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

REVISED AGENDA, POSTED ON MARCH 3, 2021

March 5, 2021, 9:00 a.m.

VIRTUAL MEETING IN RESPONSE TO COVID-19 RESTRICTIONS

Meeting invitation with connection info to arrive via email next week

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1. Welcome to our new liaison justice, Justice Maria Berkenkotter
2. Approval of minutes for January 8, 2021 meeting [pp. 001 - 004]
3. Report from Rule 1.5(b) "Scope of Representation" Subcommittee [Noah Patterson, pp. 005 - 010]
4. Proposed housekeeping amendments to Rule 1.1., cmt. [6], and Rule 5.5(a)(1) and cmt. [1] [Marcy Glenn, pp. 011 - 016]
5. New business:
   a. HB ___, Concerning Measures to Enhance Prosecutor Accountability [Jessica Yates, pp. 017 – 044]
   b. Recommendation to repeal Rule 1.5(e) [Alec Rothrock, pp. 045 – 047]
6. Administrative matters:
   a. Select next meeting date
7. Adjournment (before noon)

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COLORADO SUPREME COURT

STANDING COMMITTEE ON THE RULES OF PROFESSIONAL CONDUCT

Submitted Minutes of Meeting of the Full Committee
On January 8, 2021
Fifty-Eighth Meeting of the Full Committee
Virtual Meeting in Response to Covid-19 Restrictions

The fifty-eighth meeting of the Colorado Supreme Court Standing Committee on the Rules of Professional Conduct was convened at 9:00 a.m. on Friday, January 8, 2021, by Chair Marcy G. Glenn. The meeting was conducted virtually in response to Covid-19 restrictions.

Present in person at the meeting, in addition to Marcy G. Glenn and Justices Monica M. Márquez and William W. Hood, III, were Nancy L. Cohen, Cynthia F. Covell, Thomas E. Downey, Jr., Judge Adam J. Espinosa, Margaret Funk, Tyrone Glover, April Jones, Judge Lino S. Lipinsky de Orlov, William R. Lucero, Marianne Luu-Chen, Julia Martinez, Cecil E. Morris, Jr., Noah C. Patterson, Judge Ruthanne N. Polidori, Henry Richard Reeve, Alexander R. Rothrock, Marcus L. Squarrell, David W. Stark, Jamie S. Sudler, III, Jennifer J. Wallace, Lisa M. Wayne, Judge John R. Webb, Frederick R. Yarger, Jessica E. Yates, and Tuck Young. Eli Wald was excused from attendance. Absent from attendance was Boston H. Stanton, Jr. John M. Lebsack, Katy Donnelly, and Erika Holmes attended the meeting as guests.

1. Meeting Materials: Minutes of September 25, 2020 Meeting.

The Chair had provided the submitted minutes of the fifty-seventh meeting of the committee held on September 25, 2020 to the members prior to the meeting. The minutes of the fifty-seventh meeting of the Full Committee held on September 25, 2020 were approved.

2. Report from the Rule 1.5(b) "scope of representation" Subcommittee.

The Supplemental Report of the Rule 1.5(b) Subcommittee dated December 2, 2020 was presented at pages 001-011 of the meeting materials and through the report of its Chair and Committee member Noah Patterson. Mr. Patterson reported that the Subcommittee had drafted three options for consideration in response to the comments of the Full Committee at the meeting of September 25, 2020. Mr. Patterson noted that the Subcommittee had worked on the language of only the Rule with the understanding that drafting the Comment to accompany the Rule would be accomplished more efficiently after the language of the Rule had been finalized. Mr. Patterson then reviewed the three options presented for consideration. He noted that Option #1 was very similar to the version reviewed at the September 25, 2020 meeting with one small exception and noted that the benefit of Option #1 is that it tracks closely with the ABA's Model Rule 1.5(b). Mr. Patterson then reviewed Option #2, noting that it separates the concepts of "scope of representation" from the concept of "basis or rate of the fee and expenses," and that its wording took inspiration from and borrowed some language from New York Rule 1.5(b). He noted that

the language of Option #2 was intended to parallel the substance of the language set forth in Option #1 except that it makes the exception for communication of the scope of representation dependent on the provision of services "that are of the same general kind as previously rendered to the client." In reviewing Option #3, Mr. Patterson noted that Option #3 parallels the substance of Option #2 but attempts to simplify the requirements of the proposed changes by stating it in three separate parts.

Following Mr. Patterson's review of the options under consideration, members provided a number of comments both with respect to the timing of communication to the client and the scope of representation issues. There was discussion as to whether the timing of the communication to the client regarding the basis or rate of the fee and expenses should be "… before or within a reasonable time after commencing the representation" or "promptly." With respect to the scope of representation issue, several members having experience representing institutional clients essentially as an outside General Counsel expressed concern regarding communicating with the client regarding the scope of the representation and the language "… except when the lawyer will perform services that are of the same general kind as previously rendered to a regularly represented client…." Some members expressed the view that Option #3 adequately addressed concerns regarding institutional clients and communications regarding the scope of representation was adequately handled in.

Following additional discussion, there appeared to be a consensus favoring the layout and content of Option #3. The discussion continued, however, on whether the written communication to the client should be done "promptly" or "before or within a reasonable time after commencing the representation."

The Committee took a straw vote approving an amended Option #3 as follows:

> (b) The lawyer shall communicate before or within a reasonable time of commencing the representation to the client in writing:
>
> (1) the basis or rate of the fee and expenses for which the client will be responsible, except when the lawyer will continue to charge a regularly represented client on the same basis or rate, and
>
> (2) the scope of representation, except when the lawyer will perform services that are of the same general kind as previously rendered to a regularly represented client.
>
> The lawyer shall communicate promptly to the client in writing any changes in the basis or rate of the fee or expenses.

The Committee also referred the matter back to the Subcommittee to consider the overall formatting of the language of the Rule and to address concerns raised during the discussion in the drafting of a proposed Comment to the Rule.

3. New Business:

A. Advisory Committee's proposed renumbering amendments to Rules 1.3, 1.15D, 1.15E, 5.4, and 5.5.

Attorney Regulation Counsel and Committee member Jessica Yates provided an update on the Advisory Committee's proposed updating to Rules 1.3, 1.15D, 1.15E, 5.4, and 5.5 as more fully outlined in the meeting materials at pages 012 through 018. Ms. Yates noted that the reference to C.R.C.P. 260.6 that appears in the last line of Rule 5.4 on page 014 should be deleted and replaced with "250.7". No formal action of the Full Committee was required on this issue. The Chair thanked Ms. Yates for her report.

B. Potential housekeeping amendment to Rule 5.5(a)(1) and comment [1].

Committee guest John Lebsack made a presentation with respect to potential housekeeping amendments to Rule 5.5 dealing with the Unauthorized Practice of Law and Comment 1 to that Rule. Mr. Lebsack suggested that housekeeping amendments may be necessary in view of other recent rule changes. Mr. Lebsack reviewed the meeting materials at pages 017-018 and reviewed several options for the Committee's consideration. The potential housekeeping amendments centered on Rule 5.5(a)(1) and whether the current references to "… C.R.C.P. 204 or C.R.C.P. 205 …" should be changed to reflect the fact that the text of former C.R.C.P. 204 and C.R.C.P. 205 has been moved to new rules now numbered as C.R.C.P. 204.1 through 204.6 and C.R.C.P. 205.1 through 205.8, but the rule books continue to include C.R.C.P. 204 and C.R.C.P. 205, albeit without any text.

After discussion, a motion was made to amend Rule 5.5(a)(1) by changing the existing language "… C.R.C.P. 204 or C.R.C.P. 205 …" to read "… C.R.C.P. 204, *et. seq* or C.R.C.P. 205, *et. seq*…." The motion was approved.

C. Potential housekeeping amendment to Rule 1.1, comment [6].

Committee member Alec Rothrock proposed an additional housekeeping amendment in Comment [6] to Rule 1.1, which includes a cross-reference to other Rules, with brief parentheticals summarizing the cross-referenced rules' subject matter. The comment includes an inaccurate cross-reference to "1.5(e) (fee sharing)," a subject that is actually addressed in Rule 1.5(d). (Rule 1.5(e) states that referral fees are prohibited.) To correct this error, the Committee voted to recommend changing "1.5(e)" to "1.5(d)".

D. Potential amendment to Rule 4.5(a).

The Chair reviewed a suggestion made to the CBA Ethics Committee and referred by that committee to the Standing Committee, that Rule 4.5(a), which precludes a lawyer from threatening criminal, administrative, or disciplinary charges to obtain an advantage in a civil matter, should be amended to also prohibit threats by an attorney or the attorney's client to post negative information about another party on social media or other electronic sources. Several Committee members expressed concern that threats of social media posts do not rise to the same

level of harm as the conduct that Rule 4.5 currently prohibits. Other members noted the First Amendment issues associated with prohibitions on the use of social media. In light of these concerns, as well as the Committee's belief that the concerns raised by the inquiry were adequately addressed by the existing provisions of Rules 8.4(c) and 8.4(h), the Committee declined to form a subcommittee to further investigate the issue.

4. Administrative Matters

The Committee agreed to hold its next meeting in March 2021. Meeting dates for either March 5 or March 12 were proposed. Based on members' availability, the Chair will select the date for the March 2021 meeting, with notification to members to follow.

Meeting adjourned at 11:00 a.m.

Respectively submitted.

Thomas E. Downey, Jr., Secretary

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Colorado Supreme Court Standing Committee for the Rules of Professional Conduct

Report of the Rule 1.5(b) Subcommittee
February 24, 2021

I. Introduction

At the September 25, 2020 meeting of the Colorado Supreme Court Standing Committee for the Rules of Professional Conduct ("the Committee"), the Rule 1.5(b) Subcommittee ("the Subcommittee")[1] presented proposed changes to Rule 1.5(b) of the Colorado Rules of Professional Conduct as well as to Comment [2] to Rule 1.5.[2] After discussion of the proposed changes to the rule and comment, the Committee asked the Subcommittee to continue work on the proposed changes.

At the January 8, 2021 Committee meeting, the Subcommittee presented three options for revisions to Rule 1.5(b).[3] The Committee selected one of these options. Since the January 8 meeting, the Subcommittee has worked on revisions to Comment [2] to Rule 1.5. This report proposes two minor changes to the version of Rule 1.5(b) approved at the January 8 Committee meeting and explains proposed changes to Comment [2] to Rule 1.5.

II. Description of the Recommended Changes

A. Proposed Changes to Rule 1.5(b)

The Subcommittee has made some minor changes to the version of Rule 1.5(b) that the Committee chose at its last meeting. The Subcommittee moved the phrase "before or within a reasonable time of commencing the representation" to the beginning of (b) and added "the" before "representation" in (b)(2). Here is a clean version of the proposed revisions to Rule 1.5(b):

> (b) Before or within a reasonable time of commencing the representation, the lawyer shall communicate to the client in writing:

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[1] The Subcommittee consists of Cynthia Covell, the Honorable Adam Espinosa, Marcy Glenn, John Lebsack, Alec Rothrock, Jessica Yates, Marianne Luu-Chen, Tyrone Glover, and Noah Patterson.

[2] *See* pages 008–061 of the materials for the September 25, 2020 Committee meeting.

[3] *See* pages 001–011 of the materials for the January 8, 2021 Committee meeting.

(1) the basis or rate of the fee and expenses for which the client will be responsible, except when the lawyer will continue to charge a regularly represented client on the same basis or rate; and

(2) the scope of the representation, except when the lawyer will perform services that are of the same general kind as previously rendered to a regularly represented client.

The lawyer shall communicate promptly to the client in writing any changes in the basis or rate of the fee or expenses.

While the Subcommittee made minor changes to the revised version of Rule 1.5(b) discussed at the January 8 Committee meeting, our primary focus since that meeting has been on revising Comment [2].

B. Proposed Changes to Comment [2]

Consistent with the recommended changes to Rule 1.5(b) and to make the comment clearer, the Subcommittee recommends changes to Comment [2] to Rule 1.5. Here are the proposed revisions to Comment [2], without any track changes:

[2] In a new client-lawyer relationship, the scope of the representation and the basis or rate of the fee and expenses must be promptly communicated in writing to the client, but the communication need not take the form of a formal engagement letter or agreement, and it need not be signed by the client. It is not necessary to recite all the factors that underlie the basis or rate of the fee, but only those that are directly involved in its computation. It is sufficient, for example, to state that the basic rate is an hourly charge or a fixed amount or an estimated amount, to identify the factors that may be taken into account in finally fixing the fee, or to furnish the client with a simple memorandum or the lawyer's customary fee schedule. Similarly, it is not necessary to recite all the anticipated services that comprise, or the exclusions from, the scope of representation, so long as the communication accurately conveys the agreement with the client.

When a lawyer has regularly represented a client and the lawyer will continue to charge the client on the same basis or rate, the lawyer is not required to communicate the basis or rate of the fee and expenses. In such circumstances, the lawyer and client ordinarily will have evolved an understanding concerning the basis or rate of the fee and the expenses for which the client will be responsible.

When a lawyer will perform services for a regularly represented client that are of the same general kind as previously rendered, the lawyer is

not required to communicate the scope of the representation. Whether services are of "the same general kind as previously rendered" depends on consideration of the totality of the circumstances surrounding the services previously rendered and those that will be rendered. Circumstances that may be relevant include, but are not limited to, the type of the services rendered (e.g., litigation or transactional), the subject matter of the services rendered (e.g., breach of contract or patent infringement), and the sophistication of the client.

Whether the client-lawyer relationship is new or one where the lawyer has regularly represented the client, any changes in the basis or rate of the fee or expenses must be communicated in writing. Changes in the scope of the representation may occur frequently over the course of the representation and are not required to be communicated in writing; however, other rules of professional conduct may require additional communications and communicating such changes in writing may help avoid misunderstandings between clients and lawyers. When other developments occur during the representation that render an earlier communication substantially inaccurate or inadequate, a subsequent written communication may help avoid misunderstandings between clients and lawyers.

The Subcommittee recommends the above changes to the current Comment [2] for the following reasons:

- <u>The first paragraph of the revised comment</u>: this paragraph provides guidance regarding the written communication that a lawyer must provide in a new lawyer-client relationship.
    - <u>Proposed changes in the first sentence of the first paragraph:</u>
        - This sentence is the second sentence in the current comment. Putting this sentence first reflects the organization of the proposed revisions to the rule (which begin by discussing new client-lawyer relationships).
        - Insert the phrase "the scope of the representation and" after "In a new client-lawyer relationship, …." This proposed change reflects the addition of the "scope of representation" language to the rule.
        - Add the phrase "and expenses" after "basis or rate of the fee." This proposed change reflects the current text of the rule, which requires that the basis or rate of both the fee and expenses be communicated in writing (in a new client-lawyer relationship).
    - <u>Proposed changes in the second sentence of the first paragraph</u>:
        - Delete "Moreover" to accommodate the rearranging of the sentence structure in the revised comment.

        - Add the phrase "or rate" after "it is not necessary to recite all the factors that underlie the basis…." This change reflects the current language of the rule.
    - Proposed changes in the third sentence of the first paragraph: this sentence is taken from the current Comment [2]; the Subcommittee is proposing no changes to this sentence.
    - Proposed changes in the fourth sentence of the first paragraph:
        - This sentence is new (i.e., it is not in the current Comment [2]) and is intended to give guidance regarding communication of the scope of representation. This sentence indicates that the scope of representation may include not only services that will be performed, but also services that might be excluded from the representation. However, like communication of the basis or rate of the fee and expenses, communication of the scope of representation does not necessarily require communication of every included or excluded service. Instead, the lodestar is the agreement with the client.

- The second paragraph of the revised comment: this paragraph provides guidance regarding the circumstances in which a lawyer is not required to communicate the basis or rate of the fee and expenses.
    - Proposed changes in the first sentence of the second paragraph: most of this sentence is new, however it simply restates the principle in revised Rule 1.5(b)(1).
    - Proposed changes in the second sentence of the second paragraph: most of this sentence is taken verbatim from the first sentence in the current Comment [2].

- The third paragraph of the revised comment: this paragraph is mostly new and provides guidance regarding the circumstances in which a lawyer is not required to communicate the scope of the representation.
    - Proposed changes in the first sentence of the third paragraph: this sentence restates the principle in revised Rule 1.5(b)(2).
    - Proposed changes in the second and third sentences of the third paragraph: these sentences provide guidance regarding the standard "when the lawyer will perform services that are of the same general kind as previously rendered to a regularly represented client." As proposed by this revised comment, this standard is analyzed by reviewing the totality of the circumstances surrounding the services previously rendered and those that will be rendered. The comment does not provide an exclusive list of circumstances to consider, but only several examples of circumstances that might be considered. The first two examples provided are inspired by a treatise that discusses the "services that are of the same general kind as previously rendered"

standard in New York's version of Rule 1.5. *See* ROY D. SIMON JR., SIMON'S NY RULES OF PROF. CONDUCT § 1.5:40 (Dec. 2020 update). The third example—the sophistication of the client—is inspired by other Comments. *See, e.g.*, Colo. RPC 1.5, cmt. [6F]; Colo. RPC 4.3, cmt. [2]; Colo. RPC 5.7, cmt. [7]; *cf.*, Colo. RPC 1.5, cmt. [15] (citing a case for that proposition).

- The fourth paragraph of the revised comment: this paragraph provides guidance regarding what must be communicated to the client regarding changes in the basis or rate or in the scope of the representation.
    - Proposed changes in the first sentence of the fourth paragraph: This sentence is new and makes clear that lawyers must communicate in writing to regularly represented as well as new clients any changes to the basis or rate of the fee or expenses.
    - Proposed changes in the second sentence of the fourth paragraph: This sentence is new. The concept in the first clause of this new sentence ("Changes in the scope of the representation may occur frequently over the course of the representation and are not required to be communicated in writing") is taken from the Reporter's Explanation for the Ethics 2000 changes to the Model Rule 1.5 (available at https://tinyurl.com/y29zzpf2) (last visited February 13, 2021). The next phrase ("however, other rules of professional conduct may require additional communications") was added by the Committee at its September 25, 2021 meeting. The final phrase in this sentence ("and communicating such changes in writing may help avoid misunderstandings between clients and lawyers") conveys that while changes in the scope of representation are not required to be communicated in writing, such written communication can be a best practice and help avoid misunderstandings.
    - Proposed changes in the third sentence of the fourth paragraph: This sentence exists in the current Comment [2], however the Subcommittee proposes several changes:
        - The word "other" is inserted before "developments" to indicate that these are developments that are separate from changes in the scope of representation (which is what the previous sentence concerns).
        - The phrase "or inadequate" is added to make clear that it is often a best practice to address communications rendered incorrect or inadequate with a subsequent written communication.
        - The word "revised" is replaced with "subsequent" because the prior communication could have been either oral or written (stating "revised written" indicates that the previous communication was in writing). The Subcommittee recommends

adding "subsequent" to make clear that the communication referenced in this comment is a second communication after the now inadequate or incorrect initial communication.

- The use of the phrase "should be provided to the client" in the current Comment [2] makes it unclear whether this part of the comment is required by the rule or is instead a best practice not necessarily required by the rule. The Subcommittee has substituted the language "may help avoid misunderstandings between clients and lawyers" to explain that this sentence is a best practice which the rule does not necessarily require. For example, a case could have an unexpected change in size or complexity. While such a change would not necessarily require a written communication under Rule 1.5(b), it could be a best practice to inform the client of the change in writing to avoid any potential misunderstanding.

- Proposed deletion of the last two sentences in the current Comment [2]: The Subcommittee proposes deletion of the last two sentences in the current Comment [2] regarding flat fee and contingent fee agreements because these sentences do not appear to clarify anything in Rule 1.5(b) or other applicable rules.

III. Conclusion

The Subcommittee recommends the revision of Rule 1.5(b) and Comment [2] consistent with the discussion above.

Marcy G. Glenn
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January 29, 2021

The Honorable Monica Márquez
Colorado Supreme Court
2 East 14th Avenue
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The Honorable Maria E. Berkenkotter
Colorado Supreme Court
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VIA EMAIL AND U.S. MAIL

Re: Housekeeping Amendments to (a) Rule 1.1, cmt. [6], and (b) Rule 5.5(a)(1) and cmt. [1]

Dear Justice Márquez and Justice Berkenkotter:

I write on behalf of the Court's Standing Committee on the Colorado Rules of Professional Conduct (the Standing Committee). At its January 8, 2021 meeting, the Standing Committee voted to recommend to the Court proposed amendments to Comment [6] to Rule 1.1 of the Colorado Rules of Professional Conduct (the Rules or Colo. RPC); Rule 5.5(a)(1); and Comment [1] to Rule 5.5. In this letter, I refer to these proposed amendments collectively as the "Housekeeping Amendments." Word documents prepared by the Court's Staff Attorney Kathryn Michaels, containing clean and redlined versions of the Housekeeping Amendments, are attached as Exhibits 1 and 2.

Rule 1.1, cmt. [6]. Comment [6] to Rule 1.1 includes a cross-reference to other Rules, with brief parentheticals summarizing the cross-referenced rules' subject matter. It includes an inaccurate cross-reference to "1.5(e) (fee sharing)," a subject that is actually addressed in Rule 1.5(d). (Rule 1.5(e) states that referral fees are prohibited.) Therefore, the Standing Committee recommends changing "1.5(e)" to "1.5(d)".

Rule 5.5(a)(1) and cmt. [1]. Rule 5.5(a)(1) prohibits a lawyer from practicing law in Colorado without a license to practice issued by the Court, "unless specifically authorized by C.R.C.P. 204 or C.R.C.P. 205 or federal or tribal law[.]" Comment [1] includes this sentence: "Rule 5.5(a)(1) recognizes that C.R.C.P. 204 and C.R.C.P. 205 permit lawyers to practice law in accordance with their terms in Colorado without a license from the Colorado Supreme Court."

The references to C.R.C.P. 204 and 205 are no longer accurate. Those rules have been replaced by C.R.C.P. 204.1 through 204.6, although the rule books, Westlaw, and LEXIS maintain an umbrella (but text-less) C.R.C.P. 204. Therefore, the Standing Committee recommends deleting "C.R.C.P. 204 or C.R.C.P. 205" and "C.R.C.P. 204 and C.R.C.P. 205" in, respectively, Rule 5.5(a)(1) and Comment 1, and replacing the deleted text in the rule and comment with "C.R.C.P. 204, *et seq.*"

The Standing Committee respectfully asks the Court to favorably consider the Housekeeping Amendments. Because these amendments are non-substantive, it does not appear that the Court would need to request comments, schedule these proposed amendments for hearing, or take immediate action. The Court might wish to defer action on the proposed Housekeeping Amendments until it has fully considered the disciplinary rule amendments proposed by the Advisory Committee, which include proposed revisions to Rules 1.3, 1.15D, 1.15E, 5.4, and 5.5—most of which also relate to the numbering of cross-referenced rules. I understand that a hearing on those proposed amendments is scheduled for February 10, 2021.

Sincerely,

Marcy G. Glenn
Of Counsel
for Holland & Hart LLP

MGG:ko
Enclosures
cc: (all via email, w/enclosures)
Colo. RPC Standing Committee members
Jennifer Wallace, Esq.
Kathryn Michaels, Esq.

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Rule 1.1. Competence

[NO CHANGE]

COMMENT

[1] - [5] [NO CHANGE]

[6] Before a lawyer retains or contracts with other lawyers outside the lawyer's own firm to provide or assist in the provision of legal services to a client, the lawyer should ordinarily obtain informed consent from the client and must reasonably believe that the other lawyers' services will contribute to the competent and ethical representation of the client. See also Rules 1.2 (allocation of authority), 1.4 (communication with client), 1.5(d~~e~~) (fee sharing), 1.6 (confidentiality), and 5.5(a) (unauthorized practice of law). The reasonableness of the decision to retain or contract with other lawyers outside the lawyer's own firm will depend upon the circumstances, including the education, experience, and reputation of the nonfirm lawyers; the nature of the services assigned to the nonfirm lawyers; and the legal protections, professional conduct rules, and ethical environments of the jurisdictions in which the services will be performed, particularly relating to confidential information.

[7] - [8] [NO CHANGE]

Rule 1.1. Competence

[NO CHANGE]

COMMENT

[1] - [5] [NO CHANGE]

[6] Before a lawyer retains or contracts with other lawyers outside the lawyer's own firm to provide or assist in the provision of legal services to a client, the lawyer should ordinarily obtain informed consent from the client and must reasonably believe that the other lawyers' services will contribute to the competent and ethical representation of the client. See also Rules 1.2 (allocation of authority), 1.4 (communication with client), 1.5(d) (fee sharing), 1.6 (confidentiality), and 5.5(a) (unauthorized practice of law). The reasonableness of the decision to retain or contract with other lawyers outside the lawyer's own firm will depend upon the circumstances, including the education, experience, and reputation of the nonfirm lawyers; the nature of the services assigned to the nonfirm lawyers; and the legal protections, professional conduct rules, and ethical environments of the jurisdictions in which the services will be performed, particularly relating to confidential information.

[7] - [8] [NO CHANGE]

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.* ~~C.R.C.P. 204 or C.R.C.P. 205~~ or federal or tribal law;
(2) - (4) [NO CHANGE]

(b) - (e) [NO CHANGE]

COMMENT
[1] The definition of the practice of law is established by law and varies from one jurisdiction to another. In order to protect the public, persons not admitted to practice law in Colorado cannot hold themselves out as lawyers in Colorado or as authorized to practice law in Colorado. Rule 5.5(a)(1) recognizes that C.R.C.P. 204, *et seq.* ~~C.R.C.P. 204 and C.R.C.P. 205~~ permit lawyers to practice law in accordance with their terms in Colorado without a license from the Colorado Supreme Court. Lawyers may also be permitted to practice law within the physical boundaries of the State, without such a license, where they do so pursuant to Federal or tribal law. Such practice does not constitute a violation of the general proscription of Rule 5.5(a)(1).

[2] - [6] [NO CHANGE]

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) - (4) [NO CHANGE]

(b) - (e) [NO CHANGE]

COMMENT
[1] The definition of the practice of law is established by law and varies from one jurisdiction to another. In order to protect the public, persons not admitted to practice law in Colorado cannot hold themselves out as lawyers in Colorado or as authorized to practice law in Colorado. Rule 5.5(a)(1) recognizes that C.R.C.P. 204, *et seq.* permit lawyers to practice law in accordance with their terms in Colorado without a license from the Colorado Supreme Court. Lawyers may also be permitted to practice law within the physical boundaries of the State, without such a license, where they do so pursuant to Federal or tribal law. Such practice does not constitute a violation of the general proscription of Rule 5.5(a)(1).

[2] - [6] [NO CHANGE]

From: Jessica Yates <j.yates@csc.state.co.us>
Sent: Tuesday, March 2, 2021 2:27 PM
To: Marcy Glenn <MGlenn@hollandhart.com>
Subject: Supplement to Standing Rules Committee March 5 Meeting

External Email

Marcy,

Per our conversation yesterday, I'd like to ask the Standing Rules Committee to form a subcommittee to study whether there should be any recommended changes to the Rules and/or their comments to address recently-raised concerns about prosecutors' obligations to disclose exculpatory evidence pursuant to Colo. RPC 3.8(d).

As I mentioned, a draft bill has been forwarded to me (attached) that is expected to be introduced this week. As I understand it, the bill drafters have acknowledged that additional changes may be forthcoming, but the bill summary at the beginning should give you a sense of what they would like to accomplish. I'm also attaching a 2002 Colorado Supreme Court case *In re Attorney C*, which may be motivating some of these proposed legislative provisions.

There may be additional discussions between now and Friday's meeting, and perhaps a revised version of the bill, and if they might affect the Committee's potential decision to form a subcommittee I will circle back with you. Thank you in advance for being receptive to this late addition to Friday's agenda.

Jessica Yates,
Attorney Regulation Counsel

First Regular Session
Seventy-third General Assembly
STATE OF COLORADO

REDRAFT
2.26.21
Double underlining denotes changes from prior draft

DRAFT

LLS NO. 21-0347.02 Jacob Baus x2173 **HOUSE BILL**

HOUSE SPONSORSHIP

Kennedy and Tipper,

SENATE SPONSORSHIP

Gonzales,

BILL TOPIC: "Enhance Prosecutor Accountability"
DEADLINES: Finalize by: FEB 24, 2021 File by: MAR 2, 2021

A BILL FOR AN ACT

101 **CONCERNING MEASURES TO ENHANCE PROSECUTOR ACCOUNTABILITY.**

Bill Summary

(Note: This summary applies to this bill as introduced and does not reflect any amendments that may be subsequently adopted. If this bill passes third reading in the house of introduction, a bill summary that applies to the reengrossed version of this bill will be available at http://leg.colorado.gov.)

The bill creates a definition of "covered information" to include various forms of exculpatory information or evidence.

A prosecutor or prosecution team has a duty to disclose covered information if:

- The covered information is in the custody or control of the prosecutor or prosecution team; or
- The existence of covered information is known, or by the exercise of due diligence would become known, to the

Capital letters or bold & italic numbers indicate new material to be added to existing statute.
Dashes through the words indicate deletions from existing statute.

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prosecutor or prosecution team.

The court may order an appropriate remedy in the case if the court has reason to believe the prosecutor or prosecution team intentionally, knowingly, or recklessly failed its duty to disclose covered information.

The court shall submit a record and complaint to the Colorado supreme court's office of attorney regulation for investigation when the court has reason to believe the prosecutor or prosecution team intentionally, knowingly, or recklessly failed its duty to disclose covered information.

The Colorado supreme court's office of attorney regulation counsel shall investigate every complaint received from a court. Notwithstanding any law to the contrary, the office of attorney regulation counsel is authorized to order appropriate discipline against a prosecutor who intentionally, knowingly, or recklessly failed to comply with the duty to disclose covered information, regardless of the materiality of the failure.

At different stages in the proceedings, the lead prosecutor shall affirm the lead prosecutor's compliance with various prosecutorial ethical standards.

A prosecutor who, under color of law, intentionally, knowingly, or recklessly subjects or causes to be subjected any other person to the deprivation of any individual rights that create binding obligations on government actors secured by the bill of rights, article II of the state constitution, is liable to the injured party for legal or equitable relief or any other appropriate relief.

A district attorney shall collect various data for every case filed, publish it to the district attorney's website, and submit a semi-annual report of the data to the division.

By July 1, 2022, the statewide discovery sharing system must have operational functionality that:

- Issues an automatic time stamp when a discovery item is uploaded to the statewide discovery sharing system and is available to the prosecutor and a notice is sent to the defendant or defense counsel that a discovery item was uploaded for the prosecutor and the time it was uploaded; and
- Issues an automatic notice to the elected district attorney when a discovery item has been uploaded to the statewide discovery sharing system and is available to the prosecutor within the district attorney's office, but the prosecutor has not shared the discovery item with the defendant or defense counsel within 5 business days.

Be it enacted by the General Assembly of the State of Colorado:

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SECTION 1. In Colorado Revised Statutes, 20-1-101, **amend** (1) as follows:

20-1-101. Bond and oath or affirmation of district attorney and staff. (1) THE GENERAL ASSEMBLY DECLARES THAT EVERY DISTRICT ATTORNEY, AND EVERY PERSON WHO DISCHARGES THE DUTIES OF THE DISTRICT ATTORNEY'S OFFICE, SHALL PERFORM PROSECUTORIAL FUNCTIONS IN THE INTERESTS OF JUSTICE AND NOT MERELY TO CONVICT, AND IN SUPPORT OF THE CONSTITUTION OF THE UNITED STATES, THE CONSTITUTION OF THE STATE OF COLORADO, THE LAWS OF THE STATE OF COLORADO, THE STATE OF COLORADO'S RULES OF PROFESSIONAL CONDUCT, AND THE AMERICAN BAR ASSOCIATION CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION. Every district attorney, chief deputy district attorney, deputy district attorney, special deputy district attorney, and assistant district attorney shall take an oath or affirmation in accordance with section 24-12-101. A district attorney shall also execute to the people of the state of Colorado a bond in the sum of five thousand dollars with a good and sufficient individual, schedule, or blanket corporate surety bond or other acceptable security, to be approved by the secretary of state, conditioned for the faithful discharge of the duties of ~~his or her~~ THE DISTRICT ATTORNEY'S office, as the same are prescribed by law, and upon any breach of such bond, an action shall lie thereon for the benefit of any county fund or person injured thereby.

SECTION 2. In Colorado Revised Statutes, **add** part 4 to article 1 of title 20 as follows:

PART 4

ACCOUNTABILITY

20-1-401. Definitions. (1) AS USED IN THIS PART 4, UNLESS THE

CONTEXT OTHERWISE REQUIRES:

(a) "ACCUSED" MEANS A JUVENILE CHARGED WITH A DELINQUENT ACT OR CRIMINAL OFFENSE, OR AN ADULT CHARGED WITH A CRIMINAL OFFENSE.

(b) "COVERED INFORMATION" MEANS INFORMATION OR EVIDENCE, REGARDLESS OF ADMISSIBILITY, THAT IS FAVORABLE TO THE ACCUSED, TENDS TO NEGATE THE GUILT OF THE ACCUSED, MITIGATES THE OFFENSE CHARGED, MAY BE USED TO IMPEACH THE PROSECUTION'S WITNESS OR EVIDENCE, OR COULD REDUCE THE LIKELY PUNISHMENT OF THE ACCUSED IF CONVICTED, AND THE INFORMATION OR EVIDENCE RELATES TO:

(I) THE GUILT OF THE ACCUSED;

(II) A PRELIMINARY MATTER BEFORE THE COURT, INCLUDING THE DECISION TO GRANT OR DENY A MOTION TO TRANSFER A JUVENILE TO CRIMINAL COURT OR GRANT OR DENY A MOTION TO DIRECT FILE A JUVENILE IN CRIMINAL COURT;

(III) THE SENTENCE; OR

(IV) AN EXISTING POST-CONVICTION PROCEEDING.

(c) "PROSECUTING OFFICE" MEANS THE PUBLIC ENTITY PROSECUTING THE ACCUSED'S CASE.

(d) "PROSECUTION TEAM" INCLUDES:

(I) THE PROSECUTING OFFICE; AND

(II) AN ENTITY OR INDIVIDUAL, INCLUDING, BUT NOT LIMITED TO, A LAW ENFORCEMENT AGENCY OR OFFICER, THAT:

(A) ACTS ON BEHALF OF, OR IN CONNECTION WITH, THE STATE OF COLORADO OR ANOTHER PUBLIC ENTITY THAT PROSECUTES THE ACCUSED'S CASE;

(B) ACTS UNDER THE CONTROL OF THE PROSECUTING OFFICE WITH

RESPECT TO THE ACCUSED'S CASE; OR

(C) REPORTS, OR HAS REPORTED, TO THE PROSECUTING OFFICE CONCERNING THE ACCUSED'S CASE.

(e) "PROSECUTOR" MEANS A DISTRICT ATTORNEY OR AN ATTORNEY DISCHARGING THE DUTIES OF THE DISTRICT ATTORNEY AS DESCRIBED IN SECTION 20-1-201.

(f) "PUBLIC ENTITY" MEANS THE STATE OF COLORADO, A COUNTY, CITY AND COUNTY, MUNICIPALITY, POLITICAL SUBDIVISION OF THE STATE, OR PRIVATE ENTITY ENGAGED IN STATE ACTION.

20-1-402. Duty to disclose covered information - rules. (1) (a) A PROSECUTOR OR PROSECUTION TEAM SHALL DISCLOSE COVERED INFORMATION TO THE ACCUSED IF:

(I) COVERED INFORMATION IS IN THE CUSTODY OR CONTROL OF THE PROSECUTOR OR PROSECUTION TEAM; OR

(II) THE EXISTENCE OF COVERED INFORMATION IS KNOWN, OR BY THE EXERCISE OF DUE DILIGENCE WOULD BECOME KNOWN, TO THE PROSECUTOR OR PROSECUTION TEAM.

(b) EXCEPT AS PROVIDED IN SUBSECTION (2) OF THIS SECTION, THE PROSECUTOR OR PROSECUTION TEAM SHALL DISCLOSE COVERED INFORMATION AS SOON AS PRACTICABLE AFTER THE ACCUSED'S FIRST APPEARANCE AND PRIOR TO ANY SUBSEQUENT APPEARANCE, INCLUDING AN APPEARANCE IN WHICH A GUILTY PLEA IS ENTERED, ACCORDING TO A SCHEDULE PROMULGATED BY RULE BY THE COLORADO SUPREME COURT.

(c) IF COVERED INFORMATION IS NOT IN THE CUSTODY OR CONTROL OF OR KNOWN BY THE PROSECUTOR OR PROSECUTION TEAM IN ORDER TO SATISFY SUBSECTION (1)(b) OF THIS SECTION, THEN AS SOON AS IS REASONABLY PRACTICABLE UPON THE CUSTODY OR CONTROL OF OR

KNOWN EXISTENCE OF COVERED INFORMATION, INCLUDING DURING OR AFTER A TRIAL OR JUVENILE ADJUDICATION, AND REGARDLESS OF WHETHER THE ACCUSED HAS AGREED TO OR HAS ENTERED A PLEA OF GUILTY OR HAS BEEN CONVICTED.

(2) UPON A MOTION BY THE PROSECUTOR, THE COURT MAY ISSUE AN ORDER TO DEFER THE DISCLOSURE OF COVERED INFORMATION REQUIRED PURSUANT TO THIS SECTION IF THE PROSECUTOR ESTABLISHES A REASONABLE BASIS THAT THE DISCLOSURE WOULD REVEAL OR HAVE THE POTENTIAL TO REVEAL THE IDENTITY OF A POTENTIAL WITNESS WHO IS NOT KNOWN BY THE ACCUSED TO BE A POTENTIAL WITNESS, AND SUCH DISCLOSURE WOULD PRESENT AN ACTUAL THREAT TO THE SAFETY OF THE POTENTIAL WITNESS OR OF ANOTHER PERSON.

(3) THE COURT SHALL NOT ACCEPT A WAIVER BY THE ACCUSED OF THE PROSECUTOR OR PROSECUTION TEAM'S DUTY TO PROVIDE COVERED INFORMATION PURSUANT TO THIS SECTION, UNLESS THE COURT FINDS THE WAIVER IS MADE KNOWINGLY, INTELLIGENTLY, AND VOLUNTARILY, AND THE INTERESTS OF JUSTICE REQUIRE THE WAIVER.

(4) (a) UPON A MOTION BY THE ACCUSED OR BY THE COURT SUA SPONTE, IF THERE IS REASON TO BELIEVE THAT A PROSECUTOR OR PROSECUTION TEAM FAILED TO COMPLY WITH THE DUTY TO DISCLOSE COVERED INFORMATION PURSUANT TO THIS SECTION, THE COURT SHALL ORDER THE PROSECUTOR TO SHOW CAUSE WHY THE PROSECUTOR OR PROSECUTION TEAM IS NOT IN VIOLATION OF ITS DUTY.

(b) IF THE COURT HAS REASON TO BELIEVE THAT A PROSECUTOR OR PROSECUTION TEAM FAILED TO COMPLY WITH THE DUTY TO DISCLOSE COVERED INFORMATION PURSUANT TO THIS SECTION, THE COURT SHALL ISSUE WRITTEN FINDINGS AND INFORM THE ELECTED DISTRICT ATTORNEY

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OF THE PROSECUTING OFFICE, AND MAY ORDER AN APPROPRIATE REMEDY. IN ORDERING AN APPROPRIATE REMEDY, THE COURT IS NOT REQUIRED TO ORDER THE LEAST SEVERE SANCTION AVAILABLE.

(c) THE COURT SHALL SEND A RECORD AND A COMPLAINT TO THE COLORADO SUPREME COURT'S OFFICE OF ATTORNEY REGULATION COUNSEL IF THE COURT HAS REASON TO BELIEVE THAT A PROSECUTOR OR PROSECUTION TEAM INTENTIONALLY, KNOWINGLY, OR RECKLESSLY FAILED TO COMPLY WITH THE DUTY TO DISCLOSE COVERED INFORMATION PURSUANT TO THIS SECTION. THE WRITTEN RECORDS ARE SUBJECT TO MANDATORY DISCLOSURE PURSUANT TO THE COLORADO CRIMINAL JUSTICE RECORDS ACT.

(d) THE RECORD SENT BY THE COURT TO THE COLORADO SUPREME COURT'S OFFICE OF ATTORNEY REGULATION COUNSEL MUST INCLUDE THE FOLLOWING:

(I) THE NAME OF THE PROSECUTOR;

(II) THE DATE OF THE VIOLATION;

(III) THE JURISDICTION;

(IV) THE CASE NUMBER;

(V) THE COVERED INFORMATION WITHHELD;

(VI) THE NAME OF THE ACCUSED, BUT IF THE ACCUSED IS A JUVENILE, THE JUVENILE'S INITIALS;

(VII) THE NAME OF THE PRESIDING JUDICIAL OFFICER;

(VIII) THE REMEDY ORDERED BY THE PRESIDING JUDICIAL OFFICER;

(IX) THE CRIMINAL CHARGES AGAINST THE ACCUSED; AND

(X) THE ACCUSED'S RACE, ETHNICITY, AND GENDER, IF IDENTIFIED IN DISCOVERY.

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(5) THE COLORADO SUPREME COURT'S OFFICE OF ATTORNEY REGULATION COUNSEL SHALL INVESTIGATE EVERY COMPLAINT RECEIVED PURSUANT TO SUBSECTION (4) OF THIS SECTION. NOTWITHSTANDING ANY LAW TO THE CONTRARY, THE OFFICE OF ATTORNEY REGULATION COUNSEL IS AUTHORIZED TO ORDER APPROPRIATE DISCIPLINE AGAINST A PROSECUTOR WHO INTENTIONALLY, KNOWINGLY, OR RECKLESSLY FAILED TO COMPLY WITH THE DUTY TO DISCLOSE COVERED INFORMATION PURSUANT TO THIS SECTION, REGARDLESS OF THE MATERIALITY OF THE FAILURE.

(6) THE COLORADO SUPREME COURT MAY PROMULGATE RULES AS NECESSARY TO COMPLY WITH THIS SECTION.

20-1-403. Announcement of prosecutorial obligations and inquiry regarding compliance - rules. (1) AT THE FIRST COURT APPEARANCE WITH A PROSECUTOR AND THE ACCUSED'S COUNSEL, OR IMMEDIATELY FOLLOWING AN APPROPRIATE ADVISEMENT BY THE COURT TO AN ACCUSED WHO ELECTS TO PROCEED IN THE CASE PRO SE, THE PRESIDING JUDICIAL OFFICER SHALL ISSUE AN ORAL AND WRITTEN ORDER TO THE PROSECUTOR AND ACCUSED'S COUNSEL, OR TO THE ACCUSED IF PRO SE, THAT STATES THE PROSECUTOR'S DISCLOSURE OBLIGATIONS PURSUANT TO SECTION 20-1-402; BRADY V. MARYLAND, 373 U.S. 83 (1963) AND ITS PROGENY; THE COLORADO RULES OF CRIMINAL PROCEDURE; THE STATE OF COLORADO'S RULES OF PROFESSIONAL CONDUCT; AND THE AMERICAN BAR ASSOCIATION'S CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION.

(2) PRIOR TO JURY SELECTION, OR OPENING STATEMENTS, IF THERE IS NO JURY, JUVENILE ADJUDICATION, OR PROCEEDING TO ACCEPT A GUILTY PLEA, THE PRESIDING JUDICIAL OFFICER SHALL ASK THE LEAD

PROSECUTOR THE QUESTIONS, AND THE LEAD PROSECUTOR SHALL ANSWER THE QUESTIONS, CONCERNING THE PROSECUTOR'S COMPLIANCE WITH DISCLOSURE OBLIGATIONS, ON THE RECORD. THE COLORADO SUPREME COURT MAY AMEND THE COLORADO RULES OF CRIMINAL PROCEDURE TO ESTABLISH THE FORM AND SUBSTANCE OF THE QUESTIONS REQUIRED PURSUANT TO THIS SUBSECTION (2).

(3) AT THE CLOSE OF THE PROSECUTION'S CASE IN CHIEF IN A CRIMINAL OR ADJUDICATORY TRIAL, NOT IN THE PRESENCE OF THE JURY, THE PRESIDING JUDICIAL OFFICER SHALL ASK THE LEAD PROSECUTOR QUESTIONS, AND THE LEAD PROSECUTOR SHALL ANSWER QUESTIONS, CONCERNING THE PROSECUTOR'S COMPLIANCE WITH DISCLOSURE OBLIGATIONS, ON THE RECORD. THE COLORADO SUPREME COURT MAY AMEND THE COLORADO RULES OF CRIMINAL PROCEDURE TO ESTABLISH THE FORM AND SUBSTANCE OF THE QUESTIONS REQUIRED PURSUANT TO THIS SUBSECTION (3).

20-1-404. Civil action for deprivation of rights - creation. (1) IN ADDITION TO ANY OTHER CAUSE OF ACTION, THERE IS CREATED A CIVIL ACTION IF A PROSECUTOR WHO, UNDER COLOR OF LAW, INTENTIONALLY, KNOWINGLY, OR RECKLESSLY SUBJECTS OR CAUSES TO BE SUBJECTED ANY OTHER PERSON TO THE DEPRIVATION OF ANY INDIVIDUAL RIGHTS THAT CREATE BINDING OBLIGATIONS ON GOVERNMENT ACTORS SECURED BY THE BILL OF RIGHTS, ARTICLE II OF THE STATE CONSTITUTION. THE PROSECUTOR IS LIABLE TO THE INJURED PARTY FOR LEGAL OR EQUITABLE RELIEF OR ANY OTHER APPROPRIATE RELIEF.

(2) THE INJURED PARTY MAKING A CLAIM PURSUANT TO THIS SECTION MUST STATE WITH PARTICULARITY THE CIRCUMSTANCES CONSTITUTING THE DEPRIVATION OF ANY INDIVIDUAL RIGHTS THAT

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CREATE BINDING OBLIGATIONS ON GOVERNMENT ACTORS SECURED BY THE BILL OF RIGHTS, ARTICLE II OF THE STATE CONSTITUTION.

(3) IT IS AN AFFIRMATIVE DEFENSE IF THE DEFENDANT IN THE CIVIL ACTION PROVES BY A PREPONDERANCE OF THE EVIDENCE THAT AT THE TIME OF THE VIOLATION THE DEFENDANT WAS ACTING IN GOOD FAITH.

(4) (a) STATUTORY IMMUNITIES AND STATUTORY LIMITATIONS ON LIABILITY, DAMAGES, OR ATTORNEY FEES DO NOT APPLY TO CLAIMS BROUGHT PURSUANT TO THIS SECTION. THE "COLORADO GOVERNMENTAL IMMUNITY ACT", ARTICLE 10 OF TITLE 24, DOES NOT APPLY TO CLAIMS BROUGHT PURSUANT TO THIS SECTION.

(b) ABSOLUTE AND QUALIFIED IMMUNITY ARE NOT DEFENSES TO LIABILITY PURSUANT TO THIS SECTION.

(5) IN ANY ACTION BROUGHT PURSUANT TO THIS SECTION, A COURT SHALL AWARD REASONABLE ATTORNEY FEES AND COSTS TO A PREVAILING PLAINTIFF. IN ACTIONS FOR INJUNCTIVE RELIEF, A COURT SHALL DEEM A PLAINTIFF TO HAVE PREVAILED IF THE PLAINTIFF'S SUIT WAS A SUBSTANTIAL FACTOR OR SIGNIFICANT CATALYST IN OBTAINING THE RESULTS SOUGHT BY THE LITIGATION. WHEN A JUDGMENT IS ENTERED IN FAVOR OF A DEFENDANT, THE COURT MAY AWARD REASONABLE COSTS AND ATTORNEY FEES TO THE DEFENDANT FOR DEFENDING ANY CLAIMS THE COURT FINDS FRIVOLOUS.

(6) NOTWITHSTANDING ANY OTHER PROVISION OF LAW, A PUBLIC ENTITY SHALL INDEMNIFY A PROSECUTOR IN ITS EMPLOY FOR ANY LIABILITY INCURRED BY THE PROSECUTOR AND FOR ANY JUDGMENT OR SETTLEMENT ENTERED AGAINST THE PROSECUTOR FOR CLAIMS ARISING PURSUANT TO THIS SECTION; EXCEPT THAT, IF THE COURT DETERMINES THAT THE PROSECUTOR DID NOT ACT UPON A GOOD FAITH AND

REASONABLE BELIEF THAT THE ACTION WAS LAWFUL, THEN THE PROSECUTOR IS PERSONALLY LIABLE AND SHALL NOT BE INDEMNIFIED BY THE PUBLIC ENTITY FOR TEN PERCENT OF THE JUDGMENT OR SETTLEMENT OR TWENTY-FIVE THOUSAND DOLLARS, WHICHEVER IS LESS. NOTWITHSTANDING ANY PROVISION OF THIS SECTION TO THE CONTRARY, IF THE PROSECUTOR'S PORTION OF THE JUDGMENT IS NOT COLLECTABLE FROM THE PROSECUTOR, THE PUBLIC ENTITY OR INSURANCE SHALL SATISFY THE FULL AMOUNT OF THE JUDGMENT OR SETTLEMENT. THE PUBLIC ENTITY DOES NOT HAVE TO INDEMNIFY A PROSECUTOR IF THE PROSECUTOR WAS CONVICTED OF A CRIMINAL VIOLATION ARISING OUT OF THE CONDUCT FROM WHICH THE CLAIM ARISES.

(7) A CIVIL ACTION PURSUANT TO THIS SECTION MUST BE COMMENCED WITHIN TWO YEARS AFTER THE CAUSE OF ACTION ACCRUES. THE CAUSE OF ACTION ACCRUES ON THE LATER OF:

(a) THE DISCOVERY OF THE VIOLATION OF THE BILL OF RIGHTS, ARTICLE II OF THE STATE CONSTITUTION;

(b) THE DATE OF DISMISSAL OF THE CASE AGAINST THE ACCUSED FROM WHICH THE CLAIM ARISES;

(c) THE DATE A DEFERRED JUDGMENT OR ADJUDICATION WAS ORDERED AGAINST THE ACCUSED IN THE CASE FROM WHICH THE CLAIM ARISES;

(d) THE DATE THE CONVICTION OR ADJUDICATION OF THE ACCUSED WAS OVERTURNED IN THE CASE FROM WHICH THE CLAIM ARISES; OR

(e) THE DATE OF ACQUITTAL OF THE ACCUSED IN THE CASE FROM WHICH THE CLAIM ARISES.

SECTION 3. In Colorado Revised Statutes, **add** 20-1-115 as follows:

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20-1-115. Prosecution data collection. (1) EACH DISTRICT ATTORNEY'S OFFICE SHALL COLLECT THE FOLLOWING DATA FOR EVERY CASE FILED:

(a) THE DEFENDANT'S OR JUVENILE'S AGE, AS IDENTIFIED IN A POLICE REPORT;

(b) THE DEFENDANT'S OR JUVENILE'S RACE, ETHNICITY, AND GENDER, IF IDENTIFIED IN A POLICE REPORT;

(c) IF A CHARGE WAS FILED BY THE DISTRICT ATTORNEY'S OFFICE. IF NO CHARGE WAS FILED, ANY APPLICABLE REASON WHY A CHARGE WAS NOT FILED, INCLUDING, BUT NOT LIMITED TO:

(I) INSUFFICIENT EVIDENCE FOR PROSECUTION;

(II) REFERRAL TO A PREFILING DIVERSION PROGRAM;

(III) THE COMPLAINANT DID NOT WANT THE DISTRICT ATTORNEY'S OFFICE TO PROSECUTE THE DEFENDANT OR JUVENILE;

(IV) THE CASE WAS REFERRED TO A DIFFERENT JURISDICTION FOR PROSECUTION; OR

(V) THE PROSECUTION OF THE ALLEGED CRIME WAS DETERMINED TO BE UNNECESSARY DUE TO THE FACTS AND CIRCUMSTANCES OF THE CASE, OR ANOTHER CHARGE WAS FILED PRIOR TO DISPOSITION;

(d) ANY CHARGE FILED AS SPECIFIED ON THE INDICTMENT, COMPLAINT, INFORMATION, SUMMONS, OR DELINQUENCY PETITION, AND THE DATE OF FILING;

(e) ANY ADDITIONAL CHARGE FILED PRIOR TO THE FINAL DISPOSITION OF THE CASE, INCLUDING WHETHER ANY ADDITIONAL CHARGE REQUIRES AN ENHANCED SENTENCE;

(f) IF, AFTER THE CASE WAS FILED, IT WAS DISMISSED FOR INSUFFICIENT EVIDENCE OR INABILITY TO PROVE THE CASE BEYOND A

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REASONABLE DOUBT; AND

(g) IF A PLEA AGREEMENT WAS OFFERED TO THE DEFENDANT OR JUVENILE, AND, IF SO:

(I) THE CHARGES OFFERED IN THE PLEA AGREEMENT AND HOW THEY COMPARE TO THE ORIGINAL FILED CHARGES;

(II) THE SENTENCE AGREEMENT SPECIFIED IN THE PLEA AGREEMENT, IF INCLUDED;

(III) THE TIME PERMITTED FOR THE DEFENDANT OR JUVENILE TO ACCEPT THE PLEA AGREEMENT OFFER BEFORE EXPIRATION, IF INCLUDED;

(IV) IF THE PLEA AGREEMENT WAS ACCEPTED BY THE DEFENDANT OR JUVENILE;

(V) IF THE PLEA AGREEMENT WAS ACCEPTED BY THE COURT;

(VI) IF THE CASE PROCEEDED TO TRIAL, THE FINAL DISPOSITION AND SENTENCE IMPOSED BY THE COURT, IF APPLICABLE; AND

(VII) IF THE DEFENDANT OR JUVENILE WAS REPRESENTED BY AN ATTORNEY DURING PLEA NEGOTIATIONS AND SENTENCING, AND, IF SO, WHETHER THE ATTORNEY WAS COURT-APPOINTED OR PRIVATELY RETAINED.

(2) ON OR BEFORE JANUARY 21, 2023, AND ON OR BEFORE EACH JANUARY 21 AND JULY 21 THEREAFTER, EACH DISTRICT ATTORNEY'S OFFICE SHALL SUBMIT TO THE DIVISION OF CRIMINAL JUSTICE IN THE DEPARTMENT OF PUBLIC SAFETY THE SEMI-ANNUAL DATA COLLECTED PURSUANT TO SUBSECTION (1) OF THIS SECTION FOR CASES CLOSED DURING THE PRECEDING SIX-MONTH PERIOD.

(3) ON OR BEFORE JANUARY 21, 2023, AND ON OR BEFORE EACH JANUARY 21 AND JULY 21 THEREAFTER, EACH DISTRICT ATTORNEY IN THE STATE SHALL PUBLISH TO THE DISTRICT ATTORNEY'S PUBLIC WEBSITE THE

SEMI-ANNUAL DATA COLLECTED PURSUANT TO SUBSECTION (1) OF THIS SECTION FOR CASES CLOSED DURING THE PRECEDING SIX-MONTH PERIOD BUT SHALL NOT INCLUDE ANY IDENTIFYING INFORMATION OF THE DEFENDANT OR JUVENILE.

SECTION 4. In Colorado Revised Statutes, 16-9-702, **add** (4) as follows:

16-9-702. Statewide discovery sharing system. (4) BY JULY 1, 2022, THE COLORADO DISTRICT ATTORNEYS' COUNCIL SHALL DEVELOP AND INTEGRATE INTO THE STATEWIDE DISCOVERY SHARING SYSTEM OPERATIONAL FUNCTIONALITY THAT:

(a) ISSUES AN AUTOMATIC TIME STAMP WHEN A DISCOVERY ITEM IS UPLOADED TO THE STATEWIDE DISCOVERY SHARING SYSTEM AND IS AVAILABLE TO THE PROSECUTOR AND A NOTICE IS SENT TO THE DEFENDANT OR DEFENSE COUNSEL THAT A DISCOVERY ITEM WAS UPLOADED FOR THE PROSECUTOR AND THE TIME IT WAS UPLOADED; AND

(b) ISSUES AN AUTOMATIC NOTICE TO THE ELECTED DISTRICT ATTORNEY WHEN A DISCOVERY ITEM HAS BEEN UPLOADED TO THE STATEWIDE DISCOVERY SHARING SYSTEM AND IS AVAILABLE TO THE PROSECUTOR WITHIN THE DISTRICT ATTORNEY'S OFFICE, BUT THE PROSECUTOR HAS NOT SHARED THE DISCOVERY ITEM WITH THE DEFENDANT OR DEFENSE COUNSEL WITHIN FIVE BUSINESS DAYS.

SECTION 5. Act subject to petition - effective date. This act takes effect at 12:01 a.m. on the day following the expiration of the ninety-day period after final adjournment of the general assembly; except that, if a referendum petition is filed pursuant to section 1 (3) of article V of the state constitution against this act or an item, section, or part of this act within such period, then the act, item, section, or part will not take

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effect unless approved by the people at the general election to be held in November 2022 and, in such case, will take effect on the date of the official declaration of the vote thereon by the governor.

47 P.3d 1167
Supreme Court of Colorado,
En Banc.

In the Matter of ATTORNEY C, Attorney–Respondent.

No. 01SA19.
|
May 13, 2002.

Synopsis
Complaint charged attorney, an assistant district attorney, with misconduct in two separate preliminary hearings. The Hearing Board imposed a public censure. Attorney appealed. The Supreme Court held that:(1) application of the rule of professional conduct which addresses the special responsibilities of a prosecutor in a criminal trial requires the court to impose a materiality standard; (2) as a matter of first impression, when a prosecutor is aware of exculpatory evidence before any critical stage of the proceeding, she must disclose that evidence before the proceeding takes place; (3) the rule of professional conduct governing the duty of the prosecutor to timely disclose exculpatory evidence includes the mens rea of intent; and (4) the prosecutor's failure to disclose exculpatory evidence to counsel for the accused until after the preliminary hearing did not violate the rules of professional conduct.

Reversed.

West Headnotes (5)

[1] **Attorneys and Legal Services** Conduct of district and prosecuting attorneys

Application of the rule of professional conduct which addresses the special responsibilities of a prosecutor in a criminal trial requires the court to impose a materiality standard, and thus the rule requires a prosecutor to disclose exculpatory, outcome determinative evidence that tends to negate the guilt or mitigate the punishment of the accused; the materiality standard is identical to the standard applied to procedural rules. Rules Crim.Proc., Rule 16, Part I (a)(2); Rules of Prof.Conduct, Rule 3.8(d).

9 Cases that cite this headnote

[2] **Attorneys and Legal Services** Conduct of district and prosecuting attorneys

The specific test for materiality of evidence, for the purpose of the rules of professional conduct which address the prosecutor's duty to timely disclose exculpatory evidence to an accused, is whether there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. Rules of Prof.Conduct, Rule 3.8(d).

6 Cases that cite this headnote

[3] **Attorneys and Legal Services** Conduct of district and prosecuting attorneys

For the purpose of determining whether the prosecutor's disclosure of exculpatory evidence was timely, pursuant to the rule of professional conduct which addressed the special responsibilities of a prosecutor, when a prosecutor is aware of exculpatory evidence before any critical stage of the proceeding, she must disclose that evidence before the proceeding takes place. Rules of Prof.Conduct, Rule 3.8(d).

8 Cases that cite this headnote

[4] **Attorneys and Legal Services** Conduct of district and prosecuting attorneys

The rule of professional conduct governing the

duty of the prosecutor to timely disclose exculpatory evidence to the accused is read to include the mens rea of intent. Rules of Prof.Conduct, Rule 3.8(d).

3 Cases that cite this headnote

[5] Attorneys and Legal Services Conduct of district and prosecuting attorneys

The prosecutor's failure to disclose exculpatory evidence to counsel for the accused until after the preliminary hearing, even though the prosecutor possessed the evidence prior to the hearing, did not violate the rule of professional conduct which addressed the special responsibilities of a prosecutor, where the Hearing Board held that the prosecutor did not intentionally withhold the evidence, and the rule requires that the prosecutor act intentionally in order to impose a sanction against the attorney. Rules of Prof.Conduct, Rule 3.8(d).

9 Cases that cite this headnote

Attorneys and Law Firms

***1167** John Gleason, Attorney Regulation Counsel, Charles E. Mortimer, Jr., Assistant Regulation Counsel, Denver, Colorado, Attorneys for Petitioner.

Hall & Evans, L.L.C., David R. Brougham, Denver, Colorado, Attorneys for Attorney–Respondent.

Colorado District Attorney's Council, Peter A. Weir, Executive Director, Denver, Colorado, Donna Skinner Reed, Chief Appellate Deputy District Attorney, Golden, Colorado, ***1168** Attorneys for Amicus Curiae for Attorney–Respondent.

Opinion

Justice KOURLIS delivered the Opinion of the Court.

This case involves an important issue of first impression: namely, what are the parameters of a prosecutor's ethical duty to disclose exculpatory material to the defense under Colo. RPC 3.8(d)? We hold that Rule 3.8(d) requires prosecutors to disclose exculpatory evidence to the defense in advance of any critical stage of the proceeding. The respondent[1] in these proceedings did not do so. However, we also hold that a prosecutor violates Rule 3.8(d) only if he or she acts intentionally. In this case, the hearing board did not find that the respondent acted intentionally. Therefore, we decline to find a violation of the rule, and we reverse the hearing board's imposition of a public censure.

I. Facts

The complaint charged Attorney C,[2] an assistant district attorney, with misconduct in two separate preliminary hearings. In the first matter, a defendant, John Skidmore, faced second-degree assault, § 18–3–203(1)(g), 6 C.R.S. (2000) (intending to cause bodily injury to another, the actor causes serious bodily injury), a class 4 felony, § 18–3–203(2)(b). The case involved allegations of domestic violence. A preliminary hearing was scheduled in county court at 1:30 p.m. on Tuesday, May 19, 1998. The respondent represented the People; attorney George Buck represented Skidmore. On May 15, the Friday before the preliminary hearing, the respondent extended an offer to the defendant to plead guilty to third-degree assault. In preparing for the hearing on May 18, she examined the file and discovered a letter written by the alleged victim on May 14. In it, the victim recanted her earlier statements to the police that the defendant had pushed her down, breaking her finger. Instead, she now maintained that the defendant had bumped into her accidentally and she fell down. The letter was consistent with Skidmore's version of events.

The respondent realized that the letter was exculpatory evidence that she needed to provide to defense counsel. However, she rationalized that the letter was not material in the constitutional sense at the preliminary hearing stage because the letter would not change the outcome of the preliminary hearing, so she decided to withhold the letter from the defense until after the hearing. In addition, she did not modify or withdraw her plea offer in light of the victim's recantation. Both the respondent and Buck were present in court on May 19 for the preliminary hearing, and the hearing board found that although she "had sufficient time and opportunity to give Buck a copy of the letter or to advise him of it prior to the commencement of

the preliminary hearing, she elected not to do so."

Buck saw that the alleged victim was not present in the courtroom to testify, and advised Skidmore that the case likely would be bound over to county court on a misdemeanor assault charge, rather than a felony in district court. On Buck's advice, Skidmore agreed to waive the preliminary hearing.

After the hearing, the respondent followed normal office procedures for discovery and placed the letter in a basket for a secretary to send to Buck. Buck received the letter two days after the hearing. Recognizing that the respondent had delayed disclosing the letter until after the hearing, Buck filed a motion for sanctions, referring to the disclosure obligations of Crim. P. 16 and Colo. RPC 3.8(d). The district attorney's office offered to dismiss the charges against Skidmore if Buck withdrew the motion for sanctions, and ultimately that was the outcome.

The second matter occurred five months later. The defendant, the victim's stepbrother (Stepbrother), was charged with sexually assaulting his eleven-year-old stepsister. Stepbrother's father was also charged with ***1169** sexually assaulting the girl, his stepdaughter. In multiple interviews with different people, the girl alleged that her stepbrother had licked or kissed her genital area. The trial court appointed Buck to represent Stepbrother. Again, the respondent was to represent the People at the preliminary hearing, which was scheduled for the afternoon of October 21, 1998. On the morning of the hearing, the respondent interviewed the victim in the district attorney's office. Donna Craig Rice, a victim advocate at the office, was present during the interview. For the first time, the girl denied any oral-genital contact with her stepbrother, and said she did not remember telling anyone that such contact had occurred. Instead, the victim stated that Stepbrother had touched her genital area with his hand and his penis.

The respondent recognized that this change in the girl's story was exculpatory evidence that had to be disclosed to the defense. She asked Rice to prepare a memo reflecting the girl's new story. The respondent decided not to inform Buck of the changed version herself before the hearing because she was concerned that her whole office could be disqualified if Buck called her as a witness. She consulted with her boss, the district attorney, who did not object to this course of action. Buck, the respondent, and Rice arrived at the courthouse forty-five minutes before the hearing, but neither Rice nor the respondent told Buck of the changes in the victim's testimony. The hearing board majority specifically found that the respondent had the time and opportunity to disclose the information prior to the preliminary hearing.

Instead, the respondent elicited testimony from a social services caseworker that child victims often alter their version of events over time. During direct examination, the victim testified that there had been genital to genital and manual contact between her and her stepbrother. The respondent did not ask her about oral-genital contact, and the victim did not testify regarding her denial that this had occurred. Buck moved to strike the victim's testimony about the genital and manual contacts because he had no prior knowledge of these allegations. The court overruled the objection, but reprimanded the respondent for not disclosing the new testimony to the defense before the hearing. The court ruled that it could not find the victim's statements implausible as a matter of law, and found probable cause to bind Stepbrother over to district court.

The day after the hearing, Buck received by first-class mail the memo that Rice had prepared under the respondent's direction. Buck filed a motion for sanctions, but the trial court denied it on the grounds that the respondent's failure to disclose the exculpatory statements would not have changed the outcome of the preliminary hearing. The district attorney dismissed the charges against Stepbrother in January 1999.

The presiding disciplinary judge and one hearing board member concluded that the respondent's conduct in both the Skidmore and Stepbrother cases violated Colo. RPC 3.8(d), which provides:

> **Rule 3.8. Special Responsibilities Of A Prosecutor**
>
> The prosecutor in a criminal case shall:
>
> ...
>
> (d) make *timely* disclosure to the defense of all evidence or[3] information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense....

(Emphasis added.) Weighing the aggravating factors against the mitigating factors, the majority determined that a public censure would be the appropriate sanction. One board member dissented, finding no violation of Rule 3.8(d). The respondent appealed to this court pursuant to C.R.C.P. 251.27.

II. Analysis

The respondent presents the following issues in the opening brief:

1. Whether Colo. RPC 3.8(d) applies to the failure to disclose recently discovered ***1170** exculpatory information immediately prior to a preliminary hearing.

2. Whether a violation of Colo. RPC 3.8(d) can be established when a prosecutor fails to disclose exculpatory information, but there is no reasonable probability that had the information been disclosed ahead of time the outcome of the proceeding would have been different.

3. Whether the Hearing Board and PDJ erred in finding that the respondent violated Colo. RPC 3.8(d) in the Skidmore and Stepbrother cases.

The respondent makes two primary arguments: the first is that there can be no violation of Rule 3.8 when attorney regulation counsel fails to establish that, had the information been disclosed, the outcome of the proceeding would have been different. Second, the respondent makes an argument based on the language of the rule that the disclosure was "timely."

A. Materiality

[1] The respondent first argues that the evidence was not material to the outcome of the preliminary hearing. She does not argue that it was not constitutionally material to the outcome of the case as a whole, but rather that it would not have made a difference to the outcome of the preliminary hearing. In order to address her argument, we must first determine the extent to which Rule 3.8(d) includes a concept of materiality.

The hearing board[4] majority[5] held that the rule does not incorporate a *Brady* constitutional materiality standard, but rather is broader and more encompassing than such a standard would require. We recognize that there is support for that position,[6] but because we decline to impose inconsistent obligations upon prosecutors attempting to comply with both procedural rules and rules of professional conduct, we decline to adopt it.

In *Brady v. Maryland,* 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), the United States Supreme Court held that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *See also United States v. Agurs,* 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976). Then, in *United States v. Bagley,* 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985), the Court refined the *Brady* test. It treated exculpatory and impeachment evidence similarly for *Brady* purposes, *id.* at 676–77, 105 S.Ct. 3375, and abolished the distinction made in *Agurs* between situations where the defense makes a specific request for *Brady* material and where the defense makes either a general or no request at all for such material, *id.* at 682, 105 S.Ct. 3375 (Blackmun, J.); *see Kyles v. Whitley,* 514 U.S. 419, 433, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995).

[2] The specific test for materiality is whether " 'there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.' " *Kyles,* 514 U.S. at 433, 115 S.Ct. 1555 (quoting *Bagley,* 473 U.S. at 682, 105 S.Ct. 3375 (opinion of Blackmun, J.)).

In *People v. District Court,* 790 P.2d 332 (Colo.1990), this court determined that "Colorado courts assessing the sufficiency of the prosecution's disclosure under Crim. P. 16(I)(a)(2) should evaluate the materiality of the undisclosed information, taking guidance from the *Bagley* standard." 790 P.2d at 338. Hence, the materiality standard of *Brady* and *Bagley* applies to Rule 16 disclosures in ***1171** Colorado. Rule 16(I)(a)(2) mandates that "[t]he prosecuting attorney shall disclose to defense counsel *any* material or information within his possession or control *which tends to negate the guilt of the accused as to the offense charged or would tend to reduce the punishment therefor.*" (Emphasis added.)

The committee comment to Rule 3.8 states, "Because this provision is based to a considerable extent on the ABA Standards of Criminal Justice Relating to the Prosecution Function which many jurisdictions have adopted and because it deals with a specialized area of practice, the Committee felt it should leave this provision as it was set out in the Model Rules."

The comment to Model Rule 3.8(d) provides in part:

> A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence. Precisely how far the prosecutor is required to go in this direction is a matter of debate and varies in

> different jurisdictions. *Many jurisdictions have adopted the ABA Standards of Criminal Justice Relating to Prosecution Function, which in turn are the product of prolonged and careful deliberation by lawyers experienced in both criminal prosecution and defense.*

Model R. Prof. Conduct 3.8 cmt., *reprinted as* Colo. RPC 3.8 cmt.

The ABA *Standards for Criminal Justice: Prosecution Function and Defense Function* 3–3.11(a) (3d ed.1993) provide that:

> A prosecutor should not intentionally fail to make timely disclosure to the defense, at the earliest feasible opportunity, of the existence of all evidence or information *which tends to negate the guilt of the accused or mitigate the offense charged or which would tend to reduce the punishment of the accused.*[7]

(Emphasis added.)

Hence, the language of Crim. P. 16(I)(a)(2), Rule 3.8(d), and ABA Standard 3–3.11(a) is substantially identical. We have explicitly adopted a materiality standard with respect to our procedural rules, and we are disinclined to impose inconsistent obligations upon prosecutors. We therefore also adopt a materiality standard as to the latter, such that we read Rule 3.8(d) as containing a requirement that a prosecutor disclose exculpatory, outcome-determinative evidence that tends to negate the guilt or mitigate the punishment of the accused.

Given that standard, we now turn to the respondent's argument that the evidence was not exculpatory or outcome-determinative at the preliminary hearing, and, therefore, was not material at that particular stage of the case. We clarify that the materiality standard relates not to a specific proceeding in the criminal case, which could be a hearing on a bond or a hearing on the admissibility of certain evidence unrelated to the withheld evidence, but rather to the broader criminal proceeding itself. Material evidence, in this sense, is any evidence tending to be outcome determinative at trial. However, materiality itself is not time-sensitive, and does not come and go depending upon the nature of the next hearing. We do not accept the argument that the evidence need only be disclosed in advance of a proceeding at which that evidence would be specifically determinative. Rather, we conclude that if evidence is material to the outcome of the trial, then the prosecutor must disclose that evidence in advance of the next critical stage of the proceeding—whether the evidence would particularly affect that hearing or not.

B. Timeliness Under the Rule

In the alternative, the respondent argues that her disclosure of the evidence was sufficiently timely to satisfy the rule. Rule 3.8(d) ***1172** mandates that the prosecutor make *"timely" disclosure of all exculpatory evidence.* "Timely" is defined neither by the Rules of Professional Conduct, nor by case law. *Cf.* § 2–4–101, 1 C.R.S. (2001) ("Words and phrases shall be read in context and construed according to the rules of grammar and common usage. Words and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly."). "Timely" is a word in common usage. The *New Shorter Oxford English Dictionary* defines "timely" as: "Occurring, done, or made at an appropriate or suitable time; opportune." II *New Shorter Oxford English Dictionary* 3314 (1993). The question is whether the respondent's disclosures, which the defense received after the Skidmore and Stepbrother preliminary hearings, were still timely. We determine that they were not.

Although a preliminary hearing is not constitutionally mandated, it is a procedure incorporated into our Rules of Criminal Procedure. It is a critical stage of a criminal proceeding, not only for such purposes as the Sixth Amendment right to counsel, *Coleman v. Alabama,* 399 U.S. 1, 90 S.Ct. 1999, 26 L.Ed.2d 387 (1970); *Denbow v. Dist. Court,* 652 P.2d 1065, 1066 (Colo.1982), but also for case management purposes.[8] Notwithstanding the low burden the prosecution has to meet to have a defendant bound over for trial, a preliminary hearing is a serious part of the case. *See McDonald v. Dist. Court,* 195 Colo. 159, 161, 576 P.2d 169, 171 (1978) (stressing that "a preliminary hearing is a critical stage in the prosecution of a defendant and should not be conducted in a 'perfunctory fashion.' ") (quoting *Maestas v. Dist. Court,* 189 Colo. 443, 446, 541 P.2d 889, 891 (1975)).

For our purposes, therefore, the important thing is that, although a critical stage of the proceedings was about to occur, the respondent made a conscious decision to delay disclosure in both cases until after those proceedings concluded.

[3] Under the respondent's approach, both the judge and defense attorney were unaware of the actual strength or weakness of the prosecution's case at the preliminary hearing, which could have an unfair effect on, for example, the conditions the court might place on a defendant's pretrial release, and also on the defendant's plea-bargaining position. We therefore hold that, when a prosecutor is aware of exculpatory evidence before any critical stage of the proceeding, she must disclose that evidence before the proceeding takes place.

The hearing board majority found that in both the Skidmore and Stepbrother matters, it was quite possible for her to disclose the evidence before the hearing. We understand that the respondent was worried about the possible disqualification of her office should she become a witness in the Stepbrother case. However, the hearing board concluded that Rice could have prepared a memorandum for defense counsel before the hearing. That finding is supported by the record. The memo that Rice prepared after the hearing was one paragraph long, consisting of about eighty words.

We agree with the hearing board majority that the respondent failed to disclose exculpatory evidence in a timely manner to the defense in both the Skidmore and Stepbrother matters; however, we decline to find a violation of the rule for the reasons that now follow.

III. Conclusion

In the area of discipline of prosecutors for discovery violations, there are no Colorado cases and very few elsewhere.[9] The reasons ***1173** that prosecutors seldom face disciplinary proceedings in this area may be wide-ranging,[10] but for our purposes, it suffices to state that we face a matter of first impression.

A.

There are generally three states of mind with respect to disciplinary violations: negligence, knowledge,[11] and intent. Negligence is defined as "the failure of a lawyer to heed a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation." ABA *Standards* definitions. Negligent violation of a court order or rule presumptively occasions a reprimand or admonition, depending upon whether the conduct causes injury or potential injury to a client or to a legal proceeding. ABA *Standards* 6.2. Knowledge is defined as the "conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result." ABA *Standards* definitions. Suspension is generally appropriate when a lawyer knowingly violates a rule and causes injury or potential injury. ABA *Standards* 6.2. Intent is defined as the "conscious objective or purpose to accomplish a particular result." ABA *Standards* definitions. Disbarment is generally appropriate when a lawyer knowingly violates a rule with the intent to obtain a benefit and causes serious injury or potentially serious injury. ABA *Standards* 6.2.

The hearing board majority here concluded that the respondent committed the first violation in the Skidmore case negligently. As to the second violation in the Stepbrother case, the majority concluded that the respondent had been put on actual notice of her duty under Colo. RPC 3.8(d) by defense counsel in the Skidmore case. The majority noted that the term "knowingly" is defined in the introduction to the Rules of Professional Conduct as denoting "actual knowledge of the fact in question. A person's knowledge may be inferred from the circumstances." Accordingly, the majority concluded that the respondent committed the second violation knowingly.[12] The majority held that the negligent conduct warranted only a public censure, and then weighed aggravating factors against the mitigating factors of inexperience, absence of a dishonest or selfish motive, and a cooperative attitude toward the proceedings to arrive at an ultimate determination that public censure was also appropriate in the second case.

B.

As we consider the conduct in this case, we first note that discovery violations in criminal cases are different from other kinds of disciplinary rule violations for a number of reasons. First, discovery issues arise in almost every criminal case. Trial courts routinely make findings of fact and enter orders and sanctions designed to respond to the severity of the violation. As a result, the problems are visible, immediately addressed, and any harm to the public or to the individual parties is dealt with in the context of the pending case. Not only is management, regulation, and supervision of discovery preeminently a trial court function, *see Samms v. Dist. Court,* 908 P.2d 520, 524 (Colo.1995), but we also have case law and rules of procedure specifically tailored to redress any discovery ***1174** violations. We neither wish to upset that process nor to interject regulatory counsel into it.

Indeed, when the court revised the attorney discipline system in 1998, it did so to make the system more responsive to the goal of protecting the public. As part of

this goal, we revised the formal complaint and litigation system to assure greater attention to serious allegations of professional misconduct. The new grievance system is designed to "shift[ ] the emphasis from punishment to prevention ... [and to] protect the public as well as educate attorneys. The process will reduce delay and focus resources on the more serious cases filed."[13]

We also note that the Preamble to the Colorado Rules of Professional Conduct states that the purpose of the rules "can be subverted when they are invoked by opposing parties as procedural weapons." Colo. RPC pmbl. In the context of discovery in criminal cases, that danger is a real one. We do not wish to create a mechanism that could be used to obstruct the progress of a case.

Hence, we have an adjudicative system in place that deals regularly with discovery issues, and also an attorney grievance system that is ill-suited to addressing any but the most serious discovery violations.

C.

[4] [5] Because we do not wish to interfere with the discretion of trial courts to handle discovery disputes in the way dictated by the facts of the case, and because we do not wish the possibility of a grievance proceeding to permeate every discovery dispute in criminal cases, we choose to read the rule itself as including the mens rea of intent.

As we noted above, the ABA *Standards for Criminal Justice: Prosecution Function and Defense Function* 3–3.11(a) (3d ed.1993) provide that:

> A prosecutor should not *intentionally* fail to make timely disclosure to the defense, at the earliest feasible opportunity, of the existence of all evidence or information which tends to negate the guilt of the accused or mitigate the offense charged or which would tend to reduce the punishment of the accused.

(Emphasis added.) We observe that the ABA specifically added "intentionally" to the standard subsequent to its original enactment. ABA *Standards for Criminal Justice* 3–3.11(a) history of standard (2d ed.1986).

The ABA standard anticipated that the rule would address only the most serious of cases in which conduct occurs that reflects upon the character of the prosecutor: conduct that cannot be fully addressed by orders relating to the underlying case. We agree that grievance proceedings should be limited to those circumstances in which a prosecutor intentionally withholds exculpatory evidence in violation of the rule.

As to this respondent, the hearing board found that her violation of 3.8(d) was negligent in the Skidmore case and knowing in the Stepbrother case. In neither case did the board find that her actions were accompanied by the intent necessary to justify a sanction, as we now hold necessary. As a result, we decline to find a violation of the rule.

Additionally, we realize that we now interpret the requirements of Colo. RPC 3.8(d) for the first time. *See In re Sather,* 3 P.3d 403, 415 (Colo.2000) (holding that where our opinions have not clarified the requirements under a specific rule of professional conduct, the court may decline to impose a sanction for the violation). We have never previously clarified that a prosecutor must disclose exculpatory evidence prior to any critical stage of the proceeding. Hence, because the rule was unclear, respondent could not have had an intent to withhold the evidence prior to the preliminary hearing in contravention of ethical mandate.

In summary, although we conclude that the respondent failed to disclose material evidence in a timely manner, we decline to find a violation of Rule 3.8(d) because her conduct was not intentional. We therefore ***1175** reverse the hearing board's judgment. Each party shall be responsible for its own costs in this proceeding.

All Citations

47 P.3d 1167

Footnotes

1 Although the attorney is the petitioner in this court, because she was the respondent before the hearing board, we refer to her as the respondent throughout this opinion.

2 We identify the respondent as "Attorney C" because we are not disciplining her and do not wish the publication of this opinion to serve as de facto punishment.

[3] There is a typographical error in the Colorado Revised Statutes Annotated with respect to Colo. RPC 3.8(d): "make timely disclosure to the defense of all evidence *of* information" should read "make timely disclosure to the defense of all evidence *or* information."

[4] The presiding disciplinary judge refers separately to the PDJ and hearing board in the findings and conclusions. When the PDJ is sitting with a hearing board, we view him to be acting solely as a member of that board, despite his status as the presiding officer of that board. *See* C.R.C.P. 251.18.

[5] Richard P. Holme dissented from the majority opinion on the grounds that the conduct did not violate the rule at all.

[6] *See Kyles v. Whitley,* 514 U.S. 419, 437, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995) (dictum); *Lawyer Disciplinary Bd. v. Hatcher,* 199 W.Va. 227, 483 S.E.2d 810, 816 (1997); Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for Brady Violations: A Paper Tiger,* 65 N.C.L.Rev. 693, 708 (1986–87).

[7] Similarly, I ABA *Standards for Criminal Justice* 3–3.11(a) (2d ed.1986) provide that:

> It is unprofessional conduct for a prosecutor intentionally to fail to make disclosure to the defense, at the earliest feasible opportunity, of the existence of evidence *which tends to negate the guilt of the accused as to the offense charged or which would tend to reduce the punishment of the accused.*

(Emphasis added.)

[8] Case management principles define critical events in the progress of a case as events that cause counsel to review their files, consider their strategy, and evaluate the prospects for settlement. *See People v. Jasper,* 17 P.3d 807, 812 (Colo.2001); David C. Steelman et al., *Caseflow Management: The Heart of Court Management in the New Millennium* 8–9 (2000); Maureen Solomon & Douglas K. Somerlot, *Caseflow Management in the Trial Court: Now and for the Future* 3–6 (1987).

[9] *See Comm. on Prof'l Ethics & Conduct of Iowa State Bar Ass'n v. Ramey,* 512 N.W.2d 569, 572 (Iowa 1994); *In re Carpenter,* 248 Kan. 619, 808 P.2d 1341, 1346 (1991); *In re Application for the Discipline of Morris,* 419 N.W.2d 70, 70 (Minn.1987); *In re Brophy,* 83 A.D.2d 975, 442 N.Y.S.2d 818, 819 (1981); *Office of Disciplinary Counsel v. Jones,* 66 Ohio St.3d 369, 613 N.E.2d 178, 179–80 (1993); *Cuyahoga County Bar Ass'n v. Gerstenslager,* 45 Ohio St.3d 88, 543 N.E.2d 491, 491 (1989); *In re Illuzzi,* 160 Vt. 474, 632 A.2d 346, 347 (1993); *Read v. Va. State Bar,* 233 Va. 560, 357 S.E.2d 544, 546–47 (1987).

[10] Fred C. Zacharias, *The Professional Discipline of Prosecutors,* 79 N.C.L.Rev. 721, 725–26 (2001); Edwin H. Auler, *Actions Against Prosecutors Who Suppress or Falsify Evidence,* 47 Tex. L.Rev. 642, 646 (1968–69).

[11] With one exception,—misappropriation of client funds—we have equated "reckless" and "knowing" conduct for analyzing the appropriate sanction. *People v. Small,* 962 P.2d 258, 260 (Colo.1998).

[12] We disagree with the notion that respondent was made aware of the rule only through her brush with it in the first proceeding. All attorneys in Colorado are presumed to be aware of the rules and their import. However, given our holding in this case, whether her behavior was attributable to general or specific knowledge makes no difference.

[13] Linda Donnelly et al., *How the New Attorney Regulation System Will Work,* 28 Colo. Law. 57, 59 (Feb.1999).

End of Document

COLO. RPC 3.8 – SPECIAL RESPONSIBILITIES OF A PROSECUTOR

The prosecutor in a criminal case shall:

(a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;

(b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;

(c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;

(d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;

(e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:

(1) the information sought is not protected from disclosure by any applicable privilege;

(2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and

(3) there is no other feasible alternative to obtain the information;

(f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused unless such comments are permitted under Rule 3.6(b) or 3.6(c), and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.

(g) When a prosecutor knows of new, credible and material evidence creating a reasonable probability that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall within a reasonable time:

(1) disclose that evidence to an appropriate court or prosecutorial authority, and

(2) if the judgment of conviction was entered by a court in which the prosecutor exercises prosecutorial authority

(A) disclose the evidence to the defendant, and

(B) if the defendant is not represented, move the court in which the defendant was convicted to appoint counsel to assist the defendant concerning the evidence.

(h) When a prosecutor knows of clear and convincing evidence establishing that a defendant was convicted in a court in which the prosecutor exercises prosecutorial authority, of an offense that the defendant did not commit, the prosecutor shall take steps in the appropriate court, consistent with applicable law, to set aside the conviction.

Comments:

[1] A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient evidence and that special precautions are taken to prevent and to address the conviction of innocent persons. The extent of mandated remedial action is a matter of debate and varies in different jurisdictions. Many jurisdictions have adopted the ABA Standards of Criminal Justice Relating to the Prosecution Function, which are the product of prolonged and careful deliberation by lawyers experienced in both criminal prosecution and defense. Competent representation of the sovereign may require a prosecutor to undertake some procedural and remedial measures as a matter of obligation. Applicable law may require other measures by the prosecutor and knowing disregard of those obligations or a systematic abuse of prosecutorial discretion could constitute a violation of Rule 8.4.

[2] In some jurisdictions, a defendant may waive a preliminary hearing and thereby lose a valuable opportunity to challenge probable cause. Accordingly, prosecutors should not seek to obtain waivers of preliminary hearings or other important pretrial rights from unrepresented defendants. Paragraph (c) does not apply, however, to a defendant appearing pro se with the approval of the tribunal. Nor does it forbid the lawful questioning of an uncharged suspect who has knowingly waived the rights to counsel and silence

[3] The exception in paragraph (d) recognizes that a prosecutor may seek an appropriate protective order from the tribunal if disclosure of information to the defense could result in substantial harm to an individual or to the public interest.

[3A] A prosecutor's duties following conviction are set forth in sections (g) and (h) of this rule.

[4] Paragraph (e) is intended to limit the issuance of lawyer subpoenas in grand jury and other criminal proceedings to those situations in which there is a genuine need to intrude into the client-lawyer relationship.

[5] [Paragraph (f) supplements the prohibition in Rule 3.6, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding, but does not limit the protection of Rule 3.6(b) or Rule 3.6(c). In the context of a criminal prosecution, a prosecutor's extrajudicial statement can create the additional problem of increasing public condemnation of the accused. Although the announcement of an indictment, for example, will necessarily have severe consequences for the accused, a prosecutor can, and should, avoid

comments which have no legitimate law enforcement purpose and have a substantial likelihood of increasing public condemnation of the accused. Nevertheless, a prosecutor shall not be subject to disciplinary action on the basis that the prosecutor's statement violated paragraph (f), if the statement was permitted by Rule 3.6(b) or Rule 3.6(c).

[6] Like other lawyers, prosecutors are subject to Rules 5.1 and 5.3, which relate to responsibilities regarding lawyers and nonlawyers who work for or are associated with the lawyer's office. Paragraph (f) reminds the prosecutor of the importance of these obligations in connection with the unique dangers of improper extrajudicial statements in a criminal case. In addition, paragraph (f) requires a prosecutor to exercise reasonable care to prevent persons assisting or associated with the prosecutor from making improper extrajudicial statements, even when such persons are not under the direct supervision of the prosecutor. Ordinarily, the reasonable care standard will be satisfied if the prosecutor issues the appropriate cautions to law-enforcement personnel and other relevant individuals.

[7] When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a person outside the prosecutor's jurisdiction was convicted of a crime that the person did not commit, paragraph (g) requires disclosure to the court or other prosecutorial authority, such as the chief prosecutor of the jurisdiction where the conviction occurred. Consistent with the objectives of Rules 4.2 and 4.3, disclosure to a represented defendant must be made through the defendant's counsel, and, in the case of an unrepresented defendant, the prosecutor must take the affirmative step of making a request to a court for the appointment of counsel to assist the defendant in taking such legal measures as may be appropriate.

[7A] What constitutes "within a reasonable time" will vary according to the circumstances presented. When considering the timing of a disclosure, a prosecutor should consider all of the circumstances, including whether the defendant is subject to the death penalty, is presently incarcerated, or is under court supervision. The prosecutor should also consider what investigative resources are available to the prosecutor, whether the trial prosecutor who prosecuted the case is still reasonably available, what new investigation or testing is appropriate, and the prejudice to an on-going investigation.

[8] Under paragraph (h), once the prosecutor knows of clear and convincing evidence that the defendant was convicted of either an offense that the defendant did not commit or of an offense that involves conduct of others for which the defendant is legally accountable (see C.R.S. §18-1-601 et seq. and 18 U.S.C. § 2), but which those others did not commit, then the prosecutor must take steps in the appropriate court. Necessary steps may include disclosure of the evidence to the defendant, requesting that the court appoint counsel for an unrepresented indigent defendant and, where appropriate, notifying the court that the prosecutor has knowledge that the defendant did not commit the offense of which the defendant was convicted.

[8A] Evidence is considered new when it was unknown to a trial prosecutor at the time the conviction was entered or, if known to a trial prosecutor, was not disclosed to the defense, either deliberately or inadvertently. The reasons for the evidence being unknown (and therefore new) are varied. It may be new because: the information was not available to a trial prosecutor or the prosecution team at the time of trial; the police department investigating the case or other agency involved in the prosecution did not provide the evidence to a trial prosecutor; or recent testing

was performed which was not available at the time of trial. There may be other circumstances when information would be deemed new evidence.

[9] A prosecutor's reasonable judgment made in good faith, that the new evidence is not of such nature as to trigger the obligations of sections (g) and (h), although subsequently determined to have been erroneous, does not constitute a violation of this Rule.

[9A] Factors probative of the prosecutor's reasonable judgment that the evidence casts serious doubt on the reliability of the judgment of conviction include: whether the evidence was essential to a principal issue in the trial that produced the conviction; whether the evidence goes beyond the credibility of a witness; whether the evidence is subject to serious dispute; or whether the defendant waived the establishment of a factual basis pursuant to criminal procedural rules.

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March 2, 2021

Via Email: ***mglenn@hollandhart.com***

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Re: **Colo. RPC 1.5(e)**

Dear Marcy:

The purpose of this letter is to ask the Standing Committee on the Colorado Rules of Professional Conduct to consider recommending to the Colorado Supreme Court that Colo. RPC 1.5(e) be deleted.

(Background)

Colo. RPC 1.5(e) states, in its entirety, "Referral fees are prohibited." Colo. RPC 1.5(e) contains no exceptions and does not define a "referral fee." Black's Law Dictionary defines a "referral fee" as "[c]ompensation paid by one professional-service provider to another for directing a client to the payer's services." *Black's Law Dictionary* (11th ed. 2019). Colo. RPC 1.5(e) is a nonuniform (non-ABA) rule that the Colorado Supreme Court adopted in 1993 when it adopted a version of the ABA Model Rules of Professional Conduct.

Colo. RPC 7.2(b) also prohibits referral fees. It states that a lawyer "shall not compensate, give or promise anything of value to a person for recommending the lawyer's services," subject to five enumerated exceptions.[1] Colo. RPC 7.2(b) is identical to Rule 7.2(b)

[1] Colo. RPC 7.2(b) states:

> A lawyer shall not compensate, give or promise anything of value to a person for recommending the lawyer's services except that a lawyer may: (1) pay the reasonable costs of advertisements or communications permitted by this Rule; (2) pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service; (3) pay for a law practice in accordance with Rule 1.17; (4) refer clients to another lawyer or a nonlawyer professional pursuant to an agreement not otherwise prohibited under these Rules that provides for the other person to refer clients or customers to the lawyer, if: (i) the reciprocal referral agreement is not exclusive; and (ii) the client is informed of the existence and nature of the agreement; and (5) give nominal gifts as an expression of appreciation that are neither intended nor reasonably expected to be a form of compensation for recommending a lawyer's services.

of the ABA Model Rules of Professional Conduct. In 1993, the Court adopted a version of Colo. RPC 7.2(b) that was substantially the same as the current version of Colo. RPC 7.2(b) and similar to DR 2-103(B) of the Colorado Code of Professional Responsibility.

I do not know why the Court or the "Barnhill Committee," which studied and recommended the version of the Colorado Rules of Professional Conduct adopted in 1993, considered it necessary to include both rules in that ethics code.

(Colo. RPC 1.5(e) is Overbroad and Inconsistent with Colo. RPC 7.2(b))

Although both Colo. RPC 1.5(e) and Colo. RPC 7.2(b) regulate referral fees, Colo. RPC 1.5(e) is substantially broader than Colo. RPC 7.2(b).

With some exceptions, Colo. RPC 7.2(b) prohibits a lawyer from *paying* a referral fee. Colo. RPC 1.5(e) prohibits a lawyer from both paying *and receiving* a referral fee. *See People v. Roybal,* 949 P.2d 993, 996-97 (Colo. 1997) (violation of Colo. RPC 1.5(e) for accepting fee from client to refer client to another lawyer); CBA Formal Op. 105 (under Colo. RPC 1.5(e), a lawyer "may neither pay *nor accept* a referral fee") (emphasis added); CBA Abstract 96/97-13 (Colo. RPC 1.5(e) prohibits lawyer from receiving compensation for referring law clients to investment advisor).[2]

A lawyer's receipt of a referral fee for referring a client to another person, typically another professional, is a controversial issue that has been addressed in several ethics opinions in other states. *See generally* J. Dzienkowski and R. Peroni, "Conflicts of Interest in Lawyer Referral Arrangements with Nonlawyer Professionals, 21 *Geo. J. Legal Ethics* 197, 207-08 (Spring 2008). These ethics opinions turn on the conflict of interest of the lawyer who stands to be compensated for referring a client to another professional. According to this article, the ethics opinions are about evenly divided between those that permit the lawyer to accept the referral fee with a conflict waiver and those that prohibit the lawyer from accepting the referral fee because the lawyer's conflict of interest is non-consentable. *Id.* at 209-11.

The receipt of compensation for referring law clients to another professional presents a legitimate conflict of interest question under the conflict-of-interest rule, Colo. RPC 1.7, and perhaps under Colo. RPC 1.8(a) as well. Also, a lawyer's receipt of a referral fee from another lawyer is problematic for both the lawyer paying the referral fee as well as the lawyer receiving the referral fee; the lawyer receiving the referral fee assists another lawyer in violating the Rules of Professional Conduct (Colo. RPC 7.2(b)) in violation of Colo. RPC 8.4(a).[3] These considerations would make an excellent topic for a CBA formal ethics opinion.

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

[3] "It is professional misconduct for a lawyer to: (a) 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." Colo. RPC 8.4(a) (emphasis added).

However, Colo. RPC 1.5(e) also prohibits a lawyer's receipt of a referral fee in circumstances that do not involve the lawyer's clients and have nothing to do with conflicts of interest. It prohibits a lawyer from receiving a fee for referring any third party to any other person. Insofar as it exceeds areas of legitimate regulatory concern over conflicts of interest, as a matter of lawyer ethics, there is no regulatory justification for Colo. RPC 1.5(e).

In addition, Colo. RPC 1.5(e) is unnecessary. Colo. RPC 7.2(b) already regulates referral fees paid by lawyers. It is the product of substantial thought and analysis at the ABA level, and it benefits from interpretations of identical or similar rules in other jurisdictions. Colo. RPC 1.7 and 1.8(a) regulate a lawyer's receipt of a referral fee for referring the lawyer's clients to other professionals. Further regulation of a lawyer's receipt of referral fees is not warranted, at least under lawyer ethics rules.

In contrast, written in the passive tense with no exceptions and no definition of "referral fee," Colo. RPC 1.5(e) lacks the nuance of Colo. RPC 7.2(b) and does not benefit from the interpretation of the same or similar rules by other courts, ethics committees, and commentators. Colo. RPC 1.5(e) is as much or more a declaration of principle as it is an ethics rule.

There is yet another reason to eliminate Colo. RPC 1.5(e). It is inconsistent with Colo. RPC 7.2(b).

There are five exceptions to Colo. RPC 7.2(b). At least some of these exceptions represent authorized referral fees. But Colo. RPC 1.5(e) prohibits referral fees of every kind and description. What Colo. RPC 7.2(b) permits, Colo. RPC 1.5(e) takes away or is ignored.

It is time to eliminate Colo. RPC 1.5(e).

Sincerely,

BURNS, FIGA & WILL, P.C.

Alexander R. Rothrock