable under the circumstances and the client gives informed consent. A lawyer may provide limited ~~representation~~ legal services to ~~pro se~~self-represented parties as permitted by C.R.C.P. 11(b), ~~and~~ C.R.C.P. 311(b), and C.A.R. 5(e).

Cmt [6] The scope of services to be provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client. When a lawyer has been retained by an insurer to represent an insured, for example, the ~~representation~~ legal services provided may be limited to matters related to the insurance coverage. ~~A limited representation~~Limited legal services may be appropriate because the client has limited objectives for ~~the representation~~seeking legal services. For example, the limited legal services provided may exclude actions that the client thinks are too costly or that the lawyer regards as repugnant or imprudent. ~~In addition, the terms upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the client's objectives. Such limitations may exclude actions that the client thinks are too costly or that the lawyer regards as repugnant or imprudent.~~

Cmt [7] Although this Rule affords the lawyer and client substantial latitude to limit the ~~representation~~ legal services provided to the client, the limitation must be reasonable under the circumstances. If, for example, a client's objective is limited to securing general information about the law the client needs in order to handle a common and typically uncomplicated legal problem, the lawyer and client may agree that the lawyer's services will be limited to a brief telephone consultation. Such a limitation, however, would not be reasonable if the time allotted was not sufficient to yield advice upon which the client could rely. Although an agreement for ~~a~~ limited ~~representation~~ legal services does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation. See Rule 1.1.

Attachment 8

AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY
STANDING COMMITTEE ON PROFESSIONAL REGULATION

REPORT TO THE HOUSE OF DELEGATES

REVISED RESOLUTION

RESOLVED, That the American Bar Association amends ABA Model Rule of Professional Conduct 1.16 and its Comments [1], [2], and [7] as follows (insertions underlined, deletions struck through):

Rule 1.16: Declining or Terminating Representation

(a) A lawyer shall inquire into and assess the facts and circumstances of each representation to determine whether the lawyer may accept or continue the representation. Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of the Rules of Professional Conduct or other law;

(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; ~~or~~

(3) the lawyer is discharged; or

(4) the client or prospective client seeks to use or persists in using the lawyer's services to commit or further a crime or fraud, despite the lawyer's discussion pursuant to Rules 1.2(d) and 1.4(a)(5) regarding the limitations on the lawyer assisting with the proposed conduct.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

(1) withdrawal can be accomplished without material adverse effect on the interests of the client;

~~(2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;~~

(2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;

(3) the client has used the lawyer's services to perpetrate a crime or fraud;

(4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;

(5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

(6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(7) other good cause for withdrawal exists.

(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.

Comment

[1] Paragraph (a) imposes an obligation on a lawyer to inquire into and assess the facts and circumstances of the representation before accepting it. The obligation imposed by Paragraph (a) continues throughout the representation. A change in the facts and circumstances relating to the representation may trigger a lawyer's need to make further inquiry and assessment. For example, a client traditionally uses a lawyer to acquire local real estate through the use of domestic limited liability companies, with financing from a local bank. The same client then asks the lawyer to create a multi-tier corporate structure, formed in another state to acquire property in a third jurisdiction, and requests to route the transaction's

funding through the lawyer's trust account. Another example is when, during the course of a representation, a new party is named or a new entity becomes involved. A lawyer should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest and to completion. Ordinarily, a representation in a matter is completed when the agreed-upon assistance has been concluded. See Rules 1.1, 1.2(c) and 6.5. See also Rule 1.3, Comment [4].

Mandatory Withdrawal

[2] A lawyer ordinarily must decline or withdraw from representation if the client demands that the lawyer engage in conduct that is illegal or violates the Rules of Professional Conduct or other law. The lawyer is not obliged to decline or withdraw simply because the client suggests such a course of conduct; a client may make such a suggestion in the hope that a lawyer will not be constrained by a professional obligation. Under paragraph (a)(4), the lawyer's inquiry into and assessment of the facts and circumstances will be informed by the risk that the client or prospective client seeks to use or persists in using the lawyer's services to commit or further a crime or fraud. This analysis means that the required level of a lawyer's inquiry and assessment will vary for each client or prospective client, depending on the nature of the risk posed by each situation. Factors to be considered in determining the level of risk may include: (i) the identity of the client, such as whether the client is a natural person or an entity and, if an entity, the beneficial owners of that entity, (ii) the lawyer's experience and familiarity with the client, (iii) the nature of the requested legal services, (iv) the relevant jurisdictions involved in the representation (for example, whether a jurisdiction is considered at high risk for money laundering or terrorist financing), and (v) the identities of those depositing into or receiving funds from the lawyer's client trust account, or any other accounts in which client funds are held. For further guidance assessing risk, see, e.g., as amended or updated, Financial Action Task Force Guidance for a Risk-Based Approach for Legal Professionals, the ABA Voluntary Good Practices Guidance for Lawyers to Detect and Combat Money Laundering and Terrorist Financing, A Lawyer's Guide to Detecting and Preventing Money Laundering (a collaborative publication of the International Bar Association, the American Bar Association and the Council of Bars and Law Societies of Europe), the Organization for Economic Cooperation and Development (OECD) Due Diligence Guidance for Responsible Business Conduct, and the U.S. Department of Treasury Specially Designated Nationals and Blocked Persons List.

[3] When a lawyer has been appointed to represent a client, withdrawal ordinarily requires approval of the appointing authority. See also Rule 6.2. Similarly, court approval or notice to the court is often required by applicable law before a lawyer withdraws from pending litigation. Difficulty may be encountered if withdrawal is based on the client's demand that the lawyer engage in unprofessional conduct. The court may request an explanation for the withdrawal, while the lawyer may

be bound to keep confidential the facts that would constitute such an explanation. The lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient. Lawyers should be mindful of their obligations to both clients and the court under Rules 1.6 and 3.3.

Discharge

[4] A client has a right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services. Where future dispute about the withdrawal may be anticipated, it may be advisable to prepare a written statement reciting the circumstances.

[5] Whether a client can discharge appointed counsel may depend on applicable law. A client seeking to do so should be given a full explanation of the consequences. These consequences may include a decision by the appointing authority that appointment of successor counsel is unjustified, thus requiring self-representation by the client.

[6] If the client has severely diminished capacity, the client may lack the legal capacity to discharge the lawyer, and in any event the discharge may be seriously adverse to the client's interests. The lawyer should make special effort to help the client consider the consequences and may take reasonably necessary protective action as provided in Rule 1.14.

Optional Withdrawal

[7] A lawyer may withdraw from representation in some circumstances. The lawyer has the option to withdraw if it can be accomplished without material adverse effect on the client's interests. ~~Withdrawal is also justified if the client persists in a course of action that the lawyer reasonably believes is criminal or fraudulent, for a lawyer is not required to be associated with such conduct even if the lawyer does not further it~~. Withdrawal is also justified if the client persists in a course of action that the lawyer reasonably believes is criminal or fraudulent, for a lawyer is not required to be associated with such conduct even if the lawyer does not further it. Withdrawal is also permitted if the lawyer's services were misused in the past even if that would materially prejudice the client. The lawyer may also withdraw where the client insists on taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement.

[8] A lawyer may withdraw if the client refuses to abide by the terms of an agreement relating to the representation, such as an agreement concerning fees or court costs or an agreement limiting the objectives of the representation.

Assisting the Client upon Withdrawal

[9] Even if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the consequences to the client. The lawyer may retain papers as security for a fee only to the extent permitted by law. See Rule 1.15.

REVISED REPORT

Introduction

The Standing Committee on Ethics and Professional Responsibility (the "Ethics Committee") and the Standing Committee on Professional Regulation (the "Regulation Committee") propose amendments to the Black Letter and Comments to ABA Model Rule of Professional Conduct 1.16, Declining or Terminating Representation.

This Resolution constitutes another piece of the ABA's longstanding and ongoing efforts to help lawyers detect and prevent becoming involved in a client's unlawful activities and corruption, as described in this Report. In February 2023, the ABA House of Delegates adopted Resolution 704 proposed by the Working Group on Beneficial Ownership. Resolution 704 updates ABA policy on entities providing the federal government with information about the identity of the entity's beneficial owners. Resolution 704, like this Resolution, represents a compromise among those with diverse and strongly held views. This Resolution presents a balanced approach to ensuring that lawyers conduct inquiry and assessment ~~client due diligence~~ - appropriate to the circumstances - to detect and prevent involvement in unlawful activities and corruption.

The proposed amendments to the Black Letter clearly state for lawyers their ~~client due diligence~~ obligations to inquire about and assess the facts and circumstances when considering whether to undertake a representation and their ongoing obligations throughout the representation. The amendments further state that the lawyer must decline the representation or withdraw when the prospective client or client seeks to use or persists in using the lawyers' services to commit or further a crime or fraud after the lawyer has advised of the limitations on the lawyer's services.

These are not new obligations. Lawyers already perform these inquiries and assessments ~~client due diligence~~ every day to meet their ethical requirements. For example, they do so to identify and address conflicts of interests. They also do so to ensure they represent clients competently (Rule 1.1); to develop sufficient knowledge of the facts and the law to understand the client's objectives and to identify means to meet the client's lawful interests (Rule 1.2(a)); and, if necessary, to persuade the client not to pursue conduct that could lead to criminal liability or liability for fraud (Rule 1.2(d)).[1] Implicit duties – like unwritten rules – do not serve lawyers or the public well. Therefore, the Committees present these amendments to the Black Letter of Model Rule 1.16 from which both lawyers and the public will benefit.

In addition to the proposed changes to the Black Letter of Rule 1.16, proposed new language in Comment [1] elaborates on the duty to inquire about and assess the facts

[1] *See also* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 463 (2013) & 491 (2020).

and circumstances of the representation. The Comment makes clear that the duty is one that continues throughout the course of the representation.[2]

New language proposed in Comment [2] explains that under new Black Letter paragraph (a)(4) of Rule 1.16, the scope of the lawyer's inquiry and assessment ~~client due diligence~~ is informed by the risk that the prospective client or current client seeks to use or persists in using the lawyer's services to commit or further a crime or fraud. The use of a risk-based inquiry and assessment of the facts and circumstances of each representation set forth in Comment [2] ensures that the scope and depth of the inquiry and assessment a lawyer must make will be based on the unique facts and circumstances presented by each client or prospective client. There is no "one-size-fits-all" ~~client due diligence~~ obligation. Proposed amendments to Comment [2] provide examples for lawyers to consider in assessing the level of risk posed to determine whether lawyers must decline the representation or withdraw from an ongoing representation.

While the impetus for these proposed amendments was lawyers' unwitting involvement in or failure to pay appropriate attention to signs or warnings of danger ("red flags") relating to a client's use of a lawyer's services to facilitate possible money laundering and terrorist financing activities, it is clear that lawyers' ~~client due diligence~~ existing obligations to inquire and assess apply broadly to all lawyers. The proposed amendments will help lawyers avoid entanglement in criminal, fraudulent, or other unlawful behavior by a client, including tax fraud, mortgage fraud, concealment from disclosure of assets in dissolution or bankruptcy proceedings, human trafficking and other human rights violations, violations of U.S. foreign policy sanctions and export controls, and U.S. national security violations.

In developing this Resolution, the Standing Committees on Ethics and Professional Responsibility and Professional Regulation circulated widely for comment, inside and outside the ABA, three Discussion Drafts of possible amendments to the Model Rules of Professional Conduct addressing ~~lawyers' client due diligence~~ these obligations. The Committees held four public roundtables to obtain testimony regarding the Discussion Drafts.[3] The Committees are grateful to all who commented. Their comments and testimony informed the substance of this Resolution and Report.[4]

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[2] GEOFFREY C. HAZARD JR., W. WILLIAM HODES & PETER R. JARVIS, LAW OF LAWYERING § 21.02 (4th ed. 2021) ("Rule 1.16 often plays a role *during* representation of a client as well. By focusing attention on situations in which the lawyer either may or must withdraw, it serves as a reminder to lawyers and clients alike that they must continually communicate with each other and monitor their relationship, to minimize the likelihood that such withdrawals will occur.").

[3] These meetings were held in February and August 2022 and February 2023.

[4] Comments received and recordings of the public roundtables are available on the Center for Professional Responsibility website for public viewing at: www.americanbar.org/groups/professional_responsibility/discussion-draft-of-possible-amendments-to-model-rules-of-profes/ (last visited Apr. 28, 2023).

Background

Concerns Underlying This Resolution

As noted, the impetus for this Resolution related to lawyers' unwitting involvement in money laundering and terrorist financing or their failure to pay appropriate attention to "red flags" relating to the proposed course of action by a client or prospective client. Money laundering occurs when criminals obscure the proceeds of unlawful activity (dirty money) using "laundering" transactions so that the money appears to be the "clean" proceeds of legal activity. Terrorist financing is just that, providing funds to those involved in terrorism.[5] The proceeds of money laundering are used to facilitate terrorism and other illegal activities, including human trafficking, drug trafficking, and violations of U.S. government sanctions.

Lawyers' services can be used for money laundering and other criminal and fraudulent activity. One common way to do so is by asking a lawyer to hold money in a client trust account pending completion of the purchase of real estate or equipment, or to fund another transaction. After a period of time, the client asks the lawyer to return the funds because the "transaction" has fallen apart. By holding money in a law firm trust account then disbursing the money back to the client when the transaction does not close, the money has been laundered through the lawyer's client trust account. Of course, more sophisticated means exist by which individuals seek to use lawyers' services to launder money, either with or without the lawyer's knowledge. It is illegal and unethical for lawyers to knowingly launder money, finance terrorism, or knowingly assist another in doing so. It is also unethical for a lawyer to ignore facts indicating a likelihood that the client intends to use the lawyer's services to assist the client in engaging in illegal or fraudulent conduct.

Domestic and international laws and regulations are designed to prevent, detect, and prosecute money laundering. Anti-money laundering and counter terrorism financing laws and regulations applicable to lawyers are a complex subject.[6] Generally, the issues can be divided into three overarching topics: (1) client due diligence; (2) disclosure of entity beneficial ownership information; and (3) suspicious activity reporting.

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[5] The U.S. Department of Treasury's 2018 National Money-Laundering Risk Assessment estimated that $300 billion is laundered every year in the U.S. alone, with that amount growing and methodologies of money-launderers ever evolving and becoming more sophisticated according to the Department's 2022 National Money-Laundering Risk Assessment. *See* U.S. DEPARTMENT OF THE TREASURY NATIONAL MONEY LAUNDERING RISK ASSESSMENT (2018), https://home.treasury.gov/system/files/136/2018NMLRA_12-18.pdf and U.S. DEPARTMENT OF THE TREASURY NATIONAL MONEY LAUNDERING RISK ASSESSMENT (Feb. 2022), https://home.treasury.gov/system/files/136/2022-National-Money-Laundering-Risk-Assessment.pdf.

[6] Additional resources may be found at ABA TASK FORCE ON GATEKEEPER REGULATION AND THE PROFESSION, https://www.americanbar.org/groups/criminal_justice/gatekeeper/ (last visited Apr. 19, 2023); ABA GATEKEEPER REGULATIONS ON ATTORNEYS, https://www.americanbar.org/advocacy/governmental_legislative_work/priorities_policy/independence_of_the_legal_profession/bank_secrecy_act/ (last visited Apr. 19, 2023).

In the U.S., the primary anti-money laundering laws are the Bank Secrecy Act ("BSA") and the Money Laundering Control Act. The U.S. Department of Treasury created the Financial Crimes Enforcement Network ("FinCEN") to implement, administer, and enforce compliance with the BSA. Most recently, Congress enacted the Corporate Transparency Act ("CTA") to enhance the identification and disclosure of certain beneficial ownership information. The CTA is part of the Anti-Money Laundering Act of 2020, which is part of the National Defense Authorization Act for Fiscal Year 2021.[7]

Outside the U.S., the Financial Action Task Force ("FATF") is a powerful inter-governmental entity that coordinates efforts to prevent money laundering or terrorism financing among and between its member countries. The U.S. is a charter member of the FATF. The FATF exerts tremendous pressure on member countries, even though it has no "official" legislative or enforcement power. A primary way in which it does so is through its Mutual Evaluation Reports of countries' compliance with the FATF Recommendations.[8] The most recent Mutual Evaluation Report of the U.S. was in 2016, and the FATF found the US. noncompliant in four areas, including the lack of sufficient client due diligence by the legal profession and lack of enforceable obligations in that regard.[9]

The Organization for Economic Cooperation and Development ("OECD") is another international organization that has been active in this arena. The OECD is not a standard-setting entity like the FATF. While a primary focus of the OECD is fighting international tax evasion, it is supportive of the FATF's critiques of the legal and other professions on the subjects of money laundering and other white-collar crime.

These groups, along with U.S. and international governments, continue to focus in very public ways on lawyers as facilitators of money laundering, terrorism financing, and other related illegal and fraudulent conduct. They point to the 2016 FATF Report's recommendations, and events like the Paradise Papers, the Panama Papers, and the more recent Pandora Papers and FinCEN Files, as necessitating further and enforceable action by the legal profession.[10]

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[7] The full name of the NDAA is the WILLIAM M. (MAC) THORNBERRY NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2021, Pub. L. No. 116-283 (H.R. 6395), *available at* https://www.congress.gov/116/plaws/publ283/PLAW-116publ283.pdf. 116th Cong. 2d Sess. Congress' override of the President's veto was taken in Record Vote No. 292 (Jan. 1, 2021). The CTA consists of §§ 6401-6403 of the NDAA. Section 6402 of the NDAA sets forth Congress' findings and objectives in passing the CTA and § 6403 contains its substantive provisions, primarily adding § 5336 to Title 31 of the United States Code.

[8] *See* THE FATF RECOMMENDATIONS, https://www.fatf-gafi.org/en/publications/Fatfrecommendations/Fatf-recommendations.html (last visited Apr. 28, 2023).

[9] FATF UNITED STATES' MEASURES TO COMBAT MONEY LAUNDERING AND TERRORIST FINANCING (2016), https://www.fatf-gafi.org/en/publications/Mutualevaluations/Mer-united-states-2016.html.

[10] *See, e.g.,* PARADISE PAPERS: SECRETS OF THE GLOBAL ELITE, INTERNATIONAL CONSORTIUM OF INVESTIGATIVE JOURNALISTS, https://www.icij.org/investigations/paradise-papers/ (last visited Apr. 28, 2023); THE PANAMA PAPERS: EXPOSING THE ROGUE OFFSHORE FINANCE INDUSTRY, INTERNATIONAL CONSORTIUM OF INVESTIGATIVE JOURNALISTS, https://www.icij.org/investigations/panama-papers/ (last visited Apr. 28, 2023); PANDORA PAPERS, INTERNATIONAL CONSORTIUM OF INVESTIGATIVE JOURNALISTS, https://www.icij.org/investigations/pandora-papers/ (last visited Apr. 28, 2023); and FINCEN FILES,

The ABA has long supported state-based judicial regulation of lawyers and the practice of law and opposed federal legislative or executive branch efforts to regulate the practice of law at the federal level.[11] National and international concerns about lawyers unwitting involvement in client crimes like money laundering and terrorism finance greatly raise the risk of federal legislative and regulatory action.

The U.S. Congress has demonstrated its willingness to act in this regard. For example, initial versions of the Corporate Transparency Act ("CTA") would have required lawyers to disclose beneficial ownership information relating to their clients to the federal government, in contravention of their ethical obligations under ABA Model Rule 1.6. Additionally, various Members of Congress have sought enactment of the ENABLERS Act, which would have regulated many lawyers and law firms as "financial institutions" under the BSA.[12] Such regulation could require those lawyers and law firms to report to the federal government information protected by the attorney-client privilege or Model Rule 1.6 by requiring them to comply with some or all of the BSA's requirements for financial institutions, such as submitting Suspicious Activity Reports (SARs) on clients' financial transactions and establishing due diligence policies.[13]

To date, the ABA has successfully advocated against such incursion on the regulatory authority of state supreme courts. In response to concerns raised by the ABA and others, the sponsors of the final version of the CTA that became law omitted the language from previous versions of the bill that would have directly regulated lawyers. Therefore, the final version of the CTA passed by Congress in early 2021 only requires

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INTERNATIONAL CONSORTIUM OF INVESTIGATIVE JOURNALISTS, https://www.icij.org/investigations/fincen-files/ (last visited Apr.19, 2023).

[11] *See, e.g.*, COMM'N ON EVALUATION OF DISCIPLINARY ENFORCEMENT, AM. BAR ASS'N, LAWYER REGULATION FOR A NEW CENTURY 2 (1992) [hereinafter MCKAY REPORT], *available at* http://www.americanbar.org/groups/professional_responsibility/resources/report_archive/mckay_report.html; AM. BAR ASS'N COMM'N ON MULTIJURISDICTIONAL PRACTICE REPORT TO THE HOUSE OF DELEGATES Report 201A (2002), *available at* https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mjp_migrated/201a.pdf; and JUDICIAL OVERSIGHT OF THE LEGAL PROFESSION, https://www.americanbar.org/advocacy/governmental_legislative_work/letters_testimony/independence/ (last visited Apr. 19, 2023).

[12] The original ENABLERS Act legislation, introduced on October 8, 2021, by Rep. Tom Malinowski (D-NJ) as H.R. 5525, is available at https://www.congress.gov/bill/117th-congress/house-bill/5525/text?s=1&r=1. A revised version of the ENABLERS Act, sponsored by Rep. Maxine Waters (D-CA) and included in the House-passed version of the FY 2023 National Defense Authorization Act (H.R. 7900) as Section 5401, is available at https://amendments-rules.house.gov/amendments/GATEKEEPERS_NDAA_xml%20v3220711190941114.pdf. A third version of the ENABLERS Act, sponsored by Sen. Sheldon Whitehouse (D-RI) and offered as an amendment to the Senate version of the FY 2023 National Defense Authorization Act (H.R. 7900 and S. 4543) as SA 6377, is available at https://www.americanbar.org/content/dam/aba/administrative/government_affairs_office/whitehouse-enablers-act-amendment-to-ndaa-september2022.pdf.

[13] *See* ABA URGES SENATORS TO OPPOSE ENABLERS ACT AMENDMENT TO DEFENSE AUTHORIZATION BILL, ABA WASHINGTON LETTER (Oct. 31, 2022), *available at* https://www.americanbar.org/advocacy/governmental_legislative_work/publications/washingtonletter/oct22-wl/enablers-1022wl/.

"reporting companies"—not their lawyers or law firms—to report the companies' beneficial ownership information to the government.[14] Similarly, in response to objections by the ABA[15], numerous state and local bar associations, and many small business groups, Congress declined to include the ENABLERS Act in the final version of the FY 2023 National Defense Authorization Act (P.L. 117-263, H.R. 7776) or the FY 2023 Consolidated Appropriations Act (P.L. 117-328, H.R. 2617) that were signed into law in December 2022.

ABA Responses in the Context of the Model Rules of Professional Conduct

2013 Ethics Opinion

In 2013, the Ethics Committee issued ABA Formal Ethics Opinion 463 focusing on efforts to require U.S. lawyers to perform "gatekeeping" duties to protect the domestic and international financing system from criminal activity arising out of worldwide money-laundering and terrorism financing activities. Opinion 463 explained that "[i]t would be prudent for lawyers to undertake Client Due Diligence ("CDD") in appropriate circumstances to avoid facilitating illegal activity or being drawn unwittingly into a criminal activity. . . . [16] An appropriate assessment of the client and the client's objectives, and the means for obtaining those objectives, are essential prerequisites for accepting a new matter or continuing a representation as new facts unfold."[17]

2020 Ethics Opinion

In 2020, the Ethics Committee issued Formal Ethics Opinion 491 in response to ongoing concerns regarding lawyers' ~~client due diligence~~ obligations to inquire and assess. As explained in the Formal Opinion, a lawyer's duty to inquire into and assess the facts and circumstances of each representation is not new and is applicable before the representation begins and throughout the course of the representation. This obligation already is implicit in the following Rules:

- Rule 1.1 and the duty to provide competent representation. Comment [5] explains, "Competent handling of a particular matter requires inquiry into and analysis of the factual and legal elements of the problem."

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[14] *See* Corporate Transparency Act (CTA), available at H.R.6395 - 116th Congress (2019-2020): William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021 | Congress.gov | Library of Congress (contained in Title LXIV of the National Defense Authorization Act for FY 2021, P.L. 116-283) (Jan. 1, 2021). Division F of the FY 2021 National Defense Authorization Act is the Anti-Money Laundering Act of 2020, which includes the CTA.

[15] *See* ABA letter to Senate leaders opposing the ENABLERS Act amendment to the FY 2023 National Defense Authorization Act and urging them not to include it in the final version of the legislation. Letter to Majority Leader Schumer, et al. re: Opposition to ENABLERS Act Amendment to the FY 2023 National Defense Authorization Act (H.R. 7900 and S. 4543) (Oct. 5, 2022), *available at* https://www.americanbar.org/content/dam/aba/administrative/government_affairs_office/aba-letter-to-senate-leaders-opposing-enablers-act-amendment-to-ndaa-october52022.pdf.

[16] ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 463 (2013).

[17] *Id.*

- Rule 1.2(d) and the prohibition against knowingly assisting a client in a crime or fraud.
- Rule 1.3 and the duty to be diligent which "requires that a lawyer ascertain the relevant facts and law in a timely and appropriately thorough manner."
- Rule 1.4 and the duty to communicate which requires "consultation with the client regarding 'any relevant limitation on the lawyer's conduct' arising from the client's expectation of assistance that is not permitted by the Rules of Professional Conduct or other law."
- Rule 1.13 which requires "further inquiry to clarify any ambiguity about who has authority and what the organization's priorities are."
- Rule 1.16(a) and the duty to withdraw when the representation will result in a violation of the law or the Rules.
- Rule 8.4(b) and (c) in the prohibition against committing a criminal act or engaging in dishonesty, fraud, deceit, or misrepresentation.

The Proposed Amendments to Model Rule 1.16 and Its Comments

After careful consideration over several years of concerns raised by ABA members and outside groups that the ABA Model Rules of Professional Conduct lacked sufficient clarity on lawyers' ~~client due diligence~~ obligations to inquire about and assess the facts and circumstances relating to a matter, the Committees concluded that Model Rule of Professional Conduct 1.16 should be amended to make explicit that which is already implicit.

Amendments to Paragraph (a)

The proposed amendments to the Black Letter of Rule 1.16(a) include a statement addressing the nature and scope of lawyers' inquiry and assessment ~~client due diligence~~ obligations when the lawyer is deciding whether to accept a representation, deciding whether to terminate the representation, and considering the matter throughout the course of a representation. The following statement is added to the beginning of Rule 1.16(a):

> A lawyer shall inquire into and assess the facts and circumstances of each representation to determine whether the lawyer may accept or continue the representation.

In addition to the proposed change to the Black Letter of Rule 1.16(a), new language in Comment [1] provides guidance on the duty to inquire about and assess the facts and circumstances of the representation. The addition to Comment [1] reads:

> Paragraph (a) imposes an obligation on a lawyer to inquire into and assess the facts and circumstances of the representation before accepting it. The obligation imposed by Paragraph (a) continues throughout the representation. For example, a client traditionally uses a lawyer to acquire

> local real estate through the use of domestic limited liability companies, with financing from a local bank. The same client then asks the lawyer to create a multi-tier corporate structure, formed in another state to acquire property in a third jurisdiction, and requests to route the transaction's funding through the lawyer's trust account. Another example is when, during the course of a representation, a new party is named or a new entity becomes involved.

This additional language in Comment [1], that the obligation continues throughout the representation, helps lawyers understand that if changes in the facts and circumstances occur during a representation, lawyers must inquire and evaluate whether they can continue the representation. A new cross-reference to Model Rule 1.1 (Competence) also is added.

Creating a new provision for mandatory withdrawal in paragraph (a)(4)

Current Model Rule 1.16(a)(1) requires a lawyer to decline or withdraw from a representation if "the representation will result in violation of the Rules of Professional Conduct or other law."

Current Comment [2] explains: "A lawyer ordinarily must decline or withdraw from representation if the client demands that the lawyer engage in conduct that is illegal or violates the Rules of Professional Conduct or other law. The lawyer is not obliged to decline or withdraw simply because the client suggests such a course of conduct; a client may make such a suggestion in the hope that a lawyer will not be constrained by a professional obligation." Model Rule 1.4(a)(5), regarding communications obligations, explains that lawyers must consult with the client about any relevant limitation on the lawyer's conduct. Rule 1.2(d) tells lawyers that one of those limitations on what a lawyer may do is counseling or assisting a client in conduct that the lawyer knows is criminal or fraudulent.

But these statements appear in three different Rules and their respective Comments. As a result, lawyers must hunt for this guidance – that when a client suggests a course of conduct that is criminal, fraudulent, or otherwise illegal or violates the Rules, a lawyer must consult with the client about the limits of the lawyer's representation and that the lawyer is prohibited from engaging or assisting a client in a crime or fraud. After the conversation, if the client is not deterred from the suggested conduct, the lawyer must decline the representation or withdraw if already in the matter.

The Committees believe that lawyers deserve clear direction regarding inquiry about and assessing the facts and circumstances ~~conducting client due diligence~~, and have clear advice on what to do when concerns or questions arise about the scope, goals, and objectives of the representation. Therefore, the Committees recommend clarifying the Black Letter of Rule 1.16(a) to provide that the lawyer must decline or withdraw from the representation if:

(4) the client or prospective client seeks to use or persists in using the lawyer's services to commit or further a crime or fraud, despite the lawyer's discussion pursuant to Rules 1.2(d) and 1.4(a)(5) regarding the limitations on the lawyer assisting with the proposed conduct.

Expanding the guidance provided in Comment [2]

New language proposed for Comment [2] explains that the lawyer's obligation to inquire and assess ~~client due diligence requirement~~ is informed by the risk that the client or prospective client seeks to use or persists in using the lawyer's services to commit or further a crime or fraud. The use of a risk-based inquiry and assessment of the facts and circumstances of each representation set forth in Comment [2] ensures that the scope and depth of the inquiry and assessment a lawyer must perform will be based on the unique facts and circumstances presented by each client or prospective client. There is no "one-size-fits-all" ~~client due diligence~~ obligation, and this risk-based approach is the least burdensome for lawyers. The proposed amendments take a balanced approach to the issue.

To assist lawyers, new language in Comment [2] provides examples for lawyers to consider in assessing the level of risk posed to determine whether they must decline the representation or withdraw from an ongoing representation. This risk-based approach differs from a rules-based approach that requires compliance with every element of detailed laws, rules, or regulations irrespective of the underlying quantum or degree of risk. As noted in ABA Formal Ethics Opinion 463, implementing risk-based control measures helps a lawyer avoid being caught up in a client's illegal activities, while decreasing the burden on lawyers whose practice does not expose them to the problems sought to be addressed.

In addition to these exemplary factors, new language in Comment [2] provides lawyers with a range of additional resources to guide their inquiry and assessment. For example, the new language references the 2010 ABA Voluntary Good Practices Guidance for Lawyers to Detect and Combat Money Laundering and Terrorist Financing, which provides excellent practice examples that help lawyers using the risk-based approach better identify situations that should be considered "red flags" and provides "practice pointers" to offer further insight.

The U.S. Department of Treasury's Specially Designated Nationals and Blocked Persons List is another sample resource to assist lawyers in conducting their inquiry and assessment ~~due diligence~~, which is comprised of "individuals and companies owned or controlled by, or acting for or on behalf of, targeted countries. It also lists

individuals, groups, and entities, such as terrorists and narcotics traffickers designated under programs that are not country-specific."[18]

~~**Deleting permissive withdrawal under (b)(2) and applicable guidance in Comment [7]**~~

~~The recommended amendments to Model Rule 1.16(a) and the creation of Model Rule 1.16(a)(4) on mandatory withdrawal make the provisions on permissive withdrawal under Rule 1.16(b)(2) unnecessary for two reasons. Therefore, the Committees recommend deleting Model Rule of Professional Conduct 1.16(b)(2) and its corresponding guidance in Comment [7].~~

~~Current Model Rule 1.16(b)(2) provides that a lawyer may withdraw from the representation if the client "persists in a course of conduct involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent." With the addition of the now explicit duty to conduct a risk-based inquiry and assessment, the lawyer who reasonably believes that a client seeks to use or is using the lawyer's services to commit or further a crime or fraud will have the facts necessary to decide whether withdrawal is mandatory under new paragraph (a)(4). Therefore, paragraph (b)(2) is no longer necessary.~~

~~Additionally, deleting the permissive withdrawal under current Rule 1.16(b)(2) does not remove the option for a lawyer to withdraw from a representation. This is true because Model Rule 1.16(b)(4) allows a lawyer to withdraw when the client "insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement" or because Model Rule 1.16(b)(7) allows the lawyer to withdraw "when other good cause for withdrawal exists." Both exceptions can be used by lawyers who withdraw from the representation when the client "persists in a course of conduct involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent." Therefore, paragraph (b)(2) is no longer necessary.~~

Conclusion

The proposed changes to Model Rule 1.16 will benefit lawyers and the public by making explicit the nature and scope of lawyers' existing ~~client due diligence~~ obligations to inquire about and assess the facts and circumstances regarding a matter in the enforceable Black Letter of the Rule. Doing so will help lawyers avoid unwittingly becoming involved in clients' criminal and fraudulent conduct and will help them better identify and respond to "red flags." In doing so, this Resolution also will demonstrate to the U.S. Government, entities like the FATF, and the public that the profession takes seriously its obligations to ~~perform client due diligence to~~ avoid becoming involved in a client's criminal and fraudulent conduct, including money laundering, terrorist financing,

[18] *See* OFFICE OF FOREIGN ASSETS CONTROL, SPECIALLY DESIGNATED NATIONALS AND BLOCKED PERSONS LIST (SDN) HUMAN READABLE LISTS (last updated Apr. 27, 2023), https://ofac.treasury.gov/specially-designated-nationals-and-blocked-persons-list-sdn-human-readable-lists.

human trafficking and human rights violations, tax related crimes, sanctions evasion, and other illicit activity.

The ABA Standing Committees on Ethics and Professional Responsibility and Professional Regulation respectfully request that the House of Delegates approve this Resolution to amend the Black Letter of Model Rule 1.16 and its Comments.

Respectfully submitted,

Lynda C. Shely, Chair
ABA Standing Committee on Ethics
and Professional Responsibility

Justice Daniel J. Crothers, Chair
ABA Standing Committee on
Professional Regulation

August 2023